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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1905.

VOLUME LXXIV.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

PREPARED AND EDITED BY
HENRY P. STODDART,
DEPUTY REPORTER.

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By Harry C. Lindsay, Reporter of the Supreme Court,
In behalf of the people of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

SILAS A. HOLCOMB, CHIEF JUSTICE.
SAMUEL H. SEDGWICK, ASSOCIATE JUSTICE.
JOHN B. BARNES, ASSOCIATE JUSTICE.

COMMISSIONERS.

DEPARTMENT No. 1.

CHARLES B. LETTON.
JOHN H. AMES.
WILLIS D. OLDHAM.

DEPARTMENT No. 2.

EDWARD R. DUFFIE.
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WILLIAM T. THOMPSON.....Deputy Attorney General
HARRY C. LINDSAY.....Reporter and Clerk
HENRY P. STODDART.....Deputy Reporter
VICTOR SEYMOUR.....Deputy Clerk

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Number of District	Counties in District	Judges in District	Residence of Judge
First.....	Gage, Jefferson, Johnson, Nemaha, Pawnee and Richardson.	John B. Raper..... William H. Kelligar ·	Pawnee City. Auburn.
Second.....	Cass and Otoe.	Paul Jessen.....	Nebraska City.
Third.....	Lancaster.....	Albert J. Cornish .... Lincoln Frost ..... Edward P. Holmes...	Lincoln. Lincoln. Lincoln.
Fourth	Burt, Douglas, Sarpy and Washington.	George A. Day..... Lee S. Estelle..... Howard Kennedy, Jr. William A. Redick... Willis G. Sears..... Abraham L. Sutton.. Alexander C. Troup..	Omaha. Omaha. Omaha. Omaha. Tekamah. South Omaha. Omaha.
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Arthur J. Evans. ... Benjamin F. Good...	David City. Wahoo.
Sixth	Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck.. James G. Reeder.....	Fremont. Columbus.
Seventh	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Neligh.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Ed L. Adams.....	Minden.
Eleventh.....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	John R. Hanna..... James N. Paul.....	Greeley. St. Paul.
Twelfth.....	Buffalo, Custer, Dawson and Sherman.	Bruno O. Hostetler...	Kearney.
Thirteenth ..	Banner, Cheyenne, Deuel, Keith, Kimball, Lincoln, Logan, McPherson, Perkins and Scott's Bluff.	Hanson M. Grimes...	North Platte.
Fourteenth...	Chase, Dundy, Furnas, Frontier, Gosper, Hayes, Hitchcock and Red Willow.	Robert C. Orr.....	McCook.
Fifteenth	Box Butte, Brown, Cherry, Dawes, Holt, Keya Paha, Rock, Sheridan and Sioux.	James J. Harrington. William H. Westover.	O'Neill. Rushville.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOL. LXXIII.

FURSE, WILLIAM J.
HAMILTON, ALEXANDER W.
LOOS, JOHN G.
PINKETT, HARRISON J.

AMENDED RULES OF THE SUPREME COURT.

2. SECTION 1. **(Submission of Causes.)**—Causes will be taken up and heard in their order on the docket. A cause shall be regarded as regularly reached for submission at the expiration of the time hereinafter provided for the service and filing of briefs. Any cause may, however, be submitted upon the written stipulation of the parties thereto providing for such submission on printed briefs accompanied by or containing agreed printed abstract of the record and evidence upon which the case is to be determined.

(Default.)—Whenever a cause is reached and the brief of the party having the affirmative is not on file, the judgment will be affirmed or the proceeding dismissed. When default has been made by the other party and there is due proof of service of process and the briefs of the party holding the affirmative are on file with proof of service thereof within the time provided by Rule 9, he may proceed *ex parte*. The hearing of no cause shall be delayed by default of either party in serving or filing briefs. To avoid such results the case will be disposed of as if the delinquent party's brief had not been served; Provided, that the court may under special circumstances and on suitable terms otherwise order.

9. **(Briefs.)**—At the time of docketing each case the clerk of this court shall estimate the probable date on which the same will be reached for hearing, and thereupon fix and enter on the appearance docket the time, to be known as Rule Day, within which the plaintiff, appellant or relator shall serve his brief of points and citations in support thereof on the oposite party or his attorney of record, which rule day shall be not less than sixty days before the date of hearing so estimated by the clerk. Within thirty days after Rule Day or within thirty days after such service the opposite party shall serve his brief on the first party who may, at his own expense, reply thereto within ten days thereafter.

(Criminal Cases.)—In criminal cases the fortieth day after the docketing of the case shall be Rule Day.

(Advanced Cases.)—In advanced cases Rule Day shall be the thirtieth day after the order of advancement is entered.

(When Filed.)—Ten copies of each brief so prepared by either party, together with proof of service of the same on the opposite party, shall be filed in the clerk's office before the case is submitted.

(Rehearings.)—Within thirty days after a rehearing has been allowed the party holding the affirmative may serve a printed brief of

his points and citations on the opposite party or his attorney of record, by whom in turn a like brief in answer may be served within thirty days after the service of the first required brief, or after the service of a notice that the party holding the affirmative will stand on his original brief, to which answer brief the first party may reply within ten days at his own expense. Ten copies of each brief so prepared and served on rehearing, together with proof of service, shall be filed in the clerk's office before the case is submitted.

(Cross-Appeals.)—A cross-appellant shall serve his brief of points and citations upon the cross-appellee or his attorney of record at or before the time fixed by the clerk as Rule Day. A cross-appellee shall serve his brief within thirty days after Rule Day or service of briefs on him.

(Leave to File Briefs.)—A party in default for want of briefs may be permitted to serve and file them out of time by leave of court upon satisfactory showing of diligence and upon such terms as to costs as the court may direct. Where a cause has been regularly reached in its order and placed on the trial list and calendar for submission at a specified session of the court, and leave is applied for and granted to serve and file briefs by a party who is in default, thereby causing a continuance until a subsequent session, the court may not only in its discretion award against such party taxation absolutely of such portion of the ordinary taxable costs made or to be made in the case as it may deem proper, but also and in addition thereto, a reasonable attorney's fee to the opposite party for attendance of counsel at the session, to be taxed as a part of the costs in the case.

10. **(Briefs—How Printed.)**—All briefs shall be printed on good book paper on pages eight inches wide and eleven inches long, small pica type, leaded lines; the printed matter to be four inches wide and seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid or brevier leaded. The heading of each brief shall show the title of the cause, the court from which the cause was brought, the names of counsel filing the brief and shall also indicate in whose behalf the brief is filed.

(References and Citations.)—Each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief. Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any text book referred to must be given in connection with the cited page or section thereof.

11. **(Costs.)**—When the parties or their attorneys shall furnish their printed briefs in conformity to the rules of this court, or briefs and printed abstracts under stipulation for submission as provided for in rule 2, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party not furnishing

the same, to be collected and paid to the successful party as other costs. *No costs shall be taxed for printing briefs not printed, served and filed in conformity with the foregoing rules.* When unnecessary costs have been made by either party the court will, upon application, order the same to be taxed to the party making them, without reference to the disposition of the case.

In Memoriam.

AMASA COBB.

At the session of the supreme court of the state of Nebraska, November 21, 1905, there being present Honorable SILAS A. HOLCOMB, chief justice, Honorable SAMUEL H. SEDGWICK and Honorable JOHN B. BARNES, associate justices, the following proceedings were had:

MAY IT PLEASE YOUR HONORS:

Your committee to whom was referred the sad duty of preparing and presenting to this court resolutions which should express the high esteem in which our departed brother AMASA COBB was held, by leave of court submit the following:

Resolved, That in the death of AMASA COBB the state has sustained a distinct loss and the bar one of its most honored and revered members; that we recognize in AMASA COBB an honorable, clean, high-minded, patriotic citizen, who in the trying hour of his country's need responded gallantly to its call and gave to his country his best services on the field of battle and in the halls of congress; that GENERAL COBB was a man of high character and sterling worth, and stood for the best thought of his day and the highest ideals of his time. His life was a constant inspiration to all who came in contact with him for high, noble and unselfish living. For more than 14 years he was an honored member of this court. During his entire public and official career, no tinge of suspicion ever soiled his fair name, and he discharged his official duties fairly, impartially and fearlessly, and rendered to his country and state lasting and valuable services.

Resolved, That while he was elected to high places, he always bore his honors with easy dignity and becoming gratitude and humility, and was on such intimate terms with the people as to win their confidence and highest respect. He was a splendid type of American manhood, always dignified, safe and conservative.

Resolved, That while we deeply mourn his death, we are not unmindful of the fact that it was his good fortune to live beyond the allotted three score years and ten, and to live a life full of noble, patriotic service to his country.

Resolved, That we point with pride to his career both as a private citizen and a public servant in the legislative halls, on the bench, and at the bar. His whole life was a busy and strenuous one for the betterment and upbuilding of the state, and while we mourn his death, it is a great pleasure and consolation to find so much in his life to commend and emulate.

Resolved, That we sympathize with the family and relatives in their affliction, yet their greatest consolation and comfort should spring from the contemplation of a long and well spent life, and the hopes that spring from the grave of a good man.

F. M. HALL.
L. W. BILLINGSLEY.
CHAS. O. WHEDON.
D. G. COURTNAY.
A. W. FIELD.

FRANK M. HALL:

When a great and good man dies, we may with profit to ourselves contemplate the lessons taught by his life. Indeed, I think it most fitting that his friends and associates should make some permanent public record of their estimate of his work and worth as a citizen, neighbor, friend and public servant.

GENERAL AMASA COBB is dead. His work here among us is finished. We shall never hear his voice in these halls again, but all that was good, all that was noble, all that was inspiring and elevating and worthy of emulation, still lives, for we are persuaded that no good thought, act or deed is ever lost.

What, then, are some of the lessons from GENERAL COBB'S life that we may study with profit to ourselves? To be a great and good man does not mean that his life shall embody all the great intellectual qualities nor all of the cardinal virtues. Any one of the fundamental principles of greatness carried to an unusual degree of perfection may make a man great. The same may be said of any of the cardinal virtues. When GENERAL COBB was among us, moving to and fro in the discharge of his daily duties as a citizen, we realized that there was that in him that made him an unusual man. He had that in him and about him that differentiated him at once in a distinct manner from all other men in the community that we knew. His personality itself made him a marked man. It is true he had not those brilliant and striking intellectual qualities that at once set him apart from his fellows, and lifted him to a higher plane, and challenged the admiration and plaudits of the multitude. He had not the gift of eloquence

that lifts people to a high pitch of enthusiasm and fires them with new resolves on the burning questions of the day. He was in no sense an advocate in the usual acceptation of that term. He was not aggressive to an unusual degree, but quite the contrary, to the extent that he always shrank from a controversy, from conflict and collision. He never liked that branch of the law which carried him into the thick of the fight and the clash of the courtroom. He was in no sense a reformer. In politics he never got far in advance of his time or his party. He was not overly ambitious for places of honor or power or great wealth, and yet he enjoyed and appreciated most keenly the esteem, confidence and respect of his fellows that often marked him for political preferment and elevation. He had in his youth been deprived of substantially all of the educational facilities and advantages that are now supposed to be indispensable to character, manhood and a life of usefulness. In this regard, no one could have been more poorly equipped for a successful career than he. What, then, was it that elevated him to a high station of official trust and great responsibility?

When the electors of his district in Wisconsin were in need of an honest and able representative for the Wisconsin legislature, he was selected for the place. When there, he was selected by his peers as the best man to preside over the deliberations of the house of representatives and was accordingly chosen speaker of that body. Being speaker of the house brought him the opportunity of his life and he made the best of it.

"When the president issued his call for 75,000 volunteers, there was apathy, hesitancy and even demur, but, with a few stalwart supporters, he pushed forward Wisconsin's equipment of the quota to answer the call. He railroaded a bill through the legislature providing for the immediate transfer of the troops to the front and compelling the railroads to sidetrack all freight and passenger business for the extra trains. Then he secured an adjournment of the legislature and hurried to the country to raise volunteers. His vigorous and enthusiastic work was the chief interest in raising the Fifth Wisconsin volunteer infantry. When that regiment, afterwards the 'Iron Brigade,' the most famous of the Badger state's offering to the war, was sent to the front, he went as its first colonel.

"GENERAL COBB'S record was unlike that of any other hero of those days, except the ill-fated Colonel Baker of Oregon, who kept his seat in the senate while leading his regiment to the front. It was a con-

stant strife between congress and the army as to which should have his services, and both his state and his colleagues gave him the most distinguished positions in their power to confer. His was a gallant, bold record. From June 4, 1861, to December 27, 1862, he served as the colonel of the Fifth Wisconsin, and at the battle of Williamsburg he commanded the regiment. On September 17th at Antietam he commanded Hancock's brigade.

"But while serving in the field, his appreciative and loyal supporters at home elected him to congress, an honor conferred upon him for three successive terms. Then succeeded a stressful period. GENERAL COBB was made chairman of the committee on enrolled bills of the house, and his duty in that capacity carried him personally to the president with every bill that originated in the house.

"But no sooner was congress adjourned than he returned to the field. He was brevetted a brigadier general for gallant and meritorious conduct on the field of battle at Williamsburg, Golden's Farm, Malvern Hill and Antietam.

"On September 10, 1864, he again led a regiment to the front as its colonel—this time the Forty-third Wisconsin, which he had also been instrumental in organizing and equipping. With this regiment he served until July 7, 1865, but, while in the field, was again elected to congress."

In 1870 he came to this state and became one of our prominent and leading citizens, organizing the First National Bank of Lincoln, and was its president for many years.

In 1878 he was again honored by being appointed one of the judges of this honorable court to fill a vacancy caused by the death of Honorable Chief Justice DANIEL GANTT. He was afterwards twice elected to the same position, which he filled with honor to himself and credit to the state, striving always to do exact justice to all.

Daniel Webster, speaking of Chief Justice Story, said: "Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name, and fame, and character, with that which is and must be as durable as the frame of human society."

Such, then, in brief and very imperfectly, was the public and official life of GENERAL COBB. It was not his brilliant official acts, nor his bravery on the field of battle, nor his eloquence in the halls of congress that marked him with a superiority outranking that of his fellows and won for him the confidence, respect and admiration of all who knew him. Yet on the battle field, none were braver, more courageous; on the bench, always honest, conscientious and industrious; in congress, loyally upholding the hands of our martyred Lincoln. But I shall think of GENERAL COBB, you will think of him, and those who learned to love him will think of him, not so much a man of affairs, not as a man of high intellectual attainments, not as an able and efficient public official, but as a gentle, dignified, high-minded gentleman.

I think GENERAL COBB had the best manners of any man I ever knew. If any one who knew him had been asked to name the most dignified and best mannered man that he had ever known, he would in all probability have named GENERAL AMASA COBB, and herein lay his strength and power with men and over men, and this it was that I think differentiated him from other men. GENERAL COBB'S manners were an index to the whole man. Manners with him were not an empty form, a mere conventionality, a superficial heartless attitude toward his fellows, but were a part of the very fibre of the man. He was a native gentleman in the highest sense of the term. Always and on all occasions, in the drawing room, in the office, on the street, wherever he was, he was the same sweet mannered, deferential, courteous gentleman. He treated every one, both high and low, with the greatest deference and the most kindly consideration. He loved his fellow man and treated him accordingly. He recognized the rights of his fellows and exhibited this recognition by his considerate treatment. No man ever met and shook hands with GENERAL COBB without having a higher respect for and a better opinion of himself. His treatment of other people was a constant inspiration. He sympathized with the weakness and frailties of mankind because of his innate love of his fellow man. His own faith in man was so genuine and ingratiating that he made men believe in themselves. What higher and nobler service can you render to your fellow man than this? For who does not know that despair and discouragement is the gateway to ruin, while hope and self-respect lead to higher and nobler living? It was these noble qualities of head and heart, developed to an unusual degree, that made GENERAL COBB a power for good in the community.

Love for your fellow man may manifest itself in a kind word, a

gentle smile, the twinkle of the eye, the intonation of the voice, the shake of the hand, and in a hundred different ways. In the simplicity of his life, the gentleness of his manner, his kindly and considerate treatment of others, and at the same time his courtly and dignified bearing, these qualities, taken in connection with his high sense of honor and strict integrity, brought him at once into such close and intimate relations with his fellow man as to touch his life with noble resolves, new desires, and fresh ambitions. In this way, his long and useful life was a constant source of strength and inspiration to others. The power of such a life for good in a community cannot be measured or even estimated.

To be a great man, it is not necessary that one should be an Alexander Hamilton, of whom it is said "that the poise and at the same time the dash of his manner, the grooved precision of his mental processes, the fluent charm of his conversation, the grace of his demeanor, these qualities, when considered in connection with his power in the realm of affairs, make him one of the most exquisite specimens of the human species ever produced in the history of civilization." Nor a Daniel Webster, of whom it was said, "his massive mind brightened all beneath the sun." It was the high character of GENERAL COBB, rather than his great intellectual gifts, his lofty ideals and sense of justice, rather than his official acts, that made his life so rich and fruitful. It was the conduct of a life on a high moral plane—right thinking, noble acting, and simple living that made his life such a splendid contribution to civilization. The whole trend of his long and useful life was along proper lines and in the right direction. It was the *constant* and *steady* flow from his daily life of a stream of lofty patriotism, unselfish love, tender sympathy, a high and just regard for the rights of others, mingled with a *strict* integrity rather than the scintillations of a brilliant intellect or a spasmodic burst of genius or civic virtue, that made his life such a noble heritage. This is character. It is righteousness burned in the soul. It is the link which binds man to the divine. "In nobility of soul and in elevation of character, we are heirs not merely of the ages, but of eternity." "A good name is rather to be chosen than great riches, and loving favor rather than silver and gold."

The shame of the United States senate, with several members under indictment or convicted for crimes or known to be unscrupulous corruptionists, the department officers of high standing selling official secrets as if they were produce, the men entrusted with vast trust

funds for purposes which ought to make their custody a sacred charge greedily using the money of other people for their own benefit, is due, not to the lack of capacity or even the want of opportunity, but to the fact that, when tested, their characters failed and they proved unworthy of confidence; their moral fibre was not strong enough to withstand the temptation. It is doubtful if ever in the world's history the field of honest, manly and unselfish endeavor was so rich and vast in opportunity as at the present time. In every department of human activity the cry goes up for men of character and sterling worth, men whose glory and fame spring from duty well done, men who have an abiding faith in the eternal and everlasting principles of rectitude, men with lofty ideals and the heroic courage to strive for them. The world stands amazed at the tasks of human endeavor at the present time. Truly,

"We are living, we are dwelling,
In a grand and awful time;
In an age on ages telling,
To be living is sublime."

If the fruition of our hopes are ever realized on the governmental, industrial and commercial problems now confronting us, it will be through the consecrated efforts of men, the inspiration of whose lives is: "He that saveth his life shall lose it, and he that loseth his life shall save it."

It was my privilege to begin the study of law in the law office of Cobb & Marquette, and to be on most intimate terms of friendship with both of these men until their death. I owe them a lasting debt of gratitude. In life, I loved and honored them; in death, I cherish and revere their blessed and hallowed memory. Though they are gone from among us and their work here is finished, their noble deeds shall abide as a splendid heritage. Their spirits have entered that great court beyond, to be judged by Him who always tempers his judgment with mercy, and where they shall receive their full reward for all of their noble and unselfish deeds. Peace to their ashes and eternal felicity to their souls! In the wisdom and providence of God, such spirits do not die. They are immortal. In a spirit of reverence and humility, I lay my tribute of love and gratitude at their sacred shrines.

The inspired Victor Hugo, in the closing years of his life, speaking from a rich and varied experience, gave utterance to the following:

"I feel in myself the future life. I am rising, I know, toward the sky. The sunshine is over my head. Heaven lights me with the reflec-

tion of unknown worlds. You say the soul is nothing but the result of bodily powers; why, then, is my soul the more luminous when my bodily powers begin to fail? Winter is on my head and eternal spring in my heart. The nearer I approach the end the plainer I hear around me the immortal symphonies of the worlds which invite me. It is marvelous, yet simple. It is a fairy tale, and it is a history. For half a century I have been writing my thoughts, in prose, verse, history, philosophy, drama, romance, tradition, satire, ode, song—I have tried all, but I feel that I have not said the thousandth part of what is in me. When I go down to the grave I can say, like so many others, 'I have finished my day's work, but I cannot say I have finished my life's.' My day's work will begin the next morning. The tomb is not a blind alley; it is a thoroughfare. It closes with the twilight to open with the dawn. I improve every hour because I love this world as my fatherland. My work is only a beginning. My work is hardly above its foundation. I would be glad to see it mounting and mounting forever. The thirst for the infinite proves infinity."

The death of our departed brother is only another solemn reminder of the mutability of human life and the incompleteness of human ambition that should determine each one of us to devote himself more earnestly, more unselfishly, more worthily, to the duties we owe to our God, our country, and our fellow man.

CHARLES O. WHEDON:

AMASA COBB, in honor of whose memory the regular proceedings of this court are at this time interrupted, was born at Palestine, Crawford county, Indiana, on the 27th day of September, 1823, the tenth of a family of twelve children. In his youth he was for some time employed as a clerk in his native state, and later removed to Wisconsin, where for four years, with no marked degree of success, he engaged in lead mining. While engaged as a clerk and as a miner, and while serving as a soldier in the Mexican war, he devoted his leisure to the study of the law. On the 9th day of June, 1847, before the birth of two of the present members of this court, and before the third had arrived at the age of eighteen months, young COBB enlisted as a private in company B, Second regiment, Illinois volunteers, in the war with Mexico. His regiment was mustered into service on the 26th day of the same month, and he served until the regiment was mustered out at Alton, Illinois, on the 20th of July, 1848. He was admitted to the bar after his military services terminated, and in 1850 was elected

district attorney for his district in the state of Wisconsin, and in 1852 was elected to serve a second term of two years. Before that term expired he was elected to the state senate, and served a term of two years. He was adjutant general of Wisconsin from 1855 to 1858. In the legislature he awakened the hostility of certain interests by opposing a scheme, which had for its object the unwarranted acquisition of public lands granted to the state by congress to aid in the construction of internal improvements. A determined but futile attempt was made to prevent his reelection to the legislature. In 1860 he was elected to the house, and when the legislature assembled in 1861 he was elected speaker. At the called session in May, 1861, he was again chosen speaker. Upon the adjournment of the called session he enlisted in the war of the rebellion, and was by the governor commissioned as colonel of the Fifth regiment, Wisconsin infantry volunteers. He served as colonel of that regiment until December, 1862, when he tendered his resignation, having been elected a member of the 38th congress. Having served one term in congress, he again enlisted and was commissioned colonel of the 43d Wisconsin. While serving in the field in 1864, he was again elected to congress and was by the secretary of war ordered to Washington in December, 1864, to take his seat. Upon the adjournment of congress, he returned to his regiment and served until the close of the war, being mustered out June 24, 1865. He was brevetted brigadier general of volunteers March 13, 1865, for gallant and distinguished services at the battles of Williamsburg, Golden's Farm, Malvern Hill and Antietam. He was again elected to congress in 1866, and again in 1868. He came to Lincoln in 1870, and engaged in the practice of law. He organized the First National Bank of this city, of which he was president until his appointment as one of the judges of this court upon the death of Judge GANTT in 1878. He was elected mayor of the city of Lincoln in 1875, and served one term. In 1878 he was by appointment made a member of this court, and by that appointment and successive elections remained a member of the court until January, 1892, when he resumed the practice of his profession, in which he remained until his death July 5, 1905.

Such is an all too brief biographical sketch of the life of GENERAL AMASA COBB. He lived during the administration of twenty-one out of twenty-five presidents of the United States. He participated in the greatest civil war of modern times, and lived to see the time when the heart-burnings and animosities of that conflict were forgotten. Rarely,

indeed, does it fall to the lot of man in the lapse from youth to age to experience so much of varied, active public life. His fidelity to every trust, his honorable discharge of every duty, endeared him to the hearts of men. His loyalty and patriotism were of that character which is the nation's hope, the guaranty of its perpetuity. American citizen, warrior, statesman, sage; green be his grave and peaceful his sleep!

LORENZO W. BILLINGSLEY:

As a testimonial and tribute to the memory of the late AMASA COBB, and evidencing the general esteem and love for his virtues, and in compliance with the mandates of this tribunal, we have submitted resolutions respecting his life, to be spread upon the records of this court.

His fame, and memory of his gracious presence, need not the voice of eulogy, for he made his own place in history "safe against the tooth of time and razure of oblivion." There is neither time nor necessity to trace in detail his career. Simple in his manner, frugal in his habits, he maintained through a life, much of it devoted to the public service, an honorable and meager competency, content to support the dignity of official position upon the emolument which the law assigned. He had an early discipline in the stern and healthful school of poverty. His alloted period of existence for his work was distributed over more than four score years, crowned with an honorable and enduring record. He was profoundly sincere and earnest; he had, too, the generosity, tolerance, and magnanimity, which are inseparable from true nobility.

The passing out of our friend, GENERAL AMASA COBB, at his home in the golden state, was as quiet as the outgoing of the evening twilight. Forty-four years ago, at the time of supreme peril, when this nation, through its great leader, Abraham Lincoln, called upon twenty-two states to meet around her altar and defend her life, AMASA COBB was one of the first to respond to that call in the state of his residence, Wisconsin, where he raised a regiment for active service. Both from his father's and mother's loins he inherited heroic blood. As colonel, both as regimental and brigade commander, in the army of the Potomac, he led his command in many bloody battles, doing his full measure of duty as an intrepid soldier. After the civil war he gave his country faithful service in the national halls of legislation. For many years he was an honored member of this august tribunal, wherein his integrity was inflexible, and his composed and keen sense of justice

ever commanded respect. He was strong and sincere. He never evaded an issue, and never apologized for his decisions. His sympathies were bounded by no lines of creed, nor condition, nor race, but were broad as humanity. His integrity was never attacked. All who knew GENERAL COBB bear unqualified praise of his goodness of heart, kindness of manner, amiable disposition, and courteous demeanor to all; also of firm belief in the integrity of all of his purposes.

One of the misfortunes of public men is to be misjudged by those who know them not. However, but few of the shafts of ignorance or malice fell upon him. With cheerful courage he ever discharged his duties as husband, father, friend, citizen, soldier of the republic and servant of the state. In him we saw the intrepid soul that strove for the nobility of the strong man, whom no outer circumstances could unusually depress, or exultantly unbalance; the man who is not unduly elated over success, or dismal over failure; who is not at the mercy of circumstances, sad today, because things are troublesome, and joyful tomorrow, because they are easy; striving always to be balanced, strong, serene, composed and just. If troubles did come upon him, as they did more than once, and particularly one, that was sudden, horrible and appalling, his mind reposed in the Eternal, where no trouble comes. If friends and earthly possessions were lost, he reverted to that wealth of wisdom and spiritual life that could not be taken from him. His higher self has secured freedom from the limitations, the pains and disabilities of the body. We do not think of our friend as dead, unconscious dust; but as an eternal conscious spirit, on a higher mission, helpfully strengthening us for better lives here and in the great beyond by memories of his noble deeds. When his sun of life was setting, and he was confronted by hopeless invalidism, his words and every action were those of calm deliberation. The memory of his character is a valued heritage for posterity.

ALBERT WATKINS, SR.:

It is a social duty as well as a personal pleasure to the generous minded to acknowledge and portray the qualities that have distinguished our fellow men, and more especially the more distinguished among our fellows. The function which now engages us, in memory of a public man, is both subjective and objective in its effect, in that it awakens and stimulates our otherwise dull or dormant sentiment of philanthropic appreciation and shows to others an object lesson of

life—an appraisement of mental and moral capacity manifest in character and effective in achievement.

It is meet, therefore, to briefly examine the character and career of the subject of this most proper ceremony, and disclose their salient features. But, first, let us note how like an open book the characters of men are read by those about them; how like a city set on a hill, and which cannot be hid, the world at large discerns the minds and motives of its individual components. In all the walks and relations of our lives "there's a chiel amang us takin' notes." This consideration lends some special fitness to my contribution to this service of honor and regard; for I was familiar with JUDGE COBB'S reputation as he made it during the first phase of his career, extending through twenty-five years in his, and my, Wisconsin home. I might, perhaps, more accurately say, his first career; for he had two distinct courses of life; and enforced labor, self-denial and even hardship were the firm foundation of the staying qualities which were the safe framework of his more than half a century's active and successful life.

Forty years ago lawyers were easily leaders in the social organization; and this was especially true in the rural or less cosmopolitan communities. In each country town the worthy lawyer was "guide, philosopher and friend" to a large formal and informal clientele; and, in lesser measure and degree, this is still true. There is no more useful, honorable or enviable social relation than that of the "country" lawyer who enjoys the confidence of his community. In those earlier days the names of the leaders of the bar were household words throughout the county, and their character and characteristics were familiarly known, discussed and graded. But by the general dispersion of intelligence, once a monopoly of the "learned professions," and the now easy dominance of business over our lives, lawyers have become chiefs, guides and defenders of commercial enterprises. Thus, as a boy, long before I personally knew JUDGE COBB, I right well knew his public rating; and these popular estimates, though sometimes superficial, were in general true and fair. But to fill the public measure a legal leader must then have been clad in shining armor with a lance that was swift and keen, and with versatile tongue.

"E'en though vanquished, he could argue still."

But JUDGE COBB was of the Sir Galahad, rather than the Dalgetty type, and the sober color both of his outward equipment and his inward qualities scarcely matched the more glittering gifts of his competitors for public favor.

In his first career, JUDGE COBB successfully graduated from those graded vicissitudes which are a common, and often cruel, test of fitness for survival, and so the common precursor or cause of the self-dependent boy's rounded and successful experience. First, laborer and "prospector" in the lead mines, and some time country school teacher, now and then snatching a fugitive hour for study of the law, his intended profession; then justice of the peace, soldier in the Mexican war, twice member of the legislative assembly, adjutant general of Wisconsin, thrice in succession member of the national house of representatives, and during this last service organizer and head of one, and afterwards at the head of another, regiment of volunteers of the civil war.

This, truly, was in itself a career varied and rounded, and such as only the few possess capacity to achieve or courage to encounter. And, then, after a quarter century's active experience in pioneer state-building, and in defense of the structure, attracted by the prospectus of the novelty fiat capital city of Nebraska, he goes forth to the second west, there adventuring and successfully running a second course of life and taking an important part in the structural work of the state and its capital.

In this formative stage, society and public affairs especially were, of course, largely in the hands, or under the influence of, the flotsam and jetsam, which advanced, or rather retreated, on the western stream of emigration, anon clinging temporarily to some likely harbor, or all but hopelessly and aimlessly stranded on its shores, to take, it might be, a half-adventurous, half-confident step in a new start with the more substantial and resolute pioneer home-builders, but with the likely chance, after a brief and mutually unprofitable sojourn, of being again caught by the ever flowing, fascinating tide and moved on to new, but similar scenes, fortunes and uses, until the farthest of the progressive western "openings" and its last opportunities are again misused or altogether missed. JUDGE COBB'S substantial capital of character, experience and property ,reenforced by such special qualities as deserved public confidence, served in some sort as ballast and rudder to the crude and rude craft which is the beginning of each ship of state, and as a check upon the excesses which especially marked and marred the beginnings of this commonwealth and, peculiarly, of its capital town. In any country but ours, I think, a man of JUDGE COBB'S position and prestige would have put them to advantageous use in the well-developed field of binding beauty and richness, where they were acquired, and

would have been of most effect. But was not this repeated adventure in pioneering and state-building prompted by the still lurking spirit of our English forbears which ever impelled them to the ends of the earth, subduing, colonizing, constructing and, distinctively among all peoples, holding against all competitors and all vicissitudes. And is it not to this restless and resistless inheritance of the vikings of our prairie main that we owe the mighty, the marvelous, the magical subjugation and regeneration of its unpromising expanse? JUDGE COBB'S unusually long and steady occupation of the public eye must be attributed to unusual qualities of the recipient of the implied confidence and high regard. What were these qualities? First of all, I think, he was level both in his mental and moral faculties and processes. It may not be said that he was a brilliant lawyer or soldier or a profound or keenly discriminating jurist; and yet it may well be that he was more useful than if he had been both brilliant and profound. His generally safe judgment, and upon the bench, especially, the fact that his awards were reached through honest and painstaking intent to find justice and do equity, won and deserved public recognition, confidence and esteem and constituted his chief judicial virtue. From the first, in his Nebraska practice, he professionally served powerful and influential corporations; but he served without subserviency; and in a time of common suspicion and too common dereliction he was not suspected of carrying corporate allegiance to the bench or other public function. By an unusual fealty duty was his dictator and the sword and shield of his moral stability. There were more brilliant and, in a sense, abler men at the local bar where his first career began and closed, and yet in the long run he distanced those apparently more favored rivals. "If the flights of Dryden are higher, Pope continues longer on the wing. If of Dryden's fire the blaze is brighter, of Pope's the heat is more regular and constant." Serene and shrewd common sense were a safe substitute for those more showy qualities and a sure retreat for wise deliberation and judgment. "It is not the billows, but the calm level of the sea, from which all heights and depths are measured." Throughout his long period of official life, during which he must have breathed constantly the atmosphere of intrigue and finesse, he remained less tainted by them than most men subject to like environment. Though his public acts and their motives might be criticised, his rectitude was, I believe, never seriously questioned, and he emerged from his first overt public temptation with the sobriquet of "Honest Cobb." In pres-

ent contrasting characteristics of public men, this seems indeed a proud and precious legacy to his memory. Not the least of JUDGE COBB'S virtues, it seems to me, was that he was unused "The applause of listening senates to command." Though he escaped the American vice of speech-making, because he was unobtrusive, he was unobtrusive partly because he lacked the speech-making gift; and his considerable and continued success as a public man, where public life is so largely based on the titillation and the tricks of talk, is the more remarkable. Certainly not the least, and perhaps the greatest, of JUDGE COBB'S virtues was that he was a gentleman, and particularly in the true or unconventional sense. The suavity and graciousness of his demeanor were spontaneous and persistent, and yet he doubtless appreciated their great value in the equipment for competitive struggle so well as not to discourage their manifestation. They were as persistent and seemed as natural as Nebraska sunshine, and lent a charming grace to a perennially dignified deportment. These gifts of demeanor served him in good stead from the first. One of those typical Norwegians who spring from a cobbler's bench to affluence and leadership, and who was an early settler in JUDGE COBB'S county in Wisconsin, always asked kindly about him on my visits to the old home. The last time I saw him, he told me that in 1846 JUDGE COBB came to his shop in a country community, not far from Mineral Point, and ordered a pair of boots, saying that he needed them before beginning to teach the coming term of the district school, but would not be able to pay for them until pay day came. "Did he get the boots without the pay?" I asked. "Sure! His face was good enough for that," was the ready answer.

The sympathetic charity, the serenity, the contentment, the moral excellence of JUDGE COBB'S long life illustrate the futility and unwisdom of prescribing one set of beliefs or ethical sanctions for our guidance through this reputed vale of tears; for though he discarded dogma and clung to no creed, he yet walked uprightly all the days of a serene and sunny life, finding God in the supreme order of the universe and serving Him in loyal observance of its laws; and when the shadow of the dark unknown descended upon him, he was still courageous and content, fearing no evil. Men by millions, and of as many minds, seek and approach the highest goal of life along all the radii of the all-comprehensive circle of beliefs or non-beliefs, as they may be denoted by superficial systems of nomenclature. Faith is an attitude, a condition, common to all, though in differing degree. Faiths are con-

ditions precedent, prescribed and often proscriptive rules. Of faith JUDGE COBB possessed a plentitude of faiths a paucity. And his faith was not of that kind

"That lives in thought
On comforts which this world postpones;
That idly looks on life and groans
And shuns the lessons love has taught;
Which deems that after three score years,
Love, peace and joy become its due;
That timid wishes should come true
In some safe spot, untouched by fears."

But he the rather

"Looked on life
As present chance to prove his heart,
As time to take the better part
And stronger grow by constant strife.
* * * * * * *
So bent that they he loves shall find
This earth a home both rich and fair,
That he is careless to be heir
To all inheritance behind."

But though living, aspiring and striving in and for this world and not averse to gaining a fair share of its bounties, yet his desires and activities were normal, employing the moderate means to the moderate end, and, though now contemned and despised, yet a wholesome example when pernicious precept excites to the pernicious practice of abnormal strenuousness, and as end rather than means. Baneful example, encouraged by preaching of those who sit in high places, leads our youth and even our maturer manhood to affect and emulate the overstrained life, to take for pattern the monster rather than the normal man, and for criterion the monstrosity rather than normal achievement. JUDGE COBB loved, without ostentation, the simple life, sparing its often rapid vaunting. Does not the summing up of JUDGE COBB'S serene, moderate, wholesome and yet influential and effective life at least beckon us back from this misled and dangerous tendency to normal and healthier aspiration, effort and conditions?

CHIEF JUSTICE HOLCOMB, on behalf of the court, responded as follows:

It is altogether fitting and proper that we pause, while engaged in the ordinary business of the court, to take note of the fact that one who has practiced at the bar and adorned the bench in times past has joined

that vast silent throng in the great beyond; to pay our tribute of respect of his memory, and to make suitable acknowledgement of the services he rendered to the nation, the state and his fellow men, during a long and honorable career. We join heartily in what has been so eloquently and aptly said by those well qualified to speak concerning the character and lifework of our departed brother. The sentiments expressed in the resolutions presented, and in the addresses delivered in respect thereto, find a responsive chord in our hearts, and we beg to be permitted to adopt them as our own. In view of all that has been so well and appropriately said by those who, because of intimate social and professional relations with JUDGE COBB in his lifetime, are best qualified to testify to his virtues and accomplishments in life, it seems hardly necessary or proper that we, less well acquainted, should attempt to add anything thereto.

JUDGE AMASA COBB belonged distinctively to that class of pioneer citizens, now rapidly passing away, who, with prophetic vision at an early period of the state's history, foresaw its wonderful possibilities, severed the ties of home and earlier associations, in order to help build a new commonwealth and establish new homes amidst new surroundings for themselves and their families. He has, by his wisdom, example and industry, materially contributed to the cause of good government, the reign of law and order, and the well-being of society. To him and those who labored with him in those early days, amidst crude surroundings and unsettled conditions, we of a younger generation are greatly indebted for the blessings we are permitted to enjoy, without the hardships they endured, and for which our hearts must ever respond with a deep-felt sense of gratitude. JUDGE COBB fought for his country's cause on the field of battle, with fidelity, winning deserved distinction because of his patriotism, courage and valor; and in no less degree in the civil affairs of life, in important positions of trust and responsibility, he served his fellow man faithfully and efficiently, so that as to him it may be truly said: "Peace hath her victories no less renowned than war."

But a short time after the adoption of the present constitution of our state he was appointed a member of this court to fill a vacancy caused by the death of Judge GANTT. It became his duty to assist in the interpretation of that instrument, and to promulgate rules whereby its provisions might be properly construed. For nearly fourteen years, beginning in 1878, he, as a member of this court, served the state

with rare wisdom and fidelity, bringing to his work the ripened judgment and learning of years of experience, observation and study which had preceded his elevation to the bench. His opinions are found in the official reports beginning with the seventh volume and ending with the thirty-second. The work he and his associates were called to do was, in many instances, for the first time, to announce a principle of substantive law, or a rule of practice, which should serve as a precedent and a guide for all those who should come after them. He and they in truth laid the foundation of our judicial system, broad and deep and on an enduring basis. He was not only a pioneer citizen of the state, but a pioneer in the exploration and working out of the basic plan of a jurisprudence that would meet the requirements and needs of the people of a rapidly developing commonwealth, and stand for the protection of life, liberty and the rights of property of all, so that in truth the state's motto, "Equality before the law," should be a reality.

I knew JUDGE COBB only as one would who appeared as a practitioner at the bar of the court of which he was one of the members. My impressions were that he was a person of courtly bearing, kind and courteous to all, and one who would not intentionally cause offense to any and who was considerate in his intercourse with all. His opinions, if I may judge of them, disclose diligent research and investigation in a conscientious effort to ascertain wherein lay truth and justice. He, if I judge him correctly, cautiously weighed and thoroughly considered every legal proposition upon which he was required to pass judgment before reaching a conclusion, but, when once formed, on full investigation and mature deliberation, was adhered to with more than ordinary tenacity. He strove for the ascertainment of the right and then declared it courageously and unfalteringly. He regarded the law as it is said to be, the perfection of reasoning, and stated with fullness the reasons why he was impelled to the decision announced. In what he did and what he accomplished, he measured well up to the higher standard of human attainments. He lived an exemplary and useful life, one that we delight to honor. His life has been well spent, and we may, with reason, hope that he has received the welcome call of "Well done, good and faithful servant." He had lived to a ripe old age, and had reached that state in life whereof it has been said that the nearer one approaches death he seems as it were to be getting sight of land, and, at length, after a long voyage, to be just coming into harbor. His

memory will yield its fragrance for years to come, for "Only the actions of the just smell sweet and blossom in their dust."

The resolutions of respect to the memory of JUDGE COBB, which have been presented by the committee, and the addresses we have listened to, will, of course, be made a matter of record in the journals of the court, and at a suitable time published in one of the volumes of its official reports.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1905.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. ALEXANDER DUNDY KERR.

FILED JUNE 8, 1905. No. 13,503.

1. **Petition:** SUFFICIENCY ON APPEAL. Where a petition is for the first time assailed in this court because of its alleged failure to state a cause of action, its allegations will receive a liberal construction, with a view of giving effect to the pleader's purpose, and, if possible, sustaining the petition.

1*a*. ———: ———. A reviewing court will not only liberally construe a petition thus assailed, in order to uphold it if possible, but will view it in the light of the entire record; and where, from the nature of the answer and the testimony adduced, it appears that both parties have placed the same construction on such petition, this court will not ignore such construction in ruling on the sufficiency of the petition, even though the petition standing alone might not admit of such construction.

1*b*. ———: ———. A defective or ambiguous petition may be aided and its infirmities cured by averments in the answer. *Beebe v. Latimer*, 59 Neb. 305.

1*c*. ———: ———. The petition in the case at bar examined, and, when construed in the light of the entire record and under the rules above mentioned, *held* to state a cause of action, and sufficient to support a judgment in plaintiff's favor.

2. **Master's Liability.** The master is liable for the acts of his servant within the general scope of his employment while about his master's business, though the act be negligent, wanton, wilful or malicious.

2a. **Evidence** examined, and *held* sufficient to support a verdict in the plaintiff's favor, and to show that the acts done by the servant which are complained of were within the general scope of his employment and authority, and in furtherance of the business and interests of his master.

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

M. A. Low, W. F. Evans and *Woolworth & McHugh,* for plaintiff in error.

McCoy & Olmsted, contra.

HOLCOMB, C. J.

The plaintiff, defendant in error, obtained a judgment in the court below for damages for personal injuries alleged to have been sustained by reason of the negligence of the servant of the defendant railway company, plaintiff in error, and it is sought by this action to secure a reversal of such judgment. The action is grounded on alleged negligence of the conductor of the defendant company while ejecting the plaintiff, a boy about 16 years of age, who was a trespasser on a moving freight train, and in so doing, as is alleged, throwing the plaintiff under the wheel of one of the cars, thereby causing the crushing of one of his lower limbs near the ankle, rendering amputation necessary. It is contended here on the part of the defendant that the judgment cannot be upheld, for the reason that the petition states no cause of action against the defendant, and that under the pleadings the defendant was entitled to a judgment in the court below. It is further contended that under the evidence the company is not liable to the plaintiff for the injury received by him; the conductor's interference, if any, being, as contended for, not for the purpose of putting the plaintiff off the train or of resisting his attempt to board the train, and therefore it was not within the scope of the conductor's employment, and hence the company is not legally liable therefor.

The petition, among other things, alleges: "The said Alexander Dundy Kerr, the plaintiff, was in the said town or city of Neola, and, while the said freight train was at said town or city of Neola, wishing to return to his home in said city of Omaha, and without having paid or offering to pay any fare, but peaceably and with the knowledge of the conductor thereon, became a rider on said freight train, in a position thereon on the south side of said train, wholly outside of the wheels of the cars, and south of the south rail of the roadbed, and in a position of safety from harm or injury to the plaintiff while the train was in motion, as was well known to said conductor, unless there was an injury to the train, or the plaintiff was forcibly ejected, or compelled to alight therefrom while the train was running at high speed; and said position of the plaintiff was beneath and in the middle, but at the very side, of the car on which he placed himself, and from which he could and did remove himself without any necessity or possibility of contact with the rail of the roadbed or wheels of the car, and the position of the plaintiff under the car was such that his presence there was and could be no impediment of or interference with the management and further operation of the train on its westward journey. But after said train was in motion, and while it was going on its way as aforesaid, at a slow rate of speed, the said conductor, who was a car length or more in front of the plaintiff (and no other employee of the defendant was near or in sight), in the performance of his duty, but in a gruff or angry tone of voice, ordered the plaintiff to get off and keep off of said train, and at the same time, in performing his duty, said conductor proceeded to and did alight from the car on which he (said conductor) was riding, and walked or ran backwards on the ground at the side of the train toward the place where the plaintiff was riding, with the apparent purpose of ejecting plaintiff from the train, and of keeping or preventing him from getting on the train again. The plaintiff heard the said order of said conductor, and, intending to obey it in all

respects, proceeded at once to alight from the train upon the ground, which he did in proper, upright position, with his feet upon the ground, entirely outside of the car and train, and with face forward, and the plaintiff was then in a position and place of absolute safety to himself, and would not have received any injuries to his person about or upon defendant's railway, except for the following facts: The plaintiff, the moment after alighting from said train, and before he had an opportunity or was able to turn and peaceably to leave the side of the train and to leave the railway of the defendant, as he intended to do, came full into the arms of said conductor, and said conductor, in the continued performance of his duty to the defendant, then and there, wilfully, wantonly, negligently, and with a total disregard for the safety of the plaintiff, and of his duty to avoid doing any injury to him, grasped with his hands the arms and shoulders of the plaintiff, and proceeded violently and negligently to shake the plaintiff, who was small of size, and to swing him about and off of the ground, so that, and wholly because thereof, without any fault on the part of the plaintiff, said conductor did, in such performance of his duty, wilfully, wantonly and negligently cause the right leg of the plaintiff to be thrown over and across the south rail of defendant's railway, and beneath the wheel or wheels of said train thereon, and to be run over and crushed a little above the ankle by the wheels of said train, and the leg of the plaintiff was thereby so badly mangled as to render necessary, in order to save the life of plaintiff, the amputation of said leg, as was done, about midway between the ankle and the knee." The answer, while admitting that the plaintiff received certain injuries, denies that the said injuries, or either or any of them, were caused or were the result of any carelessness or negligence on the part of the defendant, or of any of its servants, agents or employees. It is further alleged in the answer "that all of the said injuries were caused by and were the result of the plaintiff's own carelessness and negligence and unlawful

conduct; that the said plaintiff was at the time of receiving said injuries wrongfully, negligently and unlawfully, and without the permission or consent of the defendant, trespassing upon the property of the defendant; that at said time he negligently, wrongfully and unlawfully boarded one of the freight trains of the said defendant, and got upon one of the freight cars of said defendant in said train, under the floor thereof, while the said car and train were in motion, without the knowledge or consent of the defendant, and for the purpose of riding thereon without paying, or attempting to pay, or intending to pay the fare for riding thereon; that said position was an exceedingly dangerous one, and that plaintiff well knew at said time that the said position which he took under said car on said train was an exceedingly dangerous one, and that he had no right to get on or remain upon said car at said place or time, or at any other place or time; that while negligently and wrongfully riding upon said car, under the floor thereof, plaintiff negligently, and without the exercise of any care or caution, alighted from said car and train while the said car and train were in motion; and that by reason of said negligence and carelessness and unlawful and wrongful conduct, the plaintiff received the injuries in question."

The reply is a general denial.

1. With reference to the contention that the petition does not state a cause of action, it occurs to us that both parties to the controversy have at all times during the progress of the trial in the lower court regarded the pleading as sufficient. The defendant company has given the petition such a construction as required it to answer and defend in the action, and it would seem that this court ought not now to construe the petition as not stating a cause of action unless, under a liberal construction of all of its allegations, aided, if it is, by the allegations of the answer, with the view of sustaining it if possible, the conclusion is irresistible that it is defective in substance, and that no cause of action against the defendant has been

stated. The nearest the defendant has approached to a challenge of the sufficiency of the petition, or of the evidence in support of its allegations, was when, at the close of the submission of plaintiff's evidence at the trial, the defendant asked for a peremptory instruction to the jury to return a verdict in its favor on the ground that the testimony introduced in accordance with the averments of the petition affirmatively establishes the fact that the acts complained of were acts done by the conductor, not in the performance of his duty to the master, and not within the scope of his employment, and are acts for which he himself is liable. The motion can be regarded only as a demurrer to the evidence introduced by the plaintiff in support of the cause of action set forth in his petition. The rule in this jurisdiction is that, where an objection to a petition on the ground that it does not state a cause of action is not interposed till after the trial of the case, the pleadings will be liberally construed, and, if possible, sustained. *Chicago, B. & Q. R. Co. v. Spirk,* 51 Neb. 167; *Spirk v. Chicago, B. & Q. R. Co.,* 57 Neb. 565. Against an objection at the inception of a trial to the introduction of any evidence, on the ground that the petition does not state a cause of action, the pleadings attacked will be liberally construed, and, if possible, sustained. *Norfolk Beet Sugar Co. v. Hight,* 56 Neb. 162. The petition which is attacked for the first time in the supreme court on the ground that it does not state a cause of action will be liberally construed. *Omaha Nat. Bank v. Kiper,* 60 Neb. 33. In the opinion it is said:

"The petition was not assailed in the trial court, and the rule is that it should now receive a liberal construction with the view of giving effect to the pleader's purpose."

Counsel's argument directed to the alleged failure of the petition to state a cause of action is predicated on the averments found therein, wherein it is stated: "The plaintiff heard the said order of said conductor, and, intending to obey it in all respects, proceeded at once to alight from

the train upon the ground, which he did in proper, upright position, with his feet upon the ground, entirely outside of the car and train, and with face forward; and the plaintiff was then in a position and place of absolute safety to himself," etc. These allegations, it is urged, negative any possibility of liability on the part of the company for the injuries which were received by Kerr, because the conductor had no duty to perform in removing the plaintiff from the train, nor in preventing him from boarding it. The petition, as drawn, it is asserted, presents a case where a person standing opposite a train, not boarding it nor attempting to board it, is assaulted by the conductor. It is conceded that if the conductor should injure a person by the use of unnecessary force in taking him from a train or in resisting his attempt to board the train, the company could be held liable for his acts; but in this case it is urged there is presented simply the question of a servant going outside of his employment to assault a person. This view seems to us to be hardly justified by the pleadings. It omits consideration of an essential element which seems to be fairly, even though somewhat obscurely, stated, wherein it is averred that the plaintiff, the moment after alighting from said train, and before he had an opportunity to depart therefrom, or was able to turn and peaceably leave the side of the train, and to leave the railway of the defendant, came full into the arms of said conductor, and said conductor, in the continued performance of his duty to the defendant, then and there, wilfully, wantonly, negligently, etc., committed the acts complained of. Manifestly the purpose of the pleader was to allege facts showing that the plaintiff was not guilty of contributory negligence producing or contributing to produce the injury he suffered, and that his position was such as to avoid injury to himself by his own acts in leaving the railway train, but that while he was thus in the act of removing himself from the train in obedience to the command of the conductor, and after he had gotten to a place of comparative safety to himself in

his effort to extricate himself from the car under which he was riding, he was seized by the conductor for the purpose of ejecting him from the train and from the right of way, and of keeping him therefrom, and in doing so there was inflicted the personal injury for which a recovery is sought. This construction seems to have been given to the pleadings by the parties to the controversy, and we are disposed to hold, in view of the rule of liberal construction to which reference has been made, that the petition, when thus construed, states facts disclosing the liability of the master for the acts of the servant, and will support a judgment in the plaintiff's favor. Related to the rule of construction just considered is another, which is expressed in *National Fire Ins. Co. v. Eastern Building & Loan Ass'n,* 63 Neb. 698, where it is held that, "where a petition is assailed for the first time by a demurrer *ore tenus,* interposed at the close of the testimony, it will be construed liberally and in the light of the entire record," and "where, from the nature of the answer and the testimony adduced, it appears that both parties have placed the same construction on a petition, the court should not ignore such construction in passing on such demurrer, even though the petition standing alone might not admit of such construction."

We may also in this connection call attention to another rule of construction having a direct bearing on the question now being considered. Conceding that the petition is imperfect and ambiguous as to the situation of the parties when the assault is alleged to have been committed, the defendant by its answer has aided a defective petition and supplied the imperfection, so that the two pleadings, when construed in the light of each other, unmistakably, we think, justify the inference that the injury occurred before the plaintiff had disengaged himself from the train, and while he was in the act of so doing, either by his own action, or the action of the conductor, which is alleged as a basis of recovery. In view of the averments of the answer, the conductor was manifestly acting in the strict line of

the duties owing to his master, in seeing to it that the plaintiff was compelled to leave the train; and, as thus presented, the question of surpassing importance is whether the injury was occasioned by the wilful, wanton and negligent acts of the conductor in ejecting the trespasser, or by the negligence of the plaintiff in freeing himself from the car on which he was riding, in obedience to the command of the conductor to get off of and leave the train. The petition alleges that the injury was caused by the act of the conductor in ejecting him from the car under which he was riding, and the answer alleges that, by the force of his own movements in extricating himself from the car, he permitted his limb to fall on the rail and to be crushed by the wheel on the moving train. It is said by this court that a petition which is defective by reason of the omission of material facts therefrom will be aided and cured by the averments of such facts in the answer. *Railway O. & E. Accident Ass'n v. Drummond,* 56 Neb. 235. "A defective or ambiguous petition may be aided and its infirmities cured by the averments of the answer." *Beebe v. Latimer,* 59 Neb. 305. It is difficult to perceive how it may be said that the plaintiff received the injury while in the unlawful act of stealing a ride, and while he was in the act of leaving the train, and at the same time be said that he had left the train and had ceased to be a trespasser, and that the conductor's acts as charged, conceding them to be true, were not done in the course of the performance of his duties as such.

2. Can the judgment be upheld and the plaintiff recover under the evidence? In respect of this question it is insisted that by plaintiff's own statement, assuming the truth of all that is said, it is conclusively established as a fact that the assault which it is alleged was committed by the conductor was not in the performance of any duty which he owed to the company, and was not an act for which the company is responsible. Counsel, in their briefs, say that it is fully admitted that if the conductor had made the assault for the purpose of putting the plain-

tiff, as a trespasser, off the train, or for the purpose of resisting an attempt to get on the train, such acts would be within the line of his duties, and for any improper conduct in that regard the company would be responsible; but, it is argued, if the alleged assault was not committed for the purpose of putting plaintiff off the train, or preventing him from boarding the train, then the assault would not be in the line of the duty of the conductor, but would be an act personal to him, for which the company is not responsible; and that the testimony of the plaintiff puts beyond peradventure of doubt the fact that the assault was not committed for the purpose of either removing him from the train, or preventing him from again boarding it. This contention is based on the theory that the plaintiff at the time of the alleged assault had left the train, and was manifesting no purpose or intention of returning or repeating the trespass he had committed, and for that reason the act of the conductor was not in the course of the performance of his duties. The conductor, in testifying, says he was about a car length from the plaintiff as he was getting off the truss bars on which he was riding; that he had hold of him when he was hurt; that the plaintiff was lying on the ground, and he pulled him away from the train; that the plaintiff was three or four feet from the wheel, and that he pulled him from under the train after the wheel had run over the one foot. The plaintiff says he heard the conductor halloo: "You boys get off of here and stay off of here." He testifies that, at the time, the conductor was about a car length ahead, and in the act of alighting from a freight car, down the side of which he had climbed. The plaintiff then says he immediately tried to get out, and got out; that he took hold of the post with his hands, his feet being out over the outside bar, and swung himself out from under the car; that he alighted on the ground all right, and the force he received while riding on the train caused him to run along two or three steps after getting off; that the conductor ran toward him; that he had his hands on the bar, to try to

turn out, and before he could turn out the conductor caught him; that he grabbed and shook him several times, and pretty severely; that he lost his footing; and that the conductor swung him around and the wheel passed over his foot; that the conductor pulled him out, and laid him down beside the track; and that he said to the conductor: "Now, see what you have done." On cross-examination the witness says he was entirely outside the car and train; that he was not aboard the car, nor was he trying to get on the car, but was trying to get out, and that he was standing or walking along the car after he had gotten off the truss rods; that he was outside of the car, not on nor trying to get on the car, and that only his hands were on the car; that while in this position he was assaulted by the conductor; that it was not necessary to assault him to get him off the car, and that he was not trying to get on the car, and that there was no assault to keep him from getting on the car, and that he was not trying to get on.

This evidence, drawn out on cross-examination, the substance of which we have given, is especially relied on to establish the essential fact contended for, to wit, that the conductor's assault was not within the scope of his duties, since it was neither for the purpose of putting the plaintiff off the train, nor for the purpose of preventing him from getting on the train. The record does not necessarily establish the fact contended for, nor are we to be governed solely by the statements of the witness as testified to on cross-examination, especially so, where, in order to ascertain the real and exact situation, reference must be had to his testimony preceding, as well as that which follows. It is from all that is said and testified to by him, reconciling all parts, wherever possible, that we may ascertain the truth of the matter in controversy. When so considered, we think the fair inference is that as the plaintiff was removing himself from under the car where he was riding, and after he had alighted on the ground in a position not altogether upright, but approximately so, and before he had freed himself from the train, and while his hands were

hold of the bars or rods where he had been riding, and as he was moving forward with the train, he came in contact with the conductor, who was traveling toward the rear of the train in order to drive him away, and who, seizing hold of him while yet in the position described, by throwing him around, threw his foot or limb on the rail and under the wheel, by reason of which he received the injury complained of. We are not to be understood as saying this is the literal truth, but there is evidence in the record tending to establish this state of facts, and sufficient to support the verdict of the jury, who obviously found such to be true. The plaintiff's companion, being somewhat older, testifies that, at the time or immediately preceding the injury, the plaintiff was "sitting kind of side-saddle like" on the truss rods, with his feet hanging over the outside rod; and that, while the conductor was coming toward the plaintiff, the witness saw him start to get out, and saw his feet on the ground; that his feet were on the ground, and he was in a kind of crouched position; that his hands were not on the ground. A brakeman, one of the defendant's witnesses, testifies that the plaintiff was lying by the side of the track as the conductor made a run or jump or spring toward the car under which the plaintiff had been riding. As to the contention that this evidence indisputably establishes the fact that the plaintiff had left the train, and had ceased to be a trespasser, and was making no attempt to again board it, we think it falls far short of proving such to be the case. Suppose the plaintiff had been riding on top of a freight car, and at the command of the conductor had descended the ladder at the side, with the view of leaving the train in obedience to the command, but just as he had alighted on the ground, and while yet hold of the ladder on which he had descended, and while outside of the train, and with no intention of returning to it, but while in the position mentioned, the conductor had seized him and thrown him in such a manner as to injure his person by the car passing over his limb, could it be successfully contended that the act of

the conductor was beyond the scope of the duties of the servant to his master, and for which no liability would attach to the latter? These two boys had been playing hide and seek with the trainmen. They had been dodging from side to side of the train in order to escape the trainmen, and steal a ride to Omaha. The conductor was endeavoring to prevent them from so riding, as it was his duty so to do. He was chasing them from the train. He was not only ejecting the plaintiff from the car on which he was riding at the time of the injury, but he was endeavoring to prevent him, as well as his companion, from riding on the train anywhere or in any position other than as regular passengers upon payment of fare. This was obviously his object in pursuing the plaintiff. This is why he seized, shook him, and swung him so that he lost his footing, if he did so. He had no personal ill will or malice toward the plaintiff, and so testifies. It was not for revenge nor for any other purpose than to prevent the plaintiff from riding in the manner he was endeavoring to ride, and from trespassing on the company's rights, that actuated the conductor in doing what he did at the time.

The fact that the plaintiff was not at the time trying to again board the train, or intending to do so, cannot materially affect the situation, or alter the rights, duties and liabilities of the respective parties. Such might be material, had the plaintiff entirely removed himself from the train and right of way, and for the time being ceased to be a trespasser, but he had not done this. He was still trespassing. He was yet hold of the car on which he had been riding. The act of removing himself from the train had not been completed. The act of the conductor, assuming the plaintiff's theory to be correct, was but one of a series of continuing acts set in motion with the view of ejecting the plaintiff from the train—a place where he had no business to be—and until the act had been fully completed, and the purpose for which the different acts were set in motion accomplished, the conductor was, as it seems to us, manifestly acting within the scope of

his employment, and in the furtherance of the interests and business of the master. It was his business to drive off trespassers, and to keep them off, and it was this very business he was engaged in when the acts of which complaint is made were performed. In brief, if the boy was hurt under the train, as he undoubtedly was, and as a part of the transaction of his riding on and attempting to leave the train when ordered so to do by the conductor, by what manner of reasoning is the inference warranted that he had left the train—had ceased to be a trespasser—and for that reason the conductor's acts were beyond the scope of his authority? If plaintiff was hurt while leaving the train, then it was his own or the conductor's wrong-doing that contributed to the injury, and if the latter, then the conclusion, we think, is irresistible that it was done in the course of the performance of his duties and in the line of his employment.

The general rule is that a master is liable for injuries to third persons arising from the negligence of his servant while in the lawful and authorized employment of the master. *Toledo, W. & W. R. Co. v. Harmon,* 47 Ill., 298; *Gray v. Portland Bank,* 3 Mass. 363; *Gass v. Coblens,* 43 Mo. 377; *Harriss v. Mabry,* 23 N. Car. 240. The authorities say a master is liable for the acts of his servant within the general scope of his employment while about his master's business, though the act be negligent, wanton, wilful, or malicious, and this is so though the act complained of has been expressly forbidden by the master. 4 Cur. Law, p. 608, and authorities cited. See also *Burns v. Glens Falls, S. H. & Ft. E. St. R. Co.,* 38 N. Y. Supp. 856; *Craker v. Chicago & N W. R. Co.,* 36 Wis. 657, and *Cohen v. Dry Dock E. B. & B. R. Co.,* 69 N. Y. 170. In the last case cited, in the opinion it is said:

"A master is liable for the wrongful act of his servant, to the injury of a third person, where the servant is engaged at the time in doing his master's business, and is acting within the general scope of his authority, although he is reckless in the performance of his duty, or through

lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty, and inflicts unnecessary and unjustifiable injury."

On the other hand it is said: A master is not liable for a malicious or wanton act of a servant done outside of his employment, without regard to his services, and in order to effect some purpose of his own. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543. In this same case, however, it is declared that "for the acts of a servant within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the master is responsible, whether the act be done negligently, wantonly, or even wilfully."

Tested by the principle deducible from these authorities, there seems little room to doubt that the acts of the conductor alleged in the petition, and as testified to by the plaintiff, and for which the company is sought to be held responsible, if believed by the jury, were within the general scope of the employment of the servant, were committed while he was engaged in his master's business, and with a view to the furtherance of the business and interests of the master. This court in an early case has recognized and given expression to the rule adverted to, wherein it is held that a corporation is liable for acts committed in the course of the agent's employment, or in connection with the transaction of the business of the corporation. *Miller v. Burlington & M. R. R. Co.*, 3 Neb. 219. A case well in point is *Hamilton v. Chicago, M. & St. P. R. Co.*, 119 Ia. 650, 93 N. W. 594. There a conductor in ejecting a trespasser from the train, after he had climbed thereon the second or third time, seized him by the collar, slapped and beat him with his hand, then stopped the train and put the trespasser off. It is held that the beating administered by the conductor was within the line of his employment, and that the master was liable. In the opinion it is said:

"There is no question that if, in removing plaintiff as a trespasser, the defendant's conductor, who was charged with the duty of removing trespassers from the train, caused him to suffer personal injury by reason of attempting to put him off at a dangerous place or by using unreasonable and unnecessary violence, the defendant would be liable for his acts, even though they were wanton, wilful, malicious, and unlawful." Citing a number of authorities. "This proposition," continues the court, "is conceded by counsel for appellant, but he contends that the evidence shows the beating of the plaintiff to have been a separate and distinct transaction. * * * It was not as the result of any personal malice or ill will of the conductor, but because, as conductor, he was irritated by the conduct of plaintiff, and, as he declares, was actuated with the purpose of teaching the plaintiff a lesson, so that when he was put off he would stay off. There is nothing to indicate that the conductor, under pretense of discharging his duty as conductor, was taking the opportunity to injure plaintiff on account of his personal ill will. He was confessedly acting throughout as conductor—discharging the duty of preventing plaintiff, as a trespasser, from riding on the train. We think the case is plainly one where the wrongful acts of the conductor, if any, were chargeable to the defendant."

The same may be said of the facts in the case at bar. The conductor was manifestly acting through no personal ill will to the plaintiff. His acts were with the view of removing the plaintiff, as a trespasser, and to prevent a recurrence of the trespass. He was, if the plaintiff's story is believed, forcibly removing him from the train and from the position in connection therewith he was occupying when the assault was committed, for the express purpose and with the sole object in view of preventing him from further riding on the train, which he was endeavoring to do, and to prevent a continuance of the trespass, and the act complained of was one of a series or a part of a continuous act brought about for this very

purpose. The case, as it appears to us, is clearly distinguishable from those cases holding the master not liable where the act of the servant is done outside of his employment and without regard to his services. The difficulty, of course, lies in applying the rule and drawing correctly the line which shall determine whether the act is within or without the scope of the duties of the servant in the course of his employment. In *Georgia R. & B. Co. v. Wood,* 47 Am. St. Rep. (Ga.) 146, cited by defendant in support of its contention, it appears that certain boys had been attempting to steal a ride upon a train, and that at the time of the act complained of they had left the train and right of way, and were standing in a yard on private property. A stone was thrown by one of the trainmen at one of the boys, which struck a girl who was standing on her father's porch. The company was held not liable because the act was not within the scope of the employment of the servant who was acting in the capacity of a brakeman. The court say that no presumption arises that the servant was acting within the scope of his employment in throwing a stone at this boy, with a view to injure him, after he had desisted from the trespass and gone off from the train. "If," say the court, "the brakeman, while these boys were engaged in the trespass, had, in attempting to prevent the trespass or cause them to desist, injured one of them through negligence or carelessness, or by using more force than was necessary for the purpose, the company would perhaps be liable. * * * But after the boy had desisted the company would not be responsible for an injury inflicted on him by the brakeman in attempting to punish him for the trespass." For like reason it is held in *Golden v. Newbrand,* 52 Ia. 59, that the master was not liable for the acts of the servant because, under the circumstances, they were not within the scope of the duties for which employed. In that case the servant was employed to protect property, the same being a brewery operated by the master. The party assaulted had thrown a brick into the brewery, striking some of the property

therein, and then turned and ran, when the servant, after chasing him some 15 or 20 feet from the building, shot the fleeing party in the back of the head. It is said by the court:

"We think the fact that the deceased was retreating from the brewery, at the time the fatal shot was fired, shows conclusively it was not fired for or with the intent of protecting the brewery, or in the line of Roenspeiss' duty. * * * To protect the brewery did not require Roenspeiss to shoot and kill a person who was retreating therefrom."

Davis v. Houghtellin, 33 Neb. 582, is also relied on. In that case the servant was employed to guard certain feed upon certain premises, and to seize and detain persons who might be found disturbing such feed. The party injured had occasion to be on the premises, and while there the servant, in attempting to seize and detain him, carelessly and negligently shot and killed him. There was no allegation that the third party was molesting the feed, or attempting to do so, and it was held that a demurrer to the petition was rightly sustained. The case, we think, in principle is clearly distinguishable from the one at bar. Other like cases are cited, but it will serve no useful purpose to advert to them at length. Suffice to say that the facts in these several cases on which the right to recover must rest are held to negative the idea that the servant at the time of the act complained of was acting in the line of his duty, and within the scope of the employment for which he was engaged. In such case the servant is held to be at the time when the injury was inflicted acting for himself and as his own master, and therefore the master employing him was not liable. The acts relied on as establishing the liability of the master in each instance are held not connected with the business in which the servant was engaged, and it is held that the relation of master and servant was for the time suspended. As we have attempted to elucidate in the case at bar, the acts of the servant which are made the basis for a recovery were

in the furtherance of the master's business, and with the view of discharging the duties of the servant owing to the master by ejecting the plaintiff as a trespasser, and preventing a recurrence of the trespass then being committed. This was in the line of his duty. It was a part of his employment. For the acts of the servant while so engaged, even though wanton, wilful, or unlawful, as is expressed by the authorities, the master is held liable. Entertaining, as we do, the views heretofore expressed, the conclusion is reached that the evidence is sufficient to sustain the verdict, and to disclose a liability on the part of the defendant company for the acts of the servant as alleged in the petition and proved by the evidence.

Finding no prejudicial error in the record, we are of the opinion that the judgment should be affirmed, and it is accordingly so ordered.

AFFIRMED.

PETER LADEAUX V. STATE OF NEBRASKA.

FILED JUNE 8, 1905. No. 14,068.

1. Larceny is a felonious taking and carrying away of the personal goods or chattels of another with intent to deprive the owner of his property therein and to appropriate the same to the use of the taker. Asportation, nonconsent of the owner, and a felonious intent to thereby convert the stolen property to the defendant's own use are necessary elements of larceny.
2. Evidence examined, and *held* insufficient to sustain a verdict of guilty of the crime charged in the information against the defendant in the case at bar.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

F. M. Walcott and *A. M. Morrissey,* for plaintiff in error.

Norris Brown, Attorney General, and *W. T. Thompson, contra.*

HOLCOMB, C. J.

From a judgment of conviction on a verdict of guilty of the crime of horse stealing, the defendant, an Indian, prosecutes error. He was informed against in the trial court for the larceny, with another, of several head of horses from a large pasture, where they were being grazed. The evidence is purely of a circumstantial nature. It is earnestly urged upon our attention that the evidence is wholly insufficient to support a verdict of guilty as against the defendant in this action. The other party was not tried on the information charging the defendant herein and such third party jointly with the crime. That the evidence would be sufficient to support a verdict as against the other party, had he been tried, is altogether clear. The defendant was prosecuted and convicted on the theory that he was found in the possession of stolen property soon after the commission of the crime, and that such possession was unexplained. A very thorough search of the evidence found in the bill of exceptions fails to disclose a scintilla of evidence showing that the defendant had possession of the stolen property, either actual or constructive, at any time after the commission of the theft, or that he exercised any control, authority or dominion over the stolen property, or made any attempt or effort to do so. There is nothing in the record to justify the inference that he had conspired with the other party to commit the theft, or that they were acting jointly or in concert regarding the control, possession and disposition of the property after the theft had been committed. The most that can possibly be said is that they were together a short time before the offense was committed, at a place where the defendant was well known, and in a neighborhood where he was accustomed to visit, and where his presence was altogether consistent with innocence, and that sometime after the commission of the offense he was again seen in company with the

undoubted offender while the latter was in the possession and trying to dispose of the horses that had previously been stolen. But the evidence shows that the defendant had been accustomed to visit this place also, and that he was well known there. There is some testimony in the record to the effect that, while some of the horses were being sold by the other party to certain purchasers then present, the defendant, being also present, was asked by the other party what he thought of the deal, and he answered in substance that he had nothing to do with it. It is suggested by counsel for the state that the defendant is protesting too much; that his answer evinces an undue anxiety to exculpate himself. In the absence, however, of any other evidence on which to base an inference of guilt, this answer is equally reconcilable with the truth of the statement, and may as well have been a spontaneous expression of one entirely disinterested in the transaction. All transactions, so far as disclosed by the record, respecting the sale of the stolen horses, and of the control and exercise of dominion over them, were by the other party, acting alone, and apparently on his own responsibility. Unless the stolen property can, under the evidence, be traced to the possession of the accused, or to the joint possession of him and the other party, it is manifest that the evidence is wholly insufficient to support a verdict as against him. This, as we have seen, it fails to do. Larceny is defined as "a felonious taking and carrying away of the personal goods or chattels of another with intent to deprive the owner of his property therein and to appropriate the same to the use of the taker. Asportation, nonconsent of the owner, and a felonious intent to thereby convert the stolen property to the defendant's own use are necessary elements of larceny." 2 Cur. Law, 696, and authorities cited. There is in the record in the case at bar nothing to show that the accused did any act showing an intent to either take or convert to his own use the property alleged to have been stolen. This essential element is wholly lacking. Evi-

dence that he in any way participated in the theft, or in the control or disposition of the stolen property, or that he gained or expected to gain any advantage, or that he endeavored so to do, is wholly lacking from any fact or circumstance that may be found in the record. The verdict, we think, is contrary to the law as laid down by the court in its instructions to the jury, wherein it is said: "To warrant a conviction, such a state of facts and circumstances must be shown that they are all consistent with the guilt of the defendant, and such as cannot upon any reasonable theory or hypothesis be true and the defendant be innocent." Every material fact sought to be established by the evidence may be accepted as a verity, and yet be entirely consistent with the innocence of the accused. Again, the jury were instructed that "before you can find the defendant guilty, you must be satisfied from the evidence, and beyond a reasonable doubt, that he participated in the commission of the offense charged. It is not enough that the defendant was in company of the man who sold the horses at the time such sale was made." Yet, this latter was all that was proved by the evidence as against the accused, except, as heretofore stated, he was in company with the person selling the stolen horses a short time before the crime was committed. Much latitude was allowed the prosecution in proving the guilt of the party with whom the accused is jointly charged with committing the offense, not only of the crime charged in the information, but also of other crimes of a similar nature. The undoubted tendency of the testimony was, in our judgment, to prejudice the accused in the eyes of the jury, and it is possible that he was convicted because he was in bad company, rather than because the evidence in the case at bar established beyond reasonable doubt his guilt of the crime charged in the information and for which he was tried. It is a very serious question whether nonconsent of the owner was proved; but, as the judgment of conviction must be reversed for the reasons stated, it becomes unnecessary to

rule upon the question. The judgment is reversed and the cause remanded.

REVERSED.

STATE ELECTRO-MEDICAL INSTITUTE v. L. M. PLATNER.

FILED JUNE 8, 1905. No. 13,574.

Corporations: CONTRACTS. The contracts of a corporation to furnish the services of qualified and licensed physicians, members of the corporation or its agents, for an agreed compensation, are not prohibited by the statute nor against public policy, and the corporation may recover in its corporate name for services of duly qualified and licensed physicians furnished pursuant to such contracts.

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

Edward J. Cornish and *Nelson C. Pratt,* for plaintiff in error.

Baldrige & De Bord, contra.

SEDGWICK, J.

This plaintiff in error made a contract in writing with the defendant in error whereby it agreed "to render professional services to the party of the second part, until the party of the second part shall be cured of a certain disease, as appears upon the books of the party of the first part." And the defendant on his part agreed to pay for the services a stipulated amount, and to "follow directions carefully, and take the medicine and remedies prescribed from time to time by the party of the first part, until a complete cure is effected." This contract was signed by the defendant, and was also signed "State Electro-Medical Institute, Physician in Charge." The plaintiff is a foreign corporation, and has an office and place of business in the city of Omaha. In the district

court the plaintiff set out the foregoing contract, and alleged that it was made on behalf of the plaintiff, "by and through its duly licensed and practicing physician," and alleged that it was doing business "by and through duly licensed and practicing physicians," and was organized for said purpose, and no other, and alleged that by and through L. H. Staples, a duly licensed and practicing physician, the plaintiff had partially performed the contract, and that the said physician, for and on behalf of the plaintiff, had been ready at all times, and is now ready and willing, to perform all the duties and obligations imposed by the terms of the contract, but the defendant has refused to perform. The plaintiff asks judgment for the amount due it upon the contract.

There was a general demurrer to this petition upon the ground that it did not state facts sufficient to constitute a cause of action, and also upon the ground that "said petition shows that the plaintiff is a corporation; that the contract forming the basis of the plaintiff's action is for medical services, and the plaintiff is incapacitated to render, or contract to render, or to sue for medical services." This demurrer was sustained, and judgment entered for the defendant, which judgment is brought here for review.

1. It is contended that a contract for medical services made by a corporation, to be performed by a licensed physician, is void, and that the corporation cannot recover upon such contract. The statute which forbids any person to practice medicine without first having obtained a license is quoted and discussed in *State Electro-Medical Institute v. State, post,* p. 40. The provision of the statute defining what is meant by the words "practice medicine" is also quoted and discussed, and the conclusion is reached that to make contracts such as the one in question here, and to collect compensation thereunder, does not constitute practicing medicine, as those words are used in this statute, and that therefore it is not forbidden to do these things without first being licensed.

2. The first ground set forth in the brief, from which it is there concluded that the plea of the plaintiff was insufficient, is stated as follows: "No person may practice medicine in the name of another, or under the direction and supervision of another." The case of *State v. Paul,* 56 Neb. 369, is cited. We think that this case holds the reverse of what seems to be contended for it. Dr. Bedell, who was the principal, and presumably the one with whom the contract for treatment was entered into, was qualified and duly licensed under the statute. The defendant Paul was an assistant of Dr. Bedell, and, being not qualified and licensed to practice, he assumed to perform surgical operations and administer remedies to the sick and infirm. It was held that he was not protected by the qualifications and license of Dr. Bedell, although he acted as his assistant and under his directions. The principle established by this decision is that the qualifications of one who practices medicine are personal qualifications, and that it is the one who actually performs the surgical operation or administers the remedy that must be qualified and licensed under the statute. The fact that the doctor who makes the contracts, who takes the patients and undertakes to treat them, is duly qualified and licensed is immaterial. This seems to be the doctrine of *State v. Paul.*

3. The next point urged is that "no person may profit by or enforce an agreement for the practice of medicine, except he is qualified and licensed for the practice of the profession." This construction of the act would prevent action in the name of any assignee of a physician's claim for his services, whether such assignee might be a corporation, a copartnership or an individual. Ordinarily a disqualifying statute is strictly construed. Unless its provisions plainly disqualify the plaintiff from maintaining the action, it ought not to be given that effect. There is no language of the statute in question that can be so construed, nor is there anything in the spirit and purpose of the legislation that requires such construction. This

question was mentioned in *Citizens' State Bank v. Nore*, 67 Neb. 69. It was said in the opinion in that case:

"While section 15 provides that 'no person shall recover,' the latter part of the section indicates that this prohibition is limited to the practitioner himself."

That is, no person shall recover upon such claim whether he be owner or assignee, or in whatever capacity he may claim to recover, unless "the practitioner himself" who performed the services was qualified and duly licensed at the time, and if the practitioner himself was qualified and duly licensed, the provision of the statute seems to be complied with.

The defendant cites the case of *Langdon v. Conlin*, 67 Neb. 243, as holding that one who is not licensed as an attorney and counselor at law cannot recover fees earned by an attorney who is licensed. That case is supposed to be authority for the proposition that a copartnership composed of one who is a licensed attorney and one who is not cannot recover for legal services furnished by the licensed attorney. But the case is not authority for such proposition. The point decided in the case is stated in the syllabus. It is contrary to public policy for one who is not an attorney at law to contract with one who is, for a share of the fees earned, to procure clients for him, who shall employ him to prosecute legal proceedings for them. Such contracts would tend to the encouragement of litigation, and the law will not recognize and enforce them. But if one who is not a licensed attorney is engaged in a collection or other similar business, we know of no principle of public policy that would prevent the formation of a copartnership between such a person and a licensed attorney, whereby it should be agreed that each would carry on his own particular business—the attorney at law practicing his profession—and that the earnings of both should belong to the copartnership. If it was distinctly understood that the practice of law should be carried on entirely by the licensed member of the firm, there seems to be no principle of public policy that would

make such a contract unlawful. *Harland v. Lilienthal,* 53 N. Y. 438.

There is perhaps some language used in the opinion in *Langdon v. Conlin* that might be supposed to support the defendant's contention, and yet it is plainly stated in the opinion that there is but one proposition necessary to discuss, "and that is whether or not this contract is against public policy and good morals and therefore void." The provision of the statute (sec. 5, ch. 7, Comp. St. 1903; Ann. St. 3604), prescribes it to be the duty of a licensed attorney "to counsel or maintain no other actions, proceedings, defenses, than those which appear to him legal and just, except the defense of a person charged with a public offense," and "not to encourage the commencement or continuance of an action or proceeding from any motive of passion or interest," and it is said in the opinion:

"Under a statute with no more stringent regulations governing the practice of law than our own, a contract on all fours with the one in the instant case was declared void, as against public policy and good morals, in *Alpers v. Hunt,* 86 Cal. 78, 9 L. R. A. 483, 21 Am. St. Rep. 17, 24 Pac. 846. The case is supported in principle by the holdings in *Burt v. Place,* 6 Cow. (N. Y.) 430; *Munday v. Whissenhunt,* 90 N. Car. 458. Where, as in the case at bar, a part of the consideration of the contract in issue was an agreement to furnish evidence in litigation to be commenced, the supreme court of New York, in *Lyon v. Hussey,* 82 Hun (N. Y.), 15, 31 N. Y. Supp. 281, said: 'It is clear that such a contract is against public policy. The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation. The mere statement of the proposition seems to show that such a contract could never be recognized in any court of justice.'"

This language puts the decision in that case strictly upon the point stated in the syllabus. It is the only point determined in the case.

In *Alpers v. Hunt,* 86 Cal. 78, the contract sued upon was in substance this: A third person, not an attorney and counselor at law, enters into an agreement with an attorney and counselor at law that he will procure his employment by a litigant, and that in consideration of such procurement he is to have from the attorney and counselor so employed one-third part of whatever remuneration the attorney received for his services from the litigant; and it was held that such a contract was contrary to public policy and void. It will be noticed that the contract was to procure a certain person to entrust a particular litigation to the attorneys, and for this service one-third of the fee from the client was to be paid. The court said:

"Now, if either of the attorneys who contracted with Bolte had lent to the latter his name to be used by him as attorney and counselor, he would have been guilty of a violation of the clause above quoted. * * * Was not Bolte really allowed to use their names in the prosecution of a matter in litigation?"

The principle involved is the same as in *Langdon v. Conlin, supra.* It is against public policy for attorneys to employ one not licensed to procure clients for them. It is equally against public policy to allow one who is not licensed to use the name of a licensed attorney in the prosecution of a matter in litigation. This latter was because the statute of California expressly forbids such practice, and it was thought that the contract involved amounted to agreeing that an unlicensed person should prosecute litigation in the name of a licensed attorney. This case is not authority for the proposition that a corporation composed of licensed attorneys could not recover in the name of the corporation for legal services rendered by such attorneys. At all events the statute under consideration here cannot be construed to prevent

licensed practitioners of medicine to form a corporation, and to make contracts with their patients in the corporate name. If one or more of the incorporators should not be licensed physicians the case would not be different. The person who practices medicine, that is, who undertakes to judge the nature of disease, or to determine the proper remedy therefor, or to apply the remedy, must have the necessary qualifications and obtain license. No recovery can be had for the services of any physician who is not so qualified. A hospital which is controlled by a corporation, and which receives patients, and contracts to care for them and to furnish them with medical attendance, does not by so doing practice medicine within the meaning of this act. It is said that, if a corporation can make such contracts without obtaining a license, it will be within the power of its officers, who are not licensed to be physicians, and over whom the state board of health has no control, to obtain a fee upon the assurance that a manifestly incurable disease can be permanently cured. In other words, that a corporation may conduct itself as a physician may not; that it may do things that would be a sufficient ground for the state board of health to revoke the license of a physician if done by him, and that the purpose of the legislature was to prevent such action. Whether a physician who allowed a corporation to make such contracts for his services, or who associated himself with, and practiced in pursuance of contracts made by, corporations that indulged in conduct that would be unprofessional if done by a physician, might himself be made responsible for these acts of the corporation, and so subject himself to the penalties of this act, it is not necessary in this case to determine. This contract is signed by the "Physician in Charge." He would seem to be as much responsible for this contract, and his own action under it, as if he had executed the contract in his own name. Would the same be true of any physician who, being in the employ of this defendant, should practice medicine pursuant to this contract? If

further legislation is necessary to regulate and control the conduct of such corporations, and of physicians connecting themselves with such corporations, the argument should be addressed to the legislature. We cannot derive such legislation from any public policy indicated by the provisions of this act.

It is further suggested that one of the grounds for revoking the license of a practicing physician is unprofessional conduct in the betrayal of professional secrets, and that there is no restriction upon a corporation that might obtain such secrets and betray them. Such secrets are imparted for the purpose of enabling the physician who treats the patient to understand the nature of his disease and to determine the best course of treatment. No self-respecting physician would encourage the curiosity of his clerks or assistants in attempting to discover the secrets of his patients, and if he participated in such conduct, or knowingly consented to its exercise, he might furnish grounds for the revoking of his license. If the patient saw fit to divulge his secrets to the assistants or agents without the knowledge of the physician, he would be supposed by so doing to indicate his willingness that they be published to the world.

As was said in *State Electro-Medical Institute v. State, supra,* making such contracts as the one involved herein, and collecting compensation for services of qualified and licensed physicians rendered pursuant to such contract, do not constitute practicing medicine and are not in violation of the statute or public policy.

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

REVERSED.

BARNES, J., dissents.

ANNA W. SHEIBLEY V. JOHN M. HURLEY ET AL.

FILED JUNE 8, 1905. No. 13,613.

1. **Public Officers: FEES.** The statute allowing a public officer a fee of twenty-five cents for "each certificate and seal" does not contemplate that the officer must formulate a statement of facts to which he certifies. If he, upon request, performs such service, he will be entitled to reasonable compensation therefor. The fee allowed by the statute is for the act of certifying to the paper and affixing his seal thereto.

2. ———: ———. The clerk of the district court cannot be required to search the records of his office to ascertain what liens, if any, exist against lands described in an abstract of title, and make and enter upon the abstract a compilation and statement of the result of such search. If he performs such service, he is entitled to reasonable compensation for making such statement and entering it upon the abstract. He is not entitled to a fee for making a search of his records necessary to the performance of another service "to which a fee is attached."

3. **Illegal Fees: ACTION FOR PENALTY.** Section 34, chapter 28, Compiled Statutes, 1903, prescribing a penalty for taking illegal fees by a public officer is highly penal. In an action to recover such penalty, if it appears that the fee received was exacted by the officer for services that he was not required to render as such officer, and for which he was entitled to reasonable compensation, together with other services for which it would have been illegal to exact a fee, it will not be presumed (in the absence of proof upon that point) that the fee exacted was more than the service for which he was entitled to compensation was reasonably worth.

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

W. E. Gantt, for plaintiff in error.

McCarthy & McCarthy and *John V. Pearson, contra.*

SEDGWICK, J.

The plaintiff below, who is plaintiff in error here, brought this action to recover from the defendant, as clerk of the district court for Dixon county, several pen-

alties for taking fees alleged to be illegal. The petition sets up several different counts, alleging as many different causes of action, and in each count it is alleged: "Plaintiff presented to the said John M. Hurley, clerk of the district court in and for said Dixon county, an abstract of title to (naming the land), and demanded from him a certificate, under his hand and seal, certifying that the liens and incumbrances shown in said abstract were all that were of record in the office of the clerk of the district court for Dixon county, Nebraska, or certifying that there were none," with an allegation that the defendant demanded from and collected for making said certificate an amount stated in each count, which amount "was illegally taken and was in excess of the fee provided by law." The amount stated is in each count more than twenty-five cents, which the statute prescribes as the fee for certificate and seal. The answer denies each allegation not expressly admitted, and denies specifically that the charges were made for "certificate and seal," and alleges that in each and every cause of action stated in the petition the plaintiff "brought to the defendant, John M. Hurley, a memorandum, or sketch, of the chain of title to the real estate respectively mentioned and described in the several causes of action stated in plaintiff's petition, showing the transfers of title thereof as shown by the numerical index and records of the office of the county clerk of said county, and requested the defendant to make a search and examination of the books, records and files of his office and of the district court for said county, and to make and indorse on said memorandum an abstract of each and every suit, proceeding, decree, judgment, transcript of judgment, execution, attachment or incumbrance of any kind, or affecting the real estate described in the caption of said memorandum, if any, which were at the time liens upon, or in any way affected the title to said real estate, as shown by the books, files and records of his office, certified by him as clerk of said court." The answer then sets out in detail the search

that the clerk was compelled to make of his records and documents in his office, and then alleges "that for the said examination and abstract he charged a uniform fee of fifteen cents for each name appearing in said chain of title, together with a fee of twenty-five cents, and no more, for this certificate and seal attached thereto," with an allegation that these were acts not required by law of the defendant in performance of his official duty, and a further allegation that the services rendered were well worth the sum charged. The pleadings in the case are very lengthy. They are somewhat complicated. The answer contains some inconsistent allegations; and the reply alleges that the charge in excess of twenty-five cents for the seal was made for a search of the records. This allegation of course is inconsistent with the petition, and is a departure therefrom. There are also some inconsistent statements in the evidence. In some instances it is stated by both parties that the charges in excess of twenty-five cents for the certificate and seal were made as compensation for the search of the records. There is no objection made in this court that the allegations of the reply constitute a departure from the causes of action alleged in the petition, or that the allegations of the answer are inconsistent with themselves. The cause was evidently tried below as though the evidence was properly admissible under the issues, and that no variance existed between the allegations and the proof. The cause has been presented upon the same theory here, and we think it ought therefore to be determined upon that theory. The testimony of the plaintiff and the defendant is substantially the same, and it appears from the whole evidence that when these documents were presented to the defendant for his certificate, it was contemplated that an abstract statement of the result of the clerk's search of his records should be entered thereon by him, and a formal certificate appended, to which the clerk was expected to add his signature and the seal of his office.

The determination of this case then depends upon

whether the clerk can be required to enter such a compilation upon the documents, and formulate a certificate thereto, and attach his signature and seal, for the compensation of twenty-five cents. If the theory contended for by the plaintiff is correct, then any statement, however lengthy or however much in detail, that might be prepared from the records of the clerk's office could be presented to the clerk, and he could be compelled to certify how much of the statement was true and how much false, and would be entitled to a fee of twenty-five cents for his certificate and seal. The certificate which the defendant made and for which he was entitled to charge is treated in the brief, and apparently was so treated by all parties upon the trial, as meaning the whole paper and its contents upon which the certificate is placed. It would seem rather to apply only to the act of certifying to the paper. When an abstracter of titles, who is himself a public officer under the law, has prepared a document purporting to be an abstract of title, which is complicated and may involve several descriptions of land, and many conveyances of each piece of land, and recites upon this document that there are no judgments against any of the grantors of any of the pieces of land that are or might become a lien thereon, can he present such a document to the clerk of the district court, and demand that the clerk certify that all of the statements are true, and receive as compensation therefor twenty-five cents for such certificate? It seems clear that the clerk ought to be able to protect himself against such an unjust exaction. The clerk is no doubt required by law to make certified transcripts from his record when the same are demanded and his fees tendered therefor; but in such case he is entitled to fees not only for his certificate but for his transcript as well. One who requires such a transcript cannot prepare it from the records himself and compel the clerk to certify thereto. He is under no obligations to certify to the truth of statements made or prepared by other parties, and if he consents to do so, he may, no

doubt, impose reasonable terms for his services. If he certifies to such statements on condition that he shall be paid for his services the same fee that he would have been entitled to if he had prepared the statement of facts himself, and had certified to its correctness, he violates no law in so doing.

Certainly the defendant could not be required to perform the services required of him in this case for the compensation to which he is entitled for his certificate and seal. As before pointed out, the clerk was expected to make a compilation upon these documents of the result of his searches of his records. Just how extensive these compilations would necessarily be, is not clearly shown in the evidence. This work was no part of the duties of his office, and if he consented to perform it, he might, of course, make such reasonable charges therefor as he saw fit. The evidence, however, clearly shows that the charge which he did make was intended to cover the work of searching the records, as well as the making of these compilations upon the abstracts, and formulating the statements of fact to which he was expected to certify. Of course, he could not charge in this case a fee for making a search of his record. The statute, after prescribing other fees of the district court, provides: "Every search made by the clerk, where no other service is rendered to which any fee is attached, fifteen cents." Sec. 3, ch. 28, Comp. St 1903 (Ann. St. 9029). In *M'Caraher v. Commonwealth*, 5 Watts and Serg. (Pa.) 21, 39 Am. Dec. 106, the court said:

"No stronger evidence can be given of the duty of an officer, than that the law gives him a fee for the performance of it."

Even if it should be thought that this statute imposes no duty upon the clerk to make search of his records, still it clearly authorizes him as such clerk to make such search, and in a proper case to make a charge therefor. If, therefore, he does at the request of an individual make such search, his fees for so doing are, without any

doubt, regulated by this provision of the statute. It is equally clear that the statute, by saying that he may have a fee for searching the record "where no other service is rendered to which any fee is attached," forbids him to take a fee for such service when that condition does not exist. As already seen, it was for this search for which he was not allowed to charge, and for other services for which he was entitled to compensation, that he received the fee of fifteen cents. There is no evidence in the record to show the value of the service for which he was entitled to charge. If these services were really worth more than the amount charged, the fact that he supposed that he was also entitled to compensation for making the search of his records, and that he accepted this fee as compensation for that service also, ought not in an action so highly penal as this to be treated as a violation of the statute. Demanding and receiving illegal fees by a public officer is deemed a *quasi* criminal act. If the amount involved is so small as fifteen cents, or even less, the officer is subjected to a penalty of $50. Under such a statute, all reasonable presumptions of innocence ought to be indulged, and we will not presume that the services rendered for which he was entitled to charge were of less value than the amount he received therefor.

We think, therefore, that the district court was right in instructing the jury to return a verdict for the defendant. The judgment is therefore

AFFIRMED.

BANKERS UNION OF THE WORLD V. BRICE F. MIXON.

FILED JUNE 8, 1905. No. 13,744.

1. **Insurance:** FALSE STATEMENTS. An untrue representation in an application for insurance will not vitiate the policy unless it is of such a nature that it might have been an inducement to issue

the policy. If it appears from the whole record that the representation could not have been relied upon by the insurer it will be disregarded.

2. **Waiver.** It is competent for the insured to waive all claim under the policy in case of death resulting from smallpox, and to make such waiver binding upon the beneficiary under the policy by apt words for that purpose expressed in the application.

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

Matthew Gering, for plaintiff in error.

J. L. Kaley, contra.

SEDGWICK, J.

The defendant in error, Brice F. Mixon, as plaintiff in the court below, recovered a judgment against the plaintiff in error upon a beneficiary certificate issued upon the life of plaintiff's father, William Riley Mixon. The insured was a resident of Louisiana, and died on the 12th day of February, 1900. It is admitted that he paid the dues regularly, and complied with all of the provisions of of the contract upon his part to be performed; but the defendant insists that the plaintiff is not entitled to recover in this action because of an alleged misstatement made in the application for the insurance, and because the insured waived all benefits under the beneficiary certificate in case of his death resulting from smallpox, of which disease the defendant alleges the insured died. There is some discussion in the brief in regard to the waiver or enforcement of forfeitures of insurance policies, but these discussions are foreign to this issue, as no question of forfeiture is involved.

1. The first question presented in the briefs is upon the objection of the defendant that the insurance is void because of a misstatement of fact in the application. One of the questions asked of the applicant was: "Have you been successfully vaccinated?" to which his answer was:

"No"; and it is insisted by the defendant that the evidence shows that the applicant had at that time been successfully vaccinated, and that therefore his statement was false, which invalidates the insurance. It is difficult to understand how the defendant can seriously urge such a contention. If we suppose that it is conclusively shown that the applicant, just prior to making this statement, had been successfully vaccinated, and that therefore the statement was unquestionably untrue, there is nothing in this record from which it might be found that such a statement was material to the risk, or that the defendant relied thereon. In *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, the law is stated to be:

"In order for such representations to constitute a defense to this action, it is incumbent upon the insurance company to plead and prove that the statements and answers were made as written in the application; that they were false; that they were false in some particular material to the insurance risk; that they were made intentionally by the insured; and that the insurance company relied and acted upon such statements."

This statement of the law has since been many times approved. *Royal Neighbors of America v. Wallace*, 66 Neb. 543; and upon rehearing of this last case, 5 Neb. (Unof.) 519, 73 Neb. 409.

It appears from the record that it was the policy of the company not to insure against death by smallpox unless the insured had been successfully vaccinated, and therefore it is affirmatively shown by this record that the company in contracting this insurance did not rely upon the applicant's statement that he had not been successfully vaccinated. It is enough to defeat this objection if the defendant has failed to make it appear that this statement of the applicant furnished some inducement of the company to enter into the contract.

2. Following the answer of the applicant that he had not been successfully vaccinated, the application contained these words: "If not, sign waiver. Waiver. I

agree to waive all benefits under a benefit certificate which may be issued to me, in case of my death or total or permanent disability resulting from smallpox. W. R. Mixon. Applicant to sign name in full. William Riley Mixon."

The defendant insists that the death of the insured resulted from smallpox, and that, by reason of the foregoing waiver, this loss was not insured against. The suggestion of the plaintiff that this waiver was not binding upon the beneficiary is without foundation, since it waives benefits in case of death, and such benefits could accrue to no one except the beneficiary under the certificate. It is also suggested by the plaintiff that fraternal beneficiary companies cannot contract for such waivers of liability. No reason is given upon which to base such a suggestion, and we are not aware of any. The right of the parties to so limit their contracts was recognized in *Sovereign Camp W. O. W. v. Woodruff,* 80 Miss. 546, 32 So. 4.

The question, then, is whether the death of the insured resulted from smallpox. This case was tried by the court without the intervention of a jury, upon documentary evidence, a part of which was an agreed statement of facts submitted in lieu of the oral evidence of witnesses. In this statement of facts it is stipulated that Dr. J. W. Lambert, the medical examiner of the company, would testify "that smallpox was prevalent in the community where Mixon lived at the time of his death, and that Mixon died of smallpox." It is also stipulated that six other witnesses named in the stipulation "would swear upon the stand, if personally present, that the deceased, William Riley Mixon, died of smallpox." It is also stipulated that the plaintiff and five other witnesses "would testify, if personally present, that the deceased died of a complication of diseases, viz., pneumonia and smallpox," and "that the only medical witness who testified as to the disease which caused the death of Mixon was Dr. J. W. Lambert, the medical examiner of defendant order." Upon this evidence the trial court found that the insured

died of smallpox. The trial court entered judgment for plaintiff on account of the erroneous conclusion that the fact that the death resulted from smallpox was immaterial. We think that the evidence abundantly supports the special finding of the cause of death. Smallpox was prevalent in the community at the time. All of the witnesses agreed that the deceased was afflicted with smallpox at the time of his death. The stipulation is that some would testify that he died of smallpox complicated with pneumonia, and some would testify unqualifiedly that he died of smallpox. This stipulation shows that the insured was afflicted with smallpox, which resulted in his death, and under the conditions of his insurance there can be no recovery.

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

REVERSED.

STATE ELECTRO-MEDICAL INSTITUTE V. STATE OF NEBRASKA.

FILED JUNE 8, 1905. No. 14,090.

1. **Corporations:** PRACTICE OF MEDICINE: LICENSES. While a corporation is a person in a certain sense, and for many purposes is so considered, it is not such a person as can be licensed to practice medicine under chapter 55, Compiled Statutes, 1903.

2. **Physicians.** The qualification of a medical practitioner is personal to himself. The intention and meaning of the law is that one who undertakes to judge the nature of disease, or to determine the proper remedy therefor, or to apply or direct the application of the remedy, must have the personal qualifications prescribed by statute.

3. **Corporations:** PHYSICIANS. Qualified and licensed physicians may form a corporation, and make contracts for the services of its members and other licensed physicians. Making such contracts, and furnishing services of qualified and licensed physicians thereunder, is not a violation of section 7, chapter 55, Compiled Statutes, 1903, forbidding the practice of medicine without a license.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed and dismissed.*

Edson Rich and *Nelson C. Pratt,* for plaintiff in error.

Baldrige & De Bord and *W. W. Slabaugh, contra.*

SEDGWICK, J.

This was an information in the nature of quo warranto to prevent the defendant from doing business in this state. According to the pleadings and stipulation of facts, the defendant is a foreign corporation, and has an office in the city of Omaha, and transacts its business there. It is alleged in the information:

"Said defendant is engaged in the business of practicing medicine for hire, and it contracts to, and through its agents does, assume for hire to practice medicine, prescribe for and treat the physical ailments of human beings, and does by and through its officers and agents and employees practice medicine for hire for its benefit, and for hire does operate upon and prescribe for and treat the physical ailments of human beings. The said defendant does solicit the public to come to the said defendant for treatment for physical diseases, and does advertise in the several papers published in the city of Omaha and otherwise that it treats various physical diseases." The answer admits that the plaintiff advertises to treat diseases for hire, and makes contracts to that effect, and accepts compensation therefor, and alleges: "The said defendant at all of the times mentioned in plaintiff's petition, and for a long time prior thereto, is now conducting its business by physicians who were duly licensed to practice medicine; that each and all of the physicians so employed had filed their certificates with the county clerk of Douglas county, Nebraska, and that each and all of said physicians were and are duly au-

thorized to perform each and all acts incumbent upon them under their said licenses; that the said defendant does not assume to nor does it practice medicine, prescribe for or treat persons afflicted with physical ailments, but that said business is conducted solely by duly licensed and practicing physicians in the employ of the defendant." The reply denied this allegation, but it is admitted in the stipulation of facts upon which the case was tried.

Section 715 of the code provides: "If a corporation be found to have violated the law by which it holds its existence, * * * judgment shall be rendered that such defendant be ousted, and altogether excluded from such office, franchise, or privilege."

1. The contention is that this defendant has violated chapter 55 of the Compiled Statutes (Ann. St. 9416-9492), the title of which is "An act to establish a State Board of Health, to regulate the practice of medicine," etc. The particular provision which it is claimed has been violated is the one in section 7 of that act: "It shall be unlawful for any person to practice medicine, surgery or obstetrics or any of the branches thereof, in this state, without first having applied for and obtained from the state board of health a license so to do." It is conceded that this defendant has not obtained, and could not obtain, a license in compliance with this provision of the law. While a corporation is in some sense a person, and for many purposes is so considered, yet it is not such a person as can be licensed to practice medicine. This position seems to be maintained by both parties. The defendant, therefore, not having a license, has violated this law if it has practiced medicine, surgery or obstetrics or any of the branches thereof within the meaning of the statute. The statute in section 17 of the act attempts to define what is meant by practicing medicine: "Any person shall be regarded as practicing medicine within the meaning of this act who shall operate or profess to heal or prescribe for or otherwise treat any physical or mental

ailment of another." Exception is made of the "administration of ordinary household remedies," and in some other cases. The supreme court of Kansas has said:

"The practice of medicine may be said to consist in three things: First, in judging the nature, character, and symptoms of the disease; second, in determining the proper remedy for the disease; third, in giving or prescribing the application of the remedy to the disease." *Underwood v. Scott*, 43 Kan. 714, 23 Pac. 942.

There was no necessity of legislation to prohibit corporations, as such, from practicing medicine. It is impossible to conceive of an impersonal entity "judging the nature, character, and symptoms of the disease," or "determining the proper remedy," or giving or prescribing the application of the remedy to the disease. Members of the corporation, or persons in its employ, might do these things, but the corporation itself is incapable to do them. The qualification of a medical practitioner is personal to himself. The intention of the law is that one who undertakes to judge the nature of a disease, or to determine the proper remedy therefor, or to apply the remedy, must have certain personal qualifications, and if he does these things without having complied with the law he is subject to its penalties. Making contracts is not practicing medicine. Collecting the compensation therefor is not practicing medicine within the meaning of this statute. No professional qualifications are requisite for doing these things.

2. It is urged that no one who is not himself licensed to practice can be beneficially interested in the practice of medicine, and that it is contrary to public policy, and therefore unlawful, for a person or corporation not competent to practice medicine to be beneficially interested in such practice, and to be allowed to receive compensation for the services of one who is qualified. This question and others that are discussed in the brief in this case are more fully considered in the opinion in the case of *State Electro-Medical Institute v. Platner, ante*, p. 23.

It seems clear that this defendant has not practiced or attempted to practice medicine within the meaning of this statute, and is not guilty of the violation of the law charged against it. The judgment of the district court is therefore reversed and the cause dismissed.

REVERSED.

BARNES, J., dissents.

EDWIN A. PHELPS ET AL. V. LOUISA WOLFF.

FILED JUNE 8, 1905. No. 13,859.

1. **Judgment:** NUNC PRO TUNC ENTRY. The district court may enter a judgment *nunc pro tunc* on motion and notice, and the fact that the application therefor is not made for a considerable time after the judgment was rendered does not deprive the court of jurisdiction.

2. **Foreclosure:** LACHES. A plaintiff in a foreclosure suit, who appears to have been diligent in endeavoring to subject the mortgaged property to the payment of the mortgage debt and procure a deficiency judgment, and who, to that end, has proceeded as rapidly as the nature of the case and the rules of procedure will permit, cannot be said to be guilty of laches.

3. **Judgment:** NUNC PRO TUNC ENTRY. An entry made by the clerk of the district court, which has been held by this court insufficient to constitute a final judgment, is not sufficient to constitute a bar to an application for the entry of a judgment *nunc pro tunc.*

4. ———: FINDINGS. Such a judgment, however, must conform to and be no broader in its terms than the judgment actually rendered; and where the decree so entered contains findings not supported by the evidence introduced on the hearing of the application for its entry, it will be reversed as to such findings.

ERROR to the district court for Colfax county. CONRAD HOLLENBECK, JUDGE. *Judgment modified.*

George W. Wertz, for plaintiffs in error.

George H. Thomas, contra.

BARNES, J.

This is a proceeding in error to reverse an order of the district court for Colfax county directing the entry of a decree *nunc pro tunc* in a foreclosure suit.

It appears that one Louisa Wolf commenced an action to foreclose a mortgage on certain real estate situated in Colfax county, in the district court for that county against Goodwin W. Phelps, Oweda Phelps, Julius F. Phelps, Charles J. Phelps and Edwin A. Phelps, and on the 7th day of December, 1895, obtained a decree against them. The judge's notes of the rendition of the decree appear on the court calendar of that date as follows: "Default as to all defendants except as to Julius F. Phelps. Amt. due plff. $802.87, to draw int. at 10 per cent. Decree of foreclosure accordingly, and order of sale in default of payment for twenty days." That thereafter the clerk journalized the decree, as shown by the court journal, in the words and figures following: "*Louisa Wolff v. Goodwin W. Phelps et al.* Now on this 7th day of December, A. D. 1895, this cause came on for hearing and trial to the court, and the defendants Oweda Phelps, Goodwin W. Phelps, Charles J. Phelps and Edwin A. Phelps, having failed to answer or demur, were each three times called in open court, but came not, and thereby made default, and default is hereby entered against them. On consideration whereof the court finds that there is due the plaintiff from the defendant the sum of $802.87, which said amount draws interest at the rate of ten per cent. per annum, and the sheriff is hereby ordered to advertise and sell said premises according to law, in default of payment for twenty days." The foregoing is the only decree or judgment in that action that appears in the records of the court. The defendant, Goodwin W. Phelps, at that time applied for and obtained a stay of order of sale, and, after the expiration of such stay, the real estate described in the mortgage was offered for sale, but not sold for want of bidders. Sometime afterwards

the property was sold by the sheriff for the satisfaction of the decree, the sale confirmed, and thereupon the plaintiff applied to the court for a deficiency judgment. Her application was denied, and she appealed to the supreme court, where the order of the trial court was affirmed, for the reason that it did not appear from the record that any final judgment or decree had ever been rendered by the trial court. 3 Neb. (Unof.) 511. After the cause was remanded, the plaintiff filed a motion in the district court for the entry of a proper decree *nunc pro tunc*. Notice of the application was duly served. The defendants appeared and objected to the entry of such decree, and by their objections, among other things, denied all of the allegations contained in the plaintiff's application. Thereupon, a trial was had, and after the introduction of the evidence in support of the application, the court made an order directing the clerk to enter a decree of foreclosure as of the date of December 7, 1895. To this order the defendants excepted, and to reverse the decree the defendants, Edwin A. Phelps and Charles J. Phelps, prosecute error.

The plaintiffs in error contend that the defendant has been guilty of gross laches in permitting the journal to stand in its present condition for more than eight years. It appears from the record that the defendant has been striving to enforce the decree and obtain a deficiency judgment from the date of its rendition to the present time; that the property was sold as soon as a purchaser could be found in the ordinary course of procedure; that the sale was confirmed, and the defendant herein promptly made application for a deficiency judgment; that her application was denied, and from that order she prosecuted error to this court. She then ascertained for the first time that no final judgment or decree of foreclosure had been entered in the records of the trial court, and for that reason the order of the court denying her a deficiency judgment was affirmed. As soon as the cause was remanded, the proceeding, which is the foundation of the

present action, was commenced, and resulted in the entry of the decree which is now complained of. So it cannot be successfully urged that she has been guilty of laches, as claimed by the plaintiffs.

It is also contended that the former judgment is still in force; that a new judgment cannot be entered until such former judgment is disposed of in some manner, and that the defendant herein is estopped to deny the correctness of the old entry as made. There is nothing in this contention, and it comes with poor grace from one who has heretofore sought and obtained a judgment of this court by which it is held, in effect, that no final decree had been entered in this case prior to the time of the entry of the one now complained of.

The plaintiffs further contend that the evidence is not sufficient to support the judgment or decree complained of. This presents a more serious question. As before stated, all of the allegations of the application were denied by the plaintiffs' objections. The defendant herein introduced as evidence in support of her application, first, the judge's notes found in the court calendar of the date of December 7, 1895; second, the journalizing of the same made by the clerk; both of which entries are quoted above. She also introduced the application of Goodwin W. Phelps for a stay of order of sale, together with the evidence of George H. Thomas, as follows: "I was in court on the 7th day of December, 1895; Judge Marshall presiding. I heard him pronounce the decree in this case, and at the same time he made entry thereof in the district court calendar. After he had made the entry in the court calendar, he read what he had written and entered therein. I will state that I am well acquainted with the signature of Goodwin W. Phelps; that the signature attached to exhibit A (which is the request for a stay of order of sale) is his signature. I am well acquainted with the handwriting in the body of this instrument, exhibit A, and I will state that the same is in the handwriting of one Ethal L. Robins." The above and foregoing

includes all of the evidence offered by the defendant in support of her application. We are satisfied that this evidence is sufficient to authorize the court to make the proper findings and enter an ordinary decree of foreclosure *nunc pro tunc*. But it appears that the decree as entered, and which is the basis of this proceeding in error, contains the following: "The court further finds that the defendants Goodwin W. Phelps, Charles J. Phelps, and Edwin A. Phelps, and each of them, are personally liable to the plaintiff for the payment of said note, and the amount due and owing thereon, and that they, and each of them, are personally liable for any deficiency which may remain after applying the proceeds of the sale of said premises to the payment of the amount herein found due and owing." It seems clear that the evidence of the defendant in support of her application is not sufficient to sustain the finding above quoted. Neither the judge's notes nor the journalizing thereof by the clerk contain anything whatever in relation to a finding of a personal liability on the note, or a liability of the plaintiffs herein for a deficiency. The evidence of the witness Thomas goes no further than the entries above mentioned. He simply testified that he was present in court and heard the judge render the decree, and saw him enter his notes on the calendar, and that he heard him thereafter read such entry. He did not attempt to state what the terms of the judgment which the court actually rendered were, and there is nothing in the record anywhere which would indicate that the court actually made the finding above quoted at the time he rendered his decree. It is beyond question that the district court had jurisdiction to order the decree, which was actually rendered by Judge Marshall on the 7th of December, 1895, entered upon the journal of the court as of that date. *Garrison v. People*, 6 Neb. 274; *Hoagland v. Way*, 35 Neb. 387; *Wachsmuth v. Orient Ins. Co.*, 49 Neb. 590; *Fisk v. Osgood*, 2 Neb. (Unof.) 100; *Creedon v. Patrick*, 3 Neb. (Unof.) 459; *Morrill v. McNeill*, 3 Neb. (Unof.) 220. The

present presiding judge could have no personal knowledge of the terms of the decree which was actually rendered, because it was not rendered by him. He is the successor of Judge Marshall, who rendered the judgment, and who is now deceased. A *nunc pro tunc* judgment must conform to and be no broader in its terms than the one originally rendered. We find no evidence in the record showing, or even tending to show, that the judge of the district court, when he rendered the judgment of December 7, 1895, made any finding whatever as to the liability of the plaintiffs herein for a deficiency. So we conclude that the evidence is insufficient to sustain the finding contained in the present judgment on that point.

For this reason, so much of the judgment complained of as relates to the personal liability of the plaintiffs for a deficiency is reversed, and the judgment of the district court is in all other things affirmed, and the cause is remanded for further proceedings upon the application for a deficiency judgment.

JUDGMENT ACCORDINGLY.

GEORGE L. FARLEY V. JOHN D. MCBRIDE.

FILED JUNE 8, 1905. No. 13,714.

1. **Candidates for Office:** LIBEL. The manner in which a public officer conducted the duties of his office is a fair subject for comment by the press when he is a candidate for reelection, and a newspaper is justified in calling the attention of the public to illegal charges made by him as a reason why he should not again be chosen.

2. **Libel.** Where a newspaper states, in substance, that the sheriff of the county, who is a candidate for reelection, had obtained from the county a certain sum of money upon a false and "imaginary" account for expenses which he had never incurred, this is a charge of moral turpitude and dishonesty, and, if false, is libelous *per se*.

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

Byron Clark, A. L. Tidd and *C. S. Polk,* for plaintiff in error.

Samuel M. Chapman and *Matthew Gering, contra.*

LETTON, C.

This is an action for libel. John D. McBride, plaintiff below, at the time of the publication of the alleged libel, was the sheriff of Cass county, and was at that time a candidate for reelection. The defendant below, George L. Farley, was the editor and publisher of the Evening News, a newspaper published at Plattsmouth, Nebraska. The publication which is complained of is as follows: "Question of Fees. The question of the sheriff's fees in the Shepard case has been under discussion on our streets for several days, and having gathered some information from the county records, and from parties more or less familiar with the particulars, the News has the following to offer:

"On the 18th day of April Shepard was complained against for daylight burglary with intent to steal. The next day (Sunday) Mr. McBride went to Malvern, Iowa, and arrested him. Besides fees, known or admitted to be legitimate, he charged $15 'mileage' and $18.50 'expense.' The legal fee for mileage for that distance is $2.30. The expense seems to be a fiction, created in the fertile mind of McBride himself. One item of this imaginary 'expense' is $1.50 hotel bill. Shepard was not taken to a hotel by McBride, nor was he furnished any meals by him until the next day in the jail at the expense of the county. Mr. McBride, it appears, did not go to a hotel while in Malvern, but ate supper with deputy sheriff Bushnell of that town, on invitation, and even if he had done so the county would be under no obligation to pay the bill.

"Another item of expense is 'railroad fare for prisoner' $2.65. The C., B. & Q. railroad apparently took advantage of Mr. McBride's inexperience by charging him $1.96 too much, the regular fare being only 69 cents.

"Another item is $1.50 for 'livery.' This must be pure 'pad' as he hired no livery.

"Still another item is $1.50 for 'hack hire.' This, if paid at all, was for a hack in Plattsmouth. Shepard was put into a hack upon his arrival here, without request, and driven two blocks to the jail. Such kindness to a prisoner in the matter of hacks is quite unprecedented, and was a McBride invention both in kindness and expense.

"Shepard is charged with a daylight offense. Mr. McBride's transaction was a daylight effort, but here the parallel ends. Shepard is charged with 'evil intent' but got nothing. McBride received a nice little compensation which was paid by the taxpayers of the county. Shepard is now under bond, awaiting trial, and may be sent to the penitentiary, while McBride is running for sheriff on his honesty and efficiency as a public official."

After the article was published, McBride wrote a letter to the defendant demanding a retraction, and attached to the letter an itemized statement and explanation of the fees and expenses charged in the return to the warrant for Shepard's arrest. A retraction was refused, and subsequently this action was brought. The defendant justitifies the publication as a just criticism of the acts of a public official, asserts that it was made without malice, and that the charges made as to the collection of illegal fees and expenses are true.

It appears that the matter of the charges made by Mr. McBride as sheriff had been a matter of discussion before the publication of this article, and that the defendant had been advised by different attorneys that the charges made in the Shepard case for money paid to the deputy sheriff in Iowa and for expenses and mileage incurred outside of the state of Nebraska were illegal. It does not appear that any attempt was ever made by the defend-

ant to ascertain whether or not the sheriff had actually paid out the money for expenses which he charged in his bill.

The evidence shows that in April, 1903, Shepard was accused of an attempt to perpetrate a daylight burglary at Weeping Water, Nebraska; that upon information being given to the sheriff of the fact that such an attempt had been made, and that Shepard was suspected of being the criminal, he immediately took steps to ascertain his whereabouts, went to Auburn and Lincoln in the search for Shepard, and sent out directions to local peace officers in that vicinity to arrest and hold Shepard if within their reach; that under the direction and advice of the sheriff to a local deputy sheriff Shepard was found near Malvern, in the state of Iowa, and that on receipt of this information McBride went to Iowa, and with this deputy made the arrest, the prisoner consenting to return with him to Nebraska without a requisition upon the governor of that state. In looking for Shepard, and in procuring his arrest and return to Nebraska, the sheriff incurred a number of expenses, such as $4 paid for watching Shepard's house at Weeping Water, $10 paid deputy sheriff of Mills county, Iowa, for his aid, $1.50 for hack hire, $1.50 for hotel expense, 20 cents for telephoning, and $2.65 for railroad fare. From an examination of the bill of expenses submitted by the sheriff it is clear that for part of the items of expense there was no legal liability upon the part of the county to reimburse him, while at the same time it may be said that the sheriff had actually paid out the money, and that it was not unreasonable for him to think that he should be reimbursed by the county for his expenditures in that behalf. The article charges that "the expense seems to be a fiction, created in the fertile mind of McBride himself. One item of this imaginary 'expense' is $1.50 hotel bill." This portion of the article distinctly charges that the sheriff had charged $18.50 for expenses, when in fact he had never incurred any, and that the expense was "a fiction" and "imaginary." The

evidence shows this statement to be false and untrue and that he had in fact paid out the money which he charged.

Further than this the article draws a parallel between the man Shepard, who was charged with a felony, and McBride. It is said: "Shepard is charged with a daylight offense, Mr. McBride's transaction was a daylight effort, but here the parallel ends. Shepard is charged with 'evil intent' but got nothing. McBride received a nice little compensation which was paid by the taxpayers of the county. Shepard is now under bond, awaiting trial, and may be sent to the penitentiary, while McBride is running for sheriff on his honesty and efficiency as a public official." To the ordinary mind this language is equivalent to saying that Shepard and McBride are equally guilty of crime; that Shepard is awaiting trial and may be sent to the penitentiary, while McBride is at large.

The question of whether or not the sheriff was entitled to be reimbursed by the county for the money which he had actually paid out for expenses in the attempt to capture Shepard was a question of law. There is no doubt that a part of the charges made by the sheriff against the county were unauthorized by law and were a proper subject for criticism and discussion by the press, more especially when he became a candidate for reelection. So far as the defendant might call the attention of the public to charges made by the sheriff which were not justified by law, he would be protected by the qualified privilege allowed him as the publisher of a newspaper to criticise a public officer; and if his strictures and criticisms were confined within proper limits, and were made without malice and for justifiable ends, no action would lie against him for such publication. The defendant would have been within his rights in questioning the propriety of the charge and allowance to the sheriff of this money for expenses upon the ground that the charge was not one for which the county was legally liable, but he did more than this. He recklessly

and untruthfully asserted that the sheriff had obtained from the county the sum of $18.50 upon a false account for expenses which he had never incurred. This is a distinct charge of moral turpitude, dishonesty and crime which the evidence entirely fails to justify. Further than this the parallel sought to be drawn between the sheriff and Shepard is in nowise justified by the circumstances. The meaning of the language used in this connection is clear and needs no gloss. It places the sheriff and the alleged criminal in the same class, and is entirely indefensible and malicious.

It is proper and right that the acts of public officials should be subject to criticism. It is one of the highest privileges of an active and impartial press to closely watch the acts of public officers, to praise where merit is due, and fearlessly and without favor to point out wherein such officers have failed to do their duty or have attempted to use their positions for private advantage, but this privilege granted to the press for the public welfare is not to be recklessly abused. Every man is entitled to be secure in his property, in his person and in his reputation. Our fundamental law says that "every person, for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law." The liberty of the press and the rights of the individual must and do exist side by side. No attack is so hard to resist, so difficult to withstand, nor so far-reaching in its consquences, as that which it is within the power of an unscrupulous writer to make upon one's reputation; and, while the press must not be muzzled, it is the duty of the courts to preserve in so far as may be the rights of the individual and his immunity from unwarranted attack.

Complaint is made by the defendant of certain instructions given by the trial court and of other rulings made during the progress of the trial. An examination of the record convinces us, however, that the rights of the defendant were carefully and scrupulously protected by the district court. Under the facts in this case the verdict of

the jury was clearly right, and a finding for the defendant would have been unwarranted by the evidence. The damages assessed were but little more than nominal, and we are of the opinion that the defendant is not the party who has any cause to complain of the result of the trial. We perceive no error which has resulted to his prejudice, and therefore recommend 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.

ROBINSON & COMPANY V. THOMAS H. RALPH ET AL.

FILED JUNE 8, 1905. No. 13,815.

1. **Contract:** ACCEPTANCE. Where a written order for threshing machinery contains a condition that it shall not be binding until accepted by the officers of the selling corporation, the signer of the order is not bound by stipulations or limitations therein until its acceptance by such officers.

2. **Pledge.** Where a lot of threshing machinery was consigned to the manufacturer at a point where it was expected to sell the same, and at the request of the manufacturer's general agent, who was in control of the property, money was advanced by an intending purchaser to pay freight charges, and, no sale being made, the agent pledged the machinery to the persons advancing the money until the same was repaid, the pledgee has a lien upon the property to that extent, and the owner is not entitled to its possession until the freight charges are paid.

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

J. R. Swain and *T. P. Lanigan,* for plaintiff in error.

T. J. Doyle, contra.

LETTON, C.

The plaintiff in error, Robinson & Company, a corporation, plaintiff below, brought this action in replevin to recover from the defendants a lot of threshing machinery. The defendants claimed the right of possession of the property by reason of a lien which they claimed they had upon the same for the sum of $135.10 paid by them for freight upon the same. The cause was tried to the court without a jury, and findings and judgment rendered that the defendants had a special ownership for the amount of the freight charges paid by them, with interest. The controversy arose from these facts: In July, 1903, the defendants, who are farmers residing in Greeley county, gave a written order to the plaintiff, through its local agents at Greeley, Harris & McGinn, for the purchase of the machinery. The contract was sent to the home office of the plaintiff at Richmond, Indiana, and the machinery was shipped to the plaintiff at Greeley. The written order stated the security which the defendants were to furnish, as well as the terms of sale. Upon the arrival of the machinery at Greeley the plaintiff refused to deliver the same to the defendants unless they would execute a chattel mortgage upon $600 worth of personal property in addition to that described in the order. This the defendants refused to do, and, after certain negotiations with the local agents of the plaintiff at Greeley, they started to Lincoln for the purpose of buying a machine of another make. The bill of lading for the machinery was sent to the Greeley State Bank at Greeley, Nebraska, with instructions to deliver it to the defendants upon their executing the notes and mortgage described in the written agreement, with the further security demanded. The dispute over the giving of the additional security and the delivery of the property was communicated by the local agents to one H. A. Smith at Omaha, who appeared to be the general agent of the plaintiff in this state. He apparently conveyed this information to the home office of the plaintiff, and on Au-

gust 7th was instructed by wire to have settlement made according to the original contract; and, presumably after plaintiffs had been informed that the parties were going to Lincoln to purchase another machine, another message was sent to Smith as follows: "Go yourself. Follow parties up. Get settlement or notify competitors, also us. Have wired bank deliver you papers." Smith immediately went to Lincoln, and met the local agent and the defendants at the Lincoln Hotel, where, after some negotiations, Smith reduced the price $100, and a new order was executed. It was also agreed by Smith orally that he would go to Greeley, unload the machinery, put it in shape to run and start it, and that when it proved satisfactory to the defendants they were to sign the notes. At that time the machinery had not been unloaded. The parties then returned to Greeley, Smith accompanying them. The next morning the machinery was unloaded—Smith and another agent of the plaintiff, named Gill, overseeing the unloading—and it was taken to the farm of one Fitzpatrick, who had grain to thresh. The weather was rainy; so nothing was done at that time, and Smith went home, but he returned the next week. The local agent, Harris, started the machine and tried to run it one day, and Smith and Gill also worked with it for three days. The machine did not do satisfactory work, and Smith and Gill finally abandoned the attempt to operate it, and it was taken away from the work under Smith's direction. At the time the machine was unloaded, the defendants advanced the money to pay the freight at Smith's request. When the attempt to work the machine was given up, defendant Ralph informed Smith that he wanted his freight money. Smith then told him that he would get the money, but that he did not have that much money with him, and that he could hold the machine until the freight money was paid. Apparently no further attempt was made to operate the machine, and the same was held by the defendants subject to the order of the plaintiff upon payment of the freight. There is no dispute about these facts. But the

plaintiff's contention is that Smith was only a special agent with limited powers which were specified in the printed order form, and that he had no authority from them to deliver the machine to the defendants without the execution of the notes and mortgage provided in the order, and had no authority to agree that the machine should be held by the defendants as security for the repayment of the freight charges.

The plaintiff relies upon the rule laid down in *Bradley & Co. v. Basta,* 71 Neb. 169, which holds, in effect, that oral statements and warranties made antecedent to and contemporaneous with the signing of a written contract cannot be considered for the purpose of setting aside or superseding the written instrument. This rule is elementary, and if the facts warranted its application in this case we should apply the same. In the instant case, however, the written order was never accepted by the plaintiff's officers at its office in Richmond as its terms required before it would be binding upon the company, and therefore the written contract was never completed. It was merely an offer to purchase, and at the time of the transaction by Smith had never been accepted by the plaintiff, or even seen by any of its officers qualified to accept and agree to the same under the terms of the printed matter.

The case stands thus, therefore: That an agent of the plaintiff, apparently clothed with complete control and authority over the property, requests the defendants to pay the freight upon machinery billed to the plaintiff, and by means of the bill of lading furnished him by the plaintiff obtains possession of the property. While in complete control and possession of the same, he makes an agreement that the defendants may have a lien upon it until the freight charges advanced by them are paid. The plaintiff is in no worse condition, so far as the freight charges are concerned, than it was before Smith made this verbal pledge and agreement with the defendants. The carrier had a lien upon the property for this amount,

and, under the circumstances, we are of the opinion that the defendants were, in effect, subrogated to that lien. The money was paid to the plaintiff's use at the request of its agent, and we see no good reason why the defendants should suffer by this act.

But, even if we take the view that the telegram recited gave Smith authority to accept the order, and waived the conditions therein that the contract was not binding upon the company until accepted by its officers at the home office, the written order contained a warranty that with proper management the thresher would do as much and as good work as any other of similar size for the same purpose, and provided for the rescission of the contract if it failed to comply with the terms of the warranty. When the local agent, Harris, the expert, Gill, and the general agent, Smith, all failed to make the machine work, it seems clear that it failed to meet the conditions of the written warranty, and that, even if the contract had been fully executed, the defendants would have had the right to rescind, under all the circumstances, and to recover back their outlay. We think it immaterial which horn of the dilemma the plaintiff takes and that in either event the defendants are entitled to retain the possession of the property until the money advanced by them is repaid.

We think the district court committed no error, and that its judgment should 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.

FRED SCHROEDER, SR., ET AL. V. JOHN BLUM, JR.

FILED JUNE 8, 1905. No. 13,837.

1. **Malicious Prosecution:** EVIDENCE. In an action for malicious prosecution, where two complaints were filed in the criminal action, and where one of the defenses is that the defendants made a full and complete statement of all the facts and circumstances bearing upon the guilt of the plaintiff to the proper prosecuting officers, and that the prosecution was carried on in good faith on the advice of such officers, it is error to exclude testimony of one of the defendants that such disclosure was made before the filing of the second and amended complaint, which was the complaint upon which the plaintiff was bound over to the district court, since this is a good defense *pro tanto.*

2. **Evidence:** THREATS. Generally, evidence of threats against the prosecutor not communicated to him until after the prosecution has been had are not admissible upon the question of probable cause, but where the prosecuting witness himself testifies to an overt criminal act within his own knowledge, which is denied, corroborative evidence which tends to establish the fact that the act was committed is relevant and material, and it is error to exclude the same.

3. **Instructions.** In such a case an instruction that facts cannot be considered which existed prior to the institution of the criminal proceedings, which were not communicated to the party instituting the prosecution, is erroneous.

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

J. J. O'Connor and *Cooper & Dunn,* for plaintiffs in error.

Jefferis, Howell & Shotwell, contra.

LETTON, C.

This is an action for malicious prosecution brought by John Blum, Jr., as plaintiff, against Fred Schroeder, Sr., and Fred Schroeder, Jr. as defendants. From a verdict and judgment in favor of the plaintiff, the defendants Schroeder prosecute error. For convenience the parties

will be named plaintiff and defendant as in the lower court. The plaintiff, John Blum, Jr., and the defendant Fred Schroeder, Jr., are cousins, and are both young men. At the time of the alleged transaction out of which the prosecution arose, young Schroeder was 20 years of age, and young Blum a few months older. They both lived near the village of Millard, in Douglas county, and were apparently rival suitors of one Mary Kelsey, who afterwards married young Schroeder. Young Schroeder testifies that on the evening of August 9, 1900, as he was going on horseback from his home a few miles from Millard to that place, he was shot at from a clump of willows by the roadside; that he saw Blum's pony standing there, and saw a man with a white handkerchief around his neck in the bushes. Other witnesses testify that, shortly after Schroeder rode into the village that night, Blum followed also on horseback. Blum testifies that he wore a white handkerchief around his neck that night. There is other testimony corroborative of Schroeder's. Blum denies that he was nearer the place where the alleged shots were fired that night than the village of Millard, and other evidence tends to corroborate this statement. On the 11th of August a complaint was filed before Henry Kelsey, a justice of the peace in Millard precinct, reciting that Fred Schroeder makes complaint that he has just cause to fear and does fear that John Blum, Jr., will unlawfully, maliciously and wilfully shoot him with a gun and kill him; that on divers occasions the said John Blum, Jr., has threatened to take his life; that on the 9th day of August, 1903, the said John Blum, Jr., met him on the public highway in Douglas county, Nebraska, and discharged a gun at him, and that the said John Blum, Jr., unlawfully carries a concealed revolver the greater portion of his time. This complaint was signed and sworn to by both of the Schroeders. A warrant was issued upon this complaint, and Blum arrested. He was brought before the justice and detained for about half an hour, when the personal recognizance of himself and his father was taken,

and the case continued. At the time to which the case was continued he appeared and filed a motion for a change of venue, which was granted, and the cause transferred to one William R. Learn, another justice of the peace in Douglas county. Before the date set for hearing before Justice Learn, the Schroeders, father and son, went to the county attorney of Douglas county and laid the facts before one of his deputies, whereupon an amended and substituted complaint was prepared by the deputy county attorney, and sworn to by the elder Schroeder, which charged that he had just cause to fear and does fear that John Blum, Jr., will unlawfully, maliciously and wilfully commit an offense against the person of Fred Schroeder, Jr., the minor child of this affiant. After the filing of this amended complaint, a hearing was had before Justice Learn, who found there was probable cause, and bound the defendant over to appear before the district court. On November 9, 1901, without the knowledge or consent of either of the Schroeders, the case was *nolled* by one of the deputy county attorneys of Douglas county, and Blum discharged. Thereafter this action was begun.

A number of errors are assigned, but, in the view we take of the case, it will only be necessary to notice one or two. Instruction No. 2 given by the court upon its own motion is complained of. This instruction directed the jury that the burden of proof was upon the plaintiff to establish each of the material allegations of his petition, except so far as have been admitted by the answer of the defendants. We have heretofore criticised adversely the giving of such an instruction as this, since, standing alone, it affords no guide to the jury as to what the material issues are, but in other instructions the main issues in the case were directly and specifically pointed out to the jury.

The jury were instructed that the allegations of the first complaint filed charged the plaintiff with three distinct offenses. The instruction specified the penalty for each offense, and said that the jury might consider the same as though there were three separate complaints filed at the

same time, each one charging one of the several offenses therein charged; keeping in mind on the question of damages, if they found for the plaintiff, that there was but one arrest and but one cause actually pending against the plaintiff at any given time. We are inclined to think that the court erred in this; that the purpose of the complaint was to require Blum to enter into a recognizance to keep the peace, and that the statements that Blum had threatened to take his life, that he met him and discharged a gun at him, and that he carries a concealed revolver a greater portion of the time, were merely matters of evidence improperly inserted in the complaint. No attorney was present when this complaint was filed, and as soon as the facts were laid before the public prosecutor, an amended complaint was filed, omitting these superfluous and redundant allegations.

One of the defenses set up in the answer was that at the time of filing the complaint a full and complete statement of the facts was made to the prosecuting officers of Douglas county, and that the complaint was filed upon the advice of such officers. The defense attempted to prove by young Schroeder that he made a full statement to the deputy county attorney, Mr. Helsley, before the filing of the amended complaint, of all the facts and circumstances with relation to the supposed guilt of Blum, but upon objection this evidence was rejected. An offer to prove was then made, but was rejected by the trial court, to which exception was taken. At a later stage of the trial, however, Mr. Helsley was permitted to testify to the statements that were made to him by the Schroeders, and to the effect that he told them the first complaint was informal, and that a second complaint must be filed, and further, that he advised the filing of the amended and substituted complaint. This might perhaps cure the error committed by the exclusion of the defendants' testimony with reference to the disclosure made to the county attorney before the filing of the amended complaint; and yet, it seems to us, judging from the amount of the verdict, that the jury,

perhaps, were unduly influenced by the adverse rulings of the court upon the admission of the young man's testimony.

The plaintiff having testified in his own behalf, and having denied specifically that he had ever threatened young Schroeder or that he had ever shot at him, was asked upon cross-examination whether or not upon the day that he was arrested he admitted to Miss Kelsey that he had threatened to shoot her and to shoot Fred Schroeder and another party. This testimony was objected to by the plaintiff and excluded. He was also asked whether he had not made threats to one Henry Glissman that he would get even with Fred Schroeder, that he would shoot him, or words to that effect. This testimony also was excluded upon the plaintiff's objection. Glissman was called as a witness and testified that in July, 1900, he had a conversation with young Blum, wherein Blum said, speaking of young Schroeder, "I will get even with him yet, and I will have revenge"; that with that he threw back his coat, slapped his hip pocket, and that the witness saw the butt end of a revolver in his pocket. He further testifies that similar statements were made in another conversation afterwards. On cross-examination Glissman told that he did not communicate these facts to either of the Schroeders until July, 1902, long after the prosecution. At the close of the trial, upon the motion of the plaintiff, all the evidence of the witness Glissman was excluded by the court, and the jury instructed by the 8th instruction not to consider it, for the reason that the matters in relation to which this witness testified were not communicated to the defendants, or either of them, prior to the time of filing the original complaint against the plaintiff, or prior to the time of the filing of the amended and substituted complaint. In these rulings we think the learned trial court erred. The testimony of Glissman that Blum had made threats to shoot young Schroeder before the time that Schroeder testifies to the shooting, or Blum's admission that he had made such threats before this time, was certainly proper testimony for the jury to consider. The

prosecution followed immediately upon young Schroeder being shot at, according to Schroeder's testimony. If this event actually occurred, and the facts were as Schroeder relates, the shooting, in connection with the other circumstances, would constitute probable cause for Blum's arrest upon a peace warrant, and any evidence which tended to corroborate Schroeder's story was relevant and material. The jury might disbelieve Schroeder's testimony, standing alone, but if it was corroborated by testimony that previous to this time Blum had made threats to shoot him, or to get even with him, it might establish the truth of Schroeder's story in their minds. In the absence of any overt act testified to by the defendant as ground for the charge, the truth of which was in dispute, this testimony might, perhaps, have been properly excluded under the rule expressed in *Maynard v. Sigman,* 65 Neb. 590, and this is probably the ground upon which the trial judge refused to allow the testimony to go to the jury; but we think the defendants were entitled to all the evidence offered which tended to prove that young Blum actually attempted to shoot Schroeder before the filing of the complaint, and for this reason its exclusion was prejudicially erroneous.

The same considerations apply as to instruction No. 7, requested by the plaintiff and given by the court. This instruction states, in substance, that whether or not probable cause exists must be determined upon the facts that were known to the party filing the complaint before the filing of the same, and that facts cannot be considered which existed prior to the institution of the criminal proceedings which have not been shown by the evidence to have been communicated to the party instituting the prosecution. Under the circumstances of this case we think this instruction should not have been given.

We recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

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 a new trial.

REVERSED.

BENJAMIN F. ALDRITT, APPELLANT, V. CHARLES FLEISCHAUER, APPELLEE.

FILED JUNE 8, 1905. No. 13,846.

1. **Surface Water:** DRAINAGE. An owner of land must so use his own property as not unnecessarily and negligently to injure his neighbor. Every proprietor may lawfully improve his property by doing what is reasonably necessary for this purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause surface water to flow on the premises of the latter to his damage.

2. ———: ———. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence. *Davis v. Londgreen*, 8 Neb. 43, distinguished.

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

J. D. Pope, for appellant.

C. H. Sloan and *F. W. Sloan, contra.*

LETTON, C.

The plaintiff brought this action to enjoin the defendant from discharging surface waters which accumulated in a

pond upon the defendant's land through a ditch onto and over the lands of the plaintiff. The defendant is the owner of the west half of the northwest quarter of a certain section of land in Fillmore county, and the plaintiff owns 160 acres south of it. Upon a portion of the defendant's land there is a depression which extends to the eastward over the land of an adjoining proprietor, named Howarth. The larger portion of this depression or basin is upon the land of Howarth, and in times of wet weather or of melting snows the basin is filled with water, which covers 35 or 40 acres to a depth of three feet or more at the deepest point, about 10 or 15 acres being on defendant's land. In dry seasons the basin is dry. There is no natural outlet, and the only way of escape for the water is by evaporation or percolation. On the land of the defendant a small natural waterway or channel takes its rise, extending in a southerly direction to the land of the plaintiff, and finding its outlet into a larger depression or waterway extending in a southeasterly direction over the plaintiff's land, and finally draining into a natural watercourse, called Turkey creek, some miles distant. This depression upon the plaintiff's land has been in cultivation for over 20 years. The defendant dug a ditch entirely upon his own land through a slight rim or rise of land between the pond and the natural waterway or "draw," as locally styled, which leads to the plaintiff's land, thereby draining the water from the pond into the natural waterway upon his own land, and thus into and across that portion of the plaintiff's cultivated land which occupies the waterway or depression before mentioned. The facts with reference to the character of the basin or pond upon the defendant's land and the manner of discharge upon the land of the plaintiff are very similar to those in the case of *Todd v. York County,* 72 Neb. 207, 66 L. R. A. 561. The only apparent distinction between the two cases as to the facts is that in the *Todd* case the ditch followed the direction of the natural drainage, and that, if the pond or basin had been filled up, the

water of the same would have followed the same course as it was made to follow by the digging of the ditch, while in the instant case the evidence fails to show with any certainty where the water would flow in such case, though the greater weight of the evidence tends to show that the lowest point on the rim was on the south side of the pond, on Howarth's land, and beyond plaintiff's east line, so that the water in such case would not reach plaintiff's land.

Under the rule in the *Todd* case, which seems to be the rule of both the civil and the common law (3 Farnham, Waters, secs. 889*a*-889*c;* also note by H. P. Farnham to *Todd v. York County,* 66 L. R. A. 561), an owner of land has the right to drain ponds or basins thereon of a temporary character by discharging the waters thereof by means of artificial channels into a natural surface water drain on his own property, and through such drain over the land of another proprietor, even though the flow in such natural drain is thereby increased over the lower estate, provided he acts in a reasonable and careful manner and without negligence, but he cannot divert the flow of the water in a different direction from the natural course of drainage. An interesting discussion as to the law in such case is to be found in the sections of Farnham on Waters above cited.

The instant case presents the question whether the owner of lands, upon which a large quantity of surface water often stands in a pond or basin, may by artificial means cut through the natural barrier which prevents it from reaching the lands of an adjoining proprietor, and drain it into a natural waterway on his own land, and thereby cast a new burden upon the adjoining estate, which the water previously could not reach. It is argued for the plaintiff that this case is identical with the facts in the case of *Davis v. Londgreen,* 8 Neb. 43, and that the rule laid down in that case applies that the owner of a natural pond or reservoir, wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, can-

not lawfully, by means of a ditch, discharge such water upon the land of his neighbor to his injury. In that case, however, so far as appears from the report, the defendant discharged the waters of a pond by means of a ditch, not, as in this case, into a natural drainage way upon his own land, thence flowing into a larger channel of like nature on the land of the plaintiff, but directly into and over the land of Davis, so that it spread over several acres of the cultivated land and rendered it unfit for use, and so that it commenced to cut a watercourse across the same. There is a clear and marked distinction between the facts in this case and in that, and a general principle which may apply to that case cannot control this. On the other hand, the defendant contends that the rule in the *Todd* case and in the case of *Rath v. Zembleman,* 49 Neb. 351, applies.

In the state of Nebraska, whose surface consists of more or less rolling plains, the action of the elements has caused by erosion a system of natural drainage channels, locally termed "draws" or "ravines," usually beginning with a slight depression in the surface, and gradually deepening as they reach well-defined streams and watercourses, which are, as compared with those of more humid states, comparatively few in number. These "draws" form natural drainage channels for surface water, and are largely instrumental in promoting the interests of agriculture and the healthfulness and salubrity of the climate, by furnishing an unsurpassed natural drainage system, and thus quickly removing from the soil any excess of moisture therein caused by excessive rains or melting snows. These channels are usually dry, but are often deep enough with running water after storms to swim a horse. They afford almost the only means of surface drainage available to the husbandman, and his right to the use of the same, reasonably exercised, should not lightly be impaired. We have repeatedly said that the rule of this state with reference to surface waters is the rule of the common law, and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprie-

tors by reason of such defense, he is not liable therefor. But this rule is a general one, and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor. Therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if, in the execution of such enterprise, he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor.

As the water lay on Fleischauer's land it rendered useless 10 to 15 acres of it, and the odors and exhalations from the stagnant water were noxious and annoying. A few rods away upon his own land was a natural drainage channel leading in the general direction of the drainage of the immediate locality. He drained the pond by a small drain into this waterway in such manner that no excessive quantity was precipitated at one time upon his neighbor's land. It is true it rendered a portion of Aldritt's land untillable; but this was because the land lay in the channel of a natural waterway, which from time immemorial had carried the drainage of the surrounding land as far as its branches reached. A proprietor cannot shut his eyes to the natural configuration of his land. His right of ownership is not entirely separate and disconnected from the rights of adjoining proprietors, and with it the law confers rights and imposes duties from which he cannot free himself.

To the extent that surface water having an accustomed flow in a drainage channel or waterway having well-defined banks may not be stopped by the erection of an embankment across the channel, so as to divert the waters to the injury of adjoining proprietors, a modification of the broad rule laid down in the earlier cases in this state

has been adopted by this court. *Town v. Missouri P. R. Co.*, 50 Neb. 768; *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380; *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610. These cases recognize the existence of the natural drainage channels which are common to the topography of this state, and apply the rule that the natural flow of surface water in the same cannot be interrupted by embankments in such manner as to divert the waters upon the lands of adjoining proprietors to their injury. Natural drainage channels exist to a greater or less extent in almost every locality. "That these drainage channels cannot be obstructed is supported by the great weight of authority. It is the rule in England, Canada, Ireland, Alabama, California, Delaware, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Vermont and West Virginia." (Citing cases under each jurisdiction.) 3 Farnham, Waters, p. 2,600, sec. 889*d*. If these channels cannot be legally obstructed, their use as waterways is recognized, and a reasonable use of their facilities is not wrongful.

The supreme court of Minnesota in *Sheehan v. Flynn*, 59 Minn. 436, 26 L. R. A. 632, had before it a case in which the facts were almost identical with those in this case. In that case the court examines and distinguishes the prior cases in that state and holds that, under the rule that an owner must so use his own as not unnecessarily or unreasonably to injure his neighbor, it is the duty of an owner draining his own land to deposit the surface water in some natural drain, if one is reasonably accessible, and he is entitled to deposit the same in such natural drain though it is thereby conveyed upon the land of his neighbor, if it does not thereby unreasonably injure him. In that case, as in this, it fairly appeared that the manner of drainage pursued was the only way in which the proprietor could reasonably drain the depression, and that the ravine or waterway in which the ditch emptied was the only nat-

ural drain reasonably accessible. It also further appeared that the consequent injury to others was not so great as compared to the benefit to be derived from the improvement as to make it unreasonable upon that account. The statement in the *Sheehan* case, as in *Todd v. York County, supra,* that the "common enemy" doctrine applies, except as modified by the rule above stated, is criticised by Mr. Farnham in the notes to those cases in the Lawyers Reports Annotated, and also in his recent work upon Water and Water Rights, vol. 3, p. 2,598, in which valuable work there is a historical examination and resume of the English and American cases. However, it is not of so much importance to litigants to label a doctrine properly, as to apply its provisions, and whether we say that the rule in the *Todd* case and in the *Sheehan* case is a modification of the common law rule, or that it is an adoption of the civil law rule, is immaterial, so long as the court protects the legal rights of individuals.

We think therefore that, if Aldritt cultivated the natural waterway upon his land, he did it knowing the contingencies incident to its use in this manner. The natural drainage channel existing upon his own land, and running thence through Aldritt's land, was apparently the only outlet reasonably accessible to Fleischauer for the drainage of the surface water. It presented, as is said in *Town v. Missouri P. R. Co., supra,* "many of the distinctive attributes of a watercourse," and we think he was justified in using the same in a reasonable manner, even though it resulted in injury to his neighbor Aldritt.

We have so far considered the case without reference to the law enacted in 1903, which provides: "Owners of land may drain the same in the general course of natural drainage by constructing an open drain or ditch discharging the same into any natural watercourse or into any natural depression or draw whereby it will be carried into some natural watercourse, and when such drain is wholly on the owner's land he shall not be liable in damage therefor to any person or corporation." Comp. St. 1903, ch. 89, art.

III, sec. 1 (Ann. St. 5543). This enactment has been assailed as being unconstitutional for several reasons. As we have seen, this right exists independent of this statute, provided that it be exercised in a reasonable and proper manner and with due regard to the rights of lower proprietors. It is unnecessary therefore to consider the vulnerability of the statute to the attack made by the appellant upon its validity.

We recommend 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.

WALTER J. LAMB, APPELLANT, V. HENRY H. WILSON ET AL., APPELLEES.

FILED JUNE 8, 1905. No. 13,891.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed. Judgment for plaintiff.*

Walter J. Lamb and *Joseph Wurzburg,* for appellant.

Wilson & Brown and *Ricketts & Ricketts, contra.*

LETTON, C.

This is an appeal from a decree rendered in an action for an accounting and settlement of partnership affairs. This controversy has already been before us three times, and is reported in 3 Neb. (Unof.) 496, 505, and 70 Neb. 729. We refer to these opinions for a full statement of the facts. At the last trial in the district court, that court proceeded to try the issues as it understood the mandate

of the supreme court, found that nothing was due from either of said parties to the other, and adjudged that the action be dismissed and that each party pay half of the costs. Both parties appeal from this decree.

The plaintiff contends that the district court disregarded the mandate and refused to investigate certain matters which were properly at issue, and which should have been examined into; and further, that the findings of the district court with reference to a number of the charges allowed in favor of the defendants are not sustained by competent evidence. The defendants, on the other hand, insist that the judgment of this court and its mandate directed the district court to treat the evidence and findings of the court already in the record as before the court in the further hearing of the case, and that all findings of fact made by the district court, not disturbed by this court upon appeal, stand affirmed and should not be reexamined. The mandate is as follows: "It is ordered that the judgment of reversal heretofore entered in this case be so modified as to direct the district court to hear such additional evidence as may be requisite for a complete statement of the accounts between the parties, and restate such accounts and render judgment accordingly in accordance with the law as stated in the syllabus of the opinion upon the last hearing, without regard to the findings of fact, or distribution of items, and partial statement of accounts contained in said opinion." It will be observed that the district court is directed "to hear such additional evidence as may be requisite for a complete statement of the accounts between the parties." This language plainly imports that the district court is required to take only such *additional* evidence as may be necessary. This evidently requires the consideration by the district court of all the evidence previously taken in the case, and renders unnecessary the repetition of testimony already taken.

From an examination of the record it appears that the principal dispute between the parties is with regard to the amounts severally due in what is termed the *Houston-Gran*

case, the case of *Maynard v. Hecht,* and the case of the *Chattanooga Foundry & Pipe Co. v. Orleans.* In both of the former opinions the matters in difference with reference to these claims were examined and discussed, and in the last opinion, written by Mr. Commissioner AMES, certain principles were laid down in the syllabus governing the proper disposition of the amounts received for the service of the members of the partnership after the firm had ceased to undertake the conduct of new business, and merely existed for the purpose of winding up the business. As to the fee in the *Houston-Gran* case, under the rule thus established, Ricketts & Wilson were entitled to receive and retain the reasonable value of their services and disbursements in all subsequent and supplementary proceedings made necessary by the effort to collect the judgment, and were only required to account to the firm for the balance of the amount realized by them after their fees were paid. The district court took evidence upon the value of these services and found that they were entitled to receive as compensation for the same the sum of $550.05, and they were required to account to Lamb, Ricketts & Wilson for the sum of $1,597, being the money remaining in their hands after payment of their attorneys' fees for services after judgment. We think from the evidence that, when the district court fixed the sum of $550.05 as the value of the defendants' services in the collection of the Houston-Gran judgment, it must have had in view the other side of the account, and valued the services to the end that the accounts should balance. The value of these services was variously estimated by different witnesses, one witness placing their value from $1,000 to $1,200; another from $800 to $1,000; another $875, and still another at the sum of $375. These witnesses had no interest in the controversy. From a consideration of all the evidence, we are of the opinion that these services were reasonably worth $875, and that the defendants should account to the partnership for $1,272.06 on account of the Houston-Gran collection. In the matter of fees for serv-

ices rendered the Chattanooga Foundry & Pipe Company, it appears that, after a dispute had arisen between the parties to this suit as to the proper division of these fees, and after the charge of $300 had been made by Lamb for the sale of the judgment in the case against the city of Orleans, the facts with reference to the sale were reported to Ricketts & Wilson by a letter of July 30, 1895, and that on September 24 thereafter a settlement in full was made, as recited in the opinion of Commissioner DAY upon the first hearing of this case before this court. Upon a careful review of the evidence upon this matter, we believe this settlement was fairly made, and see no reason for disturbing the same. In the *Maynard-Hecht* case the firm had been paid for services in the lower courts, and services, for which Ricketts & Wilson seek to charge $400, were rendered by them in error procedings in the supreme court of the United States. By agreement, however, only $60 was paid for these services rendered after judgment; and we think that, since the services were rendered by Ricketts & Wilson after judgment, they were entitled to the whole of the fee. We cannot consent to charge Lamb with a greater fee than was actually paid by the client.

As thus stated, the fund belonging to Lamb, Ricketts & Wilson amounts to $2,622.26, of which sum $60 is due Ricketts & Wilson for services in the *Hecht* case, leaving $2,562.26 for division, or $854.08 due each partner. Of this amount Lamb drew out and received $297.40, or $556.68 less than his share. Since Ricketts & Wilson retain the fund, he is entitled to recover this amount from them, and judgment should be rendered accordingly. We make no allowance for interest advisedly, since we think neither party is entirely blameless in the matter.

We recommend that the judgment of the district court be reversed, and judgment rendered in this court for the plaintiff for the sum of $556.68 and costs.

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 it is considered, ordered and adjudged that the plaintiff have and recover from the defendant the sum of $556.68, and costs of suit.

JUDGMENT ACCORDINGLY.

CHICAGO & NORTHWESTERN RAILWAY COMPANY V. STATE, EX REL. JOHN CARR ET AL.

FILED JUNE 8, 1905. No. 13,781.

1. **Railroads:** DISCRETIONARY POWERS. Railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing and operating their railways, and in locating, maintaining and discontinuing their freight and passenger stations, and with the exercise of such discretion the courts will not interfere except in cases of its abuse.

2. ———: DISCONTINUING SERVICE. It is not an abuse of discretion for a railway company to discontinue, under the circumstances of this case, the employment of a station agent at a country place nearly equally distant, and not more than five to seven miles from three thriving villages where regular railway service is maintained, and where are carried on the mercantile, mechanical and professional businesses usually found in such towns.

ERROR to the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Reversed and dismissed.*

Benjamin T. White, James B. Sheean and *C. C. Wright,* for plaintiff in error.

M. T. Harrington, contra.

AMES, C.

This is a proceeding in error to review a judgment of the district court granting a peremptory writ of man-

damus at the suit of two private citizens, compelling the plaintiff in error, a railway company, to continue the services of a station agent at a place on its line in Holt county in this state, called Stafford.

There is no dispute about the facts. The place in question is an unincorporated country neighborhood, having no distinctive name except that given to its station house by the respondent. There are in the immediate vicinity eight buildings, including two owned by the company. Of the remaining six, one is used in part as a dwelling and in part as a store, in which is carried for sale a stock of from three to five hundred dollars in value of general merchandise, and one is a blacksmith's shop and stable. The total population of the village, at the time of this controversy, was about forty persons of all ages, and of whom seven were employees of the company. There is very little passenger business at that point, and the freight traffic there is inconsiderable except for the shipment at certain seasons of the year of live stock and hay. Reasons are obvious. Five and two-thirds miles distant on the company's line in one direction, and seven miles in the other, are the villages respectively of Inman and Ewing, and five miles northward on the line of the Great Northern Railroad is Page. All these places are thriving communities of considerable size, in which are represented all descriptions of business, mercantile, mechanical and professional, usually found in country towns. Relators are not members of the community just described, but are the occupants of farms and ranches situate in its vicinity, and their counsel says in his brief that the proceeding is prosecuted "not merely for the town, but to a greater extent for the farming community," of whom there is, within a radius of four miles from the station, a population of twenty-nine families. A circle having that radius would extend to within two miles from Ewing, and one and two-thirds miles from Inman, and one mile from Page. It is obvious that, from aught that appears in the record, a majority of these twenty-nine families can be accommo-

dated with railway facilities at some of these latter named places equally as well or better than at Stafford. Nearly all the business transacted by the company at the last named station is in car-load lots, for which cars can be ordered and obtained from the section foreman stationed there, and it was not proposed or intended to discontinue the regular stoppage of trains at that place for the receipt and discharge of freight and passengers, but it was thought by the respondent that, during the winter and less busy months, the amount of traffic at that point did not justify the expense of the station agent, and that its patrons would not be seriously inconvenienced by his absence, and it proposed to suspend that functionary for an indefinite time, beginning on the first day of January, 1904. In the preceding month of December the company issued an order to that effect, which was the occasion of this lawsuit

Counsel for the respective parties agree that no similar case can be found in the books, but the principles by which it is to be decided are, we think, not difficult of discovery, and have not failed of announcement by the courts. The general power to manage and control the business of a railroad company, including to establish, maintain and discontinue freight and passenger buildings and stations and to employ and discharge servants, is administrative in its character and of a discretionary nature, and, in the absence of legislation to the contrary, is vested in the company itself. It is a power which from the very nature of things the courts cannot themselves exercise, and it follows of necessity that they will not interfere with its exercise, unless in exceptional cases in which it is made clearly to appear that there has been an abuse of discretion amounting, in practical effect, to the denial of a public right or a repudiation of public obligations, which the corporation expressly or impliedly assumed in the acceptance of its charter and franchises. At the conclusion of a somewhat extended discussion of the subject in *State v. Republican Valley R. Co.*, 17 Neb. 647, this court say

that no court would interfere "except where it is made to appear that such interference is necessary to prevent an unjust discrimination, or an abuse of that discretion which must be conceded to reside in all private corporations in respect to their dealings with the public." And in *People v. Chicago & A. R. Co.*, 130 Ill. 175, the court say:

"It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public."

This doctrine is approved and reasserted by the same court in *Mobile & O. R. Co. v. People,* 132 Ill. 559, the court saying:

"The company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use." And again touching another phase of the subject: "The duty to maintain or continue stations must, manifestly, rest upon the same principle, and a company cannot therefore be compelled to maintain or continue a station at a point, where the welfare of the company and the community in general requires that it be changed to some other point."

Such seems to be the unbroken tenor of the authorities, and the language of the supreme court of Iowa in *State v. Des Moines & K. C. R. Co.,* 87 Ia. 644, would have been aptly chosen as descriptive and decisive of the case before us. The court say:

"There is nothing in the case which tends to show that the managers of the road had any intention to deprive anyone of proper facilities for transacting business with the

company. * * * It appears to us that the owners of the road should not be interfered with in the management of their property, including the location of their stations, where, as in this case, there is no competent evidence that any patron of the road has been deprived of reasonable facilities for transacting business with the defendant."

We think that the foregoing principles and authorities are determinative of this case. Certainly it cannot be said that, under the circumstances disclosed by the record, the duty of the respondent to maintain an agent at Stafford is plain and unequivocal, or the right of the relators to demand that it so do is so clear and unquestionable as to bring the case within the often reiterated requirement of this court with reference to the remedy by mandamus. *State v. Bowman,* 45 Neb. 752; *State v. Nelson* 21 Neb. 572; *State v. Omaha,* 14 Neb. 265; *State v. Whipple,* 60 Neb. 650; *State v. Bartley,* 50 Neb. 874.

It does not appear to us that the patrons of the railroad company or the public would be seriously injured or inconvenienced by the proposed action of the company of which complaint is made, or that such action, if taken, would in the above quoted language of this court be "an abuse of its discretion with respect to its dealings with the public." Whether a private citizen having no peculiar interest and suffering no especial damage or injury can maintain a suit like this has not been debated and is not decided.

We recommend that the judgment of the district court be reversed and the action dismissed.

LETTON 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.

BENJAMIN F. KNIGHT V. LANCASTER COUNTY ET AL.

FILED JUNE 8, 1905. No. 13,804.

Statutes: AMENDMENTS. The act of April 1, 1901, entitled "An act to amend section 19 of chapter 10, Compiled Statutes, 1899, and to repeal said section as now existing (laws, 1901, ch. 11), is void, because the matter sought to be added by amendment is not germane to the subject of the section as enacted.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, LINCOLN FROST and EDWARD P. HOLMES, JUDGES. *Affirmed.*

George A. Adams, for plaintiff in error.

J. L. Caldwell, contra.

AMES, C.

The plaintiff in error was elected treasurer of Lancaster county for the regular term of two years, beginning January 7, 1904. On or before said day he tendered to the county board an instrument in the form of an official bond signed by himself as principal, and by a corporation described as a surety or indemnity company, as surety, conditioned for the faithful performance of his official duties during said term. The instrument was accepted and approved by the board and duly filed. Afterwards he presented to the board a claim against the county for $855 for moneys paid by him to said corporation as a premium or compensation for having signed the instrument as his surety. The board rejected the claim, and he appealed to the district court, where he again suffered defeat upon a general demurrer to his petition, setting forth, in substance, the foregoing facts. From a judgment of dismissal on the demurrer he prosecutes error to this court.

Several sections of chapter 10 of the Compiled Statutes entitled "Bonds and Oaths—Official," enacted in 1881, are devoted to a description of official bonds with respect to

their form and their obligatory force or effect, and the number and character of the persons requisite as sureties upon them, who, in case of county officers, are required to be "freeholders of the county in which such bonds are given." None of these matters is mentioned in section 19 of the act as it existed prior to 1901, but that section consisted wholly of a list of state, county, precinct and township officials, and of specifications of the amounts of penalties in the bonds required of them respectively, the list being preceded by the following language: "The following named officers shall give bonds with penalties in the following amounts, to wit: Governor $50,000," etc. In 1901 the legislature attempted to amend this section by adding thereto the following: "Provided, that the authorities whose duty it is to approve bonds of the county officials may dispense with such bonds if in their judgment they shall deem it best so to do; provided, further, that if bonds are accepted by such officials from surety or indemnity companies the cost of such bonds may be paid by the county where such bonds are required." The district court was correctly of the opinion that the attempted amendment is void. The title of the amendatory act is "An act to amend section 19 of chapter 10, Compiled Statutes, 1899, and to repeal said section as now existing." This title indicates as the subject of legislation changes in the lists of officials and penalties, with which alone the section deals, but does not suggest a purpose to change the form, or the character of the sureties, of official bonds, or to impose upon counties any pecuniary burden with reference to the same, nor to enlarge the discretion or powers of county boards with respect thereto, but it is with reference to these latter matters alone that the attempted amendment deals.

This supposed proviso is the sole ground of the plaintiff's claim, and we therefore recommend that the judgment of the district court be affirmed.

LETTON 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.

JAMES M. WECKERLY, APPELLANT, V. CADET TAYLOR ET AL., APPELLEES.

FILED JUNE 8, 1905. No. 13,835.

1. **Creditors' Suit.** A judgment creditor, with the aid of equity, may reach any property or interest of his debtor not exempt from execution, which, with such aid, the said debtor might himself reach.
2. **Fraud:** PLEADING. An assignment of a chose in action, even without consideration, is not presumptively fraudulent as to a creditor who becomes such nearly four years afterwards, and such a presumption is not supplied by vague and general allegations, but circumstances must be pleaded from which fraud may be reasonably inferred.
3. **Actions:** LIMITATION. Actions for relief on the ground of fraud must be brought within four years from the discovery of the fraud or such facts and circumstances as are indicative thereof, and, if followed up, would lead to its discovery.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Affirmed in part.*

Arthur C. Wakeley, for appellant.

A. S. Churchill, contra.

AMES, C.

This is an appeal from a judgment sustaining separate general demurrers to a petition and dismissing an action as to certain defendants. The alleged causes of action arise out of distinct facts and circumstances, so that we think a demurrer for misjoinder, which was filed by some of the defendants, would have been properly

sustained, and we are consequently compelled to divide the case into two branches and treat of each separately.

It is alleged that in 1890, Cadet Taylor, H. O. Devries, the Globe Loan & Trust Company, a corporation, and the Globe Savings Bank, a corporation, purchased a tract of real estate situate in Omaha, in this state, paying therefor the sum of $18,000, and procuring the title to be conveyed to one McIntyre, the latter paying no consideration therefor; that immediately afterwards McIntyre, also without consideration and at the request of the purchasers, conveyed the property to the Globe Building Company, another corporation, of which the purchasers were and have remained the principal stockholders. The idea that this transaction was fraudulent as to creditors, existing or subsequent, is not alleged in the petition, and is emphatically repudiated by the plaintiff in his brief, but it is alleged that such conveyance was, and was intended to be, of the bare legal title only, the purchasers or their representatives remaining continuously in possession in person or by their tenants, and managing or controlling the property and receiving its rents, issues and profits from that time until the present. Whence, it is contended, a trust resulted to the purchasers, and they are, and at all times have been, the sole equitable and beneficial owners of the property in the proportions in which they contributed to the payment of the purchase money. In 1896, more than five years after the conclusion of this transaction, the purchasers became obligated to the plaintiff upon a bond, in which the savings bank was principal and the others sureties, and upon which a liability accrued sometime later, and upon which suit was brought, and afterwards judgment obtained in March, 1901. Execution having been issued upon the judgment and returned unsatisfied, it was alleged that all the defendants were insolvent except for the property in question and other property somewhat similarly situated, and prayed that title to the tract described be adjudged to be in the purchasers, and be subjected to judicial sale for the satisfaction of the judgment.

This version of the transaction excludes the idea that the property was conveyed to the corporation as a gift or in exchange for its stocks or obligations, and it also excludes the idea of possession or ownership or claim thereof by the corporation, so as to put the statute of limitations in motion or create a title by prescription, and, as we are constrained to think, the petition states in this regard a cause of action. The plaintiff, with the aid of equity, may reach any property right or interest not exempt from execution that the judgment debtors might, with like aid, reach themselves; and it is undeniable that, if the story told by the pleading is true, the latter are entitled to have the property conveyed to themselves upon demand at any time, and that equity would, if necessary, enforce the demand. *Millard v. Parsell,* 57 Neb. 178; *Harris v. King,* 16 Ark. 122; *Havens v. Bliss,* 26 N. J. Eq. 363; *Straton v. Dialogue,* 16 N. J. Eq. 70; *Bear v. Koenigstein,* 16 Neb. 67; *Hews v. Kenney,* 43 Neb. 815; 1 Perry, Trusts (5th ed.), sec. 126; *Robinson v. Springfield Co.,* 21 Fla. 203; *White v. Sheldon,* 4 Nev. 280.

But this theory of the transaction excludes, as we have already said, the idea of fraud, or that the estate was conveyed to the building company in fraud of creditors; and the rights and remedies of the plaintiff as to it must therefore be measured by those of his judgment debtors, which they cannot exceed. If the transaction by which the title was conveyed to the building company was fraudulent, it would fall within the principles and authorities of the second branch of this discussion, and the judgment of the district court would have to be affirmed. The Sherman & McConnell Drug Company, another defendant whose demurrer was sustained and as to which the action was dismissed, is a lessee of the building company, whose fate it may share, and was, of course, properly joined with it as a defendant, as well for its own protection as to enable the plaintiff to obtain complete relief. As to both these defendants, we think the demurrer was erroneously sustained.

The other branch of the inquiry pertains to the demurrer of the Putnam Company, which was also sustained, with a judgment of dismissal. With respect to this matter it is alleged that the defendant, the Globe Loan & Trust Company, a corporation, acquired from one Ijams and wife on the 7th day of June, 1892, a mortgage on a tract of real estate, and assigned it, without consideration, on the 15th day of June, 1892, to the Linwood Park Land Company, another corporation. Thereafter the last named company procured title by foreclosure proceedings of the property described in the mortgage, and in the year 1900 conveyed a part thereof to the Putnam Company and a part to Henryton Land Company, another corporation. Concerning these transactions and the several corporations named as having had to do with them, the petition alleges: "That the said Linwood Park Land Company, said Putnam Company, said Henryton Land Company, and the said Globe Building Company were created and organized, and have always been managed, controlled and operated by the said Cadet Taylor, the said W. B. Taylor (not a party to this action) and the said H. O. Devries down to the death of said Devries on February 25, 1900, and since the death of said Devries have been controlled, managed and carried on by the said Cadet Taylor and said W. B. Taylor. That said several corporations were devised, created and organized, in so far as the said Cadet Taylor and H. O. Devries were interested and concerned, purely and solely for the purpose of defrauding the creditors of the several companies, and existing and future creditors of the said Cadet Taylor and said H. O. Devries, and especially the plaintiff above named, and for the principal purpose of taking possession of the assets and more effectually hindering, delaying and defrauding the creditors of said Globe Savings Bank and said Globe Loan & Trust Company, and to afford the means and machinery of transferring the property and assets of the said several corporations and individuals from one to another indiscriminately and interchangeably; and that the said several

corporations were created and existed, and especially the said Henryton Land Company and the Putnam Company and the said Globe Building Company now exist and are carried on, for the express purpose of hindering, delaying and defrauding the creditors and persons holding claims and judgments against the said Cadet Taylor, H. O. Devries and the Globe Savings Bank." Now, it will be observed that, according to the allegations of the petition, this last transaction was radically different in character and purpose from that which we previously discussed. According to it the mortgage from Ijams and wife to the Globe Loan & Trust Company had its inception more than four years before the execution of the instrument upon which the plaintiff obtained his judgment, in furtherance of a fraudulent and elaborate scheme and device to hinder, delay and defraud the creditors existing and subsequent of Taylor, Devries and the two corporations, the savings bank and the trust company, and particularly the plaintiff; but it is not alleged that at that time the parties or corporations, or any of them, were or was insolvent, or had any debts or creditors, or contemplated having any or having any dealings with the plaintiff. Neither is it alleged that the money with which the trust company purchased the mortgage from Ijams and wife was not the money of that corporation, which it had a lawful right to invest in that manner. The plaintiff did not become a creditor of the savings bank until March 30, 1896, nearly four years after the assignment of the mortgage to the Linwood Company, and the bank did not become insolvent until the month of June following, when the bond, which is the foundation of the plaintiff's judgment, was, on the 9th day of that month, executed by the trust company, Devries, and Cadet Taylor and one Mount, as sureties, pursuant to the statute relative to insolvent banks. It was not until three years after the instrument became effectual by official approval on June 26 that a cause of action accrued on the bond, nor until nearly two years still subsequently that a judgment was rendered

thereon. Now, with respect to this Ijams mortgage, it is to be observed that it is not a case like the former of the purchase of and payment for land by one person and its conveyance to another, but of an assignment of a chose in action, which appears, if it is not distinctly alleged, to have been absolute between the parties. The averments of the petition concerning these several corporations are so extremely vague and general as to express no definite idea at all. They are said to have been organized, so far as the defendants Taylor and Devries were interested and concerned, for the purpose of defrauding their creditors, and to afford the means and machinery of transferring their property and assets interchangeably, and concealing it from their creditors, but who else were concerned, and what was the capital stock of the corporations, and by whom owned, and what were the motives and knowledge of other stockholders, if any there were, or what property or assets any of the corporations at any time had, other than the mortgage in question, or whether Taylor and Devries, or either of them, were stockholders or ever had any creditors, existing or subsequent, except the plaintiff, the pleading does not say. For aught that appears to the contrary, all the defendants, including the savings bank, were at the time the mortgage transaction took place in June, 1892, solvent and prosperous. The bank was presumably indebted to the depositors in like manner as such institutions usually and necessarily are indebted, but it is incredible that the defendants or any of them at that time contemplated that the plaintiff would become a depositor of the bank nearly four years later, and that the bank a few months still later would become insolvent, and become obligated, with the other defendants as securities for it, upon an instrument which, at the time of the transaction sought to be impeached, was unknown to the law, but which was authorized by a statute subsequently enacted. An assignment of a chose in action, even without consideration, is not presumed to be fraudulent as against creditors who become such not until four years

later, and such a presumption is not supplied by vague and general allegations, but circumstances must be pleaded from which fraud in fact can reasonably be inferred. If a petition fails in this respect and to this extent, it is obnoxious to a demurrer. The several corporations, whether organized with fraudulent design or not, were distinct legal entities, whose existence was disclosed by the public records of the county, which also disclosed that the trust company was the mortgagee of the Ijams mortgage and had assigned it to the Linwood Park Land Company nearly four years before the plaintiff became a creditor of the bank, and more than four years before the bond in question became obligatory. These facts were notice to him, and to all the world, that these institutions were distinct legal entities, separate from each other and from the savings banks, presumably each owning assets and having rights and incurring obligations separate from every other. There was, to say the least, nothing in the circumstances or situation tending to mislead him to his prejudice. He extended his credit in the first instance to the savings bank alone. Afterwards the state accepted the obligation, as sureties, of Taylor, Devries, Mount and the trust company. None of these parties except the last is alleged to have ever had any interest in the instrument in controversy which it retained only seven days. Neither the Linwood Park Land Company, the assignee of the mortgage, nor the Putnam Company, which acquired part of the mortgaged estate after foreclosure, is charged with ever having had in its possession or under its control any specific property of the savings bank or of Taylor or of Devries, or to be or to have been in any way legally bound for the debts or obligations of any of them. The statute provides (sec. 20, ch. 32, Comp. St. 1903; Ann. St. 5969), that "no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration." *Boldt v. First Nat. Bank,* 59 Neb. 283; *Graham v. Estate of Townsend,* 62 Neb. 364; *Robinson Notion Co.*

v. Foot, 42 Neb. 156, and cases cited. Nearly eleven years intervened between the assignment of the mortgage and the recovery of the plaintiff's judgment, and nearly five years between the latter event and the happening of the insolvency of the bank, and eleven years and six months before the beginning of this suit. During all this time the petition of the plaintiff discloses that he knew or had the means of knowing all the facts and circumstances detailed in his petition. If they are indicative of a fraudulent transfer of the property of his debtors for the purpose of putting it beyond his reach, they afforded him a cause of action at least as soon as the liability of the savings bank to him became fixed, which was not later than the date of its insolvency and suspension of payment. *Gillespie v. Cooper,* 36 Neb. 775; *Hellman v. Davis,* 24 Neb. 793; *Westervelt v. Filter,* 2 Neb. (Unof.) 731.

We think therefore that the demurrer of the defendant, the Putnam Company, was properly sustained, and it is recommended that the judgment of the district court dismissing the action as to that defendant be affirmed, but that the judgment as to the Globe Building Company and the Sherman & McConnell Drug Company be reversed and the cause remanded for further proceedings.

LETTON 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 dismissing the action as to the Putnam Company be affirmed, but that the judgment as to the Globe Building Company and the Sherman & McConnell Drug Company be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

VIRGINIA G. FORD, APPELLANT, V. CARI LOUISE AXELSON ET AL., APPELLEES.

FILED JUNE 8, 1905. No. 13,842.

1. **Quitclaim:** AFTER-ACQUIRED TITLE. If a grantor of quitclaim obtains an instrument that evidences and fortifies the very estate or interest which his deed purports and was intended and effectual to convey, such instrument inures to the benefit of his grantee.

2. **Purchaser:** GOOD FAITH. "A purchaser with notice from a prior purchaser who was entitled to protection as a *bona fide* purchaser without notice, is himself entitled to protection against the previous equitable claim, which was invalid as against his grantor." LAKE, C. J. in *Garland v. Wells*, 15 Neb. 298.

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

R. J. Ahara and *H. M. Sinclair*, for appellant.

O. C. Bozarth and *J. T. McClure*, *contra.*

AMES, C.

The record in this case recites, and the briefs and arguments of counsel discuss, a tangled web of circumstances of no slight dimensions and complexity, but we think that the legal rights of the parties are to be determined by a consideration of a very few of them, to which alone our attention will be confined.

On March 6, 1897, Emma S. Challberg and Olive M. Axelson were in the possession, and appeared by the public records to be the absolute owners in fee, of a tract of land described in the pleadings. If any other person or persons had any right, title or interest, legal or equitable, in or to the property, or any of it, that fact was known only to such persons and to the parties named. On that day they executed a mortgage upon the lands to Fred P. McCormick to secure an indebtedness evidenced by their

promissory notes. In 1899, the indebtedness having become due and remaining unpaid, a suit in foreclosure was begun and prosecuted by the mortgagee against the mortgagors and all persons having a known or apparent interest in the lands, and terminated in the usual decree of foreclosure and sale on the 7th day of March in that year. Pursuant to the decree the lands were duly and regularly appraised, advertised and offered for sale, and were sold on the 9th day of July, 1900, to the mortgagee, who was the highest bidder therefor, and the sale was duly confirmed on the 4th day of the following December. On the second day of December, 1902, a sheriff's deed, pursuant to the sale and confirmation, was executed and delivered to the purchaser, and on the same day made of record in the clerk's office of the county. On the 11th day of March, 1901, after the sale and confirmation, but before the execution of the sheriff's deed, McCormick, for a valuable consideration, made an assignment of the decree of foreclosure to the plaintiff and appellant herein Virginia G. Ford, and on the 26th day of the same month, upon the same consideration, quitclaimed and conveyed the land to her by deed.

It is not disputed or questioned that McCormick was a *bona fide* mortgagee, plaintiff and purchaser for value in all that the term expresses or implies. There can be no doubt, therefore, that, upon the entry of the order of the confirmation, not afterwards impeached, he became the full and absolute owner of the entire equitable or beneficial title to the land in question; and it has been already decided by this court that a deed of mere quitclaim and release is sufficient to convey such title to the grantee therein. *Leavitt v. Bell,* 55 Neb. 57. The deed of McCormick to appellant is, however, an instrument of higher dignity than a deed merely of quitclaim, demise and release. By it the grantor expressly quitclaims and "conveys" the land, and by section 50, chapter 73, Compiled Statutes, 1903 (Ann. St. 10253), it is enacted that "every conveyance of real estate shall pass all the interest of the

grantor therein, unless a contrary intent can be reasonably inferred from the terms used." There can be no doubt, therefore, that this deed conveyed all the equitable and beneficial title to the land to Mrs. Ford, and that when the sheriff's deed was subsequently executed and delivered it inured to her benefit, and that she became thus invested with as complete and unassailable a title as her grantor would have done if the former instrument had not been executed or the decree assigned. *Hagensick v. Caster,* 53 Neb. 495, and *Troxell v. Stevens,* 57 Neb. 329, holding that an after-acquired title by a grantor in a deed of quitclaim does not inure to his grantee, and other authorities to like effect, are not in point for two reasons: First, the deed in question is not a mere deed of quitclaim but one of conveyance; and second, the grantee in the sheriff's deed did not obtain by that instrument an after-acquired title, within the meaning of the decisions cited, but merely an evidence and fortification of the title which he had already obtained by the judicial sale and confirmation, and which he had previously conveyed away, so that if his deed to the appellant had been one merely of quitclaim and release, it would have estopped him from claiming that the interest he had parted with thereby had revested in him by virtue of an instrument whose sole office is to evidence its validity and value. However, McCormick's deed to the appellant purported to convey the tract of land, that is, the entire title, and is more properly described as a grant of the land without express covenants than as a quitclaim, and it, therefore, by force of section 51 of the chapter above cited, would have conveyed any after-acquired interest.

On the 4th day of May, 1901, after the judicial sale had been confirmed and after the deed from the purchaser to appellant had been executed and delivered and made of record, there was spread upon the real estate records of the county a writing subscribed by the defendant herein, Andrew Axelson, and purporting to have been made not only in his own behalf, but also on the behalf of his

mother, Cari Louise Axelson, and all of the other defendants herein; and in which it was recited, in substance, that the mortgagors at and before the execution of the mortgage were not the owners of the mortgaged premises in their own right, but in trust for themselves and the defendants as the widow and heirs at law of one Axel Axelson, deceased, and proclaiming an intent by said persons to assert and maintain their alleged rights and interests in the property accordingly. Shortly afterwards this action was begun by the appellant to procure said writing to be adjudged a cloud upon her title, and to obtain a decree perpetually quieting the latter against it. The defendants filed a cross-petition, in which they asserted the claim set forth in the writing, and averred that at and before the plaintiff obtained her conveyances she was cognizant of the alleged interests and titles of the defendants, and of each of them severally, and of the circumstances out of which the same were averred to have arisen, and had dealt with the land in fraud of them, and prayed, in effect, that the plaintiff be adjudged to hold the title to the lands upon the same trusts and confidences upon which it was alleged to have been formerly held by the mortgagors, and that she be decreed to account for the value of the use and occupation of the lands during her possession of them, and that title to the lands be adjudged and quieted in the defendants in conformity to the terms of the alleged trusts. There was a reply consisting of a general denial, and a trial which resulted in a decree in substantial conformity to the prayer of the cross-petition.

To set forth the issues more at length, or the evidence at all, would be fruitless of benefit or advantage to any one. It is a familiar elementary principle, at least as old as any existing system of jurisprudence, that, in the language quoted and adopted by this court in *Garland v. Wells,* 15 Neb. 298, "a purchaser with notice from a prior purchaser who was entitled to protection as a *bona fide* purchaser without notice, is himself entitled to protection

against the previous equitable claim, which was invalid as against his grantor." Accepting the defendants' own version of the transactions under investigation, this language is exactly descriptive of the present case. The plaintiff, now appellant, is a purchaser from McCormick, the mortgagee and purchaser at the judicial sale, who, it is conceded by all parties, was entitled to protection as a *bona fide* purchaser for value, without notice. Therefore, whatever equitable rights the defendants, or any of them, may have had in the premises, and however cognizant of them the plaintiff may have been, it is immaterial to inquire, because she is entitled to the protection enjoyed by her grantor against them.

It is therefore recommended that the judgment of the district court be reversed, and the cross-petitions dismissed, and the cause remanded, with instructions to enter a decree in conformity with the prayer of the plaintiff's petition.

LETTON 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 cross-petitions dismissed, and the cause remanded, with instructions to enter a decree in conformity with the prayer of the plaintiff's petition.

REVERSED.

ROSE HIETT, APPELLANT, V. WESLEY HIETT, APPELLEE.

FILED JUNE 8, 1905. No. 13,850.

A contract between husband and wife, made after and in consequence of severance of the marital relation and permanent separation, and providing for a division of property, and containing mutual releases of rights and obligations relative thereto, will be re-

spected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats. But the courts will scrutinize such transactions closely, without too much regard for formal rules of pleading and procedure, and see to it that no unconscionable advantage is taken through fraud or intimidation, or even by reason of ignorance, passion or improvidence.

Appeal from the district court for Valley county: JAMES N. PAUL, JUDGE. *Affirmed.*

A. Norman and H. Westover, for appellant.

E. J. Clements and *Clements Bros., contra.*

AMES, C.

The district court granted the petition of a wife for a decree of absolute divorce on the ground of extreme cruelty, but denied permanent alimony. She appeals from the latter part of the decree, and there is no cross-appeal.

At the time of the marriage, in 1887, both of the parties were well advanced in years; she being a widow, the mother of six children varying in age from five to seventeen years, and he a widower, the father of four children of mature ages, all of whom had ceased to reside with him. He and his wife and her children resided together and constituted the family until the children, one after another, reached years of maturity and established homes of their own, and thereafter the marriage relation subsisted until 1902, when a scene of violence occurred, and a final separation took place, and the wife sought and found an asylum with her married sons and daughters. There was no issue of the marriage, and the parties, at the time it was contracted, were both impecunious, except for an inconsiderable amount of money possessed by each, which was consumed by family expenses. The children of the wife, as long as they remained members of the household, contributed by their labor and earnings to the common fund, and were maintained out of it, and from time to

time as the boys went away and established homes of their own, they were given articles of personal property and moderate sums of money aggregating several hundreds of dollars in amount and value. The family were laborious and frugal, except that the husband was addicted to the excessive use of intoxicants, and by the course of life indicated, which can be better imagined than described, and by the rise in the value of land bought and used for a farm and family homestead, had accumulated, at the time of the separation, property of a value variously estimated by witnesses, but probably worth not far from $6,000, subject to an indebtedness secured by a mortgage on the farm of $2,600, leaving a surplus of say $3,400 to $3,600. The personal property consisted of about a thousand dollars' worth of neat cattle, and of other live stock, and of utensils, such as are usually kept on a farm, to the estimated value of about $1,500.

A few days after the separation, the husbands of two of the daughters of the plaintiff and two of her sons visited the defendant, and made an agreement with him on her behalf for a perpetual separation thereafter, and for a division of property in contemplation and consideration thereof. For that purpose they visited the farm of the defendant, and inspected the premises and acquainted themselves with the quantity and character of his possessions. It is not proved that he was guilty of any fraud, concealment or intimidation in the transaction, or that they did not acquire fully and accurately all the information they desired. The plaintiff was not present, she having entrusted the protection of her interests to the persons named. After the matter had been amicably adjusted to the apparent satisfaction of all persons concerned, the plaintiff was called upon to attend, with the defendant and the intermediaries, at the offices of a firm of attorneys in a neighboring village, where the agreement was reduced to writing, and executed by both parties in the manner prescribed by law for the execution and

acknowledgment of deeds of real estate. The instrument recited the occasion and purpose of its execution, viz., the perpetual separation of husband and wife, the release by the latter of her dower and homestead rights in the land, and her interest in so much of the personal estate as was not set apart to her in severalty and freed from the claims of her husband, and which consisted of 28 of the 50 head of neat cattle and a horse, harness and buggy, certain articles of household furniture, certain domestic fowls, and 50 bushels each of corn and oats. What all these articles were worth it is difficult, if not impossible, to ascertain; the neat cattle alone probably not far from $500, and the rest from $100 to $200, or possibly more. Doubtless the value, both of what was taken and of what was left, was considerably greater for use than for sale. The instrument concluded with mutual releases of property, and marital rights and obligations, except the right of either party to prosecute an action for a divorce. A division and separation of the property pursuant to the agreement took place at once, and shortly afterwards this action was begun. The answer pleaded this instrument in bar of the demand of the petition for permanent alimony, and the reply assails it, in general terms, as being "unfair and unjust," and as having been obtained from the plaintiff in consequence of threats and ill usage by the defendant, and of her ignorance of her rights in the property divided. But there is no averment of any specific act or fact of fraud, ill-usage or intimidation with respect to making or carrying out of the agreement, and, as we have said, none is proved, and we are cited to neither principle nor authority for holding that any will be presumed. The whole tenor of the argument of counsel for appellant is that the agreement was improvidently made. Whether such fact, if it existed, would authorize the court to set aside or disregard the instrument, we are not called upon to decide, and do not decide. The weight both of reason and authority is that such agreements, made after separation, are, if fair and free from fraud,

imposition or undue means, in furtherance of good morals and in accord with sound policy. They stand upon a quite different basis from those made in contemplation and consideration of future separation. *Daniels v. Benedict,* 97 Fed. 367; *Galusha v. Galusha,* 116 N. Y. 635, 22 N. E. 1114. No prior decision of this court in conflict herewith has been brought to our attention. In *Campbell v. Campbell,* 73 Ia. 482, 35 N. W. 522, the only matter in litigation was temporary alimony, or "suit money," as it is called, which an agreement and division like that in controversy does not affect, and which in this case may be regarded as expressly excepted by the terms of the instrument itself. Whatever else is discussed in the opinion is mere *obiter.* In *McKnight v. McKnight,* 5 Neb. (Unof.) 260, no contract of settlement and mutual releases, and no final division of property, was either pleaded or proved. The husband had conveyed certain property to his wife because of the separation, but it was not shown that the conveyance was either made or accepted as a final adjustment of their marital rights.

We do not, however, intend to commit ourselves to the doctrine contended for by appellee, and which is, perhaps, held by some of the authorities, that an instrument like that under discussion is to be treated in all respects like other contracts upon a valid consideration between parties *sui juris,* and impeachable for fraud or duress only by compliance with the strict rules of procedure and proof applicable to suits involving such agreements. While there is no presumption against the fairness and good faith of such arrangements, we think that the presumption in their favor is not so strong as in cases of contracts between parties not so related, and that public policy, as well as due regard for the disabilities of the "weaker vessel," requires that the court should scrutinize them closely, without too much respect for formal rules of pleading and procedure, and see to it that no unconscionable advantage obtained through fraud or intimidation, or even by reason of ignorance, improvidence or passion, is availed of to the

unjust benefit of the stronger and more capable or more crafty spouse. We do not find, however, any of these elements in the record before us. The persons who made the contract and settlement on the behalf of the appellant were her next of kin and their spouses. They were certainly the peers in intelligence and experience of the broken old man with whom they dealt. There was no fraud or concealment, and they labored under no delusion, either as to the character of value or the property, or as to the legal or equitable rights of the parties thereto; and they were fully cognizant of all the history and circumstances of its acquisition and accumulation; and they furthermore had an interest, both direct and indirect, in seeing to it that their mother secured all to which she was entitled. In the absence of a showing to the contrary, the presumption is strong that they succeeded in attaining that object. We do not feel called upon to go into an elaborate discussion of items and values of property. Alimony is not to be awarded either as an emolument to the wife or as a punishment for the husband. The defendant is advanced in years, and left alone to struggle unassisted with a comparatively heavy burden of indebtedness, and regard must be had for his subsistence in his old age. The plaintiff obtained by the settlement at least as much as, or probably considerably more than, she would have acquired under the statute of descents and distributions if her husband had died intestate on the day before the contract was made. We think that under the circumstances she has nothing of which to complain and recommend that the judgment of the district court be affirmed.

LETTON 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.

HENRY F. RIECK V. JENKS N. GRIFFIN.

FILED JUNE 8, 1905. No. 13,820.

1. **Pleading:** DEPARTURE. Petition in the district court examined, and *held* not a departure from the issues tendered in the county court.
2. **Foreign Statute:** SEAL: EVIDENCE. The public seal of another state affixed to a copy of a written law of that state is admissible as evidence of such law.
3. ———: PAROL EVIDENCE. The unwritten law of another state may be proved by parol evidence.
4. **Instructions** examined, and *held* not prejudicial.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Charles Battelle and *William Baird & Sons,* for plaintiff in error.

Rich & Clapp and *Stillman & Price, contra.*

OLDHAM, C.

This was an action originally instituted in the county court of Douglas county, Nebraska, on the following due bill, or note of hand: "Oakland, Ark., Dec. 26, 1899. Due J. N. Griffin, on or before Feb. 10, 1900, Seven Hundred and fifty Dollars ($750) on the John Noe tract of land lying in Marion Co. Ark. as follows: N. ½ N. W. ¼ & S. W. ¼ of N. W. ¼ & N. W. ¼ of N. E. ¼ Sec. 34, township 21 range 15 W. North White River, for the purchase money of same. (Signed) Henry F. Rieck."

The petition alleged that defendant had paid upon said note an amount duly indorsed thereon: "Received the sum of $171.05, being balance of purchase money after paying all costs, for which lands sold, this Oct. 27, 1900." The petition prayed judgment for the balance due on the note, with interest. The answer denied that plaintiff was the owner and the real party in interest in the

note, and alleged that, if defendant signed the note, his signature was procured through fraud and misrepresentation of the plaintiff as to the nature and character of the instrument signed. The answer, for further defense, alleged that on the 10th day of April, 1900, the plaintiff with one John Noe, as parties plaintiff, began an action in equity in Marion county, Arkansas, against the defendant to foreclose a vendor's lien upon the premises for the unpaid purchase money; that, on constructive service on the defendant, said action was prosecuted to a final judgment, and the premises sold and purchased by one R. L. Berry, to whom was issued a certificate of purchase, which was transferred to the plaintiff, J. N. Griffin; that the sale was confirmed, and deed issued to said J. N. Griffin, who became, thereupon, the owner of said real estate. The answer also pleads a counterclaim for $800 of the purchase money advanced, and a $150 alleged to have been given to the plaintiff for the purchase of options, which plaintiff failed to make. Plaintiff, by way of reply to this answer, denied that any fraud had been practiced on the defendant in procuring his signature to the note in suit; admitted that an action had been prosecuted in Marion county, Arkansas, for the foreclosure of a vendor's lien, and pleaded the laws of the state of Arkansas, which authorized such action; denied that plaintiff was purchaser at the judicial sale, and admitted that he had purchased the certificate, for a valuable consideration, on which he had subsequently procured a deed to the premises. On a trial in the county court, defendant had a jugdment, and the cause was removed by appeal to the district court for Douglas county, where, on a trial to the court and jury, plaintiff had a verdict and judgment for $594.51, and to reverse this judgment defendant brings error to this court.

The plaintiff filed a new petition in the district court, in which he alleged the entire transaction connected with the signing of the note, the proceeding to foreclose the vendor's lien, and the laws of Arkansas authorizing the

petition. Defendant filed a motion to strike from the petion the allegations with reference to the laws of Arkansas and the foreclosure proceeding, as they were a departure from the issues tendered in the county court. This motion was overruled. The action of the court in overruling this motion is urged as erroneous in defendant's brief.

We are unable to see any departure from the original issue tendered in the county court. The suit was on a due bill, or a note of hand. The proceeding for the foreclosure of the vendor's lien had been pleaded in the county court in defendant's answer as a bar to the right of further recovery on the instrument. A reply had been filed in that court pleading the laws of Arkansas, which authorized the proceedings. While it was not requisite for the plaintiff to anticipate this defense, yet it was, at most, error without prejudice not to do so.

The next alleged error called to our attention is as to the action of the trial court in admitting proof of a digest of the statutes of Arkansas. The sections of the digest offered in evidence bore the following certificate:

"State of Arkansas, County of Pulaski, ss. I, John W. Crockett, secretary of state in and for the state of Arkansas, duly qualified and acting, do hereby certify that the foregoing sections of the digest of the statutes of the state of Arkansas, compiled in the year 1884, which are numbered, secs. 4994, 5172, and 5170, are true and correct copies of said sections of the digest of the statutes of the laws of the state of Arkansas, compiled in the year 1884, and that said sections of the law are still in full force and effect and have not been repealed or amended and are now a part of the statutory laws of the state of Arkansas. Witness my hand and seal of office on this 11th day of May, 1903. Jno. W. Crockett, Secretary of State. (Seal.)"

This certificate, we think, is sufficient under the provisions of section 420 of the code, which is as follows: "The public seal of the state or county affixed to a copy of a written law or other public writing, is also admissible as evidence of such law or writing respectively; the un-

written law of any other state or government may be proved as fact by parol evidence, and also by the books of reports of cases adjudged in their courts." Objections are also urged against the action of the court in admitting in proof of the unwritten law of the state of Arkansas the testimony of an attorney at law of that state. Our statute, however, as before set out, admits oral proof of the unwritten law of a sister state, and the witness offered showed himself qualified by long years of experience in the practice of law in all courts of that state, to give such testimony.

Objections are urged against the instructions given by the trial court. But a careful examination of the entire charge to the jury shows that the instructions were as favorable to the defendant as either the evidence or law would warrant. Finding no reversible error in the record, we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

SIMEON WEST V. C. A. LUNGREN ET AL.

FILED JUNE 8, 1905. No. 13,838.

1. **Tenancy**: PRESUMPTION. A tenancy from year to year will be presumed, where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord. *Critchfield v. Remaley*, 21 Neb. 178, followed and approved.

2. ———: EVIDENCE. This rule is, however, only a rule of presumption, and the presumption is rebutted by proof of a different agreement, or of facts inconsistent with the presumption. *Montgomery v. Willis*, 45 Neb. 435, followed and approved.

ERROR to the district court for Antelope county: JOHN F. BOYD, JUDGE. *Affirmed.*

E. D. Kilbourn, for plaintiff in error.

O. A. Williams, contra.

OLDHAM, C.

This was an action in forcible entry and detainer to recover the possession of 80 acres of land situated in Antelope county, Nebraska. The cause was originated before a justice of the peace of said county, and taken by appeal to the district court. On a trial in the district court to a jury, there were a verdict and judgment of restitution for plaintiff in the action, and to reverse this judgment the defendant brings error to this court.

It appears from the evidence that in the year 1884 the defendant in the court below leased the premises from James Gillispie, the then owner, for a period of five years, by an oral agreement; that he subsequently entered upon the premises and continued in possession thereof, for an annual rental of one-third of the crop raised thereon, until the time this suit was instituted; that he was on the land when James Gillispie died, in the year 1901. After Gillispie's death, a partition suit was brought, and the lands in controversy, with other lands, were sold, and plaintiff in the court below purchased these lands at the partition sale. It also appeared that in November, 1901, Josie Gillispie, executrix of the estate of James Gillispie, deceased, had a conversation with defendant in the court below, in which she requested him to remain another year on the premises, until the lands should be disposed of by the court, and that he did so. With reference to this conversation, defendant West testified as follows:

A. Well now, I did have a conversation with her.

Q. You agreed at that time with her that you would remain on there for the year 1902, didn't you?

A. She asked me if I was going to stay there another year. I told her I had not made any arrangements for anything different. Well, she said: "I want you to stay another year, or longer, if necessary." She says: "I don't know when that land will be sold. I don't want to change renters."

Q. When was that, that you had this talk with Josie Gillispie?

A. Last part of November, 1901.

Q. And related to the crop of 1902?

A. Next year.

Q. You knew that she had taken charge of the premises?

A. I did.

Q. And that she had authority over the renting of the premises for that year?

A. Yes, she had authority.

The executrix testified that she only rented the premises for one year, as she had no authority to rent them longer. Before the termination of this tenancy, a notice of more than three days was served on the defendant to vacate the premises on March 1, 1903. On the 12th of March following, this suit was instituted.

No complaint is lodged against any of the instructions given by the trial court, the sole contention being that defendant West was entitled to a six months' notice under the statute to terminate his tenancy. It is conceded by counsel that the five years' oral lease under which the tenancy was initiated was within the ban of the statute of frauds, but it is also conceded that the subsequent entrance and occupancy of the premises by the defendant, and the payment of rent, and acceptance of the same by the lessor, created a tenancy from year to year, which could only be terminated by the statutory notice, or by a subsequent agreement between the parties. So the only question to be determined is whether or not there was sufficient competent evidence in the record, of a subsequent agreement between the parties, to raise a question of fact for the determination of a jury.

In *Montgomery v. Willis,* 45 Neb. 434, IRVINE, C., speaking for the court, with reference to a tenancy from year to year, said:

"Such a tenancy will be presumed where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord, where no new contract was made. *Critchfield v. Remaley,* 21 Neb. 178. This rule is, however, only a rule of presumption, and the presumption is rebutted by proof of a different agreement, or of facts inconsistent with the presumption. *Shipman v. Mitchell,* 64 Tex. 174; *Williamson v. Paxton,* 18 Gratt. (Va.) 475; *Grant v. White,* 42 Mo. 285; *Secor v. Pestana,* 37 Ill. 525."

Now, we think that, under the facts and circumstances proved in the instant case, there was sufficient evidence to support the finding of the jury that a new contract for the leasing of the premises for the year 1902 was entered into between defendant in the court below and the executrix of the estate of James Gillispie, deceased.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

ALBERT PALMER ET AL., APPELLEES, V. THOMAS A. SAWYER, SHERIFF, ET AL., APPELLANTS.

FILED JUNE 8, 1905. No. 13,848.

1. **Homestead.** In its inception a homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance with the terms of the law conferring it. When these things exist *bona fide,* the essential elements of the homestead

right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition. *Galligher v. Smiley*, 28 Neb. 189, followed and approved.

2. ———. A debtor who has acquired a homestead does not lose his right to the exemption, where he continues to occupy the property as a home, though, by reason of death and the removal of his family, he has no one living with him.

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

Pope & Brown, for appellants.

Joshua Palmer, contra.

OLDHAM, C.

This was an action to enjoin the sale under an execution of a tract of land containing about twelve and a half acres, situated in Saline county, Nebraska, the plaintiffs claiming the land to be exempt as a homestead. The prayer for injunction was granted in the court below, and to reverse this judgment defendants appeal to this court.

The material facts underlying this controversy are that the plaintiff, Albert Palmer, purchased the land in controversy, in the year 1898; that at the time of the purchase plaintiff was a widower, with three minor children living with him, and that, with such children, he moved upon the premises, and has occupied the same ever since, claiming it as a homestead; that in the year 1901, one of the minor children died, another attained her majority, married and removed to the state of Iowa, and the other son also arrived at his majority and left the home, leaving the father alone in the possession and occupancy of the premises; that the year following, the judgment plaintiff in the court below, who was the administrator of the estate of Orazamus Palmer, deceased, procured a judgment against the plaintiff before a justice of the peace, in Saline county, for $162.85; that a transcript of

this judgment was duly filed in the office of the clerk of the district court for Saline county, and execution was issued on this judgment, which was levied on the lands in controversy by defendant sheriff, who advertised same for sale. To enjoin this sale, the present action was instituted.

The question to be determined is whether or not plaintiff was entitled to claim this property as his homestead at the time the indebtedness accrued on which judgment was entered. It appears from the facts above stated that, when the action on which the judgment was procured was instituted in the justice's court, plaintiff was living alone upon the lands, with no dependent relatives under his care. It also appears equally clear that, when the lands were purchased, he was the "head of a family" within the meaning of section 15, chapter 36, Compiled Statutes, 1903 (Ann. St. 6214), so that the question to be determined is whether or not a homestead once acquired by the head of a family can be divested by any act other than the voluntary alienation, abandonment or waiver of the right by the party entitled to the exemption. Both sides of this question find strong support in the adjudications of the courts of last resort of the different states, as we shall presently point out. It is well to begin with an examination of our own statute, and the trend of our own opinions which interpret it.

Sections 1 and 2 provide as follows:

Section 1. "A homestead not exceeding in value $2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

Section 2. "If the claimant be married, the homestead

may be selected from the separate property of the husband, or with the consent of the wife from her separate property. When the claimant is not married, but is the head of a family, within the meaning of section fifteen, the homestead may be selected from any of his or her property."

Section 3 provides for the liability of a homestead to sale on debts secured by merchants', laborers', or vendors' liens, or for debts secured by mortgages on the premises, executed either by both husband and wife or by the unmarried claimant.

Section 5 makes provision for setting off exemption when execution is levied on land claimed as a homestead.

Section 15 defines the "head of a family" to include:

"Second. Every person who has residing on the premises with him or her, and under his care and maintenance, either: (1) His or her minor child, or the minor child of his or her deceased wife or husband."

Section 17 contains the following provision:

"If the homestead was selected from the separate property of either husband or wife it vests, on the death of the person from whose property it was selected, in the survivor for life and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter."

It will be noticed that the provisions of these statutes reserve the homestead right to every person who is the head of a family as defined in section 15, whether married or unmarried at the time of the acquisition. When the homestead right is acquired by a married person, it cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife, under section 4.

This section of the statute, in the case of *Whitlock v. Gosson,* 35 Neb. 829, was declared to make the conveyance of a homestead executed by the husband alone void, not only as to the interest of the wife, but also as to the interest of the husband who executed it. This decision is important in establishing the principle that, when a homestead right is acquired, it can only be divested in the manner prescribed by statute, and on this principle it is supported by a line of decisions of this court cited in the opinion, and has been subsequently followed in *Giles v. Miller,* 36 Neb. 346; *Clarke v. Koenig,* 36 Neb. 572; *Violet v. Rose,* 39 Neb. 660; *Havemeyer v. Dahn,* 48 Neb. 536. If the homestead in controversy had been selected from the lands of the deceased wife, there could be no doubt but that, under the provision of section 17, *supra,* on the death of the wife, the homestead right would have descended to the husband for life, whether any children had been born of the marriage or not. And now the question arises as to whether or not we shall construe this statute as giving a higher right by reason of inheritance from the owner of the homestead than attaches to the owner himself. While this question has never been specifically determined by this court, COBB, J., in rendering the opinion in *Dorrington v. Myers,* 11 Neb. 391, did not hesitate to say how he would have determined the question, if it had been necessary, when he used the following language:

"While placing my views of this case upon the above ground, I by no means wish it understood that the plaintiff's right to homestead exemption depends upon the fact of his ability to provide for his son and daughters-in-law, and to hire servant girls. When as the head of a family he entered into possession of this homestead, he became vested, so to speak, of a homestead estate therein, which was alienable only by sale or abandonment. Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the

effect of dismantling the homestead of the protection of the exemption law."

This opinion was rendered under the homestead law of 1867, which has been broadened and extended by the enactment of 1879. The question was subsequently adverted to in the opinion in *Hyde v. Hyde,* 60 Neb. 503, but the decision there turned on another question, and no expression of opinion on the point now in controversy was given.

In *Galligher v. Smiley,* 28 Neb. 189, REESE, C. J., in rendering the opinion, said:

"In its inception a homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance with the terms of the law conferring it. When these things exist *bona fide,* the essential elements of the homestead right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition."

This opinion was rendered in a case in which the family still resided on the original homestead which, when selected, was farm land, but which was subsequently incorporated into the city of Omaha, without the consent of the owner. It was contended that the incorporation of the lands by the ordinance of the city council, extending its area, operated to diminish the area of the homestead to the limits prescribed for a homestead in city and village lots. And in determining the question, the language above quoted was used. While the facts differ from those now in issue, yet the principle announced, that, where a homestead is selected, it cannot be divested by acts or influences beyond the volition of the party claiming it, is clearly in point in the determination of the instant case.

Turning now to the decisions of the courts of last resort in other states on statutes of somewhat similar construction to our own, we find an irreconcilable conflict in the various conclusions reached. This conflict in some instances is traceable to the different provisions of the

statutes construed, and in other instances to the conception taken by the court of the intention of the legislature in the enactment of the statute. Those courts which look upon the statute as a statute of nurture, intended solely for the protection of the dependent members of the family from the improvidence of the head of the family, without any division arrive at the conclusion that, when the homestead has been selected and the dependent members of the family for whose benefit it was created have ceased to occupy, the protection of the homestead ceases, because the reason for the protection has ceased. The leading cases supporting this theory of construction are: *Revalk v. Kraemer,* 8 Cal. 66; *Santa Cruz Bank v. Cooper,* 56 Cal. 339; *Johnson v. Little,* 90 Ga. 781; *Cooper v. Cooper,* 24 Ohio St. 488; *Galligar v. Payne,* 34 La. Ann. 1057; *Hill v. Franklin,* 54 Miss. 632; *Fullerton v. Sherrill,* 114 Ia. 511, 87 N. W. 419. In opposition to this view is another line of decisions based on the hypothesis that the intention of the legislature in enacting the various homestead statutes was to protect the home and *all* its inmates from any business misfortune and financial adversity that might befall them; that the protection extends to the head of the family as well as to the dependent members. This theory leads to the conclusion that, when a homestead has been selected by the head of a family, he becomes invested with a right or estate in such homestead, which cannot be defeated by the death or abandonment of the home by the other members of the family who occupied it at the time of its selection. The following are some of the leading cases supporting this view: *Silloway v. Brown,* 12 Allen (Mass.), 30; *Kimbrel v. Willis,* 97 Ill. 494; *Stanley v. Snyder,* 43 Ark. 429; *Beckmann v. Meyer,* 75 Mo. 333; *Webb v. Cowley,* 5 Lea (Tenn.), 722; *Blum v. Gaines,* 57 Tex. 119; *Stults v. Sale,* 17 S. W. (Ky.) 148.

In the case of *Stults v. Sale, supra,* an opinion was rendered under a statute very similar in its provisions to our own, in that it provided for the descent of the homestead

right to the surviving husband or wife upon the death of the one from whose lands the homestead had been selected. In this case the husband owned the land from which the homestead was selected, and was the head of a family consisting of a wife and minor children; but at the time the levy was made, by reason of the death of the wife and the marriage or death of the other members of the family, the claimant occupied the premises alone. In rendering the opinion the court said:

"In this case * * * the property belongs to the husband, who is the debtor and is claiming it as exempt to him as a homestead. Undoubtedly the having of a family was necessary to the creation of the right in him, but is it necessary to the continuance of it? * * * The statute makes no express mention in this respect. We must, therefore, look to its general scope and spirit for guidance, the right being the creature of it. * * * Can it well be supposed that the legislature intended that in the event of the death of the wife owning the homestead, the benefit of it should continue to the husband during his occupancy, although he has no family, and yet that if he be the owner of it, and his wife or children die, or the latter marry and leave him, his right to the exemption ceases? If so, it is a singular state of case; and if so, it is equally true of the wife, where she owns the homestead. * * * Why should not the original owner have a right equal to the survivor, and why should not the law favor the latter equally at least with the former? Is the party to be worsted because he owns the property? Can any reason be given why the same right should not exist as to his own property as is given to him in his wife's property after her death?"

We have quoted somewhat at length from the decision of the case last cited, because of the similarity of the statute construed to our own, as well as for the cogency of the reasons assigned in support of the conclusions reached. While the case decided (*Stults v. Sale, supra*) differs from the one at bar in that the husband selected

the homestead from lands owned by him while his wife was living, yet the difference in nowise influenced the conclusion reached; for in each case the husband was the head of the family within the meaning of the statute at the time the homestead was selected. In neither case was the right a derivative one. There is no provision in our statute for the determination of the homestead right when once acquired, except by death or voluntary action of the party acquiring it. The statute which provides for a homestead for the head of a family, who is unmarried when the homestead is selected, does not limit the right of its enjoyment to the time during which the premises are occupied by the dependent members of the family jointly with the owner. As the statute does not limit the duration of the homestead right to the time of the dependency of the family on the claimant for support, if we follow the liberal construction accorded to this statute by our own court with a view of upholding its provisions, we can hardly escape the conclusion that, when a homestead is once acquired, the right to the continuous enjoyment of it can only be defeated by the voluntary act of the claimant. In this view of the matter the learned trial judge was fully justified in enjoining the sale of plaintiff's homestead.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

CHAUNCY HAIR ET AL., APPELLANTS, V. IRA DAVENPORT ET AL., APPELLEES.

FILED JUNE 8, 1905. No. 13,802.

1. **Homestead**: One who purchases land with the *bona fide* intention of making it his home, and who clearly manifests that intention, so that those dealing with it or with him relating to it are put upon notice, may thus impress it with a homestead character, although because of some intervening obstruction he does not take immediate actual possession thereof, if he occupies it with his family within a reasonable time after the purchase.

2. ———. A person cannot at the same time have two homesteads, nor can he have two places either of which at his election he may claim as his homestead.

3. ———. The head of a family who has a homestead cannot acquire a second homestead until the first has been abandoned or conveyed, or contracted to be conveyed, by an instrument which our statute recognizes as legal and valid for that purpose.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

George W. Wertz, for appellants.

George H. Thomas, contra.

DUFFIE, C.

In 1898 Ira Davenport, in his own right and as executor of the estate of John Davenport, contracted to sell to Albert Busch the northeast quarter of section 5, township 2, range 2, in Colfax county, Nebraska. This contract was assigned by Busch to the defendant Herman Eberhard April 9, 1902. October 17, 1902, Eberhard entered into a contract with Chauncy Hair to sell him the north half of the quarter section, and on the same day made a like contract with Henry Hamann to sell him the south half of the quarter section. This action is to enforce a specific performance of these contracts. Davenport, who had in the meantime become sole owner of the land, was

made a party defendant, and answered, alleging his readiness to deed the premises to whomsoever the court might direct. Eberhard and his wife filed an answer, setting up a claim of homestead in the entire quarter section, and defended the case upon the theory that the premises constituted the homestead of the parties, and that, Mrs. Eberhard not having joined in the contracts of sale, the same were absolutely void. A decree went in favor of the Eberhards, from which the vendees in the contract of sale have taken an appeal.

It is undisputed that on April 9, 1902, when Eberhard took an assignment of his contract of sale from Busch, Eberhard owned and lived with his family on 80 acres of land in Stanton county, some miles distant from the land in controversy. He had lived there for some years, and it undoubtedly constituted his home and homestead. On April 7, 1902, two days prior to taking an assignment from Busch, Eberhard and his wife contracted to sell the 80 acres on which they lived to one Malena, but this contract of sale was not acknowledged. The contract provided that possession should not be given until the following March, when a deed was to be made upon the payment of the full consideration, Malena having paid $500 at the date of the contract. Eberhard and his wife continued to occupy this farm until the latter part of February, 1903, when they took possession of the Colfax county land in controversy, and were living thereupon when this action was commenced. Eberhard and his wife insist that they purchased the land in controversy for a home, and with the intention of occupying the same as their homestead immediately upon removing from the farm in Stanton county; and the only questions in the case are, first, can a person have two tracts of land, either of which at his election he may claim as his homestead; and, second, whether under the facts in this case the mere intention to occupy land purchased by the head of the family, unaccompanied by any physical act manifesting such intention, gives the premises a homestead character, which can be set up as a

defense against the enforcement of a contract for the sale of the premises made by the husband alone.

In *Wright v. Dunning,* 46 Ill. 271, 92 Am. Dec. 257, the court said:

"By our act, a person could not have two homes at the same time, both exempt, nor could he have two, either of which, at his election, would be exempt. The home must be such that it, and it alone, is within the protection of the statute."

Our homestead act (sec. 4, ch. 36, Comp. St. 1903; Ann. St. 6203), provides that "the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." And this provision is held to apply to a contract to convey a homestead. *Larson v. Butts,* 22 Neb. 370. The uniform holding in this state is that any conveyance or incumbrance upon a homestead not signed and acknowledged by both husband and wife is absolutely void. The contract by which Eberhard and his wife agreed to sell their Stanton county home to Malena was not acknowledged. It was therefore void. It could not be enforced. Malena could not enforce a deed, neither could Eberhard specifically enforce the contract against Malena. *Solt v. Anderson,* 63 Neb. 734. Undoubtedly, until their conveyance of this tract of land in 1903, and their removal to the land in controversy in this action, either Eberhard or his wife could assert a homestead claim in the premises, which the courts would be compelled to recognize and uphold.

In *Waggle v. Worthy,* 74 Cal. 266, 5 Am St. Rep. 440, it was held that a homestead declaration, filed while the claimant has another homestead duly selected and never abandoned, is void. The fact that the first homestead was sold under execution and surrendered to the purchaser is immaterial, because, such sale being void, the homestead right is in no way affected thereby. In the body of the opinion it is said:

"But so far as this record shows, the sale to Jacobs was

of no effect. A homestead is exempt from execution, and if the land was worth more than $5,000 (which does not appear), the proceedings provided by the code for admeasuring the excess (Civ. Code, secs. 1245 *et seq.*) should have been taken. This not having been done, the attempted sale was void, the homestead still existed, and was not abandoned by the claimants moving off the premises. In this state 'a homestead can be abandoned *only* by a declaration of abandonment, or a grant thereof, executed and acknowledged,' etc. (Civ. Code, sec. 1243.) It results that the first homestead was a valid and subsisting homestead at the time the second was attempted to be declared. A party cannot have two homesteads; and if he attempts to acquire a second while the first is in force, the second is void."

Our conclusion is that Eberhard in October, 1902, when the contracts in suit were made, had a homestead right in Stanton county which no one could successfully dispute or question, and, such being the case, he could not at the same time acquire another homestead right in Colfax county, and assert it against the parties seeking to enforce the contracts in suit. The law is undoubtedly settled in this state that one who purchases a tract of land with the *bona fide* intention of making it his home, and takes such active steps as his circumstances will allow toward its occupation, and actually occupies it within a reasonable time, may claim a homestead interest therein from the date of his purchase. *Hanlon v. Pollard,* 17 Neb. 368. Our statute also protects the proceeds arising from the sale of a homestead for six months, and, as a consequence, one may sell his homestead, and hold the money for six months for investment in another home. Undoubtedly, if Eberhard had made such a sale of his home in Stanton county as the statute recognizes and would enforce, he might immediately invest it in another tract of land; and if he in good faith intended to make such tract his home, and did so within a reasonable time, considering his circumstances, the homestead character of such second purchase would

be recognized and protected. While the Eberhards, husband and wife, both testify that the tract in Colfax county was purchased for the purpose of a home, there are many circumstances which tend to throw discredit upon their statements. Eberhard had said that he purchased the land as a speculation. He had listed it for sale, and in October he entered into the contracts with the claimants in the present action. There is no evidence to show that he made any improvements upon the land, or took any steps indicating that he intended to occupy it, or make it his home, unless, perhaps, the planting of some fruit trees may have been done prior to his moving onto the premises, but we cannot ascertain from the record when the fruit trees were planted; and so far as is disclosed by the testimony they may have been planted after he had contracted to sell the premises, or even later than that, after he had moved onto the place. It would be an unsafe rule to adopt to say that secret intentions formed in the mind of the purchaser, without any physical act manifesting such intention, would impress upon a tract of land a homestead character, which would either exempt it from levy under legal process or operate to defeat a sale made to other parties.

We recommend that the decree appealed from be reversed and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is reversed and the cause remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED.

FRED N. BURLEIGH V. JOSHUA PALMER.

FILED JUNE 8, 1905. No. 13,847.

1. **Attorney's Lien**: TRUST FUNDS. An attorney has a lien for his compensation for professional services and for his disbursements upon moneys received by him on his client's behalf in the course of his employment, and this right of lien is not affected by the fact that the client is an executor or trustee and the services were rendered and money received on behalf of the estate.

2. ———: AGREEMENT: REVIEW. Where an attorney has filed a lien for professional services rendered in the case, and his client agrees to pay a certain amount in consideration of the release of the lien, and suit is brought upon such agreement, the question of the amount of services performed by the attorney or the terms of the original employment are immaterial, and evidence respecting these matters was properly rejected by the court.

ERROR to the district court for Saline county: LESLIE G. HURD, JUDGE. *Affirmed.*

Pope & Brown and *S. J. Coonradt,* for plaintiff in error.

Joshua Palmer, F. I. Foss and *R. D. Brown, contra.*

DUFFIE, C.

David B. Burleigh fell from a sidewalk in the city of Friend, and received injuries from which he died. Fred N. Burleigh, the executor of his will, brought an action against the city for damages, and employed Palmer, an attorney at law, as associate counsel in the case. Judgment went against the city, and Palmer filed an attorney's lien with the clerk of the district court claiming $300 for his services. This lien was filed June 21, 1898. In his petition in the district court, Palmer alleged his employment in the case; that he performed services therein to the amount of $200; that he had been paid $79.55, and claimed a balance due him of $120.45. He further alleged that on June 24, 1898, Burleigh, in consideration of his releasing the lien, agreed to make immediate payment of this bal-

ance; that thereupon he made out and delivered to Burleigh a writing addressed to the clerk of the district court, releasing his lien, whereupon Burleigh collected the amount of the judgment, but has failed and refused to carry out his agreement to pay the balance due him for fees. Judgment went in favor of Palmer for the amount claimed, and Burleigh has taken error to this court.

The plaintiff in error first urges that the plaintiff's petition is insufficient in that it is a suit on *quantum meruit,* and no allegation that plaintiff's services were reasonably worth the amount claimed. If the suit was upon a *quantum meruit,* which we do not think is the case, we are of opinion that the petition was sufficient, the allegation being that he performed services to the amount of $200, the clear meaning of which is that his services were reasonably worth that sum.

It is further objected that Palmer was not entitled to an attorney's lien on the judgment recovered against the city of Friend and in favor of the estate of David B. Burleigh, as it clearly appears that his employment was made by Fred N. Burleigh, the executor, in his individual capacity. This raises the right of an attorney to claim a lien against a judgment or fund secured by his services, where he was employed by a trustee, as in this case. The question, so far as we are advised, has never been before this court, but there are numerous decisions to the effect that an attorney cannot be deprived of the benefit of his lien because employed in the case by a plaintiff who brings the action in the capacity of a trustee. This precise question was determined by the court of appeals of the state of New York in *In the Matter of the Application of Knapp,* 85 N. Y. 284, and it was there held that "an attorney has a lien for his compensation for professional services, and for disbursements, upon moneys received by him on his client's behalf, in the course of his employment. This right of lien is not affected by the fact that the client is an executor, and the services were rendered, and money received, on behalf of the estate; nor is it confined to

moneys recovered by judgment." The same principle is recognized in *Harrison v. Perea,* 168 U. S. 311. See also *In re Holland Trust Co.,* 76 Hun (N. Y.) 323, 27 N. Y. Supp. 687; *In re King,* 61 N. Y. App. 152, 70 N. Y. Supp. 356; *Lee v. Van Voorhis,* 78 Hun (N. Y.), 575, 29 N. Y. Supp. 571, affirmed by court of appeals, 40 N. E. 164. This disposes of the contention of Burleigh that Palmer was not entitled to a lien, and that therefore his releasing the same was no consideration for Burleigh's promise to pay the remainder of his fee.

It is further urged that Palmer's petition shows that the money was in the hands of the clerk of the court prior to Palmer's filing his lien, and that therefore the lien did not attach, the money being paid into court before notice of the lien came to the adverse party. Counsel for plaintiff in error must have overlooked the second paragraph of the petition, which alleges that, "after the rendition of said judgment, and before the same was paid or discharged, plaintiff caused a lien to be filed according to law with the clerk of the district court wherein said judgment was recorded."

It is also urged that Burleigh's promise being that to pay the debt of another, is void under our statute of frauds. It will be remembered that an executor cannot bind the estate for which he is acting by any contract which he may make. If in the conduct of the business of the estate it becomes necessary to employ an attorney, he may do so, and have a reasonable fee for the services performed allowed him as part of the costs and expense of the administration. The debt however is his own, and he is personally liable to the party employed. If he wishes to protect himself against a greater charge than it is thought the court upon final settlement will allow, he must do so by contracting with the attorney to be satisfied with such fees as the court in charge of the estate thinks reasonable and just, and such as the court will allow the administrator as a reasonable disbursement for the services performed. With this principle in mind, the objections made

that the debt was that of a third party, and to the action of the court in limiting the cross-examination of Palmer, are easily disposed of. On Palmer's cross-examination it was sought to go into the question of his original employment, and the nature of the services actually performed. The court, we think, quite properly limited the evidence to the sole issue in the case, viz., did Burleigh, in consideration of Palmer's releasing his lien against the judgment, agree to pay him the sum of $120.45, the balance which Palmer claimed to be due? If he did, the contract should be enforced, regardless of what services were performed by Palmer, or of the conditions of his original employment. This was the only question submitted by the court to the jury, and, it being the only question in the case, it is needless to discuss errors assigned upon instructions given, as a careful examination shows that they were a plain statement of the questions, and the only questions, presented by the issues for the determination of the jury.

We discover no error in the record, and recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

CITY OF BEATRICE V. JOHN A. FORBES.

FILED JUNE 8, 1905. No. 13,853.

1. **Contributory Negligence:** BURDEN OF PROOF. Where negligence is the ground of the action, it rests upon the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred, and if from these circumstances as presented by the plaintiff it so clearly appears that the minds of all reasonable men would concur in the conclusion that the fault was mutual, or, in other

words, that contributory negligence must be imputed to the plaintiff, he has by his own evidence disproved his right to recover, and on his own proof he should be nonsuited; but where the proof which he offers in support of his case shows him free from fault, or where it only tends to show contributory negligence on his part, and reasonable men might fairly differ as to the conclusion to be drawn therefrom, then the case should go to the jury, the defendant having the burden to show contributory negligence on the part of the plaintiff, but being entitled in that regard to the benefit of any evidence offered by the plaintiff tending to establish that fact.

2. Cities: ACTION: NEGLIGENCE. One using the sidewalks of a city will not be excused from recklessly casting himself upon a known obstruction; yet contributory negligence is not imputable to him as a matter of law from the mere fact that he attempts to pass over a walk that is obstructed or otherwise out of repair, provided the obstruction or other defect is such that a man of ordinary intelligence would reasonably believe that, with proper care and caution, he could pass with safety notwithstanding the defect.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

M. B. Davis, for plaintiff in error.

Hazlett & Jack and *L. M. Pemberton, contra.*

DUFFIE, C.

Sixth street is one of the mainly traveled streets in the city of Beatrice. January 12, 1902, John A. Forbes, the defendant in error, while traveling on said street on his way to church, fell, and received a serious injury, at the place where the sidewalk on the west side of the street crosses an alley. It is alleged in the petition that ice had accumulated where said alley is crossed by the sidewalk, to a depth of six inches or more, and to a width from four to six feet at the place where said alley is crossed by the walk, and a greater width both easterly and westerly from where said alley is crossed by said walk; that water and slush ran down over and stood upon said crossing, and

while in that condition people tramped through said slush and water, and when the same froze there were rough places in the ice where people had walked through slush, and other places where the ice was exceedingly slippery, and on account of said accumulation of ice the crossing was in a dangerous condition. Judgment went in favor of Forbes, and the city has taken error to this court.

The first assignment noticed in the brief of the city relates to the third instruction given by the court, as follows: "If you find from the evidence that the injury to the plaintiff complained of was occasioned by the negligence and want of ordinary care of defendant, you are instructed that the burden of proof is then on the defendant city to satisfy by a preponderance of the evidence that negligence and want of ordinary care on the part of the plaintiff contributed thereto, in order to prevent a recovery in this case." It is said in the brief that "this instruction is palpably wrong; that the plaintiff testified that he saw the ice on this alley crossing before stepping on it, and considered it a dangerous place, but that, with this knowledge present in his mind, he deliberately attempted to walk over the ice at the widest point, which was, under the circumstances, a gross act of negligence, and that therefore the burden of proving negligence on the part of the plaintiff could not be shifted to the defendant city." Before proceeding to consider the objections made to this instruction, we ought to say that the record does not bear out this statement that Forbes said he knew the place to be dangerous. We reproduce what Forbes said regarding it in his own language: "I looked it over carefully, and, having seen other people cross that place, knew it was an icy place and bad place to walk, but thought by careful walking I could get over it, and made the attempt to get over it, but I did not get over it. I fell down and broke my leg." This is far from an admission that Forbes knew that it was dangerous to attempt the crossing. He knew it to be a bad place, but thought that by being careful it might be safely crossed. It is true that

what Forbes may have thought in this respect is not the controlling question in the case. It was a matter for the jury to say whether, under the circumstances, a man of ordinary prudence, having regard for his own safety, would have attempted to make the crossing.

Coming now to the instruction complained of, the law has been settled in this state by the opinions in *Rapp v. Sarpy County,* 71 Neb. 382, 385, that the burden rests upon the defendant, who defends upon the ground of the plaintiff's contributory negligence, of establishing such defense by a preponderance of the testimony, and that the burden does not shift throughout the trial. There were many former opinions by the court to the effect that, if the plaintiff can prove his case without disclosing contributory negligence on his part, then the burden rested upon the defendant to show such negligence, and while but one of the cases so held in terms (*Chicago, B. & Q. R. Co. v. Featherly,* 64 Neb. 323), the inference was that, where the plaintiff's testimony tended to show contributory negligence on his part, the burden then shifted to him to show that he was not negligent. The *Featherly* case has been overruled in the *Rapp* case above cited. The law is well settled, not only here, but in every state of the Union, that contributory negligence on the part of a plaintiff which proximately contributes to the injury complained of will defeat his recovery. In some of the states the rule is that, in order to recover, he must show not only the negligence of the defendant, but his own freedom from negligence. The burden rests on him in respect to both these questions, and if he fails in either he cannot recover. In this state the rule has always prevailed that, if he can prove the allegations of his petition showing his injury and the negligence of the defendant as the proximate cause producing it, then the defendant, in order to defeat a recovery on the ground of contributory negligence by the plaintiff, must establish such negligence by a preponderance of the evidence produced on the trial. The true theory under this rule is that, where

negligence is the ground of the action, it rests upon the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred, and if from these circumstances as presented by the plaintiff it so clearly appears that the minds of all reasonable men would concur in the conclusion that the fault was mutual, or, in other words, that contributory negligence must be imputed to the plaintiff, he has by his own evidence disproved his right to recover, and on his own proof he should be nonsuited; but where the proof which he offers in support of his case shows him free from fault, or where it only tends to show contributory negligence on his part, and reasonable men might fairly differ as to the conclusion to be drawn therefrom, then the case should go to the jury. If, after the plaintiff has rested, the case is in such condition as to require submission to the jury, and to put the defendant upon proof of his defense of contributory negligence on the part of the plaintiff, then the burden rests on him to prove it by a preponderance of the evidence, but in so doing he is entitled to the benefit of any evidence offered by the plaintiff tending to show that he contributed to his own injury. When the case goes to the jury, the proof of contributory negligence on the part of the plaintiff must be submitted to them, not alone upon the proof offered by the defendant in that behalf, but they must consider also any proof coming from the plaintiff or his witnesses tending to establish that defense.

At the request of the plaintiff in error the court gave the following instruction: "The jury are instructed that as a matter of law if the plaintiff was guilty of any negligence, however slight, which contributed to the injury complained of, he cannot recover." It might perhaps have been better had the court said to the jury in plain terms that, in determining whether the plaintiff below was guilty of contributory negligence, they should take into consideration all the evidence before them upon that question, and that any evidence coming from the plaintiff or

his witnesses in that respect should be considered together with that produced by the defendant. It can hardly be, however, that the jury were misled, as in its fourth instruction the court told them that, in determining the issues in the case, they should take into consideration the whole of the evidence and all the facts and circumstances proved on the trial, giving the several parts of the evidence such weight as they thought it entitled to. It is insisted by the plaintiff in error that the evidence taken as a whole shows that Forbes was guilty of negligence which proximately contributed to his injury; that he knew the condition of the crossing, and voluntarily assumed the risk of attempting to pass it, and that he cannot now insist that the damages sustained should be borne by the city. There are instances where the court as a matter of law would say that the danger attending the performance of an act was so great and manifest that it was negligence to attempt it, and that no recovery could be had for damages sustained in such attempt. Such a case is *Chicago, B. & Q. R. Co. v. Landauer,* 36 Neb. 640, and this court has followed the rule therein announced in other cases. We do not understand, however, that one on discovering a defect or obstruction in a public street on which he is traveling, or a place therein that might be unsafe, is required to turn back and take some other route to his destination, unless the defect is of such a character as to render it dangerous to the mind of a person of ordinary prudence to attempt the passage, of which the jury are to judge; and especially is this not required where, as in the present case, a large number of people are using the street and passing over the defective way, without injury, to the knowledge of such person. The evidence is conclusive that the crossing was being used by a large number of persons, who passed without accident or injury, and that it was not obviously dangerous to attempt it; but, notwithstanding this, counsel for the city insists in his reply brief that this court should reverse the case upon the theory that as a matter of law the plaintiff was

guilty of contributory negligence. We cannot better dispose of this contention than by quoting the language of Justice White in *Mosheuvel v. District of Columbia,* 191 U. S. 247, in speaking of a similar claim made by counsel for the district in that case. He said:

"When analyzed the proposition comes to this, that no person can, as a matter of law, without assuming all the risk, use the streets of a municipality where he knows of a defect therein, even although it be that in the exercise of a sound judgment, it might be deemed that with ordinary care and prudence the street could be used with safety. The result of admitting the doctrine would be to hold that all persons in making use of the public streets assumed all risks possible to arise from every known defect or danger. * * * Reduced to its last analysis, the principle contended for but asserts that the ordinary rules by which negligence is to be determined do not apply to the use of the public streets, since those who use such streets with a knowledge of a possible danger to arise from a defect therein must, as a matter of law, have negligence imputed to them, although in choosing to make use of the streets and in the mode of use the fullest possible degree of judgment and care was exercised. The result of this would be to relieve the municipality of all duty and consequent responsibility concerning defects in highways, provided only it chose to give notice of the existence of the defects."

He then cites and quotes from a large number of cases going to establish the rule that a person who in the lawful use of the highway meets with an obstruction may yet proceed, if it is consistent with reasonable care to do so, and that this is generally a question for the jury, depending upon the nature of the obstruction and all the circumstances surrounding the party. We think that a majority, and the better reasoned cases, establish the rule that while a traveler will not be excused in recklessly casting himself upon a known obstruction, yet contributory negligence is not imputed to him as a matter of law

from the mere fact that he attempts to pass over a street that is obstructed or out of repair, provided the obstruction or other defect is such that a man of ordinary intelligence would reasonably believe that with proper care and caution he could pass with safety notwithstanding such defect.

Other errors are assigned on some of the instructions given, and on the refusal of the court to give instructions asked by the city. It would serve no useful purpose to discuss them in detail. What we have already said covers the principal questions argued in dispute between the parties. The instructions given by the court contain a correct definition of the law applicable to the case, and cover the whole case; of those refused some were embodied in principle by those given, and others were not warranted by the evidence. Finding no reversible error in the record, we recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

CHRISTOPHER B. E. STROEMER V. JOSIAH A. VAN ORSDEL.*

FILED JUNE 8, 1905. No. 13,800.

1. **Attorney and Client:** CONTRACT: VALIDITY. A contract between an attorney and client for services to be rendered by the former is not necessarily invalid because a part of the services to be rendered is the procurement of legislative action, nor because such contract provides for a contingent fee. *Richardson v. Scott's Bluff County*, 59 Neb. 400, modified.
2. **Contract:** VALIDITY. Such contract will be enforced, unless it appears that it contemplates the use of unlawful or improper means, or that such means were employed in pursuance thereof to attain the object for which the contract was made.

*Rehearing allowed. See opinion, p. 143, *post*.

3. ———: PUBLIC POLICY. While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent on the enforcement of contracts which are lawful and contravene none of its rules.

ERROR to the district court for Gage county: ALBERT H. BABCOCK, JUDGE. *Affirmed.*

L. M. Pemberton, for plaintiff in error.

Samuel Rinaker, Robert S. Bibb and *Hazlett & Jack, contra.*

ALBERT, C.

We shall use the terms plaintiff and defendant with reference to the title of the cause in the district court.

The plaintiff alleges that he entered into an oral contract with the defendant, whereby he was employed by the defendant as his agent and attorney to take such action and render such services in the way of collecting facts, preparing and submitting to the Indians and the proper authorities of the federal government arguments on the merits of the claims of those holding lands purchased under the act of congress approved March 3, 1881, providing for the sale of the remainder of the reservation of the confederate Otoe and Missouri tribes of Indians in the states of Nebraska and Kansas, as in the judgment of plaintiff might be necessary and proper to secure from the federal government and said Indians a reduction in the amount which, under the laws of the United States as they then stood, it was necessary to pay to satisfy the unpaid balance due the government by the defendant and other purchasers under said act; that for said services the defendant undertook and agreed to pay the plaintiff a sum equal to ten per cent. of whatever such reduction might be obtained. Among other allegations in the petition, of acts done and services performed by the plaintiff in pursuance of said contract, is the following: "That

thereafter the plaintiff went to Washington city, District of Columbia, and went before the secretary of the department of the interior, and there presented the interests and claims of the defendant and other purchasers of lands under the said act of congress for a rebate and reduction in the amounts still owing to the government for the said lands. And plaintiff urged upon the secretary of the department of the interior his approval of the consent of said Indians to the said rebate and reduction made by the said Indians, as aforesaid, that, as a result of the plaintiff's presentation of the matter aforesaid to the said secretary, the said secretary prepared a bill for an act of congress, and recommended the passage of the same by congress, which said bill was for an act approving and ratifying the said action of the said Indians in consenting to the reduction aforesaid, and authorizing the said secretary to accept payment for said lands in accordance with the reduced terms consented to by the said Indians as aforesaid; that the plaintiff appeared before the committe of the senate of the United States on Indian affairs, and also before a similar committee of the house of representatives, and there again presented the interests of the defendant and other purchasers of lands sold under the said act of congress hereinbefore first mentioned, and urged the claims of the defendant and other purchasers of said lands for a reduction in and a rebate of the amounts due to the government for the lands purchased as aforesaid; that as a result of plaintiff's efforts and services as aforesaid, favorable reports were made by the said committees to their respective bodies upon the said bill, and the same was duly enacted by the congress of the United States, and approved by the president thereof, and became a law of the United States, April 4, 1900, and thereafter and pursuant to said law the government of the United States accepted from the defendant in full payment for the land occupied by him, as hereinbefore stated, the reduced amount hereinbefore alleged." It is further alleged that, by reason of said services performed by the

plaintiff in pursuance of said contract, he obtained for the defendant a reduction of $2,307.83, and that, by reason of the premises, there is now due and owing to the plaintiff from the defendant on said contract the sum of $230.78. There were a verdict and judgment for the plaintiff, and the defendant brings error.

The principal contention of the defendant is that the contract is illegal and contrary to public policy, in that it was a contract to pay a contingent fee for influencing legislation. In order to understand this contention, it is necessary to refer to some of the circumstances which gave rise to the contract, and what was done by plaintiff in pursuance of it. By the provisions of the act of March 3, 1881, above referred to, with the consent of the Otoe and Missouri tribes of Indians, expressed in open council, the secretary of the interior was authorized to survey and to sell the lands of those Indians lying in Nebraska and Kansas. After being surveyed, the lands were to be appraised by three commissioners, of whom one was to be selected by the Indians and two by the secretary of the interior. After such survey and appraisal, the secretary of the interior was authorized to offer it for sale through the land office at Beatrice, in tracts not exceeding 160 acres, to actual settlers or purchasers, who should make oath before the register or receiver at the land office that they intended to occupy the land for authority to purchase which they made application, and who should, within three months after such application, make a permanent settlement upon the same. These sales were to be for cash, or one-fourth in cash to become payable at the expiration of three months from the date of filing the application, one-fourth in one year, one-fourth in two years, and one-fourth in three years from the date of sale. No land was to be sold for less than the appraised value thereof, and in no case for less than $2.50 an acre. There was no provision in the act that the land should be sold at public auction. It was similar to a former act of congress for the sale of a portion of the same Indian reservation,

in pursuance of which the lands had been sold at private sale; and the settlers proceeded on the theory that the sales under the subsequent act would be conducted in the same manner as those under the former act. But, for some reason, the officer charged with the sale of the land put it up for sale at auction to the highest bidder. That his action in this respect was unauthorized, and a hardship was thereby entailed on the settlers and purchasers, is shown by a report made by the committee on Indian affairs to congress, from which we take the following:

"In the total disregard not only of the spirit and letter of the law, but the official assurances * * * after the survey and appraisement of the lands had been completed, to the complete surprise of the intending settlers, the general land office issued an order for a public sale."

"And the tracts were awarded to the highest bidders therefor at prices greatly in excess of the appraised value."

That "the sale was controlled by a mob of disorderly, intoxicated and irresponsible persons; and the intending settlers seeking to secure lands of their selection, and on which they had previously made settlement in accordance with the spirit and purpose of the law, were brought into unfair competition and serious menace from the mob which had gathered for the purpose of speculation and making trouble, and not for the purpose of making actual settlement of the lands through *bona fide* purchase."

"The commissioner of the general land office was present at the sale, endeavored as best he could to protect the *bona fide* intending settlers, and assured them, in his official capacity, that no advantage would be taken of the excessive bidding, and that in the end the government would make a fair and reasonable adjustment, and exact no more from the purchasers than the real and appraised value of said lands. The settlers relied upon these assurances, made the bids necessary to secure the lands, and entered upon them." See report No. 2,198, 55th congress, 3d session, house committee on Indian affairs.

After the sales, the settlers made some efforts to obtain

relief from what was deemed the injustice resulting to them by a sale of the land at public auction instead of at private sale. The merits of their claims were recognized by both the department of the interior and by congress, and on the 3d day of March, 1893, an act of congress went into effect, authorizing and directing the secretary of the interior "to revise and adjust, on principles of equity, the sales of lands in the late reservation of the confederate Otoe and Missouri tribes of Indians in the states of Nebraska and Kansas, * * * and in his discretion, the consent of the Indians first being obtained, * * * to allow to the purchasers of said lands * * * rebates on the amounts respectively paid or agreed to be paid by said purchasers." This act also provides that the rebates allowed should not bring the price to be paid for the lands below its appraised value. It was after this act went into effect that the contract sought to be enforced in this action was made. At the time the contract was made, it was generally understood, and we think properly, that no further legislation was required to enable the settlers to obtain a proper reduction from the amount which they had respectively agreed to pay for the lands. After the contract was made, the plaintiff, acting on behalf of the defendant and other settlers, negotiated an agreement with the Indians, whereby they consented that certain reductions might be made to the settlers. This agreement was submitted to the secretary of the interior by the plaintiff for his approval and enforcement, under and in accordance with the act of congress approved March 3, 1893. The matter was set for hearing, but, before the time for hearing arrived, the plaintiff was taken ill, and was confined to his bed by illness for more than two months. During his illness, the secretary of the interior came to the conclusion that there was some doubt as to his authority to proceed under the authority of the act of March 3, 1893, and prepared and submitted to congress, with his recommendation that it become a law, a bill for an act approving the settlement which the plaintiff had nego-

tiated with the Indians. This bill became a law April 4, 1900. While it was pending in congress, the plaintiff, as the attorney of the defendant and other settlers, appeared and made arguments in favor of the proposed bill before the committees on Indian affairs of both houses. He emphatically denies that he solicited any member of congress to support the bill, or used or tried to use his personal influence with any of such members to secure its passage. It appears from his testimony, which is uncontradicted, that, after his contract with the defendant, the only conversations had by him with individual members of congress in regard to the bill was to inquire on one or two occasions as to its progress, and to answer questions addressed to him by two members as to the nature and object of the bill.

It is insisted that the case falls within the rule announced in *Richardson v. Scott's Bluff County,* 59 Neb. 400, which is as follows:

"A contract by which a person agrees to draft a bill, have it introduced in a legislature, explain it to and make arguments in its favor before committees of the legislature, and do all things needful and proper to secure its passage; such party to receive no compensation unless the passage of the bill, an appropriation act, is procured—if successful, the fees not fixed, but to be liberal—is vicious, illegal and void; and, in the event of the passage of the bill, there can be no recovery of a fee in a suit upon the contract, nor as upon an implied contract, nor a *quantum meruit* for the services performed."

On the other hand it is claimed that there is nothing on the face of the contract to show that it contemplated legislative action; that the facts stated show that such action was not within the contemplation of the parties when the contract was made, and therefore that it was not a contract to procure legislation. But we think the plaintiff should be held to the interpretation which he himself placed upon the contract. By the express terms of the contract, he was to render such services in the way of col-

lecting facts, and preparing and submitting to the proper authorities of the government of the United States arguments upon the merits of the claims, as in his judgment might be necessary and proper. It appears from that portion of the petition hereinbefore quoted that, among the services which the plaintiff deemed "necessary and proper" in the premises, was to appear before the committees of the two houses of congress in support of the proposed bill. It further appears that as a result of his services favorable reports were made by such committees upon the bill, and that it was duly enacted by congress and approved by the president. These facts show, we think, that the contract, as construed by the plaintiff, brings it clearly within the rule announced in the *Richardson* case, *supra.* But after a careful examination of the authorities, we are all of the opinion that the rule in that case is stated too broadly. It is stated more broadly than was necessary to cover that case, the record of which shows a persistent and successful attempt to influence legislation by means of personal influence and solicitation of individual members of the legislature. It is thought a more accurate statement of the rule is to be found in *Trist v. Child,* 21 Wall. (U. S.) 441, where it is said:

"We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character."

From a comparison of this rule with that stated in the *Richardson* case, waiving for the present the question of contingent fees, it will be seen that the latter places all contracts for the employment of agents and attorneys to secure legislation under the ban, while under the former, under certain circumstances and within proper limits, such contracts are valid. The rule announced in *Trist v.*

Child, supra, above set out, has been frequently recognized by the supreme court of the United States and by state courts of last resort. *Wright v. Tebbitts,* 91 U. S. 252; *Meguire v. Corwine,* 101 U. S. 108; *Oscanyan v. Arms Co.,* 103 U. S. 261; *McBratney v. Chandler,* 22 Kan. 692; *Sedgwick v. Stanton,* 14 N. Y. 289; *Bremsen v. Engler,* 49 N. Y. Super. Ct. 172; *Foltz v. Cogswell,* 86 Cal. 542, 25 Pac. 60; *Moyer v. Cantieny,* 41 Minn. 242; *Denison v. Crawford County,* 48 Ia., 211. The case last cited, owing to its similarity to the case at bar, deserves more than passing notice. There a contract had been entered into between the plaintiff and the defendant county, providing that the plaintiff should make application to the federal government for certain swamp lands, or indemnity therefor, which the county claimed it was entitled to receive, and Denison was to receive for his compensation one-half of what he thus procured. To effect the object of the contract required an act of congress. The county received the indemnity contemplated by the contract, and the plaintiff brought suit for his fee under the contract. The contract was upheld by the court in an opinion, which states the rule applicable to such cases in substantially the same language as that used in *Trist v. Child, supra.* In most, if not all, of the cases cited, however, the courts add this qualification: That if the agent or attorney conceals from the members of the legislative body the capacity in which he is acting, or appears to be other than he actually is, legislation procured thereby may be said to have been obtained by improper means, and a contract to pay a compensation therefor is void as against public policy. In the present case the plaintiff is an attorney at law, and made no attempt to conceal the capacity in which he was acting, or to be other than what he actually was. Hence, the case does not fall within that qualification.

It has been held in some cases that where the fee is contingent, as in this case, there is a strong temptation on the part of the agent or attorney to make use of improper means to effect the desired end, and for that reason a con-

tract to render services before an executive officer of the government, or a legislative body, for a contingent fee is contrary to public policy. In the *Richardson* case, *supra,* considerable stress is laid on this feature of the contract. We do not share the view that such feature of the contract renders it void as against public policy. If the temptation to resort to improper methods is too strong for an attorney, working for a mere fraction of the benefits resulting from his services, it would certainly be far stronger to the real party in interest working in his own behalf and for the whole of the benefits, yet no one questions the right of the party to act in his own behalf in such matters. It would seem to us that to the extent that a contingent fee increases the temptation to the agent or attorney, it diminishes the temptation to the client, so that the sum total of the temptation to employ improper means is unaffected by the character of the fee. Besides, the right of an attorney at law to render services in court for a contingent fee is almost universally recognized in this country. The temptation to resort to improper means before the judiciary is just as strong as it is to resort to such means before the legislative or executive branch of the government, and we have no right to assume that such means would be any more effective in one department than in another. The supreme court of the United States has held more than once, that a contract between an attorney and client is not rendered invalid by a provision for a contingent fee. In *Taylor v. Bemis,* 110 U. S. 42, passing upon the validity of such contract, the court said:

"It was decided in the case of *Stanton v. Embrey,* 93 U. S. 548, 23 L. ed. 983, that contracts by attorneys for compensation in prosecuting claims against the United States were not void because the amount of it was made contingent upon success, or upon the sum recovered. And the well known difficulties and delays in obtaining payment of just claims, which are not within the ordinary course of procedure of the auditing officers of the government, justify a liberal compensation in successful cases,

where none is to be received in case of failure. Any other rule would work much hardship in cases of creditors of small means residing far from the seat of government, who can give neither money nor personal attention to securing their rights."

A contract, whereby an attorney undertakes to procure a pardon for one convicted of crime is not invalid because the compensation is made contingent on success. *Moyer v. Cantieny, supra.* On the validity of such contracts generally see, also, *Wright v. Tebbitts,* and *Denison v. Crawford County, supra. Wylie v. Coxe,* 15 How. (U. S.) 415; *Barber Asphalt Paving Co. v. Botsford,* 56 Kan. 532, 44 Pac. 3; *Aultman v. Waddle,* 40 Kan. 195; *Sedgwick v. Stanton, supra; Hunt v. Test,* 8 Ala. 713, 42 Am. Dec. 659; *Beal v. Polhemus,* 67 Mich. 130; *Wildey v. Collier,* 7 Md. 273, 61 Am. Dec. 346.

In the light of the authorities cited, we are unable to see wherein the contract in suit contravenes any rule of public policy either as to the nature of the services contemplated by the parties when the contract was made, or those rendered in pursuance of it. It is not sufficient to say that the plaintiff might have resorted to illegal or improper means to attain the end contemplated by the contract; that might be said in any case. But the public interest is not well served by indulging baseless suspicions of wrongdoing. While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules be duly enforced, and not set at naught or held invalid on a bare suspicion of illegality. Had the defendant done for himself all that is shown the plaintiff did for him in pursuance of the contract, it would have been what is everywhere recognized as a legitimate exercise of his rights as a citizen. If it were competent for the defendant to do those things in his own behalf, we are unable to see why the services of one employed to act for him should be held illegal or contrary to public policy.

Complaint is made of some of the instructions, but such

complaint appears to be disposed of in what has already been said.

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed March 8, 1906. *Judgment of affirmance adhered to:*

1. **Attorney and Client:** CONTRACT: VALIDITY. An agreement for purely professional services, such as "collecting facts, preparing and submitting to the Indians and proper authorities of the government of the United States arguments upon the merits of the claims of those holding Indian lands purchased from the government for a reduction, and upon the justice and advisability of a reduction, of the purchase price of such lands, as may be necessary and proper to secure such reduction," is valid.

2. **Contract:** PUBLIC POLICY. The fact that the agent or attorney in carrying out his agreement, and as incidental thereto, appears before a committee of both houses of congress and explains the nature of a bill prepared by the secretary of the interior, authorizing him to grant the reduction of the price of such lands agreed upon, does not render such contract void, or preclude the attorney from recovering the compensation expressed therein for his services. *Trist v. Child*, 21 Wall. (U. S.) 441.

3. **Former opinion herein, *ante*, p. 132, modified and adhered to.**

BARNES, J.

Our original opinion in this case, *ante*, p. 132, affirms the judgment of the trial court, and holds that the contract on which this action was based is valid and enforceable. A rehearing has been allowed; the case has been presented to the court by oral argument and on printed briefs, and the question now is shall we adhere to that opinion. It is stated therein: The contract in question, as construed by the plaintiff in the court below, is clearly

within the rule announced in the case of *Richardson v. Scott's Bluff County*, 59 Neb. 400. Using that expression as a foundation for his contention, counsel for the defendant now strenuously insists that our decision is wrong; that it should be set aside, and the judgment of the trial court reversed, because the contract is one to secure legislation, in other words, is a lobbying contract, and void as against public policy. We are convinced, however, that the statement above is incorrect, and is not fully justified by the record. The contract in question, set forth in the petition of the plaintiff in the court below, is as follows:

"The plaintiff and the defendant entered into an oral agreement, whereby the defendant employed the plaintiff to act for the defendant as his attorney and agent to take such action and render such services in the way of collecting facts, preparing and submitting to the Indians and proper authorities of the government of the United States arguments upon the merits of the claims of those holding lands purchased from the government, as aforesaid, for a reduction, and upon the justice and advisability of such reduction to and for all concerned as in the judgment of the plaintiff might be necessary and proper to secure from the government of the United States, and the said Indians, a rebate or reduction in the amount which, under the laws of the United States as they then stood, it was necessary to pay to the government of the United States to satisfy and extinguish the unpaid balance due the government of the United States for the said land under the terms of the said sale to the said defendant; that as a part of said agreement, and to induce the plaintiff to undertake the task of securing a reduction of, or rebate upon, the payment required to be made, as aforesaid, for the said land to the government of the United States, the defendant at said time orally agreed with, and promised to the plaintiff to pay to the plaintiff a sum of money equal to ten per cent. of the reduction or rebate which the plaintiff might secure of or upon the amount due the government as aforesaid, and the plaintiff at said time, as a part of said agree-

ment, orally promised and agreed to and with the defendant to undertake to secure a rebate upon or reduction of the amount remaining to be paid to the government for the said land as aforesaid; that it was further at the said time orally agreed by and between the plaintiff and the defendant that the sum of money to be paid by the defendant to plaintiff, as aforesaid, should be due and payable from the defendant to the plaintiff as soon as the said reduction or rebate was secured, and the government of the United States accepted the reduced amount in full payment for said land."

It is apparent from reading the contract that it is valid on its face, and one that the parties had a right to make. It contains no agreement, in terms, to procure legislative action, and it is quite clear from the record that no such action was considered necessary, or was in any way contemplated, by the parties thereto at the time it was made. It appears that, after the plaintiff below had obtained the consent of the Indians to a reduction of the price of their lands, as contemplated by the agreement, and when such consent was presented by the plaintiff to the secretary of the interior for his approval, that officer was also of opinion that he had the power to make the necessary orders to close up the transaction, under the authority of the act of congress of March 3, 1893, referred to in our former opinion; and it would seem that, when the secretary had approved of the reduction sought by the plaintiff, and agreed to by the Indians, the plaintiff had performed, as far as he could, the services contemplated by the parties when the contract was made. That such an agreement was perfectly legitimate, and the services thus performed were proper, there can be no doubt. It is shown that it was the secretary of the interior that originated the idea that additional legislation should be had, giving him further power, before making his final order approving of the agreement of the parties and granting the rebate in question. He therefore, on his own motion, and without suggestion of the plaintiff, prepared a bill for that purpose,

and had it submitted to congress. So it may be said that when, as stated in the contract, it was agreed that the plaintiff should take such action and render such services as in his judgment might be necessary and proper to secure such rebate from the government and the said Indians, it was not within the mind of either of the parties that legislative action would be required, and services of that kind were not intended to be contracted for.

In *Richardson v. Scott's Bluff County, supra,* the contract was: "To draft a bill, have it introduced in the legislature, explain it to and make arguments in its favor before committees of the legislature, and do all things needful and proper to secure its passage; such party to receive no compensation unless the passage of the bill, an appropriation act, is procured—if successful, the fees not fixed, but to be liberal." By a comparison of the contracts it clearly appears that they are not in the same class; that one is a legitimate contract for professional services, where legislative action is not contemplated or contracted for, while the other is an agreement to procure legislative action, to wit, the passage of an appropriation bill, by drafting the bill itself, having it introduced in the legislature, and doing all things necessary, including lobbying, to procure its passage. That such an agreement is a lobbying contract, is against public policy, and falls within the rule announced by the courts in the cases relied on by counsel for the defendant, there can be no doubt.

In order to dispose of the whole question, it only remains for us to consider the nature of the services performed by the plaintiff in carrying out his part of the agreement. It is insisted by counsel for the defendant that such services were illegal, opposed to considerations of public policy, and were void; that plaintiff cannot recover for such services, and by their performance the contract is brought within the rule last above stated. We are unable to give our assent to this view of the matter. It appears that the services performed by the plaintiff up to and including the time when he had secured the ap-

proval of the secretary of the interior to the agreement of the Indians granting a rebate or reduction of the price of the land in question were strictly legitimate and proper, and were such professional services as were evidently contemplated by the contract. It further appears that it was the secretary of the interior who first suggested a desire on his part for additional legislative authority before completing the transaction. The plaintiff did not frame the bill which was presented to congress, it was drawn by the secretary of the interior, who also procured it to be introduced before both houses of congress. It appears, however, that thereafter the plaintiff was called, or at least appeared, before a committee of each house, and explained the nature of the bill, and informed them of its purpose and effect. This service he performed in a proper manner, and it is not shown that he influenced, or attempted to influence, any member of congress in order to secure the passage of the bill. The services thus performed by the plaintiff, it would seem, were purely professional in their nature, and fall within the rule announced in *Trist v. Child*, 21 Wall. (U. S.) 441. They are within the category of preparing and presenting arguments, and submitting them to a legislative committee or other proper authority. And if the contract contained an express agreement to perform such services for a contingent fee, such agreement would not render it void. So we are of opinion that the conclusion announced by our former decision is right, but that the expression that the contract herein falls fully within the case of *Richardson v. Scott's Bluff County* should be, and it is hereby, disapproved. We are satisfied, however, with our modification of the rule in that case, and again give it our approval.

For the foregoing reasons, our former opinion is adhered to.

AFFIRMED.

IDA F. BOETTCHER, EXECUTRIX, ET AL. V. LANCASTER COUNTY.

FILED JUNE 8, 1905. No. 13,823.

1. **Clerks of Courts:** FEES. Before the act amendatory of section 3, chapter 28, Compiled Statutes, 1903, limiting the salary of clerks of the district court went into effect, a clerk had collected the fees for making complete records, but died before such records were made. At the request of his representatives, and after said act went into effect, his successor made up these records and received the fees therefor from such representatives. In an action by the county on the official bond of such successor, *held*, that he was properly chargeable with such fees.

2. ———: ———. Under said amendatory act, a clerk of the district court is required to account for the fees earned by him as a member of the board of commissioners of insanity.

3. ———: ———. Ordinarily, under said amendatory act, the clerk extends credit at his peril, and will be required to account for the fees earned by him for official services, whether the same are collected or not.

4. ———: ———. But the clerk is not required to account to the county for fees collected by him for services rendered by his predecessor before said act went into effect, although the act was in force when such fees were collected.

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

F. A. Boehmer and *Kennedy & Learned,* for plaintiffs in error.

James L. Caldwell, contra.

ALBERT, C.

This is an action on the official bond of Charles O. Boettcher, ex-clerk of the district court for Lancaster county. He was appointed to that office on the 14th day of September, 1899, to fill a vacancy caused by the death of Joseph H. Mallalieu, and held until the 4th day of January, 1900, when he surrendered it to his successor, who

had been elected at the preceding general election. The acts and omissions relied upon to show a breach of the conditions of the bond are, in substance, that Boettcher failed to account for the fees of said office as required by the provisions of section 3, chapter 28, Compiled Statutes, 1903 (Ann. St. 9029), which, so far as is material to the present controversy, are as follows: "If the fees of said clerk shall exceed sixteen hundred ($1,600) dollars per annum in counties having less than twenty-five thousand inhabitants, or if the fees shall exceed three thousand ($3,000) dollars per annum in counties having more than twenty-five thousand inhabitants and less than fifty thousand inhabitants, or if the fees shall exceed thirty-five hundred ($3,500) dollars per annum in counties having more than fifty thousand inhabitants and less than one hundred thousand inhabitants, or if the fees shall exceed five thousand ($5,000) dollars per annum in counties having more than one hundred thousand inhabitants, said clerk shall pay such excess into the treasury of the county in which he holds his office. Provided also, that the clerk of the district court of each county shall on the first Tuesday of January, April, July, and October of each year make a report to the board of county commissioners under oath showing the different items of fees received, from whom, at what time, and for what service, and the total amount of fees received by such officer since the last report, and also the amount received for the current year. Provided further, that if the county board of commissioners think necessary, said clerk may be allowed one deputy at a compensation not to exceed one-half that allowed his principal; and such other assistants at such a compensation and for such time as aforesaid board may allow, and that none of said clerks, deputies or assistants shall receive any other compensation than that accruing to their office." Judgment was given for the plaintiff and the defendants bring error.

In order to understand what follows, it should be kept in mind that the statutory provision above quoted is

amendatory of an act whereby the clerk was not required to account to the county for the fees earned by him, but was permitted to retain them, regardless of their aggregate amount, as his compensation for his official services. The amendatory act was passed without an emergency clause, and was approved April 3, 1899.

Among other items included in the judgment of the district court are fees, aggregating $1,150.94, for making up complete records which, in the due and orderly conduct of the clerk's office, should have been made up by Boettcher's predecessor, who had collected the fees therefor, but failed to do the work. Boettcher, during his incumbency, did this work, at the request of the representatives of his predecessor, and received therefor from them the amount of fees just mentioned. The defendants now contend that the court erroneously charged Boettcher with the fees he received for making up such records. In support of this contention, it is argued that it was no part of Boettcher's official duty to make up records, which should have been made up by his predecessor in the discharge of his duties, and that whatever fees Boettcher received for such services are for services rendered in his private capacity, and not in his capacity as clerk of the district court. Counsel in their brief say: The test is whether Boettcher, without receiving extra compensation therefor, would have been compelled by proper procedure to make up these records which should have been made up by his predecessor. That is not the test. Section 31, chapter 28, Compiled Statutes, 1903 (Ann. St. 9057), provides that a clerk of the district court, and other officers therein mentioned, may in all cases require the party for whom any service is to be rendered to pay the fees in advance, or give security. From this provision it seems clear that the test is not whether he could have been compelled, without compensation, to make up these records, but whether, upon the payment of his fees therefor, which was done in this case, he could have been compelled by proper procedure to perform such services. Section 444 of the code requires

the clerk to make a complete record of every case determined; section 445 provides that these records shall be made up in the vacation next after the determination of the cause. The statute fixing the time within which such records shall be made must be regarded as directory, because it not infrequently happens that, because of the shortness of the vacation, or other reasons, it is impossible for the clerk to make up a complete record of each case determined at the preceding term. But the duty of making such record, like the other duties of the office, is a continuing one that devolves upon each successive incumbent. It is one that belongs exclusively to the clerk of the district court. No such thing as a complete record of a cause made by a private party, under a contract, is known to the code. The duty of making such record is one that the clerk is required to perform at the request of any person interested, on receipt of his fee, and the fact that such duty should have been performed by a predecessor would be no ground for a denial of such request by the incumbent, nor would it make the services performed by him in that behalf any the less official. The services were performed by Boettcher during his incumbency. He was paid therefor by the representatives of his predecessor. The fees he received for such services are a part of the receipts of his office, and are clearly within the amendatory statute requiring him to account for all fees in excess of the salary thereby allowed.

The trial court charged the defendants with the fees received by Boettcher during his incumbency for his services as a member of the board of insanity, amounting to $66.30, and the defendants now challenge this charge. Section 17, chapter 40, Compiled Statutes, 1903 (Ann. St. 9606), provides for the organization of a board of insanity in each county, and that the clerk of the district court shall be *ex officio* a member thereof. A subsequent section fixes the compensation of members of this board. This act was in force long before the amendatory act regulating fees of the clerk of the district court, and requiring him to

account therefor, was enacted. The obvious purpose of the amendatory act is to require the clerk to account to the county for the income of his office over and above a certain sum. He is required to account for fees received for official services rendered by virtue of his office. His services as a member of the board of insanity are rendered, and the fees for such services are received by him, by virtue of his office as clerk. *State v. Whittemore*, 12 Neb. 252, seems to be in point. In that case it was sought to compel a county clerk to make a report of all fees received by him by virtue of his office. The county of which he was clerk contained, at that time, less than 8,000 inhabitants, and he was therefore also *ex officio* clerk of the district court. The question arose whether he could be required to account, as county clerk, for the fees received by him as clerk of the district court. The court held that he must account for such fees. The county clerk, in certain counties, is *ex officio* register of deeds, yet it has never been seriously questioned that the law requiring such clerk to account for the fees of his office required him to account for the fees received as register of deeds. We think the defendants were properly charged with the fees received for services rendered as a member of the board of insanity.

It appears from the record that at the expiration of his term fees amounting to $1,344.25, which Boettcher had earned during his incumbency, were uncollected, and the question now arises whether the defendants are chargeable with such fees. The amendatory statute requiring a clerk to account for the fees of his office over and above a specified salary gives the county a pecuniary interest in the services of the clerk and the earnings of his office. To the extent of that interest, he is the agent of the county and is without authority to extend credit. On the contrary, as we have heretofore seen, he has a right to demand his fees in advance, and since the enactment of the amendment giving the county a pecuniary interest in the income of the clerk's office, it is not only the right of the clerk,

but his duty, to require payment or security in advance of the rendition of his official services. It would be an anomalous holding which would permit one acting with respect to the same subject matter, in his own behalf and as agent for another, to deal more generously with himself than with his principal.

The rule laid down in *Sheibley v. Dixon County,* 61 Neb. 409, is that a county clerk must account for all fees earned by him, whether collected or not. The controversy in that case arose from an item for which the clerk had made no charge. It was contended on behalf of the clerk that, having received no fee for the services, he should not be called upon to account for the same. The court in disposing of that contention said: "This is hardly a tenable position. The law cast upon him the duty of collecting this fee, and if he did not do so, the fault was with him, and he should be compelled to account for the same." There is no great difference in principle between making no charge for services and extending credit therefor whereby the fees are lost. We are clearly of the opinion that it was the duty of Boettcher to collect these fees, and to the extent that he failed to do so, he and his sureties are liable on his official bond. Whether special circumstances might excuse a clerk for a failure to collect his fees is a question which does not arise in this case.

It appears that some of these fees were collected by Boettcher after his term of office had expired. The question is raised whether his sureties are liable for the fees thus collected by him. But the view we have taken with respect to the collection of fees renders it unnecessary to discuss this proposition because, if they were liable for all the fees uncollected at the expiration of his term of office, their liability should not be affected by the fact that he afterwards collected some of these fees.

Another item with which defendants claim they are not properly chargeable is made up of certain fees earned by Boettcher's predecessor before the amendatory act regulating the salary of clerks of the district court took effect,

and which were collected by Boettcher. We agree with the defendants in their contention that Boettcher is not required to account to the county for these fees. While it is true they were received by him during his incumbency, yet, by the provisions of the statute under which they were earned, they belong exclusively to his predecessor, and the liability of the defendants on the bond as to such fees is to his predecessor and not to the county. *Pugh v. Evans,* 31 Mo. App. 290; *Lycett v. Wolff,* 45 Mo. App. 489; *Allen v. Cowan,* 96 Mo. 193; *Peet v. White,* 43 Ia. 400. As was said in the first case cited, no public interest would be served by allowing money earned by the former clerk, which was within the limits of his salary, to go to the county. But it does not appear that these fees earned by Boettcher's predecessor were charged to the defendants by the trial court.

After allowing credit for the amount allowed the clerk by law, the court found a balance due the county of $2,700. The items which we have heretofore found properly chargeable to the defendants aggregate $2,561.49. This amount, with accruing interest, would justify the finding of the trial court, at least so far as the defendants are concerned.

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

A. S. MAIN V. SHERMAN COUNTY ET AL.

FILED JUNE 8, 1905. No. 13,836.

Expert Witness: COMPENSATION. One testifying as an expert on a subject requiring special knowledge and skill, in the absence of a special contract, is entitled only to the statutory fee.

ERROR to the district court for Sherman county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Mathew, for plaintiff in error.

Joseph Pedler, contra.

ALBERT, C.

In this action the plaintiff, who is a duly licensed physician, was called by the prosecution and testified as an expert witness in a prosecution for homicide in the district court for the defendant county. He was paid the statutory witness fees, but afterwards filed a bill with the county board for additional compensation, claiming that he was entitled to such additional compensation because his testimony was not that of an ordinary witness, but such as required special knowledge and skill. His claim was rejected, and, on an appeal to the district court, a general demurrer to his petition was sustained, and judgment given accordingly.

In our opinion, the demurrer was properly sustained, and our opinion is based on no technical objection to the petition, but on the general proposition that one testifying as an expert on a subject requiring special knowledge and skill, in the absence of a special contract, is entitled only to the statutory fee. We are fully aware that the authorities are divided upon this proposition. Mr. Rogers in his work on Expert Testimony (2d ed.), sec. 188, says:

"There can be no doubt that professional men are not entitled, in this country, to claim any additional compen-

sation when testifying as ordinary witnesses to facts which happen to fall under their observation. But another question arises, when they are summoned to testify as to facts of science with which they have become familiar by means of special study and investigation, or to express opinions based upon the skill acquired from such researches, as to conclusions which ought to be drawn from certain given facts. Whether they can be compelled to testify in such cases, when no other compensation has been tendered than the usual fees of witnesses testifying to ordinary facts, is a point upon which the cases are not in harmony. In this country the cases are nearly balanced, and the question must be regarded as still an open one, although the weight of authority rather inclines to the theory that the expert may be required to answer without additional compensation."

We think it is hardly accurate to say that the authorities are nearly balanced. On careful examination of the authorities it will be found, we think, that, after the elimination of the cases resting on peculiar constitutional or statutory provisions, and on local customs, the decided weight of authority supports the conclusion reached by us. The following are some of the cases sustaining our conclusion: *Dixon v. People,* 168 Ill. 179, 39 L. R. A. 116; *Flinn v. Prairie County,* 60 Ark. 204, 27 L. R. A. 669; *Ex parte Dement,* 53 Ala. 389, 25 Am. Rep. 611; *State v. Teipner,* 36 Minn. 535; *Summers v. State,* 5 Tex. App. 365, 32 Am. Rep. 573; *Larimer County Commissioners v. Lee,* 3 Col. App. 177. It has been held that the state may require the services of its citizens, without compensation. *Bennett v. Kroth,* 37 Kan. 235, 1 Am. St. Rep. 248; *West v. State,* 1 Wis. *269; *Ex parte Chamberlain,* 4 Cow. (N. Y.) 49. Nor do we think the rule embodied in that conclusion so oppressive as it might appear at first glance. The benefits of civil government, of necessity, carry with them certain duties more or less onerous to the citizen. It not infrequently happens that the citizen is compelled to serve the state at a pecuniary loss. When an officer armed

with a warrant commands the assistance of a citizen in making an arrest, the latter, however valuable his time, is not permitted to stand and bicker for fees. When called to serve as a juror, a citizen will not be heard to complain that the compensation fixed by law is inadequate. As to compensation in such matters, the scale is fixed without regard to calling or countenance, and the common laborer and the man of large affairs, rich and poor, learned and unlearned, are on equal footing. As was said in the *Dement* case, *supra,* quoting Ordroneaux, Jurisprudence of Medicine: "The administration of justice being a source of mutual benefit to all the members of the community, each is under obligation to aid in furthering it, as a matter of public duty. As an *ordinary* witness or a juror, every competent citizen may be summoned by due process of law to appear, and render personal service in court, without right on his part to a special compensation for so doing. His time is, *quoad hoc,* claimed by the public as a tax paid by him to that system of laws which protects his rights as well as those of others."

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

DANIEL L. JOHNSON, APPELLEE, V. BENJAMIN D. HAYWARD ET AL., APPELLANTS.*

FILED JUNE 8, 1905. No. 13,840.

1. **Real Estate Agents:** CONTRACT: STATUTE OF FRAUDS. A contract whereby one person employs an agent to negotiate for the purchase of real estate is not a contract for the creation of an estate

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

or interest in land, or trust or power over or concerning lands, etc., within the meaning of the statute of frauds.

2. **Principal and Agent:** TRUSTS. Where one employed to act as the agent for another in the purchase of real estate becomes the purchaser himself, he will be considered in equity as holding the property in trust for his principal, although he purchased with his own money, subject to reimbursement for his proper expenditures in that behalf.

3. **Title to Land:** EQUITY. The maxim "prior in time, prior in right," applied in a contest between rival claimants under equitable titles to real estate.

4. **Evidence** examined, and *held* sufficient to sustain the findings and decree of the trial court.

APPEAL from the district court for Howard county: JAMES N. PAUL, JUDGE. *Affirmed.*

T. T. Bell, F. J. Taylor and *M. B. Reese,* for appellants.

D. L. Johnson, A. A. Kendall and *O. A. Abbott, contra.*

ALBERT, C.

In this suit the plaintiff seeks to have a trust declared and enforced with respect to certain real estate. The pleadings are unnecessarily voluminous, covering some 35 pages of the record. Reduced to their simplest form, the ultimate facts relied upon by the plaintiff to entitle him to the relief sought are: That the defendant, Benjamin D. Hayward, while under an oral contract of agency with the plaintiff to negotiate on behalf of the plaintiff for the purchase of certain real estate, negotiated therefor and bought the same for his own use and benefit, taking the title thereto in the name of the defendant Day, his nephew, who later conveyed to the defendant Mary F. Hayward, the wife of defendant Benjamin D. Hayward, in trust and for the use of her said husband; that afterwards, the defendants Mary F. Hayward and Benjamin D. Hayward borrowed $1,200 of the defendant Paul, and as security therefor deposited the conveyance of the land from Day to Mary F. Hayward, which had not been re-

corded; afterwards, Benjamin D. Hayward, acting as the agent of his wife, entered into a written contract with the defendant Mathiason for a sale of the land to the latter for $2,700, receiving on the purchase price $500; that afterwards, Mathiason entered into a written contract with the defendant Kohler for the sale of the land to the latter for $3,000, upon which there was paid $500. The court found for the plaintiff, took an account of the expenditures and charges of defendant Benjamin D. Hayward in the premises, of the amount due on the Paul mortgage, and the amount due Kohler on account of the $500 paid by him on his contract with Mathiason, and entered a decree requiring a conveyance of the land to the plaintiff upon payment of the amount found due Benjamin D. Hayward, and made such order for the distribution of the proceeds of said payment as would protect the defendants Paul and Kohler as to the money by them respectively advanced on the land. The case is here on defendant's appeal, the defendant Paul not participating.

The contract of agency upon which the plaintiff relies rests wholly in parol, and no part of the consideration which the agent Hayward paid for the land was advanced by the plaintiff, and the principal contention of the defendants in this case is that it falls within the provisions of section 3 of our statute of frauds (ch. 32, Comp. St.), which is as follows: "No estate or interest in land, other than leases for a term not exceeding one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." Among other authorities supporting this contention are the following: *Burden v. Sheridan,* 36 Ia. 125; 2 Story, Equity Jurisprudence (13th ed.), secs. 1201, 1201*a;* 1 Perry, Trusts (5th ed.), sec. 135. The Iowa case just cited deserves more than a passing notice, because it is

hardly distinguishable on principle from the case at bar. As in this case the contract of agency was oral, and the principal had advanced no part of the consideration for the land. The court held that the contract, being oral, came within the section of the statute of frauds of that state corresponding with that section of our own statute just quoted, and that, no part of the consideration having been paid by the principal, the case did not fall within another provision, which provides that the section referred to shall not apply where the purchase money, or any portion thereof, has been received by the vendor. In the absence of an express statutory provision, part payment of the purchase price in and of itself is not regarded as such part performance of an oral contract as will relieve against the statute. It seems to us that in the defendants' argument, as well as in the authorities cited in support of it, there is a failure to distinguish between those cases where an estate or interest in land, or some trust or power over or concerning lands, is one of the considerations of the contract, and is acquired as a direct result thereof, and those where such estate, interest, trust or power is not such consideration, and is not acquired as a direct result of the contract, but which arises as a remote result of the contract and from an abuse of the relations thereby established. It is not claimed by the plaintiff that at the time he made his contract with Hayward he thereby acquired any title, legal or equitable, to the land, or that any trust or power over or concerning the land was thereby created. On the contrary, the most he claims for that contract is that it created between him and Hayward the relation of principal and agent. The land itself, or any interest or trust or power over and concerning the land, was no part of the consideration moving from either party to the other. The consideration which the plaintiff agreed to pay was the value of Hayward's service, and the consideration moving from Hayward was the service he undertook to render as the plaintiff's agent. That an oral contract creating an agency, although for the purchase or sale of

real estate, is valid, is clearly established by the authorities. In one of the head-notes to *Griffith v. Woolworth,* 28 Neb. 715, the rule is laid down that "where a land owner employs an agent to procure a purchaser for his real estate upon certain terms and conditions, the contract of employment need not be in writing." This was regarded as the settled law of this state up to the time of enactment of section 74, chapter 73, Compiled Statutes (Ann. St. 10258), which took effect April 12, 1897, requiring every contract for the sale of land between the owner thereof and any broker or agent to sell the same to be in writing. There is no similar provision in regard to contracts for the purchase of real estate by agents. In the absence of a statute like the above, there is no such difference in principle between a contract with an agent to negotiate a sale and one to negotiate a purchase, as would make one fall within section 3 of the statute of frauds, and the other without. That the former does not fall within the statute of frauds was the view of this court in *Griffith v. Woolworth, supra,* and this view was recognized as sound, and acted upon by the legislature by the enactment of sec. 74, *supra,* otherwise there was no necessity for the enactment of that section. That an oral contract for the employment of an agent to buy or sell land is not within the statute of frauds is settled by a long line of authorities, which are collated in 29 Am. & Eng. Ency. Law (2d ed.), 892.

If then it be competent, and we are clearly of the opinion that it is, to establish the contract of agency by parol testimony, the question then arises whether parol testimony is competent to establish the trust in this case, or whether the plaintiff will be relegated to his remedy at law for damages for breach of contract. Section 4 of our statute of frauds expressly provides that section 3 shall not be construed to prevent any trust from arising or being extinguished by implication or operation of law. A similar provision exists in all the states. This provision includes all resulting and constructive trusts, or it might be said,

it includes all trusts which are not created by the express terms of a contract. In this case, the plaintiff is not seeking to enforce an express trust. He is seeking to enforce what he claims is a trust which arises or results from an abuse of the confidential relations existing between him and the defendant Hayward, by virtue of their contract of agency. The rule is well settled that an agent instructed to purchase property for his principal will not be permitted, without his principal's knowledge and consent, to become the purchaser of the same property for himself; and if he makes such purchase, he will, although he purchased with his own money, be considered as holding the property in trust for his principal, and the latter upon repaying or tendering him the amount of the purchase price and his reasonable compensation, may by proper proceeding in equity compel a conveyance to himself. Mechem, Agency, sec. 457.

The case of *Rose v. Hayden,* 35 Kan. 106, like this case, was brought to enforce a trust in property which the plaintiff had bought in his own name and for his own use, while bound by an oral contract to purchase it for the plaintiff. The plaintiff had paid no part of the consideration. There the court discussed the statute of frauds as affecting cases of this kind at length, and held that the statute does not apply, and that the trust should be enforced. The case contains an interesting review of the leading authorities in this class of cases. Among the authorities cited is *Jenkins v. Eldredge,* 3 Story (U. S. C. C.), 181, 289, which was reported after the text from Story, *supra,* was written. In that case the learned judge says:

"It appears to me, that here a confidential relation of principal and agent did exist; and that being once shown, it disables the party from insisting upon the objection, that the trust is void, as being by parol. The very confidential relation of principal and agent has been treated, as for this purpose, a case *sui generis.* It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain, or create an interest adverse

to that of his principal in the transaction; and that fraud creates a trust, even when the agency itself may be, nay must be, only by parol. *Bartlett v. Pickersgill,* 1 Eden (Eng.), 515; 1 Cox, Ch. (Eng.) 15; 4 East (Eng.), 577, note, and *Leman v. Whitely,* 4 Russ. (Eng.) *423, are, I admit, against this doctrine—not wholly, but to a limited extent; for the latter case excludes a case of fraud. But then *Lees v. Nuttall,* 1 Russ. & M. (Eng.), 53, expressly decides, that if an agent employed to purchase an estate, purchase for himself and on his own account, he becomes a trustee for the principal. In that case the whole agency and trust was made out by parol, and the purchase was from a third person. *Carter v. Palmer,* 1 Bligh (Eng), 397, 418, goes the full length of the same proposition."

Section 4 of our statute of frauds, as we have seen, expressly excepts from the operation of section 3 trusts which arise by implication or operation of law. In our opinion, the trust sought to be enforced in this case falls within that exception, and should be enforced. We are aware, as will be seen from the foregoing, that there are authorities holding a contrary doctrine, but the reasoning upon which they are based is unsatisfactory, and contrary, we think, to the fundamental maxims of equity.

It is insisted that the evidence is insufficient to sustain a finding of any contract of agency between the plaintiff and Hayward. To set out the evidence on this point would unduly extend this opinion, and after set out, the most that could be urged in behalf of the defendants would be that it is conflicting. The witnesses were before the trial court; that gave such court advantages in weighing their testimony which we do not possess, and even without allowing for that advantage, we should hesitate, in view of the entire record, to hold that the evidence is not sufficient to sustain the finding. In this connection our attention is called to the fact that the plaintiff leased the land from the defendant Day after the latter had acquired the legal title. This fact, if unexplained, would

tell heavily against the plaintiff. But his explanation is that Hayward told him that Day had offered the owners $1,500 for the land, that being $100 more than the plaintiff had offered; that his offer had been accepted, and that he had got the land, when, in truth, Day's purchase had been negotiated by Hayward, and the land was sold to him on the exact terms plaintiff had authorized Hayway to buy it for him. Believing that the land had been sold to Day in good faith, plaintiff leased the land from Day. This explanation is not unreasonable, and the fact of the leasing, as thus explained, is not inconsistent with plaintiff's present claim.

It is also urged that at the time the contract of agency was made, plaintiff knew that Hayward had the land for sale as the agent of the owner. It is not quite clear that Hayward was the agent for the owner of the land, but it does appear that he had listed it for sale at the request of a company which apparently was acting as agent of the owner, and plaintiff knew that fact. But it also appears that at the time plaintiff employed Hayward, he asked him, pointedly, whether there was any reason why he could not act for him in the purchase of the land, and was assured by Hayward that there was none. In the face of this statement we think the plaintiff had a right to assume that there was nothing in the terms on which the lands were listed with Hayward that would be inconsistent with Hayward's acting for him in negotiating a purchase of the land. The mere listing of property with a broker for sale does not necessarily constitute the broker the owner's agent to make the sale; under such circumstances the broker is frequently, and with perfect propriety, the agent, not of the owner, but of the purchaser.

It is strenuously urged that both Day and Mrs. Hayward are innocent purchasers, and took their respective titles in good faith, and not in trust for Benjamin D. Hayward. Day never advanced but $100 of the purchase price. He never saw the land, and his contract therefor

was kept in the safe of his uncle Benjamin D. Hayward When the time came to take his deed, he decided not to take the land, and his $100 was returned to him in the form of a check from his said uncle. About one month later, he quitclaimed to Mrs. Hayward, his aunt, and the wife of Benjamin D. Hayward. As we have seen, the $100 paid Day for his relinquishment came from his uncle; the rest of the money required for Mrs. Hayward's purchase was borrowed on the joint note of herself and her said husband; the money thus raised was deposited in the bank to the credit of the husband, and checked out to pay for the land by him and in his own name. In short, the husband, Benjamin D. Hayward, seems to be the central figure in all these several family transactions. From all the facts and circumstances we think the trial court was warranted in finding that Day and Mrs. Hayward were mere instrumentalities employed by Benjamin D. Hayward to hold the beneficial title to the property to his own use.

Another contention of the defendants is that Mathiason and Kohler, respectively, are innocent purchasers, and are entitled to hold the land as against the plaintiff. So far as the money paid by them, or either of them, is concerned, they are fully protected by the decree. Mathiason had already transferred his interest to Kohler, and the decree affects Kohler only in so far as it requires the conveyance of the land to the plaintiff, instead of to him. The decree provides for the payment to him of the amount he had invested in the land. But neither Mathiason nor Kohler come under the general rule applicable to innocent purchasers. Neither of them had any legal title. Whatever title they had was purely equitable. It is a familiar rule of equity that where the equities are equal, that which is prior in point of time shall prevail. Elaborating on that rule in *Boone v. Chiles,* 10 Peters (U. S.), 176, the court say:

"A purchaser with notice may protect himself under a purchaser by deed without notice; but cannot do it by

purchase from one who holds or claims by contract only; the cases are wholly distinct. In the former, the purchaser with notice is protected; in the latter, he has no standing in equity, for an obvious reason—that the plaintiff's elder equity shall prevail, unless the defendant can shelter himself under the legal title, acquired by one whose conscience was not affected with fraud or notice, and who can impart his immunity to a guilty purchaser, as the representative of his legal rights, fairly acquired by deed, in such a manner as exempts him from the jurisdiction of court of equity."

To the same effect are the following: *Smith v. Orton,* 18 L. ed. (U. S.) 62; *Woods v. Dille,* 11 Ohio, 455; *Anketel v. Converse,* 17 Ohio St. 11; *Worden v. Crist,* 106 Ill. 326.

As the plaintiff in this cause was first in time, under the well known maxim of equity, he must be held to be first in right.

In our opinion, the decree of the district court is just and equitable, and ought to be affirmed.

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed April 5, 1906. *Judgment of affirmance adhered to:*

A broker whose undertaking merely is to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meet, is in reality only a middleman, whose duty is performed when the buyer and seller are brought together.

DUFFIE, C.

Because of Johnson's knowledge that Hayward was acting for the Fidelity Trust Company of Kansas City,

and had this land listed on his books when the offer of $1,400 was forwarded to the company, we had doubts whether Johnson ought to rely upon Hayward's representing him in the transaction, and therefore recommended a rehearing in the case. If, at the time Johnson employed Hayward, he knew that the latter was already acting as agent for another in the sale of this land, then he had knowledge that Hayward could not properly act for him in the capacity of agent, and ordinarily would have no right to rely upon his doing so. It was upon this ground alone that a rehearing was allowed, and not because we had any doubts of the correctness of our former opinion upon the other questions involved. In order that this phase of the case may be understood, it will be necessary to state some facts not set out in the former opinion.

In 1900 the plaintiff's wife owned the northeast quarter of section 15, township 16, range 10 west, in Howard county, Nebraska. He bought of the owners of the fee the adjoining northwest quarter of section 14, 145 acres of which was subject to a mortgage held by one Newton. This mortgage was in process of foreclosure, a decree having been entered for $1,577.14, a sum in excess of the real value of the land at that date. Johnson desired this land, and was seeking the owner of the mortgage for the double purpose of saving the expense of a sale on the decree of foreclosure and of purchasing the mortgagee's right in the decree at what would be the fair cash value of the land. He was not able to get into communication with the parties representing Newton, and a sale under the decree took place, Newton being the purchaser and receiving the sheriff's deed. The conditions then existing were these: Johnson's wife owned the northeast quarter of section 15, Newton the west 145 acres of the northwest quarter of section 14 adjoining her on the east, and Johnson the east 15 acres of the northwest quarter of section 14, Newton's 145 acres lying between the land owned by Johnson and Mrs. Johnson. Johnson desired the whole half-section, and in order to obtain time in

which to find and communicate with Newton's representatives, Johnson set out to appeal from the decree of confirmation in the foreclosure case. Hayward, who had been his agent in all his other matters in Howard county up to this time, had been appointed guardian *ad litem* for one of the minor defendants in the foreclosure proceedings, and, knowing this, Johnson employed another attorney, one Nunn, to prosecute his appeal. Sometime after the foreclosure sale, Johnson and Hayward were driving in the country, and, the matter of the foreclosure coming up, Hayward informed Johnson that he was not attorney for the plaintiff, and thereupon Johnson employed him to assist Nunn in the appeal to the supreme court. This conversation and employment is denied by Hayward, but is conclusively established by his own letters to Johnson, upon whom he drew for funds to defray the expense of the appeal, as well also as by the testimony of Nunn. Under date of January 9, 1901, Hayward wrote Johnson: "There are no appeal bonds here * * * but if you desire I will prepare one and send to you." January 18 he wrote: "Bond in case of *Newton v. McCracken* received, and filed as of this date. Also approved." February 12 he wrote as follows: "In case of *Newton v. McCracken* the transcript has been made and served. * * * You can send on these costs, and we will get the matter started." February 27 he wrote: "Do you want the bill of exceptions made in *Newton v. McCracken?* It will have to be done on the 10th inst. Wire answer tonight." March 20 he wrote the following: "I will file the case of *Newton v. McCracken* in the supreme court at once, and have drawn on you for $20, for costs, as per your telegram."

That he was acting as Johnson's attorney in the appeal cannot be doubted, however strongly he may deny the fact. Previous to the time when the appeal should be perfected, Johnson, who lived in Omaha, was called to Alaska, and did not return until sometime in August. Hayward, who had received the money to perfect the ap-

peal, neglected to file the papers, and the appeal failed. A deed was issued to Newton, the purchaser at the sheriff's sale. After Johnson's return from Alaska, he learned from Hayward that the appeal had not been perfected, and also that the Fidelity Trust Company of Kansas City had charge of the land. During all the time previous to this, Hayward had been Johnson's attorney in his efforts to secure this land, and to find someone who had authority to deal with it. On learning that the land was in the hands of the Fidelity Trust Company, Johnson asked Hayward if he was in a position to represent him in the purchase of the land, and Hayward replied that he was. Johnson then said to him: "Make them an offer of $1,400. Send it by wire, and get a reply this afternoon before I leave for Omaha." Hayward wired the offer to the Fidelity Company, as follows: "9-21-01. Have offer $1,400 cash McCracken land. Wire answer today." The Fidelity Company wrote in reply as follows: "We have your telegram of today reading 'Have offer $1,400 cash McCracken land. Wire answer today.' We immediately upon receipt of your wire wired the owner advising him of the offer, and recommending acceptance. It is possible we may get a reply from him before the close of business, which is at one o'clock on Saturday; and if so, we will promptly advise you. If, however, the message is not received until later, we will advise you promptly Monday morning, or as soon as the message comes to hand." Newton, in the meantime, had become insane, and nothing further was done in the matter until November 19, 1901, when Fred C. Gowing, guardian for Newton, wrote the Fidelity Company as follows: "023,906. McCracken, held by Hiram C. Newton of Troy, N. H., I find needs attention, as I have just become his guardian as he has had a long sickness and has become insane. If the party will take the property now at the $1,400, I will forward the necessary papers, if you will tell what form will be required." November 21, 1901, the Fidelity company wrote Hayward asking if it would be possible to secure a re-

newal of the offer of $1,400 cash for the property, and advising him that the offer would be accepted. And on the 26th of November Hayward wired the Fidelity Company as follows: "Have sold McCracken, $1,400 cash. Wire acceptance." In the meantime, and on October 3d, 1901, Hayward had written Johnson as follows: "D. L. Johnson, Omaha, Nebraska. I have had no reply thus far relative to the offer on the McCracken land. I wrote them again Monday, and expect an answer of some kind soon. I do not understand the delay. As soon as I hear I will write you. Yours, B. D. Hayward."

Hayward now says that the second offer made the Fidelity Trust Company of $1,400 for the land was made on behalf of Day, but in the meantime he had led Johnson to believe that he was acting for him in the purchase. It clearly appears from the facts above stated that Hayward had no authority to make a sale of this land. At the most his employment by the Fidelity Trust Company was to act as a middleman to secure offers on the land and to bring the parties together.

Let us see how the matter stood when the pretended sale was made to Day. Newton had become insane, and a guardian of his person and estate had been appointed. This terminated the agency of the Fidelity Company for Newton. The guardian employed that company to obtain a renewal of the offer of $1,400 for the land, and the company employed Hayward for the same purpose. The company and Hayward were not agents in the full sense of that term; they were middlemen to secure from a former proposed purchaser the renewal of a former offer made for the land. They come fully within the definition of Chief Justice Dixon in *Stewart v. Mather*, 32 Wis. 344, where he says: "A broker whose undertaking merely is to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meet, is in reality only a 'middleman,' whose duty is performed when the buyer and seller are brought together." The case comes fully within the rule

announced in that case and followed in *Barry v. Schmidt*, 57 Wis. 172, 46 Am. R. 35. But if we admit that Hayward was agent of the Fidelity Company in the fullest sense of that word, still he had been employed by Johnson long prior to his engagement by the company, and his services and his duty were due to Johnson, and not to the company who afterwards employed him in the same matter. It is true that Hayward, if his employment by the company required of him the exercise of any judgment relating to the price to be asked for the land or the character of the proposed purchaser, should have informed it of his employment by Johnson to purchase for him; but that Johnson owed the company any such duty, or that he should have refused to continue Hayward as his agent on learning that the land had been listed with him, is not demanded by any rule of law or morals. Hayward, as Johnson's agent, owed him the duty of honesty and fidelity in the business for which he was employed. If he wished to become owner of the land, he should at least have informed his principal that he could no longer act for him in the matter, and place him in a position where he could have protected his interest by his own efforts or by employing another agent, and we doubt, even had he renounced his employment, whether the law would have allowed him to become a purchaser of the property without Johnson's consent, for, as well said by Judge Sanborn in *Trice v. Comstock*, 121 Fed. 620: "Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." We recommend that the former opinion be adhered to.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former opinion is adhered to.

AFFIRMED.

JOHN F. ANTHES, APPELLEE, V. JOHN SCHROEDER ET AL., APPELLANTS, JOHN S. THOMPSON, APPELLEE.

FILED JUNE 8, 1905. No. 13,845.

1. **Equity.** The mere fact that a creditor has been persistent and determined in his efforts to collect his debt, and has resorted to unnecessarily expensive and vexatious means to that end, affords no just ground for denying him equitable relief in the enforcement of his debt.
2. **Estoppel.** Where one by his conduct induces another to act on the supposition that certain conditions exist, he will not be heard to deny the existence of such conditions where the other would be prejudiced by such denial.
3. **Subrogation.** Ordinarily, a junior mortgagee is not entitled to be subrogated to a lien which did not exist when his mortgage was taken.
4. **Evidence** examined, and *held* to show sufficiently that the lien to which plaintiff seeks to be subrogated existed at the time his mortgage was taken.
5. **Laches.** The facts disclosed by the record *held* insufficient to show that the plaintiff has been guilty of such laches as to deprive him of his right to be subrogated to a superior lien.

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

John C. Hartigan, for appellants.

William M. Clark and *George H. Hastings,* for appellee Anthes.

M. A. Hartigan, for appellee Thompson.

ALBERT, C.

This suit as originally brought involved the question of marshaling assets and subrogation. Plaintiff was denied

relief in the court below, and appealed to this court, where the decree of the district court was reversed. In the opinion, which is reported in 68 Neb. 370, it was definitely decided that the plaintiff was entitled to subrogation. In that opinion will also be found a somewhat extended statement of the facts necessary to an understanding of the case.

On the second trial in the district court the case was submitted on the same petition, but by the subsequent pleadings in the cause, filed after it had been remanded to the district court, certain new issues were raised, which will sufficiently appear in the discussion which follows. A second trial in the district court resulted in a finding for the plaintiff, and a decree subrogating him to Thompson's mortgage lien on the Jefferson county land, and the case is now here on an appeal from that decree.

One defense urged at this time is that the conduct of the plaintiff in his efforts to enforce his debt has been so inequitable and unconscionable as to deprive him of any right to equitable relief. On that proposition, like every other, we are limited to the record. While it would seem from the record that the plaintiff might have attained his object with less litigation, and at less expense to himself and his debtor, the most that can be said of it is that it shows a persistent and determined effort, perhaps not always wisely directed, on the part of the plaintiff to collect his debt, but does not, so far as we are able to learn, bring him within any rule of equity which would deny him the use of the only remedy left for the enforcement of what must be admitted to be a lawful claim.

Another defense urged is that the plaintiff by reason of laches has lost his right to claim subrogation. We have been referred to no laches of which he has been guilty since this court held that he was entitled to subrogation, nor does it appear that the alleged laches have been in any way prejudicial to third persons. Where the rights of third parties had not intervened, subrogation was allowed after a delay of ten years, in *Home Investment Co. v. Clarson*, 15 S. Dak. 513; of seven years, in

Kinkead v. Ryan, 64 N. J. Eq. 454; of four years, in *Darrow v. Summerhill,* 24 Tex. Civ. App. 208.

It is insisted that Thompson's Jefferson county mortgage was given after the plaintiff's mortgage on the Clay county land, and that the plaintiff is not entitled to be subrogated to a lien which did not exist when his mortgage was taken. The rule invoked is sound (Sheldon, Subrogation, sec. 67), but the evidence, we think, does not bring this case within that rule. In reaching that conclusion we have assumed, as it was assumed on the argument, that plaintiff's renewal note and mortgage taken January 2, 1896, places him in no better plight than he was in by virtue of his original mortgage, which is dated March 29, 1905. Schroeder testifies positively that the Jefferson county mortgage to Thompson was given after the mortgage to the plaintiff, referring of course to the original mortgage. This evidence is not only contradictd by the plaintiff, but is considerably discredited by the facts and circumstances surrounding the entire transaction. When the negotiations for the loan from Thompson were pending, the plaintiff held the title to the Clay county land, Schroeder having merely a contract with him for its purchase. The arrangement appears to have been that, to enable Schroeder to make the loan from Thompson, the plaintiff was to convey the fee title to him, and take back a second mortgage for the balance of the purchase price. This mortgage was to be junior to Thompson's. Thompson at first intended to take the Clay county land alone as security, but before closing the loan insisted upon and obtained a mortgage on the Jefferson county land. The mortgage on the Jefferson county land, although dated one day later than the mortgage on the Clay county land, was a part of the same transaction. It would seem from the record that the two mortgages were delivered at the same time, and before the money realized on the loan was paid. Plaintiff's mortgage bears even date with the mortgage on the Jefferson county land. Taking the evidence on this point as a whole, and the nature and object of the several

transactions, we are not required to indulge any violent presumptions in favor of the findings of the trial court to sustain its findings against the defendants on this point.

Another defense strenuously urged is that, at the time the mortgage on the Jefferson county land was given, it was orally agreed between Schroeder and Thompson that it should be effective only in case the Clay county land proved insufficient to satisfy the debt. We think the trial court very properly held against the defendants on this proposition. There is nothing on the face of the mortgage on the Jefferson county land to indicate that it was not security for the Thompson loan as fully and effectively as was the mortgage on the Clay county land, given to secure the same debt. Plaintiff testified that it was understood between him and Schroeder that the Thompson loan should be secured by mortgage on both these tracts of land, and that he was thereby induced to convey the Clay county land to Schroeder and take a second mortgage for the remainder of the purchase price. By giving two mortgages to Thompson, without incorporating the alleged oral agreement in either of them, Schroeder effectively gave it out to the world that the Clay county land and the Jefferson county land were both and alike liable for the satisfaction of the debt. After the plaintiff had acted upon conditions as they were made to appear to be by Schroeder's own act, Schroeder cannot now be heard to urge a secret agreement between himself and Thompson, the effect of which would be to deprive the plaintiff of any right to which he was entitled by virtue of the conditions as they were thus made to appear. In other words, having induced the plaintiff to act on the supposition that certain conditions existed which would give the plaintiff a right to be subrogated to the lien of Thompson, he cannot now be heard to say that, by virtue of a secret agreement with Thompson, such conditions did not exist.

In our judgment the decree of the district court ought to be affirmed, and it is so recommended.

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

ADOLPH ROSENBERG V. JOHN C. SPRECHER.*

FILED JUNE 8, 1905. No. 13,801.

1. **Tenancy:** HOLDING OVER: PRESUMPTION. Where a tenant holds over his term, the law presumes a continuation of his original tenancy for another like term, but this presumption is not conclusive.

2. ———: ACTION. To sustain an action for the use and occupation of real estate, the relation of landlord and tenant must exist between the parties by agreement, either express or implied

3. ———: ELECTION. Where a tenant holds over his term, the landlord has the option to treat him as a trespasser or as a tenant for a new term, and the exercise of that right by the landlord is conclusive against him, and he cannot impose new terms upon the tenant without his consent.

4. The instructions given by the court in this case examined, and *held* not to conform to the issues and erroneous.

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

George W. Wertz, for plaintiff in error.

George H. Thomas, contra.

JACKSON, C.

This is a proceeding in error to reverse a judgment of the district court for Colfax county. The defendant in error, who will hereinafter be styled plaintiff, instituted an action in the court below against the plaintiff in error, who will hereinafter be styled defendant, to recover rent which he claimed from the defendant for the use and occupancy of plaintiff's property, and for certain moneys

* Rehearing allowed. See opinion, p. 183, *post.*

which he claimed to have expended for the defendant, and which the defendant promised to repay. The allegations of the petition important to the inquiry may be summed up as follows: That on the 17th day of March, 1902, the defendant was and had been plaintiff's tenant from month to month, and as such in the occupancy of a certain store building at an agreed monthly rental of $50 a month, payable in advance; that on that date, at defendant's request, plaintiff furnished and turned over to the defendant for his use as such tenant an additional room in the building, under agreement between the plaintiff and defendant that defendant was to pay plaintiff on account of such additional room and additional rental of $10 a month; that on the 1st day of April, 1902, the defendant refused to pay the plaintiff the additional rent contracted for, for the period between March 17 and March 31 inclusive, and that thereupon the plaintiff notified said defendant to vacate said building and to cease to occupy the same by May 1, 1902; and at the same time notified the defendant that if he continued to use and occupy the building from and after May 1, 1902, he would be required to pay plaintiff for such use and occupancy at the rate of $65 a month during the time that he continued to use and occupy the same; that the defendant continued in possession of said store building up to and including the 4th day of August, 1902, and that he failed to notify the plaintiff prior to the 4th day of August of his intention to vacate the building, but that he vacated the building without any notice whatever to plaintiff, and that, by reason of these facts, became indebted to plaintiff in the sum of $324.67; that he paid the plaintiff on that account the sum of $206.67; that the rental value of the property was reasonably worth the amount charged by the plaintiff. It was further alleged as a second cause of action that about the 1st day of January, 1902, the plaintiff paid out the sum of $4.75 for the use and benefit of the defendant; that the defendant promised to repay the plaintiff the sum so paid out, but has refused to do so. The plaintiff

claimed judgment for $123.75, with interest. Defendant, by his answer, admitted that on the 17th of March, 1902, he was, and prior thereto had been, a tenant of plaintiff from month to month; that he was in possession of the store building, and was paying an agreed monthly rental of $50 a month, payable in advance. His answer recites that on or about the 1st day of August, 1901, he entered into a verbal contract with the plaintiff, according to the terms of which the plaintiff agreed to furnish the defendant additional room in the building, to enlarge the cellar, and otherwise to improve the building; that after such additional room and other improvements were completed he was to pay an additional rental of $10 a month; that the plaintiff never complied with the terms of the contract, and disclaimed any liability for additional rent claimed; pleaded payment of rent at the rate of $50 a month from the time that he continued in possession of the property, and that on or about May 1, 1902, the plaintiff instituted legal proceedings against the defendant to oust him from the possession of said premises; that he occupied the premises up to the 4th day of August, 1902, to which time he paid plaintiff rental at the rate of $50 a month, and that the amount paid was the reasonable and fair rental value of the premises so occupied by him. He denied the other allegations of the petition, and pleaded a counterclaim, which it is unnecessary to notice. Plaintiff replied, denying all the allegations of the answer, and alleging that the amount paid by the defendant after the 1st of April, 1902, was paid and received with an understanding and agreement between the plaintiff and defendant that the acceptance should in nowise affect or prejudice plaintiff's claim for additional rent.

The evidence discloses that the plaintiff and defendant had for several years prior to this controversy sustained the relation of landlord and tenant; that during the year 1901 it was agreed between them that the plaintiff should build an additional story on the building occupied by the defendant, and provide additional room for the defendant

in the second story. There is some dispute about other improvements, which the defendant claims were a part of the inducement for the agreement, and which the plaintiff denies. Both parties, however, agree that the tenant was to pay an additional rental of $10 a month when the improvements agreed upon were made; that on the 16th or 17th of March, 1902, the plaintiff notified the defendant that the additional room was ready for his use and occupancy, the plaintiff claiming that he had performed his part of the agreement, the defendant insisting that the improvements had not been completed as agreed upon and refusing to occupy the new room provided by the plaintiff, or to pay rent therefor. On the 1st day of April, 1902, the plaintiff caused to be served on the defendant a written notice to vacate the premises and to cease to occupy the same by the 1st day of May following, and also saw the defendant personally and informed him that if he wanted to occupy the premises after the 1st of May, he would require him to pay rent at the rate of $65 a month. It is also in evidence that about the 1st of May he instituted legal proceedings against the defendant to recover the possession of the premises.

The second instruction given by the court on its own motion is, in part, as follows: "An itemized statement of the claims now made by both parties is here made, to assist you in applying the evidence and making the computation, as follows: "Plaintiff claims on first cause of action:

"1. Additional rent from March 17, 1902, to March 31, 1902, at $10 per month..... $4.67
"2. Additional rent for April, 1902.....$10.00
"3. Additional rent for May, 1902.....$15.00
"4. Additional rent for June, 1902.....$15.00
"5. Additional rent for July, 1902.....$15.00
"6. Balance for August.....$58.33."

In the ninth instruction given by the court on its own motion, the court said to the jury: "If you believe from the evidence that the agreement was as alleged by the plaintiff, and that on the 17th day of March, 1902, he had

completed and fulfilled all that he was required to do by the terms of said contract, and that he turned the additional room over to the defendant, completed according to agreement, you will find for the plaintiff as to the first item in the statement given in instruction 2, also for the plaintiff on the second item contained in said statement, also for $10 of the third item; also for the plaintiff on the fourth item of said statement; also for the plaintiff on the fifth item of said statement; and if you further find from the evidence that the plaintiff notified the defendant on the 1st day of April, 1902, that, if he remained in the occupancy of said premises after May 1, 1902, he should pay as rent the sum of $65 per month, then you should find for the plaintiff in the full amount of the third item of said statement." To the giving of this instruction the defendant excepted, made complaint in the motion for a new trial, and also has assigned the giving of it as error in his petition.

The rule is well and satisfactorily settled in this state that, to sustain an action for the use and occupation of real estate, the relation of landlord and tenant must exist between the parties by agreement, either express or implied. *Skinner v. Skinner,* 38 Neb. 756; *Janouch v. Pence,* 3 Neb. (Unof.) 867. It is also true that where a tenant with the consent of his landlord, either expressed or implied, holds over his term, the law presumes a continuation of his original tenancy for another like term, but that this presumption is not conclusive. *Bradley v. Slater,* 50 Neb. 682; *Montgomery v. Willis,* 45 Neb. 434. Where a tenant holds over his term the landlord has the option to treat him as a trespasser, or as a tenant for a new term. *Bradley v. Slater, supra; Merchants State Bank of Fargo v. Ruettell,* 12 N. Dak. 519, 97 N. W. 853. Where a landlord has the right of election, and may treat the tenant as a trespasser or as a tenant holding over, the exercise of that right by the landlord is conclusive against him, and he cannot impose new terms upon the tenant without his consent. *Johnson v. Johnson,* 62 Minn. 302, 64 N. W. 905.

The case of *Johnson v. Johnson* was similar to the one now under consideration. Plaintiff leased the defendant certain premises in the city of St. Paul during such time as the plaintiff might permit the defendant to occupy the same, plaintiff reserving the right to terminate the lease by giving 30 days' notice. On the 9th of September, 1903, plaintiff gave the notice provided for by the lease. The defendant did not vacate. On the 14th of October, 1893, plaintiff served an additional notice, stating therein that if defendant remained in possession of the premises the rent from that time on would be $75 a month. The defendant still continued to occupy the premises until May, 1894. In November, 1893, the plaintiff begun an action in the municipal court of the city of St. Paul, under the forcible entry and detainer act, to recover possession of the premises. The plaintiff had judgment, and upon appeal the judgment was affirmed. Thereupon plaintiff brought an action to recover rent at the rate of $75 a month. Upon the trial in the district court the jury were instructed by the court to find a verdict for the plaintiff for the amount claimed by the claimant, and interest. The supreme court of Minnesota, upon an appeal, in discussing the plaintiff's claim that, if the defendant remained in possession of the premises after service of the second notice upon her, the rent thereafter would be $75 a month as long as she remained in possession of the premises, said:

"The force of this contention depends upon the question of whether, after the expiration of the thirty days' notice given to terminate the lease, there still existed the conventional relation of landlord and tenant. * * * The termination of the lease by the landlord became effectual at the expiration of the 30 days from September 9, 1893, and he did not elect to permit the defendant to remain there any longer as his tenant, but as a trespasser. She therefore continued upon the premises as a trespasser, certainly until October 14, when the notice to pay $75 per month rent was served upon her. In no way did she recognize the existence of a continued tenancy, unless by remain-

ing in possession of the premises after the termination of the lease by express notice. She could not enlarge the character of her tenancy by simply remaining in possession after the landlord had terminated it by the written notice. The right to terminate the lease existed on the part of the landlord, and when he exercised that right she did not become a tenant by merely continuing in possession. She was there as a wrongdoer, because the landlord had elected to treat her as such, and not as a tenant. This was the condition of the parties until October 14, 1893, when he served a notice upon her that, if she continued to remain longer in possession of the premises, the rent from that time on would be $75 per month. Did this notice alter the relation of the parties as they existed between the 9th and 14th days of October, 1893? The rule laid down in 1 Wood, Landlord and Tenant (2d ed.), page 25, sec. 13, is as follows: 'In all the cases the doctrine is held that as to the tenant who holds over he is a wrongdoer, and only becomes a tenant upon the terms of the old tenancy, because the landlord elects to treat him as such. By the mere act of holding over, he does not become a tenant from year to year. Something more must occur in order to show the existence of a tenancy by a renovation of the old contract, and this is done by the landlord making his election whether to treat him as a tenant, or as a trespasser, and the landlord's election is conclusive, both against himself and the tenant, and after he has once disaffirmed the tenancy while the holding over continues, he cannot afterwards set it up for the purpose of enforcing a claim for rent.' "

Applying the authorities cited to the case at bar, the conclusion seems irresistible that on the 1st day of May, 1902, the relation of landlord and tenant ceased to exist between the plaintiff and defendant because of the election of the plaintiff to treat the defendant as a trespasser and attempting to regain possession of his property by proceedings in forcible detention. The instruction complained of assumed that the relation of landlord and tenant existed

during the months of May, June and July, and therefore that, if the jury should find that the plaintiff had complied with his agreement to provide the additional room, he would be entitled to receive the $10 a month additional rent because of the contract relation of landlord and tenant. This assumption on the part of the trial court was erroneous, and the instruction therefore not only erroneous, but prejudicial.

In instruction No. 11, given by the court on its own motion, the court said to the jury: "You are instructed that as to the claim of the plaintiff for rent in August, 1902, it is admitted that defendant has paid $6.67. The plaintiff was entitled to 30 days' notice from the defendant of his intention to leave the premises, and his day for payment of rent had passed on August 4, when he left, that is, he had entered upon a new rental period without notice to the plaintiff. You will therefore find for the plaintiff on the sixth item of said statement." By reason of the conclusions already reached in this case, this instruction must also be held to be erroneous. The plaintiff could not treat the defendant as a trespasser, and at the same time require him to give 30 days' notice of his intention to vacate the premises.

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

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed October 19, 1905. *Affirmed upon condition:*

PER CURIAM.

Motion to modify sustained. Judgment of reversal vacated. Ordered that defendant be allowed to file a remittitur of $73.33 from the judgment within 30 days, and, if such remittitur is filed, the judgment of the district court is affirmed for $59.77; otherwise, the judgment is reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

CITY OF OMAHA V. KATHERINE L. LEWIS.

FILED JUNE 8, 1905. No. 13,827.

The evidence examined, and *held* sufficient to justify the submission of the case to the jury.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

John P. Breen, C. C. Wright and *W. H. Herdman,* for plaintiff in error.

A. N. Ferguson and *Smyth & Smith, contra.*

JACKSON, C.

This is a proceeding in error instituted by the city of Omaha in this court for the purpose of reversing a judgment of the district court for Douglas county in favor of the defendant in error against the city of Omaha on account of the personal injury which the plaintiff in the court below claimed to have sustained by reason of the dangerous condition of a sidewalk in that city. For convenience the parties will hereafter be designated as plaintiff and defendant, as they were designated in the court below.

The only question discussed by counsel is as to the sufficiency of the evidence upon the question of the dan-

gerous condition of the walk to sustain the verdict in plaintiff's favor. The plaintiff testified that she resided on Sherman avenue, some distance south of the place where the injury was sustained; that on the afternoon of January 10, 1903, she left her home, and upon her return came down Sherman avenue from the north; that during her absence there was a light fall of snow; she started home about five o'clock P. M., and that just north of Madison avenue she fell. In response to a question requiring her to state to the jury what the accident was, and how it took place, she said: "Well, I was walking along, and the walks were all right; of course, there was just a little light snow—hardly enough to cover it—it just probably did—I was walking along, and I hadn't taken but a few steps, I guess, on the ice when I slipped; I was going this way and I slipped this way and fell on my right wrist. Q. When did you first encounter any ice on the sidewalk? A. Well, I had only taken a few steps on the ice when I fell. Q. Whereabouts on Sherman avenue did you first find the ice? A. That was the first, north of Madison avenue. Q. How far had you proceeded on the ice when you fell? A. Just a short distance, quite a short distance. Q. About how far? A. Oh, I had only taken a few steps. Q. How long prior to this time had you passed over Sherman avenue? A. I hadn't been up there for weeks. Q. Well, how many weeks? A. Oh, probably I hadn't been that far on Sherman avenue—I had been up Sherman avenue, but not so far as that; probably I hadn't been over there since before Christmas, up past that place. Q. What knowledge did you have at that time of the condition of this walk at the point where you received this fall? A. Do you mean before I fell? Q. Yes. A. I didn't know anything about it. Q. Explain to the jury, if you can, how you came to fall, if you know. A. Why, I don't know, I just slipped and fell. I don't know how I came to fall. Q. What was the result of this fall? A. I broke my wrist. Q. Which one? A. The right one. Q. You fell to the right? A. Yes, sir. She also testified that she was unable

to get up, and called to a young man who had just passed her, and that he assisted her to his home. Frank Thompsett, who assisted the plaintiff to arise and to the home of his parents, testified at the trial that Sherman avenue was the main street in that part of the city; he described the condition of the sidewalk where the plaintiff fell, as follows: The condition of the walk was that it was rough, and it was full of dent holes—foot marks—and they run from an inch to four inches deep, those gulleys in and out, and down, and rough and uneven; that the ice wasn't so thick near the outside of the walk, but that farther in it was about four inches deep; that it was rough and full of holes; some of the bumps were four inches in height; that this condition continued for about 100 feet or more north of Madison avenue; that the sidewalk along Sherman avenue north and south of this place had been cleaned off; that he passed the place twice a day during the latter part of December and January; that the walk had been in the condition described for at least a month, ever since the snow had fallen in the winter. Charles Lewis, a son of the plaintiff, visited the spot where the injury was sustained on the following morning; he described the condition as being rough where it had been tramped—looked like a cow yard; tramped all over and frozen there; snow and ice that is packed down; had been walked over and left ridged; was rough and uneven, just like it would be any place where it had been allowed to remain for a long time and walked over; it was rough; probably higher in the middle and lower at the outer edge where it had been tramped over; that the sidewalk had not been cleaned off at that place in the months of January and December. A. N. Ferguson, witness for the plaintiff, testified to having visited the place where the injury was sustained, and described its condition like this: As far as I can recollect, it seems to me that it was a rough condition of the walk; that it was covered with ice except possibly for a little space along by the curb line; that it seemed to be more or less ridged; that in the center and toward the bank, which

was some two or three feet high on the west from the sidewalk, there was quite a little strip there that was icy and snowy, and to a certain extent was ridged and uneven and rough; its ridges were something like four inches high, more or less, like the sidewalk had been covered with ice for a long time, and icy; sidewalk with some snow on it at various places; it was not smooth but was uneven; the sidewalk was covered with this ice largely; along the edge where the curb line is there were places where it had entirely disappeared, and at the center toward the walk it was higher and ridged up. The witness Shafer testified that the walk was full of ice and was very rough; had a covering of ice all the way from one inch to three or four inches, it had little bumps in it; that the ice was higher near the bank than it was near the curb, and was several inches high near the center of the walk.

This evidence is set out somewhat at length for the purpose of comparison with the evidence set out in the case of *Foxworthy v. City of Hastings,* 25 Neb. 133. In that case a verdict for the defendant was set aside by this court as not being supported by the evidence, and there seems at least to be as much reason for supporting the judgment in this case as there was for reversing the judgment in the *Foxworthy* case. In other words, if the evidence in the *Foxworthy* case showed a sufficient accumulation of ice and snow, such as to constitute an obstruction and impediment to travel, to justify this court in setting aside a verdict for the defendant as being contrary to the evidence, the evidence in this case, disclosing a similar condition of the walk, was sufficient to justify the submission of the case to the jury; and the case having been so submitted, and the jury having found for the plaintiff, and a judgment having been entered thereon, it should not be disturbed.

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

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

STATE, EX REL. ORPHEUS B. POLK, RELATOR, V. ALGERNON GALUSHA, SECRETARY OF STATE, RESPONDENT.

FILED JUNE 22, 1905. No. 14,256.

1. **Constitutional Law.** When it is obvious that portions of an act of the legislature were the principal if not the sole inducement for the passage of the act, and such parts are held to be unconstitutional because in conflict with the paramount law, the act will be declared void *in toto*.

2. **General Elections.** The provision of section 13, article XVI of the constitution, wherein it is provided, "The general election of this state shall be held on the Tuesday succeeding the first Monday of November of each year, except the first general election, which shall be on the second Tuesday in October, 1875," construed, and *held*, that it is not of itself an imperative command that general elections shall be held annually at the time stated. Whether annual elections are required depends upon the offices created by the fundamental law, and the time as therein provided at which an election must be held to fill such offices.

3. ———. By the provisions of the constitution, sections four (4), ten (10), fifteen (15), twenty (20) and twenty-one (21) of article six (6), and sections thirteen (13) and twenty (20) of article eighteen (18), judges of the supreme, district and county courts, and regents of the university, whose offices are created thereby, it is declared, shall be elected at the first general election held in 1875. The terms of these several officers are fixed at six, four and two years respectively, and the terms of office begin on the first Thursday after the first Tuesday in January next succeeding their election. Their successors in office, it is provided, shall thereafter be elected at the general election next preceding the time of the termination of their respective terms of office. *Held*, That these several provisions, when construed together, fix the terms of office, and the time of the beginning and termination of such terms, and the time of the first election, and that thereafter at the general election next preceding the time of the termination of each and every subsequent term of office, as they shall follow each other in succession, a successor shall be elected, and that

these several sections provide for a regular succession of and continuity in such terms of office, the force and effect of which are to make it mandatory that a general election shall be held in each of the odd numbered years.

4. **Term of Office.** Ordinarily, the word or words "term" or "term of office," when used in reference to the tenure of office, mean a fixed and definite period of time.

4*a*. ———. Section 20, article VI of the constitution, declares, "All officers provided for in this article shall hold their offices until their successors shall be qualified." *Held*, That this provision cannot properly be construed to mean that the legal terms of office of the officers provided for in said article, in the sense in which used in reference to the tenure of office, shall consist of the fixed and definite periods therein mentioned, and in addition thereto the indeterminate period which an incumbent may hold after the expiration of his fixed term, and until a successor shall be qualified.

5. ———: LEGISLATIVE POWER. Where by the fundamental law certain offices are created, the terms of office of which are fixed at certain definite periods of time, and the beginning and termination thereof prescribed, as well as the time for the election of a successor, the legislature is without authority to postpone the election of such successors until the succeeding general election held in the next year, and to extend the term of office of the incumbents during the intervening time, and to provide for an election in a different year in which to elect such successors, and a different time for the beginning of such terms of office.

6. **Constitution:** INTERPRETATION. Provisions found in the schedule of the constitution are not in all instances to be construed as of a temporary character. The language used should be given its ordinary meaning; and whether it is intended to be of a temporary or permanent character must be determined from the purpose of the enactment and the object sought to be accomplished thereby. The true meaning of the law is discovered by considering the reason and spirit of it, or the cause which moved the lawmaking body to enact it.

7. ———: LEGISLATIVE CONSTRUCTION. Courts will give weighty consideration to the legislative construction of the constitution when legislation is had regarding subjects of a political nature. But when such construction clearly appears to be unwarranted it will not be followed.

7*a*. **Constitutional Law.** The provisions of the biennial election law (laws 1905, ch. 65), the act under consideration, are found to be in conflict with the paramount law relative to the election of

judicial officers and regents of the university, and the time thereof, and of their terms of office; and for such reasons the act is *held* to be inoperative and void.

ORIGINAL application for a writ of mandamus to require respondent to place relator's name on official ballot. *Writ allowed.*

C. S. Allen and *T. C. Munger,* for relator.

L. M. Pemberton, amicus curiæ.

Norris Brown, Attorney General, W. T. Thompson, L. I. Abbott, J. J. Sullivan, Roscoe Pound and *F. I. Foss,* for respondent.

HOLCOMB, C. J.

Since the adoption of the present constitution, the statutes as heretofore existing have provided for the election of the judges of the supreme court, the regents of the university, judges of the district courts, and county judges, all of whose terms of office are fixed by the fundamental law, at a general election held in November of the odd numbered years. The terms of the different offices named vary; some being for six, some for four, and some two years, begining on the first Thursday after the first Tuesday of January of the year next succeeding the time of the election. It is expressly provided by the constitution that the elections for state executive officers shall be held in the even numbered years, the first election to be held at the general election in November in 1876, and each succeeding election at the same relative time in each even year thereafter. Const. art. V, sec. 1. The legislature at its last session passed, and the governor approved, an act, the object and purpose of which is to provide for the election of all state, district, and county officers in even numbered years, and to repeal all existing laws in conflict therewith. This act is known as the biennial election law, since, if valid, general elections will be held hereafter in

this state only once in every two years, while heretofore annual elections have been the rule under laws as then existing.

The relator in this action has challenged the validity of the new act (laws 1905, ch. 65), on the ground that it is in conflict with several provisions of the organic law. The single issue before the court presented by the pleadings is in respect of the authority of the legislature to enact into law the measure referred to. The following sections of the constitution seem to have a bearing on the act under consideration either direct or remote, and which should here be stated as the basis of the discussion to follow. Section 13, article XVI, entitled "Schedule," declares that "the general election of this state shall be held on the Tuesday succeeding the first Monday of November of each year, except the first general election which shall be on the second Tuesday in October, 1875. * * * Judges of the supreme, district and county courts, * * * shall be elected at the first general election, and thereafter at the general election next preceding the time of the termination of their respective terms of office." Section 14 of the same article provides: "The terms of office of all state and county officers, of judges of the supreme, district and county courts, and regents of the university shall begin on the first Thursday after the first Tuesday in January next succeeding their election." Section 4 of article VI provides: "The judges of the supreme court shall be elected by the electors of the state at large; and their terms of office, except of those chosen at the first election, as hereinafter provided, shall be six years." Section 10 of article VI divides the state into six judicial districts, and provides for the election of a judge of the district court in each of said districts, "whose term of office shall be four years." Section 15 of the same article provides: "There shall be elected in and for each organized county one judge, who shall be judge of the county court of such county, and whose term of office shall be two years." Section 20 provides: "All officers provided for in this article

shall hold their offices until their successors shall be qualified." Section 21 provides: "In case the office of any judge of the supreme court, or of any district court, shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor shall be elected and qualified, and such successor shall be elected for the unexpired term at the first general election that occurs more than thirty days after the vacancy shall have happened." Section 22, article XVI, provides: "The regents of the university shall be elected at the first general election under this constitution, and be classified by lot so that two shall hold their offices for the term of two years, two for the term of four years, and two for the term of six years."

The distinctive features of the present act and the one attempted to be repealed are quite marked. Section 1 of the old act, which embraced a general election law, provided the general election shall be held in November of each year. The same section of the new act provides that the general election of this state for the election of officers named in section 7 of this chapter shall be held in November of each even numbered year; and section 7 enumerates all state, district and county officers who under the old law were to be elected in the odd numbered years (with possibly some few exceptions provided for in separate acts), so that at the present time, if the new act be held valid, there are no offices to be filled and no officers to be elected at a general election to be held in the odd numbered years; and there being no officers to elect, there can, of course, be no election.

Keeping in mind the generally accepted canons of construction for the testing of the validity of legislative enactments when challenged on constitutional grounds, which are to the effect that the constitution is not a grant of powers, but is a limitation upon the authority to be exercised by the legislative branch of government, and that all reasonable doubts are to be resolved in favor of

the legality of the acts of the legislature, do the provisions of the act in question so conflict with the fundamental law as that the statute must be held nugatory and ineffectual to accomplish the legislative purpose?

1. We assume, without extended discussion, that if the act fails in its purpose to provide for biennial elections, and that notwithstanding its provisions annual elections are required to be held for the election of officers for one or more offices therein mentioned, because of the requirements of the organic law, the act is void *in toto* and of no effect for any purpose. It is hardly to be doubted that the principal, if not the sole, inducement for the passage of a measure of the kind being considered was for the purpose of avoiding the holding of general elections once in each and every year, and if this is not accomplished the whole act must fall and be declared invalid under the rule now well established in this jurisdiction. *State v. Farmers & Merchants Irrigation Co.*, 59 Neb. 1; *Crawford Co. v. Hathaway*, 60 Neb. 754; *State v. Poynter*, 59 Neb. 417; *State v. Magney*, 52 Neb. 508.

2. It is argued in behalf of relator that the portion of section 13, heretofore quoted, which says, "The general election of this state shall be held on the Tuesday succeeding the first Monday of November of each year," etc., is an imperative command requiring annual elections. The language used, when considered alone, does not, as it seems to us, unmistakably call for such construction, especially when viewed in the light of conditions existing at the time the present constitution was adopted. Prior to its adoption, and under the 1866 constitution, the elections for state and county officers in this state were held in the month of October, while the election of federal officers was required to be held in November. The principal object sought to be attained by the constitution makers, as it seems to us, was to have the general election for both state and federal officers held in November, and thus bring about greater uniformity, as well as add to the convenience of the electorate, and insure economy in time and

pecuniary expenditure in the operation of the election machinery of the state.

Had the language been, "A general election shall be held," etc., using the indefinite article "a" instead of the definite article "the," the language would have been, we think, more strongly in favor of the construction contended for by the relator. It would have added something to the view that the framers of the constitution, and the people in adopting it, intended that there should be an election in each year. Reading the sentence in the exact language in which we find it constructed, and keeping in view the conditions then existing in respect to the time of holding state and national elections, and it appears not to be an unreasonable construction to say that the main thought expressed is that the time of the general elections shall be in November of each year in which such an election is required to be held to fill any office created by law. The legislature having given such construction to the language regarding a subject of legislation purely political in its nature, we would now hardly be warranted in construing it differently in passing on the validity of such provision. It would lead to an absurdity to say that the constitution commanded that an election should be held annually, unless there were other provisions which necessarily require that certain of the offices therein created must be filled at such elections. Unless we can find in other provisions of the permanent law some requirements to the effect that certain officers ought to be elected at a general election, the time of the holding of which is so regulated by that instrument as that such election must be held in the odd numbered years as is required in the even years, we do not think we are driven by the language under consideration to the conclusion that a law providing for biennial elections is in excess of legislative authority. We are not to be understood as saying this language, when considered with its context and with other sections of the constitution, is not to be construed as an expression of the constitution makers indicative of an intention to so ar-

range the time of holding general elections as that a general election, if the terms of that instrument be observed and made effective, must be held once in each year. We only reject the idea, which is advanced by the relator, that the language standing alone is susceptible of no other construction than that annual elections are imperatively commanded. As has been said by the supreme court of Kansas in construing a constitutional provision somewhat similar: "The provision simply declares that annual elections shall be held on the Tuesday succeeding the first Monday in November, and was obviously intended to fix the time for general elections, and also to provide an annual opportunity for the election of officers who, under the law, are to be chosen annually, or to be elected in any year." *Wilson v. Clark,* 63 Kan. 505.

3. Construing the language of the several sections of the constitution which are quoted above as they relate to and have a bearing on each other, we find no serious difficulty in satisfying our minds that the purpose sought to be attained thereby is reasonably clear. If we are right in our construction of the several provisions as to their force and effect, they can readily be applied to the act under consideration in testing its validity. The terms of the offices of the judges of the supreme, district and county courts are fixed with definiteness and certainty. Section 4 is devoted exclusively to the terms of the supreme judges, while sections 10 and 15 refer especially to the offices of district and county judges. There can be no doubt and no room for construction as to the intention of the lawmakers in this regard. By the provisions of section 13, article XVI, it is, in terms that cannot be well misunderstood, declared that the first general election shall be held in 1875, that judges of the supreme, district and county courts shall be elected at the first general election, and thereafter at the general election next preceding the time of the termination of their respective terms of office. That is, by these several sections, when construed together, as of course they ought to be in an effort to determine their

meaning, force and effect, the offices are provided for, the terms for which the office shall be held are fixed, the time of the general elections to fill such offices, the time when the first election shall be held and the time of holding the election for the successor of the incumbent just prior to the termination of his incumbency for the term for which elected are all provided for.

The law as a science possesses, it must be admitted, some elements of uncertainty, and can hardly be classed as one of the exact sciences. In respect, however, of the matter under consideration, the meaning of the framers of the constitution and of the people adopting it, it would seem, can be ascertained to almost the certainty of a mathematical demonstration. The first election to fill these offices is required to be held at the general election in 1875. The terms of office are six, four and two years, respectively. The terms begin on the first Thursday after the first Tuesday of January next succeeding the time of the election. The election of successors is to be had at the general election next preceding the time of the termination of their respective terms of office. The terms begin and end in January of the even numbered years, and the general election next preceding is the election to be held in the odd numbered years. Thus, as it appears to us, the constitution declares in unmistakable terms that these officers shall be elected and the offices filled at a general election which is required to be held in the years alternating with the general elections provided for state executive officers in the even numbered years. Of course, the language used to express the will of the people in this regard in the fundamental law could have been more specific and direct, but we must accept the wording as we find it in the law, and give to it its fair meaning and reasonable import.

But again, by the provisions of section 21, if the office becomes vacant, the governor is to appoint a person to fill such vacancy, and such appointee can hold only until his successor is elected and qualified, and the successor, when

elected, is chosen for the remainder of the unexpired term. The constitution by these several sections provides not only for the first term after its adoption, but for the second and all subsequent terms. The arrangement of the terms is made continuous. The word "thereafter" found in section 13 can have no other meaning than that at the general election next preceding the time of the termination of each and every subsequent term of office, as they shall follow each other in succession, a successor shall be elected. Unless, then, the terms of office may be extended or are different from the fixed and definite periods of six, four, and two years, respectively, the conclusion is, we think, inevitable that the act under consideration contravenes the paramount law. In this connection, we think it permissible to briefly refer to the history of the state, and to its laws anterior to the adoption of the present constitution, as they relate to the election laws as then existing. By the constitution of 1866 the terms of the judges of the supreme court were fixed at six years, as at present. But by the terms of that instrument they were to be elected at such time and in such manner as might be provided by law. The election law (Gen. St. 1873, ch. 20, sec. 2) provided that "the judges of the supreme court shall be elected in the year 1878, and every six years thereafter." By this same statute state executive officers were to be elected in the year 1874, and every two years thereafter. Thus it will be seen that executive and judicial officers were elected at the same general election, and in even numbered years. Mindful of the conditions then existing, and of the laws then in force, may we not with reason attach some special significance to the provisions under consideration, incorporated, as they were, in the organic law framed and adopted in the year 1875?

4. Our discussion to this point has proceeded on the theory that the terms of office, as used in the provisions of the constitution quoted, when construed with reference to the correct meaning of that instrument in providing for the election, the time thereof, the terms of office, and the

succession of incumbents, are to be understood as the fixed and definite periods of time therein stated; and, if we are correct in this, then it must logically follow that the act in controversy is an unwarranted interference with the terms of office as thus provided for, and, contrary to well-settled principles, extends the terms of the present incumbents beyond the times as therein provided.

We are here met with the proposition that section 20, which says, "All officers provided for in this article shall hold their offices until their successors shall be qualified," etc., is to be construed as making the constitutional term of office the fixed and definite periods of six, four and two years, respectively, and in addition thereto the uncertain and indeterminate period of "until their successors are qualified." Consequently, it is argued the act in question violates none of the provisions relative to the length of the terms of the offices therein provided for. It is said the authorities are uniform as to this proposition. In a sense, they undoubtedly are, and, in another sense, the authorities are equally uniform to the point that the legal definition of the word term is the fixed and definite period of time stated in the law. It all depends on the viewpoint—on the nature of the question which is receiving judicial attention. These hold-over provisions in the law are generally understood to be for the purpose of having an incumbent in a public office at all times —to provide for the one holding an office to continue therein and to discharge the duties thereof until a successor, either by election or by appointment, is installed. In this sense, the officer continues to hold his office *de jure* in continuation, and as a part of the definite term and fixed period of time for which selected. But, in the sense of fixing tenures of office and providing for the duration thereof, and for the selection of a successor it cannot, we think, be said, in strict correctness, that the definition of the word term means the uncertain and indeterminate period which an incumbent may hold over his fixed term, because of some fortuitous circumstance

which has prevented his successor from qualifying at the time contemplated in the natural and ordinary course of events. This court has said: "Holding over beyond the fixed term of an officer pending the election of a successor in pursuance of the requirements of the constitution is as much a part of the term of office as that which precedes it." *State v. Moores,* 61 Neb. 9. In the sense in which used in the authority cited, the correctness of the proposition is indisputable. The constitutional provision is obviously to meet just such conditions, and to permit the incumbent to extend his fixed term until a successor is qualified. But, nevertheless, speaking with accuracy, there legally exist two tenures in the case cited, the fixed term and the hold-over term, and the time the incumbent holds the office beyond the fixed term is just so much an encroachment on the term of the successor. Ordinarily, say the authorities, the word "term" or "term of office" when used in reference to the tenure of office, means a fixed and definite period of time. *Crovatt v. Mason,* 101 Ga. 246, 28 S. E. 891; *State v. Breidenthal,* 55 Kan. 308, 40 Pac. 651; *State v. Tallman,* 25 Wash. 295, 64 Pac. 759; *People v. Brundage,* 78 N. Y. 403; *State v. Stonestreet,* 99 Mo. 361, 12 S. W. 895. In *State v. Stonestreet, supra,* it is said:

"Whether we take the phrase, 'term of office,' in its ordinary or popular sense, or in its technical import, it means one and the same thing—'a fixed and definite period of time.'"

In that case the decision was under a statute authorizing the appointment of an oil inspector for the term of two years, and which fixed the beginning and the ending of his term, and thereby determined the beginning and ending of the term of his successor, each holding for the term of two years. It was also provided that the officer should hold his office until his successor was appointed and qualified. It will be noticed, at once, that, in principle, the provisions of the statute there being considered and the constitutional provisions we are discussing are

analogous to a marked degree. It was in that case held, however, that the provisions for holding over until a successor qualified did not affect or alter the fixed and definite term of two years; the officer holding over being regarded as holding a part of his successor's term. It may here be mentioned that the almost universal holdings of the courts in passing on a question of this character are to the effect that the hold-over period of an incumbent under provisions for holding the office until a successor is qualified has the inevitable effect of encroaching on the term of the successor, and, to the extent of the period holding over, is a shortening of the term of such successor, so that, in contemplation of law, the terms of fixed periods of time follow one after the other in the passing of time, whether held by the predecessor in office under the provisions for holding over, or by the one installed at the beginning of the fixed and definite period for the full term. It is said in *Crovatt v. Mason, supra:*

"It is apparent that the provision 'or until his successor is elected and qualified' does not reduce or change the term for which the officer is elected, but the meaning of such phrase is to extend the time in which he may hold the office beyond his term to a period when the office is filled by another who has been elected and qualified."

Say the supreme court of Kansas in *State v. Breidenthal, supra:*

"It is the opinion of the court that, as a 'term' means a fixed and definite period of time, the time definitely fixed in the law at four years is the term of office."

The term of office so fixed by the legislature was for four years, and until a successor was appointed and qualified. The constitution of that state provides that the legislature shall not create any office, the tenure of which shall be longer than four years.

State v. Tallman, supra, is relied on by both parties to the present controversy as authority in their favor. As we read the decision, it recognizes the term to be that fixed and definite period of time which the law prescribes that

an officer shall hold the office, and that a statute, which enables him to hold after his term has expired, does not change the term. It also holds to the proposition that, when the law making power assigns a stated period of time as the term of an officer, the fact that an officer is allowed to hold over does not change the length of his term, but merely results in shortening the time that his successor holds the office, although it does not affect the legal length of the succeeding term. It follows, we think, from a consideration of the authorities, and in sound reason, that the term of office, the tenure the lawmakers had in view, and which is contemplated by and designated in the provisions of the constitution to which reference has been made, is the fixed, certain and definite period of time therein specified, and not such fixed period, and in addition thereto the indeterminate period which is authorized to provide against contingencies of an accidental nature under the provisions of section 20, article VI, above quoted.

5. With the term of office of the officers named in the constitutional provisions quoted fixed and made definite and certain, the time of the beginning of such term and the termination thereof provided for, and with the time of the election for the first and subsequent terms stated in express terms, how stands the case and what is the effect of these several provisions on the act in controversy? The inevitable result of the act, if it be a valid one, is to extend the terms of all present incumbents of the offices provided for by such constitutional provision for one year, and to defer the time of the election of successors from the time of the general election, as heretofore held in the odd numbered years, to the next succeeding general election to be held in the even numbered years. The successors of the present incumbents, if we are correct in our definition of the words "term of office" as used in these several provisions, should, if they be given force and effect, be elected at a general election held in November, 1905, 1907 and 1909, respectively. By the terms of the

act under consideration, if it becomes operative, the electorate will be deprived of the privilege of choosing the successors of these several officers at the times stated; the incumbents holding over not being the choice of the voters, but under legislative authority creating a special and particular term in addition to the term fixed by the constitution.

In *State v. Thoman,* 10 Kan. 191, it is held that, as "the constitution of the state fixes the term of office of the judges of the district court at four years, and it is not in the power of the legislature to increase or extend that term either directly or indirectly," and that when the manifest purpose of the constitutional provisions are to secure not only a fixed term of office, but also to the people at stated intervals the opportunity of changing the incumbents, these provisions must prevail as the paramount law, over those expressed in the statute in conflict therewith. Says Brewer, J., writing the opinion of the court:

"The term of office is, as we have seen, four years. This being a constitutional provision is beyond legislative change. It is a fixed quantity." And again: "The manifest purpose of the constitutional provisions is to secure not merely a fixed term of office to judges, but also to the people at stated intervals the opportunity of changing the incumbents. * * * The constitutional provision is, that in each district 'there shall be elected by the electors thereof a district judge, who shall hold his office for the term of four years.' This does not apply to the first district judges alone, but establishes a permanent rule. It would seem a fair implication that such election should be held at the last general election prior to the commencement of such term. That would be consonant with the general rule governing all elections everywhere, and a constitution, as well as the statutes, must be construed in the light of settled and general usage."

In a very recent case (*Gemmer v. State,* 163 Ind. 150, 71 N. E. 478), the supreme court of Indiana, in passing on a statute deferring the time of the election of certain officers

for a year, and in which are raised many questions quite similar to those involved in a decision in the case at bar, hold that political privileges conferred on the people by the constitution are beyond legislative interference as effectually as if the constitution expressly provided that the people should not be deprived of them by any legislative enactment. Also, that a provision of the constitution to the effect that an officer shall hold his office until his successor is elected and qualified, being intended to prevent vacancies in public offices, does not confer on the legislature the power to postpone the election of a successor, and create a condition authorizing the incumbent to hold over. It is contended by counsel for respondent that the only question necessary to a decision in the case just cited was with reference to the power of the legislature to provide for the incumbent to hold office for more than four years in a period of six years, contrary to an express provision in the constiution limiting the term of any one incumbent to not more than four years in any period of six years. While it is true that the latter question may have been sufficient to dispose of the case then being considered, it is also clearly to be seen by a reading of the court's opinion that the discussion of the other questions to which we have adverted was elaborate and exhaustive, and that the conclusion reached was predicated in a large measure, if not exclusively, on the views entertained by the court relative to the questions of the same nature as those raised in the case at bar. The case is well reasoned, and appeals to us with much force as being sound in principle, and in accord with the letter and spirit of our own fundamental law, and we quote liberally from the opinion, wherein the court say:

"The office being constitutional and elective, the voters of the county are authorized to fill it at the first opportunity given under the constitution. This right cannot be taken away from them by the legislature, either directly or indirectly, by an act postponing the choice of the officers named until a general election at which they might

be elected has passed. When the framers of the constitution and the people who adopted it said in that instrument that 'there shall be elected in each county by the voters thereof, at the time of holding general elections,' the officers named, they could have meant nothing else than that the succession to these offices should be secured, without vacancies or unnecessary extensions of terms by holding over after the expiration of the constitutional terms, by the election by the voters of each county of successors to such officers, who would be ready to take the offices and discharge their duties immediately upon the expiration of the terms of the previous incumbents. The only natural and reasonable time for such selection would be at the general election next preceding the expiration of the term of the incumbent. If the power of the legislature to postpone the choice of the successors to the incumbents of these offices at such election is conceded, it follows that the time for the election of such successors rests wholly in the discretion of the general assembly. If this is the law, the control of the offices affected is taken from the people and resides exclusively in the legislature." And again: "The argument that the legislature may fix the time of the commencement of the terms of office, where that time is not fixed by the constitution itself, and that if the term of an incumbent is extended beyond the constitutional limit, the officer holds over by virtue of section 3 of article XV, constitution, which provides that an officer shall hold his office for the constitutional term, and until his successor is elected and qualified, is fallacious. The latter provision was intended to prevent vacancies in the public offices to which it applies. It cannot be understood to confer on the legislature the power to postpone unnecessarily the election of a successor to the office, and thereby create a condition authorizing the incumbent to hold over after the expiration of his term. The mischiefs which would result from this construction of the constitution and the recognition of this authority in the legislature are too evident to require discussion.

By the adoption of measures of this character the legislative department could appropriate to itself an extensive and dangerous power and influence over a great number of offices and officers."

We should not pass from this subject without referring to *State v. Hedlund,* 16 Neb. 566. In that case it appears that a statute providing for township organization contained the provision that county judges in such counties should be elected at the first general election after the adoption of township organization, and each second year thereafter. This, in the case cited, is construed to mean "the first general election at which the county officers named are to be elected," and it is held the general statute, which provided that county officers should be elected in the year 1879, and each second year thereafter, controlled and required the election of county judges under township organization to be held in the odd years. Quoting the constitutional provision relative to the term of county judges, the court then observes: "County judges were elected in October, 1875, and every second year thereafter until and including 1883. The legislature possesses no power to change the year in which such elections are to be held, nor shorten the term of office." It is apparent that this expression as to the effect of the constitutional provision relative to the tenure of office of county judges was given as another reason for construing the statute as the court in that case did. It seems to be conceded by counsel for respondent that this opinion of our own court is opposed to their construction of the constitution, but it is argued that, in so far as the case may be said to be against them, it is merely dictum and without binding force. The language used can hardly be regarded as wholly dictum for the reason above stated. It appears to be the deliberate expression of the court, and, so far as we can observe, a correct construction of the constitutional provision there under consideration.

Chief reliance for authority in support of the validity of the act of the legislature being considered is placed by

counsel for respondent on a recent decision of the supreme court of Kansas in the case of *Pruitt v. Squires,* 64 Kan. 855, 68 Pac. 643. There is found in that opinion, it is to be frankly stated, much that seems to support the construction of the act in question contended for by the respondent. The two cases may, however, be distinguished in their more marked characteristics. It may also be said the decision in the Kansas case was by a divided court, two of the judges dissenting. The Kansas constitution provides: "All county officers shall hold their offices for the term of two years, and until their successors shall be qualified * * * but no person shall hold the office of sheriff or county treasurer for more than two consecutive terms." It was this provision only the court was construing. The election law there under consideration postponed the time of election of these officers from 1901 to 1902, but made no provisions for filling the interregnum thus created. The court held, first, that the provisions for holding over applied to the second as well as the first term of the officers named, and that such holding over was a part of the second term; secondly, that there was no vacancy created by the legislative enactment postponing the election, and the governor was not authorized to appoint as though a vacancy existed; and, thirdly, no means of supplying such offices during the interregnum having been designated, such incumbents would continue to hold until their successors chosen in the usual manner had qualified. The questions thus presented and decided in that case differ from those in the case at bar in this: the constitution of that state does not designate the time when the term of office should begin and the time when it should end, but only provides that county officers shall hold their offices for the term of two years, and until their successors should be qualified, with the added provision that sheriffs and treasurers shall not hold for more than two consecutive terms. Our constitution provides expressly when the terms of judges of the supreme court and of regents of the university shall begin and when they shall end, and that

they shall continue for six years. The act of the legislature of this state providing for biennial elections attempts to break in upon this continuity of terms, but there is no such objection to the Kansas statute. If our constitution fixes the terms of these officers, and provides for a continuity of terms, so that when one officer holds over his term, he thereby holds a part of the term of his successor, then the question with us is, can the legislature change the arrangement, and provide a different time for the beginning and ending of the terms, and that the terms of the present incumbents shall be changed by adding a definite period thereto? Speaking generally as to the meaning of provisions for holding over, or for an indeterminate period, it can hardly be doubted that, even if it is beyond the power of the legislature, rightfully, to prevent an election at the time it should be held in conformity with constitutional provision, yet, if a failure of an election should happen, or if for any other reason no person was authorized to succeed to the office, under the provisions of the constitution, section 20, article XVI, the incumbent officers would hold over until successors were legally chosen. There is, however, no occasion, nor, as it appears to us, sound reason, for giving this section an enlarged meaning beyond this.

6. It is argued by respondents that, because the provisions of the constitution relative to the holding of general elections for judicial officers are found in article XVI, called the "Schedule," such provisions should be regarded as having been inserted for temporary purposes only, and without permanency of character. These provisions, it is said, are to be held merely as temporary expedients, necessary for the time being, in bridging over the break between the old and the new order of things. The reason for the creation of the "Schedule" is, it is suggested, made manifest in its introductory, wherein it is stated: "That no inconvenience may arise from the revisions and changes made in the constitution of this state, and to carry the same into effect it is hereby ordained and declared." It

may be, and probably is, true that a schedule proper, or that part of an organic law devoted exclusively to provisions for the transition of the affairs of government from the existing order of things to the conditions arising under the operation of the new instrument, should be regarded as of a temporary character and to be ignored when its purposes have been subserved. It is, however, quite manifest that the article which is denominated as the "Schedule" in our constitution contains many provisions of as lasting and permanent character as those found in other portions of the document, and is obviously so intended by its framers and the people adopting it. In fact, the instrument could be regarded only as a very imperfect one, leaving to the legislature the exercise of many powers usually controlled by the fundamental law, if these provisions are construed as having been incorporated for temporary purposes only. If counsel's contention in this regard be correct, then the legislature is authorized to change the time of holding general elections to any date it may so decree, since the provision regulating the time of holding elections is found in the schedule. This construction, however, it is manifest, cannot be entertained nor scarcely thought of. The same may be said of many other provisions found therein of the same undoubted permanent character. The language used should be given its ordinary meaning, and whether a provision is intended to be of a temporary or permanent character must be determined from the purpose of the enactment and the object sought to be accomplished thereby. "The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it, or the cause which moved the legislator to enact it." 1 Blackstone's Commentaries (Chitty's), 61. So construing the provisions of the constitution we have been considering, we have no hesitancy in saying that they are and should be held as being of a lasting character, even though found in an article denominated a "Schedule."

7. Finally, it is argued that the court should give great weight to the legislative construction of the constitution, when legislation is had regarding subjects of a political nature. The rule contended for seems to be sound and reasonable, and, although we accord to it all the force contended for, we cannot escape the conclusion that the provisions of the fundamental law we have been considering will not bear a construction permitting or authorizing the legislature to change, as it has attempted to do, the time of holding elections for judicial officers, and the time when their respective terms of office shall begin and terminate, and to extend the terms of all present incumbents for one year, in the face of such provisions. The conflict is so palpable that the legislative enactment must give way. The action of the legislative branch of government is entitled to and should receive from the judicial department the greatest of respect and deference. This has been freely accorded and ever kept in mind in the consideration and discussion of the case at bar. The court should and does approach a conclusion resulting in a holding that the law is unconstitutional with great caution and hesitancy. The wisdom, policy and expediency of the law have not been allowed, that we are conscious of, to, in the slightest degree, influence our decision. We have endeavored to keep within the legitimate sphere of action belonging to the judiciary and, in so far as human fallibility permits, to reach a conclusion from a strictly legal and judicial standpoint. The final and ultimate construction of the provisions of the constitution is by that instrument entrusted to the courts. We have endeavored to discharge the trust thus reposed in the tribunal over which we for a time give expression to its utterances and decrees according to the meaning expressed or arising by necessary implication. In so doing, we are unable to escape the conclusion that the legislative enactment in controversy conflicts with several of the provisions of the fundamental law, and that the former must give way and be declared without legal force, inoperative and void.

It follows that the writ must issue as prayed, and it is, accordingly, so ordered.

WRIT ALLOWED.

WILLIAM PRANTE, GUARDIAN, v. OSCAR LOMPE, GUARDIAN.

FILED JUNE 22, 1905. No. 14,298.

ERROR to the district court for Nemaha county: WILLIAM H. KELLIGAR, JUDGE. *Application for supersedeas denied.*

H. A. Lambert and *C. O. French,* for plaintiff in error.

E. Ferneau, Stull & Hawxby and *W. F. Buck, contra.*

SEDGWICK, J.

Upon application for that purpose the county court of Nemaha county made an order appointing a guardian for Harman Ray, as an incompetent person, and upon proceedings in error in the district court for that county this order was reversed and the cause was set down for trial in the district court. The parties interested, desiring to prosecute proceedings in error in this court to reverse the order of the district court, applied to that court for a supersedeas of its order, which was refused; and the cause having been docketed in this court upon proceedings in error, application is made to this court for a supersedeas of the judgment of the district court. It is, of course, within the discretion of the district court to determine whether a supersedeas should be allowed. But this is a legal discretion, and where such supersedeas is refused, this court will in a proper case supersede the judgment of the district court upon proper terms. With this in view we have examined the record presented, and are satisfied that the district court properly exercised its discretion.

When the judgment of the county court was reversed, and the cause set down for trial in the district court, the latter court became possessed of the cause, and application may be made to that court for such orders upon the parties interested as may be necessary to protect the property involved and the rights of all of the parties. The decision of the district court will, of course, be presumed to be correct until, upon the record, it is found to be otherwise, and this cannot be determined in this court before a final hearing. In the meantime the judgment of the district court is in full force, and there is no necessity for a supersedeas. The application is therefore

OVERRULED.

LANCASTER COUNTY ET AL. V. STATE OF NEBRASKA.*

FILED JUNE 22, 1905. No. 13,868.

1. **Claims Against State:** FILING. A creditor of the state, where the law makes no provision for the payment of his claim, is not required to file such claim within two years after its accrual with the auditor of public accounts for adjustment and allowance, and his failure to so file it will not bar an action thereon against the state. *State v. Moore*, 40 Neb. 854, followed.
2. **Action.** A resolution of the state senate, passed in accordance with the provisions of section 1106 of the code, will authorize the claimant to commence and maintain an action against the state on such a claim.
3. **Petition** examined, and *held* sufficient to resist a general demurrer.

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

James L. Caldwell, Frank M. Tyrrell and *Charles E. Matson*, for plaintiffs in error.

F. N. Prout, Attorney General, and *Norris Brown, contra.*

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* Rehearing allowed. See opinion, p. 215, *post.*

BARNES, J.

On the 26th day of June, 1903, the plantiffs commenced this action against the state in the district court for Lancaster county, and thereafter filed their amended petition, from which we gather the following facts: On or about the 26th day of January, 1893, the treasurer of Lancaster county collected, and deposited in the Capital National Bank of Lincoln, Nebraska, an authorized county depository, the sum of $35,694.54 of public moneys. On that date the bank failed, and of the money thus deposited there was lost, absolutely, the sum of $32,919.32; $5,000.40 of this money was state funds. On the 31st day of January, 1894, the county treasurer of said county paid to the state treasurer the full amount of the state's funds so lost by the bank failure, thus reimbursing the defendant; and it was alleged that such payment was made without the consent of the county, without any authority from its board of commissioners, and by inadvertence and mistake. It was also alleged in the petition that the sum so paid to the state constituted a just obligation owing from the defendant to Lancaster county at the time of the bringing of this action. It was further alleged that on the 4th day of April, 1903, the state senate passed a resolution authorizing the bringing of this action for the accounts and items sued on. The petition concluded with a prayer for an accounting, and a judgment against the defendant and in favor of the plaintiffs for such sum as might be found due, together with interest at 7 per cent. thereon from the 31st day of January, 1903. The state demurred to the amended petition, and the demurrer was sustained for two reasons: First, that it was shown on the face of the petition that the cause of action was barred by the statute of limitations; second, that the petition did not state facts sufficient to constitute a cause of action. The plaintiffs elected to stand on their amended petition, the action was dismissed, and is brought here by petition in error.

The plaintiffs contend that the trial court erred in holding that their claim was barred by the limitation contained in section 6, article III, chapter 83, Compiled Statutes 1903 (Ann. St. 9094). It would seem that this contention is not well founded. In *State v. Moore,* 40 Neb. 854, 25 L. R. A. 744, the court referred to that section, quoted section 9, article IX of the constitution, and said:

"Now, what is meant in this constitutional provision by 'claims upon the treasury' which the auditor must examine and adjust? We take it that it means claims which the state is or may be under legal obligation to pay, such as the salaries of its officers and employees, the cost of erecting buildings, and the expense attendant upon the maintenance of its prisons, asylums, schools, and other institutions."

This is in harmony with many other decisions of our court in which it is held that statutes providing for the presenting of claims to county or city authorities apply only to claims arising from contract or some direct legal obligation, and not claims arising from tort. It is only in those claims that are properly presented to the auditor, and that he is authorized to allow, that appeals provided for by the constitution and by statute can be taken. The claim involved in the case at bar could not be brought into court in that way. The law makes no provision for the payment of such a claim, and it is not included in the provisions of the statute or the constitution above mentioned. It must be brought into court by consent of the legislature. If it is not necessary under the statute that such claims as this should be presented to the auditor at all, then, of course, the two years' limitation contained in section 6, *supra,* does not apply. The statute of limitations as a defense is a personal one, and may be waived, even if the claim has been barred by statute. The state might waive that defense and authorize this suit, and we think by its action in this case it has done so. When this claim was presented to the legislature and leave to sue was asked for, more than two years had already run, which would

have furnished a sufficient excuse to the legislature to refuse leave to sue. It, nevertheless, by the action of the senate, granted such leave, and this was a waiver of the bar of the statute, if such bar existed. Section 22, article VI, of the constitution, provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suit shall be brought." And the legislature, exercising the authority thus conferred, has provided by section 1106 of the code: "The several district courts of the judicial districts of the state as now provided for and established by the constitution of the state, and of such judicial districts as may hereafter be provided by law, shall have jurisdiction to hear and determine the following matters: *First.* All claims against the state filed therein, which have previously been presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed. *Second.* All claims or petitions for relief that may be presented to the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication." Therefore the resolution of the senate, set forth in the amended petition, constitutes ample authority for the prosecution of this action.

It is claimed on the part of the state that there is a misjoinder of parties plaintiff, but this question is one which cannot be raised by demurrer, so that point requires no further consideration.

Considering now the merits of the case as presented by the amended petition, it appears that the county treasurer of Lancaster county paid to the state certain money belonging to the county, without any authority therefor, and such payment was made by inadvertence and mistake. If these allegations are true, they state a cause of action, and are sufficient to resist a general demurrer. This fact seems to be conceded by the state, for the only defense presented by the brief and argument of the attorney general is the limitation contained in the statute above men-

tioned. We are therefore of the opinion that the trial court erred in sustaining the demurrer and dismissing the plaintiff's cause of action.

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

REVERSED.

HOLCOMB, C. J., concurs in the order of reversal.

The following opinion on rehearing was filed April 5, 1906. *Judgment of reversal adhered to:*

1. **Claims Against State:** LIMITATION OF ACTIONS. If one having a claim against the state cannot prosecute the same without leave of the legislature or one branch thereof, the statute of limitations will not begin to run against an action on such claim until such leave to sue the state has been given.

2. **State taxes** in the hands of a county treasurer are the property of the state, and, if lost without fault of the county, the county is not liable to the state therefor.

3. **State Funds:** DEPOSITORY: ESTOPPEL. If money belonging to the state in the hands of a county treasurer is by him deposited in a bank that has been designated as a depository of county funds, and is lost by a failure of the bank, it is not the duty of the treasurer to use the money of the county to make good the loss to the state, and his action in doing so without authority from the county board will not estop the county to recover the money from the state.

SEDGWICK, C. J.

In the original brief of the state which was considered upon the former hearing, it was contended that the action was barred by the limitations contained in section 6, article III, chapter 83, Compiled Statutes, 1903 (Ann. St. 9094), which provides that persons having claims against the state shall exhibit the same to the auditor within two years after such claims shall accrue. It was not contended that the general statute of limitations applies. In answer to this argument on behalf of the state, it was said in the

opinion that, by the resolution of the senate authorizing a suit directly against the state upon this claim, the objection that the limitation of section 6 applies was waived by the state. It was not intended to pass upon the question whether the general statute of limitations would, necessarily, be waived by the authority given to sue the state under the resolution of the senate, without language in the resolution which expressly or impliedly waived that defense.

1. It is now contended that the general statute of limitations applies, and that the resolution of the senate is not a waiver of this defense. Upon this contention several authorities are cited. Among them is *Hepburn's Case,* 3 Bland (Md.), 95, 109. Hepburn was a creditor of William and Robert Mollison. The property of the Mollisons had been confiscated and sold by the state, and Hepburn's contention was that, by this confiscation and sale, he was prevented from realizing upon his claim against the Mollisons. The statute of limitations had run upon his claim against the Mollisons, and the chancellor held "that there is sufficient evidence to show that this debt * * * has been long since paid and satisfied by the Mollisons themselves." And the chancellor further said (p. 125): "The great lapse of time since it became due, without the delay being in any manner reasonably accounted for, gives rise to a presumption, altogether irresistible, that it must have been, in some way or other, fully and completely paid and satisfied." There is no suggestion in the opinion of the chancellor that there would be any presumption that the state had paid this claim to Hepburn. In the case at bar the delay in bringing the action is reasonably accounted for. It could not be brought without leave of the state, and it was brought within three months after such leave was obtained. Another case cited and relied upon is *Baxter v. State,* 10 Wis. *454. In that case the action was authorized by a general statute, which had been in force, and under which the plaintiff might have sued at any time after the claim accrued. This right of action had

existed for sufficient length of time to bar the claim under the general statute of limitations, and the sole question was whether, in any case, under any circumstances, the state could avail itself of the defense of the statute of limitations. After discussing and disposing of this question the court said: "The statute, of course, did not run until the state rendered itself liable to a suit on any claim. But as that statute had been in force more than six years before the commencement of this suit, we think the claim is barred." The statute of limitations does not generally run upon a claim while no right of action exists thereon, and, under that rule, the statute has no application to this case.

2. It is next contended in the brief of the state that payment of money justly due cannot be recovered back on account of mistake. This leads to a consideration of the question whether this money was justly due the state from the county. It was not within the province of the treasurer to determine this question. The fact that the treasurer had paid over the money to the state without any authority from the county board ought not to prejudice the legal rights of the county; so that the question is whether the loss of this money should fall upon the state or upon the county. It must be remembered that this question is being determined upon the allegations of the petition alone. The case is now presented to this court upon a general demurrer, which raises only the question of the sufficiency of the petition. Under these allegations we think that the money lost was the loss of the state, and that the county was not liable therefor to the state. In *County of Valley v. Robinson,* 32 Neb. 254, it was said: "The county is charged with the levy and collection of all county and state taxes, and until state taxes are paid they remain a subsisting charge against the county." The action was brought by the county against the treasurer and his bondsmen to recover taxes collected by him for the state. The question was whether the county had sufficient interest in the collection of these

taxes to maintain the action. The question presented in this case was not before the court, and the language there used was not used with reference to the question being here considered. In what sense the county is charged with the state's taxes until they are paid into the state's treasury is not made clear in that decision. The county was the obligee named in the bond upon which the action was brought, and the holding that the action might be brought in the name of the county to recover the state's taxes that have been misappropriated by the treasurer does not go so far as to hold that the county itself is an insurer of the state's funds in the hands of the treasurer, and, if unable to recover them from the treasurer, could be held liable to the state therefor. Judge MAXWELL in the opinion said: "The question here involved was before this court in *Albertson v. State,* 9 Neb. 429, and *Thorne v. Adams County,* 22 Neb. 825." In both of these cases it was held that an action could be maintained by the county against the treasurer for all such funds in respect to which he is the defaulter. In the former case the second paragraph of the syllabus is: "Section 32 of the code of civil procedure authorizes an action upon an official bond in favor of the *public,* where there are no special provisions to the contrary, in the name of the obligee of the bond." *School District v. Saline County,* 9 Neb. 403, was an action by the school district to recover from the county money in the hands of the county treasurer belonging to the district. In the opinion it is said that it is the duty of the county treasurer, when funds belonging to the school district come into his hands, "to credit them to the proper district, and on proper application pay them over to the officer of the district entitled to receive them from his hands. With the management of this business the county commissioners have no voice whatever. They cannot control, nor is the county in anywise answerable for, the acts of the treasurer, either committed or omitted, in respect of these duties. If the county treasurer has misappropriated moneys belonging to the

plaintiff, he and his sureties may be liable in a proper action on his bond; but the county very clearly is not liable therefor." This language appears to apply as well to the duties of the county treasurer in respect to the state funds; and upon the same reasoning the county would not be liable to the state for its funds in the hands of the county treasurer. While under the decisions above referred to an action may be brought in the name of the county against the treasurer to recover funds of the state misapropriated by him, the state auditor is expressly authorized by statute to bring such suit. Laws 1879, p. 343 (Comp. St. 1903, ch. 77, art. I, secs. 184, 187; Ann. St. 10583, 10586). Section 186 provides: "The bond of every county treasurer shall be held to be security for the payment by such treasurer to the state treasurer and the several cities, towns, villages and the proper authorities and persons respectively, of all taxes and special assessments which may be collected or received by him on their behalf, by virtue of any law in force at the time of giving such bond, or that may be passed or take effect thereafter." Under these provisions of the statute it is manifest that the liability of the county for state funds in the hands of the county treasurer is no greater than its liability for other funds not belonging to the county, and *School District v. Saline County, supra,* is decisive of the question here involved.

For these reasons, our former judgment upon this demurrer is adhered to.

JUDGMENT ACCORDINGLY.

PHILIP HUBERT V. STATE OF NEBRASKA.*

FILED JUNE 22, 1905. No. 14,096.

1. **Rape.** Sections 11 and 12 of the criminal code describe three classes of crimes, each of which is totally distinct from the other two. By section 11 it is declared to be unlawful for any person to have carnal knowledge of his daughter or sister forcibly and against her will. By the first clause of section 12 the act of having forcible carnal knowledge of any woman or female child, other than a daughter or sister, is denounced as a crime; and by the second clause sexual intercourse with a female child under the age of eighteen years, without force and with her consent, is forbidden.
2. **An information for the crime of rape under the first clause of section 12 must charge that the act was done with force and against the will or consent of the prosecutrix.**
3. **An information for the crime of rape under the second clause of** said section must charge the person upon whom the offense was committed as being a female child under eighteen years of age, and the accused as being a male person of the age of eighteen years or over; and, in case the prosecutrix is over fifteen years of age, her previous chastity must be alleged.
4. **Evidence.** The state, on the trial of such a case, should not be permitted to introduce evidence of acts of the accused, and statements alleged to have been made by him, which do not tend to corroborate the evidence of the prosecutrix, or impeach or discredit his own testimony.

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

Billingsley & Greene and *R. H. Hagelin,* for plaintiff in error.

Norris Brown, Attorney General, and *W. T. Thompson, contra.*

BARNES, J.

Philip Hubert, who will hereafter be called the plaintiff, was convicted in the district court for Lancaster county

* Rehearing denied. See opinion, page 226, *post.*

of the crime of statutory rape, and from a judgment sentencing him to be confined in the state penitentiary for the period of six years he prosecutes error.

The information on which he was tried, omitting the formal parts, reads as follows: "That Philip Hubert, late of the county aforesaid, on the 4th day of August, A. D. 1904, in the county of Lancaster and state of Nebraska, aforesaid, then and there being, did feloniously and unlawfully in and upon one Lilian Harding, a female child under the age of eighteen years, to wit, the age of fifteen years, and previously of chaste character, then and there being, feloniously did make an assault, and her the said Lilian Harding, then and there wickedly, unlawfully and feloniously did carnally know and abuse." Plaintiff first filed a motion to quash the information; later on demurred to it; thereafter objected to the introduction of any evidence on the part of the state because, as he alleged, the information did not state facts sufficient to constitute a crime; and after conviction, before sentence, he filed a motion in arrest of judgment for the same reason. So it appears that at the outset he objected to the sufficiency of the information, and has at all times kept his objection good. His first contention now is that the information is not sufficient to charge him with the crime of which he was convicted. As counsel for both the plaintiff and the state have given this question the most attention, we will, at the outset, give it our careful consideration.

Section 11 of the criminal code provides: "If any person shall have carnal knowledge of his daughter or sister, forcibly and against her will, every such person so offending shall be deemed guilty of a rape, and shall be imprisoned in the penitentiary during life." The plaintiff was not prosecuted under this section, therefore it will receive no further consideration, and is quoted only for the purpose of being referred to in the discussion which follows. Section 12 of the criminal code reads as follows: "If any person shall have carnal knowledge of any other woman or female child, than his daughter or sister, as

aforesaid, forcibly and against her will; or if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, every such person so offending shall be deemed guilty of a rape, and shall be imprisoned in the penitentiary not more than 20 or less than 3 years." From an examination of the sections quoted it is apparent that they describe three classes of crimes, each of which is totally distinct from the other two. The first clause of section 12 describes what is usually called the common law crime of rape. By this clause it is provided that any male person who shall have carnal knowledge of any woman or female child, other than his daughter or sister, forcibly and against her will, is guilty of the crime of rape. In an information for this offense it is not necessary to state the age of the accused. If he has the capacity to commit the crime his age is wholly immaterial, and so is the age of his victim. But it is always necessary in a prosecution under this clause of the statute to allege and prove that the act was committed forcibly and against the will of the prosecutrix. *Garrison v. People*, 6 Neb. 274; *Hall v. State*, 40 Neb. 320. The crime is made a statutory offense in this state, and the language of the information must conform, substantially at least, to that found in the statute. Judge MAXWELL in his Criminal Procedure, p. 238, says: "Rape is the carnal knowledge of a female forcibly and against her will." This definition applies particularly to the crime defined in the first clause of section 12. It will be observed that it is nowhere charged in the information that the plaintiff had carnal knowledge of the prosecutrix *forcibly and against her will*. So it is perfectly apparent that the language used therein is not sufficient to charge the plaintiff with the crime defined in the first clause of that section.

The second clause of section 12 provides that, if any male person of the age of eighteen years or upwards shall

carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age, and previously unchaste, every person so offending shall be deemed guilty of a rape. Now the essential elements of this charge are: First, that the accused is a male person of the age of eighteen years and upwards; second, that he shall carnally know and abuse a female child under the age of eighteen years; third, that such abuse shall be with her consent. If, however, she is over fifteen and under eighteen years of age, and previously unchaste, then carnal knowledge of her with her consent does not constitute the crime of rape. It is equally clear that, if the accused is less than eighteen years of age, the offense described in this clause of the statute cannot be committed by him. The state, nevertheless, contends that the statute describes but one offense; that the age of the accused is immaterial, and that it is not necessary to charge and prove that he had carnal knowledge of the prosecutrix *forcibly* and *against her will.* To support this contention several sections of Bishop's New Criminal Procedure, and cases from other states, are cited. An examination of these authorities discloses that they are based on statutes somewhat different from our own. As a matter of fact the decisions of each state conform to the definition of the crime set forth in its own statutes, and for this reason the authorities relied on by the state are of very little assistance in determining the sufficiency of the information in question herein. Sections 11 and 12 of our criminal code are almost literal copies of the sections of the Ohio statute defining the crime of rape. The supreme court of that state, in *Howard v. State,* 11 Ohio St. 328, said:

"The crime of a person in having 'carnal knowledge of his daughter or sister, forcibly and against her will,' as defined in the 4th section of the act of March 7, 1835 (Swan & Critchfield's Stat. 404), and the crime of a person in having 'carnal knowledge of any *other* woman or female child than his daughter or sister, as aforesaid, for-

cibly and against her will,' as defined in the 5th section of said act, are distinct and separate offenses, and not merely different grades of the same crime. In charging the latter crime, it is essential for the indictment to state that the woman or female child upon whom the crime is charged to have been committed is not the daughter or sister of the accused."

In construing our own statutes on this question it was said by Chief Justice SULLIVAN in *Edwards v. State,* 69 Neb. 386:

"Sections 11 and 12 of the criminal code describe three classes of crimes, each of which is totally distinct from the other two. By section 11 it is declared to be unlawful for any person to have carnal knowledge of his daughter or sister forcibly and against her will. By the first clause of section 12 the act of having forcible carnal knowledge of any woman or female child, other than a daughter or sister, is denounced as a crime; and by the second clause sexual intercourse with a female child under the age of eighteen years, without force and with her consent, is forbidden. The act charged in the information does not constitute a violation of section 11 nor of the first clause of section 12, because the elements of force and nonconsent are wanting."

We are satisfied with the language above quoted, and believe it is a correct statement of the effect of our statutes. So the contention of the state that our statutes describe but one offense, and the facts charged in the information, when viewed in that light, are sufficient to charge the plaintiff with the crime of statutory rape, must fail. In *Hall v. State, supra,* we said:

"In case it is not averred the act was done with force and against the consent of the prosecutrix, it is essential the information disclose that the person upon whom the offense was committed, at the time of the assault, was under fifteen years of age, and that the accused was of the age of eighteen years or over. An information for the crime of rape under the second clause of the section must

charge that the person upon whom the offense was committed as being a female child under fifteen years of age, and the accused as being a male person of the age of eighteen years or over; but where the unlawful intercourse is had forcibly and against the will of the complainant, the prosecution for the offense should be brought under the first part, or clause, of section 12, copied above, and in which case it is unnecessary that the information should disclose the age of the accused, or that of the prosecutrix."

Again, in *Woodruff v. State*, 72 Neb. 818, a case of statutory rape, Chief Justice HOLCOMB, speaking for the court, said:

"The gravamen of the offense charged under the section defining the crime is the unlawful sexual intercourse by a male person over 18 years of age with a female child under the age of consent. In the case at bar, the prosecutrix being over 15 years of age, her alleged previous chastity was put in issue, and evidence was introduced for the purpose of showing she was previously unchaste and as a complete defense to the crime charged."

If the previous unchastity of the prosecutrix is a complete defense to a charge of statutory rape, it necessarily follows that the fact that the accused is a male person under the age of eighteen years also constitutes a defense to such a charge. So, notwithstanding what the courts in other jurisdictions have held, we are fairly and fully committed to the rules above stated, and no reasons have been given which require us to change them. Judged by these rules, the trial court erred in overruling the plaintiff's objections to the information.

While we decline to formally consider plaintiff's other assignments of error, it is proper for us to say that, as we read the record, the evidence is insufficient to establish the offense described in the second clause of section 12. The prosecutrix testified positively that the plaintiff accomplished his purpose by force and against her will; that she never consented to the act of sexual intercourse with him; and he testified just as positively that he never had

sexual intercourse with her at any time, in any manner, or under any circumstance whatever.

It also appears that the state was permitted to introduce evidence of certain acts of the plaintiff, such as the purchase of two cocktails for the officer who arrested him, and certain statements alleged to have been made by him to that officer, none of which corroborated or even tended to corroborate the evidence of the prosecutrix, or impeach or discredit his own testimony. That this evidence, to which he objected, was prejudicial to him, and an invasion of his right to have a fair trial, can hardly be questioned. As has been often said, the charge of rape is one easily made, and hard to be defended against. Therefore it is the duty of the courts to carefully guard both the rights of the state and the accused, and see to it that a defendant shall not be convicted by reason of prejudice, and without sufficient competent evidence.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

The following opinion on motion for rehearing was filed February 8, 1906. *Motion overruled:*

1. **Rape.** Section 12 of the criminal code, as amended, defines but one crime and prescribes the punishment therefor. The first paragraph of the syllabus of the former opinion in this case, holding that this section defines more than one distinct offense, is disapproved.

2. ———: INFORMATION. If a man eighteen years of age or upwards is guilty of the sexual act with a female child not over the age of fifteen years, or with a female child under the age of eighteen years and not previously unchaste, the law will presume, without further allegation or proof, that the act was done "forcibly and against her will." But it is only when the accused is of the specified age that this presumption exists. An information for rape must allege either that the act was done forcibly and against the will of the "woman or female child," or that the accused was of the age of eighteen years or upwards.

SEDGWICK, C. J.

The attorney general, in behalf of the state, has filed a motion for rehearing in this case, and has urged upon the attention of the court, among other things, two unusually important questions.

1. The first contention is that the court erred in holding that section 12 of the statute under consideration describes two classes of crimes, each of which is totally distinct from the other. The law applicable to this question we think is correctly stated in *United States v. Fero*, 18 Fed. 901:

"Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons, or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense."

It will be readily seen that the question is of importance in the construction of this statute. If two distinct offenses are defined and punishment provided for in this section, and neither of the two offenses includes the other, then the prosecutor must elect at his peril whether he will charge that the act was committed forcibly and against the will of the woman assaulted, or that the woman was under the statutory age and the defendant was of sufficient age to bring him within the provisions of the law. Both of these charges could not be contained in the same count of the information, nor indeed in the same information. If this section of the statute defines but one offense, and prescribes the punishment therefor, then the information may be so drawn as to support a conviction if the offense has been committed in any one of the ways defined in the statute. We think the latter construction should be given to this section. The object of the section is to define the crime of rape, and to provide the punishment therefor. At the common law it was necessary to charge

that the act of intercourse was accompanied with force on the part of the defendant, and was against the will of the woman assaulted. Force was an essential element of the crime. By the first clause of this section this element of the common law crime of rape is retained. By the second clause it is provided that the crime is established without proof of force under certain conditions. If the female consents to the act it is not rape, but this clause of the statute provides that if she is under the age of fifteen years she cannot consent, or if she is under the age of eighteen years and not previously unchaste she cannot consent, and so the whole section defines the common law crime of rape, with the condition that, when the accused has reached a certain age, and the female is of such tender years as to be presumed not to understand the nature of the act so as to enable her to consent to it, these elements take the place of the proof required by the common law that the act was with force and against her will. If these conditions obtain, the law presumes that the act was with force and violence, and against the will of the child assaulted. Section 12 then is within the rule above quoted from *United States v. Fero,* and defines but one crime, and provides but one punishment therefor. If the act which is made the gravamen of the offense is with force and against the will of the victim, or if the other conditions exist so that the law presumes it to be so done, then the crime is rape. The language quoted in our former opinion from *Edwards v. State*, 69 Neb. 386, was not necessary to the point there being considered, and the case must not be regarded as a precedent upon this point. We think therefore that the first paragraph of the syllabus of our former opinion in this case is erroneous.

2. The second important contention in the brief upon the motion for rehearing is that it is not necessary in an information for rape to charge either that the crime was committed forcibly and against the will of the female assaulted, or that the defendant was at the time of the

commission of the crime of the age of eighteen years or upwards. We do not think that this point is well taken. As before stated, an essential element of the crime of rape is force and violence. The derivation of the word itself indicates that meaning, and we think that in all cases an information charging the crime of rape must allege force and violence, and that it was against the will of the female assaulted, unless it is made by the information itself to appear that the conditions existed from which the law will conclusively presume such force and violence and non-consent. The element of force and violence and non-consent of the female assaulted is of such importance in a charge of the crime of rape that it cannot be wholly omitted. For this reason, and because of the weakness of the evidence referred to in our former opinion, the motion for rehearing is

OVERRULED.

CAROLINE WEATHERFORD V. UNION PACIFIC RAILROAD COMPANY.

FILED JUNE 22, 1905. No. 13,434.

1. **Forcible Entry and Detainer:** LIMITATION OF ACTIONS. A grantee of real estate occupied by a third person acquires no greater rights against the occupier than his grantor had. If the right to bring an action of forcible entry and detention is barred as against the grantor, so likewise is it as against the grantee.
2. **Point Disapproved.** Paragraph 3 of syllabus in the former opinion, 5 Neb. (Unof.) 464, disapproved.

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

I. J. Dunn, for plaintiff in error.

John N. Baldwin and *Edson Rich, contra.*

LETTON, C.

The former opinion in this case was not officially reported, but may be found in 5 Neb. (Unof.) 464. A rehearing was granted for further consideration of the contention of plaintiff in error that an action of forcible entry and detainer was barred by section 8 of the code. The facts in the record necessary to a determination of this question are: That the defendant in the court below had been in possession as a squatter on a portion of one of the streets of the city of Omaha for about six years prior to the amendment of section 6 of the code in 1899; that subsequent to this amendment the city of Omaha conveyed the portion of the street in controversy by deed to the plaintiff, Union Pacific Railroad Company; that, after the receipt of the deed by the plaintiff from the city, it served in writing on the defendant a three days' notice to quit, which substantially complied with the provisions of section 1022 of the code. In about thirty days after the service of this notice, plaintiff below commenced its action against the defendant in forcible entry and detainer. The contention of plaintiff in error and defendant below is that the right to maintain the action of forcible entry and detainer accrued to the city of Omaha immediately on defendant's taking unlawful possession of the portion of the street in controversy, and that, as more than one year has elapsed since this right of action accrued to the city, it is barred by the provisions of section 8, *supra,* from maintaining this form of action, and that the railroad company by its deed from the city could take no greater right than the city had against the intruding defendant.

We believe that plaintiff in error is right in her contention that the grantee stands in the shoes of the grantor, and has acquired only such rights of action against her by reason of the deed as could have been enforced by the city of Omaha.

The city could have brought its action for forcible entry

and detention as soon as the defendant wrongfully took possession of the street without its consent. This was in 1893. Its right to maintain this action under the statute accrued at that time, and might be exercised at any time before the expiration of one year. The object of the short period given in which to maintain this action apparently is to compel parties to settle disputes with regard to the occupancy of real estate in which no question of title is involved in a summary manner in justices' courts, so that the dockets of other courts may not be occupied by such disputes, which are often of a trivial and petty character. If the city neglected to bring this action within one year, it would then be compelled to resort to the district court and to bring an action of ejectment. The defendant was in possession of this property at the time that the railroad company acquired title from the city. The company took the same with full knowledge of the defendant's rights, and could acquire no better title against the defendant than the city itself had. It would be a strange thing, indeed, if by the transfer of title to real estate the grantee could acquire greater rights against an occupying claimant than the original owner. The railroad company stands in the shoes of the city, and it can maintain no action against the defendant which was barred as against its grantor at the time it acquired the title.

The defendant claims title by adverse possession. We are of the opinion that under the conceded facts this defense cannot be successfully maintained. It is clear that the statute of limitations has not run in favor of the defendant, since the time which it has held adversely to the railroad company cannot be tacked to the time during which she held possession adversely as against the city, prior to the enactment of the statute of 1899. The enactment of that law stopped the running of the statute, and created a hiatus in her adverse holding. The statute only began to run against the railroad company at the time it acquired the title to the premises. This question, however, cannot be litigated in an action of forcible entry and

detainer. If it appears that the defense of title is made in good faith, the action should be dismissed; but the fact that a defendant interposes a baseless defense will not oust the court of jurisdiction in such a case. *Smith v. Kaiser,* 17 Neb. 184; *Leach v. Sutphen,* 11 Neb. 527; *Streeter v. Rolph,* 13 Neb. 388.

For the reason that the action of forcible entry was barred by the statute of limitations before this action was commenced, we recommend that the judgment of the district court be reversed.

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

REVERSED.

FIRST NATIONAL BANK OF PLATTSMOUTH V. FRANCIS N. GIBSON ET AL.*

FILED JUNE 22, 1905. No. 14,199.

Res Judicata. The plea of *res judicata* applies not only to the points upon which the court was required by the parties to pronounce a judgment, but to every point which properly belonged to the subject matter of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time. This rule is not inflexible, and may yield in cases where a good and valid reason or excuse for the failure to allege the facts and seek relief in the former action is shown, but in the instant case such excuse is neither pleaded nor proved.

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

A. N. Sullivan, for plaintiff in error.

S. L. Geisthardt and *Samuel Chapman, contra.*

LETTON, C.

This action is based upon the same facts narrated in *First Nat. Bank v. Gibson,* 57 Neb. 246, and 60 Neb. 767,

*Rehearing allowed. See opinion, p. 236, *post.*

with the additional fact that, after the former adjudication that the plaintiff's judgment was a lien upon the land in controversy, the premises were sold upon a prior lien by a decree of the United States circuit court for the district of Nebraska, so that the plaintiff had no benefit from its judgment or decree. It seeks by this action to compel Francis N. Gibson to account for the rents and profits of the land during the time he occupied it, and to apply the same to the payment of its judgment. The district court granted the relief prayed to the extent of four years' rents, and held that as to the remainder of the rents and profits the action was barred by the statute of limitations. Plaintiff prosecutes error from this ruling, claiming that the statute had not run, and that it was entitled to all the rents and profits, while the defendant Francis N. Gibson prosecutes a cross-appeal upon the whole record. A number of defenses are set up by the defendant Gibson, for the most part setting up matters adjudicated in the former case. In the view we take of the case, it will only be necessary to consider one of the defenses relied upon. This defense is that the judgment in the former case, which was a creditors' bill to reach the land and subject it to the payment of plaintiff's judgment, is a bar to this action, since it was a former recovery against defendant Francis N. Gibson for everything received by him as a result of the fraud of Carter and Benjamin A. Gibson. The point to be determined is whether or not the cause of action in this case is essentially the same as that in the former case, and whether the relief now sought was obtainable therein.

It is a well-established principle that one is not permitted to split his cause of action; that if he might have had all the relief he seeks in an action he has brought and prosecuted to final judgment, he may not again vex his former adversary with another suit based upon the same wrong. It is also a rule, which we have applied against the appellant herein as to most of the defenses he has set up in his answer, that (to quote the plaintiff in error's brief) "a judgment is conclusive not only as to the subject mat-

ter in suit, but as to all other suits, which, though concerning other subject matter, involve the same issues." In *Henderson v. Henderson,* 3 Hare (Eng.), *100, *115, the vice chancellor said:

"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time. *Beloit v. Morgan,* 7 Wall. (U. S.) 619; *Cromwell v. County of Sac,* 94 U. S. 351; 2 Black, Judgments (2d ed.), sec 609; *Slater v. Skirving,* 51 Neb. 108.

Applying these rules to the present action, what is the situation? The plaintiff by the decree in the creditors' bill established conclusively as against the appellant here the fact that he was not a *bona fide* purchaser of the land, and that it was subject to the lien of its judgment. The matters the appellant sets up in his answer on account of which he seeks to reopen or go behind that adjudication, therefore, cannot be considered, and, as we have seen, he is bound by that adjudication. On the other hand the estoppels are mutual, and the plaintiff having limited his demand for relief in the former action to a decree clearing the title to the land so as to subject it to his judgment lien, and making no showing at that time of the existence of a prior lien which would probably take the land, and

which would warrant him in asking for the aid of the court in reaching the rents and profits which Francis N. Gibson had theretofore received, or an impounding of those thereafter accruing by means of a receiver pending proceedings for review, cannot again pursue the defendant on account of the same cause of action. Had the plaintiff alleged in the former action the facts as to the value of the land, the prior mortgage, the rental value and the need of impounding the rents and profits so as to provide a fund sufficient to satisfy the plaintiff's judgment, we think the power of the court was ample to grant him the relief he now asks. We do not mean to say that this rule is inflexible, and may not yield in cases where a good and valid reason or excuse for the failure to allege the facts and seek relief in the former action is shown. But in the instant case there is neither pleading nor proof of any reason or excuse for not presenting these facts in the former action and obtaining appropriate relief.

In *Hites v. Irvine's Adm'r,* 13 Ohio St. 283, suit had been brought, alleging that the defendant had obtained the legal title to certain property by foreclosure sale under an agreement to hold the property in trust for the plaintiff. A decree was entered in favor of the plaintiff, allowing him to redeem, and ordering a conveyance on payment of the amount found due. Afterwards, another action was brought to compel the administrator of the defendant, who had meanwhile died, to account for waste and for the rents and profits pending the first suit. It was held that these causes of action were proper and necessary subjects of adjudication in the chancery suit, and should have been brought to the notice of the court in that case by supplemental bill or otherwise. See also *Pray v. Hegeman,* 98 N. Y. 351; *Neil v. Tolman,* 12 Ore. 289; *Hackworth v. Zollars,* 30 Ia. 433; Wells, Res Adjudicata, sec. 251; *Jordan v. Van Epps,* 85 N. Y. 427.

As to the right asserted herein by the administrator of John M. Carter to the rents and profits, the decree in the former case adjudicated the fact that the transaction

by which the title of Carter to the premises was conveyed through the channel of the sheriff's deed to Benjamin A. Gibson was collusive and fraudulent. This question having been thus settled cannot be reopened, and Carter's administrator can have no better standing in court than would Carter himself have if he were alive. All parties to the former decree are equally bound, and if conclusive as to one it is conclusive as to all.

It is unnecessary to discuss any other of the numerous assignments in the briefs of both plaintiff in error and of the appellant, since these considerations dispose of the case.

We are of the opinion that the former recovery is a bar to this action, and that the judgment of the district court should be reversed and the cause dismissed.

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 dismissed.

REVERSED.

SEDGWICK, J., not sitting.

The following opinion on rehearing was filed January 18, 1906. *Judgment of reversal adhered to:*

1. **Law of the Case.** A point necessarily determined by this court upon appeal becomes the law of the case, and, ordinarily, will not be departed from in the further course of the litigation, unless clearly wrong, so that it cannot be supported upon reason or authority.

2. ———: PETITION. When a petition is held by this court to state a cause of action as against a general demurrer, this ruling becomes the law of the case, and will be adhered to upon a second appeal if the cause has been tried in the district court without specific objection to the sufficiency of the petition.

3. **Creditors' Suit:** RENTS. When a conveyance of real estate is set aside as fraudulent at the suit of a creditor, and the land subjected to the lien of his judgment, and is insufficient to pay the

judgment, such fraudulent grantee may, in proper proceedings, be compelled to apply upon the judgment the rents and profits of the land which accrued while the land was in his possession under the fraudulent conveyance.

4. **Suit Pending:** LIMITATION OF ACTIONS. While an issue is being litigated in the courts, the statute of limitations will not run in favor of one of the parties to that litigation and against the other as to any claim depending upon the result of that litigation.

SEDGWICK, C. J.

In the former opinion, *ante,* p. 232, in the view that was then taken of the case, it was only necessary to consider one of the defenses relied upon. The nature of the case and the facts involved are stated in that opinion, and in the former opinions therein referred to. The question discussed was whether the judgment in the original action, which was in the nature of a creditors' bill to reach the land and subject it to the payment of the plaintiff's judgment, is a bar to this action, which is to recover the rents and profits arising from the land. The point to be determined was there said to be whether or not the cause of action in this case is essentially the same as that in the former case, and whether the relief now sought was obtainable therein. It will be remembered that the proceedings to subject the land to the plaintiff's judgment were begun soon after the transfer of the land by the defendant Carter to the defendant Gibson, which transfer was in that proceeding adjudged to be fraudulent as against this plaintiff. Gibson took possession of the land at the time of its conveyance to him, and received the rents and profits thereof until in the spring of 1901, when the land was sold upon the foreclosure proceedings in the federal court. This was about one year after the litigation upon the creditors' bill was finally determined in this court. Without doubt, under the liberal provisions of the code, the plaintiff might have filed a supplemental petition in the first action, and litigated its rights to the rents and profits that accrued while that action was pending,

and it would seem that there are authorities for the proposition that, ordinarily, the plaintiff would not be allowed to neglect that remedy, and afterwards bring another action to recover the rents and profits. If this rule should be applied to this case, it appears that about one year's rents and profits which accrued after that action was disposed of could not have been included. The plaintiff urges that the rule ought not to be applied in this case, because the mortgage which was foreclosed in the federal court, and which was prior in point of time to the plaintiff's lien, exhausted the land, and so deprived the plaintiff of the fruits of the litigation, which was successful on its part, unless it should be allowed to recover the rents of the land received by Gibson while he held the title and possession. The value of the land was amply sufficient to have paid the plaintiff's claim, and, but for the lien of the prior mortgage, there would have been no necessity of litigating the question of rents and profits; the court in the former action would not have appointed a receiver without the showing that the land itself was insufficient to pay the plaintiff's claim. There is no sufficient plea in bar in the answer. The petition sets out all of the facts in regard to the former action and its results, and in regard to the foreclosure proceedings in the federal court, and the application of the land in payment of the judgment upon those proceedings. These allegations of the petition are admitted in the answer, and there is in the answer what is called the eighth defense, in which it is alleged, "that the suit brought by the plaintiff against this defendant and commenced on or about the 7th day of August, 1899, was an action in equity, wherein and whereby the plaintiff sought to recover of this defendant all and singular the relief to which the plaintiff was or might be entitled by reason of the several matters and facts in the petition in said suit set forth with reference to said land, and whereby the court awarded to the plaintiff the relief asked by the same, and all and singular the relief herein asked in this petition might have been

awarded to the plaintiff in said suit if the plaintiff had established its right thereto; that the plaintiff had full power and opportunity to ask the relief now herein sought, and the court had full power and authority to grant the same. This defendant alleges that by reason thereof the plaintiff's cause of action herein is barred by a former recovery, and the plaintiff by reason thereof is not now entitled to have and maintain this action." None of the facts which were supposed to constitute this defense was pleaded in the answer. The plea amounts only to conclusions of law derived from the allegations of the petition. No reply to this defense was necessary. Of course, all the facts that were required to entitle the plaintiff to recover should have been stated in the petition. The defendant insists that the petition in this respect is defective, in that it does not allege any sufficient reason for neglecting to present to the court in the first action the matter which is now being litigated. He cites *Hites v. Irvine's Adm'r,* 13 Ohio St. 283, as establishing this doctrine. That case is somewhat discussed in the former opinion. In addition to what is there said, it will be noted that the defendant in that case was practically a mortgagee. He held the legal title, but held it in trust as security for the payment of money advanced by him for the plaintiff's use. It was his duty to apply the rents and profits upon the mortgage, and it was likewise the duty of the plaintiff in his action, which was virtually an action to redeem, to insist that the rents and profits should be so applied, and the holding was that, having neglected to do this, the plaintiff could not afterwards maintain an independent action to recover the rents and profits. The court said:

"If, during the pendency of the suit, payments were made by the plaintiff, or rents and profits received by the defendant, which were properly applicable only to the reduction of the debt due to him from the plaintiff, these facts, affecting the very matter in controversy, should have been brought to the notice of the court, by supple-

mental bill or otherwise. If this was not done, and the plaintiff thereby failed to obtain the benefit of credits to which he was entitled in that action, his petition should aver that fact, and also show that such failure was not owing to his own negligence."

Without determining whether this rule applies to the case at bar, we will inquire how the plaintiff's case would stand if it did. Upon a former appeal it was held by this court that the allegations of the petition in the case at bar are sufficient to constitute a cause of action as against a general demurrer. 69 Neb. 21. The question is not discussed in the opinion, but the general demurrer, of course, raised the question of the sufficiency of the petition, and it was overruled by this court. A point necessarily determined by the court upon appeal becomes the law of the case, and, ordinarily, will not be departed from in the further course of the litigation. Unless clearly wrong, so that it cannot be supported upon reason or authority, it will be adhered to as a final adjudication in the cause. The trial court would, as a matter of course, follow the law of the case so established, unless its correctness was specifically challenged. A general objection to evidence on the ground of incompetency would not suggest to the trial court that the petition which had been upheld by this court was the object of attack. The plaintiff upon the trial below asked a witness these questions: Q. "You may state what you know, if anything, about the mortgage upon this land described in the petition." Q. "You may state whether or not that mortgage was supposed, during the period of the litigation in the case of the First National Bank against Gibson and Carter, whether or not that was supposed to have been paid." The defendant Gibson objected to these questions on the ground that they were indefinite, and incompetent, irrelevant, and immaterial, and not tending to specify which mortgage is referred to. The objection was sustained, and the evidence was excluded. The plaintiff then offers "to prove that, in the litigation between Car-

ter and Gibson, Gibson received credit for the payment of that mortgage given by Carter, I think, to the Connecticut Mutual Life Insurance Company, or some eastern company." To this offer of proof the general objection was made that it was incompetent, irrelevant and immaterial. The objection was sustained, and the proof excluded. There was no objection upon the ground that the allegations of the petition were insufficient to admit the evidence. The offered evidence tended to show that the defendant Gibson had agreed with Carter to pay off this mortgage, which was long past due, and that the plaintiff had reason to suppose, during the pendency of the first action, that the land was clear of incumbrance, and would be amply sufficient to pay the plaintiff's claim. The attention of the court was not called to the supposed defect in the petition. Under these circumstances we think that the defendant ought not now to be allowed to ask this court to reverse its former adjudication as to the sufficiency of this petition.

2. The defendant insists that the plaintiff acquired no right in the rent and proceeds of the land. He is wrong in this contention. If the judgment debtor had transferred current funds to the defendant for the purpose of defrauding his creditors, the creditors, upon making this appear, might in equity recover the amount from the defendant; and so, if, to defraud his creditors, he placed in the hands of the defendant that which would produce value, intending that the proceeds should be placed beyond the reach of his creditors, such proceeds could in equity be reached by the creditors. In *Robinson v. Stewart*, 10 N. Y. 189, which is relied upon by the defendant, the general creditors had not reduced their claims to judgment, and were therefore not in a position to reach the proceeds of the land by creditors' bill.

3. The defendant also relies upon the statute of limitations. He says in the brief that the action is one for fraud, and that, "according to the plea of the plaintiff, the fraud had its inception on or about the — day of May,

1887, and was consummated in November, 1887," and that the fraud was discovered by the plaintiff in August, 1889. These considerations will not enable the defendant to avail himself of the statute of limitations. It is true that this action arises out of and depends upon the fraudulent transfer of the land. That the land was fraudulently transferred is established by prior litigation. While the defendant was resisting that allegation in the courts, the statute of limitations could not run against the plaintiff's contention that the land was fraudulently conveyed. *Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. 82. In this action it was necessary to show that the land had been fraudulently transferred. No recovery could be had without the existence of that fact. While that question was being litigated in the courts, the statute of limitations as to any claim that depended upon the questions there in controversy would not run in favor of one party in that controversy and against the other. Without counting the time while the action to set aside the transfer of the land from Carter to Gibson was pending, the statute of limitations has not run upon any part of the plaintiff's claim. The trial court therefore erred in limiting the plaintiff's recovery to the rents of the land accrued within the four years immediately preceding the commencement of this action.

4. Various other defenses are asserted and relied upon that were in issue in the former action and there determined. The parties to this litigation are bound by that judgment.

Our former judgment is vacated, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

GEORGE M. CASTER v. JOHN F. SCHEUNEMAN.

FILED JUNE 22, 1905. No. 13,856.

Justice's Court: APPEAL: UNDERTAKING. In order to confer jurisdiction upon a district court upon appeal from a judgment of a justice of the peace, the justice's docket must show affirmatively not only that an undertaking such as the law requires was executed within the prescribed time, but that it was delivered to the justice to be entered upon his records.

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

A. H. Byrum and *George M. Caster,* for plaintiff in error.

J. P. A. Black, H. Whitmore and *H. W. Short, contra.*

AMES, C.

This action was begun in replevin in a justice's court, where there was a trial which resulted, on the 9th day of July, 1903, in a judgment for the plaintiff. An attempted appeal was docketed in the district court, accompanied by a certified transcript of the justice's docket, containing the following recitals:

"On this 15th day of July, 1903, at the town of Franklin, Franklin county, Nebraska, H. Whitmore and H. W. Short, attorneys for defendant, presented to me an appeal undertaking which I, supposing it would be left with me and in my custody, then and there approved and placed upon it my filing mark. Said attorneys then and there took the said undertaking and refused upon my demand to permit me to take it and place it on my docket and keep it with the other files in this case. Said attorneys demanded of me a transcript of the proceedings had before me in this case, which I have refused at this

time because I do not consider that the defendant has furnished and filed with me the necessary undertaking as required by law. N. GLICK, *Justice of the Peace.*"

"July 29, 1903. On this day H. Whitmore, attorney for defendant, came before me and made a tender of $2 and demanded a transcript of the proceedings in this case, said Whitmore agreeing that he would pay any legal fee for making a transcript in excess of $2 now tendered. I refused to accept the tender and agreement of said Whitmore and to make out the transcript, because I did not consider that the defendant had furnished to the plaintiff the undertaking in the time and manner required by law.
"N. GLICK, *Justice of the Peace.*"

"July 31, 1903. On this day at the town of Franklin, H. Whitmore handed me the following undertaking, which I disapproved of, but, at the request of said Whitmore, brought with me to Riverton to copy on my docket. Which undertaking was copied by me and returned forthwith to said Whitmore."

Here follows what purports to be a copy of an appeal undertaking, bearing date of July 9, and answering to the description given in the first of the above copied recitals, and an additional indorsement as follows: "Handed me at Franklin and disapproved July 31, 1903, copied on my docket and returned to H. Whitmore attorney for defendant."

The plaintiff appeared specially, and objected to the jurisdiction of the court, and moved to dismiss the appeal because of the absence of an appeal undertaking; but the objection and motion were both overruled, and the parties were ordered to plead, which they did, and the cause proceeded to trial and judgment in favor of the defendant, from which the plaintiff prosecutes error to this court.

There are several assignments of errors alleged to have occurred at the trial, none of which we shall consider, be-

cause, in our opinion, it is properly assigned that the court erred in overruling the objection to its jurisdiction and the motion to dismiss the appeal. The transcript recites that affidavits were filed both in support of and in opposition to them, but a supposed bill of exceptions authenticating the affidavits was not made until nearly six months after the date of the adjournment of the term at which the case was finally disposed of, so that they are not worthy of consideration; and if in any event the justice's transcript can be impeached in the manner attempted, that document must in this instance be treated as importing verity.

Section 1086 of the code requires that every justice of the peace must keep a docket upon which certain entries of proceedings before him shall be made—among others: "Thirteenth. If appeal be taken, the undertaking and the time of entering into the same, and by which party taken," and section 1087, that, with certain exceptions, "the several particulars in the last section specified must be entered under the title of the action to which they relate, and at the time when they occurred," and shall be evidence, when certified by the justice, to prove the facts stated therein. Section 1007 requires an undertaking in appeal to be entered into within ten days from the rendition of the judgment appealed from. It is quite clear, therefore, that, in order to confer jurisdiction upon the district court, the justice's docket must show affirmatively not only that an undertaking such as the law requires was executed within the time prescribed, but that it was delivered to him to be entered upon his records. This transcript not only omits this essential feature, but recites affirmatively that the required step was not taken. Whether the recital is of greater weight or significance than the omission it is not necessary now to decide. It is sufficient to say that the absence of a jurisdictional record cannot be supplied by presumption or parol. Neither is it necessary to decide what would have been the defendant's remedy or procedure if he had seasonably tendered a proper under-

taking, and the justice had refused to accept it. Such a state of affairs is not only not disclosed by the record, but if the justice's recital of what occurred at a distance of many miles from his office, and outside the precinct or township for which he was elected, is to be considered at all, which we doubt, it tends to prove the exact contrary. The conduct of defendant's attorney, as related by the transcript, had the necessary effect, if it was not expressly designed, to defeat the clearly expressed intent of the statute, viz., that within ten days after the rendition of the judgment the undertaking in appeal shall be delivered finally into the custody of the justice, and entered upon his docket, so that a copy thereof may be included in his transcript to be transmitted to the clerk of the district court within twenty days thereafter.

We recommend that the judgment of the district court be reversed and the cause remanded, with instructions to dismiss the appeal.

LETTON 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 dismiss the appeal.

REVERSED.

NEBRASKA MOLINE PLOW COMPANY V. WILLIAM R. BLACKBURN.

FILED JUNE 22, 1905. No. 13,872.

1. **Bona Fide Purchaser.** One is not a *bona fide* purchaser for value until he has actually paid the purchase price or become irrevocably bound for its payment.

2. **A trustee in bankruptcy** succeeds to the bankrupt's title to choses in action, subject to any defense, abatement or counterclaim to which they would have been liable in the hands of the latter.

ERROR to the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Reversed.*

O'Neill & Gilbert, for plaintiff in error.

R. C. Noleman and *Gardner & White, contra.*

AMES, C.

J. S. Romine was the owner and in the possession of a stock of merchandise of the general description usually found in country stores, and in which was included certain agricultural implements bought by him from the plaintiff in error, who was plaintiff in the court below. The purchase price of the implements had not been paid, and the contract of purchase provided that title to them should remain in the vendor until it should be paid, and if the vendee should, before payment, "sell out, fail or become insolvent," it should become and be immediately due and payable. On the 14th day of July, 1902, Romine sold and delivered the stock of goods, including the implements, to the defendant Blackburn, the contract with the plaintiff not being of record, and Blackburn having no knowledge or notice of its existence. The purchase price for the stock of goods was satisfied by the transfer by Blackburn to Romine of certain corporate shares in an Ohio institution, of an agreed and actual value of $2,600, and by the execution by the former to the latter of promissory notes for the sum of $14,631.57, secured by mortgages on lands lying without this state. Whether the notes were negotiable in form does not appear and is under the circumstances immaterial, because they were never in fact negotiated or attempted so to be. On the 26th day of the month this action was begun in replevin to recover the possession of the implements, which were of the value, as subsequently found by the jury, of about $750. On the 28th of July, two days after the seizure of the property in replevin, an involuntary petition in bankruptcy was filed

against Romine, upon which there was subsequently an adjudication, and afterwards the notes executed by the defendant in part consideration of the purchase of the stock of goods came into the possession of the trustee in bankruptcy, and were discharged by Blackburn, upon a compromise and settlement, by the payment of $7,000 to the trustee, and some $1,700 to other persons, pursuant to an agreement with his vendor at the time of his purchase. The petition is in the usual form, and the answer is a general denial, and the above related facts are not in dispute. There were a verdict and judgment for the defendant, and the sole question in this proceeding is, are they supported by the evidence? We think the answer must be in the negative. Blackburn bought the property in suit in good faith, but before he had made or had become irrevocably bound to make payment of the purchase price to the extent of at least $13,000 thereof or thereabout, his title failed, and he became fully aware of the fact. As between himself and his vendor, or anyone standing in the shoes of the latter, he became immediately entitled to abate the value of the implements from his purchase price. As has been said, it does not appear that his notes were either negotiated or negotiable, but, if they had been of the latter description, it is not doubted that the trustee in bankruptcy was not in the attitude of an innocent purchaser for value. He merely succeeded to the bankrupt's title to the notes, subject to any defense, abatement or counterclaim to which they would have been liable in the hands of the latter. *Hewit v. Berlin Machine Works,* 194 U. S. 296, 48 L. ed. 986, and cases cited in opinion. Such being the situation, the case falls within the principles of the decisions of this court in *Hedrick v. Strauss,* 42 Neb. 485, and *Bush v. Collins,* 35 Kan. 535. It is true that in these cases the matters under consideration were transactions in fraud of the creditors of the vendor, to which this case is only collaterally related; but obviously the same principles are applicable to this case as to them. One is not a *bona fide* purchaser for value unless he has

actually paid the purchase price or become irrevocably bound for its payment, as, for instance, by giving his negotiable obligation, which has been or may be transferred to an innocent purchaser according to the law merchant, so as to cut off his defense to it. But in this case, whether the defendant's notes were negotiable or not, it is certain that they never were negotiated. Whether in the latter case that fact would affect the result, we are not called upon now to decide.

We are of opinion therefore that the evidence is insufficient to sustain the verdict and judgment, and recommend that they be reversed and a new trial granted.

LETTON 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.

SEDGWICK, J., not sitting.

BEN COHEN V. EDWIN R. HAWKINS ET AL.

FILED JUNE 22, 1905. No. 13,876.

Sale: ACCEPTANCE. A vendee who accepts and retains goods and consumes them by use, without objection, admits by so doing that they are satisfactorily in compliance with the terms of his purchase as respects character and quality.

ERROR to the district court for Douglas county: EDMUND M. BARTLETT, JUDGE. *Affirmed.*

A. L. Knabe, for plaintiff in error.

Crane & Boucher, contra.

AMES, C.

The only question in this case is whether the answer states facts sufficient to constitute a defense. The district court held that it does not, and directed a verdict, and entered a judgment accordingly, from which the defendant prosecutes error.

The action is to recover a balance alleged to be due upon an open and running account for merchandise sold and delivered by the assignor of the plaintiff to the defendant. The defendant was engaged in business in Omaha as a retail merchant tailor, and the goods bought were woolens and trimmings for use in his trade. They were purchased and delivered to him in two quantities at agreed prices, one on August 25, 1899, and the other on February 5, 1900, for the aggregate sum of $2,024.61. The defendant received them, and consumed them in the ordinary course of his trade, without objection, and made payments on account of them from time to time, usually of $100 each, and at intervals of about a month, until he had made 18 such payments, aggregating $1,462.50 in amount, the last of them being made on July 29, 1901. The plaintiffs became the assignees of the residue of the claim for value, and in good faith, in June, 1902, and in May of the following year begun this action. The defense is that, at the time the defendant agreed to purchase the goods on August 15, 1889, it was represented to him by the vendor that they "should all be of the very best quality and materials, and up to date in quality and color in every respect, and that all the goods that would be forwarded to him should be fully worth the price therein charged," but that the goods, "at the time they were delivered to the defendant, were all of a worthless, rotten and inferior quality, and were entirely unfit for the purposes for which they were intended," and that the statements of the vendor with reference thereto were false and fraudulent, and that therefore the defendant had never incurred any liability by reason of the transaction,

and his payments on account thereof were made without any consideration. So far as appears, the averments of the answer are the first complaint made by the defendant concerning the quality of the goods or the alleged breach of his contract by his vendor.

The case is ruled, undoubtedly, by the decision of this court in *Hazen v. Wilhelmie*, 68 Neb. 79. A vendee who accepts and retains goods and consumes them by use, without objection, admits, by so doing, that they are satisfactorily in compliance with the terms of his purchase as respects character and quality. We therefore recommend that the judgment of the district court be affirmed.

LETTON 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.

SEDGWICK, J., not sitting.

JACOB K. MAY ET AL. V. FIRST NATIONAL BANK OF MENDOTA, ILLINOIS.

FILED JUNE 22, 1905. No. 13,881.

1. **Notes:** TRANSFER AFTER MATURITY. An assignee of the payee of negotiable paper after maturity takes the same subject to any defense to which it would have been liable in the hands of his assignor.

2. **Chattel Mortgage:** ASSIGNMENT: ESTOPPEL. If an assignor of a chattel mortgage given to secure a promissory note which is past due at the time of the assignment has, prior thereto, become estopped by his own conduct from enforcing it against an innocent subsequent mortgage for value, his assignee is also estopped.

3. **Verdict:** EVIDENCE. Upon an examination of the record it is found that the verdict and judgment of the district court are such as the evidence was alone sufficient to support.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

McCoy & Olmsted and *Hamer & Hamer,* for plaintiffs in error.

C. A. Robinson and *H. M. Sinclair, contra.*

AMES, C.

On February 18, 1901, F. J. Greer executed to Shelley-Rogers Company a mortgage on certain cattle owned by him to secure payment of his promissory note for $8,020.96, payable October 24, then next following. The mortgage was made duly of record, and the note at its maturity, augmented by accrued interest, was extended so as to become due January 5, 1902. In December, before the maturity of the note as extended, a larger part of the cattle were shipped to the mortgagee, which was a live stock commission dealer at South Omaha, and sold, and the proceeds of the sale, amounting to $5,080.44, applied toward payment of this and other indebtedness, leaving an unsatisfied balance of $4,495.35. For this residue the mortgagee was desirous of obtaining payment or marketable paper, but it was agreed between the parties that the unsold residue of the cattle would not be adequate security for a sum exceeding $2,200. A mortgage upon the remnant of the herd to secure a note for that sum, and containing the usual covenants that the property described in it belonged to the mortgagor, free from prior liens, etc., was executed and delivered by Greer to the commission firm. There was thus left unprovided for, of the old indebtedness, $2,295.35, which was paid in part by a shipment of hogs, and afterwards further reduced so as to leave a residue of $1,742.53, which was put into a new note secured by a mortgage on real estate. Shortly after the settlement, the defendant in error became in the usual course of business in good faith, and for value, before maturity, the indorsee and owner of the $2,200 note and mortgage, which have never been paid, but which have been several times renewed. The last renewal was by a

new note and mortgage corresponding in all respects with its predecessors, except augmentation by accrued interest, but executed February 20, 1903, and filed for record six days later. The note for $1,742.53 was executed October 1, 1902, long subsequently to the execution and sale of the note for $2,200, and on the day after its execution was sold to the plaintiffs in error. Between the promissory part of the instrument and the signature is a recital upon a printed blank to the effect that its payment is secured by collateral consisting of the first mentioned note of $8,020.96 and the mortgage given as security for the latter. Greer, the maker, testified without contradiction that the blanks in this recital were not filled at the time he executed and delivered the note, nor afterwards with his consent or knowledge. In October, 1903, the defendant in error took possession of the cattle described in its mortgage, which were taken from it under an order of replevin in this action. There was a trial resulting in a verdict and judgment for the defendant below, to reverse which this proceeding is prosecuted. None of the above recited facts is in dispute, and there are no others involved in the litigation, so that the sole question is, to whom does the law award the title and right of possession of the animals taken in replevin?

We think the answer should be in favor of the defendant. The plaintiff's claim arises solely out of the recitals in the note purchased by it, which could be effectual, if at all, merely as a pledge of a chose in action. Now, besides the uncontradicted testimony of the maker, Greer, that these recitals were not made or authorized by him, and are therefore nugatory, the instrument to which they refer did not, at the time they appear as having been made, purport to be such a document as they describe. It was by its terms nearly a year and a half past due, and bore no evidence of being secured by mortgage, and it carried memoranda on its back indicating that three payments had been made upon it, aggregating the sum of $5,460.34. Certainly a more discredited piece of paper, or one less

entitled to the favorable presumptions of the law merchant, would be difficult to imagine. Its assignees cannot pretend to stand in any better light than their assignor would have done if the transfer had not been made. What was the position of the payee, Shelley-Rogers Company? It had taken and sold to an innocent purchaser for value a mortgage upon a part of the identical cattle described in the first mortgage, which recited that the animals were in the "undisputed possession (of the mortgagor), free from all liens and incumbrances," which is equivalent to a recital, or at least representation, that the former mortgage had been satisfied and discharged. Whether with or without this recital the jury would have been fully justified in finding that, and we think would not have been excusable for finding otherwise than that, as they doubtless did find, the transaction with reference to the note and mortgage for $8,020.96 amounted to, and was intended by the parties as, a satisfaction, payment and discharge of those instruments; and with this recital in an instrument in the hands of an innocent purchaser for value, there seems to us to be no room for doubt that both mortgagor and mortgagee were, and are, estopped to deny that such was not the case. As a proposition of law it would be absurd to say that the plaintiffs, when they acquired the instrument in controversy, were not put upon their inquiry with respect to its validity and status. If they had made inquiry of Greer, the maker, to whom their attention was immediately directed, they would have learned without difficulty or delay that their supposed collateral had been fully satisfied, in part by the security held by the defendant, and as to the residue by payments in money and by the note purchased by plaintiffs, which was secured by a mortgage on real estate; and, in addition thereto, that the property described in the old mortgage had been disposed of, all of it, with the consent and concurrence of both mortgagor and mortgagee, a larger part by sale and the remainder by a new mortgage securing a negotiable promissory note. It can hardly be necessary

to cite authorities in support of so plain and indisputable a conclusion. The rights of the defendant are even superior to those of the mortgagor; but that the latter, if he had not made or authorized the disputed recitals, as the uncontradicted evidence is that he did not, could successfully defend against the so-called collateral note and mortgage, has been so often decided by this and other courts in similar cases that the rule of law has become axiomatic. *Roberson v. Reiter,* 38 Neb. 198; *Owen v. Evans,* 134 N. Y. 514, 31 N. E. 999. As respects this recital, counsel seek to evade the force of the uncontradicted testimony by Greer by citing *Humphrey Hardware Co. v. Herrick,* 72 Neb. 878, to the effect that the maker of a note on a printed form, who delivers the instrument with unfilled blanks, in some circumstances impliedly authorizes the filling of the blanks after such delivery. But the case is not in point. In this instance the filling of the blanks, or the recital itself, was not essential to the completion of the contract as an obligation to pay a specified sum of money at all events on a day certain. The instrument was to that extent perfect. If the blanks had been properly filled, the recital would not have constituted, but would have been evidence of, a contract of pledge of the prior note as collateral security for the payment of the later one. That contract, if it was made, was not dependent upon the recital for its terms, validity or certainty. The blank spaces, if they were left unfilled, cannot be said to have implied authority to fill them with a description of the prior note, rather than of any other instrument, unless a previous contract of pledge, of which there is no evidence, had been entered into. In other words, it cannot be presumed that the delivery of the note with unfilled blanks carried with it implied authority to the payee to insert, at its option, the description of any obligation or chose in action of the maker it happened to have in its possession. In short, the recital in the instrument is of no significance at all unless it was made by the payor, or with his previous consent or subsequent ratification. Such a pledge as the al-

leged recital purports to evidence would have been inconsistent with the circumstances and the relations of the parties as above set forth, and could not have been made without an intent on the part of both maker and payee to perpetrate a fraud upon innocent third persons. For such conduct the former had no known or conjecturable motive. By so doing he could have gained nothing, and would have been likely to subject himself to embarrassment and loss by uttering two obligations for a single debt. It is far less likely that he did so than that he omitted to take up and destroy the old note through carelessness or inadvertence. We think that under the evidence a verdict by the jury that the recital was made by or with the consent of Greer would have lacked sufficient support, and could not have been upheld. But, if it were otherwise, if both the pledge and the recital were made at the time the plaintiff's note was executed, it could not be availed of in the hands of an assignee after maturity to cut off the prior equity of an innocent purchaser for value who had rightfully relied upon the recitals in his own instrument.

Exceptions were taken to several instructions, but as we are of opinion that the verdict returned is the only one that the evidence would support, we have not felt called upon to discuss them, but recommend that the judgment of the district court be affirmed.

LETTON 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.

SEDGWICK, J., not sitting.

LINCOLN GAS & ELECTRIC LIGHT COMPANY V. WALTER E. THOMAS.

FILED JUNE 22, 1905. No. 13,828.

Evidence examined, and *held* not sufficient to sustain the judgment.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

I. R. Andrews, H. F. Rose and *Edgar M. Morsman,* for plaintiff in error.

T. J. Doyle, contra.

OLDHAM, C.

This is an action for damages sustained by the plaintiff in the court below while in the employment of the defendant as a lineman. There was a trial to a jury in the district court, verdict for the plaintiff, judgment on the verdict, and to reverse this judgment defendant brings error to this court.

At the outset of the opinion it is well to say that a careful examination of the proceedings in the court below reveals no reversible error in the conduct of the case, either in the admission and exclusion of evidence, or in the instructions given, if the evidence introduced by the plaintiff, when liberally construed and given the benefit of every reasonable conclusion which logically flows from the facts proved, can be said to be sufficient to show any actionable negligence on defendant's part, on which the proximate cause of the injury can be predicated.

The record shows that, at the time of the injury, plaintiff was a lineman engaged in putting a cross-arm on the top of one of defendant's electric light poles, and in stringing and adjusting wires on this cross-arm. For the purpose of climbing and working on defendant's poles, a lineman is provided with a pair of metallic spurs, or climbers,

fastened to the feet, and a strong leathern belt, which is buckled around his waist. On each side of this belt is a ring, into which a second or "safety" belt is fastened by means of metallic snaps when the lineman is working on the pole. This safety belt extends around the pole to prevent the lineman from falling backward or forward while at work The cross-arms used on the poles are about 32 inches long, and are fastened to the pole by an iron bolt driven into the pole. These cross-arms are further supported by iron stays on each end of the arm. These stays, or supports, are fastened to the cross-arm about two inches from the end by bolts which are driven through the arm and secured on the inside of the arm by a nut or tap. The other end of the iron stay is bolted by the lineman into the pole. The iron stays are generally bolted on the ends of the cross-arms in defendant's shop before they are delivered to the linemen for use. On the pole where the injury occurred there were two main cross-arms. The upper one, which extended north and south, was the one on which plaintiff was stringing wires when the accident happened. While plaintiff was working on this cross-arm, another lineman in defendant's employ had fastened a lower cross-arm on the pole, extending east and west about a foot below the upper arm, and standing at right angles to it. After this second cross-arm was fastened to the pole, plaintiff, while working on the upper arm, brought his left side in contact with and against the inside of the lower cross-arm. While thus engaged, as his evidence tends to show, the bolt which protruded through the stay of the cross-arm came in contact with the spring of the snap which fastened his safety belt to the ring in his body belt, and loosened it from the body belt; and this caused the plaintiff to fall to the ground and sustain a serious and painful injury. The evidence shows that it was the custom of the defendant company to fasten the stays on these cross-arms with bolts four inches in length; that the width of the cross-arm is about three and one-quarter inches, so that when they were bolted with four-inch bolts the thread

end of the bolt, instead of standing flush with the tap which secured it on the inner side of the arm, projects from one-quarter to one-half an inch beyond the tap. The evidence shows that the circumference of the ring in which the safety belt was snapped was about one-eighth of an inch thick. Now, the negligence declared on is that defendant had used a bolt four and one-half inches in length to fasten the stays on this lower cross-arm, and that by reason of this negligent act the end of the bolt projected three-quarters of an inch beyond the tap on the inside of the arm, and that this extra half-inch projection of the bolt was the cause of the injury.

Now, conceding everything that the plaintiff's testimony tends to establish as having been proved, it may be summarized as follows: It is shown that plaintiff received serious injury while in the line of his duty in the defendant's employ; that the injury was not occasioned by any fault on plaintiff's part; that the proximate cause of the injury was the unfastening of the safety belt from the ring in the main belt, and that this was caused by the spring of the snap coming in contact with the projecting end of the bolt in the cross-arm; and that this bolt projected about half an inch farther than bolts ordinarily used in this work would project. What further deduction can be made from these established facts which tends to show actionable negligence on defendant's part in the use of these bolts?

It is suggested by counsel for plaintiff below that the record show that the jury, by consent of counsel, were permitted to go and view the premises, and from this view of the premises they may have gained information necessarily not imparted to this court in the bill of exceptions. In support of this contention we are cited to our former holdings in *Chicago, R. I. & P. R. Co. v. Farwell*, 59 Neb. 544, and *Omaha & R. V. R. Co. v. Walker*, 17 Neb. 435. In each of the cases cited the question involved was as to the value of lands taken under condemnation proceedings by the railroad. In cases of this character it is manifest

that a view of the premises would of itself constitute evidence not imparted by the record. But, in the case at bar we cannot see what advantage a view of the premises could be in determining the question as to whether an extra projection of half an inch of the bolt through the cross-arm on the pole was the proximate cause of the injury; or, whether the use of a four and one-half-inch bolt, instead of a four-inch one, was such an act as would suggest to a reasonable mind the probability of such an accident as befell the plaintiff. On first principles negligence has been defined as "a want of that care which a man of common prudence and of common sense ordinarily exercises in like employment." To constitute it, there must be "a disregard of some duty or rule of conduct prescribed beforehand or arising so manifestly from the facts as to leave no doubt of its existence." Wharton, Negligence, sec. 3; Deering, Negligence, sec. 3. It is of the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of omission or commission as might, within the domain of probability, cause some such an injury as that complained of. After much hesitation, we are forced to the conclusion that there is nothing in the record from which we can reasonably impute knowledge to the defendant, either of the probability of the peculiar and extraordinary accident that happened to plaintiff, or that the ordinary hazard of a lineman at work on its poles would be in any manner enhanced by the use of these bolts in its cross-arms.

We therefore conclude that the evidence is not sufficient to sustain the judgment, and we recommend that the judgment of the district court be reversed and the cause remanded.

AMES and LETTON, CC., concur.

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

REVERSED.

CLARK C. MCNISH ET AL. V. STATE, EX REL. SARAH DIMICK.

FILED JUNE 22, 1905. No. 13,854.

1. **Mandamus**: PUBLIC SCHOOLS: FOSTER-CHILD. Mandamus will lie at the relation of the foster-parent of a child of school age, who is a *bona fide* resident of the district, to compel the board of education to admit such child to attendance, without the payment of tuition, in the public schools of the city in which such foster-parent resides.

2. ———: ADOPTION. To be entitled to such relief, it is not necessary that the foster-parent shall have legally adopted the child under the forms of our statutes.

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

Grant G. Martin and *John W. Graham,* for plaintiffs in error.

Courtright & Sidner, contra.

OLDHAM, C.

This was an action on the relation of Sarah Dimick for a peremptory writ of mandamus against the members of the board of education of the school district of the city of Fremont and the superintendent of public schools of said city, to compel the respondents to admit Iva Dimick, a child of the age of eight years, to the public schools of the city of Fremont. A peremptory writ was granted by the district court, and to reverse this judgment respondents bring error to this court.

The facts underlying this controversy are that the relator in this proceeding is, and has been for several years preceding the controversy, a *bona fide* resident and taxpayer of the city and school district of Fremont. The relator is a widow, and was living alone in April, 1903. Prior to this time the mother of the child, called Iva Rarick Dimick, had died in the state of Iowa, leaving a husband

and six children. The mother of the child was a cousin of the relator. After the death of Iva's mother, Mrs. Dimick corresponded with the father, and offered to take the child and raise her, educate her, and treat her in all respects as her own child, if the father would give Iva to her. After considerable correspondence, the father consented to the proposition. On the 25th day of April, 1903, he brought the child to Omaha, and gave her into the care and custody of the relator, and since that time the child has lived with the relator as a member of her household. The name of the child was entered on the enumeration lists in the school census of the district. She entered the schools and attended for some months without objection. Later, when the schools became crowded, the teacher of the grade in which the child was instructed, by direction of the superintendent, refused her admission, unless she would comply with the rule of the board which required the payment of tuition from nonresident pupils of the district. The relator appealed to the board for permission for the child's attendance, which the board refused, and on this refusal the present cause of action was instituted.

There is practically no disputed fact in the record. Respondents rely on a rule of the board, as follows: "Children, whose parents (or guardians who have legally adopted them) do not reside in the school district of Fremont shall be considered as nonresident pupils. They shall pay tuition per month, in advance, as follows." The respondent school district is governed by the provisions of section 2, chapter 79, subdivision 14, Compiled Statutes, 1903 (Ann. St. 11237), as follows: "That all schools organized within the limits of said cities shall be under the direction and control of the boards of education authorized by this subdivision. Such schools shall be free to all children between the ages of five and twenty-one years, whose parents or guardians live within the limits of said district, and all children of school age nonresidents of said district who are or may be by law allowed to attend said schools without charge." It will be noted that the rule of the

board relied upon qualifies the word guardian by the parenthetical clause, "who have legally adopted them," and that no such clause is found in the statute relied upon to support the rule. It is true that the relator has never been appointed by a process of any court the guardian of Iva Dimick, nor has she ever formally adopted her as her own child; and yet no reasonable mind could deny that she does stand *in loco parentis* toward the child. When the father found that, on account of the death of his wife, his own straitened financial circumstances, and the large size of his dependent family, he was unable to keep the children with him, he yielded to the request of the relator to furnish a home for the child and to educate and care for it in all respects as if it had been the natural child of the foster mother. Now, the question arises as to whether section 2, *supra,* of our statutes is to be narrowly and technically construed for the purpose of shutting the doors of the school houses in the faces of many of the little boys and girls of the city and turning them out into the streets and by-ways, to grow up in idleness and ignorance, or whether it shall be liberally and broadly interpreted in the spirit of the provisions of section 6, article VIII of our constitution, which says: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." Our view of the case is fitly expressed in the language of state superintendent Thayer of the state of Wisconsin, which is quoted with approval by the supreme court of that state in *State v. Thayer,* 74 Wis. 48, 41 N. W. 1014, and is as follows:

"In the incidents of human life families are broken up and must be scattered, by the necessities of obtaining a livelihood, by death of one or both parties, or by abandonment of offspring, as in this case. Such children, as all others, are the wards of the state, to the extent of providing for their education to that degree that they can care for themselves and act the part of intelligent citizens. To secure these ends, laws relating to public schools must

be interpreted to accord with this dominant, controlling spirit and purpose of their enactment, rather than in the narrower spirit of their possible relations to questions of pauperism and administration of estates."

The doctrine here announced is supported by holdings in *Yale v. West Middle School District*, 59 Conn. 489, 22 Atl. 295; *Board of Education v. Hobbs*, 8 Okla. 293, 56 Pac. 1052; *Mizner v. School District*, 2 Neb. (Unof.) 238.

We therefore conclude that the learned trial judge properly awarded the peremptory writ to compel the respondents to admit the child to their public schools, and we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

SEDGWICK, J., not sitting.

JESSE R. SHRECK, TRUSTEE, APPELLEE, V. ELIZA E. HANLON, APPELLANT.

FILED JUNE 22, 1905. No. 13,871.

1. **Bankruptcy**: CREDITORS' SUIT. A trustee in bankruptcy, acting for the creditors of the bankrupt, may maintain an action in the nature of a creditors' bill to set aside a fraudulent conveyance, without reducing the claims of the creditors to judgment.
2. ———: APPLICATION FOR DISCHARGE. The question of fraud in conveyances made prior to July 1, 1898, could not be determined in a hearing on application by a bankrupt for his discharge in the bankrupt proceedings. *Paxton v. Scott*, 66 Neb. 385, followed and approved.
3. Evidence examined, and *held* sufficient to support the judgment.

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

John C. Stevens, for appellant.

Thomas H. Matters and *Ambrose C. Epperson, contra.*

OLDHAM, C.

This was an action in the nature of a creditors' bill instituted by the trustee in bankruptcy of the estate of David Hanlon, a bankrupt, for the purpose of setting aside the conveyance of 480 acres of land situated in Clay county, Nebraska, to Eliza E. Hanlon, wife of the bankrupt, as having been made in fraud of his creditors. The cause was instituted in the district court for Clay county, and is here a second time for review. At the first hearing of the cause in the district court a judgment was rendered in favor of the defendants. This judgment was reviewed on error and reversed by this court. *Shreck v. Hanlon*, 66 Neb. 451. The issues in the case are set forth in this opinion, and the questions determined, which are now governed by the rule of "the law of the case," are that the plaintiff has legal capacity to maintain the action; that the action was not barred by the statute of limitations when the cause was instituted; that it is not a sufficient defense to the action to show that the bankrupt had other property in his possession at the time the transfers were made which was sufficient to satisfy the creditors, if the conveyance was, in fact, fraudulent and made for the purpose of defeating claims of creditors, and at the time of commencing the action the grantor in the conveyance had no property subject to execution, out of which the claims could be made. When the cause was reversed and remanded, in pursuance to the directions of our first opinion, a new trial was had to the court, and plaintiff's bill was dismissed as to the quarter section of land occupied by defendants as a homestead, and the conveyance from the husband to the wife of the other two quarter sections was set aside as fraudulent. To reverse this judgment, defendant Eliza E. Hanlon appeals to this court.

The petition was instituted by the trustee in bankruptcy to subject the lands in dispute to the payment of the following claims, which are admitted to have been properly filed, approved, and allowed by the referee against the estate of the bankrupt: Claim of the First National Bank of Harvard for $445.45 and interest; claim of the First National Bank of Harvard for $33.85 and interest; claim of Jesse R. Shreck for $20.20 and interest; claim of S. J. Rice & Co., for $74.50 and interest; claim of the Commercial State Bank of Clay Center for $170.88 and interest; claim of the Phœnix Insurance Company of Brooklyn, New York, for $170.88 and interest. But one of these claims, that of the Commercial State Bank of Clay Center, has ever been reduced to judgment and had execution returned unsatisfied thereon prior to its being filed with the referee, and it is now contended by appellant that this is the only claim on which a creditors' action will lie at the suit of the trustee to set aside the alleged fraudulent conveyance of the real estate in controversy. This question, however, has been determined against the contention of the appellant in *Sheldon v. Parker,* 66 Neb. 610, wherein this court held:

"The bankrupt act vests the assignee with title to all property conveyed by the bankrupt in fraud of creditors, and he may proceed to recover the interest of the bankrupt in the property, whether any creditor was in position to attack the transfer or not."

And again in *Hood v. Blair State Bank,* 3 Neb. (Unof.) 432, it was specifically held that a trustee in bankruptcy, acting for the creditors of the bankrupt, may maintain an action in the nature of a creditors' bill to set aside a fraudulent conveyance, without reducing the claims of the creditors to judgment. While we are aware that we are not bound by the language and reasoning of this opinion, yet the conclusion reached on this question is in harmony with the doctrine announced in *Sheldon v. Parker, supra,* and is supported by the holding in *Southard v. Benner,* 72 N. Y. 424.

The next point urged is that the question involved in this controversy was adjudged adversely to the claim of the appellee, and more particularly the claim of the Commercial State Bank, by the United States district court, because it is admitted in the record that this creditor objected to Hanlon's discharge in bankruptcy because at the time of the commencement of the action he was the equitable owner of the land in controversy, and that these objections were overruled by the federal court, and the discharge granted. This question has also been determined against the contention of appellant in the case of *Paxton v. Scott,* 66 Neb. 385, in which it was held that the question of fraud in conveyances made prior to July 1, 1898, could not be determined in a hearing on application by a bankrupt for his discharge in the bankrupt proceedings. The conveyances in the instant case were made in 1895. Consequently, even if fraudulently made, such fact would not prevent the bankrupt from having his discharge in the federal court. Again, as further held in *Paxton v. Scott, supra,* "the discharge of a bankrupt is only personal to himself, and does not affect any lien, either by contract or by judicial proceedings, against property."

The only question then remaining is as to the sufficiency of the evidence to support the judgment. We have made a careful examination of the evidence contained in the bill of exceptions for the purpose of arriving at an independent conclusion on the question of the good faith of the transfer from the husband to the wife. In the first place, the relationship existing between the parties rendered the transfer of practically all of the available assets of the grantor presumptively fraudulent as to existing creditors. While there is a suggestion in the evidence offered by defendant that David Hanlon owned other property of a personal nature at the time of the transfer, yet nothing is pointed out which it is conceded that he did own, except some sort of a land contract in the state of Colorado, which is admitted to have been of the value of $60, and which is all the property that actually passed into the

hands of the trustee. The evidence of defendant shows that they removed to Nebraska in the year 1884; that the quarter section of land now occupied by them as a homestead was purchased by the husband; and that a deed to it was made in his name, but it is claimed that the purchase price was paid by money which the wife procured from her father, that is, that she got $1,100, and purchased the home quarter section with this sum, subject to a mortgage of $1,000. About eleven years later another quarter section was purchased for the sum of $3,000. This purchase was effected by the payment of $1,000 in cash, and the execution of a mortgage for $2,000 which still remains upon the land. Defendant claims that the $1,000 paid on the purchase was procured from the home quarter, which in reality belonged to the wife. This second quarter was deeded to the husband, and mortgaged by him to secure the remainder of the purchase price. It is likewise claimed that the third quarter was paid for by sale of stock and grain raised on the home place. Appellant admits that she knew that all this land was held in the name of the husband; that she knew that he was buying and selling stock, and depositing the funds in the bank in his own name; that he had been farming on lands leased in his own name prior to the conveyance to her. She also admits that she knew he was in debt when he made the conveyance to her. With reference to this fact, her testimony is as follows:

Q. You say, when you learned that Mr. Hanlon was signing notes as surety, you demanded that the farms be put in your name?

A. I demanded that they were mine, and that I wanted them.

Q. You wanted the farms in your name?

A. I wanted my property.

Q. Because you learned that he was involved?

A. Because I learned that he was signing notes for everybody, and that he was prey for 'most anybody that wanted to prey on him, and I wanted my place to keep my home there. * * *

A. I demanded that they be put in my name, because it was mine, and I wanted it, so that he wouldn't run through with it.

We think, in view of this testimony, that the evidence is amply sufficient to sustain the judgment of the trial court, and we therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

WILLOW SPRINGS IRRIGATION DISTRICT v. JAMES WILSON.

FILED JUNE 22, 1905. No. 13,829.

1. **Irrigation:** PRELIMINARY WORK. An irrigation district may contract with a competent engineer to survey and furnish plans for the construction of a proposed canal, and from which the board of directors of the district may estimate the cost thereof and the amount of bonds to be voted therefor. Such work is preliminary to the work of construction, and the expense thereof is not to be paid out of the construction fund.

2. **Corporation:** ACTION: PRESUMPTION. In an action against a corporation based on a contract, the presumption obtains that the contract is within the power of the corporation to make, and that the officers executing it on behalf of the corporation acted within the law, unless the petition states facts showing the contrary.

3. ———: ———. Where a claim has been rejected or disallowed in part by the auditing board of a corporation, an original action may be instituted on the claim, in the absence of a statute directing other proceedings to enforce it.

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

A. M. Robbins, for plaintiff in error.

E. J. Clements and *V. O. Johnson, contra,*

DUFFIE, C.

The petition in this case alleges that the defendant is an irrigation district duly organized under the laws of this state; that on November 20, 1895, soon after its organization, and for the purpose of enabling its directors to determine the amount of money necessary to be raised for the purpose of constructing an irrigation canal and acquiring the necessary property and rights therefor, it entered into a written contract with the plaintiff, by the terms of which it agreed to employ the plaintiff as engineer of said irrigation district, and to pay him for his services the sum of $5.50 a day for the time he was actually engaged in said services. A copy of the contract is attached to the petition. It is further alleged that the plaintiff performed 93¼ days' services for the defendant in making the surveys and plans for an irrigation canal and works for said district, and estimates of the cost of constructing the same, which survey, plans and estimates were accepted and adopted by the district; that on May 21, 1896, plaintiff presented to the defendant his account and claim for services amounting to $512.87, and the board of directors of the district audited said account and allowed only $350 on the same; that defendant neglected and refused to pay the amount due plaintiff for his services, or any part thereof, and he asks judgment for the amount of his claim, with 7 per cent. interest from April 30, 1896. A demurrer was filed to this petition, which was overruled, and thereupon the defendant answered. A trial was had to the court, resulting in a judgment for the plaintiff below for the sum of $305.25, with interest from November 20, 1896, at 7 per cent. per annum, making altogether $458. The defendant has brought the case to this court by petition in error, but has failed to file a bill of exceptions showing the evidence taken on the trial. In this condition of the case we can only examine the pleadings to determine whether they support the judgment entered.

It is vigorously contended by the plaintiff in error that the petition does not state a cause of action, and that it discloses facts avoiding the cause of action. The agreement made between the parties contains this stipulation: "The party of the second part further agrees to wait for the $5.50 per day, the consideration above named, until the same can be paid out of the first tax levy on said district, provided the same is paid within one year from date." It is urged that the district could not enter into any contract relating to the construction of the ditch until the funds had been provided to cover the expense, and *School District v. Stough,* 4 Neb. 357, *Markey v. School District,* 58 Neb. 479, and *Pomerene v. School District,* 56 Neb. 126, are cited in support of this contention. These cases were all based upon a statute which prohibits a school district from contracting for buildings and the furnishing of school houses until the fund therefor is provided, and unless the statute relating to irrigation districts contains a like prohibition the authorities cited are not applicable. Section 24, article III, chapter 93*a,* Compiled Statutes, 1903 (Ann. St. 6846), provides that "the cost and expense of purchasing and acquiring property and constructing the works and improvements herein provided for, shall be wholly paid out of the construction fund, or in the bonds of said district at their par value. * * * For the purpose of defraying the expense of the organization of the district, and the care, operation, management, repair, and improvement of such portions of said canal and works as are completed and in use, including salaries of officers and employees, the board may either fix rates of tolls and charges, and collect the same from all persons using said canal for irrigation or other purposes, or may provide for the payment of said expenditures by a levy of assessments therefor, or by both said tolls and assessments." These provisions make it plain that the construction funds can be used only in purchasing and acquiring property for the canal, and constructing the same, and this was the construction given

the section by this court in *Lincoln & Dawson County Irrigation District v. McNeal,* 60 Neb. 613. Section 13 makes it the duty of the board of directors, as soon after the organization of the district as practicable, to estimate and determine the amount of money necessary to be raised for the purpose of constructing the necessary canals and works, and acquiring the necessary property rights therefor, and otherwise carrying out the provisions of the act. It is evident that capable civil engineers will not be found among the directors of all the irrigation districts formed under the provisions of this act, and it is quite apparent that no estimate of any real value can be made by one not a civil engineer. It is a necessity, therefore, in order to obtain the approximate cost of the proposed work, that a civil engineer should be employed to run the line, and to ascertain as nearly as possible the amount of funds necessary to be raised for carrying on and completing the work. This was the opinion of the supreme court of California in *Cullen v. Glendora Water Co.,* 113 Cal. 503, 526, 39 Pac. 769, in construing a similar statute. In that case it is said:

"While I am inclined to the opinion that the statutory requirements that an estimate must be made implies that it must be made by a competent engineer upon such plans or data as that it may be approximately correct, and that it should be recorded in the office of the district, or otherwise made accessible to all parties interested, it is not necessary so to decide in this case." On rehearing, reported in 113 Cal. 503, 510, 45 Pac. 822, it was said: "We think that the language of the act (St. 1891, p. 147, sec. 15) clearly implies that there must be some plan or plans in the alternative, before an estimate can be made, and that without such plan or plans there can be no real estimate."

The object of the statute under consideration was undoubtedly to allow the people of the district to examine and know the plan of the proposed improvement, and the estimated cost thereof, before they incurred the burden of

the indebtedness necessary to complete the proposed works; and it is necessary, in order to prepare any definite plan and to obtain any reliable estimate, that the services of an engineer should be secured. This is all to be done before bonds are voted or any tax laid. The expense is not incurred in the construction of the canal, but in obtaining information necessary to the voters of the district, in order that they may act intelligently upon the question, and say whether they will enter upon the construction at all or not. In our opinion, the contract in question is not only one that the district might enter into, but which it was necessary to make under the provisions of the law.

It is further urged that, as an irrigation district is a body of limited powers, in a suit brought upon a contract made by the district, the petition should allege that the corporation had power to make the contract sued on, and that it was made at a regular meeting of the board of directors, or some special meeting called for that purpose. The general rule is that, in actions against a corporation upon a contract, it is not necessary to allege either that the corporation had power under its charter or governing statute to enter into the contract or that its officers by whom the contract was made in its behalf were duly empowered or authorized thereto. These are matters of defense. In *Montague v. Church School District,* 34 N. J. L. 218, a suit upon a note of the school district, the court said:

"In declaring on a promissory note, it is not necessary to aver that in its creation the corporate body which gave it acted within its power. It is sufficient for the holder to declare upon the instrument as the act of the defendants, and if it be *ultra vires,* he will fail upon the trial of the cause."

So in *Red Willow County v. Davis,* 49 Neb. 796, it was held that, "where a petition alleges and a demurrer admits that the plaintiff was employed by the county board to render professional services as a physician for a

pauper, the presumption will be indulged that the county board kept within the law in employing the physician, and that a poorhouse had, prior to that time, been established and opened in said county for the reception of its paupers."

It is also insisted that the only remedy available to the plaintiff below for the collection of his claim is by presenting the same to the defendant's board of directors, and obtaining its allowance in whole or in part by said board; that as he presented it for allowance and the board made an order awarding him $350 for his service, and the statute not providing for an appeal from such order, it is final and conclusive, and no action can be maintained on the original claim. We know of no rule which precludes a party from maintaining an action against a corporation, public or private, where its proper auditing board has refused to allow the claim in whole or in part. It is true that the holder of a claim against a county must present it to the county board, and appeal to the district court from an order rejecting the claim; but this is so only because the statute has provided that mode of procedure, and, in the absence of the statute, suit might be instituted against the county in the first instance.

We find no reversible error in the record, and recommend an affirmance of the judgment.

JACKSON, C., concurs. ALBERT, C., not sitting.

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

AFFIRMED.

SEDGWICK, J., not sitting.

CHRISTINA COPPOM, APPELLANT, V. ROBERT FORMAN, APPELLEE.

FILED JUNE 22, 1905. No. 13,843.

Pleadings and evidence examined, and *held* to require an affirmance of the decree of the district court.

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

W. S. Morlan, for appellant.

E. B. Perry and *John T. McClure, contra.*

DUFFIE, C.

The amended petition in this case alleges that the plaintiff is the owner and in possession of the northwest quarter of section 20, in township 4, range 24, in Furnas county, Nebraska, and that the defendant is the owner of the southwest quarter of said section. It is further alleged that plaintiff, with her husband, settled upon and made claim to said land in 1879 under the preemption law of the United States; and that in 1882 Adolph Coppom, the husband, made final proof, and obtained a receiver's final receipt therefor; and that in February, 1885, a patent was duly issued to him for said northwest quarter; that in 1894 the plaintiff and her husband conveyed the land to Andrew Ruben, which conveyance was for the purpose of vesting title in the plaintiff, and that in May, 1897, Ruben and wife conveyed the same to her; that Adolph Coppom died in May, 1897; that plaintiff has always lived on said land from date of settlement thereon, occupying the same to what is called the "original quarter corner" on the west side of said section 20. It is further stated that in June, 1900, D. S. Hasty, the then county surveyor of Furnas county, made a pretended survey of sections 19 and 20 in the above township and range,

and set a stone on the line between said section 16 rods north of the point which had for more than 20 years prior thereto been known and recognized as the original quarter corner between said sections, and which said stone is now known as the "Hasty quarter corner"; that after the establishment of the Hasty quarter corner the defendant entered upon the tract of land in dispute, moved a building thereon, and constructed a fence across the tract, removing a fence which the plaintiff had placed thereon. Plaintiff removed the fence built by defendant when he began to erect another one, and commenced cutting and harvesting the grass growing upon the land. In the original petition a temporary injunction was prayed and issued, and the prayer of the amended petition is that the injunction be made perpetual; that defendant may be enjoined from trespassing upon the land in dispute, and from building or maintaining any buildings thereon, and from interfering with or removing any fence erected by the plaintiff, or any of the crops on said land; and that plaintiff's title to said tract be quieted, and defendant adjudged to have no interest therein.

It is quite apparent from the allegations of the petition, and the evidence on the trial makes it certain, that after the Hasty survey, which located the quarter corner 16 rods north of what the plaintiff claims to be the original quarter corner established by the government survey between sections 19 and 20, the defendant took possession of the disputed tract containing about 16 acres, moved a building thereon, and erected a fence along what he claimed to be the boundary line between himself and the plaintiff, and that he was in the actual possession of the tract at the time of the commencement of this action. The facts in this case as to possession by defendant are not substantially different from those alleged in the petition in *Warlier v. Williams,* 53 Neb. 143, in which it was said that "a plaintiff is not entitled to a mandatory injunction to remove from real estate one who has without color of title unlawfully and forcibly entered and wrongfully re-

mains thereon, though such trespasser be insolvent." If the action was based solely upon the plaintiff's claim that this disputed strip of 16 acres was part of the northwest quarter of section 20, we would have no hesitation in dismissing the plaintiff's petition, and remitting her to her action at law to recover possession of the premises. But the plaintiff asserts a claim of title to the disputed land by adverse possession, and, under the rule in this state, an action to quiet title may be maintained by any party, whether in or out of possession of the premises, against another asserting an adverse claim. *Foree v. Stubbs,* 41 Neb. 271; *Hall v. Hooper,* 47 Neb. 111; *Eayrs v. Nason,* 54 Neb. 143; *Ross v. McManigal,* 61 Neb. 90. This phase of the case requires us to examine the evidence and determine therefrom the location of the original quarter corner on the west side of section 20, and the plaintiff's claim to have occupied the land south to the point which she now claims to be the original quarter corner for the statutory period. In June, 1888, Joseph S. Phebus, county surveyor, made a survey of at least a part of the line between sections 19 and 20, and either placed or found a stone at a point which he established as the quarter corner on the west side of section 20. The field notes of this survey show that he commenced at the government corner common to sections 19, 20, 29 and 30, running north 40 chains and 26 links to the quarter section corner between 19 and 20, where he found an old stake and set a stone 10 by 5 by 2 to perpetuate the corner; thence north 44 chains and 28 links to the corner of sections 17, 18, 19 and 20, where were a mound and pit. This survey was made at the request of J. Higgins and Adolph Coppom. Mr. Higgins testified upon the trial that the survey commenced at the common corners of sections 19, 20, 29 and 30, and ran thence north one-half mile, where Coppom took a spade and uncovered a stone; and, while the field notes of the survey made by Phebus show that the survey was continued to the northwest corner of section 20, Higgins testified that the north half mile was not surveyed.

His testimony regarding that is as follows: "He only surveyed half up the section; I asked to run it on through and have the corner located, but he said it was not necessary, that was all it was necessary to do."

The evidence is quite conclusive to our minds that the original government quarter corner on the west side of section 20 is something like 16 or 18 rods south of where the plaintiff claims that Phebus established it, and in the immediate vicinity of what is called the "Hasty quarter corner." Lawrence D. Carroll, a witness for the defendant, was well acquainted with the premises in the year 1873, and was asked this question: "Going back now to 1873, when you said you found the government corners, I will ask you if at that time you found government landmarks, so that you could determine the lines between the southwest quarter and the northwest quarter of said sections? A. Yes, sir. The whole country was surveyed in 1870, and perhaps it would be a mound 18 inches high, and you could see them for a long way all over the country." It is clear that the government pit and mounds would be very distinct for a period of three years or more after they were made, and Mr. Carroll locates the point at which the government quarter coroner on the west side of section 20 was located as from 18 to 20 rods north of the point which plaintiff claims as her southwest corner. He states that there is a row of cottonwood trees about on the line between the two quarters, and about where the government line runs and 18 or 20 rods north of the line as now claimed by the plaintiff. Carroll further testified that Charles Twist occupied the southwest quarter of section 20 in the fall of 1873; that he helped him build a house on the land during that fall. He also states that the fence now claimed by plaintiff to be on the boundary line between the two quarters is from 18 to 20 rods south of where he knew the government quarter corner to be. One Morrill, who worked for the Coppoms in 1882 and 1883, testified that Coppom planted a row of cottonwood trees on his south line during the time he was in his em-

ploy; that, when preparing to plant the trees, Coppom directed him to ride over to the corner and stand there until they got a furrow plowed to plant the trees in, telling him where the corner was. It was then marked by a fence and a stone, and he stood at this corner, which we understand to be the corner in dispute, while the furrow was run. He claims to be well acquainted with the land, and says that the corner now claimed by Mrs. Coppom is close to 20 rods south of the place where he was directed to stand. G. B. Misner testified that he cut hay on the southwest quarter of the section in 1890; that he had a conversation with Adolph Coppom relating to the north line of that quarter, and that Coppom showed him three or four rows of cottonwood trees as marking the line; that these trees are about 18 rods north of where plaintiff now claims the line to be. One Bolinbaugh testified that Adolph Coppom told him at one time that he had established his corner about 14 rods to the south, so as to get more alfalfa land. There is evidence on behalf of the plaintiff that her fence and the line claimed by her is that established by the Phebus survey of 1888, but, in our judgment, the immovable monuments shown to have existed on the southwest quarter since 1873, such as the Twist sod house which was erected in that year, the cottonwood trees planted by Adolph Coppom himself on what he then claimed to be his south line, the fact that this quarter corner was well known by one or more of the witnesses at an early date, and while the government corner established by the government survey was plain and distinct, all lead us to the conclusion that there has been a gradual encroachment by the plaintiff and her husband upon the southwest corner of the section, and that the land in dispute is a part of the southwest quarter. We are better satisfied with this conclusion as it agrees with that of the district court, who had an opportunity to hear and see most of the witnesses who gave evidence in the case, and a much better opportunity to judge of their candor and truthfulness than have

we, who are only allowed to read a cold and impassive record.

The amended petition in this case was filed March 28, 1902, but there is nothing in the record to show us when the original petition was filed and the action commenced. We think that the weight of evidence is to the effect that no claim was made to the land in dispute by the plaintiff or her husband prior to the fall of 1890, when Misner cut hay upon the southwest quarter. Whether this action was commenced prior to the fall of 1900, or after that, we cannot know, as the original petition and the summons issued and served are not contained in the transcript. It is impossible therefore for us to tell whether the action was commenced within ten years from the fall of 1890, or whether ten years by which title by adverse possession could be acquired had expired since Coppom pointed out his south line to Misner. Being without exact data to determine this question, we accept the finding of the district court, and recommend the affirmance of the decree.

JACKSON, C., concurs. ALBERT, C., not sitting.

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

AFFIRMED.

SEDGWICK, J., not sitting.

HENRY Z. POWELL V. NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY.

FILED JUNE 22, 1905. No. 13,861.

Action for Personal Injuries: NEGLIGENCE. The Union Pacific Railroad Company and the New Omaha Thomson-Houston Electric Light Company both occupied the north part of Jones street between Ninth and Twelfth streets by permission of the proper authorities of the city of Omaha, one with a spur track for the receipt

and delivery of freight, the other with poles for carrying its wires. The electric light company erected its poles some time after the railroad company had laid its track, and the poles were so placed as to stand only 9¾ inches from the ladder of a box car being moved over the spur track. The plaintiff, an employee of a cold storage company, was directed by his employer to go to this spur track and lock the door of a car containing goods consigned to the storage company. On arriving at the track he found that the car, with others, was being moved toward the west end of the spur by those in charge of a switch engine of the railroad company. He ascended part way up the ladder on the side, and stood there until the car reached one of the poles of the electric light company, where he was caught between the car and the pole, and injured. On the trial of an action brought by him against the electric light company for damages, the district court directed a verdict for the defendant. *Held*, That under the circumstances he could not recover, and the direction of the court was proper.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Baldrige & De Bord, for plaintiff in error.

Greene, Breckenridge & Kinsler, contra.

DUFFIE, C.

The defendant in error, the New Omaha Thomson-Houston Electric Light Company, hereafter spoken of as the defendant, is a corporation organized for the purpose of generating and furnishing electric power and lights, and for some years has been engaged in that business in the city of Omaha. In the conduct of its business it has, by permission of the city of Omaha, erected poles in certain of the streets and alleys of the city, upon which wires are strung to convey the electric current from the place where generated to the place of use. Its poles are set along the north side of Jones street. The Union Pacific Railroad Company, by permission of the city of Omaha, occupies the north part of Jones street with a spur track, the better to accommodate the warehouses and wholesale establishments situated on the north side of the street.

The tracks of the Union Pacific Railroad Company were laid and being used on Jones street for a long time prior to the time when defendant obtained permission to erect or erected any poles in said street, and when the poles were erected they were placed so near the railroad track that the rungs of the ladder of a passing box car were only 9¾ inches from the poles. The poles had been set, however, a long time previous to the accident complained of. The above facts are stated with much detail in the petition, and it is further alleged that the defendant knew that railroad box cars usually had ladders on the outside, made of iron rungs placed on the side of the car, one above the other, to enable persons to ride thereon or to mount to the top of the car, and that, knowing these facts, and that cars were from time to time propelled along said spur track, and that the car ladders were used by persons for the purpose of riding thereon and for ascending to the top of the car, it recklessly and negligently erected its poles in close proximity to the track, as above stated. The petition contains these further allegations detailing the manner of the plaintiff's injury for which the action was brought. "The plaintiff further alleges that on said 10th day of July, 1903, while employed by the Omaha Cold Storage Company, he was directed and ordered by the foreman of said company to lock one of the box cars filled with merchandise consigned to the said storage company, and of which merchandise said company had charge of the delivery; that, in pursuance of said directions, the plaintiff went from the place of business of the said storage company to Ninth street, for the purpose of locking said car, and that, before the plaintiff arrived at said place, the train to which said car was attached began to move westward in the direction of the place of business of the said storage company; that thereupon the plaintiff, at the corner of Ninth and Jones streets, jumped upon the rungs of the iron ladder on the northwest corner of a car attached to said train, and on the north side of said corner, without seeing or knowing of the close proximity of said

poles to said car, and without any negligence on his part, and that plaintiff rode upon said car until said car approached one of said poles that was 9¾ inches away from the iron rungs of the ladder on said box car where said plaintiff was standing; that as the car passed one of said poles the plaintiff, not being able to save or protect himself from injury, was struck by said pole, and violently and with great force was knocked from the position in which he was standing on the rung of the ladder on the north side of said box car to the ground, and was crushed on his side, hip and body and limbs, and injured internally, and in such a permanent way that he will never recover from the effects thereof; that the plaintiff was not guilty of negligence in riding on the ladder of said car, and could not, with the exercise of ordinary care, have foreseen said danger, and did not know of the close proximity of said pole to said car." Judgment in the sum of $30,000 was prayed.

After the plaintiff had introduced his evidence and rested, the defendant moved for a directed verdict in its favor upon the following grounds: "First. That the petition does not state facts sufficient to constitute a cause of action. Second. That the evidence fails to establish any duty owed by the defendant to the plaintiff which was breached. Third. The evidence fails to establish any actionable negligence upon the part of the defendant which resulted in the injury to the plaintiff. Fourth. If the pole with which the plaintiff came in contact while riding on the side of a box car, and which threw him off the car on which he was riding, was negligently placed in the position that it occupied, and on the day of the injury, such negligence is not the proximate cause of the injury to the plaintiff. Fifth. The testimony shows that the injury to the plaintiff resulted from his own negligence." The court sustained the motion. A verdict for the defendant was accordingly returned by the jury, upon which judgment was entered. A motion for a new trial being overruled, plaintiff has taken error to this court.

A great share of the plaintiff's brief is devoted to showing that a person charged with negligently inflicting an injury upon another cannot defend upon the ground that the person injured was at the time a trespasser upon the lands or property of a third party. This argument assumes that the defendant seeks to escape liability upon the ground that the plaintiff was a trespasser upon the car of the railroad company at the time of his injury, and that it was his trespass, and not the alleged negligent act of the defendant in setting the pole, that caused the injury. The law, we think, is well settled that one who wilfully or negligently injures another cannot defend upon the ground that the party injured was trespassing upon some third party. It will not do to say that one who carelessly and negligently shoots and wounds another can escape liability by showing that the injured party was trespassing upon the premises or property of a third party. But we do not understand that the defense is based at all upon this theory, or that the court, in instructing a verdict against the plaintiff, accepted that view of the law. As we understand the position of the defendant and of the trial court, it is that the defendant owed no duty to any person using the street to see that he did not collide with the pole. The question is not whether the plaintiff was a trespasser upon the car of the railroad company, but whether a person who places an inanimate object in the street by permission of the municipal authorities, so that it is lawfully there, is liable to another person for damages sustained by him in consequence of a collision between such person and the inanimate object. It being conceded that the defendant had permission from the city of Omaha to erect its poles along Jones street where the collision occurred, it must be assumed that it erected the poles under the direction of the city, and at the several points in the street designated or permitted by the officers of the municipality. Such being the case, can the plaintiff, or any other citizen or person using the street, maintain an action against the company on account of being

brought in collision with the pole? Inanimate objects occupying a street by permission of the municipal authority have as much right there as an individual lawfully using it. The tracks of a street railway company, shade trees, platforms of wholesale and warehouse establishments, the poles of public utility companies, each and all have the right to occupy the street under permission and control of the municipality. Those erecting poles or planting shade trees by permission and direction of the city are guilty of no negligence in so doing, and as the pole or the tree cannot possibly injure a person using the street, except through a collision brought about through some other agency than the action of the party in planting them, the latter owed no duty to any person using the street. When they plant the tree or set the pole in a secure manner, they have performed their whole duty, for no possible injury can result to parties using the street, except through the active agency or active force of another. To state it briefly, the pole or tree has as much right to be in the street as the individual or vehicle, or any other thing lawfully on the street. In the case we are considering, the injury complained of resulted from a collision, but in that collision the pole was a passive and irresponsible agent. It was the active force of the railroad company in moving the car upon which the plaintiff had placed himself that caused the collision and the injury. If the plaintiff was upon the car with the knowledge and assent of those in charge of the same, and they knew of his exposed position and of his danger of collision with the pole, it may be that he might have an action against the company; but, in our opinion, he has no greater right of action against the defendant, who committed no trespass, but was acting lawfully in placing the pole where it did, than would one walking along the street have against the owner of a lot, who had planted a shade tree by permission of the city, for an injury occasioned by a collision with such tree. The plaintiff is simply one of the public, and can claim no rights or pro-

tection in the use of Jones street that might not be claimed by another citizen. Had he been walking or driving on Jones street, and run into the pole, he could not recover against the defendant, as the collision would be the result of his own act. But further than this, the plaintiff, when injured, was not using the street as one of the public. He had abandoned his rights therein and whatever protection was due him in that capacity, when he left the street and boarded the car of the railroad company. In mounting the car he stepped from the street upon the moving premises of the company, and when he did this he voluntarily placed himself in a position where he necessarily surrendered control of his own movements so long as he remained on the car. In mounting the car and remaining there, he voluntarily surrendered himself to the control of the force which was moving it. He voluntarily put himself in a position where he could no longer avoid contact with the pole. Had he remained upon the street in the character of one using the street, he could have avoided the collision, but when he mounted the car he ceased to have control over his movements. It will not do to say that, where the city gives a railway company the right to run its cars through a street, any chance pedestrain who boards a train is using the street as a citizen, and entitled to all the privileges and protection incident to such character. Under the circumstances of this case the defendant owed the plaintiff, as one of the public, no greater duty while riding on the car than it owed him had he been walking or driving upon the street. It owed no duty to the railroad company, because that company had acquiesced for years in the use of the street granted by the city to the defendant, and operated its cars thereon with full knowledge of the dangers incident to the services performed by its employees in control of passing cars. It had no greater right in the street than had the defendant. Both were there by permission. In all probability the railroad company had anticipated the danger of collision from this pole, and had warned its employees to guard

against it. That would probably be its duty, and its duty to anyone whom it commanded or knowingly allowed to ride in the position which plaintiff occupied. But neither the defendant nor the city owed any duty to the plaintiff to notify him of the position of the pole. Had he walked or ran against it in the broad light of day, such collision would be the result of his own carelessness, because, the pole being in plain view, he must take notice of it. The fact that he left the street and mounted the car did not add to the duty of the city or of the defendant to protect him by notice of the location of the pole. He was charged with notice of its location to the same extent that he is charged with notice of the location of a lamp-post erected by the city, and this is true whether he is using the street as a traveler thereon or as a traveler on board a passing railroad car.

It is quite plain to us that no charge of negligence can be laid to the defendant in the erection of these poles, unless it owes to every citizen the duty to guard him from contact with every pole which it erects in the street, and this duty we do not think exists. When defendant maintains its poles in a safe and sound condition at the point directed by the city authorities, it has performed its whole duty to those using the streets, and, if collision with these poles is brought about by the voluntary act of the party or by some uncontrollable force, the defendant is not liable.

We think the court was right in directing a verdict for the defendant and entering judgment thereon, and recommend an affirmance of the judgment.

JACKSON, C., concurs. ALBERT, C., not sitting.

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

AFFIRMED.

PETER HANSON V. FRANK PAUL NATHAN.

FILED JUNE 22, 1905. No. 13,873.

Review: MOTION FOR NEW TRIAL. The rule is well settled that the supreme court will not review a judgment of the district court on a petition in error as to errors occurring at the trial, unless the alleged errors are first called to the attention of the trial court by a motion for a new trial. *Smith v. Spaulding*, 34 Neb. 128.

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

A. R. Oleson, for plaintiff in error.

McNish & Graham, contra.

DUFFIE, C.

Hanson, plaintiff in error, owns the northwest quarter of section 33, township 24, range 5, in Cuming county, Nebraska. Nathan, defendant in error, is the owner of the northeast quarter of the same section. A survey establishing the boundary line between these two quarter sections was run and established in the year 1870, and the present owners, and those through whom they claim title, occupied the lands up to the line thus established down to the year 1901. About this time a controversy arose between Hanson and Nathan relating to this boundary line, and Hanson procured a survey of the premises to be made by the county surveyor of Cuming county in the early summer of 1902, which survey established the line some distance east of that which had theretofore been recognized as the true boundary. After this last survey Hanson commenced the erection of a fence along the line established by the last survey, which he completed in March, 1903, and took possession of the disputed strip, and thereupon Nathan commenced this action in equity to restrain

Hanson from trespassing upon his premises. An injunction was issued by the county judge of Cuming county which, on motion of Hanson, was dissolved by the district judge, upon the ground that the relief claimed was the possession of a strip of land in dispute between the owners, the title of which had not been established in a court of law. After the dissolution of the injunction Hanson filed an answer, to which Nathan replied, and in his reply prayed for a decree quieting his title to the premises in dispute. Hanson moved to strike this reply from the files upon the ground that it sought to incorporate a new and independent cause of action not set out in the petition. This motion was overruled, and thereupon Nathan asked and obtained leave to amend the prayer of his petition by adding thereto a prayer to quiet his title to the strip in dispute. Leave was given to so amend the prayer of the petition, to which Hanson objected, and the court announced that the trial would proceed as an action to quiet title, the case being set for trial the following day. Hanson thereupon moved for a continuance, supporting his motion by a showing to the effect that, because the action was to proceed as one to quiet title, different proof would be necessary, which required time to procure. This motion was overruled and the trial proceeded, resulting in a decree quieting title to the disputed premises in the plaintiff, Nathan. Hanson has brought the case here by petition in error, but, under the well-established rules of this court, no motion for a new trial being filed in the district court, we can only examine the pleadings and the decree entered to ascertain whether the decree is supported by the pleadings on which the case proceeded to trial. *Zehr v. Miller,* 40 Neb. 791; *Harrington v. Latta,* 23 Neb. 84; *Schmid v. Schmid,* 37 Neb. 629; *County of Lancaster v. Lincoln Packing Co.,* 5 Neb. (Unof.) 521; *Hansen v. Kinney,* 46 Neb. 207.

It is objected that the petition does not contain any allegation to the effect that Hanson was asserting an adverse claim of ownership, or that his acts constituted a

cloud upon Nathan's title. It is probably true that the petition is barren of facts entitling the plaintiff, on a strict construction, to a decree quieting his title, but all the pleadings taken together clearly show that Hanson was asserting title to the premises in dispute as against the claim of Nathan. His answer alleges that he is the owner and in possession of the northwest quarter, and that this disputed strip is a part of said quarter section; and the reply alleges "that, under and by virtue of the claim of said defendant to said strip of land in question, there is a cloud cast upon the title of plaintiff's land." As a rule, the failure of a petition to allege the necessary facts to constitute a cause of action cannot be supplied by statements in the reply, and if the motion made by Hanson directed against the reply had been to strike therefrom statements that should have been set out in the petition, it would undoubtedly have been sustained, but the motion was to strike the reply from the files, and as it contained matter denying several allegations of the defendant's answer, the motion was properly overruled, and the allegations of the reply may now be considered in aid of the defective petition. *Farmers & Merchants Ins. Co. v. Dobney,* 62 Neb. 213; *Gregory v. Kaar,* 36 Neb. 533. So, also, a defective petition may be aided by statements contained in the defendant's answer. *Railway Officials & Employees Accident Ass'n v. Drummond,* 56 Neb. 235, in which the following appears: "A petition which is defective by reason of the omission of material facts therefrom will be aided and cured by the averment of such facts in the answer."

The objection that a trial by jury was denied the defendant cannot be sustained in the absence of a motion for a new trial. The same objection was made in *Lowe v. Riley,* 57 Neb. 260, and the court said: "Again, if the district court erred in denying the appellants a jury for a trial of the issues in this proceeding, that was an error of law which occurred at the trial and cannot be reviewed on appeal, but only on petition in error." This, of course,

means that the question should have been raised in the trial court by a motion for a new trial. Some of the rulings of the trial court, especially the refusal to grant a continuance, were probably prejudicial to the defendant, and this ruling, if properly presented to that court by a motion for a new trial, would incline us to reverse the judgment entered; but, as before stated, no opportunity was given the trial court to correct any of the alleged errors, and, following the rule, from which there has been no variation in this court, that errors of law occurring upon the trial cannot be reviewed in the absence of a motion for a new trial, we recommend an affirmance of the decree.

JACKSON, C., concurs. ALBERT, C., not sitting.

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

AFFIRMED.

SEDGWICK, J., not sitting.

CHARLES A. MORRILL V. RUTH MCNEILL.

FILED JUNE 22, 1905. No. 14,138.

1. **Review:** INSTRUCTIONS. Where a case has been reversed and remanded, with directions to the trial court to submit certain issues to the jury, and the case is tried a second time on the same issues made by the pleadings on the first trial, this court, on a second appeal, will examine and pass upon the correctness of the instructions of the trial court in submitting to the jury the issues which the court was directed to try and determine, notwithstanding a claim made on behalf of the defendant in error that error in such instructions is without prejudice to the plaintiff in error because of a former adjudication of such issues asserted by the defendant in error.

2. **Ratification of Settlement:** INSTRUCTIONS. The plaintiff pleaded the ratification by the defendant of a settlement made between him-

self and the defendant's husband, and produced competent evidence tending to prove such ratification. The court instructed the jury to the effect that, if they found that the defendant had ratified the settlement, they should find for the plaintiff, but failed to state what acts on the part of the plaintiff would amount to a ratification, and refused a proper instruction covering the question asked by the plaintiff. *Held*, Error.

3. **Trial:** THEORY OF CASE. Where the court and the parties to the action proceed in the trial of a case on the theory that the pleadings present a certain material issue not jurisdictional in its nature, this court will not on appeal examine the pleadings to determine their sufficiency to clearly make the issue.

ERROR to the district court for Logan county: ROBERT C. ORR, JUDGE. *Reversed.*

Wilcox & Halligan, for plaintiff in error.

Hoagland & Hoagland, contra.

DUFFIE, C.

This is an appeal from a judgment entered in favor of Ruth McNeill on a second trial of the case. The opinion of the court on the former appeal is found in 3 Neb. (Unof.) 220, where a full statement of the facts is given. The errors complained of by Morrill are that the court failed to properly submit to the jury the question of a ratification of the settlement made between Morrill and Allen McNeill after the property in question had been taken on the writ of replevin. On behalf of Mrs. McNeill it is urged that her plea of *res judicata* is fully sustained by the record and the evidence, and that the only questions which should have been submitted to the jury were the amount and value of the property claimed by her; that, in this view of the case, errors of the court in instructing the jury on other issues made are immaterial, such errors, if they exist, being without prejudice to the plaintiff in error. As we understand the record, the pleadings have not been changed or amended since the first trial. The issues were therefore the same. On the

former appeal the case was reversed and remanded for another trial because the court had failed to submit to the jury the question of the alleged settlement, and the ratification thereof by Mrs. McNeill. This is conclusively shown by the language of the former opinion, from which we quote:

"It is apparent that the only question submitted to the jury was that of the right to the possession of the property as beween plaintiff in error and the defendants in error at the time the replevin action was instituted. No evidence was offered by plaintiff in error upon the merits of the controversy as presented at the commencement of the action, but the supplemental petition and all the evidence offered by plaintiff in error related solely to the settlement. It is, therefore, clear that the issue presented by plaintiff in error in his supplemental petition, and supported by the evidence offered by him, is entirely taken from the consideration of the jury. We do not express an opinion as to the weight of the evidence offered by plaintiff in error tending to establish the settlement pleaded, or tending to establish the authority of Allen McNeill to represent his wife in such settlement; nor upon the evidence tending to show that the wife had full knowledge of the terms of such settlement, and accepted the benefits thereof, failing to question it for more than two years after it was consummated. But we do say that sufficient competent evidence was offered by plaintiff in error and received by the trial court to require the submission of the question under proper instructions to the jury. The rule is well settled in this state that a party is entitled to have his theory of a case, if it is supported by the pleadings and proof, submitted to the jury. * * * For error of the trial court in withdrawing from the jury the question as to the existence and validity of the settlement pleaded, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings."

It will be seen, therefore, that the case was remanded

with directions to the trial court to submit the question of settlement and ratification to the jury, and to give them proper instructions relating thereto. This has become the law of the case, and the trial court had no discretion except to try the issues which this court specially directed should be heard and determined. If defendant in error was not satisfied with the former opinion, and if she thought this court went too far in remanding the cause for the special purpose of having the issues of a settlement and of a ratification of that settlement by Mrs. McNeill disposed of by the trial court, she should have taken steps to have the opinion reviewed, and such directions given and orders made as the facts and the law warranted. We do not understand that any objections were offered to the order made on the former appeal, and defendant in error cannot now, after the trial court has proceeded in obedience to the orders of this court, take exceptions to the action of the trial court in so doing. Neither can we overlook errors committed by the trial court in submitting to the jury issues which he was specially directed to try, or say that these errors were not prejudicial to the plaintiff in error because these issues were immaterial or had been settled at a former hearing.

Relating to the questions of the settlement made by Mr. McNeill with plaintiff in error, and its ratification by Mrs. McNeill, the court instructed the jury as follows: "Ninth. The jury are instructed that the plaintiff, in his supplemental petition, alleges, and seeks to prove the same by testimony introduced, that the defendant, Ruth McNeill, authorized her agent to consummate the settlement as alleged in plaintiff's petition, and further claims by her acts and language did ratify said agreement subsequent to its execution. If you find from the evidence that the defendant did so authorize her agent to consummate this alleged agreement, or that by her acts subsequently she ratified the same, then she is estopped from denying the validity of said contract, and your verdict should be for the plaintiff; but the question as to whether

she ever authorized her agent to execute such contract, or that she by her acts and language afterwards ratified the same, are questions for the jury to determine from all the evidence." There was evidence tending to show that after Morrill had commenced his action in replevin, and the sheriff had seized the property described in the writ, Mrs. McNeill sent for Callender, and desired him to effect a settlement of the case. It is conclusively shown that Callender and Allen McNeill, the husband of Ruth, met the attorneys for Morrill in the office of one Morrison on the evening of the second day after the levy; that a settlement was effected, by the terms of which Morrill was to release from the levy 100 bushels of corn, a like amount of wheat, certain horses, and all the agricultural implements taken on the writ, and that he was to allow McNeill the sum of $801 for the property not returned; that McNeill made a bill of sale to Morrill for all the property not returned to him, executing the same for himself and for his wife as her agent. There is other evidence tending to prove that, within a short time after this settlement was consummated, Mrs. McNeill knew of the terms of the settlement, and received back and had the benefit of such property as was returned; that she knew that the McNeill note to Morrill had been surrendered, and a new note taken for a balance of something in excess of $300 still due on the debt; and that she did not in any manner repudiate the act of her husband in acting for her, but, on the contrary, expressed herself as well satisfied to several parties who testified upon the trial. It was upon this state of facts that the instruction above quoted was given. Objection was taken to the instruction by Morrill, for the reason that the court did not define what acts were necessary on the part of Mrs. McNeill to constitute a ratification. An examination of the instruction will show that this objection is well taken. The court does not in this instruction, nor in any of the instructions given, attempt to inform the jury what act or acts on the part of Mrs. McNeill might be considered by them as a ratification on her part of her

husband's act in making the settlement, if she did not authorize him to do so in the first instance. Under this instruction the jury had to determine for themselves what, in law, would constitute a ratification, and the court submitted to the jury for their determination a question of law which it was his province alone to determine. To cure this defect in the instruction, the plaintiff below offered one or more instructions defining what acts on the part of Mrs. McNeill would constitute a ratification of her husband's act in making the settlement, and these instructions were refused by the court. As said in the former opinion, "The rule is well settled that a party is entitled to have his theory of the case, if it is supported by the pleadings and proof, submitted to the jury," and as there was competent evidence tending to show a ratificatio on the part of Mrs. McNeill, the court should have submitted that question to the jury by a proper instruction clearly defining what would constitute a ratification by her.

The record does not show that any objections were made in the trial court to the sufficiency of the pleadings setting up a ratification by Mrs. McNeill of the alleged settlement by her husband. The case was apparently tried upon the theory that the pleadings sufficiently presented that issue. It is now urged that the supplemental petition of Morrill does not state facts sufficient to show a ratification by Mrs. McNeill, or to estop her from claiming her property, and that a misdirection on that question should not work a reversal of the case. As before stated, the case was tried on the theory that the pleadings sufficiently presented the issue of a ratification by Mrs. McNeill of the settlement made by her husband; and after having tried the case on this theory, and without in any manner questioning the sufficiency of the pleading of the plaintiff to make that issue, she cannot now take advantage of its insufficiency, if it is defective, and gain an advantage by urging it for the first time in this court. The case must be tried here on the same

theory that obtained in the district court, and misdirection relating to issues which both parties accepted as presented by the pleadings will not be disregarded because the pleadings of one of the parties may be technically defective in making the issue. We do not wish to be understood as intimating that Morrill's supplemental petition did not fairly present the question of the ratification by Mrs. McNeill of the settlement made by her husband. That is a question which we are not called upon to examine or determine, the trial court and the parties having accepted it as doing so.

For the error pointed out, we recommend a reversal of the judgment.

JACKSON, C., concurs. ALBERT, C., not sitting.

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

REVERSED.

LYMAN RICHARDSON ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED JUNE 22, 1905. No. 13,766.

1. **City Council:** SPECIAL MEETINGS: NOTICE. A call for a special session of the city council of the city of Omaha in the following language, "A special meeting of the city council of the city of Omaha is hereby called for Saturday, July 1, 1899, at 8:30 o'clock A. M., in the council chamber in the city hall, for the purpose of considering communications, petitions, resolutions, committee reports and ordinances on first, second and third reading and passage"—where such call is properly recorded in the journal with the proceedings of the council when assembled, is a sufficient compliance with the provisions of the Omaha charter to enable the council to introduce, read and pass ordinances at such special meeting.

2. ———: DELEGATION OF AUTHORITY. A resolution adopted by the city council of the city of Omaha, directing that certain permanent

sidewalks shall be constructed "of stone or artificial stone," is a compliance with the provisions of an ordinance in force in that city, requiring the mayor and council to designate the kind of material with which permanent sidewalks shall be constructed, and does not amount to a delegation of the authority to determine of what material permanent walks shall be constructed.

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

C. C. Wright, W. H. Herdman and *A. G. Ellick,* for appellants.

H. W. Pennock and *McGilton, Gaines & Storey, contra.*

JACKSON, C.

The plaintiffs instituted this action to enjoin the collection of certain special taxes and assessments levied by the city of Omaha on certain lots and lands, and the case was brought to this court by appeal from the decree declaring the assessments in street improvement district No. 679 to be void, and that the assessment for certain permanent sidewalks was also void. It appears from the record that at special meetings of the city council of the city of Omaha an ordinance was introduced and passed providing for certain improvements in street improvement district No. 679. Section 39 of the charter of Omaha provides:

"The mayor or any three councilmen shall have power to call special meetings of the council, the object of which shall be submitted to the council in writing, and the call and object and disposition thereof, shall be entered upon the journal by the clerk." The record of the meeting at which the ordinance was introduced, in so far as it is pertinent to the inquiry, is as follows: "Council Chamber, July 1, 1899. Special meeting. Council called to order. Special session Saturday July 1, 1899, at 8:30 o'clock A. M., by President Bingham. Present, Bechel, Burkley, Burmester, Karr, Mount, Stuht, Mr. President.

Absent, Lobeck, Mercer. Quorum present. Call. A special meeting of the city council of the city of Omaha is hereby called for Saturday, July 1, 1899, at 8:30 o'clock A. M., in the council chamber in the City Hall, for the purpose of considering communications, petitions, resolutions, committee reports and ordinances on first, second and third reading and passage. Frank J. Burkley, Ernest Stuht, W. W. Bingham, Wm. F. Bechel." At this meeting the ordinance was introduced, read the first time, and, under a suspension of the rules, read for the second time. On July 3 of the same year, at another special meeting of the council, of which the record material to the inquiry is substantially the same as that of the meeting of July 1, with the exception of the date and the hour of the meeting, and that only one of the councilmen was absent, the ordinance was put upon its third reading and passage, and was passed by the necessary number of votes.

It is contended by the plaintiffs that the ordinance is void because it was introduced and passed at special sessions of the city council, and that at the special sessions, so held, the object of the meeting was not submitted to the council in writing, nor was the object and call of the meeting spread upon the journal of the council by the clerk. This contention of the plaintiffs was sustained by the court, and the collection of the special assessments and taxes was enjoined. The record of the special meetings quoted above was introduced and received in evidence at the instance of the plaintiffs, from which it appears that the claim of the plaintiffs and the finding of the court that the call and object of the meeting were not spread on the journal of the city council by the clerk is not well founded. It is argued by counsel that Omaha inherited its charter provisions from the colonies, which required notice of special town meetings to contain a statement of the object and purpose of the meeting, and that consideration of the construction placed upon the requirements as to the notice of such special town meetings will sustain their contention in this case. A careful reading, however, of

the charter provision relied upon, leads to a different conclusion. No particular form for the notice of special meetings of the city council in Omaha is required by the charter, nor is it required that the object of the meeting shall be stated in the call. What seems to be required, if the charter provision is mandatory, is that, after the council is convened, the object of the meeting shall be stated; in other words, that the question shall be stated before the motion is put. We think that the Omaha charter has adopted the form rather than the substance of the requirements necessary to a special town meeting in the colonial period, and that the call of the special meetings of the Omaha council included a sufficient statement of the object of the meeting, and obviates the necessity of any other statement or procedure to give the meeting vitality, other than the act of spreading the call at large upon the journal as a part of the proceedings of the council. A very substantial reason might be given for obeying the provision of the charter, had it required notice of the meeting to contain a statement of the object of the meeting, but there seems to be no good reason for insisting that, after the council has convened, the contents of the proposed ordinance should be disclosed by a statement before the ordinance is read, when a much more satisfactory exposition of the ordinance is made by the reading of the ordinance itself. We conclude that the requirements of the provisions of the Omaha charter questioned in this proceeding have been substantially complied with.

Upon the other branch of the case, relating to the assessments for permanent sidewalks, it is contended by the plaintiffs, and was found by the court, that the resolution directing the construction of the walks is invalid because the mayor and council did not designate the kind of material with which the walks should be constructed, and that the authority to designate such material was delegated to the board of public works, contrary to the provisions of the ordinance under which the walks were or-

dered to be constructed. Section 3 of the ordinance of the city authorizing the mayor and council to order the construction of permanent walks is as follows: "That the sidewalks shall be laid and constructed of permanent material, such as brick, tiling, stone, artificial stone, macadam, slagolithic or other like material, as may be ordered by the mayor and council." The resolution directing the construction of the walks provided that they should be constructed "of stone or artificial stone" and required them to be constructed according to the plans, specifications and requirements of the board of public works, and provided that, unless the owner or owners of the premises should construct such walks within 15 days, the board of public works should cause the same to be done, and report the cost to the city council, to be assessed to the extent of special benefits thereto upon the lot, part of lot or real estate along or abutting with such sidewalk so constructed. The owners failed to comply with the resolution, and the walks were constructed by the city, and the cost of such construction assessed to the owners of the abutting property, according to the provisions of the resolution directing construction of the walks.

The district court sustained the contention of the plaintiffs and enjoined the collection of the special assessments and taxes; the language of the decree being:

"For the reason that the city of Omaha, through its mayor and council, failed to determine or designate the material of which the sidewalks should be constructed, but unlawfully delegated the power to designate and determine the material to be used in said sidewalks to the board of public works in the city."

We find ourselves unable to agree with the conclusions reached by the district court. The mayor and council directed the sidewalks to be constructed of stone, leaving it to the owner in the first instance, and to the board of public works in the second instance, to determine whether the stone so used should be natural or artificial, a provision which we think beneficial to the property owner,

especially so, had he elected, as he should have done, to have obeyed the mandate of the corporate authority and constructed the sidewalk at once, instead of compelling the public to resort to the expediency of improving his property, and being obliged to appeal to the courts to compel him to make payment therefor. A similar question was before the appellate court of Missouri in the case of *Gallaher v. Smith,* 55 Mo. App. 116. In that case it appears that the city of St. Joseph had directed the construction of certain walks of "plank, * * * sawn from sound pine, white or burr oak timber." The charter provision under which the council in that case acted is as follows: "The common council shall have the power to cause to be constructed, reconstructed, or otherwise improved and repaired, all * * * sidewalks * * * within the city, at such time, and to such extent, and of such dimensions, and with such materials, and in such manner, and under such regulations as shall be provided by ordinance." Payment of a tax imposed for the construction of a walk was sought to be avoided upon the ground that the ordinance and the contract were void, as they delegated to the city engineer a discretion which was vested by the charter in the city council. The court say:

"The ordinance and contract * * * clearly left it to the option of the contractor to use either pine or oak lumber in building the sidewalk. Was the ordinance for that reason void? In support of the judgment below, it is insisted that the ordinance fails to designate the *materials* from which the walk was to be constructed, but left the decision of that matter with the contractor, thereby delegating the legislative powers of the common council to another. * * * We cannot give our assent to the contention that there was such a delegation of legislative judgment as will avoid the ordinance. The council has not failed to designate the material. The ordinance, with much minuteness of detail, has prescribed the length, breadth and thickness of the lumber, how laid and how ballasted, and then has in effect said to the contractor,

'we are indifferent whether you use pine or oak—either will answer.' The council has exercised its judgment and declared in effect that there can be no choice between the two; and this is all that can be asked. * * * We think the council, in the matter in hand, did exercise its judgment and discretion, and did not delegate it to another."

The reasoning in that case is sound, and, in our judgment, should be adopted and followed in this case.

As the district court allowed a perpetual injunction, we recommend that the judgment of the district court, in so far as it affects the special taxes and assessments in street improvement district No. 679, and for the construction of permanent sidewalks along the north 142 feet of sublot 1 of tax lot 16, section 21, township 15, range 13, and lots 5 and 6, block 8, West End Addition to the city of Omaha be reversed, and the action dismissed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the action is dismissed in so far as it affects the special taxes and assessments in street improvement district No. 679, and for the construction of permanent sidewalks along the north 142 feet of sublot 1 of tax lot 16, section 21, township 15, range 13, and lots 5 and 6, block 8, West End Addition to the city of Omaha.

REVERSED.

SEDGWICK, J., not sitting.

SARAH A. JOHNSON ET AL. V. ELIZABETH EMERICK ET AL.

FILED JUNE 22, 1905. No. 13,849.

1. **Review:** BILL OF EXCEPTIONS. A petition in error will not be dismissed on motion of the defendant in error because of a failure to settle and file a bill of exceptions, where the only question to be determined is one of law, and it is properly presented by a transcript of the record of the proceedings of the lower court.

2. **Partition:** ATTORNEYS' FEES. A partition proceeding is one for the benefit of all the parties in interest, and where such proceedings are amicable it is proper for the trial court to allow the attorneys conducting the proceedings a reasonable attorney's fee, and to require the payment of the same by the parties in proportion to their interest in the property involved.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed in part.*

Crane & Boucher, for plaintiffs in error.

C. A. Baldwin, contra.

JACKSON, C.

This case is submitted both upon a motion to dismiss the error proceedings and upon the merits of the question raised by the petition in error. The motion to dismiss the petition in error is based upon the ground that the plaintiffs neglected to prepare and file a bill of exceptions. The original certificate of the clerk of the district court recites that the bill of exceptions attached to and made a part of the transcript is the original bill of exceptions. Subsequently, however, a new certificate of the clerk was attached to the record, from which it appears that that portion of his original certificate referring to the bill of exceptions is erroneous; that no bill of exceptions had ever been filed. The only question involved in the case is the refusal of the district court to tax as a part of the costs and expenses an attorney's fee. That question is presented by the transcript, and no bill of exceptions is necessary to enable this court to determine the question. The motion of the defendants to dismiss the error proceedings is therefore overruled.

The plaintiffs, five in number, instituted the proceedings in the court below, for the partition of real estate. Three of the plaintiffs were minors, and the caption of the original petition discloses that they appeared by their mother and next friend. The plaintiffs represent a one-

fifth interest in the real estate sought to be partitioned. Personal service was had upon the defendants, who were defaulted at the hearing, and a decree of partition entered as prayed on the 23d day of July, 1903. On November 23, 1903, the defendants, by their attorney, filed in the office of the clerk of the district court an instrument indorsed on the back, "Objections to Jurisdiction," the text of which is as follows:

"The above named defendants Elizabeth Emerick, John Emerick and Hattie Amelia Hale, in reference to the matters here involved, say the facts stated in the petition as to the interests of said defendants in the lands to be partitioned are true as therein stated; and that said John Emerick, Elizabeth Emerick and Hattie Amelia Hale are the owners of, and are entitled to have and hold, four-fifths part of said lands. That by reason of the fact that three of the heirs of Eli Johnson, Jr., deceased, who as such heirs are each entitled to have a one-twentieth part of said lands set off to them, are minors, it is entirely impractical to make an actual partition of the land, such a partition would have rendered their separate interests in the land almost valueless, and for that reason, and to protect said minors, and for no other reason, these proceedings are properly instituted, and by a sale of all of said lands have the value of the one-fifth interest in the land which is to be divided between the said heirs of said Eli Johnson, Jr., determined; an amicable partition between John and Elizabeth Emerick and Mrs. Hale, who is the sister of Mrs. Emerick, if a partition is ever desired, can be made at any time, and without costs. The aforesaid defendants say that, to protect their rights and interest here involved, and to see that the steps taken to obtain the partition were in all things regular and legal, they employed C. A. Baldwin, attorney, as their counselor and advisor, and he has acted as such from the commencement of this action. Defendants say that they have been advised by their attorney that it is extremely doubtful as to whether a suit for partition of land can be brought by

minors in the name of "their next friend," as is done in this case, and they here and now submit that question to the court and ask judgment thereon. If the court finds that suit cannot be thus brought, it would invalidate the entire proceedings had. Said defendants say that they are informed and believe, and therefore aver the fact to be, that no proceedings have been taken to settle the estate of said Eli Johnson, Jr., deceased, and there is here nothing appearing that there are no claims against said estate that must be fully paid before said heirs of said Eli Johnson, Jr., deceased, are entitled to receive the one-fifth part of the proceeds arising from a sale of the lands or any part thereof. Wherefore said defendants ask the court, before an order of sale of the property is made, that the court determine the question as to the right of the said minors to bring this suit in the name of their next friend, and if the court finds that the suit was so properly brought, then and in that case the court make such order as is provided in section 828, code of civil procedure, Nebraska."

The district court, it appears from the record, considered his so-called "objections to its jurisdiction," and determined that the action was properly brought in the name of the minors by their mother and next friend. The record recites, however, that, out of deference to counsel who filed the objections, the title to the petition, and in the decree, was changed to read, "Guardian and next friend." No other or further appearance was made by the defendants until after the confirmation of the sale, when the plaintiffs asked for the allowance of a reasonable attorney's fee, the defendants again appeared and resisted the allowance of an attorney's fee. The court allowed the attorneys for the plaintiffs the sum of $150 for services rendered the referees, and found: "That the law of this state does not authorize the taxing as costs in any action of partition the fees for services of attorneys for the plaintiffs, without the consent and against the objection and protest of defendants, they having employed separate

counsel, and for that reason alone it is ordered by the court that the objections to such allowance be sustained, and that the said motion be, and the same hereby is, overruled; to which conclusion and order the plaintiffs except, and their exception is allowed."

It is contended by counsel for defendants that the judgment of the district court is right, because the proceedings were adverse as between the plaintiffs and defendants. That question, however, must be determined from the record with reference to the claims of the different parties to the suit and the course pursued by them. In law, an adversary proceeding is one in distinction from an application to which no opposition is made. Was the paper filed in this case four months after the entry of the decree such a one as raised an issue as between the plaintiffs and defendants? On the contrary, it seems to have been in the nature of a friendly suggestion to the court on the part of the defendants and in behalf of the plaintiffs. The allegations of the petition were admitted to be true. The interest of the defendants in the property sought to be partitioned was conceded to have been properly set out in the petition, and provided for in the decree. No relief was sought on behalf of the defendants. No adverse action was ever taken in the case until the plaintiffs requested the payment of counsel's fees out of the proceeds of the sale of the premises. When that application was made, the proceedings at once became adversary on the question of the payment of attorneys' fees alone; but a contest over the payment of attorneys' fees would not of itself be sufficient to make the partition proceedings adversary, and, in our judgment, the case must turn upon the right of the trial court to allow attorneys' fees in partition proceedings in any event. That question never seems to have been before this court except in the case of *Oliver v. Lansing,* 57 Neb. 352. That case, however, does not determine the right of the court to allow an attorney's fee in partition proceedings where such proceedings are amicable, because that question was not before the court.

In that case the proceedings were confessedly adversary. The inference, however, to be drawn from the language of Mr. Justice SULLIVAN, who delivered the opinion of the court, is that, had the proceedings been amicable, it would be proper to allow an attorney's fee. The statute provides that all costs of proceedings in partition shall be paid in the first instance by the plaintiffs, but eventually by all the parties in proportion to their interests, except those costs which are created by contests above provided for. It has been the practice of the trial courts generally in this state to allow a reasonable attorney's fee to be paid out of the proceeds of the sale according to the interests of the parties, in addition to the other costs incurred. This practice is supported by precedent. Originally, the English law courts required parties in partition proceedings to pay their own expenses up to the entry of the order of partition, and thereafter the expense incurred was paid out of the estate. Later, when the chancery courts assumed jurisdiction of partition proceedings, owing to complications in titles, with which the law courts could not deal, the practice of requiring all costs and expenses to be paid out of the estate, especially in cases where the interests of minors were involved, prevailed. It is probably due to that practice that in the United States several states have provided by statute for the payment of attorneys' fees in partition proceedings by all the parties in proportion to their interests. Many of the states, however, have not, by express terms, provided for the payment of attorneys' fees in partition proceedings, and the courts of last resort in some of these states at least, notably Rhode Island, Ohio, Michigan and Minnesota, have held that the trial court should allow fees to counsel conducting the proceedings where they are not adversary. *Redecker v. Bowen,* 15 R. I. 52; *Lowe v. Phillips,* 21 Ohio St. 657; *Greusel v. Smith,* 85 Mich. 574; *Hanson v. Ingwaldson,* 84 Minn. 346, 87 N. W. 915.

It has already been noticed that three of the plaintiffs are minors, who represent only three-twentieths of the

estate partitioned, and under the circumstances in this case it would be inequitable not to require all of the parties to contribute toward the payment of the fees of counsel whose services were equally beneficial to them all. The trial court allowed counsel for the plaintiffs a fee of $150 for service performed in behalf of the referees. That service, however, is one which should ordinarily be performed by counsel who are employed generally in the case, and, if the conclusion reached by the trial court with respect to the allowance of attorneys' fees was correct, the allowance of the item of $150 was entirely improper.

We recommend that the judgment of the district court be reversed in so far as it denies the allowance of an attorney's fee, and that the case be remanded for further proceedings in conformity with this opinion.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed in so far as it denies the allowance of an attorney's fee, and the case is remanded for further proceedings in conformity with this opinion.

REVERSED IN PART.

SEDGWICK, J., not sitting.

WILLIAM STULL V. AGGIE MASILONKA ET AL.*

FILED JUNE 22, 1905. No. 13,858.

1. **Decree:** SUIT TO ANNUL: PARTIES. In an action to set aside a decree of the district court affecting the title to real estate, a plaintiff cannot be permitted to recover, unless it appears from the pleadings and proof that he has some interest in the title to the property involved.

2. **Foreclosure:** DECREE: VALIDITY. The record and evidence examined,

* Rehearing denied. See opinion, p. 322, *post*.

and *held*, that the district court had acquired jurisdiction in the foreclosure proceedings pleaded and proved at the trial, and that the decree and sale thereunder were not void.

3. ———: ASSAILING TITLE: EQUITY. Where a valid real estate mortgage has been foreclosed, even though the foreclosure proceedings were void, neither the mortgagor nor a person claiming under him will be permitted to assail the title acquired through the foreclosure proceedings without offering to pay the amount of the decree and interest.

ERROR to the district court for Platte county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

John J. Sullivan, for plaintiff in error.

A. M. Post, L. R. Latham and *McAllister & Cornelius,* for defendants in error.

Flansburg & Williams, amici curiæ.

JACKSON, C.

This is a proceeding in error to reverse a judgment of the district court for Platte county. To insure a proper understanding of the issues involved, it seems necessary to make a detailed statement of the facts and conditions as they appear from the record. On December 5, 1894, Paul Masilonka borrowed of Stull Bros. $800. He gave his note secured by a real estate mortgage covering the west half of the northeast quarter of 18-19-2. A portion of the interest accruing on this loan was evidenced by separate notes secured by a second mortgage. Paul Masilonka died intestate. Default was made in the payment of interest accruing on the loan, and on March 5, 1896, William Stull and Louis Stull, partners as Stull Bros., commenced an action in the district court for Platte county, where the land is situate, for a foreclosure of the second mortgage. Among the defendants named in the petition were the unknown heirs of Paul Masilonka, deceased. In the body of the petition the land was described as the west

half of the northwest of 18-19-2. The petition, however, recited the execution and delivery of the mortgage, and referred to a copy of the mortgage which was attached to the petition as an exhibit. In the copy of the mortgage so attached the land was correctly described. On April 13th following there was filed in the case the affidavit of William Stull, wherein he testified that he was a member of the firm of Stull Bros., plaintiffs in the above case; that said Paul Masilonka, deceased, was the maker of the note and mortgage sought to be foreclosed in this case; that said Paul Masilonka has departed this life, and has left surviving him certain heirs, who appear to have an interest in the premises described in the petition filed herein, and who are made defendants in this cause; and that the names and residences and whereabouts of said heirs are to the plaintiffs unknown; that service of summons cannot be had upon them except by publication. On the following day the district court for Platte county made an order providing for service by publication upon the defendants, the unknown heirs of Paul Masilonka. A notice was published pursuant to the order of the court, and, among other things, contained a correct description of the land. On November 16 of the same year the plaintiffs in the foreclosure proceedings filed an amended petition, similar to the original petition, except that the real estate was correctly described both in the body of the petition and in the copy of the mortgage attached, and that, in addition to naming the unknown heirs of Paul Masilonka, there was added, "unknown devisees of Paul Masilonka, deceased." With the amended petition was filed another affidavit of William Stull, wherein he recited the death of Paul Masilonka, and that Masilonka left certain heirs and devisees, whose names and whereabouts were unknown to plaintiffs; that plaintiffs have made inquiry and have endeavored to ascertain the names and residences of said unknown heirs and devisees, but have been unable to ascertain the same. This was followed by the publication of a new notice, regular in all

respects, except that the land was described therein as the west half of the northwest quarter of 18-19-2. The defendants defaulted, and on June 14, 1897, a decree of foreclosure was entered, and the property was sold to satisfy the decree, subject to the $800 mortgage; William Stull and Louis Stull being the purchasers at such sale. The sale was confirmed, and a deed was executed, delivered and recorded.

Thereafter, on the 14th day of July, 1898, William Stull and Louis Stull, partners as Stull Bros., filed a petition in the district court for Platte county against Agnes Masilonka, widow of Paul Masilonka, deceased, Anton Masilonka and his wife, Mary Winski and her husband, Anna Stempa and her husband, Aggie Masilonka, Kate Masilonka, John Masilonka, Valeria Masilonka, Sophia Masilonka and Paul Masilonka, minor heirs of Paul Masilonka, deceased. In this petition the execution and delivery of the mortgages above referred to were set out, together with the proceedings of foreclosure. It recited the death of Paul Masilonka, and that Agnes Masilonka, Anton Masilonka and his wife, Mary Winski and her husband, Anna Stempa and her husband, Aggie Masilonka, Kate Masilonka, John Masilonka, Valeria Masilonka, Sophia Masilonka and Paul Masilonka were the sole heirs of Paul Masilonka, deceased. It further recited that the plaintiffs had entered into the possession of the premises, and an error in the description of the property in the publication of the notice in the foreclosure proceedings; that, by reason of the error in the process, the defendants appeared to have an equity of redemption in the premises. The petition further recited that the mortgage indebtedness was still unpaid; prayed for the appointment of a guardian *ad litem* for the minor defendants; that a decree might be entered directing the defendants, within a short day, to be fixed by the court, to pay the plaintiffs the amount thereof, with interest, and that, upon failure to pay said amount within the time fixed, defendants be barred and foreclosed of all title, interest and equity of

redemption in the premises; further prayed that the title to the premises be forever quieted in the plaintiffs and their grantees. Proper service was had upon all of the defendants in this proceeding. A guardian *ad litem* was appointed for the minor defendants, who filed a general denial in their behalf. A default was entered as to the other defendants for want of appearance, and on November 15, 1898, the cause was tried to the court, and a decree entered in conformity with the prayer of the petition. The court found, among other things, that the plaintiffs had entered into the possession of the premises, and that they were then in possession; that they were entitled to a strict foreclosure of the equity of redemption, and a quieting of the title in and to said described premises; that the defendants had not redeemed from the sale, and had not paid the amount due the plaintiffs on their mortgage; and it was adjudged that if the defendants should fail for the space of 30 days from the entry of the decree to pay the plaintiffs herein the sum of $251, the amount of the original decree, with interest, the right, title, interest and equity of redemption of the defendants be forever foreclosed and barred, and, upon failure of the defendants to pay said sum as aforesaid, title to said premises is by this decree forever quieted in the plaintiffs herein and their grantees. No redemption was ever attempted or had. The property was conveyed by Stull Bros., and the title finally vested in Adam Peir, who purchased for a full consideration and without actual notice of the defect now alleged in the title.

Thereafter, on the 10th day of September, 1903, Aggie Masilonka, Kate Masilonka, Vera Kodzeij, John Masilonka, Sophia Masilonka and Paul Masilonka filed their petition in the district court for Platte county against Louis Stull and William Stull, partners doing business in the firm name of Stull Bros., Anton Masilonka, Mary Winski, Anna Stempa, Adam Peir and —— Peir, his wife, whose Christian name is unknown, and Israel Gluck; the petition being as follows:

"The plaintiffs herein complain of the defendants, and for cause of action allege:

"1. Plaintiffs and the defendants Anton Masilonka, Mary Winski and Anna Stempa were on the 14th day of July, 1898, the owners, by title in fee simple, as the joint tenants, of the west half of the northeast (N. E. ¼) quarter of section eighteen (18), in township nineteen (19) north of range two (2) west of the 6th principal meridian, in Platte county, Nebraska, subject to the estate for life therein of their mother, Agnes Masilonka. And upon the death of the said Agnes Masilonka, to wit, on the 8th day of February, 1899, plaintiffs and the defendants above named became, have been continuously since said date, and now are, seized of the full legal and equitable title of said premises.

"2. On the said 14th day of July, 1898, the said Louis Stull and William Stull filed in this court their petition against the plaintiffs herein, and the defendants Anton Masilonka, Mary Winski and Anna Stempa, impleaded with the said Agnes Masilonka, the object and prayer of which were to obtain a decree of strict foreclosure of a certain mortgage then existing upon the above described premises. Said suit was prosecuted to final decree on the 15th day of November, 1898, whereby the aforesaid defendants therein, owners of the above described property, were ordered to redeem said property by paying to the said Louis Stull and William Stull, within the period of 30 days from and after said date, the full amount of such mortgage debt, with interest thereon and expenses incurred on account thereof, to wit, the sum of $251. And it was by decree further ordered and adjudged that, upon the failure of such owners to so pay the said sum of $251, together with interest and cost of said suit, within the aforesaid period, the right, title, interest, and equity of redemption of such owners, and each thereof, in and to said property be forever barred and foreclosed, and the title thereto of the said Louis Stull and William Stull forever quieted and confirmed.

"3. The plaintiff, John Masilonka, and the defendant, Anton Masilonka, were personally served with summons notifying them of the pendency of said suit. Service in said cause was had upon the plaintiffs herein, Aggie Masilonka, Kate Masilonka, Sophia Masilonka and Paul Masilonka, and also upon the defendants herein, Mary Winski and Anna Stempa, by publication of notice in a newspaper of said Platte county, and not otherwise; no service whatever being had in said suit upon the plaintiff herein, Vera Kodzeji. No appearance was made in said suit by the defendants therein, plaintiffs and defendants in this cause, or either thereof, nor was any authorized appearance made therein in their behalf, or in behalf of either of them.

"4. Plaintiffs herein, and each thereof, were at the date of the decree aforesaid infants under the age of 17 years, and are each now within the age of 21 years. The said Henry C. Carrig is the duly appointed guardian of the said John Masilonka, Kate Masilonka and Paul Masilonka, and as such guardian and next friend of said infants prosecutes this suit in their behalf. The said Anton Masilonka, Mary Winski and Anna Stempa, having refused to join herein as plaintiffs, are accordingly made parties defendant hereto.

"5. The plaintiffs and defendants herein, owners of said property, have been at all times since the date of said decree, and now are, unable to comply with the terms and conditions thereof, and said decree remains unreversed and unsatisfied. The said Louis Stull and William Stull, upon the failure as aforesaid of the owners thereof to redeem said property within the period of 30 days from and after the entry of said decree, took possession of said property, claiming to own and hold the same by title absolute, and the said Stulls and their grantees have continuously since said date enjoyed the possession, rents and profits thereof. The defendants Israel Gluck, Adam Peir and —— Peir, his wife, whose first or Christian name is unknown to plaintiffs, claim an interest in said property

through certain mesne conveyances, as the successors of the said Louis Stull and William Stull.

"6. There is manifest error to the prejudice of these plaintiffs in the decree aforesaid and in the proceedings of said cause antecedent thereto, viz.: (1) The court failed to determine who among the defendants in said cause were infants, and failed to name or sufficiently describe the defendants for whom it assumed to appoint a guardian *ad litem.* (2) The appointment in said cause of a guardian *ad litem* for certain of the defendants therein, and the subsequent appearance in said cause of said guardian, are irregular and erroneous, for the reason that it does not appear for whom said guardian was appointed, or in whose name or interests he assumed to act. (3) The plaintiffs herein, and each thereof, although known by said Louis Stull at the date of said decree to be infants, were not represented in said cause, and their interests in the subject thereof were not protected. (4) The only object or purpose of said suit being to obtain a decree of strict foreclosure of a mortgage upon the real property hereinbefore described, at the date thereof owned and held by the defendants in said cause by title in fee simple, failed to state a cause of action against said defendants, or either thereof, and the court accordingly erred in adjudging that the plaintiffs, Louis Stull and William Stull, were entitled to any relief therein. (5) The plaintiffs in said cause, Louis Stull and William Stull, were not upon the facts alleged in their petition therein entitled to a decree of strict foreclosure against the defendants in said cause, owners and holders of the legal title of the real property in said petition described. (6) There is no authority of law for a decree of strict foreclosure against the holder of the legal title of the mortgaged property. (7) The guardian who appeared in said cause, by appointment of the court, negligently failed to guard or protect the interests of the infant defendants therein, in omitting to challenge the sufficiency of the petition of the plaintiffs therein. (8) And the plaintiffs

say that they and their codefendants in said suit, the said Anton Masilonka, Mary Winski and Anna Stempa, had at the date of the decree aforesaid, and now have, by reason of the facts hereinbefore alleged and shown, a full, complete, and perfect defense to the aforesaid suit, and that said decree is as to these plaintiffs inequitable and erroneous. Wherefore plaintiffs pray, upon such terms and conditions as may be found reasonable and just: (1) That the decree hereinbefore mentioned may be vacated and wholly set aside, and that plaintiffs may be permitted to appear in said cause and make defense thereto. (2) That plaintiffs' title and interest in and to said real property be forever quieted and confirmed as against the defendants, William Stull and Louis Stull, and all persons claiming through and under them including the defendants Adam Peir and Israel Gluck. (3) That said premises be partitioned in the manner prescribed by law among the several owners thereof as their interests may be made to appear. (4) That an account may be taken of the rents and profits of said premises for the period that the same have been occupied by the several defendants respectively, and that the plaintiffs may have judgment for the amount found in their favor. (5) For such other and further relief as may appear to be just and equitable in the premises."

To this petition William Stull answered, denying such allegations of the petition as were not admitted; setting up the foreclosure proceedings already described; the sale of the real estate thereunder, and the confirmation thereof, together with the subsequent action brought by them, and the decree of the court thereunder; the transfer of the real estate by the purchasers at the judicial sale; the payment of the $800 mortgage by one of the purchasers by renewal mortgage; and asked that the plaintiffs' petition be dismissed. Adam Peir, the present owner of the real estate, answered, challenging the authority of Henry C. Carrig as guardian for the minor plaintiffs, and also setting out the foreclosure proceedings, with a copy of the

decree therein; the sale of the real estate and the confirmation thereof; the subsequent proceedings by Stull Bros.; the sale by them of the real estate, and the final purchase by himself; and he also prayed the dismissal of the action. The defendants, Anton Masilonka, Mary Winski and Anna Stempa, answered by adopting the allegations of the petition and the prayer thereof. The plaintiffs, replying to the answer of William Stull, admitted the execution of the mortgage involved in the foreclosure proceedings; admitted the institution of the action to foreclose the mortgage, and the proceedings thereunder as herein stated, but denied the jurisdiction of the court in that action, and claimed that the proceedings were void. They admitted the conveyance of the property by Stull Bros., and the final conveyance to defendant, Peir. They also replied to the answer of Adam Peir substantially as they had replied to the answer of the defendant Stull. The defendant, Louis Stull, did not answer, and was defaulted. There was a hearing to the court, and a finding for the plaintiffs, setting aside the decree entered November 15, 1898, in the second action brought by Stull Bros.; directing that said action be placed upon the trial docket for hearing in its order; and requiring the defendants therein to answer within 30 days from that date. Separate motions for a new trial were filed by defendants, William Stull and Adam Peir, which were overruled, and they have brought the case to this court by petition in error.

The scope of inquiry may be embraced in two questions: First. Did the defendants in error, plaintiffs below, have an interest in the subject matter such as to entitle them to any relief whatever? Second. If they did have such interest, is their petition sufficient, under the facts disclosed by the record, to entitle them to the relief granted by the court below?

It will be observed that their prayer for relief consisted, first, of a request that the so-called decree of strict foreclosure be set aside, and that they be permitted to appear in that case and defend; second, that their title to the real

estate be quieted and confirmed as against the Stulls and all persons claiming through them, including the defendant, Adam Peir; third, that the premises be partitioned; and fourth, that an account should be taken of the rents and profits of the premises while in the possession of the defendants, and that they have judgment therefor. The original foreclosure proceedings are nowhere referred to in the petition; such proceedings are not assailed, and no relief is asked as against such proceedings, it is evident, however, that the rights of the parties depend, to some extent at least, upon the validity of the foreclosure proceedings, and to that proceeding we will first devote our attention.

It is contended that the first notice to the unknown heirs of Paul Masilonka, deceased, was unauthorized and void for two reasons: First, because the affidavit of one of the plaintiffs that the names and whereabouts of the unknown heirs of Paul Masilonka were to the plaintiffs unknown is insufficient; that the affidavit of both plaintiffs is required. This contention cannot be sustained. The affidavit of William Stull recites that "the names and residences and whereabouts of said heirs are to the plaintiffs unknown." The trial court acted upon that affidavit and found it to be sufficient, and ordered service by publication on account thereof. The affidavit was positively sworn to, and contained the information upon which the court was authorized to act. The provisions of the code are to be liberally construed, with the view to promote its object and assist the parties in obtaining justice. Code, sec. 1. And second, because it is said that the affidavit was not attached to the petition as the statute required. The record does not disclose whether the affidavit was attached to the petition or not, and it is sufficient to say that, in the absence of direct proof to the contrary, the proceedings of the district court will be presumed to have been regular. We hold therefore that the district court acquired jurisdiction of the parties through the first notice in the foreclosure proceedings. The notice was com-

plete and ample to advise the parties in interest of the cause of action upon which the plaintiffs sought relief. It recited the date of the filing of the petition; the names of the plaintiffs; the court wherein the action was pending; that the plaintiffs were seeking the foreclosure of a mortgage; named the mortgagors and mortgagee; described the land upon which the mortgage was given; the notes secured by the mortgage; the amount due thereon; that the plaintiffs sought a decree of foreclosure, and that the premises might be sold; and correctly fixed the answer day.

The district court therefore having acquired jurisdiction of the parties, the inquiry next turns to the validity of the decree under the pleadings. It is said that the original petition was insufficient to support the decree because of the misdescription of the land in the body of the petition. The petition, however, referred to the mortgage, a copy of which was attached to the petition as an exhibit, and in the copy so attached the real estate was correctly described; and it is very doubtful whether this court would be justified in disturbing the decree had it been based upon this petition alone. No variance between the allegations in the petition and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice; and, whenever it is alleged that a party has been so misled, the fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and, whenever the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, and may order an immediate amendment, without costs. Code, secs. 138, 139. Furthermore, the property having been correctly described in one part of the petition, we think it would be a violation of the spirit of the code to hold that the decree is not supported by the original petition. However, the plaintiffs in the foreclosure proceedings filed an amended petition, setting out the same cause of action, and asking for the same relief. In the

amended petition the real estate was correctly described, both in the body of the petition and in the exhibit thereto attached. By section 144 of the code, it is provided that "the court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect." This section of the code authorized the correction of the error in the description of the real estate in the original petition by amendment, and such amendment was in no sense prejudicial to the defendants in that action; and a judgment founded upon the corrected petition, without notice other than the original notice, would, at the most, be a mere irregularity, and would not render the judgment void or open to collateral attack. We hold that by the foreclosure proceedings the heirs of Paul Masilonka were devested of their title to the real estate involved in this controversy, and for that reason the judgment of the district court here reviewed should be reversed.

There is another reason why the judgment cannot be sustained. The mortgage involved in the foreclosure proceeding was confessedly a valid mortgage; it has never been paid. The defendant, Adam Peir, has succeeded to all the rights of the mortgagee, and even though the foreclosure proceedings were held void, the mortgagor (in this case his heirs) will not be permitted, in equity, to avoid the effects of such foreclosure, without offering to pay what is equitably due under the decree, with interest. *Loncy v. Courtnay,* 24 Neb. 580; *Merriam v. Goodlett,* 36 Neb. 384; *Hall v. Hooper,* 47 Neb. 111.

We recommend that the judgment of the district court be reversed and that the cause be remanded, with directions to enter judgment in conformity with this opinion.

DUFFIE, C., concurs. ALBERT, 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, with directions to enter judgment in conformity with this opinion.

REVERSED WITH DIRECTIONS.

SEDGWICK, J., not sitting.

The following opinion on motion for rehearing was filed June 20, 1906. *Motion overruled:*

Constructive Service: STRICT CONSTRUCTION. Where a defendant is sought to be brought into court by some method prescribed by a statute, other than personal service, which notice may or may not reach him, and which is more or less unsatisfactory, the statutory provisions relating to such service are construed with strictness, and it is incumbent that all steps in the process required to be taken shall be followed with substantial accuracy. Former opinion modified accordingly.

LETTON, J.

The facts in this case are set forth at length in the former opinion, *ante*, p. 309. The defendants in error upon reargument urgently insist that this action is brought only for the purpose of reviewing the action to quiet title and for strict foreclosure, and that since in the petition in that case the Stulls alleged that the present plaintiffs "appeared to have an equity of redemption in the land," this was such an admission of the title of the present plaintiffs, and was so inconsistent with the assertion of any title in the Stulls under the first foreclosure proceedings, that they ought not to be allowed to object that the present plaintiffs have not a sufficient interest in the second proceeding for a strict foreclosure to enable them to maintain the present proceeding for a new trial therein.

It is further contended that the first foreclosure was void for want of proper affidavit for service by publication upon unknown heirs. In that portion of the former opinion treating of the validity of the affidavit for publication,

it is said: "The provisions of the code are to be liberally construed, with the view to promote its object and assist the parties in obtaining justice." While this is true as a general proposition, we think it is the rule, not only in this state, but in most jurisdictions, that, where a defendant is sought to be brought into court by some method prescribed by a statute, other than personal service, which notice may or may not reach him, and which is more or less unsatisfactory, the statutory provisions relating to such service are construed with strictness, and it is incumbent that all steps in the process required to be taken shall be followed with substantial accuracy, before the court will be held to have acquired jurisdiction of such a defendant. *Albers v. Kozeluh,* 68 Neb. 522; *Buchanan v. Edmisten,* 1 Neb. (Unof.) 429; *Omaha Savings Bank v. Rosewater,* 1 Neb. (Unof.) 723; *Boden v. Mier,* 71 Neb. 191. The former opinion therefore is so far modified.

We think, however, that this modification does not militate against the correctness of the position taken as to the validity of the service by publication. The affidavit for service upon unknown heirs states positively that the plaintiffs had no knowledge of the names and whereabouts of such heirs. The court might in its discretion have called for further proof of the facts alleged, but its judgment and order made with such proof before it are not void and open to collateral attack. Counsel has cited several cases from Wisconsin and Kentucky as upholding his contention that the affidavit was insufficient. In the Kentucky case it is held that an affidavit by only one of several plaintiffs is insufficient, but the allegations of the affidavit are not set forth in the opinion. In *Kane v. Rock River Canal Co.*, 15 Wis. *179, the affidavit of one of the plaintiffs merely stated that there were parties interested in the premises who were unknown. It did not even show that they were unknown to him, and the court said:

"The question then is, whether, where there are several complainants in a partition suit, an affidavit by one of them that there are parties interested who are unknown,

which by its most favorable construction can be only held to mean that they are only unknown to him, is sufficient to authorize an order of publication which will give jurisdiction over unknown owners, there being nothing to show that there were not other owners known to the other plaintiffs? We think it is not." This case is followed in *Mecklem v. Blake,* 19 Wis. 419, but the form of the affidavit is not set out in the opinion. These cases therefore are distinguishable from the one at bar.

Section 83 of the code providing for service upon unknown heirs provides that, if "it shall appear by the affidavit of the plaintiff annexed to his petition, that the names of such heirs or devisees, or any of them, and their residence are unknown to the plaintiff," etc. This affidavit therefore is evidently intended to be attached to the petition and presented to the court with the petition, so it may determine before making the order whether a cause of action exists against the unknown heirs, and whether the proof is sufficient to require an order to be made respecting service upon such persons. We see no good reason why one plaintiff should not make the affidavit, provided that he sufficiently shows lack of knowledge on the part of each of the other plaintiffs as to the names and residences of the unknown heirs, which under some circumstances one of the plaintiffs could no doubt do.

2. If the decree rendered in the first foreclosure proceeding was valid, and the sale thereunder barred and foreclosed all the interest of the plaintiffs herein in the land, the fact that the Stulls, after they had parted with the title which they acquired under the sale in the foreclosure proceedings, began an action to quiet their title by reason of what they erroneously thought was a defect in the original suit, and prayed for a strict foreclosure and a decree quieting their title, would in no wise harm or prejudice the plaintiffs herein. The decree in that case, though erroneous, would give them no new rights or revest them with the title which had been divested by the foreclosure proceedings in the first case. If they had personally ap-

peared and defended the second action they could not have prevailed, and neither can they if the decree be opened. Courts of review will not correct technical errors by which no one has been prejudiced, and a trial court will not grant a new trial for such reasons. While, under the old chancery practice, a decree of strict foreclosure would not bar an infant from showing cause against the same, and while this right is preserved in section 442 of the code, it is pointed out in *Manfull v. Graham,* 55 Neb. 645, that, where the title to land has passed by a sale under foreclosure proceedings, this right is not available to an infant.

To uphold the plaintiffs' contention we must ignore the first foreclosure proceedings. Though these proceedings were irregular in several respects, they were not void and are not subject to collateral attack. Further than this, the plaintiffs have pleaded no good grounds for opening up for review the first foreclosure proceedings, pleaded in the answer. This is essential whether the proceeding seeking to open up the decree is under the code provisions or by original action in equity. As long as the first decree must stand, to open the second for review would serve no good purpose.

The former opinion is adhered to, and the motion for rehearing

OVERRULED.

WILLIAM APKING V. GERHARD HOEFER ET AL.

FILED JUNE 22, 1905. No. 13,880.

1. **Written Contract:** PAROL EVIDENCE. Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms. *Nebraska Land & Feeding Co. v. Trauerman,* 70 Neb. 795.

2. **Contract**: DEFAULT: ACTION. Law will not aid a party to recover damages for the breach of a contract, where the failure to comply with the contract was his own.

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

Tibbets Bros. & Morey, for plaintiff in error.

J. M. Ragan and *Ernest Hoeppner, contra.*

JACKSON, C.

On the 30th day of June, 1902, plaintiff in error, hereinafter called the defendant, as party of the first part, entered into a written contract with the defendants in error, hereinafter called the plaintiffs, as parties of the second part, for the sale of a tract of land in Adams county for the sum of $6,300, of which $100 was paid at the time of the execution of the contract, and by the terms of the agreement the remainder was to be paid, $900 on or before July 10, 1902, and $5,300 on March 1, 1903. The contract also provided that the plaintiffs were to have a share of the crops then growing on the land. The contract contained the following condition: "And in case of the failure of the parties of the second part to make either of the payments, or to perform any of the covenants on their part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and parties of the second part shall forfeit all payments made by them on this contract, and such payments shall be retained by said party of the first part in full satisfaction and liquidation of all damages by him sustained, and he shall have the right to reenter and take possession of the premises aforesaid." The plaintiffs failed to meet the payment due on the 10th day of July, 1902, but on the 14th of that month tendered the defendant the amount of the payment due on the 10th, which the defendant refused to accept, and declared that the contract had

been forfeited. On the 1st of March, 1903, plaintiffs tendered the defendant $6,200, with interest on $900 from July 10, 1902, to March 1, 1903, and demanded a deed of the premises. The defendant refused to accept the tender, and refused to execute a deed, and on the 23d day of May, 1904, the plaintiffs instituted an action in the district court for Adams county against the defendant, claiming damages in the sum of $1,400 by reason of the failure of the defendant to perform the contract. The petition sets out the execution and delivery of the contract, and the payment of the $100, and recites that, "after said contract was signed by the plaintiffs and defendant, it was verbally agreed between plaintiffs and defendant that the payment of $900 due on or before July 10, 1902, need not be made on that exact date, but might be made by these plaintiffs, at their option, within a few days thereafter." The petition further recited the tender of the $900 and $6,200. The defendant answered, first, that the facts stated in the petition were not sufficient to constitute a cause of action against the defendant; second, admitted the execution of the written contract and the payment of the $100, and denied each and every other allegation in the petition; and third, that the plaintiffs had filed the contract for record, and that it constituted a cloud upon his title to the land, and asked to have the title quieted and confirmed as against the contract; also set up the failure of the plaintiffs to make the payments as agreed upon. Plaintiffs replied, the reply consisting of a general denial. The cause was tried to the court, without the intervention of a jury, and at the trial the defendant objected to the introduction of any evidence on the part of the plaintiffs, for the reason that the petition did not state facts sufficient to constitute a cause of action against the defendant; and the objection was overruled; and at the trial the plaintiffs were permitted to prove by oral evidence that, at the time of the execution of the contract and after it had been signed, the defendant agreed orally with the plaintiffs to the effect that, if they did not have the

money with which to meet the payment on the 10th day of July, 1902, they might make the payment within a few days thereafter. There was judgment in favor of the plaintiffs for the sum of $210.70. A motion for a new trial was overruled, and defendant prosecutes error to this court, his contention being that the court erred in not sustaining his demurrer *ore tenus,* and admitting parol evidence to vary the terms of the written contract, and for that reason that the judgment is contrary to law. The plaintiffs have not favored us with a brief and the case was submitted without oral argument.

We think both contentions of the defendant well founded. The rule is well settled in this state that, where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms. *Nebraska Land & Feeding Co. v. Trauerman,* 70 Neb. 795, and authorities there cited. Even if the defendant agreed orally, after the contract was executed, that the plaintiffs might have a few days after July 10 to meet the payment maturing on that date, it was a naked promise, without consideration, and could not be enforced. It follows therefore that the court erred in the admission of oral evidence to vary the terms of the written contract. It is clearly apparent from the written contract that time was of the essence of it, and that the failure of the plaintiffs to meet the payment maturing on the 10th day of July, 1902, gave defendant the option to forfeit the contract and declare it at an end. This he has done, and the law will not aid the plaintiffs, under the circumstances in this case, to recover where the breach of the contract was their own.

We recommend that the judgment of the district court be reversed.

DUFFIE, C., concurs. ALBERT, C., not sitting.

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

REVERSED.

SEDGWICK, J., not sitting.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1905.

OSMOS C. HIGBEE V. STATE OF NEBRASKA.

FILED SEPTEMBER 20, 1905. No. 14,112.

1. **Embezzlement.** In a prosecution for embezzlement of a "right in action" under section 121 of the criminal code, it is not necessary to show that the defendant was at the time of the alleged embezzlement in the manual possession of the money or property which was the subject of the right in action. If the agent of a corporation so uses the rights in action of his employer as to prevent his employer from asserting those rights, and so deprives the employer of the property or money involved, and by so doing appropriates the property or money to his own use, without the assent of the employer, and with the fraudulent intent to so appropriate the same, he is guilty of embezzlement under the statute.

2. **Corporation:** EVIDENCE. The allegation of the information that the party injured is a corporation is sufficiently sustained by proof that it is a *de facto* corporation. Proof of the regularity of the proceedings to incorporate is not necessary.

3. **Venue.** Under this clause of the statute, converting rights in action to one's own use is an essential element of the crime. The venue is properly laid in the county where the purpose is formed to convert the right in action, and the decisive steps taken to carry out that purpose, although the subject of the right in action is situated in another county.

4. **Evidence** that the party against whom the right in action existed was solvent, and actually paid the money involved as directed by the defendant in adjustment of the right in action, is sufficient *prima facie* evidence of value.

5. **Election.** When two counts of an information involve substantially the same facts, and call for the same evidence to support them, the court will not ordinarily require an election upon which count the prosecution will proceed.

6. **Instructions.** An instruction is not prejudically erroneous because it states some of the elements of the crime charged and omits others, when the other elements are correctly stated and defined in other instructions. Instructions must not contain conflicting statements, and when read and construed together must correctly state the law.

7. **Erroneous Instructions.** An instruction which recites some of the essential elements of the crime charged and omits others, and tells the jury that the things recited in the instruction would constitute the crime, is erroneous and prejudicial, even though there was another instruction which contradicts it and correctly states the other things necessary to be shown to constitute guilt.

8. ———. In a prosecution against an agent for embezzling the rights in action of his employer, an instruction in which the jury are told that if the defendant "received credit in his individual capacity" for a right in action of the employer he would be guilty of embezzlement is erroneous. Unless the act is done with a felonious intent, and results in depriving the employer of his money or property, it is not embezzlement.

ERROR to the district court for Sarpy county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

Nelson C. Pratt and *E. S. Nickerson,* for plaintiff in error.

Norris Brown, Attorney General, and *William T. Thompson, contra.*

SEDGWICK, J.

The Farmers Co-operative Shipping Association was engaged in buying grain at Gretna, in Sarpy county, and in shipping and selling the same. The defendant Higbee was in charge of the business as agent of this company. The George A. Adams Grain Company, of Omaha, was indebted to the Farmers Co-operative Shipping Association for grain, which the defendant as the agent of that

company had shipped and sold to the Omaha company. The defendant, who is plaintiff in error here, was prosecuted upon a charge of embezzlement; the information containing two counts. Upon the first count he was found not guilty. The charge upon which he was convicted is the embezzlement of "a certain right in action, to wit, a certain indebtedness then due and owing by the George A. Adams Grain Company, of Omaha, Nebraska, to the said Farmers Co-operative Shipping Association, for grain shipped to said George A. Adams Grain Company by the said Farmers Co-operative Shipping Association, in the amount of twenty-eight hundred nine & 53-100 dollars ($2,809.53)."

1. The first contention made is that the indebtedness of the Omaha company to his employer was not within the meaning of the statute defining the crime of embezzlement and providing a penalty therefor. It is said in the brief: "The plaintiff is charged with embezzling a right in action, an indebtedness. Just how the plaintiff could obtain possession of an indebtedness we are at a loss to know." The language of the statute is: "If any officer, attorney at law, agent, clerk, or servant of any incorporated company or joint stock company shall embezzle or convert to his own use, or fraudulently take or make away with or secrete with intent to embezzle or fraudulently convert to his own use without the assent of his or her employer or employers, or the owner or owners thereof, any money, goods, rights in action or other valuable security, or effects whatever, belonging to any other persons * * * every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled." Criminal code, sec. 121. The evidence in this case tends to show that the defendant as managing agent of the company was in the control of its business in buying and shipping grain, and in collecting the proceeds thereof for the company. In this capacity he sold grain to the Omaha company, and instead of receiving the money for the use

of his employer as his agency contemplated, he caused the proceeds to be applied by the Omaha company to the adjustment of his speculations upon the board of trade. His contention now seems to be that he never had possession of the money, nor of any tangible thing that could be made the subject of embezzlement. Of course, if he had collected the money for his employer, as it was his duty to do, and then had without the owner's assent used it for his own benefit with intent to defraud the owner, there could have been no doubt that such action would have constituted embezzlement. The result reached by him was the same, so far as his individual business was concerned, as it would have been if he had first collected the money and used it in adjusting these speculations. At the common law possession was a necessary element of the crime of larceny, as it is by statute of embezzlement. The distinction between the two crimes depends upon the nature of the possession and the manner of obtaining it, and it would seem that a mere credit was not the subject of larceny at common law. It is within the province of the legislature to define crimes and provide punishment therefor, and to determine what action or conduct shall be deemed criminal and subject to punishment. The contention upon this point then depends upon the construction and meaning of the statute. It was, of course, competent for the legislature to make the act of defrauding his employer, by using the credits of the employer for the personal benefit of the agent without the assent of the employer and with the intent to defraud the employer, criminal, and to provide for the punishment of such act as embezzlement.

What is meant by the words "rights in action" as used in this statute? They are not the exact equivalent of choses or things in action. The term "chose (or thing) in action" is used in contradiction to a chose or thing in possession. It is used when the title to the money or property (the thing) is in one person, and the possession is in another. The word "rights" used in this connection

is a broader term. The legislature seems to have contemplated that an agent might use a mere claim or demand in such a way as to deprive the owner of the thing claimed, and to appropriate it to his (the agent's) own use. To do this with intent to defraud, and without the assent of the owner, is made embezzlement by this statute. Unless the owner is deprived of the thing (the money or property) involved in the transaction, there can, of course, be no embezzlement. *McCormick v. Keith*, 8 Neb. 142; *Western White Bronze Co. v. Portrey*, 50 Neb. 801. If his title to the property is not impaired, his right in action would still remain. Upon the trial the prosecution introduced evidence tending to show that the speculations upon the board of trade, in which these funds were used, were the individual transactions of the defendant. It was admitted that the transactions were carried upon the books of the Omaha company in the defendant's name. The defendant testified that in these transactions he was acting for his employer, and supposed at the time that the accounts were so kept. The jury must have found that he acted for himself in these speculations, and that his manipulation of the accounts of his employer was such as to cancel his employer's claim to the money as against the Omaha company, and so deprive his employer of the money owing by that company. The evidence upon this point is not entirely satisfactory, and the point is not discussed in the briefs. Because of these facts, and in view of the conclusion reached upon another feature of the case, we do not find it necessary to consider this matter further. It is sufficient to say that we consider the contention of the defendant that it is necessary to show manual possession and conversion of the money claimed untenable. If the agent of a corporation so uses the rights in action of his employer as to prevent his employer from asserting those rights, and so deprives the employer of the property or money involved, and by so doing appropriates the property or money involved to his own use, without the assent of the employer, and with the fraudulent intent to so ap-

propriate the same, he is guilty of embezzlement under the statute.

2. The next contention is that there is no competent proof of the corporate existence of the Farmers Co-operative Shipping Association. There seems to be no merit in this contention. Articles of incorporation of this company were received in evidence, and they appear to have been filed with the county clerk. It was shown that the association had directors, and had elected officers and performed the ordinary functions of a corporation. The defendant contracted with this board of directors, and carried on the business under their employment. This is ample proof of a *de facto* corporation, and is all that is required. *Braithwaite v. State*, 28 Neb. 832.

3. Under this clause of the statute converting "rights in action" to one's own use is an essential element of the crime. The defendant was in Sarpy county, the business of his employer was being there transacted by him, and if, by his actions there, he so converted the rights in action of his employer as to violate this statute, the prosecution for the offense was rightly brought in that county. The objection that the courts of Sarpy county had no jurisdiction of this case was rightly overruled.

4. The evidence shows that the Omaha company was solvent, and that the claim of the employer was actually applied to the adjustment of the deals upon the board of trade. This is sufficient proof of value of the rights in action converted.

5. The two counts of the information involved the same facts, and called for the same evidence to support them. The court therefore did not err in refusing to require the state to elect upon which count it would proceed.

6. In the sixth instruction given by the court to the jury some of the elements of the crime of embezzlement are stated, and it is contended that the instruction is defective in that it omits other essential elements of the crime. To this contention, it is replied by the state that these elements are defined in other instructions, and that

the instructions, taken as a whole, are for that reason not objectionable. This would appear to be a sufficient answer to the objection that is made to this instruction, but the same objection is made to the thirteenth instruction given by the court, and this objection is not so satisfactorily answered. The thirteenth instruction is as follows: "You are instructed that if you find from the evidence, beyond a reasonable doubt, that the defendant, within three years prior to the filing of the information in this case, and within the time charged in the information, was the agent of the Farmers Co-operative Shipping Association, an incorporated company, and that while such agent he disposed of, or caused to be disposed of, any money or right in action of the said Farmers Co-operative Shipping Association, or secured credit for the same in his individual capacity and for his own use, or for the use of any other person except the said Farmers Co-operative Shipping Association, without the assent of the said Farmers Co-operative Shipping Association, that would constitute embezzlement of such money or right in action, as the case may be; and it would make no difference whether the amount embezzled, if any, was disposed of in the manner above indicated in one transaction, at one particular time, or consisted of a continuous series of acts." The jury were told by this instruction that, if they found from the evidence, beyond a reasonable doubt, certain facts, "that would constitute embezzlement." Did it omit essential elements of the crime charged? To constitute embezzlement there must be a fraudulent intent on the part of the accused to convert the property to his own use. The defendant must have made an intentionally wrong disposal of the property, indicating a design to cheat and defraud the owner. The instruction omits an essential element of the crime of embezzlement—the felonious intent. Not even the word "wrongful" was used in characterizing the defendant's acts. If the defendant did everything stated in the instruction, he would not be guilty of embezzlement. The attorney general does not defend this instruction, but

contends that, when it is read in connection with other portions of the charge, the error, if any, is cured. It is true that instructions will be construed together, and the charge considered as a whole; but it is firmly established that "an instruction whereby the whole case is attempted to be covered, but which omits an essential element, is erroneous and is not cured by another instruction which covers the point." *Dobson v. State*, 61 Neb. 585; *Bergeron v. State*, 53 Neb. 752; *McAleer v. State*, 46 Neb. 116; *Barnes v. State*, 40 Neb. 545. The instruction condemned in *Dobson v. State*, *supra*, is similar to the one in the case at bar. It purported to define larceny, but omitted the felonious intent. NORVAL, C. J., speaking for the court, said: "By this instruction the court attempted to cover the whole case. If it omitted an essential element of larceny, the giving it was error. * * * This is true, even though another instruction may include the element omitted in the one by which the court attempts to state to the jury the essential ingredients of the crime."

The instruction also tells the jury that, if the defendant "secured credit in his individual capacity and for his own use" for any right in action of his employer, he would be guilty of embezzlement. It is clear that, unless by securing this credit for himself he deprived his employer of the right in action, by destroying or alienating his title to the subject of that right, and unless he did this with the felonious intention of so depriving his employer, he could not be guilty of embezzlement. For these reasons, this instruction was erroneous, and the verdict cannot be supported.

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

REVERSED.

RICHARD S. HORTON, TRUSTEE, v. WILLIAM HAYDEN ET AL.

FILED SEPTEMBER 20, 1905. No. 14,169.

Petition: SUFFICIENCY: STARE DECISIS. In an action to recover money that has been paid to defendant pursuant to a judgment in mandamus which was afterwards reversed, a petition which alleges only the payment of the money in obedience to the writ, and the subsequent reversal of the judgment in mandamus, without allegations of fact showing that the plaintiff is justly entitled to the money in controversy, does not state a cause of action. A judgment overruling a motion for restitution in the mandamus proceeding upon the ground that under the circumstances of the case the respondent was not entitled to an order of restitution, and that his remedy was in an action at law to establish his right to the money, will be adhered to. The rule of *stare decisis* will be applied.

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

Hamilton & Maxwell and *Richard S. Horton,* for plaintiff in error.

Smyth & Smith, contra.

SEDGWICK, J.

The facts underlying this controversy are stated somewhat in detail in the opinion in *State v. Horton,* 70 Neb. 334. The order of the district court sustaining the motion of the respondent there to compel Hayden Brothers to make restitution was reversed, and the cause remanded to the district court, with instructions to dismiss the proceedings. The motion for rehearing was overruled in an opinion which may be found in 70 Neb. 343. It was there held that the general rule announced in *Hier v. Anheuser-Busch Brewing Ass'n,* 60 Neb. 320, that "upon the reversal of a judgment which has been executed it is the duty of the court to compel restitution," was not of universal application, and that restitution is not in all cases

a matter of absolute right. It rests in the sound discretion of the court. It was said that under the circumstances of this case "the court would not, in this summary proceeding, order a return of the money in controversy," and that "this was not a proper case in which to summarily order a return of the money before the rights of the parties had been adjudicated in an action at law." 70 Neb. 343.

The petition in the case at bar counted solely upon the allegation that the money had been obtained by Hayden Brothers from the exposition company by the operation of the writ of mandamus, and that the order allowing the writ of mandamus had been reversed, and that cause dismissed. There was no allegation of any facts from which it could be found that Hayden Brothers were justly indebted to the exposition company or to the trustee in bankruptcy. It was determined in the former decisions cited that allegations identically the same as those contained in this petition did not, under the circumstances disclosed in that case, entitle the trustee in bankruptcy to any relief. We were satisfied, then, with the conclusion reached, and we see no ground now to change our views. The district court sustained a general demurrer to the petition, and the plaintiff electing to stand upon the petition, the action was dismissed.

This judgment of the district court was right, and is

AFFIRMED.

JAMES CONNOLLY V. STATE OF NEBRASKA.

FILED SEPTEMBER 20, 1905. No. 13,867.

1. **Instructions: REVIEW.** It is not error to refuse to give instructions requested by the defendant on the law of self-defense, if the court has already by instructions given on his own motion properly submitted that question to the jury.

2. ——— : ———. It is not error to refuse an instruction correct in principle, where the evidence is not such as to make it applicable.

3. Improper Statements of Counsel: REVIEW. Alleged improper statements of counsel, made while arguing a case to the jury, to be available on error, must have been objected to at the time they were made and the ruling of the court invoked thereon; and the record of such statements, together with the objections thereto and the ruling of the court thereon, must be preserved in the bill of exceptions.

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

R. C. Noleman, Fred Wright, Grant Guthrie and *M. F. Harrington,* for plaintiff in error.

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

BARNES, J.

On the 15th day of March, 1904, the plaintiff in error, James Connolly, shot and killed one Henry H. Miller, in Sioux county, in this state. He was tried for the crime on an information charging him with murder in the first degree, and was found guilty of manslaughter. From a judgment sentencing him to imprisonment in the state penitentiary for a term of eight years he prosecutes error. On the trial it was admitted by the accused that he shot and killed the deceased, and he defended himself against such action on the ground of justifiable homicide. There are seventeen assignments of error in his petition, but in his brief and on the oral argument only three of them were relied on for a reversal of the judgment of the trial court. The record discloses that the accused introduced some evidence tending to show that the deceased was a man of violent temper and quarrelsome disposition; that he had made some threats against the accused, both communicated and uncommunicated; that the accused had been well and intimately acquainted with the deceased for

about twelve years, and that the deceased was approaching him in a threatening manner at the time he fired the fatal shot.

It is contended that the court erred in refusing to give the jury an instruction, tendered by the accused, submitting his theory of self-defense. The instruction tendered specifically directed the attention of the jury to the evidence tending to show the bad character and violent temper of the deceased. This instruction was refused for the reason, as stated by the trial court, that he had already instructed the jury on his own motion in relation to that matter. The record discloses that paragraphs fifteen and sixteen of the court's instructions properly submitted the question of self-defense as applied to the evidence above mentioned. In the latter part of paragraph sixteen the court said: "The rule in such cases is this: What would a reasonable person, a person of ordinary caution, judgment and observation, in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings? If such reasonable person, so placed, would have been justified in believing himself in immediate danger, then the defendant would be justified in believing himself in such peril, and in acting upon such appearance." Having given the instruction above quoted, the court properly refused to give the instruction tendered by the accused. Where the substance of an instruction asked for has been given by the court on his own motion, the party tendering the instruction cannot complain of its rejection by the court. *Bush v. State,* 47 Neb. 642; *Carrall v. State,* 53 Neb. 431.

The accused further contends that he had the right to shoot and kill the deceased in order to prevent the commission of a felony, and that the court erred in refusing to give an instruction tendered by him presenting that theory of his defense to the jury. In order to determine this question, it is necessary for us to give at least a summary statement of what was shown by the evidence

introduced at the trial. It appears that the accused had in some manner obtained possession of a steer claimed by the deceased; that he had had possession of the animal for some length of time prior to the tragedy; that the deceased had knowledge of his possession of the animal, and that on the 14th day of March, 1904, the accused and the deceased were in the town of Alliance; that the accused there learned that the deceased was going to get the steer, and thereupon he started for his ranch, rode nearly all night, and arrived at home at about three o'clock on the morning of the 15th; that before noon of that day he armed himself with a Winchester rifle, mounted what was called a "buckskin" pony, rode to the ranch of his neighbor, Swanson, where the steer then was, drove it home and placed it in his own herd. About noon of the 14th inst. the deceased, accompanied by one Harry Dash, started on horseback from Alliance to find and bring away the steer in question. On the first day after leaving Alliance they reached the ranch of one Ellmore, about nineteen miles west and a little south of that place. They stayed there over night, and left Ellmore's ranch the morning of the 15th, at seven o'clock. From there they went to what is called the "Swanson Ranch," which they reached in the forenoon. They looked over the cattle on the Swanson ranch in search of the steer, but did not find it. At that time they saw a man driving an animal away. The man was riding a buckskin horse, and was going in an easterly direction toward the ranch of the accused. Thereupon the deceased and Dash started in the direction of Connolly's place, which was distant about a mile and a half southeast. After arriving at the ranch they looked among the cattle, and there found the animal they were searching for. After finding the steer, they rode over south of the ranch, and then east, and then came back to the windmill situated near the barn. It appears that their purpose in riding about the ranch was to find the accused. Not finding him, the deceased went up to the ranch house to see one Rea, who was working there, to

get some grain for the horses. Afterwards he came back, and about this time they noticed a buckskin horse down in the draw by some boulders or rocks, the reins of the horse's bridle being fastened to the rocks. They then rode down to where the horse was standing, but saw nothing of the accused at that time. They then rode back to the corral, and put their horses in the barn, where they fed them. After coming out of the barn, they saw the accused on a knoll southeast of the corral, about 200 yards distant, in a crouching position on his hands and knees, apparently crawling on the ground and looking toward them. It appeared to them that he crouched lower after he saw they were looking his way. When the deceased saw Connolly, he started to go out where he was. When he came within 50 or 60 yards of him, the accused fired the shot that almost instantly killed the deceased. It appears that during all the time intervening between the time Miller left the barn and until he was shot by the accused he was seen and observed by Harry Dash; that he was a one-armed man, 63 years of age, and at the time of the tragedy had no weapon of any kind on his person. The evidence of the state shows that before the shot was fired no conversation had taken place between the deceased and the accused; and that immediately before the shot was fired the arm of the deceased was swinging by his side. It further appears that the accused, after he had shot the deceased, immediately left the scene of the tragedy.

The foregoing facts are not disputed, except in so far as the evidence of the accused differs from the evidence of the state as to what took place at the time the tragedy occurred. Connolly testified in his own behalf, in substance, as follows: "I looked up. I had taken off my shoes to take some cactus out, or my boot, rather, and I looked and saw Mr. Miller in about 50 or 60 feet of me. He said: 'What are you doing there?' And I said: 'I am here attending to my business. What are you doing here?' He said: 'I am here after that steer (pointing to where

there was a bunch of cattle).' I said: 'That is my steer, Miller, and you can't take him without you have an officer, or a writ of replevin.' He was walking right along toward me, slowly. He said: 'You go in the house and stay there until I take this steer.' I said: 'I will do no such thing. I will stay here and see that you don't take the steer.' He said: 'Damn you, I will fix you right here.' He run his hand in his pocket, and ran right toward me. When he was within about 20 feet (my gun was lying beside me), I jerked it up and shot quick, like that."

It is apparent from the foregoing evidence, given by the accused himself, that at the time he fired the fatal shot the deceased was neither in the act of committing, nor was he about to commit, a felony. He was not attempting to take possession of the steer in question, and even if he had made such an attempt, openly and under a claim of ownership, he would not have been guilty of a felony. Nay, more than that, even if he had succeeded in taking forcible possession of the steer under a *bona fide* claim of ownership (and it is not shown or contended that his claim was not made in good faith), he would not have been guilty of a felony. His offense, at most, would have been no more than a trespass. So the evidence of the accused did not even tend to support his claim that he fired the fatal shot to prevent the commission of a felony. It is true that the defendant in a criminal case is entitled to have his theory of his defense submitted to the jury by proper instructions. But there must be at least some evidence to support such a theory before it can be submitted. There was no evidence in this case which would support the instruction tendered, and it was, for that reason, properly refused.

Lastly, it is contended that a new trial should be granted for misconduct of the prosecuting attorney. We find attached to the transcript a couple of affidavits made by counsel for the accused, in which are set forth certain statements alleged to have been made by the county at-

torney in arguing the case to the jury. These statements or strictures, however, if they may be called such, were of a mild nature, and it is doubtful if they were at all prejudicial to the rights of the accused. Again, the record fails to show that they were objected to, or that the trial court was asked to make any ruling thereon. To make such statements available, they must be preserved in the form of a bill of exceptions. *Wright v. State,* 45 Neb. 44; *Korth v. State,* 46 Neb. 631; *Holt v. State,* 62 Neb. 134. The affidavits above mentioned are not preserved in or made a part of the bill of exceptions, as required by the authorities above cited, and for that reason we have no authority to consider them.

From an examination of the whole record we are satisfied that the accused was given a fair and impartial trial. Indeed, every doubtful proposition seems to have been resolved in his favor. He was allowed to introduce evidence of the character and disposition of the deceased, without regard to its competency, and we are impressed with the idea that the evidence in this case would have sustained a conviction for a higher degree of crime than manslaughter. In fact, it is apparent that the accused ought to be well satisfied with the verdict of the jury and the judgment and sentence of the court.

There being no reversible error in the record, the judgment of the district court is hereby

AFFIRMED.

JAMES YOUNG V. STATE OF NEBRASKA.

FILED SEPTEMBER 20, 1905. No. 14,119.

1. **Homicide.** Where one is assailed in his home or domicile, or the home is attacked, he may use such means as are necessary to repel the assailant from the house, or prevent his forcible entry or material injury to the home, even to the taking of life; but a homicide in such a case would not be justifiable, unless the slayer, in

the careful and proper use of his faculties, *bona fide* believes, and has reasonable ground to believe, that the killing is necessary to repel the assailant or prevent his forcible entry.

2. **Domicile.** A box stall at a fair ground provided with inside fastenings to its doors, which is prepared and used by a man as his office and sleeping apartment, the place where he resides, he having no other place of abode, and which contains his clothing, his money, and all of his belongings, is in legal effect his home or domicile.

3. **Murder:** DEFENSE: INSTRUCTIONS. Where a defendant charged with the crime of murder admits the killing, defends his action as justifiable in defense of his person and his domicile, and introduces competent evidence tending to establish his theory of the homicide, he is entitled to have the jury instructed on the law of such defense.

4. **Criminal Law:** INSTRUCTIONS. It is the duty of the trial judge, particularly in criminal actions, to instruct the jury as to the rules of law governing the disposition of the cause, whether he is requested to do so or not; and if a charge to a jury, by omission to instruct on certain points, in effect withdraws from their consideration an essential issue of the case, it is erroneous.

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

R. D. Stearns, W. W. Towle and *W. P. McCreary,* for plaintiff in error.

Norris Brown, Attorney General, and *William T. Thompson, contra.*

BARNES, J.

James Young, who will hereafter be called the accused, was tried in the district court for Lancaster county on an information charging him with murder in the first degree for the killing of one Samuel Winter. He was found guilty of murder in the second degree, and was sentenced to imprisonment in the state penitentiary for a term of fifteen years, and from that sentence he prosecutes error.

It appears from the evidence that the accused was located at the State Fair grounds, near the city of Lincoln,

during the summer of 1904, and there had charge of some trotting horses owned by one Brownell; that he was authorized to employ assistants, and had full power to discharge them; that he prepared one of the stalls at the grounds for, and used it as, his office and sleeping apartment, having provided its doors with inside fastenings, consisting of hooks and staples; that during the summer, and up to about the 1st of September, he had in his service Max Wagner, Samuel Winter (the deceased), and a colored man of the name of Milt Basil. It further appears that on or about the last day of August he discharged Winter, and on the evening of September 1st met him in the city of Lincoln, and paid him his wages, giving him $4 more than was his due; and the deceased at that time declared his intention to go to Denver, Colorado. The accused thereafter returned to the fair grounds in company with one John Wright, arriving there about midnight. After drinking some coffee at a lunch counter, he went to the stalls where the horses which he had charge of were kept, and ascertained that they had not been properly cared for. For this neglect he found some fault with Wagner and Basil, but no serious difficulty occurred between them. He then went to his sleeping apartment. He claims that before going to bed he heard some persons, whom he recognized by their voices as Wagner and the deceased, talking about "doing him up," as he expressed it. He thereupon went down the line of stalls to where one Vorhees was lying on a cot, and told him not to go to sleep, as he feared there would be trouble. He then returned to his apartment, placed his revolver under his pillow, undressed, and went to bed. Shortly afterwards, and about two o'clock on the morning of September 2d, Wagner and the deceased forced open the doors and entered the stall where the accused was sleeping. The evidence is conflicting as to what was there said and done by them. The accused, however, admits that he seized his revolver and fired three shots at them, or in their direction, with the result that Wagner was wounded in

the arm, and the deceased was shot in the hip, the ball entering the abdomen, thus giving him a wound which caused his death. At the trial it was the theory of the defense that the accused was justified in firing the fatal shot in defense of his domicile and his person, and at the conclusion of the testimony he tendered certain instructions fairly submitting that defense to the jury, and requested the court to give them. They were refused, and he excepted to such refusal. It further appears that the court failed to instruct the jury on the law of this theory of the defense on his own motion, and such refusal and failure to instruct are now assigned as grounds for a reversal of the judgment of the trial court.

It is well settled in this state that it is the duty of the trial judge, particularly in criminal actions, to instruct the jury as to the rules of law governing the disposition of the cause, whether he is requested to do so or not; and if a charge to a jury, by omission to instruct on certain points, in effect withdraws from the consideration of the jury an essential issue of the case, it is erroneous. *Pjarrou v. State,* 47 Neb. 294; *Dolan v. State,* 44 Neb. 643; *Long v. State,* 23 Neb. 33. The first question, then, for us to determine is: Was the stall or apartment occupied by the accused in a legal sense his domicile at the time he fired the fatal shot?

It appears from the evidence that the accused was a single man, and it was not shown that he had any home or place of abode other than the one where the tragedy occurred. The evidence also shows that he came there with Brownell's horses early in the spring of 1904 and had lived there continuously from that time until the shooting took place; that he had fixed up box stall No. 47 for his office and sleeping room, and had put inside fastenings on the doors; that he had therein his bed, his trunk, all of his clothing, his money, and the harness, boots and other things used by him in training and racing the horses which were in his charge. In fact, it was the only home he had. It was the place where he lived, his

only place of residence. Text writers, so far, have been unable to agree upon a legal definition of the word "domicile," or rather as to what is a man's domicile. We find, however, in 14 Cyc. 834, a quotation from *Smith v. Croom*, 7 Fla. 81, defining the word as follows:

"We like this conception of the word *home*, which constitutes the commanding element of the definition given in the Roman law, as well as those given by two modern jurists. It is the word whose essential meaning comes up fully to our idea of domicile. It is a word which admits not of qualification. To speak of a *permanent* home is to perpetrate a tautology. To speak of a *temporary* home is to involve a contradiction of terms. It is a word which finds its true interpretation in the instincts of our nature. It is a word the full meaning of which is of universal application; it is understood alike by the degraded savage and the classic Greek—by the republican serf and the refined Roman. Wherever that spot is found, there the law fixes the domicile."

This definition seems to be a reasonable one, and it fully meets with our approval. The word domicile or dwelling has, in cases like the one at bar, received a most liberal construction. In *Pond v. People*, 8 Mich. 149, a building 36 feet distant from a man's house, used for preserving nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants, was held to be in law a part of his dwelling or domicile. So, bearing in mind the rule "that no man shall be deemed to be without a domicile" (14 Cyc. 836), we are of opinion that the place where the shooting occurred was, within the meaning of the law, the domicile of the accused.

This brings us to the question: Was there competent evidence introduced on the trial tending to show that the accused killed the deceased in defense of his person and his domicile? The defendant was sworn and testified in his own behalf, in substance, as follows: "And after I went to bed I laid quite a while, and I knew Max was

drinking, and I knew his disposition when he was drinking; he was notoriously bad tempered. After a while I thought it was just more talk than anything else, so I covered up, and was just about half asleep, and they came around to the door. I heard some one speak. I woke up and lit the lantern, and some of them was over against the door. I said: 'Whoever that is, go away from the door.' And just at that the door was jerked open. The foot of my cot came right up to the door, like this (indicating). Here is the door, here (indicating). Here was my cot (indicating). And Wagner said: 'You s—— of a b——, here is the man that said you was going to fire all of us Friday.' I said: 'Max, so far as you are concerned, you come around tomorrow, when you are sober, and I will talk to you.' I said: 'I have settled with Sam, and have nothing to say to him.' He said: 'You s—— of a b——, I will cave your head in with this lantern.' Sam made the remark: 'I will cut your guts out and hand them to you.' When he made his first remark, 'We come to do you up,' I shot right through the door. I said: 'Now, Max, you had better go out.' He raised the lantern. I turned over again, and shot in his direction, and was getting out of bed. I shot three shots. After I shot the third time, Max turned and ran out. Sam went to the door, I got out of bed. I said: 'Now, Sam, get out of here, you are coming around to cause trouble after I discharged you.' I said: 'Now, Sam, I have always used you right in every way.' He said: 'Yes.' I said: 'I have tried to use you like a man, and give you the easy side of it since you have been at work, and you come around now and make a disturbance.' He turned and walked around the barn. That was the last I seen of him. I didn't know at that time that I had shot Winter."

The testimony of witnesses Carter and Towle in a measure corroborates the foregoing statements. They both testified that Wagner said to them: "We went there to get even with that d——d nigger by giving him a good pounding, and we got the worst of it." It is true that

Wagner tells a different story as to what occurred after he and deceased forced open the stall door. And Winter, in his so-called dying declaration, said nothing about threats or hard words at the time the shooting occurred. With these conflicting statements in evidence, it was for the jury to determine who of the witnesses was entitled to the most credit, and which of them should be believed; and it was error for the court, by refusal to instruct, to ignore any part of the evidence. So we are satisfied that there was sufficient evidence introduced in support of defendant's theory of the homicide to require the court to submit it to the jury by proper instructions.

Where one is assailed in his home, or the home is attacked, he may use such means as are necessary to repel the assailant from the house, or prevent his forcible entry or material injury to his home, even to the taking of life; but a homicide in such a case would not be justifiable, unless the slayer, in the careful and proper use of his faculties, *bona fide* believes, and has reasonable ground to believe, that the killing is necessary to repel the assailant or prevent his forcible entry. *State v. Peacock,* 40 Ohio St. 333; *Marts v. State,* 26 Ohio St. 162; *Pond v. People,* 8 Mich. 149; *Brown v. People,* 39 Ill. 407. The instructions asked for by the accused embodied the foregoing principle in apt and suitable language, and yet the court refused to give them, and failed to so instruct on his own motion. That this was reversible error there can be no question.

Many other assignments of error are ably presented by counsel for the accused, which we decline to consider, because a new trial must be granted for the error above mentioned; and it is to be presumed that the district court will correctly determine all questions which may arise on the next trial of the accused.

For the refusal to give the instructions asked for on an essential issue of the case, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

IN RE ALGOE.

FILED SEPTEMBER 20, 1905. No. 14,337.

Constitutional Law. The subject of chapter 93, laws 1901, which provides penalties for blackmail, extortion and kindred felonies, is expressed by its title with sufficient clearness to meet the requirements of section 11, article III of the constitution.

APPLICATION of Lillian Algoe for a writ of habeas corpus. *Writ denied.*

John O. Yeiser, for applicant.

Norris Brown, Attorney General, and *William T. Thompson, contra.*

BARNES, J.

Lillian Algoe was charged in the district court for Douglas county with violating the provisions of section 2, chapter 93, laws 1901, entitled "An act to provide penalties for blackmail, extortion and kindred felonies." To that charge she pleaded guilty, and was sentenced to pay a fine of $250 and the costs of the prosecution, and to stand committed until said fine and costs were paid, or she should be otherwise discharged according to law. In default of payment she was placed in the custody of the sheriff, and was by him confined in the common jail of Douglas county. To regain her liberty, she filed her petition for a writ of habeas corpus in this court. A writ was issued directed to said sheriff, returnable on the 6th day of July, 1905. To said writ the respondent made return, setting forth the foregoing facts as his warrant for her detention, and also a plea of former adjudication. The petitioner demurred to the return, and the cause was thereupon submitted to the court.

Her first and principal contention is that the provisions of the act in question, and especially of the section thereof

under which she was prosecuted, are broader than its title, and violative of that clause of section 11, article III of the constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." To support this contention counsel cite *State v. Persinger,* 76 Mo. 346. That case clearly announces the principle contended for; but an examination of the act there under consideration discloses that the legislature of Missouri, under the following title: "An act to change the penalty for disturbances of the peace"—not only changed the penalty for that crime, as already defined by the statutes, but also included therein other acts which had not theretofore been declared disorderly conduct, making them a crime and fixing a penalty therefor. The supreme court of Missouri could well say in that case that the title to the act gave no notice that a new definition of what should constitue disorderly conduct was to be given therein. Indeed, by the plain language of the title it clearly appeared that nothing was to be accomplished by the act but a change of penalty for the violation of the provisions of an existing penal statute. It is quite clear that the title to the act in that case was much narrower in its scope than the one in question herein. Therefore we do not feel constrained to follow that decision. The question involved in this controversy has not heretofore, in its present form, been presented to us. But one quite analogous to it was decided in the case of *Granger v. State,* 52 Neb. 352, where we held that a title which read, "An act to punish cattle stealing and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves," was broad enough to embrace provisions defining such crimes and providing a punishment therefor, although there was another statute in existence which defined the crime of cattle stealing. That case was followed and approved in *Ream v. State,* 52 Neb. 727. Again, it appears that this question was before the supreme court of Kansas in *State v. Dunn,* 66 Kan. 483. There the title to the act

was, "An act to punish pickpockets." And it was held to be broad enough to cover a definition of the crime, as well as to provide a punishment therefor. These authorities would seem sufficient to sustain the validity of the section of the act in question. It may also be said that on principle, as well as precedent, we should hold the act in question valid. As was said in *Wenham v. State,* 65 Neb. 397:

"Courts should never usurp legislative functions, and before declaring a law unconstitutional we should be fully convinced that it clearly conflicts with some provision of the fundamental law, some clause of the constitution, either national or state."

The purpose of the clause of our constitution above quoted was to prevent surreptitious legislation; and if the title to an act is sufficiently comprehensive to indicate to the legislature and the public the matters actually embraced therein, it cannot be said to violate that provision of the fundamental law. From the language of the title to the act in question it was to be expected that the legislature would define blackmail and extortion. The meaning of the word "blackmail" is well known and understood, and its definition as it appears in the body of the act is just what we would expect it to be by a glance at its title. Rapalje says: "Blackmail is an extortion of hush money; obtaining value from a person as a condition of refraining from making an accusation against him, or disclosing some secret calculated to operate to his prejudice." And extortion is a synonymous term. The provisions of the act in question are clearly expressed by this definition, and it is not to be believed that the legislature was, or that the public will be, deceived by the title as to what is contained in the body of the act. We are therefore of opinion that the passage of the act was in all respects a valid exercise of legislative power. This view of the case renders it unnecessary for us to determine the effect of the respondent's plea of former adjudication, and we therefore decline to consider it.

For the foregoing reasons, the demurrer to the return to the writ is overruled, the writ is quashed, and the petitioner is remanded to the custody of the respondent.

JUDGMENT ACCORDINGLY.

HOLCOMB, C. J., not sitting.

ROBERT W. MCGINNIS ET AL. V. R. K. JOHNSON COMPANY.

FILED SEPTEMBER 20, 1905. No. 13,775.

1. **Pleading:** MOTION. A denial in an answer that the oral contract alleged by the plaintiff was made, together with a statement that a contract was made at the time alleged differing substantially from the one set up by plaintiff, is not subject to a motion to strike on account of changing the issues from a general denial, since the allegation that a different contract was made is a mere matter of evidence, tending to prove that the contract declared upon was not made. Such allegations may be superfluous and redundant, but do not change the issue.

2. **Sale:** DELIVERY. Where coal from a mine in Illinois was ordered from a wholesale coal dealer in Nebraska on December 7, 1901, to be delivered to the buyer at Valparaiso, Nebraska, for the winter trade, an offer to deliver the same upon March 28, 1902, is such an unreasonable delay in delivery as to release the buyer from the obligation to take and pay for the same, no good reason for the delay being shown.

3. **Delivery:** QUESTION FOR COURT. In such a case the court may determine whether the offer to deliver was made within a reasonable time as a matter of law, and it is unnecessary to submit the question to the jury for determination.

4. **Appeal Bond:** AMENDMENT. It is not error for the district court to allow an appellant to file an amended appeal bond within a specified time, to take the place of a bond irregular and defective in form.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

C. E. Abbott and *B. E. Hendricks,* for plaintiffs in error.

L. E. Gruver, contra.

LETTON, C.

This action was originally brought in justice court to recover damages for the breach of a contract of sale and delivery of two cars of coal sold by the plaintiffs to the defendant. The bill of particulars alleged that an order was given to plaintiffs for two cars of coal, the delivery of one car to the defendant and payment therefor, and the tender to it of the second car and its refusal to accept the same. No answer was filed, but a continuance for 30 days was granted at defendant's request. The defendant failed to appear at the time to which the cause was continued. A trial was then had, and upon the evidence adduced the court found in favor of the plaintiff and against the defendant and rendered judgment accordingly. An appeal was duly perfected from this judgment to the district court. The petition filed in that court is substantially the same as the bill of particulars in the justice's court. The defendant filed an answer, first, denying every allegation in the petition except as thereinafter admitted; second, admitting that the coal was ordered, but setting forth in addition thereto that the coal was to be delivered in 30 days from the date of the order, that it was ordered expressly for winter trade, and that the delivery was not offered for nearly four months after the order was given and after the winter season was passed, and alleging further that the defendant before that time had rescinded and canceled the order on account of the nonfulfilment of the contract by the plaintiffs within the time limited. The plaintiffs thereupon filed a motion to the answer, asking the court to strike the same from the files for the reason that the allegations thereof were not in issue in the court below, and because of a change of

issues from those tried in the lower court. This motion was overruled, to which the plaintiff excepted.

This is the first error assigned. Since the defendant made no appearance in the justice's court, the allegations of the bill of particulars were to be taken as denied generally, and the plaintiffs were required to sustain the same by proper evidence. *Carr v. Luscher,* 35 Neb. 318. When they proved the making of the contract and the offer to deliver the coal to defendant within a reasonable time, its refusal, and the amount of damages sustained by reason of this refusal, they had made their case. In the district court the issues are required to be the same as those upon which the case was tried in the lower court, for otherwise it would be a new case and not an appeal. *Inglehart v. Lull,* 64 Neb. 758, 69 Neb. 173.

Does the answer tender a different issue from that presented in the justice court? The allegations of the answer deny the making of the contract sued upon, and allege the making of a different contract. Under the general issue as presented in the justice's court the defendant can only be permitted to show any fact which goes to disprove the facts alleged in the petition. The plaintiffs plead and rely upon an ordinary oral contract of sale and delivery. Under a general denial the defendant would be entitled to prove that the conversation in which the oral contract was claimed by the plaintiffs to be made was in fact different from what the plaintiffs' witness narrates, and that the agreement actually made was in fact different from the one alleged by limitations and conditions as to the time of the delivery of the coal. This would disprove the allegation that a contract was made such as is alleged and relied upon by the plaintiffs. While that part of the answer which pleads a rescission of the contract by the defendant was new matter, and not within the issues in the justice court, still the motion was made to the answer as a whole, and since a portion of the matter alleged therein was properly pleaded the motion was properly overruled.

At the conclusion of the testimony both parties moved for a directed verdict. The motion of the defendant to direct a verdict in its favor was sustained, the reason given by the court in the instruction being that the plaintiffs had failed to show that they delivered the coal within a reasonable time and because they failed to excuse the delay in the shipment of the coal. Plaintiffs duly excepted to the giving of this instruction, and the same is assigned here as error. The evidence upon the part of the plaintiffs was to the effect that its agent, J. A. Miller, took the order at Valparaiso for two cars of coal and one of salt on December 7, 1901, from R. K. Johnson, the managing agent of the defendant corporation, and that no stipulation was made as to the time of shipment or the size of the cars. The order was sent by him to the office of the plaintiffs at Fremont, Nebraska, and the coal was ordered shipped from a coal mining company in Illinois. On February 3, 1902, neither car had arrived, and the defendant wrote to the plaintiffs stating they needed the coal very badly and wished they would hurry it up. The first car reached Valparaiso on or before March 11, 1902, and was received and paid for by the defendant. On March 26, defendant wrote plaintiffs, stating that the other car had not come and "that it is now so late that we will be unable to use it." In reply to this the plaintiffs wrote that they were not responsible for the delay, and that since they had no other place for the car at this time they would expect defendant to take it. The second car arrived at Valparaiso on March 28. The defendant was notified of its arrival, but refused to accept it on account of the delay in delivery. The evidence does not show that any conditions or limitations were made in the contract with reference to the time of delivery. The contract therefore is nothing more or less than an ordinary contract of sale and delivery. In such a contract the condition is implied that the delivery shall be made within a reasonable time. The question presented here is whether or not this question in the instant case should have been decided

by the court or whether it should have been submitted to the jury under appropriate instructions. If there are no circumstances which might tend to excuse the delay, there can be no question that the lapse of nearly four months from the time of the giving of the order to the offer of delivery is so unreasonable that the buyer cannot be required to accept the goods, and the delay would be so clearly unreasonable that it would be the duty of the court to say as a matter of law that the buyer was excused thereby. Where there are circumstances of doubt or dispute as to the terms of the contract, or where facts are testified to which if believed by the jury might excuse the delay in delivery, then the question of whether delivery has been made according to the terms of the contract or whether the delivery has been made within a reasonable time under all the circumstances is a question for the jury.

We are of the opinion that the testimony as to an alleged usage of the coal trade that unless the buyer rescinds before the coal is shipped he cannot rescind thereafter, when considered in connection with the other facts, is no excuse for the delay. The knowledge of such custom was not brought home to the buyer. The coal was not shipped direct to the purchaser, it was billed to the seller, and the buyer had no control over the shipment. The seller was notified before the coal reached Valparaiso that the buyer did not want it, and its disposition was entirely within his own control. The defendant purchased the coal delivered at Valparaiso. It had a right to its delivery within a reasonable time, and after waiting from December 7, 1901, the date of the order, until March 26, 1902, without receiving the same, the delay was so unreasonable that it had the right to rescind the order at that time, which it did by letter of that date, and before the coal arrived at Valparaiso or before delivery was offered. We are of the opinion, under all the facts in this case, that the delay in delivery was so unreasonable as a matter of law that the district court was justified in giving the instruction complained of.

Complaint is made of the appeal bond, which was irregular and defective, but an amended bond was given by leave of the district court, and we think there was no error in this action.

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

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

AFFIRMED.

BENT LARSON, APPELLEE, V. GUSTAVE ANDERSON, APPELLANT.

FILED SEPTEMBER 20, 1905. No. 13,844.

1. **Adverse Possession: TACKING.** Where during his lifetime a husband took possession of certain real estate, claiming title thereto, and lived upon the same with his wife and family as his home, and before the ten-year period of limitation expired the husband died, leaving his widow who continued to reside upon the same as her home, the possession of the widow may be tacked to that of the husband so as to raise the bar of the statute of limitation. *Montague v. Marunda*, 71 Neb. 805.

2. ———: ———. In such case the possession of the widow is a continuation of the adverse possession of the husband, and will not be presumed to be adverse to the claims of their children and heirs.

3. **Possession, by Widow: PRESUMPTION.** The widow's right to possession is by virtue of the marital relation, and will not be construed to be independent and hostile to that of her husband's heirs, unless by some means she brings to their attention the fact that she claims to own the property in her own right and adversely to any right derived through her husband.

4. **Estoppel.** Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

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

William R. Patrick and *Samuel L. Winters,* for appellant.

J. O. Detweiler, contra.

LETTON, C.

This is an action to quiet the title to a certain tract of land lying in Anderson's addition to the village of Bellevue, Nebraska. This tract consists of a part of block 10, and all of blocks 11 and 12 in said addition, together with the streets lying between said blocks. The plaintiff alleges that on November 16, 1887, and for more than three years prior thereto, one Anna C. Carlson and Andres Carlson, her husband, were the owners of this property; that their title to block 11 was by deed, and to the remainder of the premises by adverse possession of Anna C. Carlson for more than ten years; that said parties executed a mortgage on block 11, which was afterwards foreclosed, and the title to the same conveyed through said foreclosure proceedings to one Martin, and from him to one Charles G. Anderson who conveyed the same to the plaintiff; that after the title of Anna C. Carlson to the remainder of the property by adverse possession had become complete, she conveyed the same to Charles G. Anderson who conveyed to the plaintiff; that the defendant Gustave Anderson claims title to the premises, and plaintiff prays for a decree quieting title as against said defendant. The defendant answers, claiming title to the premises, averring that his father, Andres Carlson, took possession of the property in 1882, and held the same adversely to all persons until his death in 1890; that after his death the defendant himself went into possession of the same by virtue of his right as heir at law of his said

father, and that ever since said time he has been in adverse possession of the same, subject to the homestead and dower rights of his mother, Anna C. Carlson. He prays that the action be dismissed and the title to the premises quieted in the defendant. The reply is a general denial, coupled with an allegation that plaintiff's grantor, Charles G. Anderson, purchased the premises upon the defendant's representation that he would get an absolute title by buying from Anna C. Carlson, the defendant's mother; that Charles G. Anderson did so in reliance upon said representations, and that the defendant is estopped by such conduct to claim any title in the premises. The district court found in favor of the plaintiff and entered a decree accordingly, from which decree the defendant has appealed.

In 1883 Andres Carlson, the father of defendant, Gustave Anderson, and the grandfather of Charles G. Anderson, who is the son of Gustave, bought a tax certificate upon block 11, and soon after took possession of part of block 10, all of 11 and 12, and the streets lying between, inclosing the same with a fence and building a small house upon the tract. He lived upon the premises with his wife, Anna Carlson, as his home, claiming title to the same, until October, 1890, when he died. His wife continued to live there until March, 1902, when, on account of her frail physical condition, she went to the plaintiff's house, where she died in December, 1902. In his lifetime Andres Carlson and wife executed a mortgage on block 11. Upon a foreclosure of this mortgage the property was sold, bid in by Martin, the mortgagee, and sold by him to Charles G. Anderson, who afterwards conveyed the same to the plaintiff. As to this portion of the property there seems to be no room for disputing the plaintiff's title. So, also, as to a portion of block 10 described in a deed to plaintiff in which defendant joined. This conveyance is unimpeached, and the plaintiff's title seems clear, as against the defendant.

As to the remaining property, the only title shown

in any of the parties is a title derived by the adverse possession of Andres Carlson for seven years before his death and of his widow and heirs since that time. This brings us to the only question of moment in the case, and that is whether the possession of Mrs. Carlson after her husband's death operated to vest the title to the premises in her by adverse possession, or whether her possession was only a continuation of the adverse possesion held by her husband so that the legal effect would be the same as if her husband had lived throughout the statutory period. In other words, did she hold adversely to all the world, including her husband's heirs, or did she hold adversely only as against the same persons to whom her husband's possession was adverse? The presumption is, in the absence of any evidence, that where the title to a homestead is in the husband, and the widow remains in occupation of the homestead after her husband's death, she claims by virtue of her homestead right, and her possession will not be construed to be adverse to the rights of the heirs, unless by some act on her part she indicates her intention to hold adversely to them. In the present instance it appears that Mrs. Carlson, after having been appointed administratrix of her husband's estate, took some steps to have a homestead set apart to her by the county court, though no order setting the same apart was ever made, so far as the evidence shows. In her application for license to sell real estate to pay debts, she sets forth the real estate belonging to her husband, including that in controversy, alleges that the portion involved in the action had been set apart to her as her homestead, and asks leave to sell the other real estate belonging to the deceased for the payment of his debts. This evidence strongly militates against the plaintiff's claim that she held the premises, claiming title independent of her husband's estate therein and adversely to all persons, including her husband's heirs, and the evidence taken as a whole fails to establish this contention. The plaintiff's title to this portion of the premises is derived

through a deed from Mrs. Carlson to her grandson, Charles G. Anderson. We are convinced from the evidence that the only title she had thereto was the right derived from her husband's occupancy of the premises, and which, through her occupancy of the same as a homestead subsequent to his death, ripened into a perfect title in her husband's heirs, subject to her life estate. *Montague v. Marunda,* 71 Neb. 805. The plaintiff contends that the defendant requested Charles G. Anderson to purchase the property from his grandmother, and represented to him that she owned it all, and that since his son relied upon these statements in the purchase the father is now estopped from claiming any right to the premises, and therefore has no title to the same. The evidence to sustain this contention is virtually undisputed. The father urged the son to buy from his grandmother, stating that she owned the property and could give a good deed to it. The son then made the agreement that he would care for the old lady until she died in consideration for the transfer of the land. The defendant did not disclose at that time that the only estate his mother, Mrs. Carlson, had was her life estate by virtue of her homestead right, or that he claimed any title to the land, and at his request and relying upon his representations the son took the title. Having thus induced the son to assume the burden of his grandmother's care in consideration for the transfer of a good title to the premises, he cannot now be permitted to speak and claim a title that he then disowned. He afterwards concurred in this disposition of the property, living upon the land, acknowledging this son's title, and paying taxes upon it in his son's name, and it is now too late for him to change his position to his son's detriment.

The judgment of the district court is right and should 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.

EDWARD M. ALLISON ET AL., APPELLEES, V. FIDELITY MUTUAL FIRE INSURANCE COMPANY ET AL., APPELLANTS.

FILED SEPTEMBER 20, 1905. No. 13,860.

Judicial Notice. Courts do not take judicial notice of the existence of judgments or decrees in cases other than the then pending case, and a decree rendered in receivership proceedings is no exception to the rule.

APPEAL from the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Reversed with directions.*

Baldrige & De Bord, for appellants.

Isaac E. Congdon, contra.

LETTON, C.

This is an appeal from a decree of the district court for Douglas county allowing a claim against the receiver of the Fidelity Mutual Fire Insurance Company. The Fidelity Mutual Fire Insurance Company and the Merchants and Manufacturers Fire Insurance Company were mutual insurance companies organized and doing business under the laws of this state providing for mutual fire insurance companies. The respective companies were each in the custom of reinsuring with the other any risks which they did not wish to assume in their entirety. Both organizations became insolvent and were placed in the hands of receivers. The receiver of the Merchants and Manufacturers Fire Insurance Company claimed that the Fidelity Mutual Fire Insurance Company was indebted to the Merchants and Manufacturers Fire Insurance Company for a balance of $2,532.79 due for assess-

ments on policies issued to it for such reinsurance, and a further sum of $300 due for a reinsured loss, and that an assessment had been made by the district court in the receivership proceedings to that amount. An answer was filed to this claim, containing a general denial, a denial that an assessment had been made by the district court, and setting up a settlement between the companies, with other defenses not necessary to notice. No reply was filed to this answer.

Appellant insists that the affirmative allegations of the answer, not being denied by a reply, stand admitted, and that it is entitled to a dismissal upon the pleadings. As to this, it is not the usual practice to compel creditors of insolvent corporations whose affairs are being settled up by a receiver under the direction of the court to draw their claim with the nicety and formality required in ordinary legal procedure, nor are technical rules of pleading usually applied. In such a case as this, however, when it is apparent there is a substantial controversy between the parties, the better practice is for the court to direct issues to be made up, and the pleadings in such case should conform to and the issue be tried according to the usual methods of procedure in litigated cases. Since no issue was directed to be made up by the court, we will not at this time apply the strict rules of pleading, and therefore hold that this point is not well taken.

The claim of the appellee alleges that a decree entered in the case of *Wells v. Merchants & Manufacturers Mutual Fire Insurance Company* in the district court for Douglas county found that the Merchants & Manufacturers Mutual Fire Insurance Company had made certain assessments against the Fidelity Mutual Fire Insurance Company, and that the amounts set opposite the name of the Fidelity Mutual Fire Insurance Company in said decree under words "Unpaid Assessment" are the respective amounts due from said company to the Merchants & Manufacturers Company, and that the receiver should forthwith proceed to collect such amounts; and

that in order to raise a fund to fully pay and discharge the obligations of the Merchants & Manufacturers company, and receivership and expenses and costs, it was necessary to make a further assessment, and that the amounts set opposite the name of the Fidelity company in the decree under the word "Assessment" are the amounts of assessment, and that the receiver should forthwith proceed to collect the same. These allegations of the claim filed are denied by the answer. They constitute the foundation of the claim, and unless proved there is no evidence to support the decree. The proceedings are similar to an action upon a judgment or decree, and unless the judgment or decree is admitted by the answer, or taken *pro confesso* by default, it must be proved. But this may as well be said of any other decree or judgment rendered by the district court for Douglas county. Courts do not take judicial notice of the existence of judgments or decrees in cases other than the then pending case, and a decree rendered in a receivership proceeding is no exception to the rule. There is no competent evidence in th record to show that any such assessment was ever made or decree rendered as is declared upon, and hence the judgment is not supported by the evidence.

Since the case must be reversed and remanded, we think the district court should direct issues to be made up and further proceedings be had in like manner as in other litigated causes.

We recommend that the judgment of the district court be reversed and the cause remanded, with directions to cause proper issues to be framed, if a new trial is desired.

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 directions to cause proper issues to be framed, if a new trial is desired.

REVERSED.

LINCOLN TRACTION COMPANY V. KATHERINE M. SHEPHERD.*

FILED SEPTEMBER 20, 1905. No. 13,899.

Street Railways: NEGLIGENCE: EVIDENCE. In an action for damages by a passenger against a street railway company, where the defendant's liability rests upon the question whether or not a street car was suddenly and carelessly started as the plaintiff was about to alight therefrom, which is denied, the defendant is only required to furnish sufficient proof to rebut that produced by the plaintiff upon this point, and is not required to establish its freedom from negligence by a preponderance of the evidence.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Clark & Allen, for plaintiff in error.

Stewart & Munger, contra.

LETTON, C.

This action is brought to recover for personal injuries which the plaintiff alleges she suffered while a passenger upon a street car belonging to the defendant company. She alleges that when she desired to alight she notified the motorman to stop the car; that after the car was stopped, and while she was in the act of alighting, the car was negligently, suddenly and violently jerked and started forward, thereby throwing her upon the brick pavement and causing severe injuries. The defendant, for answer, denied these allegations, and alleged that while the car was in motion the plaintiff carelessly and negligently alighted and stepped down upon the street, that by reason of her negligence in alighting from a moving car she fell upon the pavement, and that the injuries she received were the result of her own carelessness and negligence. These allegations were denied by the reply. A trial was had, resulting in a verdict and judgment for the plaintiff, from which the defendant prosecutes error. For conven-

* Rehearing allowed. See opinion, p. 374, *post.*

ience the parties will be designated as in the district court.

Defendant alleges that the court erred in giving instruction No. 11. This instruction, so far as material in this discussion, is as follows: "The burden of proof is on the plaintiff to prove by a preponderance of the evidence that she received the injuries while being transported by the defendant company at or about the time and place alleged, and that the negligence of the company was the proximate cause of such injuries, and that by reason thereof the plaintiff has sustained damages, and the amount of such damages. On the other hand, when the plaintiff has shown that she met with an injury while being transported by the defendant, arising from defendant's management and operation of its car, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of the negligent act complained of in the plaintiff's petition, and as set out in the first paragraph of these instructions." The complaint made of this instruction is that it is erroneous because it states that the burden shifted to defendant to disprove the "negligent act" complained of in the petition. The brief of defendant was filed before the opinions of this court in *Lincoln Traction Co. v. Webb*, 73 Neb. 136, and *Lincoln Traction Co. v. Heller*, 72 Neb. 134, were handed down, and is mainly taken up with an argument and citation of authorities for the purpose of establishing the rule laid down in these cases that it is error to instruct the jury, in substance, that it is only necessary for the plaintiff to prove that he was a passenger and was injured, and that the burden of proof is then upon the defendant to show by a preponderance of the evidence that it was not guilty of the negligent act complained of. So far, therefore, this court has already adopted the doctrine for which the plaintiff contends, and the only question necessary to consider in this connection is whether this instruction is in contravention of the principles laid down in the two cases mentioned.

Instruction No. 11 consists of two main propositions, the first of which is to the effect that the plaintiff must prove (1) that she received the injuries alleged while being transported by the defendant, (2) that the negligence of the company was the proximate cause of such injuries, (3) that by reason thereof she had sustained damages to a certain amount. The second proposition embraced in the instruction is (1) that, when the plaintiff has shown that she met with an injury while being transported, and (2) that the injury arose from the defendant's management and operation of its car, then the burden of proof is on the defendant to prove by a preponderance of the evidence that it was not guilty of the negligent act complained of. As to the first proposition, we have heretofore said that it is a general rule that the burden of proof is always upon the party maintaining the affirmative of an issue. *Rapp v. Sarpy County,* 71 Neb. 382, 385, *Lincoln Traction Co. v. Webb,* 73 Neb. 136. The first division of this instruction lays down this principle, and correctly informs the jury that the burden of proof is upon the plaintiff to show that the negligence of the company was the proximate cause of the injuries. The necessity of proving this essential element to establish the plaintiff's case was wholly omitted from the instructions given in the *Webb* and *Heller* cases. In those cases the jury were instructed that, when an injury to a passenger was proved, the negligence of the defendant was presumed, while in this instruction the jury are correctly told that the burden of proof is on the plaintiff to prove such negligence. As to the second division of this instruction, the jury were instructed that, after the plaintiff has shown that she met with an injury arising from the defendant's management and operation of the car, the burden of proof was upon the defendant to prove by a preponderance of the evidence that it was not guilty of the negligent act complained of.

It will be seen that the negligence charged in the petition consisted in the careless act of suddenly moving and

jerking the car when the plaintiff was in the act of alighting. The case is different from one in which a collision or derailment occurs, or where there is an accident to the machinery or appliances used as a means of transportation. In such case, evidence of that fact and of the plaintiff's injuries arising therefrom, without other proof, raises the presumption of negligence. The thing itself speaks—*"res ipsa loquitur"*—and this is the foundation upon which the doctrine rests. The plaintiff is not required in such a case to prove that the accident resulted from the defendant's negligence, on account of the hardship he would be under of being compelled to seek evidence which might lie wholly within the defendant's grasp and control. This subject is discussed and the reason for the rule clearly shown in *Lincoln Traction Co. v. Webb, supra,* the opinion citing the cases upon which the doctrine rests, and which are quoted in the brief of defendant in this case. In cases such as this, however, it is impossible to apply this rule. When the plaintiff had introduced testimony to substantiate the allegation that the proximate cause of her injury was the careless starting of the car while she was in the act of alighting, the defendant's obligation, in order to escape liability, was the same as in any other case of negligence. It was compelled to disprove this allegation, either by showing that the sudden movement did not happen, or that, although it happened, the defendant was exercising all due and proper care in the operation of the car at the time, and was free from negligence. The plaintiff was required to go further by her evidence than in a case where evidence is furnished by the thing itself. In such case, the legal presumption furnishes a part of the plaintiff's case. There was a direct conflict in the evidence as to whether or not the car stopped as plaintiff was alighting, and then started forward with a jerk, or whether the accident was caused by the plaintiff stepping from the car while it was in motion and before it stopped. The question whether or not the car was negligently started with a sudden jerk

while the plaintiff was in the act of alighting was the crucial point in the case, and to require the defendant to prove by a preponderance of the evidence that this negligent act did not occur was imposing a requirement upon it which the law does not justify. It was the plaintiff's duty to establish this allegation by a preponderance of the evidence. If the defendant produced merely sufficient evidence to balance that produced by the plaintiff upon this point, it was enough. The defendant was not compelled to introduce any evidence until the plaintiff had shown that the injury resulted from a negligent act, and after the plaintiff had introduced evidence to that effect it was only compelled to meet the same to the same extent as in other cases where damages are sought for injuries by reason of negligence, and was not compelled to establish its innocence by a preponderance of the evidence.

Plaintiff in an extensive and painstaking brief has cited cases from the courts of England and almost every state and territory in the United States using expressions that, where an injury to a passenger has been proved arising from the defendant's management and operation of the means of transportation, a presumption of negligence is raised, and the "burden is cast" upon the defendant to show that it was not negligent, or "that the defendant must show," or that "the burden of proof is upon the defendant," or "it rests upon defendant, to establish" freedom from negligence. Though the language employed in these cases is not exactly the same, and is used with more or less exactness, the idea intended to be conveyed is that which is expressed in *Lincoln Traction Co. v. Webb, supra,* as follows: "Where negligence is proved, or where from the nature of the accident which was the proximate cause of the injury negligence is presumed, the carrier is then required to show that it was in no wise at fault." But this is the extent of the burden imposed upon the defendant, and is the same in cases of carriers of passengers as in other cases of negligence, and the defendant is not required to overcome the plaintiff's

testimony by a preponderance of the evidence. In the instant case, as soon as the defendant convinces the jury that the evidence upon its part as to the sudden starting of the car is equal in weight and credibility to that of the plaintiff on this point, it is entitled to a verdict, and the jury should have been so instructed. Where the liability of the defendant depends upon a question of fact as to which there is a direct conflict in the evidence, an instruction which imposes a heavier burden upon it than is proper is prejudicially erroneous.

Defendant further complains of the overruling of a motion for a new trial upon the ground of newly discovered evidence. The evidence offered was cumulative in its nature, and it is a very close question whether or not it would influence the result upon a new trial. Since a new trial must be granted on account of the error in the instruction, the defendant will be afforded an opportunity to produce this further evidence at that time.

We recommend that the judgment of the district court be reversed.

AMES and OLDHAM, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed April 18, 1906. *Judgment of reversal adhered to:*

1. **Negligence:** BURDEN OF PROOF. The rule that the burden of proof upon the issue of negligence does not shift during the progress of the trial, but rests throughout upon the party alleging such negligence, is based upon the better reason, and well supported by authority, and is established in this state as the correct rule.

2. ———: EVIDENCE: PRESUMPTION. When it appears, in an action against a common carrier for personal injury caused by the negligence of the carrier, that some defect in the appliances of the carrier, or some act of its employees in the conduct of its business, contributed to the accident which caused the injury complained

of, a presumption of negligence on the part of the carrier arises, and unless there is evidence against the presumption it will be sufficient to establish the allegation of negligence of the carrier.

3. **Instruction:** BURDEN OF PROOF. It is erroneous to refuse to instruct the jury that the party alleging facts from which a presumption of negligence would arise has the burden of proving the existence of such facts.

SEDGWICK, C. J.

The proposition announced in the opinion upon the former hearing that in actions for negligence the burden of proof is upon the plaintiff to establish the negligence of the defendant, and that this burden does not shift to the defendant during the progress of the trial, but remains with the plaintiff throughout the trial, we think is supported by the better reason and probably also by the best considered authorities. *Rapp v. Sarpy County,* 71 Neb. 385; *Omaha Street R. Co. v. Boesen,* p. 764, *post.* There is quite a comprehensive note upon this subject in connection with *Black v. Boston E. R. Co.* (187 Mass. 172), 68 L. R. A. 799. Many of the leading cases are cited and, after a consideration of these cases, the conclusion is reached: "The position of those who hold that the *onus probandi,* which, under the circumstances detailed, rests at the commencement with the one alleging the negligence of the carrier as the direct and proximate cause of the injury, continues to do so during the trial—is the more logical." There is no doubt that a duty of the highest order is placed upon the conductor of a street car to protect his passengers from danger by all reasonable means within his power. When a passenger is injured through some defect in the appliances of the carrier, or some act that is done by its employees in the conduct of the business, a presumption of negligence on the part of the carrier arises, and this presumption is sufficient, in the absence of any other evidence upon the subject, to supply the proof demanded of the plaintiff upon that point and establish *prima facie* the negligence of the

carrier. If unexplained by the carrier, no further proof upon that point is necessary to establish his negligence. But if evidence appears in the plaintiff's own testimony, or is offered by the defendant, sufficient to rebut this presumption, then the negligence of the carrier is not established by the presumption. In determining this question upon the whole evidence the burden of proof is upon the party who alleges negligence, and the proof must be sufficient to establish such negligence. The evidence tending to prove negligence of the carrier, including the presumption referred to as a part of such evidence, must preponderate, that is, the plaintiff must show by a preponderance of the whole evidence upon this point that the carrier was negligent and that this negligence contributed directly to his injury. Under this rule the instruction set out in the former opinion was erroneous. By that instruction the jury were told that under certain circumstances "the burden of proof is upon the defendant *to prove by a preponderance of the evidence* that it was not guilty of the negligent act complained of in plaintiff's petition." It is contended in plaintiff's brief that the instructions taken together show that the preponderance of the evidence required of the defendant by the instructions was limited to the proof of the facts which the defendant alleged from which due care on its part was to be derived. This would not affect the rule. But we do not think that the instructions can be so construed. The act complained of in the plaintiff's petition is stated in the instructions as the subject matter upon which the defendant must produce a preponderance of the evidence, and the jury must have understood this to refer to the plaintiff's cause of action as predicated upon the defendant's negligence.

2. It is earnestly argued in the plaintiff's brief that the former decision turns entirely on the question whether it is possible to apply in this case the doctrine of *res ipsa loquitur*. The question was discussed in the opinion, and it must be confessed that whether the doctrine can be ap-

plied to the solution of the matter presented to this court is not entirely clear. It was shown in the former opinion that it was claimed on the part of the plaintiff that she had signaled the conductor that she desired to leave the car, and that the car was stopped accordingly; that she thereupon proceeded to leave the car, and, when she had reached the steps and was about to alight, the car was suddenly started "with a jerk" which threw her to the ground and caused her injury. If the facts so alleged were established by the evidence, then the doctrine of *res ipsa loquitur* would apply. The sudden starting of the car, in the manner and under the circumstances alleged, while the plaintiff was properly on the steps and in the act of stepping to the ground, being the act of the carrier, would, if the cause of the accident, furnish a presumption of negligence on the part of the carrier. On the other hand, it was alleged by the defendant that the plaintiff, while the car was moving, carelessly attempted to step from the car to the ground, the motion of the car being such as to throw her down and cause the injury. In such case, no presumption of negligence on the part of the carrier would arise. The issue of fact thus sharply presented was not with clearness explained to the jury. The jury should have been told to determine this question of fact; and that if it was found to be as alleged by plaintiff the presumption above stated would arise; but if found as alleged by defendant, then the plaintiff, having by her own carelessness contributed to the cause of her injury, could not recover. The defendant requested the court to instruct the jury: "You are instructed that the burden of proof is upon the plaintiff to show that the car started with a jerk when she was in the act of alighting." The facts from which a presumption of negligence on the part of the defendant arises, must be proved before the plaintiff can have the benefit of such presumption. This request for instruction was along that line. A more accurate and comprehensive instruction upon this phase of the case was desirable, but the case could not be properly

submitted without a statement of the vital point in dispute, and it appears that the refusal of the request was prejudicial to the defendant.

We think the conclusion reached upon the former hearing is right, and it is adhered to.

REVERSED.

JOSEPH GUTSCHOW, APPELLANT, V. WASHINGTON COUNTY ET AL., APPELLEES.

FILED SEPTEMBER 20, 1905. No. 13,974.

1. **Contract:** PERFORMANCE. A contract which has never been begun is a contract "not completed within the time specified," under the provisions of section 20, article I, chapter 89, Compiled Statutes, 1903.

2. **Letting Contract.** The fact that the person to whom a contract is let under the provision of said section 20, requiring the contract to be let to the "lowest responsible bidder," is the only bidder, does not render the contract illegal, in the absence of fraud or collusion, or of any showing that the price is excessive or unreasonable.

3. **Notice:** BID. A bid which proposes "to construct, excavate and complete by working sections" at a fixed price per cubic yard of earth responds to a notice that required bids to be made "by each working section," since the proposal means at the same price per yard for each working section or for the whole work.

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

E. C. Jackson, for appellant.

Frank Dolezal, Walton & Mummert and *E. B. Carrigan, contra.*

LETTON, C.

This was an action brought by a taxpayer of the county of Washington, who was the owner of lands ad-

joining and affected by a proposed ditch improvement in said county, to enjoin the board of supervisors from letting a contract for the construction of the ditch. It appears that, after the preliminary proceedings required by the statute were had, the county board advertised for bids for the construction of the improvement, and in February, 1904, the contract therefor was awarded to Callahan Bros. & Katz, a firm of contractors. They filed the required bond, which was approved, and a contract was duly entered into between them and the county board for the construction of said ditch. The contract provided that the ditch was to be completed by the 15th of June, 1904. On June 1, 1904, on the application of the contractors, the time for completing the ditch was extended to January 1, 1905, under certain conditions. In July, 1904, the contractors declined to further proceed with the work on account of alleged irregularities in some of the proceedings of the board, and at a meeting on July 13 the board found that the contract had not been completed, nor had the work thereunder been commenced, and the contract was declared forfeited. The board then proceeded to advertise for bids for the construction of the ditch. At the time specified for the reception of bids the board met and, the bid of R. A. Brown & Company being the only one submitted, they awarded the contract for the construction of the ditch to that firm, whereupon this action was begun to enjoin them from entering into this contract. In the district court a demurrer to the petition was sustained, and judgment rendered dismissing the action, from which judgment plaintiff appeals to this court.

His first argument is that the only power given to the board to relet a contract for the construction of the ditch is given by section 20, article I, chapter 89, Compiled Statutes 1903 (Ann. St. 5519), which provides that "any contract not completed within the time specified, shall be reestimated and relet to the lowest responsible bidder, but not for a sum greater than the estimate, nor a second time to the same party"; that a contract which

has never been begun is not a contract "not completed," and that the words "not completed" imply something commenced and left unfinished. We are unable to discern the force of this argument. A contract, the work upon which has never been commenced, is certainly no nearer completion than one upon which part of the work has been performed. To adopt the construction contended for by the appellant would be to create the anomalous situation that, where a few shovelfuls of dirt had been thrown out in beginning the work of constructing a ditch, the board might relet the contract, but that, where nothing has been done at all, it was absolutely deprived of all power, and had reached an *impasse*. We will not lightly impute to the legislature such an intention, and we think the argument is without merit. If such were the law, the only means necessary to take to render abortive the whole proceedings would be to act as the first contractors did here—take the contract and fail to carry out its provisions.

The next point urged is that, since there was only one bidder, the contract was not let to the "lowest responsible bidder." *State v. Board of County Commissioners*, 13 Neb. 57, was a mandamus proceeding brought to compel the board of county commissioners of York county to enter into a contract with the relator for the purchase of certain stationery, on the ground that he was the lowest competent bidder therefor. It appears that two bids were filed with the board, but one of the bids was filed out of time and was not in accordance with the advertisement. This left the relator the only bidder. The court held that he was the lowest competent bidder and the writ was awarded as prayed. See, also, *Baum v. Sweeny*, 5 Wash. 712, 32 Pac. 778. It may often happen from the character of the work to be performed, or of the supplies to be furnished, that in a given locality one person alone may have the facilities and appliances necessary to fulfill the terms of the contract. It is a matter of common knowledge that extensive excavations, such as canals, ditches, or railway cuts, may be carried on much more cheaply and expedi-

tiously by the use of power machinery. A bidder equipped with such appliances may have so great an advantage over the ordinary individual as to make it useless to attempt to compete with him. Indeed, the bid of R. A. Brown & Company in the instant case recites that they had "a suitable dredge machine, now idle and ready for immediate use." There is nothing alleged against the good faith of the bidder, nor is it averred that the price is excessive or the bidder not responsible. Apparently, neither the county board nor the bidder are to blame in any way for the failure of other persons to file bids. Some courts have held that, where there was only one bidder, he could not be said to be the lowest bidder, since he was also the highest bidder; but in the absence of fraud or collusion, or of any showing that the price is excessive or unreasonable, we see no reason for assuming this position.

The third objection made is that the contract exceeds the estimated cost of construction, and that the bid did not comply with the terms of the notice which called for bids for the construction of the ditch by working sections. The reestimate made under the direction of the board showed no change from the former estimate. The estimate makes the total cost $42,705.84, the number of yards of earth to be excavated 388,344 cubic yards, and Brown's bid at 9¼ cents a cubic yard makes the total $35,912.57, which is within the estimate. The petition alleges that the amount of $42,690.24 was adopted by the board of supervisors as the estimate of the cost of said improvement, after having ascertained all the expenses, compensation for land taken and damages; that the main item of cost in the estimate was for the excavation of the ditch, which under the bid of Callahan Bros. & Katz amounted to $32,536.78, while Brown's bid aggregated $35,912.57, whereby the estimate would be exceeded by $3,375.79, which the board of supervisors had no authority to do. The petition, however, does not separate the items of the estimate so as to show what was originally estimated as the cost of excavation and construction. Brown's bid

falls within the original estimate, and hence is not subject to the objection made by appellant.

As to the contention that the bid did not respond to the advertisement, because it was not made by each working section, this is a mistake, since the bidder proposed to "construct, excavate and complete by working sections" at and for the price of 9¼ cents a cubic yard of earth. This means at 9¼ cents for each working section, or the same rate per yard for all.

We think the judgment of the district court is correct, and recommend that it be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

ALVIN R. HENSEL ET AL. V. WENZEL HOFFMAN.

FILED SEPTEMBER 20, 1905. No. 13,831.

1. **Erroneous Instruction.** An instruction which withdraws from the jury consideration of an issue of fact concerning which there is a conflict of evidence is reversible error.
2. **Pleading.** A formal admission of a mere conclusion of law in a pleading may be avoided by positive averments of fact in the same pleading which show the admission to be erroneous.

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

McGilton, Gaines & Storey, for plaintiffs in error.

B. N. Robertson, contra.

AMES, C.

One Eggen was the owner and in possession of certain laundry machinery situate in a certain building in Omaha.

He executed a mortgage upon it to the defendant in error, plaintiff below, and turned the possession over to him by delivering to him the keys of the building in which it was situated. An execution upon a judgment against the mortgagor came into the hands of the plaintiff in error, defendant below, who was a constable. This is an action for conversion against the constable and the surety upon his official bond. The petition alleges that Hensel, under color of his office and by virtue of the execution, "wrongfully and unlawfully took from the possession" of the mortgagee the property in question and converted it to his own use, to the damage of the plaintiff. The answer admits that the constable levied the writ upon the property mentioned, and that he advertised it for sale under the writ and made a sale of it, but alleges "that neither at the time said chattels were levied on, nor at the time of the sale thereof of defendant Eggen's interest therein, nor at the sale, were said chattels disturbed or moved by the said Hensel, nor have they been moved at any time since by any one; and these defendants further allege that nothing whatever was done to place the property in controversy beyond the reach of plaintiff mortgagee, nor to prevent him from taking possession of it, nor has plaintiff ever been refused possession of said chattels, neither at the time of the levy nor since, by the parties to this suit," and that the property since the sale has been in the same building and condition in which it was at the time of the levy, and at all times subject and free to be taken possession of by the mortgagee, to whom possession had been tendered by the purchaser. Defendant in error contends that this answer admits the levy, and consequently a conversion of the property, if he was in possession and his mortgage was valid when the levy was made, which latter mentioned facts are not disputed; but the plaintiff in error argues, we think more cogently, that, if the negative averments of the answer are true, there was in reality no levy and no trespass, and that the formal admission of a levy is an admission of a mere conclusion of

law which is conclusively shown to be erroneous, and by which, therefore, plaintiff in error is not bound. The negative averments are put in issue by the reply, and the evidence with respect to them is conflicting. The answer further alleges that the constable did not know of the mortgage, or that the mortgagee was or claimed to be in possession thereunder, until the day before the sale was advertised to take place and did occur, when he was informed of it by an agent and attorney of the mortgagee, and agreed with him that the sale should proceed, but should be a sale of the mortgagor's interest only, subject to the lien of the mortgage, and that a statement to this latter effect was made publicly and in the hearing of the bidders when the sale was cried, and that such interest was all that the purchaser acquired or claimed by reason of the sale, as the mortgagee well knew, and that, if the latter had failed to take actual possession of the goods and sell them for the satisfaction of his debt, such failure was due to his own neglect or obstinacy, and not to any act or fault of the constable or purchaser, or anyone acting by the direction or under the authority of either of them. But these allegations are also put in issue by the reply, and the evidence concerning them is in conflict.

Two instructions are complained of. One is numbered 2 in the record, and is to the effect that the burden of proof is upon the plaintiff in error, defendant below, to establish by a preponderance of evidence that he did not at the time of the alleged levy "place said mortgaged chattels beyond the reach or control of the plaintiff, Hoffman." It is undisputed that the situation of the chattels did not change between the times immediately before the levy and after the sale. The levy, as we have already said, was, as we interpret the answer, practically denied, and it was expressly averred that the situation or possession of the goods was at no time disturbed, and that nothing was done to prevent access to them by the mortgagee. As respects the trespass, the real wrong or gravamen of the charge in the petition of the plaintiff, the answer did not differ

in legal effect from a general denial, and the plaintiff was not relieved of the burden of making that charge good by a preponderance of the evidence. This instruction was therefore, we think, erroneous.

Exception was also taken to an instruction numbered 6 which told the jury, "If you believe from the evidence that the plaintiff Hoffman was in the possession of chattels mortgaged at the time the levy was made thereon by defendant Hensel, * * * you should find for the plaintiff and assess his recovery," etc. This instruction withdrew from the jury the defense that, although the chattels were at all times in the possession of the plaintiff, such possession was not disturbed; and the sale was made, by the agreement of the parties, expressly subject to the lien of the mortgage, and was nearly or quite equivalent, in the then state of the record, to a peremptory instruction to return a verdict for the plaintiff. We recommend therefore that the judgment of the district court be reversed and the cause remanded for a new trial.

LETTON 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 a new trial.

REVERSED.

STEPHEN HADACHECK V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

FILED SEPTEMBER 20, 1905. No. 13,887.

Judgments of Sister States: GARNISHMENT. The supreme court of the United States has exclusive final jurisdiction over the subject of the effect to be given in each state to the records and judgments of courts of sister states, and that court has held that a judgment in garnishment in one state is a bar to an action by the principal

defendant against the garnishee to recover the same debt in the state of the residence of the former. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

A. D. McCandless and *W. H. Ashby*, for plaintiff in error.

J. W. Deweese, Hazlett & Jack and *Frank E. Bishop*, *contra.*

AMES, C.

This is a proceeding in error to reverse a judgment for the defendant in the district court. The plaintiff had been employed as a laborer in this state by the defendant, and had been discharged from such employment on the 19th day of December, 1902, when there was due him as wages, earned within the then next preceding 60 days, the sum of $58.20, to recover which this action was brought. In the preceding April an action had been begun against the plaintiff in a justice's court in the state of Missouri, in which an attachment had been issued, and the defendant railway company served with process of garnishment as his debtor. To this process the company answered that it was not indebted to the defendant therein except for wages earned by him as a laborer within the then next preceding 60 days, which were exempt to him under the laws of Nebraska, the state of his residence. On the 12th day of April, 1902, the plaintiff also appeared in the Missouri court by plea and affidavit, setting forth the same matters contained in the answer of the company, and concluding with a prayer "that said moneys so attached be released." This prayer was granted by the court; but three days later the action proceeded to trial and a judgment in favor of the plaintiff therein for the sum of $98.96. This judgment has never been impeached or satis-

fied, and a duly authenticated transcript of it, as well as of subsequent proceedings thereon, was offered and received in evidence in this case. On December 9, 1902, an execution upon it was issued, and new proceedings in garnishment were instituted against the company, which made answer to the like effect as that already recited, and the judgment defendant also appeared and moved to quash the proceeding, upon the ground that the judgment was void for want of jurisdiction over his person. Both objections were overruled by the court on the 19th day of December, and a judgment in the usual form was rendered for the recovery by the plaintiff in that action against the company of the sum of $58.20, being the same money and for the identical indebtedness in dispute in the present suit. This latter mentioned judgment has not been in any manner impeached, but was satisfied and discharged by the company by payment, and the record and proceedings in the Missouri court were pleaded and proved in bar in this action.

In the face of the decision of the supreme court of the United States in *Chicago, R. I. & P. R. Co. v. v. Sturm,* 174 U. S. 710, it cannot be contended that the judgments set out in the answer are subject to collateral attack, or that they are not an effectual bar to the present suit. That court has exclusive final jurisdiction over the subject of the effect to be given in each state to the records and judgments of courts of sister states. The case before us is identical in all essential respects with that cited, in which it was held that a judgment in garnishment in the state of Iowa was a bar to an action by the principal defendant against the garnishee to recover the same debt in the state of Kansas where the former resided. Nothing would be gained by repeating here the reasons given by the court in its opinion for reaching such conclusion. The matter is settled beyond criticism or cavil, and we recommend that the judgment of the district court be affirmed.

LETTON 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.

HIRAM T. CHAPMAN V. FLORENCE E. CHAPMAN.

FILED SEPTEMBER 20, 1905. No. 13,894.

1. **Judicial Record:** AUTHENTICATION. It is indispensable to the authentication of a judicial record of a sister state that it have attached thereto a certificate of the presiding judge that the attestation is "in due form" or "in due form of law."
2. **Husband and Wife:** SEPARATION: EVIDENCE. In case of the separation of husband and wife, it is incumbent upon the spouse first repudiating marital obligations to establish freedom from fault and justification or excuse for such conduct.
3. **Suit for Maintenance:** DECREE. In an action by a wife, not for a divorce of either description authorized by the statute, but simply to compel the husband to provide her an adequate support and maintenance, it is error to render a judgment in her favor for a single sum in gross and award execution therefor.

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

W. E. Gantt and *J. C. Robinson,* for plaintiff in error.

Gurley & Woodrough, contra.

AMES, C.

This is an action by a wife against her husband, not for a divorce from the bonds of matrimony nor from bed and board, but to obtain a decree for maintenance only, which she alleges that the defendant, being a man of large means and ability, has for a term of years failed to provide, he having utterly deserted her. The answer in effect admits the desertion and failure to support, but justifies by averring that some ten years previous to the beginning of this

action the defendant, by the judgment of the district court for Cass county, in North Dakota, obtained a divorce from the bonds of matrimony with the plaintiff, in an action duly pending in said court, in which the plaintiff had entered her appearance, and in which she had been allowed by the court and paid by the defendant certain sums as "suit money" or alimony *pendente lite.* In her reply the plaintiff admits the beginning of the suit in the North Dakota court, but denies that she was ever served with process or ever appeared therein; denies that she was ever paid anything by way of temporary alimony in the action; denies the rendition of a decree of divorce in that action as alleged in the answer; and alleges that neither she nor the defendant has at any time been a resident of the state of North Dakota or of the county of Cass therein, and that the district court of that county never had jurisdiction of her person or of the subject matter of a suit of divorce between herself and her husband. In short, by these and other denials and averments the entire proceeding in the North Dakota court was put in issue as completely as could have been done by a general denial, except that it was admitted that there was some such proceeding or pretended proceeding by which the defendant sought to justify his desertion of the plaintiff and his failure to support her.

To maintain the issues on his part the defendant offered in evidence a copy of the judgment roll in the proceeding in the North Dakota court, which was objected to on the ground that it was not authenticated in the manner provided by law. The defect of which the plaintiff complains is the absence of a certificate by the presiding judge of the court that the attestation to the record by the clerk is "in due form" or "in due form of law," as is required by an act of congress and a statute of this state. Authorities that the absence of such certificate is a fatal defect are too numerous and too familiar to permit a contrary contention, which, indeed, counsel for plaintiff do not in this court attempt to make, but he does argue that the

objection in the court below was so vague and general as to be ineffectual. The objection, as appears by the bill of exceptions, was in the following form: "That the same is not authenticated as required for the authentication of foreign records under the laws of this state or by act of congress in such cases made and provided." We think the language used was sufficiently definite to invite especial examination of the form and language of the certificate of authentication, which, if made, would have disclosed the defect, and that greater precision was not required. The trial court received the document in evidence, but as the objection goes to its competency we feel bound to ignore its presence in the record. We are thus excused from discussing the evidence offered to impeach the proceeding in the North Dakota court for fraud and want of jurisdiction, but may note in passing that it sufficed to satisfy the trial judge of the invalidity of the decree attacked.

The conclusion thus reached dispenses with a consideration of much of the briefs and arguments of counsel for plaintiff in error, but the foremost and principal of his remaining complaints is the assignment that there is no evidence that the plaintiff below is a person of good character and free from fault in her marital relations with the defendant. As showing the validity of this objection counsel cites Stewart, Marriage and Divorce, sec. 179, and several judicial decisions by courts of other states to the effect that a wife who is living apart from her husband must, in order to sustain an action of this kind, aver and prove that she herself is free from fault, and that the separation was not due to her own wrong. But we do not think that this rule is intended to impose an unequal burden on the wife or to deprive her of the benefit of the ordinary presumptions of innocence that obtain in favor of one regularly indicted by a grand jury for an alleged offense. There is enough in the record to show, and indeed it is not disputed, that the defendant deserted his wife within a short time after his marriage, and about ten years before the beginning of this action. If he had valid

excuse or justification for such conduct, it is surely incumbent upon him to make known its nature and establish it by proof. Upon the face of the transaction he is himself a wrongdoer, and it appears to us that it would be a glaring injustice both to exonerate him from explaining his desertion and to require the plaintiff to show affirmatively that she has been guilty of no act calculated to provoke it. We do not think that the rule invoked by counsel, or any of the authorities cited by him, sanction such a practice. The case would be quite different if the plaintiff had left the bed and board of the defendant. In such a case there would be no impropriety in calling upon her to prove her own freedom from fault, as well as a justification for her own conduct by that of her husband. In short, the gist of the rule is that whichever spouse has first repudiated the marital obligations is rightly called upon to give a valid reason for so doing.

There was a judgment for the wife for the sum of $10,000, which the defendant, who prosecutes error, complains of as excessive and as being supported by insufficient evidence. The evidence, in brief, is that he was worth in excess of $100,000 at the date of desertion; the wife being ignorant of and being unable to procure witnesses having knowledge of the state of his affairs since that time. The defendant offered no evidence on the subject, but complains that that of the plaintiff is so remote as to be incompetent. We do not think so. It was the best obtainable by her concerning a matter within the peculiar, if not exclusive, knowledge of the defendant, and it suffices to raise a presumption, which he had abundant opportunity to rebut if he could do so; the fact that he made no such attempt serves to strengthen the presumption.

We think, however, that the court erred in awarding so large a sum, or, indeed, any sum at all, in gross, for the future support and maintenance of the plaintiff. That practice was sanctioned and the contrary course disapproved by this court in *Cochran v. Cochran*, 42 Neb. 612,

and in *McGechie v. McGechie,* 43 Neb. 523, but we think without mature or adequate deliberation. Neither description of divorce authorized by the statute is prayed for in the petition or granted by the court, nor does the plaintiff ask for *separate* maintenance. She prays simply that the defendant be compelled to support her accordingly with his ability and suitably with her station in life, and for aught that appears she is ready and willing to resume marital relations with him at any time he shall express a wish or afford an opportunity for her so to do. The judgment is in form and effect an ordinary judgment at law that the plaintiff have and recover of and from the defendant the sum of $10,000 and costs of suit, and that execution issue therefor. The defendant is considerably her senior and not improbably will predecease her, but she is not barred of her dower or of her distributive share in his estate in the event she shall survive him; and if, after his payment of the judgment, she should through improvidence or misfortune again become destitute, he would still remain obligated for her support so long as the marriage relation should subsist, which, on the other hand, might terminate by his death on the day after the payment should be made. We are ignorant of any authority, statutory or other, for the creation for a married woman of a separate estate out of the property of her husband without his consent, and such an act would have a tendency to discourage the resumption of marital relations which it is in the interest of good morals and sound public policy to promote. We think that the judgment of the district court should be reversed and the cause remanded with instructions to receive such additional competent evidence pertinent to the subject of alimony as may be offered by either party, and to award to the plaintiff such sums, to be paid to her periodically by the defendant, as shall appear to be within his ability to pay and be adequate for her suitable maintenance.

It is therefore recommended that the judgment be re-

versed and the cause remanded, with instructions to proceed in compliance with this opinion.

LETTON 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 proceed in compliance with this opinion.

REVERSED.

JACOB C. WEBBER, APPELLANT, v. L. H. INGERSOLL, EXECUTOR, ET AL., APPELLEES.

FILED SEPTEMBER 20, 1905. No. 13,945.

1. **Appeal: ELECTION: REVIEW.** Upon an appeal to this court for a trial *de novo* of the issues tried in the district court, an error of that court in compelling the appellant plaintiff to elect upon which of two causes of action set forth in his petition he would proceed cannot be corrected.
2. **Pleading.** An answer setting up the statute of limitations is not a technical plea of confession and avoidance; whether an answer of a supposed estoppel is so or not depends upon the nature of the matter alleged in the plea.
3. **Evidence** examined, and found to uphold the judgment of the district court.

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

T. H. Matters, for appellant.

Boslaugh & Moore and *Charles H. Sloan, contra.*

AMES, C.

This action was formerly before this court and disposed of by an opinion by Mr. Commissioner DAY, reported in 3 Neb. (Unof.) 534. The suit was begun to

quiet title to a quarter section of land in the possession of the plaintiff against what he alleged to be a cloud thereon, consisting of a deed purporting to convey the same and executed by John M. Ragan to one John M. Elder, deceased, an ancestor of the defendants. The answer put in issue the title of the plaintiff and alleged that Ragan, at and before the conveyance by him of the land to Elder, was the owner of the same by purchase and conveyance for a valuable consideration from the plaintiff, and that the former mentioned conveyance was also for a valuable consideration and obtained in good faith. The reply alleged that the conveyance by the plaintiff to Ragan was upon certain express and implied trusts of which the ancestor of the defendants had full knowledge at and before the time he obtained his conveyance, and which he became bound to observe and carry out, and from and by means of which and of attending circumstances the grantee became, by result or operation of law, a trustee of the title for the plaintiff. From a judgment in favor of the plaintiff, error was prosecuted to this court, where it was held that the new matter pleaded in the reply was a departure from the cause of action set out in the petition, which, upon timely objection in the trial court, should have been stricken therefrom, but that failure to make such objection and the trial of the action upon the issue thus tendered amounted to a waiver thereof and entitled the matter thus pleaded to be treated as though it had been properly incorporated into the petition, but the judgment was reversed for insufficiency of the evidence for its support.

After the cause was remanded, the plaintiff by leave of court filed an amended petition, setting forth with greater amplitude the cause of action pleaded in the former reply, and for a second cause of action pleading that he had been in adverse possession of the premises in dispute for more than ten years immediately preceding the beginning of the suit. A motion to compel the plaintiff to elect upon which of the two causes of action, claimed to be mutually

inconsistent, he would proceed, was sustained by the court, and the plaintiff chose the first of them. The answer is a general denial, supplemented by the defense of the statute of limitations, and a plea that the plaintiff is estopped from litigating the cause of action upon which he elected to proceed by the fact that it is, as has been adjudged by this court, a departure from the cause of action contained in the original petition. The allegations of the answer were put in issue by a reply, and the action proceeded to a trial, resulting in a judgment for the defendants, from which the plaintiff prosecutes this appeal.

Appellant in his brief relies upon three propositions which are propounded by him in his own language as follows: (1) "The court erred in compelling the plaintiff to elect." (2) "The plaintiff is entitled to judgment on the pleadings." (3) "That plaintiff is entitled to judgment on the evidence."

As to the first of these propositions, counsel for appellees object, we think rightfully, that it could have been properly presented only by a petition in error. This court cannot, upon an appeal bringing a cause here for a trial *de novo,* reform the pleadings by introducing issues not tried in the district court, the trial of which would or might require the examination of evidence which neither party was called upon to produce or could have successfully offered in the court below. It is not a solution of the difficulty for the appellant to say, as he does say, that there is enough evidence in the record to maintain the issue of adverse possession in his behalf. Although that assertion be true, appellees were not bound, and might not have been permitted, to introduce evidence in rebuttal, and the only means of correcting the error, if it be one, is a reversal and a new trial, an object which, under the law as it existed when this appeal was taken, was not the office of an appeal to accomplish.

The second proposition is founded upon the contention that the defenses of the statute of limitations and of estoppel are both of them technical pleas of confession and

avoidance, and that, neither of them being sufficient in this case, the allegations of the petition stand confessed without defense and entitle the plaintiff to judgment. But counsel seems in this respect to be afflicted with some confusion of thought. If an answer setting forth the statute of limitations or an estoppel amounted simply to a confession as a pleading, so that the plaintiff would be entitled to a judgment on motion without a reply or evidence, neither defense would ever be available. If either of them is insufficient in this case, it is because of a failure of proof in its support as might be the case with respect to any other issue. Counsel cites no authority for holding that a plea of the statute of limitations is a confession of the alleged cause of action to which it is interposed, and we are quite sure that it has not been hitherto so regarded by the courts or profession in this state. In effect, if not in form, the plea is that the plaintiff ought not to have or maintain his suit, because the facts out of which a cause therefor is alleged to have accrued are not averred to have taken place or did not in fact occur, if at all, within the period of limitation before the action begun. This plea is quite consistent with the contention that they did not take place at all, and the two issues may be, and usually are, tried as one. If the plaintiff fails to prove the existence of the requisite facts, he, of course, fails to recover; but if he proves them, and it appears that their occurrence was too remote in time, he also fails. As to estoppels, there are several varieties of them. An estoppel, for instance, may consist of a waiver by which the plaintiff has forgone or abandoned a previously subsisting and valid cause of action; and a plea of such an estoppel of necessity confesses the existence of the facts, the effect of which, it is alleged, was afterwards waived. But there are other estoppels which arise out of the very transaction and circumstances upon which the plaintiff relies as affording him a ground of recovery, and a plea of such an estoppel, so far from confessing and seeking to avoid, amounts to a practical denial of the plaintiff's cause of

action. And there is still another kind, in which it is averred that the conduct of the plaintiff since the alleged accrual of his supposed cause of action has been such as to lead the defendant to believe that it did not exist or would not be asserted, and that the latter has conducted his affairs accordingly, and that therefore whether the plaintiff has a good cause of action arising out of the facts alleged by him or whether he has not is immaterial, because he ought not in good conscience to be permitted to assert it. It is of such a plea that it is correctly said in Stephens, Pleading (2d ed.), sec. 166, that it "is neither by way of traverse nor confession and avoidance, viz., a pleading that, waiving any question on the fact, relies merely on the estoppel; and, after stating the previous act, allegation or denial of the opposite party, prays judgment if he *shall be received or admitted* to aver contrary to what he before did or said." In this last case, if the matter alleged in estoppel is sustained by sufficient proof, there is no occasion to inquire whether the averments of the plaintiff are true or false, but if the defendant fails in his proof, the plaintiff must still establish the truth of his averments, unless it is admitted otherwise by the plea of estoppel. Now, the estoppel pleaded by the appellees in this case is analogous to, if not strictly of, the last mentioned kind, and prays the judgment of the court whether the plaintiff ought to be "received or admitted," in the language of Mr. Stephens, to "aver" or assert the cause of action alleged in his amended petition, after having previously set up and litigated a different and inconsistent cause of action in his original petition. For the purposes of this discussion it may be assumed, but is not decided, that the matter thus pleaded, and admittedly true, is ineffectual as an estoppel, because the former trial was actually of the same issue, tendered in the former reply.

We thus arrive at a consideration of appellant's third proposition, which is that he is entitled to a judgment on the evidence. The evidence establishes, as we think without serious conflict, that the plaintiff was the owner of

the land in controversy, subject to a mortgage thereon, upon which there had been a decree of foreclosure and sale in the federal court, and that a marshal's sale pursuant to the decree had been had, but not confirmed; that Ragan bought the title and received a conveyance from the plaintiff for a valuable consideration for his own use and benefit, and unaffected by any trust, express or implied, and not under circumstances from which a trust would result by operation of law, but intending to make a profit by its subsequent sale at a larger price; that after he obtained his title he redeemed the land from the marshal's sale before confirmation and with his own funds; that afterwards Ragan sold and conveyed the premises to the ancestor of the defendants for an actual and adequate consideration, who paid for the same, in part with funds previously belonging to him, and in part with proceeds of a loan secured by a mortgage executed upon the same and other lands, and that there was no agreement, express or implied, that the grantee should hold the lands in trust for the plaintiff, or as security for the purchase money, or any part of it, paid to Ragan. This version of the transaction is testified to by Ragan, who is a disinterested witness, without equivocation, and is corroborated by that of both the defendants. It is not directly or pointedly disputed either by the plaintiff or by any witness in his behalf, and the nature of his occupancy of the premises since that time is consistent with the testimony of the defendants, who are his nephews, that it was with their permission and as a means of providing him with a livelihood in his declining years. Without reciting the evidence, which we have examined with care, in further detail, it may suffice to say that we are satisfied that it fully supports the judgment of the district court, which we recommend be affirmed.

LETTON 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.

CHRISTINE SOEHNER V. GRAND LODGE, ORDER OF SONS OF HERMAN.

FILED SEPTEMBER 20, 1905. No. 13,789.

1. **Insurance:** MUTUAL BENEFIT ASSOCIATION. A certificate of a mutual association will be treated as a contract of insurance between the member and the association.

2. **Payment of Assessments.** Where by the constitution and by-laws of a fraternal benefit society it is made the duty of the members of such society to pay their assessments and dues to the secretary of the local lodge to which they belong, such secretary in receiving such dues and assessments acts as the agent of the grand lodge of the order which issues the certificate.

3. Forfeiture: WAIVER. If, with knowledge of the facts by reason whereof it is entitled to claim a forfeiture, the insurer continues to treat the policy as in force, or does any act inconsistent with an intention to insist upon the forfeiture, the forfeiture is waived. *Hunt v. State Ins. Co.*, 66 Neb. 125, followed and approved.

4. Conditions in a policy of insurance limiting or avoiding liability are strictly construed against the insurer and liberally in favor of the assured.

5. Directing Verdict. *Held*, under the facts and circumstances shown by the record in this case, that it was error to direct a verdict for the defendant.

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

John Bridenbaugh, for plaintiff in error.

B. Ready and *J. C. Robinson*, *contra.*

OLDHAM, C.

This was an action on a fraternal benefit certificate issued by the grand lodge of the Order of the Sons of

Herman to Jacob Soehner on his becoming a member of the fraternal insurance society and the payment by him of the dues required by the society on the 21st day of February, 1899. By this certificate the association, on proof of the death of Jacob Soehner, promised to pay to plaintiff, the wife of Jacob Soehner and the beneficiary named in the certificate, the sum of $500. The petition alleged the issuance of the certificate and the full compliance by Jacob Soehner with the constitution, by-laws and rules of the order, and payment in full of all dues and assessments required by the rules of the association and by the terms of such certificate and policy of insurance; and that on the 25th day of September, 1902, the said Jacob Soehner died from the effects of having been struck and run over by a railroad train; and that notice of the death was properly communicated to the defendant, and defendant refused and failed to pay the amount due plaintiff on the benefit certificate. The answer admitted that the defendant was a fraternal benefit society organized under the laws of the state of Nebraska, and that plaintiff was the wife of Jacob Soehner, and that defendant had issued the certificate alleged on in the petition. The answer then sets up the application of Jacob Soehner for membership in the order, the material provision to the questions now in issue, which was that "I further agree that I will comply with all the laws, rules and regulations now in force and those which may hereafter be adopted, and this fact shall be the specific reason which will entitle me to the insurance and all other provisions and benefits of the order." The answer then alleges that at the time of the death of deceased, and for more than two years prior thereto, the laws of the order governing the payment of dues were as follows:

"Art. 17. Par. 1. Members who have failed to pay their lodge dues, insurance assessments and fines within 30 days, figured from the date of making the assessment, shall be suspended *ipso facto,* and shall lose all rights to

which they would otherwise be entitled, and it shall need no special order or notice on the part of the order.

"Par. 2. Such suspended members, whether such suspension is on account of failure to pay lodge dues or insurance assessments, shall lose all rights to which they would otherwise be entitled, and the certificate of insurance shall be null and void. * * *

"Par. 3. A suspended member can be reinstated if he pays all arrearages within 30 days from date of suspension. He can also be reinstated if he makes written application for reinstatement to the local lodge within three months of the date of suspension and pays all lodge dues, insurance assessments and fines. To be reinstated at this time, however, requires a two-thirds of all the votes cast by ballot in favor of such reinstatement at a meeting of the local lodge.

"Par. 4. Former members who have been suspended more than three months can be reinstated to their rights only when they follow the same proceedings as for the taking in of new members, yet there must be an examination by a physician. In such cases, however, the initiation can be dispensed with, provided he applies within six months from the date of the suspension."

The answer further alleges that assessment numbered 4, payable during the month of April, had not been paid by the deceased or anyone for him, nor have assessments numbered 5, 6, 7, 8 and 9 of the series of 1902 been paid, the same being the assessments for the months of May, June, July, August and September; that according to the laws and obligations above set forth Jacob Soehner thereby forfeited his certificate of insurance, and such forfeiture was entered on the records of the grand lodge of said Order of Sons of Herman by the secretary thereof on the 1st day of May, 1902; and that the deceased had failed to make any application or a request for reinstatement, and never has been reinstated, and this defendant is relieved of said lodge certificate of insurance. A reply was filed to this answer in the nature of a general denial;

and on issues thus joined there was a trial to a jury, and at the close of the testimony offered by both plaintiff and defendant the court directed a verdict for defendant and entered judgment on such verdict, and to reverse this judgment the plaintiff brings error to this court.

In addition to the by-laws set up in the answer of defendant the following provisions of the benefit certificate were offered and admitted. "Art. 2. Membership. (1) All the members of all the lodges of the Order of the Sons of Herman in the state of Nebraska are firmly bound in the case of death of a brother who is entitled according to the constitution and by-laws to the sum of $500 to pay the same to such person or persons as was designated in his application by the deceased member as the recipient of the insurance money. (2) The assessment for the making up of this sum shall be made from all the members of the order in the state in the following manner: Members from 18 to 30 years of age, 30 cents; 30 to 38 years of age 40 cents; 38 to 40 years of age 50 cents. (3) By the first of each month each member of the order shall pay to the secretary of his lodge his assessment to the mortuary fund, which assessments are to be sent not later and within the 10th of the same month by him to the grand secretary," etc., "and the grand secretary is required to forward receipt, which receipt must be laid before the lodge at the next meeting. * * * (5) If a member has not paid his assessments 30 days after the calling in day, he shall be suspended for 30 days; if he pays within this time, he is reinstated into his rights; if he does not pay, he is to be stricken off the membership list. (6) If the mortuary fund amounts to more than $3,000 through the monthly assessments of the members, the executive committee is empowered to postpone the next following assessment for an indefinite time."

The by-laws pleaded in defendant's answer were adopted after the benefit certificate was issued. The last provisions set out were in force and embodied in the certificate at the time it was issued. The material evidence

introduced at the trial was that on the 13th of September Jacob Soehner paid to the local secretary of the lodge, Lewis Ottenheimer, the assessments for April, May, June, July, August and September, and arrears of dues for the third and fourth quarters, and his *per capita* tax, and received a receipt in full of such payments from the local secretary; that on the 25th day of September he was killed in a railroad accident, and that notice of his death was properly communicated to the defendant lodge. The evidence showed that the local secretary had repeatedly requested Soehner to pay his arrearages to the lodge. The local secretary testified on behalf of defendant, and over defendant's objection, that, when he received the money from Soehner and gave him a receipt in full for his arrearages, he told Soehner that he had been out so long that he was scratched off, but that he would write to the grand secretary and see if he would accept the money, and, if he did, it would be all right. The record of the grand secretary was introduced, which showed after the name of Soehner, on date of July 1, a German word, which translated meant "scratched off." There is no evidence, however, except the entry itself, as to when this word was written after the name of Soehner. When the local secretary received the money, he did not write to the grand secretary, as he said he had agreed to do, until after the death of Soehner. He then wrote to the grand secretary, without inclosing the money, and the grand secretary declined to receive it, and so far as the evidence shows the local secretary still has the money in his possession. This is all the evidence material to the issues contained in the record.

We have set out the material conditions of the policy, the application and the constitution and by-laws of the of the association, because they, when not in conflict with the statute authorizing such organization, constitute the contract between the member and the association. While in the early days of the existence of fraternal benefit associations a different view of their relation to their mem-

bers was entertained by some of the courts of the United States, the very strong trend of modern decisions is to treat a benefit certificate as a contract of insurance between the member and the association, and this modern doctrine has received the approval of this court in the very recent case of *Modern Woodmen of America v. Colman,* 64 Neb. 162. It is not the policy of the law to favor forfeitures, and it is the tendency of courts to regard a provision in the constitution or by-laws of a benefit society that a member not remitting his assessments within a specified time shall forfeit his claim to membership as not a self-executing provision, but one which requires affirmative action of the association by declaring a forfeiture. *Northwestern Traveling Men's Ass'n v. Schauss,* 148 Ill. 304. In fact, the strong tendency is to construe the by-laws and constitution liberally in favor of the assured.

In the instant case it is contended on the part of the insurance company that Jacob Soehner was suspended by the affirmative action of the grand lodge on the 1st day of July for his arrearages. But there is no evidence that the local lodge was ever notified of this suspension, if it were actually made at that time. Section 3 of the by-laws pleaded in defendant's answer provides that the suspended member can be reinstated by paying all arrearages 30 days from date of suspension. Under this section of the by-laws all he has to do is to pay his arrearages. It is also provided that after his suspension for three months he may by a two-thirds vote of the society be reinstated on payment of arrearages. Now, assuming that Soehner was suspended on July 1 by the grand lodge, he had not been out of the order three months at the time he paid all arrears to the local secretary. While there is no specific provision for reinstatement between 30 days and three months, yet, fairly and liberally construed, any member of this order in arrears may within three months of his suspension be reinstated by paying his arrearages, when the money is accepted without a vote of the lodge.

By section 3 of the constitution and the conditions of the policy it is made the duty of each member to pay his dues and assessments to the local secretary of his lodge, and the duty of the secretary to remit to the grand secretary, and the grand secretary to return a receipt to be read in lodge. Under such a provision as this the local secretary becomes the agent of the grand lodge in receiving dues and assessments from its members. In *Supreme Tribe of Ben Hur v. Hall,* 24 Ind. App. 316, it is said:

"The duties of an officer determine the question of his agency, and not what he may be called. He is the agent of the supreme tribe for doing what its by-laws require him to do as between the members of the order and the supreme tribe"—citing *Supreme Council of the Catholic Benevolent Legion v. Boyle,* 10 Ind. App. 301; *Germania Life Ins. Co. v. Lunkenheimer,* 127 Ind. 536.

If, then, the local secretary of the lodge was the agent of the grand lodge in the receipt of dues and assessments from the members of the local organization, the question arises as to whether the receipt by him to Jacob Soehner for all past due assessments and *per capita* tax amounted to a waiver of the conditions of the by-laws providing for the suspension of a member in arrears more than 30 days. In the very recent case of *Hunt v. State Ins. Co.,* 66 Neb. 125, it was said by this court: "If with knowledge of the facts by reason whereof it is entitled to claim a forfeiture, the insurer continues to treat the policy as in force, or does any act inconsistent with an intention to insist upon the forfeiture, the forfeiture is waived"—citing in support of this proposition, *Hughes v. Insurance Company of North America,* 40 Neb. 626; *Rochester Loan & Banking Co. v. Liberty Ins. Co.,* 44 Neb. 537; *Home Fire Ins. Co. v. Kuhlman,* 58 Neb. 488.

In Richards, Insurance, sec. 76, the author says: "Universally it is held that the acceptance of an assessment or premium by the home office is a waiver by the company of all former grounds of forfeiture known by it." To the same effect is the holding in *Supreme Tribe of*

Ben Hur v. Hall, supra, and *Masonic Mutual Benefit Ass'n v. Beck,* 77 Ind. 203, 40 Am. Rep. 295.

In *Queen Ins. Co. v. Young,* 86 Ala. 424, 5 So. 116, it is said: "Conditions in a policy of insurance, limiting or avoiding liabilty, are strictly construed against the insurer, and liberally in favor of the assured. Though a waiver may be in the nature of an estoppel, and maintained on similar principles, they are not convertible terms. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture. * * * If the company, after knowledge of the breach, enters into negotiations or transactions with the assured, which recognize and treat the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as having waived the right to claim the forfeiture" —citing *Titus v. Glen Falls Ins. Co.,* 81 N. Y. 410.

A fraternal benefit association, as defined by section 91, chapter 43, Compiled Statutes 1903 (Ann. St. 6483), is "a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit." Section 92 requires such association to make provision for the payment of benefits in case of death, and permits provisions to be made for the payment of benefits in case of sickness, etc. Section 93 provides that the funds from which benefits shall be paid and the expenses of the society defrayed shall be derived from beneficiary calls, assessments or dues collected from the members. Under the by-laws and constitution of the Sons of Herman, as before set out in this opinion, assessments for the mortuary fund were made monthly, according to the age at which the member was admitted, until the fund reached a certain stipulated amount, when the calls might be suspended by the grand secretary. In other words, both under the statute and the by-laws of the order these assessments were levied under the direction of the grand lodge. While there is some question interposed about the legality of

these assessments, yet this question we think does not arise and cannot be considered under the pleadings filed and issues raised in this case. Plaintiff tried the case on the theory that the assessments had been legally levied and had been paid by her husband. Defendant tried it on the theory that all these assessments from April to September, inclusive, had been legally levied, and that Jacob Soehner was in default for nonpayment of each one and all of them. Then the question arises whether or not the action of the lodge in assessing the deceased member Soehner for the months of August and September is consistent with its theory that he was suspended in July. In *Stylow v. Wisconsin Odd Fellows Mutual Life Ins. Co.*, 64 Wis. 224, it is said by the supreme court of Wisconsin:

"Every time the company makes an assessment against the assured after he has failed to pay a previous assessment within the time prescribed by the rules, it waives the forfeiture of the policy for such failure to pay and admits him to be a member of the company nothwithstanding such failure."

It is urged by counsel for defendant in error that under the rule laid down by this court in *Adams v. Grand Lodge A. O. U. W.*, 66 Neb. 389, the receipt of the money by the local secretary was not sufficient to show a waiver of other conditions for the reinstatement of a member, especially when the receipt is accompanied by an express requirement of compliance with other conditions. In the case just cited, the member of the order had been suspended and so entered on the books of the local as well as the grand lodge. When he applied for reinstatement, the rules of the order required, in addition to the payment of dues, the production of a health certificate from a physician. The finance officer notified him of this condition, and furnished him a health certificate to return properly executed by a physician. This the member neglected to do. The evidence in this case also shows that the member himself was fully familiar with the rules, and

had been suspended and reinstated under these rules before this time. In the case at bar, there was no requirement under the rules for a health certificate, or anything, as we have pointed out, but the payment of arrearages. This the member did. So that the only question in this case, if there be one at all, is whether or not the alleged conversation between him and the local secretary was sufficient to inform the member that the local secretary would hold the money subject to the action of the grand secretary. No condition was named in the receipt executed and delivered by the local secretary, and no explanation is made as to why the assessments were charged against the deceased member, when the grand secretary was insisting that he had been "struck off." It seems to us that under this peculiar condition the question of the understanding between deceased and the local secretary at the time the payment was made was at least one of fact for the jury. In *Thibert v. Supreme Lodge Knights of Honor*, 78 Minn. 448, 81 N. W. 220, under conditions very similar to those in the case at bar, it was said by Collins, J., in rendering the opinion: "But, in any event, the question whether the reporter gave the notice testified to was for the jury; taking into consideration, as we must, that Thibert, who alone could deny the conversation, was dead, and could not be heard."

We are therefore of opinion that the district court erred in directing a verdict for the defendant, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES, C., concurs.

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.

WILLIAM RODENBROCK v. RAIMOND GRESS.

FILED SEPTEMBER 20, 1905. No. 13,886.

Real Estate Agent: ACTION FOR SERVICES. Services as a real estate broker, rendered for the owner of the land without a written contract, cannot be recovered for as such on a *quantum meruit. Blair v. Austin*, 71 Neb. 401, followed and approved.

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

W. H. Pitzer, for plaintiff in error.

James W. Eaton, John V. Morgan and *John C. Watson, contra.*

OLDHAM, C.

This was a suit to recover the value of services alleged to have been rendered by plaintiff in the court below as a real estate agent and broker in negotiating the sale of certain lands owned by the defendant in Otoe county, Nebraska. Defendant demurred to the petition in the district court. The demurrer was sustained and, plaintiff refusing to further plead, the petition was dismissed. To reverse the judgment of the district court in dismissing the petition, plaintiff brings error to this court.

The petition, after showing that on and prior to January 1, 1902, the defendant was the owner of the lands in controversy, describing them, alleges that in the month of October, 1902, the defendant, being desirous of selling said lands, requested the plaintiff to sell them for the defendant for $12,000, and promised to pay plaintiff for his services if plaintiff succeeded in making a sale of the lands on said terms. The petition then alleges that, in reliance on the request and agreement of the defendant, plaintiff devoted a large amount of time and made continued efforts toward effecting a sale of said lands, and that he did effect a contract of sale thereof to one John Bando for the price of $12,000, and that thereafter the defendant and

John Bando completed the transfer of the lands, and defendant executed his deed to Bando, conveying the lands, and received the sum of $12,000, the purchase price thereof, and that the sale was effected entirely through the efforts of the plaintiff, and was highly advantageous to the defendant. Plaintiff further alleged that the usual compensation for similar services in effecting sales of real estate is a commission of 5 per cent. on the first $1,000 and 2½ per cent. on the sale price exceeding $1,000, and that this was well known to the defendant; that since the sale has been completed defendant promised to pay the plaintiff this commission, and that no part thereof has been paid. The petition prays for judgment for the amount of the commission at the rate stated.

It will be noticed that there is no allegation in the petition for the recovery of money expended in the negotiation of the sale at defendant's request and for his benefit, nor is there any allegation for the reasonable value of services performed at defendant's request and for his benefit; but, on the contrary, the petition alleges on the reasonable value of commissions earned as a real estate agent and broker in effecting the sale of lands. This brings the case squarely within the doctrine announced by this court in *Blair v. Austin,* 71 Neb. 401, in which it was held that "services as a real estate broker rendered for the owner of the land, without a written contract, cannot be recovered for, as such, upon a *quantum meruit.*" Section 74, chapter 73, Compiled Statutes 1903 (Ann. St. 10258), has recently been construed in all its phases by this court in *Spence v. Apley,* 4 Neb. (Unof.) 358; *Baker v. Gillan,* 68 Neb. 368; *Danielson v. Goebel,* 71 Neb. 301, and *Blair v. Austin, supra.* It therefore needs no further discussion in this opinion.

The judgment of the district court in sustaining the demurrer was in full harmony with all these decisions, and we recommend that such judgment be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

JOHN MORRIS, APPELLEE, V. PHŒBE R. E. E. LINTON ET AL., APPELLANTS.

FILED SEPTEMBER 20, 1905. No. 13,901.

1. **Depositions:** ADMISSIBILITY. In the case of alienation of lands *pendente lite*, depositions of witnesses taken after the alienation and before the alienee becomes a party to the cause may be used against the alienee the same as they might have been used against the party under whom he claims.

2. **Mortgage:** VALIDITY. Where a mortgage is given to secure a *bona fide* indebtedness contracted before the execution of a note, the mortgage will be held valid as security for the debt, although the note itself may be invalid for want of a revenue stamp.

3. **Dismissal:** EFFECT. The dismissal of a bill without prejudice does not conclude the parties thereto.

4. **Trusts:** EXECUTED AND EXECUTORY. The distinction between trusts executed and executory is this: A trust executed is where the party has given complete directions for settling his estate, with perfect limitations; an executory trust is where the directions are incomplete, and are rather minutes or instructions for the settlement.

5. The law of the situs governs in regard to all rights, interests and titles in and to immovable property.

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

John O. Yeiser, for appellants.

E. W. Simeral, contra.

OLDHAM, C.

The original petition in this case was filed on May 24, 1898, in the district court for Douglas county, praying for

the foreclosure of a real estate mortgage executed by the defendant, Phœbe R. E. E. Linton, to John Morris, mortgagee. The mortgage was given to secure advancements of money made by the mortgagee for the separate use of Mrs. Linton, and was purported to be evidenced by a note executed by her to the mortgagee at the time the mortgage was given. It was a Nebraska form of mortgage, describing the mortgagor as "Phœbe Rebecca Elizabeth Elwina Linton of Omaha, Nebraska, United States of America, wife of Adolphus Frederick Linton." It was acknowledged on January 14, 1896, in London, England, before the deputy consul general of the United States of America, under seal of his office, in the ordinary form of acknowledgment in this state. It is stipulated, however, that Mrs. Linton was a subject of Great Britain at the time the note and mortgage were executed. When the suit was instituted, all parties appearing to have any claims or interest in the mortgaged premises were made parties defendant. The cause of action was continued from time to time, and on August 28, 1901, upon notice to all the parties defendant, depositions were taken by the plaintiff in London, England, and these depositions were filed in the district court for Douglas county, September 17, 1901. On May 20, 1901, there had been filed for record with the register of deeds of Douglas county a purported conveyance in trust of the lands in controversy from Mrs. Linton to a trustee for the benefit of her two minor children, Charles and Fryda Linton. This is claimed to have been done in compliance with an antenuptial contract with her husband. Thereafter, on November 4, 1901, plaintiff filed an amended and supplemental petition, making these minor children and the trustee named in the purported deed parties defendant. A guardian *ad litem* was appointed for the minor defendants, and after many delays the issues were finally settled. On April 9, 1904, a decree was entered in favor of the mortgagee for the sum of $44,679.20, and a foreclosure of the mortgaged premises was directed. To reverse this decree the guardian

ad litem of the minor defendants brings error to this court, and defendants Phœbe R. E. E. Linton and her husband bring the cause here by appeal. The two causes of action were consolidated and will be treated together. In the error proceedings by the guardian *ad litem* of the minor defendants it is first urged that the court erred in overruling the motion of the guardian *ad litem* to suppress the depositions taken in London on August 28, 1901, as against the rights of the minor defendants. No motion to suppress these depositions was made until May 2, 1902, and the motion to suppress was not called for action until April 8, 1904, the day the trial began. The court overruled the motion, and the trial proceeded without further objections from the defendants. Without determining whether or not these minors were necessary parties to the suit, it is sufficient to say that they came into the suit *pendente lite* under a conveyance executed long after the suit had been instituted. It is the rule that, where an alienation of property is made *pendente lite,* the alienee is bound by the proceedings in the suit after the alienation and before the alienee becomes a party to it. Depositions of witnesses taken after the alienation and before the alienee becomes a party may be used against the alienee, as they might have been used against the party under whom he claims. 2 Barbour, Chancery Practice (1st ed.) *79; *Lange v. Braynard,* 104 Cal. 156, 37 Pac. 868.

It is next urged that the court erred in admitting in evidence the note executed by Mrs. Linton to the mortgagee, because such note does not appear to be stamped, as required by the revenue laws of England, where the note was executed, and that, consequently, the mortgage which secured the note was void. In the first place, as the trial was to the court and not to a jury, it was not error to admit the note in evidence in the first instance, even if unstamped. The only error that could be predicated would be the action of the trial court in rendering judgment on such improper testimony. The court, after admitting the note, refused to render judgment on it, and only found for

the plaintiff for such sums of money as were shown without dispute to have been furnished Mrs. Linton for the benefit of her separate estate. The note was given for $55,454, but the evidence showed that part of this consideration was a debt of the husband, Adolphus Frederick Linton, and no recovery was allowed for this part of the obligation. It is a well settled proposition that, where the original consideration is valid and is contracted prior to the execution of the note, a mortgage given to secure the debt will be valid, although the note purporting to evidence the debt is invalid for want of a revenue stamp. 1 Jones, Mortgages (3d ed.), 353; *Wilson v. Carey,* 40 Vt. 179; *Brown v. Watts,* 1 Taunt. (Eng.) 353; *Sutton v. Toomer,* 7 B. & C. (Eng.) 416.

The sufficiency of the evidence to sustain the decree is challenged in both the error and the appellate proceedings. The facts underlying the controversy are that in 1878 Phœbe R. E. E. Finley, a prospective American heiress, then a minor of the age of 16 years, whose father resided in the state of Pennsylvania, was married in Paris, France, by the English consul to Adolphus Frederick Linton of London, England, who appears to have been a profligate bankrupt. Before the marriage the following antenuptial agreement was entered into by the intended husband and wife: "This is an agreement made on the 9th day of December, Anno Domini 1878, between Adolphus Frederick Linton, Esq., bachelor, of 18 Gilbert St., Grosvenor Square, Middlesex, on the one part, and Rebecca Elizabeth Phœbe Elwina Finley, on the other part, in pursuance of a marriage which is proposed to take place between said parties. It is agreed that all the moneys and property that the said intended wife may become or is now in possession of or that she may at any future time become entitled to, shall be free from the debts, control and engagements of the said intended husband, and settled upon herself for her sole and separate use, and be divided amongst the children of the said intended marriage in such shares as the said intended hus-

band and wife may appoint, but subject, nevertheless, to the said husband taking a vested life interest in any such money or property as above mentioned, in the event of his surviving the said intended wife. And it is further agreed between the said parties that a formal deed of settlement shall be drawn up embodying, in effect, the said agreement as soon as conveniently possible after said marriage. (Signed.) Phœbe Rebecca Elizabeth Elwina Finley. (Signed.) Adolphus Frederick Linton. Witness: R. Lancaster Johnson." At the time this agreement was entered into, Mrs. Linton was the heir expectant of her maternal grandfather, James E. Brown, a resident of Pennsylvania. In 1880, the grandfather died, leaving a valuable estate, which, in 1890, was conveyed in trust to Colonel John B. Finley, father of Mrs. Linton, for her sole benefit. This estate was held in trust by Colonel Finley until 1894, when, on September 28 of that year, he conveyed the lands now in controversy and other lands to Mrs. Linton. This conveyance was properly filed for record with the register of deeds of Douglas county. About two years later the mortgage in controversy was given. On November 15, 1892, Mrs. Linton brought an action in the English chancery court against her husband and his trustee in bankruptcy for specific performance of the antenuptial agreement above set out. It is fair to say that the suit appears to have been brought with the full knowledge and probably at the suggestion of plaintiff, John Morris. The suit, however, was dismissed without prejudice by the plaintiff, October 30, 1893.

It is now contended by counsel for the appellants and plaintiffs in error that the institution of this suit was a ratification of the antenuptial agreement entered into while Mrs. Linton was a minor. If we should regard the institution of the suit as a ratification of the contract, we would be compelled likewise to regard the dismissal of the cause by her as a revocation. The true rule, however, is that the dismissal of a bill without prejudice does not conclude the parties thereto, and they are at liberty to

bring another bill upon the same subject matter. *House v. Mullen,* 22 Wall. (U. S.) 42; *Bank of Maywood v. Estate of McAllister,* 56 Neb. 188. Hence, the institution and dismissal of this suit amounted to neither a ratification nor a revocation of the contract. From the terms of the above agreement it is plainly an executory rather than an executed contract. It shows on its face that its purpose was to protect the expected inheritance of the wife from the debts and liabilities of the bankrupt husband, because, at the time the contract was entered into, under the laws of England, where the parties intended to reside, the personal property of the wife, when reduced to possession, passed to the husband. Consequently, the husband was to have a life estate in the property if he survived the wife; but all the property to be received by her was settled on herself for her sole and separate use, to be divided among the children of the intended marriage in such shares as the husband and wife might subsequently agree upon; and it was further agreed that a formal deed of settlement should be drawn up to effect this purpose as soon as conveniently possible after the marriage.

The contention of the plaintiffs in error is that the minor defendants take the fee of the land in dispute as purchasers under this antenuptial settlement, and that the mortgage was taken by the mortgagee with full knowledge of their rights under this agreement. "The distinction between trusts executed and executory is this: a trust executed is where the party has given complete directions for settling his estate, with perfect limitations; an executory trust, where the directions are incomplete, and are rather minutes, or instructions for the settlement." *Neves v. Scott,* 9 How. (U. S.) 196, 211; *McCartney v. Ridgway,* 160 Ill. 129. The action anticipated by this agreement for carrying it into effect was the execution of a formal deed for that purpose. This was never made until 1901, or five years after the mortgage had been executed. At the time the agreement was entered into, Mrs. Linton had not yet come into possession of her estate, and

the ancestor from whom she received it was still alive. In this court, in the case of *Kocher v. Cornell,* 59 Neb. 315, after a very careful review of the authorities, we held that a married woman cannot contract with reference to her subsequently acquired property. Now, at the time the contract was made, it is conceded that Mrs. Linton was a minor, and that the contract to be binding upon her must have been affirmed after she arrived at maturity, which was long after she had become a married woman.

But it is contended by counsel for the Lintons that the contract, the mortgage and the note are all governed by the laws of Great Britain, the place where the contract was entered into, and not by the laws of the state of Nebraska, the *situs* of the real estate. It is said authoritatively by the learned Judge Story, in his Conflict of Laws, sec. 428, that the law of the *situs* shall exclusively govern in regard to all rights, interests and titles in and to immovable property. See also *Richardson v. De Giverville,* 107 Mo. 422, 17 S. W. 974. It follows therefore that the execution of the mortgage and the contract under which the minors claim title to the real estate must be determined by the laws of this state, and not by the laws of England. As already set forth in the opinion, the mortgage itself was a Nebraska form, and was executed in conformity with our statutes. But even if the acknowledgment had been informal as between the parties, the mortgage would have been good, as held by this court in *Linton v. Cooper,* 53 Neb. 400, and in *Morris v. Linton,* 61 Neb. 537.

We therefore conclude that the antenuptial agreement relied upon is no sufficient defense against plaintiff's mortgage, and recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

ALLEN W. FIELD ET AL. V. LINCOLN TRACTION COMPANY ET AL.

FILED SEPTEMBER 20, 1905. No. 13,906.

Taxation: BOARD OF EQUALIZATION: DISCRETION. The sound discretion reposed in the board of equalization in hearing complaints on the valuation of property for assessment under the revenue law in force in 1902 will not be disturbed by this court, unless so manifestly wrong that reasonable minds could not differ thereon.

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

Allen W. Field and *Tibbets & Anderson,* for plaintiffs in error.

Clark & Allen and *J. L. Caldwell, contra.*

OLDHAM, C.

This cause is a proceeding in error from the action of the board of county commissioners of Lancaster county sitting as a board of equalization on the valuation of property of the Lincoln Traction Company, a corporation, for the year 1902. The plaintiff in error filed a protest and objection to the assessment as returned by the assessor. The protest was heard and evidence taken in this and other similar cases before the county board sitting as a board of equalization, and on such hearing the value of the property for taxation was fixed by the board at $50,000. Error was prosecuted from this finding to the district court, where the action of the board was affirmed, and to reverse this judgment of the district court error is brought to this court.

The only contention urged in the brief of the plaintiff in error is that, under the testimony taken before the board of equalization, it is grossly inadequate to assess the property of the defendant traction company at $50,000. The evidence was taken in a very informal manner before the

board of equalization, as is generally the case in proceedings of this nature before such boards. Under the rules governing the admission and exclusion of testimony in courts of record, little of the evidence offered would have been received. The assessment was made under the revnue law in force in 1902, which has been superseded by the enactment of 1903, which, it is hoped, will prove much more effective in distributing the burdens of taxation in an equitable manner on all classes of property within the commonwealth. Under the law as it existed in 1902 it was the peculiar province of the board of equalization, in its administrative capacity, to hear and determine complaints of improper valuation made by the local assessors, and, unless it is made to appear that the judgment of the board in fixing the valuation on such complaints was so clearly wrong that reasonable minds could not differ thereon, the sound discretion reposed in the board should not be disturbed by a reviewing court. There is no evidence in the record before us to say that the judgment in the case at bar was erroneous in this sense.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

ALLEN W. FIELD ET AL. V. NEBRASKA TELEPHONE COMPANY ET AL.

FILED SEPTEMBER 20, 1905. No. 13,907.

Taxation: BOARD OF EQUALIZATION: APPEAL: BILL OF EXCEPTIONS. Under section 311 of the code, a bill of exceptions of the proceedings had before a county board of equalization may be settled and

approved by the presiding officer of such board; but the general provisions of this section, limiting the time in which the bill may be allowed and providing for notice on the adverse party, must be complied with.

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

A. W. Field and *Tibbets & Anderson,* for plaintiffs in error.

W. W. Morsman and *Halleck F. Rose, contra.*

OLDHAM, C.

The plaintiffs in this cause of action, as taxpayers of Lancaster county, Nebraska, filed a complaint with the board of equalization of said county, objecting to the assessment for taxes for the year 1902 of the Nebraska Telephone Company as being too low. A hearing was had before the board, evidence taken, and a final judgment rendered by the board fixing the valuation of the company at $20,000. The complainants excepted to the judgment of the board, prepared a bill of exceptions, had the same settled and certified to by the chairman of the board, and filed a petition in error with the bill in the district court for Lancaster county. On motion of the defendants, the bill of exceptions was quashed by the district court, and the judgment of the board of equalization was affirmed, and to reverse this judgment plaintiffs bring error to this court.

In the brief filed by the plaintiffs in error, it is said: "If the bill of exceptions was properly quashed, then complainants are in no position to attack the action of the board of equalization; if not properly quashed, then the cause should be remanded to the district court for action on the merits of the case." With reference to the settlement of the bill of exceptions, it appears from the record that, before the adjournment of the board of equalization on July 10, 1902, an order was made giving the

complainants 60 days in which to settle a bill of exceptions; that two days after the expiration of this order, on September 10, 1902, the board of county commissioners extended the time for settling the bill of exceptions to September 21, 1902; that on the 20th day of September the bill was settled, without notice of any kind having been served upon the defendants. The bill of exceptions was attempted to be settled under section 311 of the code, which, so far as it is necessary to consider it, is as follows: "When the decision is not entered on the record or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment sine die of the term of court at which judgment is rendered or at which the motion for new trial is ruled on, and submit the same to the adverse party or his attorney of record for examination and amendment if desired. * * * Within ten days after such submission the adverse party may propose amendments thereto and shall return said bill with his proposed amendments to the other party, or his attorney of record. The bill and proposed amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who heard or tried the case, upon five (5) days' notice to the adverse party, or his attorney of record, at which time the judge shall settle the bill of exceptions. * * * In cases where a party seeking to obtain the allowance of the bill of exceptions has used due diligence in that behalf, but has failed to secure the settlement and allowance of the same as herein required, it shall be competent for the judge who tried the cause, upon due showing of diligence, and not otherwise, to extend the time herein allowed, but not beyond forty (40) days additional to that herein provided, making such specific directions in that behalf as shall seem just to all parties. *Provided,* that any person or officer, or the presiding officer of any board or tribunal before whom any

proceedings may be had, shall, on request of any party thereto, settle, sign and allow a bill of exceptions of all the evidence offered or given on the hearing of such proceedings." The proviso with which this section closes was added to the section by amendment in the year 1895, plainly, as we think, for the purpose of making the provisions of the section applicable to inferior tribunals, officers and boards not included in the original section.

The contention of plaintiffs in error seems to be that the amendment of 1895 is an independent act, complete within itself, intended alone to govern the settlement of bills of exceptions in inferior tribunals, and that the general provisions of the act requiring the service of notice on the adverse party and limiting the time that may be allowed in the first instance to forty days have no application to bills of exceptions of proceedings from county boards and other inferior tribunals. With this contention we are unable to agree, for, if the act of 1895 is complete within itself and was intended as an independent act, it could not be passed as an amendment to section 311, *supra,* but must have been enacted under a separate title. As we view it, the amendment of 1895 is germane to the section to which it refers, and was simply intended to extend the provisions of the section to proceedings had in county boards and inferior tribunals. Thus considered, it should be interpreted as if the entire section as amended had been enacted at one time. The proper office of a proviso in a statute is to limit or qualify general provisions. The general provisions of the act require the bill of exceptions to be settled by the "judge who heard or tried the case," while the proviso added to the statute allows the bill to be approved by "any person or officer, or the presiding officer of any board or tribunal before whom the proceedings may be had." There is nothing, however, in the proviso qualifying the time in which the bill may be prepared or dispensing with the service of notice on the adverse party, as provided for in the body of the section. The right of a litigant to examine a bill of

exceptions which purports to contain all the evidence that was taken at the trial of the cause to which he is a party, and the privilege of suggesting amendments before the bill is settled and becomes conclusive of the facts therein recited, is a valuable right which should not be lightly denied; certainly not by the strained construction of the proviso of an act which, in itself, clearly recognizes and seeks to protect this right.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

ALLEN W. FIELD ET AL. V. LINCOLN GAS & ELECTRIC LIGHT COMPANY ET AL.

FILED SEPTEMBER 20, 1905. No. 13,908.

Case Followed. For the reasons set forth in *Field v. Nebraska Telephone Co., ante,* p. 419, the judgment of the district court is affirmed.

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

Allen W. Field and *Tibbets & Anderson,* for plaintiffs in error.

Halleck F. Rose and *J. L. Caldwell, contra.*

OLDHAM, C.

This is a companion case to *Field v. Nebraska Telephone Co., ante,* p. 419, and involves the identical question on the settlement of a bill of exceptions from the

county board of equalization therein determined. The causes were argued together, and for the reasons set forth therein, we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons given in *Field v. Nebraska Telephone Co., ante,* p. 419, the judgment of the district court is

AFFIRMED.

SIMPSON MCKIBBIN ET AL. V. HENRY J. DAY.

FILED SEPTEMBER 20, 1905. No. 14,120.

1. Partnership: EVIDENCE. Evidence examined, and *held* sufficient to sustain the special finding of the jury that Simpson McKibbin was a member of the firm of McKibbin Brothers.
2. Trial: EVIDENCE. An error of the trial court in the admission of evidence, which is insufficient to support an allegation of the petition, may ordinarily be cured by striking the testimony from the record and especially withdrawing it from the consideration of the jury by an instruction.
3. Instructions of the trial court examined, and *held* not prejudicial.
4. Evidence: REVIEW. Action of the trial court in the admission of evidence examined, and *held* not prejudicial.
5. Award of damages examined, and *held* excessive; and further, *held* that, unless a remittitur of $412.55 of the damages awarded be entered in this court, the judgment of the district court will be reversed and the cause remanded for further proceedings.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed on condition.*

A. E. Harvey and *Stewart & Munger,* for plaintiffs in error.

L. C. Burr, contra.

OLDHAM, C.

This is an action for deceit, before this court for a second review. At the first review, a judgment in favor of the plaintiff and against the defendant Simpson McKibbin alone was reversed, and the cause was remanded for proceedings under the opinion. This opinion is reported in 71 Neb. 280. On a second trial of the issues to a jury in the court below, there was a verdict for the plaintiff against all of the defendants. Judgment was rendered on this verdict, and to reverse this judgment defendants bring error to this court.

In the former opinion the issues involved in the controversy are fully set out, consequently, a restatement is unnecessary. At the last trial of the cause in the district court, the question as to whether Simpson McKibbin was a member of the firm of McKibbin Brothers was by his own request submitted to the jury for a special finding, and the jury answered that he was a member of the firm. An examination of the testimony contained in the bill of exceptions shows that there is competent evidence to support this finding, consequently, the verdict against all the defendants is sufficiently supported.

At the last trial of the cause, plaintiff amended his petition on the allegations of fraud and deceit in the sale of the real estate involved in the controversy. Defendants filed a motion to strike this allegation from the petition, because, on the testimony introduced at the first trial, we had held that the evidence was not sufficient to support the allegation of damages. The motion was overruled, and plaintiff was permitted, over defendants' objections, to introduce his testimony tending to support this issue. When the testimony was all introduced, the court, being of the opinion that it was still insufficient, struck out all the testimony admitted as to false representations of the cash value and rental of the real estate conveyed to plaintiff, and gave an instruction to the jury specifically withdrawing this issue from its consideration. It is now

strongly urged in defendants' brief that this admission of testimony, in the first instance, and the overruling of the motion to strike this allegation from the petition were highly prejudicial to the defendants, although the testimony was subsequently stricken from the record and the issue withdrawn by instruction from the consideration of the jury.

In the first place, the court did not err in refusing to strike the allegation from the petition, because the evidence introduced at the first trial was insufficient to support it, for the court had no means of knowing what additional testimony might be offered at the second hearing. Again, the testimony offered and received, in the first instance, was not of such a peculiarly prejudicial character as to probably influence the jury in its finding on the alleged fraud and deceit charged to have been practiced on the plaintiff in the sale of the stock of goods. When testimony is admitted and is not connected in such a manner as to make it material to the allegation it tends to support, the error in its admission at first is ordinarily cured by the action of the trial court in striking the testimony from the record and withdrawing it from the consideration of the jury by special instructions.

The next alleged error called to our attention in defendants' brief is that the court refused to give any instructions that fairly presented defendants' theory of the case to the jury. The case, as submitted to the jury, depended upon alleged fraudulent representations made by defendants to the plaintiff concerning the value of a stock of goods which defendants traded to plaintiff. Plaintiff's theory was that defendants had falsely and knowingly represented that the stock of goods had been invoiced at the first of the year, 1902, and that by such invoice they were shown to be of the value of $6,700; and that between the time of the invoice and the sale of the goods on April 30, 1902, defendants had made additions by purchase to the stock of goods sufficient to increase its value to the sum of $7,000. De-

fendants practically admitted the representations, but denied that they were fraudulently made, or that the goods were not of the value claimed. Plaintiff's testimony tended to show conclusively that the value of the stock of goods was but $4,353.31. Defendants introduced testimony tending to show that in July, 1901, there had been some kind of an invoice of the stock, as it then existed, and while contained in another building with some different fixtures, which invoice approximated $6,700. But the pretended invoice was incomplete, some pages missing, and included, among other things, items of $233 cash in the drawer, and $650 in notes and accounts. Under the issues thus arising on the testimony, the court instructed the jury much more at length than was necessary, but each of the instructions cast the burden on the plaintiff to show by a preponderance of the evidence that the representations of value made were false, and that they were made either with a reckless disregard of their verity, or with knowledge that they were false when made. The instructions were all framed to reflect the law of the case as determined at the first hearing in this court, and we are not pointed to any instructions which are inherently wrong.

Complaint is made in the brief of the defendants as to the action of the trial court in the admission of evidence, and in the latitude given the plaintiff's counsel in the cross-examination of the defendants. When deceit and fraud are alleged, a liberal range of investigation is properly permitted in the proof of such issues, and we have examined each of the several complaints in this regard and are satisfied that the trial judge did not exceed his proper discretion in his rulings in these matters.

It is next urged that the damages are excessive. In a determination of this question, we have made a careful examination of the evidence contained in the record, and are convinced, from such examination, that the quantum of damages awarded in the verdict exceed the proper measure of plaintiff's recovery, under the evidence and

the instructions given to the jury. Plaintiff's evidence shows very conclusively that an invoice of the stock of goods, made by competent and disinterested persons of large experience and unquestioned skill in mercantile pursuits, shows the value of the stock to have been $4,353.31 at the time it was purchased by plaintiff. Now, the measure of plaintiff's damage was the difference between the value of the stock as represented by the defendants and its actual value. Deducting the actual value of the stock from its represented value, the difference is $2,646.69. Allowing interest at the rate of 7 per cent. for 31 months —the time intervening between the purchase of the goods and the date of the trial—the amount of the interest, which is $478.61, added to the principal ($2,646.69) is $3,125.30, or $412.55 less than the damages awarded in the verdict.

We therefore recommend that, unless plaintiff enters a remittitur of $412.55 of the damages awarded, the judgment of the district court be reversed and the cause remanded for further proceedings; but that, if such remittitur be entered within thirty days of the filing of this opinion, the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that, unless the plaintiff, Henry J. Day, enter a remittitur in this court of $412.55 of the damages awarded in the court below, the judgment of the district court will be reversed and the cause remanded for further proceedings; but, if such remittitur be entered within thirty days, the judgment of the district court w

AFFIRMED.