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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1905—JANUARY TERM, 1906.

VOLUME LXXV.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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

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SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1905.

STATE OF NEBRASKA, EX REL., JOHN H. MICKEY, RELATOR, v. L. C. RENEAU, COUNTY CLERK, ET AL., RESPONDENTS.

FILED NOVEMBER 22, 1905. No. 14,512.

ORIGINAL application for a writ of mandamus to compel respondents to select jurors under chapter 176, laws 1905. *Writ denied.*

Norris Brown, Attorney General, William T. Thompson and *E. Falloon*, for relator.

Wesley T. Wilcox, contra.

PER CURIAM.

Writ denied, on the ground that the law is unconstitutional. Opinion to be filed later.

The following opinion was filed December 20, 1905:

1. Statutes: VALIDITY. If a statute is incomplete, so that it cannot be complied with without additional provisions that are not indicated by the act itself, the court cannot supply such defects so as to give validity to the act.

2. ———: ———. Chapter 176 of the laws of 1905, which purports to prescribe the method of selecting juries in counties having less than 30,000 inhabitants, is invalid because its requirements cannot be complied with. The method provided is impossible of execution.

SEDGWICK, J.

In this case the writ of mandamus was denied because the "jury law" enacted in 1905 (laws 1905, ch. 176) was held to be invalid. The constitution provides: "The right of trial by jury shall remain inviolate." Const., art. I, sec. 6. Also, "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Const., art I, sec. 13. Under the provisions of the act in question, it would be impossible to obtain a jury in some of the counties of the state, and justice could not be regularly administered without delay. By section 2 of the act it is enacted: "That upon the completion of the canvass of the election returns said board shall select at least 500 names from the tally sheet, provided that the tally sheet contains that many names; if the tally sheet does not contain 500 names then from the actual number of names contained on said sheet, in all counties having less than 30,000 inhabitants, in the manner following: They shall divide the number of electors to be selected by the number of the voting precincts, and allot to each voting precinct the quotient or number thus obtained; then the board shall divide the number of names found upon each tally sheet of each voting precinct by the quotient or number allotted to each precinct, and then shall count from the top of the tally sheet of the precinct the number of names of this last quotient, the last name of which shall be selected and put into a receptacle as hereinafter provided, then again count down the tally sheet selecting every name that corresponds to the number of this quotient until the full quota of names from said precinct shall have been chosen, and thus continue the process through each precinct until the required number of names shall have been selected, and the names so selected shall be furnished to the clerk of the district court of the county or his deputy." The "tally sheet" does not contain the names of electors, and,

consequently, if this provision is to be construed as it reads, there is no method provided for obtaining the names of qualified persons from which to select the jury. If, however, the rules of construction can be strained so far as to make these words mean the poll-book or some other recognized register of names of the voters of the county, still the difficulty would not be removed. If "the number of electors to be selected" is divided by the number of voting precincts in the county, the quotient would generally be fractional, so that it would be impossible to allot to each voting precinct "the number thus obtained." This again requires a forced construction, such as, for instance, that fractions less than one-half are to be rejected, and that fractions of more than one-half are to be counted as one. We are confronted with other difficulties which would render the proceedings prescribed for selecting a jury impracticable. The number of names found upon such register of electors as the court should substitute for the "tally sheet" named in the statute is to be divided by the number of electors which has been allotted to each precinct, and here again no provision is made for fractional quotients, and no method to ascertain the exact number by which the number of names on the "tally sheet" shall be divided. If the number of names of the voters of the precinct is to be divided by a fractional number, it would be impossible to "count from the top of the tally sheet of the precinct the number of names of this last quotient," and impossible by this process to select the names from the list so being divided. To supply these defects, and others which appear in the act, requires legislation, and not judicial construction. The act is incapable of accomplishing the only purpose which it professes.

The relator asks for a writ of mandamus, compelling the officers to select juries under this act, which is impossible. The writ was therefore denied.

WRIT DENIED.

STATE OF NEBRASKA, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 22, 1905. No. 14,198.

1. **Taxation:** TAX LIST. The statute requires the county clerk in making up the tax list "to prepare a complete statement of all the lands and lots in his county on which the taxes for one or more years are delinquent," but if this duty is neglected by the clerk the lien of the taxes is not thereby lost.

2. ———: EMINENT DOMAIN. A railway company in condemning land for its right of way and depot grounds is not the agent of the state. The state has no ownership in the lands by virtue of condemnation proceedings.

3. **Eminent Domain:** NOTICE: LIENS. If a railway company in condemnation proceedings for its right of way and depot grounds fails to make all parties interested in the land parties to the proceedings or to give them notice of the proceedings so that their rights may be protected, it takes the land subject to such liens as are prior to the rights of the parties to the proceedings.

4. ———: OWNERS. Real estate cannot be taken by condemnation proceedings unless payment therefor to the owners is first made or secured. All parties having an interest in the land are "owners" within the meaning of the statute. A lien for taxes is such an interest in the land.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

B. P. Waggener, James W. Orr and *A. N. Sullivan,* for appellants.

C. A. Rawls, contra.

SEDGWICK, J.

A tax suit was brought for the year 1904 in the district court for Cass county, in which the Missouri Pacific Railway Company was made defendant, and it was sought to enforce the collection of taxes upon certain lots upon which the railway company had acquired a right of way. The district court upon the trial held that all taxes levied

after the railway company acquired its right of way were void, because the right of way should be assessed by the state board and was not subject to local taxation. The district court also held that the taxes assessed before the right of way was acquired by the railway company were a lien upon the lots and upon the right of way of the railway company. It directed that the fee of the lots should be first offered for sale subject to the easement of the railway company to satisfy this lien, and that, if the fee subject to said easement could be sold for a sufficient amount to satisfy the tax lien, the easement of the railway company should not be disturbed, but, if no bid could be obtained sufficient to satisfy the taxes, then the fee and the easement of the railway company should be offered for sale. The railway company appeals, and complains of so much of the decree as charges its right of way with the lien of these taxes. Some of the lots were obtained by the railway company upon contracts with the owners, who deeded them in fee to the railway company. Others were obtained by condemnation proceedings under the statute. From the view we take of the case this distinction is immaterial.

1. It is suggested in the brief on the part of the railway company that "the first section of the act under which the suit is brought provides that on or before the 15th day of May, each year, it is the duty of the county treasurer to prepare a complete statement of all the lands and lots in his county on which the taxes for one or more years are delinquent, or on which any special assessment of any city in the county is delinquent," and it is stated in the brief that, if this jurisdictional provision had been observed, the suit would not have been brought. We do not understand how this suggestion affects the merits of this case. The revenue law then in force provided that the county clerk, in making up the list for the current year, should enter delinquent taxes also. If these taxes were a lien upon the lots in question, the clerk should of course have entered them as delinquent taxes upon the

list, so that they might be collected as delinquent taxes; but we do not see how his failure to do so would in any manner affect the lien of the taxes, or prevent the clerk in a subsequent year from completing his tax list as the law requires by entering these delinquent taxes thereon.

2. The statute then in force made these taxes a lien upon the real estate, and that lien accrued before the commencement of the condemnation proceedings instituted by the railway company. The statute declared that this lien should continue until the taxes were paid. The law under which the condemnation proceedings were had provided "that no appropriation of private property for the use of any corporation provided for in this subdivision, shall be made until full compensation therefor be first made or secured to the owners thereof." Comp. St. 1903, ch. 16, sec. 81 (Ann. St. 9967). It is contended that the condemnation proceedings were instituted for a public purpose, and that in those proceedings the railway company acted merely as the instrument for the state in appropriating the right of way for public use, and that such proceedings must necessarily result in the destruction of the state's lien for taxes, since it would be inconsistent for the state to proceed to condemn its lien for taxes. It is said in the brief: "When these lots were taken by the state, the state had a lien on the lots for any tax that had become delinquent." This argument is not satisfactory to our minds. The state did not take this land. The lands and the right of way after the taking were private property the same as before. The state had no ownership therein by virtue of the condemnation. These lands are subject to taxes after the condemnation, as well as before. The state does not levy taxes upon its own land, nor does it allow any tax to be levied thereon in its name. The language used in *Tinsman v. Belvidere D. R. Co.*, 26 N. J. Law, 148, 69 Am. Dec. 565, which was a somewhat similar case, is, we think, entirely applicable here. The court said:

"This work was not done by the state nor by the agents

of the state, nor is the profit resulting from it to inure to the treasury of the state. It was done by a private corporation, acting in their own behalf, for their own benefit, and for the interest of the individual stockholders. True, they were invested with such portion of the sovereign power as enabled them to construct the road. They were authorized, in virtue of the right of eminent domain, to take private property, so far as was essential to the completion of a work of public improvement, and thus far we provide strictly for remuneration."

And, also, in *Burlington & M. R. R. Co. v. Spearman,* 12 Ia. 117, it was said:

"The property of a railroad company is not exempt from taxation in this state. The road of complainant is not the 'work of the state.' The roadbed and depot grounds are not 'held as an easement of the public, by the company as the agents of the state,' as claimed by the appellant. The plaintiff, on the contrary, is a private corporation; the stock is the private property of the stockholders, who, as such, own all the corporate property."

There is therefore no inconsistency in bestowing the power of eminent domain upon railway companies without at the same time giving to the railway company the power to annul, without payment, all tax liens upon the property it may desire to so take. At the time these condemnation proceedings were instituted the statute gave to the railway company the right to construct its road over the lands owned by the state, without compensation to the state, and it was held in *Chicago, B. & Q. R. Co. v. Englehart,* 57 Neb. 444, that a railway company which had constructed its road over the saline lands of the state, relying upon this statute, could not be evicted from the land either by the state or its subsequent grantee. A doubt was expressed whether the legislature could donate the land to the railway company for right of way, without compensation. It was suggested that possibly the state might afterwards recover from the railway company the value of the land. The railway company cannot avail itself of this

provision of the statute in this case. The legislature has no power to release lands from tax liens. Section 4, article IX of the constitution, forbids it. The constitutional provision would prevent granting such right of eminent domain as would operate to cancel the tax lien existing against the land taken under such right. If it cannot release land from taxes, it cannot grant power to private corporations, which in its exercise would necessarily operate to release the land. It was the duty of the legislature, then, in granting the power of eminent domain, to make provision for applying the proceeds of the land so taken to the payment of tax liens existing thereon. The legislation on the subject should be construed in view of this duty on the part of the legislature.

3. A number of authorities are cited by appellant upon the proposition that special assessments against land included in the right of way and depot grounds of railway companies cannot be enforced; but these authorities can have no application to this case, because the lien which it is sought here to enforce is for a general tax, and not for a special assessment, and because this lien attached to the land before the railway company obtained any interest therein. The language used in such cases must be construed in the light of questions that were being discussed, and a very different question is presented when it is sought to enforce a lien which existed against the land when the railway company acquired its title thereto. In *Gray v. Case*, 51 N. J. Eq. 426, 26 Atl. 805, the state had loaned from its sinking fund $6,000 upon a tract of land, and had taken a mortgage thereon to secure the loan. Afterwards the railway company acquired a right of way over this land by condemnation proceedings, but did not notify the state of the proceedings, and, because no notice of the condemnation proceedings was given to the state nor to the commissioners of the sinking fund, it was held that the lien of a subsequent assignee of the mortgage was prior to the rights of the railway company, and that the railway company was liable to the holder of this mortgage

for the full amount of the award in the condemnation proceedings, although it had paid the amount of the award to the holder of the fee title of the land. The fact that the state was the holder of the lien at the time of the condemnation proceedings, and that the proceedings were authorized by the state, did not affect the liability of the railway company. In discussing this question the court said:

"But the company failing to give the requisite notice, it still had the right to have equitable distribution of the award amongst those interested. For this purpose it was entitled to the aid of the court. *Platt v. Bright,* 2 Stew. Eq. 128, s. c. 4 Stew. Eq. 81. This, too, was neglected by the company. Parties who fail to avail themselves of the rights and safeguards which the law offers them cannot complain when such failure results in their disadvantage."

4. The property of an individual cannot be taken for the use of a railway company by condemnation proceedings without payment therefor. Under our statute the payment must be made to the owner of the land, and the doctrine is well settled that all persons who have an interest in the land are owners within the meaning of this statute. In *Omaha B. & T. R. Co. v. Reed,* 3 Neb. (Unof.) 793, it was contended that a mortgagee was not an owner of the land within the meaning of this statute, but the court said:

"A large number of cases are cited from other states in support of this position. The answer to this is, simply, that there are various statutes in various states, and various decisions of the courts construing them, but that our statute has been construed by this court in *Gerrard v. Omaha, N. & B. H. R. Co.,* 14 Neb. 270, to include all persons who have an interest in the estate, and in *Dodge v. Omaha & S. W. R. Co.,* 20 Neb. 276, it has been expressly decided that the mortgagee is an owner within the meaning of this statute."

In the *Gerrard* case cited in the above quotation it was

held that the owner of a tax lien on the lands was a proper party to the proceedings. In this case the court used the following language:

"It is therefore its duty to bring in all parties having an interest in the estate in order that the condemnation money may be properly applied. The word 'owner' as used in the statute applies to all persons who have an interest in the estate. Where it is necessary the court possesses ample power to require such parties to interplead, and to apportion the money according to their rights." See also *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276; *Leigh v. Green*, 62 Neb. 344.

We are satisfied with the construction placed upon the statute by the foregoing decisions. The rule thus established does not put any hardship upon the railway company. The lien of these taxes was a matter of record. It could have been easily ascertained, and could have easily been provided for. Several cases have been brought to our attention in which the courts of other states have held that, upon the suggestion of the railway company, the court would require taxes then existing upon the land to be paid out of the condemnation money while the same was in the hands of the court. *Philadelphia & R. R. Co. v. Pennsylvania S. V. R. Co.*, 151 Pa. 569, 25 Atl. 177. However this may be, there can be no doubt that under our statute the railway company might protect itself by making lien-holders parties to the proceedings, and if it neglects to do this, and allows the holder of the fee to obtain the entire award, it cannot afterwards insist that the lien-holders shall by such proceeding be deprived of their interest in the property. It follows that the judgment of the district court is right, and it is therefore

AFFIRMED.

JOHN R. LUCAS V. STATE OF NEBRASKA.

FILED NOVEMBER 22, 1905. No. 14,218.

1. **Criminal Law:** CHANGE OF VENUE: DISCRETION. The constitution guarantees to every person charged with crime a trial by an impartial jury. If there is such a prejudice in the minds of the people of the county against the defendant, or such a firm conviction of his guilt of the crime charged against him that there is substantial and well-founded reason to believe that he cannot obtain a fair trial in the county, the constitution requires that the venue be changed. The trial court must exercise discretion in determining these facts, but has no discretion to refuse the change of venue when these facts appear.

2. ———: ———: ———. The determination of the trial court upon an application of the accused for change of venue will not be disturbed, unless it appears from the record that its conclusion is wrong. Its discretion in the matter is a legal and not an arbitrary one.

3. **Continuance.** The defendant in a criminal trial is not prejudiced by the denial of his application for continuance upon the ground of absence of material witnesses, if the matters to be proved by the evidence of the absent witnesses are conclusively established upon the trial by other witnesses and are not controverted by the state.

4. **The guaranty of the constitution** that in all criminal prosecutions the accused shall have the right of trial by an "impartial jury" should be carefully guarded by the courts. It is not competent for the legislature to limit or modify this right.

5. **Jurors:** COMPETENCY. Section 468 of the criminal code provides that a juror who is prejudiced against the accused is not competent; nor is one who has an opinion as to the guilt or innocence of the accused, unless he says on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence.

6. ———: ———. A juror who has an opinion as to the guilt or innocence of the accused, from whatever source he has acquired the information on which that opinion is based, is not rendered competent by the mere fact that he says, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence. It must affirmatively appear from the whole evidence, upon a fair examination, that he is impartial.

7. ———: ———. The court must be satisfied that the juror is im-

partial. This means that the whole evidence, in the light of the circumstances, including the conduct and demeanor of the juror, must show affirmatively that the juror is impartial.

8. Verdict: EVIDENCE. In criminal trials, the verdict of guilty is not supported by the evidence, unless each element of the crime charged is proved beyond a reasonable doubt. A finding of malice or criminal intent must be derived from the facts proved, and not from conjecture.

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

H. M. Sinclair, S. A. Dravo and *J. L. McPheely,* for plaintiff in error.

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

SEDGWICK, J.

The defendant was tried in the district court for Phelps county upon an information charging him with murder in the first degree. The jury having by their verdict found him guilty as charged, he was sentenced to imprisonment for life, and brings the proceedings to this court for review upon petition in error.

1. The defendant made an application for a change of venue. The application is supported by a large number of affidavits. These affidavits are mostly in substantially the same or a simliar form, and, with few exceptions, it is stated in each affidavit that the affiant has heard a great deal of talk concerning the alleged offense with which the defendant is charged, and that the matter has been generally talked about and thoroughly canvassed in the community where the affiant resides; that affiant knows that there is a strong prejudice against the defendant, and believes that the prejudice is so strong and so universal that it would be impossible for the defendant to have a fair and impartial trial before any jury of citizens of the county. These affidavits are from residents of various townships in the county, and in some of them the affiant

states that he is thoroughly acquainted throughout the whole county. The leading counsel for the defendant in his affidavit shows that he is well acquainted throughout the county, and that he was present at the preliminary examination of the defendant, and there "discovered an intense, bitter feeling against the defendant"; that he has taken pains to investigate the cause thereof, and finds that it is based upon prejudice which is generally entertained against the defendant, and that on account of such prejudice the defendant cannot receive a fair and impartial trial in the county; that he has talked with numerous citizens relative to their making affidavits of said feeling, and has been generally refused. Some of the refusals were based upon the avowal that the defendant did not deserve a fair trial; others on the ground that the making of such affidavit might injure their business. He further says that from his experience he believes that a trial of the cause in that county would be a farce, instead of a fair and impartial trial, as guaranteed by the constitution. Quite similar facts are testified to in other affidavits of defendant's attorneys. Affidavits were filed in opposition to the motion, and, although their number was greater, they are quite similar in form and in the manner of presenting their facts to those already noticed. Each affiant testifies that he is acquainted in the county or in some particular township of the county, and that he knows the feeling of the people in regard to the case in question, and that there has been but little talk in the immediate neighborhood of the residence of the affiant in regard to the matter, and that affiant does not believe that there is any bias or prejudice against the defendant, and feels confident that there would be no doubt of readily getting a fair and impartial and unbiased jury in that county to try the case. The witnesses upon both sides, as far as the affidavits show, would appear to be honest in their convictions. We do not think that the affidavits, taken altogether, make it appear that the trial court erred in the exercise of its discretion in overruling the application. The constitution

guarantees to each citizen a fair and impartial trial when charged with crime, and it is the duty of the trial court to see that this guaranty is effective. If there is such a prejudice in the minds of the people of the county against the defendant, or such a firm conviction of his guilt of the crime charged against him, that there is substantial and well-founded reason to believe that he cannot obtain a fair trial in the county, the constitution requires that the venue be changed. Where these facts appear, there is no discretion in the matter. The trial court must grant the change. The discretion of the court is in determining these facts. It is, of course, a legal and not an arbitrary discretion. The determination of the trial court upon this question will not be disturbed, unless it appears from the record that its conclusion is wrong. It would be a difficult matter to determine solely from the affidavits in this record whether there was or was not such a prejudice against the defendant in Phelps county as might reasonably be expected to prevent a fair trial, and, when we consider the advantages of the trial court in passing upon this question, it seems clear that it is not the duty of this court to interfere.

2. An application was made by the defendant for a continuance. It is insisted that the court erred in overruling this application. To determine this question, it is necessary to bear in mind the issues of fact that were being contested by the parties. The defendant was charged with murder in the first degree. The homicide was admitted, and the defendant attempted to show that the killing was done in self-defense. The continuance was applied for upon the ground of the absence of two witnesses whose evidence, it was claimed, was material upon the question of self-defense. In the affidavits filed for the defendant it is shown that both of these witnesses, if present at the trial, would testify that the deceased immediately before the homicide had made threats against the defendant; that the deceased stated to the witnesses that the defendant owed him money and refused to pay it, and that

he, the deceased, did not propose to waste any money or time in attempting to collect it by law, "but would take it out of the hide" of the defendant, and that the deceased at this time, being in great anger, declared to the witnesses, "unless Lucas pays me what he owes me, I will kill him as sure as I am here," and also told the witnesses to inform Lucas of this fact; and that the witnesses just before the homicide did inform the defendant of these threats made against him. Of course, this evidence was material to the issue being tried, and we are satisfied from the showing made that the defendant was not so lacking in diligence as to justify refusing him a continuance upon that ground. It is, however, urged in answer to this contention that the proposed evidence of these two witnesses would, if offered upon the trial, have been cumulative only, and that the evidence of threats of the same nature was so strong in the record that further evidence upon that point was wholly unnecessary, and could not have been of any use to the defendant. This view seems to be justified. There could have been, under the evidence received upon the trial, no doubt in the minds of the jury that the deceased had made the strongest possible threats against the defendant, and that the defendant was aware of these threats at the time of the homicide. The testimony upon this point will be again referred to in the consideration of the objection that the evidence is not sufficient to support the verdict. We are satisfied that no injury resulted to the defendant from the absence of these two witnesses, and that the defendant has not been prejudiced by the refusal of the court to grant his application for a continuance.

3. The objection to the competency of some of the jurors is a more serious one. Section 11 of article I of the constitution is in these words: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy

public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." No one of these enumerated rights of the defendant in a criminal prosecution is of more importance than the right to have a speedy public trial "by an impartial jury." No legislation could be valid that in any manner limits or modifies this right. The statute provides that, although a juror may show that he has formed an opinion as to the guilt or innocence of the accused, still, if that opinion is "founded upon reading newspaper statements, communications, comments, or reports, or upon rumor, or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." Criminal code, sec. 468. This statute, if rightly construed, is a correct interpretation of the constitutional provision. Unless the juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict, he cannot be retained upon the panel, and if he does so say, upon oath, the court still cannot retain him, unless satisfied that the juror is impartial and will render such verdict. The rule is correctly stated in *Basye v. State,* 45 Neb. 260, 276, in these words:

"A juror, who upon his *voir dire* discloses that he is biased or prejudiced, or who has a fixed and settled conviction or opinion as to the guilt or innocence of the defendant based upon mere rumor, or the reading of the public press, or founded upon conversations with witnesses of the transaction, is incompetent to serve, and should be rejected, even though he may upon his examination state that he feels able 'to render an impartial verdict upon the law and the evidence.' This is the true test of disqualification within the meaning of the statute. If upon the

whole examination of the juror it is manifest that the opinion formed by him from reading newspaper accounts of the alleged crime or upon rumor is merely hypothetical, or conditional on the truth of the rumor or the newspaper reports read; that he has no settled opinion as to the guilt or innocence of the accused, and that he can render a fair and impartial verdict upon the evidence adduced on the trial, under the instructions of the court, the juror is competent."

The examination of the juror made by the court should be with the view of ascertaining the condition of his mind, and whether in reality he is an impartial juror. To so frame the questions as to lead the juror to say that he is disinterested, and that he can and will render a fair and impartial verdict upon the evidence under the law, as stated in the instructions of the case, is not enough. It would frequently happen that a juror, who is himself conscious of being prejudiced against the defendant, or of having a settled conviction of the guilt or innocence of the defendant, may be so questioned by the court as to lead him to make formal statements, which, if taken by themselves alone, appear upon their face to justify his retention.

August L. Johnson, who was one of the jurors, is now alleged to have been incompetent. Upon his direct examination by the attorney who was prosecuting in behalf of the state, he answered that he had resided in Bertrand for 22 years; that he was not acquainted with either the deceased or the defendant; that he was not present at the preliminary examination, and had not talked with any one who knew or claimed to be a witness in the case. The prosecuting attorney then asked him: "Do you know of any reason why you could not sit as a fair and impartial juror in this case?" and he answered: "Well, I have heard considerable." "Q. That has been from newspapers and talk? A. Yes; and talk and things in general." He was then asked whether he believed that, notwithstanding what he had heard, he could sit in the case and render a ver-

dict as fairly and impartially as though he had never heard of the case, "just try it on the law and the evidence right here in the court room," and he answered: "I think so." "Q. That wouldn't influence your verdict, what you have heard and read? A. I think not. * * * Q. Have you at the present time any opinion as to the guilt or innocence of the defendant? A. Yes, I have. Q. When I ask you that question, I don't mean to ask you whether it is your opinion in regard to whether somebody is killed, or who killed him, but whether the party charged is guilty of the murder or not. That opinion you have is formed exclusively on newspaper reports and talk? A. Yes, sir. Q. Notwithstanding that opinion, you think you could sit in this case and render a fair and impartial verdict upon the law and the evidence here in court? A. I think so. Q. If selected as a juror you would try it on the law and the evidence here? A. Yes, sir." Defendant's attorney then cross-examined him briefly, and in that examination he stated that there had been talk among the people; that he had not heard a great deal because his time was occupied, but from what he had heard he had formed an opinion, and that it would require evidence to remove that opinion. The court then questioned him, and the juror answered the court as follows: "Q. I understand you haven't talked with any witness in the case, so far as you know? A. No, sir. Q. You haven't talked with anyone who purported to know the facts in the case of their own knowledge? A. No, sir; I have not. Q. What you have heard talked was the common talk that was prevalent in your town, discussing the matter? A. Yes, sir. Q. Commonly called hearsay—what one heard somebody else say—was that the nature of it? A. I think so. Q. You have read the papers? A. I read an account of it in the Bertrand paper of how it took place. Q. Did this account purport to give the testimony taken at the preliminary examination? A. No, sir; it was just after it happened. Q. And upon that you formed an opinion as to the guilt or innocence of the de-

fendant? A. Yes, sir. Q. Notwithstanding the opinion that you have formed from what you have heard and what you have read, do you feel that, if you were retained as a juror in this case, you could render a fair and impartial verdict on the evidence as introduced here in court and the instructions that might be given you? A. I think I could; yes, sir. Q. And, if chosen as a juror, would you do that? A. Yes, sir. Q. Uninfluenced by what you have heard or read? A. Yes, sir." The challenge was then overruled by the court, and the defendant's attorney cross-examined him further, and he answered as follows: "Q. The opinion that you have formed was as to the guilt or innocence of the defendant? A. Yes, sir; it was. Q. That opinion, then, as I might say, was as to the guilt of the defendant? (Not answered.) Q. You have that opinion now, haven't you? A. Yes, sir. Q. And that is such as would require evidence to remove it? A. It would. Q. You couldn't start in on the trial of the case, then, as a juror, just the same as though you had never heard about the case? A. Well, I don't just think I could. Q. Now, in other words, if chosen as a juror, Mr. Johnson, as a juror, in the commencement of the trial, you would remember what you have heard, and you would have that impression in mind as to the guilt or innocence of the defendant, and it would require evidence to remove that? A. Yes; it would require evidence to remove that. Q. You would start in the trial of the case, as a juror, if chosen, with that impression and opinion on your mind? A. Certainly." The court then questioned, and the juror answered as follows: "Q. But you told me, notwithstanding the opinion that you have, based upon what you have heard and what you have read, yet, if retained as a juror, you feel that you could render a fair and impartial verdict under the evidence, as introduced in court, and the instructions given you by the court? A. Yes; because I haven't heard only this hearsay. Q. And disabuse your mind of what you have heard? A. Yes, sir. Q. That wouldn't enter into your deliberations upon a final determination of the

case at all? A. No, sir; it would not." The challenge of the defendant to the juror was then overruled, and the defendant excepted.

When the juror had upon examination of the defendant shown himself to be clearly incompetent, the court proceeds with the juror in language rather in the nature of positive statements than of interrogatories for the purpose of ascertaining the candid opinion of the juror, and determining from the whole evidence whether the juror was disqualified. Such a mode of questioning a juror was not calculated to bring out evidence upon which the court might fully determine whether or not there was an abiding prejudice in the mind of the juror against the accused, or whether there was, in fact, a conviction in the mind of the juror as to the guilt of the accused which would, in some part at least, neutralize the circumstances that might be brought before him tending to justify the accused. The apparent object of such an examination is to obtain from the juror a statement that he is impartial. The juror himself probably so understood it, and human nature is such that very few jurors would fail to declare themselves impartial if they were aware that it was the desire of the court that they should so declare; but, as before seen, such a declaration on the part of the juror is not enough. He must be able at least to so declare, but such declaration by him is not decisive of the question. The implication of the statute is that the juror who makes such declaration may himself be mistaken, and may not express the true conclusion to be derived from the whole evidence. If he has an opinion as to the guilt or innocence of the accused, it must affirmatively appear from the whole examination that he is impartial, or he cannot be received as a juror. We think upon the whole evidence of this juror it is manifest that the court had no sufficient evidence before it from which to be legally satisfied that the juror was impartial in the sense intended in the constitution. When the juror testifies that he has an opinion as to the guilt or innocence of the

accused, no matter from what source that opinion was derived, he cannot be accepted as a juror, unless from a consideration of the whole evidence, and the circumstances of the examination, including the conduct and demeanor of the juror, the court can find that he is impartial. Unless the court can find this as a matter of fact, it cannot be said the court is satisfied that the juror is impartial within the meaning of the statute. The testimony of several of the jurors was substantially the same as that of Mr. Johnson. They were received as jurors over the objection of the defendant, and in this we think the court erred.

4. Another question presented by the defendant is as to the sufficiency of the evidence to support the verdict. As before stated, the homicide was admitted, and it was sought to excuse it on the ground of necessary self-defense. There were several eye-witnesses to the transaction, and there are very few material discrepancies in their evidence. One of these witnesses to the transaction was examined in behalf of the state, and the others, as far as practicable, were called by the defendant. The deceased had been in the employ of the defendant for several months during the summer and early fall of 1904. Some difficulty had arisen between them in the settlement for these services. The defendant paid the deceased the amount that he admitted that he owed him and, as the defendant says, $10 in addition. The deceased insisted that he still owed him $30. He placed his claim against the defendant in the hands of an attorney for collection, but this claim seems to have been withdrawn without any action being taken thereon. The deceased was very vindictive against the defendant, and frequently made the most violent threats against him. There were several witnesses to these threats, some of whom testified that the deceased told them that the defendant had not paid him as much as he owed him, and that he would "take it out of his hide." Others testified that the deceased told them that he would kill the defendant unless he paid him the balance that he owed

him. On the evening before the tragedy the deceased came to the defendant's house at about 7 or 8 o'clock. He tied the mule which he rode at the gate, and left there a club which he had with him. This club was in evidence and was one of the exhibits, and appears to be a formidable weapon in the hands of an enraged man. The deceased then went to the house of the defendant and rapped at the door. Nobody answered him, and he walked into the room, where the defendant was, without further ceremony. The defendant took a lantern and went to his barn, as he says, to do some chores. The deceased walked along with him. While they were gone, it appears they had some controversy in regard to the difficulty existing between them, and when they came back as far as the gate an altercation arose, which was so violent as to attract the attention of the people in the house, who went to the door, and one of them went out where the altercation was. He testifies that the first thing he heard when he got there was that the defendant said to the deceased: "You brought this club here to kill me with, did you?" The deceased said: "I admit that I brought it here." The defendant then said: "Well, that is a pretty way for you to come to collect a bill. You brought that club on purpose to kill me with, did you?" The deceased said "Yes; I admit that I brought it and I intended to use it" and, calling the defendant a vile name, added: "You are too ornery to live. You ought to be killed." The witness says that the deceased kept calling the defendant names and "shaking his fist at him and threatening him." He was asked what Mr. Lucas said, and answered: "Mr. Lucas kept backing off, and told him to get out of the way. He did not want any trouble with him. He wanted him to get away, and let him alone. He didn't want to have any trouble with him." The witness testified further: "I heard Mr. Lester tell Mr. Lucas that he was going to come back the next morning. He said: 'I will come back prepared to fix you,' he said, 'or get my money.' He said: 'You * * * if I don't get my money, I will kill you.' He said: 'I will come back pre-

pared to do you up.' Mr. Lucas told him: 'You had better get on your mule and go on home and get off the place.' He said: 'I don't want you on the place any more.'" This evidence is not disputed by anyone, and is in harmony with the other evidence in the record. Soon after the deceased had left the defendant that night, the defendant went several miles to a telephone office to request the sheriff at Holdrege to come out there and protect him, but, not being able to talk directly with the sheriff, and being informed that the sheriff refused to come, he went several miles farther, where there was more direct line of telephone communication with Holdrege, but, as he testifies, he was unable to get the sheriff, it being so late and the offices being closed. He then bought a double-barrelled shotgun, and told the merchant from whom he bought it some of the circumstances that had taken place between himself and the deceased, and represented that he wanted the weapon to defend himself with. The party from whom he purchased this gun was a witness upon the trial, and testified that the defendant also said during their conversation, that if the deceased came into his yard, he would kill him. The cartridges which the defendant procured were charged with fine shot, which were removed by the defendant and replaced with buckshot. The next morning at about 7 o'clock, and soon after the defendant had finished his breakfast, the defendant saw from the window of his house the deceased and Mr. Kirschener coming across the field toward the defendant's house. He took his gun, which was loaded with buckshot, and went out into his yard, and, when Mr. Kirschener saw that the deceased was walking directly toward the defendant he left the deceased and went in a somewhat different direction, toward the barn, where one of the other witnesses was at work. When the defendant saw this and that the deceased was coming directly toward him, he shouted to him: "Halt!" The deceased answered: "I won't do it," and paid no further attention.

Several witnesses were watching the transaction. None

of them testified that the deceased turned out of his course, which was directly toward the defendant, or that he hesitated in his advance toward the defendant. Some of them testified positively that he maintained his direct course toward the defendant, and hastened his speed when the defendant directed him to halt. There was a road or lane between the parties from 25 to 30 feet in width, upon which there had been some travel, and which led in one direction toward the Platte river, a few rods distant, where there was no bridge, and in the other direction toward what appears to be the main traveled road. When the defendant saw that the deceased was still approaching him, he called to him again, telling him to stop. "Don't come any closer," he said, "You take the road there and get away from here, I don't want any trouble with you. Keep away from me." The deceased answered, as before: "I won't do it," and kept on. The two fences were of about the same character, each being of two wires and not difficult to pass. The deceased passed through one of them. There appears to have been no impediment by the fence. One of the witnesses who was watching him testifies that he did not know whether he touched the wires at all, or just walked right through between them. Just as he had passed through the first fence, the defendant called to him the third time, telling him not to come on. The third time the deceased said: "I won't do it," and, just as he stepped into the traveled track, the defendant shot him, discharging both barrels of his gun, and killing him instantly. It must be said that the evidence clearly discloses that the conduct of the deceased from the first was such as to invite the tragedy which occurred. No rational man could have conducted himself as the deceased did, and consider himself safe in so doing. He was unarmed, but he had told the defendant the night before that he would be armed, and he purposely acted in such a way as to lead the defendant to believe that he was prepared to kill the defendant, as he said he would be. He probably had no intention of taking the life of the defendant. He would appear

to be a braggart, but he wanted the defendant to suppose that he intended to kill him, and he wanted that fact to be of assistance to him in carrying out his purpose. The question is whether the defendant did really suppose that the deceased intended to kill him, that is, whether the defendant himself acted in good faith in the matter, or whether he was pleased to see the deceased carry himself in such a manner as to give the defendant a special cause for taking his life, and whether, when he did take his life, he believed that the deceased was trying to impose upon him, and that there was no real danger. If a man of ordinary prudence and caution, situated as the defendant then was, and knowing what the defendant knew, would reasonably suppose that the deceased was armed, and was prepared and intended to then and there kill the defendant, and that, in order to prevent his doing so, it was necessary for the defendant to shoot the deceased, and if the defendant in good faith believed that his life was so in danger, and that he could only protect himself by shooting the deceased, then his action is justifiable on the ground of necessary self-defense. That the circumstances, as disclosed by this evidence, were such as to cause a man to reasonably believe that the deceased was armed, and that he intended then and there to kill the defendant and would do so, unless prevented, there can be no doubt.

It is contended by the state that the defendant did not, in good faith, believe himself to be in danger; that he had endeavored from time to time to aggravate the deceased, and to lead him on to such rashness as to afford the defendant an opportunity to take his life. The jury must have taken this view of the case. The question is whether the evidence establishes the view so taken beyond a reasonable doubt. The law does not allow a jury to reach such a conclusion from conjecture, or from considering that it may have been so. It was not incumbent upon the defendant to prove that he did not act from a malicious motive, that he did not desire to take the life of the deceased, but was compelled to do so. On the other hand,

in order to establish the guilt of the defendant, it was necessary that the state should prove, beyond a reasonable doubt, that the defendant did act from malicious motives, and that the defendant did not believe himself to be in such imminent danger as to make it necessary to take the life of the deceased in order to protect his own. These things, as before stated, must be found from the evidence in the case, and not from conjectures based upon possibilities, and the evidence must be of such a nature as to establish these elements of guilt beyond a reasonable doubt. The questions so presented are peculiarly within the province of the jury. If ordinary minds might differ as to whether the evidence establishes these elements of guilt beyond a reasonable doubt, the verdict of the jury cannot be disturbed. When the sheriff refused to go out to the defendant's place for his protection until the next morning, the defendant told him that it might be necessary then to bring the coroner; but this statement furnishes no evidence of an intention or desire on the part of the defendant to kill the deceased. The defendant had insisted to the sheriff that the deceased would kill him, and the expression used in regard to the coroner would as well apply to that view of the case as to any expectation that the deceased himself would be killed. Again, when the defendant purchased the gun with which the killing was done, he is said to have stated that, if the deceased on the following morning came into his yard, he would kill him. This statement furnishes the only evidence that we find in the record tending to show a disposition on the part of the defendant to unlawfully take the life of the deceased. If the defendant made this statement, which is by no means clear under the evidence, we do not see how it could be said to justify the conclusion, beyond any reasonable doubt, that the defendant did not at the time of the homicide in good faith believe that his life was in danger, and that the deceased was prepared and intended to carry out the threats which he had made upon the previous evening. We conclude that there is not sufficient evidence in the

record upon which to find the defendant guilty of murder in the first degree.

Several instructions to the jury are objected to, but the conclusion which we have reached renders their discussion unnecessary.

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

REVERSED.

HOLCOMB, C. J., took no part in the decision.

JOSEPH NICKOLIZACK V. STATE OF NEBRASKA.

FILED NOVEMBER 22, 1905. No. 14,145.

1. **Criminal Law**: ACCUSED AS WITNESS. Where a defendant in a criminal case offers himself as a witness on his own behalf, he is subject to the same rules of cross-examination as other witnesses, and it is the duty of the court to keep the cross-examination within the law.

2. ———: ———: IMPEACHMENT. A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issues, for the purpose of contradicting him by other evidence if he should deny it, thereby discrediting his testimony.

3. ———: ———: ———. Where the prosecuting attorney, on the cross-examination of the accused in a criminal case, asks him if he has not been guilty of a similar offense upon another person at another time, he is concluded by the answer and cannot call another witness to impeach the accused.

4. ———: EVIDENCE. On a trial of one charged with the crime of rape, evidence of an attempt of the accused to commit a similar crime on another person is inadmissible.

5. ———: NEW TRIAL. Where the accused, in such a case, was a witness in his own behalf, and the prosecuting officer on cross-examination asked him, in substance, if he had not at a previous time been guilty of a like offense upon another young girl, naming her, and other like questions, and thereafter called the person named to the witness stand and examined her, for the purpose of not only impeaching the accused but of proving him guilty of such independent offense, *held*, that such conduct was improper and prejudicial, for which the accused should be granted a new trial.

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

R. R. Dickson, for plaintiff in error.

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

BARNES, J.

Joseph Nickolizack, who will hereafter be called the accused, was tried in the district court for Holt county on a charge of what is commonly called statutory rape, alleged to have been committed on the person of one Lena Kmich, a female child under the age of fifteen years. He was found guilty and was sentenced to the penitentiary for a term of six years. From that judgment he brings the case here by a petition in error.

The record discloses that there were 39 assignments of error in the motion for a new trial, and 100 of such assignments in his petition. However, we will discuss only so many of them as may be necessary to a proper disposition of the case. Counsel for the accused insists that the verdict is not sustained by the evidence; but, as we are constrained to dispose of the case upon another ground, we decline to discuss that question.

The accused further contends that the prosecuting attorney was guilty of misconduct during the trial, which was prejudicial to his rights and was reversible error in this: That the prosecutor was permitted to, and did, ask the accused, while testifying as a witness in his own behalf, if he had not, at a time previous to the transaction complained of, assaulted one Eunice Butterfield, and attempted to commit rape upon her; and, on being answered in the negative, produced the person so named as a witness for the purpose of not only impeaching him, but to further show that he had been guilty of an independent offense like the one for which he was being

tried; that the prosecuting attorney was permitted to, and did, inquire of other witnesses if they had not heard that the accused on one occasion had taken his wife down upon the floor, in the presence of his mother-in-law and their children, and had forcible sexual intercourse with her. It appears that, while the accused was on the witness stand giving testimony in his own behalf, and after he had positively and emphatically denied the commission of the crime charged against him, he was cross-examined by the county attorney, who was permitted to, and did, ask him the following questions: "Q. Do you wish to be understood that you never committed a crime before? A. How is that? Q. That you never committed a crime before. Is that the understanding? A. How do you mean? Q. That you never committed any offense before? A. Well, I never did. Q. Do you know this little Butterfield girl? A. Yes, sir. Q. Do you know what her name is? A. Eunice, I guess. * * * Q. Do you remember an occasion when she came down to get you to go up to her father's on some business of some kind—about two years ago? A. I don't remember. Q. You don't remember that? Do you remember an occasion when you grabbed hold of her and pulled her over on your lap and tried to get your hands up under her clothes? A. No, sir. Q. You say you did not do that? A. No, sir; not that I remember of. Q. You would remember a thing like that, wouldn't you? A. I guess I would if I done it. * * * Q. Will you answer you did not do that? A. Yes, sir." That the cross-examination complained of was incompetent and highly improper, there can be no doubt. The rule is too well established to admit of question that, where a witness is cross-examined on a matter collateral to the issues, he cannot, as to his answer be contradicted by the party putting the question. When a party on cross-examination asks a witness an immaterial question, he is concluded by the answer and will not be permitted to *call a witness* to contradict it. *McDuffie v. Bentley,* 27 Neb. 380; *Carpenter v. Lingenfelter,*

42 Neb. 728; *Farmers Loan & Trust Co. v. Montgomery,* 30 Neb. 33; *Johnston v. Spencer,* 51 Neb. 202. A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issues, for the purpose of contradicting him by other evidence if he should deny it, thereby discrediting his testimony. *Carter v. State,* 36 Neb. 481. The rule is perhaps more strongly stated in *Republican Valley R. Co. v. Linn,* 15 Neb. 234, where it is said:

"A party who on cross-examination of a witness asks him an immaterial question is concluded by his answer and cannot call another witness to impeach him."

That this evidence was incompetent and immaterial there can be no question. In *McAllister v. State,* 112 Wis. 496, it was held: "On a trial for an assault with intent to rape, evidence of an attempt of accused to commit a similar crime on another person is inadmissible."

In *Elliott v. State,* 34 Neb. 48, where the accused was a witness in his own behalf, the prosecuting officer on cross-examination questioned him as to his being charged with the commission of a similar independent offense, one not connected with the crime for which he was being tried, and such cross-examination was held to be highly improper and prejudicial.

After having thus cross-examined the accused, and having obtained his denial of an assault upon the Butterfield girl, the county attorney, in rebuttal, called her as a witness, and, after proving by her that some two years before the present charge was preferred against the accused she was with him going from his place to her home, asked her the following questions: "Q. What, if anything, did the accused do that day on the road up to your place?" This question was objected to and the objection sustained, whereupon the prosecuting attorney excepted. He then asked her: "Q. I will ask you whether or not the defendant attempted to put his hands up under your clothing?" This was also excluded, and the state excepted. The court thereupon told the jury to disregard the last question.

Whereupon the county attorney made an offer of proof, which was objected to and the objection was sustained, to which ruling he excepted. We are of the opinion that, in view of the condition of the evidence and under the circumstances, as disclosed by the record in this case, such a proceeding amounts to gross misconduct on the part of the prosecuting officer. He not only asked the accused incompetent and irrelevant questions, with the purpose, as it must have appeared to the jury, of showing that he had been guilty of a similar offense upon another young girl at a previous time, but, failing to obtain an affirmative answer to his question, he then proposed to impeach the accused by the evidence of the person alluded to. He must have known that he had no right to so cross-examine the accused, and having such knowledge, he further resorted to the extreme and unwarranted procedure of putting Eunice Butterfield on the witness stand, and propounding to her the questions above set forth. The fact that the testimony was objected to by the accused, and was thus excluded, would strongly indicate to the jury that the witness, if permitted to testify, would not only impeach him, but would prove him guilty of a similar offense. In *Elliott v. State, supra,* Judge MAXWELL, speaking for the court, said:

"The plaintiff was a witness in his own behalf and on cross-examination the county attorney asked the accused the following questions: Q. Were you ever in Burnett county, Texas? A. Yes, sir. Q. Is it not a fact that you stole horses in Burnett county? A. I never did; no, sir. Q. Don't you know that the sheriff has a warrant for you for stealing a horse in that county? A. I don't know it; no, sir. And other questions of like character. Such cross-examination is highly improper and cannot fail to be prejudicial. A prosecuting officer, in his zeal to enforce the law, must not forget that he also occupies a semi-judicial position, and that his duty requires him to resort to no questionable or improper means to secure a conviction. The emblem on every court house, of justice hold-

ing the scales in equipoise, would be a meaningless symbol if even one of the poorest and most abject of human kind was unjustly deprived of a right. The state—the people collectively in their corporate capacity—will not, through its officers, be permitted to do acts which every fair-minded individual thereof would condemn, and which, as individuals, they would not sanction. The questions quoted and others of like kind must have been prejudicial to the accused. Where a defendant in a criminal case offers himself as a witness on his own behalf, he is subject to the same rules of cross-examination as other witnesses, and it is the duty of the court to keep the cross-examination within the law."

As stated above, the prosecuting attorney is a semi-judicial officer. The state for whom he prosecutes does not desire the conviction of an innocent person, and it is as much his duty to see to it that such conviction shall not take place as it is his duty to use his utmost endeavors to fairly convict the guilty. He should never let his zeal, or the temptation to obtain the glittering bauble of success, lead him to the employment of questionable or unfair methods for the purpose of securing a conviction. It was stated by Lord Chief Justice Hale that the charge of rape was one easy to be made and difficult to be defended against. It is a matter of common knowledge that this offense is so revolting in its nature that for one to be charged with its commission is sufficient to prejudice the human mind against him. Therefore prosecuting attorneys and courts should both carefully guard the rights of the defendant in such cases, and see to it that he is not unjustly convicted. In the instant case, the public prosecutor seems to have forgotten these well-established and salutary rules, and allowed himself to resort to a course of conduct which was unfair and highly prejudicial to the rights of the accused. That such conduct amounts to reversible error seems clear, and for this reason, if for no other, the judgment of the district court should be reversed and a new trial granted.

Having concluded to reverse the judgment for the reason above mentioned, we will not undertake to discuss or pass upon the many other assignments of error contained in the record. The judgment of the district court is therefore reversed and the cause remanded for a new trial.

REVERSED.

HOLCOMB, C. J., expresses no opinion.

WILLIAM L. NEWBY V. STATE OF NEBRASKA.

FILED NOVEMBER 22, 1905. No. 14,246.

Forgery: INFORMATION. To charge the crime of having possession of a forged, false and altered deed, with intent to utter and publish the same as true and genuine, with intent to damage or defraud, as defined in the last clause of section 145 of the criminal code, the words "knowing the same to be false," or their equivalent, must appear in the information; and where such words are wholly omitted the information will not sustain a conviction.

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

William L. Newby, John D. Milliken, W. G. Hastings and *W. L. McGintie,* for plaintiff in error.

Norris Brown, Attorney General, W. T. Thompson, B. V. Kohout and *Joshua Palmer, contra.*

BARNES, J.

William L. Newby was convicted in the district court for Saline county of having in his possession a forged instrument, with intent to utter the same as genuine, for the purpose of defrauding one Joseph R. Jennings, and was sentenced to serve a term of two years in the state penitentiary. To reverse that sentence he brings the case here on error.

The information on which he was tried contained three counts charging him with three separate offenses for the violation of the provisions of section 145 of the criminal code, entitled "Forgery; Counterfeiting," etc. The first count of the information charged the accused with having forged a certain deed to lots 144 and 145 in R. S. Bentley's Addition to the town of Friend, Saline county, Nebraska, and alleged that the offense was committed at Coyle, in the territory of Oklahoma. But for the fact that it appeared that the act complained of was committed in a foreign jurisdiction, the facts stated therein were sufficient to sustain a conviction. The second count charged the accused with having the forged instrument described in the first count in his possession in Saline county, Nebraska, with intent to utter and publish the same, and thereby defraud the said Joseph R. Jennings. While the third count, which was sufficient in form and substance, charged him with having uttered and published the forged instrument above mentioned in Saline county, Nebraska, knowingly, and with the intent to defraud the said Jennings. It appears that the jury found him not guilty as to the first and third counts, but guilty of the crime attempted to be charged in the second count of the information, which reads as follows: "And the said B. V. Kohout, county attorney in and for said county and state, gives the court to further understand and be informed that said William L. Newby did, on the 18th day of February, 1904, in Saline county, Nebraska, aforesaid, unlawfully, feloniously and purposely have in his possession, with intent to utter and publish as true and genuine, the false and fraudulent deed, as aforesaid, with intent then and there and thereby to damage and defraud the said Joseph R. Jennings, aforesaid."

It appears that the accused, after verdict and before sentence, filed a motion in arrest of judgment, and alleged as one of the grounds of his motion that the second count of the information upon which he was convicted did not state facts sufficient to charge a crime against the

laws of the state of Nebraska, and he now assigns the overruling of the motion as one of his principal grounds of error. Section 145 of the criminal code on which the charges contained in the information were based, after defining the crimes of forgery, and of uttering and publishing a forged instrument, concludes as follows: "Or shall have in his possession with intent to utter and publish, as true and genuine, any of the above named false, altered, forged, counterfeited, falsely printed, or photographed matter, above specified and described, knowing the same to be false, altered, forged, counterfeited, falsely printed, or photographed, with intent to prejudice, damage, or defraud any person or persons, body-politic or corporate, every person so offending shall be imprisoned in the penitentiary for any space of time not exceeding twenty years, nor less than one year, and pay fine not exceeding five hundred dollars." Comparing the charge on which the accused was convicted with the language of the statute above quoted, it appears that the words "knowing the same to be false, altered (and) forged" are wholly omitted from the count in question. The rule is well settled that to charge a statutory offense the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it. In charging a statutory offense it is always necessary, and generally sufficient, to charge it in the language of the statute, or its equivalent. While the precise words of the statute need not be used, it is necessary that words equivalent in meaning be employed. 1 Bishop, Criminal Procedure (4th ed.), sec 614; Maxwell, Criminal Procedure, 145; *Cuthbertson v. State,* 72 Neb. 727. That knowledge of the forgery was requisite to constitute the crime of which the accused was convicted, there can be no doubt. The attorney general in his argument concedes this, but claims that the charge of knowledge is comprehended by the words "unlawfully, feloniously and purposely." We cannot give our assent to this proposition. Those words import only criminal intent, which is a necessary part of every

felony or other crime. It was said in *People v. Mooney*, 127 Cal. 339, 59 Pac. 761:

"The words 'wilfully, unlawfully, feloniously and maliciously' were properly used in the information, but they are not sufficient. Such words import only that criminal intent which is a necessary part of every felony or other crime, but they do not necessarily include the specific purpose to destroy the building, which is an element of the crime of arson. 'Whether the indictment is on a statute or at the common law, it is a rule, universal and without exception, that every intent, like everything else which the law has made an element of the offense, must be alleged; for otherwise no *prima facie* case appears.'"

In *People v. Nelson*, 58 Cal. 104, which was a burglary case, it was held that an information charging that the intent of the defendant in entering the building was to commit the crime of felony, without stating what particular felony, does not state the offense of burglary.

In *Matthews v. State*, 4 Ohio St. 359, the word "feloniously" was held not to supply the place of a direct charge of an intent to rob, which was specified in the statute describing the crime. So we are of opinion that the second count of the information was not sufficient to charge the crime of which the accused was convicted, and the district court erred in not sustaining his motion in arrest of judgment.

Having reached this conclusion, we are relieved of the necessity of deciding the other questions presented by the record. The accused having been found not guilty on the counts of the information which were sufficient to charge him with the commission of the crimes described therein, and the count on which he was convicted not stating facts sufficient to charge him with the commission of any crime against the laws of this state, nothing remains but to reverse the judgment.

Therefore, the judgment of the district court is reversed and the cause is remanded.

REVERSED.

GEORGE P. ELMEN, ADMINISTRATOR, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED NOVEMBER 22, 1905. No. 13,839.

1. **Judgment by Default, Amount of.** In an action for the recovery of money only, in case of default by the defendant, judgment can be rendered for no greater sum than is indorsed upon the summons. *Crowell v. Galloway*, 3 Neb. 215.

2. **Process: AMENDMENT: LIMITATIONS.** Where, in an action for money only, the præcipe omitted to direct the clerk of the district court to indorse upon the summons the amount for which judgment would be taken if the defendant failed to appear, and the summons issued and served bore no such indorsement, an amendment to the summons, made by leave of court, allowing such indorsement, and the issuance and service of an alias summons, the defendant having made no appearance in the action, will not relate back to the time of the original summons, so as to stop the running of the statute of limitations.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD and ARTHUR J. EVANS, JUDGES. *Affirmed.*

Frederick Shepherd and *John L. Sundean*, for plaintiff in error.

J. W. Deweese, Frank E. Bishop and *T. B. Wilson, contra.*

LETTON, C.

This action was brought by George P. Elmen, as administrator of the estate of Robert Stewart, deceased, to recover damages for the widow and next of kin on account of the death of his intestate, which he alleges was caused by the negligence of the defendant railroad while the deceased was working in its Havelock shops. Stewart died on July 18, 1899. Soon after his death his supposed widow, Annie Stewart, was appointed special, and afterwards general, administratrix of the estate, and acted as general administratrix until the present administrator was appointed on April 15, 1901. While this woman was acting as adminis-

tratrix, a settlement was made with her by the railroad company, and a judgment rendered in the county court in pursuance thereof for all damages accruing to the widow and next of kin by reason of the death of Stewart. This woman was not the wife of the deceased; and at the time of his death he left a wife and two children living in England. As soon as knowledge of these facts came to the wife and children, they caused the pretended wife to be ousted as administratrix and had the plaintiff appointed. On July 17, 1901, one day before the time limited by the statute for the beginning of an action for death by wrongful act, a petition was filed in this action and a summons issued. The præcipe for the summons did not ask for the indorsement of any amount for which judgment would be taken if the defendant did not appear, nor did the summons which was issued have either upon its face or indorsed thereupon any amount for which judgment would be taken in such case. This summons was duly served upon the defendant and returned. No appearance was made, and no default was entered. On February 10, 1902, the plaintiff filed a motion requesting to be permitted to amend the præcipe so as to show the amount for which plaintiff would take judgment, in case of default, to be $5,000, that the clerk be directed to amend the original summons by indorsing that amount upon it, and that an alias summons be issued, with that amount indorsed, requiring the defendant to answer on or before March 17, 1902, and that the amended summons, a copy of the motion and order allowing it, and the alias summons, be served upon the defendant the same as an original summons. The court, by an *ex parte* order, sustained the motion and ordered the defendant to show cause on or before March 17, 1902, why it should not be defaulted. The defendant appeared specially within the time limited and objected to the jurisdiction of the court for the reason that the original summons contained no indorsement of any amount for which judgment would be taken, and that the court had no authority to issue an alias summons or to require the de-

fendant to appear in any manner to the original summons as changed or amended, nor to render judgment against it on that summons, and that the record showed that the action was barred by the limitation of two years from the date of Stewart's death. This special appearance was overruled, to which exception was taken, and afterwards the defendant answered, preserving its objections to jurisdiction, pleading the absence of negligence upon its part, assumption of risk and contributory negligence on the part of the deceased, and former adjudication in an action brought by Annie Stewart, as administratrix and personal representative of the deceased, and payment of the judgment rendered in such case. The cause was first tried to a jury, Judge Sornborger presiding, which trial resulted in a verdict in favor of the plaintiff. On motion of the defendant for a new trial, which motion was heard before Judge Good, this verdict was set aside and a new trial ordered. At a subsequent term, the case was tried to the court without a jury upon the evidence taken at the former trial. The defendant then moved the court to sustain its defenses to the action and for judgment on the pleadings and the evidence, which motion was sustained and the present judgment dismissing the action rendered. This proceeding is to review that judgment.

Apparently the motion for a new trial was granted and the judgment complained of was rendered for the reason that the district court was of the opinion that the action was barred by the statute of limitations; and this for the reason that the summons, as first issued, bore no indorsement of the amount for which the plaintiff would take judgment if the defendant failed to appear. We have repeatedly held that no judgment can be rendered in excess of the amount indorsed upon the summons in case of default in an action where the only relief sought is a money judgment. *Crowell v. Galloway,* 3 Neb. 215; *Roggencamp v. Moore,* 9 Neb. 105; *Cooperative Stove Co. v. Grimes,* 9 Neb. 123; *Forbes v. Bringe,* 32 Neb. 757. The plaintiff in error contends that the amendments to the

summons and præcipe, which were permitted by the court, relate back to the time of the issuance and service of the original summons, and that therefore the action was begun within the two year period, while the position of the railroad company is that, since no judgment could have been rendered for any amount whatever upon the summons as it was when issued and served, an amendment which gave to the writ a force and effect of which it was entirely devoid was in effect the beginning of a new action, and that in such case, if the bar of the statute had fallen, it could not override the same. We have been cited to no cases directly in point in either this or any other jurisdiction. This court has held that a motion to amend an affidavit for attachment may be sustained, even though a motion is pending to quash the writ on account of the very defect which it is sought to cure by amendment. *Struthers v. McDowell*, 5 Neb. 491; *Rathman v. Peycke*, 37 Neb. 384; *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520; *Dobry v. Western Mfg. Co.*, 57 Neb. 228. In such cases the amendment relates back to the issuance of the writ of attachment. The general rule is that irregular or voidable process may be amended, but that void process is incapable of amendment. The reasons are obvious. A void writ is not a writ, and an amendment which would give such a writ force and effect would call the process into being at the time of the so-called amendment. The courts of other states have not been uniform in their holdings as to the effect of the failure to include an *ad damnum* clause in a summons or to indorse upon the back of the writ the amount claimed, where required by statute. See *Campbell v. Chaffee*, 6 Fla. 724; *Kagay v. Trustees*, 68 Ill. 75; *State v. Hood*, 6 Blackf. (Ind.) *260. In Ohio, in such a case, it was held by an inferior court that such a summons could be amended, but unless appearance were made the amendment would have to be served. *Williams v. Hamlin*, 1 Handy, 95. While in another such court in the same state it was held that a judgment rendered upon the service of a writ with no amount indorsed was errone-

ous, but not void, and therefore valid and subsisting, since not directly attacked. *Gillett v. Miller,* 12 Ohio C. C. 214.

If the first position is correct, the latter is wrong. The holdings are clearly irreconcilable. This court, however, in an early case, pointed out the proper procedure and indicated the effect of such an amendment. In *Watson v. McCartney,* 1 Neb. 131, the action was to enforce a vendor's lien upon certain lands. The summons was indorsed with the notice required in cases where a judgment for money only is sought. The defendants did not appear, and the indorsement was by leave of court amended so as to conform to the nature of the action, and judgment was rendered accordingly. In that case as in this both the præcipe and the summons were defective as to indorsement. In the opinion Judge LAKE says:

"So well am I satisfied that this amendment was irregular and unwarranted, that I have not undertaken to look into the cases relating to amendments cited by counsel for the defendant in error. Although cases might be found to support such a proceeding I should deem it unwise, in the settlement of the practice which is to govern in the courts of this state, to conform to precedents of that character. * * * Had the defendants appeared, the amendment might have been made by order of the court. The office of the notice indorsed on the summons is to advise the defendant of the amount claimed. He then is at liberty to consent or resist. * * * The plaintiff's course was to take judgment for the amount indicated in the notice, with interest from April 1, 1897. If he desired a further or greater recovery, he should have obtained leave and issued another summons, such as was proper in the case." See also *Reliance Trust Co. v. Atherton,* 67 Neb. 305; *Atchison, T. & S. F. R. Co. v. Nicholls,* 8 Colo. 188, 6 Pac. 512.

In the instant case the summons was issued in all respects in conformity with the præcipe which was filed, and in conformity with law. It is not a case where an error has been made by a clerk of the court or other officer. In

such a case, as, for instance, where an error has been made in the date of the return day of the summons or the answer day, we have permitted amendments to be made, and such amendments relate back to the time of the issuance of the summons. *Barker Co. v. Central West Investment Co.*, p. 43, *post*. The court, in such case, has power to preserve the rights of the defendants by granting such additional time to plead as may be necessary. In such cases, the defendant is fully advised of the nature of the judgment which is sought to be rendered against him, and the only prejudice which he can suffer is being deprived of the necessary time in which to prepare his defense. The case here, however, is different. Upon its face the summons was valid, but it failed in anywise to apprise the defendant of any money demand against it. No sum is mentioned either on the face or upon the back of the writ. This being the case, an amendment to the præcipe which directs the clerk to indorse a sum of money upon the writ, and an indorsement of the same upon the summons, the defendant not being in court, injects into the case a liability upon the defendant to which he was not subject when the writ was issued, and the effect as to him is the same as the amendment of a petition by setting forth a new cause of action, or the issuance of an alias summons. The defendant may have been, and evidently was, perfectly satisfied to let judgment go against him upon the process as it was first issued, but, when the same was made valid and effectual to charge him with a money judgment, it was the same as beginning a new action, and he had the right to the time prescribed by law for his answer after the indorsement.

It is a significant fact that the plaintiff did not rely upon the amended præcipe and summons to bring the defendant into court, but procured the issuance and service of a new summons, fixing the answer day at a future date. Taking this fact into consideration, we conclude that the action was begun, so far as the liability for the amount indorsed upon the summons is concerned, at the

time the amendment was made and the new summons issued. If during the interval between the issuance of the summons and its amendment, or the issuance of the new summons, the bar of the statute of limitations has fallen, it cannot be removed by an amendment or a new summons which virtually begins the action. Since the bar of the statute had fallen at time of the amendment and the issuance of the new summons, no right of action existed, and the judgment of the district court is correct.

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.

BARKER COMPANY ET AL. V. CENTRAL WEST INVESTMENT COMPANY.

FILED NOVEMBER 22, 1905. No. 13,878.

1. **Review**: RECORD. Where a party relies upon an order of the district court, which he alleges was made, but which the record of that court does not disclose, he must apply to that court for a correction of the record. This court can only consider the record of the proceedings of the district court as it appears in the transcript.

2. **Process**: AMENDMENT. Where a mistake is made in the date of the return and answer days of a summons, the same may be amended by the district court, even after objections to the jurisdiction of the court are pending based upon that particular defect.

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

B. N. Robertson, for plaintiffs in error.

H. P. Leavitt, contra.

LETTON, C.

This is a proceeding in error to reverse a judgment of the district court for Douglas county for lack of jurisdiction. A summons was issued and served upon the defendants upon October 24, 1900, two days after its issuance. This summons was defective in form as to the date of return day and answer day, making each of these dates one week earlier than the proper time. A special appearance was made by the defendants, objecting to the jurisdiction of the court for these reasons, which was sustained. A rehearing was granted, and the objections to jurisdiction again sustained on January 19, 1901, but afterwards, on the same day, the presiding judge obliterated the entry upon his trial docket by drawing lines with his pen through the same. On the same day the plaintiff asked leave to amend the summons by inserting the proper dates. This motion was not acted upon until December 19, 1903, when objections to jurisdiction were filed by the defendants, reciting the former orders sustaining the objections previously filed. On January 2, 1904, the motion to amend the summons was sustained, and the special appearance and objection to jurisdiction was overruled. The defendants appeared no further, but announced they would stand upon their plea to the jurisdiction. Their default was then taken and judgment rendered against them.

The defendants complain that the judgment was rendered without jurisdiction, and that the court erred in overruling the objections to jurisdiction filed December 19, 1903. The objections that were made to the validity of the summons by the special appearance filed November 19, 1900, were properly sustained by the district court. The provisions of the statute fix the time for the return day of the summons and the answer day, and neither the district court nor the clerk of the same has any power to change these dates. *Crowell v. Galloway,* 3 Neb. 215; *Calkins v. Miller,* 55 Neb. 603. This order was set aside, however,

and a rehearing granted. The findings of the district court show that, at a rehearing of these objections upon the 19th day of January, 1901, the district court, Judge Keysor presiding, announced that the ruling which the court had made on December 7, 1900, would be adhered to, and sustained the objections to the jurisdiction of the court; that on the same day, at the plaintiff's request, the judge struck out the order from his trial docket by drawing his pen through the same. But the record here is silent as to this proceeding. We cannot take this order into consideration, for the reason that the record as it stands before us shows that a rehearing was granted, but does not disclose that a rehearing was ever had until January, 1904, and after the motion to amend the summons had been sustained. If the plaintiffs in error desired to take advantage of the order of January 12, 1901, sustaining the objections to jurisdiction, they should have applied to the district court for a correction of the record of that court so as to show that the objections were then sustained. So far as this court is concerned, we must consider the motion to amend the summons as having been filed while the question as to jurisdiction was still open by reason of a rehearing having been granted. If the defendant had made a general appearance in the action, there is no question of the power of the court to amend the summons. The question presented is whether or not the court has such power after the defendant appears specially and calls the attention of the court to the defects in the process.

The summons in this case was not void, but merely irregular, and, if no appearance had been made by defendant and a judgment rendered thereon, the judgment would be proof against collateral attack. 1 Freeman, Judgments (4th ed.), sec. 126; *Gandy v. Jolly*, 35 Neb. 711; *Ley v. Pilger*, 59 Neb. 561; *Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co.*, 50 Neb. 283; *Jones v. Danforth*, 71 Neb. 722. We have held that amendments to an affidavit for attachment may be properly permitted, even after a

motion to quash the proceedings has been filed based upon that particular defect. *Struthers v. McDowell,* 5 Neb. 491; *Rathman v. Peycke,* 37 Neb. 384; *Moline, Milburn & Stoddard Co. v. Curtis,* 38 Neb. 523; *Dobry v. Western Mfg. Co,.* 57 Neb. 228. The power residing in the court to permit amendments to such affidavits is granted by the same section of the code as applies to the amendment of process, and we see no reason why a narrower construction should be given it than in such matter. When the mistake in the date was called to the attention of the court by the motion to amend, the objections to the jurisdiction being still pending before the court, it was within the power and discretion of the court to permit the amendment to be made. *Fisher v. Collins,* 25 Ark. 97; *Hamilton v. Ingraham,* 121 Mass. 562; *Richmond & D. R. Co. v. Benson,* 86 Ga. 203; *Kidd v. Dougherty,* 59 Mich. 240; *Kelly v. Harrison,* 69 Miss. 856. The amendment was not made until a long period of time after the time allowed the defendants to plead or answer had expired, so that they were deprived of no substantial right, and we doubt not that the court would, if they had desired it, have granted them all necessary time to plead. They, however, announced that they would stand upon their objections to jurisdiction, and the court then rendered judgment. In this we think there was no error. As the amended summons stood, the time to plead or answer had long expired, and the defendant was in default. He asked no grace and was therefore subject to the rendition of judgment at any time. *Hamilton v. Ingraham, supra.*

Since the defendants were given proper personal service of the summons, and thus notified that an action was pending against them on which a sum certain thereupon indorsed was sought to be recovered, we see no reason why the amendment should not relate back to the time of the issuance of the summons so as to prevent the bar of the statute of limitations from falling.

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.

JOHN QUISENBERRY, APPELLANT, V. SCHOOL DISTRICT ET AL., APPELLEES.

FILED NOVEMBER 22, 1905. No. 14,220.

1. **School Districts**: MEETINGS: RECORD. The records and proceedings of school district meetings are not to be given a narrow and technical construction, but should be construed in such a manner as to give effect to the manifest intention of the voters, if the same can be ascertained from the record.

2. **Resolutions** set forth in opinion *held* sufficient to vest the officers of a school district with power to sell the schoolhouse and to build a new one upon the designated site.

APPEAL from the district court for Hall county: JOHN R. HANNA, JUDGE. *Affirmed.*

Harrison & Prince, for appellant.

R. R. Horth and *John R. Thompson, contra.*

LETTON, C.

At the annual meeting of school district No. 6 of Hall county held in 1902, it was voted to move the schoolhouse to the "N. E. corner of the N. E. ¼ of S. 19, T. 10, R. 10," A levy of 10 mills tax was also voted to raise a fund wherewith to build a schoolhouse on this site. No instructions were given at the meeting to the school district officers to purchase the new site; and, the directors thereafter taking steps to move the schoolhouse to the new site, an

action was brought by a resident taxpayer to enjoin its removal. This action was finally brought to this court, and it was held that the officers had no power to purchase a schoolhouse site unless directed so to do by the electors of the district at an annual or special meeting, and that such a purchase by the school board without being directed was not binding upon the school district (*Ladd v. School District,* 70 Neb. 438), and the removal of the schoolhouse was permanently enjoined. At the annual meeting in 1903 a levy of a 4 mills tax was voted "to pay for the new schoolhouse site which was bought in 1902." At the annual meeting in 1904 the following resolutions were adopted: "Be it resolved, that the act of the school district board in purchasing the following described premises, to wit: Commencing at the northeast corner of sec. 19, in town 10, range 10, Hall county, Nebraska, running thence west along the north line of said sec. 19, 13⅓ rods; thence south 12 rods; thence east 13⅓ rods to the east line of said section; thence north 12 rods to the place of beginning—in the name of the district and for the purpose of a site for the schoolhouse, for the sum of $50, be and the same is ratified, confirmed and in all things approved, and is hereby declared as the site for the schoolhouse in this district.

"Be it further resolved, that if for any reason the title of the district to the above premises is not sufficient, that the school district board be and they hereby are instructed to procure a good title to said premises so long as it shall be used for school purposes."

It was further voted to sell the old schoolhouse, and to build a new schoolhouse on the new site, and the school board was appointed a building committee.

Pursuant to this action by the voters the school board procured a warranty deed to the premises described in the resolutions and were about to proceed with the erection of the schoolhouse when this action was brought by the appellant John Quisenberry to restrain the sale of the old schoolhouse and the construction of the new one.

It appears that in August, 1902, after the ineffective attempt to change the site of the schoolhouse, the owner of the tract in the northeast corner of section 19, in town 10, range 10, Hall county, Nebraska, had made a warranty deed to the school district to one acre in the northeast corner of the quarter section. After the decision in the Ladd case, and after the passage of these resolutions another warranty deed was made by him conveying the same tract to the district. The appellant contends that it was not within the power of the voters to ratify the illegal act of the directors in purchasing this tract without prior authorization by the directors of the district; that the contract of purchase was void and was not capable of ratification, and that the resolutions of 1904 should be considered as a whole and were nothing more than an attempted ratification of a void act. It is also contended that the designation of the site was not so definite in its terms and description as to be operative, since it was made in an abbreviated form. Under the view we take of these resolutions it is unnecessary to consider whether or not the illegal act of the district officers was capable of ratification, or whether the description in the records of the 1902 meeting is sufficiently definite and certain.

We think the appellant fails to give proper weight to that portion of these resolutions which declares a certain tract of land specifically described therein to be the schoolhouse site. At the 1902 meeting a schoolhouse site was designated by the voters by a defective description. In 1904 by this resolution the same site described more specifically, was declared to be the site for the schoolhouse in the district, and the school district officers were instructed to procure a good title to the same, and to build a schoolhouse thereon.

The purpose of the resolution adopted at the meeting in 1904 was to designate a site for the schoolhouse in a legal manner; properly to authorize the officers of the district to procure a title to the new site; to sell the old schoolhouse, and to build a new one on the site designated. If

no prior action had been attempted to be taken, these resolutions are broad enough to accomplish the desired purpose, and we fail to see why a prior abortive effort to attain the same result should render them a nullity. The records and proceedings of school district meetings are not to be given a narrow and technical construction, but should be construed in such a manner as to give effect to the manifest intention of the voters, if the same can be ascertained from the record. We think the 1904 resolutions confer the required authority upon the school district officers and 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.

MCKINLEY-LANNING LOAN AND TRUST COMPANY, APPELLEE, V. MARTHA JOHNSON ET AL., APPELLANTS.

FILED NOVEMBER 22, 1905. No. 13,939.

Homestead: MORTGAGE: EXTENSION: DISCHARGE. A mere promise by a creditor to a husband, who is the sole debtor and the owner of the title of a mortgaged homestead, that the former will forbear for a term of years to enforce his past due obligations, on condition that the latter shall pay promptly semiannual instalments of interest at a greater rate than that reserved in the contract, will not operate to discharge the lien of the incumbrance.

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

Starr & Reeder, for appellants.

C. E. Eldred and *J. W. James, contra.*

AMES, C.

William Johnson was the owner of a tract of land in Red Willow county in this state and, together with his

wife, was in occupancy of it as a homestead. On the 10th day of April, 1893, the husband borrowed of the plaintiff $1,000 and executed his note for that amount payable March 1, 1898, with interest at the rate of six per cent. per annum, payable semiannually until maturity, and at the rate of ten per cent. per annum thereafter if the principal should not be paid when due. This instrument was secured by a mortgage on the homestead executed by both husband and wife. On October 17, 1898, the note was more than seven months past due. No part of the principal had been paid, and there was accrued and unpaid interest upon it to the amount of $428. On that day the husband paid to the mortgagee the sum of $500, of which $200 was appropriated to the complete satisfaction of the obligation for accrued interest, and $300 to a reduction of the principal of the note; and on that day, also, the payee, or someone in its behalf, in consideration of the premises, indorsed upon the note the following memorandum: "Paid on the principal of within bond three hundred dollars. Balance principal extended five years from September 1, 1898, at seven per cent. semiannually provided interest payments be made promptly when due." Interest payments as provided by this memorandum were made until September 1, 1900, when they were finally discontinued, and no further payment than that above noted has been made upon the principal. The husband having died, this action was begun September 16, 1902, against the widow and heirs at law for a foreclosure of the mortgage, and resulted in a decree as prayed, from which the defendants have appealed to this court.

The sole defense is that, evidenced by the indorsement, there was a contract for a renewal and extension of the loan superseding the former obligation and discharging the homestead from the incumbrance, because it was entered into between the husband and the mortgagee alone, or without the concurrence and joinder of the wife. But the memorandum on the note does not appear to have had, or to have been intended to have, the effect sought to be

imputed to it. It was not signed or subscribed by either of the parties to the note or by anybody on the behalf of either of them, and it does not import any contract or promise on the part of the husband or anyone else to pay any sum, either as principal or as interest, at any time or at any place. The most that can be inferred from it is that the creditor had promised to forbear enforcing his security for the term of five years, upon condition that during that length of time the debtor should make prompt payments of semiannual instalments of interest at the rate of seven per cent. per annum, but whether the debtor should make such payments, or any of them, was left wholly to his option. If at any time he failed to make them, the creditor was released from his promise and at liberty to enforce his security according to its terms. Even if the memorandum had been turned into a formal agreement, formally executed, and had expressly stipulated for an extension of time, it may well be doubted if it would have been supported by a sufficient consideration. At the time it was made the debtor paid a part of the principal and also a little more than half of the accrued and past due interest in discharge of the whole of the latter, and the note was a demand obligation bearing interest at the rate of ten per cent. per annum. This rate the creditor promised to compound for seven per cent. on condition that the latter should be paid promptly at stated intervals. We fail to see what pecuniary benefit or advantage he could have gained or secured by such a contract, because, as we have said, the debtor did not agree to pay the specified rate of interest, or any interest, for any length of time, or at any time, nor did he agree not to pay off and discharge the principal of the debt at once or as soon as he should choose to do so. The only contract he ever made in these respects was expressed upon the face of his notes and mortgage. What oral promises, if any, he may have made in these regards are immaterial. The homestead law does not treat of oral promises, and neither he nor his wife, nor, of course, his creditor, was or could have been bound by them to the

prejudice of the rights of either as established by the notes and mortgage. Anxiety of the courts to sustain and protect the homestead right, laudable as it is, ought not to be carried to the extent of punishing lenient and forbearing creditors for acts of generosity and benevolence by depriving them of their securities.

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.

JOHN M. WESTERFIELD V. SOUTH OMAHA LOAN & BUILDING ASSOCIATION ET AL.*

FILED NOVEMBER 22, 1905. No. 14,004.

1. **Foreclosure Sale:** TITLE. Under our law governing sales of real property on execution, the title of a purchaser thereat depends upon a final confirmation of the sale made; and until this is had, and a conveyance of the real estate is executed and delivered in pursuance of such confirmation, the legal title of the execution debtor to the real estate is not devested. *Yeazel v. White*, 40 Neb. 432, followed and approved.

2. ———: ———. The owner of real estate that has been sold on execution retains the legal title therein, and is entitled to the possession, rents, profits, and usufruct of such real estate until a final confirmation of the sale made.

3. *Clark & Leonard Investment Co. v. Way*, 52 Neb. 204, examined and distinguished.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed with directions to dismiss.*

*Rehearing denied. See opinion p. 58, *post*.

Ellery H. Westerfield, for plaintiff in error.

A. H. Murdock, contra.

OLDHAM, C.

On and prior to the 20th day of June, 1893, one Griffith was the owner of a certain lot in the city of South Omaha. This lot was subject to two mortgages, the first one for $1,000 in favor of the plaintiff in the court below, the South Omaha Loan & Building Association, and the second one for $753 in favor of W. A. McCollester and C. L. Brenizer. On the 12th day of October, 1893, the second mortgage was sold and assigned to John M. Westerfield, one of the defendants in the court below, and, subsequently, Griffith conveyed his equity in the premises by a quitclaim deed to the other defendant in the court below, Harry A. Westerfield. John M. Westerfield, the second mortgagee, entered into possession of the premises by consent of the owner, and for some time applied the rents of the building as partial payments on the first mortgage. After a number of these payments, Westerfield began applying the rents to the satisfaction of his second mortgage. The plaintiff loan and building association some time thereafter began foreclosure proceedings on its first mortgage, making the owner and the second mortgagee parties to the action. The action proceeded to a decree, finding the sum of $1,009.17 due on the first mortgage, and directing the property to be sold to satisfy the mortgage indebtedness. Under this decree the property was sold to the loan and building association for an amount practically equal to the debt secured by the first mortgage. The sale was confirmed in the district court on the 19th day of May, 1900. On the first day of June, 1900, defendant Harry A. Westerfield filed a supersedeas bond provided for in the decree and perfected his appeal to this court. On the 4th day of April, 1902, this appeal was dismissed,

and the possession of the premises and a sheriff's deed were delivered to the plaintiff loan and building association. After entering into possession of the premises, the plaintiff association instituted the case at bar by filing a petition in the county court of Douglas county against defendants John M. and Harry A. Westerfield to recover the value of the rents and profits of the mortgaged premises from the 19th of May, 1900, until the 4th of April, 1902, or for the time defendants were alleged to have occupied the premises pending the determination of the appeal from the order of confirmation. From a judgment in the county court in favor of the defendants, the cause was taken by appeal to the district court, where, on a trial to the court, a jury having been waived, a judgment was entered in favor of the plaintiff and against defendant John M. Westerfield for the sum of $303.57, and the cause was dismissed as against the defendant Harry A. Westerfield. To reverse this judgment, defendant John M. Westerfield brings error to this court.

There is no dispute as to any material facts in the controversy. It is admitted that defendant John M. Westerfield, by consent of the owner of the equity of redemption, held possession of the mortgaged premises during the pendency of the appeal from the order of confirmation and applied the rents to the payment of his second mortgage. The only question to be determined, then, is whether or not the purchaser at a mortgage foreclosure sale may recover from the mortgagor, or one holding under him, for the rents and profits of the mortgaged premises during the pendency of an appeal to this court from the order of confirmation, where the appeal bond does not contain such a condition. The appeal in this case was taken prior to the passage of the act requiring appeal bonds to provide for the payment of rents pending the appeal. Consequently, the conclusions reached herein apply only to appeals from execution sales of real estate prior to the passage of this act.

At the threshold of the discussion lies the question

as to when the legal title vests in the purchaser at a mortgage foreclosure sale. This interrogatory is answered by a long line of decisions of this court, which hold that the legal title to the mortgaged premises remains in the mortgagor until the sale is finally confirmed and the deed delivered. In the case of *Yeazel v. White,* 40 Neb. 432, RAGAN, C., after a careful review of the decisions of our own court, as well as those of sister states having similar statutes, announced the rule:

"Under our law governing sales of real property on execution, the title of a purchaser thereat depends upon a final confirmation of the sale made; and, until this is had and a conveyance of the real estate is executed and delivered in pursuance of such confirmation, the legal title of the execution debtor to the real estate is not divested." And also: "The owner of real estate that has been sold on execution retains the legal title thereto, and is entitled to the possession, rents, profits, and usufruct of such real estate until a final confirmation of the sale made."

In the still later case of *Hatch v. Shold,* 62 Neb. 764, HOLCOMB, J., said:

"The legal title of mortgaged real property remains in the mortgagor pending the confirmation of a sale thereof made under a decree of foreclosure of the real estate mortgage."

It is true, as contended for by counsel for the loan and building association, that, for certain purposes, the title after the final confirmation relates back to the date of the sale. But it was held in *Yeazel v. White, supra:*

"This doctrine of relation applies only to the title. It has no necessary reference to the *quantum* of the estate which the execution debtor owned at the time the judgment became a lien."

In this state a mortgage, prior to its foreclosure, and the final confirmation of the sale had thereunder, is but a security for the debt and does not operate as a lien on the rents and profits of the mortgaged premises unless

an application is made for a receiver in the manner provided by the statute. In opposition to this view, we are cited to an *obiter* remark of IRVINE, C., in *Clark & Leonard Investment Co. v. Way,* 52 Neb. 204, in which he says:

"Undoubtedly the purchaser is entitled to an accounting for rents in such a case from the time of confirmation; and perhaps in case of insolvency, where a surplus remains of the purchase money after discharging the liens, the purchaser may, on an application for distribution, obtain an equitable set-off to protect himself."

The facts involved in the case in which this suggestion was made were very complicated. The contest arose between the purchaser and the owner of the equity of redemption in the form of a motion to compel the purchaser to pay into court the full amount of his bid, and the purchaser sought to have deducted from the amount of his bid sums which he had paid as interest accruing on a prior mortgage after the sale, as well as taxes subsequently levied. While the court denied the right to apply these subsequent payments on the bid, the writer of the opinion merely suggested that, on the settlement of the surplus between the owner of the premises and the purchaser, the subsequent taxes and interest paid might be treated as an equitable set-off against the rents and profits pending the foreclosure. We express no opinion on the soundness of this suggestion, because the language is pure *dicta;* but, if the learned commissioner intended to infer that the purchaser at the mortgage sale could have an action at law against the mortgagee for rents and profits pending an appeal from the confirmation of the sale, we would specifically disapprove the suggestion.

It follows from what has been said that plaintiff has no right of action against the defendants, or either of them, for use and occupancy of the mortgaged premises pending the final decree of the confirmation of the sale. We therefore recommend that the judgment of the dis-

trict court be reversed and the cause remanded, with directions to dismiss plaintiff's petition.

AMES and LETTON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with directions to dismiss the plaintiff's petition.

REVERSED.

The following opinion on motion for rehearing was filed June 8, 1906. *Rehearing denied:*

Foreclosure Sale: SUPERSEDEAS. The statute, prior to the recent amendment, allowed the supersedeas of a decree confirming a sale upon foreclosure of mortgage by giving a waste and cost bond only, and the purchaser at such sale could not recover for the use of the premises while the order of confirmation was so superseded, pending an appeal, even though the appeal was voluntarily dismissed by the appellant.

SEDGWICK, C. J.

In the brief upon the motion for rehearing it is insisted that, as the appellant dismissed his appeal to this court without any action of this court thereon, the judgment of confirmation of the district court was not affected by the appeal, and the purchaser's title became complete upon the confirmation of the sale in the district court. Under the former statute providing that upon appeal to this court from confirmation of sale the decree might be superseded by giving a bond for costs and guaranteeing against waste, and without providing for payment for the use of the premises while the appeal was pending, many complications arose, and in some of the decisions there are apparently conflicting statements. It was said in *Yeazel v. White,* 40 Neb. 432, that the purchaser's title is not complete until after the deed is executed and delivered. And in *Trompen v. Hammond,* 61 Neb. 446, it was said that the creditor is entitled to interest upon his

claim up to the date of confirmation. If therefore the creditor was compelled to purchase the land in satisfaction of his claim, he was deprived both of interest upon his claim and of the use of the premises from the date of the confirmation of sale until the deed was actually executed and delivered. An appeal and supersedeas operated to deprive the purchaser of the use of the premises for a considerable time after interest upon his claim had ceased. This injustice was perpetrated by the statute providing for a supersedeas without payment for the use of the premises; and the result was the same whether the appeal was voluntarily dismissed by the appellant, or the order of the district court confirming the sale was affirmed upon hearing in this court. In either case the purchaser who took the land in satisfaction of his mortgage was deprived of the use of the premises after interest had ceased to run upon his claim. This injustice has been done away with by the statute requiring a supersedeas guaranteeing payment for the use of the property in case the order appealed from is affirmed. The rule, as it formerly existed, resulted in restricting the value of real estate as security for loans. One desiring to purchase at foreclosure sale could only bid such sum as he could afford to pay in view of the fact that he might not obtain possession of the land until after an appeal had been prosecuted to this court, and the order confirming the sale was finally enforced. He could not pay for the land what it would be worth if upon confirmation of the sale he could obtain possession of the land or its equivalent. It would seem from a consideration of the statutes, and their construction by the former decisions of this court, that the legislature intended to so limit the right to pledge lands in security for debt. This construction of the statute justifies the judgment entered in this case, and the motion for rehearing is

OVERRULED.

ESTATE OF CHARLES H. KORFF V. HENRY BUEKER.

FILED NOVEMBER 22, 1905. No. 14,009.

1. **Review:** LAW OF CASE. The rulings of the court on the first appeal of a case settle definitely for the purpose of the litigation all questions adjudicated.

2. **Claims Against Estates.** Chapter 28, laws 1891 (Comp. St., ch. 23, sec. 226), has no application to claims pending before its enactment.

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

John V. Morgan, William Hayward and *John C. Watson,* for plaintiff in error.

W. W. Wilson, contra.

DUFFIE, C.

This is a second appeal of the case reported in 5 Neb. (Unof.) 194. The case was tried a second time in the district court upon the same pleadings and, presumably, upon the same evidence offered by the claimant upon the first trial, the estate failing to offer any evidence in defense of the claim, and relying entirely upon the statute of limitations, and upon chapter 28 of the laws of 1901 requiring a claim against the estate of a decedent, whether due or to become due, to be exhibited to the judge or commissioners within the time limited by the court for that purpose or to be forever barred, and providing further that a claim shall be barred if the claimant shall fail for two years after the death of the decedent to apply for or take out letters of administration on the estate of such deceased person, or to cause such letters to be taken out.

Relating to this statute it is sufficient to say that it did not go into effect until sometime after the appointment of an administrator for the estate of Charles H. Korff, and that within a short time after the appointment of an

administrator Bueker filed his claim. It is evident that the statute has no application in this case. The same questions discussed on the former appeal are again urged upon our attention. If we were in any way doubtful of the correctness of the former opinion, we could not in this case apply a different doctrine. The conclusions arrived at on the former appeal have become the law of the case and must be adhered to. Not only is this the rule which must govern, but a reexamination of the questions discussed in the former opinion have satisfied us that the case was correctly disposed of, and the law properly applied to the facts under consideration. 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.

H. V. TEMPLE, RECEIVER, v. T. L. CARROLL ET AL.

FILED NOVEMBER 22, 1905. No. 13,903.

1. Checks: PRESENTATION FOR PAYMENT. Due diligence in the presentation of a check for payment does not require the holder, in the absence of special circumstances or some special custom, to present it at other than banking hours for payment.
2. ———: ———: NEGLIGENCE. When the failure of a bank, holding a check as indorsee, to present it for payment is predicated on some act or omission of one of its agents having authority to make presentation, it is not excused by the fact that such agent was ignorant of the existence of the check.
3. Instructions examined and criticised.

ERROR to the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Warrington & Stewart, for plaintiff in error.

E. A. Cook, John A. Sheean and *Edson Rich, contra.*

ALBERT, C.

On the 27th day of May, 1901, the defendant Carroll made a check on the People's State Bank of Gothenburg, in favor of "L. J. Morton, Agt." On the same day, about 4:30 P. M., and after banking hours, Morton indorsed and transferred the check to the State Bank of Gothenburg. It was the practice of the two banks to "clear" between 3 and 4 o'clock each day, that is, representatives of the two banks would meet and take up the checks held by the one against the other. About 8:30 A. M., the day following the making and transfer of the check, the president of the State Bank, having reason to believe that the People's State Bank was in a failing condition, took the check in question, with the other checks held by his bank against the People's State Bank, for the purpose of presenting them to the latter for payment. The banking hours of both banks were from 9 A. M. to 4 P. M., and he found the bank closed. Without returning to his own bank, he called at the People's State Bank a second time, and found it in the hands of a state bank examiner and closed to the transaction of business. It was insolvent and never resumed business. The exact time at which the second call was made is one of the matters in dispute; the evidence, on the one hand, tending to show that it was as early as 9 o'clock, while, on the other, it tends to show that it was as late as 10 o'clock. During such absence of the president from his own bank, an employee of the People's State Bank, acting under the directions of the state bank examiner, took the checks held by it against the State Bank and presented them to the latter for payment. There is evidence tending to show that the State Bank, at the same time and place, presented certain checks against the People's State Bank which it had cashed during the absence of the president. Whether it did hold and present such checks is another point in dispute, and the evidence would sustain a finding either way. A clearance was effected, however, and some cash passed to the

People's State Bank to adjust the amount found due it; but the amount thereof, and whether the same was equal to or in excess of the amount due on the check in suit, is not shown. Neither such check nor any of the checks taken by the president of the State Bank to present to the other bank were included in the settlement. The check was never paid, and this action was brought by the receiver of the State Bank against the maker and indorser. The nominal payee and indorser was acting as agent of the Union Pacific Railroad Company, and the case was tried on the theory that the railroad company was the real payee. The defense relied on is that the plaintiff's bank failed to exercise due diligence in the premises. Judgment was given in favor of the defendants.

One of the grounds upon which the plaintiff urges a reversal of the judgment in this case is the giving of the following instruction: "You are instructed that, if you find from the evidence that the State Bank of Gothenburg had notice of the failing condition of the People's State Bank at the time it received the check, then it was the duty of the said State Bank of Gothenburg to present the check for payment forthwith to the People's State Bank." Two complaints are urged against this instruction: First, that there is no evidence tending to show that the State Bank had notice of the failing condition of the People's State Bank at the time it received the check; second, that it requires a presentation of the check outside banking hours. As to the first, the evidence is clear that on the morning after receiving the check the president of the State Bank had reason to believe that the other bank was in a failing condition. Just when or how he acquired this knowledge does not appear, but, taking into account all the facts and circumstances in the case, we are inclined to think there was sufficient evidence to warrant that portion of the instruction. But the other complaint is more substantial. The State Bank received the check after banking hours, and in the absence of special circumstances, or some special custom, not shown in

this case, the holder of a check is not required to present it for payment after banking hours. But under this instruction the jury were told, in effect, that it was the duty of the State Bank to present the check for payment as soon as it received it, although the banking hours were over for the day. The instruction is therefore erroneous and prejudicial.

Another instruction of which the plaintiff complains is as follows: "The court instructs the jury that, if you find from the evidence that the State Bank of Gothenburg and the People's State Bank cleared accounts on the morning of May 28, 1901, and at that time the State Bank of Gothenburg, having reasonable grounds to believe that the People's State Bank was in a failing condition, paid over to the People's State Bank an amount equal to or greater than the check in controversy, then the failure of said State Bank of Gothenburg to retain sufficient funds for the payment of the check in question will prevent recovery by the plaintiff in this action, and your verdict will be for the defendants." One objection urged against this instruction is that "there is no evidence that the person who 'cleared' for the State Bank had any knowledge of this check." Such evidence was not necessary to warrant the instruction. The bank had received and cashed the check over its counter. It left its affairs in the hands of the person who effected the clearance, and it is not claimed that such person was not authorized to make the settlement. If the bank saw fit to withhold from such person the information necessary to enable it properly to conduct the business intrusted to it, it cannot urge its ignorance as an excuse for a lack of due diligence on its part. The instruction, however, is open to the objection that there is no evidence to support a finding that the State Bank, at the time of the settlement, paid over to the other bank "an amount equal to or greater than the check in controversy." The extent to which the evidence goes on that point is that the amount paid was small. The instruction therefore is erroneous.

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

DUFFIE and JACKSON, 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.

NORMAN J. ELDRIDGE ET AL., APPELLEES, V. ANDREW J. COLLINS, APPELLANT.

FILED NOVEMBER 22, 1905. No. 13,992.

1. **Highways:** DEDICATION: EVIDENCE. Evidence of user, and of surveying, platting and otherwise improving by public authorities, examined, and *held* sufficient to show the establishment of a public road by dedication.
2. **Evidence** examined and found sufficient to justify the finding and decree of the district court.

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

Charles G. Ryan, for appellant.

W. H. Thompson, contra.

ALBERT, C.

This suit was brought by the plaintiffs, in their own behalf and in behalf of others similarly situated, to restrain the defendant from obstructing an alleged public road. The substance of the complaint is that the plaintiffs are the owners of the northeast quarter of section 14, township 10, in Hall county, and that the defendant is the owner of the southwest quarter and the west half of the northwest quarter of the same section; that there is a

public highway 26 feet wide, along the section line between sections 13, 14 and 15 in said county, and extending in a westerly direction across the state; and, that the defendant threatens and intends unlawfully to obstruct the said highway by building a fence along the west side of his land, in section 14, to the great and irreparable injury of the plaintiffs. The defendant answered, denying the existence of a public road through or over any portion of his land in section 14, and averring that the alleged road or way leading through said section and over and upon his land was, and for many years had been, a mere private way running east and west through the middle of said section, with no established width or location. The district court found that there was a public highway, 26 feet wide, running east and west through the middle of section 14, and granted an injunction restraining the defendant from obstructing it. The defendant appeals.

Some 20 witnesses were examined, and their evidence covers more than 200 pages of the bill of exceptions. There is some conflict in the testimony, but it conclusively appears that as early as 1859, seven years before the section was surveyed by the government, there was a well-defined road, in common use by the public, extending east and west through section 14, on or near the half section line; that in 1867 the county surveyor of Hall county surveyed and platted this road, and that a report of his doings in the premises, including a plat of the road, was filed with the county clerk and approved by the county board. It further appears that in 1872 or 1873 the road overseer, acting under the authority of the county board, constructed a culvert and made other improvements on the road, and further improvements thereon were made by such officer a year or two later.

The principal controversy is whether the line of that road coincides with the line of the road which the plaintiffs now claim is a highway. The plat, made and filed by the county surveyor in 1867, shows a substantial vari-

ance, especially as to that portion extending over and along the land now owned by the defendant. But, in our opinion, the evidence of early settlers and those acquainted with the early history and condition of the locality ought to prevail as against this plat. In 1862 the settlers procured a private survey to be made of section 14. Some of these men testify that when the government survey was made, four years later, the lines and corners of the latter survey coincided with those established by the private survey, and that the road then extended east and west on the half section line. By the evidence of the early settlers it is also shown that about the year 1865 the parties then occupying the land now owned by the defendant broke portions thereof, leaving about 13 feet on each side of the half section line unbroken for road purposes, and that the unbroken space at that time was used and has ever since been used and recognized as a public road. The same plan was pursued nearly, if not quite, the entire length of the road through the section and for more than 40 years buildings have been erected, fences built, groves planted, and the soil cultivated, along this road, and always with reference to it. This evidence is practically uncontradicted, at least it is of such persuasive force that we accept it as true, and are convinced, notwithstanding the plat, that as early as 1866 the line of the road was not substantially different from that now claimed by the plaintiffs.

We are also satisfied from the evidence that the road has been in constant use by the public and recognized as a highway for almost half a century, although less used now than formerly, when it was one of the great thoroughfares of the state. It is true, the evidence shows that during the winter season from 1891 to 1895 the owners of lands adjoining the road sometimes stretched wire gates across it to connect fences on either side. But, from the entire evidence, we are satisfied that such obstructions never amounted to an assertion of any right inconsistent with the easement of the public, because the

public used the road notwithstanding such obstructions, and submitted to the inconvenience, not in recognition of any right inconsistent with the free use of the road as a highway, but as an act of grace, and out of regard for the necessities of the landowners during that period. Besides, we think the facts established by the evidence are very similar to those in *Streeter v. Stalnaker,* 61 Neb. 205. There it was shown that the county board in 1867 had appointed one Thomas a special commissioner to inquire into the expediency of establishing a certain road. He surveyed and platted a road, and a report of his doings and a plat of the road were filed with the county clerk and approved by the board. Afterwards, in the same year, the road overseer constructed culverts on the road, and thereafter it was in constant use by the public. As in this case, no formal order of the county board locating and establishing a road was shown. The court said:

"In order to show that the road was established by user it was not necessary to prove an exact adherence to the line of the survey at all points. It was enough to show that there was no permanent or material deflection. It is said that the public could not acquire an easement by user in the land in question because it belonged to the general government, which is not affected by the statute of limitations. As we understand counsel for the defendant, they do not claim that the public acquired any rights by adverse occupancy of the disputed strip. Their contention is that the road was established by dedication and acceptance; and this view of the matter we think is correct. In 1866 congress passed an act declaring that 'the right of way for the construction of highways over public lands not reserved for public uses is hereby granted.' U. S. Revised Statutes, sec. 2,477. By this act the government consented that any of its lands not reserved for a public purpose might be taken and used for public roads. The statute was a standing offer of a free right of way over the public domain, and as soon as it was accepted in an appropriate manner by the agents of the

public, or the public itself, a highway was established. What the Hamilton county authorities did was perhaps insufficient to show the establishment of a road under the general road law, but was enough, we think, to indicate an acceptance of the government's bounty, and that is all that was required to create an easement. In this case there was not only evidence of user, general and long continued, but also proof that the public authorities have assumed control over the road and had worked and improved a portion of it. Both facts were competent evidence tending to show an acceptance of a dedication."

While the defendant's lands were settled upon at an earlier period, those through whom he traces his title to the government received a patent therefor in 1878, more than ten years after the public authorities had surveyed and platted the road. In other words, applying the rule laid down in the case above cited, the road had become a public road by dedication as early as 1867, and was a public highway when the gates in question were thrown across it. That a highway cannot be vacated by occasional acts of trespass, especially when such acts cover only a period of three or four years, is obvious.

The defendant bases a complaint on the fact that the road is but 26 feet wide. But, as he denies the existence of any highway, it would seem that he is not in a position to complain because the court found a highway of but 26 feet in width instead of 66 feet. Just how the road came to be but 26 feet in width is not quite clear, but we infer from the record that the adjacent owners by tacit consent broke the land and built the fences and other improvements with reference to a road of that width, and the public acquiesced.

We are satisfied, after an examination of the entire record, that the decree of the district court is as favorable to the defendant as the evidence would warrant, and we therefore recommend that it 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.

IDA M. HISKETT, APPELLEE, V. JANE BOZARTH ET AL., APPELLANTS; IDA M. HISKETT ET AL., DEFENDANTS IN ERROR.

FILED NOVEMBER 22, 1905. No. 13,961.

1. **Decedent:** WITNESS: COMPETENCY. In this case (an action by a married woman against the representatives of a deceased person to enforce specific performance of a contract with the deceased), the husband of the plaintiff was a competent witness in her behalf.

2. **Contract:** DESCRIPTION OF LAND: PAROL EVIDENCE. A contract affecting the title to real estate is not void for uncertainty, if the land intended to be described can be identified from the description in the contract with the aid of parol evidence. *Ruzicka v. Hotovy*, 72 Neb. 589.

APPEAL from and error to the district court for Pawnee county: ALBERT H. BABCOCK, JUDGE. *Affirmed.*

J. C. Dort, for appellants.

L. W. Colby, for appellee.

J. C. Dort and *Story & Story,* for plaintiff in error.

L. W. Colby and *G. T. Belding, contra.*

JACKSON, C.

Ida M. Hiskett, plaintiff, obtained a decree in the trial court against E. H. Lloyd, executor of the last will and testament of Andrew McPheeters, deceased, and other defendants, as heirs and devisees of the deceased, for the specific performance of a contract covering real estate. The executor prosecutes error and the other defendants have appealed. Certain of the defendants are minors, who appeared by guardian *ad litem.* The case was tried

upon an amended petition, answers on behalf of the defendants, and the reply thereto.

The allegations of the petition pertinent to the inquiry are: That on or about the 19th day of August, 1896, Andrew McPheeters, grandfather of the plaintiff, was the owner in fee simple of the north half of the northwest quarter of section 18, township 3 north, range 10 east, in Pawnee county, Nebraska; that the tract contained about 86 acres according to government survey; that said Andrew McPheeters, then being in advanced old age and requiring special care and attention incident to his condition, and desirous to sell and dispose of said premises for the purpose of having such care and attention during his remaining days, and the plaintiff being desirous of purchasing said premises and giving the said care and attention, the said Andrew McPheeters, for a good and valid consideration, made and entered into a written agreement on said date with the plaintiff, which said writing was duly signed and delivered by the said Andrew McPheeters to the said plaintiff; that the plaintiff signed and accepted the terms of the agreement, the contract being as follows:

"Aug. 19, 1896.

"I Andrew McPheeters do agree to give Ida M. McPheeters this (86) eighty-six acre farm free of incumbrance, provided that she take care of me all my remaining days. ANDREW MCPHEETERS.

"Witness: S. D. Hiskett.

"The farm is the north half of northwest quarter, section 18, town 3, range 10, in Pawnee county, Nebraska. I agree to the above contract. IDA M. HISKETT."

That upon the execution of said contract by Andrew McPheeters the plaintiff entered upon the performance of the same, and thereafter fully consummated and performed the terms and provisions thereof to be performed by her; that she took care of said McPheeters during all of his remaining days as desired and required by him, and to his full and entire satisfaction; that the services

were received and accepted by McPheeters under the terms of the agreement until his death; that McPheeters died on the 19th day of January, 1902, and at the time of his death she had not received a conveyance of the said described premises; that said McPheeters left a last will and testament; that the defendant E. H. Lloyd was the executor of the estate of McPheeters; that the plaintiff had demanded a conveyance according to the terms of the contract, and that the executor had refused to convey the same. The answer of the adult defendants, including the executor, in substance denied the execution of a written agreement, and alleged that the agreement was not sufficient in law to constitute a contract; admitted that McPheeters was the owner of the real estate, and pleaded as an estoppel that on the 23d day of July, 1900, said McPheeters executed a last will and testament of all of his property, both real and personal, wherein the plaintiff was named as one of the heirs and devisees, and at the same time he executed a promissory note for the sum of $150 in favor of the plaintiff; that the plaintiff had received the amount of the note; that the will had been admitted to probate; that the plaintiff's husband, S. D. Hiskett, with the knowledge and consent of the plaintiff, filed a claim in the county court against the estate of deceased for board, supplies furnished, and the keeping of McPheeters for the period of about five years. The minor defendants answered by their guardian *ad litem,* admitting the death of the deceased; that he was the owner of the real estate in question on August 19, 1896; that McPheeters left a last will and testament which had been admitted to probate; that Lloyd was appointed executor; and denying other allegations of the petition. The reply was a general denial.

The appeal presents the question of the sufficiency of the pleadings and proof to sustain the decree, one of the principal contentions being that the contract is not sufficiently definite and certain to permit of its being enforced, because parol evidence was necessary to identify the particular tract of land intended to be affected by its terms,

and is therefore insufficient under the statute of frauds. This contention is not well founded. The contract as pleaded definitely describes the land, and no parol evidence was necessary to identify it, and, even though it were informal in that respect, the correct rule is that, if the land intended can be identified from the description with the aid of parol evidence, the contract is not void for uncertainty. *Ruzicka v. Hotovy,* 72 Neb. 589. The execution of the contract by the deceased was proved to the entire satisfaction of the trial court, and the findings of the court in that respect meet with our approval. In fact, the execution of the contract is not controverted except by pleadings and argument. It appears from the evidence that when the agreement was signed by the deceased it did not contain the memorandum describing the real estate below his signature and over the signature of the plaintiff. The evidence, however, on the part of the plaintiff, discloses that the memorandum was added during the lifetime of the deceased and at his instance and request. There was some evidence on behalf of the defendants that the memorandum was not on the contract at the time of the death of McPheeters. Upon that issue the trial court found against the defendants upon the conflicting evidence of witnesses who appeared in court and testified at the trial. The opportunity afforded the trial court to determine as to the credibility of these witnesses was such as to justify us in adopting the findings of the trial court as our own.

Some months after the contract was signed by the deceased the plaintiff was married to the witness, S. D. Hiskett. At the trial Hiskett was sworn and testified as a witness in behalf of his wife, over the objection of the defendants, and it is now contended that he was an incompetent witness and that without his testimony the evidence is insufficient to sustain the decree. It appears from the evidence, without dispute, that after the marriage of the plaintiff and the witness Hiskett he entered into the possession of the real estate involved under a

lease from McPheeters, and that under the lease he, with his wife, occupied the premises until the death of McPheeters; and that after the appointment of the executor he continued to reside there with his family under a lease with the executor; that his possession grew out of the relation of landlord and tenant; that the plaintiff had never acquired possession of the premises under the contract which she now seeks to enforce, and the question arises whether, under the facts, he was a competent witness against the representatives of the deceased. It has been held that, in an action by the husband against the representatives of a deceased person to enforce the performance of a contract with the deceased, the wife is an incompetent witness. *Wylie v. Charlton,* 43 Neb. 840, 851. It was there held that as an aid in the construction of our statute the common law tests applied, and, applying the test, it was demonstrated that the statutory right of dower of the wife, when once attached, remained a charge and incumbrance upon the real estate of the husband, unless released by the voluntary act of the wife or extinguished by operation of law, and that the statutory inhibition rendered the wife incompetent as a witness in behalf of her husband in that and similar cases, because of her direct legal interest in the result of the suit. It was also said in that case:

"While it seems clear that the term 'interest' was used in our statute in the common law sense, it is equally clear that by restricting the disqualification to those having a direct legal interest in the action the legislature intended to admit the testimony of some persons having interests not direct or not legal which at common law would have excluded them."

The right by curtesy is distinguishable from the right by dower in this: that it may be defeated by the deed of the wife and without the consent of the husband. Under the common law rule an heir apparent was held to be a competent witness in behalf of his ancestor, because his interest in the estate was liable to be defeated with-

out his consent and by the act of his ancestor, and his interest was, therefore, too remote to disqualify him as a witness. Applying that test to the question under consideration, it seems evident that the interest of the husband in the result of the controversy is so remote, for the reasons stated, that he was not disqualified and his evidence was properly received.

But it is argued that the plaintiff is estopped from maintaining the action because of the fact that her husband filed and had allowed a claim against the estate of decedent for board and supplies and material furnished. As affecting the appellants, however, it is sufficient to say that no evidence was admitted to establish the filing and allowance of such a claim. An offer to prove the fact of the making and allowance of the claim was denied by the trial court, and, in our judgment, rightfully. Such action on the part of the husband could not affect the rights of the wife.

We have carefully read the evidence and find that the decree has ample support in the facts adduced at the trial

The decedent, at the time he entered into the contract, was about 80 years of age. He died about five years thereafter. During a portion of the period from the time of making the contract until his death he was entirely helpless. He needed care and attention of an extraordinary nature. No question is raised but that his every want was provided for and his declining years made comfortable. The plaintiff established by ample proof the performance of the conditions imposed upon her by the contract, and is entitled to the specific performance of the contract by the representatives of the deceased.

The questions discussed on behalf of the executor as plaintiff in error are substantially the same as those already discussed.

We find no prejudicial error in the record, and recommend that the decree of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

JOHN NOTHDURFT V. CITY OF LINCOLN.

FILED NOVEMBER 22, 1905. No. 13,981.

Cities: ACTION FOR DAMAGES: NOTICE: PETITION. The provisions of the statute in force February, 1900, construed, and *held*, first, to require a claimant of unliquidated damages against a city of the first class to file with the city clerk, within three months from the time the cause of action accrued, a statement in writing, containing, among other things, the full name of the claimant; second, that in an action against such a city for unliquidated damages, where the petition did not show the filing of the statement complying with the provisions of the statute, the petition failed to state a cause of action.

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

Frederick K. Shepherd, for plaintiff in error.

E. C. Strode, contra.

JACKSON, C.

On January 18, 1904, the plaintiff in error instituted an action in the district court for Lancaster county against the defendant in error to recover damages on account of an injury alleged to have been sustained by his wife on a defective sidewalk on January 22, 1900. The allegations of the petition important to the inquiry are: "That on the 12th day of February, 1900, the plaintiff filed, and caused to be filed, for the purpose of giving notice of the accident on his account and for his own benefit, as well as on the account and benefit of his wife, in the office of the city clerk in the city of Lincoln, Lancaster county, Nebraska, a statement in writing, giving

full name, and the time, place, nature, circumstances and cause of the injury or damage complained of. * * * And afterwards, on or about the 2d day of January, 1904, the plaintiff filed in the office of the city clerk of said city of Lincoln a statement of the amount of his claim, giving his full name as claimant, and the time, place, nature, circumstances and cause of the injury or damage complained of." A copy of the notice filed February 12, 1900, is attached to the petition and is as follows:

"LINCOLN, NEBRASKA, February 12, 1900.

"To the Honorable Mayor and City Council of the City of Lincoln, in Lancaster County, Nebraska.

"Gentlemen: Pursuant to section 86, chapter A, article one of the Compiled Statutes of Nebraska, for the year 1899, I herewith present to you my claim for damage against the city of Lincoln by reason of the accident and injuries hereinafter more fully and particularly described. On the afternoon of Tuesday, January 23, 1900, at about 3 o'clock P. M., while I was passing along and upon the sidewalk on the north side of F street, between Eighth and Ninth streets in the city of Lincoln, Nebraska, in front of the lot on which is located a residence known as 820 F street, being the sidewalk in front of lot No. 9 in block No. 162 in said city I was tripped by a loose and broken board in said sidewalk, and fell heavily upon said sidewalk, and thereby seriously injured my right arm, right leg, hip, back, and right side of my face, and my right eye, and broke, tore and lacerated the cords, ligaments and muscles of my right arm, right leg, hip, and back, and severely sprained and wrenched said cords, ligaments and muscles, and bruised and injured the nerves of the right leg, hip, back, and right eye, thereby permanently injuring said members. That said injuries were caused by the impassable and dangerous condition of said sidewalk at the place aforesaid, and without negligence on my part. Said sidewalk being then and there an old, dilapidated and partially worn out board walk, with

rotten stringers and boards, and on which were many loose and broken boards, and many holes through the same where boards had been removed, making said sidewalk uneven, impassable and unsafe, thereby causing me to trip and fall and sustain injuries to my damage, caused thereby and following therefrom, in the sum of $5,000. That said sidewalk was in said dilapidated, unsafe and impassable condition and allowed to remain so for more than three months prior to said 23d day of January, 1900, and, by reason of the aforesaid injuries, I claim of said city of Lincoln damage in the sum of five thousand dollars ($5,000). MARIE F. NOTHDURFT.

"STATE OF NEBRASKA, }
LANCASTER COUNTY. }

"Marie F. Nothdurft, being first duly sworn, on her oath says: I am the claimant herein, and have read the foregoing claim and know the contents thereof, and believe the facts therein stated to be true, and that the amount claimed is correct, reasonable and just.

"MARIE F. NOTHDURFT.

"Subscribed in my presence and sworn to before me this 12th day of February, A. D. 1900.

"C. M. PARKER, *Notary Public.*

"My commission expires Feb. 9, 1906."

A general demurrer on behalf of the defendant was sustained in the trial court, and, the plaintiff electing to stand upon his petition, the case was dismissed, and he prosecutes error.

The statute in force at the time of the alleged injury was as follows: "All claims against the city must be presented in writing with a full account of the items, verified by the oath of the claimant or his agent, that the same is correct, reasonable, and just, and no claim shall be audited or allowed unless presented or verified as provided for in this section, and read in open council. * * * And to maintain an action against said city

for any unliquidated claim it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature, circumstance, and cause of the injury or damage complained of." Comp. St. 1889, ch. 13*a*, art. I, sec. 36. By the provisions of this section two distinct acts on the part of the claimant are contemplated: First, a notice of the accident within three months from the time the cause of action accrued; and, second, the filing of a claim. The notice of the accident within the time specified is jurisdictional, except where special facts constituting a legal excuse for the delay intervene. *City of Lincoln v. Finkle*, 41 Neb. 575.

The only question presented for the consideration of this court is the one of the sufficiency of the notice of the accident, it being conceded that if the notice is insufficient the demurrer was properly sustained. A determination of this question requires a construction of the provisions of the statute quoted above. Does the statement of the notice set out in the petition and relied upon by the plaintiff in error meet the requirements of the statute? We are agreed that it does not. The purpose of the statute evidently was to require the party entitled to maintain the action to file a notice of the accident, containing a statement, among other things, of the name of the claimant, so that the proper city authorities might be advised whom it was that would claim damages by reason of the accident. The elements of damage sustained by the husband are essentially different from those sustained by the wife, and the only conclusion which the city authorities would be justified in reaching from the notice set out in the petition was that the wife was the claimant and the person with whom they were authorized to adjust any claim for damages that might arise. Any other conclusion would be manifestly unjust to the defendant, to whom no notice of the claim on the part of the plaintiff was given until almost four years after the

cause of action accrued. Nowhere in the notice of the accident does the plaintiff's name appear. On the contrary, it appears from the face of the notice that Marie F. Nothdurft was the claimant; in fact, she so swears in the verified statement. The allegation in the petition that the plaintiff caused to be filed, for the purpose of giving notice of the accident on his own account, a statement in writing is a mere conclusion and is not supported by the contents of the notice, which speaks for itself.

Counsel on either side have discussed the effect of the case of *Nothdurft v. City of Lincoln,* 66 Neb. 430, from which it appears that the wife prosecuted an action against the city on account of the injury complained of in her own name, and was defeated. We do not, however, consider that fact in the determination of this case. As it does not appear from the petition that the provisions of the statute requiring a statement to be filed by the claimant within three months of the time the cause of action accrued were complied with by the plaintiff, the petition fails to state a cause of action, and the demurrer of the defendant was properly sustained.

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.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY v. EMIL SCHWANENFELDT.

FILED NOVEMBER 22, 1905. No. 14,005.

Negligence: EVIDENCE: QUESTION OF LAW. In an action wherein the plaintiff seeks to recover damages on account of an injury alleged to have been sustained because of the negligent acts of

the defendant, where it appears from the undisputed evidence that the plaintiff was guilty of the neglect of a clear legal duty and that his own negligence was the proximate cause of the injury, the question presented is one of law for the court, and not for a jury.

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

J. W. Deweese and *Frank E. Bishop,* for plaintiff in error.

A. W. Field, contra.

JACKSON, C.

The plaintiff in the trial court recovered judgment against the defendant in an action for damages on account of a personal injury, which it was alleged he sustained because of the negligent acts of the defendant. At the close of the plaintiff's evidence the defendant moved for a directed verdict. The motion was denied and the defendant offered no evidence. From the judgment the defendant prosecutes error, alleging insufficiency of the evidence to sustain the verdict and judgment.

The facts disclosed by the evidence are: That the defendant owned and used a railway track along Eighth street in the city of Lincoln, a street extending from the south to the north along the east side of block 52. The track in question was a switch put in for the accommodation of wholesale houses, and was connected with the company's yards at the south end only, so that the only means of access to the track was from the south. At the point where the accident occurred the west rail of the railway track was 17 feet east of the lot line. An alley 16 feet in width extends east and west through block 52, and is paved with stone. On the east side of the block, and immediately south of the alley, a lumber yard, inclosed with a high board fence, with an office building at the east end of the lot, obstructs the view, so that it

would be impossible for a person passing through the alley from the west to the east to see a train approaching from the south, except at a point at or near the east end of the alley where it intersects Eighth street. Between the buildings on the east side of block 52 and the railway track there is nothing to obstruct the view to the south, except some telegraph poles. The plaintiff was the driver of a butcher's delivery wagon, drawn by a single horse. The seat on the wagon was at the front, flush with the end of the box, so that the driver occupying the seat would sit with his feet resting on the foot-board extending out from the bottom of the box. The plaintiff was hauling meat from the supply house of a packing establishment, and, in company with a companion, who occupied the seat on the wagon with him, drove through this alley from the west to the east onto the railway track, where his wagon was struck by a freight car then being moved from the south to the north, and as a result he sustained injuries, on account of which the action was brought. The horse was gentle, and being driven by the plaintiff.

The plaintiff, as a witness in his own behalf, testified that he had driven over that route almost every day for several months. He knew the location of the railway track; the location of the buildings; that it was his usual way to come back from the meat house; that the horse was trotting up the alley, and continued to trot in the same way until he, the plaintiff, saw the cars. As to when he saw the train he testified as follows: "Q. Tell the jury when you first saw the train. A. When I first saw it, it was right about two feet, I guess, from me. Q. You don't know what it was called your attention to the cars? A. No, sir; I don't know as to what it was exactly—the rattling of them I guess." Questioned as to an effort to jump, he answered: "I looked at the cars, and if I had jumped on my side I would have jumped under the wheels of the car." This testimony showed that his sense of hearing and eyesight were both good. Both he and his companion testified that they did not hear

either a whistle or a bell, or other warning of the approaching train. His companion testified that he discovered the train when about 15 feet west from the track; that at that time the train was probably 17 feet from the alley crossing, meaning, doubtless, from a point where the alley, if extended east, would intersect the railway track; that he jumped out from the north side of the wagon and alighted about the center of the platform, between the buildings on the north of the alley and the railway track, and was unhurt. One witness on behalf of the plaintiff testified that he heard the train whistle as it rounded a curve into Eighth street, about two blocks below where the accident occured; that he did not know whether any warning signal was given after that or not. It appears from the evidence that the train was moving at the rate of five or six miles an hour, and an ordinance of the city of Lincoln, in force at the time of the accident, provided that no train, engine, car or truck, should be run over any railway within the corporate limits of the city of Lincoln at a greater rate of speed than four miles an hour, and that a bell of at least 30 pounds' weight should be continuously rung by the engineer or fireman in charge of the engine, while passing over any railway within the corporate limits of the city.

The question is thus fairly presented whether, under this state of facts, the court will be justified in saying that the judgment cannot stand. This court has uniformly adhered to the doctrine that, where the existence of a state of facts is undisputed, and where upon such facts different minds may honestly draw different conclusions from them as to whether or not such facts establish negligence or the absence thereof, the question as to the conclusion to be arrived at is a proper question for the trial jury, and not for a court. It has as uniformly held that, where the facts are undisputed and the evidence disclosed that the party has failed in the performance of a clear legal duty, the question is one for the court, and not for the jury. The line is clearly drawn,

and it would be idle to cite or comment upon the authorities. The law imposes upon railway corporations certain duties which they are not at liberty to disregard, and, for the purpose of the determination of this case, it may be conceded that the defendant was guilty of negligence in the operation of its train, because of the failure to give the warning provided by the ordinance of the city. But the obligations do not all rest upon the railway corporation. Individuals are required to have some regard for their own safety. Every person of mature years and in the possession of his faculties is bound to make a proper use of them to avoid danger, and we are all required to take notice of the fact that a railway crossing is a dangerous place, and he who makes use of it must exercise that degree of caution commensurate with the danger; and where, as in this case, the view from the alley was obstructed, so that a traveler might not observe an approaching train until he reached the end of the alley, he is required to exercise a degree of caution commensurate with such surroundings, and to avail himself of every possible unobscured opportunity, and the omission of any reasonable effort likely to be effective is negligence as a matter of law. *Koester v. Chicago & N. W. R. Co.*, 106 Wis. 460.

The plaintiff testified that, as he approached the railway track, he listened, but there is no pretense that he looked. He might be excused for not hearing, because the noise of his own conveyance, as it was being driven over the pavement, might easily be sufficient to overcome the rumble of the train; but no excuse is offered for not looking, with 17 feet of open space between the buildings and the railway track; and, at least that distance from the point where he might have observed the danger, he had every opportunity to see and avoid it. His companion did so. The opportunity afforded his companion was no greater than that possessed by himself, and the only reasonable explanation of the accident is that the plaintiff failed to exercise that degree of cau-

tion and prudence which the law required of him in approaching the point of danger, and that his own neglect was the proximate cause of his injury.

We conclude that under the evidence the case should not have been submitted to a jury, and we recommend that the judgment of the district court be reversed.

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

JESSE LOWE ET AL., APPELLANTS, V. PROSPECT HILL CEMETERY ASSOCIATION ET AL., APPELLEES.*

FILED DECEMBER 6, 1905. No. 14,188.

1. **Courts:** INJUNCTION: VACATION. The district court, in the exercise of its general equity powers, is authorized and possesses jurisdiction to modify or vacate an order for a perpetual injunction, which it has allowed, after the term at which rendered, and at any time when the cause upon which it was granted has been removed and the danger of invading the rights of the plaintiff no longer exists.

1*a*. ———: EQUITY POWERS. The exercise of such jurisdiction does not rest on the statutory provisions for modifying or vacating judgments or final orders in the same court after the term at which such judgment or final order was rendered.

2. **Procedure.** Where facts have arisen since a final order was entered allowing a perpetual injunction, of such a nature that it is clear the decree ought not to be executed, relief against it may be given in a summary proceeding on motion to modify or vacate the same, provided the facts are undisputed.

2*a*. ———: QUÆRE. Whether proceedings of a summary character are permissible for such purpose or whether more formal proceedings are not required, when there is a substantial controversy regarding the facts on which the proposed action is to be predicated, *quære*.

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* Rehearing allowed. See opinion, p. 100, *post*.

3. **Judgment:** RES JUDICATA. A judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose.

3*a*. **Law of Case.** When a question in controversy has been once finally decided, it becomes the law of the case, and is binding on the parties and those claiming under or through them in all subsequent stages of the litigation.

4. **Cemetery:** INJUNCTION: ACTION OF CITY COUNCIL. Where, in an action in which the object is to enjoin the defendant from using a certain tract of land for the interment of dead bodies, one of the vital issues is whether such land is a part of an established cemetery, and it is in such action determined that it is not, a resolution afterwards passed by the city council of the city in which such grounds are situated to the effect that such disputed ground is a part of the cemetery, and is not therefore taxable, will not affect the question as litigated and determined, and will afford no sufficient basis for a modification or vacation of an order for a perpetual injunction restraining the defendants from the use of such ground for burial purposes.

5. **Evidence examined,** and it is found that there has been no material change since the entry of the final order allowing a perpetual injunction in respect of the wells on the premises of the plaintiffs, and the threatened dangers to them because of the pollution of the underground waters from which such wells are supplied by reason of the decomposition of dead bodies, if interred in the tract of land involved in the controversy, and that no such change has arisen since the rendition of the original decree in the action in respect of such matters as would justify the modification or vacation of the order of injunction therein allowed.

6. **Res Judicata.** A question tried and determined in an action in which a perpetual injunction is allowed cannot be relitigated on a motion to modify or vacate the order allowing such injunction.

7. **Cemetery:** INJUNCTION: CITY ORDINANCE. The cause upon which the order allowing a perpetual injunction against the use of a tract of land for burial purposes is not removed, and the threatened invasion of the plaintiff's rights is not obviated, by an ordinance of the city within which such tract of land is located, which authorizes the health commissioner in his discretion to provide rules and grant permits for the burial of dead bodies in a different manner than that ordinarily obtaining, by

covering the bottom and walls of the grave with a coat of mortar, so as to render the same impervious to the fluids arising from the decomposition of dead bodies.

7a. Injunction: VACATION: BURDEN OF PROOF. Where a defendant seeks the vacation of a perpetual injunction allowed after a trial in a civil action, the burden is on him to show that the threatened injury has been certainly overcome, not that it possibly may be.

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

Francis A. Brogan, for appellants.

C. A. Baldwin, G. W. Doane and *E. Wakeley, contra.*

HOLCOMB, C. J.

By a proceeding summary in character, on motion, the defendant association has applied for a modification or vacation of a final order of the district court for Douglas county rendered April 2, 1896, granting a perpetual injunction restraining the defendants from using a certain strip of land adjacent to Prospect Hill cemetery in Omaha, for the purposes of burial of the dead. On appeal to this court from the order of the district court allowing a perpetual injunction in the original action, the decree complained of was affirmed. *Lowe v. Prospect Hill Cemetery Ass'n,* 58 Neb. 94. Upon the filing of the motion to modify or vacate the order for a permanent injunction, theretofore granted, a notice or citation to show cause why the same should not be granted was issued and served on the attorney of record appearing for the plaintiffs in the original action, who appeared specially and objected to the jurisdiction of the court over the subject matter, and to its authority in such a proceeding to modify or vacate the order entered long prior thereto and after many subsequent terms had intervened, contrary to the provisions of sections 602 *et seq.* of the code. These objections were overruled; whereupon the plaintiff filed formal objections to the granting of the mo-

tion, and traversing many of the averments of fact found therein. Upon the issue thus formed, affidavits were filed and, after a hearing to the court upon the motion and the objections thereto and the affidavits filed by the respective parties, the court sustained the motion and entered an order vacating the injunction, theretofore allowed, and denying to the plaintiffs any relief whatever. The plaintiffs appeal.

A very full and substantially accurate statement of the case, with a plat of the grounds involved in the controversy, will be found in the opinion cited, *Lowe v. Prospect Hill Cemetery Ass'n, supra,* and need not here be restated. The defendants, by their motion, seek to be relieved from the effect of the order granting a perpetual injunction upon the following grounds, the substance of which only is herein stated: (1) That when the decree was rendered, the ground in controversy was found by the court to be no part of the first addition to Prospect Hill cemetery, and that to use such ground for burial purposes would have been in violation of one of the ordinances of the city preventing the establishment of cemeteries within the city limits, or of enlarging those already established. It is asserted in the motion that at the present time said ground is a part of Prospect Hill cemetery, has been so recognized by the city council, and that it would not now be a violation of city ordinances to use said ground for burial purposes. (2) The motion also sets forth that at the time of the rendition of the decree the plaintiffs had wells upon their premises, which, because of the probaility of pollution of the underground waters by reason of the decomposition of dead bodies, would be a menace to the health of those using such wells; and that now there is no well on said premises subject to pollution by reason of the burial of dead bodies in said ground. (3) It is further claimed that the soil in which the interments were to be made was at that time found by the court to be such as to permit the percolation of water through said ground and into the wells of the plain-

tiff, thereby endangering the health of those using the same; and that at the present time the ground is dry, compact, hard clay, and that the contour of the surface is such that it contains no water which can percolate through it. (4) The last of the grounds upon which the modification or vacation is asked is that, when the decree was rendered, there were no rules and regulations regarding the burial of the dead in such manner as to prevent the occurrence of any evil effects therefrom, but that since said time provisions have been made by ordinance for the creation of a tribunal to which is given power, and which is charged with the duty, of making all needful rules and regulations governing the burial of the dead as shall be required to fully protect the inhabitants of the city of Omaha, and all of them, from any and all evil effects that can arise from any burials made in any cemetery in the city.

1. The first contention of the plaintiffs, appellants here, is to the effect that the proceedings resorted to by the defendants and the order therein by the court in its vacation of the original decree are unauthorized; that the court was without power to vacate or modify its final decree at any succeeding term, except in the manner and for causes pointed out in the statutes. The question presented is an interesting one, but the objection is not, in our opinion, as grave as is contended for. The order allowing a permanent injunction which the court grants is in the exercise of its powers as a court of equity. Its allowance is predicated on the fundamental idea that the aggrieved party is without an adequate remedy at law. The constitution has clothed the district courts with the exercise of the equity powers possessed by the courts of chancery of England. These powers cannot be abridged by statute. Indeed, it has been frequently decided in this jurisdiction that the statutory methods for granting new trials, vacating and modifying judgments, decrees and final orders rendered at a prior term, do not deprive the courts of the right to exercise their general equity powers

for the relief of those whose cases do not come within the provisions of the statute. We perceive no good reason why this same right should not be exercised where a final order granting a perpetual injunction, because of the occurence of facts and conditions since its rendition, has become of no use or benefit to the one whose rights were thus protected or where it would be inequitable and against good conscience to longer enforce it. The power of the court to enforce and make effective its orders of injunction, and to punish as for contempt their violation, continues for all time. As a correlative there must also exist the power to refuse to punish for the violation of the orders, and to modify or vacate, as exigencies arising since their rendition may require. "The remedy sought was purely preventive; and, in such cases, it is perfectly well settled that a court of equity will not continue or make perpetual an injunction, after the cause upon which it was granted has been removed, and the danger of invading the rights of the plaintiff no longer exists." *Wiswell v. First Congregational Church,* 14 Ohio St. 31, 42. The injunction in this case is purely preventive. It restrains the defendants from doing the prohibited acts and nothing more. It prevents a threatened injury to, and incroachment of, the rights of the plaintiffs. It is not of the nature of a decree or judgment which, when executed, has served its purpose. Its force and effect continue so long as it shall remain without modification and unvacated. Those against whom it operates can only be relieved from its binding and enforceable character by the court granting the injunction. *Muller v. Henry,* 5 Sawyer (U. S. C. C.), 464. We are satisfied that, where a final decree has been rendered allowing a permanent injunction, as in this case, the court granting it possesses the undoubted power to either vacate or modify when the circumstances and situation of the parties have so changed as to render such action just and equitable, and this even though the statute may not have specifically provided for the exercise of such power. The

difficult question, in our view, is not as to the existence of the power, but as to how its exercise shall be called into action and the method of procedure with reference thereto.

2. It is objected, further, by the plaintiffs that the summary proceeding resorted to in the case at bar, whereby it is sought to have the question involved determined on motion supported by affidavits and opposed by counter-affidavits, is unauthorized and insufficient to support a final order or decree vacating and annulling the final order, theretofore entered, allowing the perpetual injunction. Whether or not, when there is a substantial controversy regarding the facts as to the right of a party to have an injunction modified or vacated, it is not required that more formal pleadings be had, the parties brought into court in the ordinary way as in an original action, and the issues of law and fact regularly made up, is not free from doubt. In *Wetmore v. Law,* 34 Barb. (N. Y.) 515, it is held that, where facts have arisen since a judgment was entered of such a nature that it is clear the judgment ought not to be executed, relief against the judgment may be given upon a motion to vacate the same, provided the facts are undisputed. In the opinion it is said:

"The first objection taken to the motion is that relief cannot be granted in this summary way against a solemn judgment of the court; that resort should be had to the writ of *audita querela,* and a formal issue made between the parties to test the truth of the matters alleged, and their legal bearing upon the judgment. I think the modern practice authorizes a resort to this motion, especially if the facts are undisputed. *Baker v. Judges of Ulster,* 4 John. (N. Y.) *191; *Davis v. Sturtevant,* 4 Duer (N. Y.), 148; *Clark v. Rowling,* 3 Comst. (N. Y.) 216, 221, 222, 226, 227. It has been frequently applied for the benefit of a party who has obtained a bankrupt's discharge, and who has had no opportunity, before judgment, to avail himself of that defense. *Lister v. Mundell,* 1 B. & P. (Eng.) 427; *Baker v. Judges of Ulster,* 4 John.

(N. Y.) 191; *Thompson v. Hewitt,* 6 Hill (N. Y.), 254; *Clark v. Rowling,* 3 Comst. (N. Y.) 216, 226. And if it be clear upon the facts presented, which are usually, perhaps always, facts arising after judgment, or after the time has passed, before judgment, in which the party can avail himself of them in the action—if it be clear that the new matter is of such a nature that the judgment ought not to be executed—then resort may be had to this summary proceeding, or the party may, at his peril, take the risk of disobeying the positive directions of this court, contained in the judgment itself." See, also, *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. (U. S.) 421.

The reasoning in the authority quoted from is adopted and followed in a later case in Minnesota, where precisely the same question arose. *Weaver v. Mississippi and Rum River Boom Co.,* 30 Minn. 477. Whether the controversy of fact arising in the case at bar takes it without the rule announced in the foregoing authorities, we need not here determine. This question goes to the form of procedure rather than the substance of the controversy. This case is here on appeal for a trial *de novo* on the record as presented, and not upon error for the correction of irregularities in the trial of the action in the court below. We may, for the present and in this case, waive the question of the method of procedure and address ourselves to an inquiry as to whether, on the merits of the controversy, the defendants are entitled to be relieved of the decree, which has become final, enjoining them from making use of the ground involved in the controversy for purposes of sepulture.

3. It is argued by the plaintiffs that the motion to modify or vacate filed by the defendants is an attempt to obtain a rehearing in the original cause and relitigate the questions therein determined. To this, counsel for defendants say that they make no attack on the original decree; that they accept the results of the litigation as determined by the decree in good faith and ask

only for relief because of changed conditions and circumstances arising since the rendition of that decree. We accept counsel's word regarding this phase of the case, and shall, as it is our duty to do, treat all matters and questions therein litigated as binding on both parties and as concluding their respective rights in reference thereto.

The rule is well settled that a judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose. *Slater v. Skirving,* 51 Neb. 108. When a question in controversy has been once squarely decided, the decision, if acquiesced in or if not recalled, becomes the law of the case, and is binding upon the parties and those claiming through or under them in all subsequent stages of the litigation. *Smith v. Neufeld,* 61 Neb. 699. In *Fayerweather v. Ritch,* 34 C. C. A. 61, a case where the principle of *res judicata* was applied to a question which renders it quite in point, it is said:

"By whatever process of reasoning the result was reached, it is plain that by the judgment of the state court it has been determined that the fund now in controversy equitably vested in the various corporations made legatees by the ninth clause of the will, and did not, as any part of it, belong to the complainants; and that determination was reached in an action, between the same parties now present, brought to settle the ultimate rights of each to the fund. As the present suit is brought to determine the rights of the same parties to the same fund, we are unable to doubt that the former judgment is an estoppel and a finality, not only as to every matter which was offered and received to sustain or defeat the respective claims of the parties to the fund, but also as to any other admissible matter which might have been offered for that purpose. It suffices to refer to *Cromwell v. County of*

Sac, 94 U. S. 351, as a complete exposition of the doctrine of estoppel, so far as pertinent to the present case."

We need not further pursue the inquiry into this branch of the case. It is obvious that the defendants are in these subsequent proceedings concluded by the original decree as to all matters urged as a defense in that action, as well any defense which might have been presented to defeat the plaintiff's demand for a permanent injunction restraining the defendants from doing the things therein prohibited. From the consequence of that decree, as to all such matters, neither of the parties can now escape. Our present consideration of the case is limited to an inquiry as to whether, because of subsequent changes in the situation of the parties and of facts since arising creating different conditions, the defendants ought in equity to be relieved from the force and effect of a just and valid decree entered against them.

4. The first ground of the motion to modify or vacate proceeds upon the theory that, while it was determined in the original action that the tract of land involved in the controversy was not a part of Prospect Hill cemetery, or the first addition thereto, it has, since the entry of the decree, become a part and parcel of the already established cemetery, so recognized by the authorities of the city of Omaha, and that, for such reason, the injunction ought not now to operate against this particular tract in dispute, no more than it ought to against the burial of the dead in the cemetery as then established. It is very evident that one of the vital issues tried and determined in the original action was whether the disputed tract was a part of the established cemtery grounds. In plaintiffs' petition, after describing what is mentioned as the cemetery grounds proper, it is alleged "that the southern boundary of the said cemetery proper lies more than 200 feet north of the lands belonging to the plaintiffs, as above described, and lies 127 feet north of the north line of Parker street, aforesaid"; and again, "but the plaintiffs say that the tract so occupied by them (defendants), as

aforesaid, included only that portion above described as Prospect Hill cemetery proper, and the tract inclosed by them for the purpose aforesaid included no other ground than the said cemetery proper." By these and other allegations it was positively averred that the tract involved in this controversy was no part of the established cemetery, known as Prospect Hill cemetery, nor of the first addition thereto, and that it was proposed to extend and enlarge the cemetery, as then established, so as to include the disputed strip. In the answer it is said: "Defendant says it is not true and it denies that the limits of Prospect Hill cemetery is now, or ever was, as set forth in plaintiffs' petition; * * * that it is not true that the southern boundary of Prospect Hill cemetery is now, or ever was, 127 feet, more or less, from the northern line of Parker street." It at once becomes manifest that the very groundwork of the original action was with reference to the question of whether the disputed tract was or was not a part of the Prospect Hill cemetery as then existing. There was no claim or contention on plaintiffs' part concerning an injunction against the burial of the dead in the cemetery then established. What was contended for was that, by the proposed enlargement of the existing cemetery by adding to and including therein the ground designated as "the disputed strip," a private nuisance would be created endangering the life and health of the plaintiffs, which would be an unlawful invasion of their property rights. Whether "the disputed strip" was or was not a part of the cemetery proper was of necessity involved in the decision rendered, and indisputably establishes the fact that it was no part of the then existing cemetery. The ordinances of the city then as now declare it unlawful "to enlarge, add to or increase the limits or boundaries of any cemetery space, ground, or burial place for the dead, not laid out, prepared, or set aside and intended for such purposes." It is true that, since the rendition of the original decree, the city council has, by resolution, declared the tract in dispute to have been cemetery grounds

and intended for burial purposes, and therefore exempt from taxation, and instructed the tax commissioner accordingly. Can this resolution have the effect of nullifying the solemn adjudication of a court of competent jurisdiction to the contrary? We think not. Nor can it be said to be such a change in the situation, surroundings or circumstances connected with the transaction as that the injunction ought, for that reason, to be vacated. The ordinance prohibiting the enlargement of any existing cemetery is still in force. The material findings and the adjudication in the trial of the original action to the effect that the plaintiffs' rights would be invaded, if the disputed tract were used for burial purposes, are in no way affected or lessened by the resolution of which mention has been made. So far as the parties to this suit are concerned, the question of the relation of the disputed tract to the cemetery proper has been adjudicated against the contention of the defendants, and, however so much the city council may resolve to the contrary, it cannot change the legal status of the parties in respect thereto.

5. It is next contended that the situation of the parties to the controversy in respect of the wells subject to pollution from the percolation of water through the soil has materially changed. Unfortunately for the defendants, there exists no reasonable doubt on the proposition that in this respect the situation is almost, if not quite, identical with what it was when the decree was entered. We observe no difference whatever. The same wells are there now as they were during the trial of the original action, and the same use is being made of them. In fact there does not appear to be but one well in use on the plaintiffs' property and one not in use. There are many other wells in the immediate vicinity. Accepting, as we do and as counsel say they do, the former adjudication as a finality on this question, there is left no room for substantial controversy regarding the situation of the parties now and as they were when the original decree was entered, and it must follow that there is no basis in law, nor in equity,

for a modification or vacation of the decree in regard to the matters just mentioned. The decision rendered on the former appeal has been much criticised because it is remarked that the wells of the plaintiffs would probably become polluted from waters percolating through the ground in the event human remains were interred in the tract of land involved in the controversy, when, in fact, as is claimed, there are no wells on the lands of the plaintiffs that can possibly be injured from this source. It may be remarked, in passing, that the opinion as we interpret it decides, in substance, that the plaintiff's lands were in the residential district in the city of Omaha, and in a locality where those living thereon must rely for their supply of water upon wells dug for that purpose; that the underground waters from which the wells were supplied would, in all reasonable probability, from the evidence in the case, become infected with bacteria from the decomposed bodies of those dying with contagious and infectious diseases, thereby rendering such waters unfit for human consumption, and menacing the health and life of those using the same; that the proposed cemetery would constitute a private nuisance, and would, if permitted to be used as such, wrongfully encroach upon the rights of the plaintiffs and prevent them from enjoying the reasonable and comfortable use of their property, be a menace to health, and render the locality unsuitable for residences, for which purposes only it was adapted. The same reason which impelled the city by ordinance to make it unlawful to enlarge existing cemeteries or establish new ones in the corporate limits, to wit, regard for the comfort, health and life of its citizens, guided the court in the enforcement of those principles which insure to the citizens protection from the actions and conduct of others calculated to prevent their enjoyment of these same blessings.

6. It is further contended that the condition of the soil has materially changed from the condition it was in at the time of the original decree as found by this court in the opinion cited. There is no merit whatever in this con-

tention and, at best, it deserves only a passing notice. The condition has in nowise changed. Some additional evidence of a cumulative character in the form of affidavits was introduced at the last hearing. The evidence taken at the former trial was also introduced on the last hearing. We cannot possibly consider this matter without retrying the question heretofore litigated and adjudicated, and this we decline to do.

7. Lastly, it is contended that, because of the adoption of an ordinance, having for its object the promotion of the health of the citizens of Omaha, and in which there is conferred on certain officers authority to regulate the manner of the burial of the dead, the order allowing a permanent injunction should be modified or vacated. To this it may be said, first, that there is an ordinance in existence prohibiting the enlargement of an existing cemetery; second, that it has been determined, as we have seen, that the use of the "disputed strip" would be an enlargement of an existing cemetery in violation of such ordinance; and, third, the ordinance referred to does not profess to provide with certainty any regulation as to the manner in which dead bodies shall be interred, and that, so far as the ordinance goes, the interments may be made in the ordinary method and as it was contemplated they would be when the perpetual injunction was allowed; and, fourth, it is by the ordinance left discretionary with the commissioner of health whether he will or will not adopt a different method than is ordinarily resorted to, and by his affidavit introduced in evidence he says he has no intention of doing so. The ordinance reads: "The commissioner of health, when, by reason of the locality in the cemetery where the burial is to be made, he may deem it necessary or advisable for the preservation of the health of the inhabitants of the city, may require, and so direct in the permit issued by him for the burial of said body, that the bottom of the grave and the walls thereof extending above the casket containing the body shall be covered with a coat of mortar made of sand and cement, so as

to render the bottom and walls of said grave impervious to the fluids arising from the decomposition of the dead body." Whether the method proposed, even if adopted, would obviate the threatened danger found to exist, or would aggravate the same, we are left entirely in the dark. Of course the burden would be on the defendants to show that the threatened injury had been certainly overcome, not that it possibly might be. To vacate the injunction on this ground would be to remand the plaintiffs for any relief they are entitled to to the commissioner of health. It would be for the court to abdicate some of its functions in favor of that officer, and to leave the matter wholly to his discretion. If he sees fit to omit the requirement contemplated by the ordinance, it cannot be doubted that he is at liberty to do so, in which event the plaintiffs would be altogether without a remedy, notwithstanding it has been adjudicated that they are entitled to relief. The ordinance does not meet the requirement, even conceding it to be proper and effectual, which we do not now stop to inquire, in that the reasons which impelled the allowance of the injunction are as strong as when granted, and it wholly fails to show that the objections to the use of the disputed ground for burial purposes are overcome or obviated thereby. The most that can be said of the ordinance is that it is an exercise of the police power which the city has always possessed, and that the exercise of such powers and the adoption of ordinances in pursuance thereof would not deprive the courts of their inherent power to protect property rights by granting injunctions against maintaining nuisances, and of enforcing the same. This same question was in a measure considered in the former opinion. The adoption of the ordinance does not materially change the situation. Whether the ordinance existed at the time of the trial, or has since been adopted, it would not have prevented the granting of the injunction in the first place, nor would its adoption afterwards be sufficient ground upon which to base a vacation of the order after it had once been rightfully

entered. The learned judge hearing the application to vacate the decree in the court below found that the matters heretofore discussed, arising in the manner stated, constituted sufficient grounds, and showed such changes in the situation of the parties and of the conditions surrounding the land involved in the controversy as to justify the vacation of the permanent order of injunction. We are, for the reasons heretofore given, unable to coincide with the conclusions reached in the trial court. It follows that the order vacating the decree making the injunction perpetual must be reversed and this proceeding dismissed, and it is accordingly so ordered.

REVERSED.

The following opinion on rehearing was filed September 21, 1906. *Judgment of reversal adhered to:*

LETTON, J.

A statement of the facts in this case may be found in the opinion upon the original decree, *Lowe v. Prospect Hill Cemetery Ass'n,* 58 Neb. 94, and in the opinion upon the application to modify the injunction, *Lowe v. Prospect Hill Cemetery Ass'n, ante,* p. 85.

The original injunction was granted upon two grounds: (1) That interments in the disputed strip of land would pollute and poison the water in the wells of the plaintiffs; that by such interment the health and lives of the inhabitants of the locality would be endangered, the use and enjoyment of the plaintiffs' property interfered with and their real estate rendered valueless, and that such use would constitute a private nuisance at common law. (2) That the use of the land for interring therein dead bodies would violate the ordinances of the city of Omaha. While counsel for the defendants insist that it is impossible to tell from the decree upon what ground the injunction was granted, it appears that the defendants were enjoined from in any manner establishing a cemetery on the disputed strip and from enlarging the limits of Prospect

Hill cemetery so as to include the said disputed strip, or any part thereof; also, from causing any burials to be made, and from selling or using any portion of said strip for the purpose of interring human remains or for the purpose of sepulture. It is clear that such a decree is based not alone upon the existence of a private nuisance, but upon the fact that the disputed strip was not at that time cemetery ground, and that the city ordinance prohibited the establishment of new cemeteries or the enlargement of old ones within the city limits.

At the first hearing of the case in this court upon appeal (*Lowe v. Prospect Hill Cemetery Ass'n,* 58 Neb. 94), it was said by RAGAN, C.:

"We have carefully studied both the history and the argument, and have not the slightest doubt that the ordinances of the city of Omaha forbid the cemetery association from interring dead bodies in the strip of land in controversy, and, without determining whether the appellees made such a showing as would entitle them to this injunction because the interring of dead bodies in the land by the cemetery association would violate the ordinances of the city of Omaha, we proceed to inquire whether the decree of the district court can be sustained upon the ground that the use proposed to be made by the cemetery association of its ground would constitute a private nuisance at common law."

The remainder of the opinion of Mr. Commissioner RAGAN is mainly devoted to a consideration of this question, and the question as to the prohibition of interment therein by ordinance is not further considered.

Since the rendition of the original decree the city council has declared the disputed tract to be cemetery grounds, and thus, in effect, attempted to set aside an adjudication by a court of competent jurisdiction to the contrary. Upon renewed consideration of the facts and the law upon this branch of the case, we are fully satisfied that the action of the city council could in nowise affect the legal status of the parties, and on this point we ad-

here to the reasoning and conclusion of the former opinion by Chief Justice HOLCOMB.

It is contended by the defendants that sufficient change has been shown in the conditions and circumstances of the case to justify a modification of the injunction, among other things, by the adoption of a health ordinance by the city council of Omaha, in which the regulation of the manner of the burial of the dead so as to prevent the dangers of pollution of waters or spread of disease is placed within the power of the commissioner of health; but at the time of the passage of the health ordinance granting such powers the ordinance prohibiting the enlargement of cemeteries or the interment of dead bodies therein was still in full force and effect. As is pointed out by Chief Justice HOLCOMB, the ordinance relied upon does not repeal the ordinance prohibiting burial within the tract. It consequently could have no effect as to the premises in dispute, and, as is shown in the former opinion, the adoption of the ordinance does not materially change the situation. After consideration of all the evidence we are in accord with the finding of the district court, and the conclusion arrived at by Mr. Commissioner RAGAN and Chief Justice HOLCOMB, that the fact is established by a preponderance of the evidence that the disputed strip was no part of the then existing cemetery at the time of the passage of the ordinance prohibiting the enlargement of cemeteries within the city. We think no other change of circumstances of any effective character has been shown to have taken place.

It is urged by the defendants that, conceding that the preservation of the plaintiffs' right to be protected from the evils caused by interment in the disputed tract may not properly be preserved by the provisions of the health ordinance of the city of Omaha granting power to the health commissioner to prescribe rules for interment, still, the cause should be remanded to the district court, with directions to allow further pleadings and proofs, if necessary, to ascertain whether or not such restrictions and

regulations of the right of sepulture can be made so as to prevent injury to the plaintiffs, and, if it be found that the rights of the plaintiffs may be protected by proper regulations, then that the court modify the injunction so as to allow burials to be made under regulations and conditions prescribed in its decree. Were it not for the existence of the ordinance forbidding interments, this request would be seriously considered by the court, but to modify the decree so as to permit or authorize or countenance such interment upon the premises would be in plain conflict with the provisions of the ordinance and would put the court in the position of at least impliedly sanctioning a violation of law. While it is possible that the plaintiffs, without the existence of some special injury to them different from that to the public at large, might not have been entitled to an injunction in the first place merely upon the ground that the defendants proposed to violate, or were violating, ordinances of the city, still both elements were pleaded, found to have been proved, and entered into the decree, viz., the existence of an ordinance making it unlawful to perform the prohibited acts, and the existence of the right on the part of the plaintiffs to insist upon obedience to the ordinance by the defendants on account of special injury to their property.

While we appreciate the sentiment which has moved the distinguished and venerable counsel for the defendants to persevere in the great labor they have performed in this case, and while we would be gratified to grant them the relief sought, we are of the opinion that the conclusion reached in the former opinion is right and should be adhered to.

REVERSED.

SARAH S. FALL, APPELLEE, V. EDMUND W. FALL ET AL., APPELLANTS.*

FILED DECEMBER 6, 1905. No. 13,737.

1. **Courts:** JURISDICTION. The court of one state cannot by its decree directly affect the legal title to lands situated in another state, but, "if all the parties interested in the land are brought personally before a court of another state, its decree, establishing their equities in the land, would be conclusive upon them and thus in effect determine the title." *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333.

2. **Judgments of Sister States:** FEDERAL PROVISIONS. When the courts of a sister state having jurisdiction of the parties, and of their equitable rights in all of the property owned by one or both of them, by its findings and decree determine those rights, such decree must, under the provisions of the federal constitution, be given full faith and credit by the courts of this state.

3. ———: DIVORCE: DECREE AS TO PROPERTY. The statute of the state of Washington, quoted in the opinion, as construed by the courts of that state, give the courts jurisdiction in the trial of a divorce case to make distribution between the parties of all of the property possessed jointly or severally by the parties upon principles of general equity, "having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired." When both parties to the divorce proceedings in that state have appeared before the court, being a court of general jurisdiction, and have asked the court to distribute their property, including land in this state, and the court by its decree has done so, its decree is conclusive of the equities of the parties in the real estate situated in this state.

4. **Possession of land** is notice of equities; and a purchaser of land from one not in possession takes it subject to the equitable right of one in possession thereof.

APPEAL from the district court for Hamilton county: SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

Hainer & Smith, for appellants.

Thomas H. Matters and *Stark & Grosvenor*, *contra.*

* Rehearing allowed. See opinion, p. 120, *post.*

SEDGWICK, J.

This controversy relates to a quarter section of land in Hamilton county. The plaintiff bases her right in the land upon a decree of the superior court of King county in the state of Washington. In 1876 the plaintiff and Edmund W. Fall intermarried in the state of Indiana. Afterwards they removed to this state and became the owners of the quarter section of land now in controversy. After residing here for some years they removed to the state of Washington, and, being residents there, an action for divorce was begun by the plaintiff's then husband. In this action she answered, denying that any cause for divorce existed against her, and in her cross-petition she asked that it might be found that she was entitled to a divorce, and that a decree in her favor be rendered accordingly. The court decreed a divorce in her favor and also by the decree gave her the land in dispute herein. Under this decree the plaintiff took possession of the land in October, 1895, and has ever since been in the actual possession and occupancy of the land. Afterwards her former husband, the said Edmund W. Fall, conveyed the land in question to the defendant Elizabeth Eastin. The plaintiff brought this action, setting out a full statement of the rights which she claimed in the land and the facts which she claimed supported these rights, and prayed, among other things, that her title in the land be quieted and "for all other proper and equitable relief." Much is said in the pleadings and evidence in regard to the conveyance from Edmund W. Fall to the defendant Elizabeth Eastin, who is his sister, it being claimed, upon the one side, that the land was purchased by Mrs. Eastin in good faith and for full consideration, and, on the other, that the sale was fraudulent. But as Mrs. Fall took possession of the land under the decree before the conveyance to Mrs. Eastin, the latter would, of course, be charged with constructive notice of the rights of the plaintiff, and, as against the plaintiff, would take no

further or greater rights than those of her grantor in the conveyance. We will first inquire as to the effect of the decree, and the rights, if any, that the plaintiff took thereunder in the land in question.

1. At the time the divorce proceedings were pending in the state of Washington, and when the decree was rendered therein, the statute of that state provided: "In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage." 2 Codes & St. sec. 5723, p. 1598. It is contended that the decree entered in pursuance of this statute in the state of Washington could have no extraterritorial effect upon real estate situated in another state, or the rights of the parties therein, and this appears to be the gist of the whole contention between the parties. It is clear that the statute in question gives to the court in divorce proceedings complete equitable jurisdiction over the property of the parties situated within the state. The language is apt and pertinent for that purpose. A court that makes a just and equitable disposition of the property of parties litigant in an action is a court of equity and the distribution of the property is, at least in part, the subject matter of the litigation. If, indeed, there could be any doubt in other jurisdictions as to the intention of the legislature in enacting this law, and the force and effect thereof in conferring equitable powers upon the trial court, that doubt has been resolved by the supreme court of that state. In *Webster v. Webster*, 2 Wash. 417, the court, in construing this statute, said:

"This statute, however, provides that when coverture is to be broken, and the marriage relation dissolved, the

parties shall bring into court all their property, and a complete showing must be made. Each party must lay down before the chancellor all that he or she has, and, after an examination into the whole case, he makes an equitable division. * * * We are clearly of the opinion that par. 2007 of the code confers upon the court the power, in its discretion, to make a division of the separate property of the wife or husband."

And, indeed, the parties themselves so considered it. The plaintiff in that case set out a description of the land here in Nebraska, with other property owned by the parties, alleged its value, and asked the court to make an equitable disposition of it under this statute; and the plaintiff here, who was the defendant in that action, also in her cross-petition described this land, and asked the court to determine the rights of the parties to all the property which they owned, including this land in question. The findings and decree of that court were full and covered all of the issues in the case presented by the pleadings, and adjudged the issues so determined in favor of the defendant in that action, who is the plaintiff here. It may be further observed that in that case it was alleged in her cross-petition, by this plaintiff, that the parties to that action had, by their joint efforts as husband and wife, accumulated the property which they held, including the land in question here; and the court especially found that that allegation of her cross-petition was true, and that the property which Mr. Fall had already used for his personal benefit, together with that given him by the decree, was his equitable part of all the property of both parties. The same allegations are embraced in the petition in this case, and the trial court found especially that they were true, and that the plaintiff had contributed equally to the accumulation of the property, including this land in dispute. The findings of fact of the trial court in this case are also quite comprehensive. These findings were not questioned in the oral arguments, nor do the briefs point us to any fail-

ure of the evidence to support them. We will, therefore, in the further consideration of the case, consider these findings as the established facts in the case.

Giving full faith and credit to the decree of the Washington court, as the federal constitution requires us to do, the question is what rights in the land in question the plaintiff derives from that decree. It is suggested in the brief that, "on a cause of action which is purely local, a judgment respecting property that is not within the jurisdiction of the court rendering the judgment should not be enforced by the courts of another state where the property is situated." In pursuance of this argument a quotation is made from 2 Black, Judgments, sec. 933, where it is said that, if a judgment in an action for divorce goes further than to determine the status of the parties, and assumes to adjudicate other matters, no personal liability can be imposed on the defendant, "unless there is jurisdiction of his person acquired by a proper service of process." We do not quite understand why this argument is made. In this case the defendant here was the plaintiff in the divorce proceedings and, of course, there could be no question of jurisdiction of his person.

It is contended in the briefs that the decree of the Washington court and the proceedings afterwards had in that court pursuant to the decree did not and could not have the extraterritorial effect to transfer any title, either legal or equitable, in the land situated in this state to the plaintiff in this action, and that she cannot maintain this action without such title. The foundation for this contention is that, under our statute, in an action to quiet title the plaintiff must allege and establish on the trial either a legal or equitable title. It is essential that "he have title, and the relief must be obtained on the strength of his own title, and not on the weakness of his adversary's." But this suggestion, of course, assumes the proposition that is being discussed. The question under consideration is whether the plaintiff obtained any title, either legal or equitable, in this land by virtue of that decree.

Thus, in *Blodgett v. McMurtry,* 39 Neb. 210, one of the cases cited by the defendant upon this question, it is said:

"In an action having for its object the declaration of a trust in land in favor of the plaintiff and the quieting of title in him, it is incumbent upon the plaintiff to affirmatively establish an equitable title in himself, and if he fail to do so, the nature of defendant's title or the existence of any title in defendant, is immaterial."

By the statutes of this state the court in a divorce proceeding has no power to set apart real estate to either party or to make any equitable division of the real estate of the respective parties. And it is urged in the brief that our courts would not be competent to render such a decree as was rendered by the superior court of Washington, and from this fact it is argued that by the decree in the court below an effect was given to a judgment of a sister state which no court in this state could have rendered. But in our state the courts may in divorce proceedings adjust the equitable rights of parties in property, if such equitable rights exist, and judgments for alimony in divorce cases become liens upon real estate of the party against whom they were entered, and by a sale under such lien the title to the real estate is transferred. The question therefore raised by the foregoing suggestion is one of practice rather than one of substantive law. The methods provided by the law of Washington for adjusting the rights of the parties to a divorce proceeding cannot be said to be in conflict with the general policy of the laws of this state. On the other hand, the results aimed at are, in substance, the same, the intention in both states being to give each party a fair share of the property which they have accumulated in common. The superior court of Washington is a court of general jurisdiction. It has full power to settle all equities of the parties, and by the statutes of that state it was confided to the court to make an equitable adjustment and distribution between the parties of all the property owned by them both, or, in the language of the

court of last resort in that state, it is the duty of the parties to an action for a divorce to bring into court all their property. "Each party must lay down before the chancellor all that he or she has, and, after an examination of the whole case he makes an equitable division." No clearer language than this could be used to indicate that the divorce courts there have general equity jurisdiction over the property and property rights of the parties, and that the decree of the court in such a case is a decree in equity as to the property of the parties, and fixes and disposes of their property rights in the same manner as do decrees in equity in courts of general jurisdiction in actions brought for the purpose of determining the equities of the parties in specific property. It cannot, of course, be doubted that, if by the law of the state where the parties reside one of the parties is given equity in property, and, in a proper case for that purpose, the courts of that state find and adjudicate that right to exist, the courts of another state will not refuse to recognize that decree, and give the full faith and credit, solely on the ground that under its laws the equitable rights of the parties could not have been adjudicated in the form of action used in the court rendering the decree. We see no reason why the rules that obtain in the adjudication and adjustment of partnership rights would not be applied here. In an action in equity to settle partnership affairs the property of the partnership is considered to be in court for the purpose of the full adjustment of the rights of the partners in the property; and so here, the law required that all of the property of the parties to the divorce proceedings be brought into court, so that the court might do what the statute required it to do—"make such disposition of the property of the parties as shall appear just and equitable"—and when the parties have by their pleadings so brought the property into court, we see no reason why the force and effect of the decree should not be as full and complete as in

similar proceedings for the adjustment of partnership rights and equities.

In *Burnley v. Stevenson,* 24 Ohio St. 474, the court declared the rule to be:

"A court of equity in one state, having acquired jurisdiction over the persons of the parties, may enforce a trust, or the specific performance of a contract, in relation to land situate in another state. Although the decree in such case, or the deed of a master executed in pursuance thereof, cannot operate to transfer the title to such lands, yet the decree is binding upon the consciences of the parties, and concludes them in respect to all matters and things properly adjudicated and determined by the court. When the decree in such case finds and determines the equities of the parties in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action, or as a ground of defense in the courts of the state where the land is situated; and it is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud."

In an action for that purpose in the courts of Kentucky, a judgment was entered, decreeing the specific performance of a contract to convey lands in Ohio. Parties who derived title from the plaintiff, who obtained the decree in the Kentucky court, set up that decree as a defense in an action in Ohio brought to recover possession of the land in the latter state. The defense was sustained. The court said:

"That courts exercising chancery powers in one state have jurisdiction to enforce a trust, and to compel the specific performance of a contract in relation to lands situate in another state after having obtained jurisdiction of the persons of those upon whom the obligation rests, is a doctrine fully settled by numerous decisions."

Counsel for the defendant in their brief quote at length

from the statement of facts in the opinion in this case, and then say: "This statement of facts clearly shows that the action in the state of Kentucky was based upon the contract to convey by Scott, the ancestor of plaintiffs. When a suit is instituted upon a contract and the court acquires jurisdiction of all the parties to be affected thereby, its judgment is a legal construction of that contract and will bind the parties. Such construction, which becomes a part of the contract, can be plead as the true and legal construction, although a suit thereon be instituted in a foreign jurisdiction." But such judgment of the court not only affects, but necessarily determines the rights of the parties to the land lying in another state; so that it is not correct to say that no judgment of a court of one state can affect the rights of the parties in real estate lying in another state. Again, if the courts of one state have jurisdiction to affect and virtually determine the equitable rights of parties in real estate lying in another state by construing the contracts of the parties in relation thereto, that is, by determining what equities between the parties their contracts have raised, why may they not also determine what equities between the parties the law and their respective contributions to accumulating the property, and their conduct toward each other have raised? Counsel say that "such construction, which becomes a part of the contract, can be plead as the true and legal construction, although a suit thereon be instituted in a foreign jurisdiction." That is to say, in a suit in one state to establish equities in land and to quiet title thereto, the plaintiff may plead the judgment of the courts of another state determining what his rights in the land are, if those rights arise from a contract; and such judgment is conclusive, it will not admit of contradiction. But if the rights of the plaintiff depend upon equitable considerations arising from the relation and the condition of the parties, and the amounts they have respectively contributed toward its purchase, such judgment has no binding force. This distinction seems not

to be based upon any difference in principle. The Washington court, as has already been suggested, by the law of that state, had undoubted jurisdiction of all of the equities of the parties, and it was expressly made the duty of the court, by the law of the state, upon separating the parties, to adjust and declare what their equitable rights were in all of the property which they both possessed. We do not see why its judgment upon these issues should not have the same force in determining the rights of the parties to real estate situated in another state, as though those rights originated in an express contract between them.

In *Pingree v. Coffin,* 12 Gray (Mass.), 288, 304, the court said:

"The fact of the *situs* of the land being without the commonwealth does not exempt the defendants from jurisdiction, the subject of the suit being the contract, and a court of equity dealing with persons, and compelling them to execute its decrees and transfer property within their control, whatever may be the *situs.* These defendants having been found within the jurisdiction of the court, and served with its process, and having appeared and answered originally without objection to the jurisdiction, will not be presumed to be without its jurisdiction so that its decrees cannot be executed. If such event should occur, it will be time to determine what remedies the plaintiff might have. But it seems that their personal property within the commonwealth might be sequestered. 2 Daniel, Chancery Practice, 1236, 1237. The court might retain the bill, and, under the general prayer for relief, mould the decree to one of damages for nonconveyance. *Andrews v. Brown,* 3 Cush. 136; *Peabody v. Tarbell,* 2 Cush. 226. And a decree of this court might be a foundation for other courts to compel performance specifically."

In the state of Washington, in an action to dissolve marriage, the subject of litigation is the marriage status, and the equitable rights of the parties in the property of both upon their separation, and so, the action being *in*

personam, a decree of that court in such action "might be a foundation for other courts to compel performance specifically."

Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. Rep. 333, was an action brought in Iowa to compel reconveyance of real estate situated in that state on the ground of the defendant's failure to advance money thereon as agreed. A defense set up in the action by an amended answer was that a judgment had been recovered in the state of New York in an action involving the same question and between the same parties. The validity of this defense was denied upon two grounds, as shown in the opinion of Mr. Justice Brewer, as follows:

"Upon these facts we remark that as the land, the subject matter of this controversy, was situate in Iowa, litigation in respect to its title belonged properly to the courts within that state, *Ellenwood v. Marietta Chair Co.,* 158 U. S. 105, 107, although, if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them and thus, in effect, determine the title."

The other reason given was that the defendant in the Iowa case, who held the title to the land, although he obtained his title from a party to the New York decree, was not in privity with him because he obtained his title before the commencement of the New York action. It is said in the syllabus:

"A grantee of lands is not bound by a judgment rendered in an action commenced against his grantor subsequent to the conveyance."

From which it appears that, if the New York action had been begun before the conveyance of the Iowa land to the defendant and he had been a party to the New York decree, he would have been bound by that judgment, and would have been compelled by the Iowa court to convey the land.

In the defendant's brief we are earnestly requested to carefully consider *Bell v. Bell,* 181 U. S. 175, 21 Sup. Ct. Rep. 551; *Streitwolf v. Streitwolf,* 181 U. S. 179, 21 Sup.

Ct. Rep. 553; and *Andrews v. Andrews,* 188 U. S. 14, 23 Sup. Ct. Rep. 237. In *Bell v. Bell,* it is held that "no valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled." The recital in proceedings for divorce of the facts necessary to give jurisdiction may be contradicted in a suit between the same parties in another state. The other cases mentioned are similar to this. The point, however, relied upon in these cases, we suppose, is to be derived from the opinion, in which it is held that an action for divorce, that is, to dissolve the marriage status between the parties, is a local action, and that no court has jurisdiction to dissolve the marriage status, except the court of the domicile of the parties, or one of them. We do not see how this proposition has any bearing upon the question involved here. Both of these parties were domiciled in the state of Washington at the time of the divorce proceedings, so that the courts of that state had jurisdiction of their marriage relation, and, by the laws of that state, that court was also given the further jurisdiction to determine and adjust the equities of the parties in the property of both.

Again, it is sought to draw an argument from the language used in the decree of the Washington court. It was adjudicated that the land in question "be, and the same hereby is, set apart to the defendant Sarah S. Fall as her own separate property, forever, free and unincumbered from any claim of the plaintiff thereto." The law required the court to determine the equitable rights of the parties in all of their property, and it is possible that language might be selected to more nearly correspond with the requirements of their law in that regard. The court found that the defendant therein, Sarah S. Fall, "is entitled to a decree of this court setting apart to her as her own separate property, forever, * * * a certain tract of real estate, to wit" (describing the land in question), and the language of the decree is sufficient, as far as formalities are concerned, to adjudicate her

equities in the land. The defendant asks in his brief: "Was the title to the land in question at issue in the divorce suit, and did that court possess jurisdiction to determine the question of title? We think it should rather be said that the right to the land was in issue, and the equitable right to have title, rather than the legal title itself.

Our attention is also called to *Kline v. Kline,* 57 Ia. 386, 42 Am. Rep. 47. In that case the wife and children were residing in Iowa, the husband was a resident of Wisconsin and there obtained a divorce from his wife upon the ground of desertion. The service was by publication only. The wife had no notice nor actual knowledge of the legal proceedings. The decree of the Wisconsin court gave the husband the custody of the children. The supreme court of Iowa refused to enforce this decree. Its reason is stated in a quotation which the court makes from *Woodworth v. Spring,* 4 Allen (Mass.), 321:

"Every sovereignty exercises the right of determining the *status* or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens, while they are residing on the territory and within the jurisdiction of an independent government. * * * The question whether a person within the jurisdiction of a state can be removed therefrom depends, not on the laws of the place whence he came or in which he may have his legal domicile, but on his rights and obligations as they are fixed and determined by the laws of the state or country in which he is found."

If the law of Wisconsin had given their courts jurisdiction in a divorce proceeding to determine the custody of the children, and if both parties had there appeared and submitted themselves to the jurisdiction of the court, and had asked the court to determine to which party the custody of the children should be given, the Iowa court might still have refused to banish the children from its

state because of the personal rights of the children themselves; but the case would have been very different from the one presented to and determined by the Iowa court.

The case of *Bullock v. Bullock,* 52 N. J. Eq. 561, 30 Atl. 676, is much relied upon by the defendant. Indeed, this is the only case to which our attention has been drawn which conflicts in some degree at least with the conclusion which we have reached. The opinion of the court as announced by Magie, J., appears to contain language which in its literal meaning supports the contention of the defendant. The wife had obtained a divorce in the state of New York, with a decree for permanent alimony, and also decreeing that the husband should execute a mortgage upon land situated in the state of New Jersey to secure the payment of the alimony. An action was brought in the state of New Jersey to compel the specific performance of this decree by executing the mortgage upon the lands in that state. The court held that such a decree would not be enforced in the state of New Jersey. In the opinion it is stated that the petition alleged that the action commenced in New York was for the purpose of dissolving the marriage of the parties, and alleged that the court had jurisdiction of the case. The writer of the opinion said:

"I find difficulty in determining how extensive a jurisdiction is thereby asserted to have inhered in the supreme court of New York. * * * From these statements it was obviously to be assumed that the court in question had jurisdiction to decree a divorce and annul a marriage. But is it to be inferred—for there is no express averment of it—that the same court possessed jurisdiction to fix the amount and require payment of alimony, and especially to require a defendant to secure the payment of alimony by a charge upon lands lying beyond the territorial jurisdiction of the court? Alimony is, in general, an incident of divorce. It may be justifiable to infer that a court empowered to dissolve the bonds of matrimony would also be clothed with authority to

determine on the amount of alimony and to render judgment therefor. But how, without some further averment, is an inference to be drawn that the same court was authorized to require security for the payment of alimony to be given by the mortgage of lands and of lands beyond its jurisdiction?"

One member of the court concurs in the conclusion solely upon the ground expressed in the above quotation, and five members of the court refused to agree to the conclusion reached, so that the language of the remainder of the opinion, which one member of the court, at least, who concurred in the conclusion, thought unnecessary to the determination of the case, and from which five members of the court dissent, is not to be regarded as authority of a controlling nature. Van Syckel, J., in his dissenting opinion said:

"The New York court having jurisdiction of the person of the husband and also of the subject matter of the suit there, the judgment in that state, as between the parties to that suit, was conclusive of the right of the wife to have the husband execute a mortgage upon the New Jersey lands, although it did not of its own force create a lien upon the lands. As to the title to such lands, it had the effect of an admitted legal contract or obligation by the husband to convey and should be enforced in equity here. A judgment in New York that a party defendant shall specifically perform a written contract to convey lands in New Jersey would furnish no better foundation for the interference of our court of equity than the judgment relied upon in this case. In what respect they differ in principle is not apparent. In either case obedience to the mandate of the federal constitution would give effect to the judgment here."

The reasoning of the minority opinion is more satisfactory to our minds, and we think is in harmony with the better authorities. It may further be observed that this case is distinguishable from the one at bar. This

will be observed from a consideration of the concurring opinion of Mr. Justice Garrison, who said:

"That only is *judgment* that is pronounced between the parties to the action upon the matters submitted to the court for decision. To judgments thus rendered, the federal law accords in every state the same conclusive force possessed in the state where they are rendered. After judgment in a state court, all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution or in aid of execution. No interpretation has ever been placed upon the federal constitution giving conclusive effect, or, indeed, any effect at all to the executions of the judgments rendered in sister states or to any order merely in aid thereof."

This view appears to have been unanimously taken by the chancery court when the case was there considered. 51 N. J. Eq. 444, 27 Atl. 435. In the case at bar it seems that the Washington judgment was "pronounced between the parties to the action upon the matters submitted to the court for decision." Under such circumstances Mr. Justice Garrison, at least, would not have concurred in the conclusion reached in *Bullock v. Bullock, supra*. In that case there was a judgment for the payment of alimony and a decree that it should be secured. It was this decree that was sought to be enforced in another state. The providing for the collection of the amount of alimony due under the decree was thought to be in the nature of an execution, or in aid thereof, that is, a part of the remedy, which is always provided by the state in which it is to be used. In the case at bar the judgment was not for alimony. Alimony is decreed for the necessary support of the wife. This land was decreed to her, not because she needed it, but because she was entitled to it, not necessarily for the purpose of her support, but because the equities arising out of her marriage relation under the laws of Washington, and the conduct of her husband toward her, and her personal

contributions toward the accumulation of the property, entitled her to this land, and the law required the court to consider, determine and adjust her equities.

The decree of the Washington court determined that it is "just and equitable" that this plaintiff have the land. That was a proper issue to be presented under the law. The court had jurisdiction of the matter and of the parties. If we give "full faith and credit" to that decree, we must affirm the judgment of the lower court.

AFFIRMED.

BARNES, J., dissenting.

I am unable to concur in the foregoing opinion. Conceding that the superior court of the state of Washington had jurisdiction of the parties and power to render the decree which it pronounced between the plaintiff and her former husband, Edmund W. Fall, still that decree had no extraterritorial force and could not create or affect the title to lands situated in Nebraska. And while such decree is no doubt binding upon the conscience of each of the parties thereto it does not give the plaintiff such an interest in the land in controversy as amounts to a title and which will serve as a basis to quiet the same. It does not seem to me that the clause of the federal constitution which provides that we shall give full faith and credit to the judgments and decrees of the courts of our sister states, requires us to give such judgments more force or a greater effect than they would have had if rendered by the courts of our own state.

The following opinion on rehearing was filed July 12, 1907. *Reversed with directions.*

1. **Courts:** JURISDICTION. A court of chancery has power, in a proper case, to compel a conveyance of land situated in another country or state, when the persons of the parties interested are within the jurisdiction of the court.

2. **Decree:** EFFECT AS CONVEYANCE. If no action is taken by the person ordered so to do, either voluntarily or involuntarily, to con-

vey the land, as directed, neither the decree nor the order to convey can in any manner affect title to lands in another state.

3. ———: LANDS IN ANOTHER STATE. A decree and order to convey in such a case can act only upon the person and cannot affect the title to the land. It imposes a mere personal obligation enforceable by the usual weapons of a court of chancery.

4. **Judgments of Sister States:** FEDERAL PROVISIONS: JURISDICTION. The clause of the constitution of the United States requiring full faith and credit to be given in each state to the public acts, records and judicial proceedings of every other state does not prevent the courts of this state from examining the records of the courts of a sister state to ascertain whether or not that court had jurisdiction of the subject matter.

LETTON, J.

This is an action to quiet the title to an undivided one-half interest in a certain tract of land in Hamilton county, and to cancel and annul a certain mortgage and deed executed by the defendant, E. W. Fall, to the defendants W. H. Fall and Elizabeth Eastin. The plaintiff, Sarah S. Fall, bases her right to the relief prayed upon a decree rendered in divorce proceedings in the state of Washington, whereby a court of that state set apart the premises to her as her separate property and ordered her former husband, E. W. Fall, to convey the same to her.

In 1876 E. W. Fall and Sarah Fall were married in Indiana. They afterwards removed to Hamilton county, Nebraska, and lived in Nebraska until 1889, when they removed to the state of Washington. In 1879, while they lived in Nebraska, E. W. Fall purchased 160 acres of land in Hamilton county, the title to the undivided one-half of which is in controversy. In 1887 he conveyed the farm to Mrs. Fall's brother, as an intermediary, who in turn reconveyed to E. W. Fall and Sarah S. Fall, thereby vesting each with an undivided one-half interest in the land.

E. W. Fall began an action for divorce against his wife in February, 1895, in the superior court of King county,

Washington, to which she filed an answer and cross-petition. The law of Washington required parties desiring a divorce to bring into court a list and description of all their property, and empowers the judge of the court, sitting as a chancellor, to make an equitable division of all the property between the parties. See former opinion, *ante,* p. 104. The husband in his petition claimed the Nebraska land as his own property, while the wife asserted the same to be community property belonging to them both, and asked the court to set it apart to her as her separate property. On October 5, 1895, by its decree, the Washington court refused a divorce to the husband, and granted it to the wife on her cross-petition, and set apart and gave the Nebraska land to the wife as her sole and separate property, and directed the husband to convey the land to the wife in five days, which he refused and neglected to do. An appeal bond was filed, and the cause was taken to the supreme court of Washington by Mr. Fall, but on May 15, 1896, the appeal was dismissed. On May 24, 1895, E. W. Fall executed an indemnity mortgage to his brother, the defendant W. H. Fall, a resident of Nebraska, as defendants allege, to secure him from loss by reason of his having signed a note of $1,000 as surety for E. W. Fall in September, 1893, for money borrowed from his sister, Elizabeth Eastin. This mortgage was recorded on January 10, 1896. On July 3, 1896, without notice to E. W. Fall, the Washington court appointed one W. T. Scott as commissioner for the purpose, who executed a deed of E. W. Fall's undivided half interest in the Hamilton county land to Sarah S. Fall. This instrument was approved by the judge of the superior court, filed in the office of its clerk, and afterwards recorded in Hamilton county, Nebraska. At the time of these various conveyances the land was in the actual possession of a tenant of E. W. Fall and Sarah S. Fall, but this tenant attorned to Sarah S. Fall, who has held possession ever since. On April 27, 1896, and while the appeal was pending, E. W. Fall, who in the meantime had become a resident of Cali-

fornia, executed a warranty deed to Mrs. Eastin for his undivided one-half interest in the land in payment of the same debt. At the time of the divorce and conveyances the land was incumbered, and Fall's interest was apparently worth no more than the amount of the debt.

In 1897 Sarah S. Fall began this action in the district court for Hamilton county, Nebraska, setting up the proceedings and decree in the state of Washington, the execution of the deed to her by Scott, commissioner, the execution and recording of the mortgage to W. H. Fall and the deed to Mrs. Eastin, and alleging that the mortgage and deed were each made without consideration and for the purpose of defrauding her, and that the mortgage and deed cast a cloud upon her title to the land acquired by virtue of the decree and commissioner's deed, and praying that the title to the land be quieted in her, and the deed and mortgage declared null and void. Personal service was had upon W. H. Fall, who disclaimed any interest in the premises and executed a release of the mortgage made to him by E. W. Fall. Constructive service was sought to be had upon Mrs. Eastin and E. W. Fall by publication, which service was defective as to Mrs. Eastin. This fact not appearing at the time, and default being made, a decree was entered on September 23, 1897, in favor of Mrs. Fall in accordance with the prayer of her petition. Within five years thereafter, upon Mrs. Eastin's application, this default judgment was opened under the statutory provisions and she was allowed to defend. Mrs. Eastin filed an answer, which pleads, in substance, that the petition does not state a cause of action; and in addition thereto sets forth her loan of $1,000 to E. W. Fall, the taking of the note signed by E. W. and W. H. Fall therefor, the giving of the indemnity mortgage to W. H. Fall and the subsequent execution of the deed by E. W. Fall to her in satisfaction of the debt. She further alleged the *bona fides* of the transaction, and denied the remaining allegations of the petition. No appearance was made by E. W. Fall and no personal service was had upon him. Trial was had,

the issues found in favor of the plaintiff, Sarah S. Fall, and a decree rendered accordingly. The case is now before us upon appeal by Mrs. Eastin from this judgment of the district court.

The contentions of the appellant, in substance, are: That the decree of the Washington court and the deed executed by the commissioner of said court to Mrs. Sarah S. Fall are absolute nullities in so far as they relate to the land in Nebraska; that Mrs. Fall has no such title or interest in the undivided half interest in the land which had belonged to E. W. Fall that she can maintain this action; that, conceding that the Washington court had the power to compel the execution of the conveyance by E. W. Fall while he was within its jurisdiction, still since its decree acted only upon the person and not upon the land, and since no action was taken or compelled toward conveying the title to Mrs. Fall, she never acquired any interest in or title to the real estate in this state, and the decree of the Washington court utterly failed to affect the land, or to bind or fetter any action taken by E. W. Fall after he passed beyond the jurisdiction of that court. She further contends that by the laws of this state the courts of Nebraska are not permitted, by a decree in a divorce proceeding, to take the title of real estate from the husband and vest it in the wife, by way of adjusting the equities of the parties in the property of the husband, and that such a proceeding would be in violation of the law and public policy of this state. Upon the other hand, the appellee, Mrs. Fall, contends that the decree of the Washington court in the proceedings for divorce and for a division of the property fixed the equities and bound the conscience of the parties, and created a personal legal contract of record on the part of E. W. Fall to make a conveyance of his interest in the land, which he could not escape by going beyond the jurisdiction of the Washington court, and that the decree is entitled to the same faith and credit in the courts of this state that it has in the courts of Washington; that Mrs. Fall's rights in and to the land, acquired by virtue of the

decree, are sufficient to enable her to maintain an action in this state for the purpose of quieting her title to the land; that the decree of the Washington court bound E. W. Fall to such an extent that neither he nor his privies could afterwards set up any right or title in the Nebraska lands against her, and that Mrs. Eastin acquired no right, title or interest in the land by virtue of the deed from E. W. Fall or the mortgage to W. H. Fall, and that the same were fraudulently made.

If the Washington court had taken the value of the Nebraska land into consideration in fixing the rights of the parties and rendered a money judgment accordingly, such a judgment might be enforced here under the full faith and credit clause of the United States constitution, since the court had full power and jurisdiction to render the same. *Barber v. Barber,* 21 How. (U. S.) 582, 16 L. ed. 226; *Trowbridge v. Spinning,* 23 Wash. 48, 62 Pac. 125. And this has been the usual method in such cases. 2 Bishop, Marriage, Divorce and Separation, sec. 1,123. But what power had the Washington court to affect the title to the land or to confer equities therein by its decree? The purpose of the statutes of Washington referred to evidently was to give to the courts of that state powers with reference to the ascertainment of the duties of the parties with reference to property, growing out of the marriage relation, of the same nature as those which are enjoyed by courts generally having jurisdiction over divorce, alimony and the custody and support of children, but greater in extent than those enjoyed by the courts of some states. This power was unknown to the unwritten law, and when no statute exists the courts do not possess it. 2 Bishop, Marriage, Divorce and Separation, sec. 1,119. The power thus given is to be exercised in connection with the proceedings concerning the marriage status, ibid. sec. 826. It is remedial and ancillary to the divorce proceedings, and not independent. In that state the same marital duties, which are enforced here by way of alimony, may be enforced by the compulsory division of real estate be-

longing to either spouse. This division of property is not based upon the view that the innocent party has an equitable interest in the property itself, but upon the fact that it is the duty of a husband to provide for, support and maintain his wife in such manner as suits and accords with his pecuniary circumstances and station in life, so that she, being innocent, shall not suffer from his fault. It is of the same nature as that exercised by the courts of Nebraska in awarding permanent alimony. In such case it is the duty of the court to consider the condition, situation and standing of the parties, financial and otherwise, the duration of the marriage, the amount and value of the husband's estate, the source from which it came, and the necessity for the support and education of children. It is a method of enforcing the duty of support and maintenance. *Fischli v. Fischli,* 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; *Shafer v. Shafer,* 10 Neb. 468; *Cochran v. Cochran,* 42 Neb. 612; *Zimmerman v. Zimmerman,* 59 Neb. 80; *Smith v. Smith,* 60 Neb. 273.

It is well established that a court of chancery, in a proper case, has power to compel a conveyance of lands situated in another country or state, where the persons of the parties interested are within the jurisdiction of the court. It is said by Justice Story: "The ground of this jurisdiction is that courts of equity have authority to act upon the person: '*Æquitas agit in personam.*' And although they cannot bind the land itself by their decree, yet they can bind the conscience of the party in regard to the land, and compel him to perform his agreement according to conscience and good faith." 2 Story, Equity Jurisprudence (13th ed.) sec. 743; 3 Pomeroy, Equity Jurisprudence (2d ed.) sec. 1,318. The leading case upon this doctrine in England is *Penn v. Lord Baltimore,* 1 Ves., Sr., (Eng.) 444, in which the chancellor of England decreed a specific performance of a contract respecting lands lying in North America. This case was followed in *Massie v. Watts,* 6 Cranch (U. S.), 148, in a learned opinion by Chief Justice Marshall, who examined and reviewed

the cases prior to *Penn v. Lord Baltimore,* and announced the rule as follows:

"Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion, that, in a case of fraud, or trust, or of contract, the jurisdiction of a court of chancery is sustainable, wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

This case settled the law upon this point, and its principal doctrine has ever since been recognized and enforced by the courts of chancery in this country. But, says Judge Story:

"Still it must be borne in mind that the doctrine is not without limitations and qualifications; and that to justify the exercise of the jurisdiction in cases touching lands in a foreign country the relief sought must be of such a nature as the court is capable of administering in the given case. We have already seen that a bill for a partition of lands in a foreign country will not be entertained in a court of equity, upon the ground that the relief cannot be given by issuing a commission to such foreign country. Perhaps a more general reason might be given, founded upon the principles of international law; and that is, that real estate cannot be transferred or partitioned or charged, except according to the laws of the country in which it is situated." 2 Story, Equity Jurisprudence (13th ed.), sec. 1,298.

It is conceded by the appellee that the decree of the Washington court has no force and effect on the title to property here, but it is contended, mainly upon the authority of *Burnley v. Stevenson,* 24 Ohio St. 474, that, though the decree of the court of Washington could not affect the title to land in this state, yet, when this decree is pleaded in the Nebraska court as a cause of action, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled in the divorce case. A number of cases have been cited in which it is said this princi-

ple is upheld, but we have yet been unable to find a single case in which the direct question at issue was whether or not a decree affecting the title to real estate lying in another state will be recognized in the state in which the land lies, where no conveyance has been made in obedience to the decree, and where the title has been conveyed to third parties. It is true that in *Cheever v. Wilson*, 9 Wall. (U. S.) 108, and in *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333, there are certain *obiter* expressions which are quoted in support of such doctrine, but in these cases this question was not before the court for decision, in *Cheever v. Wilson* an instrument having been executed in performance of the decree, and in *Dull v. Blackman* the case was decided upon another point. We think there can be no doubt that, where a court of chancery has by its decree ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by reason of such compulsion is valid and effectual, wherever it may be assailed. In the instant case, if Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed. *Gilliland v. Inabnit*, 92 Ia. 46, was a case of this kind, where the controversy was between the plaintiff, who was the grantee in a conveyance of land in Iowa, which had been compelled by a Kentucky court, and the heirs of her grantor. The Iowa court held that the decree of the Kentucky court established the trust, and that the conveyance made in consequence of such decree was valid and effectual to convey the Iowa land, even though made by compulsion and by imprisonment of the grantor.

It is said by Mr. Freeman in an exhaustive note to *Newton v. Bronson*, 67 Am. Dec. 89 (13 N. Y. 587). "From

the very nature of the property, land must be governed by the *lex loci rei sitæ*. No judgment of a court of another jurisdiction can have any effect upon the title to the property. And the power of equity in decreeing the conveyance of land is effectual only upon the person, not upon the land. The decree does not change the title to the land. It remains the same as before until the person in whom the title resides either voluntarily or perforce obeys the decree of the court and divests himself of the title by a conveyance valid under the *lex loci*. The decree of chancery, then, with respect to realty beyond its jurisdiction, can have no direct operation upon the property, and *per se* in no way affect the legal or equitable title thereto. *Carrington's Heirs v. Brents*, 1 McLean (U. S.), 167; *Massie v. Watts*, 6 Cranch (U. S.), 148; *Hawley v. James*, 7 Paige Ch. (N. Y.) 213, 32 Am. Dec. 623; *Proctor v. Ferebee*, 1 Ired. Eq. (N. Car.) 143." See also *Cooley v. Scarlett*, 38 Ill. 316; Westlake, Private International Law, 64. *Proctor v. Proctor*, 215 Ill. 275, 69 L. R. A. 673, and note.

In *Wimer v. Wimer*, 82 Va. 890, 3 Am. St. Rep. 126, it is said, speaking of cases under the general rule: "But even as to these cases it must be borne in mind that the decrees of the foreign court do not directly affect the land, but operate upon the person of the defendant, and compel him to execute the conveyance, and it is the conveyance which has the effect, and not the decree." Citing *Davis v. Headley*, 22 N. J. Eq. 115; 4 Minor, Institutes, pt. 2, p. 1,201.

In *Lindley v. O'Reilly*, 50 N. J. Law, 636, 7 Am. St. Rep. 803, it is said: "The principle upon which this jurisdiction rests is, that chancery, acting *in personam* and not *in rem*, holds the conscience of the parties bound without regard to the *situs* of the property. It is a jurisdiction which arises when a special equity can be shown which forms a ground for compelling a party to convey or release, or for restraining him from asserting a title or right in lands so situated, and is strictly limited to those cases in which the relief decreed can be obtained through the

party's personal obedience. * * * The decree in a suit of this aspect imposes a mere personal obligation, enforceable by injunction, attachment or like process, against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer or vest a title." *Carpenter v. Strange,* 141 U. S. 87; *Bullock v. Bullock,* 52 N. J. Eq. 561; Story, Conflict of Laws (8th ed.), sec. 543; 1 Wharton, Conflict of Laws (3d ed.), secs. 288, 289; *Watkins v. Holman,* 16 Pet. (U. S.) *25; *Northern I. R. Co. v. Michigan C. R. Co.,* 15 How. (U. S.) 233; *Davis v. Headley,* 22 N. J. Eq. 115; *Miller v. Birdsong,* 7 Bax. (Tenn.) 531; *Gardner v. Ogden,* 22 N. Y. 327; *Hayden v. Yale,* 45 La. Ann. 362, 40 Am. St. Rep. 232; *Allen v. Buchanan,* 97 Ala. 399, 38 Am. St. Rep. 187; *Langdon v. Sherwood,* 124 U. S. 74; *Clarke's Appeal,* 70 Conn. 195, affirmed *Clarke v. Clarke,* 178 U. S. 186; note to *Proctor v. Proctor,* 69 L. R. A. 673 (215 Ill. 275); *Short v. Galway,* 83 Ky. 501, 4 Am. St. Rep. 168.

The case of *Bullock v. Bullock, supra,* deserves special examination. In this case the complainant's husband had been adjudged by the supreme court of the state of New York, in a divorce proceeding of which it had jurisdiction, to execute a mortgage upon lands in New Jersey to secure the payment of a certain sum per month to the complainant as alimony. He refused to do so, and made other mortgages and conveyances of the lands, which the wife alleged were fraudulently made for the purpose of defeating her rights. She charged that she had acquired an equitable lien in the lands by virtue of the New York decree, and prayed the court to set aside the several mortgages and conveyances, and that he be decreed to execute and deliver the mortgage required by the New York court. It will be seen, therefore, that the case was similar to the one at bar, but it was stronger in this respect, that personal service was had upon the respondent in New Jersey in the action to enforce the decree, while in this case, no personal service has been had upon E. W. Fall. The majority of the court held that, while the New York court

might have enforced the execution of the mortgage by the defendant while he was within its jurisdiction, this not having been done, the New York decree could not operate as a cause of action affecting the title to land in New Jersey, and it is pointed out that "the doctrine that jurisdiction respecting lands in a foreign state is not *in rem,* but one *in personam* is bereft of all practical force if the decree *in personam* is conclusive and must be enforced by the courts of the *situs,*" and that such a doctrine would result in practically depriving a state of that exclusive control over its real estate which has always been accorded. Justice Garrison concurred upon the ground that the decretal order was only ancillary to the divorce suit, and "did not possess any element of a judgment upon the issue submitted to the court of decision, which was whether the marriage between the parties should be dissolved." Justice Van Syckel, in a dissenting opinion, said that the New York judgment was conclusive as to the right of the wife to have him execute a mortgage on the New Jersey land, and that, since the courts of New Jersey *would have afforded such relief if the action had been brought in that state,* the judgment imposed an obligation upon the husband which could be enforced in New Jersey by the intervention of a court of equity there. In this connection, however, he says: "The question is whether our court of equity will establish a lien upon the New Jersey land so as to give effect to the New York decree. It may be conceded that the *lex fori* must apply to the remedy to enforce the New York judgment in our courts. *Harker v. Brink,* 4 Zab. (N. J. Law) 333; *Garr v. Stokes,* 1 Harr. (N. J. Law) 404; *Armour v. McMichael,* 7 Vr. (N. J. Law) 92; While we will give full faith and credit to the New York judgment, we cannot be asked to give greater efficacy to a decree for alimony made in New York than we can give to a like decree made in our own courts. For instance, if the common law prevailed here we would enforce the New York decree for alimony only according to the common law practice, for that would exhaust our powers in that

respect. * * * It being competent for our courts to enforce such a decree made in our own courts by establishing it as a lien on lands, we cannot refuse like relief in this case on the extraterritorial judgment. *Huntington v. Attrill,* 146 U. S. 657; *McElmoyle v. Cohen,* 13 Pet. (U. S.) *312." It will be seen, therefore, that neither the opinion of the majority or of the minority of the New Jersey court in *Bullock v. Bullock, supra,* would warrant the granting of the relief sought in this case, since the appellee is asking the court to give effect to a decree of the Washington court which it would not enforce if it had been rendered in a court of this state, and that, if the view expressed by Justice Garrison is correct, as to which we express no opinion, the decree adjudging the land to Mrs. Fall is only of the nature of a decretal order, ancillary to the subject matter of the suit, which was the matrimonial status, and is not such a judgment as is entitled to full faith and credit under the constitution and laws of the United States. From a consideration of these authorities, and upon principle, it seems clear that a decree of a court of chancery in a foreign state acting upon a person within its jurisdiction and directing him to make a conveyance of lands in this state in nowise affects the title to the land. The decree and order acts only upon the person, and, if obedience to its mandate is refused, it can only be enforced by the means which have from time immemorial been the weapons of a court of chancery. To say that the decree binds the conscience of the party, so that persons to whom he may convey the land thereafter take no title, is the same as saying that the decree affects the title, which is beyond the power of the courts of another state to do. The transfer and devolution of title to real estate within the limits of a state is entirely subject to the laws of that state and no interference with it can be permitted by other states. *Watts v. Waddle,* 6 Pet. (U. S.) *389; *Davis v. Headley,* 22 N. J. Eq. 115; *Clarke v. Clarke,* 178 U. S. 186; *Wimer v. Wimer, supra; Bowdle v. Jencks,* 18 S. Dak. 80; *Manton v. Seiberling,* 107 Ia. 534. The law will not per-

mit that to be done indirectly which cannot be done directly, and, if the courts of other states can so adjudicate the rights of parties to land in this state that a title apparently clear upon the official records could be made null and void by its action "upon the conscience" of the holder of the legal title, the recording acts of this state would cease to afford protection to purchasers of land, and thus the title in fact be affected, and the power of the state over the transfer and devolution of lands interfered with.

If the Washington decree bound the conscience of E. W. Fall, so that when he left the jurisdiction of that state any deed that he might make would be absolutely void, and had he sold the land to an innocent purchaser, who had inspected the records and found that he was the owner in fee of an undivided one-half interest to the premises, such purchaser, though relying on the laws of this state for his protection, would receive no title. This is the contention of the appellee, carried to its ultimate conclusion, and, if this is correct, the action of the court of another state directly interferes with the operation of the laws of this state over lands within its sovereignty.

Under the laws of this state the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and in such an action have no power or jurisdiction to divide or apportion the real estate of the parties. *Nygren v. Nygren,* 42 Neb. 408; *Brotherton v. Brotherton,* 14 Neb. 186; *Cizek v. Cizek,* 69 Neb. 800; *Aldrich v. Steen,* 71 Neb. 33, 57. In the *Cizek* case, Cizek brought an action for divorce, and his wife filed a cross-bill and asked for alimony. The court dismissed the husband's bill, found in favor of the wife and, by a stipulation of the parties, set off to the wife the homestead, and ordered her to execute to the husband a mortgage thereon, thus endeavoring to make an equitable division of the property. Afterwards, in a contest arising between the parties as to the right of possession of the property, the decree was pleaded as a source of title in the wife, but it was held that that portion of the decree which

set off the homestead to the wife was absolutely void and subject to collateral attack, for the reason that no jurisdiction was given to the district court in a divorce proceeding to award the husband's real estate to the wife in fee as alimony. The courts of this state in divorce proceedings must look for their authority to the statute, and, so far as they attempt to act in excess of the powers therein granted, their action is void and subject to collateral attack. A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void.

Is it our duty to give effect to this decree under the full faith and credit clause of the constitution of the United States? "These provisions of the constitution and laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject matter or of the parties, * * * and they confer no new jurisdiction on the courts of any state; * * * nor do these provisions put the judgments of other states upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the state in which they are sued on, pleaded, or offered in evidence." *Huntington v. Attrill,* 146 U. S. 657. The provision of the constitution establishes a rule of evidence rather than of jurisdiction. *Weaver v. Cressman,* 21 Neb. 675; *Hanley v. Donoghue,* 116 U. S. 1, 6 Sup. Ct. Rep. 242; *State of Wisconsin v. Pelican Ins. Co.,* 127 U. S. 265. We know of no rule which compels us to give to a decree of the courts of Washington a force and effect we would deny to a decree of our own courts upon the same cause of action. We must accord full faith and credit to the divorce decree since the Washington court had jurisdiction to render it, but we are not compelled to recognize a decree affecting the title of E. W. Fall and his grantees in an action where he is not in court by personal service, and where the act directed by the Washington court is in opposition to

the public policy of this state, in relation to the enforcement of the duty of marital support. *Anglo-American Provision Co. v. Davis*, 191 U. S. 373, 24 Sup. Ct. Rep. 92; *State of Wisconsin v. Pelican Ins. Co., supra; Lynde v. Lynde,* 181 U. S. 183, 21 Sup. Ct. Rep. 555; *McElmoyle v. Cohen,* 13 Pet. U. S. *312; *Bullock v. Bullock,* 51 N. J. Eq. 444; *Andrews v. Andrews,* 188 U. S. 14. In order to vest Mrs. Fall with any right, title or interest in and to her husband's land in Nebraska by virtue of the Washington decree, it was absolutely necessary that the decree be carried into effect by that court by compelling a conveyance from her husband. Neither the decree nor the commissioner's deed conferred any right or title upon her. The decree is inoperative to affect the title to the Nebraska land, and is given no binding force or effect, so far as the courts of this state are concerned, by the provisions of the constitution of the United States with reference to full faith and credit. Since the decree upon which the plaintiff bases her right to recover did not affect the title to the land, it remained in E. W. Fall until divested by operation of law or by his voluntary act. He has parted with it to Elizabeth Eastin, and whether any consideration was ever paid for it or not is immaterial so far as the plaintiff is concerned, for she is in no position to question the transaction, whatever a creditor of Fall might be able to do. In whatever manner the result of our conclusion may affect the parties to this controversy, it is our duty to sustain the rights of the state to sovereignty over the land within its borders, and to resist an attempt to convey and set apart real estate in Nebraska by the court of another state, when not acting upon and through the person of the owner when under its jurisdiction and by virtue of the proper powers of a court of chancery.

It appears that Mrs. Fall has paid taxes and interest and made other outlays for the benefit of the property, for which she should be reimbursed. The former judgment of this court is vacated and the cause reversed and

remanded to the district court, with directions to proceed in accordance with this opinion, and, if plaintiff so desires, to take an accounting of the rents and profits and disbursements, and to render such decree as may be equitable.

REVERSED.

SEDGWICK, C. J., dissenting.

The fundamental question in this case, the question upon which all others depend, is whether by the law of this state a wife has an equity in the land of her husband during coverture? This question is briefly disposed of in the former opinion, *ante,* p. 104, and it is there considered that she has such equity. The meaning of the court, however, as expressed in the former opinion upon this point, has been substantially overlooked or entirely misunderstood. It is therefore thought advisable to discuss the question more at large. In this state the amount given to the wife in a decree of divorce is generally called alimony. This term is derived from a Latin word which primarily meant to nourish, that is, to supply the necessities of life. It was introduced into divorce proceedings by the early ecclesiastical courts of England, and in the early practice of those courts it was defined to be "that support which the husband, on separation, is bound to provide for the wife, and is measured by the wants of the wife, and the circumstances and the ability of the husband to pay." After stating this definition the supreme court of Illinois, in *Cole v. Cole,* 142 Ill. 19, 27, proceeded as follows:

"The duty of the husband to support and maintain the wife in a manner befitting his condition and circumstances in life still continues; but the foregoing definition may fall far short of what is termed alimony in our statute, and, indeed, in all those jurisdictions where divorces are granted *avinculo matrimonii.* It will require no discussion or citation of authority to establish that the husband owes the wife who by his fault has been driven to seek a

permanent separation, not only reasonable support and maintenance, but also that she shall be put in no worse condition by reason of the marriage, the dissolution of which has been caused by his wilful misconduct. Equity and good conscience require that the husband shall not profit by his own wrong, and that restitution shall be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate, so far as may be done consistently with the preservation of the rights of each, and also that a fair division shall be made, taking into consideration the relative wants, circumstances and necessities of each, of the property accumulated by their joint efforts and savings. The policy of the law should be, and is, to do justice, and to give to the injured wife not merely what necessity but what justice demands."

Alimony, in its primary sense, may be allowed the wife although neither party has any property whatever. If the husband is competent to earn a living for himself and wife he is, by the fact of his marriage, required by our law to furnish such support to the wife, and, again, if upon the consummation of the marriage there is a separation, and the wife neither brought any property to the husband nor contributed in any manner toward the accumulation of property, still the husband is bound to furnish suitable support for the wife. Under such circumstances as these, the term alimony is used in its original meaning and signification. In the progress and development of our law governing the domestic relations, the word alimony has come to be used with a far different meaning. When the property that the wife had at the time of her marriage is combined with the property of her husband and accumulations are afterwards added, or when neither had property at the time of the marriage and by their united efforts and economies property is accumulated, to say that, because the title to that property is taken in the name of one party, the other party has no equitable rights therein, would be a monstrous per-

version of modern ideas of justice and equity. In the case just cited, the Illinois court said:

"The husband and wife are placed upon an equal footing in respect to the interest each may have in the estate and property of the other, and husband and wife may contract with each other, and she with strangers, as if she were sole. In case of divorce the courts look at the standing of the parties, the conduct of each, and from whence the estate is derived, and, having due regard to the living of each, will make such allowance to the wife as is reasonable and just. * * * And the same is undoubtedly true where the property has been accumulated by the joint effort and economy of the husband and wife, and the allowance has been made to her upon the basis of a reasonable and equitable division of the estate. It may be true that the husband, in such cases, has been the apparently efficient means of its accumulation; yet if she has performed her duties as his wife faithfully, giving him her life, her care, strength and prudent management, it can no more be said that the estate is the result of his labor than it is of her labor. * * * For aught that appears in this petition the entire property of the petitioner may have come from the wife, or been the result of their joint earnings and accumulations, and the court, in making the allowance, may have been making simple restitution, either for property brought to the husband or for assistance in its accumulation."

It has frequently been held by this court that, in the allowance of permanent alimony, the court should consider whether the wife contributed anything to the common fund. *Zimmerman v. Zimmerman*, 59 Neb. 80. If she is entitled only to support and maintenance, the amount would depend upon her necessities and upon her husband's ability. If the amount that she has contributed toward the accumulation of the property is to be taken into consideration, it is because she has an equitable interest in the property which they together have earned and paid for. Our statute provides a method for enforce-

ing this right of the wife in the property which is in the name of the husband. The court must ascertain from the evidence what amount she has contributed toward it, either in property or by her individual efforts, and must decree that amount in her favor. This decree at once becomes a lien upon the property. The husband cannot, after this decree is entered, convey the property so as to avoid payment according to its terms. He cannot convey the property before the decree, and while they are living together as husband and wife, with the purpose and effect of defrauding the wife of her interest in the property. *Roehl v. Roehl,* 20 Neb. 55. In that case the conveyance was made long before the decree of divorce and alimony. It could not therefore be held to have been made to defraud creditors. The wife was not a creditor of the husband at the time the conveyance was made. The conveyance was set aside because it was in fraud of the wife's equitable interest in the property which arose from the marital relations. Our statute provides that the remedy which it specifically gives the wife to enforce her interests in the husband's property shall not be exclusive. By chapter 40, laws, 1883, it was enacted: "Section 1. All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by execution and proceedings in aid thereof, or other action or process as other judgments. Section 2. The remedy given by this act shall be held to be cumulative and in no respect to take away or abridge any subsisting remedy or power of the court for the enforcement of such judgments and orders. *Provided,* Nothing in this act shall affect the title of any *bona fide* purchaser for value holding by reason of such *bona fide* purchase at the date of its passage." There are no exemptions under this statute. All property that stands in the name of the husband is absolutely liable to the full extent of any interest that the husband may have at the time of the decree, and by chapter 41,

enacted in the same year, it is provided that: "In all cases where alimony or other allowance shall be decreed for the wife or for the children, the court may require sufficient security to be given by the husband for the payment thereof, according to the terms of the decree," and it is further provided that, if security is not given, a receiver shall be appointed to take charge of both real and personal property; and the provisions of the first section of chapter 40, which was approved on the preceding day, are reenacted.

A judgment in favor of the wife, to be determined by a consideration of the amount which she has contributed toward accumulation of the common property of the family, has no other basis or foundation than her equitable rights in the property which she has so helped to accumulate. Unless she has an equity in such property to be in some manner enforced, such judgment is wholly arbitrary and unsupported. It is not based upon contract. It is not compensation for wrongs which she has suffered. It is because our statute has provided for the enforcement of this right by judgment, and lien, and execution, and receivership, and compulsory security, if necessary, and because it expressly provides that the court, in an action for divorce, may transfer the title of personal property from the husband to the wife, that this court has established the doctrine that this remedy, as so provided, is exclusive, and that the court cannot directly transfer the legal title in land from the husband to the wife to satisfy her equities in the land. Whether this conclusion of the court was just or is necessary, we are not required now to consider; but it is manifest, from the provision of the statute and from the decisions of the court, that this construction of the statute relates only to the remedy, and not in any respect to the fundamental rights of the wife. Without doubt the law of Nebraska recognizes the equitable right of the wife in the property which she brought to the family at the time of her marriage, or to the accumulation of which she has contributed. It will be

remembered that in this case the trial court found that at the time this husband and wife came to Nebraska they were without means; that this land in controversy was purchased and paid for by their joint efforts and contribution. Afterwards, and after they had owned this land for some time, they removed to the state of Washington. The marriage status was within the jurisdiction of the Washington court. When they removed from Nebraska they had, as husband and wife, mutual equities in this land in question. These equities were personal rights and went with their persons to the state of Washington. The courts of the state of Washington therefore had jurisdiction both of the marriage status and of the equities existing between the parties in this land.

2. It is said that it is against the public policy of this state to transfer the lands of the husband directly to the wife in a divorce proceeding. Courts have been accused of appealing to public policy in justification of acts or omissions on their part, which could not in fact be justified. Can public policy be interested in forms of procedure? Is there any principle of morality or public policy involved in determining what instrumentalities shall be used to give a wife her equitable share of the common property? When a divorce is granted her, the public policy of this state is to consider what property she brought to the family, and how much her individual efforts, her care, prudence and economy have contributed to the accumulation of the property, whether that property at the time of their separation is held in her name or in the name of her husband, or in both their names jointly. When those rights and equities of the wife are determined, the policy of our law is to see that she gets her equitable share of the property. There is no charm of public policy in the method by which it is brought about. When the husband and wife go to another state and there make their home, their rights and equities go with them, though their property is left here. The relations between them are no less intimate, and their equitable rights in the joint

property are no less palpable and certain than are those of ordinary business copartners, and when the marital partnership between them is terminated the public policy of this state, and of all other civilized states, demands that the court that dissolves that relation should adjust their property rights, and determine what the wife is entitled to out of their joint property. In Washington the court does this by directly determining the just and equitable interest that each has in the joint property, and not by the circuitous process of a judgment, lien and sale —a procedure which we have introduced by a doubtful construction of our statutes, but which is supposed to bring about the same result. No court would hesitate to hold that, in a judgment of dissolution of ordinary partnerships, the court should determine the rights of the several partners in the joint property, and that, if the court has jurisdiction of the persons of the partners, its judgment fixing their equities may be used as a basis of right wherever the property may be situated. It is not doubted that, so far as the marriage status is concerned, and the equitable rights of the parties properly before the court, the judgment of the court thereon would be final and binding everywhere.

If the husband had agreed to sell and convey this property to the wife, and she had paid him therefor, and he had still retained the legal title, and their equities under this contract had been submitted to the court by proper pleadings and evidence in the divorce case, a question of the proper joinder of causes of action might possibly have arisen, but there would have been no question of the jurisdiction of the court over either cause of action. Whether they could be determined together would be a mere question of practice, in which no other court would be interested. If the trial court upon such an issue had determined that the wife had fully paid for the land, and was in equity the owner thereof, that determination would be binding everywhere, and, while it would not operate directly upon the land, and would not change the legal

title, still the husband could never be heard to deny in any court that the wife had paid him in full for the land, and was in equity and common justice the owner thereof. In this case she has paid him for the land by becoming his wife, and by contributing to the accumulation of a common property of which he has had his full equitable part. He has agreed to convey it to her, because the law implies that agreement from his marriage and separation from her under the circumstances. The equities so arising are as strong and as capable of litigation and adjudication as are the equities created by a written contract of partnership, or a contract of purchase and sale of land. Such equities may be adjudicated by any court of general equity jurisdiction, when the parties and the conditions or relations out of which they arise are properly before the court. Under our statute these equities of the wife are valued, and by decree and lien are taken from the property in the husband's name.

3. Another important feature of the case, and which is also a matter of preliminary character, appears to have been misunderstood. Much is said in the briefs in regard to an action to quiet title, and the rule of law that a party to maintain an action to quiet a title must have some title to quiet. Authorities are cited upon this proposition and the discussion is gone into much at large, and so the real question presented here is overlooked. The plaintiff in her petition sets out her marriage and residence in Nebraska, the acquisition of this property where they resided in Nebraska, her contributions to the accumulation of the property, the fact of their removal to the state of Washington and becoming residents of that state, the divorce proceedings there, and the fact that the equities of the respective parties in the land were by both parties submitted to the court, and the trial and judgment there, and other matters tending to support her right, and then asks that equity may be done her. She also asks that her title be quieted. This, then, is an action in equity by the plaintiff to have her interest, her right, her equity in the

land determined, adjudicated and quieted. To say that she cannot maintain an action to fix her interest in the land and to establish her title thereto, because she has no title, appears to be an attempt at mockery. She alleges facts which she claims entitle her to an interest in the land and to relief at the hands of the courts of Nebraska, and the question is whether these facts entitle her to any relief.

4. Another matter that has confused the argument in this case is the indefinite use of the word "title." It is shown in 8 Words and Phrases, 6979, that this word is used in connection with property in some thirty odd different shades of meaning, and it is said by the supreme court of Illinois, in *Irving v. Brownell*, 11 Ill. 402, 415:

"There are perfect titles and apparent or imperfect titles. Even a naked possession constitutes a species of title, though it may be the lowest degree. The meaning of the word is, therefore, to be ascertained from the connection in which it is used."

It is sometimes, and perhaps quite commonly, used in the signification of a regular chain of transfer from or under the sovereignty of the soil. It is sometimes used in the sense of the particular conveyance under which a man holds his property. In either of these senses of the word, the courts of one state cannot in any manner affect the title to lands of another. But the word title in connection with interests in land has been carelessly used in various opinions of courts, as well as in the opinion now promulgated in this case. For instance, the note of Judge Freeman to *Newton v. Bronson*, 67 Am. Dec. 89 (13 N. Y. 587) is cited, and an extensive quotation is made therefrom, which ends with the following words:

"The decree of chancery, then, with respect to realty beyond its jurisdiction, can have no direct operation upon the property, and *per se* in no way affect the legal or equitable title thereto."

A subsequent sentence in the same paragraph of the note is not quoted. It is as follows:

"Still a decree concerning a conveyance is not without its effect *per se*. Thus a decree directing a conveyance may be pleaded as a cause of action or defense in the courts of the state where the land is situated, and it is entitled in such a court to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud."

If this statement had also been quoted, it would have been necessary to have considered what was meant by the words "equitable title" in the first quotation. It may be that the words were not used by the learned author with entire accuracy, but he certainly did not mean thereby "equitable right to any interest in the land." Of course, in an action, whether at law or in equity, the decree of the court of another state cannot be considered to create a title to lands in this state. No one with such a decree can maintain a possessory action thereon; but, with such a decree, he can say to his opponent you will not be allowed to dispute the facts that are established by this decree. The distinction is analogous to that which is made in the application of the law of *res adjudicata*. A judgment in an action of forcible entry and detainer, whether obtained before a justice of the peace or upon appeal to a court of general jurisdiction, is not a bar to any other action between the same parties in regard to the same land. But any controversy of fact which was properly in issue before the justice, and within his jurisdiction, and contested by the parties, and determined by the judgment of the justice, is settled by his judgment, and that question of fact, so settled, cannot afterwards be disputed by either of those parties in litigation concerning the same land. And so, in determining the effect of a judgment of courts of a sister state in controversies in regard to real estate in this state, it is uniformly held that such judgment cannot be relied upon as title; that it does not affect the title nor in any way act directly upon the land. But questions of fact that were in litigation before the foreign court, and were within the juris-

diction of that court to determine, and were settled by the judgment of the court, ought not again to be litigated by the parties, and either party may rely upon such adjudication as finally settling such questions of fact. If, in such litigation in the sister state, it was alleged and proved that, by virtue of an existing contract between the parties, there was a controversy as to their equitable rights in real estate situated within this state, or if it was alleged and proved that, by reason of fraudulent practices on the part of one of the parties, equities existed in the other in real estate in this state, and the issues so presented were tried and determined, we are required by the comity which exists between the states, as well as by the express provisions of the federal law, to give full faith and credit to such determination. In this case the wife had an equity in this land, because she had assisted her husband to accumulate the means with which it was paid for, and because he, by his treatment of her, made their separation and the separation of their rights and equities necessary. These questions were submitted to, and determined by the Washington court.

It is said that "not a single case" has been found, in which the direct question at issue was whether a decree "affecting the title to real estate lying in another state will be recognized in the state in which the land lies, where no conveyance has been made in obedience to the decree, and where the title has been conveyed to third parties." This appears to overlook the question presented here. No court of England or America has held that the decree of the courts of one state can affect the legal title or "chain of title"—that is, the title, as the word is commonly used—of lands in another state. It is always held that only the courts of the state where the land lies can adjudicate land titles. If this were not so, the plaintiff might record a copy of her decree and complete her title thereby. Neither has any court held that the decree of a court of another state would affect the rights of third parties, who were innocent purchasers of the land. When,

however, issues are presented to a court of competent jurisdiction, and the court, having jurisdiction of the parties and of the issues so presented, determines such issues, and the equitable rights of the parties in lands in another state depend upon the facts so determined, that determination of the equities of the parties may be relied upon in any litigation that may arise between the same parties, and full faith and credit must be given to such adjudication of the rights of the parties. In any event, third parties who purchase from the apparent owner are not affected by outstanding equities in the land. In this respect it will make no difference whether or not those equities have been adjudicated. If the purchaser is charged with actual or constructive notice of those equities at the time of his purchase, he takes the land subject to those equities, whatever they may be, whether adjudicated or not. In the former opinion it was pointed out that the defendant who claims through Mr. Fall had constructive notice of Mrs. Fall's equities in the land. The land was occupied by a tenant, who recognized Mrs. Fall as his landlord and attorned to her, to the exclusion of all other claims to the land. This was notice to a subsequent purchaser. These facts appear to fully answer the statement that, "To say that the decree binds the conscience of the party, so that persons to whom he may convey the land thereafter take no title, is the same as saying that the decree affects the title." The determination of the Washington court upon the facts there in issue so far binds the conscience of the parties that third parties, who know that the conscience of the parties is so bound, ought not to buy the land and pay the purchase price to the wrong person. It is conceded that the Washington court might have compelled obedience to its decree. It might have, by imprisonment, enforced the execution of a deed, but it is said: "The decree and order acts only upon the person, and, if obedience to its mandate is refused, it can only be enforced by the means which have from time immemorial been the weapons of a court

of chancery." Again, the authorities from which this thought is derived have been misunderstood, as it appears to me. The court which enters the decree can only enforce it by acting upon the person, and that is all of the meaning of these authorities. The decree is binding upon the conscience of the parties. In what sense is it binding upon the conscience? Would the conscience be released from obligations of this decree as soon as they crossed the state line? If their consciences are affected and bound by the decree it would seem that they would be so bound until they complied with the decree. If litigants come before the courts of equity of this state and concede that they are in conscience bound to acknowledge the rights and interest of their adversary in the matter in dispute, what is the duty of the court of equity? It is for no other purpose that courts of equity are established. It is to compel litigants to do what they are in conscience bound to do. And so here, if Mr. Fall is in conscience bound to transfer the legal title of this land to Mrs. Fall, and if his grantees knew when they took their title from him that he was in conscience bound so to do, and these parties are before a court of equity in this state, the power and duty of the court are clear. I do not understand the application of the following language: "If the Washington decree bound the conscience of E. W. Fall, so that when he left the jurisdiction of that state any deed that he might make would be absolutely void, and had he sold the land to an innocent purchaser, who had inspected the records and found that he was the owner in fee of an undivided one-half interest to the premises, such purchaser, though relying on the laws of this state for his protection, would receive no title. This is the contention of the appellee, carried to its ultimate conclusion." We have already shown that there is no such question in this case. If Mr. Fall had been bound by contract or in any other way to recognize the equities of Mrs. Fall in this land, it would not be true that "any deed that he might make would be abso-

lutely void." The binding force of such contract upon his conscience would be no greater and no less than the decree in question. It establishes beyond further controversy that there are existing facts by virtue of which Mrs. Fall is in equity entitled to this land. In order to preserve these equities, it was her duty to act at once as soon as she knew there was danger that Mr. Fall would attempt to sell the land to an innocent purchaser. This she did by taking notorious possession of the land and commencing her action in the courts of this state to establish her rights in the land. If there are innocent purchasers of the land, their rights should, of course, be protected, and it seems strange that it should be supposed that there is doubt upon that proposition.

The case of *Bullock v. Bullock,* 52 N. J. Eq. 561, was somewhat discussed in the former opinion. In addition to what was there said, it may be suggested that the question there in controversy was whether the New York decree dealt with equities in the land. The New York court first entered a judgment against the defendant, and then directed that the judgment should be secured by transferring the title of the land in New Jersey by way of mortgage to the plaintiff as security for her judgment. It attempted to act directly upon her title to the land, and, while some of the judges thought it ought to be construed as a determination that she had an equity in the land, the majority of the court thought otherwise, holding that the decree did not purport to establish an equity in the land, but only to require the defendant to transfer the title as security, and, as the courts of New York cannot operate directly upon titles to lands in New Jersey, it was held that the decree was inoperative. If the New Jersey court had been convinced that the question before the New York court was whether or not the plaintiff had some equity in the New Jersey land, and that the New York court had decided that, by virtue of their former relations and transactions between them, there were existing equities in the land in favor of the plaintiff, there

can be no doubt from the various opinions filed in the case that all of the judges would have agreed that such decree would be binding upon the conscience of the parties and would everywhere estop them to deny the existing equities of the plaintiff. It is said in the opinion: "If Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed." The validity of such a conveyance to transfer the land would depend upon the same considerations that would determine the validity of the decree itself to fix the equities in the land in such manner as to be binding upon courts of other states.

If the Washington court had no jurisdiction of the equities of the parties, a deed procured by threats of contempt proceedings under the decree of the Washington court, and by imprisonment, would have no more validity in this state than would any other deed procured by duress and threats. But if, on the other hand, the Washington court had jurisdiction of the equities of the parties and the question of those equities was properly presented, the decree of that court thereon would be a sufficient basis for contempt proceedings in that court to compel the execution of a deed, and, for the same reason and to the same extent, it would be a sufficient basis in litigation in all other courts to estop the defendant to deny the equitable rights of the plaintiff so fixed. It is a general rule with courts of equity that they will not assume jurisdiction unless the circumstances are such that they can enforce their decree, and so, unless the party is before the court so that he can be compelled by its process to perform the decree, a court of equity will not assume jurisdiction of the equities of the parties in land situated in another state. This principle has been construed in the opinion to mean that, in case the court, believing that

it can enforce its decree, assumes jurisdiction, tries the issue and enters the decree, that decree will be of no force as settling the equities of the parties, if the party can evade the process of the court so that the same court cannot compel a conveyance. Such reasoning, it seems to me, calls for no discussion.

The following language is quoted in the opinion from the supreme court of Virginia in *Wimer v. Wimer,* 82 Va. 890.

"But even as to these cases it must be borne in mind that the decrees of the foreign court do not directly affect the land, but operate upon the person of the defendant, and compel him to execute the conveyance, and it is the conveyance which has the effect, and not the decree."

Why does this court and all other courts use the word "directly" in this statement of the law? If the decrees of the foreign court do not in any way affect rights in the land, the expression would be much more simple and emphatic if the word "directly" were omitted. That case was an action in partition, and language of Judge Story is also quoted in the majority opinion in regard to the jurisdiction of the court in one state to partition lands in another state, and it seems to be thought that such authorities have a bearing upon the question presented here. An action in partition is an action in regard to the legal title. An equitable right to land will not support an action in partition at all. Both parties must have the legal title in common, and, when they do so hold the legal title, either has the right to have that title severed and the land divided. If the parties have equitable rights in the land these must be settled and adjudicated in another action before partition can be had. Equitable rights are personal rights and may be adjudicated where the parties are, but the legal title can only be severed and the land apportioned where the land is. This is a sufficient reason for holding that the courts of one state cannot partition the title to lands in another state. The decrees of a foreign court cannot directly affect the land,

but as is everywhere determined, and as is said by Mr. Justice Brewer in *Dull v. Blackman,* 169 U. S. 243, cited in the former opinion:

"If all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them and thus in effect determine the title."

This is the statement of a principle so commonly known and so generally determined by the courts that it called for no discussion by the learned judge who used it, and yet this statement of the law and the statement of the same court in *Cheever v. Wilson,* 9 Wall. (U. S.) 108, are spoken of in the opinion as *dicta* merely and are lightly turned aside as of no importance. The case of *Cizek v. Cizek,* 69 Neb. 800, is cited as authority in the case at bar. In the first opinion of this court in that case, written by Mr. Commissioner POUND, it was said: "In case the pleadings are sufficient to bring the subject matter before the court, the decree may not be attacked collaterally merely for want of findings."

This proposition is reaffirmed in the last opinion as "sound," but it is considered that the pleadings did not present the issue of an equitable interest of the wife in the real estate in question, and, as no such issue was presented by the pleadings, it was held that the court was without jurisdiction to determine it. In the case at bar the issue of the wife's equity in the land was presented and the Washington court had undoubted jurisdiction to determine that issue.

It seems clear that when they lived in Nebraska the wife had an interest in equity in this land; and she did not lose her interest when they removed to Washington. When their separation became necessary from the conduct of her husband, the law, both of this state and of Washington, required that she be given her rights in the land. These rights were necessarily and properly submitted to the court. The court had jurisdiction to determine these rights and did determine them. This decision was then,

and still continues to be, binding upon the conscience of Mr. Fall, so that he cannot anywhere, in any court, be allowed to say that such right does not exist. These rights of Mrs. Fall would not prevent Mr. Fall from conveying the land to an innocent purchaser in good faith who took the conveyance without notice, but a purchaser from Mr. Fall, with notice of the rights of Mrs. Fall, would take the land subject to those rights, and this would be so whether the rights had been adjudicated or not. Mr. Fall, having fraudulently transferred the legal title to another, is not a necessary party to this action; his grantee with notice holding the legal title from him is a necessary party, and the same relief can be granted to plaintiff as could be granted against Mr. Fall, if he still held the title.

The former judgment is right and should be adhered to.

DELL TITTERINGTON V. STATE OF NEBRASKA.

FILED DECEMBER 6, 1905. No. 14,176.

1. An instruction which informs the jury that, if they believe that a witness has wilfully and corruptly testified falsely as to any material fact, they are at liberty to reject all or any portion of the testimony of such witness, correctly states the rule to be applied to such cases.

2. Instruction Refused: ERROR. Where, in a proper case, such an instruction is tendered, it is error for the court to refuse to give it because it does not contain the qualifying words "unless corroborated by other competent proof."

3. Case Disapproved. The rule announced in *Denny v. Stout*, 59 Neb. 731, in so far as it conflicts with this opinion, is disapproved.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

W. W. Graves, J. T. Beeler and *Albert Muldoon,* for plaintiff in error.

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

BARNES, J.

The plaintiff in error was convicted of the crime of stealing certain cattle of the value of $120, while they were in his possession as bailee, and was sentenced to the penitentiary for the period of three years. To reverse said judgment he brings the case to this court.

By the second assignment of error it is contended that the district court erred in refusing to give the jury paragraph five of the instruction asked for by the plaintiff, which reads as follows: "The jury are instructed that they are the sole judges of the credibility of the witnesses, and of the weight to be given to their testimony. In determining such credibility and weight they will take into consideration the character of the witness, his manner on the stand, his interest, if any, in the result of the trial; his relation to, or feelings toward, the parties, the probability or improbability of his statements, as well as the facts and circumstances given in evidence. And in this connection you are further instructed that, if you believe that any witness has wilfully and knowingly sworn falsely to any material fact, you are at liberty to reject all or any portion of such witness' testimony." Not only was this instruction refused, but the court failed to instruct the jury on that point on his own motion.

It appears that one G. W. Bentley was the prosecuting witness, and claims to have been the owner of the animals alleged to have been stolen; that he delivered 12 head of cattle, consisting of 7 heifers and 5 steers, to the plaintiff to be pastured during the season of 1904, at the agreed price of 25 cents a head per month; that during the summer

he exchanged 5 of the steers with the plaintiff for 5 heifers, and bought enough other cattle of him to increase the number in his charge to 27 head; that in September of that year Bentley paid the plaintiff for the cattle thus purchased, and for the pasturing, up to the 25th day of that month. The plaintiff claims that on the 10th day of October following Bentley purchased a mare of him at the agreed price of $125, and was thereafter indebted to him for that amount, and for pasturing the cattle from September 25 to December following. It is admitted that he delivered 19 head of cattle to Bentley, leaving 8 head still in his possession, 3 of which died; and he states that he butchered 3 of the remaining animals, and shipped 2 of them. He also testified that, before so doing, he met Bentley at the Vienna Restaurant in North Platte, and there, in the presence of Ed. Hosler, Walter Etchison and the restaurant keeper, Otto Weil, Bentley said to him: "How much do I owe you now, Dell, for pasturing them cattle? He says: 'I have been hailed out, and had a team knocked out, one with fistula and one with sweeney,' and I think he said: 'I am hard up. I don't know when I will ever get any money to pay you.' I told him I did not think his pasture bill was very big. I don't remember just what it was. I didn't think it was very big. I says: 'There is the mare yet.' We had some other conversation. I says finally: 'Why not let me have the balance of those heifers on the account, and I think it will nearly finish it. I don't know just what it is, but I think it will very nearly finish the account.' He says: 'All right.' I understood it to be a trade." Thereafter he disposed of the cattle in question as above stated. The plaintiff's evidence on this point was fully corroborated by all the witnesses there present, except Weil, and was partially corroborated by him, although he stated that he paid very little attention to the conversation. The record discloses that Bentley denied that he ever had any such conversation with the plaintiff, and, so far as that point was concerned, he seems to have been entirely uncorroborated. So it would seem that the case was one where it was not only proper,

but it was the duty of the court to instruct the jury as to the rule *falsus in uno, falsus in omnibus,* and correctly define that rule.

It is conceded by the state that the instruction tendered was incorrect in this: That it should have contained the qualifying words, "unless corroborated by other competent proof." We are satisfied that the weight of authority is opposed to such a qualification. The question was carefully considered by this court in *Atkins v. Gladwish,* 27 Neb. 841, where an instruction in the following language was approved: "If the jury believe that any witness in this case has knowingly sworn falsely to any material matter in this case, then you are instructed that this would justify you in disregarding the testimony of such witness entirely." In the body of the opinion, Judge COBB, speaking for the court, said:

"The maxim, *'falsus in uno, falsus in omnibus,'* is one of general acceptation; but there is quite a diversity of opinion in the reported cases as to how it should be expressed in an instruction to a jury. It is not my purpose to compare the instruction above quoted with those which have been approved or disapproved in the courts of other states, but to say that I do not find the weight of authority or the reason of the case to indispensably require such charge to be qualified by the addition of the words 'unless corroborated.' Indeed, if the witness may not be believed unless corroborated, but may not be disbelieved if corroborated, even then credence is given alone to the corroborating testimony, and not to that of the implicated witness."

In *Dell v. Oppenheimer,* 9 Neb. 454, the syllabus states the rule as follows:

"Where a party swears falsely to a fact in respect of which he cannot be presumed liable to mistake, courts are bound to apply the maxim *'falsus in uno, falsus in omni bus,'* and to give no credit to any alleged fact depending upon his testimony alone."

The rule thus stated was approved in *Freiberg v. Treitschke,* 36 Neb. 880. In *Johnson v. State,* 34 Neb. 261,

this court approved the following instruction: "In weighing the testimony of each witness the interest, or absence of interest, of such witness in the result of the trial, should be taken in consideration by the jury. If the jury believe from the evidence that any witness has wilfully and knowingly sworn falsely to any material fact in this trial, it is competent for the jury to wholly disregard the testimony of such witness so far as it is in favor of the side calling him, if they believe his testimony wholly unworthy of belief." In 2 Rice, Evidence, page 795, we find the rule announced as follows: "If a jury are convinced of the intentional falsity of evidence and such wilful perjury, committed for the purpose of deceiving and misleading them, has destroyed their confidence in the truthfulness of the man and of his whole story, it is their legal duty then to reject his entire testimony as proving nothing." The rule thus stated is supported by the great weight of authority. In fact, after a thorough examination of the adjudicated cases, we feel that we can say that no case can be found where an instruction thus stating the rule has been refused because it did not contain the qualifying words, "unless corroborated by other competent proof." It is probable that the trial court was misled in this case by *Denney v. Stout,* 59 Neb. 731, where, in discussing an instruction, the writer of the opinion said:

"Error is assigned on the refusal of the court to give the following instruction requested by the defendants: 'If you find that any witness testified falsely as to any material point, you may disregard all he testified to unless corroborated by other competent proof.' This instruction omitted an important element, and was, therefore, properly refused. The rule is that the jury are authorized to disregard the entire evidence of an uncorroborated witness where his testimony upon a material point is wilfully and corruptly false."

It must be observed that the instruction in that case was disapproved, not because it did not contain the words, "unless corroborated by other competent evidence," but be-

cause the words, "wilfully and corruptly false," were omitted therefrom, and the rule thus announced, in so far as it seems to hold that the qualifying words, "unless corroborated by other competent evidence," must be contained in an instruction on that point, is disapproved. The trial court in this case not only refused the instruction tendered, but instructed the jury, in substance, not to regard merely slight variances of testimony between the witnesses as affecting their credit. In *State v. Swayze,* 11 Ore. 360, 3 Pac. 575, it was held reversible error to give such an instruction.

So we are constrained to hold, both on principle and upon the weight of authority, that the court erred in refusing to give the instruction in question. Having reached this conclusion, we find it unnecessary to consider any of the other assignments of error.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

JAMES F. LOGHRY V. FILLMORE COUNTY ET AL.

FILED DECEMBER 6, 1905. No. 13,985.

Amended Petition Stricken. If, after leave is taken to file an amended petition, another petition containing no new allegations of fact and substantially the same as the former petition is filed, it is proper practice to strike it from the files.

ERROR to the district court for Fillmore county: GEORGE W. STUBBS and LESLIE G. HURD, JUDGES. *Affirmed.*

Charles H. Sloan and *F. B. Donisthorpe,* for plaintiff in error.

John K. Waring and *Smyth & Smith, contra.*

LETTON, C.

A petition was filed by the plaintiff in error in the district court for Fillmore county to quiet the title to a certain lot in the city of Geneva. To this petition an answer was filed containing, among other defenses, a demurrer to the petition. A general denial was filed as reply. Before a trial was had upon the issues, the demurrer contained in the answer was argued and sustained, plaintiff excepted to the ruling, and took leave to file an amended petition. The amended petition which was filed was identical with the former petition, except that the following sentence in the first petition: "That all the negotiations, agreements and contracts herein referred to and contained were oral, except where alleged to be in writing and copies thereof herein set forth," was changed in the amended petition so as to read as follows: "That all the negotiations, agreements and contracts herein referred to and contained were in form, substance and solemnity good and sufficient for the purpose for which each of them was intended under and by virtue of the statutes of the state of Nebraska, and that copies of certain of said contracts and agreements are hereby attached, properly marked and referred to." The effect of the only change made was to eliminate the statement that the negotiations and agreements were oral, except where alleged to be in writing, but it sufficiently appears from the remainder of the petition that no other written agreements are relied upon than those set forth in the original petition. The allegation that the agreements were sufficient in law is a mere conclusion, and of no force as an amendment. A comparison of both petitions shows that there is no further allegation of fact in the amended petition than there was in the original. A motion to strike the amended petition from the files was sustained by the court, and exception taken. No further petition being filed by plaintiff, a motion to dismiss the case for want of prosecution was sustained and judgment of dismissal rendered, from which proceedings the plaintiff prosecutes error to this court.

The only point argued in the brief of plaintiff in error is that the procedure was irregular and unwarranted; and that, if the allegations appearing in the amended petition not appearing in original petition were too general, a motion to make more definite and certain was the proper procedure, or a general demurrer directed to the petition. We think this argument is unsound. If, after leave is taken to file an amended petition, another petition containing no new allegations of fact and substantially the same as the former petition is filed, it is proper practice to strike it from the files.

The writer of the brief states that two important exhibits attached to the second petition were absent from the original one. It is probable that the transcript, as it stood when the brief was written, led him to make this statement, but upon a diminution of the record being suggested and correction made, it appears that these exhibits were attached as well to the original petition as to the amended one. The action of the district court in striking the amended petition from the files was fully warranted, and the motion to dismiss was properly sustained.

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

AMES and OLDHAM C. C., concur.

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

AFFIRMED.

EMELINE CLARK, APPELLEE, V. DAVID PAHL ET AL., APPELLANTS.

FILED DECEMBER 6, 1905. No. 14,019.

The word "defendant," as used in section 477*b* of the code, applies to the mortgagor or to persons in privity with him, and not to cross-petitioners seeking to enforce a lien upon the premises, or to parties defendant having only a contingent or collateral interest in the property.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

L. W. Colby, for appellants.

R. W. Sabin, contra.

LETTON, C.

An action was brought in the district court for Gage county by the plaintiff against David Pahl, Louis Haverland and Leonard W. Colby to foreclose a mortgage executed by the defendant Pahl to the plaintiff upon certain real estate in that county. Pahl made default, and Colby filed an answer and cross-petition, alleging the recovery of judgment against Pahl and the filing of a transcript with the clerk of the district court, which he alleged created a lien upon the real estate, and prayed that the lien of his judgment might be established as the first lien. A trial was had, and the court found that the amount due plaintiff from the defendant Pahl was the first lien, and that the amount due the defendant and cross-petitioner Colby upon the judgment was a second lien upon the premises, and decree was rendered accordingly. On the same day Colby filed a written request for a stay of the order of sale upon the decree. Objections to such stay were filed by the plaintiff, and a hearing was had; the request for stay was overruled, and the clerk was directed to issue an order of sale

upon the decree. To these proceedings Colby took proper exceptions and has brought the case to this court for review.

The sole question presented is whether or not the defendant and cross-petitioner Colby was entitled to a stay of the decree of foreclosure. Section 477*b* of the code is as follows: "The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months from and after the rendition of such decree, whenever the defendant shall within twenty days after the rendition of such decree file with the clerk of the court a written request for the same; *Provided,* That if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof." This section constitutes section 2 of "An act to provide for stay of execution and orders of sale," approved February 23, 1875. The act covers the stay of execution in cases for the recovery of money only, as well as those for the foreclosure of mortgages, and from its context would seem to apply only to the judgment debtor and to the defendant mortgagor or his privies. It seems clear to us that the word "defendant," as used in this section, is intended to apply only to the mortgagor or to persons in privity with him, and that it was never the intention of the legislature that cross-petitioners seeking to enforce a lien on the premises or persons who might have only a contingent or collateral interest in the property, more or less remote, should be permitted to deprive the mortgagee of his right to an immediate sale of the premises for the satisfaction of his debt by the mere act of filing a written request for a stay. The purpose of the statute was evidently to give grace to the debtor so that he might have time to pay the debt and prevent a sale. In Iowa, in a case where the mortgagor failed to take a stay, but one Smith, the purchaser of the mortgaged premises, had done so, and his right so to do was challenged, the court upheld it, for the reason that Smith had become the principal debtor by his purchase of the land. *Moses v. Clerk of Dallas District*

Court, 12 Ia. 139. See also, *Corbett v. Waterman,* 11 Ia. 86; *Murray v. Catlett,* 4 G. Greene (Ia.), 108.

It is often necessary or proper in foreclosure cases to make persons parties defendant who have but little interest in the controversy or in the subject matter of the suit. If the word "defendant" is to be construed as including all persons who may be properly made parties defendant to the foreclosure suit, we think it might be productive of much injustice. In such case, the mortgagee's right to enforce his decree might be made subject to the whim of any person or persons, however slight his or their interest in the premises, who might be made defendants in the foreclosure action. This, we think, was not the intention of the lawmaker.

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.

JAMES L. REYNOLDS ET AL., APPELLEES, V. HENRY RICKGAUER, APPELLANT.

FILED DECEMBER 6, 1905. No. 14,025.

Vendor and Purchaser: FRAUD: RESCISSION: QUIETING TITLE. Where a purchaser of real estate has procured the execution and delivery of a deed by improper means, and by false and fraudulent representations which are relied upon by the grantors, the grantors are entitled, upon an immediate rescission on account of the fraud, to have the deed declared void and the title to the real estate quieted in them.

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

Harding & Harding, A. J. Sawyer and *H. V. Failor,* for appellant.

A. H. Tingle and *M. F. Harrington, contra.*

LETTON, C.

This action was brought for the purpose of declaring void a contract of sale of the plaintiff's homestead, which it is alleged was fraudulently procured, and to remove the cloud upon the title to the same created by the alleged unauthorized recording of a deed thereto which was executed by the plaintiffs to defendant, and which it is alleged had been placed in escrow, but had been fraudulently procured and placed upon record by the defendant.

The testimony of the plaintiff and his witnesses is substantially to the effect that plaintiff is a farmer, living upon and owning a tract of land in Boyd county, which was incumbered by mortgages to the extent of about $800. A foreclosure decree had been rendered against the land, and it had been advertised for sale under the decree. A short time prior to the time for the sale, the defendant went to the plaintiff's farm and stated to plaintiff that he would lose the place by the foreclosure sale; that he could not borrow any money on the land by reason of the land being in litigation; that he, Rickgauer, owned a $3,000 stock of goods at Naper, Nebraska, that they were all new goods and worth dollar for dollar, and that he would buy the plaintiff's farm, and his live stock, and other property, and would pay $1,500 for the land, and $457 for the personal property, the plaintiff to take $1,000 in goods at invoice price from the store at Naper; that he would pay the indebtedness upon the land and upon the personal property, and would pay the balance to the plaintiff. It was agreed between the parties that the deed to the land should be left at the bank at Spencer, Nebraska, until plaintiff inspected the goods.

The deed was executed and was delivered to Rickgauer

by one Lynn, who was employed in the bank, without the plaintiff's knowledge or consent. The goods, in fact, were part of an old stock, and consisted of odd sizes of clothing, shirts, underwear, boots and shoes, of old styles, and of but little value, the entire stock at Naper not being worth over $400 or $500. The plaintiff had no experience in mercantile business. The next day after the deed was executed, the plaintiff was informed of the true facts with reference to the value of the stock of goods, and told the defendant, when he came to his place that morning not to take away part of the live stock; that he wanted his deed back. The defendant paid none of the indebtedness of the plaintiff and allowed the land to be sold at foreclosure sale, when he purchased it in the name of his wife. The plaintiff has never taken possession of the goods, and is still in possession of the land. Both the plaintiff and his wife testify that they had no knowledge of the foreclosure proceedings until the night before Rickgauer came to their place, and that, when he told them that they would lose the land if they did not sell it, and that they could not borrow any money upon it, they believed him, as they also did with reference to the character of the goods. The fair market value of the farm, as testified by plaintiff's witnesses, is about $3,500 or $4,000.

On the other hand, the story told by the defendant and his witnesses is to the effect that he made no representations to the plaintiff with reference to his being unable to borrow money on the land, or that he would lose it by the foreclosure sale; that the land is only worth about $2,500 at the outside; that the goods on hand at Naper were worth close to $2,400, and that, while it is an old stock, the articles are in fair second-hand condition. It is shown, however, upon the cross-examination of one Ness, who was the clerk in charge of the store at Naper for the defendant, that on the Friday before the case was to be tried, when some one was going to inspect the stock for the plaintiff, Ness received a telephone message from Rickgauer to close the store until after the trial, and it is further shown by

defendant's own witnesses that the stock was the remains of an old stock, part of which had been auctioned off at different times and places, and the unsold remainder taken to Naper. Lynn, who drew up the deed and took the acknowledgment of both the plaintiff and his wife, testifies that he handed the deed to Rickgauer in their presence, and that no objection was made by them; that Rickgauer handed Mrs. Reynolds the bill of sale of $1,000 worth of goods, and that Rickgauer then gave the deed to him and told him to mail it to the county seat to be recorded; and this is Rickgauer's testimony also. A number of witnesses residing in the neighborhood in which the defendant lives testified that his reputation for truthfulness was bad.

Upon consideration of all the testimony, we think the weight thereof is with the plaintiff. As to the fraud charged, we are satisfied that the defendant made the representations alleged; that they were false; and that the plaintiff was deceived thereby. It appears that the next day, as soon as the plaintiff ascertained the fraud, he rescinded the contract and demanded a return of the deed, which was refused. Upon the whole case, we are of the opinion that the plaintiff was deceived and defrauded, and that he had the right to rescind the contract upon that account, and to demand and receive his deed. The petition seems sufficiently to set forth a cause of action, and we think the judgment of the district court is fully supported by the evidence.

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.

ADOLPHUS F. LINTON V. JOHN W. COOPER ET AL.

FILED DECEMBER 6, 1905. No. 13,890.

Dismissal: DEFENSE: POWER OF COURT. A court has no power or jurisdiction, upon dismissing a cause without prejudice to a new action, to adjudge that such new action shall not be subject to the defense that it is barred by the statute of limitations.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

John O. Yeiser, for plaintiff in error.

Charles A. Goss, contra.

AMES, C.

This is a proceeding in error to review a judgment of the district court sustaining a general demurrer to the petition of the plaintiff and dismissing the action, with costs, for the specific reason that it appears upon the face of the petition that the cause of action therein set forth was barred by the statute of limitations at the time the suit was begun.

The purport of the petition is that in January, 1889, the plaintiff delivered to the defendants certain shares of corporate stocks as a pledge to secure the repayment of a sum of money at that time borrowed by the plaintiff from the defendants, and that in May of said year the defendants converted said shares of stock to their own use to the damage of the plaintiff in a sum equal to their alleged value, for which sum, and interest from the last named date, he prays judgment. But the plaintiff seeks to evade the bar of the statute, apparent from the above recited facts, by alleging that in 1899, in an action then pending in the district court for Douglas county, the same facts had been pleaded by the plaintiff as a defense to an action for the foreclosure of a certain mortgage that had been executed to secure the same loan of money, and in which

a decree of foreclosure and sale was rendered, wherein it was adjudged that, upon payment and satisfaction of said decree, the plaintiff herein should be entitled to a return of said corporate shares, and that full payment and satisfaction of said decree had been made. If the decree had concluded with the adjudication just recited, we should have little doubt of the correctness of the plaintiff's contention, but, on the contrary, it proceeds in the next following paragraph to a final disposition of the matter in the following language: "The court expressly refuses to inquire into or adjudicate the rights of the respective parties in and to the shares of stock; and this decree is without prejudice to the rights of the Lintons or either of them to demand a return of said shares of San Sebastian Nitrate stock, on payment or satisfaction of the amount found due in this decree, and is without prejudice to the rights of said Lintons, or either of them, to maintain an action to recover said stock, or for a conversion of them, if any such right they have." Counsel for both parties have happily relieved us of some embarrassment in the interpretation of this decree by agreeing, in effect, that it does not itself suffice for a cause of action relative to the corporate stock, or, at any rate, that it is not the foundation of the cause of action set out in the petition; but the plaintiff argues, and the defendants deny, that it operated to toll the limitation by the statute, of the cause of action alleged to have accrued from a conversion of the stock ten years previously. This effect it does not purport to have, and we are not cited to any principle or authority for holding that a court has jurisdiction or power, upon dismissing a cause without prejudice to a new action, to adjudge that such new action shall not be subjected to the defense that it is barred by the statute of limitations. 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.

WILLIAM DOUGLAS V. JOHN R. SMITH.

FILED DECEMBER 6, 1905. No. 14,012.

1. The defense of res judicata is only available as to matters actually in issue and determined in the former suit.
2. A verdict upon conflicting evidence will not be disturbed except for specific error occurring at the trial.
3. New Trial: JURY, MISCONDUCT OF. The statement by a juror in the jury room of his personal knowledge of a fact not in dispute and not material to the issues is not misconduct requiring a new trial.

ERROR to the district court for Richardson county: JOHN S. STULL, JUDGE. *Affirmed.*

A. J. Weaver and *Edwin Falloon,* for plaintiff in error.

Reavis & Reavis, contra.

AMES, C.

A quarter of a century ago there were two water mills and dams on the Nemaha river in Richardson county in this state, and situated several miles apart. The proprietor of the upper mill, called the "Fall Mill," had the superior and prior right, and begun an action against the proprietor of the lower mill, called the "Exchange Mill," alleging that the latter, by means of his dam, had set the water back in the stream so as to flood the wheel of the plaintiff, and praying that the defendant be perpetually enjoined from continuing so to do. The suit was tried in June, 1885, and resulted in a general finding for the plaintiff, and in a decree perpetually enjoining the defendant "from flowing the water in the Nemaha river, upon which the respective mills of the parties are situated, back upon

the mill wheel of the plaintiff, situated on said river above the mill of said defendant, and from doing any act to prevent the easy and natural flow of the water in said river from the mill wheel of said plaintiff." But the height of the dam at the lower mill was not ascertained nor any specific height determined as one to which it could rightfully be maintained. There was an appeal to this court, where the judgment was affirmed. *Stumbo v. Seeley,* 23 Neb. 212. All that this decision accomplished therefore was to adjudge the superiority and priority of the right of the plaintiff to the flow of the water in the river necessary to the operation of his mill, and to restrain the defendant from unlawfully violating that right, an obligation which would have rested on him with equal force in the absence of the injunction. The two mills and dams have come, by mesne conveyances, to the respective parties to this action, which was brought by the present proprietor of the upper mill to recover damages from the present proprietor of the lower mill for the alleged unlawful obstruction of the stream by the dam of the latter, and consequent flooding and injuring of the mill of the former. There were a trial, and a verdict, and judgment for the defendant, and the plaintiff brings the record here for review.

The principal contention of the plaintiff in error is that the matter in issue is *res adjudicata,* and that his right of recovery is conclusively established by the judgment in the former case, but in this he is obviously mistaken. All the former case decided has been already stated, except that the defendant had in that instance violated the plaintiff's rights, to the damage of the latter, but whether the proprietor of the lower mill was guilty of a like wrong 25 years later must, of course, be determined by the evidence adduced on the trial of the present case. The evidence upon that issue is conflicting, and the court will not, in such circumstances, disturb the verdict, except for specific error occurring at the trial.

The defendant offered in evidence a letter written by the plaintiff to a third person, in some respects contradictory

to the testimony of the latter upon the trial, and containing admissions against his interest in the present controversy. The assignment is not much insisted upon, and we know no reason why the ruling was erroneous.

A new trial is also asked because of the alleged misconduct of a juror. Two witnesses, Abbott and Towle, testified that, during the period of the alleged flooding complained of, they had observed a riffle or ripple in the stream between the two dams. The witnesses were not contradicted, and it is admitted by plaintiff in error in its brief that "this testimony was wholly immaterial, for the reason that plaintiff does not contend that there was no current between the two dams. No sane man would make such a contention." The alleged misconduct complained of was a statement by one of the jurors in the jury room that he believed the witnesses, Abbott and Towle, because he had observed the riffle or current himself. If the fact had been material and in dispute, the conduct of the juror might have been prejudicial, but, since it was neither, it does not, we think, furnish ground for complaint.

Counsel for plaintiff in error submitted their cause without oral argument and the foregoing are all the assignments of error we find treated of in their brief. We think none of them sufficient to require a reversal, 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.

ERICK C. MUNK V. J. L. FRINK ET AL.

FILED DECEMBER 6, 1905. No. 14,332.

1. **License of Physician:** REVOCATION: REVIEW. By section 580 of the code the district court is given jurisdiction to review, by proceedings in error, an order of the state board of health revoking the license of a physician.
2. **A complaint** filed before the state board of health for the purpose of procuring an order revoking the license of a physician is sufficient if it informs the accused, not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration.
3. **State Board of Health.** The act of 1891, creating a state board of health, is not rendered void by the fact that it provides for compensation of its secretaries by fees which are not required to be accounted for to or paid into the state treasury.

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

M. F. Harrington, H. Halderson and *A. M. Post,* for plaintiff in error.

Norris Brown, Attorney General, William T. Thompson, L. R. Latham, H. F. Rose and *H. C. Vail, contra.*

AMES, C.

In March, 1891, the state board of health of this state issued, pursuant to the statute in force at that time, a certificate licensing or permitting the plaintiff in error to engage in the practice of medicine. On May 27, 1904, there was filed with the secretaries of the board a verified complaint against him, of the first two clauses of which the following are copies: "The affiants, F. Frink and R. R. Kennedy, residents of Madison county, Nebraska, who, being first duly sworn, depose and say that your Honorable Board should refuse to issue a certificate to Dr. Erick C. Munk of Newman's Grove, Madison county, Nebraska, or

if certificate has already been issued to Erick C. Munk, that it should be revoked for the following reasons: First. In the procurement, aiding and abetting a criminal abortion as follows: Dr. Erick C. Munk on the 11th day of February, 1904, in the county of Boone, wilfully, unlawfully and maliciously did use a certain instrument, the name of which is to affiant unknown, by thrusting and inserting said instrument into the womb of one Laura Orender, then and there being a pregnant woman, with the intent then and there and thereby to procure the miscarriage of the said Laura Orender, the same not being necessary to preserve the life of the said Laura Orender, not being advised by two physicians to be necessary for that purpose other than Dr. D. G. Walker, who assisted in producing said miscarriage, and was a co-conspirator in said crime."

In November following, the board, after having heard testimony and arguments by counsel, entered of record a finding by them that "the said Erick C. Munk is guilty in manner and form as charged in said complaint," and an order that said certificate issued to said Munk "be, and the same is, hereby canceled and revoked." The board are empowered by section 14, chapter 55, Compiled Statutes 1903 (Ann. St. 9428), to revoke such certificates for several specified causes, among which are "the procuring or aiding or abetting in procuring a criminal abortion." The statute (Cr. code, sec. 6) defines the crime of abortion as the unlawful use of drugs or instruments for the destruction of a vitalized embryo or foetus, resulting in the death thereof, or of its mother. And such may be regarded as substantially the common law definition of the offense. *Hatfield v. Gano,* 15 Ia. 178; *Smith v. State,* 33 Me. 48; *State v. Cooper,* 22 N. J. Law, 248. From the foregoing order of the state board, Munk prosecuted a petition in error to the district court for Lancaster county, but his proceeding was dismissed, on motion, on the sole ground that the order is not, in the opinion of the presiding judge, reviewable by the courts, either by proceedings in error or

otherwise. To reverse the order of dismissal, this proceeding is now prosecuted in this court.

In support of the judgment below it is contended that the state board is a body belonging to the executive department of the state government for the exercise of purely police functions, and that its powers are exclusively executive and administrative, and not judicial, in any sense, and that its judgments and orders are therefore not reviewable by the courts upon error, as provided in section 580 of the code which confers upon district courts jurisdiction to review in that manner final orders of tribunals, boards and officers, "exercising judicial functions." Reliance in support of this argument is mainly upon *State v. Hay*, 45 Neb. 321, and authorities there cited. But that decision does not appear to us to be in point, or rather, so far as it is in point, it seems to us to countenance the opposite conclusion. The statute under consideration in that case provided that the superintendent of the Lincoln hospital for the insane should hold his office for the term of six years, "unless sooner removed by the governor for malfeasance in office, or other good and sufficient cause. Comp. St. 1903, ch. 40, sec. 11 (Ann. St. 9600). The governor preferred against the superintendent certain formal specific charges in writing, and, after notice and a hearing, at which testimony was produced, made an order formally sustaining them, and removed the incumbent from office, and appointed a successor. The former refused to yield, and the attorney general instituted in this court an original proceeding in the nature of an information *quo warranto* for the purpose of obtaining a determination of the validity of the order of removal. It was held that the court would not, in that proceeding, either inquire into the sufficiency of the evidence adduced before the governor or retry the issues themselves, but that the governor was without jurisdiction or authority to remove, except for the cause of malfeasance in office, and that the court would examine the charges for the purpose of ascertaining whether they were such as, if true, justified the order under review. It was

found that certain of them were too indefinite to sustain an order of removal, but that certain others were sufficient for that purpose, and, thereupon, the court rendered a judgment of ouster against the incumbent and in favor of the person appointed as his successor. Such being the jurisdiction and power of the court in a collateral action, that of the district court in a direct proceeding for a review can, as it seems to us, certainly not be less, and it follows from logical necessity that, if the testimony taken before the tribunal, board or officer, has been authenticated and preserved in the form of a bill of exceptions, it may be reviewed in such a proceeding for the purpose of ascertaining whether it is sufficient to sustain the charges made, or some of them, and the consequent order of removal or revocation, as the case may be.

We quite agree with counsel for both parties that there is a close analogy between the class of cases to which *State v. Hay, supra,* belongs, and that in which the present case is included. An incumbent of an appointive statutory office has not, necessarily, a property or contractual right in his term, so as to render his removal therefrom a judicial act. Neither has a licensee, necessarily, a property or contractual right in his privilege, so as to render a revocation of his license a like act; but we think that the legislature confers a *quasi* property or contractual right in either case by providing that removal or revocation, as the case may be, shall be only for specified cause or causes arising out of the conduct of the appointee or licensee, and analogous to a forfeiture, the declaration of which is essentially a judicial act. This view does not, of course, involve a limitation of the power of the legislature to abolish the office or revoke the license by direct enactment. We conclude therefore that the district court erred in his order of dismissal, and that his judgment should have been one either of affirmance or of reversal, accordingly as the law, applied to the record before him, required the one or the other. The evidence taken at the hearing was before the district court, and, in our opinion, a judgment of that

court thereon must be rendered before it can be reviewed by this court; but counsel for the plaintiff in error contends that the judgment should have been one of reversal, in any event, for the alleged reason that the complaint before the state board was insufficient to authorize the order of revocation of the license. To that extent we are unable to follow him. The complaint accused the plaintiff in error, in almost the language of the statute, with "the procurement, aiding and abetting a criminal abortion," "as follows" (that is to say, in the following manner, and at the time and upon the person below named). "Dr. Erick C. Munk on the 11th day of February, 1904, in the county of Boone, wilfully, unlawfully and maliciously did use a certain instrument, the name of which is to the affiant unknown, by thrusting and inserting said instrument into the womb," etc. It is quite true, as counsel urges, that the language succeeding the words "as follows" does not constitute a complete description of the crime of abortion, but it is equally evident that it was not used or intended for that purpose, but for the purpose of particularizing and defining the offense charged in general terms in the preceding clause of the paragraph. It is quite likely that the entire "count," as it has been called, is not framed with such definiteness and precision as would be requisite in an indictment or information for the criminal prosecution of the alleged offender, but it is sufficient to inform him with reasonable certainty, not only of the nature of the wrong laid to his charge, but of the particular instance of its alleged perpetration. In other words, it is "certain to a common intent," and in a proceeding of this kind that, we think, is all that is indispensably requisite. *State v. Common Council,* 53 Minn. 238; *People v. Thompson,* 94 N. Y. 451; *In re* Smith, 10 Wend. (N. Y.) 449; *Meffert v. Medical Board,* 66 Kan. 710.

There is a second "count" in the complaint accusing the plaintiff, in the same form as the preceding, of a similar offense upon the person of Maggie Daly, and what has been said above applies to it also.

Counsel for plaintiff in error also attacks the act creating the state board of health for unconstitutionality because it provides for the payment of the secretaries of the board by fees, which are not required to be accounted for to and paid into the state treasury. To what extent this method of compensation was a material inducement to the passage of the act may be a subject of debate, but in the light of *State v. Porter*, 69 Neb. 203, we do not think it material. The state board is composed of executive state officers to whom the act awards, or attempts to award, no fees or compensation whatever, and even if it should be held that its provisions for the remuneration of the secretaries is void, that fact would not necessarily be destructive of the board, for the compensation of whose assistants the legislature might enact some other means.

For the foregoing reasons, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law.

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 further proceedings in accordance with law.

REVERSED.

STATE OF NEBRASKA V. DANIEL G. WALKER.

FILED DECEMBER 6, 1905. No. 14,328.

Directing Verdict. For reasons stated in the opinion, an instruction of the trial judge directing a verdict of not guilty in this action is adjudged erroneous.

ERROR to the district court for Platte county: JAMES G. REEDER, JUDGE. *Instruction held erroneous.*

Norris Brown, Attorney General, William T. Thompson, L. R. Latham, Halleck F. Rose and *H. C. Vail,* for plaintiff in error.

M. F. Harrington, H. Halderson and *A. M. Post, contra.*

AMES, C.

The circumstances that gave rise to this litigation are recited at length in *Munk v. Frink, ante,* p. 172, and need not be repeated here. Dr. Walker was informed against, arrested and put upon his trial for the alleged offense of practicing medicine after the date of the revocation of his license therefor, as related in the opinions above cited. The acts complained of were admitted, but the court excluded from evidence the record of the proceedings of the state board upon the ground that the complaint disclosed thereby was insufficient to confer jurisdiction upon that body to make the order of revocation, and directed a verdict of acquittal, which was accordingly rendered. The state prosecutes this proceeding for the purpose of obtaining the opinion of this court whether the ruling of the trial judge was erroneous. We have in the case cited given our reasons for thinking it was so, and recommend that it be so adjudged.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is adjudged that the instruction given by the trial judge directing a verdict of not guilty in this action was

ERRONEOUS.

DANIEL G. WALKER V. D. B. MCMAHN ET AL.

FILED DECEMBER 6, 1905. No. 14,331.

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

M. F. Harrington, H. Halderson and *A. M. Post,* for plaintiff in error.

Norris Brown, Attorney General, William T. Thompson, L. R. Latham, Halleck F. Rose and *H. C. Vail, contra.*

AMES, C.

The record and proceedings in this case are, with the exception of the persons who are parties to it, in all respects identical with those in *Munk v. Frink, ante,* p. 172, argued and submitted at the same time, and, for the reasons there stated, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law.

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 further proceedings in accordance with law.

REVERSED.

JOHN YOESEL ET AL., APPELLANTS, V. WILLIAM RIEGER, ADMINISTRATOR, ET AL., APPELLEES.

FILED DECEMBER 6, 1905. No. 14,389.

Wills: DEVISE: CONSTRUCTION. Where a testator devised lands to his daughter in fee, but with a limitation over by way of executory devise in favor of her brothers and sisters, contingent upon her dying within a definite term of years without surviving issue, and the daughter died within the specified term leaving such issue, the latter succeeded to the estate of its mother in fee simple.

APPEAL from the district court for Richardson county: ALBERT H. BABCOCK, JUDGE. *Affirmed.*

Francis Martin, A. J. Weaver and *E. Falloon,* for appellants.

Reavis & Reavis, contra.

AMES, C.

This is a petition in error to review a judgment of the district court affirming an order of distribution made by a county court in a proceeding for the settlement of the estate of a deceased person.

On the 15th day of April, 1895, Christian Yoesel died, a resident of Richardson county, in this state, leaving an estate consisting of a tract of land and considerable personal property situate in that county. He also left a will, afterwards duly admitted to probate, of so much of which as is pertinent to this controversy the following is a copy:

"Item 2. It is my will and desire that my son John have the use of my home farm of 150 acres in section 33, town 2, north, range 17 east, 6th P. M., in Richardson county, Nebraska, for the term of seven years, or until March 1, 1902, and to pay to my administrator for said rent the sum of four hundred and fifty dollars ($450) each year, to be paid

as may be agreed upon between John and my administrator.

"Item 3. It is my will and desire that when my youngest child, viz., David, becomes of age, which will be in said year 1902, then my said farm of 150 acres is to be the property of all my then living children, share and share alike, to be disposed of by them as in their judgment may seem best for all of them, and should any of my now living children die before the division above mentioned then said child's share shall go to my remaining children, share and share alike, provided, however, that should such deceased child leave any children, then his or her share shall go to his or her said children, which said division or bequest in this item shall also include the three children of my deceased daughter, Mrs. Catherine Rieger, who shall be entitled to an equal share in my estate as though their mother was living, and said estate or any moneys derived from said estate shall not be paid to said three children or any of them until they or each of them become of legal age."

After the death of the testator one of his daughters, Christina, intermarried with one Daniel Rieger, and in March, 1899, died intestate leaving, her surviving, her husband and a daughter by the marriage. The latter died in July of that year, and in the following month the husband also died. David Yoesel, the youngest child of the testator, attained his majority on March 1, 1902. Daniel Rieger at his death left, him surviving, three minor children, his issue by a former marriage, and the sole question litigated in this case is whether these minors succeeded, as both the lower courts held that they did, to the estate which the deceased daughter of the testator, Christina, would have had if she had lived until March 1, 1902, After the determination of this question two familiar rules are to be kept in mind: First, that at the common law a fee estate in lands is always vested somewhere; and, second, that in the construction of a will the intent of the testator, so far as it is consistent with law, must, if possible, be ascertained and given effect. But the latter rule is governed by the pre-

sumption that the testator knew the law and that he chose the language employed in the instrument with a view to its ordinary legal signification. The purport of the instrument under discussion is that the fee to the lands in dispute vested upon the death of the testator in his children and grandchildren, named as devisees, as tenants in common of aliquot parts thereof, but burdened with a leasehold estate for a definite term of years, and subject to executory devises in favor of the survivors of them, contingent upon the death of any of them during the existence of the term without lawful issue surviving. Upon the death of Christina the contingency upon which alone the devise over of her share of the lands could have taken effect had not happened, and her title thereto, therefore, devolved upon her infant daughter, and upon the death of the latter descended to her sole heir at law, her father, and upon his death came by inheritance to his sole heirs at law, his minor children by the former marriage. 2 Washburn, Real Property (6th ed.), sec. 1,739. This construction is both in accordance with the technical rules of law and consistent with the manifest intent of the testator.

The suggestion that the result thus reached bestows upon the deceased infant a greater estate than was devised by the will to her mother is wide of the mark. The mother took a title in fee determinable upon her death, during the period of the leasehold term, without surviving issue, but upon her death leaving issue, that contingency not only did not happen, as has already been said, but ceased forever to be possible, and her estate in fee became absolute, so that it is immaterial whether the infant is regarded as having succeeded as executory devisee under the will or as sole heir at law. In either view she acquired the very estate with which her mother was vested at the instant of her death, to wit, the unlimited and unqualified title in fee simple, subject only to the unexpired portion of the term of years.

It is not disputed, as we understand, nor can it be so, successfully, that upon the death of Christina her estate or

title was transmitted to her daughter, but the very event that effected its transmission freed it from every condition and limitation expressed in the will, and the only escape from the foregoing conclusion is, therefore, that, in some manner, the title became conditioned or qualified in the hands of the infant, but there are in the will no limiting or qualifying words applicable to the issue of a deceased child of the testator, nor is there any reason to suppose that the testator contemplated the death of such issue, and the courts are powerless to engraft any such words upon the instrument, even if they were disposed so to do.

For these reasons, it is recommended 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.

JOHN A. BEBER V. BROTHERHOOD OF RAILROAD TRAINMEN.

FILED DECEMBER 6, 1905. No. 13,862.

It is for the jury to determine whether a total loss of three fingers and an injury to the remaining finger and thumb, which materially interferes with their use, and a cutting away of a part of the palm of the hand constitute a total loss of the hand within the meaning of a by-law of a mutual benefit association, which provides indemnity for any member in good standing suffering, "by means of physical separation, the loss of a hand at or above the wrist joint."

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Mockett & Polk, for plaintiff in error.

Stewart & Munger, contra.

OLDHAM, C.

On the 2d day of May, 1900, the plaintiff in error, who was plaintiff below, became a member of a fraternal benefit society, known as the Brotherhood of Railroad Trainmen, and agreed to pay monthly assessments of $2 a month on a beneficiary certificate issued to him by said society in the sum of $1,200. The plaintiff was a brakeman, and belonged to the class of risks called "Class C" in the constitution of the society. By section 37 of the constitution of the order it is provided that the member shall be entitled to the amount of his certificate "upon his becoming permanently and totally disabled within the meaning of section 45." Section 45 is as follows: "Any member in good standing, suffering, by means of physical separation, either the loss of a hand at or above the wrist joint, or suffering the loss of a foot at or above the ankle joint, or suffering the loss of the sight of both eyes, shall be considered totally and permanently disabled and shall receive the full amount of his beneficiary certificate, but not otherwise." On the 10th day of May, 1902, while the beneficiary certificate was in full force and effect, plaintiff received a personal injury by chopping and cutting his left hand, while splitting wood, and as a result of this injury lost his second, third and fourth fingers and about half of the second, third and fourth metacarpal bones, which removed nearly half of the palm of his hand, damaged the first and second joints of the index finger, and caused a running sore on the thumb between the second and third joints, which stiffened and impaired the motion of the thumb and practically destroyed its usefulness. Plaintiff's testimony tended to show that this injury had totally destroyed the usefulness of the hand, as such, while the evidence offered by defendant tended to show that the remaining thumb and finger on the hand and the partially stiffened wrist joint were of some utility to the plaintiff. In this state of the record, when the testimony was all in, the court, being of the opinion that, under section 45 of the defendant's constitution,

plaintiff was only entitled to recover on proving that the entire hand was severed at or above the wrist joint, directed a verdict for defendant and rendered judgment for the defendant on the verdict so directed. To reverse this judgment plaintiff brings error to this court.

That plaintiff's benefit certificate is a contract of insurance between him and the society is both apparent and conceded, and that his right to recover depends upon a construction of the contract as set forth in section 45 of the constitution is also conceded by both parties to the controversy. Eliminating from this section all points not applicable to the case at bar, it would read as follows: Any member in good standing suffering, by means of physical separation, the loss of a hand at or above the wrist joint shall be considered totally and permanently disabled, and shall receive upon sufficient and satisfactory proof of the same, the full amount of his beneficiary certificate, and not otherwise. Now, the question to be determined is, what did the defendant company contract to insure against under the provisions of this by-law? Was it the severance of the entire hand at or above the wrist joint, or, was it the entire loss of the use of the hand at or above the wrist joint by physical separation? If the only risk assumed by defendant was the amputation of the whole hand, then the learned trial court was fully justified in directing a verdict for defendant; but, if a fair and liberal interpretation of the contract most favorable to the insured can make it a risk which includes the total loss of the use of the hand by severance, then the question as to whether such loss is established by the evidence is properly one for the triers of such facts. If the officers of the society, who prepared the by-law in which the contract is set forth, have used ambiguous terms, the ambiguities must be interpreted in the manner most favorable to the insured. If, instead of stating in plain and simple language the exact loss they intend to protect against, they propound riddles in a jargon of equivocal phrases, these riddles should be solved most favorably to him who has been the victim of such artifice. Inter-

preted in this spirit, can the by-law of the defendant be reasonably said to protect against the entire loss of the hand by physical separation, whether such loss be occasioned by amputation or by an injury by severance which totally destroys the usefulness of such member?

In *Lord v. American Mutual Accident Ass'n,* 89 Wis. 19, under a policy containing a provision for the payment for an injury "causing an immediate, continuous and total disability," it was held that it was a proper question for the jury to determine whether a total loss of three fingers and part of another on the same hand, and destruction of the joint of the thumb, and the cutting of the hand, constituted a total loss within the meaning of such provision. In disposing of this question, Cassoday, J., speaking for the court, said:

"On the part of the defendant it is contended that there is no such thing as the loss of the hand unless the injury is such as to require the amputation of the hand above the wrist. That would be too much of a refinement upon language for practical purposes. The hand was for use; and, if it was injured so as to become useless as a hand, then the defendant became liable for its loss under the contract. This was held, in principle, in *Sheanon v. Pacific M. L. Ins. Co.,* 77 Wis. 618, s. c. 83 Wis. 507. In *Sneck v. Travelers Ins. Co.,* 34 N. Y. Supp. 545, the action was on a policy against "a loss by severance of one entire hand or foot." There was a loss of a part of the hand by severance. Plaintiff testified that he had no use of the hand, as such. The court held that the word severance in the policy meant the method by which the accident occurred, and that it was the loss of the use of the hand that was insured against, and that the question as to whether the loss was total under the evidence was one of fact for the jury. While the supreme court was divided on this question and at the first hearing of the same case, reported in 81 Hun (N. Y.), 331, indicated a different conclusion, yet the last decision was reviewed by the court of appeals in 156 N. Y. 669, and the last majority opinion of the intermediate court was approved, with-

out division, by the court of appeals. The doctrine announced in this case is quoted with approval in 1 Am. & Eng. Ency. Law (2d ed.), p. 301, wherein it is said: "Many of the companies have altered their policies so as to read 'the loss of feet or hands by severance' thereof, but this provision has been held to be intended to refer to the manner rather than to the exact physical extent of the injury."

Defendant's counsel cite us to the holding in *Fuller v. Locomotive Engineers M. L. & A. Ins. Ass'n,* 122 Mich. 548, as supporting the conclusion reached by the trial judge in the court below. After a careful examination of this very well-considered case, we are satisfied that, instead of supporting the theory of the trial judge in the instant case, it makes directly against it. In this case the by-law provided that any member receiving bodily injuries which alone should "cause amputation of a limb (whole hand or foot)" should receive the amount of the certificate, but not otherwise. Plaintiff sustained a loss of a portion of his foot. While the conclusion reached was that, under this peculiar contract, he could not recover, yet, in reaching this conclusion, the learned author of the opinion reviewed with approval the conclusions reached in the cases above cited, and other cases of the same import, and distinguished the case he was deciding by saying:

"These cases establish the proposition that where an insurance policy insures against the loss of a member, or the loss of an entire member, the word 'loss' should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application. In all of these policies the word 'loss' is used, and it is the loss of the member that is in terms insured against. As indicated in the last authority cited, the attempts of the insurance companies to avoid this construction by so changing the policy that it reads, 'loss by severance of feet or hands,' have failed; the courts holding, as before, that it is the loss of the use of the member which was the object of the contract. In the present case the word 'loss'

is eliminated, and the insurance is against 'an *injury* that shall cause the amputation of a limb (whole hand or foot), or total and permanent loss of eyesight.'"

We are therefore of opinion that the question of whether there was a total loss of the use of plaintiff's hand, at or above the wrist joint, under the evidence contained in the bill of exceptions, is one of fact for the jury, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

LETTON and AMES, 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 for further proceedings.

REVERSED.

HOLCOMB, C. J., expresses no opinion.

LOUISA LANGE V. ROYAL HIGHLANDERS.*

FILED DECEMBER 6, 1905. No. 13,913.

1. **Beneficial Insurance Contract.** Where a member of a fraternal benefit association agrees to be bound by subsequently enacted by-laws, such contract will be upheld when the subsequently enacted by-laws are reasonable in their nature and legally enacted.

2. ———: NEW BY-LAW: FORFEITURE: SUICIDE. A subsequent by-law, legally enacted, providing for the forfeiture of a fraternal benefit certificate when the death of the member is occasioned by suicide, whether sane or insane, is a reasonable by-law and will be upheld.

3. ———: ———: CONSTRUCTION. A subsequent by-law providing for a forfeiture will be strictly construed against the association, and, if passed in contravention of the provisions of the statute governing such associations, it will be held void and of no effect.

* Rehearing allowed. See opinion, p. 196, *post*.

4. **Corporate Powers:** STATUTORY REGULATION. When the exercise of corporate power has been regulated by statute, the corporation cannot, by its by-laws or resolutions, change the mode of the exercise of this power.

5. **Fraternal Societies:** GOVERNMENT. A fraternal benefit association must have a representative form of government. This requires that the directors or other officers who have charge and control of the property and business of the society, and the management of its affairs, shall be chosen by the membership thereof. *State v. Bankers Union of the World*, 71 Neb. 622, followed and approved.

6. **Collateral Attack.** An attack on an illegal by-law of a fraternal benefit association is not a collateral attack on the right of the society to do business.

ERROR to the district court for Seward county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

M. D. Carey and *J. J. Thomas,* for plaintiff in error.

R. S. Norval and *Hainer & Smith, contra.*

OLDHAM, C.

This was an action by the plaintiff in the court below in her own right, and as guardian and next friend of her minor son, to recover the sum of $2,000 on a benefit certificate issued August 14, 1897, upon the life of Alexander D. Lange, by the Royal Highlanders, a fraternal benefit society organized under the laws of the state of Nebraska. The defense interposed was that Alexander D. Lange had come to his death from wounds inflicted by his own hand with suicidal intent. On issues thus joined there was a trial to the jury, and at the close of all the testimony the court directed a verdict for the defendant. Judgment was entered on this verdict, and to reverse this judgment plaintiff brings error to this court.

The facts underlying this controversy, which are either admitted or fully established by the proofs offered, are: That on August 14, 1897, the deceased, Alexander D.

Lange, was duly admitted to membership in the defendant society and received a certificate of indemnity for the amount sued for in the petition, payable at his death to the beneficiaries therein named; that by the application and certificate of indemnity it was agreed that the insured should comply with the edicts of the association then in force and such as thereafter should be enacted; that at the time the deceased was admitted to membership there was no edict or by-law of the society providing for a forfeiture of the policy if the member came to his death by suicide, whether sane or insane. It is clearly established by the proofs offered that on June 26, 1902, Alexander D. Lange died from the effects of a gun-shot wound inflicted by his own hand with suicidal intent, and that on June 12, 1901, the executive castle of the defendant association assumed to pass and publish an edict or by-law which provides as follows: "The benefit certificate issued to a member shall become void and all benefits thereunder shall be forfeited in case the member shall die from suicide, feloniously or otherwise, sane or insane."

There are certain underlying propositions, sound in principle and supported by the former decisions of this and other courts of last resort, that govern the rights and liabilities of members of voluntary associations, whether mutual insurance companies or fraternal benefit societies, that are applicable, in the first instance, to the questions involved in this controversy. One of these principles is that a member of such society, who agrees in his application, or has the agreement incorporated in his policy or benefit certificate, that he will comply with the by-laws of the company then in force or thereafter to be adopted, is bound by subsequent by-laws the same as by those in force at the time his certificate was issued, provided that such subsequent by-laws are reasonable in their nature, and are properly adopted in conformity with the rules of the order and the statute governing such associations. *Farmers Mutual Ins. Co. v. Kinney*, 64 Neb. 808. Another underlying principle established by

the clear weight of authority is that, where a member of a fraternal benefit association contracts in his application or certificate of membership to be bound by subsequently enacted by-laws, a by-law, properly enacted, providing for the forfeiture of a certificate where the death of the member is occasioned by suicide, whether sane or insane, is a reasonable by-law and will be upheld. *Hughes v. Wisconsin Odd Fellows Mutual Life Ins. Co.*, 98 Wis. 292, and cases therein cited. Another well established principle is that a subsequent by-law providing for a forfeiture will be strictly construed most strongly against the association, and if passed in contravention of the provisions either of the articles of association, the constitution and by-laws of the society, or the statute governing it, it will be held *ultra vires* and of no effect. *Briggs v. Earl,* 139 Mass. 473; *Supreme Council, A. L. H., v. Perry,* 140 Mass. 580, 5 N. E. 635; *Supreme Lodge, K. P., v. Kutscher,* 179 Ill. 340, 70 Am. St. Rep. 115; *Supreme Lodge, K. P., v. La Malta,* 95 Tenn. 157; *Supreme Lodge, K. P., v. Stein,* 75 Miss. 107, 65 Am. St. Rep. 589. Again it is well established that, where the exercise of corporate power has been regulated by statute, the corporation cannot by its by-laws, resolutions or contracts, change the mode of the exercise of this power. 1 Thompson Corporations, secs. 849, 1,013; *Brewster v. Hartley,* 37 Cal. 15, 99 Am. Dec. 237.

From these principles it follows that the only question to be determined is as to whether the by-law relied upon as a defense has been legally enacted by a duly authorized body of the defendant association. This question requires an examination into the articles of incorporation and by-laws or edicts of the society, as well as the provisions of the statutes of the state regulating fraternal benefit associations. From the evidence contained in the record it appears that at some time prior to June, 1896, six persons conceived the idea of organizing the society known as the "Royal Highlanders"; that these six members constituted themselves the executive castle of the order, with

plenary powers in the organization. On August 10, 1896, the society commenced business with a membership of 311, and properly filed its articles of incorporation. It appears from the testimony that there never was a meeting of the members of the association, and that the officers were never voted on, either directly or indirectly, by the policy-holders of the order. On June 14, 1897, the executive castle, which had in the meantime increased its number to 12 members, together with one delegate of the association, held a meeting at which they formally elected themselves to the different offices in the executive castle for a term of four years, and adopted the edicts or by-laws in force at the time the certificate of membership was issued to Alexander D. Lange. Section 4 of the edicts so adopted provides as follows: "The executive castle shall be composed of its officers, its standing committees, its special committees, and its delegates elected by district conventions, as is hereinafter provided." In 1897 the legislature of Nebraska enacted: "A fraternal beneficiary association is hereby declared to be 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. Each such society shall have a lodge system, with ritualistic form of work and representative form of government." Laws 1897, ch. 47, sec. 1. And also enacted: "All such societies organized under the laws of this or any other state, territory or province, and now doing business in this state, may continue such business provided they hereafter comply with the provisions of this act." Laws 1897, ch. 47, sec. 8. On June 12, 1901, the executive castle of the order promulgated the by-law or edict in dispute at its regular meeting. The executive castle, among other powers, was authorized to institute representative castles as might be deemed essential, in accordance with its edicts. In furtherance of this power it had, prior to the meeting in 1901, provided for the election of representatives from districts composed of tributary castles having an aggre-

gate of not less than 500 members, nor more than 1,000. And at the meeting at which the by-law at issue was enacted, the executive castle was composed of 25 members, 9 of whom had been elected from representative castles, and 16 of whom were self-constituted officers and their appointees.

Now, as before stated, this executive castle had, by its own by-laws, granted itself plenary powers over the organization, and constituted itself the sole governing and law-making body of the order. Bearing in mind that the inherent right to enact by-laws for the government of a corporation is in the stockholders, and that this right can be exercised by a board of directors, or other similar body, only when such right is clearly conferred by the rules of the society and the statute of the state governing the incorporation, the question is, was the executive castle of the defendant, constituted as above set out, a representative body of the association? A representative form of government is defined in the Universal dictionary of the English language as one "conducted and constituted by the agency of delegates, or deputies, chosen by the people." This definition fairly expresses the modern American idea of a representative government, and, as applied to section 1, *supra,* is in full harmony with the construction placed upon that section by this court in the recent case of *State v. Bankers Union of the World,* 71 Neb. 622, wherein it was said:

"A fraternal benefit association must have a representative form of government. This requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, shall be chosen by the members."

While counsel for the defendant in error have filed a very able and persuasive brief urging us to reconsider and modify the definition of a representative form of government as expressed in the case just quoted, we find ourselves, after a careful consideration of their well written brief and strong oral argument, wholly unpersuaded

to do so. It seems to us that it was the manifest intention of our legislature in the enactment of sections 1 and 8, *supra,* to require all fraternal benefit associations, either then doing business or which should later be organized, to conduct the affairs of the associations for the sole benefit of the members and their beneficiaries, and that to further this object they required such associations to be governed by representatives elected by the members. The fact that defendant and other similar fraternal societies had been organized without even a fair semblance of a provision for a representative form of government in its modern sense most likely influenced the lawmakers in the passage of this statute. To prevent the possibility of a self-constituted oligarchy controlling and managing any such association for its own benefit, rather than for the good of the members and their beneficiaries, this wholesome measure was enacted. In our conception of the matter, these sections of the statute should be liberally construed for the purpose for which they were plainly enacted, for they seem to have been intended not to destroy but to save fraternal benefit societies.

It is earnestly contended by counsel for defendant in error that the attack on the suicide edict of 1901 is a collateral attack on the charter of the corporation, and it is urged that, even if the executive castle of the defendant society is illegally exercising its corporate functions, its right to do so can only be questioned in an action by the state in *quo warranto.* We concede the contention that the plaintiff cannot in her petition sue the defendant as a legal organization under the laws of the state, and then deny the validity of the organization. But does the denial of the authority of the executive castle, as constituted in 1901, to pass the edict in question amount to a denial of the legal authority of the society to do business? This depends on whether or not the edict assailed should be treated simply as a by-law of the association, or as part of the charter of the corporation. It is conceded in the brief of the association that, if the edict assailed is simply

a by-law and not part of the articles of incorporation, then an attack on the passage of such edict does not necessarily call into question the right of the society to do business. As was said in *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279: "In this state the legislature does not by a special act charter a corporation, but all corporations are formed under general laws, and these laws and the articles of incorporation adopted in pursuance of and in conformity with such laws constitute the charter of a corporation in this state."

By reference to section 20, chapter 47, laws 1897, it will be seen that the requisite of authority for a fraternal benefit association to do business in this state is the filing with the auditor of a "certificate of association" signed by the persons who desire to associate themselves together for the purpose of forming such an organization, with a plan of business clearly and fully defined. It is these articles and the plan of association that the auditor is required to pass upon, and, if found correct, it is his duty to issue a certificate of organization. At the time the certificate of association was issued to the defendant society by the auditor, the statute requiring such societies to have a representative form of government had not been enacted, and, as the plan submitted was not then in contravention of the statute law, the auditor properly issued the certificate of organization. It is the certificate of association and the statute governing the corporation that stands in place of the charter of the association.

It is true that section 22, chapter 47, laws 1897, provides for the filing of the constitution and by-laws of fraternal societies with the auditor after the certificate is issued, but the auditor has nothing to do with the approval or rejection of the by-laws. It is only when it is brought to his attention that a society is doing business in contravention of the provisions of the statute that he is called upon to institute proceedings; and these proceedings are in the nature of an information in *quo warranto*. Moreover, the tenor and the very nature of the edict relied

upon classify it as a by-law providing for a forfeiture of a benefit certificate, and not as a constituent element of the charter authorizing the association to transact business in this state. We conclude that the edict in issue is merely a by-law of the society enacted by an unauthorized body, and, as against a member who received his certificate of membership prior to its adoption, is *ultra vires* and void, and subject to attack whenever and wherever found.

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

AMES and LETTON, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed February 8, 1907. *Judgment of reversal adhered to:*

1. **Insurance:** BENEFIT ASSOCIATION: GOVERNMENT: STATUTE. Where a fraternal-benefit association has not complied with the provisions of section 1, chapter 43 of the act of 1897, and adopted a representative form of government, its governing body is without power to adopt an edict or by-law changing the terms and obligations of a mutual benefit certificate theretofore issued to one of its members.

2. **New By-Law:** COLLATERAL ATTACK. An attack on such an edict or by-law on that ground does not amount to a collateral attack on the right of the society to transact business.

3. **Suicide** will not defeat a recovery upon a contract of life insurance or a mutual benefit certificate not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms.

BARNES, J.

This case is before us on a rehearing. The facts, as disclosed by the record, are so clearly and concisely stated

in our former opinion, *ante,* p. 188, as to render any other or further statement unnecessary. Two propositions decided by that opinion are vigorously assailed by counsel for the defendant: First, that the so-called edict or by-law of June 12, 1901, which is interposed as a defense to plaintiff's action, is void, and does not affect her right of recovery on the benefit certificate, which is the foundation of this suit; second, that suicide is not a defense to an action on such a certificate, unless made so by the contract itself, or some valid edict or by-law of the association.

1. The defendant's first contention requires but little consideration, because the reasoning and authorities contained in our former opinion fully answer the brief and argument of counsel on that point. If the statement describing the organization of the defendant, and the manner of the election or selection of its executive castle, is true—and, as its correctness has not been challenged we assume it to be so—it cannot be said that such executive castle gave to the defendant a representative form of government within the meaning of section 91, chapter 43, Compiled Statutes 1905 (Ann. St. 6483). At its session of 1897 the legislature of this state passed an act (Laws 1897, ch. 47), providing for the organization and government of "fraternal beneficiary associations," which contains the section above mentioned. Since that time all such associations have been required, where necessary, to so change the manner of electing or choosing the officers by which their business is conducted as to give them a representative form of government. *State v. Bankers Union of the World,* 71 Neb. 622. In that case it was said: "A fraternal beneficial association must have a representative form of government. This requires that the directors or other officers, who have general charge and control of the property and business of the society and the management of its affairs, shall be chosen by the members"—and the defendant therein was enjoined from transacting business until it should provide for and adopt

such a representative form of government. It appears that the defendant association was organized in the year 1896 by six persons, residents of Aurora, Nebraska, who prepared and filed its articles of incorporation, and thereupon constituted themselves its executive castle; that on August 10 of that year the society, having then acquired a membership of 311 persons, commenced business. It appears also that there never was a meeting of the members of the association, and said officers were never voted for, either directly or indirectly, by the policy-holders or members of the order. It further appears that in June, 1897, the first election was held, and that on June 14, 1897, the executive castle, which had in the meantime increased its own number to 12 members, including one delegate elected by the members of the association, held a meeting at which its members again elected themselves officers of the association for a term of four years, and adopted the edicts or by-laws in force at the time the certificate in question herein was issued to Alexander D. Lange. The affairs of the association are conducted by its executive castle, and section 4 of the edicts adopted by that body provides: "The executive castle shall be composed of its officers, its standing committees, its special committees and its delegates elected by district conventions, as hereinafter provided." After the passage of the act of 1897, above mentioned—the association presumably recognizing the fact that its form of government should be changed so as to comply with said law, and thus enable it to continue its business—the executive castle in December, 1897, at a special meeting, provided for a change in the manner of its own selection; and one June 12, 1901, when the by-law or edict in dispute was adopted and promulgated, said executive castle was composed of 25 members, 9 of whom had been elected from representative districts, and sixteen of whom were the self-constituted officers above mentioned, and their own appointees. That this was not a fair compliance with the provision of the law requiring the defendant to have a representative form of govern-

ment does not appear to us to be an open question. It follows, both upon principle and authority, that it had no power to adopt and promulgate any edict or by-law changing the nature and obligation of the contract with the assured member. It is conceded that the certificate itself contains no provision for forfeiture on account of suicide, and at the time it was issued the articles of incorporation, edicts and by-laws of the association were silent as to that matter. Therefore the question should be ruled by *Supreme Lodge, K. P., v. La Malta,* 95 Tenn. 157, 30 L. R. A. 838; *Supreme Lodge, K. P., v. Stein,* 75 Miss 107, 37 L. R. A. 775, and other cases, where it was held that an anti-suicide clause was not binding upon a member of the order, when such provision had been adopted by a board of control only, and not by the supreme lodge, although such lodge had attempted to delegate that power to the board.

It is contended, however, that this rule amounts to a collateral attack upon the organization of the defendant, and a declaration that all of its acts, contracts and proceedings are void. We do not so understand the matter. It must be conceded that the defendant, by filing its articles of incorporation in compliance with the law in force at the time of its organization, acquired the right to carry on the business for which it was created. It must also be conceded that when the legislature passed the act of 1897 it became the duty of the defendant to so change the manner of selecting or choosing its officers as to comply with the terms of that act. It attempted to do so, and, while the change made was not sufficient to confer power to alter the insurance contract without the consent of the insured, yet it was and is a *de facto* organization, and its acts and doings in the ordinary conduct of its business are to be construed by the rules applicable to such a condition. This, however, does not prevent a member or a beneficiary from questioning the validity of any of its edicts or by-laws by which it is sought to vary or change the obligations of a contract which it has made with

him, or for his benefit. We have not overlooked the fact that counsel intimated on the hearing that the defendant was unable to comply with the present law requiring it to adopt a representative form of government. We are unable to seriously consider this suggestion. It is self-evident that the power which enabled the association to twice change the number and the manner of choosing the officers comprising its executive castle is sufficient, if properly exercised, to enable it to make such further changes in regard to that matter as will create for the association a representative form of government. Indeed, nothing can stand in the way of such action but a determination on the part of the members of the executive castle to perpetuate themselves in office, and assume permanent control over the business of the association, and we will not presume that they are, or have been, actuated by such a motive.

For the foregoing reasons, our former opinion is right as to this point of the controversy, and should be adhered to.

2. We come now to consider the effect of the suicide of the assured member on the benefit certificate in question. It may be stated, at the outset, that to procure such a certificate with intent to commit suicide is a fraud on the association, and will defeat a recovery. In such a case the insurer would have the option of rescission, with all of its incidents, even as against the beneficiary. But in this case it is not claimed that the record discloses any such intention on the part of the deceased member. Indeed, the effect of his conduct is to exclude that idea. It appears that he took out his certificate on the 14th day of August, 1897; paid all of his assessments for a period of nearly five years, and was a member of the association in good standing at the date of his death. So it seems clear that the contract in this case was entered into in good faith, and without fraud. Notwithstanding this fact, the defendant contends that suicide is a defense to this action even if the benefit certificate and by-laws of

the association are silent on that subject. In support of this contention counsel cite *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139. In that case, however, the proof was plenary that the insurance was procured with the intent to commit suicide, but as the trial court had expressly charged the jury that in no case could there be a recovery if the assured had taken his own life designedly, while in sound mind, the question here at issue was necessarily involved in that decision. It was there held:

"Intentional self-destruction, the assured being of sound mind, is in itself a defense to an action upon a life policy, even if such policy does not, in express words, declare that it shall be void in the event of self-destruction."

We find, on an examination of that opinion, that the reasoning of the learned judge who wrote it was to some extent based on the assumption that the experience tables used as a basis for fixing the consideration to be paid for such insurance exclude suicide as a cause of mortality, but we find it to be a fact, as shown by the authorities, and one which we have never heard questioned, that all of the mortality or experience tables used as a basis for computing premiums on life insurance, and assessments for carrying benefit certificates in fraternal benefit associations, include all forms of death, of which suicide is considered one. *Campbell v. Supreme Conclave, I. O. H.*, 66 N. J. Law, 274, 54 L. R. A. 576. So, self-destruction, although it may shorten the period of the life expectancy of the member, and thus decrease the amount which he may be expected to pay to the association, does not violate the terms of his contract, unless it is so expressly stipulated therein, because that contingency is included in, and is a part of, the consideration which supports such contract. Suicide is only one of the many ways that may determine the event of death. Life insurance, of whatever kind and nature, is, in effect, an indemnity against the happening of that event, which is certain; and, insurance rates being based upon the average expectancy of life, as determined from experience tables, which include suicide as one of

the causes of mortality, that contingency is considered a part of the contract, unless it is otherwise stipulated therein. As to the moral or ethical side of the discussion indulged in by Judge Harlan, we have to say that, while suicide was considered a crime at common law, yet we have no common law crimes in this state; neither have we any statute making suicide, or an attempt to commit suicide, a crime. As to the matter of public policy, it may be said that suicide as a cause of death bears so small a percentage to the other causes of mortality, and is so infrequently committed, that insurance companies and mutual benefit associations should be permitted, at their option, to provide in their policies and benefit certificates that voluntary suicide will avoid the contract, or leave them silent on that subject. It is a custom, in this state at least, so well established as to become a matter of common knowledge that many life insurance companies and mutual benefit associations print their policies and certificates without the suicide clause, and, when selling insurance or soliciting membership, point to that fact as an evidence that their contracts are much more favorable and desirable than those which contain such a provision. Again, the trend of modern authority upon this question has led at least one state to enact a law providing that suicide shall not be a defense to a life insurance policy or a mutual benefit certificate, unless it was contemplated at the time the insurance was obtained; and that act has been upheld by the court of last resort of that state. *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557.

Our attention is also directed to *Shipman v. Protected Home Circle*, 175 N. Y. 498, 67 N. E. 83. In that case the benefit certificate was silent on the subject of suicide, while sane, but a by-law, subsequently enacted, provided that the certificate should be void if the insured should die by suicide, sane or insane. No question was raised as to the power of the governing body of the association to adopt such a by-law, or its validity; and it was held to apply to a certificate in force at the time of the amend-

ment, because it was agreed therein that the member should comply with all the laws and regulations in force at the time he received the certificate, and all by-laws and regulations adopted thereafter. There is another case not called to our attention by counsel, to wit: *Hopkins v. Northwestern Life Ass'n,* 94 Fed. 729, where the United States circuit court, being bound by the case of *Ritter v. Mutual Life Ins. Co.,* 169 U. S. 139, logically extended the bar against recovery to a policy taken out by the insured for the benefit of his wife. The judgment, however, in that case was affirmed (99 Fed. 199) upon other grounds. These appear to be the only authorities which support the defendant's contention. We have been unable to find any others, and, if there are any, counsel have not called our attention to them. On the other hand, in the case of *Campbell v. Supreme Conclave, I. O. H., supra,* it was held that "suicide will not defeat recovery upon a contract of life insurance, not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms."

In *Patterson v. Natural Premium Mutual Life Ins. Co.,* 100 Wis. 118, 42 L. R. A. 253, 69 Am. St. Rep. 899, it was held that intentional suicide, while sane, does not avoid a life insurance policy, in the absence of any provision therein to that effect, if third persons are beneficiaries, and, although suicide is technically a crime, it is not within the clause of an insurance policy providing that death in consequence of, or in violation of, law is not covered by the policy, where the usual suicide clause is omitted, and an absolutely incontestable clause included. An examination of the opinion, however, discloses the fact that the court declined to put its decision upon the incontestable clause and said:

"Bearing these things in mind, and while conceding the strength of the arguments upon public policy on which the Ritter case is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence

in those decisions by the courts and by the people, that we ought to hold, in accordance with those decisions, that, in case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect. Whether the rule would apply to a case where the personal representatives of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us. In so holding, it becomes unnecessary to consider the effect of the incontestable clause upon this branch of the case."

Indeed, we find the rule in most jurisdictions to be that suicide is not a defense to an action on a life insurance policy, or mutual benefit certificate, unless it is made so by the terms of the contract. *Kerr v. Minnesota M. B. Ass'n*, 39 Minn. 174; *Horn v. Anglo-Australian and U. F. L. Ins. Co.*, 7 Jur. N. S. (Eng.) 673; *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389; *Northwestern Benevolent and M. A. Ass'n v. Wanner*, 24 Ill. App. 357; *Mills v. Rebstock*, 29 Minn. 380; *Fitch v. American Popular Life Ins. Co.*, 59 N. Y. 557; *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557; *Knights Templar & M. L. I. Co. v. Berry*, 1 C. C. A. 561. Again, we find that this is not the first time this question has been before us. In *Supreme Lodge, S. & D. P., v. Underwood*, 3 Neb. (Unof.) 798, we held that: "a certificate of membership, in favor of a person therein named as beneficiary, in a fraternal insurance company organized for the benefit of its members and beneficiaries, is not avoided by the suicide of the assured, in the absence of a provision in the contract of insurance to that effect."

So we are of opinion that we should decline to follow *Ritter v. Mutual Life Ins. Co., supra;* that we ought to place ourselves in line with the great weight of authority in this country, which leads us to the conclusion that the defense of suicide in this case cannot be maintained.

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

JUDGMENT ACCORDINGLY.

SEDGWICK, C. J.

I concur in the conclusions reached upon both points discussed in the opinion, but do not concur in the language used in the criticism of the reasoning of the supreme court of the United States in *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139.

TOM COLLINS HAVENS v. FRANK L. ROBERTSON.

FILED DECEMBER 6, 1905. No. 13,989.

1. **Arbitration.** An unexecuted agreement to arbitrate will not be recognized by the courts of this state.
2. **Defense:** EVIDENCE: REVIEW. It is not error to refuse to submit a defense pleaded, which is not supported by competent evidence,
3. **Instructions:** PREJUDICIAL ERROR. Action of the trial court in giving instructions examined, and *held* prejudicial.

ERROR to the district court for Douglas county WILLIS G. SEARS, JUDGE. *Reversed.*

Hamilton & Maxwell, for plaintiff in error.

Baldrige & De Bord, contra.

OLDHAM, C.

This was an action instituted by the plaintiff in the court below to recover damages on a building contract entered into with defendant. There were three counts in the petition. The first one was for an alleged balance due on the contract for work done in the construction of the building. The second count was for extras alleged to have been agreed upon. The third cause of action was for delays alleged to have been occasioned by the failure of the defendant to have the stone work on the foundation and walls of the building in readiness for the plaintiff at the time agreed upon in the contract. The answer,

with reference to the first count of the petition, denied that the contract had been fully completed by the plaintiff, and pleaded payment in full for all work actually done. As to the second count, it denied that the extras sued for had been agreed upon between the plaintiff and defendant. As to the third count, there was a general denial, coupled with a plea of an agreement to arbitrate this question contained in the written contract under which the work was performed. There was also an attempted defense of estoppel, because plaintiff had not claimed damages for delays before the defendant had settled in full with the stone company. Defendant also filed a counterclaim for damages against the plaintiff for plaintiff's failure to complete the work within the time specified in the contract, and for the use of improper material, and for poor workmanship in the construction of the building. On issues thus joined, there was a trial to a jury and a verdict for the plaintiff for $1,327.52. On this verdict the court directed a remittitur of $290.23, which was entered by the plaintiff. Thereupon a judgment was entered in his favor for $1,037.29, and to reverse this judgment defendant brings error to this court.

The material facts underlying this controversy are that the plaintiff entered into a written contract with the defendant to furnish certain materials and to perform the carpenter work, plastering, inside finishing, roofing, etc., on a stone dwelling-house then in process of erection. This contract contained conditions that bound the defendant to reimburse the contractor for loss on account of delays by the failure of the defendant to have the building in readiness for his work, as well as conditions allowing damages to the owner if the contractor failed to perform the work within the time specified. There was also a provision in the contract for the arbitration of differences for delays, etc., should a dispute arise between the parties. Defendant, owner of the building, had a separate and independent contract for the construction of the foundation and walls of the building with the Omaha

Litholite Stone Company. It is without dispute that the defendant owner agreed to have the building in readiness for the plaintiff by the 28th of September, 1900. It is also without dispute that the stone contractors failed to complete their contract for the construction of the foundation and walls until the latter part of April, 1901. While there is a very voluminous record of testimony covering each item in each count in the petition, the real contest rages around the claim of the plaintiff and the counterclaim of the defendant for damages occasioned by delays. The controversy over the small amount claimed and allowed for the alleged balance due on the contract and for extras alleged to have been furnished is of minor importance; and there is nothing in the determination of either of these causes of action seriously complained of either in the brief or in the oral argument of the defendant in the court below. We might further remark that there is nothing in the record to warrant any complaint as to these causes of action, and our attention will therefore be directed to the allegations or error touching on the third cause of action in the petition.

Numerous assignments are made of alleged errors in the admission of evidence, and, after an examination of each of these, we are satisfied that the criticism on the action of the trial court in this particular goes rather to technical form than to real substance, and that the record shows no prejudicial error in this respect.

It is urged by counsel for the defendant below that the court erred in admitting any testimony on the third cause of action, because, under the contract sued on, this matter should have been submitted to arbitration. It is a rule, too well established in this court to require any further examination, that an unexecuted agreement to arbitrate will not be recognized or enforced in this jurisdiction. See *Schrandt v. Young,* 62 Neb. 254; *Home Fire Ins. Co. v. Kennedy,* 47 Neb. 138; *Connecticut Fire Ins. Co. v. O'Fallon,* 49 Neb. 740; *Butler v. Greene,* 49 Neb. 280; *Phœnix Ins. Co. v. Zlotky,* 66 Neb. 584.

Another question urged is that the court erred in excluding from the jury the defense of estoppel pleaded in defendant's answer. The evidence offered in support of this defense wholly failed to show that the defendant in any manner changed his position toward the stone company by reason of plaintiff's failure to file his claim for damages before such settlement was made, consequently, there was no competent evidence in the record to support this defense.

A serious complaint, however, is lodged against the instructions of the trial court on the plaintiff's right to recover damages on his third cause of action, and on the proper measure of damages, should any be allowed. The fact of delay was not disputed, and plaintiff introduced testimony tending to show a material interference with the progress of his work on account of such delay. The defendant, on the other hand, introduced testimony tending to show that the delay of the stone work was without material injury to plaintiff in the prosecution of his work. In submitting the question of plaintiff's right to recover on this cause of action, the court, in the fifth paragraph of instructions given on his own motion, said: "The jury are instructed that, if they believe from the evidence, by a preponderance thereof, that the delays of the plaintiff or the delays of those employed by him to perform other departments of the work of defendant's house, and for which he was responsible, and on which plaintiff's work depended, hindered and delayed plaintiff in the work that he had undertaken to perform, so that it took more of his time and labor to complete said contract than would have been required if such other departments of the work had been concluded in reasonable time, then you are instructed that plaintiff is entitled to recover from defendant in this action the reasonable value of such extra time and labor as you shall find it to be under the evidence in the case." Counsel for the plaintiff below concedes that this instruction is technically erroneous in permitting plaintiff to recover for delays occasioned by his own em-

ployees instead of the employees of the defendant. But he further contends that the error in this particular is so patent that the jury could not have been misled by it. There would be much weight in this contention if this instruction had been either preceded or followed by another, clearly and specifically directing as to plaintiff's right of recovery for delay. But we look in vain through all the instructions given to find another, which would clearly solve the riddle propounded to the jury in this paragraph. In the first paragraph of the instructions given at the request of the plaintiff, the court, among other things, said: "You are further instructed that it is established by the proof in this case that Havens so delayed in the furnishing of labor and materials for work, outside of Robertson's contract, as to materially hinder Robertson in the performance of that work which Robertson had agreed to perform. It will therefore be your duty, and the court instructs you, to ascertain the amount of damage occasioned to Robertson by this failure of Havens to fulfill his contract." This instruction amounted to a plain direction to the jury to find for the plaintiff on his third cause of action. It is contended in its support, however, that in any event plaintiff was entitled to nominal damages for his delay, which was admitted. It is true, it was admitted that plaintiff was delayed, but it was denied that he was materially damaged by such delay; and the instruction given was not one for nominal damages for the delay, but for damages for a material delay. We are therefore of the opinion that the giving of the instructions above set forth was prejudicial error, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and LETTON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district

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

REVERSED.

FRANK HOUFEK V. R. B. HELD & COMPANY.

FILED DECEMBER 6, 1905. No. 14,001.

Partnership, Evidence of. Record of a certificate provided for in section 27, chapter 65, Compiled Statutes 1903, is not the only evidence by which the existence of a partnership may be established. Notwithstanding that statute, a partnership may be proved by any method permissible before the statute was enacted. *Schneider v. Patterson*, 38 Neb. 680, followed and approved.

ERROR to the district court for Colfax county: JAMES G. REEDER, JUDGE. *Affirmed.*

George H. Thomas, for plaintiff in error.

C. J. Phelps, *contra.*

OLDHAM, C.

This is an action by a copartnership to recover commissions as real estate brokers. A copy of the written contract on which the action is founded, signed by each of the parties, describing the premises to be sold, the terms of the sale, and the amount of the commission, is attached to the petition; and it is alleged that the plaintiff procured a purchaser for the premises, who tendered the amount of money provided for in the contract, in full compliance with its conditions, and the defendant refused to convey the premises. The answer admitted the execution of the contract, denied the legal capacity of the plaintiff to sue, and pleaded a subsequent revocation of the contract. A reply was filed in the nature of a denial of the new matter in the answer, coupled with a plea of

estoppel. On issues thus joined, there was a trial to a jury, and at the close of all the testimony the court directed a verdict for the plaintiff for the amount of the commission provided for in the contract. Judgment was entered on the verdict, and to reverse this judgment defendant brings error to this court.

The contract relied upon as a basis of this action is in strict compliance with the provisions of the statute, and the evidence is clear and convincing that within the time specified in the contract plaintiff procured a purchaser for the premises and offered a full compliance with all the terms of the contract, and that defendant refused to convey the premises. There is no competent testimony of a revocation of the contract before the offer of sale, and the only point relied upon for a reversal of the judgment is the failure of the plaintiff partnership to comply with the provisions of section 27, chapter 65, Compiled Statutes 1903 (Ann. St. 9300), which provides for the recording of the names of all the members of associations doing business under a firm, partnership, or corporate name. It is conceded that the plaintiff had never filed a certificate with the county clerk of the county in which the business was transacted in the manner provided for in this enactment. It is settled, however, by a judgment of this court in the case of *Schneider v. Patterson,* 38 Neb. 680, that a failure to comply with this section of the statute does not prohibit the conduct of the partnership's business, and that parol evidence is sufficient to establish the partnership where no certificate has been filed.

We therefore conclude that the judgment of the district court was right, and we recommend that it 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.

CHARLES R. LEE, APPELLEE, V. STORZ BREWING COMPANY, APPELLANT.

FILED DECEMBER 6, 1905. No. 14,022.

1. **Payment:** APPLICATION. While as between the debtor owing several debts and his creditor, where the former, at the time of payment of a sum of money, fails to designate the debt on which it is to be applied, the latter may do so, yet there is an exception to this rule, as, where the money was received by the debtor from a third party whose property would be liable for the debt in case the money was not applied upon the third party's liability. *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683, followed and approved.

2. **Mechanics' Liens:** FORECLOSURE: PLEADING. In a proceeding to foreclose a lien for materials furnished and used in the construction of a building under the provisions of section 2, article I, chapter 54, Compiled Statutes 1903, a general denial of such lien by the owner of the building is sufficient to put the materialman on proof of the amount actually due for such material furnished.

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

Hamilton & Maxwell, for appellant.

Montgomery & Hall, contra.

OLDHAM, C.

This was an action to foreclose a mechanics' lien for materials furnished and used in the construction of a building on a lot in the city of Omaha, Nebraska, owned by the defendant Storz Brewing Company. There was a judgment for the plaintiff in the court below, from which the defendant brewing company appeals to this court.

There is no disputed question of fact in the record. The material sued for was furnished to James P. Detrick, who had a contract with the defendant brewing company for the construction of the building in which the material was used. Detrick was made a defendant in the court below.

Judgment was rendered against him for the full amount of the account, and this judgment is not appealed from. The only dispute here is between the plaintiff material man and the owner of the building, and that is as to the application of a payment of $300 which was made by the agent of the defendant brewing company to the material man by the consent and direction of the contractor. When this payment was received, it was applied by the material man generally on the account of the contractor, and $46.23 of the payment was credited on two items of indebtedness of the contractor to the material man which were not included in the lien. It is claimed by the appellee material man that, as he had no directions as to the particular items on which the payment should be applied, he had a right to apply it generally on the contractor Detrick's account. This contention would probably be well taken in a contest between the material man and the contractor, but as to the owner of the building a different rule applies. As was said by this court in *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683:

"While as between the debtor owing several debts and his creditor where the former, at the time of payment of a sum of money, fails to designate the debt on which it is to be applied, the latter may do so, yet there is an exception to this rule, as, where the money was received by the debtor from a third party whose property would be liable for the debt in case the money was not applied upon the third party's liability."

It is urged, however, by the appellee that as the answer of the defendant brewing company was in the nature of a general denial of the lien, it cannot avail itself of a defense of a payment without having specially pleaded such defense. Here again we think the appellee is invoking a rule that would control as between the parties to the contract for the purchase of the material, but not as between the material man and a third party whose property might be affected by a lien for such material. The right to a lien for material furnished a contractor and used in the con-

struction of a building is purely statutory, and can only be enforced by compliance with sections 2 and 3, article I, chapter 54, Compiled Statutes, 1903 (Ann. St. 7101, 7102). The latter section, after prescribing the manner in which a lien may be enforced, concludes with the following provision: "Nothing herein contained shall be taken to prevent the ascertainment by proceedings at law, or otherwise, of the amount actually due for such labor and material, and such lien shall be for no larger sum than the amount actually due therefor." We think, that, under this provision of the statute, the general denial by the owner of the property of the lien for material furnished the contractor was sufficient to put the appellee on proof of the amount due and unpaid for such material.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded, with directions to enter an additional credit for $46.23 in favor of defendant Storz Brewing Company, as of the date of August 5, 1901, the time at which said payment was made.

AMES and LETTON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with directions to enter an additional credit for $46.23 in favor of defendant Storz Brewing Company, as of the date of August 5, 1901.

REVERSED.

STATE OF NEBRASKA V. WILLIAM A. PAXTON ET AL.*

FILED DECEMBER 6, 1905. No. 13,780.

1. **Bill of Exceptions:** CERTIFICATION: QUASHING. A bill of exceptions will be quashed where it is not certified and identified in such manner that this court may know that it is the identical bill allowed by the trial court, and the whole thereof.

* Rehearing allowed. See opinion, p. 219, *post*.

2. ——: ——: ——. The statute (587*a* of the code) provides that a bill of exceptions, where the original bill is used, shall be attached to the transcript of the record. Where this court is presented with what purports to be a bill of exceptions contained in two separate and detached volumes, neither of which is attached to the transcript and but one volume of which is certified by the clerk of the district court, and the contents of this volume show that there was other important and material evidence upon which the decision of the case must depend, and there is nothing in the clerk's certificate or in the record itself by which this court can, with any certainty, determine whether the volume not certified or otherwise identified contains the omitted evidence, the bill will be quashed.

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

F. N. Prout, Attorney General, and *Norris Brown,* for plaintiff in error.

John C. Cowin, Robert Ryan and *F. T. Ransom, contra.*

DUFFIE, C.

In this case the jury returned a verdict for the defendants, and the state has taken error to this court, presenting to us the single question whether the verdict is against the evidence. This requires an examination of all the evidence introduced on the trial, and which can be preserved and presented to us only by a properly authenticated bill of exceptions. The defendants object that the state has failed to preserve or to have a bill of exceptions certified in the manner required by statute, or in such way that this court can know what evidence was before the trial court on which the verdict of the jury is based, and have moved to quash the bill. The state has filed in this court three separately bound records or volumes, the first of which is indorsed as follows: "State of Nebraska v. William A. Paxton et al." This volume is a transcript of the pleadings and proceedings in the district court. The second volume is entitled as follows: "State of Nebraska v. William A. Pax-

ton et al.—Bill of Exceptions, Volume 1." This volume contains what purports to be oral evidence given on the trial of the case, and reference is made to numerous documents and exhibits that were offered by the parties and received by the court, but which are not contained in this volume. The third volume is entitled: "State of Nebraska v. William A. Paxton et al., Volume 2—Exhibits," and this contains copies of a large number of exhibits, consisting of accounts with various funds and other documents. Attached to the volume marked 1 is the following certificate of the clerk of the district court:

"STATE OF NEBRASKA, }
DOUGLAS COUNTY, } SS.

"I, Frank A. Broadwell, clerk of the district court, Fourth judicial district of the state of Nebraska, in and for said county, do hereby certify that this is the original bill of exceptions filed in my office in the cause in said court, wherein State of Nebraska is plaintiff and William A. Paxton et al. are defendants.

"Witness my signature and official seal this 9th day of April, 1904.

(Signed) "FRANK A. BROADWELL, *Clerk.*
"By JOHN H. GROSSMAN, *Deputy.*"

A motion to quash the bill of exceptions was submitted with the case. It will be observed that this certificate makes no reference to another volume as a part of the bill of exceptions, and contains no intimation that we are to look outside of the volume to which it is attached for any part of the evidence in the case. As before stated, this is a separate volume, and ends with the following: "Mr. Ransom: The answering surety defendants rest. Mr. Prout: The state rests. (Both sides rest.)" There is nothing here indicating that we are to look elsewhere for any part of the evidence given on the trial, or directing us where to look to find the evidence which an examination of this volume discloses was introduced, but which is not

contained therein. One might suppose that the volume marked 2 contains the evidence referred to in volume 1, but not contained therein. Of this, however, we cannot be sure, there being nothing to connect these two volumes, or to show that they are part of the same case, except the title of the case indorsed on the outside cover, and this title even does not correspond with the pleadings contained in the transcript, in which the case is entitled: *"State of Nebraska v. Joseph Bartley et al."* Section 587*a* of the code requires the clerk of the district court to "attach" to the transcript of the record the bill of exceptions settled and filed in the case, when the same is taken to this court on error or appeal, and this court, by a long line of decisions, has refused to consider a bill of exceptions not properly authenticated by the clerk. Notes to sec. 1594, Ann. St. 1903. The statute relating to proceedings on appeal to this court was carefully framed to avoid error or mistake in the record presented for our examination. The evidence taken on the trial, and all objections made thereto, and the ruling of the court on such objections, must be certified by the trial judge, and filed and made a part of the record of the case. The clerk is then to certify a copy of the pleadings and proceedings in the trial court, and to this transcript of the record he is to "attach" the bill of exceptions, certifying under his hand and seal that it is the original bill of exceptions filed in his office. Every care is taken to prevent substitution by interested parties of any part of the record, and the court would be remiss in its duty if it neglected to enforce the purpose of the legislature in enacting the statute, or opened the door for any opportunity to an interested party to impose upon the court a false record, in whole or in part, or to receive for consideration anything that is not identified in such manner that we may know with certainty that we have before us the identical record made by the trial court.

We have held this case an unusual time, and given it our best consideration, and we have all reluctantly come to the conclusion that, because of the failure of the state to ob-

serve the plain reading of the statute relating to bills of exceptions and their authentication, this so-called bill cannot be considered by us. It is not our custom to look with favor on technical objections which dispose of a case. On the contrary, we are disposed to give to the statute governing appeals, and to the rules of procedure in this court, the most liberal construction, in order that the parties may be heard and their cases disposed of on the merits. This is but just to the parties interested and to the court itself. But, under the most liberal construction of which the statute relating to bills of exception is capable, the bill presented by the state in this case is so wanting in authentication, so lacking in the earmarks required by our law to identify it, that we have no alternative but to sustain the motion to quash made by the defendants. We cannot in this case, more than in another of less importance, disregard the plain reading of the statute, or establish a precedent which would allow the presentation to this court of records which may or may not contain the evidence on which the trial court acted. To do so would give opportunities for imposition and fraud which would endanger the interest of those who seek this court to establish and maintain their rights. The responsibility for this disposition of the case does not rest with us, but with those whose duty it was to see that the appeal was taken in due form and the necessary statutory steps taken to secure a record which this court could consider. The bill of exceptions being quashed, we have nothing to consider further than to see whether the judgment is supported by the pleadings, and, there being no doubt on that point, the judgment must be affirmed, and we so recommend.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

HOLCOMB, C. J., not sitting.

The following opinion on rehearing was filed June 20, 1906. *Judgment of affirmance adhered to:*

LETTON, J.

A motion for rehearing was filed in this case and a rehearing allowed, mainly upon the state's contention that, by submitting the cause on briefs, the motion to quash the bill of exceptions had been waived by the defendant in error, and that the court should therefore have considered the case upon the evidence furnished by the purported bill of exceptions. A motion has been filed to vacate the order granting the rehearing and to adhere to the former opinion, on the grounds that the motion to quash was submitted to the court by agreement of parties at the same time that submission was made upon the merits, and that the former opinion as to the bill of exceptions is correct. No entry was made on the record showing that the motion to quash and the main case had been submitted together. It is now admitted by the state that, by agreement of both parties, the motion to quash was submitted at the same time as the main case and therefore was properly considered by the court.

In view of the importance of the case, since the briefs which have been filed upon these motions fully reargue the question as to whether or not the so-called bill of exceptions is properly authenticated and identified, we have again considered this question, and have again examined the purported bill of exceptions in the light of the arguments furnished by these briefs. The whole difficulty rests in the failure to properly identify a certain collection of papers marked "Volume 2, Bill of Exceptions." The certificate of the clerk of the district court to the volume of transcripts of the pleadings certifies that "the bill of exceptions hereto attached is the original bill of exceptions," etc. This certificate makes no mention of more than one volume of the bill of exceptions and implies the existence of but one volume. The certificate of the clerk of the dis-

trict court attached to the papers, marked "Volume 1, Bill of Exceptions," is to the effect that "this is the original bill of exceptions filed in my office in the cause in said court, wherein the State of Nebraska is plaintiff and William A. Paxton et al. are defendants," impliedly suggesting the existence of but one volume. It is true that contained in volume 1 there is a stipulation by counsel, and a certificate by the trial judge and by the stenographer, that the bill of exceptions consists of two volumes. These certificates, if volume 1 had been accompanied by a second volume properly certified and identified by the clerk of the district court as being volume 2, would be sufficient to show that a second volume was in existence, and, perhaps, that a volume thus certified as volume 2 by the clerk of the district court was the identical volume referred to, even though the certificate to the first volume made by the clerk failed to disclose that the bill of exceptions consisted of two volumes. The difficulty in the present case, however, is that the papers marked "Volume 2" *have no certificate whatever*, either of the stenographer, the trial judge, or the clerk of the district court, showing that they form a part of the bill of exceptions in this case.

It is argued by the attorney general that, by referring to the contents of the first volume, it will be seen that certain exhibits which appear in the second volume are mentioned therein, and that consequently from an examination of the exhibits it will be shown that they were a part of the testimony offered in the case, but this would require us to read the evidence contained in one volume for the purpose of determining from it whether or not the evidence contained in the other volume was in fact the evidence in the trial court. This, of course, would furnish no certain, fixed or proper ground of identification. Under the law the court can consider only the certificates of the proper officers who are charged with the duty of preserving the record, for the purpose of determining whether or not any papers offered in this court are entitled to be considered as a part of the record in the case. The attorney general also contends that

there are certain marks and indorsements upon the outside of the volumes, presumably by the clerk of the district court or by the clerk of the supreme court, though there is nothing to show by whom made, and that we should consider these indorsements or markings as proof that "Volume 2" is a part of the record in the case. What has been said disposes of this contention. Mere filing marks cannot take the place of a certificate required by the law, nor can unidentified indorsements do this.

As pointed out in the former opinion, there is also a discrepancy between the title of the case certified to by the clerk of the district court in the transcript, and the title of the case certified in volume 1 of the bill of exceptions, and also the title indorsed upon the cover of the purported "Volume 2." A complete exposition of the doctrines and rule of this court with reference to the authentication of bills of exceptions is to be found in the opinions of Justices BARNES and SEDGWICK in the case of *Palmer v. Mizner*, 2 Neb. (Unof.) 903, and 70 Neb. 200. The cases in this court upon this subject are fully reviewed and the reasons for the rule set forth, and it is pointed out that, even though a bill of exceptions has been allowed and settled by the judge and has his signature attached thereto, showing such allowance, this would not be in compliance with the statute, and the bill could not be considered, unless further authenticated by the proper certificate made by the clerk of the district court. Volume 2, therefore, being utterly unauthenticated, cannot be considered, and, since it is apparent that volume 1 does not contain all the testimony, it cannot aid us in determining the question presented, and the former opinion of Commission DUFFIE is adhered to.

In this connection it may not be improper to indicate the proper practice in cases of voluminous bills of exceptions. In such case the certificate of the trial judge should show that the bill of exceptions, consisting of a certain number of volumes, marked in a certain manner, contains all the testimony in the case, in the usual form. There should also be a certificate of the clerk of the district court certi-

fying that the bill of exceptions in the cause consists of a certain number of volumes, and a separate certificate should be attached to each volume, certifying that that volume constitutes volume — of the original bill of exceptions in the cause, filed in his office, so that each volume may be properly identified and authenticated as part of the record in the case.

AFFIRMED.

REUBEN A. MERRIMAN, APPELLEE, V. MARIE L. MERRIMAN, APPELLANT.

FILED DECEMBER 6, 1905. No. 14,015.

1. **Statute of Frauds: EQUITY: GIFT OF LANDS.** Equity protects a parol gift of land equally with a parol gift to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property, and this applies to the gift of a life estate as well as the fee.
2. **Evidence examined, and *held* to show the gift of a life estate in land.**

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

John C. Wharton and *Baird & Sons,* for appellant.

W. C. Lambert, contra.

DUFFIE, C.

This action was brought by Reuben Merriman, plaintiff and appellee, against his mother, Marie L. Merriman, the appellant, to quiet his title to lot 2, block 91, in the city of South Omaha. The circumstances surrounding the case are as follows: In October, 1890, the plaintiff resided in South Omaha. He was a married man and lived with his family in a poor quarter of the city, and in a poor tenement house. The evidence discloses that he had no property, except a few household goods; that his health was bad and on

account thereof he was unable to work more than about half the time. His mother resided in Illinois, was quite wealthy and about 70 years of age. Her other children were in good circumstances financially. In the fall of 1890 she visited her son at South Omaha, as she states in her own testimony, "for the purpose of securing him a home during his life." She bought the lot in question, paying $1,100 therefor. This purchase was made through a firm of real estate agents in South Omaha, with whom Mrs. Merriman left $500 to pay for building a house on the premises. The house was completed sometime in December, and the plaintiff took immediate possession and has occupied the premises since that time. This house, which is referred to in the testimony as the "small house," was placed upon the south 30 feet of the lot. In 1893 the plaintiff arranged with a loan and building association in South Omaha to borrow $1,000 to be used in the erection of another house on the north side of the lot. He claims that his mother visited him again in 1893, previous to making this loan, that the matter was talked over between them, and that they both concluded that the rent of the larger house would pay off the loan within eight or ten years, and that he would then be secured in quite an income, derived from the rent, for his old age. Mrs. Merriman claims that her consent to making this loan was obtained through correspondence had with her by the plaintiff, and that she consented to mortgage the north half of the lot at her son's urgent request; that it was agreed between them that he was to continue to live in the small house, devoting the rent received from the larger house, to be built with the proceeds of the loan, to the payment of the mortgage, taxes on the property, insurance, etc. It is also in evidence that a further loan of $400 was thereafter secured from the loan and building association, for which Mrs. Merriman executed a second mortgage on the north half of the lot. The plaintiff claims that this second loan was made for the purpose of completing the new house, while Mrs. Merriman asserts that her son secured her consent to the second loan

for the purpose of building the barn that is upon the premises. Attached to the bill of exceptions is a letter from the plaintiff to his mother under date of January 24, 1893, in which he uses this language: "I will commence digging cellar tomorrow. Will put brick foundation under house. If it does not take the $1,000 to do the work, the balance will be paid back on the shares." This supports the theory of Mrs. Merriman that, previous to making the first loan, the plans of the house had been sent her, together with an estimate of its cost which was not to exceed $1,000, and that she secured the money for building the barn as well as the house. Some four years previous to bringing this action the plaintiff moved from the smaller into the larger house, and was occupying the same at the time of the trial. A short time before the action was commenced, Mrs. Merriman claims to have learned that $1,000 or more was due the loan and building association upon the loans made, and she sent her son George from Illinois to South Omaha to see the plaintiff, and to arrange with him, if possible, to sell the north half of the lot and to pay off the balance due to the loan and building association. This the plaintiff refused to do, and soon thereafter he commenced this action to require his mother to execute a deed conveying to him the fee title, claiming that she had made him a gift of the lot, which he had accepted and was entitled to from entering into possession and making valuable improvements. The district court entered a decree giving the plaintiff a life estate in the premises, and requiring him to move from the large house, and to apply the rentals derived therefrom to the payment of the mortgages on the north half of the lot, and to the taxes and insurance.

The only evidence in support of the plaintiff's contention that his mother intended to make him an absolute gift of this lot, aside from his own testimony, is that of one of the real estate agents who testified that, when asked to whom the deed to the lot should be made, Mrs. Merriman said that she would take the title in her own name for the present, but that the property would be Mr. Merriman's after

awhile. We think that as against the positive evidence of Mrs. Merriman that she never agreed or intended to make an absolute gift of this property to her son, this is not sufficient to warrant a decree for plaintiff, and that the district court properly so found.

It is insisted by appellant that the statute of frauds stands in the way of granting the plaintiff any relief, and that his petition should be dismissed. To this we cannot agree. In *Dawson v. McFaddin*, 22 Neb. 131, it is said: "Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property." The court, in that case, adopted the rule of the supreme court of the United States announced in *Neale v. Neale*, 9 Wall. (U. S.) 1, and this rule has been since followed and applied. The evidence is quite plain and satisfactory that Mrs. Merriman intended to provide a home for her son during his life. Her own evidence is conclusive upon that question. On her examination she was asked: "Q. What arrangement did you make with him at the time you bought the lot and left the $500 for the small house to be built? A. That I bought for him a home, and he was to keep up the taxes and insurance. Q. And you let him live in it as a home? A. Yes sir; I intended always for him to have it as a home. Q. State what, if anything, you ever said to him, that you would give that property or intended it for him to be his. A. I do not know that I can tell you—I do not know as I can. I always intended it for a home for him as long as he lived and paid the insurance and taxes. Q. After you came here you told him, did you, that you would go on and provide a home for him? A. He knew I was coming for that purpose. Q. Well, now, was it your understanding that that was to be his home during your lifetime or during his lifetime? A. His lifetime—his lifetime. Q. Whether you died before him or not? A. Yes, sir."

The record shows that the plaintiff had inherited quite a fortune from his father's estate; that he had run through

it or lost it in some way, and at the time of this arrangement with his mother was in very poor circumstances. We are also led to believe from the testimony that his mother, knowing of his poor success in a financial way, did not intend to give him absolute title to this property, but did intend to give him a life estate therein that he might have a home for himself and family, not during her own life, but, as she herself testified, during his life, and the evidence is satisfactory that he took possession and has made such improvements with his own means, as his condition would warrant. We are satisfied that the decree of the district court is the only one which is warranted by the evidence, and we recommend its affirmance.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

SAMUEL N. POWERS V. STATE OF NEBRASKA.

FILED DECEMBER 6, 1905. No. 14,182.

1. **Misconduct of the county attorney** in the argument of a case will work a reversal, where it is reasonably apparent that such misconduct worked prejudice to the defendant.

2. **Criminal Law:** EVIDENCE OF ADMISSIONS: ERROR. A witness was present and heard statements made by the defendant, which the state offered as admissions of guilt. These admissions the court refused to allow in evidence, for the reason that they appeared to be made while under fear of bodily harm. The witness referred to testified at the preliminary hearing, and there stated the admission of the defendant as he understood and remembered it. In a private conversation between the defendant and the witness previous to the trial in the district court, the defendant disputed the correctness of the testimony of the witness given at the preliminary examination and claimed that he had incorrectly quoted his language. The witness replied

that his claimed admission was in the language given by him at the preliminary hearing, at the same time repeating it. This conversation was admitted in evidence by the court as tending to show an admission of guilt on the part of the defendant. *Held* error.

3. **Adultery**: TRIAL: MISCONDUCT OF COUNSEL. The defendant was on trial for adultery, charged to have been committed with a married woman, who was called by the state as a witness. When interrogated regarding her relations with the defendant, she claimed her privilege and refused to testify. The county attorney, in his argument to the jury, commented upon her conduct in this respect, asserting that it was proof of her guilt. *Held*, under the circumstances of the case, that this constituted prejudicial error.

4. ———: ———. It is error for the judge to absent himself from the court room, out of the sight and hearing of the parties, during the argument of a case, unless by consent and agreement of the parties interested, which may work a reversal of the judgment rendered in the action.

ERROR to the district court for Hamilton county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

Stark & Grosvenor, for plaintiff in error.

Norris Brown, Attorney General, William T. Thompson and *M. F. Stanley, contra.*

DUFFIE, C.

An information was filed against the plaintiff in error charging him with adultery with one Maud Cattron, the wife of William Cattron, who was the complaining witness in this case. On the trial Maud Cattron was called as a witness by the state. Being examined by the county attorney, she stated that she was the wife of William Cattron, the complaining witness, and had been acquainted with the defendant for about seven years. She further testified that she had seen the defendant on the 18th of May, 1904, both at her own house and at her husband's livery barn. She was then asked to state to the jury what took place between Mr. Powers and herself on or about the 18th

of May, 1904, and replied that she did not care to answer, and claimed her privilege not to testify. Her claim of privilege was sustained by the court, and she was dismissed from the stand. In his argument to the jury the county attorney called attention to the refusal of Mrs. Cattron to testify, in the following language: "I call your attention to the witness that comes on the witness stand and hides behind her constitutional privilege and exemptions. You would be justified as taking that as a confession of her guilt." Exceptions were immediately taken to this line of argument by the attorneys for defendant, but the presiding judge being absent in his private room preparing his instructions to the jury, no immediate ruling of the court could be had until the reporter informed the judge that objection was being taken to the line of argument pursued by the county attorney, whereupon he immediately returned to the bench, when that part of the argument objected to was stated in his presence by counsel for the defendant, and the court thereupon stated to the county attorney that he should desist from pursuing that line of argument, and he orally charged the jury that they should pay no attention to the fact that the witness, Maud Cattron, had claimed her constitutional and statutory right to refuse to testify, or the reference to such fact made by the county attorney, and that such failure on her part to testify should not be taken against the defendant.

The facts above stated are shown by an affidavit filed by the defendant in support of his motion for a new trial, as well also as a record entry made and certified by the trial judge and attached to the bill of exceptions. The defendant's affidavit is not included in the bill of exceptions, and it is objected that this court cannot consider it, or the facts therein recited, for that reason. This is undoubtedly the general rule, but the record in this case contains the certificate of the trial judge referring to and identifying the defendant's affidavit, and clearly, as we think, makes it as much a part of the record in the case as his own statement. In his certificate the trial judge does not recite the facts

stated in the affidavit, but refers this court to the affidavit itself for the facts set forth, and we think it would be a grave injustice to the defendant to ignore, upon technical grounds, an affidavit called to our attention by the trial judge. What inference, if any, might the jury draw from the refusal of Mrs. Cattron to testify relating to her relations with the defendant? If the jury were warranted in drawing the inference that she was guilty of adultery with the defendant, that, of course, would go to establish his guilt, and counsel for the state might properly refer in argument to any circumstances surrounding the case from which the jury might infer the guilt of the party on trial. This is one view of the case. Another, and we think a better, view is that the refusal of a witness to testify, because such testimony might be used in a criminal prosecution against him or because it would subject him to humiliation and disgrace, is not a fact or circumstance which may be considered as tending to prove the guilt of the defendant on trial. The law is plain that a witness need not give testimony which would tend in any degree to prove him guilty of a criminal offense or which would subject him to humiliation and disgrace. The exercise of this privilege on his part cannot, we think, in any legitimate degree be considered as tending to prove the guilt of the party on trial. Let us see what the result of any other rule would be? Two parties, man and wife, seek to establish the charge of adultery with the wife against another. The wife is put upon the stand to prove the charge. She is told of the privilege which the law extends to her of refusing to testify. She claims that privilege, knowing well that she could not truthfully testify to the guilt of the defendant. Can it be said that the law would sanction in this way the conviction of a man, not upon statements of fact testified to by a witness, but upon the refusal of the witness to state any facts? The law will not be so unjust as to impute guilt to one upon trial because a witness called by the state refuses to give evidence upon a question which might or might not be used against him. We think that no inference against the inno-

cence of the defendant could be drawn, or should be allowed, from the refusal of Mrs. Cattron to testify upon the question of the relations existing between them. This being the case, that circumstance should not have been referred to by the county attorney in his argument; and the only question remaining is, did the admonition of the judge and his instructions to the jury to disregard the argument, and not to allow the refusal of Mrs. Cattron to testify to influence them against the defendant, cure the error? The general rule appears to be that, unless the appellate court is satisfied that prejudice to the defendant resulted from misconduct of counsel in the argument of the case, it does not constitute reversible error. See extended note to *People v. Fielding,* 158 N. Y. 542, 46 L. R. A. 641.

In the present case the testimony tending to show the guilt of the defendant is not of a satisfactory character. The husband of Mrs. Cattron, it is true, testifies that on the night of the 18th of May, 1904, he was aroused from his sleep about 11 o'clock, and went to the rear of his house and looked out through a glass door in the kitchen, and saw the defendant and his wife in the act of sexual intercourse. He immediately returned and went back to bed. He said nothing of it to anyone. He made no complaint. There were trees and shrubbery in his back yard. There were no lights nearer than about 60 feet from where he claims to have seen the parties. The jury might well have doubted his ability to recognize them, and doubted his unusual and unnatural conduct if he did—conduct that cannot be understood or explained in the ordinary man. A week or ten days after this, Cattron and the defendant had some trouble in Cattron's livery barn growing out of the claimed intimacy between the defendant and Mrs. Cattron. Two witnesses were called by the state to prove admissions made by the defendant during and shortly after that trouble, but the court ruled out these admissions, upon the ground that serious threats had been made against the defendant and that his statements were made under such circumstances as to annul their force as evidence. Two of these witnesses

testified upon the preliminary hearing, giving the defendant's admissions as they understood them on that trial. Shortly before his trial in the district court the defendant had a conversation with these witnesses relating to their testimony on his preliminary examination, in which he claimed that they were mistaken in the statements made by him, and in which they asserted that they were not mistaken, that their testimony to the effect that he had admitted being sexually intimate with Mrs. Cattron was true. The court allowed these later conversations to be given to the jury. If, as held by the trial court, the defendant's statements relating to his intimacy with Mrs. Cattron, made on the 25th of May, 1904, were made under such circumstances of apparent peril and bodily danger as to make them inadmissible, it is quite evident that declarations of the witnesses made to the defendant at a later date, to the effect that he did make such admissions, ought not to be used against him. But a more serious objection than this exists. This admission, claimed to have been made by the defendant, was not testified under oath by the witnesses. They testified only that, in a talk they had with the defendant at a time when they were not under oath, they told him he admitted that he had been criminally intimate with the woman. This is not sworn testimony and cannot be used to support a verdict. The testimony of the husband and of these two witnesses in this later conversation, to which we have referred, is the only evidence of guilt upon which the verdict rests, and we incline to the belief that the jury must have been largely influenced by their attention being called to the refusal of Mrs. Cattron to testify, and the argument of the county attorney based thereon that this should be taken as a confession of her guilt.

We think also that this case comes within the rule adopted in *Palin v. State*, 38 Neb. 862. In that case, as in this, the trial judge was absent from the court room when the statements objected to took place, but immediately returned to the bench and admonished the attorney to keep within the record, and the attorney himself stated to the

jury that, if he was mistaken, he desired that they should pay no attention to his statements. Under these facts it was said:

"Considerable latitude should always be allowed counsel in the discussion of facts before the jury; but an attorney, and especially a prosecutor in a criminal trial, has no right in arguing a case to state as a fact any matter not borne out by the testimony. The argument in this case was clearly beyond legitimate bounds and was highly prejudicial to the accused. The trial judge likewise erred in permitting the argument to be made while he was absent from the court room."

It often occurs that the trial judge, by consent of the parties, retires to his private room during argument of counsel to prepare his instructions. In such case it would undoubtedly be held that the parties have waived his presence, and that his absence from the court room during the argument, under such circumstances, would not be reversible error; but we think the better rule, especially in criminal cases, is for the judge to be present during the whole trial, and that, if he absents himself without the consent of the defendant on trial, it is error which may call for a reversal of the case.

Upon these grounds, we base our decision that the judgment should be reversed and the cause remanded for another trial.

ALBERT and JACKSON, CC., concur.

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

REVERSED.

CITY OF CENTRAL CITY V. JOHN MARQUIS ET AL.

FILED DECEMBER 6, 1905. No. 13,882.

1. **Repeals by implication** are not favored, and, where two acts are simply repugnant, they should be so construed, if possible, that the latter may not operate as a repeal of the former.

2. **Bridge Repairs:** STATUTES: REPEAL. Sections 102*a* and 102*b*, chapter 78, Compiled Statutes 1903, being chapter 72, laws 1887, do not operate as a repeal of that portion of section 77, article I, chapter 14, Compiled Statutes 1903, pertaining to the liability of counties, cities and villages for the construction and repair of bridges.

3. **The term** "bridges," in said section 77, does not include the approaches thereto.

4. **Evidence** examined, and *held* sufficient to sustain a finding of constructive notice of the defective condition of a bridge.

5. **Instruction:** NOTICE. In an action to recover for personal injuries resulting from the defective condition of a bridge, it is not error to instruct the jury that actual notice to the municipality is not necessary, where "the defects are of such a nature or have existed for such a length of time that they might by the exercise of ordinary diligence have been discovered and repaired."

6. **Bridges:** PRESUMPTION. A party attempting to cross a bridge which is a part of a highway in the absence of notice to the contrary, or facts sufficient to put him on inquiry, has a right to assume that it is reasonably safe for the accommodation of the public at large in the various occupations pursued in the locality where the bridge is situated.

7. **An expert** witness will not be permitted to usurp the functions of the jury.

ERROR to the district court for Merrick county: JAMES G. REEDER, JUDGE. *Affirmed.*

W. T. Thompson, for plaintiff in error.

George W. Ayres, Patterson & Patterson and *John C. Martin, contra.*

ALBERT, C.

This action was brought against Merrick county and the city of Central City, a city of the second class of said county, to recover for personal injuries sustained by the plaintiff by falling through a bridge within the city, across a stream which crosses a section line road extending through said city. The pleadings and the evidence show that, while the plaintiff was attempting to cross the bridge with a traction engine and water tank, the stringers of the bridge broke, and he, with the engine, was precipitated to the ground, whereby he sustained serious bodily injuries. It is alleged in the petition, in effect, that the injuries sustained by the plaintiff were the proximate result of the negligent construction of the bridge, and the negligent omission of the defendants to keep and maintain the same in a reasonably safe condition. As to the county, the case went off on a general demurrer. As to the city, there was a trial to a jury which resulted in a verdict and judgment for the plaintiff. The city brings error.

One of the questions presented by the record is, which of the two defendants is charged with the duty of making and keeping the bridge in question reasonably safe for public travel. The county is under township organization, and the plaintiff contends that the bridge is less than 60 feet in length, and that the duty of making and keeping it in repair devolves upon the city by virtue of section 77, Article I, chapter 14, Compiled Statutes, 1903 (Ann. St. 8756), which, so far as is material at present, is as follows:

"The city council or board of trustees shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares and commons within the city or village, and shall cause the same to be kept open and in repair, and free from nuisances. * * * All public bridges exceeding sixty feet in length, over any stream, crossing a state or county highway, shall be constructed and kept in repair by the county: *Provided,* that when any city or village has constructed a bridge over sixty feet span,

on any county or state highway within their corporate limits, and have incurred a debt for the same, then the treasurer of the county in which said bridge is located shall pay to the treasurer of said city or village seventy-five per cent. of all bridge taxes collected in said city or village until said debt is fully paid and interest upon the same."

On the other hand, the city contends that the section quoted, so far as it relates to the duty of cities and villages with respect to bridges, was impliedly repealed by chapter 72, laws 1887, entitled "An act to provide for the building, maintaining and repairing certain bridges in counties under township organization," and which now constitutes sections 102*a* and 102*b*, chapter 78, Compiled Statutes, 1903 (Ann. St. 6130, 6131). The following is the act in full:

"Section 102*a*. That in counties under township organization the expense of building, maintaining and repairing bridges on public roads over streams shall be borne exclusively by the counties within which such bridges are located.

"Section 102*b*. The county board of every such county shall build, maintain and repair every such bridge, and make prompt and adequate provision for the payment of the expense thereof."

The history of this act is a matter of common knowledge. It will be observed that it relates exclusively to counties under township organization. Before its enactment, subject to the provision of section 77, *supra*, counties not under township organization were charged with the duty in question, while in counties under township organization such duty devolved exclusively upon the townships. *Whitcomb v. Reed*, 24 Neb. 50. It was felt that the law, as it then stood, imposed too great a burden on the townships, and it was to relieve them of this burden, and to place the two classes of counties on equal terms with respect to bridges over streams, that the act of 1887 was enacted. As it relates only to counties under township organization, to give it the effect claimed for it by the city would relieve

cities and villages in such county of the duty of constructing and maintaining bridges over streams, but would leave that duty still resting upon cities and villages in other counties. It seems unlikely that the legislature intended thus to discriminate in favor of the cities and villages of one class of counties and against those of another. Besides, repeal by implication is not favored. *Dawson County v. Clark,* 58 Neb. 756; *Albert v. Twohig,* 35 Neb. 563. When two acts are simply repugnant they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication. *People v. Weston,* 3 Neb. 312. The act of 1887 is complete in itself. There is nothing in it to indicate that it was intended to repeal any portion of section 77. It refers exclusively to "bridges on public roads over streams." In *Nebraska Telephone Co. v. Western Independent L. D. T. Co.,* 68 Neb. 772, it was held that the term public roads in a statute giving telegraph and telephone companies a right of way along the public roads, does not include the streets and alleys of an incorporated city or village. In the same opinion the following language was approved by the court: "Whatever may be the usage in other jurisdictions, we think it safe to say that in this state the term 'public roads' is commonly understood and recognized to apply exclusively to rural highways." From the language of the act itself, its obvious purpose and history, and the fact that for 18 years section 77 has stood unchallenged as a part of the law of the state, and has been so recognized and acted upon, notwithstanding the act of 1887, we are satisfied that the word "roads," in the act of 1887, should be taken in the sense in which it is commonly used and understood, namely, as including only rural highways, and not that portion of a highway lying within the limits of a city or village.

But the city insists that the bridge is over 60 feet in length, and consequently, even under section 77, the duty in question belongs to the county. It is not claimed that structure itself exceeds 60 feet in length, but the city

contends that the term bridge includes the approaches, and that the bridge in question, including the approaches, is more than 60 feet long. Whether the approaches are included within the term bridge depends upon the context, and the circumstances under which the term is used. *Nims v. Boone County,* 66 Ia. 272; *Phillips v. Town of East Haven,* 44 Conn. 25; *City of New Haven v. New York & N. H. R. Co.,* 39 Conn. 128; *New Haven and Fairfield Counties v. Milford,* 64 Conn. 568, *Commonwealth of Kentucky v. Louisville Bridge Co.,* 42 Fed. 241. By the section in question, bridges were divided into two classes, one of which was to be constructed and maintained by counties, the other by cities and villages; those over 60 feet in length falling within the former, and those 60 feet or under within the latter. It is fair to presume that the legislature did not overlook the importance of adopting a rule of classification whereby the class to which a given bridge belongs, and the liability for its construction and maintenance, could be readily ascertained and definitely determined. If by the term "bridge" was meant merely the bridge proper, the length would afford a reasonably certain and readily applied test; but, if was meant the bridge proper and the approaches, it is doubtful if two minds would ever agree on the exact length of the bridge, and, in many cases, whether the duty of maintaining it devolves upon the county or whether upon the city or village would become a fruitful source of contention. Again, in cities and villages, the approaches to bridges generally come under regulations relating to sidewalks, paving, curbing, and other matters of a purely local nature. It does not seem likely that the legislature intended to transfer the supervision of these matters to the county. What seems to us stronger reasons for holding that it was not intended to include the approaches within the term bridge are to be found in the language of the section itself. In that portion which classifies the bridges, the term is used without qualification. In that portion which provides

for the relief of cities and villages for expenses theretofore incurred in the construction of bridges over 60 feet in length, and for which they were then indebted, the test is "over 60 feet span." It seems to us from a study of the entire section that the legislature clearly intended that the liability of municipalities for the construction and repair of bridges should be determined by the same test as their right to relief for expenses incurred for bridges already constructed, namely, the length of the bridge proper or span. Another thing that inclines us to this view is that in ordinary speech the term "bridge" is seldom used or understood to include the approaches, which, frequently, are hardly distinguishable from the highway leading to the structure.

It is insisted that the verdict is not sustained by sufficient evidence. A considerable portion of the argument on this point is disposed of by what has already been said. But there remains the question of the sufficiency of the evidence to sustain a finding that the defendant had notice, either actual or constructive, of the defects in the bridge. The defendant contends that the defects relied upon were latent and not discoverable from ordinary tests and examination, and, for that reason, the failure to discover such defects was not negligence, and their existence for whatsoever time will not support a finding of constructive notice. There is no evidence of actual notice, save so far as the location of the bridge, and the time the defects had existed and their nature, taken in connection with the defendant's duty in the premises, may be regarded as circumstantial evidence tending to show actual notice. But it is the contention of the plaintiff that the stringers supporting the planking of the bridge had been weakened by decay, and that two of them had been cracked about one-third of their width, some six years before the accident. As to the decay of the stringers, fragments of them were introduced in evidence, and these fragments certainly bear out the theory that they had been seriously weakened by lapse of time and natural decay. That they

had been cracked as claimed, and that the cracks in the stringers had been noticed by casual observers, in one instance some years before the accident, is conclusively established by the evidence. In the face of these facts, we do not think it can be fairly said that a finding of constructive notice is not sustained by sufficient evidence.

At the request of the plaintiff, the court gave the following instruction: "The jury are instructed that it is not necessary that a city, whose duty it is to keep and maintain a bridge in repair, have actual notice of defects, if such defects are of such a nature or have existed for such length of time that they might, by the exercise of ordinary diligence, have been discovered and repaired. In such case notice may be presumed." One criticism of this instruction is that it allows no interval between the discovery of the defects and the accident, in which to make repairs. The answer to this is that by this paragraph the court did not undertake to instruct the jury further than as to what facts and circumstances would warrant a presumption of notice. Besides the language, "that they might, by the exercise of ordinary diligence, have been discovered and repaired," implies that the defendant was allowed a reasonable time after discovering the defects to repair them. Another criticism of this instruction is based on the clause, "if such defects are of such a nature or have existed," etc. The defendant contends that the two members of this clause should have been connected by "and" instead of "or." This criticism, we think, is without substantial merit. Under this instruction, no matter what the nature of the defects, nor what length of time they had existed, the city was required to exercise only reasonable diligence. That being true, they were not required to discover latent defects, nor such as had existed for so short a period that, in the exercise of ordinary diligence, they could not have been discovered. But whether they existed for a long or short period, or whatever their nature, there can be no doubt, under the uniform holdings of the courts with respect to constructive

notice in cases of this kind, that if, by the exercise of ordinary diligence, the defendant could have discovered and repaired the defects before the accident occurred, the city is chargeable with such notice. The instruction certainly goes no further than that. Complaint is made of other instructions given by the court, but all complaints on that ground are disposed of, we think, by what has been said on the question of the liability of the defendant to maintain the bridge, and it is not necessary to go over the ground a second time.

It is also insisted that the court erred in refusing to give certain instructions tendered by the defendant. Some of these are eliminated by what has already been said, while others cover substantially the same ground as that covered by instructions given, consequently, the refusal to give them was not error. As to the remainder, no assignment of error in the petition is predicated on their rejection, hence the rulings in that behalf are not reviewable.

Contributory negligence was one of the defenses relied upon. To establish this defense an expert witness was produced, and, after objections to several hypothetical questions had been sustained, the defendant offered to prove by the witness, among other things, "that to pass over a bridge, whose framework is about from 45 to 48 feet in length, by steam, without planking the same, with a traction engine, with a tender attached to said engine, and water tank, containing about 200 pounds of coal and about 6 barrels of water, with two men on said engine at the time, was not an ordinarily safe method of passing over said bridge, and that extra precautions were necessary to be taken in the way of planking such bridge or bridges, and in propelling the engine across the same by means of pulleys or other force than steam applied to said engine." An objection to this offer was sustained and we think properly. The evidence shows conclusively that the use of traction engines on the highways in that locality had been common for some years. Therefore the

use of the bridge in moving such engines was one which might have been fairly anticipated by the defendant and for which it was bound to provide. *Anderson v. City of St. Cloud,* 79 Minn. 88. This case is cited with approval in *Seyfer v. Otoe County,* 66 Neb. 566. That being true, unless the plaintiff had knowledge of the unsafe condition of the bridge, he had a right to assume that the defendant had discharged its duty, and that the bridge was safe for the "accommodation of the public at large in the various occupations, which from time to time may be pursued in the locality where it is situated," and was not charged with the duty of "planking" it. Besides, one of the questions for the jury was whether the plaintiff was making an unusual or extraordinary use of the bridge at the time of the accident. *Seyfer v. Otoe County, supra.* Had the evidence been received, the expert would have passed on that question. That an expert witness will not be permitted to usurp the functions of the jury is elementary. 2 Jones, Evidence, sec. 374.

We discover no error in this record, and we recommend that the judgment 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.

WILLIAM C. FRAHM, APPELLANT, V. N. B. METCALF ET AL., APPELLEES.

FILED DECEMBER 6, 1905. No. 13,994

1. **Vendor and Purchaser:** OFFER: ACCEPTANCE. In order to conclude a binding contract by the acceptance of an offer, the offer must be accepted substantially as made.

2. **Statute of Frauds.** The authority of an agent for the sale of real estate, if not in writing, is void under the statute of frauds.

3. **Principal and Agent:** WRITTEN AUTHORITY: NOTICE. Where the act of an agent is one which requires authority in writing, those dealing with him are charged with notice of that fact and of any limitation or restriction on the authority of the agent contained in such written authority, and a contract beyond the scope of such authority, as thus limited or restricted, is not bindng on the principal.

4. **Statute of Frauds:** MEMORANDUM. A writing that neither names the parties to a contract nor describes them in such a way that they may be identified is not sufficient as a note or memorandum under the statute of frauds.

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

A. M. Walters and *F. A. Sweezy,* for appellant.

A. D. Ranney and *Tibbets Bros. & Morey, contra.*

ALBERT, C.

This is a suit for specific performance of a contract for the sale of real estate. The land which is the subject of the action lies within a certain quarter section in Webster county. A railroad running north and south divides the east half of the quarter into two nearly equal parts. The defendant Metcalf owned the west half of the quarter and all that portion of the east half lying west of the railroad. The alleged sale was not made by Metcalf personally, but by one claiming to act as his duly authorized agent. The only evidence in the record of the authority of the agent to act in the premises is in the following letter, which he received from Metcalf: "Enid, Ok., 8-29, 1903. A. M. Walters. I received your letter in regard to selling my place. I will sell all of the place for 4,700, or the south 40 separate. Will sell on easy terms. Simpson wrote me about a month ago. I told him he could list it if he wanted to for 6 months, but have not heard from him. I don't know what he has done. If he has listed it or not you may see if you can sell either all together or the 40

on the south, 4,700 for all or $900 for the south 40, to be taken if sold subject to the contract of J. Stabenow. Please let me know if you list it."

On receipt of this letter the agent Walters notified Metcalf that he would list the land, and within a day or two thereafter entered into an oral contract with the plaintiff for the sale to the latter of a strip of land containing 40 acres extending from Metcalf's west line and along his south line to the railroad for $900, "rent corn to go with the land." Plaintiff paid the agent $25 earnest money. Thereupon the agent sent the following telegram to Metcalf: "M. B. Metcalf, Enid, Okl. Sold south 40, $900 cash. Rent corn goes with land. Wire approval. A. M. Walters." There appears to have been some delay in the transmission of the telegram, and upon its receipt Metcalf wrote his agent as follows: "Enid, 9-6, 1903. A. M. Walters. I received your message, also your letter, but got R. A. Simpson message first. R. A. Simpson sold the south 40. The other part of the farm is for sale. Will set a price if any one wants it. N. B. Metcalf. Will give plenty of time at the rate of 6 per cent. Long time. Message was put in post office. They did not know where I was."

Three days thereafter he wrote the following letter to his agent: "Enid, Ok., 9-9, 1903. Mr. A. M. Walters. Your letter and telegram received in regard to selling the south 40. I received word from R. A. Simpson before I got word from you that he had sold the south 40. I wired him all O. K. If I had of got word from you first you would have got to handle the land but you could not make a deal the way you had, you had no right to sell the crop with the land. The crop was not for sale; also you was selling some of the land that don't belong to that 40. I should of objected to both deals. I give you only south 40 for sale for $900. N. B. Metcalf."

Metcalf repudiated the sale made by the agent Walters, and the purchaser brings this suit. The defendant Towbridge claims as Metcalf's vendee. The district court dis-

missed the bill for want of equity and the plaintiff appeals.

The plaintiff's theory is clearly shown by the following, taken from his brief: "These two letters (referring to the last two), together with the first letter and telegram, constitute the sale. * * * The question is not whether Walters made a sale of the land as agent of Metcalf, but was there a contract of sale consummated and completed between Metcalf and Frahm. No doubt Walters had authority to offer the land for sale on the terms proposed and contained in Metcalf's letter first written to him, a copy of which is set out in the petition. And when Frahm accepted the offer Walters did not undertake to bind Metcalf by making and executing a written contract with Frahm as the agent of Metcalf, but for and on behalf of Frahm transmitted the telegram, a copy of which is set out in the petition." There is at least one fatal objection to this theory, and that is, assuming that the first letter was an offer, which, upon its acceptance by the plaintiff, would become a binding contract, there is absolutely nothing in the record to show that it was accepted as made. It is expressly stated in the alleged offer that the land is to be sold "subject to the contract of J. Stabenow." There is nothing in the evidence to explain what Stabenow's contract was, but we infer from the argument that Stabenow was a tenant in possession under a lease for a term of years, a share of the crop going to Metcalf as rent for the land. We also infer that Metcalf had sold his share of the crop, then standing on the land, to the tenant. But whatever may have been the nature of Stabenow's contract, the land was to be sold subject to it. Such was the offer, and it is elementary that an offer is not binding unless accepted substantially as made From the evidence it would appear that the plaintiff agreed to take the land at $900, "rent corn to go with the land." That was not an acceptance of the offer as made, because it ignores Stabenow's contract, unless the clause, "rent corn to go with the land," is a reference to the contract. But the

evidence is silent on that point, and offers no explanation of what was meant by rent corn. If our inferences from the argument hereinbefore referred to are correct, then by the terms of the letter, which the plaintiff claims was an offer, the rent corn was not to pass with the title, and the alleged acceptance was a flat rejection of this part of the offer, because it states that it does thus pass. It is quite clear to us that the offer, if it be regarded as an offer, was not accepted as made, and the plaintiff's theory fails.

In fact, we can discover no ground that would serve as a foundation for a decree for specific performance in this case. If we say that the sale was made by an agent, then the first letter set out is the only evidence in the record of his authority. That the acts of an agent are binding on his principal, only when within the scope of his authority, actual or ostensible, is elementary. There is no claim, and can be no claim, in this case that the ostensible authority of the agent was greater than that conferred by the letter just referred to. The authority of an agent for the sale of land is void under the statute of frauds unless in writing. *O'Shea v. Rice,* 49 Neb. 893. Where the act is one which requires an agent's authority to be in writing, the party dealing with him must take notice of that fact, and is bound by any limitation or restriction contained in the written authority. Mechem, Agency, sec. 273. Here the statement in the letter that the sale was to be subject to Stabenow's contract was a limitation on the authority of the agent. As the law required his authority to be in writing, the plaintiff is charged with notice of that fact, and when he entered into a contract with him for the purchase of the land, without any reservation as to Stabenow's contract, he knowingly contracted beyond the scope of the agent's authority, and the contract is not binding on the principal.

Even had the agent authority to make the contract, it was void under the statute of frauds, because no note or memorandum thereof was made and signed by Metcalf.

The claim appears to have been put forward in the district court that the telegram from the agent to Metcalf amounts to such note or memorandum, but that claim is unfounded. While the law does not require technical exactness and precision in such cases, there are some things which it does require. One of these is that the note or memorandum should show "the parties to the contract, either by naming them or so describing them that they may be identified." 29 Am. & Eng. Ency. Law (2d ed.), p. 864, sec. 6. This rule is recognized in *Barton v. Patrick,* 20 Neb. 654; *Gardels v. Kloke,* 36 Neb. 493. The telegram utterly fails either to name or describe the purchaser. It is insufficient in other respects, which we pass without notice.

We are of the opinion, therefore, that in any view of the case the plaintiff is not entitled to a decree for specific performance, and we therefore recommend that the decree of the district court 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.

HENRY M. KIDDER V. HARRIET MAYNARD ET AL.

FILED DECEMBER 6, 1905. No. 14,010.

A new trial will not be granted merely to allow a party to offer newly discovered evidence on an issue already established in his favor, or on an immaterial issue.

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

Henry M. Kidder and *Charles E. Abbott,* for plaintiff in error.

F. W. Button, contra.

ALBERT, C.

The plaintiff, an attorney at law, brought this suit to recover the reasonable value of services rendered, as he claims, at the instance and request of the defendants, in and about the revivor and collection of a judgment in another state. His claim includes the reasonable value of the services of a foreign attorney, whom he claims to have employed, with the defendant's knowledge and consent to assist in the matter. The defense to the claim is based on the theory that the defendants themselves employed the foreign attorney; that he performed all the services and had been paid in full by the defendants; that they had never employed the plaintiff, nor had he ever rendered any services in the matter. The plaintiff proved the reasonable value of his services, but offered no evidence of the reasonable value of the services of the foreign attorney. It is conclusively established, however, that the foreign attorney made a charge of $40 for his services and disbursements, and that the defendants had paid him in full. The court instructed the jury to the effect that, if they found that the plaintiff had been employed in the matter by the defendants, they should allow him the reasonable value of his services, and that, if they found that the plaintiff had employed the foreign attorney, with the knowledge and consent of the defendants, they should allow the plaintiff the reasonable value of the services of the foreign attorney, less whatever amount the defendants had paid the foreign attorney. No exception was taken to this or to any other portion of the charge to the jury. The jury found for the plaintiff and awarded him $6. Judgment was given accordingly. The plaintiff filed a motion for a new trial, based exclusively on the ground of newly discovered evidence. This motion was overruled, and that ruling presents the only question for review in this court.

The record shows that the newly discovered evidence tends to establish two propositions: First, that the de-

fendants employed the plaintiff; second, that he employed the foreign attorney with the knowledge and consent of the defendants. The first is already established by the general verdict, because, under the issues submitted, without a finding in plaintiff's favor on that proposition, a general verdict in his favor would be a logical impossibility. As to the second proposition which the newly discovered evidence tends to establish, it appears to be immaterial, in view of the evidence and the instructions of the court. Under the instructions, if the jury found in plaintiff's favor on that proposition, he was entitled to recover the reasonable value of the services of the foreign attorney, less whatever amount the defendants had paid such attorney. The evidence is undisputed that the defendants had paid the foreign attorney in full, consequently the plaintiff was entitled to nothing by reason of such services, however the jury found on that proposition, and how they found thereon is wholly immaterial to him. In short, the motion for a new trial amounts to a request for a new trial in order to give the plaintiff an opportunity to offer further proof on an issue already decided in his favor, and one that is wholly immaterial. Neither is good ground for a new trial, and the motion was properly overruled.

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

CENTRAL GRANARIES COMPANY V. ISAAC AULT, ADMINISTRATOR.*

FILED DECEMBER 6, 1905. No. 13,962.

1. **Master and Servant:** HAZARDS OF EMPLOYMENT: NOTICE. Whether it is incumbent upon a master to warn his servant of the hazards attending the business in which he is engaged must be determined from the facts and circumstances shown to exist. A servant, who from the length or character of previous service or experience may be presumed to know the ordinary hazards attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he was ignorant or inexperienced in the particular work, and this rule applies to infants as well as adults.

2. **Facilities:** DUTY OF MASTER. The master is required to provide only such facilities and conveniences for the use and operation of machinery by his employees as are in common and general use.

3. ———: NEGLIGENCE: QUESTION FOR JURY. Whether the master is guilty of negligence in not providing a safe place for his servant to perform the labor required of him is a question of fact for the jury, but what is competent evidence to establish that fact is a question of law for the court.

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

I. R. Andrews and *Edgar M. Morsman, Jr.,* for plaintiff in error.

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

JACKSON, C.

The plaintiff in the trial court, as administrator of the estate of Nelse C. Nelson, deceased, recovered judgment against the defendant in an action wherein it was claimed that the death of the deceased was caused by the negligent acts of the defendant. The defendant prosecutes error,

* Rehearing denied. See opinion, p. 255, *post.*

and one of the grounds of complaint is that the verdict and judgment are not sustained by the evidence.

At the date of Nelson's death the defendant was operating an elevator at Filley, Nebraska. The power was provided by means of a gasoline engine placed in a room adjacent to the main building. The engine room was rectangular in shape, 12 feet 10 inches in length from the north to the south, and 7 feet 3 inches in width from the east to the west. The engine is situated in the northwest corner of the room, so that the fly wheels are within 4¼ inches from the north wall. There are 2 fly wheels situated 18 inches apart, one on either side of the engine. The power is transmitted to the elevator by a belt. The belt is attached to the engine by means of a pulley on the main shaft of the engine, extending outward from the east fly wheel. From the outer edge of the pulley to the east wall the distance is 35 inches. Attached to the east wall, 44 inches from the floor, is a shelf 12 inches wide and some 7 feet long, leaving a space of 23 inches between the shelf and the outer edge of the pulley Below this was another shelf 16 inches wide and 23 inches in length, described as being about the height of a man's knee from the floor, leaving a space of 19 inches between the outer edge of the pulley and the lower shelf. From the floor line to the center of the shaft it is 23¾ inches. The driving pulley is 12 inches in diameter. The deceased at the time of his death was 16 years and about 11 months of age. He was a boy of ordinary intelligence, and inclined, perhaps, to be careless; a hard working, industrious boy, of good habits and well developed for his age. He was employed by the defendant, and had exclusive charge of the engine room and engine, and owing to the fact that the engine, after being started, required little or no attention, he attended to the loading of cars. This duty required the shoveling of grain away from the spout by means of which the grain was conducted from the elevator into the car, and the changing of the spout from one end of the car to the other. This service it was necessary

to perform in order to prevent the spout from becoming clogged and interfering with the operation of the machinery in the elevator. He had been employed in and about the elevator, during the busy seasons, for about 3 years, during which time the elevator had changed hands 2 or 3 times, and was so employed at the time the defendant acquired and took possession of the elevator, and had been repeatedly warned by former employers to be cautious, to be careful, and not get mixed up with the machinery.

On the day of his death he was first at the elevator; he was seen to go there at about 7 o'clock in the morning, and soon afterwards the machinery was heard in motion. Later the defendant's manager, while on his way to the elevator, heard what he described as a screeching noise. He ran to the elevator, went into the driveway between the engine room and the main building, and saw that the elevator was stopped. He then opened the door of the engine room, and found the engine in operation, and the deceased lying dead on the floor in the space between the east fly wheel and the east wall, with his head, the entire top of which had been crushed off, very near to the fly wheel. No one saw the accident, and no one has undertaken to explain it, except by detailing the circumstances and conditions under which the body was found. It is manifest from the evidence that he went to the elevator, started the engine and commenced loading a car of grain. One end of the car had been filled and the spout changed to the other end, when he returned to the engine room, for some purpose not known. The grain had filled into the car around the spout, and because of the fact that no one was there to shovel it away the spout had filled up until the elevating machinery was clogged, and the pressure had loosened the set-screw fastening the pulley to the elevator shaft, so that the pulley revolved on the shaft without turning the machinery, thus causing the screeching noise heard by the manager. The engine was in perfect repair and there is no pretense of defective machinery.

The theory upon which the plaintiff justifies the recovery is that the space between the pulley on the engine operating the belt and the shelves on the east wall was so narrow that it was unsafe for a person to pass through while the engine was in motion, the danger being that the person passing through would be liable to have his clothing caught between the belt and the pulley, and that the deceased was required to go into this space, by reason of his employment, for tools lying on or hung over the upper shelf, or for oil with which to oil the machinery, and that he did, in fact, meet death in that manner. The oil was contained in cans on the floor beneath the lower shelf. None of the tools were displaced or found lying on the floor, and the oil cans had not been disturbed. Nothing was found on the floor to indicate that the deceased had anything in his hands at the time the accident occurred.

It is insisted that the defendant is liable because of its failure to warn the deceased of the hazards attending the business in which he was engaged. Whether it is incumbent upon a master to so warn a servant must be determined from the facts and circumstances shown to exist. It appears in this case, without controversy, that at the time the defendant took charge of the elevator the deceased was in the employ of its grantor, engaged in the performance of the same duty which he afterwards performed for the defendant, and that he was continued in that service; and the rule is that a servant, who from the length or character of previous service or experience may be presumed to know the ordinary hazards attending the proper conduct of a certain buisness, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he were ignorant or inexperienced in the particular work. *Omaha Bottling Co. v. Theiler,* 59 Neb. 257. We think it a fair inference that the deceased was as familiar with the danger incident to his employment, and the liability of injury on account of contact with rapidly moving machinery, as was the defendant. This, in connection with the fact that he had

been warned in his early employment by former managers of the elevator, leaves nothing to the claim of negligence on account of the failure of the defendant to warn the deceased, and does not bring the case within the rule that a master is liable to an infant who has been injured in his service in consequence of being exposed to a danger, which on account of his youth and want of experience he did not fully understand and appreciate. Infants, like adults, assume the ordinary risks of the service in which they engage.

The existence of negligence in providing a place for the deceased to perform the labor required of him was a question of fact for the jury, but it must be established by competent evidence and according to certain fixed rules of liability. What is required of a master is that he use such machinery and appliances as are in common and general use. *Cudahy Packing Co. v. Roy,* 71 Neb. 600; *Weed v. Chicago, St. P., M. & O. R. Co.,* 5 Neb. (Unof.) 623. Measured by the same rule, he would be required to furnish such facilities for the use and operation of the machinery by his employees as are in common and general use, and, where the lack of such machinery and appliances or facilities for the use of the same is relied upon as a cause of action, the burden of proving such failure is upon the party seeking to maintain the action. Does the proof in this case fall within that rule? We think not. It is true that several witnesses testified that they did not regard the passageway between the pulley and the shelves on the east side of the room as being safe when the engine was in motion, but the witnesses who so testified were substantially all of them without experience in the use of that or similar machinery, while witnesses on behalf of the defendant, some of them at least familiar with the use of such machinery and accustomed to the operation thereof, testified that they regarded the passageway as safe, with the exercise of reasonable caution. The operation of such machinery is, of course, dangerous, but the employer is not liable for the

consequences of danger; his liability is to be determined by the existence of negligence. The question of whether a space of 23 inches between moving machinery on the one side and a fixed object on the other provides sufficient room for the body of a man to pass through, and whether a space of 19 inches between such machinery and a fixed object affords ample space for a man's lower limbs, is one to be determined by experience, and whether that is the common and ordinary space provided as a passageway around such machinery is a question of fact to be determined by competent evidence. The record in this case discloses an absolute want of evidence bearing upon that question.

There is considerable force in the contention of the plaintiff in error that, even though the passageway was found to have been negligently constructed, the evidence falls short of establishing that the narrowness of such passageway was the proximate cause of Nelson's death. The mere fact that his body was found in the passageway does not raise the presumption that he came to his death through the negligence of the defendant. *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720. The evidence discloses that the floor in the passageway was covered with oil and slippery, a fact which would readily explain the falling of a person passing there. That fact, however, is not alleged as a ground of negligence. There is nothing in the evidence to indicate that the clothing of the deceased was caught in the machinery, and, even if there were, that fact might readily be explained by the inference that it was so caught when the deceased was examining the engine with a view of ascertaining whether it required oiling or not. Such an examination would necessitate the inspection of oil cups by means of which it was shown that the engine was oiled and in that case the narrowness of the passageway would not contribute to his proximity to the machinery.

An eye witness is not always necessary to establish the cause of death or injury, but the authorities cited by de-

fendant in error in support of that proposition are easily distinguishable from the case at bar. In *Union Stock Yards Co. v. Conoyer,* 41 Neb. 617, the deceased was foreman of an engine crew. His dead body was found between the rails of a track owned by his employer, under a train then being operated by the crew of which the deceased was foreman. The forward truck of the car upon which the deceased was supposed to be riding had become derailed because of an accumulation of cinders and other rubbish on the track, and the only reasonable inference was that the deceased was thrown from the car by the jolting caused from the derailment. The cases of *Lillstrom v. Northern P. R. Co.,* 53 Minn. 464, 55 N. W. 624; *Soeder v. St. Louis, I. M. & S. R. Co.,* 100 Mo. 673, and *Galvin v. Mayor,* 112 N. Y. 223, 19 N. E. 675, are parallel cases with the one just cited.

Upon a consideration of the entire evidence, we conclude that it does not sustain the verdict of the jury, and we recommend that the judgment of the district court be reversed and the cause remanded.

DUFFIE, C., concurs.

ALBERT, C.

I concur, but in yielding to the rule stated in the second headnote, merely acknowledge the binding force of precedent.

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

REVERSED.

The following opinion on motion for rehearing was filed June 8, 1906. *Former opinion modified. Rehearing denied:*

DUFFIE, C.

In an exhaustive and instructive brief, filed by the defendant in error in support of his motion for a rehearing,

exceptions are taken to the following extract from the opinion of Mr. Commissioner JACKSON, *ante*, p. 249:

"The existence of negligence in providing a place for the deceased to perform the labor required of him was a question of fact for the jury, but it must be established by competent evidence and according to certain fixed rules of liability. What is required of a master is that he use such machinery and appliances as are in common and general use. * * * Measured by the same rule, he would be required to furnish such facilities for the use and operation of the machinery by his employees as are in common and general use, and, where the lack of such machinery and appliances or facilities for the use of the same is relied upon as a cause of action, the burden of proving such failure is upon the party seeking to maintain the action. Does the proof in this case fall within that rule? We think not."

We are satisfied the above quotation does not contain a correct exposition of the law and that the opinion in that respect should be modified. The rule undoubtedly is that the master is not liable for furnishing dangerous machinery and appliances for the use of his servant, for all machinery is more or less dangerous. Employers are not insurers. They are liable for consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. *Weed v. Chicago, St. P., M. & O. R. Co.*, 5 Neb. (Unof.) 623. The rule that the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business, means that it is the test to disprove negligence, and not to prove it. The party charged with negligence disproves it by showing that the tools he employed were those in general use in the business, but the converse does not follow. The party charging negligence does not show it by showing that the machinery was not in common use. If it should be so held, the use of the newest and best machinery, if not yet generally adopted, could be adduced as negligence. Such evi-

dence should not generally, in the first instance, be admitted on behalf of the plaintiff, unless it tends to show that the method pursued was not only unusual, but more dangerous in itself than the ordinary one. *Cunningham v. Fort Pitt Bridge Works*, 197 Pa. St. 625. We think, on reexamination of the question, that this is the true rule, and that the opinion should be modified to that extent and, as thus modified, should be allowed to stand.

The other matters discussed in the brief for a rehearing have, we think, been fully met in the original opinion. We recommend that the opinion be modified as above set forth and the motion for a rehearing overruled.

By the Court: For the foregoing reasons, the opinion is modified as above set forth and the motion for a rehearing

OVERRULED.

SECURITY MUTUAL LIFE INSURANCE COMPANY V. ABRAHAM L. MILLER, ADMINISTRATOR.

FILED DECEMBER 6, 1905. No. 14,021.

1. **Insurance Policy:** VALIDITY. A life insurance policy issued on the life of a person but fourteen years of age, which policy had attached thereto a memorandum to the effect that the company issuing the policy would not assume any risk on account of the death of the insured until the insured had arrived at the age of fifteen years and is examined by an examiner of said company, and the examination approved by the medical director, is not void.

2. ———: WAIVER. In the case stated, where the company issuing the policy received and retained the second premium from the insured after he had arrived at the age of fifteen years, without requiring the medical examination as stated in the memorandum and provided for by its articles of incorporation, *held*, in the absence of fraud, that the medical examination was waived.

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

N. Z. Snell, for plaintiff in error.

A. D. McCandless and *W. H. Ashby*, *contra*.

JACKSON, C.

The plaintiff in the trial court, as administrator of the estate of Samuel Earl Miller, deceased, recovered judgment against the defendant on a life insurance policy issued by the defendant to the deceased, and the case is brought to this court by a proceeding in error instituted by the defendant below.

The facts involved in the inquiry are that on the 31st day of May, 1901, the defendant issued and delivered to Samuel Earl Miller a policy of insurance in consideration of a note for the sum of $40.96, and the annual payment on the 31st day of May of each following year, for 19 years, of the sum of $40.96 as premiums. The policy provided for an indemnity in the sum of $2,000 in the event of the death of the insured, and contained the further provision that, in the event of total and permanent disability as a result of accident, the insured may elect to receive one-half of the face amount of the policy upon a surrender of the policy and a discharge from all further liability. At that time the insured was but 14 years of age, his fifteenth birthday occurred on the 8th day of May, 1902, and the application for the policy, which was in writing, correctly stated the age of the applicant. Attached to the policy at the time of its delivery was the following memorandum: "It is understood that the Security Mutual Life Insurance Company will not assume any risk on account of the death of the insured under this policy, until the insured arrives at the age of 15 years, and is examined by an examiner of said company, and the examination approved by the medical director of said company." By the articles of incorporation of the defendant it is provided: "The plan by which the business of this company shall be conducted is as follows: The application for membership

and for insurance or accident indemnity must be made in writing upon such forms as shall be prescribed by the board of directors, which application shall be passed upon by the board of directors or at least a majority of a committee appointed by them for that purpose. Each and every applicant shall submit to examination by the medical examiner, which must be passed on in writing by the medical director or his deputy." Below the signature of the insured upon the application for the policy is written: "We waive death risk until after examination at age of 15 years."

The insured died intestate on the 4th day of March, 1903, and had never taken the medical examination. At the trial it was admitted by the defendant that on the 8th day of May, 1902, and from that time to and including the 31st day of May, 1902, the insured was in good health, sound, well and strong, and that no demand was made upon him for a medical examination during that time, or at any other time, except as in the application and the slip or rider attached to the policy. Prior to the maturity of the premium due May 31, 1902, the defendant notified the insured of the date of the maturity of that premium. Upon receipt of the notice the insured transmitted to the defendant the following letter: "Oketo, Kans., April 19, 1902. W. A. Lindly, Sec. of Sec. Mut. L. Ins. Co.: Your notice received for policy No. 2462 on S. E. Miller. I don't think I will ever pay any more on it. I didn't like the way you done business come & take a policy before I had any chance to inquire of you & go & sell my note at once just as though it wouldn't be paid You must be hard up for money to do that kind of business. I havent tried to find out what you ar but I have always fealt they way you done you hant much of a Co. not very lasting so I think I better give you the one payment & quit before I get stuck for more I want in a Co I feel safe in. S. E. Miller, by A. L. Miller."

Upon receipt of this communication the defendant company wrote the insured as follows: "Lincoln, Nebr., April

23, 1902. Mr. A. L. Miller, Oketo, Kas. Dear Sir: We have your favor of the 19th and note what you say. It is our rule as well as the rule of all other companies to accept nothing but cash from agents in payment of the first premium on policies. Sometimes the agents take notes, and they either carry them themselves or dispose of them. If they are not able to carry them, it is necessary for them to sell them in order to pay the company. The object of this rule is to prevent agents from writing up a whole raft of people who are not responsible and sending the notes to the company that cannot be collected. There is no trouble in writing policies on people when they do not have to pay for them, and if we would accept any kind of a note, we would find ourselves doing a very large business, but we would also find that it was worthless. This policy of yours was written just before we increased our rates. We would charge you now for the same policy $50 a year. Still our rates are somewhat lower than most eastern companies. The policy which you hold is a saving to you of $9.04 a year, which in twenty years amounts to about $181, saying nothing about interest. This, taken into consideration with the fact that the death rate in this country is only sixty per cent. of the average death rate of the United States, should be a great inducement to keep this policy in force. In addition to the normal death rate, you have the advantage of a young company, made up mainly of young policy-holders, consequently, there will be naturally a low death rate for the next fifteen or twenty years. We can see no reason why this policy will not be very much more profitable to you than a policy in a large eastern company. If you desire any particulars of any kind, in regard to the business, we will be pleased to furnish them. We can assure you that the business is on a legitimate basis, and we are doing everything that we can to keep our expenses low. We are also very careful with our risks. Our aim is to have only first class risks on our books. Very truly yours, W. A. Lindley, Secretary."

This latter communication seems to have assured the

policy-holder. At any rate the premium maturing May 31, 1902, was paid, and the receipt of that premium is acknowledged by the defendant.

Upon this state of facts, it is contended by the plaintiff in error: First, that the policy was void from its inception; and, second, that, if not void, it was never in force as a death risk by reason of the failure of the insured to take the medical examination. The first contention involves a construction of the statute governing life insurance companies organized under the laws of this state, and of the contract itself as affected by that statute. The statute provides as follows: "No corporation or association organized or operating under this act shall issue any certificate of membership or policy to any person under the age of fifteen years and over the age of sixty-five years, nor unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such insured member, nor shall any such certificate be assigned, and any certificate issued or assignment made in violation of this section shall be void." Comp. St., ch. 43, sec. 76. The writing of life insurance is not by this act made unlawful, the purpose of the law being to regulate and not prohibit. The parties to the contract in suit contracted with reference to the statute, and by agreement postponed the operation of the policy until the assured should have arrived at the age of 15 years, when the statutory inhibition would not apply. We think it was entirely competent for the parties to enter into such an agreement, and hold that the policy was not void under the statute. The delivery of the policy by the insurance company to the deceased was conditional that it should not go into effect until the assured had arrived at the age of 15 years and submitted to the physical examination required by the company's rules, and, waiving for the present the question of the physical examination, the policy would become operative and in full force when the insured did arrive at the age of 15.

This brings us to the question of the effect upon the con-

tract of the failure to have the physical examination made as contemplated by the parties at the time the contract was entered into. When the insured arrived at the age of 15 years, the defendant company had a right to insist, under the terms of its original agreement, that the insured should submit to an examination by their medical examiner as a condition precedent to the policy going into effect. In that respect it would seem that the case must stand or fall as though the insured at that time made application for the policy. There is no serious contention but that under such circumstances the company might waive the provision of its charter requiring the applicant to submit to the medical examination, and if the application had been made at that time, accompanied by the payment of the premium, and the policy unconditionally delivered to the assured without requiring the medical examination, such delivery on the part of the company would amount to a waiver. It appears from the facts disclosed at the trial that the deceased contemplated dropping the policy in suit before making the second payment, which would mature 23 days after he arrived at the age of 15 years, and so informed the company. Their letter to him of April 23 urgently soliciting him to continue the policy in force, and offering substantial reasons why he should do so, doubtless induced the payment of the second premium. When the second premium matured and was paid, the defendant company still had the right to insist upon medical examination. The acceptance of the premium at that time by the company, without requiring the assured to submit to an examination, in our judgment, amounted to a waiver of their right to do so, as much so as if the contract had been originally entered into at that date, especially in view of the fact that the premium was retained and no offer ever made to return the same to the assured during his lifetime.

There is no question of fraud involved; it is rather one of the legal effect of the acts of the parties performed in the utmost good faith. The failure of the defendant to

demand and of the insured to submit to the medical examination may have been an oversight of both parties. However, under the admitted facts, but one result could have followed from the examination. The condition of the health of the insured at that time was such as to have secured the approval of the defendant's medical examiner, and the company was in nowise prejudiced by the failure to have the examination made.

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.

CLARENCE A. SWEET V. STATE OF NEBRASKA.

FILED DECEMBER 20, 1905. No. 14,087.

1. **Criminal Law:** CHANGE OF VENUE. A motion for a change of venue in a criminal prosecution is addressed to the sound discretion of the trial court, and, unless there has been an abuse thereof, its ruling on the motion cannot be disturbed. *Goldsberry v. State*, 66 Neb. 312.

1*a*. ———: ———. If from the showing made in support of and against the motion for a change of venue in a criminal case there is no reasonable ground shown on which to found a belief that the accused cannot have a fair and impartial trial in the county where the offense is alleged to have been committed, it is not error to deny such motion. *Goldsberry v. State*, 66 Neb. 312.

2. **Objections to Evidence.** An objection to a question on the ground that it is leading and calling for a conclusion of the witness does not properly raise the question of the competency of the evidence sought to be elicited by such question.

2*a*. **Harmless Error.** The admission of incompetent evidence may be error without prejudice, where the fact to which such evidence relates is otherwise established by competent evidence.

3. **Instruction:** EVIDENCE OF CHARACTER. It is not error to refuse an instruction concerning evidence of the previous good character of the accused, when the instruction calls attention especially to such evidence and to no other, and tells the jury that it may be relied on to raise a doubt of the guilt of the accused sufficient to acquit him, which, without such proof, would not have existed.

3*a*. **Evidence of good character** is always admissible as a circumstance favorable to the accused, to be considered by the jury in connection with the other evidence bearing upon the question of guilt or innocence, and given such weight as the jury believe it fairly entitled to, and when so considered it may be sufficient to create a reasonable doubt, when, without it, none would exist; but the conclusion of the jury is to be drawn from the whole of the evidence, and when, after giving evidence of good character due weight, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of good character is unavailing.

3*b*. **Noninstruction** alone on the question of evidence of good character, in the absence of a proffered instruction correctly stating the law, is not reversible error.

4. **Instructions:** HARMLESS ERROR. Certain requested instructions examined, and the refusal to give the same *held* not prejudicial error.

5. **Error:** WAIVER. Errors assigned but not argued will be considered as waived.

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

J. C. Cook, W. S. Cook and *F. Dolezal,* for plaintiff in error.

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

HOLCOMB, C. J.

The defendant was tried and convicted of the crime of an assault upon a female child five years old with the intent to commit a rape, and by error proceeding brings the record of his trial here for review.

1. His counsel complain of the action of the trial court

in overruling his application for a change of venue. We are satisfied from an examination of the record that no error was committed in this regard. There is no showing of any considerable strength that the people of Holt county, outside of the immediate locality where the crime was alleged to have been committed, were unusually excited, or that the public feeling was greatly aroused, or that there existed a deep seated prejudice against the accused. The showing of bias and prejudice was limited to but a few, and then only to those who by reason of relationship or acquaintanceship with the alleged victim would naturally be expected to be incensed, and exhibit strong feeling against the accused. Some newspaper articles published in local papers of a somewhat inflammatory character were introduced in support of the application. A counter showing of equal or greater weight was made, tending to prove that a fair and impartial trial could be had by a jury wholly free from bias or prejudice against the defendant. Holt county is one of the large counties of the state, and has from 3,300 to 3,500 voters, a large percentage of whom are possessed of the qualifications of jurors. The county is not densely populated. The circulation of the local newspapers was limited, and we can find no sufficient basis in the record for holding that there existed reasonable grounds on which to found a belief that the accused could not have a fair and impartial trial in that county. On the authority of *Goldsberry v. State*, 66 Neb. 312, this alleged erroneous ruling is held to be not well taken.

2. During the examination of the mother of the child on whom the alleged assault was committed, she was asked: "Now then, you need not state what your child said to you, but you may state the fact, whether at that time, on the 14th day of May, your daughter Maudie complained to you that she had been assaulted, indecently assaulted by the defendant here." The record shows: "Counsel for defendant objects as leading and calling for a conclusion of the witness. Objection overruled. Defendant excepts."

The witness answered: "She did." Error is sought to be predicated on the above ruling. While the question may be answered yes or no, it is not for that reason alone leading. The question was preliminary, and for that reason permissible in the form asked. The trial court possessed a large discretion in permitting questions of a leading character to be propounded and answered, and we perceive no prejudicial error in its ruling in that regard in the case at bar. The question does not call for a conclusion of the witness. Whether complaint was made of an indecent assault is a fact rather than a conclusion. It does not appear that prejudicial error was committed in permitting the question to be answered notwithstanding this objection. The competency of the evidence sought to be elicited is argued in brief of counsel, but we do not regard the objection interposed as covering this question, or that such question is properly raised and presented for review by the objections interposed. The question propounded, we think, was objectionable in the form it was put. It, in substance, called for a statement made by the child and connected the defendant with the alleged statement. This, of course, if proper objections had been made and exceptions preserved, might have resulted in prejudicial error. We are of the opinion, however, waiving for the time being the form of the objection, that no serious consequences to the prejudice of the defendant resulted. But a few moments before this question was asked, this same witness, in an answer to a proper question, stated something the child had said, and it was moved by defendant's counsel to strike out what the child said, as incompetent. The state consented to its being stricken out and the court sustained the motion. The jury were thus clearly advised that statements made by the child were not to be considered; and the question objected to especially disclaimed intention to have the witness testify to anything the child said to her. There is also in the record undisputed testimony of a credible character of admissions made by the defendant concerning his relations with the child, which

proved much more than was implied in the objectionable question, or that possibly could be inferred therefrom when answered in the affirmative. Upon full consideration of the matter, we are disposed to the view that the judgment ought not to be reversed because of this alleged erroneous ruling of the trial court. See in this connection *State v. Crawford,* 96 Minn. 95.

3. Evidence of the previous good character of the accused was submitted to the jury for its consideration, and the court was requested to instruct the jury on this point, as follows: "The jury are instructed that the accused has called witnesses to prove his good character for morality and virtue; the same is before you pertinent and proper. And the evidence that the defendant possessed a good character for virtue may be relied on to raise a doubt of his guilt sufficient to acquit him, which, without such proof, would not have existed." The requested instruction was refused and an exception duly taken. This ruling is assigned as error. As an abstract proposition of law there is, perhaps, nothing unsound in the statement contained in the instruction. It is not to be doubted that evidence of good character weighs in favor of the accused, and may be sufficient to turn the scales in his behalf, when all else has failed. It may be sufficient to generate a reasonable doubt in the minds of the jury, which would not have arisen were it not for such evidence. The same, however, may be said of most of the evidence introduced in behalf of a defendant accused of crime, but this would hardly justify the trial court in selecting certain parts of the evidence, calling attention of the jury especially to the portion or portions thus selected, and say to them that such evidence may be relied upon to raise a doubt of the defendant's guilt sufficient to acquit him, which, without such proof, would not have existed. But it is said that this instruction has been by this court approved in the case of *Garrison v. People,* 6 Neb. 274, in the very language as now drafted. That case hardly supports the contention of counsel that it would be error to the prejudice

of the defendant to refuse to give such an instruction when requested in his behalf. It is true the instruction was given in that case worded as is the one under consideration. It is equally true that, if the court erred in giving the instruction in the case cited, the error was favorable to the defendant, and for the giving of the instruction he had no cause to complain. It was the defendant in that case complaining of the giving of the instruction, and not of the court's refusal to give it, as in the case at bar. The question therefore now being considered is an altogether different one than was the question determined in the authority relied upon. A study of that opinion will reveal that the court did not approve the giving of the instruction as a correct statement of the law for the guidance of the jury. It was expressly held that, "where evidence of good character is before the jury, it is their duty to give it such weight as they think it is entitled to." "It is," say the court, "the province of the jury to weigh the evidence and determine the facts, and they should be left as free and untrammeled to give such weight to the evidence of good character as they are in relation to other facts." In *Latimer v. State,* 55 Neb. 609, 620, it is said: "In the case at bar there was before the jury evidence of the prisoner's good character, and it was the province of the jury to consider this evidence, as all the other evidence in the case, and to give it such weight as they deemed it entitled, and they should have been left free and untrammeled in this respect." In *Johnson v. State,* 34 Neb. 257, it is held: "Previous good character of the accused in a criminal prosecution is a fact which he is entitled to have submitted for the consideration of the jury precisely as any other circumstance favorable to him, without any disparagement by the court." It must at once become obvious that, if to disparage evidence of good character is a vice, it is equally erroneous to single out in the court's instructions a particular fact or facts, and to give special prominence and emphasis to its value as evidence or the weight to be given by the jury to such proof. *Rising v. Nash,* 48

Neb. 597, and *First Nat. Bank v. Lowrey Bros.*, 36 Neb. 290.

The instruction under consideration tells the jury that evidence of good character may be relied upon to raise a doubt of the defendant's guilt sufficient to acquit him, which, without such proof, would not have existed. The fault of the instruction is in segregating this particular item of evidence, and giving it such prominence as to its weight and sufficiency, and instructing the jury that it could be relied on to raise a reasonable doubt which otherwise would not be entertained. It separated this proof of good character from the other evidence in the case, and gave to it a degree of importance it was not entitled to. Charges that good character, if proved, may sometimes have the effect to generate such a doubt as would authorize an acquittal, even when the jury would otherwise have entertained no doubt, and that a defendant may offer evidence of his previous good character, not only where a doubt exists on the other proof, but even to generate a doubt of his guilt, were properly refused, as tending to give undue prominence to evidence of the good character of the defendant. *Goldsmith v. State*, 105 Ala. 8. See also *Lillie v. State*, 72 Neb. 228. The true rule, we think, is that evidence of good character is always admissible as a circumstance favorable to the accused, to be considered by the jury in connection with the other evidence bearing upon the question of guilt or innocence, and given such weight as the jury believe it fairly entitled to, and when so considered it may be sufficient to create a reasonable doubt, when, without it, none would exist; but the conclusion of the jury to be drawn from the whole of the evidence, and when, after giving evidence of good character due weight, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of good character is unavailing. 12 Cyc. 620, and authorities cited. 4 Elliott, Evidence, sec. 2721. We are of the opinion that the mere failure of the court to give an instruction relative to the question of the evidence introduced to prove

good character cannot operate to work a reversal of the judgment, and we find no complaint in the motion for a new trial regarding such alleged error. The evidence concerning previous good character was admitted for the consideration of the jury, and they were instructed generally that the question of the guilt or innocence of the accused was to be determined from an impartial consideration of the whole of the evidence before them. While the giving of an instruction respecting evidence of good character may have been proper, noninstruction alone on that point, in the absence of a proffered instruction correctly stating the law, is not prejudicial error.

4. The defense requested of the court the giving of three certain instructions, which were each refused, and exceptions to the ruling as to each instruction duly taken and preserved. It is argued that these several instructions were responsive to the theory of the defense, as presented by his plea of not guilty and the evidence introduced in the case, and that prejudicial error was committed by the court in refusing to give such requested instructions. The substance of these instructions is that, before the accused could be found guilty of the charge of assault with intent to commit rape, it must be made to appear to the jury by the evidence beyond reasonable doubt that the defendant was infected with a gonorrheal disease, and that he communicated such disease to the person he was charged with assaulting by connection or touching of the sexual organs. The state, in making its case, offered evidence tending to prove that the accused was infected with the disease mentioned, and that the little girl he was charged with assaulting became infected with the same disease at or about the time of the alleged assault, as a circumstance tending to establish the charge contained in the information. There was evidence tending to prove that the disease might be transmitted and communicated to others by means other than by contact of the sexual organs. The theory of the accused, if we understand counsel aright, is that under the evidence the jury might very reasonably have enter-

tained a doubt as to whether the disease was communicated by the coming in contact of the sexual organs of the accused and his alleged victim, and, if so, he could not be found guilty of the crime charged, and the instructions requested should therefore have been given, as presenting his theory as to the communication of the disease in a way that was consistent with his innocence. The court, we are of the opinion, committed no prejudicial error in its ruling on these requested instructions. Had the charge been rape, instead of an assault to commit a rape, the instruction would have been more pertinent and proper. They do not correctly define the law as to what constitutes an assault with intent to commit a rape, nor do they state a correct rule when applied to the evidence in the case at bar. The jury could find under the evidence the defendant guilty, without finding from the evidence beyond a reasonable doubt that the disease was transmitted to the person assaulted by connection or contact of the sexual organs. The evidence would not, in our judgment, justify a conviction, unless the jury believed beyond a reasonable doubt that the disease was communicated by the accused to the person assaulted at the time of the assault and as a part of the transaction constituting the crime charged, but to say that its communication must be restricted to connection or contact of the sexual organs of both the parties is placing a too narrow construction on the evidence. The crime charged may have been committed without the touching of these organs, and the disease, according to the defendant's own theory, may also have been transmitted without actual connection or contact of the organs of generation. The court gave several instructions to the jury, at the request of the defendant, directing the jury that they could only find the defendant guilty of the crime charged, and that they were not to be moved by any other consideration, and must from an impartial consideration of all the evidence be satisfied of his guilt beyond a reasonable doubt. Under the evidence the disease with which the accused was infected could have been transmitted to his

alleged victim only by his being indecently familiar with her or by the assault charged. While the disease may be transmitted from one to another in various ways, according to the evidence, there was no evidence by which the girl may have become infected with it, save in the manner stated, and the jury would not be permitted to conjecture and speculate regarding possibilities to support which there was no evidence in the record. The jury were not only directed that the crime charged must be proved beyond a reasonable doubt, and that the evidence alone must be looked to on which to base a verdict of guilty, and that the defendant was entitled to the benefit of all reasonable doubt on every essential element necessary to constitute the crime, but also, at the request of the accused, that evidence of indecent familiarity alone would not be sufficient to establish guilt of an assault with intent to commit a rape. They were also directed that, if a reasonable doubt was entertained as to his guilt of the higher crime charged, he should be acquitted of that charge and found guilty of simple assault, if satisfied from the evidence beyond a reasonable doubt that an unlawful assault was committed; and, if not, to return a verdict of not guilty. The requested instructions but stated in another form what the jury had already been charged, and with the given requested instructions it is not perceived that the substantial rights of the defendant have been violated by the refusal of the court to give those we have been considering, of which complaint is made.

5. Other alleged errors are assigned, but as they are not argued in briefs, nor in the oral arguments, they will be considered as waived. *Madsen v. State*, 44 Neb. 631.

Finding no error in the record working prejudice to the substantial rights of the accused, the judgment is accordingly

AFFIRMED.

J. C. CLELAND ET AL. V. GEORGE F. ANDERSON ET AL.

FILED DECEMBER 20, 1905. No. 12,160.

Bankruptcy: ASSETS. The right of action given by section 11, chapter 91*a*, Compiled Statutes 1903, is for injury to "business, employment or property," and under the national bankruptcy act passes to the assignee in bankruptcy.

ERROR to the district court for Dawson county: HOMER M. SULLIVAN, JUDGE. *Reversed.*

Kennedy & Learned, Stinson & Martin and *E. A. Cook,* for plaintiffs in error.

H. D. Rhea, H. M. Sinclair and *Warrington & Stewart, contra.*

SEDGWICK, J.

In the opinion last filed in this case, 66 Neb. 276, the former judgment of this court was vacated, and the judgment of the district court affirmed. It appears that at least two important errors in that opinion led the court to a wrong conclusion. These errors did not arise from any neglect of counsel. There were at least a dozen briefs filed in the case, which ably and exhaustively discuss the various questions involved. One of these briefs, which seems to present a vital question with unanswerable logic, was entirely overlooked by the writer of that opinion.

1. By the conclusion there reached the judgment of the district court was affirmed against all defendants, whereas the action as against the defendant Nebraska Retail Lumber Dealers Association had already been dismissed for satisfactory reason thoroughly discussed by Mr. Commissioner POUND in the first opinion. 66 Neb. 252. It was not intended to vacate the judgment as to this defendant, which was entered pursuant to the first opinion.

2. By the 6th paragraph of subdivision *a* of the section

of the national bankruptcy act (3 U. S. Comp. St. p. 3451, sec. 70) referred to in the last opinion, "rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property" passed to the trustee in bankruptcy. In the last opinion it was said that the damages involved in this action did not arise upon contract, nor from the unlawful taking or detention of or injury to the bankrupt's property. This seems to be an error, as is plainly pointed out in the brief which was then overlooked. This action was based on chapter 91*a*, Compiled Statutes, 1903, entitled "trusts." Section 1 (Ann. St. 11500) of that act defines "trusts," and section 11 (Ann. St. 11510) gives the right of action. "Any person who shall be injured in his business, employment or property * * * may have his right of action * * * and he shall recover the damages by him sustained." The action pending in Lincoln county when the plaintiff became a bankrupt was likewise based upon this statute, and like this action was brought to recover damages for injury in his business, employment and property. It was a mistake to suppose that the injury complained of was personal to the plaintiff in the same sense that an action for loss of limb or other physical disability would be. No action for damages for physical disability could be maintained under the statute in question, and, as far as the petition attempted, if it did attempt, to recover for injury to plaintiff's business reputation, it failed to state a cause of action under that statute. If this reasoning is correct, as it seems to us to be, the plaintiff's action for damage in Lincoln county was for injury to his business, employment and property, and so would be within the 6th subdivision of the section of the federal statute referred to, and would pass to the assignee in bankruptcy. This claim, having been satisfied and released as against some of the parties liable, would be satisfied as to all, as pointed out in the first opinion.

The judgment entered herein is therefore vacated, and the judgment of the district court is reversed, and the

cause dismissed as to defendant the Nebraska Retail Lumber Dealers Association, and remanded for a new trial as to the defendants Cleland and Carroll.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA V. STATE JOURNAL COMPANY.*

FILED DECEMBER 20, 1905. No. 13,833.

1. **The unauthorized use of the literary production of another furnishes no ground for the recovery of damages except through the federal copyright laws. All persons are at liberty to print, publish and sell the literary productions of others, unless they are protected by a compliance with the act of congress for that purpose.**

2. **Trust:** CREATION. Merely reposing confidence in another does not of itself create a trust, nor make a trustee of one in whom confidence has been reposed. To create a fiduciary relation by contract it is necessary that the consent of the trustee to assume that relation be expressed in the contract, or be derived therefrom by necessary implication.

3. **The measure of damages for the unauthorized use of the property of another by a bailee thereof is not the value that may be produced by the labor and investment of the bailee, combined with such use of the property, but is the value of the use itself and any damage that may be done to the property in so using it, or, if the use amounts to a conversion, then the measure of damages will be the value of the property.**

4. **Manuscript, Unauthorized Use of:** INJUNCTION: ACCOUNTING. If the defendant printed and manufactured to sell for its own benefit volumes of the reports of the supreme court of the state, containing matter prepared by the state and not protected by copyright, and in so doing unlawfully used manuscripts and other property entrusted to the care of the defendant to enable it to perform its contracts to manufacture specified volumes for the state, this would not give the state title to books so unlawfully produced, so as to enable it, by injunction, to prevent the defendant from disposing of the books, or entitle the state to an accounting of the proceeds of such sales.

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* Opinion on rehearing filed Dec. 21, 1906. Judgment adhered to.

ORIGINAL action for damages for breach of contract. Defendant demurred. *Demurrer sustained and action dismissed.*

F. N. Prout, Attorney General, Norris Brown and *William T. Thompson,* for plaintiff.

Hall & Marlay, contra.

SEDGWICK, J.

This defendant, which is a printing and publishing company, has, under various contracts with the state, published the reports of this court from volume 4 to volume 64 inclusive. In this case the state seeks to recover damages for alleged breaches of the printing contracts and abuse of the relation of trust and confidence assumed by the defendant as publisher. A general demurrer to the original petition was sustained, the plaintiff filed an amended petition, and the case is now submitted upon a general demurrer to this amended petition.

From the amended petition it appears that the state, from time to time, entered into successive contracts with the defendant, by which the defendant agreed to "print, stereotype, bind and deliver to said party of the first part 1,000 copies each" of a certain number of volumes of the reports mentioned in each respective contract, and also agreed that "all the supreme court reports printed under this contract shall be printed from stereotype plates, and that such plates shall belong to, and remain the property of the state of Nebraska, and that at the completion and delivery of each of said volumes, the stereotype plates from which the same was printed shall be delivered free of charge at the vault in the basement of the capitol building and there stored under the direction of the clerk or reporter of the supreme court. The contract also contained provisions as to the character of the work, the manner of performing it, and as to the payments to be made therefor.

The amended petition also alleges that the reporters of the supreme court prepared the opinions of the court for publication, "and when sufficient material accumulated for a volume of said reports (caused) one thousand copies of said volume to be stereotyped, printed, bound and delivered, with the stereotype plates thereof, to the proper officer of the state." These duties were required by the statute, and the law also required the state librarian to dispose of some of the copies of each volume by delivering them to the judges of the courts and other officers, and to sell the remainder at a price fixed by the statute for the benefit of the state, and when the 1,000 copies were exhausted to cause 500 additional copies of each volume to be printed, to be also sold for the state. It is alleged that the reporters did cause 1,000 copies of each volume to be printed, and an additional 500 copies of each of several of the volumes also to be printed and delivered to the librarian for sale on behalf of the state. It is in the petition alleged in full how many copies of each volume were so contracted for and printed and furnished to the state by the defendant, and how many of such copies have been sold, and how many of them still remain in the hands of the librarian for sale. It is also alleged that, after the defendant had printed the respective volumes, the stereotype plates were delivered to the state officer as the law and contracts provide.

It is further alleged that from the nature of the business it was necessary that the plaintiff should "entrust its said stereotype plates to the custody of defendant during the time necessarily required for printing the number of copies authorized by law; and in contracting for the publication of said official supreme court reports in the manner hereinbefore alleged, plaintiff reposed confidence in defendant and employed defendant as an agent and servant in a fiduciary capacity, believing that defendant would be honest and faithful in discharging all the duties imposed by law, by contract and by the relation of trust and confidence, and defendant entered into

said printing contracts in a fiduciary capacity in the relation of trust and confidence, and in that capacity plaintiff entrusted defendant with the making and custody of its stereotype plates for the sole purpose of carrying out the said publishing enterprise authorized by law and by said contracts; and plaintiff, believing that defendant had honestly and faithfully performed its duties in the premises, paid defendant, at the stipulated times and places, the several amounts agreed upon for an honest and faithful discharge of the duties and obligations imposed upon defendant by said contracts and the said relation of trust and confidence, and defendant received all of said payments; but defendant, in disregard of its said duty to plaintiff, and in violation and betrayal of its said relation of trust and confidence, and contrary to said printing contracts, and intending to cheat plaintiff and its said library fund, did unlawfully, secretly and clandestinely use, appropriate and convert to its own use said stereotype plates belonging to plaintiff, and did unlawfully, secretly and clandestinely for its own use and benefit print and reproduce from said stereotype plates, and bind, and sell for its own use and benefit, in addition to the said copies delivered to plaintiff, a large number of copies of each of said supreme court reports from volume 4 to 64, both inclusive, and did receive and retain for its own use and benefit $2.50 for each of said copies so unlawfully, secretly and clandestinely printed, bound and sold; * * * that the defendant has sold at least 700 copies of said volumes from 4 to 64 inclusive, making in all 42,700 copies, for which defendant received $2.50 a copy or $106,750, and made a net profit in unlawfully reproducing and selling said reports of $2 on each copy, or $85,400 on all. * * * Every unlawful sale by defendant of any copy of any of said reports deprived plaintiff of an opportunity to sell from its stock on hand a copy of the same report to defendant's purchaser, and the unlawful conduct and sales of which complaint is herein made prevented plaintiff from selling the copies it now has on hand,

and made it unnecessary for plaintiff to use its said stereotype plates for the reproduction of copies, except in the few instances hereinbefore alleged, to the damage of plaintiff and its library fund in the sum of $85,400.

"The principal item of cost in making said reports consisted in preparing and editing manuscript copy, composition, proofreading, indexing and stereotyping, all of which was borne solely by plaintiff; and in clandestinely using said stereotype plates, and in surreptitiously printing, binding and selling additional copies as hereinbefore alleged, defendant wrongfully and unlawfully used, appropriated and converted to its own use the said property of plaintiff. * * * Plaintiff is ignorant of and is unable to ascertain the condition of the account of the unlawful profits made by defendant out of plaintiff's said publishing enterprise in violation and betrayal of the relation of trust and confidence assumed by defendant under said printing contracts." It is alleged that a demand by the plaintiff that the defendant account for the profits has been refused; and "that the defendant has now on hand a large number of copies of said supreme court reports which were unlawfully, secretly and clandestinely reproduced from plaintiff's stereotype plates, and that defendant will continue to sell the same surreptitiously on its own account and for its own benefit, unless prevented by the interposition of this court." The prayer of the petition is: "1. That defendant may be perpetually enjoined from selling any official copies of said supreme court reports, except those lawfully purchased from the said reporter or from some other person with lawful authority to sell such reports. (2) That defendant may be required to deliver to the proper officer of the state of Nebraska, upon such terms as equity may require, all copies of said official supreme court reports in possession or control of defendant, except those lawfully purchased from said reporter or from some other person with lawful authority to sell such reports. (3) That an accounting may be taken of the profits wrongfully made by defendant out

of plaintiff's said publishing enterprise, and to that end that defendant's books of account may be subjected to the examination and scrutiny of plaintiff and this court, and that plaintiff may have judgment for the amount of said profits, or for $85,400, together with interest from March 1, 1905, and for costs of suit," with a general prayer for equitable relief.

1. The first ground of the plaintiff's complaint against the defendant is that one of the objects of the law and the provisions of the contract between the plaintiff and the defendant was to secure to the state the stereotype plates from which the reports were printed, so that the state could reproduce "copies of said reports indefinitely at nominal cost, and for the further purpose of preventing the clandestine use of its said stereotype plates to the detriment of the state and its library fund." It will be noticed that there is no allegation in the petition that these reports were copyrighted, or that any steps were taken on the part of the state, either through the action of the legislature or its contracts with the defendant, to protect the state in its right of authorship of the matter contained in the reports. If the object of the state was to prevent other parties from publishing the reports and selling them to the public, that object does not appear from any positive enactment of the legislature, nor from any provision of the contracts into which the state entered with the defendant.

2. The federal constitution authorizes congress to secure to authors and inventors for limited times the exclusive right to their respective writings and discoveries, and, pursuant to such authority, congress has provided that any citizen who shall be "the author, inventor, designer or proprietor of any book * * * shall (upon certain conditions) have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same." It is only through these provisions of the law that the writings of authors can be protected as their individual property. No such right

existed at the common law. In *Banks v. Manchester,* 128 U. S. 244, 9 Sup. Ct. Rep. 36, the court said:

"A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of congress."

In that case the reporter of the supreme court of Ohio attempted to obtain a copyright of the reports of the opinions of the supreme court of that state for the benefit of the state, and it was held that the reporter was not the author, inventor, designer, or proprietor of the syllabus, the statement of the case or the decision or opinion of the court. The action was to prevent the publication of the opinions of the supreme court in the American Law Journal. Several other questions are discussed, which are interesting in view of the circumstances of the case at bar, but the importance of the case to this discussion is in the principle that no property right can be asserted in literary work that has been made public, except under the provision of the federal constitution and the legislation of congress pursuant thereto. It is not alleged in the petition in this case that any attempt was made on the part of the state, or any one for it, to reserve to the state the exclusive use of the literary matter constituting the volumes of the reports in question.

3. It will also be noticed that there is no allegation in the petition that this defendant has violated any of the provisions of its contracts with the state, nor that it has violated any of the express requirements of the statute. It is alleged that the law and the contracts of the parties created a fiduciary relation between the state and the defendant. Upon this proposition it must be observed that the statutes do not forbid the printing and publishing of these reports by any person or persons who may desire to do so, and do not require the officers of the state to prescribe any limitations of that kind in the contracts that may be made for printing reports. The contracts with the defendant were made upon public competition, as the law required, and no attempt was made

therein to limit the right of the defendant to print and sell such copies of the reports as it might see fit. These were ordinary contracts, upon the one part to perform certain services, and upon the other to pay a certain price therefor. The parties contracted in the manner of equals. Neither was in any degree under the influence or control of the other in entering into the contracts, or in the performance thereof. Merely reposing confidence in a party does not of itself create a trust, nor make a trustee of one in whom confidence has been reposed. If the relation of trust is created by a contract, and in view of that relation a confidence is reposed, a fiduciary relation may be said to exist. In most contracts of hire a special confidence is reposed in each other by the parties, but more than this is required to establish fiduciary relations. The consent, either expressed or implied, of the trustee to assume that relation is necessary in all cases in order to raise a fiduciary relation from contracts entered into by him. *Patten v. Warner,* 11 App. D. C. 149. Neither the law nor the contracts themselves raised any fiduciary relations between the parties.

4. It was, however, necessary under the contracts that the state entrust to the care of the defendant the manuscripts which had been prepared by the officers of the state, and it is claimed by the state that the stereotype plates that were, under the law and these contracts, to be the property of the state became so as soon as they were manufactured, and even while being manufactured, so that it was also necessary that these plates, as the property of the state, be entrusted to the care of the defendant. It is, of course, true that this required such confidence on the part of the state as is implied when one party entrusts its property to the care of another, and it would seem to follow that the defendant would not be justifiable in using, for its own private purposes, those things that were entrusted to its care to enable it to carry out its contract with the state, without the consent, express or implied, of the state. In so far as it has done so, it may be said

that it has violated the confidence of its employer, and has made an unwarranted and unlawful use of the property of the state. It is manifest that there is nothing in the law, nor in the contracts of the defendant, that would have prevented the defendant from using the literary matter contained in these volumes, as any other citizen of the state might use it. The right of any citizen to print and sell literary matter that is not copyrighted is undoubted. If under the law the state could have reserved to itself or its officers the sole right to publish the literary production contained in these reports, and had exercised that right, either by obtaining copyrights thereon, or by apt provision for that purpose in its contracts with the defendant, a different question would be presented from the one presented here. It did not, as far as the allegations of this petition go, attempt to do either, If we consider that the manuscripts furnished by the state might have been of intrinsic or pecuniary value, exclusive of the right of authorship in the literary production, the violation of the confidence reposed in the defendant consisted, not in the use of the matter contained in the manuscripts, but in the use of the manuscripts themselves, property belonging to the state. It is doubtful whether the stereotype plates became the property of the state before their delivery to the state. All provisions of the contract upon that point appear in the above quotations. That they should "remain the property of the state" was necessary under the law, which intended that the state should not dispose of these plates, and this expression in the contract is of no assistance to us in determining from what time they should become the property of the state. The provision that they "shall be delivered free of charge" makes it the duty of the defendant to transport them at its own expense, and would ordinarily fix the time of the change of title in the property so delivered; and, in the absence of any other provision as to when the title in these plates should vest in the state, would seem to be controlling. If, at any time before the delivery, the

plates had been destroyed, without fault of either party to the contract, it would seem that the duty would devolve upon the defendant to restore them and deliver them according to the contract, and this is the ordinary test of ownership; so that, in the absence of any other provision in the contract, it would seem that the title of the state in the plates would begin upon the delivery of the plates. If, however, we suppose that the defendant was manufacturing the plates for the state, and that, as soon as the defendant selected the material from which they were to be manufactured and commenced the manufacture of the same, the plates became the property of the state, and if there was no consent in the contract, expressed or implied, that the defendant might use these plates for its own purposes, then such use of the plates by the defendant would be unwarranted, and it would become liable to the state therefor. Undoubtedly, one who uses the property, or property rights, of another is liable for damages. There is, however, no allegation in the petition as to the value of this use of the manuscripts or of the plates. The measure of damages for such unwarranted use of the property of another by a bailee is not the value that may be produced by the labor and investment of the wrongdoer, combined with such use of the proptery, but is the value of the use itself, and any damage that may be done to the property in so using it, or, if the use amounts to a conversion, then the measure of damages will be the value of the property itself. But this petition is not framed with a view to recover such damages, and no such damage is alleged.

5. The allegation that the sale of these reports by the defendant has deprived the plaintiff of an opportunity to sell them is, for another reason, wholly insufficient to support an action for damages against the defendant. There is an allegation that the plaintiff has been damaged thereby in the sum of $85,400, but there is no allegation of fact from which it is made to appear that any such damage could have arisen. It is not alleged that the plaintiff

would or could have realized any profit upon the sales that it might have made, if not prevented by the defendant; so that the statement that the defendant has been damaged would amount to an unwarranted conclusion. Nor is there any allegation of fact from which it could be determined that the plaintiff was or could have been prevented from making sales by the fact that the defendant sold copies of these reports.

6. From the foregoing considerations it may also be seen that there is no basis in the petition for the relief asked for by injunction. The plaintiff has no such property rights, either legal or equitable, in any volumes of reports printed by the defendant, and now in its hands, as would entitle the plaintiff to prevent the defendant from disposing of such volumes, or that would entitle the plaintiff to demand such reports from the defendant as the property of the state. It follows that the facts alleged in this amended petition are neither sufficient to enable the plaintiff to recover damages from the defendant, nor to entitle it to any relief in equity. It was understood upon the argument that the plaintiff would not attempt to plead further.

The demurrer to the amended petition is therefore sustained and the cause

DISMISSED.

KNIGHTS OF THE MACCABEES OF THE WORLD, APPELLEE, V. EDWIN M. SEARLE, JR., APPELLANT, ET AL.

FILED DECEMBER 20, 1905. No. 14,292.

1. **Beneficial Associations:** PROTECTION OF NAME. Under section 110, chapter 43, Compiled Statutes 1903, the auditor is not authorized to issue a certificate of organization to a society whose name or title so resembles a title already in use in the state as to have a tendency to mislead the public.

2. ——: ——. If a name or title of a beneficiary insurance com-

pany contains a descriptive word by which the society is generally known to the public, to incorporate that word as the characteristic word in the name of a proposed new company must be held to have a tendency to mislead the public.

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

Norris Brown, Attorney General, William T. Thompson, W. H. Thompson and *J. C. Hartigan,* for appellant.

Hainer & Smith, contra.

SEDGWICK, J.

The district court enjoined the auditor "from issuing a permit (to plaintiff) to use the word 'Maccabees' in the formation of its corporate name, and enjoined all other defendants from using the word 'Maccabees' in the formation of the corporate name of the new or proposed society for which they have been designated as officers." The plaintiff is a Michigan corporation, and is authorized to do business in this state as a fraternal beneficial association. Its corporate name is "The Knights of the Maccabees of the World." It has been doing business under that name for more than 20 years, and was doing business in this state before the adoption of the present law regulating beneficiary associations, and has continued under the operation of that law. The auditor, at the request of the other defendants, was about to issue certificate of organization to a fraternal beneficial association which was being organized by the other defendants under the name of the "Western Maccabees." The question was presented by a general demurrer to the petition for injunction, which was overruled, and this is the ruling complained of. The correctness of this ruling depends mainly upon two questions. First: Can the action of the auditor in issuing or refusing this certificate be controlled by the courts under any circumstances? Second: Is the name

which has been adopted by the other defendants seeking this license the same name as the name of this plaintiff, or does it so nearly resemble the plaintiff's title as to have a tendency to mislead the public?

1. This court has frequently approved the general doctrine in 2 High, Injunction (4th ed.), sec. 1,249: "No principal of equity jurisprudence is better established than that courts of equity will not sit in review of the proceedings of subordinate political or municipal tribunals and that where matters are left to the discretion of such bodies, the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed." The rule is stated by Mr. Chief Justice Fuller, as follows:

"The writ of mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty, involving the exercise of judgment or discretion." *United States v. Blaine,* 139 U. S. 306, 11 Sup. Ct. Rep. 607.

In *State v. Searle,* 74 Neb. 486, which involved a construction of the provisions of section 100, chapter 43, Compiled Statutes 1903 (Ann. St. 6492), it was held that, in the matter of granting the annual license provided for in that section, the auditor, while clothed with a large discretion, was not given unlimited and arbitrary power to refuse a license. This was thought to be the policy of our statute, plainly derived from a consideration of all of its provisions. The same reasoning seems to apply here. The section under consideration (Comp. St. 1903, ch. 43, sec. 110, Ann. St. 6502), provides that, if the auditor shall find (among other things) "that the name or title is not the same, or does not so nearly resemble a title in use as to have a tendency to mislead the public, he shall approve the same, and forthwith issue a certificate of organization to such society." If the name adopted by the society asking for the certificate of organization resembles a title in use by a company of a similar nature, so as to have a tendency to mislead the public, the audi-

tor is not authorized under this statute to issue the certificate.

2. Did the name or title of this company so nearly resemble a title in use as to have a tendency to mislead the public? The petition demurred to alleges that the word "Maccabees" is the principal part of the corporate name of the plaintiff, and has been so established by the plaintiff at great expense of time and money; "that the plaintiff is commonly known and designated by the public by the name of 'Maccabees.' That the defendants, who are promotors of said proposed association, were heretofore members of plaintiff association; that they and each of them, without just cause therefor, became discontented and dissatisfied with some of the requirements of plaintiff, the exact nature of which plaintiff is unable to state; that said defendants last referred to, with the intent to gain an undue advantage over plaintiff by causing the public to believe that the new society by them proposed to be incorporated was or had some connection with plaintiff, did insert as the principal part of its proposed corporate name for said new society the word 'Maccabees,' so as to mislead the public and bring about confusion as to the identity of the societies, and thereby enable it to obtain membership by causing persons to believe that the plans of operation were the same, and the new society only a branch or component part of plaintiff association." If the word "Maccabees" is a descriptive word in the name of plaintiff, and the public are in the habit of designating the plaintiff society by that name, and the society is commonly so known to the public, it would seem that there could be no doubt that the title "Western Maccabees" so nearly resembles the name of the plaintiff as to have a tendency to mislead the public. Suitable names for societies of this nature are not so rare as to make it necessary to borrow characteristic words from the name of another association. It was not necessary for the plaintiff to allege and prove that the public would be misled by the use of a part of plaintiff's

name in the way proposed. It was sufficient to allege and prove that there would be a tendency to so mislead the public. The statute requires that such tendency be avoided, and does not allow a society to be organized having a name or title so borrowed from a name already in use.

The demurrer to the petition was properly overruled, and the judgment of the district court is therefore

AFFIRMED.

FRANK BARKER V. STATE OF NEBRASKA.

FILED JUNE 15, 1905. No. 14,323.

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

Francis G. Hamer, for plaintiff in error.

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

PER CURIAM.

Error found in the record. Order of dismissal of the district court reversed and cause remanded for further proceedings. Application for suspension of sentence overruled for the reason that jurisdiction of that matter rests with the district court from which these proceedings come. Mandate to issue instanter.

The following opinion was filed December 20, 1905:

1. Criminal Law: INSANITY: VENUE. Under the law prior to the act of 1901, the district court of the county of the conviction and sentence of death of a person charged with a capital offense had jurisdiction, independent of statute, to investigate the question of the sanity of such convict; but that jurisdiction has by the statute been transferred to the judge of the district court for the county in which the penitentiary is situated.

2. **Convict:** INSANITY: PROCEDURE. Under section 6 of chapter 105, laws 1901, it is the duty of the warden, if a convict confined in the penitentiary under sentence of death appears to be insane, to give notice thereof to a judge of the district court for the county in which the penitentiary is situated, and if such notice is given a jury must be summoned "to inquire into such insanity."

3. ———: ———: JURISDICTION: DUTY OF JUDGE. The jurisdiction of the judge of the district court for Lancaster county to inquire as to the sanity of a convict confined in the penitentiary under sentence of death does not depend upon the giving of the notice by the warden. If it is alleged in a proper application to the judge, under oath, that the convict is insane, and that the warden unjustifiably refuses to give the statutory notice, it is the duty of the judge to make such investigation as will satisfy him whether there are such appearances of insanity as will justify summoning a jury to try the question.

4. **Dismissal of Application.** If the judge, upon such investigation, is satisfied that the warden was justified in his refusal to give the notice, and that there are no substantial appearances of insanity, the application will be dismissed.

5. **Trial by Jury.** If upon investigation of the application, the judge finds that the convict appears to be insane, a jury should be impaneled to try the question of insanity.

SEDGWICK, J.

The plaintiff in error was convicted in the district court for Webster county of the crime of murder in the first degree, and sentenced to be executed by hanging. Afterwards, upon proceedings in error brought in this court, the judgment of the district court was affirmed, and the date of the execution was fixed for the 16th day of June, 1905. A few days before the day fixed for the execution the defendant, by his attorney, applied to one of the judges of the district court for Lancaster county for an examination as to the sanity of the defendant. It was alleged in the application that the defendant appeared to be and was insane, with the other necessary allegations of the application, except that the application alleged that the warden of the penitentiary refused to notify the judge of the district court for Lancaster county that the defend-

ant appeared to be insane, and that therefore the application was made by the defendant's attorney. The application was denied upon the sole ground that the court was without jurisdiction to entertain it because of the want of such notice by the warden. This court held that the failure of the warden to give notice to the judge of the district court did not deprive the district court of jurisdiction to investigate the matter, and the order of the district court was reversed. It is necessary that the reasons for this holding should be stated.

In 1901 there was an act of the legislature entitled: "An act for the carrying into effect of the death penalty, and to repeal (certain sections) of the criminal code." The principal object of this act was to provide for executions at the penitentiary instead of in the respective counties as the law before provided. Sections 553 and 554 of the criminal code were substantially reenacted as sections 6 and 7 of the new act and, as reenacted, are as follows:

Section 6. "If any convict under sentence of death shall appear to be insane, the warden shall forthwith give notice thereof to a judge of the district court of the county in which the penitentiary is situated, and shall summon a jury of twelve impartial electors of the county, to inquire into such insanity at a time and place to be fixed by the judge, and shall give immediate notice thereof to the attorney general of the state and the county attorney of the county in which the conviction was had."

Section 7. "The judge, clerk of the court, and attorney general or his deputy, shall attend the inquiry, witnesses may be produced and examined before the jury. The findings shall be in writing and signed by the jury. If it be found that the convict is insane, the judge shall suspend the execution of the convict until the warden shall receive a warrant from the governor of the state directing such execution. The finding of the jury and order of the judge, certified by the judge and clerk, shall be transmitted to the clerk of the district court of the county in which the conviction was had, and shall be by such

clerk entered upon the journal of the court." Laws 1901, ch. 105.

To hold that the warden, by refusing to give the notice mentioned in section 6, could prevent the judge of the district court from investigating as to the sanity of the person under sentence of death, would be to give an arbitrary power to the warden that the statute never intended to give. The convict is under the care of the warden, and if there are appearances of insanity the fact must necessarily come to the attention of the warden. The statute makes it his duty, when there are such appearances, to notify the judge of the district court of that fact. This is to avoid the possible danger that a convict might be executed, while insane, without the fact coming to the notice of the proper judicial authorities, and the requirement is not for the purpose of giving the warden the power of life and death of an insane convict. The matter is left to the discretion of the judge, but he must exercise that discretion, and, when it is brought to his attention by affidavit that there are appearances of insanity, he must take measures to ascertain the reality of those appearances. This jurisdiction and practice is much older than the statutes of our state. In 1 Chitty, Criminal Law, p. *761, it is said: "It has from the earliest periods, been a rule, that though a man be in the full possession of his senses when he commits a capital offense, if he become *non compos* after it, he shall not be indicted; if, after indictment, he shall not be convicted; if, after conviction, he shall not receive judgment; if, after judgment, he shall not be ordered for execution. And this opinion is confirmed by the fact, that a statute was passed in the reign of Henry the Eighth, to allow of execution of persons convicted of high treason, though insane, which was always thought cruel and inhuman, and was repealed in the reign of Philip and Mary. The true reason of this lenity is not that a man, who has become insane, is not a fit object of example, though this might be urged in his favor, but that he is incapable of

saying anything in bar of execution, or assigning any error in the judgment. The judge may, if he pleases, swear a jury to inquire, *ex officio,* whether the prisoner is really insane, or merely counterfeits; and, if they find the former, he is bound to reprieve him till the ensuing session." It was not the purpose of our statute to do away with this beneficent principle of the common law, and there can be no doubt that, in the absence of a statute, and under the old practice, where the convict, after sentence, was confined in the county jail of the county of his conviction, it would be the duty of the judge of the court in which he was convicted, upon a formal representation to him under oath that the convict appeared to be insane, to make investigation of the matter. The present statute requires that the convict, after sentence, be transferred to the penitentiary, and it also transfers the jurisdiction from the county of the conviction to the judge of the court for the county in which the penitentiary is situated. The warden is an officer of the state, and his position and authority are such that, if, in his judgment, the convict appears to be insane, the district judge cannot refuse to call a jury to investigate the matter, but, if the warden neglects to notify the judge that the convict appears to be insane, the judge should, upon proper information of that fact, and a *prima facie* showing that the convict is insane, investigate the matter for himself so far as to determine whether the convict appears to be insane, and, if he finds that he does so appear, then it would be his duty to impanel a jury to try the question of insanity. If, in the absence of the notice by the warden, the judge, upon investigation, does not find such appearances of insanity in the convict, he would not be required to call a jury to investigate the matter, but would dismiss the application. He cannot, however, refuse to make any investigation of a proper allegation of insanity solely upon the ground that the warden has not notified him that such investigation is necessary. See also authorities cited, 12 Cyc. p. 772, and note 33.

For these reasons, the order of the district court was

REVERSED.

WILLIAM KRENS V. STATE OF NEBRASKA.

FILED DECEMBER 20, 1905. No. 14,040.

1. **Criminal Law:** CODEFENDANTS: REVIEW. Where two persons charged jointly with a criminal offense demand and are accorded separate trials, an order of the court refusing the request of the one on trial for the presence of his codefendant in the court room will not be reviewed by the appellate court, in the absence of any showing of prejudice resulting to the rights of the accused by the refusal of such request.
2. **Evidence** of identification of shoes taken from the defendants examined, and *held* sufficient.
3. **Evidence:** CODEFENDANTS. One of two persons jointly charged with the commission of a crime cannot, by being accorded a separate trial, prevent the state from introducing evidence, otherwise competent, to prove his guilt, because such evidence also tends to establish the guilt of his codefendant.
4. **Evidence** describing comparisons made between the shoes worn by the accused and footprints found near the place where the crime was committed, without the opinions of the witnesses, is proper and competent as tending to connect the accused with the commission of the offense.

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

Aaron Wall, C. L. Gutterson and *N. T. Gadd,* for plaintiff in error.

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

BARNES, J.

The plaintiff in error, William Krens, together with his brother Joseph, were jointly charged with the crime of

burning a certain stack of oats, of the value of $35 and upwards, belonging to one Albert J. Read, on the 10th day of September, 1904, in Custer county, Nebraska. When the case came on for hearing in the district court for that county, both defendants demanded separate trials. The court, in compliance with their demands, ordered a severance; and the plaintiff, who will hereafter be called the accused, was placed upon his trial, which resulted in his conviction. He was thereupon sentenced to serve a term of two years in the state penitentiary. To reverse that judgment he brings error to this court, and relies for a reversal upon four assignments.

1. He contends that the court erred in refusing to permit his codefendant, Joseph Krens, to remain in the courtroom during his trial.

It is a sufficient answer to this contention to say that the matter complained of is one resting in the sound discretion of the trial court. There is no showing of an abuse of such discretion, or that the accused was in any way prejudiced in his substantial rights by the refusal to allow his codefendant to be present at the trial. The order complained of was the result of the severance which the accused demanded, and he is not in a position to complain of a situation which resulted from his own action.

2. Complaint is also made of the action of the trial court in admitting in evidence state's exhibits "A" and "B," the former being the shoes of the accused, and the latter those of his codefendant, Joseph, because of lack of proper identification. It appears from the evidence that on the 10th day of September, 1904, Albert J. Read had a party of the name of Howard threshing for him with a steam thresher. Howard had recently come into the neighborhood from a distance, bringing with him his threshing outfit, and this was his first work in that neighborhood. That night, after Mr. Read had retired, he was awakened by a neighbor, who informed him that a fire was destroying his grain stack and other property. Read and Howard went immediately to the scene of the fire, where

they found the grain, straw, wagons, racks and separator were either burned up, or were then burning. It was discovered that certain parts or attachments of the engine, which stood some distance from the fire, had been broken off and thrown into the burning stack. It appears that the accused and his codefendant were, during that season, and had been for several seasons prior thereto, engaged in running a threshing machine in that vicinity. Previous to the fire the accused stated to one Herman Burrows that "if any other machine would pull onto his run he would fix them." He also made substantially the same statement to one William Hanna. At daylight, the next morning after the fire, Read and Howard found the tracks of two persons only a short distance from the burned grain stack leading away from it and in the direction of the residence of the accused. They followed the tracks across two pieces of plowed ground, some stubble, through a corn field, across another stubble field, and to within a couple of rods of the house where the accused lived and was staying at the time of the fire. The tracks were subsequently followed by Charles Hussie, George Luce and William Haney. The accused and his codefendant were arrested by the sheriff of Custer county on the afternoon following the fire, and their shoes were taken from them by the officer, who testified that exhibit "A" was the pair of shoes he took from the accused, and exhibit "B" was the pair taken from his codefendant, Joseph. According to the testimony of the sheriff, exhibit "A" was a pair of pegged shoes, one of them having a defective heel; and exhibit "B" was a pair of box-toed sewed shoes. While the officer was somewhat uncertain in his explanation as to how he knew that the shoes, exhibit "A," belonged to the accused, and exhibit "B" to his codefendant, yet his testimony was positive that he took the shoes, exhibit "A," from the accused; that they were worn by him at the time he was arrested, and that exhibit "B" was the pair worn by Joseph. So we are satisfied that the identification was sufficient, and the trial court did not err in permitting the shoes to be introduced in evidence.

3. The accused further contends that the trial court erred in admitting in evidence the facts and circumstances which tended to show the presence of his codefendant at the place where the fire occured. Counsel's line of argument in support of this contention seems to be that the accused should not be burdened with the facts which concerned his codefendant; "that it is not contended that more than one pair of the shoes belonged to him, yet the state introduced in evidence, over his objection, not only the shoes claimed to have been taken from him, but likewise the shoes purported to have been taken from the person of Joseph; that the evidence from beginning to end involves one pair of shoes as much as it does the other; that one reading the record would be impressed from the evidence that two persons were being tried for the offense instead of one." No authorities are cited in support of this contention, and it would seem a sufficient answer to it to say that the accused and his brother, Joseph, were informed against jointly for the commission of the crime for which the accused was on trial; that it would be practically impossible for the state to prove that the offense was committed by the accused, without the introduction of proof tending to show the guilt of his codefendant, Joseph. Any competent evidence which tended to show that both of the accused persons were present at the time and place where the fire occurred, and probably committed the offense, should be received upon the trial of either of them. Persons jointly charged with the commission of a crime cannot, by demanding separate trials, deprive the state of the right to introduce competent evidence to prove the guilt of the one on trial, because such evidence also tends to connect the other with the commission of the offense charged. So, where two persons are charged jointly with a criminal offense, it is proper to prove, on the trial of one of them, that they were both present and participated in its commission.

We are therefore of opinion that the district court did not err in receiving the evidence complained of.

4. Lastly, it is contended that the court erred in admitting the state's evidence describing the tracks and the comparisons made between them, and the shoes, exhibits "A" and "B." From an examination of the evidence it appears that the persons who made these comparisons testified to what they did, and the things they saw; how the shoes were taken from the accused and his codefendant and fitted into the tracks which led from the fire to a point near their residence, leaving the jury to draw their own conclusions from the facts thus related. The witnesses were not allowed to testify as to their conclusions, but were permitted to state what they did, and how they made the comparisons, and what such comparisons showed. This evidence was proper and competent, because it tended to connect the accused with the commission of the crime charged against him. *People v. McCurdy,* 68 Cal. 576; *Commonwealth v. Pope,* 103 Mass. 440; *Clark v. State,* 28 Tex. App. 189. As counsel for the accused has not directed our attention to any authorities supporting his contention, we conclude that the trial court properly received the evidence complained of.

An examination of the record convinces us that the accused was accorded a fair trial, and that the evidence is sufficient to sustain the verdict and judgment. We are satisfied that the record contained no reversible error, and the judgment of the district court is therefore

AFFIRMED.

IN RE ESTATE OF CHARLES NELSON, DECEASED. JOHN LARSON V. MARTIN THORSON ET AL.

FILED DECEMBER 20, 1905. No. 13,915.

1. **Wills:** COMPETENCY. Where a testator, though aged and infirm, understands the nature of the act he is performing, knows and can retain in mind the amount and character of his property, and who are or naturally should be the objects of his bounty,

and has a full understanding of the persons or institutions to whom and the purposes for which his devises and bequests are made, he is competent to make a will.

2. **Harmless Error.** Where a verdict and judgment is the only one that could be supported under the evidence, errors in the rulings of the court are without prejudice and will not be considered.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Simpson & Good, for plaintiff in error.

V. L. Hawthorne, J. L. Sundean and *S. H. Sornberger, contra.*

LETTON, C.

On July 25, 1903, Charles Nelson, who was an old Swedish farmer, residing in Saunders county, made a will whereby he left all of his property, consisting of an 80 acre farm and some personal property, to certain charitable and educational institutions connected with the Swedish Lutheran church. On October 2 of the same year Nelson died. The will was filed for probate with the county judge of Saunders county, when objections were filed to the probate and allowance of the same by Nelson's widow and by John Larson, a brother of Nelson, who resided in California. The objections made to the probate of the will denied the execution of the same and the testamentary capacity of Nelson, and also alleged that it was procured by the fraud and undue influence of one J. E. Swanbom. Upon a hearing the will was admitted to probate, from which order John Larson appealed to the district court. From a judgment and verdict in that court sustaining the will, John Larson prosecutes error to this court.

At the time of his death Charles Nelson was in his 78th year. He had been a resident of Saunders county and had lived upon the farm from the time that he first

homesteaded it, a period of more than 30 years. Twenty-two years ago, and before he was married, a part of his brother's family lived with him for some time upon the land, but he had not seen his brother for many years, nor had the families been intimate for a long period, though Larson and his family had lived in Omaha up to four years before this time. Nelson was a member of the Swedish Lutheran church at Mead, Nebraska. For three or four years prior to his death he had been ailing more or less, his debility increasing with his years, and for some time prior to the date of the execution of the will, while he was able to be up and around the place, he was not strong enough to do any work except a few chores, and for some years he had rented his farm, though caring for his stock himself most of the time. It appears that he relied upon a neighbor and friend to advise him with reference to the marketing of his grain and stock, to sell the same for him, and to deposit the money received in the bank. On July 23, 1903, he wrote to J. E. Swanbom, the pastor in charge of the church at Mead to which he belonged, asking him to come to see him. Swanbom went to the farm the next day, when Nelson told him that he wanted him to draw up a will for him. Swanbom objected, saying he was not well fitted for this, suggesting that Mr. Sundean, a lawyer at Wahoo, could talk Swedish with him and was better qualified to draw up a will. Nelson asked him to call up Sundean by telephone and ask him to come out. In the same conversation he told Swanbom he intended to make a will of his property to some benevolent institutions and asked him which were most in need of support. In response to this Swanbom named the institutions which benefit by the will. The next day Swanbom and Sundean went to Nelson's house, and Sundean drew up a will in accordance with Nelson's directions. At that time he told Sundean who his relatives were, stated that he had no children, that he did not want to leave any of his relatives any property, and both Nelson and his wife said that they wanted the will made so

their relatives would get nothing. Sundean suggested that he make no bequest for his wife, but provide for her maintenance and support, and that the institutions should get nothing until after his wife's death, and the will was drawn up in accordance with these suggestions. Nelson was able to be up and about, and was sitting in the room with his clothes on. Swanbom testifies that a year before this time Nelson had told him he had no children, said that his heirs did not care for him and that he intended to leave the property to a benevolent institution. The day before the will was made, Nelson told Swanbom that Mr. Henning, a neighbor, wanted him to make a will giving the property to his brother, John Larson. Sundean testifies that during the conversation with reference to the provisions of the will Nelson talked connectedly and intelligently, that he spoke slowly, but that there was no incoherency in his conversation; that in writing the will he wrote Mr. Nelson's name as "Charles N. Nelson," and that when he read the will to him Nelson said that he had no middle initial, and the name was changed accordingly; that there was some discussion with reference to the manner in which the Luther Academy, one of the beneficiaries, should use the money, and also whether that left for mission purposes should be for foreign missions or missions of the synod, and also with reference to the manner of employment of the bequest to the Augustana College and to the Orphans Home. Sundean's testimony in substance is that Nelson acted in an intelligent manner throughout the whole transaction and was apparently competent to transact business.

On the part of the contestants there was testimony by one Bergren, a neighbor, to the effect that five years before his death Nelson had rented his farm land to him; that Bergren usually advised him as to when he ought to sell his crop and stock, and marketed it for him; that the year before his death he seemed a little childish, and remarked on the rapidity with which Bergren had put up his hay, when in fact the usual time had been employed; that

he attempted to pay $20 for this work, when half of this amount was enough; that at that time Nelson was weak, and walked with a cane; that in April, 1903, the witness was assessor in that precinct, and Nelson told him, when assessing, he had about 30 head of cattle, when in fact he only had 9 calves; that when asked how much money he had he said he did not know, that the bookkeeper at the bank could tell him; that in May, 1903, Nelson told him that he would go over to Mead and have a will made out, that he was going to give his property to his brother, Larson, that he had a sister, but he did not want her to have any of it. This witness further testifies that he did not think Nelson capable of doing business the last year of his life, but on cross-examination he testified that he talked to him for an hour the last of May, 1903, as to making a will, and that he seemed to understand what he wanted, and why he wanted it, and that at this time he seemed to know what he wanted to do with his property, the nature of his property, and who he wanted to have it, and that in respect to making his will he was sane enough. One Henning testifies that on June 23, 1903, Nelson talked to him about his will; that he told him that Swanbom wanted the property for churches and charity; that he would not give it to him, and that his brother should have the land, and his wife should have the personal property. He further testifies that in May and June, 1903, he did not think Nelson was in sound mind at all times; that he was unsound sometimes and sometimes sound. Henning's testimony is corroborated by that of his wife and son with relation to Nelson's physical and mental condition, and on cross-examination Mrs. Henning testifies that in June he spoke about making his will; about leaving his property to his brother; that he said he would not leave it to charitable institutions; that his wife was to have her support as long as she lived; that he had helped his sister all he wanted to; that Larson had helped him, and that for that he was going to have it; that he seemed to understand his obligation to his brother,

and to understand that he was not under obligations to his sister nor to these charitable institutions. Mrs. Nelson testifies that the Sunday before the will was made Nelson brought in two axes, put one in his bed and one in the kitchen; that he took a stick or club and drove nails in one end so as to project; that he brought it in and said he was going to have it to protect them.

The testimony as a whole shows testamentary capacity on the part of Nelson, and just as plainly fails to show the exercise of any undue influence. It shows a condition of mind and body of the testator at the time the will was made such as is not uncommon in men or women of such advanced age who have pursued a life of toil. Physical and mental decay had evidently begun, but Nelson was still able to be about the house, and, while subject to an occasional vagary or lapse of memory, his mental grasp of the facts with reference to his property, his duties so far as his wife and his brother and his sister were concerned, and his intention as to the use to be made of his property, was amply sufficient to make him competent to dispose of his estate. Neither is there sufficient evidence to show undue influence. A year before he had expressed the idea of leaving his property for benevolent purposes. A month after the will was made he was told there was still time and opportunity to change it, if he so desired, but he refused to alter it. The conversations which have been narrated by the witnesses wherein Nelson spoke of making his will, whether to his brother, John Larson, or to the charitable institutions to which his property was eventually left, seem to have been carried on by him with a clear understanding of what his property consisted of, to whom he desired to leave it, and their relations to him. The fact that at times he expressed an intention of leaving his real estate to his brother, his personal property to his wife, and depriving his sister of any share of his bounty, affords of itself no ground for believing that when he changed his mind he was unduly influenced to do so. If the testamentary dis-

position of property may be set aside because the testator made a different will from that which he at some former time had expressed an intention to make, but few instruments of this nature would ever be admitted to probate. From the whole evidence we are satisfied that Nelson possessed testamentary capacity at the time the will was made and that no undue influence was exercised.

The plaintiff in error has called our attention to certain alleged errors in regard to the admission of opinion evidence as to the capacity of Nelson to make a will, and also has complained of certain instructions given by the trial court. We deem it unnecessary to consider these asssignments for the reason that, if a verdict and judgment had been returned for the contestants in this case, we would have found it our duty under the evidence to have set it aside as against the clear weight of evidence. No other judgment than that which has been rendered would be proper under the testimony in this case. For this reason, the errors, if any, which are complained of were without prejudice and need not be considered.

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.

HENRY E. HUNT V. JOHN M. VAN BURG.

FILED DECEMBER 20, 1905. No. 13,987.

1. **Trial:** STIPULATION: EVIDENCE. Where a case is tried upon an agreed stipulation of facts and oral and written evidence, it is proper for the jury to consider all the evidence, even though part of it may be inconsistent with the statement of facts.

2. **Action:** DEFENSE OF FRAUD: EVIDENCE. In an action by a *bona fide* purchaser of a negotiable instrument for value before maturity, without notice, where the defense is fraud in the procurement of the paper, evidence of similar frauds committed by the agent of the payee about the same time is inadmissible. *Monitor Plow Works v. Born*, 33 Neb. 747.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

A. G. Greenlee, for plaintiff in error.

Billingsley & Greene, contra.

LETTON, C.

This was an action to recover upon a promissory note in the hands of an innocent purchaser for value before maturity. The defense was, in substance, that the obligation was executed under the following circumstances and was not enforceable.

In September, 1898, one Sullivan came to the residence of the defendant, who was a farmer residing near Panama, in Lancaster county, and claimed to be the agent of Pierce's Cooperative Medical Dispensary of Chicago; that the defendant made a contract with this medical dispensary to treat him for six months, or until completely cured, and that he was to pay nothing unless cured. Sullivan executed and delivered to the defendant a written contract to that effect, and informed the defendant that he wanted a duplicate of the contract. Sullivan then filled out what appeared to be a duplicate of this contract, and presented it to him for signature. He read over the paper, and it was an exact duplicate of the contract, and was not a promissory note; that, believing this, the defendant signed the paper, and that this was the only paper he signed; that he did not intend to execute, nor did he execute, a promissory note, but that he cannot tell the nature of the fraud or artifice which was practiced upon him. The case was tried upon oral evidence and upon an agreed stipulation of facts. The jury found for the plaintiff, and the defendant prosecutes error. Four errors are assigned in the brief: That the verdict is not supported by the evidence; that the court erred in refusing defendant's request for a peremptory instruction; that it erred in refusing an

instruction defining negligence, and erred in excluding from the jury a portion of the agreed statement of facts.

1. It is urged that there was error in leaving to the jury the question whether the defendant was negligent in signing his name as he did, because upon the stipulated facts they could not so find. Defendant concedes that the court correctly instructed the jury that the only question for them to consider was whether the defendant was negligent in affixing his signature to the note sued on, but it is argued that under the facts stipulated the defendant cleared himself from any charge of negligence. If the defendant had rested content with the evidence furnished by the agreed stipulation of facts, possibly there might be some ground for this argument, but the defendant himself went upon the stand and testified in relation to the transaction with Sullivan. It was shown that at a former trial he had testified to the placing of a revenue stamp upon the instrument, and that he canceled the same by writing his initials thereupon, while at this trial he first denied this, but upon cross-examination admitted that he did so. The original contract signed by Pierce's Cooperative Medical Dispensary was in evidence also, and so likewise was the instrument sued upon. The defendant's testimony as to his former evidence was contradicted by other witnesses. The jury had the right to consider and weigh the oral evidence of the witnesses, as well as the appearance of the written papers, in connection with the agreed stipulation of facts. Neither was entitled to precedence over the other. The whole question of the credibility and weight of the testimony was for the jury, and we are of the opinion that the evidence is sufficient to support the verdict. This disposes of the first and second errors complained of.

2. As to the third error assigned, the court in the second instruction gave upon its own motion the substance of the instruction requested and refused.

3. The next complaint is that the court erred in not admitting in evidence a part of the stipulation, which was

to the effect that Sullivan, as agent of the medical dispensary, had made agreements with other persons in the neighborhood in which the defendant lived, similar to the agreement with the defendant, and that he procured in a similar manner what appeared to be a duplicate of the contract to be signed by different persons, and that the papers thus signed afterwards appeared to be promissory notes. In cases of fraud, where intent is material, evidence of similar fraudulent acts has been admitted by some courts as tending to show the intention of the party charged with being the fraudulent actor. In this state, however, the tendency has been against the admission of such testimony. *Monitor Plow Works v. Born,* 33 Neb. 747, was an action upon a promissory note. The theory of the defense was that the note in suit was forged by C. Neidig, who was the payee and indorser of the note, and as tending to establish that fact, evidence was admitted to the effect that about the same time other notes in favor of Neidig had been repudiated and alleged to be forged by the apparent makers thereof. This was held to be error, the court saying:

"It is not at all certain that the notes referred to by the witness Stuart were forged, only that the purported makers claimed they did not sign them. But conceding that the notes mentioned by Stuart in his testimony were not genuine, the proof of such fact could not, in any manner, tend to show that Born's name to the note in controversy was forged by Neidig. In other words, it was not competent to prove that, at another time and place, Neidig had committed the crime of forgery. *Smith v. State,* 17 Neb. 358; *Cowan v. State,* 22 Neb. 519; *Berghoff v. State,* 25 Neb. 213."

This case was followed in *Johnson v. Gulick,* 46 Neb. 817, and in *Patterson v. First Nat. Bank,* 73 Neb. 384. The plaintiff in this case is a *bona fide* purchaser for value, before maturity, in the ordinary course of business, and testimony to show that Sullivan had procured similar instruments, in like manner, from other persons, would in

nowise throw any light upon the question of whether or not the defendant was guilty of negligence in signing the paper which was presented to him. This portion of the stipulation was properly excluded.

It is now urged by defendant that no evidence should have been received which tended to vary or contradict the agreed stipulation of facts, and therefore this court should consider the stipulated facts as absolutely true, and his attorney has furnished us with a brief and argument to the effect that evidence should not be received to contradict a stipulation. But the defendant's testimony was offered by himself, part of it over the objection of the plaintiff that it was covered by the pleadings and by the stipulation of facts, and it was evidently upon doubts raised by the examination and cross-examination of the defendant himself as to the truth of some of the evidence set forth in the stipulation that the jury found as they did. If the court erred, it did it at his instance and request, and against the protest of the opposite party. Having insisted upon introducing testimony, the defendant is in no position at this time to urge that the stipulation of facts alone should have been considered, or that the jury or this court should disregard all evidence except the facts recited therein. The case seems to have been fairly tried, and was submitted to the jury upon instructions not unfavorable to the defendant.

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, it is ordered that the judgment of the district court be

AFFIRMED.

A. GOBLE, APPELLANT, V. M. V. BRENNEMAN ET AL., APPELLEES.

FILED DECEMBER 20, 1905. No. 14,030.

1. Homestead: LIENS. Where a mortgage lien exists upon a tract of land claimed as a homestead, and the mortgage debt is paid by the proceeds arising from a loan secured by a new mortgage on the same land, the interest of the claimant being at all times less than $2,000 in value, and the homestead is sold to a third person while thus incumbered, the transcript of a judgment filed while the first mortgage was in force does not become a lien upon the premises. *France v. Hohnbaum*, 73 Neb. 70, 74, followed.

2. Process: RETURN: IMPEACHMENT. The return of an officer as to service of process may be impeached by extrinsic evidence.

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

J. W. James, for appellant.

John M. Ragan, contra.

LETTON, C.

Two judgments were rendered in justice's court in Adams county, in January, 1896, against M. V. Brenneman and Ida Brenneman, his wife, transcripts of which were at once filed in the office of the clerk of the district court for that county for the purpose of procuring a lien upon the real estate of the defendants. Executions were issued soon after the rendition of the judgments and filing of the transcripts and returned *nulla bona*. The defendants occupied certain real estate as a homestead, which was of the value of $3,100, and was incumbered by a mortgage to the Eastern Banking Company in the sum of $1,400. On the first day of April, 1899, the Brennemans borrowed from the Nebraska Loan and Trust Company the sum of $1,550 for the purpose of paying the debt to the Eastern Banking Company, which was done, and the first mortgage released on the 10th of April, 1899.

On the same day the property was sold to the defendant, Mike Flessner, who has ever since occupied the same as his homestead. On April 23, 1899, executions were again issued upon the judgments and were levied upon the real estate. This action was then begun by the judgment creditor for the purpose of declaring the judgments to be a lien upon the real estate, subject only to a homestead right of $2,000 in value. The answer sets up that the premises were the homestead of the Brennemans and of less value than $2,000 at the time of the sale to Flessner, and consequently were and are exempt. Mrs. Brenneman further alleges that the real estate was her own separate property and homestead until she sold the same to Flessner. She denies that she ever executed the notes sued upon, avers that no summons was ever served upon her in the actions on the notes, and denies that she was ever indebted to plaintiff, or that he has or ever had a judgment against her. By way of cross-petition, she alleges the same facts and asks that the cloud created by the transcripts upon her real estate be removed. The court found that the judgments are not liens upon the real estate, and are void as to the defendant Ida Brenneman.

1. Upon the question of the homestead character of the real estate, and whether or not the judgments are liens upon the same, this case is governed by the case of *France v. Hohnbaum*, 73 Neb. 70, 74. Under the doctrine of this case, the property was exempt.

2. As to the defense of Ida Brenneman against the judgments, Brenneman testifies that her name was written upon the notes by him when she was not present, and without authorization. He also testifies that the summonses for his wife in the two cases were served upon him by John Patterson, the constable; that at that time he was in the country near his house, and his wife was in Hastings; that the constable gave both summonses to him and told him to give them to his wife; that he did not give them to her, nor tell her anything about it, and that his wife knew

nothing about his having given the notes, or the suit having been brought. Mrs. Brenneman testified that she never signed the notes, never saw either summons and never knew of the suit before the justice. The deposition of the constable is in the record. He testifies that he left the summonses for Mrs. Brenneman with her husband, who said he would give them to her, as she was not at home; that he did not see Mrs. Brenneman nor leave a copy for her at her place of residence, and never gave her any copies of the summonses at any time or place. The return on the summonses is to the effect that he made service "by delivering to each of said defendants a certified copy of this summons, and of the indorsements thereon, at their residence." The justice's docket shows that at the trial the defendant M. V. Brenneman was present, but that Ida Brenneman made default. The evidence is clear that Mrs. Brenneman never signed the notes, was never served with a copy of a summons and had no notice or knowledge of the actions. It is the rule in this state that the return of an officer as to service of process may be impeached by extrinsic evidence. *Walker v. Lutz*, 14 Neb. 274; *Wilson v. Shipman*, 34 Neb. 573; *Campbell Printing Press & Mfg. Co. v. Marder Luse & Co.*, 50 Neb. 283.

The evidence in this case is strong enough to do so successfully, and the judgment of the district court should be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

HARRY SCHICKEDANTZ V. F. W. RINCKER.

FILED DECEMBER 20, 1905. No. 14,033.

1. **Landlord and Tenant:** PAROL LEASE. A parol agreement between a landlord and a tenant, whose term was about to expire, that the tenant should remain in possession for four months longer, followed by the tenant retaining possession after his first term had ended and the four months' term begun, even though the amount of rent to be paid was not agreed upon, is a valid lease for four months, and the law implies an agreement to pay a reasonable rent for the use and occupation of the premises.

2. **Parol Lease:** ANNULMENT. A notice served by the landlord after the making of such agreement notifying the tenant that, if he held over his first term, he would be taken as occupying for another year at an increased rent, *held* inoperative to set aside such parol lease.

ERROR to the district court for Howard county: JOHN R. HANNA, JUDGE. *Reversed.*

F. J. Taylor and *A. A. Kendall*, for plaintiff in error.

T. T. Bell, contra.

LETTON, C.

This was an action to recover rent. The petition alleges, in substance, that the defendant prior to January 1, 1903, was in possession of a brick building as a tenant under lease with the then owner, which lease by its terms expired on January 1, 1903. On the 22d day of December, 1902, the plaintiff served the following notice upon defendant:

"NOTICE.

"*To Harry Schickedantz, St. Paul, Nebraska.*

"The undersigned, F. W. Rincker, hereby notifies you that he owns lot number 2, in block 83, St. Paul, Nebraska, except the east 8 feet of the south 36 feet thereof, now occupied by you and used by you as a tenant; that

he cannot lease said property to you after your lease expires, to wit, January 1, 1903, for less than $900 for the basement and first floor per annum, and that in case you remain in possession of said property, or any part thereof, after the expiration of your present lease, to wit, January 1, 1903, the undersigned will consider the said property as taken by you for the term of one year, to wit, from January 1, 1903, to January 1, 1904, at the rent of $900 per annum for the basement and first floor, payable $75 per month in advance, on the first day of each and every month during said year, without demand.

"Dated this 22d day of December, 1902.

"F. W. RINCKER,
"By T. T. BELL,
"His Attorney."

The defendant did not vacate the premises on January 1, and refused to pay $75 on that date as rent for the month of January. On January 12, 1903, the plaintiff began this action for $75 as rent for the month of January. The defendant filed an answer, admitting the expiration of his lease on January 1, 1903, the serving of the notice, and his failure to vacate or to pay rent. He pleads that under the lease he was to pay for the whole of the brick building $23 a month, payable in advance, $17 of which was for the lower story, and $6 a month for the upper story; that the building is in poor repair, and together with the lot upon which it stands is reasonably worth $2,000, and no more; that the reasonable rental value of the building is $23; that on the 18th day of December, 1902, defendant advised the plaintiff that he intended building, and that he would vacate the property about the 1st of May, 1903, and move into his own building, and would pay plaintiff $23 a month in advance for rent, as before; that plaintiff consented that he might occupy the premises for four months, but desired him to pay a greater monthly rental, no particular amount being agreed upon, and defendant objecting to pay more than the regular rent; that thereafter the plaintiff served a notice, de-

manding $75 a month for a full year for the use of the lower story only; that this amount is exorbitant, unjust and oppressive; that defendant's stock of goods consisted of farm machinery, buggies, carriages, farm implements, seeds and grains in bulk, and to move said stock out of the building would have required another building, or to have placed the same in the street, subject to the elements; that defendant had no place or building to move to, and his failure to remove was not intended as an acceptance of plaintiff's demand; that on the 1st of January, 1903, he tendered plaintiff the sum of $23 as rent for the month of January, which plaintiff refused. A demurrer to this answer was sustained by the district court, and, defendant electing to stand upon his demurrer, judgment was rendered against him for $75, as rent for the month of January, 1903, from which judgment defendant prosecutes error.

Defendant complains of the striking out of a portion of the answer, which set forth that he had purchased certain lots; that he intended to build upon them in the early spring and to then move from the plaintiff's building, and that on the 30th day of November, 1902, he so advised T. T. Bell, attorney for plaintiff. We see no error in this ruling. The facts, even if proved, would be immaterial.

The main question is whether the answer sets up a defense. The defendant's term ended on January 1, 1903. He alleges that prior to this time the plaintiff agreed with him orally that he might remain in possession until May, 1903, but that no definite agreement was made as to rent. It is elementary that, if the defendant had continued, after the expiration of his lease, to hold possession of the premises, the landlord had his election either to give him notice to quit and eject him, or to treat him as a tenant for another year, under the terms and conditions of the original lease. *Montgomery v. Willis,* 45 Neb. 434; *Bradley v. Slater,* 50 Neb. 682. Since the landlord continued to recognize the defendant's tenancy, in the absence of a new contract or agreement between the parties, the law pre-

sumes a continuation of the original tenancy, and the amount of rent recoverable would be $23 a month, as specified in the original lease. The plaintiff, however, relies upon the doctrine that, where a tenant under a lease from year to year is notified by his landlord before the expiration of his term that, if he occupies the premises thereafter, he must pay a certain increase in the rent, and the tenant, without making any objection or protest as to the amount of rent demanded, continues to occupy the premises after the expiration of his term, such occupation will be construed as an acceptance of the conditions imposed by the landlord, and the premises will be held upon the terms specified in the notice; citing *Despard v. Walbridge,* 15 N. Y. 374; *Higgins v. Halligan,* 46 Ill. 173; *Prickett v. Ritter,* 16 Ill. 96; *McKinney v. Peck,* 28 Ill. 174; *Griffin v. Knisely,* 75 Ill. 411; *Reitham v. Brandenburg,* 7 Colo. 480, 4 Pac. 788. There is no doubt that this rule has been adopted by numerous courts in this country. See 18 Am. & Eng. Ency. Law (2d ed.), note 3, p. 308. In our view of the allegations of the answer, however, it is unnecessary at this time for us to say whether or not this rule should be adopted in this state. It may in many cases operate with harshness and injustice, and as is pointed out in *Atkinson v. Cole,* 16 Colo. 83, 26 Pac. 815, in some cases rests upon statutory provisions.

The answer is unskillfully drawn and contains much matter which is utterly immaterial. It seems, however, to set forth matter of defense. If, as alleged, prior to the service of the notice the plaintiff and the defendant had agreed that the defendant should remain in possession until the 1st of May, even though no definite agreement as to the amount of rent that should be paid had been entered into, yet the law would imply a promise upon the part of the tenant to pay a reasonable rent, and this parol agreement would constitute a defense to the action, so far as the right to recover more than a reasonable rent for the use and occupation of the premises. *Skinner v. Skinner,* 38 Neb. 756. Rent is not essential to a valid lease of land.

Folden v. State, 13 Neb. 328. A parol agreement that a person may occupy as a tenant and pay rent to an amount not fixed at that time, if followed by possession, is an executed contract, and the mere service of a notice, such as served by the plaintiff, would not set aside the former agreement. An oral contract of lease for the term of four months, beginning January 1, 1903, is set forth in the answer, and the tenant is in possession claiming to hold thereunder. This agreement was entered into prior to the service of the notice relied upon as constituting the basis of an implied contract by the defendant to pay $75 a month, and, if proved, is a proper and sufficient defense to the action for rent under the implied contract alleged.

For these reasons, we think the demurrer should have been overruled, and recommend that the judgment of the district court be reversed.

AMES and OLDHAM, CC., concur.

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

REVERSED.

GEORGE H. LEWIS, TRUSTEE, APPELLEE, V. EDWARD F. MOREARTY, APPELLANT.

FILED DECEMBER 20, 1905. No. 14,053.

Objections to the appraisal of property sold at a judicial sale should be filed before the sale, except where fraud in the appraisement is charged

APPEAL from the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Affirmed.*

Edward F. Morearty, for appellant.

H. W. Pennock, contra.

LETTON, C.

This is an appeal from a confirmation of sale of certain real estate in the city of Omaha, sold under foreclosure proceedings. The property was appraised at $5,000. No objections were filed to the appraisement before the sale. Before confirmation, a motion was filed to set aside the sale on the grounds of irregularity on the part of the appraisers; that the appraisers were incompetent persons to appraise the property, because the appraisement was unreasonable and unjust to defendants, and because said sale was fraudulently brought about and fraudulently made. The only evidence in support of these allegations is the affidavit of one of the defendants to the effect that the appraisers did not view the inside of the house; that the interior of the house is of the finest material and handsomely finished; that the improvements, when made, cost, as affiant is informed, the sum of $5,000; and that one of the appraisers is not, as affiant is informed, a freeholder of Douglas county. This affidavit was not contradicted.

It will be observed that there are only two allegations of fact in the affidavit: First, that the appraisers did not view the inside of the house; second, that the interior of the house is of the finest material and handsomely finished. The other allegations are merely testified to on information. This evidence is not sufficient to overcome the positive allegations of the sheriff's return that the appraisers are freeholders, and that they did, upon actual view, appraise the property at its real money value. While the motion which was filed by the defendant was a motion to set aside the sale of the property, it constitutes in fact objections to the appraisement. We have repeatedly held that objections to an appraisement, except for fraud, must be made prior to a sale. *Burkett v. Clark*, 46 Neb. 466; *Overall v. McShane*, 49 Neb. 64; *McMurtry v. Columbia Nat. Bank*, 53 Neb. 22; *Best v. Zutavern*, 53 Neb. 619; *Jarrett v. Hoover*, 54 Neb. 65; *Mills v. Hamer*,

55 Neb. 445; *Smith Brothers L. & T. Co. v. Weiss*, 56 Neb. 210; *Scottish-American Mortgage Co. v. Nye*, 58 Neb. 661. There is no proof as to any fraud upon the part of the appraisers.

The judgment of the district court was correct 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.

G. SAM ROGERS V. CITY OF OMAHA.

FILED DECEMBER 20, 1905. No. 14,034.

Cities: EMINENT DOMAIN: AWARD OF DAMAGES: LIMITATIONS. Under the Omaha charter of 1893, a cause of action upon an award of damages to one whose property was taken for a public street, did not accrue until the lapse of a time reasonably sufficient for the creation of a special fund for the payment of such damages.

ERROR to the district court for Douglas county: EDMUND M. BARTLETT, JUDGE. *Reversed.*

W. A. Saunders and *Fawcett & Abbott*, for plaintiff in error.

John P. Breen, W. H. Herdman and *A. G. Ellick*, *contra.*

AMES, C.

In August, 1893, the city of Omaha began proceedings in the exercise of the power of eminent domain for the appropriation of certain lands to the use of the public for a street. It is agreed that these proceedings were in all respects regular and according to law down to and including an order of the mayor and council, made in November, 1893, approving and confirming an award of a

commission of freeholders appraising damages and determining the sums to be paid to the several property owners for the lands so appropriated. This order confirmed to Fannie M. Croft four several sums of money for as many separate tracts of land belonging to her, which were included in the aforesaid proceedings. Nothing further appears upon the record to have been done about the matter until the 8th day of June of the following year, 1894, when the mayor and council attempted to enact an ordinance levying special assessments upon abutting property and creating thereby a fund for the payment of the awards of damages. This ordinance is admitted to have been void for irregularities in or preceding its passage. But the mayor and council, apparently acting in good faith, passed an ordinance purporting to appropriate the fund, contemplated to be raised by this supposed levy, to the payment of the several sums awarded to the property owners as damages, and directing warrants payable out of such fund to be drawn upon the city treasurer and issued to the several persons to whom awards had been made. This latter ordinance was approved by the mayor on the 16th day of June, 1894, and on the 23d of July four warrants drawn pursuant to it were issued to Fannie M. Croft, who on the same day caused them to be presented and registered for payment at the office of the city treasurer. When the city took actual possession of the lands for street purposes does not distinctly appear from the record. The petition alleges that it did so on or about July 1, 1894, but the answer fixes the date at or about November 4, 1893, the date of the confirmation of the award of damages, and there is an entire absence of evidence on the subject. But the city charter in force at that time, and governing the proceeding in question, enacted that "the damages, so assessed, shall be paid to the owners of such property, or deposited with the city treasurer subject to the orders of such owners, respectively, *after which* such property may at any time be taken for the use of the city," and this language is plainly an implied prohibition of such taking

until after the making of such payment or deposit. The mayor and council appear to have acted throughout in good faith and without intent to do any violent or illegal act, and we think that, in the absence of evidence, the fair inference is that they did not take actual possession until the proceeding was supposed to be substantially completed by the creation and appropriation of the fund, and the acceptance of warrants thereon by the property owners, such acceptance being regarded, perhaps, as a waiver of the actual payment or deposit of the sums awarded. The warrants and the claim for compensation have come by purchase and assignment to the plaintiff, who brought this action on the 7th day of June, 1899. The sole defense is that of the statute of limitations, which the trial court upheld, and the plaintiff prosecutes error.

The argument of the defendant in error, in brief, is this: That all the proceedings subsequent to the order confirming the award of damages, including the attempted levy, the appropriation ordinance and the warrants, were and are wholly void, and are incompetent, singly or collectively, to constitute a cause of action; and that the confirmation of the award of damages, which this court has held, in *City of Omaha v. Clarke*, 66 Neb. 33, constituted a cause of action, was made more than five years before the beginning of the suit, and is the only cause of action the property owner ever had, and is barred, the void proceedings being insufficient as acknowledgments or promises to toll the statute. But we think the decision in *City of Omaha v. Clarke* is distinguishable from the case at bar. In that case it was contended that the cause of action accrued at some earlier date than that of the order confirming the award, and apparently it was also contended that the order did not constitute an obligation in writing. The court overruled both these contentions, but they did not determine, and seemingly their minds did not advert to the question, when does a cause of action upon the award arise? It may not be necessary definitely to decide that question now. It is clear that a cause of

action does not arise upon it until it is due and demandable, and it is equally clear that it does not necessarily become so immediately upon the making of the order of confirmation. For the satisfaction of claims of this kind, cities are required to create a special fund, and such fund is in most cases derived wholly or in greater part from assessments levied in proportion to benefits upon adjacent property, which are limited in two respects: First, that they shall not exceed in any instance the amount of benefits conferred, nor in the aggregate the total cost of the improvement. As a condition precedent to the creation of the fund, therefore, these two elements must be ascertained, with as close approximation as possible, in some manner provided for by law, and the prescribed procedure must consume considerable time, and the mayor and council, or other municipal authority charged with the duty, cannot properly be regarded as in default while engaged in good faith in the prosecution of the requisite proceedings. What degree of wilful delinquency or delay, if any, in this respect, would amount to a default of payment entitling a property owner to sue on the award, is not now necessary to be determined, because it does not appear that any such occurred until well within the five year period of limitations. Nor is it necessary to determine what was the effect, if any, upon the operation of the statute of limitations of the taking possession of the land by the city without having in fact provided a fund for the payment of damages, because the burden of proof on this issue is upon the defendant, and it has not informed us when such possession was taken. We are disposed to think, however, that such unwarranted invasion of the rights of a property owner furnished him with an additional cause of action, but did not in any way affect or accelerate his right of action on the award, except that it might well be held to have fixed irrevocably its obligation thereon. What is clear is that, for nearly, but not quite, five years next before the beginning of the action, the defendant had been unlawfully in the occupancy of

the property in question, and during nearly the whole of that time it has not made or attempted any effectual effort to provide the compensation to which plaintiff is entitled both by the statute and by the constitution. But we are not prepared to hold, in the light of this record, that the delay from November 4, 1893, to June 14, 1894, during a considerable part of which time proceedings were in progress, was so unreasonable as to start the statute running upon the award before the latter date.

For these reasons, we recommend that the judgment of the district court 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.

D. W. BUTLER v. E. E. BRUCE & COMPANY ET AL.

FILED DECEMBER 20, 1905. No. 14,038.

1. **Contract:** ASSUMING DEBT: ACTION. When a vendee of personal property assumes and agrees to pay as the purchase price, or a part of it, an indebtedness of the vendor to a third person, the creditor may enforce the obligation by a suit at law against both parties to the agreement.

2. **Appeal:** JUDGMENT. A judgment for the plaintiff rendered in the district court on appeal is not erroneous because it includes interest upon the claim sued upon during the time of the pendency of the action in that court, although the judgment is thereby made to exceed in amount the jurisdiction of the court from which the appeal was taken.

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

B. F. Gilman, R. C. Noleman, D. W. Butler and *J. B. Strode,* for plaintiff in error.

W. G. Simonson and *Hamilton & Maxwell, contra.*

AMES, C.

Tillotson was a retail merchant owning a considerable stock of goods and book accounts, and was considerably indebted to divers parties, among the latter of whom were the defendants in error, E. E. Bruce & Company. He sold and transferred the property mentioned to the plaintiff in error, Butler, by a written contract, in which the latter agreed "to settle with the wholesale houses on such terms as may be agreed on between said Butler and said wholesale houses, * * * a copy of said obligations to said wholesale houses is hereby attached and made a part of this contract, and the settlement of the aforesaid obligations is to be made in such manner as to save said Tillotson harmless on said obligations." It is the settled law of this state that, when a vendee of mortgaged real estate assumes in his deed and agrees therein to pay the mortgage debt, as a part of the purchase price, the vendor is not thereby released from his obligation, but, as between himself and the vendee the latter becomes the principal debtor and the former his surety, and the obligation thus assumed by the vendee the mortgagee may enforce in a joint action against both the parties to it. *Merriam v. Miles,* 54 Neb. 569; *Graves v. Macfarland,* 58 Neb. 802; *Lincoln University v. Polk,* 1 Neb. (Unof.) 403.

By such a transaction there is no novation or substitution of one debtor for another and no release of the mortgagor from his indebtedness, but the vendee, as between himself and the vendor, makes himself a party to the obligation as principal debtor, and the creditor becomes entitled to recognize and affirm the relation, and advantage by it, if he chooses so to do, and it has even been held that in equity the mortgagor may compel him so to do.

By such a transaction the vendee becomes something different from, and something more than, a guarantor of the obligation of the original debtor, although he has entered into no direct contract relation with the creditor. Although this doctrine originated in equity, it was recognized and enforced, and we think correctly so, as a legal obligation in an action at law in the case last above cited, and we can see no reason why it is not equally applicable when the subject of the transfer and the consideration for the assumption of the debt is personal property. It is true that in *Lincoln University v. Polk, supra,* the original debtor was not made a party, so that the precise question here discussed was not decided, but no reason is suggested why, if the equitable rule is adopted in part by the courts of law, it should not be accepted by them in its whole scope and meaning.

One of the obligations referred to in the agreement and contained in the schedule thereto annexed was the indebtedness to E. E. Bruce & Company, for $915.16, for the recovery of which the defendant in error begun this action against both Tillotson and Butler in the county court. In that court there was a general demurrer to the petition by Butler, which was sustained, and the action was dismissed as to him, and at the same time a judgment was recovered against Tillotson, who failed to appear. From both these judgments the plaintiff appealed to the district court, where, after a general demurrer by Butler to his original petition had been sustained, he filed an amended petition, to which the latter filed an answer, in which he attempted to incorporate an objection for misjoinder of defendants and of causes of action. If this objection had been good, the grounds of it would have appeared upon the face of the petition, and it would have been waived by the general demurrers in both courts, so that it would not have been available by answer, but we have already given our reasons for thinking it not good.

The facts above recited were well pleaded in the petition and were admitted by the answer, and the court, on mo-

tion, rendered a judgment for the plaintiff upon the pleadings, which Butler seeks to reverse in this proceeding.

There was included in the judgment an item of $114.69 for interest. This item is objected to for the reason that the amended petition merely prays for interest, without fixing any date from which it was computable, but the computation was made from the date of the filing of the original petition in the district court to the date of the judgment, that is, for the time during which the action was pending in that court. The amended petition related back at least to the date of the filing of the pleading of which it was an amendment, and there was therefore no error in the respect complained of (*McKeighan v. Hopkins*, 19 Neb. 33), although the judgment was thereby made to exceed in amount the jurisdiction of the court from which the appeal was taken.

For these reasons, 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.

JULIA A. STEVENS, APPELLEE, V. JOSEPH W. NAYLOR ET AL., IMPLEADED WITH MARGUERITE RAND, APPELLANT.

FILED DECEMBER 20, 1905. No. 14,045.

A notice of a judicial sale of lands must be published for at least thirty days next preceding the date of sale and must appear in all the regular issues of the paper during that period.

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

C. L. Gutterson, for appellant.

R. A. Moore and *James Ledwich, contra.*

AMES, C.

This is an appeal from an order of confirmation of a sale under a decree of mortgage foreclosure. The objection is with reference to the publication of the notice of sale. It was published four times consecutively in a weekly newspaper, the first insertion being on the 7th day of May, and the fourth on the 4th day of June, but the date specified in the notice for the sale and on which the latter took place was the 13th day of June, so that between the last publication and the date of the sale there was a regular issue of the paper, to wit, on the 11th day of June, which did not contain a copy of the notice. We think the case is ruled by *Lawson v. Gibson,* 18 Neb. 137. That case holds, in effect, that the notice must be published for at least 30 days preceding the date of sale and must appear in all the regular issues of the paper during that period. *State v. Cherry County,* 58 Neb. 734.

We recommend that the order appealed from 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 order of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

SIMON B. CLARK V. TUKEY LAND COMPANY.

FILED DECEMBER 20, 1905. No. 13,978.

1. **Forcible Entry and Detainer:** JURISDICTION. A purely specious claim of ownership will not oust the jurisdiction of a justice of the peace in an action of forcible entry and detainer.

2. **Tenancy at Sufferance:** HOW TERMINATED. When a tenant from month to month makes default in the payment of the rent reserved and holds over after such default, his occupancy is that of tenant at sufferance, and such tenancy may be terminated by the landlord by service of the statutory notice of three days to quit the possession.

3. **The statute of limitations** against an action of forcible entry and detainer against a tenant holding at sufferance begins to run against the landlord on the termination of the tenancy.

4. **Case Distinguished.** *Weatherford v. Union P. R. Co.*, 74 Neb. 229, examined and distinguished.

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

J. S. Miller, for plaintiff in error.

Charles A. Goss, contra.

OLDHAM, C.

This was an action in forcible entry and detainer, originally instituted before a justice of the peace of Douglas county, Nebraska, and removed by appeal to the district court for said county, where a jury was waived, trial had to the court, and judgment entered for the plaintiff. To reverse this judgment defendant brings eror to this court.

Three reasons are alleged for reversal of this judgment. The first one is that the defendant in the court below occupied the premises under a contract of purchase, and not as a tenant of the plaintiff, and therefore the action of unlawful detainer would not lie. The second reason urged is that, if the defendant below was a tenant from month to month, his rent had been in arrears for more than a year before any notice to quit was served, and, consequently, the action was barred by the statute of limitations. The third reason alleged is that, if defendant below was a tenant of the plaintiff, he was a tenant from year to year, and not from month to month, and, consequently, his tenancy could only be terminated by a six months' notice, which was not given.

With reference to the first defense, it is sufficient to say that, under the testimony in the record, defendant's claim of ownership is plainly and purely specious. Plaintiff below was the record owner of the property, and the defendant had been paying rent for the property at the rate of $5 a month for a long time before the action was instituted. The trial court was therefore fully justified in holding that defendant below was in possession of the premises as a tenant, and not under any *bona fide* claim of ownership.

The claim that the action is barred by the statute of limitations is based on the proposition that a tenancy from month to month is terminated as soon as a tenant refuses or neglects to pay the rent reserved each month of the tenancy. The trouble with this contention is that, when a tenancy from month to month is terminated for default in the payment of the rent reserved, the tenant may still occupy the premises by permission of the landlord as a tenant by sufferance until the formal statutory notice of three days to quit possession has been served upon him. And where the tenant remains in possession of the premises under such permissive sufferance, the statute of limitations against an action of forcible entry and detainer does not begin to run until such formal notice to quit has been served by the landlord. At common law a tenant at sufferance was not entitled to a notice to quit, but under our statute the formal notice of three days must be served as part of the procedure in an action of forcible entry and detainer. *Moran v. Moran,* 54 Kan. 270. What is here said in nowise conflicts with the recent decision of this court in *Weatherford v. Union P. R. Co.,* 74 Neb. 229. In this latter case the relation of landlord and tenant never existed between the parties to the action, but, on the contrary, the holding had been adverse to plaintiff and its grantors from the time of the entry.

With reference to the third contention that defendant below was a tenant from year to year, and not from month to month, it is sufficient to say that there is neither a

fact nor a circumstance shown by the record from which such a tenancy could be inferred.

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.

WILLIAM HOPPER V. DOUGLAS COUNTY.

FILED DECEMBER 20, 1905. No. 14,017.

1. Counties: DIVERSION OF SURFACE WATER: LIABILITY. A county is not liable in damages to an individual landholder for the negligent diversion of surface water in the improvement and construction of its public highways.
2. ———: NEGLIGENCE OF OFFICERS. A county is not liable in damages for the negligent acts of its officers, unless made so by legislative enactment.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Jefferis, Howell & Shotwell, for plaintiff in error.

James P. English, W. W. Slabaugh and *Charles E. Foster, contra.*

OLDHAM, C.

This was an action instituted by the plaintiff in error, a landowner in Douglas county, against the county for damages for the diversion of surface water by the negligent construction of a fill, or embankment, on a public road in said county adjacent to plaintiff's land. The petition alleges that, by reason of the raising of the embank-

ment without sufficient ditches and culverts, surface water, which otherwise would have flowed without obstruction from the land of the plaintiff, was dammed up and caused to remain and flow back upon the said lands to the plaintiff's damage in the amount sued for in the petition. Defendant county demurred to plaintiff's petition, and the demurrer was sustained by the trial court. The plaintiff refused to further plead, and his petition was dismissed. To reverse the judgment of the district court, plaintiff brings error to this court.

As stated in the brief of the plaintiff, there is but one question involved in this controversy, and that is: "Is a county liable in damages to an individual for injuries caused him in the construction and maintenance of highways, and ditches in connection therewith, because of diverted surface water?" It is conceded that this question has been specifically answered in the negative in the recent case of *Stocker v. Nemaha County,* 4 Neb. (Unof.) 230, but, as the opinion in that case was not officially reported, and as we are only bound by the conclusion there reached and not by the reasoning of the opinion, we are strongly urged not only to disapprove the line of reasoning on which the opinion is based, but also to repudiate the conclusion arrived at. The contention is that the conclusion reached in that case is in conflict with section 21, article I of the constitution. Now, in the case at bar, the petition charged negligence in the erection of the embankment on a public road, which turned back the surface water onto plaintiff's land by reason of the officers' failure to construct proper culverts through the embankment and proper ditches to carry away the surface water. If the agents of the county were guilty of actionable negligence in the construction of the road, they would, no doubt, be liable to plaintiff, individually, in an action for damages; or, if the agents of the county in the erection of an improvement on a public highway should carelessly obstruct the flow of surface water through a natural drainage basin, they might be prohibited by injunction from such

wrongful act; but a different rule would apply as to the liability of the county in an action at law against it.

It has been uniformly held by this court that a county is not liable for the negligent acts of its officers, unless made so by legislative enactment. See *Wehn v. Gage County*, 5 Neb. 494; *Woods v. Colfax County*, 10 Neb. 552; *Hollingsworth v. Saunders County*, 36 Neb. 141. This rule is grounded on the fact that a county is an arm of the sovereign state and cannot, as such, be sued by an individual, without express permission. We have no doubt that section 21, article I of the constitution, was and is self-executing, and that, under this section, it would require no legislation to prevent private property from being taken or damaged for public use without just compensation in the first instance. The only object of this section of the constitution is to stay the hand of the sovereign from the property of the individual until proper compensation has been made; and when this has been done, the whole object, intent, and purpose of the section has been accomplished. Plainly, there is no intention expressed in this section of the constitution to make the county liable to the individual in damages for the tortious acts of its officers; and, if any such right exists, it must be founded upon a statutory declaration thereof. And, as clearly pointed out in *Stocker v. Nemaha County, supra,* no such statute has ever been enacted.

We therefore conclude that the learned trial judge was fully warranted in sustaining the demurrer to the plaintiff's petition, and we recommend that the 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.

DANIEL HOPPER V. DOUGLAS COUNTY.

FILED DECEMBER 20, 1905. No. 14,018.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Jefferis, Howell & Shotwell, for plaintiff in error.

James P. English, W. W. Slabaugh and *Charles E. Foster, contra.*

OLDHAM, C.

This is a companion case to *Hopper v. Douglas County, ante,* p. 329. The two cases involved the same question, and by agreement were consolidated and argued together. Hence, for the reasons given in the opinion in said case, we think the trial court was correct in sustaining the demurrer to the plaintiff's petition, and we recommend that the 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.

HARRY N. VERTREES V. GAGE COUNTY.

FILED DECEMBER 20, 1905. No. 14,026.

Burden of Proof. The burden of sustaining the affirmative of an issue involved in an action does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there till the end. *Rapp v. Sarpy County,* 71 Neb. 382, 385, followed and approved.

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

E. O. Kretsinger, for plaintiff in error.

H. E. Sackett, Hazlett & Jack and *S. D. Killen, contra.*

OLDHAM, C.

This was an action to recover damages for injuries received by plaintiff from the breaking down of a bridge over a stream of running water in Gage county, Nebraska, while assisting in taking a threshing machine engine across the bridge. The negligence relied upon was the action of the county in permitting the bridge to remain in a dangerous condition by reason of rotten stringers and piling after notice of such defective condition had been given to the board of supervisors of the county. The defense mainly relied upon by the county was contributory negligence of the plaintiff in going upon the bridge with a threshing machine engine when he had knowledge of the dangerous condition of the bridge.

An examination of the testimony in the bill of exceptions shows that plaintiff's evidence, standing alone and uncontradicted, tended to show a want of knowledge of the dangerous condition of the bridge on the part of the plaintiff when he went onto it to assist in taking the engine across the bridge. On the contrary, the testimony introduced by the county shows facts and circumstances connected with the injury, as well as alleged admissions of the plaintiff after the injury, that strongly tended to support the defense of contributory negligence. All these alleged admissions, however, were denied by the plaintiff, so that, in view of the entire testimony, the question of contributory negligence was one of fact for the determination of the jury. This was the view evidently taken by the learned trial judge who presided at the hearing of the cause in the district court, and, at the close of all the evidence, submitted the question to the jury. On issues thus submitted, the jury returned a verdict for the defendant. There was judgment on the verdict, and to reverse this judgment plaintiff brings error to this court.

No complaint is urged in the brief of plaintiff in error except as to the action of the trial court in giving instructions, and we see but one instruction complained of that requires serious notice at our hands. This was the second paragraph of instructions given at the request of the defendant county, which is as follows: "The court instructs the jury that the rule that the burden is upon the defendant to show by a preponderance of the evidence that the plaintiff was guilty of negligence, which contributed to cause the injury, does not apply where the evidence of the plaintiff himself shows that he was guilty of any negligence, which contributed to cause the injury, and if you believe from the evidence of the plaintiff in the case that, in the exercise of reasonable care and prudence, and in view of the circumstances known and apparent to him, the plaintiff ought to have known and appreciated the danger of going upon the bridge, where he was injured, with a threshing machine of great weight, then his going upon said bridge under such circumstances was contributory negligence on this part." This instruction, in that it shifts the burden of proof of the defense of contributory negligence from defendant to plaintiff, falls within the ban of the rule recently announced in *Rapp v. Sarpy County*, 71 Neb. 382, 385. The rule announced by AMES, C., at the first hearing in *Rapp v. Sarpy County, supra,* is as follows:

"The burden of sustaining the affirmative of an issue involved in an action does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there till the end."

On a rehearing, and after mature consideration, this rule was adhered to by this commission and a majority of the court, and, as we take it, has now become the settled rule of law in this jurisdiction. Consequently, for the error committed in giving the second paragraph of instructions, as above set out, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and LETTON, CC., concur.

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

REVERSED.

THURSTON COUNTY V. H. H. MCINTYRE.

FILED DECEMBER 20, 1905. No. 14,043

Counties: ACTION ON WARRANT. An action to recover a money judgment upon a county warrant may be maintained when the money for the payment of such warrant has been collected and wrongfully applied by the county authorities to the payment of other claims against the county. *Ayres v. Thurston County*, 63 Neb. 96; followed and approved.

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

Hiram Chase and *W. E. Whitcomb*, for plaintiff in error.

R. G. Strong and *J. M. Curry*, *contra.*

OLDHAM, C.

This was a suit against the county of Thurston to recover the amount of numerous unpaid warrants which had been legally issued by the board of county commissioners of said county, and for which, it was alleged, money had been collected and wrongfully applied to the payment of other claims. The answer of the county admitted that each of the warrants alleged upon in the petition had been legally issued by the board of county commissioners, and that money had been collected by the county for the payment thereof, and had been applied to the payment of other claims, and that all of the warrants so issued were due and unpaid. The answer further alleged that plaintiff had mistaken his remedy in bringing an action at law against

the county instead of suing the treasurer of said county on his official bond. The answer further prayed for an injunction permanently restraining plaintiff from further prosecuting his action against the defendant county. Plaintiff demurred to this answer. The demurrer was sustained by the trial court and, defendant refusing to further plead, judgment was entered for plaintiff as prayed for in his petition. To reverse this judgment defendant county brings error to this court.

The only question involved in this controversy is as to the right of the holder of county warrants, legally issued, to sue the county for a money judgment on such warrants. This identical question was before this court for determination in the recent case of *Ayres v. Thurston County,* 63 Neb. 96, and it was there held:

"An action to recover a money judgment upon a county warrant may be maintained when the money for the payment of such warrant has been collected and wrongfully applied by the county authorities to the payment of other claims against the county."

The opinion in the above case was carefully considered, and nothing contained in the brief of the plaintiff in error suggests any good reason for departing from the rule therein announced.

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.

GEORGE M. WALSH ET AL., ADMINISTRATORS, V. JOHN L. LUNNEY.

FILED DECEMBER 20, 1905. No. 14,055.

1. Contracts: MERGER. Before one contract is merged in another and superseded thereby, the last contract must be between the same parties as the first, and must embrace the same subject matter, and must have been so intended by the parties.
2. Evidence examined, and *held* sufficient to sustain the judgment.

ERROR to the district court for York county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

Landis & Schick, Halleck F. Rose and *France & France,* for plaintiff in error.

Mecker & Wray, contra.

OLDHAM, C.

This was an action by the administrators of the estate of Homan J. Walsh, deceased, upon a promissory note made and executed by defendant, John L. Lunney, in the year 1895. There were numerous defenses pleaded to the note. The material one, however, was that of accord and satisfaction, and this was the only defense that was submitted to the jury. There was a verdict for the defendant and judgment on the verdict, and to reverse this judgment plaintiffs bring error to this court. No objections to the admission or exclusion of testimony, or to the action of the trial court in giving and refusing instructions, are called to our attention in the brief of the plaintiffs in error. It is urged, however, that the evidence is not sufficient to sustain the judgment, and to this allegation alone will our attention be directed.

In support of the plea of accord and satisfaction, defendant introduced testimony tending to show that sometime after the note in suit was past due, Homan J. Walsh, the deceased payee, agreed with the defendant that, if de-

fendant would farm an eighty-acre tract of land owned by the deceased for the years 1896 and 1897, and give the deceased one-third of the crops raised on the land as rent, and apply one-half of the remainder of the crops, so raised, on the note, and permit the deceased to enter credit on the note for a sum agreed upon, which deceased owed defendant for the care and keeping of a colt, he would surrender the note for such consideration. It clearly appears from plaintiff's testimony that he farmed the eighty acres of land during the season of 1896 under this agreement, and delivered to the deceased two-thirds of the crop raised on the land for that year. It appears further from the testimony that early in the year 1897 the deceased had conveyed the land, which defendant was farming, to his brother, George M. Walsh, and that after the land had been so conveyed the defendant and George M. Walsh entered into a written lease for the farming of the land during the season of 1897. This lease contained, among others, the following stipulation, by which defendant Lunney agreed to pay as rental for the land "one-third of all crops raised; also one-half of his two-thirds of crop, which I agree to apply on my note payable to Homan J. Walsh, and if the one-third which is my portion should exceed, at the time of sale, an amount which will over-pay amount due Walsh on my note held my him, the excess shall be paid to Lunney."

The contention of the plaintiff is that this subsequent written agreement with George M. Walsh superseded the original oral agreement with Homan J. Walsh, and that by this subsequent written agreement the value of the one-third of the crop raised on the land was to be applied on the note as part payment thereon, and not in satisfaction of the note. Acting on this theory, he indorsed the value of one-third of the crop for the years 1896 and 1897 as credits on the note, as well as the agreed price for the keeping of the colt, and brought this action for the balance still due. The court, however, submitted the question as one of fact to the jury to determine whether or

not the stipulation in the written contract with George M. Walsh was intended by the parties as a new contract, or merely as a supplement to the original oral contract entered into between defendant and Homan J. Walsh. Evidence was admitted without objection tending to show that defendant refused to execute the new contract until he was assured by Homan J. Walsh that it would in no wise interfere with the original contract. Now, the rule is well settled that, before one contract is merged in another and superseded thereby, the last contract must be between the same parties as the first, and must embrace the same subject matter, and must have been so intended by the parties. In *Uhlig v. Barnum,* 43 Neb. 584, it is said:

"A new contract with reference to the subject matter of a former one does not supersede the former and destroy its obligations, except in so far as the new one is inconsistent therewith, when it is evident from an inspection of the contracts and from an examination of the circumstances that the parties did not intend the new contract to supersede the old, but intended it as supplementary thereto."

We think that under this rule the intention of the parties as to the effect of this subsequent written agreement on the original oral agreement was properly submitted as a question of fact for the determination of the jury. We therefore conclude that there was competent evidence in the record to sustain the judgment, 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 foregoing opinion, the judgment of the district court is

AFFIRMED.

OMAHA FEED COMPANY V. ARTHUR H. RUSHFORTH.

FILED DECEMBER 20, 1905. No. 14,036.

1. **Sale:** RESCISSION. If one party to an agreement of sale for the purpose of obtaining credit makes false representations relating to the amount of his assets, or the condition of his financial affairs, and the other party, replying thereon, enters into the agreement to extend credit on the strength of such representations, he may, on discovering the fraud, repudiate the agreement and refuse to carry it into effect.

2. **New Contract.** Where a party repudiates an agreement to extend credit to another because of false and fraudulent representations made in obtaining it, and the agreement is then so changed as to eliminate the provision for credit and to require cash on delivery, the second agreement is not a mere modification of the first but a new and independent agreement, and no new or further consideration is necessary to support it.

3. **Contract:** DEFENSE: PLEADING. Where a party to a contract inserts a provision exempting him from fulfilling because of a condition which may afterwards arise, he must, when sued for a breach of the contract, plead in defense the existence of the condition in order to have the advantage thereof.

ERROR to the district court for Merrick county: JAMES G. REEDER, JUDGE. *Affirmed.*

W. T. Thompson, for plaintiff in error.

John C. Martin, contra.

DUFFIE, C.

The parties to this action entered into the following agreement: "Clarks, Nebraska, September 3, 1903. This will certify that I have this day sold to the Omaha Feed Company (500) five hundred tons of No. 1 second bottom hay, reasonably free from weeds, and good color, at $7.25, seven dollars and twenty-five cents, F. O. B. Omaha, also (200) two hundred tons of No. 2 hay, same to be reasonably free from weeds, and good color, but coarse hay, at $6.50, six dollars and fifty cents per ton, F. O. B.

Omaha. Same to be delivered from one to two car-loads per day, provided we are able to get cars and the weather permits. Returns for said hay to reach me not later than Tuesday of each week for all hay unloaded."

Rushforth delivered but two cars of hay to the plaintiff under this agreement, and the plaintiff commenced an action against him to recover damages alleged to have been sustained for failure to deliver the full amount stipulated in the contract. The answer of the defendant admitted the making of the agreement, and denied the other allegations of the petition. It contained a counterclaim to the effect that the plaintiff, as a means and for the purpose of procuring from the defendant the credit provision in the contract above set out, knowingly, falsely and fraudulently represented to the defendant that it had a fully paid up capital stock of $50,000 while, in fact, its paid up capital stock amounted to $1,000 only; that defendant, in extending the credit provision of said agreement, relied upon this false and fraudulent representation, and would not otherwise have consented to extend any credit to the plaintiff; that, after the agreement had been executed and after defendant had shipped two car-loads of hay, he was for the first time advised that the representations of the plaintiff were false and that plaintiff did not have a business rating for credit to exceed $500; that, thereupon, he complained to the plaintiff that its credit rating was not as represented in procuring the agreement, and declined to ship to the plaintiff any more hay unless the same was paid for on delivery; that, thereupon, the plaintiff agreed with him that the original agreement should be modified to the extent and effect only that the defendant should ship the hay as provided in the contract, and should draw through the banks for the value of each car-load, so shipped, with a bill of lading attached for each car; that afterwards, and on October 14, 1903, the defendant, in compliance with the terms of said agreement, so modified, shipped to the plaintiff a car-load of hay of the value of $67.70, and attached the bill of lading therefor to a draft

given to the First National Bank of Clarks for said sum of $67.70 upon the plaintiff at Omaha, Nebraska, payable at sight; that the plaintiff refused to accept and pay for said draft, and accept and pay for said hay, so shipped, and has refused to accept the remainder of the hay mentioned in said memoranda agreement, by reason of which he claimed damages in the sum of $339.43. A trial resulted in a verdict in favor of the defendant on his counterclaim in the sum of $5, upon which judgment was entered, and the plaintiff has taken error to this court.

Among others, the court gave the jury the following instruction: "You are instructed in this case that, if you believe from a preponderance of the evidence that on or about the 4th of October, 1903, the contract set forth in plaintiff's petition was by a verbal agreement, then made between said plaintiff and defendant, modified, providing that the plaintiff should pay for all the hay shipped to the plaintiff by the defendant, at Omaha, upon delivery, then and in that case the plaintiff cannot recover herein." And the following instruction asked by the plaintiff was refused: "The court instructs the jury, as a matter of law, that, unless you find that there was some valuable consideration to support the modification alleged by defendant, such modification is null and void, and the defendant cannot claim advantage under it."

The original agreement provides for the shipment of from one to two car-loads a day from and after September 3, 1903. The alleged modification of this agreement was made October 4, 1903, at which date two car-loads only had been shipped. There had been a breach of the contract on the plaintiff's part therefore prior to the making of the second agreement, unless a failure to get cars or the condition of the weather prevented daily shipments from being made. The two instructions above quoted, the one given by the court and the other tendered by the plaintiff and refused, fairly, we think, present the question insisted on by the plaintiff in error, that no valid modification of a contract can be made, after breach thereof, without a new

and further consideration passing between the parties. This may be conceded as the rule, and still, we think, it has no application in this case. It is undoubted law that one may refuse to perform an executory contract procured from him by false and fraudulent representations, and any false representation of a material fact, made with knowledge of its falsity and with intent that it shall be acted upon by another, and which is so acted upon, constitutes fraud. In *Tallon v. Ellison & Sons*, 3 Neb. 63, 74, the court uses the following language:

"The principle is well established, that if a party for the purpose of obtaining credit makes false representations as to his solvency or of the condition of his financial affairs, whereby the other party relying on these statements is induced to sell his goods or part with his property, it is manifestly a fraud on such party."

That the paid up capital stock of a corporation to whom a party is to extend credit for a large amount is a material matter is not a question for dispute. If, as alleged in the defendant's counterclaim, the plaintiff represented to him that it had a paid up capital stock of $50,000 when, in fact, its paid up capital amounted to but $1,000, the representation was a material one. The defendant was privileged, if he saw fit, to refuse to deal with a corporation which had but a small paid up capital stock, and if, as alleged, he was induced to enter into this agreement by the representation that the paid up capital stock was greatly in excess of what he afterwards found it to be, he had a right to refuse to make delivery under the contract. While the plaintiff in error refers to the second contract as a modification of the first, and while the defendant in his pleadings so denominates it, we think that the pleadings as a whole must be construed as setting up facts which show a repudiation of the contract by the defendant, and the making of a new contract, providing for a cash payment on receipt of the hay, to take its place. It is true that the so-called modified contract relates to the same hay and the price to be paid is the same, but the allegation is

that the defendant refused to deliver any more hay "unless the same was paid for on delivery"; in other words, he repudiated the contract and refused to be bound by its terms. This, we think, ended the contract, and whatever agreement was made thereafter was a new and independent agreement, although it related to the same subject matter. Whether the representation relating to the amount of the paid up capital stock of the plaintiff was made, and whether the defendant's refusal to deliver the hay arose from a discovery that such representation was false, if such is the case, were questions of fact to be determined by the jury, and these issues being found in favor of the defendant, there was no prejudicial error of which the plaintiff can complain either in the instructions given by the court or in his refusal of those tendered by the plaintiff.

One other matter, of which complaint is made, should be mentioned although not affecting the result. The defendant offered, and the court received, evidence over the plaintiff's objection tending to show that the condition of the weather was such that only the two loads of hay delivered could be shipped by the defendant after the making of the original agreement and up to October 4, 1903. One of the conditions of the agreement is the following: "Same to be delivered from one to two car-loads per day, provided we are able to get cars and the weather permits." This was inserted in the agreement for the benefit of the defendant. In case he failed to deliver as fast as called for by the contract, he might defend against a claimed breach for failure to deliver, by showing that such failure was in consequence of the condition of the weather or his inability to obtain cars. The general rule is that, where a party claims a right in derogation of a general law, or when his claim is founded upon an exception of any kind, he shall set forth such claim or such exception particularly in his pleading. If the defendant in this case wished to excuse himself for a failure to deliver as called for by the contract, he should have pleaded the existence of the

condition of the contract exempting him from liability; and in the absence of such a plea the testimony should have been rejected. The plaintiff was not required to negative an exception made for the defendant's benefit, and of matters particularly within his own knowledge.

We recommend an affirmance of the judgment upon the grounds first discussed.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

CLARISSA J. AUSTIN, APPELLANT, V. MARY E. BROWN ET AL., APPELLEES.

FILED DECEMBER 20, 1905. No. 14,058.

Deed: REFORMATION. As between the parties thereto, or where purchasers without notice are not affected, a deed of conveyance will be corrected to cover the premises intended to be conveyed.

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

R. E. Evans, for appellant.

Edwin J. Stason, contra.

DUFFIE, C.

Section 19, township 29 of range 9, Dakota county, Nebraska, originally contained but 8.8 acres of land. The Missouri river by its changes has added accretions which, by a decree of the district court for that county, were assigned to the different tracts bordering upon that portion of the river affected, the part falling to section 19 being 44.5 acres. This accretion belonging to section 19

is in the form of a strip 525 feet wide running in a northwesterly direction to the present bank of the river. Prior to May 12, 1894, Mrs. Allithear Scott was the owner of section 19 and the accretion thereto, and she contracted to sell to one Mary Swinson ten acres of this accretion. The husbands of these respective parties were authorized to make the contract and to mark out the land to be conveyed. Not being able to obtain a surveyor, they ran off the land themselves, using a rope two chains in length for that purpose. In this manner the ten-acre tract was located, and a deed, supposed to describe the same, was prepared by a person in Sioux City, and the land, as located, has been occupied by some one of the defendants since about the date of the sale. There was supposed to be about 24 acres of accretion land lying south of this ten-acre tract, which Mrs. Scott afterwards conveyed to one Dorn, and by subsequent conveyances the title became vested in the defendant Mary E. Brown. The description contained in the deed from Mrs. Scott to Mrs. Swinson is as follows: "Commencing at a point on the east line of the accretion belonging to section 19, township 29, range 9 east of the 5th P. M., at a distance of 30 chains from the northeast corner of said section 19; running thence north 23 degrees west 14.90 chains; thence west to the west line of accretion belonging to said section 19; thence south and east along said west line of said accretion 14.90 chains; thence east to the place of beginning. Also a private right of way 16 feet in width along the east line of said accretion from the northeast corner of said section 19 to a point on said east line 14.90 chains north of said corner, and reserving a private right of way 16 feet wide along the east side of the tract herein conveyed." When Mrs. Scott conveyed to Dorn the south tract, supposed to contain 24 acres, he went upon the premises, and was shown the line claimed by the plaintiff as her south line, and supposed that that was the north line of the tract which he was buying, but at the same time understood that the tract contained 24 acres of accretion land; and all sub-

sequent purchasers of that tract, including the defendant Mrs. Brown, purchased under the same circumstances and with like information. The descriptions in the deeds conveying the south tract are as follows: "Lot No. 1 of the N. E. ¼, section 19, in township 29 north of range 9 east of the 6th P. M., containing 8.8 acres: Also the accretion lands belonging to said fractional section 19, described as follows, to wit: Commencing at meander corner between sections 19 and 20; then north 23 degrees west 30 chains; thence due west to the west line of the accretion to said fractional section 19, township 29, range 9 east; thence south 20 degrees 45 minutes east 30 chains to the meander corner between fractional section 19, township 29, range 9 east and fractional section 31, township 89, range 47 west of the 5th P. M., containing 24 acres, more or less, except a private right of way 16 feet in width along the east line of said accretion." It will be noticed that the southeast corner of plaintiff's land as described in her deed, is 30 chains north of the northeast corner of fractional section 19, and that in describing the accretion land now owned by Mrs. Brown the description places the northeast corner the same distance north of the northeast corner of fractional section 19. There is therefore no conflict between the description in the two deeds; but in 1902 Mrs. Brown had her land surveyed, and the description in her deed located the northeast corner of her land six rods north of the line claimed by the plaintiff. She immediately made claim to the south six rods of the land claimed and occupied by the plaintiff, and the plaintiff has brought this action to correct the description in the deeds in such manner as to cover the land claimed and occupied by her. Neither the old line, as claimed by the plaintiff, nor the new line, as established by the survey, will give the defendant, Mrs. Brown, 24 acres of accretion land. If the old line is adopted, she will have but a little over 21 acres. If the new or last survey line is adopted, she will have an excess of nearly two acres. The district court found for the defendants and dismissed the plaintiff's petition,

and we are asked to examine the evidence and to reverse that finding and decree.

We think the entire case depends upon the effect to be given to the testimony of Mr. Scott and Mr. Swinson, the parties who marked off the ten-acre tract claimed by the plaintiff, and who have more perfect knowledge of what was done and intended than any others. Scott testified that he intended to reserve 24 acres of accretion land south of the tract sold to Mrs. Swinson; but Swinson claims that he informed Scott at the time that he would not take any of the lowland bordering the river bank, and that a point some three feet distant from a tree was agreed upon between them as the northeast corner of the tract (his evidence is undisputed in this regard), and that Scott himself drove a stake at that point. It is undisputed that Mrs. Swinson and her grantee have occupied and cultivated the land up to the point now claimed by her as her south line; that Scott and his grantees recognized that as the south line of her tract; that Scott's grantees purchased their land believing that it was their north boundary, and that no dispute ever arose concerning the same until after the survey made in 1902. It is not disputed that each of the grantees of this south tract had notice of the plaintiff's claim prior to their purchase. One cannot read the evidence without coming to the conclusion that it was the intention of Scott to convey to Mrs. Swinson the land now claimed by the plaintiff, and there was an evident mistake in drawing her deed and placing her south boundary line six rods north of the point actually fixed upon and designated by the parties at the time. We recommend a reversal of the judgment and that the cause be remanded, with directions to enter a decree in accordance with the prayer of plaintiff's petition.

ALBERT and JACKSON, CC., concur.

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

with directions to enter a decree in accordance with the prayer of plaintiff's petition.

REVERSED.

JOSEPH BECKWITH V. DIERKS LUMBER & COAL COMPANY.

FILED DECEMBER 20, 1905. No. 14,059.

1. **Review:** RECORD. A judgment will not be reversed for error of law occurring at the trial unless it is alleged in the petition in error and shown by the record that the court erred in overruling the motion for a new trial. *James v. Higginbotham*, 60 Neb. 203.
2. **Instruction:** OBJECTION. A party who fails to object to an instruction is conclusively presumed to be satisfied with it as given.
3. **Judgment:** JURISDICTION. One claiming title to personal property through a sale under attachment proceedings in a justice's court must show legal notice to the defendants of the pendency of the action and that the property claimed was attached therein.

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

C. W. Beal and *H. J. Shinn*, for plaintiff in error.

J. S. Kirkpatrick, C. H. Holcomb, G. E. Hager and *Milton Schwind, contra.*

DUFFIE, C.

The Dierks Lumber & Coal Company is the owner of a lot and building in the city of Broken Bow, Nebraska. A tenant erected a shed addition to this building and put a counter and some shelving therein. He afterwards sold all his right in the premises to Warner Brothers. Robinson, another tenant, occupied the building until some time in May, 1901, when he vacated, and the Dierks company then rented the same to one Dischous. In the meantime Beckwith, the plaintiff in error, commenced an action aided by attachment in a justice's court against Arthur and

Joseph Warner and A. Wallace, obtained judgment, and had the shed, counter and shelving sold, himself becoming the purchaser. The Dierks company refusing to recognize his ownership, this action was brought for the value of the property and for rents. After the plaintiff had introduced his evidence, the court directed a verdict for the defendant, overruled a motion for a new trial, and entered judgment for costs against the plaintiff.

The judgment must be affirmed for several reasons. The petition fails to allege error in overruling the motion for a new trial. If the court did not err in overruling the plaintiff's motion for a new trial, it is evident that the judgment appealed from is the only one that could have been entered, and errors of law occurring at the trial, if any, were not prejudicial to the plaintiff. Again, no exception was taken to the action of the trial court in directing a verdict for the defendant, and the conclusive presumption arises that plaintiff was satisfied with this instruction. *Scofield v. Brown,* 7 Neb. 221; *Billings v. Filley,* 21 Neb. 511; *Gravely v. State,* 45 Neb. 878. This rule is as applicable to peremptory instructions as to any other. *Startzer v. Clarke,* 1 Neb. (Unof.) 91.

We think, also, on the merits the judgment should be affirmed. While the plaintiff claims title to the property under an attachment proceeding in a justice's court, there is no showing in the record that this particular property was attached as the property of the defendants in that proceeding. Service against the defendants in that action was had by publication, without any showing that they could not be served in the county. It is true the affidavit for publication shows that the defendants were nonresidents, but it does not negative the fact, which may have existed, that they were present in Custer county at the time the affidavit was made.

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.

THOMAS LUCAS, APPELLEE, V. COUNTY RECORDER OF CASS COUNTY ET AL., APPELLANTS.

FILED DECEMBER 20, 1905. No. 14,051.

1. **Evidence** examined, and *held* to warrant the decree of the trial court.
2. **A sale** is a transmutation of property or a right from one person to another, in consideration of a sum of money, as opposed to barters, exchanges and gifts.
3. **Contract for Sale.** A written contract between the owner of real estate and a real estate broker for the "sale" of property does not contemplate an exchange thereof for other property.
4. **Statute of Frauds:** EXECUTED CONTRACT. A subsequent oral contract, superseding or modifying one which the statute of frauds requires to be in writing, will be upheld, if executed.
5. **Evidence:** AMOUNT OF RECOVERY. Under the evidence, *held*, that a real estate broker has no just cause for complaint of an allowance to him of $300 as commission for services in the exchange of properties.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

O. A. Williams, for appellants.

Byron Clark, contra.

ALBERT, C.

This is a suit to restrain the recording of a certain deed or its return to the defendant Allison, and that said defendant be required to deliver the same to the plaintiff. It is alleged in the petition that at the date of the deed the defendant Allison was the plaintiff's agent for the sale of certain real estate in the village of Wabash, in Cass

county, and that said defendant falsely and fraudulently, and for the purpose of obtaining plaintiff's title to said real estate, represented to the plaintiff that he had a purchaser for the property, and that if the plaintiff would sign and acknowledge the same, leaving the name of the grantee blank, said defendant would take the deed to plaintiff's wife, who at the time was in a distant county, for her to sign it, and would give her the purchase money, which would become due the plaintiff on the consummation of the sale, but that if a sale was not made the deed should be canceled and returned to the plaintiff; that the plaintiff, relying upon said representations, signed and acknowledged a deed to said property, leaving a blank space therein for the insertion of the grantee's name, and orally authorized said defendant to fill in the name of the grantee, upon payment of the purchase price to plaintiff's wife, after she had joined in the execution of the deed; that the deed was presented to the plaintiff's wife, who, not understanding the agreement, refused to sign it, and the said defendant retained the possession thereof. It is further alleged that said defendant has presented the deed to the defendant county recorder, requesting that it be placed on the records of Cass county; that said recorder threatens to return the deed to the defendant Allison, and refuses to deliver it to the plaintiff, although the same belongs to him, and should be canceled and destroyed. It is further alleged that, although no sale of the property has been made, the defendant Allison threatens and intends, if he obtains possession of said deed, to insert the name of a grantee therein, and that, by reason of the filing of said deed and the said acts and threats of the defendant Allison, plaintiff's title to said real estate is rendered precarious and clouded.

The defendant county recorder made default. The defendant Allison's answer contains a general denial, and certain allegations touching the relation of the other defendant to the case. In addition thereto he filed a cross-petition against the plaintiff and his wife, wherein he al-

leges, in substance, that on the 29th day of April, 1903, the plaintiff and himself entered into a written contract which is as follows:

"April 29, 1903.

"Know all men by these presents, that for and in consideration of the sum of one dollar and other valuable considerations to Thomas Lucas cash in hand paid, receipt of which is hereby acknowledged, said Thomas Lucas is to give into the hands of C. J. Allison for exclusive handling as to sale for the term of eight months from date the following lands: The south half of the northeast quarter and the north half of the southeast quarter of section 17, township 26, range 6 west of the sixth P. M. This land is hereby from this date placed in the hands of C. J. Allison for sale for the eight months, as aforesaid, at the price net to Mr. Lucas of $1,600. All the proceeds of the sale of this land over $1,600 is to be C. J. Allison's commission for the sale of this land.

"In testimony of which, witness our hands the day and year first above written. THOMAS LUCAS.

"Witness: CLYDE MCGINITIE. C. J. ALLISON."

That on or about the 25th day of October, 1903, he found a purchaser for said premises at a consideration of $3,200, and the plaintiff conveyed the same to said purchaser; that at the same time, as agent for the plaintiff, he sold certain residence property in Neligh, and a quarter section of land in Holt county, of the aggregate value of $4,700, incumbered to the amount of $1,500, the plaintiff receiving as the consideration for the several properties, including that described in said written contract, a stock of goods, and certain real estate in the village of Wabash, and that the property thus received was of the aggregate value of $6,400; that the reasonable compensation for the sale of the residence property in Neligh and the farm in Holt county is 5 per cent. on the first $1,000 of the consideration, and 2½ per cent. on the remainder aggregating $142.50, and the commission due this defendant under the

written contract above set forth is $1,600, and that the commission for his services amount in the aggregate to $1,742.50; that at the time the negotiations for the sales mentioned were in progress, and before they were closed, it was agreed between himself and the plaintiff that the commission of the defendant should be paid in kind from the real estate or merchandise which formed the consideration for the proposed transfers, and that a portion of such real estate should become his property; that, in order not to arouse the suspicions of the purchaser, the title should all be taken in the plaintiff, and the plaintiff should hold his (Allison's) share until the prospective trade was consummated; that after the negotiations were closed and the transfers made the plaintiff signed and acknowledged the deed described in his petition, but that his wife refused to sign or acknowledge the same, and that by reason of this refusal the property therein described is incumbered by her dower interest, whereby this defendant is damaged in the sum of $500. The relief prayed in the cross-petition is that plaintiff's action may be dismissed, and that the defendant's title to the premises described in the deed in question, which are a part of the consideration taken by the plaintiff in exchange for his said properties, be quieted in him as against the plaintiff and his said wife, and for certain other relief not necessary to set forth.

The wife of the plaintiff was brought in, and denied generally all the allegations of the cross-petition. The plaintiff filed an answer to the cross-petition, admitting the execution of the contract above set forth, but alleging that the property therein described, at the time of the transfer thereof, was incumbered, and that it was understood at the time of the contract that the sale was to be for cash, and that the plaintiff was to receive $1,600, free and clear of all liens and incumbrances and charges for commission. This answer to the cross-petition, in effect, denies all the other allegations of the cross-petition save such as are impliedly admitted by the closing paragraph of the answer, which is as follows: "Further replying, this

plaintiff alleges that he placed the following properties with the defendant C. J. Allison for trade or sale, to wit: 160 acres at O'Neill, of the value of $4,000; 160 acres at Neligh., Neb., of the value of $2,400; residence in Neligh of the value of $2,000. Total, $8,400. That this plaintiff received from said defendant in exchange therefor a stock of goods from McCaig & Swarts, at the price of $4,000, McCaig real estate at $2,400, incumbrances upon plaintiff's real estate deducted $1,945, and a Swarts note of $55; making a total of $8,400. That in making said trade the defendant Allison placed his own values in his own way upon plaintiff's property to McCaig & Swarts, and the values placed thereon by him did not in anywise represent the trade as between this plaintiff and defendant, and this plaintiff has always been ready and willing, and now is ready and willing, to pay to defendant Allison a reasonable and fair consideration as his commission in making said trade, based upon the actual values thereof; that the contract marked exhibit "A" and attached to defendant's cross-bill was wholly abandoned by each of the parties hereto, for the reason that it called for cash and not trade, and the only disposition that the defendant could make thereof was in trade; that the fair and reasonable consideration due the defendant is the sum of three hundred ($300) dollars, which this plaintiff has, as aforesaid stated, always been ready and willing to pay." The plaintiff paid $300 into court for the use of the defendant, on account of his services in and about the transactions referred to in the pleadings, and the court awarded the defendant that amount, but found all the other issues in favor of the plaintiff, and entered a decree accordingly. Defendant Allison appeals.

It is not quite clear from the appellant's brief (the case was submitted without oral argument) whether he complains because of the relief granted the plaintiff with respect to the deed in question, or of the amount awarded as commission for effecting or bringing about the exchange of plaintiff's property. He testified that, while

the negotiations were in progress, it was agreed between him and the plaintiff that, when the exchange was consummated, he should take his commission out of the property the plaintiff should receive in the exchange, and that after the exchange was made it was agreed that he should take the property covered by the deed for his services, and, in pursuance of that agreement, the deed was signed, acknowledged and delivered to him by the plaintiff. The plaintiff's version is that some time after the written contract was made the exchange of properties in question was decided upon, and that it was agreed between him and the appellant that the appellant should take a portion of the stock of goods in payment of his services. He further testified that after the exchange was made, and the property covered by the deed conveyed to him, the defendant undertook to sell it, and requested the plaintiff to make the deed in question in order to expedite a sale of the property when he procured a purchaser. After the examination of all the evidence, we think the trial court was fully warranted in finding for the plaintiff on this issue.

The remaining question then is whether the amount awarded the appellant as compensation for his services as plaintiff's agent in bringing about the exchange of the properties is insufficient. It will be remembered that the property described in the written contract set out in the appellant's cross-petition was a part of the property included in the trade. In making the exchange, it was put in or estimated at $3,200 in value. It was incumbered, but, as we view the case, it is not necessary to go into that. The contention of the appellant is that, as he was to receive all above $1,600 received by plaintiff for that property, and as it was put into the trade at $3,200, his compensation for bringing about an exchange of that land is $1,600; and as the court awarded him but $300 in the aggregate, the decree is erroneous. But the answer to that is that the written contract seems to have been superseded by one resting in parol. The written contract

contemplates the sale of a particular tract of land. Subsequently, the plaintiff exchanged this tract of land and other real estate for other real estate and a stock of goods. While this exchange was effected through the efforts of the appellant, it was not authorized by the written contract. All lexicographers and law writers recognize a distinction between a sale and an exchange of property. "A sale is a transmutation of property or of a right from one man to another, in consideration of a sum of money, as opposed to barters, exchanges and gifts." Rapalje and Lawrence, Law Dictionary. See *Labaree v. Klosterman*, 33 Neb. 150. The appellant's own testimony, noticed in the preceding paragraph, as well as that of the plaintiff, shows that the written contract was abandoned, at least to the extent that it contemplates a cash commission to appellant. But the appellant insists that a contract which, like that set out in the cross-petition, is in writing, and which the statute of frauds requires to be in writing, cannot be superseded or abrogated by a subsequent parol contract. But here a subsequent parol agreement was, in fact, made. Instead of a sale, as contemplated by the written contract, the subsequent contract contemplated an exchange of properties. In pursuance of the subsequent contract, the subject matter of the written contract passed beyond the control of the parties, so that performance of the written contract on either side became impossible. Neither party can predicate any right of action thereon against the other, because neither can aver performance, or an offer to perform his part of such contract. This, we think, spells abrogation, and in the presence of a thing actually accomplished, it is idle to argue that it cannot be done. Without undertaking to say how such subsequent contracts will be viewed under any and all circumstances, it seems perfectly safe to hold that, when fully executed, they will be upheld. See *Bowman v. Wright*, 65 Neb. 661, 666.

What, then, is the proper measure of appellant's recovery. The court found against him on the proposition

that he was to have a share of the realty taken by the plaintiff in the trade, and, as above intimated, we think properly. He repudiates plaintiff's statement that he was to be paid out of the merchandise, so that those propositions are out of the way. It would seem, then, that he is left to a recovery on a *quantum meruit*. It is reasonably clear from the uncontradicted evidence of the appellant himself that 5 per cent. on the first $1,000, and 2½ per cent. on the remainder of the selling price, is a reasonable commission to a real estate agent for bringing about a sale or exchange of real property. According to the appellant's own figures, the net trading value of the property received by the plaintiff in exchange for his real estate is $6,455. According to the evidence just referred to touching the percentage constituting a reasonable commission, the appellant was entitled to $186.32. The plaintiff tendered him $300 and paid that amount into court for his use, and the court awarded him that sum. He was awarded all the evidence would warrant, to say the least.

We discover no ground for a reversal of the decree of the trial court, and therefore recommend that it be affirmed.

DUFFIE, C., concurs.

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

AFFIRMED.

EMILIE V. PRESTON, APPELLANT, V. EDGAR M. MORSMAN, JR., TRUSTEE, ET AL., APPELLEES.

FILED DECEMBER 20, 1905. No. 13,834.

1. **Mortgages:** ASSIGNEE, RIGHTS OF. A mortgagee may, by agreement, fix the rights of his assignees of the notes secured by a mortgage to the mortgage security, and such an agreement may be implied from the circumstances of the transfer.

2. **Res Judicata:** FRAUD. A decree of a court vested with jurisdiction over the subject matter and the persons in interest, fixing the status of a series of notes secured by a single mortgage, is binding on one who, in a subsequent action, attempts to avoid the effect of the decree, where it appears that the transfer of the note involved in the later proceeding was fraudulent as against the holders of the other notes.

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

Fawcett & Abbott, for appellant.

Edgar M. Morsman, Jr., and *Charles F. Tuttle, contra.*

JACKSON, C.

On the 3d day of December, 1892, George F. Orchard and Sarah M. Orchard made and delivered to William Preston three promissory notes, one for the sum of $5,000, payable three years after date; one for the sum of $5,000, payable four years after date, and one for the sum of $6,000, payable five years after date, each to draw interest at the rate of 7 per cent. per annum, payable semiannually. For the purpose of securing the payments, the makers of said notes, on the 20th day of December, 1892, executed and delivered to the payee, William Preston, a mortgage on certain real estate in Douglas county Nebraska. The mortgage recited the execution and delivery of the notes, giving the dates of payment of both principal and interest, and contained this provision: "But if said sums of money, or any part thereof, or any interest thereon, is not paid when the same is due, then in that case the whole of said sum and interest shall, and by this indenture does, immediately become due and payable." Afterwards William Preston borrowed of the Blackstone National Bank of Boston, Massachusetts, $5,000, and assigned to this bank as collateral security the note secured by said mortgage which matured three years after date. He also borrowed of the First National Bank of Mauch Chunk, Pennsylvania, the sum of

$5,000, and assigned to that bank as collateral security the note secured by said mortgage which matured four years after date. William Preston defaulted in the payment of his indebtedness to the bank of Mauch Chunk, and the Orchards defaulted in the payment of interest on the notes secured by the mortgage, and on the 28th day of February, 1896, the bank of Mauch Chunk instituted proceedings in the district court for Douglas county against George F. Orchard, Sarah M. Orchard, William Preston and the Blackstone National Bank, for the purpose of foreclosing the mortgage securing the Orchard note, which it held as collateral. The petition contained the usual allegations where the relief sought is the foreclosure of a mortgage, and among the allegations was one that the defendant, William Preston, sold and transferred the said promissory note to the petitioner by a blank indorsement thereon. The plaintiff, with other relief asked for in his prayer, required an accounting of the amounts due on the three notes secured by the mortgage; prayed that the property might be sold under the decree of the court, and that the proceeds of the sale be applied, first, to the payment of the costs, second, to the payment of the sum found due the defendant, the Blackstone National Bank, and the amount due the plaintiff, *pro rata;* third, to the payment of such sum as should be found due the defendant, William Preston, as holder of the note for the sum of $6,000. Service was had upon the defendants, and George F. Orchard and Sarah M. Orchard were defaulted. The defendant, the Blackstone National Bank, answered, and by way of a cross-petition alleged facts entitling that bank to a foreclosure of the mortgage for the purpose of securing the payment of the $5,000 note which it held as collateral. By its cross-petition it made Alfred H. Preston and Walter G. Preston parties to the foreclosure proceedings, and caused summons to be served on said additional defendants. The cross-petition of the Blackstone National Bank recites, among other things, that the defendants, William Preston, Alfred H. Preston and Walter G. Preston, under

the firm name of William Preston & Company, executed and delivered to the bank their promissory note for $5,000, payable on demand, and also recites the assignment of the $5,000 Orchard note as collateral to secure the payment of the note of William Preston & Company, by the indorsement in blank of William Preston; that, when said note became due and payable, payment was duly demanded and refused and said note was duly protested. It showed a default by Preston & Company in the payment of their indebtedness to the bank, and the default of the Orchards in the payment of the collateral note. It asked for a foreclosure of the mortgage and a sale of the mortgaged premises; that, out of the proceeds of the sale, there first be paid the costs; second, the sums found due the plaintiff and defendant, the Blackstone National Bank, *pro rata;* third, such sum as should be found due the defendant, William Preston, as holder of the $6,000 note, and for personal judgment for the deficiency, if any, due the Blackstone National Bank, against William Preston, Alfred Preston and Walter G. Preston, and William Preston & Company.

To the petition William Preston filed a separate answer, admitting the execution and delivery of the Orchard note, but denied that the note was sold to the plaintiff by absolute sale; alleged that the note and mortgage were assigned to the plaintiff as collateral to secure the payment of his own $5,000 note, payable to the plaintiff, and asked that the court so find, and find that the legal title to the note was in him, but consented that the mortgage might be foreclosed in that action, and prayed that his rights in the premises might be protected, and that he should have every relief that justice and equity might require. William Preston also answered the cross-petition of the Blackstone National Bank, in which he denied that Alfred Preston and Walter G. Preston were partners in the firm of William Preston & Company, and alleged that he, William Preston, was the only person interested in the business of William Preston & Company, and alleged that the note of

William Preston & Company, made payable to the Blackstone National Bank, was executed and delivered by himself alone as William Preston & Company. He also alleged that he alone transferred the Orchard note to the Blackstone National Bank; that the Orchard note was assigned to that bank as collateral security only, and asked that the legal title to the note might be held to be in him alone; but consented to the foreclosure of the mortgage, and asked that his own rights in the premises be protected. Walter G. Preston answered separately the cross-petition of the Blackstone National Bank, wherein he denied that either himself or Alfred H. Preston were partners in the firm of William Preston & Company, and denied that he was a partner of William Preston; denied that he was a member of any firm that executed and delivered to the said bank any of the papers mentioned in the cross-petition. He admitted that the Blackstone National Bank held the note executed by William Preston & Company, and that it held as collateral the Orchard note, and asked that he be dismissed with his costs.

Upon a trial to the court on the 27th day of December, 1896, the court entered a decree, finding that the Orchard note held by the plaintiff was assigned to that bank by the defendant, William Preston, as collateral security for the promissory note of said Preston, and determining the amount due the plaintiff on the Orchard note. The court also found that the Orchard note held by the defendant, the Blackstone National Bank, was held as collateral, and determined the amount due on that note. The court entered a decree of foreclosure, and directed the mortgaged premises to be sold, and that, out of the proceeds of the sale, there should first be paid the costs, second, the sum found due the plaintiff, the First National Bank of Mauch Chunk, and the sum found due the defendant, the Blackstone National Bank, *pro rata,* and any sum remaining after the satisfaction of the sums due the plaintiff and the Blackstone National Bank be held to abide the further order and decree of the court. The court also found

that, by reason of the indorsement of the Orchard note held by the plaintiff and the Orchard note held by the defendant, the Blackstone National Bank, by the defendant William Preston, said William Preston was personally liable for any deficiency that might remain after applying the proceeds of the sale to the payment of those notes.

Under this decree the mortgaged premises were offered for sale and bid in by Edgar M. Morsman, Jr., as trustee for the plaintiff and the defendant, the Blackstone National Bank. At the sale the sheriff was put into the possession of and read this notice: "In the District Court of the State of Nebraska, within and for the County of Douglas. The First National Bank of Mauch Chunk, Plaintiff, v. George F. Orchard et al., Defendants. Notice. To the purchaser or purchasers at sheriff's sale of the property in controversy in this action: You and each of you are hereby notified that Earnest Griffith claims a first lien for six thousand dollars ($6,000) upon the property in controversy in this action (describing it); that he claims said lien by reason of the fact that he is the holder of a note for six thousand dollars ($6,000) executed by George F. Orchard and Sarah M. Orchard, and secured by the mortgage upon said above described property which is sought to be foreclosed in this action. Lysle I. Abbott, Atty. for Earnest Griffith." This notice was returned by the sheriff with his report of the sale and filed by the clerk of the court on December 3, 1897. On December 4, 1897, the plaintiff and the defendant, the Blackstone National Bank, joined in a motion for an order confirming the sale, and for the execution and delivery of a deed. On January 6, 1898, the court ordered a confirmation of the sale and execution of a deed. The deed was duly executed and delivered to the purchaser, and was filed and recorded on January 18, 1898. Morsman, as trustee, entered into the possession of the premises, and has expended a considerable sum of money in the payment of taxes in order to preserve the property for the benefit of his clients. The Blackstone National Bank has subsequently sold its in-

terest in the property to the Mauch Chunk bank and received in consideration therefor the sum of $2,000, and has conveyed its interest to Morsman, trustee for the Mauch Chunk Bank. A portion of the mortgaged premises was afterwards conveyed to the Fred Krug Brewing Company.

William Preston is the father of Alfred Preston and Walter G. Preston. Emilie V. Preston, the plaintiff in this action, is the wife of William Preston, and is the mother of Alfred Preston and Walter G. Preston.

On the 18th day of October, 1901, Emilie V. Preston filed a petition in the district court for Douglas county, setting out the execution and delivery of the $6,000 note secured by the mortgage foreclosed in the former action, claiming to be the owner of the same; that she was the owner at the time of the commencement of the former action, and at all times since has been such owner and in possession thereof; that the Blackstone National Bank, the First National Bank of Mauch Chunk, and Edgar M. Morsman, Jr., trustee, had actual notice and full knowledge of the fact of such ownership. She made Edgar M. Morsman, Jr., as trustee, the First National Bank of Mauch Chunk, George F. Orchard, Sarah M. Orchard, William Preston, the Blackstone National Bank, Frederick Brommer, Fred Armbrust and Fred Krug Brewing Company, defendants. She prayed a foreclosure of the mortgage; that the mortgaged premises be sold, and that, out of the proceeds of such sale, she be paid the amount of the note. It was alleged in the petition that no part of the note had been paid, except interest instalments on June 3 and December 3, 1893, and June 3 and December 3, 1894.

Edgar M. Morsman, Jr., trustee, and the First National Bank of Mauch Chunk answered, and, among other defenses, pleaded the foreclosure proceedings hereinbefore related; the title acquired by Morsman, Jr., trustee, thereunder; that no assignment of the mortgage had ever been made by William Preston and entered of record in the

office of the recorder; denying any notice of an assignment of the $6,000 note to Emilie V. Preston; alleging that no such assignment was ever made, in fact; that, if such an assignment had been attempted, it was colorable only and made with the intent to defraud the creditors of William Preston; alleging that Morsman, Jr., purchased the real estate at the foreclosure sale without any knowledge that Emilie V. Preston claimed any interest in the property, the mortgage, the notes secured thereby, or claimed any part of the proceeds arising from the sale of said property; that he purchased said property for the sum of $12,000, as trustee for the First National Bank of Mauch Chunk and the Blackstone National Bank, and that the interest of said banks equaled the proceeds of said sale. They pleaded an adjudication in the decree of foreclosure; that the liens of the Blackstone National Bank and the First National Bank of Mauch Chunk were superior to the lien of William Preston by reason of his indorsements of the notes held by these banks; pleaded a sale of the interest of the Blackstone National Bank in the property to the Mauch Chunk Bank; pleaded a knowledge on the part of Emilie V. Preston of all the former foreclosure proceedings; pleaded that Emilie V. Preston was the wife of William Preston, the payment of taxes on the premises by Morsman, Jr., trustee, and the performance of valuable services in securing a reduction of the assessed valuation of the property at various times; services performed by said Morsman in resisting condemnation proceedings, wherein it was sought to condemn the property for boulevard purposes; pleaded the payment of costs in the former foreclosure proceedings, and prayed a dismissal of the plaintiff's petition; and, as an alternative, that, if the findings should be for the plaintiff, an account should be taken of the sums paid by Morsman, Jr., trustee, for taxes and for other expenses incurred, and that such sums be decreed to be a paramount lien on the property. The Fred Krug Brewing Company answered, setting out the purchase by them of a fractional part of the property in-

volved; the foreclosure proceedings before referred to; that their purchase was in good faith, without any knowledge of any claim on the part of Emilie V. Preston; praying that title to the fractional part purchased by them be confirmed, free of any lien on account of the claim by Emilie V. Preston. Replies were filed to these answers, in substance denying the allegations of the answers. There was a trial to the court, and a finding for the defendants. From the decree the plaintiff appealed to this court.

At the trial of the latter case there was offered and introduced in evidence a power of attorney from the plaintiff, Emilie V. Preston, to her son Walter G. Preston, authorizing Walter G. Preston, as such attorney in fact, to execute, convey, acknowledge and deliver by deed of trust, mortgage, bill of sale, or any other conveyance, any real estate or personal property that she then owned or might thereafter own, wherever the same was situated; to sign notes, checks, drafts or any other documents in her name, and to secure payment of the same by deed, mortgage, deed of trust, or any other conveyance upon any property, real or personal, granting full power to transact any and all business. This power of attorney was executed on the 23d day of July, 1895; was properly acknowledged and was recorded in the office of the register of deeds of Douglas county on the 11th day of January, 1896. The deposition of the plaintiff was taken and read in evidence, from which it appeared that, since the giving of the power of attorney, she had entrusted all of her business affairs to her son, Walter G. Preston, as such attorney. Walter G. Preston was called as a witness on behalf of the plaintiff, and testified that his mother had been incompetent to handle her own business by reason of nervous prostration; that it was necessary for some one to handle her business, and that she gave him a power of attorney; that he had attended to her business since 1891; that prior to the transaction with reference to the $6,000 note he had no recollection of transacting any business for his mother other than the payment of taxes on some property in Iowa; that on the 10th

day of January, 1896, William Preston gave him the $6,000 note, as attorney for Emilie V. Preston; that the note was given as part payment or reimbursement for what they called the home property, which, he stated, his mother owned; he did not remember the conversation which he had with his father at the time the note was delivered to him. From his evidence it also appears that the record title to the home property (a residence property in the city of Omaha) was in his father; that his father had repeatedly stated in his presence that it belonged, however, to his mother; that he had given it to her as a wedding present, although no conveyance had ever been made; this home property had been several times mortgaged, his mother joining in the mortgage, on express promise of his father that the mortgages would be paid and the home property preserved for his mother; these mortgages, however, were all executed long prior to the surrender of the $6,000 note into his possession for his mother's benefit. It also appears from his evidence that his father, William Preston, had been engaged in business on a large scale, and at the time this note was turned over his indebtedness would probably reach $100,000; that he had indorsed notes with his father probably to that amount, and at that time he was turning over to his creditors by way of mortgages his entire estate, and that the surrender of this $6,000 note was in pursuance of his purpose to turn over all of his property to his creditors. He testified also that, after the foreclosure proceedings had been instituted by the First National Bank of Mauch Chunk, he consulted with an attorney with reference to intervening in that proceeding, on his mother's behalf, on account of the $6,000 note which he then held for her; that, acting on the advice of the attorney whom he consulted in her behalf, he did not intervene. He testified also that at one time the $6,000 note had been placed with Earnest Griffith, as collateral, a transaction which he says he had no personal knowledge of, but which was conducted by his brother, Alfred Preston. The plaintiff offered the deposition of her husband,

William Preston, who testified that in 1875 he gave his wife their homestead in Omaha as a wedding present and a homestead for herself and children, and afterwards he desired to borrow money to improve property of his own and procured her consent to put a mortgage upon the homestead upon his promise to pay the mortgage off; that the property was afterwards remortgaged with the consent of his wife under a similar promise on his part; that he transferred the $6,000 note to Walter G. Preston for his mother; that no assignment of the mortgage was ever made; that he divided up his property *pro rata* among his creditors in proportion to what he thought they ought to have; that he turned the $6,000 note over to his son for Mrs. Preston as a part recompense for the loss of her homestead; that the transfer of the note to Mrs. Preston was at the same time that he turned his property over to his creditors; that the homestead had never been deeded to his wife; that he had no recollection of the conversation between himself and son at the time it was turned over. Mrs. Preston, in her deposition, also testified that she did not know what the controversy involved in the suit was; that she did not know if she ever owned the mortgage in the suit or not; she left her business affairs entirely with her son. These questions and answers appear in her deposition: "Q. You were not aware ten days ago that this suit had been commenced, were you? A. No; I was not. Q. Did you ever own or claim to own any promissory note executed by George F. Orchard? A. I don't know, I don't remember. Q. Did you ever own a note executed by George F. Orchard and his wife in the sum of $6,000? A. I don't remember. Q. Did you ever have any property of your own? A. I did. Q. What was the nature of that property? A. It was my home. Q. Any other property besides that? A. Yes, sir. Q. What was the nature of that property? A. It was property that was given to me in lieu of my home after its mortgage. Q. Did you ever have this other property in your possession? A. It was mine in lieu of the home, it was given to me in lieu of the

home. Q. Where was the property situated or located? A. It was south of the city. Q. Real estate? A. Yes, sir. Q. Was it ever deeded to you? A. That was attended to by my son." This deposition was taken in the state of Washington on the 17th day of October, A. D. 1903. There was also evidence by other relatives of statements made by William Preston to the effect that the home property belonged to his wife. The evidence also discloses that, at the time of the transfer of his property by William Preston for the benefit of his creditors, certain real estate was deeded to his sons (evidently the real estate testified to by Mrs. Preston at the time her deposition was taken). There was an entire absence of any evidence of knowledge of the First National Bank of Mauch Chunk and the Blackstone National Bank that Emilie V. Preston claimed any interest in the mortgage securing the $6,000 note.

On the part of the defendants, the record of the foreclosure proceedings was put in evidence, together with the sheriff's deed and the record of the same. It was also shown that the Blackstone National Bank had conveyed its interest in the property to Morsman, Jr., trustee for the Mauch Chunk Bank; that the Blackstone National Bank had gone into voluntary liquidation and had ceased to exist; that a portion of the premises involved had been conveyed to the Fred Krug Brewing Company; that no assignment of the mortgage securing the $6,000 note had ever been filed in the office of the register of deeds. Payment of the taxes on the property was also shown, together with services performed in reference to the assessed valuation and the defense of condemnation proceedings. There was evidence that the Mauch Chunk and Blackstone National banks, and Mr. Morsman, Jr., as trustee, had never had any knowledge of any claim to the $6,000 note on the part of Emilie V. Preston.

It is contended by plaintiff in this court that the decree in the foreclosure proceedings instituted by the Mauch Chunk Bank, in so far as it fixes a personal liability upon William Preston on account of his indorsement of the two

$5,000 notes involved in that case, and in so far as it determines that the holders of those notes were entitled to be first paid out of the proceeds of the sale of the property, is void, because it is not based upon any allegations in the petition of the Mauch Chunk Bank and the cross-petition of the Blackstone National Bank, and because it does appear from the allegations of such petition and cross-petition that the holders of these notes did not cause them to be protested for nonpayment, and that because of such failure to protest the notes for nonpayment Preston was released from any personal liability as an indorser.

We think, however, that under the facts in this case, no protest for the nonpayment of the notes was necessary. These notes were payable directly to Preston; he pledged them to the bank as collateral security for his own debt; there were no indorsers to be charged; Preston suffered no loss by reason of the failure to protest the notes.

Mr. Story, in his work on Promissory Notes (7th ed.), sec. 284, declares the rule to be "a relaxation of the strict rule as to the necessity of a due presentment of a note by the holder to the maker for payment at its maturity, where the note has been received as collateral security for another debt due to the holder. * * * In order therefore, to entitle the debtor, as owner of the collateral security, to resist the payment of the debt, he must establish that he has sustained damages by reason of the want of due diligence and due presentment on the part of the creditor, and to the extent of such damages he may recover compensation or indemnity, or recoup the amount in any suit for the debt."

Another writer on the same subject declares that "the creditor who has effects of the principal in his hands, or under his control for the security of the debt is a trustee for all parties concerned, and if such effects are lost through the negligence or want of ordinary diligence of the creditor, the surety is discharged to the extent that he is injured, the same as if the effects had been lost by the positive act of the creditor. In such case he is bound to

be diligent in preserving such effects to the same extent that any other trustee similarly situated is bound to use diligence. The kind of diligence required will be governed by the circumstances of each particular case. If the principal places in the hands of the creditor, as collateral security for the debt, an obligation of a third person, the creditor is, without any special agreement to that effect, bound to use diligence to collect the same and to charge all the parties thereto, and if anything is lost on account of his failure to use such diligence, not only the surety but the principal also is discharged to the extent that he is injured." 1 Brandt, Suretyship and Guaranty (3d ed.), sec. 498.

The rule announced by these authors is supported by sound reasoning, and, applied to the facts in this case, leaves nothing in the contention of the plaintiff as to the failure to protest the notes involved in the original foreclosure. In that case the answers of Preston to the petition and cross-petition were evidently prepared with this rule in view. He asserted therein his title to the notes and insisted upon a decree in conformity with his demand. It was right and proper that he should do so, and the trial court in that case rightfully found that these notes were held as collateral only, and, in so far as the rights of William Preston are concerned, he was absolutely bound thereby, and, whether liable as an indorser on these notes or not, he was still held under his contract of indebtedness to the holders of the notes; and, in our opinion, the court upon the issues there presented, properly found that the Mauch Chunk Bank and the Blackstone National Bank were first entitled to be paid out of the proceeds of the sale of the mortgaged property.

A mortgagee may, by agreement, fix the rights of the holders by assignment of the notes secured by the mortgage to the mortgage security, and such an agreement may be implied from the circumstances of the transfer. *Noyes v. White*, 9 Kan. 640; *Grattan v. Wiggins*, 23 Cal. 16. From the assignment of the notes to the banks by Preston as

collateral to his own indebtedness, it may fairly be presumed in equity, in the absence of facts showing a contrary purpose, that it was the intention of the parties that, out of the security for the payment of the notes the banks should first realize the amount of the collateral held by them, not exceeding Preston's indebtedness to the banks; and, in addition to the reason given by the trial court in the original foreclosure for the decree fixing the status of the notes, the decree was right upon the ground that such course was contemplated by the parties. Equity does not seek circuitous routes. It would have been idle to have permitted Preston to have participated *pro rata* in the proceeds of the sale of the security, and then require him to pay the money back to the banks in satisfaction of his indebtedness to them. The transfer of the $6,000 note to Mrs. Preston subsequently to the transactions with the banks would not affect their security. *Noyes v. White, supra.* But there are other considerations which aid us in a determination of the case. The right of William Preston, as to the $6,000 note held by him after the transfer to the banks, to participate in the proceeds of the sale of the mortgaged property in the original foreclosure was, as we have determined, to receive such proceeds after the payment of the costs, and the amount found due the plaintiff therein and the defendant, the Blackstone National Bank.

Mrs. Preston claims to have acquired the $6,000 note in January, 1896. At that time, by reason of the failure of the maker to pay the interest which had matured thereon in June and December, 1895, the note, according to the express stipulation of the mortgage, was past due for the purpose of the foreclosure which the plaintiff now invokes, and for that purpose was dishonored. She took, therefore, by the delivery of the note, a chose in action. She acquired the rights of William Preston, and no more.

Furthermore, the good faith of the transaction may well be questioned. We are far from convinced that the name of the wife is not being used for the purpose of enabling Preston to evade his obligations. Walter G. Pres-

ton, attorney in fact for the plaintiff, was a party to the original foreclosure, and according to his own testimony, consulted an attorney with reference to an intervention on behalf of his principal, while the foreclosure was pending. He knew that the plaintiff in that proceeding, and the defendant, the Blackstone National Bank, claimed a preference as against the holder of the $6,000 note. The course pursued by him was by virtue of authority from his principal, and she cannot now be heard to say that she was not bound by it. She permitted the foreclosure to proceed to final decree; permitted the interested parties to purchase the property upon the decree of the court that they were entitled to be first paid out of the proceeds of the sale; permitted the title to pass to the purchaser and the deed to be recorded without notice of her claim; permitted one of the parties to purchase, in good faith, the interest of another; permitted a sale of a portion of the property to another third party, and she should now rest in the position that she has voluntarily placed herself.

The judgment of the district court was right, and we recommend that it be affirmed.

DUFFIE, C., concurs.

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

AFFIRMED.

JACOB NORTH & COMPANY ET AL. V. EVA ANGELO.*

FILED DECEMBER 20, 1905. No. 13,855.

Appeal: ISSUES. A case appealed to the district court must be tried in that court upon the issues presented in the lower court.

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

* Rehearing allowed. See opinion, p. 381, *post.*

Wilson & Brown, for plaintiffs in error.

T. J. Doyle, contra.

JACKSON, C.

On March 6, 1903, the defendant in error, hereafter styled the plaintiff, instituted an action before a justice of the peace in Lancaster county against the plaintiffs in error, hereafter styled the defendants. The bill of particulars upon which the cause was tried in justice's court, omitting the caption, is as follows:

"Plaintiff, complaining of the defendants, avers that said defendants entered into a contract in writing with plaintiff on or about the year of 1897, which said contract was made by Jacob North, Sr., who was then the president and manager of Jacob North & Company of Lincoln, Nebraska, and who also represented the defendant, Clarence S. Paine, by the terms of which said contract the defendants agreed to pay to the plaintiff, as a commission for taking orders for the history of Nebraska, $7.50 for each order procured, and further agreed to pay to the plaintiff 10 per cent. commission on the collection of money due for histories sold, and also agreed to pay to the plaintiff $40 a month for services rendered in gathering data for said history; and, in pursuance of said contract, did sell and procure 15 orders for said histories, and there is due to the plaintiff from the defendants therefor the sum of $150, no part of which has been paid; that the names of the parties of whom said orders were procured are as follows: Mr. L. W. Colby, Judge Hazlett, Mr. Hoyte, Dr. Sprague, Mrs. Minnick, Mr. A. J. Sawyer, Prof. Caldwell, state library of Nebraska, school library and Allen Fisher. The names of the other parties to whom sales were made, this plaintiff has not a list but turned the same in, and the same are upon the records of the defendants, who have refused to permit this plaintiff to see the same, and plaintiff cannot at this

time give a full statement of the names of all the parties, nor can the plaintiff more definitely describe the names of those herein given, for the reason that she has not the full names of the parties. The contract, which was in writing, providing the compensation of this plaintiff for said work, this plaintiff cannot set out in full at this time, for the reason that the same is not in her possession, but is in the possession of the defendant. At a time when this defendant turned in her records in pursuance of the request of the defendants pertaining to said business, said contract was delivered, through inadvertence, with the other papers, and since said time has been in possession of the defendants and defendants have refused to return the same to plaintiff. Said contract, in the employment of this plaintiff, was repeatedly referred to and ratified by the defendants, after the same was made. On the 12th day of November, 1901, the defendant, Clarence S Paine, wrote this plaintiff with reference to said contract as follows: 'If you are still after those people (referring to the collections placed in the hands of this plaintiff) and pushing matters, well and good, but, if not, I should like to have you return histories and supplies, etc., as I can use them. In any event I should like to hear from you.' This was written for the defendants, and all of them, in recognition of the contract of this plaintiff, hereinbefore referred to. Again, on the 9th day of December, 1901, the defendant, Paine, for all of the defendants wrote this plaintiff as follows: 'Please return at once the History of Nebraska, contracts and supplies which you have. It seems to me that I have waited as long as I should be required to for you to show some interest in the business which you have in hand. Don't you think so?' Parties from whom collections were made, so far as this plaintiff can give a list of same, are as follows: Mr. Abbott, Mr. Stearns, Mr. Tyrrell, Mr. Stevens, Mr. Raymond, Mr. A. J. Sawyer, Mr. McBrien, Mr. Dodson, Governor Thayer and Chancellor Andrews, and numerous others whom this plaintiff cannot name for the reason that the list and

records of the same are in the hands of the plaintiff. The dates of the collections this plaintiff cannot give with any degree of accuracy, for the reason that she has not the data which she turned in in her report to the defendants, and the defendants have full and complete records of the collections made, and the time of making the same, and the parties from whom they were made, and will not give this plaintiff access to their records or permit her to obtain said data until so ordered by the court. The months for which plaintiff was employed by the defendants, for which she claims the sum of $65, were as follows: From about September 12 to December 20, 1901. Plaintiff further says, in pursuance of said contract she collected for said defendants the sum of $300, and there is due to this plaintiff from said defendants for said services so performed the sum of $30, no part of which has been paid. Plaintiff further avers that she worked for said defendants for the period of three months by the terms of said contract, and there is due to this plaintiff from said defendants therefor the sum of $65, no part of which has been paid. Plaintiff avers that, by reason of the premises, there is due to this plaintiff from the said defendants the sum of $200, no part of which has been paid. Wherefore the plaintiff prays judgment against the defendants for the sum of $200 and costs of suit."

From a judgment favorable to the plaintiff, the defendants appealed to the dstrict court. In the district court the plaintiff filed a petition substantially the same as the bill of particulars. The issues were joined in the district court upon this petition by proper pleadings and the case proceeded to trial. The trial of the case in the district court occupied the attention of the court for several days. During the progress of the trial, and after the taking of testimony had commenced, plaintiff asked and obtained leave of court, over the objection of the defendants, to amend her petition, the record being this: "Plaintiff requests the court for permission to amend the

petition by inserting after the words 'was made,' on the second page of the petition, the words 'adopted and accepted the terms thereof.'" Objections were made on behalf of both defendants, but the amendment was allowed, and exceptions taken, and the trial proceeded. On the third day of the trial, the plaintiff, over the objections of the defendants, obtained leave of court to file, and did file, an amended petition which, omitting the caption, is as follows:

"Plaintiff, complaining of the defendants, avers that on or about the month of May, 1898, the firm known as Jacob North & Company, a copartnership, of Lincoln, Nebraska, then composed of Jacob North, Sr., and Jacob H. North, entered into a written contract with this plaintiff, by the terms of which they agreed to pay to the plaintiff as a commission for taking orders for a work then in contemplation of publication by the said defendants, known as the History of Nebraska, agreeing with the plaintiff to pay her a commission of $7.50 for each order procured, and further agreeing to pay to the plaintiff 10 per cent. commission on all collections of money made by her upon orders given for said history; that, in pursuance of said contract, the plaintiff entered upon her duties under said contract and solicited and procured orders for the defendants; that thereafter, and about the 9th day of September, 1899, Jacob North, Sr., a member of said copartnership, died in Lancaster county, Nebraska; that after the death of said Jacob North, Sr., the business of said copartnership was still continued in the name of Jacob North & Company. That Hannah North, devisee in his will, was substituted in said partnership for the said Jacob North, Sr., and said new partnership still continued said enterprise of gathering and procuring data for said history and orders for the same; that soon after the death of said Jacob North, Sr., this plaintiff called upon said new copartnership of Jacob North & Company, and said new copartnership of Jacob North & Company, the defendants herein, with a full knowledge of the terms and conditions

of the contract executed by the old firm of Jacob North & Company to this plaintiff, accepted and adopted the terms of said contract, and promised and agreed to and with this plaintiff, in consideration of this plaintiff continuing in said work with said defendants, the new copartnership of Jacob North & Company would pay to this plaintiff all moneys earned by her in the performance of said work, and for future services which she might render would pay to her $7.50 for each order procured for said history, or each history for which she obtained an order, and would pay to her $7.50 for each order she had procured and 10 per cent. commission on all moneys collected by her on orders given for said history, which was accepted by the plaintiff, and by reason thereof, and relying thereon, she continued in said services in the performance of said work; that, at the time of commencing said work, Jacob North & Company stated to this plaintiff that said history would be completed and ready for delivery early in the year of 1899; that, again, shortly after the death of said Jacob North, the defendants stated to this plaintiff that said history would be completed and ready for delivery in a short time, and directed the plaintiff to so represent to the subscribers to said history; that, again, on the 12th day of September, 1901, the defendant, Clarence S. Paine, who was then a joint owner with the defendants, Jacob North & Company, in said enterprise of publishing said history, orally promised and agreed for and on behalf of the defendants that defendants would pay to this plaintiff the sum of $7.50 for each order procured by her for said history, and would further pay to this plaintiff the sum of 10 per cent. on all moneys collected by her on orders given for said history, and would pay this plaintiff the sum of $40 a month for gathering data, photographs, plates and information pertaining to said history; that, in pursuance of said contracts, this plaintiff did procure for the defendants and delivered to the defendants 19 written orders for said history, including the orders delivered to the old firm of Jacob North & Com-

pany, and accepted and received by the defendants; that there is due to this plaintiff from the defendants for said services so performed in the procurement of said orders for said history as aforesaid the sum of $142.50; that there has been paid thereon a total sum of $52.50, leaving a remainder due this plaintiff thereon of $90, no part of which has been paid; that said payments consisted of $37.50 commissions collected direct from the parties making payments upon said orders, and $15 paid thereon by the defendant, Clarence S. Paine; that, in pursuance of said contracts, this plaintiff collected for the defendants upon said orders for said history the sum of $105; that there is due to this plaintiff from the defendants for said collections so made the sum of $10.50, no part of which has been paid; that, in pursuance of said later oral contract made with the defendants through the defendant, Clarence S. Paine, on or about the 12th day of September, 1901, this plaintiff procured for the defendants two orders for said history, and there is due to plaintiff from the defendants by reason thereof the sum of $15, no part of which has been paid. This plaintiff further avers that, under the terms of said contract, she worked for the defendants from the 12th day of September, 1901, to the 2d day of December, 1901, at the agreed price of $40 a month, making a total time of three months and eight days, and there is due to this plaintiff from the defendants by reason of said services so rendered the sum of $140, no part of which has been paid. That there is now due to the plaintiff from the defendants, by reason of the premises, a total sum of $200, no part of which has been paid. Wherefore plaintiff prays judgment against the defendants for the sum of $200 and costs of suit."

To the order allowing the amended petition to be filed, the defendants severally excepted, and afterwards moved to strike the amended petition from the files. The motion was denied and the trial again proceeded, resulting in a verdict and judgment for the plaintiff. From the judgment so obtained, the defendants prosecute error to this court.

Among other errors assigned is the order of the district court permitting the filing of the amended petition and the refusal of the trial court to strike the amended petition from the files after it had been filed, it being argued that the amended petition presented another and different issue from the one presented and tried in justice's court. The evidence discloses that in the year 1897 Jacob North, Sr., and Jacob H. North were partners, doing business as Jacob North & Company. These were the only members of the partnership, and that that partnership continued until the 11th day of September, 1899, when Jacob North, Sr., one of the partners, died. Some weeks afterwards Hannah North and Jacob H. North, the surviving partner in the old firm of Jacob North & Company, associated themselves together as partners and succeeded to the business of the old partnership, which they continued under the partnership name of Jacob North & Company, one of the defendants in this action. The evidence also discloses that a considerable portion of the services performed by the plaintiff, and for which she claims the right to recover in this action, were performed by her during the existence of the partnership which was extinguished by the death of Jacob North, Sr., and by the amended petition it is sought to charge the present partnership (one of the defendants) with services which the plaintiff claims to have performed for the defunct partnership, and the amount of the judgment obtained by plaintiff in the district court necessarily includes the plaintiff's claim for services performed during the lifetime of the former partnership, so that the question fairly arises as to whether in justice's court the plaintiff's bill of particulars presented a similar demand. In our judgment it did not. The bill of particulars recites a written contract with the defendants in the year 1897, by the terms of which the defendants agreed to pay the plaintiff certain commissions for taking orders for a History of Nebraska, and for the collection of moneys, and a salary per month for services rendered in gathering data for

the history, and upon that alleged contract the plaintiff sought to and did recover in justice's court. It would be trifling with language to say that the same cause of action was set out in the amended petition, upon which the plaintiff was permitted to recover in the district court.

The district court erred in permitting the amended petition to be filed, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings 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 for further proceedings in conformity with this opinion.

REVERSED.

SEDGWICK, J., dissents.

The following opinion on rehearing was filed December 21, 1906. *Judgment of reversal vacated and judgment of district court affirmed:*

1. **Appeal:** ISSUES. A case must be tried in the district court upon appeal upon the issues tried in the lower court. This does not mean that no issuable fact can be pleaded in a petition in the district court that was not alleged in the bill of particulars in the lower court. If the identity of the cause of action is preserved in the petition it is sufficient.

2. **Witnesses:** COMPETENCY. A party is not prohibited from testifying by section 329 of the code, unless his adversary represents a deceased person in the issue that is being tried.

SEDGWICK, C. J.

The bill of particulars in the justice's court and the amended petition in the district court are set out in full in the former opinion, *ante,* p. 373. The judgment of the district court was reversed because it was thought that the amended petition contained allegations which amounted to a change of the issues from those presented in the jus-

tice's court. After the plaintiff had made a written contract with the copartnership that was then doing business under the name of Jacob North & Company, and was composed of Jacob North, Sr., and Jacob H. North, one of the members of the copartnership died, and a few weeks later his widow, who was legatee under his will, was substituted in his place in the copartnership, and the business continued under the same name. The action was brought against Jacob North & Company, but the firm at that time was composed of Jacob H. North, one of the original copartners, and Hannah North, who had been substituted, as before stated, in the copartnership for the deceased member thereof. Nothing was said in the bill of particulars as to the individual membership of the firm, except that it was alleged that Jacob North, Sr., was, at the time the contract was made, president and manager of the copartnership and acted for the copartnership in making the contract. The amendment which constituted the supposed change of issue consisted of the allegation: "That after the death of said Jacob North, Sr., the business of said copartnership was still continued in the name of Jacob North & Company. That Hannah North, devisee in his will, was substituted in said partnership for the said Jacob North, Sr., and said new partnership still continued said enterprise of gathering and procuring data for said history and orders for the same; that soon after the death of said Jacob North, Sr., this plaintiff called upon said new copartnership of Jacob North & Company and said new copartnership of Jacob North & Company, the defendants herein, with a full knowledge of the terms and conditions of the contract executed by the old firm of Jacob North & Company to this plaintiff, accepted and adopted the terms of said contract, and promised and agreed to and with this plaintiff, in consideration of this plaintiff continuing in said work with said defendants, the new copartnership of Jacob North & Company would pay to this plaintiff all moneys earned by her in the performance of said work, and for future serv-

ices which she might render would pay to her $7.50 for each order procured for said history, or each history for which she obtained an order, and would pay to her $7.50 for each order she had procured and 10 per cent. commission on all moneys collected by her on orders given for said history, which was accepted by the plaintiff, and by reason thereof, and relying thereon, she continued in said services in the performance of said work."

Did this constitute such a change of plaintiff's cause of action as to require her petition to be stricken from the files for that reason? The plaintiff sued to recover for services rendered to the copartnership of Jacob North & Company. After the death of Jacob North, Sr., the business of the copartnership continued to be conducted by the surviving partner in the same name for three or four weeks, whereupon the widow and legatee of the deceased partner became a member of the firm in place of the deceased and, without any change in the name of the firm, the same business was carried on in the same way. It would appear from the record that the new partner, by the terms of the will, succeeded to all of the rights of the deceased partner in the business. The contract that the plaintiff had entered into with the firm before this change in its membership was being carried out by the parties at the time of the death of the senior North, and was continued after Mrs. North became a member of the partnership in the room of her deceased husband. The action was brought against the copartnership in the name which it has always borne and has continued against that defendant in that name. The plaintiff did not rely upon these facts to fasten a liability upon the firm, as at present organized, for contracts entered into and services rendered before the change in the personnel of the membership of the firm. It seems to have been supposed by both parties that the present firm would not be liable for such contracts and services, unless the new member had expressly agreed that it should be so liable, or some member of the firm had made such agreement after the new member entered

the firm. The allegations were that the contracts that had been entered into by the firm before the change in the membership were ratified and agreed to after the change in the membership. Upon this point the allegations were specific and alleged the making of a contract in detail similar to the original contract. It was upon this issue that the case was tried. The cause of action in the justice's court was services rendered by the plaintiff for the firm of Jacob North & Company, and manifestly the cause of action was the same in the amended petition in the district court. In a leading case in this court upon this subject it was said:

"If new issues can be raised in the appellate court it is not a trial of the same cause—not in fact an appeal." *O'Leary v. Iskey*, 12 Neb. 137.

This is the true reason of the rule, and, accordingly, it was said in *Citizens State Bank v. Pence*, 59 Neb. 579:

"The facts were pleaded with more particularity in the district court than in the court from which the appeal was prosecuted; nevertheless, the identity of the cause of action was fully preserved. The plaintiffs were not required to state their cause of action in the district court in the same language as it was set forth in the county court."

To plead an issuable fact in the appellate court that was not pleaded in the lower court is not necessarily pleading a new cause of action, and a change in the issue presented in the petition is not subject to this objection, unless it is such a change as to amount to a new cause of action. We think therefore the court did right in overruling the motion to strike the amended petition from the files.

2. Upon the trial in the district court the plaintiff was asked to testify as to the making of the original contract between herself and the defendant Jacob North & Company and testified that the contract was made with the copartnership through Jacob North, Sr., now deceased; whereupon it was objected that it was incompetent for her to testify to conversations and transactions between herself and the deceased. It has been held that when one

member of a copartnership dies, and the surviving member continues the business in the name of the copartnership, one who had business transactions or conversations with the copartnership, through the deceased member thereof, is prohibited by section 329 of the code from testifying to such transactions or conversations in an action by him against the copartnership. *Mead v. Weaver*, 42 Neb. 149. This is upon the theory that the copartnership is the representative of the deceased member. In this case, if the parties had insisted that the partnership, as now organized, is the successor of the partnership as it existed when the plaintiff first entered into contract with it, and that the substitution of the new member in the partnership for the deceased member made the partnership, as now organized, liable for the contracts it had entered into through the deceased partner, there would be great force to the objection; that is, if the plaintiff was seeking to enforce a liability which existed against the deceased at the time of his death and which had been transferred to the new member of the partnership, a liability which the deceased would now be interested in contesting, if living, the new partnership would be considered the representative of the deceased in such a contest, and, being the adverse party, the plaintiff would not be allowed to testify to such transactions. In this case, however, the defendant insisted, and plaintiff seems to have conceded, that the liability of the defendant copartnership, as now organized, depended solely upon contracts that had been made since its present organization, and that, in order to recover, the plaintiff must prove that she had entered into a contract with the copartnership, as now organized, by which the copartnership made itself liable for her claim. This issue was tried to the jury, and the evidence in regard to a prior conversation or contract with Mr. North, the deceased, is not within the prohibition of the statute. It is not as a representative of the deceased that the copartnership now defends. It is, as the issue was presented and tried, called upon to defend against its own contracts entered

into by the copartnership, as now constituted. The objection then was properly overruled.

3. It is argued somewhat at length in the brief that the evidence is not sufficient to support the verdict. A large amount of evidence was taken considering the amount involved in the litigation and the evidence is somewhat conflicting, but we cannot say that there is such a failure of testimony as to render the verdict erroneous on that account.

4. The court was asked to instruct the jury that the plaintiff could not recover against the present firm of Jacob North & Company for work that had been done for the firm of Jacob North & Company before the death of Jacob North, Sr. The refusal of this instruction is assigned as error. The issues were made, and the case was tried, as before stated, upon the theory that the copartnership, with members as at present organized, expressly agreed that the plaintiff should continue her work, and that the firm of Jacob North & Company would pay her for all services rendered to that firm, notwithstanding that the membership had been changed. It seems reasonable that the parties should so agree, under the circumstances. The instruction asked would be equivalent to telling the jury that there was no such agreement, which under the evidence in this case would be erroneous, as before stated.

The petition in error contains a large number of assignments, but such of them as are insisted upon in the briefs fall within the principles already discussed, and it is not thought necessary to pursue the matter further. We have discovered no error in the record requiring a reversal of the judgment.

The judgment heretofore entered is vacated, and the judgment of the district court is

AFFIRMED.

RICHARD THESING V. ANDREW WESTERGREN.

FILED DECEMBER 20, 1905. No. 14,029.

Judicial Sale: APPEAL: REDEMPTION: RES JUDICATA. During the pendency of an appeal from a judgment of the district court confirming a judicial sale, the supreme court is vested with jurisdiction to entertain an application to redeem and to determine the amount of redemption money required for that purpose, and where such jurisdiction is exercised the adjudication of the appellate court incident thereto becomes *res judicata.*

ERROR to the district court for York county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

Meeker & Wray and *France & France,* for plaintiff in error.

F. C. Power, contra.

JACKSON, C.

The plaintiff in error was the owner of the west half of the northwest quarter and the southwest quarter of section 4, township 12, range 2 west, in York county. This property was incumbered by three separate mortgages. One of the mortgagees instituted foreclosure proceedings in the district court for that county. The holders of the other mortgages appear by cross-petitions seeking a foreclosure of the mortgages held by them. Proceedings were had resulting in a decree foreclosing all of the mortgages. The property was sold upon the decree, and the defendant in error purchased at such sale the east half of the southwest quarter for the sum of $2,205. The west half of the southwest quarter was purchased by Bertha L. Richardson for $1,800; and the west half of the northwest quarter by A. Bothwell, one of the mortgagees, for $1,350. From an order confirming the sale plaintiff in error appealed to this court, and while the appeal was pending applied here for an order permitting him to redeem the

entire tract. The application was by motion, which contained this prayer: "And appellants ask the court to fix the amount to be paid by them to each of said purchasers to redeem said tracts of land from said sales." Jurisdiction of the motion was entertained, and upon the hearing it was ordered that a redemption be allowed from the sale to A. Bothwell upon payment to the clerk of the district court for him the sum of $2,591.92, with 7 per cent. interest from the date of the decree, and all costs; and from the sale to Bertha L. Richardson by payment to the clerk of the district court interest on $1,200 at 12 per cent. from May 15, 1899, to the date of redemption, and at the same rate on $1,000 from November 18, 1901, to the date of redemption, and a return to said Richardson of the $1,800 purchase money held by the sheriff; and from the sale to the defendant in error herein upon payment to the clerk of the district court of interest on $2,205 at 12 per cent. per annum from May 15, 1899, to the date of redemption, and upon the return of the principal of the purchase money paid by such purchaser. All of the sums required by the order of the court to be paid as a condition precedent to the redemption were fully paid, and thereafter the orders of confirmation entered by the district court were vacated by this court and the appeal dismissed by final order of the date of December 17, 1901.

On July 30, 1903, the plaintiff in error instituted an original action in the district court for York county against the defendant in error, alleging as a cause of action that preceding the sale of the real estate recited above he entered into an oral agreement with the defendant in error, by the terms of which it was agreed that the defendant should purchase the real estate afterwards purchased by him at the sale and that the plaintiff should be permitted to redeem the same at any time before final confirmation in the supreme court, by paying to the defendant the amount of the purchase money, together with such interest as the defendant might be obliged to pay

for the use of the money necessary for the purchase; that the defendant did in fact borrow the money and pay for the use of the same interest at the rate of 5 per cent. only; that, when the plaintiff was prepared to and did redeem, the defendant refused to perform the agreement on his part and demanded interest at the rate of 12 per cent. per annum, that being the rate allowed by statute. It is further alleged that, because of the fact that the cause was about to be finally reached in the supreme court and would soon be disposed of, the plaintiff was under duress and was obliged to meet the demands of the defendant in order to avoid the ultimate loss of his property. The defendant, in answer, pleaded the appeal to the supreme court from the order of confirmation, the application there made to redeem, and the order permitting the same and fixing the amount to be paid; that he employed counsel, who appeared and resisted the right of redemption, and urges such proceedings as an adjudication and estoppel. By the reply the proceedings in the supreme court were admitted. After the issues were fully made up in the trial court, judgment was entered for the defendants on the pleadings, and the plaintiff prosecutes error.

We have not set out the pleadings at length nor presented in the statement the entire defense pleaded, because of the conclusion that we have reached that upon the issues stated the judgment must be affirmed. It is contended by the plaintiff in error that this court was without jurisdiction to entertain the application to redeem, and for that reason the order authorizing the redemption and determining the amount of redemption money to be paid is void. The general rule is that, after the jurisdiction of the supreme court attaches, the trial court has no longer authority to take any steps but such as may be necessary to transmit the record to the supreme court and to carry into effect its mandate. An appeal supersedes further exercise of judicial functions and transfers such jurisdiction to the appellate court, where the rights of all parties will be conserved. Exceptions to this rule

are statutory, notably the appointment of a receiver for the preservation of property during the pendency of an appeal, where concurrent jurisdiction is expressly conferred on the supreme and district courts, or the judges thereof. It is doubtless true, as contended by plaintiff in error, that he might have redeemed without application to any court, but he desired something more than an order permitting the redemption. Facts intervened which seemed to require a judicial determination of the amount necessary to be paid to secure that result. We find nowhere authority for holding that such an application, during the pendency of the appeal, might be made in the court below, and it would be anomalous to hold that the jurisdiction does not exist somewhere. We have no doubt as to the jurisdiction of this court to entertain the application to redeem and determine the amount required to be paid by the party desiring to do so. That the plaintiff in error obtained some measure of relief from the procedure adopted by him is evident from the terms of the order, which required him to pay to the purchaser Richardson interest on $1,200 from one date, and on $1,000 from another date. An explanation of this order is found in the argument of counsel that interest was allowed only from the date the money on the bid was actually paid. The validity of the order is not affected by the fact that notice of the application to redeem was not served on the defendant in error, because he was represented at the hearing by counsel and resisted the order. We conclude that the jurisdiction of the court was ample and complete, and that both parties are bound thereby.

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

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

WALTER A. LEESE, JUSTICE OF THE PEACE, v. COURIER PUBLISHING & PRINTING COMPANY.

FILED DECEMBER 20, 1905. No. 14,041.

Justice of the Peace: ILLEGAL FEES: PENALTY. The taking of fees by a justice of the peace for services performed by him and for which no fee is allowed is actionable under the provisions of section 34, chapter 28, Compiled Statutes, 1903.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

T. J. Doyle, for plaintiff in error.

J. A. Brown and *C. O. Whedon, contra.*

JACKSON, C.

This is an action to recover the penalty provided by section 34, chapter 28, Compiled Statutes 1903 (Ann. St. 9060), and is the second appearance of this case here, the first opinion appearing in 65 Neb. 581.

After the cause had been remanded, plaintiff filed an amended petition wherein the allegation material to the inquiry is: "That said defendant, Walter A. Leese, justice of the peace, on or about the 24th day of July, 1899, did demand of this plaintiff the sum of 50 cents for the approval of said appeal bond as follows: 10 cents for filing the same; 15 cents for copying the same upon his docket; and 25 cents for acknowledgment and certificate of the same. That the charging and taking of said sums of 15 cents for copying and 25 cents for acknowledgment and certificate were unauthorized and unlawful, and said defendant did demand, charge and take from this plaintiff the said sums without authority and contrary to law. That said sums so demanded and received by the defendant from this plaintiff, as aforesaid, were more than by law the defendant was entitled to receive and the taking

thereof was a taking of greater fees than allowed by law, and was in violation of section 34, chapter 28 of the Compiled Statutes of Nebraska, 1899, entitled 'Fees.' Whereby the defendant became indebted to the plaintiff in the sum of $50, no part of which has been paid." The answer to the amended petition contains, first, a general denial; second, a plea of the statute of limitations; third, a want of legal capacity to sue; and, fourth, the constitutionality of the act under which the action is brought, together with the issue that the petition fails to state a cause of action. The reply is a denial of the allegations of new matter. A trial on the issues thus tendered terminated in a verdict being directed for the plaintiff for the sum of $50 and a judgment thereon. The defendant prosecutes error.

The petition in error and argument in support thereof present the following questions for review: First, that the court erred in overruling an objection to the introduction of any evidence, for the reason that the petition failed to state a cause of action; second, that the action was barred by the statute of limitations; third, that the verdict and judgment are contrary to the evidence; fourth, the constitutionality of the act authorizing the maintenance of the action; fifth, want of legal capacity to sue; and, sixth, that the court erred in directing a verdict for plaintiff.

The amended petition, upon which the second trial was had, was filed more than four years after the cause of action accrued, and it is argued that the cause of action therein stated is entirely different from the one contained in the original petition, and that the action is therefore barred by the statute. An examination of the first opinion, however, discloses that the identical items enumerated in the amended petition were involved in the original cause of action, and that it was because of the charging and taking of the fees said to be illegal that the first judgment was reversed. The original petition was offered in evidence at the second trial, and it appears that the only

difference is that in the original petition it was charged that the defendant did demand of this plaintiff the sum of 50 cents for the approval of said appeal bond, and did demand and take the said sum of 50 cents therefor contrary to law, while in the amended petition, upon which the second trial was had, the itemized statement shows that only 25 cents of the 50 cents collected was charged for the approval of the bond. The charging of a fee, however, for the approval of the bond is the essence of the complaint, and the illegal charge set out in the amended petition is identical with that in the original, except as to the amount, and the plea of the statute of limitations must therefore be determined adversely to the plaintiff in error.

The questions suggested by the fourth and fifth contentions have already been determined in this court adversely to the plaintiff in error. *Iler v. Cronin,* 34 Neb. 424; *Graham v. Kibble*, 9 Neb. 182.

The assignments of error involved in the objection to the introduction of evidence on the part of the plaintiff for the reason that the petition fails to state a cause of action, and that the verdict and judgment are contrary to the evidence, are based upon a construction of the statute, which we are urged to adopt. The statute is as follows: "If any officer whatever, whose fees are hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, or if any such officer shall charge or demand, and take any of the fees hereinbefore ascertained and limited, where the business for which such fees are chargeable, shall not be actually done and performed, such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable by law." Comp. St., ch. 28, sec. 34. This statute is penal in its nature and should be strictly construed, and the contention of the plaintiff in error is that the cause of action set out in the petition does not come within the letter of the statute; that the penalty provided by the statute is for the taking of a

greater fee than that expressed and limited for services performed, or for charging or demanding and taking fees ascertained and limited for business which has not actually been done, whereas the cause of action set out in the petition is for the charging and taking of fees for services actually performed and for which no fee has been provided by statute. There is considerable force in this contention, and, if it were an open question, our conclusion might be different. However, it was so held in *Phœnix Ins. Co. v. McEvony*, 52 Neb. 566, and in our former opinion it was expressly ruled that the charges were illegal and that the collection of the fee therefor was actionable under the provisions of the statute quoted, and it was because of that construction that the former judgment was reversed.

The only question remaining is, was the court justified in directing a verdict for the plaintiff? The evidence discloses, without dispute, that at the time the item of 50 cents was paid to the plaintiff in error, counsel for defendant in error presented an appeal bond and applied for a transcript, for the purpose of taking an appeal from a judgment rendered by the plaintiff in error as a justice of the peace against the defendant in error, and was informed that the advance charges on the appeal would be 50 cents. This sum was paid, and later, when the transcript was completed and delivered to counsel for appellant in that proceeding, the further sum of $1.75 was demanded and paid for the transcript and certificate thereto, and at that time, at the request of counsel representing the appellant therein, defendant in error herein, the plaintiff in error made and delivered to such counsel a statement and receipt as follows:

"In Justice Court. Before Walter A. Leese, Brownell block, rooms 16 to 19, Lincoln, Nebr. Charles F. Wilson v. Courier Ptg. & Pubg. Co., Doc. 40, page 155. J. A. Brown, Def'ts Attorney.

"Def'ts J. P. Fees for appeal costs, viz.:

July 24-99. Filing appeal bond	$ .10
Ack. & certificate appeal bond	.25
Copying appeal bond	.15
Transcript 1,500 words	1.50
Certificate to transcript	.25
Total	$2.25
July 24-99. Cr. def't	.50
Bal. trans. & cert. fees	$1.75

"Aug. 19, 1899. Rec'd balance of above amt. $1.75 from def't, by J. A. Brown. Walter A. Leese, Justice of the peace."

The taxation of costs on the justice's docket appears as follows:

"Costs in Margin.

"Justice's fees—Walter A. Leese:

	Plaintiff's Costs.	Defendant's Costs.	
Docketing case	$ .25	....	
Summons & filing	1.20	....	
Filing papers	.30	.30	
Entering judgment	.50	....	
Satisfaction	....	.25	
Entering motions and rules	.20	.10	
Swearing witness	.20	.10	
Copying	.10	....	
Continuance	.50	....	
Attendance	1.00	....	
Filing appeal bond	....	.10	
Certificate approval bond	....	.25	
Copying appeal bond	....	.15	
Transcript for appeal 1,500 words	....	1.50	
Certificate to trans	....	.25	
Total J. P. costs			$7.25

7-24-99.	Credit Def't..	$ .50		
8-19-99.	Cr. Def't.....	1.75		2.25
	Bal.			$5.00
	Officer's Fees—A. M. Bartram:			
	Service of alias summons....	$ .50	....	
	Copy of alias summons.....	.25	....	
	Mileage on alias summons...	.10	....	
	Total	$ .85	....	$ .85
	Witnesses:			
	Charles F. Wilson	Pl'ff		
	Sarah B. Harris.....		$1.00	
	Lottie Hummel		1.00	
	Total		$2.00	$2.00"

From this statement it appears that the total taxed as the defendant's costs amounted to $3, the item of 25 cents for entering satisfaction of judgment it is conceded was improperly taxed; striking out that item together with the items of 25 cents for certificate of approval of appeal bond and 15 cents for copying the same, there would still be left $2.35 of legal costs primarily chargeable to the defendants therein, 10 cents in excess of the exact amount actually paid; and it is the contention of the plaintiff in error herein that, as the item of 50 cents paid July 24, 1899, was credited generally, it should be applied on the legal costs and not the illegal. Upon a consideration of the whole evidence, however, we are convinced that it was the purpose of the plaintiff in error, at the time the items of 50 cents and $1.75 were charged and received, to charge the same as they are specified in his receipt. We entertain no doubt that these charges were made and collected by the plaintiff in error in the utmost good faith, with the conviction that he was entitled to charge and receive the same; however, in doing so he acted at his peril. The statute as applied to the facts in this case is manifestly unjust.

It is evident, however, that under the facts there was no course open to the trial court except to direct a verdict for the plaintiff, and we recommend that the judgment 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.

MARY J. MCINTIRE, APPELLEE, V. CHARLES H. MCINTIRE ET AL., APPELLANTS.

FILED DECEMBER 20, 1905. No. 14,057.

Deeds: CANCELATION. The plaintiff, a soldier's widow 81 years of age, was the owner of a small cottage and two lots in the village of Louisville. She had no other property and no means of support except a widow's pension. She conveyed the property to her son and daughter-in-law upon an express promise of support. Within a short time of the conveyance she was ejected from their home and compelled to seek support elsewhere. *Held*, that the decree of the district court canceling the conveyance should be affirmed.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

D. O. Dwyer, for appellants.

S. M. Chapman, contra.

JACKSON, C.

The plaintiff instituted this action to set aside a conveyance of real estate. There was a decree in the trial court conforming to the prayer of the petition. The property consists of a small cottage and two lots in the village of Louisville, Cass county, said to be of the value of $200. The plaintiff is a soldier's widow, 81 years of age at the

time of the trial, and has no property other than that in controversy, and no means of support except a widow's pension. The defendants are her son and daughter-in-law.

The plaintiff claims to have conveyed the premises to the defendants in consideration of an express promise on their part to take care of her and provide her a good home, and that within two months from the delivery of the deed she was turned out of doors and compelled to seek refuge elsewhere. The defendants contend that the property was a gift. The evidence is conflicting and it would serve no useful purpose to set it out at length. We find, however, ample support for the decree, and conclude that the court would have been remiss, had it failed to restore the widow's mite.

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

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1906.

STATE OF NEBRASKA V. JOSEPH CANNOT.

FILED JANUARY 3, 1906. No. 13,710.

State v. Tanner, 73 Neb. 104, approved and followed.

ORIGINAL action in the nature of ejectment. *Judgment for the state.*

Norris Brown, Attorney General, for the state.

Sanford Parker, M. F. Harrington and *W. T. Wills, contra.*

PER CURIAM.

This cause in all its essential features is the same as the case of *State v. Tanner,* 73 Neb. 104. The same questions of fact and of law are presented in both cases. The decision in the one controls in the other. On the authority therefore of the decision in the case cited, the demurrer in the case at bar is sustained, and it is ordered that judgment be rendered therein in favor of the state as in its petition prayed.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA V. WILLIAM LUEDKE.

FILED JANUARY 3, 1906. No. 13,711.

State v. Tanner, 73 Neb. 104, approved and followed.

ORIGINAL action in the nature of ejectment. *Judgment for the state.*

Norris Brown, Attorney General, for the state.

Sanford Parker, M. F. Harrington and *W. T. Wills, contra.*

PER CURIAM.

This cause in all its essential features is the same as the case of *State v. Tanner*, 73 Neb. 104. The same questions of fact and of law are presented in both cases. The decision in the one controls in the other. On the authority therefore of the decision in the case cited, the demurrer in the case at bar is sustained, and it is ordered that judgment be rendered therein in favor of the state as in its petition prayed.

JUDGMENT ACCORDINGLY.

IN RE APPLICATION OF A. JORGENSEN FOR A LIQUOR LICENSE.

FILED JANUARY 3, 1906. No. 13,742.

1. **Intoxicating Liquors: LICENSE.** The board of fire and police commissioners of a city of the metropolitan class may, for good reason, in the exercise of a sound discretion, refuse to grant a license to sell malt, spirituous and vinous liquors, even though no protest or objection by others be interposed against the granting of the license applied for.

2. ———: ———. An applicant had complied with all the requirements of the statute and ordinances relating to the subject, and no protest or remonstrance had been made against the granting of his application, but the board of fire and police commissioners refused to grant it, for reasons expressed in a resolution spread upon the record as follows: "Resolved, that the application of A. Jorgensen for a license at number 124 North Tenth street, Omaha, be, and the same hereby is, denied and refused, for the reason that there are now four or five saloons in operation within a block of the said place, and that the public interests require that no new or additional saloons be allowed at said place. Applications for a saloon license at said place have twice been refused to different parties in the past two years, for the same reason." Upon appeal to the district court the decision of the board was approved and affirmed. *Held*, upon the record as presented, that no error was committed by the ruling complained of.

ERROR to the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Cooper & Dunn, for plaintiff in error.

F. A. Brogan and *W. D. McHugh, amici curiæ.*

HOLCOMB, C. J.

The plaintiff in error complains of the judgment of the district court affirming an order of the board of fire and police commissoners refusing his application for a license to sell malt, spirituous and vinous liquors in the city of Omaha. The alleged error complained of in its last analysis relates to the action of the board in denying the plaintiff a license on the application presented to that body. From the record before us, it is made to

appear that the applicant presented to the board for its consideration with his petition evidence showing that he had complied with the law and ordinances of the city, and that no objection existed as to the form or manner of presenting his said application. There was no protest or remonstrance to the granting of the licenses from any outside source. The record recites: "At a regular session of the board of fire and police commissioners of the city of Omaha, held on the 8th day of January, 1904, the following, among other proceedings, were had: 'In the matter of the application of A. Jorgensen for a saloon license, for the year 1904, at 124 North Tenth street, in the city of Omaha. Resolved, that the application of A. Jorgensen for a license at 124 North Tenth street, Omaha, be, and the same hereby is, denied and refused, for the reason that there are now four or five saloons in operation within a block of said place, and that the public interests require that no new or additional saloons be allowed at said place. Applications for a saloon license at said place have twice been refused to different parties in the past two years, for the same reason.' The motion was duly seconded and carried unanimously." On this record did the district court err in affirming the action of the licensing board and dismissing the application? But two questions are presented for consideration. The first is: Had the board discretion to refuse a license, for good reasons, where no objection or protest was interposed to the granting of the license? Second: Did the board act arbitrarily and upon insufficient ground in refusing the application for the reasons stated?

1. The holdings generally, as we interpret them, are to the effect that the licensing authorities exercise a sound discretion in granting or refusing an application, and from the order made an appeal lies to the district court, which is empowered to pass judicially on the question of the applicant's right to the license applied for. The fact that there is no protest against the issuance of the license does not deprive the board of the right to

exercise the discretion vested in them by law, nor are they lacking in this authority because the power to regulate or prohibit the traffic rests with the mayor and the city council. The question is, we think, set at rest by the utterances of this court in *Waugh v. Graham,* 47 Neb. 153, 161, where it is said:

"It is clear that the licensing body is vested with discretionary power; that its action is judicial and not merely ministerial. 'In far the greater number of states the doctrine is now well settled that the court or board charged with the duty of issuing licenses is vested with a sound judicial discretion to be exercised in view of all the facts and circumstances in each particular case, as to granting or refusing the license applied for. The principle is that the licensing authorities act judicially, and not merely in a ministerial capacity. In determining the nature as well as the existence of this discretion much will depend upon the language of the local statute, and this, of course, should be carefully scrutinized; but the general disposition, under all the diverse forms of statutory provisions, is to leave a wide margin of discretion to the court or board hearing the application.' Black, Intoxicating Liquors, sec. 170; *State v. Cass County,* 12 Neb. 54."

To the same effect are *State v. Pearse,* 31 Neb. 562, and *State v. City of Alliance,* 65 Neb. 524. In the latter case, it was held that the licensing board possessed no arbitrary power in the matter of refusing a license, and that there must be some sufficient reason as a basis of its action, before the action taken could be justified. This, we think, in the very nature of the case must be true. The right to grant or refuse a license is not to be treated as an official perquisite of the board, to be given or withheld at mere pleasure, for whimsical reasons, or through favoritism or for any other like purpose. The board acts under the law, and it is the law, and not the men charged with the duty of its administration, that must govern and control. The fundamental basis of all

law, equality and impartiality, must be applied here as in all other matters arising in the administration of the law.

2. Can it be said that the board's position in refusing the license in the case at bar is untenable, and that it acted arbitrarily in respect of the matter, for the reasons stated? We are unable to say from the record that such is the case. The presumption ought to be indulged in that the action was taken in good faith and from right motives, and with the view of best conserving public interests. We are not warranted in drawing other inferences from the record before us. The rule adopted appears to operate on all alike. Its object is to limit the number of saloons in a certain locality. This is a matter that must be left to the wise and sound discretion of the board, if there be any limit placed on the number or saloons in any particular locality. That such a limit is required in the interests of law and order, and their due and orderly enforcement, must, we think, be accepted upon the mere statement of the proposition. There are places in every city wherein the number of saloons should be restricted. Many reasons for such restrictions readily suggest themselves and we need not, it would seem, enter into a discussion of any of them. This right of limitation as to numbers was distinctly recognized in *State v. City of Alliance, supra.* The guarding of the public interests requiring, as it may, a limitation in respect of the number of saloons in certain localities, and the conservation of these interests being confided to the body authorized to grant the license, and it having been determined that such a limitation should be enforced in respect of the application under consideration, we cannot say that the board did not exercise a wise and sound discretion in refusing the license on that ground, nor that the district court erred in affirming such action and dismissing the application of the plaintiff in error.

The judgment is accordingly

AFFIRMED.

NEBRASKA TELEPHONE COMPANY V. HALL COUNTY.

FILED JANUARY 3, 1906. No. 14,102.

1. **Taxation:** EQUALIZATION: APPEAL. On appeal from an order of a board of equalization in the matter of assessment of property for taxation, the cause must be tried on the questions raised by the complaint before that tribunal.

2. **Corporations:** ASSESSMENT. The value of the tangible property of an express, telephone or telegraph company, apart from its gross receipts for the year prior to the time of the assessment and its franchise, or right to carry on its business, does not furnish the true value of its property for taxation. Such value should be ascertained from a consideration of all of the aforesaid items taken together, and by treating the corporation as a going concern.

ERROR to the district court for Hall county: JOHN R. HANNA, JUDGE. *Affirmed.*

W. W. Morsman and *W. H. Thompson,* for plaintiff in error.

R. R. Horth and *A. C. Mayer, contra.*

BARNES, J.

The Nebraska Telephone Company furnished the assessor of Hall county a schedule of its property for taxation for the year 1904, which contained a list of all its tangible property and its gross receipts for the preceding year in each of the several precincts of that county. The assessor duly listed its property and valued it and assessed the same for taxation, using the schedule so furnished him as his basis therefor. On the 13th day of June, 1904, the company filed its protest and complaint against the said assessment with the county board of equalization. The sole ground of the complaint was that the value of its property was excessive, and the prayer was for a reduction of the assessment to an amount

therein stated. On the 15th of June a hearing was had before the board. The complaint was overruled, and it was ordered that the assessment complained of should stand and be taken as the value of the complainant's property for the purpose of taxation. The company appealed to the district court for Hall county, where the case was tried and the order of the board was affirmed. To reverse that judgment the company brings error, and will hereafter be called the plaintiff.

1. The plaintiff's first contention is that the court erred in overruling its request to amend its petition so as to allege that there was a mistake in its schedule in the number of poles returned in the city of Grand Island and the village of Wood River, and in not receiving the evidence offered to prove such mistake. It appears that the plaintiff first offered its evidence tending to prove that the number of poles returned in its schedule was greater than the true number. Objection was made that such evidence was incompetent under the pleadings and the issues made thereby. The plaintiff thereupon asked leave to amend its petition so as to raise that question. Objection was then made that such amendment would change the issues presented to and passed upon by the board of equalization, and would present a question not in issue before that tribunal. The court sustained the objection, and it would seem that his ruling was correct. The rule that a case must be tried on the same issues as in the lower court, on appeal from the justice's or county court, should prevail on the trial of a case appealed from the order of the county board or board of equalization. But we are not required to invoke that rule in this case, for the section of the statute granting appeals from the order of the board of equalization provides: "The court shall hear the appeal as in equity and without a jury, and determine anew all questions raised before the board which relate to the liability of the property to assessment, or the amount thereof." Comp. St. 1905, ch. 77, art. I, sec. 124 (Ann. St. 10523). This language

clearly limits the inquiry in the district court to the questions raised before the board of equalization; and the reason for the limitation is obvious. If a taxpayer could present a question to the board which was without merit, and, after a determination of that question against him, could appeal to the district court and there present another and different question, a meritorious one, which required a different ruling, he could always overturn the assessment, and thus escape taxation of his property altogether. So we are of opinion that the motion or request to amend was properly denied.

2. The plaintiff next claimed that the amount of its gross receipts for the preceding year contained in its schedule represented and fixed the value of its franchise for the purpose of taxation, and offered to prove the value of its tangible property, consisting of poles, wire, cable, instruments and office fixtures contained in its central offices in Grand Island and Wood River, on the assumption or basis that it had no franchise whatever, and no right to do business in those places. The court refused to receive the evidence, and declined to adopt that method of fixing the value of the plaintiff's property, and it is now urged that such ruling was reversible error. The question is no longer an open one in this state. In *Western Union Telegraph Co. v. Omaha*, 73 Neb. 527, decided since this cause was submitted, it was expressly held that the gross receipts of express, telephone and telegraph companies during the year prior to the time of the assessment, taken alone, is not a reasonable or proper method of ascertaining the value of the franchises of such corporations. And so much of section 77, article I, chapter 77, Compiled Statutes 1903 (Ann. St. 10476), as provided that such gross receipts shall represent the franchise valuation of the corporation, which shall not be otherwise assessed, is unconstitutional and void. It was further held in that case that such gross receipts should be considered as an item in estimating the value of the corporate franchise. It would seem that, in estimating

the value of the property of such corporations for the purpose of taxation, its tangible property, such as poles, wire, cable, instruments, office fixtures and appliances, its gross receipts, and its intangible property, to wit, its franchise, or right to do business in the taxing district, should all be considered; and, from all these items taken together as a going business, the value of the corporate property should be determined.

So we are of opinion that the ruling of the district court excluding the evidence thus offered was correct. This sufficiently disposes of plaintiff's contentions and determines all of the questions herein presented for review.

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

AFFIRMED.

COURT HOUSE ROCK IRRIGATION COMPANY, APPELLANT, V. WILLIAM M. WILLARD ET AL., APPELLEES.

FILED JANUARY 3, 1906. No. 13,990.

Irrigation: INJUNCTION. Where the evidence shows that an appropriator of water does not beneficially use the amount which it has diverted into its canal by reason of wastage and seepage caused by defective maintenance, and there is enough water in the stream, if economically used, to supply both the complainant and certain riparian owners taking water for irrigation purposes above the point of diversion, the appropriator is not entitled to an injunction to prevent the use of the water by such owners.

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

William P. Miles, James L. McIntosh and *Hamer & Hamer,* for appellant.

Le Roy Martin, H. S. Crane and *Wilcox & Halligan, contra.*

LETTON, C.

The Court House Rock Irrigation Company, plaintiff, owns an irrigating canal and is entitled to so much of an appropriation of 30½ cubic feet of water as it can beneficially use from the waters of Pumpkin Seed creek, in Cheyenne county. The defendants are riparian owners whose lands lie above the dam and point of diversion of the plaintiff's canal. In 1902 the defendants constructed a dam and a canal upon their lands for the purpose of diverting the waters of the creek to irrigate their own land, claiming the right to do so as riparian owners and subsequent appropriators. On May 21, 1903, this action was brought by the Court House Rock Irrigation Company to enjoin the defendants from diverting the waters of the creek into this canal, or from obstructing their natural flow. A temporary injunction was allowed, which was dissolved at the final hearing and the cause dismissed, from which judgment the Court House Rock Irrigation Company appeals.

Several defenses are made to the action, but the principles announced in *McCook Irrigation Co. v. Crews,* 70 Neb. 115, the opinion in which has been handed down during the pendency of this action, dispose of most of them adversely to the defendants' contentions. At the oral argument it was stated that the defense mainly relied upon is that plantiff's bill is without equity, for the reason that the plaintiffs were not, at the time the injunction was prayed, making a beneficial use of all the water they were taking; that they were taking all that was necessary to apply to the lands actually irrigated, but that they were largely wasting it through defects and leaks in the canal, and that the action of the defendants therefore was of no damage to them. The point at issue then is a question of fact, and has necessitated a close examination of the testimony.

The plaintiff, at the time the priorities of right were determined by the state board under the act of 1895, was

found to be entitled to an appropriation of 30½ cubic feet a second, but the testimony shows that the water flowing in the creek has never been of sufficient volume to furnish such a quantity of water during the irrigation season. The evidence shows that Pumpkin Seed creek is largely fed by springs, and that above the point where the stream crosses the west line of defendant Dugger's land, its waters, during the irrigating season, are largely diverted and consumed by upper irrigators, and that the water used by the plaintiff mainly finds its source in springs upon the banks and in the stream as it passes through the defendants' lands. The weight of evidence is to the effect that, during the years 1902 and 1903, the plaintiffs irrigated about 200 acres of land. In 1902 the defendants' dam and ditch were completed only a short time before the close of the irrigating season, and a very small tract was irrigated by them, and in 1903, at the time the injunction was allowed, they had 74 acres of land which were susceptible of irrigation. Mr. R. H. Willits, an under-assistant secretary of the state board of irrigation, testified that it was his official duty to make measurements of the streams within this state; that he had measured the flow of water in Pumpkin Seed creek and that its average flow at the point of diversion of the plaintiff's canal was between nine and ten cubic feet a second of time; that on May 30, 1903, which was a few days after the injunction was allowed, he measured the flow of water in the Court House Rock canal, 800 feet below the point of diversion at the rating flume of the plaintiff, and there was then flowing 7.9 cubic feet a second; that on the same day he measured the flow of water in the canal one mile below the point of diversion, and that there was then flowing 4.11 cubic feet a second, showing a loss of 2.79 cubic feet of water a second in this short distance. He explains that this loss was caused by a heavy seepage and by evaporation, and that the flow of water in the ditch was very much obstructed by weeds and moss. Other testimony shows that the plaintiff's

canal was in such a condition with reference to gopher holes and other leaks, at the time of the beginning of this action, that the water escaped to a considerable extent, in fact, so much so that there was considerable water flowing in the creek below the dam after the entire flow of the stream had been diverted into the plaintiff's canal, and that the same arose largely from seepage and leaks from the canal; and Mr. Willits testifies that on June 17, 1903, at a point 1,000 feet below the present Court House Rock dam, he found 3.6 cubic feet of water flowing in the creek at an old dam site. This water apparently came from seepage from the ditch and from springs.

It is an essential purpose of our irrigation laws to require an economical use of the waters of the state. The plaintiffs have an adjudicated right to the use of 30½ cubic feet of water a second of the waters of Pumpkin Seed creek, so far as they beneficially use the same, but they are not permitted to take water from the stream which they cannot apply to a beneficial use, or, what amounts to the same thing, they are not entitled wastefully to divert water into a canal which is so defective as to waste and dissipate the water, which otherwise might serve a good purpose, if used by other appropriators or riparian owners whose priorities are inferior or subsequent to the rights of the plaintiff. If the evidence showed in this case that the action of the defendants in diverting the waters of the creek resulted in such diminution of the plaintiff's supply that, if the same were carried in a properly constructed and properly maintained canal, the amount of water would fall below that which the plaintiff was entitled under its appropriation to use upon the lands actually irrigated, or which its shareholders are actually prepared to irrigate, it would be entitled to the aid of a court of equity to enjoin such diversion; but if, as in this case, there is sufficient water in the stream which, if carefully and economically used and administered, would allow the defendants the use of a portion of the same to irrigate their lands, and would also furnish

the plaintiffs with sufficient water so that it could apply 1-70 of one cubic foot a second of time to each acre of land to which the water was actually and usefully applied by its shareholders, then no right to injunction would arise. The object of the law is not to encourage waste, but to enforce economy in the use of the waters of the state. Under the method of apportioning the use of the water among the plaintiff's shareholders, it is difficult to determine whether each man used more or less than the statutory amount, and the only definite and reliable data in the record is that furnished by Mr. Willits.

We see no reason, and the learned trial judge saw none, why the defendants should not be permitted to irrigate that portion of their lands to which they seek to apply the water, and the plaintiffs also irrigate all the land under their ditch which they were irrigating at the time this action was begun, if the water in plaintiff's ditch is carefully husbanded and carried without undue loss or waste.

We think the judgment of the district court should be affirmed.

AMES and OLDHAM, C. C., concur.

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

AFFIRMED.

ROBERT M. TURNER V. RICHARD S. GRIMES.

FILED JANUARY 3, 1906. No. 14,008.

1. **Election of Remedies.** Where a plaintiff sets up a conversion of a team of horses by a bailee, and pleads the execution of a bill of sale by him to the bailee for such team upon the agreement of the bailee to pay a fixed and definite amount therefor, he cannot afterwards, if unsuccessful in this action, in another action claim that the title to the horses never passed from him, and that they

were killed by the negligence of the bailee. He had the right to elect as to whether he would treat the title to the property as having passed and sue in assumpsit upon the promise, or he had the right, upon the theory that the title never passed, to sue for the wrong. He did not have the right to do both.

2. ———. The doctrine of election of remedies applies when a party who actually has at hand two inconsistent remedies, with full knowledge of such fact, proceeds to enforce one of these remedies. *Pekin Plow Co. v. Wilson*, 66 Neb. 115.

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

Tibbets & Anderson, for plaintiff in error.

Billingsley & Greene, W. T. Stevens and *Love & Frampton, contra.*

LETTON, C.

This action was begun in the county court of Lancaster county and, after a trial and judgment in that court, was appealed to the district court. A judgment was rendered in that court, from which error proceedings are now prosecuted.

The petition alleges, in substance, that on the 15th day of February, 1899, the plaintiff was the owner of a certain team of horses of the value of $200, which was in the possession of the defendant under an oral contract of bailment without hire for the accommodation of the defendant; that the defendant, while in possession of said team, negligently drove the same upon the railroad track of the Union Pacific Railroad Company, and carelessly and negligently permitted the horses to be run over and killed by a passing train; that afterwards, in consideration of a written assignment executed by the plaintiff to the defendant of all right of action against said railroad company, the defendant orally promised to pay the plaintiff the value of the horses, but that he now refuses so to do. To this petition the defendant filed a special plea

in bar, setting forth, in substance, that on the 23d day of September, 1901, the plaintiff commenced an action in the county court of Lancaster county against the defendant; that the action was tried in the county court and judgment rendered in favor of the plaintiff; that it was thereafter appealed to the district court; that the cause was tried to a jury and a verdict returned and judgment rendered in favor of the defendant; that the cause of action in said suit was identical with the cause of action in the present suit; that the parties are the same, and that the judgment was upon the merits, and has never been modified and is now in full force and effect. Attached to this plea were copies of the pleadings and judgment in the former case. A general demurrer was interposed to this plea, which was sustained and exception taken by defendant. An answer was then filed by defendant, in which he pleads: first, a general denial; second, a former adjudication and estoppel; and third, he admits that plaintiff was the owner of the horses; denies that the value was more than $50; admits that the horses were in his possession on the day that they were killed; denies that he was in any way negligent at the time of the killing, and alleges that at all times he had used due care. A motion was then filed by the plaintiff to strike from the answer the plea of former adjudication, which motion was sustained and exception taken. The plaintiff then filed a general denial by way of reply, and the cause was tried upon the issues thus formed. Judgment was rendered for the plaintiff, from which the defendant prosecutes error.

In the first action the petition alleged, in substance, that on the —— day of December, 1898, the plaintiff was the owner of a certain team of horses, reasonably worth $200; that at the solicitation of the defendant the plaintiff allowed him to use the horses in and about defendant's business, entirely for the benefit of the defendant and without charge; that the defendant has wholly failed and refused to return said team to the plaintiff, though often

requested so to do, and has retained the same and converted same to his own use, to the plaintiff's damage in the sum of $200; that on the —— day of February, 1899, the plaintiff requested the defendant to return the team of horses, which defendant refused to do, but agreed in settlement for said team to pay to the plaintiff the sum of $175 in full settlement, and plaintiff executed and delivered to the defendant a bill of sale in writing for said team; that the defendant has failed and refused to pay the amount agreed upon, to wit, $175, though often requested so to do. The answer filed to this petition contained, first, a general denial, and second, an allegation that there was no consideration for any agreement to pay the sum of $175 as set forth in the petition. Upon appeal to the district court, the issues were substantially the same as in the county court.

The petition in the first case alleges the bailment, the conversion of the team, the execution of a bill of sale, and an express agreement to pay the sum of $175. The second alleges the bailment and the negligent killing of the team, and an express agreement to pay the value of the team. Both petitions are, perhaps purposely, unskillfully drawn, and two causes of action seem to be mingled and confusedly set forth in each. In the first case the plaintiff set up the conversion, and sued upon an express contract to pay a fixed sum for the team. His position was that the title to the horses had passed from him to the defendant. This position is entirely inconsistent with the theory that the title to the horses never passed from him; that they were his when they were killed, and that all he ever conveyed to the defendant was an assignment of his right of action against the Union Pacific Railroad. If the first petition is true, the second one must be false. If an election is made to treat the title as transferred, it is entirely inconsistent with the theory that it never passed.

"It is a familiar principle that a person should not be allowed to avail himself of the advantages of inconsistent positions in respect to the same matter; and after one has

voluntarily chosen and carried into effect an appropriate remedy, with knowledge of the facts and of his rights, this will, in general at least, preclude him from subsequently resorting to a different remedy, involving a negation or repudiation of the grounds upon which the former proceeding was based." *Dyckman v. Scratson,* 39 Minn. 132.

To sustain the present action requires a negation of the facts set forth in the petition in the first action, and, having assumed a certain position in this litigation, and having vexed the defendant with a lawsuit based thereupon, he cannot now be permitted to change his position and harass the defendant with another action based upon another and totally different theory. *State v. Board of County Commissioners,* 60 Neb. 570; 7 Ency. Pl. & Pr. 370; *Moss v. Marks,* 70 Neb. 701; *Thompson v. Howard,* 31 Mich. 309; *Fowler v. Bowery Savings Bank,* 113 N. Y. 450, 10 Am. St. Rep. 479, and note, p. 491.

The plaintiff argues that, in suing for the amount which the defendant expressly agreed to pay, he did not negative the fact that the defendant had negligently killed his horses, and, in suing for damages occasioned by the negligence of defendant, he did not negative the fact that the defendant had expressly promised to pay him a certain amount in payment of the damages so incurred. This argument, however, loses sight of the fact that the execution of a bill of sale for an agreed amount and an action for this agreed sum is entirely inconsistent with the idea that the title to the horses never passed to the defendant. The cases cited by plaintiff lay down the principle that, where the plaintiff was mistaken and undertook to avail himself of a remedy that he was not entitled to, he may afterwards avail himself of the proper remedy. The plaintiff in this case had the right to elect as to whether he would treat the title to the property as having passed, and sue in assumpsit upon the express promise, or he had the right, upon the theory that the title never passed, to sue for the wrong. He did not have the right to do

both. The matter stricken out was proper matter of defense. The rule is clearly stated by Mr. Commissioner OLDHAM, in *Pekin Plow Co. v. Wilson*, 66 Neb. 115, as follows: "The doctrine of election of remedies only applies when a party who actually has at hand two inconsistent remedies and with full knowledge of such fact proceeds to enforce one of these remedies, in which event he is bound by such election. But if in his first action he has adopted a mode of redress incompatible with the facts in his case, and is defeated on that ground, he is still free to proceed anew," and is supported by the authorities therein cited.

The judgment of the district court should be reversed and the cause remanded.

AMES and OLDHAM, C. C., 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.

REVERSED.

ANNIE BRICHACEK ET AL., APPELLEES, V. JOSEPH BRICHACEK ET AL., APPELLEES; FRANK SPEVAK, SR., APPELLANT.

FILED JANUARY 3, 1906. No. 14,083.

Wills: HOMESTEAD. Under the provisions of section 17, chapter 36, Compiled Statutes 1903, a homestead which was the separate property of the wife, at her death, vests in her surviving husband for life, and the wife has no power to limit or dispose of the life estate of the survivor by will.

APPEAL from the district court for Colfax county: JAMES G. REEDER, JUDGE. *Reversed.*

George H. Thomas, for appellant.

F. W. Bartos and *J. H. Grimison*, *contra.*

LETTON, C.

In 1887, Barbara Spevak, with her husband, Frank Spevak, Sr., resided upon 160 acres of land in Colfax county, and occupied the same as the family homestead. The title to the land was in Mrs. Spevak. In that year she died, leaving surviving her six children, the eldest of whom was at that time sixteen years old, and the youngest was four years of age. Before her death she executed a will, by the terms of which she bequeathed to her children 80 acres of the land, using the following language in making such bequest: "I do bequeath to my children east half of the northwest quarter section (23) twenty-three, township (19) nineteen, range (4) four east, and Frank Spevak, my husband, shall have the use of all the land, and shall provide for all my children until they come of age, and after they come of age my husband shall pay them ($50) fifty dollars to each, and he shall provide for them until they come of age." The will also devised the other 80 acres to the husband, as well as all the personal property, and nominated him as executor. The controversy in this case is as to the extent of the interest of Frank Spevak, Sr., in the premises. He claims that he takes the 80 acres which were devised to him by the will in fee, and that he has a life estate in the remainder of the premises. The children admit his title to the 80 acres which were devised to him, but insist, as to the other 80 acres, that his interest in the same is limited to the use of the land until the youngest child becomes of age; that the devise was to them in fee, subject to the use by him for a term for years. The case was tried upon an agreed statement of facts. The court found that Frank Spevak, Sr., did not have a life estate in the premises, but was only entitled to the use of the same until the youngest living child became twenty-one years of age, to reverse which judgment he appeals to this court.

It is contended by the appellees that, by qualifying as executor and by accepting the title in fee to the 80 acres

which were given him under the will, Spevak elected to take under the will and cannot claim a life estate in the premises under the homestead law, and further, that the husband cannot, a long time after his wife's death, select a homestead out of her separate property. It is further contended that the provisions of the will that the husband shall provide for the children until they become of age, limits his right to the use of the 80 acres until the youngest child becomes twenty-one. Apparently counsel for each of the parties have overlooked the existence of a statutory provision which limits the right to dispose of the homestead by will. Section 17, chapter 36, Compiled Statutes 1903 (Ann. St. 6216), is as follows: "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." This section has been construed in *Durland v. Seiler,* 27 Neb. 33; *Schuyler v. Hanna,* 31 Neb. 307; *Finders v. Bodle,* 58 Neb. 57; *Nebraska Loan & Trust Co. v. Smassall,* 38 Neb. 516; *Fort v. Cook,* 3 Neb. (Unof.) 12, and has been upheld according to its plain import. The will of Mrs. Spevak was therefore so far inoperative, if, as the appellees contend, it attempted to limit the life estate of her husband to a term extending only until the time that the youngest child became of age. By the provisions of the statute, she had no power to dispose of his life estate by will. At the instant of her death he became vested with the right to occupy the homestead for the term of his natural life, irrespective of any terms or conditions contained in the will. It is urged that, for the reason that in the will she devised to him a portion of the land in fee and nominated him as her executor, the fact that he accepted the devise and qualified as executor constituted an election upon his part to take under the will, and not under the homestead law, but this cannot be so, because any language

of the will, the purport of which was to limit his life estate, was entirely nugatory and of no effect. The fact of marriage and family residence gave him the legal right to the life estate, and it could not be devested save by some act of his. Where there is no alternative, there can be no election. He is the owner of a life estate in the premises and has all the rights of a tenant for life.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

JOHN T. CATHERS, APPELLEE, V. PHŒBE R. E. E. LINTON ET AL., APPELLANTS.

FILED JANUARY 3, 1906. No. 14,067.

Evidence examined, and *held* to support the judgment of the district court.

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

John O. Yeiser, for apellants.

John T. Cathers, contra.

AMES, C.

John T. Cathers recovered a judgment in the district court for Douglas county against Phœbe R. E. E. Linton, upon which on the 19th day of May, 1901, there was an unpaid balance of $2,660, which was a lien upon certain

real estate including certain lots in "Argyle," an addition to the city of Omaha. On that day the Lintons paid to Cathers in cash and by bank check $1,500, and executed to him a note for $1,160, secured by a mortgage on the lots mentioned, in full satisfaction of the judgment, and received from him a receipt containing recitals to that effect and also to the effect that the transaction was in settlement "of all old matters up to date," having reference to various dealings between the parties prior to that time. The judgment was not, however, satisfied of record and Cathers attempted to enforce the same by execution sale of some of the property upon which it was an apparent lien. The sale was set aside and the judgment judicially canceled pursuant to a decision of this court in an opinion by KIRKPATRICK, C. (*Linton v. Cathers,* 4 Neb. (Unof.) 641), upon the ground that the judgment had been satisfied by the payments and mortgage above mentioned. The result was, of course, such as to leave Cathers at liberty to enforce his mortgage, or else he would have been deprived without consideration of $1,160 in amount of his judgment lien, and we think that matter does not require further discussion.

At the time of the making of the payments and mortgage above mentioned, there was pending in the district court for Douglas county a suit by Cathers against the Lintons for recovery for services alleged to have been rendered by the former as an attorney at law for the latter. The answer pleaded the payments and mortgage as constituting a settlement and payment of the claim of the plaintiff, and a trial resulted in a verdict for the defendant. A motion for a new trial was filed, which remains undisposed of.

In February, 1902, Cathers began another action against the Lintons to recover about $6,000 for services and expenses as an attorney, part of which were alleged to have been rendered and incurred prior to the date of said settlement. The settlement was pleaded in bar of demands for services prior to its date, but the action proceeded to

trial and resulted in a judgment for the plaintiff in the sum of $3,628, which the jury may have thought the plaintiff entitled to recover for services rendered subsequently to that date. This is an action to foreclose the mortgage, and the two former actions last above mentioned are pleaded in defense thereto. There was a decree of foreclosure and sale, from which the Lintons have appealed to this court.

A preliminary, and perhaps vital, question of fact is whether the payments and the mortgage in suit made and given on May 19, 1901, were intended and agreed by the parties as a payment and satisfaction of the services and expenses for which the suits were brought, or whether they were intended merely to discharge the unpaid residue of the judgment which they, in the aggregate, exactly equaled in amount, and which appears to have been a lien on real property sufficient in value for its satisfaction. The plaintiff, Cathers, testifies unequivocally that the latter was their sole purpose, and that the words, "Also agree to dismiss the case now pending: this is to settle all old matters up to date," were inserted in the receipt in view of another object, and after the transaction had been closed, and the money and mortgage delivered to and accepted by him. He is to some extent corroborated by the circumstances, and the trial judge who presided over his examination, and enjoyed the advantages incident to so doing, may have believed his story. Although he is contradicted by one of the defendants, we do not think that under such circumstances this court would be warranted in reversing a finding of fact in favor of the plaintiff in this respect, without doing which the decree appealed from cannot be disturbed. Moreover, the settlement and receipt above mentioned were pleaded as a defense in both the last two mentioned suits at law, and the question whether they were intended as a bar to a recovery for services rendered prior to their date appears to have been properly submitted to the juries, respectively, and to have been decided by them in favor of the defend-

ants, so that, if this action also be decided in their favor, the plaintiff would be wholly deprived of benefit or advantage of or from his mortgage. Whether the trial court adopted the former view, that the settlement was not intended as a bar to the recovery for services rendered prior to its date, or the latter one, that it was so intended, and that the defendants, in the several litigations above mentioned, had fully enjoyed its protection, we do not certainly know. The latter appears to us to be the more consistent with the record and that which the evidence the more satisfactorily supports, but neither, if accepted, will deprive the plaintiff of his right of recovery upon the mortgage, 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.

C. C. ALLEN V. AMERICAN BEET SUGAR COMPANY.

FILED JANUARY 3, 1906. No. 14,082.

Directing Verdict. Although the evidence is uncontradicted, yet, if diverse inferences of fact are warranted thereby, the fact itself is for determination by the jury.

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

Richard S. Horton, for plaintiff in error.

Frank H. Gaines, contra.

AMES, C.

On the 9th day of August, 1902, the plaintiff in error, also plaintiff below, entered into a written agreement with the defendant, of which the following is a copy:

"We hereby agree to reserve for the American Beet Sugar Company warehouse space sufficient for storing 38,500 sacks of sugar until the 1st day of October next, at which time the American Beet Sugar Company will have the option of retaining or refusing to take all or any portion of said space, and will be entitled to hold for their use all the space they may then decide to retain, and for as long a period as they may desire, and we further agree to hold for the said American Beet Sugar Company an additional warehouse space sufficient for storing 40,000 sacks of sugar until the 1st day of November next, on the same conditions as noted above, except that the extreme length of time for the use of this latter space is limited to June 15, 1903. In consideration for our reserving the total warehouse space for 85,000 sacks of sugar as heretofore agreed, the American Beet Sugar Company agrees to pay us a total of $600, at the rate of $200 each for this and the succeeding months of September and October, due the 10th of each following month, and we agree to accept as full compensation one cent per sack per month for all sugar we may store under this agreement, except as noted below. And we further agree to store free of charge all sugar stored with us under this agreement, if the storage charges thereon at the rate noted above are less than $200 per month, but when the storage charges on sugar so stored amount to the monthly rental charges for reserving space, we would, from that date, cancel and waive all rights to any future monthly rental charges."

It is agreed by counsel that this agreement, so far as it has reference to any matter involved in this litigation, contemplated the use, for the storage purposes mentioned, of two buildings named, respectively, the "Barb Wire" and the "Creamery Package." It is further agreed that the former building had a storage capacity of or exceeding 20,000 sacks of sugar and the latter a capacity of or exceeding 40,000 sacks. It is agreed, too, that there were certain oral conversations and understandings between

the parties explanatory of and supplementary to the written contract, the purpose of which, in part, was that the rental value of the buildings was determined by the number of sacks of sugar they were respectively capable of holding, estimated at one cent a sack, but counsel disagree as to the application of this rule to the contract and transaction in question. It is contended by the plaintiff that after the expiration of the option mentioned in the agreement the defendant was required to pay, during the time of the retention of the buildings by it, rental at the rate of one cent a sack computed upon the total storage capacity of the buildings, while the defendant contends that it was obligated to pay at the same rate, but only upon so many sacks as should be actually stored by it in the buildings, provided that the minimum rental of the "Barb Wire" building should not be less than $100 a month and the minimum rental of the other building should not be less than $200 a month. Payments were made to an aggregate amount exceeding those sums respectively, but falling considerably short of the compensation required to equal the rate of one cent a month a sack upon the full capacity of the buildings. This action is brought to recover the difference between the amount paid and the amount demandable according to the theory of the plaintiff. The evidence consists of the written agreement, and of certain receipts for rent, and of the testimony of the plaintiff, at the conclusion of which the court directed a verdict for the defendant, and the plaintiff prosecutes error.

The testimony of the plaintiff is admittedly somewhat confusing and self-contradictory. Some parts of it, if standing alone, would support his own contention, and some parts of it, separately regarded, would tend to support that of his adversary, and neither party accuses the other of intentional bad faith. The plaintiff has not, apparently, a very clear idea or recollection of the conversations or of their purport, but the defendant has admittedly occupied the plaintiff's buildings under an agree-

ment for the payment of rent, the terms of which are not clearly ascertained or ascertainable from the evidence. If the burden of proof is upon the plaintiff to establish the contract sued upon, it is equally upon the defendant to establish the defense of payment. We are disposed to think that the whole matter, including the circumstances under which the conversations were had, and the manner in which payments were made and receipted for, and the conduct of the parties, should have been submitted to the jury for their determination of the intent of the parties and the ascertainment of the terms of the oral contract, as being a question of fact and the only matter really in dispute.

We therefore recommend that the judgment of the district court 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.

REGENT SHOE MANUFACTURING COMPANY, APPELLANT, V. ROBERT B. HAAKER ET AL., APPELLEES.

FILED JANUARY 3, 1906. No. 14,061.

1. **Trade Name:** INJUNCTION. When a mercantile company has acquired a trade-name in a particular locality, it is entitled to protection against unfair competition in its particular line of business by the use by a competitor of a name of such similar import as to probably deceive the public in such a manner as to work a fraud on the good-will of such trade-name.

2. ———: INFRINGEMENT. It is an infringement on a legally acquired trade-name to use in the same locality and in the same line of business another name of such similar import that the ordinary attention of persons or customers would not disclose the difference between the two names.

3. ———: ———. But, to constitute an infringement on a trade-name, it is necessary that the two places of business be in actual competition with each other; and, where one of the concerns is engaged exclusively in retailing boots, shoes and rubbers, and the other in the manufacture and wholesale jobbing of such goods, there is no such competition as will warrant an order restraining the latter at the suit of the former, although the names of the firms are of similar import, and although the retail firm had legally acquired its trade-name before the organization of the wholesale company.

4. ———: INJUNCTION. When the owner of a trade-mark applies for an injunction to restrain a competitor from injuring his property by making false representations to the public, it is essential that the complainant should not, in his trade-mark or his advertisements and business, be himself guilty of any false or misleading representations.

5. ———: ———. It is, however, not every exaggerated puff of one's own goods that is to be regarded as such a false representation as will deny relief in a court of equity; it is rather such materially fraudulent statements as to the character, quality and make of the goods as tend, if untrue, to deceive the public to its injury.

6. Evidence examined, and *held* not sufficient to fully sustain the decree of the district court.

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

McGilton, Gaines & Storey, for appellant.

Charles B. Keller, contra.

OLDHAM, C.

At and prior to the year 1897, the George Richardson Company was engaged in the manufacture of men's shoes at Dubuque, Iowa, and in May of that year the company began to brand or mark certain of its makes with the name of "Regent." It subsequently sought to obtain the exclusive right to this term as a trade-mark, and to the accomplishment of this end purchased a patent thereto from one Stephen E. Miller in the year 1900. After the purchase of the patent on this trade-mark, the Richard-

son company claimed the exclusive right to the use of the term "Regent" in marking its shoes. It registered this name as a trade-mark under the laws of six of the western states, including Wisconsin, Colorado, Illinois, Minnesota, Michigan, and Iowa, in the months of July and August, 1903. At this time the Williams Shoe Company was engaged in the business of jobbing shoes in Omaha, and had been selling shoes marked "Regent" since its organization in 1902. Prior to that time its predecessor, the Williams-Hayward Shoe Company, had likewise been selling shoes marked with this brand. In April, 1904, a new corporation was formed under the name of "Regent Shoe Manufacturing Company," plaintiff in this cause of action, which bought out the rights of the Richardson company and the Williams Shoe Company. Under this new arrangement the entire plant of the Richardson Company at Dubuque was moved to Omaha to engage in the manufacture and sale of men's boots, shoes and rubbers. The articles of incorporation provided, among other things, that "the general nature of the business to be transacted shall be the manufacturing, buying, selling, handling and consigning, of shoes, shoe findings and rubber goods of all kinds and descriptions, both at wholesale and retail * * * and may do any and all such other acts and things as may be incidental to the main powers of the corporation." In 1897 the defendants and cross-petitioners in this cause of action, Robert B. Haaker and Catherine Haaker, engaged in the retail business of selling men's boots, shoes and rubbers on South Fifteenth street in Omaha, Nebraska, under the trade-name of "Regent Shoe Company." Under this name they have advertised and built up a large and increasing trade in Omaha and vicinity. Their first stock of shoes were all branded "Regent." Part of these were purchased from the George Richardson Company, and part from other manufacturers using the same mark. Afterwards the defendants distinguished the Regent shoe which they offered for sale by their own patented trade-mark, "Onimod." In April, 1900, a contro-

versy arose between the Richardson Company and the defendants as to the latter's right to sell Regent shoes not of the manufacture of the Richardson Company; and, after the consolidation of the Richardson Company and the Williams Shoe Company and the organization and incorporation of the Regent Shoe Manufacturing Company, the present cause of action was instituted to restrain the defendants from the use of the trade mark "Regent" on shoes not purchased from and manufactured by the plaintiff. Defendants answered plaintiff's petition, denying that plaintiff was entitled to the exclusive use of the trade-mark "Regent" by reason of its purchase of such right from the Richardson Company, assignee of Stephen E. Miller, it being alleged that the trade-mark "Regent" was in common use by manufacturers of boots and shoes throughout the United States long before it was attempted to be patented by Miller. Defendants also, by way of cross-petition, asked, in substance, that plaintiff be restrained from engaging in the business of selling shoes in Omaha and vicinity under the name of Regent Shoe Manufacturing Company, as such name was used by plaintiff in fraud of the good-will of defendants, and for the purpose of deceiving the public and unfairly obtaining trade from the defendants. The cross-bill also asked that the plaintiff be restrained from selling shoes to the firm of W. S. Striker Company, retailers, who, it was alleged, were conducting business and selling Regent shoes near defendants' place of business, and in fraud of their rights, for the sole benefit of the plaintiff, the real owner of this retail store. On issues thus joined and after some testimony had been taken, which clearly established that the trade-mark "Regent" had been in common use before its pretended patent by S. E. Miller, plaintiff dismissed its cause of action, and the suit proceeded on the relief prayed for in the defendants' cross-bill. At the close of the testimony the court found all the issues in favor of the defendants and entered a decree as prayed for in the cross-bill; and to reverse this decree the plaintiff has appealed to this court.

At the outset of the opinion it might be well to say that two questions once involved in this controversy are clearly established by the record and the admissions of the parties to the action. One is that the trade-mark "Regent" on shoes is a mark to which neither of these litigants has an exclusive privilege, and, so far as the sale of shoes bearing this brand is concerned, neither has any right against the other which courts of conscience can recognize. The second proposition is that the cross-petitioners have clearly shown themselves entitled to the use of the trade-name of "Regent Shoe Company" for the purpose of retailing boots, shoes and rubbers in the city of Omaha, Nebraska, and its immediate vicinity, and that, as incident to this right, they are entitled to protection against unfair competition in their particular line of business by the use of a name so similar to their trade-name as to probably deceive the public in such a manner as to work a fraud on the good-will of the cross-petitioners. In *Miskell v. Prokop,* 58 Neb. 628, it was held that "a right to the exclusive use in a particular locality of a trade-name or sign may be acquired," and further, that "a sign or trade-name is not an infringement of another, if ordinary attention of persons or customers would disclose the differences. Applying this rule to the use of the plaintiff's name, "Regent Shoe Mfg. Co.,' and defendants' trade-name, "Regent Shoe Co.," we could hardly think that ordinary attention of customers would likely disclose any difference between these two remarkably similar names. It is contended, however, by counsel for appellant that the plaintiff Regent Shoe Manufacturing Company is not a retailer of boots, shoes and rubbers, but only a manufacturer and wholesale jobber of such goods, and consequently not in competition with defendants and cross-petitioners. This contention, in view of the testimony contained in the record, we are unable to concede. In the first place, the articles of incorporation of the plaintiff provide for selling at retail as well as at wholesale. In the second place, the testimony contained in the bill of exceptions shows that

plaintiff has actually been selling at retail. True, the evidence does not show that it has been largely engaged in the retail business, yet it does show that it does sell at retail. This proof, coupled with the provision in the articles of incorporation providing for such sales, we think sufficient to sustain the finding of the trial court that plaintiff had been selling in unfair competition with defendants and cross-petitioners as a retail dealer. While we think the evidence sufficient to sustain the decree of the district court restraining the plaintiff from selling shoes at retail in the city of Omaha and the immediate vicinity, yet we think this is as far as the restraining order should have gone. The issue of unfair trade arises only on a showing of fraud or deception in the use of a trade-name, trade-mark or sign, by one in competition in the same line of trade; and, in so far as plaintiff was engaged in the business of manufacturing shoes and selling them at wholesale, it was not, and should not have been held to be, in unfair competition with defendants and cross-petitioners. *Sartor v. Schaden*, 125 Ia. 696, 101 N. W. 511; *Kann v. Diamond Steel Co.*, 32 C. C. A. 324.

It is next urged by counsel for appellant that the order of the court restraining plaintiff from selling Regent shoes to the W. S. Striker Company is wholly unauthorized under the evidence contained in the bill of exceptions. It appears from the testimony that this firm is engaged as retailers of boots and shoes on Sixteenth street in the city of Omaha, about two blocks from the place of business of cross-petitioners; that this firm is composed of persons, part of whom have been in the employ of the Williams Shoe Company, or the Richardson Company, prior to their consolidation into the incorporated company of plaintiff. The evidence shows that this firm advertised very prominently the sale at retail of Regent shoes; that the advertisements of this firm gave prominence to the brand of shoes sold rather than to the name of the firm making the sales. It is also shown that plaintiff had furnished this firm with advertising matter for its

brand of shoes. It further appears that most of the stock of this firm was sold to it by the plaintiff, but the evidence failed to show that plaintiff corporation was in fact the owner of the establishment. In view of this state of the record, we think that so much of the decree as prohibited the plaintiff from selling to this firm at wholesale is unauthorized. If this firm is advertising its merchandise in such a manner as to operate as a fraud on the sign and trade-name of the cross-petitioners, an action might lie at the suit of the cross-petitioners against this firm for an infringement of its sign and trade-name.

It is finally contended by counsel for appellant that there is no equity in the bill of cross-petitioners because, in the promotion of their business and for the purpose of attracting the attention of the public, frauds were committed in their advertisements in representing to the public that defendants were the manufacturers and makers of the shoes that were sold by them. It was shown in the testimony that defendants' advertising placards had contained, among other things, head-lines marked "Maker to Wearer," and "Made by Us," and "Manufactured and Sold by Regent Shoe Company," and other similar expressions indicating that the goods sold by this firm were also manufactured by them, when in fact the cross-petitioners never were manufacturers of any of the goods which they offered for sale. There was, however, no testimony in the record to show that the public at large, or any customer of the defendants, had ever been deceived or induced to trade with the defendants because they believed the shoes sold from their store were actually manufactured by this firm.

It is an elementary principle that he that asks equity must come with clean hands, and, as well stated in *Worden v. California Fig Syrup Co.*, 187 U. S. 516, "when the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in his

advertisements and business, be himself guilty of any false or misleading representations."

It is, however, not every exaggerated puff of one's own goods that is to be regarded as such a false representation as will deny relief in a court of equity; it is rather such materially fraudulent statements as to the character, quality and make of the goods as tend, if untrue, to impose upon and deceive the purchaser. Such imposition might be made by representing the shoes sold by defendants to have been manufactured by some firm of known and established reputation, when they were not; or it might be by representing the wares to be of a material of which they were not made; but the mere fact of representing them as "made by us," when they were made by some one else, as defendant claims, under their special order and direction, is not a misrepresentation of so grave a character as to deny defendants relief in a court of equity against an infringement of their trade name. *Wormser v. Shayne,* 111 Ill. App. 556.

We therefore conclude that the decree of the district court, in so far as it prohibited plaintiff from manufacturing and selling men's boots, shoes and rubbers at wholesale under the name of "Regent Shoe Manufacturing Company," and also in restraining it from selling at wholesale to the firm of W. S. Striker Company, is not sustained by the law and the evidence, and we recommend that the judgment of the district court be reversed and the cause remanded, with directions to enter a decree permanently enjoining plaintiff from selling, or advertising to sell, men's boots, shoes and rubbers at retail in the city of Omaha and immediate vicinity under the trade-name of "Regent Shoe Manufacturing Company."

AMES and LETTON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with direc-

tions to enter a decree permanently enjoining plaintiff from selling, or advertising to sell, men's boots, shoes and rubbers at retail in the city of Omaha and immediate vicinity under the trade-name of "Regent Shoe Manufacturing Company."

JUDGMENT ACCORDINGLY.

JOSEPHINE F. STREET ET AL., APPELLEES, V. ELIZABETH M. SMITH ET AL., APPELLANTS.

FILED JANUARY 3, 1906. No. 14,081.

Revivor. When the sole plaintiff in an action dies, the effect is to suspend further proceedings until the action has been revived in the name of the legal representatives of the deceased.

APPEAL from the district court for Hitchcock county: GEORGE W. NORRIS and ROBERT C. ORR, JUDGES. *Reversed.*

W. F. Button, for appellants.

W. S. Morlan, contra.

OLDHAM, C.

This is an appeal from the confirmation of a sale in a foreclosure proceeding. The facts involved in the controversy are these: On the 14th of March, 1901, Josephine F. Street, as plaintiff, filed her petition in the district court for Hitchcock county, Nebraska, against Elizabeth M. Smith and others for the foreclosure of a real estate mortgage on certain lands in that county owned by defendant Elizabeth M. Smith. On the 18th day of November, 1901, a decree of foreclosure was rendered as prayed for in the petition. On the 25th of November, 1902, an order of sale was issued, and on the 29th day of December, following, the lands were bid in by plaintiff's attorney for the plaintiff. On the 31st day of March, 1903, this sale

was confirmed and deed ordered. On the confirmation of the sale, Charles B. Diehl filed a claim for the surplus, as purchaser of the equity of redemption of Elizabeth M. Smith pending the litigation, and the surplus was ordered to be paid to him, which was done. On June 20, 1903, the attorney of plaintiff filed an application for Irving W. Street, in which it was made to appear that the plaintiff, Josephine F. Street, had departed this life on May 22, 1902, seven months before the sale and six months before the order of sale was issued. It appeared from this application that Irving W. Street was the husband of the plaintiff, and that plaintiff had left a will devising all her property, except a few chattels, to Irving W. Street. The application, however, did not show who the executor of the will was, or that the will had ever been admitted to probate. The application prayed for an order vacating the order confirming the sale entered on March 31, 1903, and to authorize and direct the sheriff of the county to deliver to Irving W. Street a deed for the property pursuant to the bid of Josephine F. Street, deceased, and in all things to confirm said sale made as aforesaid in the name of Irving W. Street. While this application was pending, Charles B. Diehl, owner of the equity of redemption of the lands, filed a motion, asking to have the same stricken from the docket. This motion was overruled on April 11, 1904, and Diehl thereupon filed a showing that he had accepted part of the surplus in ignorance of the death of the plaintiff, and paid to the clerk of the district court for Hitchcock county the amount so received, and asked the court to direct it to be paid to the proper parties, when they were before it. On the same day he filed numerous objections to the final confirmation of the sale, and, among other things, denied the jurisdiction of the court to enter the decree prayed for by the plaintiff's attorney. Objections were also filed to the confirmation in the name of Elizabeth M. Smith, grantor of Diehl, and the original defendant in the cause of action. These objections were all overruled, and the sale was confirmed in

the name of Irving W. Street on the bid of Josephine F. Street, deceased. To reverse this judgment and order of confirmation, defendants Smith and Diehl have appealed to this court.

It is first urged by appellee that Charles B. Diehl is a mere interloper in the case, and not a party in interest and cannot, for that reason, maintain the appeal. With this contention we cannot agree. The record shows that he was the purchaser of the equity of redemption of the lands in controversy during the pendency of the suit; that he appeared in the case and was permitted to show, without objection, that he was the owner of the equity of redemption, and the surplus was paid to him on that showing. Having purchased the rights of the defendant pending the litigation, he was entitled to appear in the action at each subsequent stage, either in his own name or in the name of his grantor. *Howell v. Alma Milling Co.*, 36 Neb. 84; *Alexander v. Overton*, 52 Neb. 283.

It is next urged by appellee that, as no bill of exceptions was settled in this case, the appeal should be dismissed. This would be true if any testimony admitted could have sustained the judgment of the district court, but on the showing of Irving W. Street himself he was not entitled to the order prayed for. The order of sale of the land, issued after the death of the plaintiff, was a nullity, and the bid of the plaintiff's attorney at such sale for her, as her agent and attorney, was likewise a nullity. On the showing made by Irving W. Street, the only order that the district court could have rendered was an order setting aside the decree of confirmation of the sale, and it should then have revived the action in the name of the legal representative of plaintiff before any other proceedings were had.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

AMES and LETTON, CC., concur.

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

REVERSED.

CITY OF RED CLOUD, APPELLEE, V. FARMERS AND MERCHANTS BANKING COMPANY, IMPLEADED WITH JOHN O. YEISER ET AL., APPELLANTS.

FILED JANUARY 3, 1906. No. 14,438.

Evidence examined, and *held* sufficient to sustain the judgment.

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

John C. Cowin, for appellants.

George R. Chaney, J. R. Mercer, B. McNeny and *T. H. Matters, contra.*

OLDHAM, C.

This is an action in the nature of a creditor's bill in aid of execution, which is before this court a second time for review. The opinion in the first hearing of the cause in this court is unofficially reported in 3 Neb. (Unof.) 544. In this opinion, delivered by ALBERT, C., the issues arising on the pleadings and evidence are fully set forth and need not be again stated. A judgment for the plaintiff at the first hearing of the cause was set aside by this court, for the reason that plaintiff had failed to establish by competent evidence its judgment at law against the Farmers and Merchants Banking Company, on which its right of action depended. At a second trial of the cause in the district court, plaintiff's judgment against the banking company was properly established, and judgment was again ren-

dered in favor of the plaintiff. To reverse this judgment defendants have appealed to this court.

The only question now presented is as to the sufficiency of the testimony to sustain the judgment of the trial court, the material question being as to whether or not the evidence shows that defendant Yeiser purchased the premises in controversy in good faith relying on the record, and without knowledge of the fact that the lands were held in trust by N. S. Harwood and his grantor, James McNeny, for the banking company, judgment debtor of the plaintiff. The facts underlying the several conveyances are these: In June, 1893, the Farmers and Merchants Banking Company of Red Cloud, Nebraska, closed its doors and went into voluntary liquidation. Among the creditors of this institution was the city of Red Cloud, plaintiff in this cause of action, which had about $6,000 on deposit in the bank at the time it closed its doors. At that time W. S. Garber was its cashier and George O. Yeiser, father of the defendant, was its vice-president. After the bank had suspended business, its officers and directors asked and received from its depositors an extension of time for the purpose of meeting its indebtedness. W. S. Garber took charge of the affairs of the bank as liquidating agent. One of the creditors of the bank, Thomas Ryan, procured a judgment against it for a little more than $1,000 and caused an execution to be levied on the lot in controversy, on which the building of the bank had been erected. When this execution was levied on the building, W. S. Garber borrowed sufficient funds from the state bank of Red Cloud to satisfy Ryan's judgment. In securing the loan of this money, he gave his own note, and deposited collateral of the suspended bank, and also agreed with the cashier of the state bank that, if the loan was not promptly met, he would have the property, which was advertised for sale, bid in in the name of the cashier of the state bank, as additional security for the loan. The loan, however, was paid by Garber and the judgment of Ryan was paid and satisfied, but, as testified to by Garber, for the pur-

pose of preventing other creditors of the banking institution from levying on the building, the sale was had and the property was bid in at the sale by Garber, and the sheriff was directed to make the deed to N. S. Harwood, of Lincoln, Nebraska, who knew nothing about the transaction. When the deed was executed by the sheriff, it was delivered to Garber and recorded by him. Subsequently, defendant Yeiser, who, as attorney for one Bedford, had procured two individual judgments against W. S. Garber in the district court for Webster county, began negotiations with Garber for the settlement of these judgments. Garber, in the meantime, had removed to the state of Colorado and had been succeeded by George O. Yeiser as liquidating agent of the bank. According to the testimony, it fairly appears that defendant Yeiser made an agreement with Garber, by which Garber was to get a deed for the lot in controversy from N. S. Harwood in favor of Yeiser, and was to procure certain other conveyances of other lands and the satisfaction of a mortgage in the settlement of the Bedford judgments.

The exact nature of the representations which Garber made to Yeiser as to the condition of the title to the lot in controversy is not entirely clear from the record, but it is clear and unequivocal that Garber notified N. S. Harwood of the reason that he had placed the property in his (Harwood's) name, which was that it might be held in trust for the creditors of the banking institution. It is also clearly in evidence that Garber directed Harwood to forward a quitclaim deed to James McNeny, so that the interests of the creditors of the bank might be conserved. After James McNeny had received the quitclaim deed from Harwood, Yeiser applied to him, by Garber's direction, for a deed to the premises. Here the testimony is in sharp conflict. McNeny testifies, in substance, that he told Yeiser that he could only convey the premises as trustee for the creditors of the bank, and that he refused to give a warranty deed, as Yeiser requested, and gave only a special warranty against those claiming under

him (McNeny). Yeiser claims that no such conversation took place until after he had received and recorded the deed. The circumstances, however, seem to corroborate McNeny, for he gave only a special and not a general warranty deed to the lands. And again, Harwood, whom all the evidence shows never to have had nor claimed any interest in the lands, conveyed to McNeny by quit-claim deed, so that the character of the conveyances, on which Yeiser's title depends, was of itself sufficient to have put him on inquiry as to the real condition of the title.

We therefore conclude that the evidence is sufficient to sustain the judgment of the trial court, and we recommend that the 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.

WILLIAM COLGROVE V. IRA N. PICKETT.

FILED JANUARY 3, 1906. No. 13,888.

Trial: INSTRUCTIONS. A party has a right to have his theory of the case submitted to the jury, when there is competent evidence to support it.

ERROR to the district court for Gage county: W. H. KELLIGAR, JUDGE. *Reversed.*

R. W. Sabin, for plaintiff in error.

Hazlett & Jack, contra.

DUFFIE, C.

In the district court for Gage county, Pickett, a duly licensed physician, sued Colgrove for services rendered to one Lee Taylor, a son-in-law of Colgrove. The peti-

tion alleges that these services were rendered at the special instance and request of the defendant, and for which the defendant promised to pay. The answer was a general denial. The evidence discloses that Taylor was taken sick at Colgrove's house and that he requested his father-in-law to send for a physician. The physician was attending another patient in the neighborhood of Colgrove's home, and, being informed of that fact, Colgrove called at the neighbor's house and requested Pickett to visit, examine and prescribe for Taylor. The evidence of Pickett is to the effect that, after having examined Taylor and prescribed for him, Colgrove followed him to the yard, where his horse was tied, and requested him to continue his visits and that he would see him paid for his services. After one or two visits Pickett failed to call, and Colgrove and one Homershon visited his office, where Pickett informed them that the case was very serious; that he had doubts of Taylor's recovery, and did not like to assume the whole responsibility of the case and desired another physician called for consultation. Plaintiff's evidence tends to show that at this time both Colgrove and Homershon agreed to pay him for his services, and Homershon later did pay him about $40, the full amount of his bill at that time, and notified him that he would not be responsible for further services. Pickett continued his visits until his services amounted to the sum of $94, in addition to the amount paid by Homershon, for which he brought this action against Colgrove. Colgrove and his daughter both testified that, about the time that Homershon paid Pickett the amount of his bill, he (Colgrove) informed the doctor that he need not visit Taylor any longer "on his account."

The court instructed the jury very fairly relating to the defense of the statute of frauds, and Colgrove requested an instruction (No. 5) to the effect that, if the jury believed from the evidence that plaintiff was told by the defendant, after having made several visits, that he did not want him to make further calls on his account, then, in order to hold him liable for services thereafter

rendered, it would be necessary to show a new contract. The instruction, as drawn, is not a clear or satisfactory statement of this phase of the defense, but is not an erroneous statement of the law, and served to call the attention of the court to the particular point upon which Colgrove wished an instruction, and we think, under the circumstances of the case, the court should have properly instructed the jury relating to that particular feature of the case. If Pickett had been paid in full by Homershon up to the date that Colgrove and his daughter testified that he was informed that he need not continue his visits on Colgrove's account, then he ought not to recover, or if not paid in full, then it is clear that Colgrove should not be held for more than the balance then due. It is a universal rule that a party has a right to have his case submitted to the jury upon his own theory of the case, which there is competent evidence to support, and the evidence of two witnesses if believed by the jury, to the effect that on a certain date Colgrove told the doctor that he would not thereafter be responsible for his visits, would be a complete defense to any charges made against him after the date of such notification, and this phase of the case should have been submitted to the jury by a proper instruction.

For the error in failing to instruct the jury in that regard, we recommend that the judgment be reversed and the cause remanded for another trial.

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 and the cause remanded for another trial.

REVERSED.