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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1906.

VOLUME LXXVI.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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

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By HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

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First.....	Gage, Jefferson, Johnson, Nemaha, Pawnee and Richardson.	Leander M. Pemberton.....	Beatrice.
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		Lincoln Frost	Lincoln.
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		Lee S. Estelle.....	Omaha.
		Howard Kennedy....	Omaha.
		William A. Redick...	Omaha.
		Willis G. Sears	Tekamah.
		Abraham L. Sutton..	South Omaha.
		Alexander C. Troup..	Omaha.
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Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1906.

CITY OF McCOOK V. JAMES McADAMS.*

FILED FEBRUARY 22, 1906. No. 14,135.

1. **Municipal Corporations: SURFACE WATER: INJURY TO GOODS: EVIDENCE.** Evidence examined, and *held* sufficient to sustain a finding against the defendant on the question whether the loss in question was occasioned by the act of God.
2. **Evidence** which tends to negative that offered by the defendant to establish an affirmative defense is not open to the objection that it is not proper rebuttal, although it may also tend to prove some issue which the plaintiff was required to establish in making his case.
3. **Evidence** examined, and *held* insufficient to warrant the submission of the question of contributory negligence to the jury.
4. **An instruction** covering defendant's theory that the loss was occasioned by the act of God examined, and *held* as favorable to the defendant as the law would warrant.
5. **Instruction** as to the burden of proof examined, and *held* not erroneous.
6. **Damages.** In an action for damage to merchandise, the original cost of the goods is not a proper basis for the computation of damages. In such case, the measure of damages is the difference between the value of the goods immediately before and immediately after the injury.
7. ———: EVIDENCE. In order to establish the amount of such dam-

*Rehearing allowed. See opinions, pp. 7, 11, *post*.

ages, it is not permissible for a witness to testify to his conclusion as to the amount of damages; he should state the facts within his knowledge, and from those and other facts in evidence it is for the jury to determine the amount of damages sustained.

ERROR to the district court for Red Willow county: ROBERT C. ORR, JUDGE. *Reversed.*

F. I. Foss, J. R. McCarl, J. S. Le Hew, Boyle & Eldred and *R. D. Brown,* for plaintiff in error.

W. S. Morlan, contra.

ALBERT, C.

This is an action for damages caused by surface water flooding the basement of the plaintiff's storeroom as a result, it is alleged, of the defendant's negligent omission to maintain in proper condition a system of drains, ditches and culverts, which it had constructed for the purpose of conducting the surface water through the city. This cause was reviewed by this court on a former occasion. The opinion by Mr. Commissioner OLDHAM, reported in 71 Neb. 789, contains a clear and concise statement of the issues and facts in the case. A second trial in the district court resulted in a verdict for the plaintiff. The defendant brings error.

The first contention of the defendant is that the verdict is not sustained by sufficient evidence. This contention is based, in part, on the proposition that the storm which occasioned the injury complained of was of such unusual severity that the defendant's failure to guard against it cannot be imputed to it for negligence, in other words, that the plaintiff's loss is to be attributed to the act of God, and not to the negligence of the defendant. The evidence shows that on the 17th day of June, 1901, the city of McCook was visited by a severe storm of wind, rain and hail. It lasted about 36 minutes, and, during that time, more than 2½ inches of water fell. But there is evidence

tending to show that storms of that character, and of almost, if not quite, equal severity, are not unusual in that part of the state, and sufficient to warrant a finding that in the construction and maintenance of a system of drainage in the defendant city ordinary care and prudence would require the defendant to take into account the fact that such storms were likely to occur, and to provide against them. In this connection, the defendant complains because a portion of the evidence, tending to establish plaintiff's charge of negligence, was introduced in rebuttal. But it must be kept in mind that one theory of the defense was that plaintiff's loss was occasioned by the act of God. To establish this defense, the defendant undertook to show that the rainfall during the storm was so unusual in quantity that, even had the drainage system been maintained in a reasonable state of efficiency, it would not have prevented the damage to the plaintiff. This was pleaded as an affirmative defense, and one which the defendant undertook to establish by a preponderance of the evidence. Consequently, it was certainly competent for the plaintiff, on rebuttal, to negative that defense, although the evidence offered for that purpose might also tend to prove some issue which the plaintiff was required to establish in making his case. Such seems to be the situation in this case, and, taking into account the nature of the issues and the evidence, and the fact that the defendant made no effort to meet such evidence by further evidence on its part, the complaint now made that it had no opportunity to disprove the facts shown on rebuttal is unfounded.

Two of the instructions given by the court are as follows:

"(4) One defense interposed in this case is that the loss complained of by the plaintiff was occasioned by an act of God. The jury are instructed that by the term "act of God" is meant those events and accidents which proceed from natural causes, and cannot be anticipated and guarded against or resisted, such as unprecedented

storms or freshets, lightning, earthquake, and so forth. For loss occasioned by an act of God a city is not liable, provided its own negligence has not contributed to the damages sustained. On this defense, however, the city assumes the burden of proof to the extent that it must prove by a preponderance of evidence that the storm was of such a violent and unprecedented nature that no ordinary and reasonable amount of care would have prevented the damage. Therefore, if the plaintiff has established by a preponderance of the evidence that the defendant was guilty of negligence, then the burden of proof is upon the defendant city to prove by a preponderance of the evidence that the storm was of sufficient violence to have caused the damage sustained by plaintiff without the concurrence of such negligence; for if the negligence of the city contributed to plaintiff's damage the city is liable.

"(5) The question for you to determine in this case is simply this: Did the allowing of the drains, ditches, culverts and embankments to become and remain in the condition in which they were at the time of the storm cause or contribute to the plaintiff's damages? If it did not, and the rain-storm was of such violence that the plaintiff would have been damaged to the same extent, even with such drainage in the condition it was in when established and constructed, then your verdict must be for the defendant."

The defendant complains of these instructions, and construes them to mean that, although the plaintiff's negligence proximately contributed to the injury, the defendant would still be liable. We do not think they admit of that construction, in view of the evidence and the theory upon which the case was submitted by the court. The contributory negligence charged is that the plaintiff's store building was situated in a place where large quantities of surface water would naturally accumulate; that it was constructed without proper barriers to guard against surface water, and that the loss complained of was due to such omission, and plaintiff's own negligence. The

only evidence we find that tends, even remotely, to sustain this charge is that the water at the time of the storm broke down the area wall in front of the store building, flooded the basement, and damaged plaintiff's goods, and the testimony of one witness, who appears to have known nothing of the character of the wall or its condition, who, as an expert, testified as to the character of a wall required under circumstances not shown to be similar to those in which the wall in question was constructed and maintained. Assuming that contributory negligence is charged, the evidence is wholly insufficient to warrant the submission of that issue to the jury. The trial court evidently held that view, because the question of contributory negligence was not submitted, nor do we find, among the numerous instructions tendered by the defendant, any request for the submission of that question. The instructions in question, then, are to be construed in the light of the fact that the element of contributory negligence is eliminated from the case, and, with that fact in mind, it is plain that in these the court was dealing only with the defendant's theory that the loss was occasioned by the act of God. Taken together, and in connection with other instructions defining negligence and the defendant's duty in the premises, the effect of these two instructions was to convey to the jury that, if plaintiff's loss was occasioned by the act of God, the defendant was not liable, unless its negligence, cooperating with the act of God, contributed to the injury and increased the damages. Thus construed, the instructions state the law as favorably to the defendant as the authorities will warrant. *Collier v. Valentine,* 11 Mo. 299, 49 Am. Dec. 81; *New Brunswick S. & C. T. Co. v. Tiers,* 24 N. J. Law, 697, 64 Am. Dec. 404; *Baltimore & O. R. Co. v. Sulphur Springs Independent School District,* 96 Pa. St. 65, 42 Am. Rep. 529.

The defendant complains of another instruction, on the ground that it states that, on certain questions, the burden of proof shifted to the defendant. Ordinarily, it cannot be said with technical accuracy that the burden of proof

shifts in a case of this nature. But, in the instruction under consideration, the court first instructed the jury that the burden of proof was upon the plaintiff to establish the material allegations of his petition. Then comes that portion of the paragraph of which the defendant complains: "This burden, however, does not remain with the plaintiff upon a question of affirmative defense, and the point at which the burden shifts to the defendant will be later pointed out in these instructions." It is clear that the court did not instruct, and the jury could not have understood, that the burden of proof as to any issue tendered by the petition shifted, but merely that the burden of proof rested upon the defendant to establish its affirmative defense. That the instruction, as thus construed, is a correct statement of the law will be conceded.

But we think the judgment must be reversed, because of the erroneous admission of evidence on the question of damages. In order to establish the amount of damages sustained, the plaintiff and another witness, after having testified that they had made an estimate of the damages to the goods, were asked substantially this question: "What was the amount of damage (to the goods)?" The plaintiff answered, $534"; the other witness, "Over $500." The evidence shows that these estimates were based, in part, at least, on the original cost of the goods as shown by the cost mark. It is quite clear that the original cost of the goods is not a proper basis for the computation of damages, because it not infrequently happens that goods on the shelves of a merchant are actually worth but a fractional part of their original cost. The measure of damages in cases resulting from injury to property is the difference between the value of the property immediately before and immediately after the injury. *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848. Besides, it is not permissible for a witness to state the amount of damages sustained. He should state the facts within his knowledge, and from those facts and the other evidence adduced, it is for the jury to determine the amount of damages. *Fre-*

mont, E. & M. V. R. Co. v. Marley, 25 Neb. 138; *Jameson v. Kent,* 42 Neb. 412. The competency of the evidence offered by the plaintiff on the question of damages was challenged by timely and proper objections, and, as the verdict as to the amount of damages rests entirely upon evidence of that character, its admission necessarily constitutes prejudicial error.

Other errors are assigned, but as they are not such as are likely to occur in another trial, it would be profitless to consider them at this time.

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

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.

REVERSED.

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

Cities: ACTION FOR DAMAGES: INSTRUCTION. In an action against a city for damages alleged to have been caused by the negligent omission of the city to maintain in proper condition a system of drainage constructed by it, where one of the defenses relied upon is that the loss was occasioned by the act of God, it is error to instruct the jury that the burden is upon the defendant to establish such defense.

ALBERT, C.

The plaintiff in error recovered a judgment for damages to a stock of goods, which, it is alleged, resulted from the negligent omission of the defendant city to maintain in proper condition a system of drainage which it had constructed for the purpose of carrying off surface water. The city brought error.

Among other errors assigned was one to the affect that the reception of certain evidence adduced by the plaintiff on the question of damages was incompetent. The evidence was pointed out and its competency challenged in the brief filed on behalf of the city. In the brief subsequently filed by the plaintiff, no attempt was made to show that the evidence was competent, to justify its reception, or to show that its reception, if error, was error without prejudice. The judgment was reversed on the ground that the evidence in question was incompetent. *City of McCook v. McAdams, ante,* p. 1. A motion for rehearing was then filed, and in the brief in support thereof it was contended, among other things, that the cause was submitted on the theory, acquiesced in by both parties, that there was no dispute as to the amount of damages, and that the plaintiff, if entitled to recover at all, was entitled to recover the whole amount claimed. There seems to be some ground for this contention, and if the case rested solely upon that assignment we should hesitate to recommend a reversal of the judgment.

But we think the former judgment should be adhered to on other grounds. In the former opinion we discussed certain instructions relating to the burden of proof, and attempted to dispose of the contention that such instructions were to the effect that the burden of proof shifted during the trial. We are satisfied that the specific contention just mentioned is fairly disposed of in the former opinion, but, upon further consideration, are convinced that in the disposition thereof we impliedly gave effect to a rule of law which has no application to cases of this character, and that is that the burden of proof is upon the defendant to establish the defense that the loss was caused by the act of God. That rule is generally recognized and applied in actions against carriers for the loss of goods. *Black v. Chicago, B. & Q. R. Co.,* 30 Neb. 197; 1 Jones, Evidence, sec. 180, citing among other cases: *Nelson v. Woodruff,* 1 Black (U. S.), 156; *The Mohler,* 21 Wall. (U. S.) 230; *Levering v. Union Co.,* 42 Mo. 88, 97

Am. Dec. 320, and note. But its applicability to such cases is due to the peculiar liability of a common carrier. His obligation is to carry and deliver the goods, and rests upon a contract, expressed or implied. Where there is a breach of this obligation, the law, from considerations of public policy, pronounces the carrier legally answerable therefor, unless he can clear himself by bringing the loss within certain exceptions, one of which is the act of God. Schouler, Bailments and Carriers (2d. ed.), sec. 405. But an ordinary action in tort for damages caused by some negligent act or omission of the defendant stands on a different footing. In such case, the bare fact that the plaintiff has suffered damages raises no presumption against the defendant. Nor is it sufficient for the plaintiff to show that the defendant was negligent; he must also show that such negligence was the proximate cause of the injury complained of. *Brotherton v. Manhattan Beach I. Co.*, 48 Neb. 563; *City of Omaha v. Bowman*, 52 Neb. 293. In other words, the burden is upon the plaintiff to show that his loss is the proximate result of defendant's negligence. Plaintiff's proof tending to establish that proposition may be met by evidence in direct negation thereof, or by evidence which indirectly negatives the proposition, as, for example, that the loss was caused by a third person, or by the act of God, or some other agency, therefore it was not the proximate result of defendant's negligence. In either case, where the evidence for and against the proposition is equally balanced, or preponderates in favor of the defendant, the plaintiff is not entitled to a verdict. The mere fact that the defendant proceeded indirectly instead of directly to negative the proposition does not shift the burden of proof to its shoulders. Indeed, this court has held that, in an action for damages on the ground of negligence, the burden of proof on the question of negligence does not shift, but remains with the plaintiff throughout the trial. *Omaha Street R. Co. v. Boesen*, 74 Neb. 764; *Lincoln Traction Co. v. Shepherd*, 74 Neb. 369, 374. These cases, while not

directly in point, have a strong bearing on the question under consideration. We have been unable to find a case directly in point, as the question has generally arisen in actions against common carriers which, as we have seen, stand on a different footing. *Chicago, R. I. & P. R. Co. v. Shaw,* 63 Neb. 380, tends to support the opposite view. That case, like the present, was for damages for surface water, and it was there held that the act of God, when relied on as a defense, must be specially pleaded. But the holding in that case seems to be the result of a failure to distinguish between actions against common carriers, as such, and those grounded entirely on negligence, and seems to be in conflict with the holdings of the New York courts which have repeatedly held that in the latter class of cases it may be shown, under a general denial, that the injury was caused by the negligence of a third person. *Schular v. Hudson River R. Co.,* 38 Barb. (N. Y.) 653; *Schaus v. Manhattan Gas Light Co.,* 14 Abb. Pr., n. s. (N. Y.) 371; *New Haven & Northampton R. Co. v. Quintard,* 6 Abb. Pr., n. s. (N. Y.) 128; *Gilbert v. Sage,* 5 Lans. (N. Y.) 287; *Howell v. Biddlecom,* 62 Barb. (N. Y.) 131; *St. John v. Skinner,* 44 How. Pr. (N. Y.) 198; *Kansas P. R. Co. v. Searle,* 11 Colo. 1. We can see no difference in principle between showing that the loss was caused by a third person and that it was caused by the act of God, or some other agency. After a careful examination of the subject, we are satisfied the rule that the burden of proof is upon the defendant to establish the defense of the act of God is not applicable in cases of this character. It follows therefore that the instructions of the court which we have considered are erroneous.

It is recommended that the former judgment of reversal be adhered to.

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

REVERSED.

The following opinion on second rehearing was filed January 8, 1908. *Former judgment of reversal vacated and judgment of district court affirmed:*

Cities: ACTION FOR DAMAGES: INSTRUCTION. In an action brought against a city by a property owner for damages occasioned by the failure of the city to keep in repair an artificial drainage system constructed by it, whereby surface water was diverted from its natural flow during a rainstorm and cast upon his premises, the defendant pleaded a general denial, and that the storm was of such unprecedented character as to constitute the act of God. The jury were instructed in substance that, if they found that the defendant was guilty of negligence in failing to keep the drainage system in repair, the burden of proof was, in that event, upon the defendant to establish by a preponderance of the evidence that the storm was of sufficient violence to have caused the damage sustained by the plaintiff without the concurrence of such negligence. *Held*, That such instruction was not erroneous.

LETTON, J.

A full statement of the facts in this case and of the issues involved has been made in former opinions. The court being in doubt as to the correctness of the law as to the burden of proof laid down in the last opinion, a rehearing was granted mainly for the consideration of that question. Upon the other questions involved we are satisfied the case was properly submitted. At the trial the question of the amount of damages was treated as practically conceded, the main contention being whether plaintiff was entitled to recover at all.

The plaintiff bases his right of recovery upon the alleged negligence of the defendant in failing to keep in repair and in proper condition a system of drainage constructed by it, whereby surface water, which would not otherwise have flowed upon his premises, was diverted from its usual course and permitted to flow thereon to his damage. The defendant pleaded a general denial, and also pleaded that the injuries complained of were caused by a storm of such an unprecedented and extraordinary char-

acter as to constitute in law the act of God. The last opinion held that it was error, in such a state of the issues, to instruct the jury that the burden is upon the defendant to establish the defense of the act of God. It is said in the opinion of Mr. Commissioner ALBERT:

"In other words, the burden is upon the plaintiff to show that his loss is a proximate result of defendant's negligence. * * * Plaintiff's proof tending to establish that proposition may be met by evidence in direct negation thereof, or by evidence which indirectly negatives the proposition, as, for example, that the loss was caused by a third person, or by the act of God, or some other agency; therefore, it was not the proximate result of defendant's negligence. In either case, where the evidence for and against the proposition is equally balanced, or preponderates in favor of the defendant, the plaintiff is not entitled to a verdict. The mere fact that the defendant proceeded indirectly instead of directly to negative the proposition does not shift the burden of proof to its shoulders."

We think these statements hardly applicable to the question before us, for the instruction complained of only cast the burden of proving *vis major* on the defendant after the jury had been convinced by the plaintiff's proof that the defendant had been guilty of negligence to his damage. While the burden is on the plaintiff to show that his loss is the result of the defendant's negligence, when he has established the fact of negligence on the part of the defendant and that his loss occurred directly therefrom, he has met all of the conditions the law imposes upon him in order to recover, before any evidence is produced by the defendant. He is not required to go further, and to anticipate and disprove all defenses which the other party may have pleaded or may introduce evidence to support under a general denial. When the plaintiff has closed his case, the defendant may show that it was not guilty of the negligent act complained of by either direct or indirect proof which negatives the proof offered

by the plaintiff as to the fact of its negligence or the plaintiff's damage. Further than this, the defendant may plead and offer proof of matters in excuse or justification, as that the injury complained of would have occurred in any event without the concurrence of the defendant's negligence, or that some outside, independent force, of such nature that the defendant in its duty of observing care could not reasonably have anticipated or guarded against, was the proximate cause of the injury. Such defenses, while not technically confession and avoidance, partake of the nature of such defense. While not confessing the cause of action, they seek to avoid its effect by proof of other and new matter which bars the plaintiff's right to recover, and they must be established by the defendant in order to overcome the evidence on the part of the plaintiff, which, unexplained, would establish the defendant's negligence. They are affirmative in their nature and the burden of proving them is upon the person asserting them.

In the former opinion a distinction is sought to be drawn between such defense if pleaded by a common carrier and if offered by another, but we see no reason for the distinction, provided that the person seeking to assert it stands in a similar relation to the person injured. A carrier has undertaken a special duty to carry safely. If he fails to do so a presumption arises against him, which he must explain away. In this case the city had constructed a drainage system which the jury found it had neglected to keep in repair, and that by its negligence the plaintiff apparently was injured. In the one case, the presumption took the place of evidence against the carrier; in the other, the jury found the facts against the city as to neglect to keep up the ditches. The burden then rests alike on the carrier and the city to produce proof to show that its negligence was not the proximate cause of the loss or injury, but that the loss was attributable to an independent cause without the concurrence of its negligence, or, in other words, that, even if it had not been negligent, the injury would have occurred. In this case,

the city having constructed the artificial drainage system and changed the natural flow of the surface water, the obligation rested upon it to exercise reasonable care to maintain the system so that the water would not be collected and thrown upon the plaintiff's premises to his damage. The plaintiff had a right to rely upon its exercise of proper and reasonable care in that regard. If he was damaged by water breaking from such artificial drainage channel and rushing upon his premises by the negligence of the defendant, and the defendant undertook to explain the occurrence, the burden was upon it to make the explanation, and not upon the plaintiff to negative the excuse in making his case. *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380; *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698; *Olsen v. Webb*, 41 Neb. 147; *Williams v. Evans*, 6 Neb. 216; *Chicago, R. I. & P. R. Co. v. Buel*, p. 420, *post*. The illustration given by Judge Cooley in discussing special duties is instructive: "The case may be instanced of a householder on a prominent street of a city repairing his roof. While thus engaged a slate falls from the roof and injures a person passing along the street below. Here, manifestly, it was the duty of the householder to take such precautions as would reasonably guard against such an injury; all the obligation of special care was upon him, and the passer-by had a right to assume that no work being done over the walk was to subject him to danger. True, the act of God, or some excusable accident may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection." 2 Cooley, Torts (3d ed.), p. 1,422.

This view does not conflict with the doctrines of the cases of *Omaha Street R. Co. v. Boesen*, 74 Neb. 764, or *Lincoln Traction Co. v. Shepherd*, 74 Neb. 369, 374, for the burden of proof as to the existence of negligence still rests upon the plaintiff throughout the trial; neither, we think, does it conflict with the holdings of the New York cases cited in the last opinion, but may be distinguished therefrom. In fact, the case of *New Haven & North-*

ampton Co. v. Quintard, 6 Abb. Pr., n. s. (N. Y.) 128, established the rule in that state that an act of God must be specially pleaded in order to admit proof. This was an action against a common carrier, but, as we have seen, the rule is applicable to all other cases of special duties. The burden was placed upon the plaintiff by the instruction to prove the defendant's negligence of duty and his damage. After he had made his case, in order to escape the logical result of this proof, the defendant was required to show that the loss was inevitable under the circumstances. We think this was proper. After its negligence was established it had the laboring oar. The burden did not rest upon it to disprove negligence, but upon the plaintiff to prove it, but, negligence being proved against it, it did have the burden of showing an independent cause for the injury, by reason of which it was released from liability. Upon the whole case, we find no prejudicial error in the record.

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

AFFIRMED.

HENRY C. JORDAN V. ANDREW R. JACKSON.*

FILED FEBRUARY 22, 1906. No. 14,149.

1. **Review:** RECORD. Affidavits used on the hearing of a motion to set aside a default, if not preserved in the bill of exceptions, will not be considered in this court.
2. **Specific Performance:** PLEADING. Amendment to a cross-petition examined, and *held* not to constitute a departure, and the cross-petition, as thus amended, examined, and *held* sufficient to support a decree for specific performance.
3. ———: FINDINGS. In such case a general finding in favor of the cross-petitioner will sustain a decree for specific performance.
4. **Married Women:** CONVEYANCES. Where a married woman owns

*See opinion on motion for rehearing, p. 26, *post.*

real estate in her own right, except when such real estate is a homestead, in order to convey a good title it is not necessary that her husband should join in the conveyance.

5. **Evidence** examined, and *held* sufficient to sustain the findings and decree.

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

W. E. Gantt, for plaintiff in error.

J. C. Mabry and *William P. Warner, contra.*

ALBERT, C.

On the 28th day of August, 1902, the plaintiff and the defendant entered into a contract in writing, whereby the defendant agreed to sell and convey to the plaintiff 840 acres of land in this state for $36,120. The purchase price was to be paid as follows: $2,500 when the contract was executed, $2,500 on February 1, 1903, $5,000 March 1, 1903. The remainder to be evidenced by two notes to be executed March 1, 1903, secured by second mortgage on the land, one for $16,000, and the other for $10,120, both payable March 1, 1908. The contract further provides that upon receipt of the cash payments above mentioned and the execution of the notes and mortgage for the deferred payments, the defendant shall execute a warranty deed to the plaintiff. After the contract was prepared and signed, the plaintiff paid the defendant $1,000 of the $2,500 cash payment, and the contract was left in a bank in Sioux City. The understanding upon which it was left there is one of the matters in dispute, and will be referred to hereafter. Shortly afterwards the plaintiff expressed himself as dissatisfied with the abstract furnished by the defendant, claiming that the defendant's title appeared to be defective. The defects urged at that time are discussed in the body of the opinion. Afterwards, in the month of September, the plaintiff wrote the defendant notifying

him of his demand for the return of the $1,000, and that the abstract did not show good title. Failing to procure a return of the $1,000, on the 14th day of October, 1902, the plaintiff brought this action.

It is alleged in the petition that on or about the 28th day of August, 1902, the plaintiff and the defendant made an agreement, whereby it was mutually agreed between them that the plaintiff should buy from the defendant, and the defendant should sell to the plaintiff, the lands hereinbefore mentioned, at the price already stated; that after making a verbal agreement and agreeing upon the terms and conditions, it was then further agreed by and between the parties that the agreement should be reduced to writing, signed by the parties and placed in escrow in a certain bank in Sioux City, Iowa, there to remain until the defendant should furnish the plaintiff abstracts of title to the land showing perfect title to the same in the defendant, and that plaintiff was then to have ten days in which to examine the abstracts, and if, upon such examination, they were satisfactory to him that the sale was to be completed in accordance with the terms of the agreement in escrow. A copy of the agreement reduced to writing is set out at length in the petition. It is further alleged that said written agreement was deposited in said bank, and at the same time the plaintiff also deposited in escrow his check for the sum of $1,000, payable to the defendant, which at said time was by the defendant indorsed to the bank, and that the money thereon has been collected by the bank, and that the funds so collected remain in escrow in place of the check; that on or about the first day of September, 1902, the defendant furnished abstracts to the land, and that on or about the 5th day of the same month the plaintiff notified the defendant that the abstracts were not satisfactory, and that they did not show that the defendant had good and sufficient title to the land; that he then notified the defendant that he would not accept said title or proceed further in carrying out the agreed contract of sale, and demanded of defendant, and of the said

bank, the return of the said $1,000 so as aforesaid left in escrow, and the cancelation of the said agreement; that the defendant refused and still refuses to cancel the agreement and have said money returned to the plaintiff. The petition also contains a general allegation that the plaintiff has performed all the conditions of said agreement on his part, but that the defendant has failed as aforesaid to perform his part thereof. The damages are laid at $1,300. The petition contains a second cause of action, but it need not be noticed at this time.

On the 23d day of February, 1903, the defendant having failed to answer, a default was entered against him, although his attorney at the time appeared and tendered an answer. On the same day the defendant presented a motion to set aside the default. It was supported by affidavits and accompanied by an answer setting up a meritorious defense. The motion was allowed and leave given to answer.

The answer is of unusual and unnecessary length. It admits the execution of the written contract set out in the petition, that it was deposited in a Sioux City bank, but denies specifically that it was placed there in escrow for the reasons and for the purpose alleged by the plaintiff, and avers that it was left there for the reason that the plaintiff was unable at that time to pay more than $1,000 of the cash payment required by the contract, and required ten days to pay the remaining $1,500, and that the contract was deposited in said bank with the understanding that it would be delivered to the plaintiff when he had paid the remaining $1,500, which was to be paid within ten days from the execution of the contract. The answer also denies that the plaintiff deposited his check in said bank in escrow, but alleges that the check was given in part payment of the cash payment mentioned in the contract. It denies that defendant's title to the land was defective, and alleged affirmatively that his title thereto is clear and perfect, with the exception of certain mortgage liens, which the defendant was to pay out of the money re-

ceived from the plaintiff on the purchase price. The answer contains a general denial of all allegations not admitted or qualified. The answer also contains what is denominated a counterclaim, but it will not be necessary to notice it at this time.

A cross-petition was filed with the answer, which it will be necessary to notice at length. It is as follows:

"Against the plaintiff the defendant alleges: (1) The making of said written contract, a copy of which is set out in the petition, which was entered into by the plaintiff and defendant on the 23d day of August, 1902; the defendant further alleges that he performed all that said contract requires of him up to the present time, and that he will perform all that it required by said contract hereafter, and that on or before March 1, 1903, he will make and tender to the plaintiff a good and sufficient warranty deed to all the property described in said contract, with a clear and perfect title thereto, which is all that can be required of the defendant by the terms of said contract. (2) He further alleges that all that plaintiff had done on his part by way of performance of said contract is the payment to the defendant of the sum of $1,000 which was paid at the time of signing said contract, that there remains now due and payable on said contract the further sum of $4,000 which the plaintiff refuses to pay; that he declares his intention not to further perform his part of said contract, and continues to disregard and repudiate its terms; that there will be due upon said contract the further sum of $5,000 March 1, 1903, and at the time the plaintiff is required by the terms of said contract to execute and deliver to the defendant his two promissory notes, one for $16,000, with interest at 5 per cent. payable semiannually, and the other for $10,120, with interest at 5½ per cent. per annum, both due March 1, 1903, and to execute mortgages upon the real estate sold to him to secure the payment of said notes, all of which the plaintiff declares he will refuse to do, and asserts his intention to repudiate said contract. Wherefore, the defendant prays

the court for a decree against the plaintiff requiring him to specifically perform said contract in all its terms and conditions, and to pay said sums of money now due upon said contract, and to pay the sum of money to become due March 1, 1903, and to execute said notes and mortgages in compliance with the terms of said contract, and he prays the court for such other and further relief against the plaintiff as shall secure the performance of said contract, and, if the plaintiff fails and refuses to perform said contract within 30 days from the signing of the decree requiring him so to do, that then the court shall render judgment against the plaintiff for the full amount unpaid upon said contract, to wit, $35,120, together with interest at 7 per cent. thereon, and costs of suit."

The reply is a general denial. Afterwards the defendant filed the following amendment to his cross-petition: "Comes now the defendant and, leave of court being first obtained, files the following amendment to his answer and counterclaim: (1) He alleges that on March 1, 1903, and at all times he was, and has been, and is now ready and willing in all particulars to perform said contract on his part, but alleges that he did not on March 1, 1903, or at any other time, make and tender to the plaintiff a deed as provided in said contract, for the reason that prior to that time the plaintiff repudiated his said contract and refused to perform its terms or make any further payments on the purchase price of said land as required by the terms of said contract, and the defendant avers that he was able, willing and ready on said 1st day of March, 1903, to make a clear and perfect title to the plaintiff for all of said land, and to make and deliver to the plaintiff a good and sufficient warranty deed therefor, and would have done so, except for the plaintiff's persistent refusal to perform said contract on his part and his avowed purpose to repudiate the same. The defendant alleges that he is still willing and ready to perform his contract, and convey to plaintiff a clear and perfect title to all of said real estate, as soon as the plaintiff makes the payments

of the purchase price as required by the terms of said contract. Wherefore, in addition to the prayer of his original and cross-petition, the defendant prays the court for the additional relief, if the plaintiff fails to specifically perform his said contract within a time fixed by the court's decree, then the defendant be given judgment against the plaintiff for the full amount of the balance due on the purchase price of said land, and that all plaintiff's rights, title and interest in said lands, and all his equities therein, be foreclosed and forever barred, and that such judgment be established as a lien upon said land as in proceedings to foreclose a mortgage, and that special execution issue for the sale of all the plaintiff's rights, interests and equities in all said real estate, for the satisfaction of such judgment, interest and costs, so far as the same will extend, and that he have judgment for any deficiency, and general execution to satisfy any unpaid balance that remains due after the sale of said property, and for all other orders and relief as justice and equity require in the premises."

A trial was had to the court without a jury which resulted in a finding for the defendant and a decree for specific performance. The plaintiff brings the case here on error.

The first assignment of error is that the court erred in setting aside the default. The motion to set aside the default was accompanied by an answer setting up a meritorious defense, and appears to have been supported by affidavits. The affidavits are not preserved by bill of exceptions, and for that reason cannot be considered at this time. This is a rule that is reiterated at almost every sitting of the court. *Mercantile Trust Co. v. O'Hanlon,* 58 Neb. 482; *Reid, Murdock & Co. v. Panska,* 56 Neb. 195, and cases cited. Every presumption is in favor of the correctness of the order of the district court, and, in the absence of evidence showing that its discretion was abused, the presumption that it was properly exercised in this instance will prevail. The plaintiff, however, insists that it was in-

cumbent upon the defendant to preserve the evidence on this motion. We know of no rule of practice that requires a party to preserve the evidence for the use of his adversary.

The next contention of the plaintiff is that the court erred in permitting the defendant to file an amended petition. This contention is based on two grounds: (1) That the facts set out in the amendment existed at the time the original answer was filed: (2) that the amendment presents another and different cause of action than that set up in the original cross-petition. The first objection could be urged against almost any amendment offered to a pleading, because, ordinarily, an amended as distinguished from a supplemental pleading is based on facts which existed when the original pleading was filed. Consequently, to sustain that objection would be, practically, to deny the right to amend. As to the second, it cannot be fairly said that the amendment presents another and different cause of action than that set up in the original answer and cross-petition, because the identity of the cause is clearly preserved and the relief asked is substantially the same. It is possible that it did present issues which would have to be supported, and which the plaintiff would have to meet, by different testimony than that required by the issues tendered in the original cross-petition, and it is possible that the plaintiff would have been entitled to a continuance on that ground, had he asked it, but it does not seem that he applied for a continuance, at least he does not complain of a refusal of a request for a continuance. There seems to be no merit in the contention that the court erred in permitting the amendment.

The decree is next assailed on the ground that it is not supported by the cross-petition and the amendment thereto. We have set out the pleadings in substance and we are satisfied that they are amply sufficient to sustain the decree. In this connection we might notice another assignment of error, which is based on the denial of a motion made by the plaintiff to strike certain portions of the prayer to plaintiff's amendment to the cross-petition. The prayer

is no part of the pleading, tenders no issue, and neither adds to nor takes from the evidence required of either party. We are unable to perceive how the denial of this motion could in any way prejudice the plaintiff.

Another assignment, argued at some length, is that the decree is not supported by the findings, in that the court did not find that the defendant had performed his part of the contract, or any fact that would excuse such performance. The answer to this is that at the close of specific findings in favor of the defendant is a general finding in favor of the defendant which, if it stood alone, is sufficiently broad to support a decree in his favor.

A further contention of the plaintiff is that the findings of the court necessary to support the decree are not sustained by sufficient evidence. He insists that it is established by the evidence that after the contract was drawn up and signed it was left in the bank at Sioux City, with the understanding that it was not to become effective until the defendant had procured abstracts showing clear title to the property in question, and satisfactory to the plaintiff. The testimony of the plaintiff is to that effect, but he is flatly contradicted by the defendant. The defendant's version of the transaction is that after the contract was made and signed it was found that the plaintiff was unable to pay the full amount of the first payment, the receipt of which was acknowledged in the contract, but could only pay $1,000, and asked a week or ten days to pay the remaining $1,500. This was agreed to, whereupon the plaintiff paid $1,000, and his copy of the contract was left in the bank at Sioux City, with instructions to the effect that upon the payment of the remaining $1,500 it was to be delivered to him. The objection to delivering it to him at the time being that on its face it showed the receipt by the defendant of the full amount of the first payment. The defendant's story is corroborated by the cashier of the bank, as well as by many facts and circumstances appearing in evidence, and we think the evidence upon this branch of the case clearly preponderates in his favor.

But the plaintiff contends that the evidence shows that the title which the defendant proposed to convey was defective, and, consequently, a decree for specific performance in favor of the defendant is inequitable and erroneous. We are unable to concur in this view. The defects upon which the plaintiff relies in support of this contention are: (1) An omission in a deed forming part of the chain of title to state whether the grantor therein, a woman, was married or single; (2) another deed forming a link in the chain of title purports to have been given by certain parties described in the deed as widow and only heirs of one in whose name the title stood of record at the date of the conveyance; (3) a mortgage lien on the land, or a part of it, for $8,500 in favor of Connecticut Mutual Life Insurance Company; (4) a trust deed to secure the payment of $400 annually to defendant's mother during her lifetime, constituting a lien on the land. As to the first it appears to be frivolous. We are unable to see how it is material, on the question of the title to this land, whether she was married or single when she executed the deed. It is not claimed that any portion of it constituted a family homestead. If she were single, and otherwise competent, there can be no question as to her right to convey. If married, she could convey in the same manner and with like effect as if she were single. Comp. St. 1905, ch. 73, sec. 42. Her husband's contingent right as tenant by curtesy stands on a different footing than that of the wife's inchoate right of dower. The surviving wife takes dower in all lands whereof the husband was seized at any time during the marriage, unless lawfully barred (Comp. St. 1905, ch. 23, sec. 1), whereas the husband's right of curtesy extends only to lands whereof his wife was seized in her own right at the time of her death. In other words, while the wife, if a resident of the state, must join the husband in a conveyance, or execute a separate conveyance, in order to cut off her right of dower; by her own conveyance and without the concurrence of her husband she may convey good title to the lands owned by her, unless the property be a homestead.

As to the second defect, it is not claimed that the grantors named in the deed did not stand in the relation there stated to the party who had died seized of the land, but merely that it does not thus appear on the paper title. So far as the abstract itself is concerned, it shows how the grantors were described in the deed, by recital which would be of as much weight, at least, as the recital omitted from the other deed, namely, whether the grantor was married or unmarried, upon which plaintiff places so much stress. Aside from the recital in the deed, two affidavits were produced from parties having knowledge of the facts which show that one of the grantors was the surviving wife of said decedent, that he had died intestate, and that the other grantors are his only children, save a posthumous child, which died when less than two years old. The proof by affidavit is of the character usually required to cure such defects, and we think was amply sufficient to satisfy any reasonable person.

As to the two mortgages, it sufficiently appears that the plaintiff was apprised of them when the negotiations leading up to the contract were in progress, and that it was understood between the parties that the one to defendant's mother should be released on or before March 1, 1903, and the other paid off and discharged out of the payments then and previously made by the plaintiff on the purchase price of the land. The first was in fact released in September, 1902, about two weeks from the date of the contract. As to the other mortgage, as it was to be satisfied out of the payments which the plaintiff was to make, so long as he is in default on such payments he is in no position to complain that it has not been satisfied, especially so long as the balance which would still remain unpaid on the purchase price is largely in excess of the lien of the mortgage.

The abstract furnished is in evidence; it was passed upon and approved by plaintiff's attorney, except as to the mortgage of the insurance company, and, subject to that exception, which as we have seen is not available to the

plaintiff at this time, shows a good and merchantable title in the defendant. The objections to it appear to be captious, and, judging from the entire record, seem to have been raised rather because the plaintiff desired to escape from the contract than because of any fear that the title he had agreed to purchase was not good.

Many assignments are based on the reception of evidence which the plaintiff insists was incompetent. But it is well settled that the reception of incompetent evidence, in a trial to a court without a jury, is not reversible error, when there is sufficient competent evidence to sustain the findings. Little, if any, incompetent evidence was received in this case, and the competent evidence is ample to sustain the findings and decree. For these reasons, it is unnecessary to go into this assignment with greater particularity.

It is recommended 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.

The following opinion on motion for rehearing was filed June 8, 1906. *Former judgment vacated and judgment of district court reversed. Motion for rehearing overruled:*

JACKSON, C.

For the first time our attention is called to the fact that the defendant has at all times retained possession of the land covered by the contract, which he now seeks to have specifically enforced. It is now insisted that an account should have been taken of the rents and profits, and the amount credited to the plaintiff on the payments required to be made by him. By the terms of the contract and the

decree the deferred payments draw interest, and it would seem to be inequitable that the defendant should be allowed interest and at the same time enjoy the rents and profits of the real estate. *Craig v. Greenwood,* 24 Neb. 557. It does not appear, however, that this matter was brought to the attention of the trial court, nor has counsel pointed out any basis in the record for a computation of the rents and profits. But as the decree itself is in form defective, in that it provides only for performance on the part of the plaintiff and not on the part of the defendant, we think the ends of justice would be served by vacating the decree of the district court and remanding the cause, with directions to permit the plaintiff to file a supplemental bill for an account of rents and profits and to deduct the amount thereof from the payments required of the plaintiff, and to enter a decree for specific performance on the part of both the plaintiff and the defendant.

It is therefore recommended that the former judgment of this court and the decree of the district court be vacated, and the cause remanded, with directions to permit the plaintiff to file a supplemental bill for an account of the rents and profits to be credited on the payment to be made by the plaintiff, and to enter a decree accordingly for specific performance on the part of both the plaintiff and the defendant.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court and the decree of the district court are vacated, and the cause remanded, with directions to permit the plaintiff to file a supplemental bill for an account of the rents and profits to be credited on the payment to be made by the plaintiff, and to enter a decree accordingly for specific performance on the part of both the plaintiff and the defendant, and the motion for rehearing is overruled.

JUDGMENT ACCORDINGLY.

IN RE ESTATE OF CALISTA E. SCOTT.
SARAH M. BROWN ET AL. V. MATILDA E. HARMON.*

FILED FEBRUARY 22, 1906. No. 14,146.

1. **Administrators: APPOINTMENT: APPEAL.** The administrator of an estate is an officer of the court, and in making the appointment the court is required to exercise a reasonable discretion. Upon appeal to the district court from an order appointing an administrator, the issue presented by the appeal is one for the court, and should not be submitted to a jury.
2. **Letters of administration** should ordinarily be granted to the widow or next of kin where the application for such appointment is timely, but where the next of kin are unable to agree upon an administrator, and in the exercise of its discretion the probate court appoints some one other than the next of kin, the appointment should not be disturbed on appeal, unless it appears that there has been an abuse of such discretion.

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

Berge, Morning & Ledwith, for plaintiffs in error.

Stewart & Munger, contra.

JACKSON, C.

Calista E. Scott died intestate in Lancaster county April 30, 1904. Her heirs were Sarah M. Brown, Matilda E. Harmon and Lucinda Kemble, daughters, A. L. Scott, a son, and W. L. Scott, a grandson. A. L. Scott was a resident of Thayer county. Sarah M. Brown, Lucinda Kemble and A. L. Scott joined in a petition to the county court of Lancaster county, requesting the appointment of A. L. Scott as administrator of the estate of their parent. Matilda E. Harmon filed a counter petition, objecting to the appointment of Scott for the sole reason that he was a nonresident of Lancaster county, and re-

*Rehearing denied. See opinion, p. 30, *post.*

quested the appointment of Henry Harkson. After hearing, Harkson was appointed upon a finding that he was a more suitable person and competent to act as such administrator. An appeal was taken to the district court, where the appointment of Harkson was confirmed, and Scott and his sisters, Mrs. Brown and Mrs. Kemble, prosecute error.

In the district court Matilda E. Harmon moved that the case be placed on the docket for the trial of cases without a jury. This motion was sustained. The record discloses that the order of the court was that the case be transferred to the equity docket. Plaintiffs in error demanded a jury trial, which was denied.

Two questions are presented by the petition in error: First, the absolute right of Scott upon the record to be appointed administrator of his mother's estate; and, second, the denial of a jury trial in the district court. There is considerable force in the contention of plaintiffs in error that the county court should have appointed Scott administrator of his mother's estate. The application was timely, and his qualifications were not put in question. The county judge seems to have acted entirely upon the assumption that it would best conserve the interests of the estate to appoint a resident of Lancaster county. That condition alone ought not to deprive the next of kin of the right to administer the estate of their ancestor. There is, however, a degree of discretion vested in the county court in the appointment of administrators, and we find no such abuse of discretion as would justify a reversal in the case at bar.

Coming to the question of a right to a jury trial, our view is that the trial court adopted the proper procedure. The case of *Sheedy v. Sheedy,* 36 Neb. 373, which it is urged supports the demand of the plaintiffs in error for a jury, in our judgment is not in point. On principle the questions involved in the appointment of an administrator are easily distinguished from those arising out of an allowance to the widow. It is true that this proceeding is

not equitable, but the question of the qualifications of a person to administer upon an estate is purely a question for the court. An administrator is an officer of the court. The appointment is one resting in sound discretion, and it would be anomalous to hold that such discretion must be controlled by the verdict of a jury.

We find no reversible error in the record, and 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.

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

Administrators: APPOINTMENT: DISCRETION. When the next of kin disagree as to the selection of an administrator, and the court appoints one requested by one of the next of kin, it will not be presumed upon appeal, in the absence of any evidence upon that point in the record, that the court has abused its discretion in making the appointment.

SEDGWICK, C. J.

In the brief upon the motion for rehearing it is insisted that the statement in the opinion that there is "a degree of discretion vested in the county court in the appointment of administrators" is not applicable to this case. It is undoubtedly true, as stated by the supreme court of Wisconsin in *Welsh v. Manwaring,* 120 Wis. 377, that the right of administration is not inherent, but statutory. The statute is mandatory, and must be followed by the probate court. Our statute provides that: "Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled to the same in the following order: *First,* the widow, or next of kin, or both,

as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust." Comp. St. 1905, ch. 23, sec. 178. Where the preference of appointment is given by the statute to two or more persons, or classes of persons, in the alternative the probate court has a discretion in the matter. 18 Cyc. p. 83. In this case there are four persons equally entitled to preference in the appointment of an administrator. These persons did not agree, and the statute provides that the probate court may appoint one of these four persons, *or such person as they may request to have appointed.* One of the four persons entitled to preference requested the appointment of the person appointed by the court. In such case, where there is a disagreement among the parties entitled to name the administrator, and the appointment is of one chosen by some of these parties, we think that the presumption ought to obtain, in the absence of any proof to the contrary, that the court in making the appointment has properly exercised its discretion.

The motion for rehearing is

OVERRULED.

FARMERS & MERCHANTS INSURANCE COMPANY V. SARAH R. BODGE.*

FILED FEBRUARY 22, 1906. No. 14,151.

Insurance Policy: BREACH: WAIVER. A policy of tornado insurance, containing a provision that if the buildings insured be or become vacant or unoccupied the policy shall be null and void, does not become absolutely void upon a violation of such condition, unless the insurer chooses to take advantage of the forfeiture; and where, after loss under such a policy, the company issuing the same, being informed of the loss as well as the breach of condition, cancels the policy and retains the premium up to and including the time of the loss, it will be held to be a waiver of the breach of condition.

*Rehearing allowed. See opinion, p. 35, *post.*

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

Halleck F. Rose, for plaintiff in error.

E. C. & H. V. Calkins, contra.

JACKSON, C.

Plaintiff in error issued an insurance policy to the defendant in error, providing for indemnity in case of loss occasioned by winds, cyclones or tornadoes. The policy contained these stipulations:

"It is agreed that if the assured shall have, or hereafter accept, any other insurance on the above mentioned property, whether valid or not, or if the above mentioned buildings be or become vacant or unoccupied, or be used for any other purpose than that mentioned in said application, without consent indorsed hereon, * * * in each and every one of the above cases, this policy shall be null and void. Nor will this company be liable for any cyclone, tornado, or windstorm loss or damage on buildings in course of erection unless fully inclosed, nor for buildings or their contents, except said buildings rest on good and substantial foundations, securely inclosed so as not to admit of an unnecessary current of wind circulating through or under them, nor for buildings or their contents covered, in whole or in part, with hay, straw, thatched or board roof, nor for the blowing down of defective chimneys, loose clapboards, shingles or window blinds."

The form of the policy admits of its use for either fire and lightning, or tornado insurance, or both. The buildings insured by the policy were at the time the policy was issued occupied by a tenant, who afterwards vacated the premises, and while they were vacant one of the buildings was damaged by a windstorm, and thereupon the assured made proof and submitted to the company a proposition

for arbitration, according to one of the provisions of the policy. Upon receipt of the proof the company sent the following communication to the assured:

"Lincoln, Neb., April 19, 1904. Sarah R. Bodge, Kearney, Nebraska. Dear Madam: We received a notice from S. S. St. John of a claim purporting to have been made by you on property covered by policy No. 101,634, having been alleged to have been occasioned by wind. We sent a representative of this company to investigate the matter, and upon arriving he found the place vacated, no one living in the house, barn or on the premises, and from inquiry from the neighbors he learned that no one had been living there since last February. You are aware that such vacancy is in direct violation of the conditions of your policy, and no company without special permission ever intends to cover such a risk. In addition, our representative ascertained that the property was in poor condition and in most places uninsurable. Repairs had long been needed, but nothing seems to have been attended to. We are inclosing you a draft for $6.35, which is the unearned part of the premium on your policies, $3.10, $3,25, and desire to cancel same immediately. Upon receipt of this, kindly forward the policy, and oblige, Yours truly, L. P. Funkhouser, Secretary. Cancelation of policies, 101,634, 3.10; 99,630, 3.25."

Action was instituted on the policy, resulting in a judgment favorable to the assured, from which the company prosecutes error.

It is sought to sustain the judgment of the trial court on three grounds: First, because the provision in the policy avoiding the insurance in the event the buildings were or should become vacant applies only to insurance against fire, and was not, within the contemplation of the parties, intended to apply to tornado insurance; second, if it was intended to apply to tornado insurance, that it is immaterial, because the vacation of the buildings does not increase the hazard as a tornado risk; and, third, if it was, within the contemplation of the parties, intended to apply to tornado insurance and is material, that it was waived

when the company, upon the cancelation of the policy, retained the premium up to and including the time of the loss. If the defendant in error is correct as to the latter contention then it becomes unnecessary to examine the former. In *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, it was held that a fire insurance policy, providing that it should be void if the buildings be or become vacant or unoccupied, does not upon a violation of such condition become absolutely void, unless the insurer chooses to take advantage of the forfeiture; and where an insurance company, after loss and upon being informed of a breach of a condition in its policy providing for forfeiture, canceled the policy but retained the premium beyond the date of breach of the condition and up to and including the date of the loss, such action on the part of the company amounted to an estoppel and should be held to be a waiver of the breach of condidition. The total amount of insurance provided by the policy in suit is $500; the total premium paid was $5; the policy was dated May 17, 1902, and would expire by its terms May, 17, 1907. It appears from the evidence that prior to the loss now in litigation the assured had sustained a loss upon which payment had been made by the insurance company. The only evidence on that branch of the case is the testimony of one witness, as follows: "Q. Do you know whether or not Mrs. Bodge received for another windstorm loss under this policy $25? A. Well, I ain't sure it was exactly $25, it was pretty near that, I think. Q. Do you remember about when that was paid? A. I should think it was 15 months ago, something like that. Q. It was a windstorm loss paid on this same identical policy? A. Yes, I think it applied—— Q. On the house? A. On the granary, might have been partly on the granary and partly on the barn. It wasn't much over $20, I don't think, of course, I couldn't remember the exact amount." The company had earned the full premium on any amount of loss paid under the provisions of the policy, and the policy would be in force for the balance of the term only upon the difference between the amount so

paid and the face of the policy. If the amount of loss paid by the company was $20, then the policy was in force for $480; if the amount paid was $25, then the policy was continued in force for $475. The amount of unearned premium returned was $3.10. On April 19, 1904, the date when the premium was so returned, computing the loss previously paid by the company at $20, it had earned of the premium paid by the insured $1.89, leaving the amount of unearned premium $3.11. The loss now in litigation occurred on the 8th day of April, 1904. The trial court doubtless found that the amount of premium retained by the company was sufficient to carry the policy beyond the date of the loss, and such finding is not without support in the evidence, although the amount of prior loss paid exceeded the sum of $20, and applying the rule of *Home Fire Ins. Co. v. Kuhlman, supra,* we find that the retention of such premium under the circumstances amounted to a waiver of the breach of the conditions of the policy, 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.

The following opinion on rehearing was filed February 8, 1907. *Former judgment of affirmance vacated and judgment of district court reversed:*

1. **Insurance Contract:** CONSTRUCTION. A stipulation in a contract for tornado, cyclone and windstorm insurance that the policy shall be void in case the buildings insured become vacant is material to the hazard and will be enforced.
2. ———: WAIVER. The cancelation of a policy of insurance after loss and notice of facts occurring before loss constituting a forfeiture, coupled with the return of unearned premium from date of forfeiture, does not constitute a waiver of the forfeiture.

JACKSON, C.

A former opinion in this case is reported, *ante,* p. 31. Our conclusion was there put upon the ground that the

insurance company had waived a forfeiture of the policy by an attempted cancelation after notice of loss, and retaining the premium up to and including the time of loss. A rehearing has been allowed and we find from further consideration that, owing to a mistaken method of calculating the unearned premium, we were in error in holding that the insurance company retained the premium to cover the period of the loss. The case must therefore stand upon the other questions presented on behalf of the plaintiff in error. It appears that after notice of loss the company sent a representative to make an investigation, and after receiving his report wrote the assured the following letter:

"Lincoln, Neb., April 19, 1904. Sarah R. Bodge, Kearney, Nebraska. Dear Madam: We received a notice from S. S. St. John of a claim purporting to have been made by you on property covered by policy No. 101,634, having been alleged to have been occasioned by wind. We sent a representative of this company to investigate the matter, and upon arriving he found the place vacated, no one living in the house, barn or on the premises, and from inquiry from the neighbors he learned that no one had been living there since last February. You are aware that such vacancy is in direct violation of the conditions of your policy, and no company without special permission ever intends to cover such a risk. In addition, our representative ascertained that the property was in poor condition and in most places uninsurable. Repairs had long been needed, but nothing seems to have been attended to. We are inclosing you a draft for $6.35, which is the unearned part of the premium on your policies, $3.10, $3.25, and desire to cancel same immediately. Upon receipt of this kindly forward the policy, and oblige, Yours truly,

"L. P. Funkhouser, Secretary.

"Cancelation of policies 101,634, 3.10; 99,630, 325."

It is insisted on behalf of the defendant in error that this letter amounts to a waiver of the forfeiture provisions of the policy, and we are cited to the case of *Home Fire*

Ins. Co. v. Kuhlman, 58 Neb. 488, in support of this contention. Some of the language employed in the opinion would seem to sustain the position of the defendant in error, but a careful reading of the entire opinion has convinced us that the decision was grounded upon the fact that the insurance company in that case, after notice of loss, undertook to cancel the policy, and in so doing retained the premium up to a time after the loss occurred, a state of facts altogether different from those here presented. The contract involved covers loss by cyclones, tornadoes and windstorms; the policy is written on what is termed a combination form that might be used either for fire and lightning, or cyclone, tornado and windstorm insurance, or for all. The stipulations of the policy, in so far as they are important to the determination of the case, are as follows:

"And it is agreed that if the assured shall have, or hereafter accept, any other insurance on the above mentioned property, whether valid or not, or if the above mentioned buildings be or become vacant or unoccupied, or be used for any other purpose than that mentioned in said application, without consent indorsed hereon, or if the property be or shall hereafter become mortgaged or incumbered, or if the same be or hereafter become involved in litigation, or upon the commencement of foreclosure proceedings, or in case any change shall take place in the title, possession, or interest of the assured in the above mentioned property, or if this policy shall be assigned, or if the risk be increased in any manner, except by the erection of additions and repairs to dwelling and of ordinary out-buildings, without consent indorsed hereon, then, in each and every one of the above cases, this policy shall be null and void. Nor will this company be liable for any cyclone, tornado, or windstorm loss or damage on buildings in course of erection except fully inclosed, nor for buildings or their contents, except said buildings rest on good and substantial foundations, securely inclosed so as not to admit of an unnecessary current of wind circulating through or under them, nor for buildings or their contents covered,

in whole or in part, with hay, straw, thatched or board roof, nor for the blowing down of defective chimneys, loose clap-boards, shingles, or window blinds."

It will be observed that some of these provisions are general and others limited in their application, and it is argued on behalf of the defendant in error that only such provisions as are limited to cyclone, tornado and windstorm insurance apply to that class of insurance. We cannot, however, so construe the contract. It is plain that the special provisions quoted as applicable to tornado, cyclone and windstorm insurance were intended as additional conditions to those that are general in terms. We do not wish to be understood as saying that a disregard of any one of the general provisions would work a forfeiture of windstorm or cyclone insurance, but we should give effect to those stipulations which are material to the risk. At the time the policy in suit was issued the buildings covered by the insurance were occupied by a tenant; they later became vacant and were vacant at the time of the loss. The question as to whether the vacancy of the buildings increased the hazard is the vital question in the case, and we think it did. In *Sexton v. Hawkeye Ins. Co.*, 69 Ia. 99, and *Republic County M. F. Ins. Co. v. Johnson*, 69 Kan. 146, 76 Pac. 419, the identical question was involved, and in each case it was held that the stipulation against vacancy was material. They are both well-reasoned cases and we are satisfied that the conclusion reached is correct.

The plaintiff had judgment, from which the insurance company prosecuted error. Giving effect to the stipulation against vacancy contained in the contract, the judgment was erroneous, and we recommend that our former opinion be vacated, the judgment of the district court reversed and the cause remanded.

DUFFIE, C., concurs.

By the Court: For the reasons stated in the foregoing

opinion, the former judgment in this cause is vacated, the judgment of the district court reversed and the cause remanded.

REVERSED.

JOSEPH L. LOCKE ET AL. V. JAMES J. SKOW.

FILED FEBRUARY 22, 1906. No. 14,162.

1. **Bonds**: CONSIDERATION: ESTOPPEL. One who executes a bond under circumstances that would estop him to assert its invalidity for want of consideration cannot, in an action upon the bond, avoid liability on the ground that the plaintiff is estopped to assert that there was any consideration for the bond. *United States Fidelity & Guaranty Co. v. Ettenheimer*, 70 Neb. 147.
2. ———: PETITION: SUFFICIENCY. In an action for the breach of the conditions of a bond, one of which was that the defendant would satisfy the judgment, if judgment be rendered against him on appeal, the petition is not open to demurrer because it does not show the rendition of a judgment which could be paid, where it does show the breach of another condition actionable independently of the liability to satisfy or perform the judgment.

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

S. D. Killen, J. E. Cobbey and *G. M. Johnston*, for plaintiffs in error.

E. O. Kretsinger and *Sackett & Spafford, contra.*

JACKSON, C.

James J. Skow sued Joseph L. Locke in county court for the unlawful possession of real estate and had judgment for the restitution thereof on March 20, 1900. Locke caused to be executed, filed and approved in the county court a bond for the purpose of perfecting an appeal to the district court. The bond, after reciting the judgment, contained these conditions: "Now, therefore, we * * * do promise and undertake to the said James J. Skow that

said defendant shall prosecute said appeal to effect, and without unnecessary delay, and that said defendant, if judgment be adjudged against him on the appeal, will satisfy such judgment and costs, and pay a reasonable rent for the use and occupation of the premises aforesaid to the said plaintiff." The plaintiff assailed the bond as being insufficient in law, but his objections were overruled, and a transcript of the proceedings had in the county court was filed in the district court within the time allowed for perfecting an appeal. Locke remained in possession of the premises until the 11th day of December, 1900, when the district court, on motion of the plaintiff, dismissed the appeal for want of jurisdiction, this court having in the meantime held that the statute authorizing an appeal to the district court in actions for the forcible detention of real estate was unconstitutional, and that the district court acquired no jurisdiction in such cases by appeal. No proceedings having been taken to reverse or modify the judgment of dismissal, the action of the district court became final, and the defendant in error thereupon instituted an action in the district court against Locke and his sureties on the bond. The material allegations of the petition contained a recital of the judgment in the county court; the execution and approval of the appeal bond; the judgment of dismissal by the district court; that Locke had sole and exclusive use, possession and occupation of the premises, and obtained the rents and profits therefor by reason of the execution and approval of the bond from its execution until the 11th day of December, 1900; that the reasonable price and value of such use and occupation during the period was $280; that the defendant had failed, neglected and refused to pay the reasonable rent for such use and occupation, and the costs of the proceedings; that no part of the same had been paid, except the sum of $150 to apply on the costs; that there was due and unpaid costs amounting to $23.50; and the plaintiff prayed judgment for $303.50, with interest. Issues were joined, and a trial to the court and a jury

resulted in a verdict and judgment favorable to the plaintiff. Locke and his sureties prosecute error.

Four questions are discussed and urged as a reason why the judgment of the district court should be reversed: First, that the petition does not state a cause of action; second, the alleged bond is not a statutory bond; third, it contains none of the elements of a common law bond, that there was no mutuality, and that by the action of the defendant in error it was prevented from becoming effective in securing a trial on appeal; and, fourth, that the sureties are not liable because the consideration which influenced them to sign failed, that is, the alleged bond did not procure for Locke a trial *de novo*.

It is said that the petition is insufficient because it does not appear from the allegations that a judgment was rendered in the district court that could be satisfied by payment, and the case of *German Nat. Bank v. Beatrice Rapid Transit & Power Co.*, 69 Neb. 115, is cited in support of that contention. A comparison, however, of the bond in that case with the one now under consideration discloses a marked difference in the language and conditions of the two bonds. The condition of the bond in the case cited being: "Now, if the said Beatrice Rapid Transit & Power Company shall prosecute this appeal with effect, and without unnecessary delay, and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect." And it was held that because the petition did not show a judgment rendered in the appellate court requiring payment, the petition did not state a cause of action; while in the case at bar the bond contained a provision that, in case judgment was rendered against the defendant, the principal and his sureties would pay a reasonable rent for the use and occupation of the premises to the plaintiff. From the nature of the action such a promise furnished the principal consideration for permitting the defendant to remain in possession of the premises, and had the case been tried

in the district court *de novo* and judgment there entered for the plaintiff, as in the court below, it is obvious that the liability of the sureties would have been something beyond that of a compliance with the judgment in the district court; there would still be a liability for the use and occupation of the premises. The promise to pay rent was a separate promise and was supported by a distinct consideration. The petition recited that by reason of the undertaking the said Locke remained in the possession of the premises and enjoyed the rents and profits therefrom; that the value of such use and occupation was the sum of $280, no part of which had been paid. It disclosed the final determination of the action, in which the bond was given, adversely to the principal in the bond.

There is some claim that the petition is insufficient because it does not show a delivery of the bond and an acceptance on the part of the obligee. The question of delivery is purely one of intention. Did the obligors intend the instrument to become operative as a bond? To hold that they did not would be to discredit the evidence furnished by their own acts in procuring the same to be approved. That the bond was accepted, and the course of the obligee influenced and controlled thereby, is conclusively shown by the fact that he refrained from asserting his right to the possession of the premises involved in the litigation until the dismissal of the appeal in the district court. The contention that the petition does not state a cause of action cannot be sustained.

The remaining questions may be disposed of together. It is not important that the bond is not a statutory bond, because the obligation would be good at common law unless the plaintiff in error is estopped from maintaining an action thereon, and it is seriously urged that he is so estopped by reason of the fact that the appeal to the district court was dismissed on his own motion. In *United States Fidelity & Guaranty Co. v. Ettenheimer*, 70 Neb. 147, it was held that "one who executes a bond under circumstances that would estop him to assert its invalidity

for want of consideration cannot, in an action upon the bond, avoid liability on the ground that plaintiff is estopped to assert that there was any consideration for the bond." In principle that case cannot be distinguished from the one at bar, although that case proceeded to the supreme court before its dismissal. The present chief justice, speaking for the court in that case, said:

"If the defendant obtained no other benefit of his attempted appeal, he, at least, was enabled to present the question to this court, and in the meantime retained the possession of the premises in dispute. The object of the undertaking was to protect the plaintiff against two sources of possible injury: (1) he would be subjected to expenses in the district court, which would be unnecessary if the judgment already rendered should finally stand as the law of the case; (2) he would, while the proceedings were pending, be deprived of the possession of the premises which had been awarded to him by the judgment of the justice."

The order dismissing the appeal in the forcible detention proceedings was a judgment within the meaning of the bond, and we hold that there was both a consideration for the bond and a breach of the conditions thereof; that the judgment of the district court was right, and we recommend that it 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.

JOHN P. O'NEIL ET AL. V. STATE OF NEBRASKA.

FILED MARCH 8, 1906. No. 14,441.

1. **Intoxicating Liquors: UNLAWFUL SALE: EVIDENCE.** Where in a prosecution for a violation of the provisions of section 20, ch. 50, Comp. St. 1905, entitled "Liquors," intoxicating liquor is found and seized in the possession of the accused, or is shown to have been in his possession and kept by him at his place of business, by other competent evidence, the statutes make such possession, when not satisfactorily explained, presumptive evidence of guilt, and such possession and keeping may be sufficient to sustain a conviction. *Peterson v. State*, 63 Neb. 251.

2. ———: ———: ———. It is not every kind of possession of intoxicating liquor, however, that raises the presumption that it was kept for an unlawful purpose; and when the evidence on the part of the prosecution shows that the liquor in question was not kept by the accused, and that his possession of or connection with it was of such a nature that he could not have sold or disposed of it unlawfully, and that such liquor, when seized, was not in his possession, but was rightfully in the possession of another, such evidence alone will not sustain a conviction.

ERROR to the district court for Boone county: JAMES N. PAUL, JUDGE. *Reversed.*

James A. Armstrong and *Critchfield & Reid*, for plaintiffs in error.

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

BARNES, J.

John P. O'Neil and Burch A. Baldwin were tried in the district court for Boone county on an information charging them jointly with a violation of the provisions of section 20, ch. 50, Comp. St. 1905, in manner as follows: "That the defendants, John P. O'Neil and Burch A. Baldwin, on the 28th day of June, 1904, in the county of Boone, and state of Nebraska, then and there being, did then and there, in the city of Albion, in said county and

state, keep and have in their possession, in a certain coal shed, then and there located upon the Union Pacific railroad right of way in said city, county and state, certain vinous and intoxicating liquors, to wit, two barrels of wine, with the unlawful intent of them, the said John P. O'Neil and Burch A. Baldwin, of unlawfully disposing and selling the same without having first obtained a license or a druggist's permit therefor." The trial resulted in a conviction, and they were each sentenced to pay a fine of $200, together with the costs of the prosecution, and to stand committed to the jail of Boone county until said fine and costs were paid. To reverse said judgment they bring the case here by petition in error, and will hereafter be called the plaintiffs.

Among the numerous errors assigned, it is contended by the plaintiffs that the trial court erred in overruling their motions to direct the jury to return a verdict of not guilty in their favor, and in refusing to so instruct the jury, because the evidence was insufficient to sustain a conviction. All of the testimony is before us in the form of a bill of exceptions, and it discloses the following undisputed state of facts: The plaintiffs were copartners as retail druggists, and their place of business was situated on Fourth street, in the city of Albion, in said county. On the evening of the 27th day of June, 1904, there came to the depot of the Northwestern Railway Company, in said city, two barrels of wine, consigned to the plaintiffs, upon which the charges of the common carrier for transporation were unpaid. The agent of the company delivered the consignment in question to a drayman, doing business in that city, together with a statement of the charges thereon, with instructions to deliver the liquor to the plaintiffs on the payment of the said charges. It appears that the plaintiffs had theretofore rented a bin in a coal shed, situated upon the Union Pacific Railroad Company's right of way, and were using the same as a sort of warehouse; that the drayman to whom the agent of the railroad company delivered the liquor had a key

to this so-called warehouse; that at the general direction of one of the plaintiffs he placed the liquor therein and on the following morning called upon the plaintiffs, presented the expense bill, informed them that he had placed the wine in the warehouse, and demanded payment thereof. They objected to the expense account, and refused to accept the consignment. As soon thereafter as the drayman could conveniently do so, he informed the agent of the railroad company of the situation, and was directed by him, as was his duty, to return the liquor to the depot. He thereupon went to the so-called warehouse or coal bin, loaded the barrels of wine in question upon his dray, drove to the depot, and turned them over to the railway company. Shortly afterwards the wine in question was seized by the officer charged with the arrest of the plaintiffs upon a complaint which was the basis of the information above quoted.

The evidence shows, without question, that it was the custom of the agent of the railway company to entrust all consignments of freight to the aforesaid drayman for delivery to the consignees, with instructions, in case the expense bills and charges for transportation thereof were not paid, to return the goods to the railway company by 10 o'clock on the following day. It was not shown that plaintiffs ordered the consignment of liquor from any one, or that they had paid anything therefor. The only possession of the wine they ever had was, at most, a mere joint constructive possession thereof with the drayman during the time it was in the warehouse or coal bin. It was subject, all of the time, to the control of the drayman, with power on his part to return it to the railroad company in case the charges thereon were not paid.

The state contends that the provision of the statute which makes the possession of intoxicating liquors presumptive evidence of the violation of section 20 of the act in question, and subjects the person so found in possession thereof to the fine prescribed in section 11 of

the act, unless, after examination, he shall satisfactorily account for and explain the possession of such liquor, and that it was not kept for an unlawful purpose, when applied to the evidence in this case, requires us to sustain the judgment of the trial court. In support of this contention, the attorney general cites the case of *Holt v. State,* 62 Neb. 134. An examination of that case discloses that a traveling salesman of a South Omaha liquor house took an order from defendant Holt, in Grand Island, for a gallon of whiskey, collected the price thereof, and agreed to ship the same to him at said last named place; that he transmitted the order to his house, where the whiskey was put up in a suitable package and delivered to the railroad company, addressed and consigned to Holt, as per the agreement, with all charges for transportation prepaid. When the liquor arrived in Grand Island, a complaint was filed against the salesman, charging him with having sold the liquor to Holt in that city without a license or permit. A trial resulted in a conviction. The case was brought to this court by petition in error, where the judgment was reversed, it being held that the sale was made in South Omaha by the wholesale liquor house, and not by its traveling salesman in Grand Island.

In the case at bar, there is no testimony showing a sale of the wine in question, and it appears that the carrying charges against the same were not paid, so that the railroad company was entitled to the possession of it, until its carrier's lien for such charges was satisfied. It never waived its lien, and if it ever relinquished possession of the goods, which is a matter of doubt, it at once regained the same. *Peterson v. State,* 64 Neb. 875, and *Peterson v. State,* 63 Neb. 251, are also cited by the state, and it is contended by the attorney general that, under the rule announced in those cases, the conviction herein should be sustained. In one of them the evidence showed beyond question that intoxicating liquors were kept by the defendant in his place of business, so that the presumption contended for by the state obtained; while in the

other the possession of the liquor and the sale of it was admitted, and it was sought to justify the same or defend against the charge on the ground that the seller was the agent of a social club, and sold the liquor to members of the club only. So the authorities cited are of no assistance to us in this case.

In the case at bar it must be conceded that whatever posession the plaintiffs may have had of the wine in question, it was not such a possession as could be designated a keeping of it; or, in other words, they cannot be said to have kept it either at their place of business or elsewhere; while the facts in evidence show they could not have sold, or otherwise disposed of it, and could have formed no purpose of so doing either in a lawful or unlawful manner. No search warrant was ever issued in this case, and no intoxicating liquor was found in the plaintiffs' possession. The evidence shows that, when the liquor in question was seized, it was not in their possession, but in the possession of the railroad company. No evidence was offered or received showing or tending to show that the plaintiffs had any other intoxicating liquor in their possession at or about the time charged in the information, or that they ever were engaged in the sale thereof. The state's evidence satisfactorily explained whatever possession the plaintiffs had of the consignment of liquor in question and was sufficient to rebut the presumption invoked by the prosecution.

The district court therefore erred in overruling the plaintiffs' motions, and in refusing to instruct the jury to render a verdict in their favor of not guilty. This conclusion renders it unnecessary for us to discuss, examine or determine any of the other assignments of error, and, for the foregoing reason, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

PAUL KLAWITTER V. STATE OF NEBRASKA.

FILED MARCH 8, 1906. No. 14,464.

1. **Rape: EVIDENCE.** The rule is settled in this state that in cases of rape unless the testimony of the prosecutrix is corroborated on material points, where the accused testifies as a witness on his own behalf and denies the charge, her testimony alone is not sufficient to warrant a conviction. *Mathews v. State*, 19 Neb. 330.
2. **Evidence** examined, and *held* not sufficient to sustain the verdict of conviction.

ERROR to the district court for Pierce county: JOHN F. BOYD, JUDGE. *Reversed.*

A. R. Olson, for plaintiff in error.

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

LETTON, J.

The plaintiff in error was convicted of rape on a female child with her consent. To reverse this judgment he prosecutes error to this court. The principal error relied upon is that the verdict is not supported by sufficient evidence.

The prosecutrix is a girl who was at the time of the alleged offense between 14 and 15 years of age. She testifies that she first saw the defendant about the 1st of September, 1904; that about the 11th of September she was staying at the home of a Mr. Gutch in Pierce county; that two acts of sexual intercourse took place between her and the defendant with her consent, one while she was working for Mr. Gutch, and one a short time afterwards when she was at home and the defendant came there with a buggy and took her with him to a point near a Mr. Melchers. Her story as to the second time is contradictory and inconsistent as to the place where she met the.

defendant, and the whole of the circumstances as narrated by her seem somewhat improbable, yet if she had been corroborated by other credible testimony we should be constrained to support the verdict. The rule is settled in this state that in cases of rape unless the testimony of the prosecutrix is corroborated on material points, where the accused testifies as a witness on his own behalf and denies the charge, her testimony alone is not sufficient to warrant a conviction. *Mathews v. State,* 19 Neb. 330; *Oleson v. State,* 11 Neb. 276; *Fisk v. State,* 9 Neb. 62. But this rule is qualified by the other principle that it is not essential that she be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. *Fager v. State,* 22 Neb. 332; *Hammond v. State,* 39 Neb. 252; *Dunn v. State,* 58 Neb. 807.

The offense charged is a serious one and the defendant, if guilty, merits the severe punishment inflicted, but, on the other hand, it would be a denial of the defendant's constitutional rights if he were committed to the penitentiary for a term of years without a fair trial, and unless his rights thereto had been properly preserved. The evidence of the prosecutrix is contradictory and somewhat improbable in itself. It certainly seems strange that this girl should go with a man almost a total stranger to her and submit herself to him upon his mere invitation. There is an entire lack of circumstances corroborative of the principal fact, and with the exception of the testimony of Dr. Myers there are no other circumstances proved which can in anywise be said to corroborate the testimony of the prosecuting witness as to matter of probative value. It is urged by the state that the testimony of her brother, a boy of 11 years, is corroborative of the prosecutrix, but his testimony is that the defendant came to their home with a buggy, and his sister went

with him, and he saw them come back again, while the girl herself on cross-examination describes specifically and with detail that on this occasion she and her sister went to Melchers, and found the defendant there, and that she went with him from that place and did not go from home. She testifies that when they came home from Melchers two of her brothers saw and talked with the defendant, that when she went to Melchers her sister left her with defendant and went home alone, that after the second act of intercourse she told Mrs. Gutch about it, yet none of these persons were called as witnesses to corroborate her statements. If this evidence was within reach it should have been produced. The defendant is directly corroborated by the witness Melcher as to his whereabouts at the times charged. Further, this witness says that defendant had a team but no buggy at his place. No effort was made to prove that the defendant or Melcher ever owned a buggy or that there was a buggy used by defendant at or about that time. It is true that Dr. Myers testified that it was his opinion from what the girl's mother said, and from his examination of the parts on October 13, that the prosecutrix had had sexual intercourse, but this was a month afterwards and might be true and yet the defendant be innocent. Whether innocent or guilty he was entitled to have sufficient corroborative proof of the story of the prosecutrix so that a jury, not influenced by the prejudice which usually prevails in cases of this nature, should be convinced beyond a reasonable doubt of his guilt. Viewing the evidence as a whole, we are satisfied that it is not sufficient to sustain the verdict of conviction. Upon a new trial the state will have an opportunity to produce further corroborative evidence if the story of the prosecutrix be true.

But few objections were made by defendant's counsel to the introduction of evidence and few exceptions taken. No instructions were requested by the defendant, and the jury were not told that the evidence of the prosecutrix required corroboration. The defendant has not assigned

for review any errors of law committed at the trial and hence we cannot consider any of these matters, but deem it proper to say that cautionary instructions should have been requested.

The judgment of the district court is reversed and a new trial ordered.

REVERSED.

JENS SILLASEN ET AL., APPELLANTS, V. WILLIAM H. WINTERER, APPELLEE.

FILED MARCH 8, 1906. No. 13,791.

Continuing Trespass: INJUNCTION. Concerning simple acts of trespass equity has, in most cases, no jurisdiction, but, if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted.

APPEAL from the district court for Keith county: HANSON M. GRIMES, JUDGE. *Reversed with directions.*

Wilcox & Halligan, for appellants.

Beeler & Muldoon and *H. E. Goodall, contra.*

AMES, C.

There is no dispute of fact in this case. Appellants are the owners of a contiguous body of land in Keith county around which, in 1903, they plowed a strip in intended compliance with, and for the purpose of securing the protection of, section 8, art. III, ch. 2, Comp. St. 1905, commonly known as the "Herd Law," which reads as follows: "That cultivated lands, within the meaning of this act, shall include all forest trees, fruit trees, and hedgerows planted on said lands, also all lands surrounded by a plowed strip, not less than one rod in width, which strip shall be plowed at least once a year." The strip

was not quite continuous, but there were some breaks or gaps in it which were filled or occupied by fences of the legal standard, so that the incompleteness of the strip was fully supplied within the intent and meaning of the statute. There is some controversy whether the entire width of the strip was plowed upon the lands of appellants or whether it encroached to some extent upon lands of third and, as to this controversy, disinterested parties. We do not think the question is material. The object of the statute is not to promote cultivation of the soil, but to provide a substitute for a fenced inclosure which will suffice to notify the public that the land inclosed is privately owned and exclusively possessed.

For some years prior to this time appellants and appellee had occupied this and other lands belonging to the government, and to individuals, in common for grazing purposes, but when the inclosure above described had been made appellants notified appellee of the fact and required him to restrain his cattle from further trespass upon their land. Appellee not only expressly refused compliance with this request, but practically and continually disregarded it by permitting his cattle, to the number of 150 head or more, to trespass daily upon the inclosed lands, and confessed an intention to continue so doing indefinitely. There are no contract obligations involved in the suit. Appellants sought relief in the lower court by injunction, which was denied them apparently on the ground that they had an adequate remedy by an action at law for damages, and appellee was permitted to show by witness the annual rental value of the lands for grazing purposes. Such a procedure would amount in practice to compelling appellants to lease their land indefinitely for such annual compensation as a jury should see fit to award them and would be equivalent to taking private property, not for public, but for private use. We think that such is not only a principle that the courts will not sanction, but that it is one the practical application of which equity will prevent by injunction. It is, of course,

not intended to hold, nor does the plaintiff contend, that occasional acts of trespass, voluntary or involuntary, that are committed by a solvent person and that are susceptible of compensation by damages recoverable in a common law action, will be restrained by injunction, but such are as far as possible from the nature of the injuries complained of in this action. These were voluntary trespasses. It does not matter in such a case as this, in which an attempt is openly made wrongfully to appropriate the use and occupation in whole or in part of the plaintiff's land, whether the trespasser is solvent or insolvent. A landowner may deny himself a fortune, if he chooses so to do, to insure that his premises shall be put to only such uses as he desires, or that they may remain vacant or unoccupied. Concerning simple acts of trespass equity has, in most cases, no jurisdiction, but the rule is firmly established in this state and elsewhere that, where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. *Lynch v. Egan,* 67 Neb. 541; *Pohlman v. Evangelical Lutheran Trinity Church,* 60 Neb. 364; *Peterson v. Hopewell,* 55 Neb. 670; *Shaffer v. Stull,* 32 Neb. 94; 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1,357. Appellants might, indeed, have brought successive actions for damages from day to day as acts of trespass occurred, but damages in such cases would have been extremely difficult to measure, and doubtless would not have been as great as the expense of recovery, and the same would have been true of procedure by distraint of the animals damage feasant, if, indeed, the latter would have been at all practicable. The only practical remedy they would have had at law would have been to submit to the trespasses until the end of the grazing season, and then sue for the value of the use and occupation. But such a course instead of protecting their rightful and lawful possession, which is guaranteed to them by the constitution and laws of the land, presupposes a practical abandonment and loss of it.

We recommend that the judgment of the district court be reversed and the cause remanded, with instructions to grant an injunction in conformity with the prayer of the petition.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with instructions to grant an injunction in conformity with the prayer of the petition.

JUDGMENT ACCORDINGLY.

REEVES & COMPANY v. EDWARD CURLEE.

FILED MARCH 8, 1906. No. 14,147.

Evidence examined, and *held* insufficient to support the verdict.

ERROR to the district court for Red Willow county: ROBERT C. ORR, JUDGE. *Reversed.*

W. S. Morlan and *W. E. Stewart,* for plaintiff in error.

C. E. Eldred, Hall, Woods & Pound, and *Starr & Reeder, contra.*

AMES, C.

This is a proceeding in error to reverse a judgment for the plaintiff in the district court in an action to recover commissions as a sales agent. The defendant corporation is a dealer in traction engines, and had constituted the plaintiff its agent, at the village of Bartley and vicinity, by a written contract containing the following clause: "The party of the first part reserves the right to sell to any party in the above mentioned territory who

may come to their shop to buy, or send their orders direct to them, or any of their general agents; but when such parties have been solicited by the said second party, then such agency may, on a satisfactory presentation of the claim, have such commission as the agency in making the sale will entitle him or them to." Pursuant to this contract the plaintiff sold at Bartley, to Ginter Brothers, a second-hand engine which was incapable of doing the work required of it because of defective flues, for which sale he was paid commission for his service. The defendant, whose place of business was at Lincoln, was notified of the defect, and sent a mechanic named Williams to Bartley for the purpose of repairing the engine, which he was unable to do. One of the purchasers then proposed going to Lincoln and attempting to arrange with the manager of the company for an exchange of the old engine for a new one. Such an attempt was not or had not been so much as suggested by the plaintiff. On the contrary, when one of the purchasers asked if he thought it would be successful, he replied that "he did not know, but that he knew that it was their (the company's) business, trading new stuff and taking second-hand stuff in exchange, and he had no doubt that it could be done." One of the purchasers called up the manager and talked with him by telephone about the proposed exchange, and expressed an intention to go to Lincoln for the purpose of attempting to effect it. The plaintiff was present, but did not talk with the manager, nor in any definite way with the purchasers, nor further than to discuss briefly and in a general way, to the effect above related, the probability of an exchange being possible of accomplishment. One of the Ginters started for Lincoln on the same evening, and upon his arrival there traded the old engine for a new one, paying a difference in value in cash. The recovery is for commissions at a contract rate on the selling price of the new engine. The foregoing is the substance of all the evidence touching the matter in issue to which our attention has been invited. We fail to find in it any indications

that the plaintiff "solicited," or promoted, or in any manner contributed toward the effecting of the exchange of engines, or was of any service, actual or constructive, to either party in the transaction. The answer was a general denial, and the verdict is wholly unsupported by the evidence.

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

OLDHAM and EPPERSON, 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 awarded.

REVERSED.

DANIEL L. CUATT v. NELLIE A. ROSS.

FILED MARCH 8, 1906. No. 14,197.

Review: HARMLESS ERROR. When the evidence is insufficient to support an alleged counterclaim, the defendant cannot complain of errors in the giving or refusing of instructions having reference to it.

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

Hamer & Hamer, for plaintiff in error.

Fred A. Nye and *H. M. Sinclair, contra.*

AMES, C.

The plaintiff below, defendant in error here, was the owner of a tract of land which the defendant contracted to cultivate for a term, for a part of the produce, undertaking to gather and distribute the crop in a manner described in a written agreement between the parties. The

ground was cultivated, but the plaintiff complains that the defendant neglected properly to care for, preserve, and deliver her share of the produce, as he was required to do, and that he had failed in some respects in caring for the lands and certain buildings thereon, in all to her damage for a considerable sum, which this action was brought to recover. The defendant pleaded by way of counterclaim that, during the term, cattle belonging to the plaintiff were permitted by her to trespass upon the premises and destroy grain in stack and crib, and commit other depredations, to the injury of the defendant, for which he prayed damages. There was a trial to a jury, and a verdict and judgment for the plaintiff, from which the defendant prosecutes error.

The record is rather voluminous, considering the amount involved in the controversy, and an exposition of the evidence in this opinion would hardly be justified by the circumstances. We are convinced, however, from a careful examination of it that it is insufficient to sustain the counterclaim in any degree. There is, indeed, an entire absence of competent evidence tending to show that the plaintiff was ever the owner or custodian of any cattle, and there is affirmative evidence that she never was such. Errors assigned and urged upon the hearing have reference to instructions given or refused concerning the counterclaim, but in view of the state of the evidence they are plainly immaterial. It is also assigned that the evidence is insufficient to support the verdict, but the evidence, with reference to the cause of action set forth in the petition, covers all the matters in issue, and, in so far as it is not undisputed in support of it, is conflicting, so that this court is not called upon to review it.

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

OLDHAM and EPPERSON, 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.

CLARK & LEONARD INVESTMENT COMPANY ET AL., APPELLEES, V. LYDIA LINDGREN ET AL., APPELLANTS.

FILED MARCH 8, 1906. No. 14,201.

1. **Writ of Assistance: LACHES.** An objection that an application for a writ of assistance to put a purchaser at a judicial sale into possession has been too long delayed, is addressed to the sound discretion of the court, and where it is not made to appear that new rights have intervened, or that the defendants have been prejudiced by the delay, such an objection will not be upheld.

2. ———: DISCRETION OF COURT. The grantee of a purchaser at a judicial sale is not necessarily incompetent to prosecute an application for a writ of assistance to put him into possession, and whether he shall be permitted so to do or not is a matter dependent upon circumstances and resting largely in the discretion of the court.

APPEAL from the district court for Hitchcock county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Starr & Reeder, for appellants.

W. S. Morlan, contra.

AMES, C.

This is an appeal from an order of the district court granting a writ of assistance to put a grantee of a purchaser at a judicial sale of lands, on a decree of mortgage foreclosure, into possession of the premises. The evidence consists of a stipulation of facts, from which it appears that the foreclosure proceedings were in all respects regular, the defendants and appellants herein having been parties defendant thereto, making personal appearance in the action.

The premises were in April, 1899, conveyed by sheriff's deed to one W. N. Johnson, a remaining defendant in the suit, who in March, 1903, conveyed them by warranty deed to Thomas E. Swarner. During all this time Lindgren and Lindgren, husband and wife, who are appellants herein, and one of whom seems to have been the principal mortgage debtor, appear to have remained in possession, but whether by sufferance or under what additional circumstances, if any, the record does not disclose, but the stipulation recites that after Swarner had obtained his deed from Johnson he presented it, together with the sheriff's deed, to the Lindgrens "and demanded possession of said premises, and the defendants at that time, and at all times, refused to deliver possession of said premises to this applicant, but claimed to own the land." Afterwards Swarner begun an action in forcible detainer against the Lindgrens in the county court, which, as the stipulation recites, was dismissed by the county judge "on the ground solely that a question of title was involved." But we are left wholly in the dark as to what was the nature or extent of the appellants' claim of title, or how or when it originated, or in what manner it arose. Swarner then made the present application to the district court in the original foreclosure suit, to which his grantor was a party defendant, for a writ of assistance to put him into possession. The defendants, Lindgren and Lindgren, appeared and filed a written objection to the jurisdiction of the court over their persons, and over the subject matter of the proceeding, for the alleged reason that they had, shortly after the judicial sale, entered into a still valid and subsisting contract with the purchaser Johnson for the purchase of the land, of which contract they alleged that Swarner had notice; and for the reason that an action in forcible detainer, instituted by Swarner to recover possession, had terminated in favor of the defendants. These allegations were denied by a paper filed by the applicant, and called a reply, and upon these pleadings, if they may be so called, and upon the stipulation of

facts above mentioned, the matter was submitted to the court, who overruled the objections and granted the writ as prayed. There was a motion for a new trial which was overruled, and which seems to have been abandoned, the cause having been brought to this court by appeal.

We suppose that it must be conceded that the paper filed by the defendants, considered merely as an objection to the jurisdiction of the trial court, was ineffectual. It would be a novelty to hold that a court is deprived of jurisdiction by a claim that the defendant has a good defense to the proceeding on its merits. The sole question presented upon the appeal, therefore, is whether the district court abused its discretion by granting the writ. For an answer to this question, recourse must be had solely to the stipulation of facts, which controverts no allegation of the petition, but contains merely the additional recital that at the time Swarner demanded possession the defendants "claimed to own the land." We think that claim, wholly unsupported, amounts to nothing. They might have claimed to own the earth. It is said that in ancient times one did make such a claim, but that being destitute of evidences of title he was not allowed a hearing. The code expressly enacts (sec. 1021) that judgments in actions of forcible detainer "shall not be a bar to any future action by either party."

Two legal objections are made to the proceeding: One is that its beginning was too long delayed, but this goes only to the discretion of the court, which does not appear to have been abused in a case in which it is not shown that any new rights have intervened since the sale; the other is that the grantee of the purchaser was incompetent to make the application and that it could properly have been made by the latter only. This is a matter, too, which we think rests largely in the discretion of the court. A statute in this state has abolished the common law rule against conveyances of land in adverse possession, and actions are required to be prosecuted in the name of the real party in interest, and, when there has been a trans-

fer of the subject matter of a pending suit, the court may, in its discretion, allow a substitution of the transferee as a party in the action. We know no means by which, in this instance, the purchaser could have been compelled to prosecute the proceeding, and after having parted with his title he might, perhaps, have been held not to possess sufficient interest to enable him so to do. Finally, we do not discover that the defendants have suffered any wrong or prejudice in person or estate, and recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, 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.

W. E. JAKWAY V. RANSOM S. PROUDFIT.*

FILED MARCH 8, 1906. No. 14,183.

1. **False representations** as the basis of an action, whether for damages or for the rescission of a contract, are such only as in some manner actually mislead the party to his damage. *American Building & Loan Ass'n v. Bear*, 48 Neb. 455, followed and approved.
2. **Prejudicial Error.** Action of the trial court in excluding testimony offered by the defendant examined, and *held* prejudicial.
3. **Instructions** examined, and *held* prejudicial.

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

Rose & Comstock and *I. H. Hatfield,* for plaintiff in error.

Stewart & Munger, contra.

*Rehearing allowed. See opinion, p. 67, *post.*

OLDHAM, C.

This was an action by Ransom S. Proudfit, plaintiff in the lower court, to recover from defendant Jakway the consideration for the purchase price of 50 shares of capital stock of the Lincoln Incubator Company. The petition alleged that the purchase of the stock was induced by the false and fraudulent representations of the defendant concerning the indebtedness of the corporation; that, on the discovery of the deceit practiced upon plaintiff by defendant, plaintiff rescinded the contract and tendered back the shares of stock. It was also alleged that the capital stock is of less value than it would have been had the representations relied upon been true. Defendant answered this petition with a plea of a subsequent ratification of the contract of purchase by the plaintiff after full knowledge of the condition of the company's indebtedness, a general denial of any misrepresentation, and an allegation that plaintiff purchased the stock with full knowledge of the condition of the company. On issues thus joined, there was a trial to the court and jury, verdict for the plaintiff, and judgment on the verdict. To reverse this judgment defendant brings error to this court.

There is no serious controversy in the testimony, except as to the subsequent ratification of the contract by the plaintiff after full knowledge of the condition of the company. On that issue there was a conflict of testimony, which was properly submitted to the jury, and we feel bound by the verdict on that question.

The misrepresentation relied upon for a rescission of the contract was as to the liability of the company as indorser and guarantor of two notes, aggregating $1,000, executed by one Garoutte in payment for certain shares of capital stock in the corporation. The notes, when taken, had been cashed at their full face value at the Columbia National Bank, and were indorsed by the corporation. The notes were not due at the time of the

purchase of the capital stock by Proudfit, and the liability of the company as indorser on these notes was not carried as a liability on the books of the corporation. There is no contention that any other liability was concealed from plaintiff by either defendant or the secretary of the corporation. It appeared from such of the evidence as was admitted by the trial court that these notes, which became due after the commencement of this suit, were paid by the maker at maturity. Defendant also offered to prove that the maker of the notes was worth over $250,000 above all liabilities and exemptions, but this evidence was excluded by the trial court. And by instruction No. 5, given by the court on its own motion, the jury were told that, if they believed that defendant made the false representation alleged and that the same was a material inducement to plaintiff to purchase the stock in question, then it would be immaterial and no defense to the action that, subsequent to the commencement of the action, the Garoutte notes were taken up and the Lincoln Incubator Company thereby relieved from liability thereon, unless they should find that the same was done in pursuance of a contract between the plaintiff and defendant. By instruction No. 7 the court told the jury, in substance, that the fact of the solvency of Garoutte was wholly immaterial. In other words, the court submitted the case to the jury on the theory that, if the representation of the indebtedness of the corporation was false and if such representation was relied upon by the plaintiff as an inducement to the contract, he was entitled to rescind, whether any actual damage accrued by reason of the misrepresentation or not. On the contrary, defendant requested instructions which predicated plaintiff's right of recovery on the fact that the representation was false and that he had suffered material damage by reason of such false representation. All of these instructions were refused by the trial court, so that the only question at issue is whether a rescission of a contract is warranted for fraudulent representations inducing it, where no actual

damage is occasioned by such deceit. In 1 Story, Equity Jurisprudence (13th ed.), sec. 203, it is said: "And in the next place the party must have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that to support an action at law for a misrepresentation there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff. And it has ben observed with equal truth by a very learned judge in equity, that fraud and damage coupled together will entitle the injured party to relief in any court of justice." In Bispham, Principles of Equity (6th ed.), sec. 217, it is said that "fraud without damage is no ground for relief at law or in equity." Again, in 2 Pomeroy, Equity Jurisprudence (3d ed.), sec. 893, the rule is laid down that "the party must suffer some pecuniary loss or injury as the natural consequence of the conduct induced by the misrepresentation. In short, the representation must be so material that its falsity renders it unconscientious in the person making it to enforce the agreement or other transaction which it has caused. Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal; courts of justice do not act as *mere* tribunals of conscience to enforce duties which are *purely* moral. If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury." In 14 Am. & Eng. Ency. Law (2d ed.), p. 140, it is stated: "Relief or redress will not be granted, either by way of rescission or by way of damages, at law or in equity, if it clearly appears that the party complaining has not sustained any pecuniary damages, nor been otherwise put in any worse position than he would have occupied if there had been no fraud; but when we go beyond this broad proposition we meet with difficulties, and find some conflict in the decisions." While, as suggested in

the authority last quoted, there is some diversity of opinion in the adjudged cases as to the nature of the damages which will warrant a rescission of a contract, the very great weight of authority, however, is in line with the text writers above quoted on the proposition that it must be an actual pecuniary damage, as distinguished from a nominal or theoretical injury. The rule in this state seems to be in harmony with the strong current of authority on this question. *American Building & Loan Ass'n v. Bear,* 48 Neb. 455, was an action for the rescission of a contract of purchase of shares of stock of the association. The misrepresentations relied upon were as to the management of the corporation by well known and eminent citizens of Iowa and Minnesota. In determining the question of the right of rescission, POST, C. J., said:

"False representations as the basis of an action, whether for damages or for the rescission of a contract, are such only as in some manner actually mislead the complaining party to his damage. 'A statement made with intent to defraud a subscriber, but without that effect, is immaterial; mere intent without damage is insufficient.' 1 Cook, Stock and Stockholders (3d ed.), sec. 149. See, also, *Keller v. Johnson,* 11 Ind. 337; *Robertson v Parks,* 76 Md. 118; *Wainwright v. Weske,* 82 Cal. 193."

This decision is in harmony with the holding in *Lorenzen v. Kansas City Investment Co.,* 44 Neb. 99, and is fully supported in principle by our later holding in *Gerner v. Yates,* 61 Neb. 101.

It follows from the above stated principles that the trial court erred in excluding the evidence offered by the defendant, and in giving paragraphs No. 5 and No. 7 of instructions above set out. We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing

opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

The following opinion on rehearing was filed October 18, 1906. *Judgment of reversal adhered to:*

1. Contract: FRAUD: RESCISSION. A purchaser of real or personal property is entitled to the benefit of his bargain, in other words, to receive the identical property purchased; and where the vendor by fraud or false representations has conveyed to him or induced him to accept something not contemplated by his contract, he may rescind the sale and recover what he has paid, without showing that he has sustained any pecuniary injury or damage thereby.

2. ———: RESCISSION: EVIDENCE. Where, however, a purchaser receives what he actually purchased, and bases his right to rescind on some false representation as to its quality, condition, or matter affecting its value, he must show that such representation was material, and that he was misled thereby to his injury and damage.

3. Former conclusion, *Jakway v. Proudfit, ante,* p. 62, adhered to.

BARNES, J.

When this case was before us the first time it was considered by Department No. 2 of the Commission. An opinion was prepared by Judge OLDHAM, and adopted by the court, reversing the judgment of the court below. *Jakway v. Proudfit, ante,* p. 62. A rehearing was ordered, and the case has been presented to the court both upon printed briefs and oral arguments. The defendant in error in an able, comprehensive and exhaustive brief contends that our former opinion is wrong; that the rule there announced that "false representations as the basis of an action, whether for damages or for the rescission of a contract, are such only as in some manner actually misled the party to his damage," is opposed to the great weight of authority, and should not be adopted in this jurisdiction. Many cases are cited and quoted from to

sustain this contention, and it appears that there are two lines of decisions in this country, one holding that to justify a purchaser in rescinding his contract and suing to recover the price paid for the thing purchased, it is not necessary for him to show that he has sustained an actual pecuniary loss by reason of the false representations, and the other holding that the false representations must have been material, and have misled the purchaser to his injury and damage. An analysis of the cases shows that, although there seems to be a conflict between them, yet, as a matter of fact, no such conflict exists, and they can easily be harmonized. In the first class of cases the holding is based on the rule that the purchaser is entitled to have the thing actually purchased. A pertinent illustration of this rule is found in *Hansen v. Allen,* 117 Wis. 61, where it is said:

"It is enough to say that the plaintiff was entitled to have the particular piece of timbered land with a stream of water upon it which had been pointed out to him, and for which he actually contracted, instead of a different piece of land situated at some other place."

Again, in *Bristol v. Braidwood,* 28 Mich 191, where the defendant purchased a team of horses of the plaintiff, for which he gave a note of a third party, which he represented was secured by a first mortgage, and it appeared that the representation was false, the note being in fact secured by a second mortgage, it was held that the plaintiff was entitled to have what he bargained for, that is to say, a note secured by a first mortgage. We think these cases are sufficient to illustrate the rule that the purchaser is entitled to the benefit of his purchase, and is not obliged to accept something he did not buy. With this rule we are in strict accord, and believe it to be in line with the great weight of authority in this country. Now, if the facts in the case at bar bring it within this rule, then the plaintiff was entitled to recover, and our former opinion should be reversed. It seems to us, however, from a careful examination of the record, that the

defendant in error has not brought himself within this rule. He purchased stock of the Lincoln Incubator Company, and obtained the thing he purchased. The question, then, is whether the alleged false representations were material, and misled him to his injury and damage. The record discloses that the defendant was seeking an investment, and to that end first approached one F. W. Brown, who was a stockholder and officer of the corporation; that he sought and obtained from Brown information as to the financial standing and condition of the company, together with the nature and extent of its business; that he disclosed to Brown his intention to purchase an interest in the company and finance its affairs, if he could obtain such an interest as he desired; that he was informed by Brown, and other officers of the corporation with whom he talked, that, perhaps, Jakway would sell his stock. Thereupon he spent several days investigating the books and the affairs of the corporation to ascertain its financial condition, and was told that the debts of the corporation did not exceed some $600 or $800. He also ascertained the substantial truth of this statement by an examination of the books, from which he claims to have made a memorandum statement. Thereupon he visited Jakway, and asked him what he would take for his stock in the corporation. He first offered Jakway $1,500 for his holdings, which was refused. He then offered him $1,800, which was also refused. Jakway then told the defendant that he would take $2,000 for his stock. Defendant said he would give it, and they agreed to meet at noon of that day, at the office of the corporation, for the purpose of closing the deal and having the stock transferred on the books of the company. The foregoing facts are undisputed. When they met at the office of the company defendant claims that he exhibited his memorandum to Jakway, and asked him if it was correct, and he testifies that Jakway told him it was. On the other hand, Jakway swore that he never made any such statement; that he did not know the financial condition of the com-

pany or the amount of its debts, because he was not the bookkeeper, and knew no more about it than was known by the defendant himself.

As to the allegation that Jakway represented that there had been paid into said corporation, upon certain stock, the sum of $1,000 in cash, when, in truth and in fact, the purchaser of said stock had not paid the sum of $1,000 in cash, but had given his promissory note to said corporation for the same, which note said corporation had indorsed, sold and discounted at the Columbia National Bank of Lincoln, Nebraska, no evidence was introduced to support it. On the other hand, it appears that Proudfit, as soon as he obtained possession of the Jakway stock, became very active in the company's affairs; that in about a week thereafter he claims to have ascertained the fact that one L. W. Garoutte had purchased $1,000 worth of stock of the corporation; had given his notes, amounting to $1,000, in payment therefor; that the notes were indorsed by the company and sold to the Columbia National Bank, for which it received the sum of $1,000 in cash. He testifies that when he discovered this fact he was dissatisfied; that he informed the directors of the company that the matter must be fixed up. It appears that in answer to such demand Jakway was sent for, who agreed to take up the notes, and relieve the corporation of any possible contingent liability thereon. It appears that this arrangement was satisfactory, and was carried out in due time; that in accordance with his demands he was elected a director and treasurer of the corporation, which office was formerly held by Jakway; that he proposed to go forward and finance the concern in accordance with his original plan, if matters could be arranged to his satisfaction. He testified in part as follows:

"I told them that everything had to be cleared up, so it would be to my entire satisfaction in every respect. I positively said I would not continue with the company, except on condition that everything was cleared up, and to my satisfaction. Q. What were the things particularly

that you insisted on that should be cleaned up before you proceeded with the company? A. The main issue was the Garoutte notes. Q. Was there anything else involved? A. There was a receipt that did not look clear to me at the meeting at the Capital Hotel. Q. Relating to the McCarthy stock? A. Yes, sir. Q. Was there something in connection with that that you insisted on being cleaned up? A. Yes, sir."

Cross-examination: "Q. You were present when you were elected a director, weren't you? A. Yes, sir. Q. And present when elected treasurer? A. Yes, sir. Q. And wasn't one of the conditions you made as to going on with the company, and advancing $5,000 of your money, and procuring $10,000 more to promote this enterprise, that you should also be manager of the business of the company? A. It was the condition that I should know all about its business. Yes, sir. Q. Didn't you insist, also, that you would be business manager of the company in McCarthy's place, and that McCarthy should resign his place? A. No, sir. I don't know that I did. Q. Who would know, if you don't—these people who have testified before about it? Who do you think would know, if you don't know? A. I wanted it all cleaned up, and new officers elected, and everything of the kind. Q. You wanted to be elected manager didn't you? A. I certainly wanted to have some voice in the matter."

From this evidence it seems reasonably clear that defendant was not dissatisfied with the condition he ascertained to exist in reference to the Garoutte notes, but rather with his inability to secure the entire management of the corporation to himself. Again, it seems to us that, if it be conceded that the evidence shows that Jakway stated that the financial condition of the company was, as disclosed by the memorandum, made by defendant, such representation was substantially true. We are of the opinion that this case should be ruled by *American Building & Loan Ass'n v. Bear,* 48 Neb. 455. The opinion in that case is an able and exhaustive one, and

correctly states the rule of law which should be applied in cases where, as in the case at bar, the buyer obtains the thing purchased, and is compelled to rely for his right to rescind on false representations as to matters affecting its quality, condition or value. In such cases, the party must have been misled to his injury or damage. To hold otherwise would enable a purchaser to rescind his contract for any misstatement of the vendor, however trivial. We would thus overturn the ordinary and well-established rules governing the purchase and sale of property of all kinds.

It seems clear to us that the conclusion arrived at by our former opinion is sound and should be adhered to.

JUDGMENT ACCORDINGLY.

UNION PACIFIC RAILROAD COMPANY V. CHARLES NELSON.

FILED MARCH 8, 1906. No. 14,196.

1. **Evidence** examined, and *held* sufficient to sustain the judgment of the district court.
2. **Instructions** examined, and *held* not prejudicial.

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

John N. Baldwin, Edson Rich and *John A. Sheean,* for plaintiff in error.

C. H. Holcomb, contra.

OLDHAM, C.

This was an action by the plaintiff in the court below, a shipper of live stock, against the defendant railroad company for damages alleged to have been occasioned by an unnecessary and negligent delay in transporting

a car-load of cattle from South Omaha, Nebraska, to Callaway, Nebraska. There was a trial to the court and jury below, judgment for plaintiff for $61.70; and to reverse this judgment defendant brings error to this court.

The facts underlying the controversy are that on Friday, October 9, 1903, plaintiff shipped a car-load of cattle from South Omaha to Callaway over defendant's railroad. The car was transported to Kearney, Nebraska, over defendant's main line where it was to be transferred to a branch line to be delivered at Callaway. There was only one train a day on the Callaway branch, and this train leaves Kearney at about 6:30 A. M. When the main line train reached Kearney on Saturday, the train on the Callaway branch had departed, and, as there was no Sunday train on the branch line, the stock were unloaded and yarded there over Sunday. On Monday morning plaintiff loaded his cattle in the car before the train left Kearney for Callaway, and this car was included in the train when it was first made up. But the conductor of the train claimed that he had no authority to take the car without the shipping bill, which appeared to have been with the yardmaster. Plaintiff insisted on the car being taken and tried to find the yardmaster to get the car billed out, but failed to do so. Accordingly, the car was "kicked loose" from the train and left standing on the side-track until about 2 o'clock in the afternoon, when the cattle were unloaded, and again yarded until Tuesday morning, and then transported to Callaway. The only conflict in the evidence is as to whether it was the negligence of the yardmaster, or of the conductor of the train, in not sending the car to Callaway on Monday; and, as far as plaintiff's right of recovery is concerned, it is wholly immaterial which of defendant's employees was at fault, as the evidence clearly shows that the delay at Kearney on Monday was wholly unnecessary.

The only objection urged against the instructions of the trial court is that they were given on a theory that there was evidence tending to show an unnecessary delay

in the shipment. We think this theory was the only one on which the court could have instructed under the evidence. There is a technical contention that the evidence shows that the delay, if any, occurred on the shipment from Kearney to Callaway, and not from Omaha to Callaway as pleaded in the petition. This is purely specious, as the contract of shipment was from Omaha to Callaway, and any unreasonable delay at any intervening point in making this shipment is sufficient to constitute the cause of action alleged upon.

As we are pointed to no reversible error in defendant's brief, and as the quantum of damages awarded was very reasonable under the testimony, we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

GOTTLIEB WESSEL V. JOHN S. BISHOP.

FILED MARCH 8, 1906. No. 14,123.

1. **Instructions:** REVIEW. Rulings of the court upon objections to instructions given and refused examined, and *held* without error.
2. **Misconduct of Juror.** Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict, but the proof must show that his conduct is of such a character that prejudice may be presumed.

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

W. E. Stewart, for plaintiff in error.

John S. Bishop, pro se.

EPPERSON, C.

The defendant in error sued the plaintiff in error for the value of his services as an attorney at law in several cases, in each of which the defendant or some member of his family was a litigant. Trial was had to a jury resulting in a verdict and judgment for plaintiff, defendant in error.

The first assignment of error presented by defendant in his brief is the refusal of an instruction, the object of which was to take from the jury all consideration of an item of $10, charged by the plaintiff for his services in an action against the adult sons of the defendant. Defendant's sons were in jail, charged with crime, and upon the request of their sister plaintiff procured them bail, for which service he neither received nor charged a fee. He rendered no further service until the defendant employed him to counsel and defend his sons. Defendant claims that the contract testified to by the plaintiff was within the statute of frauds, the same not being in writing, and the services rendered for another. Such evidence we think shows an original undertaking, in which the plaintiff extended credit to the defendant, and therefore the contract was not within the statute of frauds. *Williams v. Auten,* 62 Neb. 832.

2. Plaintiff in his petition admitted the receipt of $20 upon account sued on, and upon the trial admitted the payment thereon of $2.50 additional. In his answer, defendant denied that he employed the plaintiff in the several actions alleged in the petition, except in one certain injunction suit in which plaintiff's services were of a value not exceeding $25, which has been paid. The testimony of both litigants shows payment by defendant to plaintiff of sundry amounts covering a multitude of minor transactions and expenditures, some of which having no connection with the subject matter of this litigation. These items, aggregating $58, defendant contended should be credited to him upon the account sued on, and now al-

leges that the court erred in giving to the jury the instruction containing the following language: "The burden is upon the defendant to prove any payments in addition to the $20, admitted in plaintiff's petition, and in addition to the $2.50, admitted in his testimony." He argues that by reason of this instruction the jury were at liberty to infer that the defendant had some burden or unusual duty in respect to the several items in excess of $22.50, composing the sum of $58. The reasons which the defendant gives for the purpose of showing error appear to us as good reasons for the giving of the instruction. The burden of proof was upon the defendant to show that the payments not specifically alleged in the pleadings, but testified to, were made in part payment of the claim sued on, instead of upon other items of indebtedness.

3. As a further reason for reversal, defendant alleges misconduct on the part of the jury. The conduct complained of is stated in the affidavit of one of the jurors, as follows: "That throughout the deliberations of said jury on said cause, Mr. Minor S. Bacon, one of said jurors, repeatedly stated, in substance, that he never would agree to return a verdict for less than the whole amount claimed by the plaintiff, and was quite decided in trying to get the other jurors to agree with him. Said juror Bacon further stated, in substance and effect, that he was himself an attorney, and had knowledge of the reasonableness of rates charged for legal services by the plaintiff in question in this action, and knew from his own experience that the plaintiff was entitled to recover all he sued for in said cause. That while so deliberating in said jury room, said juror Bacon further said, in substance, that he was acquainted with the defendant, and knew that he was a hard man to get along with, and that he had trouble with everybody he had dealings with, and was always in litigation." This was corroborated by the affidavits of seven other jurors. The position of this lawyer juror, shown by the first paragraph of the affidavit, might have been prompted by a fair and impartial consideration of the evidence; and

the facts stated in the third paragraph are clearly insufficient to justify an avoidance of the verdict. Other facts shown by the affidavit are of a more serious nature, but as the amount of the recovery is supported by sufficient evidence, and as the objectionable matter is limited to the opinion of the juror whose conduct is challenged, we cannot see our way clear to reverse the judgment of the lower court. Evidence as to the value of plaintiff's services was given by lawyers of high standing at this bar, and varies only as to one item or fee of $100 sued for by plaintiff; three witnesses fixing the value at a considerably larger sum, one at $75 and two at $25. Proof of mere indiscretion on the part of a juror is not sufficient to avoid the verdict; but the proof must show that his wrong is of such a character that prejudice may be presumed. The conduct complained of was very near the dividing line, but it is not clearly prejudicial.

"Where a new trial is asked for on the ground of misconduct of a juror or of the prevailing party, the finding of the trial court in support of the verdict will not be set aside unless the evidence of misconduct is of a clear and convincing character." *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.*, 42 Neb. 105.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

DIEMER & GUILFOIL, APPELLANTS, V. GRANT COUNTY ET AL., APPELLEES.

FILED MARCH 8, 1906. No. 14,126.

Taxation: ASSESSMENT. The action of the county board of equalization in fixing the place for listing and assessment of personal property, under the provisions of section 42, art. I, ch. 77, Comp. St. 1905, will not be disturbed, unless an abuse of discretion is shown.

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

R. C. Nolcman and *W. L. Stark,* for appellants.

H. M. Sullivan and *L. B. Unkefer, contra.*

EPPERSON, C.

This action originated before the board of equalization of Grant county upon the petition of M. E. Harmston and others, who petitioned the county board to assess to the appellants 1,500 head of cattle in Hyannis precinct and School District Number 1, instead of in Collins precinct and School District Number 3. The order of the county board granting the petition was sustained by the district court on appeal.

The testimony of the appellants shows the following facts: Appellants resided in Collins precinct upon a cattle ranch owned by them. They also owned and operated another and a smaller ranch or farm in Hyannis precinct, separated, and at a distance of about 15 miles from the home ranch. That the appellants are engaged in the business of buying, feeding and selling cattle, and owned in the spring of 1904, and for some time prior thereto, 4,000 head of cattle, on account of which they were liable for assessment for revenue purposes in the year 1904. Appellants used the Hyannis precinct ranch for the purpose

of producing hay, and for a winter and spring range for cattle, and from November, 1903, to about May 1, 1904, had there from 600 to 1,900 head of cattle. At times a number of cattle would be removed to the home ranch for dipping or other purposes, but soon thereafter the same or other cattle were returned, and in this way about 1,500 head were kept upon the Hyannis ranch grazing over the meadows, valleys and hills in and near the same, until about the first of May, 1904, when they were shipped or returned to the home ranch for summer grazing. Upon this ranch there is a small corral, stable and four wells, sufficient to supply water for the cattle, and also a small dwelling house used by the owners and their employees during the feeding and haying seasons. Section 42, art. I, ch. 77, Comp. St. 1905, provides: "In all questions that may arise under this chapter as to the proper place to list personal property, * * * if between several places in the same county, the place for listing and assessment shall be determined and fixed by the county board; * * * and when fixed in either case, shall be as binding as if fixed in this chapter." This section makes it the duty of the county board to determine where within the county personal property shall be assessed, when questions arise, as in this case, and its decision will not be disturbed unless an abuse of discretion is shown. Under the facts stated above, the order of the county board, fixing Hyannis precinct as the place for listing and assessing the 1,500 head of cattle, is reasonable and just.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

W. T. MORRIS ET AL. V. ALFORD H. PERSING.

FILED MARCH 8, 1906. No. 14,163.

1. **Chattel Mortgage:** SALE BY MORTGAGOR. The making of a written contract by a mortgagor of chattels in possession, providing for the sale and future disposition of the property, and providing for the payment or satisfaction of the mortgage indebtedness, is neither *malum in se* nor *malum prohibitum*.

2. **Instructions:** REVIEW. The giving of instructions set out in the opinion *held* error.

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

Patterson & Patterson, for plaintiffs in error.

W. T. Thompson and *George W. Ayres, contra.*

EPPERSON, C.

Plaintiff sued the defendants in the district court for Merrick county to recover $200, which sum was advanced by plaintiff to defendants as part of the purchase price of certain property described in their written contract. The contract was made October 24, 1903, and provided: "The said W. T. Morris and C. A. Burke have sold and agree to convey by bill of sale on the first day of January, 1904, their meat market and butcher business in Central City, Nebraska, including all fixtures therein," etc. It also contained the following provisions: "A. H. Persing agrees to purchase said business and articles and to pay therefor the sum of $900 as follows, to wit, $200 cash, receipt of which is hereby acknowledged, and shall further have the option of paying said balance of $700 in cash on the first day of January, 1904, or to pay $200 cash on said date and assume an indebtedness of $500 now existing against said business and articles; the said W. T. Morris and C. A. Burke to retain possession of and conduct said business until the first day of January, 1904."

The indebtedness referred to consisted of a certain chattel mortgage held by one Wright, securing a note given by defendants for $500, payable "on or before July 1, 1904." The mortgage had not then been filed of record, but plaintiff had knowledge thereof. He sought to rescind his contract on the grounds that the defendants did not have the consent of the mortgagee to such sale; and alleges that he did not know on the date of contract that the mortgagee had authority to take immediate possession of the property upon a disposition thereof by mortgagors. The trial in the lower court resulted in a verdict and judgment for the plaintiff and defendants bring the cause to this court by proceedings in error.

It is shown by the evidence that subsequent to the date of the contract, and before January 1, 1904, plaintiff requested the mortgagee to release the defendants from said indebtedness, and to accept plaintiff therefor, and that the mortgagee refused. The evidence further shows that on December 31, 1903, the plaintiff and defendants invoiced the stock of meat preparatory to the delivery thereof to the plaintiff; and that the plaintiff made no further attempt to comply with the terms of the contract. These facts are uncontradicted. It also appears that the mortgagee had not, on January 1, 1904, given his written consent to the sale of the mortgaged property. Plaintiff testified that before January 1, 1904, he saw the defendant Morris, and told him that the mortgagee refused to take him, and defendant replied that he did not know what he would do if the mortgagee did not accept him. This is denied by the defendant Morris. No other evidence was given to prove that plaintiff notified the defendants of his election to pay the $200 and to assume the mortgage indebtedness. It will be observed that the contract did not provide that in case plaintiff elected to assume the mortgage a release of the defendants from such indebtedness must be procured. There is a great difference between the assuming by a third party of an indebtedness and a novation. In the former, the liability of the original

obligor to the obligee remains unchanged, in the latter, the original obligor is relieved. The option might have been exercised by plaintiff's assuming the mortgage debt; instead of this he attempted to bring about a novation, which was not required. The mortgagee simply refused to release the defendants. He was not asked to do more.

The court gave to the jury the following instruction: "If in this case you find that the plaintiff did, in good faith, exercise said option and elect to pay $200 cash and assume an incumbrance of $500, and you further find that the owner of the incumbrance on said property refused to permit the plaintiff to exercise his said option above mentioned, then you are instructed that plaintiff will have the right to rescind said contract and recover from the defendants the money paid thereon." This instruction was not justified by the evidence.

The court further instructed the jury, in substance, that it was the duty of the defendants to procure the consent in writing of the mortgagee to the making of the sale contemplated in the contract on or before January 1, 1904, and that in the absence of such consent defendants had no right to make such sale, and could not retain the said sum of $200. Section 9, ch. 12, Comp. St. 1905, prohibits the actual sale and disposition of mortgaged property without the written consent of the owner and holder of the debt thereby secured, but it does not prohibit the mortgagor from contracting for the future disposition of the mortgaged chattels. And the making of a written contract, wherein the mortgagor agrees to sell and deliver the mortgaged chattels at a future time, and in which the mortgage is contemplated and the payment or satisfaction thereof provided, is neither *malum in se* nor *malum prohibitum*. Under the terms of this contract, the plaintiff obligated himself to exercise one of two options therein expressed, and it was his duty at the time fixed by the contract to notify the defendants of his election, and demand of them the execution of the contract on their part. Then, and not until then, upon their failure to deliver to

him a legal and effective bill of sale which would enable him to enjoy the fruits of his contract, could he demand a rescission.

The giving of each of the above instructions was error, and we therefore recommend that the judgment of the district court be reversed and the cause remanded to the district court for a new trial.

AMES and OLDHAM, CC., concur.

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

REVERSED.

JAMES K. P. PINE, APPELLEE, V. DANIEL MANGUS ET AL., APPELLANTS.

FILED MARCH 8, 1906. No. 14,179.

Mortgage: ASSIGNMENT: PAYMENTS TO MORTGAGEE. A mortgagee of real estate assigned its mortgage, and guaranteed the payment thereof, and thereafter collected the principal and interest, but failed to account therefor to its assignee, who instituted this action to foreclose the mortgage. Evidence examined, and *held* sufficient to show that the mortgagee was the agent of its assignee, and the payments to it satisfied the mortgage indebtedness.

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

Tibbets Bros. & Morey and *W. S. Morlan,* for appellants.

M. A. Hartigan and *C. E. Eldred, contra.*

EPPERSON, C.

On the first day of March, 1888, a mortgage was given to the Guarantee Loan & Trust Company of Kansas City, Missouri, by one Mangus, conveying 160 acres of land in

Red Willow county to secure the payment of a loan of $750 due in five years. The principal indebtedness was evidenced by one bond or note, which was made payable at the office of the mortgagee in Kansas City. The record shows the following undisputed facts: That on the 25th day of September, 1888, the mortgage was assigned to the appellee Pine, by the execution of an ordinary written assignment, and the delivery of the bond, coupons and mortgage, and with the guaranty on the part of the mortgagee, hereinafter referred to as the loan company, that the interest would be paid promptly, and the principal within two years after due. By mesne conveyance from the mortgagor, Mangus, the mortgaged property was on March 17, 1893, deeded to the appellant Gustofson, who took the title subject to the mortgage. Soon thereafter he paid $250 of the principal and obtained, by negotiation with the loan company, whose assignment to the appellee had not then been recorded, an agreement extending the time for the payment of $500 for two years from March 1, 1893. The extension agreement was submitted by the loan company to him, and contained the following: "The Eastern Banking Company, J. K. P. Pine, the legal owner and holder, has agreed to and does extend the time of the payment of $500 thereof for a term of two years from March 1, 1893, the consideration being the loan as first made." The coupons thereto attached were, however, made payable to J. K. P. Pine. This agreement and the coupons when signed and forwarded to the loan company which retained them until paid, when they were returned to Gustofson, with a written satisfaction of the mortgage signed and acknowledged by the loan company, and which was duly recorded November 7, 1896. None of these payments, either of principal or interest, unless it be the interest maturing September 1, 1893, were remitted by the loan company to the appellee, nor did he know of such payments being made. On the 3d day of July, 1897, the appellee caused his assignment to be recorded in the office of the register of deeds of Red Willow county; and on the

20th day of October, 1899, instituted this action in the district court for Red Willow county to foreclose the mortgage, alleging default in the payment of the principal sum falling due March 1, 1893. The appellants Gustofson and Fagerstrom, and other necessary parties, were made defendants. The district court found for the appellee, and decreed a foreclosure of the mortgage for the satisfaction of the claimed amount. From this decree the appellants Gustofson and Fagerstrom appeal.

On September 24, 1893, Gustofson conveyed the land by his warranty deed to Fagerstrom, who claims to be a purchaser in good faith, without notice, of the appellee's assignment. It is apparent that the appellant Fagerstrom had actual notice of all the facts known to his grantor, and knew of the assignment, and therefore he has no greater equities than Gustofson would have, had such transfer never been made. The sole question here presented is whether or not the loan company was the agent of its assignee, the appellee herein, clothed with actual or ostensible authority to collect the principal and interest. The appellee claims that the loan company had no authority to extend the time for the payment of $500 of the principal, nor to collect any part of the principal or interest at any time; and in his deposition states that no such authority existed. But we take into consideration the facts testified to by him, and other evidence showing the relationship which existed between him and the loan company, rather than his opinions or conclusions as to their relations. About the time of the assignment of the mortgage in controversy, the appellee also procured seven other mortgages from the loan company, and regarding his relations generally with the loan company he says, in substance, that he did in one or two cases accept part payment and extend the time for the payment of the remainder; that the loan company usually sent its check, and requested him to send coupons; that at least two other loans were collected by the loan company for him. He also attached as exhibits to his deposition letters re-

ceived by him from the loan company regarding the collection of several mortgages, from which it appears that the loan company was looking after collections on account of their guaranty of the payment. And in a letter dated January 6, 1893, the loan company said: "If it is your wish that the collection of these coupons be given to other parties, we will give the matter no further attention. I request that you indicate your wishes with reference to these matters at once." And April 24, 1903, wrote: "Some of your loans have matured, and will be glad to give you any assistance needed in the collection thereof." These were transactions of the same character, the proof of which goes to show that the appellee had authorized the loan company to collect such debts. "Such authority may be inferred from the fact that similar acts, through a series of transactions relating to a like business, have been uniformly ratified by the creditor." *Harrison Nat. Bank v. Austin,* 65 Neb. 632.

But the proof is not limited to facts showing general authority. In his deposition, appellee admits that he did agree to an extension of two years' time for the payment of $500 of the principal, upon the payment of $250. After agreeing to this he did nothing toward the collection of the paper, until the amount thereof had been paid and the loan company had failed in business. As a reason for his inexcusable neglect he says: "These people," referring to the loan company, "assured me that these papers were all completed, and that all that I would have to do was to put them in my safe and receive the principal and interest when due, and the company would guarantee the payment of it." Upon these facts it appears that the appellee relied upon the agency of the loan company for the collection of the principal and interest; and it makes no difference whether that agency was authorized by express contract, or implied from the relationship existing between them. In *Thomson v. Shelton,* 49 Neb. 644, it was held:

"Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or

intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency."

In the case at bar, proof of the lack of ordinary care in looking after his property, either personally or through some other agent, and the other facts proved convince us that he depended upon the agency of the loan company to protect his interests, and that Gustofson was justified in relying upon such agency and making the payments as he did. The loan company having authority to collect the money, payment to it satisfied the lien, and the appellee's right to foreclose thereby ceased.

The appellants, in the court below, asked that the said mortgage be declared no lien upon said premises; that it be canceled of record, and the title to said land be quieted in the appellant Charles Fagerstrom, and that the appellee's action be dismissed. Appellants were entitled to this, and we recommend that the judgment of the district court be reversed, and that court be directed to dismiss the appellee's action, and enter his judgment therein canceling said mortgage of record, and affirming the title to said premises in the appellant, Charles Fagerstrom, in so far as the same is affected by the said mortgage and the assignment thereof.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons appearing in the foregoing opinion, it is ordered that the judgment of the district court be reversed, with instructions to the district court to enter his judgment dismissing the appellee's case, and canceling his said mortgage of record, and quieting the title to said premises in the appellant, Charles Fagerstrom, in so far as the same is affected by said mortgage and the assignment thereof.

JUDGMENT ACCORDINGLY.

BAKER FURNITURE COMPANY ET AL. V. RICHARD S. HALL.*

FILED MARCH 8, 1906. No. 14,203.

Corporation: TAKING ASSETS OF FIRM: LIABILITY. A corporation organized for the sole purpose of continuing the business of a partnership firm, which takes over to itself the ownership and control of the assets thereof, thereby assumes the debts of such firm to the extent of the property so received.

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

Brome & Burnett, for plaintiffs in error.

John F. Stout, contra.

EPPERSON, C.

On the 16th day of February, 1903, the defendant in error herein obtained a judgment in the district court for Douglas county against Charles Shiverick & Company, and against the individual members of that firm, for $6,997.60, the amount then due from the judgment debtors upon a promissory note. Later an execution was issued upon the judgment, which was returned *nulla bona.* The defendant in error, appellee, hereinafter called plaintiff, then instituted this action in the district court for Douglas county against the Baker Furniture Company, contending that the latter is liable for the payment of said indebtedness, as the successor in business of the judgment debtor Charles Shiverick & Company; that it assumed and agreed to pay the debts of said copartnership, and took over to itself, without consideration and in fraud of creditors, the assets of said debtor company, which is insolvent.

In October, 1899, and for ten years prior thereto, Arthur S. Shiverick and Ella C. Shiverick were engaged in the retail furniture business in the city of Omaha, conducting

* Rehearing allowed. See opinion, p. 93, *post.*

said business as a copartnership under the firm name of Charles Shiverick & Company. At that time the members of the firm and Joseph L. Baker organized a corporation known as the Shiverick Furniture Company, and in 1903 changed its corporate name to Baker Furniture Company. The circumstances attending the organization of the corporation are as follows: The Shivericks had been doing an unprofitable business, and their liabilities then greatly exceeded their assets. They were indebted to Baker in the sum of $5,750; to the plaintiff in the sum of $6,000, later reduced to judgment; to the First National Bank in the sum of $34,000; and to certain of their relatives in sums aggregating $27,000, and owed merchandise indebtedness amounting to about $6,100. Just prior to the incorporating the Shivericks, Baker and the First National Bank entered into a certain written agreement, in which the Shivericks and Baker agreed to form the corporation for the purpose of conducting the furniture business, and in which it was also provided that the Shivericks should secure forgiveness and relinquishment of the debts owing to their relatives, and to pay to the bank $10,000 of its indebtedness, and for which they gave their notes; and Baker agreed to pay $5,000 of the bank's indebtedness, $5,000 of the merchandise indebtedness, and cause the corporation to assume liability for the balance of the merchandise debts; to cancel his own indebtedness against the copartnership, and to pay $1,000 of the personal obligations of the Shivericks; in consideration for which he was to receive from the Shivericks assignment of shares of stock in the corporation. The bank agreed to accept the notes of the Shivericks for $10,000, and the $5,000 cash from Baker, and to forgive $19,000, the balance of their indebtedness. In the written agreement there was also this provision: "The purpose and intention of this agreement is to enable said Shivericks through said corporation to continue in business and to prevent their business failure; and the understanding is that said Shivericks will and shall be absolutely freed from all in-

debtedness to all parties, except on said notes to said bank, aggregating ten thousand dollars ($10,000), and such other notes and evidences of indebtedness as it now holds, and except an indebtedness of said Ella Shiverick to said Baker not exceeding one thousand dollars ($1,000) which she may hereafter owe to him for moneys which he may advance on her behalf."

The corporation was organized, and 499 shares of the stock were issued to the Shivericks, and one share to Baker, who paid nothing therefor. And, as agreed previously, 384 shares issued to the Shivericks were assigned to Baker. The property of the copartnership was turned over by proper conveyances to the corporation, and the business conducted under the management of Charles Shiverick in the same manner and for the same purposes as was the copartnership. By the incorporation and the agreements leading to it, the Shiverick copartnership was relieved of all indebtedness, except the note due to the plaintiff, and the $1,100 of the merchandise indebtedness. The corporation undertook no business other than that previously conducted by the copartnership, nor did they acquire any property other than that received from the copartnership. The evidence adduced shows that when the corporation was organized the Shivericks and Baker considered the property of the company, which was turned over to the corporation, of the value of about $25,000, and that the capital stock of the corporation was worth one-half its face value. The findings and judgment of the lower court were for plaintiff, and the Baker Furniture Company have filed their petition in error in this court, alleging that the findings and judgment of the court are contrary to the evidence, and contrary to law. The evidence above referred to clearly supports the allegations of fact alleged in the petition, and this leaves us to determine whether or not the findings and judgment of the lower court are contrary to law.

This plaintiff in error maintains that, as the corporation did not by express contract assume the payment of the co-

partnership's indebtedness, and that as no actual fraud was proved, it necessarily follows that the findings and judgment of the lower court were not sustained by the evidence, and were contrary to law; and cites in support thereof the judgment of this court in the case of *Austin v. Tecumseh Nat. Bank,* 49 Neb. 412, a similar case, in which the creditor failed to recover judgment against the new corporation. But in that case the decision was based upon the ground that the petition failed to state a cause of action. It is unnecessary to review that case here. Suffice to say that the petition there held defective failed to recite certain necessary allegations regarding the nature of the interests acquired by the new corporation; and such defects do not appear in the petition filed by the plaintiff herein. In that case it is held that, to render a new corporation liable in such cases, "it should, in the absence of a special agreement, affirmatively appear from the pleadings and proofs that the transaction in question is fraudulent as to creditors of the old corporation, or that the circumstances attending the creation of the new and its succession to the business and property of the old corporation are of such character as to warrant the finding that it is a mere continuation of the former." In the case at bar the pleadings clearly alleged, and the proof sustained them, that the corporation succeeded to the business and property of the Shiverick copartnership, and that the object of the promoters of the corporation was to free the copartnership from all indebtedness and to prevent their business failure. And the proof is sufficient to bring the case clearly within the rule announced in *Austin v. Tecumseh Nat. Bank, supra,* showing as it does that the corporation was simply a continuation of the copartnership. It is a rule of the common law that a corporation which succeeds to the business of a copartnership, or a corporation, organized for the purpose of continuing the business, and takes over the assets thereof, by so doing assumes the debts and liabilities of the partnership or corporation which it succeeds, to the extent of the property so

received. 2 Cook, Stock and Stockholders (3d ed.), sec. 671; 1 Beach, Private Corporations, sec. 360; *Evans v. Exchange Bank,* 79 Mo. 182; 2 Cook, Corporations (5th ed.), sec. 673; *Austin v. Tecumseh Nat. Bank, supra; Reed Bros. Co. v. First Nat. Bank,* 46 Neb. 175.

There was some conflict of evidence as to the value of the property, but as it is not shown that the property was consumed in the payment of the debts of the partnership firm, we cannot see what difference it makes whether the property was worth $15,000, as claimed by the plaintiff in error, or a greater sum, as claimed by defendant in error.

Joseph L. Baker in the court below filed a petition for intervention, alleging that at the time of incorporation the Shivericks deceived him as to the value of the property; that he had no knowledge of the indebtedness owing to the plaintiff; that he was, when the suit was instituted, the owner of all the stock of the corporation, except ten shares assigned to other persons that they might act as directors. A demurrer to this petition was sustained. This ruling of the court the intervener alleges is error, in his separate petition in error herein filed. Intervener did not allege fraud as against the plaintiff, and his petition stated no defense to the plaintiff's cause of action, nor any reasons why he should be made a party to the suit. The liability of the corporation existed the instant of its creation; the stockholders knew of the liability owing to plaintiff, and assignees of stock cannot interpose as a defense to plaintiff's action that the stockholders were guilty of deceit or fraud in the sale of such stock.

There is no error in the record, and we recommend that the judgment of the court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed March 7, 1907. *Judgment of affirmance vacated and judgment of district court reversed:**

1. Corporation: SUCCEEDING TO ASSETS OF FIRM: LIABILITY. To render a newly organized corporation liable for the debts of an established corporation or firm to whose business and property it has succeeded, it should, in the absence of a special agreement to assume such liabilities, affirmatively appear from the pleadings and proofs that the transaction in question is fraudulent as to creditors, or that the circumstances attending the creation of the new and its succession to the business and property of the old corporation or partnership are of such character as to warrant the finding that it is a mere continuation of the old firm or corporation.

2. ———: ———. Where a corporation is organized by the members of an existing partnership and a third person, who contributes the funds necessary to properly finance the new enterprise, and receives therefor his agreed proportionate share of its capital stock, the partners contributing thereto the stock in trade, bills receivable and real estate of the firm, for which they receive their proportionate share of such capital stock, in the absence of fraud, the new corporation cannot be said to be a mere continuation of the old firm.

3. ———: ———: GOOD FAITH. If the new corporation takes all of the property of the old corporation or partnership, and pays for same entirely in its stock issued to the stockholders of the old corporation or members of the former partnership, the creditors of the former partnership or corporation may enforce their claims in equity against the interests of the former partners or stockholders, and a court of equity will seize such property rights in the hands of fraudulent grantees, as in other cases of fraudulent transfer of property, but an innocent purchaser in good faith, without notice, will be protected. A stockholder in the new corporation may be an innocent purchaser.

BARNES, J.

This is a suit in the nature of a creditor's bill to charge the Baker Furniture Company with the payment of a debt due from Arthur Shiverick and Ella C. Shiverick, as the Shiverick Furniture Company, to one R. S. Hall. The

* Rehearing denied. See opinion, p. 101, *post*.

plaintiff had judgment in the district court, and the defendants brought the case here by a petition in error. By our former opinion, *ante,* p. 88, the judgment of the trial court was affirmed. A rehearing has been had, and the case again demands our consideration.

The facts underlying this controversy, briefly stated, are as follows: In the month of October, 1899, Arthur Shiverick and Ella C. Shiverick were, and for many years theretofore had been, conducting a general retail furniture business in the city of Omaha, as copartners, under the firm name and style of Charles Shiverick & Company. At the date mentioned the partnership was indebted to the intervener, Joseph L. Baker, in the sum of $5,700 for borrowed money. The Shivericks at that time represented to Baker that the firm was financially embarrassed; that its assets consisted of a stock of furniture, worth from $12,000 to $15,000, and certain real estate situated in the city of Omaha, of the value of about $7,000; that the obligations of the partnership consisted of $27,000 owing to certain of their relatives; $34,000 to the First National Bank of Omaha, and $6,100 to persons and firms from whom the partnership had bought goods. It was proposed to Baker to form a corporation to be properly financed by him for the purpose of taking over and conducting the business; that such a business could be conducted with great profit; and it was represented to Baker that the relatives of Shivericks would forgive the debt due them. The First National Bank was thereupon consulted, and it was ascertained that that institution, in consideration of a cash payment of $5,000, and the execution of new notes to the amount of $10,000 by Arthur Shiverick, and Ella C. Shiverick, secured by a mortgage upon certain lands owned by Ella C. Shiverick at San Antonio, Texas, would forgive the balance of its indebtedness. Thereupon Baker and the bank required the Shivericks to make a written statement of the indebtedness of the firm, so that provision could be made to liquidate the same and thus start the business, which was to be taken over

and conducted by the proposed corporation, without debt and on a cash basis. This was supposed to have been done, and thereupon it was agreed between Baker and the Shivericks to organize a corporation to be known as the Shiverick Furniture Company, with a capital stock of $50,000. The Shivericks were to transfer their stock of furniture, bills receivable, and Omaha real estate, of the supposed value of about $25,000, to the corporation; and Baker agreed to pay to the Shivericks, or the First National Bank of Omaha, $5,000 in cash, to advance to the Shivericks $5,000 more, with which to pay their merchandise indebtedness, together with such other sums as might be necessary for that purpose; to also advance to Ella C. Shiverick about $1,000, and forgive the debt due him from the firm amounting to something over $5,700, as his contribution to the new enterprise. This arrangement was consummated, and it appears that at the time the corporation was formed all of its capital stock, except one share, was issued to the Shivericks; but in order to carry out the terms of the agreement 385 shares thereof were immediately transferred to Baker as his share of such capital stock, the remainder being retained by the Shivericks in payment for the property which they transferred to the corporation. The business from that time forward was conducted by Arthur Shiverick, as secretary, treasurer and manager of the corporation, Baker being its president, and Ella C. Shiverick its vice-president. To induce Baker to purchase the stock and join in creating the corporation, the Shivericks entered into a contract with him in writing, whereby they guaranteed that he should receive a dividend of 10 per cent. per annum on $25,000 worth of the capital stock so purchased by him; and he in turn gave them an agreement by which they had the right to repurchase all of the capital stock assigned to him in excess of the sum of $25,000 at the price at which it was sold to him, at any time within three years after the organization of the corporation. The Shivericks, to secure the fulfillment of this contract and

also as collateral security for individual loans subsequently made to them by Baker, pledged to him stock owned by them to the amount of $11,500. The business of the corporation under the management of Arthur Shiverick was not successful. It appears that no dividends were earned or paid upon the stock; the contract with the Shivericks respecting the payment of their $10,000 in notes to the First National Bank was not carried out by them; no payments at all being made thereon. The result was that suits were brought by the bank against the Shivericks; judgments were recovered, and to protect the credit of the corporation in which Baker was so largely interested he was compelled to and did purchase the judgments above mentioned. He thereupon procured an amendment of the articles of incorporation, and increased the board of directors, and during the year 1902 took over the management of the business of the corporation; brought suit in the district court for Douglas county upon his claims against the Shivericks to enforce his lien upon the stock held by him as collateral; recovered judgment against them, and had a decree entered for the sale of the shares of stock so held by him as collateral. These shares were sold by the sheriff of Douglas county pursuant to the decree, and were purchased by Baker, who thereupon reorganized the corporation in the name of the Baker Furniture Company.

It now appears that Richard S. Hall, the plaintiff in the court below, had loaned $6,000 to Arthur Shiverick and Ella C. Shiverick, a number of years before the date of the organization of the corporation, and at that time he held their note for that amount. Hall had theretofore been counsel for the Shivericks, and was advised of the facts relating to the formation of the corporation, at the time, or within a few days after, the transaction occurred. Hall's note was not included by the Shivericks in the statement of their indebtedness made to Baker and the bank, and Baker knew nothing about the matter until more than two and one-half years thereafter. Hall testified on the

trial of this case that he knew of the organization of the corporation; that he made no effort to procure the payment of his note at that time, because he trusted to the promise of Arthur Shiverick to pay it out of the salary he was to receive as manager for the corporation. However, on the 24th day of May, 1902, some two and a half years after the corporation had been organized and the partnership property had been conveyed to it, Hall advised Baker of the fact that he held the note above mentioned, purporting to have been signed by Charles Shiverick & Company and Arthur Shiverick on the 14th day of April, 1892, some ten years before that time, and that the note, with interest thereon for about two years, had not been paid. Thereafter, Hall brought suit in the district court for Douglas county against Arthur Shiverick and Ella C. Shiverick on said note, and on the same day they appeared in open court, waived the issuance and service of summons, and confessed judgment in his favor for the sum of $6,997.60 as against themselves, and as partners doing business under the firm name and style of Charles Shiverick & Company, and agreed that the judgment should bear interest at the rate of 8 per cent. per annum from the date of its rendition.

At the January, 1903, meeting of the stockholders of the Shiverick Furniture Company its articles of incorporation were amended, and the name of the corporation was changed from Shiverick Furniture Company to Baker Furniture Company. On the 23d day of July, of that year, Hall instituted this suit against the Baker Furniture Company, and recovered judgment as above stated. It seems clear that the transaction in question herein was not fraudulent as to the creditors of the Shiverick Furniture Company. Indeed, Baker and the bank insisted that all claims against the partnership should be adjusted and settled, and that was one of the conditions on which Baker agreed to become one of the incorporators. It appears that Hall, knowing all about the transaction at or about the time it occurred, failed to inform Baker of the existence

of his note, and accepted the promise of Arthur Shiverick to pay the same out of the salary he was to receive from the new corporation. It is true that the Shivericks, who owned the property and business of the copartnership at the time that Baker helped organize the new company, continued thereafter to also have an interest in the business through the stock which they had retained in the corporation. This interest which they had in the copartnership was, of course, an interest in the property of the copartnership, and they still retained and continued to hold an interest in the same property, and Baker is now claiming that it is free from the claim of Hall, who could, of course, have satisfied his claim out of the property while the partnership held it. We think it follows that a court of equity would reach any interest that the Shivericks had in the property at the time the proceedings in equity were begun, and it may be that Baker could not purchase the interest of the Shivericks in the corporate property, so as to be an innocent purchaser for value, after he had notice of the outstanding claims of this plaintiff against the property. *Montgomery Web Co. v. Dienelt,* 133 Pa. St. 585; *Hibernia Ins. Co. v. St. Louis & New Orleans T. Co.,* 13 Fed. 516. It was said in the latter case:

"Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market."

This possibly might depend upon the circumstances in the case. If the court could do complete equity by impounding the shares of stock held by the Shivericks, there would seem to be no necessity of interfering with the property of the corporation. The corporation itself would, of course, be a proper party to such proceedings in equity, and a court of equity should, in view of all the circumstances in the case, frame its decree so as to do equity to the parties and to make its relief effective.

Since the plaintiff Baker acted in good faith in the

formation of the corporation and in investing his money therein, it becomes important to inquire what interest the Shivericks had in this corporate property at the time that Baker had notice of the claims of the plaintiff Hall. This is especially so since the plaintiff purposely failed to notify Baker of his claim against the Shivericks, and allowed him to deal with the Shivericks and with the property in question upon the supposition that all claims against the property had been fully satisfied. There is a conflict in the evidence as to the value of the property which the new corporation took from the Shivericks. There is much evidence tending to show that the total value of all the assets of the Shivericks' copartnership which were taken by the corporation amounted to less than $18,000, and that Baker invested at the time the amount of $17,700, and afterwards paid $1,200 for the judgment against the Shivericks, making a total of $18,900, all of which was done by Baker before he had notice of the outstanding claim of the plaintiff Hall. Whatever the facts may have been in this regard, it is clear that neither at the time that Baker had notice of the claim of Hall, nor at the time that this action was begun, did the Shivericks have any interest in the property of the corporation to the amount of the judgment which was rendered by the court below in favor of the plaintiff Hall. Again, it cannot be said that the corporation assumed and agreed to pay the debts of the partnership, for such debts, as far as they were known or could be ascertained, were either paid or compounded and released before the corporation was formed. So if the Baker Furniture Company is liable to the plaintiff at all, it is made so because the transaction was merely a continuation of the old partnership of Charles Shiverick & Company.

In our former opinion that fact seems to have been assumed, but we now think the assumption was not warranted by the evidence. An examination of the record discloses that Baker contributed to the new enterprise his own claim of $5,700; $5,000 in cash paid to the First Na-

tional Bank of Omaha, $5,000 to the merchandise creditors of the firm, together with about $1,000 advanced to Ella C. Shiverick, in all about $16,700. For this he received what was understood to be his proportionate share of the capital stock of the new corporation, It was Baker's capital which financed the new corporation and brought it into existence. Without such capital the adjustment of such large accounts with the prior creditors of the partnership could not have been made, and no steps could have been taken to further the organization of the new company. Again, the members of the old partnership were Arthur Shiverick, Ella C. Shiverick, and no others, while the new corporation was composed of Joseph L. Baker, Arthur Shiverick and Ella C. Shiverick, together with two other persons, who later on became stockholders therein. To this new corporation the old partnership contributed its stock of furniture, its bills receivable, and certain real estate situated in the city of Omaha, for which its members received their proportionate share of the capital stock of such corporation. When the corporation was formed a new entity was created which engaged in the furniture business, but it cannot be said that the transaction was, in fact, a continuation of the old partnership. *Paxton v. Bacon Hill & Mining Co.*, 2 Nev. 257; *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412.

The fact that Baker became the owner of the shares of capital stock issued to the Shivericks, and reorganized the corporation under the name of the Baker Furniture Company, is strenuously urged as a reason for affirming the judgment of the trial court. It must be remembered, however, that the Shiverick stock was purchased by Baker at a judicial sale; and the rule is well settled that by such purchase he incurred no liability for the debts of either the partnership or the corporation. *Armour v. Bement's Sons*, 123 Fed. 56, 62 C. C. A. 142; *Fernschild v. Yuengling Brewing Co.*, 154 N. Y. 667; *Allen v. North Des Moines M. E. Church*, 127 Ia. 96; *Smith v. Chicago & N. W. R. Co.*, 18 Wis. 21; *Vilas v. Milwaukee & P. du C. R. Co.*, 17 Wis.

513; *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 142 U. S. 396.

The evidence contained in the record is not sufficient to support the judgment of the district court. Our former judgment is vacated, and the judgment of the district court reversed and the cause remanded for further proceedings, not inconsistent with this opinion.

REVERSED.

The following opinion on motion for rehearing was filed October 3, 1907. *Rehearing denicd:*

PER CURIAM.

In the former opinion the following language was used: "If the Baker Furniture Company is liable to the plaintiff at all, it is made so because the transaction was merely a continuation of the old partnership of Charles Shiverick & Company."

This language is not strictly accurate, and from the briefs upon the motion for rehearing it appears that it has led to a misunderstanding of the views of the court. From other portions of the opinion it is made clear that any interest that the members of the original firm of Charles Shiverick & Company had in the partnership property at the time this action was begun could be reached in this action to satisfy the existing claim of Hall against the copartnership of Charles Shiverick & Company. The plaintiff was entitled to subject the interests of the members of the former copartnership in the copartnership property to the payment of his claim, whether that interest was represented by shares of stock or otherwise, and after notice of plaintiff's claim the defendant Baker could not deal directly with the Shivericks for the purchase of their interests, if such transaction would result in enabling the Shivericks to hinder or delay the plaintiff in collecting his claim out of the interests of the former copartnership in the property.

We think the conclusion reached is right, and the motion for rehearing is

OVERRULED.

ADAM HABIG V. CHARLES B. PARKER.

FILED MARCH 8, 1906. No. 13,969.

1. **Pleading:** CAUSE OF ACTION. A petition setting up numerous and continued tresspasses to personal property states but one cause of action, and is not subject to a motion to divide and number.
2. ———: DAMAGES. It is unnecessary in most actions where the demand is unliquidated and sounds wholly in damages, and where there is but a single cause of action, to state specifically and in amounts the different elements or items which go to make up the sum total of the damages. It is enough generally to claim so much in gross as damages for the wrongs done. In case, however, the pleader elects to claim a named sum for any one or more of the items of claimed damages, he is restricted in his recovery on these items to the amount named in his petition, and the court should so charge.
3. **Instruction:** HARMLESS ERROR. It is not reversible error to charge that the measure of damages for injury to or destruction of bearing fruit trees is the market value of such trees, where the party complaining tendered and procured the court to give an instruction stating the same rule of damages.

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

Neal & Quackenbush, for plaintiff in error.

Edgar Ferneau, contra.

DUFFIE, C.

Parker sued Habig for trespass alleged to have been committed by Habig's stock upon his cultivated lands. The allegations of the petition covered a period of three years, charging repeated acts of trespass during all of that time, and the paragraph of the petition relating to the damage claimed is in the following words: "That the hogs of said

defendant, which he so permitted to run at large and over and upon the cultivated lands of this plaintiff during the year 1900, the exact dates in said year the plaintiff is unable to give, ate up, run over and destroyed corn and corn fodder of this plaintiff to the value of $7.20; that during the year 1901, the exact dates the plaintiff is unable to give, the said hogs of the defendant ate up, and run over and destroyed corn and corn fodder of this plaintiff to the value of $7.20; that during the year 1902, the exact dates in said year this plaintiff is unable to give, the said hogs of defendant ate up, run over, damaged and destroyed corn and corn fodder, apples and pasture and damaged the apple trees of this plaintiff to the amount of $135. That the plaintiff has, therefore, been damaged by the stock of the said defendant, and which said defendant permitted to run at large over and upon the cultivated lands of this plaintiff at the times hereinbefore stated, in the total sum of $149.70; that no part of said amount has been paid by the defendant to this plaintiff." Habig moved for a more specific statement in the petition, the motion being as follows: "Comes now the above named defendant, and moves the court to require the plaintiff herein to separately state and number the causes of his action set forth in his petition, and further to make his petition more definite and certain by, first, setting out the amount, quantity and kind of the personal property damaged or destroyed for the year 1900, and the amount of damages to each kind of property; second, that he segregate the injuries and damages to real and personal property in the year 1902, and that he set forth the amount, quantity and kind of personal property injured or damaged during said year, and the amount of damages to pasture and apple trees, and set forth the nature and the amount of damages to each." This motion was overruled by the court and error is alleged thereon.

We think that reversible error cannot be predicated on this ruling of the court, as, in our opinion, the petition contained but one cause of action. The petition charges

numerous and repeated acts of trespass, and, in effect, a continuing trespass. The general rule applicable to a complaint in an action of trespass is stated in 21 Ency. Pl. & Pr. p. 812, as follows: "Where a trespass has been continued without intermission for a longer time than the space of one day or has been repeated on a subsequent day, the party injured may recover in one action for the first act of trespass and in another for the continuance or repetition thereof; but he is not under the necessity of bringing two actions in either case, because he may in one action, by declaring with a *continuendo,* recover for the first trespass and also for the continuance or repetition thereof." And this rule is by the authorities as applicable to actions for trespass to personal property as upon real estate. *Folger v. Fields,* 12 Cush. (Mass.) 93. There was no error in overruling the defendant's motion so far as it asked that the plaintiff be required to separately state and number his causes of action.

Relating to the other assignments of the motion, the law is well settled that it is unnecessary in most actions where the demand is unliquidated and sounds wholly in damages, and where there is but a single cause of action, to state specifically and in separate paragraphs the different elements or items which go to make up the sum total of damages. It is enough to claim so much in gross as damages for the wrong done. *Shepherd v. Pratt,* 16 Kan. 209; 2 Sutherland, Damages (3d ed.), sec. 424. While it is usual, and perhaps the better practice, to grant a motion requiring the plaintiff to itemize the damages claimed for injury to different articles of personal property, there was no reversible error in denying the motion in this case, especially as the case had been first tried in the county court, and defendant was fully informed upon that trial of the plaintiff's claim. The evidence offered by the plaintiff tended to show that the defendant's hogs, to the number of about 30 or 40, trespassed upon plaintiff's cultivated lands on numerous occasions during the years 1900, 1901 and 1902; that they ate and destroyed certain corn

and corn fodder, quite a quantity of apples, and, as a result of the trespass, five of his apple trees died and other of the trees were injured. Evidence was offered to show the value of the five dead trees, but no evidence was offered as to the value of the other trees prior to the injury and their value after the injury occurred.

The court instructed the jury, at the request of plaintiff, "that the measure of the plaintiff's damages is the reasonable market value of the property destroyed at the time the same was destroyed by the defendant's stock running at large." It is urged that this instruction is erroneous and prejudicial. It is disclosed, however, by the record that in instruction No. 2, given by the court at the defendant's request, the same measure of damage was applied, the language being: "The measure of the plaintiff's damages and his recovery therefor, in this case the property destroyed, would be the fair and reasonable market value of such property at the time, and located at the place, in the same condition that said property was in at the time it was destroyed." It will be observed at once by a comparison of the two instructions that both parties had the same theory as to the measure of damages, and that the court adopted the theory of the parties themselves. The rule is well established in this state that where parties have tried a case upon a certain theory, and procured the trial court to adopt that theory, they cannot be permitted to change their position in the appellate court on error.

The questions already discussed are the principal and most important ones presented. There are 53 assignments of error in the petition. The case, however, is not of sufficient importance to justify extending this opinion by separate mention of each. We have examined the record with care, and conclude that the case was fairly tried upon the theory adopted by the parties, and find no prejudicial error.

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

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

JAMES A. GRAY V. JOHN NOLDE.

FILED MARCH 8, 1906. No. 14,166.

Vendor and Purchaser: RESCISSION: POSSESSION. Gray purchased from Nolde 160 acres of land at the agreed price of $6,000, $1,000 of which was paid in cash, the remainder to be paid at Gray's option with 6 per cent. interest, payable annually. Some three years after the date of purchase Gray tendered to Nolde the remainder of the purchase price with the accrued interest, and demanded a deed, which was refused, and he thereupon commenced an action to recover the purchase money paid and the increased value of the land, and recovered judgment for about $3,000. Nolde superseded this judgment and appealed therefrom to the supreme court. While the action was pending in this court, Nolde commenced an action against Gray to recover possession of the land (Gray still remaining in possession), and for the rents and profits. He recovered judgment for the possession and $825 damages, from which this appeal was taken by Gray. *Held*, That if Nolde had submitted to the judgment obtained against him by Gray and satisfied the same he would be entitled to possession of the land, but that having appealed from the judgment, and refusing to recognize it as settling their rights relating to the land, he could not use it to oust Gray from possession.

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

L. B. Stiner and *Tibbets Bros. & Morey,* for plaintiff in error.

L. J. Capps, C. H. Sloan, F. W. Sloan and *J. P. A. Black, contra.*

DUFFIE, C.

In May, 1901, Gray, plaintiff in error, entered into a written contract with Nolde, defendant in error, for the

purchase of a quarter section of land in Clay county, Nebraska. The agreed purchase price was $6,000, $1,000 of which was paid on the making of the contract, the remaining $5,000 to be paid at the option of Gray with 6 per cent. interest until payment was made. Gray thereupon entered into the possession of the purchased premises, and in February, 1903, tendered to Nolde $5,000 and the accrued interest, and demanded a deed from Nolde and wife, which Nolde refused to execute. Thereupon, Gray commenced an action for damages, claiming that the land had advanced in value between the date of his purchase and his demand for a deed to the amount of $2,000. Upon a trial of the case he recovered judgment for $2,969.63, being $1,000 paid on the purchase price, and the enhanced value of the land as found by the jury. Nolde superseded the judgment and appealed to this court. While the case was pending in this court, Nolde commenced this action in ejectment to recover possession of the premises, and the rents and profits received by Gray during his possession. The trial resulted in a judgment for the plaintiff for possession of the land and $825 damages, and costs, from which judgment Gray has appealed to this court.

The defendant in error insists that by suing at law for the consideration paid on the contract and for his damages sustained because of Nolde's refusal to make a deed of the premises, Gray has in law effected a rescission of the contract of purchase and is no longer entitled to possession of the land. Had Nolde satisfied the judgment for damages obtained against him, there would be force in this contention. Gray should not have both the land and damages for a failure to convey. This court so held on the appeal of *Nolde v. Gray*, 73 Neb. 373, 378. But Nolde refused to acquiesce in the judgment against him and to pay the same. He appealed therefrom, insisting that Gray's neglect to surrender possession, and put him *in statu quo* before commencing the suit, was a complete defense to the action, and he procured the judgment of

this court to that effect. If Gray could not hold the land under his contract and also a judgment for damages on account of a breach thereof, neither can Nolde hold Gray's money paid on the contract and oust him from his possession. The rule must be reciprocal and operate alike upon both parties. Neither can claim a rescission and at the same time lay fast to what the contract has given him. In an action by the grantee against his grantor for breach of covenant, the rule appears to be well settled that if the grantee recover and receive from his grantor the full consideration price, with interest, such grantor is thereby remitted to his right and title to the granted premises as he held them before he granted them away, and the grantee is estopped by such judgment and the payment thereof to set up his title deed against his grantor. *Porter v. Hill,* 9 Miss. *34; *Stinson v. Sumner,* 9 Mass. *143; *Blanchard v. Ellis,* 1 Gray (Mass.), 195; *Parker v. Brown,* 15 N. H. 176; *Kinkaid v. Brittain,* 5 Sneed (Tenn.), 119. The same rule should be applied between vendor and vendee in a contract for the sale of real estate, where the vendor has paid part of the purchase money and becomes vested with the equitable title. Instead of satisfying the judgment for damages against him and then demanding possession, Nolde refused to acquiesce in the judgment, insisting that it was wrongfully obtained, and at the same time, by bringing this action, asserts that it was rightfully given and seeks to use it as the means of regaining possession of his property. He cannot, while denying the validity of the judgment and prosecuting an appeal to have it set aside, use it as an instrument of warfare to eject his vendee from possession, and to recover rents and profits.

We recommend a reversal of the judgment, and a dismissal of the action without prejudice to the commencement of another action, if conditions warrant.

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 action dismissed without prejudice to the commencement of another action, if conditions warrant.

REVERSED.

HARVEY M. ABRAMS, APPELLANT, V. HIRAM C. TAINTOR ET AL., APPELLEES.

FILED MARCH 8, 1906. No. 14,178.

1. **Mortgage Foreclosure: TRUSTEE.** A mortgage made to a trustee may be foreclosed by him without joining the beneficiary as a plaintiff.
2. ———: **REVIVOR.** Where the beneficiary is made a coplaintiff with the trustee in a foreclosure action, and dies while the suit is pending, irregularity or error in reviving the suit in the name of his administrator is without prejudice to further proceedings in the case, as he was not a necessary party plaintiff.
3. ———: **ADVERSE POSSESSION.** A mortgagor's possession of the mortgaged premises after foreclosure and sale will not become adverse until notice to the purchaser that he is holding in hostility to his title.

APPEAL from the district court for Knox county. JOHN F. BOYD, JUDGE. *Affirmed.*

W. A. Meserve and *E. A. Houston,* for appellant.

J. H. Berryman, O. W. Rice and *Charles B. Keller, contra.*

DUFFIE, C.

October 1, 1887, Harvey M. Abrams, the appellant, borrowed $3,300 and to secure payment thereof executed a mortgage upon the premises in controversy in this action maturing October 1, 1892. The mortgage ran to L. W. Tulleys, trustee. At the same time he executed to Burn-

ham, Tulleys & Co., the agents through whom the loan was obtained, a second mortgage on the same premises to secure the sum of $330, the amount of their commission. This mortgage matured before the first mortgage and, not being paid when due, Burnham, Tulleys & Co. commenced an action to foreclose the same, which went to decree October 21, 1890. The premises were thereafter sold under the decree and a sheriff's deed issued to Burnham, Tulleys & Co., bearing date January 6, 1892. While L. W. Tulleys, trustee, was made a party defendant in the action, no right which he held under the mortgage was attempted to be cut off or foreclosed, the decree reciting "that the equity of redemption of the defendants, and each and all of them, except L. W. Tulleys, trustee, be foreclosed and forever barred, and said mortgaged premises shall be sold and an order of sale shall issue to the sheriff of Knox county, Nebraska, after the expiration of three months from date, commanding him to sell the real estate above described as upon execution, subject to the lien existing in favor of L. W. Tulleys, trustee, and bring the proceeds thereof into court to be applied in satisfaction of the sum so found due." No possession of the premises was taken under the deed issued in this case. The note secured by the first mortgage was indorsed to Hiram H. Taintor, and in July, 1893, L. W. Tulleys' trustee, and Hiram H. Taintor, beneficiary, commenced an action to foreclose the first mortgage, making Harvey M. Abrams and wife, Burnham, Tulleys & Co., and other parties claiming to have some interest in the land, parties defendant. This action went to decree May 22, 1894. From the evidence produced upon the trial of the case at bar, it appears that Hiram H. Taintor, one of the plaintiffs in the action, died in March, 1894, previous to the entry of the decree, and on September 24, 1894, the action was revived in the name of Hiram C. Taintor, administrator of his estate. No conditional order of revivor was made and served upon the defendants in the action, nor was any supplemental pleading filed by the admin-

istrator, but upon the suggestion of the death of Hiram H. Taintor the court forthwith entered an order reviving the action. The mortgaged premises were sold under the decree and bid in by Hiram C. Taintor, assignee, and a sheriff's deed duly issued, bearing date November 2, 1895. No possession of the premises was ever taken under this deed, and Abrams, the mortgagor, has at all times remained in possession of the premises. In 1901 plaintiff and appellant commenced this action to quiet his title to the premises, basing his claim upon adverse possession for more than ten years. Burnham, Tulleys & Co. answered the petition, in effect disclaiming any interest in the premises since the making of the sheriff's deed to Hiram C. Taintor. Taintor filed an answer and cross-petition asking that the title be quieted in him and that he be awarded a right of possession. From a decree quieting title in the defendant Taintor, the plaintiff has appealed.

On the submission of the case, appellant abandoned his claim to have title quieted in him, but he insists that the court erred in quieting title in defendant Taintor, and urges that the foreclosure proceedings, under which Taintor obtained a sheriff's deed to the premises, were void on account of the death of Hiram H. Taintor, one of the original parties in the foreclosure proceeding, and the revival of the action in the name of Hiram C. Taintor without notice of any kind to any of the defendants in the action, and without any appearance on the part of any of the defendants. It may be conceded, for the purposes of this case, that the court erred in reviving the action without notice to the defendants, but, if Hiram H. Taintor was not a necessary party to the action, then such error was without prejudice and would not invalidate the further proceedings in the case. It will be remembered that the mortgage in that case ran to L. W. Tulleys, trustee, and that L. W. Tulleys, trustee, was a party plaintiff to the foreclosure proceeding. While Hiram H. Taintor, the beneficiary, was also made a plaintiff, and while he

was a proper party, we do not think that he was a necessary party plaintiff in the case. Section 32 of the code is as follows: "An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way." In *Hays v. Galion Gas Light and Coal Co.*, 29 Ohio St. 330, the question was before the supreme court of Ohio, and, speaking of the right of the trustee to foreclose a mortgage without joining the beneficiaries, it was there said:

"Whether the owners of the debt, or beneficiaries under the trust, are numerous or not, he may so act or sue without uniting with him those for whose benefit the action is prosecuted. Code, sec. 27; *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372; Pomeroy, Code Remedies, sec. 174."

To the same effect is Wiltsie, Mortgage Foreclosures, sec. 110. It is true that in some jurisdictions it has been held that, where the trust is merely nominal, it is necessary for the trustee to join with him as coplaintiffs the *cestuis que trust*, except in those cases where the beneficiaries are numerous, as in the case of mortgages to secure railroad and other bonds; but we prefer to follow the decision of the Ohio court based on a statute similar to, if not identical with, section 32 above quoted. Hiram H. Taintor not being a necessary party to the foreclosure proceedings, it was unnecessary to revive the action as to him, as it could still proceed in the name of Tulleys, trustee, and any error in the proceedings to revive were without prejudice.

If we understand the theory of the plaintiff and appellant, it is that, having held possession of the premises for more than ten years after the deed issued to Burnham, Tulleys & Co. under their foreclosure, he has ac-

quired title by adverse possession. In his brief it is said: "We contend that even if the foreclosure of the $3,300 mortgage was valid the legal effect thereof would not arrest the running of the statute of limitations in favor of appellant, as the result of said action was merely a conveyance by process of law of the title from Burnham, Tulleys & Co. to Hiram C. Taintor, and its effect would be no greater than a deed executed." There are two reasons why we cannot agree with this contention: First. The law appears to be well settled that possession by the mortgagor, after foreclosure and sale under the mortgage, is not adverse to the purchaser at the foreclosure sale until actual notice of an adverse holding is brought home to the purchaser. In *Root v. Woolworth,* 150 U. S. 401, 415, the court, discussing this question, say:

"If, since that decree, he has inclosed a part of the land, cut wood from it, or cultivated it, he would be treated and considered as holding it in subordination to the title of Morton and his privy in estate, until he gave notice that his holding was adverse, and in the assertion of actual ownership in himself. * * * Without such notice the length of time intervening between the decree and the institution of the present suit would give him no better right than he previously possessed, and his holding possession would, under the authorities, be treated as in subordination to the title of the real owner. This is a well-established rule."

Numerous cases from different states are cited by the court in support of this proposition. Under this rule the plaintiff's possession was not adverse, even as against Burnham, Tulleys & Co., as the record nowhere discloses any notice brought home to them that the plaintiff was in possession claiming adversely to them. Second. Even though the statute were held to run as against Burnham, Tulleys & Co. on account of the plaintiff's continued possession of the premises, it would not commence running against Taintor before his mortgage was barred. So long as he may maintain an action on his mortgage,

he has a right to call upon the court to foreclose and order a sale and the delivery of the possession, regardless of the length of possession by the mortgagor or the claim under which possession was held. As stated by appellee, if the statute could be started in the manner claimed by appellant, then one giving a long time mortgage might take a second, due at an early date, have foreclosure proceedings instituted and the premises bid in, and in this way bar the first mortgagee, even before the maturity of his claim. The law is not so inconsiderate of the rights of a creditor.

The district court was undoubtedly right in entering the decree which it did, 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.

ELIJAH M. TOPLIFF, TRUSTEE, APPELLEE, V. JOHN A. RICHARDSON ET AL., APPELLANTS.

FILED MARCH 8, 1906. NOS. 14,186, 14,187.

1. **Service by publication** was attempted on three defendants. Two of the defendants were residents of the state, and the third, a nonresident, had died previous to the publication of the notice. *Held*, That a decree entered on such attempted service was void.

2. **Estates: MERGER.** There can be no merger unless a greater and a a less estate meet in the same person holding in the same right, nor where intervening rights or estates interfere, nor where the intention to keep the estates distinct may be inferred or has been expressed.

3. **Proof of the statute of a sister state and of a judicial record appointing trustees examined, and *held* sufficient.**

4. **Tax Sale: TITLE ACQUIRED.** The title conveyed under a tax sale is not derivative, but a new title, and the purchaser, if his deed is

valid, takes free from any incumbrance, claims or equities connected with the prior title.

5. Judicial Sale: INCUMBRANCES: ESTOPPEL. One purchasing at judicial sale is estopped from questioning the validity of an incumbrance shown by the appraisement and deducted from the appraised value of the estate sold, where he makes no objection to the validity of the incumbrance prior to the sale.

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

J. L. McPheely, for appellants.

Hall, Woods & Pound, Hague & Anderbery and *H. J. Whitmore, contra.*

DUFFIE, C.

These two cases were, by stipulation of parties, heard upon one set of briefs, the facts in each case being nearly identical. The action was to foreclose a mortgage brought by Elijah M. Topliff, trustee. The New Hampshire Trust Company in March, 1894, issued its bonds in the sum of $3,500,000, and as security for payment thereof deposited with Isaac W. Smith, Alfred T. Batchelder and Elijah M. Topliff, as trustees, notes and mortgages of about the face value of the bonds issued, the mortgage in suit being among the number. Previous to the bringing of this action two of said trustees, Smith and Batchelder, departed this life. The mortgage was made December 26, 1885, by Daniel Bender and wife to secure the payment of a note for $700 maturing January 1, 1891, and payable to Hiram D. Upton or bearer. January 22, 1891, Bender secured an extension of the note and mortgage for the additional term of five years, this extension agreement not being put of record. In 1901 J. W. Whiffin & Son commenced an action in the district court for Kearney county to foreclose a tax lien held against the premises, and such proceedings were had in that case that on February 21, 1902, a sheriff's deed was issued, on the decree foreclosing the tax lien, to

the appellant John A. Richardson, who now claims to be the owner in fee of the mortgaged premises under said sheriff's deed. In that action Daniel Bender and Ida M. Bender, the mortgagors, were made parties defendant as owners of the fee, and Hiram D. Upton was made a defendant as holder of the mortgage lien. Service was had on all the defendants by publication and it developed upon the trial of the case at bar that Upton died prior to the commencement of the tax foreclosure case, and that Bender and wife were residents of this state. In this condition of the case it is clear that the court acquired no jurisdiction against the parties, the authorities all agreeing that, if the party sued was dead at and prior to the date of the pretended service, there can be no valid decree. *Loring v. Folger,* 7 Gray (Mass.), 505; *Childers v. Schantz,* 120 Mo. 305; 1 Black, Judgments (2d ed.), sec. 203. The Benders being residents of the state, the court could not acquire jurisdiction over them on notice by publication. *Eayrs v. Nason,* 54 Neb. 143; *German Nat. Bank v. Kautter,* 55 Neb. 103; *Wood Harvester Co. v. Dobry,* 59 Neb. 590. The decree of the court being entered without jurisdiction of the defendants was absolutely void, and the deed to the appellant Richardson growing out of the proceedings confers on him no title.

It further appears from the evidence that one Jesse M. Dailey procured from Bender and wife a quitclaim deed to the mortgaged premises in July, 1897, and Dailey quitclaimed to the plaintiff Topliff in September, 1897. Appellant claims that, the fee of the premises having been conveyed and accepted by the mortgagee, a merger thereby occurs and the mortgage lien is thereby extinguished, for which reason the plaintiff's bill should be dismissed. Ordinarily this is true, but the law is well settled that when intervening rights interfere, or when the two estates meet, and it is necessary that the charge be kept on foot to protect those interests, the courts will not enforce a merger. Where there is a union of rights, equity will preserve them distinct, if the intention so to do is either expressed or im-

plied. *Miller v. Finn,* 1 Neb. 254. The facts developed on the trial make it very apparent that the interest of the mortgagee was wholly adverse to a merger of the two estates. As before stated, one Jesse M. Dailey procured a deed from Bender and wife in July, 1897, and while his deed to Topliff was dated in September, 1897, that deed was not delivered to Topliff until shortly before its record on April 18, 1903, the reason being that Dailey claimed a certain sum as due from Topliff, over which there was a dispute which was not settled until about that date. In the meantime, and in January, 1902, Bender and wife made a new quitclaim deed to one E. C. Dailey. In his testimony Bender says that when he gave this new deed to E. C. Dailey the latter represented himself to be the agent of the parties to whom the original deed had been given, and that they had lost the papers; that he assured them that the parties were the same and that it was "all straight." E. C. Dailey, after getting this new deed from the Benders, conveyed to Ida M. Hollenbeck on March 6, 1902, and prior to the recording of the deed from Jesse M. Dailey to Topliff. It will be seen, therefore, that unless the mortgage was kept alive the interests of the mortgagee would be seriously affected by the conveyance from E. C. Dailey to Ida M. Hollenbeck.

One other matter might be noticed in relation to this claim of merger. Topliff holds the mortgage in question as trustee, while the deed from Jesse M. Dailey is made to Elijah M. Topliff. One of the essentials of a merger is that the two interests be held in the same right. *Clift v. White,* 12 N. Y. 519. Had Topliff intended a merger of the two estates, the presumption is that he would have required the deed to run to him in his capacity of trustee. Objection is further made that the act of the legislature incorporating the New Hampshire Trust Company is not sufficiently authenticated. The act is authenticated by the secretary of state of New Hampshire under the great seal of that state. This is sufficient under section 420 of the code. Appellant makes two objections to the

proof of the order appointing trustees of the New Hampshire Trust Company: (1) That the certificate omits to certify to the order; (2) that it is not stated in the certificate of the justice of the supreme court attached to the clerk's seal that the order is in due form "in law." The certificate is in the following form: "I, Thomas D. Lucé, clerk of the supreme court of the state of New Hampshire, for the county of Hillsboro, do hereby certify that the foregoing are true copies of the petition for, and order for the appointment of the trustees in the matter of the New Hampshire Trust Company, No. 855 Eq. (not including exhibits), and the bonds filed therein, with the approval of the court thereon." Receivers are often appointed by interlocutory orders as well as by final decrees of court, and we do not think it a good objection to the certificate that the clerk has used the word "order" instead of "decree." The certificate of the justice of the supreme court attached to that of the clerk certifies "that the foregoing certificate is in due form." The certificate is strictly in form with the federal statute, which requires that the certificate of the judge must be that the "attestation is in due form." *Grover v. Grover*, 30 Mo. 400.

Some stress is laid on the fact that the agreement to extend the mortgage was not recorded, and that appellant bid in the land on the tax foreclosure relying on the records and believing that the mortgage lien was barred by lapse of time. There are several answers to this claim. As long as the mortgage remained uncanceled of record it was notice to everyone that the plaintiff might assert it in the future. Payments on the debt, of which no public record is required or could be made, would prevent the running of the statute, and this, of itself, was sufficient to require of a purchaser inquiry, which, if prosecuted with reasonable diligence, would have disclosed the true facts.

Again, the appellant claims title under a decree foreclosing a tax lien. The title conveyed under a tax sale is not derivative, but a new title in the nature of an independent grant by the sovereign authority, and the pur-

chaser takes free from any incumbrances, claims or equities connected with the prior title. *Crum v. Cotting,* 22 Ia. 411. Had proper service been made to give the court jurisdiction in the tax foreclosure proceedings, the deed issued therein would have given appellant perfect title to the land and cut off every prior claim or equity existing against it. The appellant was not concerned with the record title to this land further than to see that the proper parties were made defendants in the tax foreclosure suit.

Another matter going to the inequity of the appellant's claim is this: When the land was appraised prior to the sale under the decree foreclosing the tax lien, the mortgage in controversy was deducted from the appraised value of the land, and the plaintiff bid not to exceed two-thirds of the appraisement, thus recognizing the validity of this mortgage lien and estopping himself, under our former decisions, from resisting its enforcement.

We have no doubt of the correctness of the decree foreclosing the mortgage, and recommend its affirmance.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree foreclosing the mortgage is

AFFIRMED.

HARRY A. SHUMAN ET AL., APPELLEES, V. A. HEATER, APPELLANT.

FILED MARCH 8, 1906. No. 14,192.

1. **Sale: WARRANTY.** No particular form of words is necessary to constitute a warranty as to the quality or soundness of chattels. Any form of words whereby a vendor, for the purpose of inducing a sale, makes affirmation pending the negotiations that the subject matter of the sale is of a particular quality or fitness will constitute a warranty, when relied upon by the purchaser.

2. Evidence examined, and *held* sufficient to show: (1) That the defendant sold a team to the plaintiff; (2) that he warranted the team to be sound; (3) a breach of such warranty.

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

Morning & Ledwith, for appellant.

C. O. Whedon, contra.

ALBERT, C.

In their petition the plaintiffs charge that on the 14th day of May, 1904, the defendant sold and delivered a span of horses and set of harness to the plaintiff, Harry A. Shuman, for the agreed price of $250, of which amount $15 was paid at the time, the remainder to be paid according to the terms of several promissory notes of that date secured by chattel mortgage on the property included in the sale and other personal property. The notes and mortgage were executed by both parties plaintiff, who are husband and wife, to the defendant. The plaintiffs further charge that the plaintiff vendee bought said team for use in teaming, draying and transfer business, as his vendor at the time well knew, and that he was induced to buy the team by the defendant's false and fraudulent representations that the team was sound and fit in every way for the use thereof contemplated by the vendee; that neither of the horses belonging to said team was sound or fit for use for the purpose for which they were bought by the vendee, but were lame, diseased and unfit for work. The petition also contains averments to the effect that the vendee, immediately upon his discovery that the defendant's representations with respect to the team were false, tendered and returned the team and harness to the defendant, and demanded a return of the cash payment made at the time of the sale, and of the notes for the deferred payments and the cancelation of the mortgage

securing them. The defendant declined to rescind the sale, and the prayer of the petition is for judgment for the amount of the cash payment, a return of the notes and the cancelation of the mortgage, etc.

The theory of the defense is that at the time of the sale the team belonged to a third party who was indebted to the defendant in the sum of $1,300, and whose indebtedness was secured by a chattel mortgage on the team and other property. That, in order to enable a third party to make the sale and the vendee to purchase the team, it was arranged that the defendant should release the mortgage of the third party as to this team, and that the vendee should pay the defendant $15 and give him security for $235 on the team and other personal property, and that the entire $250 should be credited on the indebtedness of the third party to the defendant. The answer admits the payment of the $15, the execution and delivery of the notes and the mortgage mentioned in the petition, and the plaintiff's tender of a return of the property. It also includes a cross-petition, praying for the foreclosure of the mortgage. The court found all the issues in favor of the plaintiffs and entered a decree accordingly. The defendant appeals.

It is first insisted that the evidence is insufficient to sustain a finding that the defendant sold the team to the vendee, one of the plaintiffs in the case. That was the principal question litigated in the case. The evidence bearing thereon covers the major portion of a bill of exceptions, consisting of more than 160 pages. On that question it must suffice to say that the vendee's testimony, to the effect that the defendant was the vendor of the team and harness, is flatly contradicted by the defendant. Both parties are to a certain extent corroborated by other witnesses and by facts and circumstances appearing in evidence. The witnesses were before the trial court, who was in a position to observe their appearance and demeanor while testifying, and in many other ways had a better opportunity to judge of their credibility than we,

who have nothing to guide us but the written transcript of their evidence. But were we to be guided by that alone we are not prepared to say that we should arrive at a different conclusion than that reached below. On the contrary we are inclined to think our conclusion would be the same.

It is next contended that the evidence is insufficient to show that there was any warranty on the part of the defendant with respect to the condition of the team or its fitness for the work for which it was bought. The testimony of the plaintiff vendee upon this point, corroborated in many particulars, is as follows: "Well, of course, it is hard for me to remember all that he said, but I asked him, and explained very thoroughly, that I not only wanted the team for the job with the telephone people, as long as it lasted, to do that work with, when I was through with that I wanted to do dray work, also to run a storage room. He says the team is sound. I believe they are sound in every way, good for my work all the time; told me how nice a team they was, how strong; also spoke about having seen them pulling a building. I think we talked about them moving this building. Q. What did he say about their being sound? A. He said they was sound in every way, didn't know anything wrong with them. * * * Q. Now, did you know the actual condition of that team prior to the time you bought it. A. No, I didn't. Q. Upon what did you rely on buying it? A. On what Mr. Heater told me. Q. What did he tell you? A. I asked him if the team was sound and fit for my work, and explained thoroughly. I told him I didn't expect to finish doing that telephone work—that was light work. If I got money enough to pay for them and was situated right, I wanted to put them on a van. Q. What did he say about their being fit? A. Said that was the very use they was adapted for. Wasn't made to trot, but they were draught horses. Q. He said they were sound? A. Yes, sir; said they were sound in every way. Q. Did you rely upon that statement in buying the team? A. I

relied on him for everything. * * * Q. Did you ever have a conversation with Mr. Ferdinand about buying this team from him? A. No, sir; I didn't."

No particular form of words is necessary to constitute a warranty as to the quality or soundness of chattels. Any form of words whereby a vendor, pending negotiations, for the purpose of inducing a purchase, makes affirmation that the subject matter of the proposed sale is of a particular quality or fitness will constitute a warranty, when relied upon by the purchaser. *Little v. Woodworth,* 8 Neb. 281; *Erskine v. Swanson,* 45 Neb. 767; *Unland v. Garton,* 48 Neb. 202. This case falls within the rule just stated, and we consider the evidence amply sufficient to sustain a finding of a warranty in the sale of the team.

Lastly, the defendant contends that the evidence is insufficient to sustain a finding of a breach of the warranty. The evidence upon this point shows that the horses were delivered to the vendee on Saturday, about 3 or 4 o'clock, and did some light work that afternoon. The next day they stood in the barn. They were driven on the following day, and in the afternoon one of them was found lame. On the following morning his leg was swollen and his condition such that he was unable to work. A skilled veterinarian was called to examine the horse, and he testifies that the horse was suffering from a disease called water farcy, Monday morning fever, or big leg, and he testifies that the horse showed marks of having had previous attacks of the disease. The testimony of another witness was to the effect that he had been acquainted with the horse some months before the sale in question, had seen him at work, and that he was lame and unsound during that time. This evidence certainly warranted a finding that the team was not sound at the time of the sale, and defendant's previous transactions, with the team would warrant the inference that he knew its condition.

We are satisfied that the decree of the district court is

amply sustained by the evidence on every essential point, 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.

JANE C. SIMMONS, APPELLEE, V. LURINDA KELSEY ET AL., APPELLANTS.

FILED MARCH 8, 1906. No. 14,487.

1. **Pleading:** MOTION TO STRIKE: HARMLESS ERROR. A plea in abatement was stricken on plaintiff's motion. The defendants then incorporated the same matter, with a plea to the merits, in the answer and fully litigated such matter. *Held*, That they were not prejudiced by the ruling on the motion to strike.
2. **Mental Capacity:** EXPERT TESTIMONY. Where the mental capacity of the plaintiff to maintain the suit is in issue, her disposition, aside from the question of her mental integrity, is not involved, and is not a subject of expert investigation.
3. ———. Where the plaintiff reasonably understands the nature and purpose of her suit, the effect of her acts with reference thereto, and has the will to decide for herself whether it shall be brought and prosecuted, she has sufficient mental capacity to maintain it.
4. **Contracts:** CONSIDERATION. The dismissal, by a child, of proceedings instituted by her for the appointment of a guardian for her mother on the ground of the incompetency of the latter, is not a valid consideration for a promise made by the mother to such child.
5. **Public Policy** will not permit one who institutes such proceedings to make the prosecution or the abandonment thereof a source of profit to herself.
6. **Contracts:** UNDUE INFLUENCE. Evidence examined, and *held* sufficient to sustain a finding that plaintiff's assent to a contract was obtained by undue means and without consideration.

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

E. B. Quackenbush and *E. M. Tracy,* for appellants.

S. P. Davidson, contra.

ALBERT, C.

The plaintiff is a woman about 80 years old. She inherited about $25,000 from a brother who died in the state of Illinois, of which amount about $18,000 was ready for distribution and was to be paid over to her on or before January 7, 1903. At about that date, and before plaintiff had received any portion of the inheritance, one of her daughters instituted proceedings in the county court of Johnson county for the appointment of a guardian for the plaintiff, alleging as ground therefor that the plaintiff was not of sufficient mental capacity to have the care and management of her property. While such proceedings were pending the plaintiff entered into a contract with her husband, children and certain of her grandchildren, who are the issue of two deceased daughters, whereby she surrendered all of her estate, save less than $3,000, to such children and grandchildren, and the amount reserved was placed practically beyond her control. After the contract was signed the proceedings for the appointment of a guardian were dismissed. In pursuance of the contract just mentioned about $8,000 of the plaintiff's inheritance was collected and distributed among her children and grandchildren. Afterwards the plaintiff commenced this suit against the other parties to the contract for a cancelation thereof, alleging that it was made by her without any consideration, and that her assent thereto had been procured by undue means employed by defendants to that end. The plaintiff's husband and two of her sons, defendants, answered, uniting with her in the prayer for the cancelation of the contract. The other defendants filed a plea in abatement, averring that the plaintiff was an incompetent person, without a guardian, and not of sufficient capacity to maintain the

action. This plea, when filed, was not verified, and a motion was made to strike it for that and other reasons. After the motion was filed, and about four days before the ruling thereon, but without leave of court, a verification was added. The court sustained the motion, but in doing so gave the defendants leave to incorporate the matters in abatement in their plea to the merits. Thereupon the defendants resisting the suit joined in an answer, renewing their plea in abatement, denying all matter set forth in the petition not expressly admitted, and averring that the contract was founded on a sufficient consideration, performance on their part, a subsequent ratification, and other matters not necessary to mention. The reply is a general denial. The court entered a decree dismissing this bill, and the plaintiff appealed to this court, where the judgment of dismissal was reversed and the cause remanded for further proceedings. *Simmons v. Kelsey,* 72 Neb. 534. In the meantime the plaintiff's husband, one of the defendants, died, and some of the infant defendants had attained their majority, and, leave of court having been obtained, the plaintiff, after the cause was remanded, amended her petition by interlineation, showing those facts, and refiled it on the 20th day of April, 1905. The other pleadings remained as they stood at a former trial. The court found generally in favor of the plaintiff and entered a decree accordingly. The defendants who resisted the suit bring the record here for review.

The first complaint is of the ruling of the trial court on the motion to strike the plea in abatement. The motion was good when made because the plea was not verified. But, aside from that, defendants were permitted to include the same matter with their plea to the merits, and to litigate such matters fully, consequently, no substantial right of the defendants was prejudicially affected by the ruling.

Complaint is also made of several rulings of the court excluding evidence tending to show that James E. Sim-

mons, one of the defendants who answered, joining in plaintiff's prayer for a cancelation of the contract, is addicted to the use of intoxicating liquors and betting, and is reputed to be a man of profligate and immoral habits. We are wholly unable to see how his habits or reputation are material. upon any issue in this case. The court very properly refused to allow the issues between the plaintiff and the defendants resisting her suit to be obscured by such evidence, and, in our opinion, the complaint of the rejection of such evidence is not only without merit, but one that requires some hardihood to urge in a court of review.

The defendants called a physician to testify as an expert touching the mental capacity of the plaintiff, apparently, to sustain the matters pleaded in abatement of the suit. He testified, in effect, that he discovered no mental defects, but whether she would be competent to look after the ordinary business affairs of life would depend largely upon the extent of the business, and that he hardly thought her capable of managing a farm, buying and selling stock, and looking after the estate of $10,000 or $12,000, but that he considered her competent, with the advice and assistance of a competent attorney, to conduct this litigation. The defendants then propounded this interrogatory: "From the examination you made of the plaintiff, * * * in your judgment, would she or would she not be easily influenced by one she liked or one occupying a fiduciary relationship?" The question was repeated several times in substantially the same form, and in each instance an objection thereto was sustained by the court, and the defendants now complain of these rulings. We think this evidence was properly excluded. The defendants had called this witness to show that the plaintiff was mentally incompetent. His testimony shows that he had made an examination lasting about 15 minutes. Her disposition was not in issue, and, had it been, could not have been established by expert testimony.

It is urged that the suit should have been abated be-

cause the plaintiff lacked sufficient mental capacity to maintain it. The evidence shows that the plaintiff is a woman about 80 years of age. It is not at all surprising that, when her mental capacity is called in question, there should be abundant evidence showing that she lacked the intellectual strength and vigor that she once possessed. But that falls far short of proving that she is mentally incompetent to maintain this suit. As was said in *English v. Porter,* 109 Ill. 291: "Although the mind of a person may be to some extent impaired by age or disease, still, if he be capable of transacting his ordinary business —if he understands the nature of the business in which he is engaged, and the effect of what he is doing, and can exercise his will with reference thereto—his acts will be valid and binding." See *Emerick v. Emerick,* 83 Ia. 411, 13 L. R. A. 757, and notes. The evidence satisfies us that the plaintiff reasonably understood the nature and purpose of her suit, the effect of her acts with reference thereto, and had the will to decide for herself whether or not it should be brought and prosecuted. That, we think, is sufficient mental capacity to maintain the action. The effect of a contrary holding on the rights of the defendants at this stage of the litigation would be an interesting question, if necessary to a decision of the case.

Coming to the merits of the case, it is strenuously urged that the evidence is insufficient to sustain the decree of the district court. The defendants are children and grandchildren of the plaintiff who, as we have seen, is old and illiterate. As we have also seen, when the contract was made, proceedings which had been instituted by one of the defendants, a daughter of the plaintiff, to have a guardian appointed for her were pending in the county court. Whatever may have been the motive that induced such proceedings, the record leaves no room for doubt that they operated to disturb and harrass the plaintiff, and that she was exceedingly anxious to have them dismissed. We are satisfied from the evidence that while such proceedings were pending the conduct of at least a portion

of the defendants toward the plaintiff, coupled with the pendency of the proceedings, operated as duress *per minas*, whereby plaintiff's assent to the contract was obtained. No consideration moved to the plaintiff, save the dismissal of such proceedings. Obviously that was not a valid consideration, because, if the proceedings were well grounded and brought in good faith, public policy required that they be pushed to a conclusion. If groundless and not brought in good faith, public policy would again interpose and require their dismissal, and that, too, without any consideration. In either case, would the party instituting the proceedings be permitted to use them as a source of profit to herself. The fact that after instituting such proceedings she was one of the parties who undertook to bind the plaintiff by the contract in suit, involving a large estate, reflects somewhat on the good faith with which the charge of mental incapacity was preferred. The findings, then, to the effect that the contract was procured by undue means and without consideration is sufficiently sustained by the evidence, and justifies the decree, not only as to such of the defendants as made use of such means to procure the contract, but as to all who seek to profit by it. We note that the defendants resisting the suit urge that the contract has been partially performed on their part. Such performance aside from the dismissal of the proceedings for the appointment of a guardian, which we have already noticed, consists of the appropriation by the defendants of a large portion of the plaintiff's estate. It is hardly necessary to add that such acts of performance do not stand in the way of a cancelation of the contract.

It is recommended 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.

ELIZA B. HAWLEY ET AL., APPELLANTS, V. ALBERT C. POUND ET AL., APPELLEES.

FILED MARCH 8, 1906. No. 14,072.

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

Herman Aye, R. S. Hall, G. W. Covell and *Wright & Stout,* for appellants.

John C. Cowin, W. C. Walton, D. Z. Mummert, I. C. Eller, Clark O'Hanlon and *E. B. Carrigan, contra.*

JACKSON, C.

The issue in this case is identical with that in *Hawley v. Von Lanken,* 75 Neb. 597, and following the conclusion there reached we recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reason stated above, the judgment of the district court is

AFFIRMED.

ELIZA B. HAWLEY ET AL., APPELLANTS, V. MICHAEL J. BARRY ET AL., APPELLEES.

FILED MARCH 8, 1906. No. 14,073.

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

Herman Aye, R. S. Hall, G. W. Covell and *Wright & Stout,* for appellants.

John C. Cowin, W. C. Walton, D. Z. Mummert, I. C. Eller, Clark O'Hanlon and *E. B. Carrigan, contra.*

JACKSON, C.

The issue in this case is identical with that in *Hawley v. Von Lanken,* 75 Neb. 597, and following the conclusion there reached we recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reason stated above, the judgment of the district court is

AFFIRMED.

ELIZA B. HAWLEY ET AL., APPELLANTS, V. SOREN M. NEILSON ET AL., APPELLEES.

FILED MARCH 8, 1906. No. 14,074.

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

Herman Aye, R. S. Hall, G. W. Covell and *Wright & Stout,* for appellants.

John C. Cowin, W. C. Walton, D. Z. Mummert, I. C. Eller, Clark O'Hanlon and *E. B. Carrigan, contra.*

JACKSON, C.

The issue in this case is identical with that in *Hawley v. Von Lanken,* 75 Neb. 597, and following the conclusion there reached we recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reason stated above, the judgment of the district court is

AFFIRMED.

ELIZA B. HAWLEY ET AL., APPELLANTS, V. HANS C. NEILSON ET AL., APPELLEES.

FILED MARCH 8, 1906. No. 14,075.

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

Herman Aye, R. S. Hall, G. W. Covell and *Wright & Stout,* for appellants.

John C. Cowin, W. C. Walton, D. Z. Mummert, I. C. Eller, Clark O'Hanlon and *E. B. Carrigan, contra.*

JACKSON, C.

The issue in this case is identical with that in *Hawley v. Von Lanken,* 75 Neb. 597, and following the conclusion there reached we recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reason stated above, the judgment of the district court is

AFFIRMED.

ELIZA B. HAWLEY ET AL., APPELLANTS, V. FRANK JAHNEL ET AL., APPELLEES.

FILED MARCH 8, 1906. No. 14,076.

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

Herman Aye, R. S. Hall, G. W. Covell and *Wright & Stout,* for appellants.

John C. Cowin, W. C. Walton, D. Z. Mummert, I. C. Eller, Clark O'Hanlon and *E. B. Carrigan, contra.*

JACKSON, C.

The issue in this case is identical with that in *Hawley v. Von Lanken,* 75 Neb. 597, and following the conclusion there reached we recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reason stated above, the judgment of the district court is

AFFIRMED.

E. W. PARKER v. R. E. LEECH.

FILED MARCH 8, 1906. No. 14,137.

1. **Principal and Agent.** Ordinarily, an agent authorized to receive payment has no authority to commute his principal's debt for a debt due from himself to his principal's debtor, nor to receive payment other than in money.
2. **Evidence** examined, and *held* insufficient to sustain a finding of payment.

ERROR to the district court for Furnas county: ROBERT C. ORR, JUDGE. *Reversed.*

W. S. Morlan, for plaintiff in error.

John T. McClure, contra.

JACKSON, C.

This is an action on a promissory note. The answer contains a plea of payment, which is denied in the reply. From a judgment in favor of the defendant the plaintiff prosecutes error.

The sole question in the case is whether the evidence is sufficient to sustain a finding in favor of the defendant on the question of payment. It is not claimed that payment was made direct to the plaintiff, but to one Clark, to whom he authorized it to be made, and the case turns on whether what the defendant relies upon as payment to Clark amounts in law to a payment of the note. When the note was given, and at the time of its alleged payment, the plaintiff was in business in the village of Wilsonville, Clark was dealing in live stock in the village of Lebanon, in this state, and the defendant was engaged in farming, and resided in the state of Kansas, about 22 miles from the former and about 8 miles from the latter village. According to defendant's testimony, it was arranged between him and the plaintiff that the note should be paid out of

the proceeds of the sale of certain cattle, then owned by the defendant. After the note had been due for some time, the defendant shipped the cattle to Kansas City, and sold them, receiving the proceeds of the sale in the form of a draft on a bank in Oberlin, Kansas. On his return from making the sale, he stopped at Wilsonville, informed the plaintiff of the sale, and of the draft on the bank at Oberlin. At the same time he told him of a certain sale of some hogs, which he had made to Clark, at Lebanon, and for which Clark still owed him. As to the conversation between the parties at that time, defendant's examination, in part, is as follows: "Q. Where was the draft? A. It went to Oberlin, to the bank. Q. And you told Mr. Parker when you got the money on this draft you would pay him this note? A. I told him when I went to Oberlin I would pay it, if I didn't have money enough with Clark. Q. But if you had money enough with Clark you would pay it there? A. I would get the money from him to pay it. * * * Q. And Parker said you could leave the money with Clark and it would be all right? A. He told me to pay it over to him. Q. What did he say? A. I told him Clark had some money up there for my hogs, and he said: 'Well, just take and pay it over to him, and it will be all right with me.' Q. If you paid it to Clark, it would be all right with him? A. Yes, sir; and I told him if there wasn't enough there I would get it when I went to Oberlin. Q. I think, before, you said something like he said, if you would pay Clark, it would be all right. Just give the words he said. A. He told me to pay it over to Clark and it would be all right." The defendant's testimony further shows that he went from Wilsonville to Lebanon, where he saw Clark, and that he informed Clark of the arrangement made with plaintiff for the payment of the note, and of the amount due thereon, ascertained the amount due him from Clark, which was a few dollars less than the amount of the note; that at the same time he arranged with Clark to sell him some hogs to make up the difference, and that Clark

should then remit the amount of the note to the plaintiff. His testimony further shows that, within two or three days thereafter he sold two more hogs to Clark, for a sum more than sufficient to make up the deficit. Whereupon, Clark retained sufficient of the amount due defendant to pay the note, paid him the excess and agreed to pay plaintiff the amount of the note.

Assuming that the defendant's version of the transaction is true, and it is by no means inherently improbable, still, we think it is insufficient to sustain a finding of payment. It is clear, we think, from that portion of the evidence set out, that the plaintiff had no intention to substitute Clark for the defendant as his debtor. In fact, his language, even as quoted by the defendant himself, appears to have been carefully chosen to avoid that construction, and to merely make Clark his agent to receive payment. As such agent, Clark had no authority to commute plaintiff's claim for his own debt to the defendant. *Padfield v. Green,* 85 Ill. 529; *Hurley v. Watson,* 68 Mich. 531. See 1 Am. & Eng. Ency. Law (2d ed.), p. 1,028, and notes. That he had no authority to receive payment other than in money is elementary. Hence, we have a case where the defendant, dealing with the plaintiff's agent, authorized to receive payment of a debt due from the defendant to the plaintiff, undertook, by an arrangement between himself and the agent, to offset a debt due him from the agent against his indebtedness to the plaintiff, and to pay the balance other than in money. That, as we have seen, was not within the scope of the agent's authority, and would not support the plea of payment. This rule is a salutary one, and in view of another issue disclosed by the evidence has a peculiar application to this case. Clark was a witness on behalf of the plaintiff and testified that no such arrangement as the testimony of Leech disclosed was entered into between Leech and himself. His testimony was to the effect that, while he bought hogs of Leech, the purchase price thereof was credited on an account between Leech and himself, and in satisfaction of

Leech's indebtedness to him. It would be a harsh rule to require a creditor to accept in lieu of an undisputed debt a chance to recover in litigation with a third party, in the absence of an express agreement to do so.

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

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

CHARLES T. JENKINS, APPELLANT, V. L. E. CAMPBELL ET AL., APPELLEES.

FILED MARCH 8, 1906. No. 14,173.

Justice of the Peace: APPEAL: DISMISSAL: EXECUTION. Pending an appeal from a judgment rendered in justice's court, the judgment creditor procured and filed in the district court a transcript of the proceedings had before the justice of the peace, and after dismissal of the appeal, and an order remanding the cause to the justice for further proceedings, caused an execution to issue out of the district court on the transcript so filed. *Held*, That the execution was void.

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

Charles T. Jenkins, pro se.

W. R. Starr and T. J. Doyle, contra.

JACKSON, C.

On November 22, 1902, the International Harvester Company recovered a judgment before a justice of the

peace in Lancaster county against Charles T. Jenkins. Jenkins procured to be filed and approved a bond for the purpose of perfecting an appeal to the district court. A transcript of the proceedings had before the justice of the peace was seasonably filed in the district court. On January 7, 1903, the company filed a motion in the appellate court attacking the sufficiency of the undertaking. The motion was supported by affidavit, and on the 5th day of February of that year the cause came on to be heard upon the motion, which was sustained, and the defendant was required to give a new bond. On the 13th day of May following, no additional untertaking having been given, the appeal was dismissed and the cause remanded to the justice's court for further proceedings. On February 10, 1903, and while the appeal was pending in the district court, the harvester company procured and filed in the office of the clerk of the district court for Lancaster county a transcript of the proceedings had before the justice of the peace. The transcript so filed disclosed all of the proceedings had before the justice, including the filing and approval of the appeal undertaking, together with the fact that the transcript had been prepared for an appeal. After the dismissal of the appeal in the district court, the harvester company caused an execution to issue out of the district court on the transcript which it filed therein while the appeal was pending. The execution was sent to the sheriff of Dundy county, who levied upon certain property belonging to the judgment debtor to satisfy the judgment, and thereupon the debtor, appellant herein, instituted this action in the district court for Dundy county, seeking to enjoin the sheriff and others from proceeding under the execution. A temporary injunction was allowed, which on final hearing was dissolved and the action dismissed. The plaintiff appeals.

The sole question presented by the record is whether a valid execution could issue on the transcript filed in the district court by the judgment creditor while the appeal

from the judgment was pending. The rule is that, by perfecting an appeal from the judgment of an inferior court, the judgment is thereby vacated and the matter stands as it did at the commencement of the action. The lower court is ousted of jurisdiction, and any proceedings taken by the judgment creditor to enforce the judgment pending the appeal are not only void, but contemptuous of the appellate court. *State v. Johnson,* 13 Fla. 33; *M'Laughlin v. Janney,* 6 Grat. (Va.) 609. That rule has been approved and followed in this state. *Jenkins v. State,* 60 Neb. 205. The transcript upon which the execution was issued was not only taken while the appeal was pending, but it discloses on its face every step taken in the lower court necessary to the perfection of an appeal. It does not show that the appeal was disposed of and would not authorize the clerk to issue an extension. It had no vitality when it was filed, it could not be made the basis of an execution and was absolutely void for the purpose intended. The creditor, doubtless, might have had judgment in the district court upon the failure of the appellant to file an additional appeal undertaking. Instead, however, of pursuing that course, it caused the appeal to be dismissed and the cause remanded to the justice's court for further proceedings. Such further proceedings, of course, related to the enforcement of the judgment, and any action taken by the judgment creditor for the collection thereof should have been initiated in the court where the judgment existed. To hold that the creditor acquired any rights under the transcript in question would be to encourage litigants to proceed in spite of the law and in contempt of the court.

We recommend that the judgment of the district court be reversed and the cause remanded, with instructions to enter judgment in accordance with the views here expressed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to enter judgment in accordance with the views here expressed.

JUDGMENT ACCORDINGLY.

SECURITY MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. NICHOLAS RESS ET AL., APPELLANTS.

FILED MARCH 8, 1906. No. 14,181.

1. Corporations: VENUE. The fact that an agent is temporarily employed in transacting the business of a domestic corporation in a county other than the one where the corporation has its principal place of business does not subject such corporation to the jurisdiction of the courts of that county under the provisions of section 55 of the code.
2. ———: ———. The residence of a person who is employed as the agent of a domestic corporation is personal, and is immaterial in an inquiry as to whether a domestic corporation is situated in a county within the meaning of said section.

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

Talbot & Allen and *W. H. Thompson,* for appellants.

N. Z. Snell and *Field, Ricketts & Ricketts, contra.*

JACKSON, C.

The appellee had judgment in the district court for Lancaster county enjoining the sheriff of that county and others from enforcing an execution issued out of the district court for Hall county. The defendants have brought the case to this court by appeal.

The appellee is a domestic life insurance corporation, with the principal place of transacting its business in the

city of Lincoln. An action was instituted against the appellee in the district court for Hall county by the beneficiaries named in a policy of life insurance issued by appellee. Summons was issued and delivered to the sheriff of that county, who made return as follows: "The State of Nebraska, Hall County, ss.: I hereby certify that on the 27th day of June, 1904, I served the within writ of summons on the within named the Security Mutual Life Insurance Company by delivering a true and duly certified copy of the same with all indorsements thereon to Charles Wasmer, he being the agent and chief officer of the said the Security Mutual Life Insurance Company in Hall county. S. N. Taylor, Sheriff." The company made no appearance in that action, and on September 28, 1904, judgment was entered as prayed in the petition. On the following day the sheriff of Hall county applied to the court for permission to amend his return to correspond with the facts relative to the service, and, leave of court having been obtained, the return was amended to read as follows: "The State of Nebraska, Hall County, ss.: By leave of court Sept. 29, 1904, I hereby certify that on the 27th day of June, 1904, I served the within writ of summons on the within named the Security Mutual Life Insurance Company by leaving a true and duly certified copy of the same with all indorsements thereon at the usual place of residence of Charles Wasmer, he being the agent and chief officer of the said the Security Mutual Life Insurance Company in Hall county. No other officer of said defendant being found in Hall county. S. N. Taylor, Sheriff." In fact, the sheriff left a copy of the summons at the residence of Charles Wasmer, whose wife forwarded the same to him, he then being absent from Hall county. When Wasmer returned to his home he brought the copy with him and placed it in a pigeonhole in his desk at his residence. He did not forward it to the company, and failed to inform the company of the fact of such service.

Wasmer was termed a special agent. His employment

by the company was by written contract. He had authority to solicit applications for insurance, to collect and receipt on the company's binding receipt form for any part or all of the first year's premium on insurance applied for, and to remit the same to the company with the application. He was authorized by the contract to solicit insurance only in such territory as might be designated or permitted by the directors of the company, and his employment contemplated the appointment and instruction of subagents, subject to the approval of the directors of the company. In consideration for the services he was to receive a certain stipulated per cent. of the premiums. The company maintained no office in Hall county. Wasmer had no office there, although it was his home and his residence was there with his family. Concerning this Wasmer testified as follows: "Q. Have you ever had any office there? I mean the Security Mutual Life Insurance Company? A. Not since I have been with the Security Mutual Life Insurance Company; no sir. Q. Where do you solicit insurance? A. Wherever I go. I travel a great deal, go to other places, counties and cities, and visit parties whom I would like to talk insurance to. Q. How much of your time do you actually put in in Hall county would you say? A. Well, it is very little time. It is only the time when I am coming home for a few days; probably not more than two months in a year. * * * Q. You may state when you were in Grand Island last prior to the 27th day of June, 1904. A. I was there on the 9th day of May. Q. And then when next were you in Hall county? A. On the 6th day of July. I arrived there about the 3d of July. * * * Q. And between those dates you were not in Hall county? A. Not that I know of, I could not say surely. Q. Well, how certain are you of it? A. I am certain this way, that I have not been in Grand Island from the 20th day of June until the 3d day of July; that is the time that I suppose is important. Q. Grand Island or Hall county? A. Yes, sir. The company procured from the state audi-

tor an agent's certificate for Wasmer, describing him as an agent at Grand Island, in Hall county, and authorizing him to transact the business of insurance as agent of the company in the state. This certificate was in force at the time the action was commenced in Hall county. Wasmer appointed no subagents, but did, in fact, solicit insurance for the company in all parts of the state without restriction. The secretary of the company was a witness in its behalf, and testified to its principal place of business as having been originally located at Fremont and afterwards changed to Lincoln; that the company never was located in Hall county and had maintained no office there; that all the agents of the company were employed to solicit insurance and were authorized to collect the first premium; that they could select their own territory wherever the company was authorized to do business; that Wasmer operated at Grand Island, Scotia, Cedar Rapids, Spalding, Primrose, Wolbach, St. Paul, Wilber and Talmage; that they corresponded with him at whatever point he happened to be, unless they were in doubt as to where he was, when his mail was sent to his residence at Grand Island to be forwarded.

The cause of action arose in Lancaster county, and prior to the proceedings in Hall county action on the policy had been instituted in the county of Lancaster; the case there tried resulting in a verdict and judgment for the plaintiffs which on error to the supreme court had been reversed, and thereafter, for some reason, the action was by the plaintiffs dismissed without prejudice.

The questions presented by this appeal are: Did the district court for Hall county have jurisdiction to hear and determine the case; did the service shown by the record give the district court for Hall county jurisdiction over the person of the insurance company; and, if not, has the company shown itself entitled to relief, as against the judgment there rendered, by injunction. Section 55 of the code, in force at the time of the institution of the action, was as follows: "An action other than one of

those mentioned in the first three sections of this title, against a corporation created by the laws of this state, may be brought in the county in which it is situated, or has its principal office or place of business; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose." None of the provisions of the first three sections of the title applies to actions like the one under consideration. In *Western Travelers Accident Ass'n v. Taylor*, 62 Neb. 783, that section was construed, and it was held that a domestic corporation could only be sued, first, in the county where, by its articles of incorporation, it has fixed its principal office or place of business; second, in any county where it maintains an agency and servants and employees engaged in carrying on the business for which it exists; and, third, in the county where the cause of action, or some part thereof, arose. The sixth paragraph of the syllabus in that case is:

"When the legislature provides the county in which a domestic corporation may be sued, such provision is exclusive."

It is conceded that the corporation did not have its principal office or place of business in Hall county and that the cause of action arose in Lancaster county, so that the question is, did the company maintain an agency in Hall county, so that it might be said to be situated there, within the meaning of the provisions of section 55. In paragraph five of the syllabus in *Western Travelers Accident Ass'n v. Taylor, supra,* it is said:

"A domestic corporation may be sued only in the places provided by law, and the tempory presence of one or more of the officers of such corporation in another jurisdiction does not authorize the corporation to be sued there."

In that case service was had on the secretary of the company while temporarily in Douglas county, engaged in an effort to settle the very controversy over which the action was brought. The principal place of business of the corporation was in Hall county, it maintained no

office in Douglas county, and it was held that the action was improperly brought in Douglas county.

In *Fremont Butter & Egg Co. v. Snyder,* 39 Neb. 632, the company was a domestic corporation with its principal place of business at Fremont, in Dodge county. It was sued in Saunders county. The jurisdiction of the court over the corporation in that county was questioned. It appeared, however, from the evidence that the company had a branch house at Wahoo, in Saunders county, where it displayed its sign, "Fremont Butter & Egg Co. Buyers of Butter and Eggs." It had employed there one or more persons engaged in transacting the company's business, buying, assorting and boxing eggs, which were shipped to the Fremont house and to other points, as the corporation manager directed. The business there was of a permanent nature, and it was held that the action was properly brought in Saunders county; that the corporation was situated there within the meaning of the statute.

In *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44, an action on a life insurance policy against a domestic corporation, it was held that the action was properly brought in Valley county, although the company was domiciled in Lancaster county, because of the fact that the insured died in Valley county, and the cause of action arose there for that reason.

A review of the adjudications of this court, where the provisions of section 55 of the code have been under consideration, leads to the conclusion that the mere presence of an agent of a domestic corporation in a county is not sufficient to give the courts of that county jurisdiction in an action against such corporation, and the residence of an agent does not necessarily justify the inference that the principal is situated within the county of such residence; and the fact that an agent is temporarily engaged in transacting the business of his principal even in the county where the agent resides, is not sufficient to vest the courts of that county with jurisdiction over an action against the corporation. We do not regard the fact that

Wasmer resided in Hall county as being at all important to the inquiry. The duties arising out of his employment were of such a character that they could and did permit of their being performed in any county in the state, and there is no more reason for holding that, because of his employment, an action might be maintained against the company in Hall county, than for holding that, because of such employment, the company might be sued in any county where he was transacting its business. We think something more is contemplated by the term "situated" in section 55 than the mere temporary presence of an agent in a county for the purpose of transacting the company's business. The fact that the agent received and answered correspondence and kept blank supplies in his residence in Hall county, as the evidence discloses, is not sufficient to show that the company maintained an office there. He received and answered correspondence in every county where he transacted business, he carried supplies with him as an incident to his employment; in fact, the business transacted by him for his principal was the same in whatever county he was employed. The scope of the employment and the character of the business transacted by him all tend to support the claim of the company that they maintained no office in Hall county; that the company was not situated there within the meaning of the statute, and we think the trial court correctly concluded that the judgment rendered in Hall county was void for that reason.

The company has pleaded that at the time of the death of the insured the policy had lapsed by reason of the nonpayment of premiums, and the evidence is sufficient to establish that defense, at least, *prima facie;* but the appellant insists, notwithstanding, that the remedy by injunction should not be allowed because the company had an adequate remedy at law. In *Bankers Life v. Robbins, supra,* it was held:

"A remedy is not adequate, within the meaning of this rule, which compels the citizen to go from the county of

his residence into a foreign jurisdiction in which he has never been present and in which he has never been lawfully summoned. The right of the insurance company to be sued in the county where its principal place of business was located, or in some county in which it was situated or had an agent, was and is a legal right; and it is a strained construction of language to say that, because a litigant may go into a foreign jurisdiction and enter a special appearance to an action, that that remedy is adequate, when, besides the costs, expenses, and time spent in attending court in the foreign jurisdiction, he is compelled to surrender valuable legal rights."

The rule there announced is peculiarly applicable to the conditions of this case, and is a complete answer to the claim of a lack of equity.

The judgment of the district court was right, and we recommend that it 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.

JOHN LOAR V. STATE OF NEBRASKA.

FILED MARCH 22, 1906. No. 14,514.

1. **Rape**: EVIDENCE. In a trial for statutory rape, admissions by the defendant showing that he planned and procured an opportunity to commit the act charged, with evidence of familarities between them, furnishes sufficient corroboration of the girl's positive testimony to support a judgment of conviction.
2. **Review**: RECORD. Affidavits found in the files of the case or attached to the transcript cannot be considered as having been used in support of a motion for new trial, unless they are included in and shown by the certificate of the proper officer to be a part of the bill of exceptions, and to have been actually used in evidence upon the hearing of the motion.

ERROR to the district court for Garfield county: JOHN R. HANNA, JUDGE. *Affirmed.*

E. M. White and *A. M. Robbins,* for plaintiff in error.

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

SEDGWICK, C. J.

The defendant, John Loar, plaintiff in error here, was convicted in the district court for Garfield county of the crime of statutory rape. He has brought the judgment here for review upon a petition in error.

1. The principal contention is that the evidence is not sufficient to support the verdict. The act itself is testified to by the girl Mary Kramer, and is denied by the defendant. It is insisted that the evidence of the girl is inconsistent with itself, that her testimony is unreliable, and that there are no corroborating circumstances. The record shows that the girl was between 16 and 17 years of age. Her parents were German, and she was not entirely familiar with the English language, or, at all events, it appears from the record that she frequently failed to comprehend the full force of the questions that were asked her. There are apparent inconsistencies in her testimony, and her evidence, if uncorroborated, would be subject to criticism. Whether this fact is due in part to her ignorance and want of familiarity with the language used, or was altogether owing to her failure to comprehend the importance of accuracy and directness in her evidence given in so important a matter, it is impossible to say from the condition of this record. We think it is a mistake to suppose that her evidence is not corroborated. Indeed, the corroboration is so strong that it might with candor be insisted that the proof of the defendant's guilt was sufficient without regard to the testimony of the prosecutrix. The defendant was a man

past 26 years of age. He had been in the army during the Spanish war, had traveled considerably and had lived in different places, apparently not long at any one time in the same place. A short time before the transaction in question he had begun working by the month for Mr. Spelts at his ranch, in Garfield county, and had boarded and roomed with the family, which consisted of Mr. and Mrs. Spelts. Mr. and Mrs. Spelts left home to be gone from the county for several days. Shortly before that Mary Kramer had stayed a few days and nights with Mrs. Spelts, and the defendant states at that time the girl came to his sleeping room unknown to Mr. and Mrs. Spelts, and that there were then familiarities between them. Mr. and Mrs. Spelts both testify that, when they were about to go away from home, the question being raised with the defendant as to who should do his cooking for him while they were gone, they suggested a certain woman whom he might procure to cook for him, but objected to his getting Mary Kramer who had before that time stayed with Mrs. Spelts. The defendant modifies this statement somewhat, but we do not understand him to deny that they objected to his getting Mary Kramer. Soon after they had gone, within an hour or two, according to the defendant's testimony, he went over to Mr. Kramer's place, about three miles distant, for the purpose of getting Mary to come and stay with him. Mr. and Mrs. Kramer both testify that he told them that Mrs. Spelts wanted Mary to come and stay while her husband was gone, and that it was upon that understanding that they allowed her to go. The defendant, however, testifies that he asked them to allow Mary to go over and stay while Mr. Spelts was gone. He says that he did not tell them that Mrs. Spelts was at home, nor did he tell them that Mrs. Spelts had gone. Whatever may have been the language that he used, it is very manifest from the record that Mr. and Mrs. Kramer supposed that Mrs. Spelts was there, and that she had sent for Mary. It also seems clear from the defendant's testimony that he

knew that Mr. and Mrs. Kramer so understood the matter and was aware that they would not have allowed Mary to go if they had known that Mrs. Spelts was away from home. He says that after he and Mary left the Kramer house to go home he told her that Mrs. Spelts was not at home. He also says, in another part of his testimony, that just before they arrived at the Spelts place he told Mary that Mrs. Spelts was not at home. The girl denies this, and says that she did not know that Mrs. Spelts was away from home until, after they had put away the horses, when they went to the door and it appeared that the door was locked. The defendant and the girl stayed at Mr. Spelts' house several days and nights, no other person being present. In this condition of the evidence it is not necessary to discuss in detail the evidence of the girl, who testified explicitly to the criminal act. The defendant himself testifies that soon after they arrived, and either the first evening or the next day, he is not certain which, there were familiarities between them, such as might lead to the act itself. These familiarities, according to his evidence, were continued at various other times during their cohabitation together. The opportunity for sexual intercourse, and the disposition on the part of both parties to commit the crime, when clearly shown, are generally held sufficient to establish the charge. This evidence was furnished by the defendant's testimony.

2. One other contention is discussed in the briefs, and was presented upon the oral argument. This relates to the disqualification of one of the jurors. It is claimed that while the trial was pending, the jury being allowed to separate, one of the jurors expressed in the hearing of several parties a decided opinion as to the guilt of the defendant, and there are among the files in the case affidavits which it is claimed support this contention. The bill of exceptions in the case contains the evidence introduced upon the trial before the jury. It does not purport to contain the affidavits above referred to, nor any other evi-

dence used upon the motion for a new trial. The certificate is that the defendant "in order to maintain the issues on his part produced the following named witnesses, to wit, John Loar and Henry Phillips, who were each sworn and testified on behalf of the defendant, a copy of whose testimony is contained at length herein; and the defendant in order to further maintain the issues on his part produced and offered the following exhibits, to wit, exhibit 1 and 2, which are hereto attached and made a part hereof." Exhibit 1 is an affidavit for continuance, and exhibit 2 is a pension certificate, so that the affidavits used upon the motion for a new trial are expressly excluded by the certificate itself; that they are entitled in the case does not tend to authenticate them. It has been so many times determined by this court, and others that fugitive papers found among the files which are not identified by the certificate as a part of the bill of exceptions, cannot be considered by the court, that it is unnecessary to cite authorities or further discuss the matter.

The judgment of the district court is fully sustained by the record, and is therefore

AFFIRMED.

MICHAEL F. DEMPSEY V. EDWARD STOUT.

FILED MARCH 22, 1906. No. 14,597.

A complaint, which alleges that the defendant, "having in his possession solely for his own use, as his own property, tobacco and a paper commonly known as cigarette paper, did place certain of said tobacco within said paper, and did proceed to roll the same into form as a cigarette, solely for his own use," does not charge the "manufacture" of cigarettes within the meaning of the statute.

ERROR to the district court for Douglas county: GEORGE A. DAY and HOWARD KENNEDY, JR., JUDGES. *Affirmed.*

Norris Brown, Attorney General, and *W. T. Thompson,* for plaintiff in error.

W. D. McHugh, contra.

SEDGWICK, C. J.

The question presented in this proceeding depends upon the meaning of the word "manufacture" as used in the anti-cigarette law. The complaint upon which this defendant was arrested charges that: "Edward Stout on or about the 29th day of November, A. D. 1905, in the county aforesaid and within the incorporate limits of the city of Omaha aforesaid, then and there being an adult man of the age of 30 years and not engaged in the business of the manufacture or sale of tobacco, cigars or cigarettes or cigarette papers, and then and there having in his possession solely for his own use, as his own property, tobacco and a paper commonly known as cigarette paper, did place certain of said tobacco within said paper, and did proceed to roll the same into form as a cigarette, solely for his own use and for the purpose of smoking the same himself and with the intent so to do; and he the said Edward Stout did then and there proceed to light the same and did smoke the same, thereby manufacturing a cigarette, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the state of Nebraska." Upon the argument the merits of the motion for a rehearing in *Alperson v. Whalen,* 74 Neb. 680, now pending in this court, were also discussed. In that case it was held that the giving away of cigarettes and cigarette paper is prohibited by the statute, and that such prohibition is not invalid because not sufficiently expressed in the title of the act. It was said that the purpose of the act was "to protect the people of the state against results arising from furnishing these articles to the public." That it appears from the act itself that the legislature "supposed that the

use of cigarettes was injurious to the public in general, through its effects upon the health and morals of the people," and that to discourage this use "it was made unlawful to manufacture, sell, or give away the article itself, and a particular material that is used only in the manufacture of that article." That the manifest intention was to remove these articles from the avenues of commerce, and to prevent all traffic therein, and it was held that this purpose was manifest from the title of the act. Upon the argument it was insisted that giving away these articles is a separate and distinct subject from the manufacture and sale thereof, and this was the ground of the argument that the legislation is unconstitutional. To this proposition it was suggested by the attorney general that, if the giving away of the articles was a distinct subject, then clearly the manufacture and sale were two distinct subjects, and, so, it would follow that there must be three separate acts; one prohibiting the manufacture, another prohibiting the sale, and another prohibiting the giving away of the articles. This suggestion seems to be unanswerable. The only reasonable conclusion is that neither the manufacture, nor the sale, nor the giving away of these articles is of itself the subject of the legislation. If the subject of the legislation is considered to be the traffic in cigarettes, and if that subject is sufficiently expressed in the title of the act, then the conclusion of the opinion in *Alperson v. Whalen, supra,* is justifiable. Applying this construction of the act to the case at bar, does the complaint state an offense? It was contended upon the hearing that the legislature has no power to regulate the personal habits of an individual by forbidding him to use cigarettes; that it is the right of the sovereign citizen to eat, drink and smoke what he may choose to, although it may be the judgment of the legislature that he is injuring himself by so doing. From a comparison of this suggestion with the act itself and the title thereof, it will readily be seen that the legislature in this act has avoided any attempt to regulate the personal habits of the citizen.

As shown in the opinion in *Alperson v. Whalen, supra,* the purpose of the law is to suppress the traffic in, and not to forbid the use of, these articles. It is true that the law assumes that the use of the articles is injurious to the health and morals of the public, and that therefore traffic in the articles themselves should be made illegitimate. The law thus discourages the use of the articles, but it intentionally avoids forbidding the individual to use them. The word "manufacture" in the act, then, is used in the sense of "to engage in and carry on the business of manufacturing." It is the business of manufacturing for traffic that is prohibited. The act of "rolling cigarettes" from one's own materials and for one's own use is so connected with the use as to be a part of such use, and this it was clearly not intended by the legislature to prohibit. This action originated in the district court for Douglas county, and it was there held that the complaint failed to state an offense.

We think the conclusion of the district court was correct, and its judgment is therefore

AFFIRMED.

STATE, EX REL. JOHN S. BISHOP, APPELLEE, V. LEE J. DUNN ET AL., APPELLANTS.

FILED MARCH 22, 1906. No. 14,620.

1. Statutes: CONSTRUCTION. Statutes *in pari materia* should be construed together, and their provisions harmonized, if possible; and where the conflict between them relates to an immaterial matter, such as the name or title by which an officer shall be designated, such discrepancies will be disregarded by the courts.
2. The city council of a city of the first class, as a legislative body, has the power, by ordinance, to establish and adopt suitable rules for its own government in matters of procedure; and such rules, when adopted, will not be set aside by the courts, unless they are directly, or by necessary implication, in conflict with some provision of the statutes.

3. Mandamus will not lie to compel the president *pro tempore* of such city council to preside over the meetings of that body, and appoint its standing committees, where that duty is neither enjoined upon him by statute nor by ordinance.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

E. C. Strode, Dennis J. Flaherty and *A. S. Tibbets,* for appellants.

John S. Bishop, contra.

BARNES, J.

The respondent and the intervener have brought this case here by an appeal from a judgment of the district court for Lancaster county awarding the relator a peremptory writ of mandamus commanding the respondent to preside at all meetings of the city council of the city of Lincoln and appoint the standing committees of said council. It appears that in the year 1902 the city council of the city of Lincoln passed an ordinance known as "Ordinance No. 107," by which it was provided, among other things, as follows: "The council is hereby authorized to elect one of the members of the council as president of the council, who shall preside at all meetings of the council, and, while so presiding, shall have the same privileges as other members. He shall appoint all the standing committees of the council, and perform such other duties as are usually performed by a presiding officer. In the absence of the mayor from the city, or in any case when the mayor is from any cause disqualified from acting as mayor, the president of the council shall be *ex officio* mayor, and all his acts, while so acting as mayor, shall be as binding upon the mayor and upon the city as if done by the mayor." That ordinance was in force at the time the legislature passed the act of 1905, amending article I, ch. 13, Comp. St., commonly called the "City Charter." That act amended section 13, and other sections of the charter, so that said

section 13 as amended, among other things, provides: "The mayor shall be *ex officio* president of the said council, and shall preside at the meetings thereof, and shall appoint the standing committees of said council, and in the event of a tie vote shall cast the deciding vote: Provided, however, that the council shall have the power to elect a president *pro tempore* who shall preside over the meetings of the council in the absence of the mayor and who shall exercise the powers of the mayor on his absence from the city." The amended charter also provides for the election of seven city aldermen or councilmen at large, together with seven ward councilmen; whereas, under the former charter all of the fourteen councilmen were elected from their respective wards, and were known as ward councilmen. After the officers elected under the amended charter qualified and assumed their duties, the city council was reorganized, and the mayor, the intervener herein, became *ex officio* a member of said council, presided over the meetings thereof, and appointed the standing committees above mentioned. The respondent, who had theretofore been acting as president of the council under the provisions of the old charter, and by virtue of ordinance No. 107, thereupon declined to preside at its meetings, and refused to appoint the aforesaid committees. The relator, who is one of the members of the city council, demanded that the respondent preside at the meetings of that body, and appoint its standing committees. The respondent refused to comply with that demand, and the relator thereupon commenced the present suit in the district court for Lancaster county, to compel him to perform the acts above mentioned. The mayor, Francis W. Brown, intervened; issues were properly framed, and the matter was submitted to the court upon the evidence and an agreed statement of facts. The trial resulted in a judgment awarding the relator a peremptory writ of mandamus, as prayed.

The relator now contends that the provision of section 13, above quoted, is unconstitutional and void, because it is not germane to the subject matter of the original sec-

tion. The question of the constitutionality of the amendatory act of 1905 was before us in *State v. Malone,* 74 Neb. 645, where it was upheld. It is contended, however, that the validity of that part of section 13 in question herein was not determined in that case; that what was there said was *obiter,* and was the view of one member of the court only. We may say, in passing, that whatever was there said was concurred in by every member of the court, as then constituted, and was our unanimous opinion on the questions there decided. It is true, we did not deem it necessary in that case to determine the question now presented; neither do we think we are now required to pass on it, in deciding the case at bar, for reasons which we shall presently give.

It is further contended by the relator that section 13 of the charter, as amended, and section 27 thereof are in "irreconcilable conflict, and their provisions are hopelessly repugnant." It is said, in substance, that one or the other must be declared invalid; that section 27 is not repealed by implication, and the provisions of section 13, which are in conflict with those contained in section 27, must be declared void. We decline to entertain this view of the matter. Section 13 creates the office of president *pro tempore* of the council, and provides that he shall preside over its meetings in the absence of the mayor, and shall exercise the powers of the mayor on his absence from the city. Section 27 provides: "In case of vacancy in the office of the mayor or in case of his absence or disabilty, the president of the council shall exercise the powers and duties of the office until such vacancy shall be filled or disability removed, or in case of temporary absence, until the mayor returns, and such acting mayor shall perform such other duties as may be required by law." It is our duty to read and construe the two sections together, and, if possible, to reconcile their provisions. Proceeding with this rule in view, we find that section 27 seems to supplement the provisions of section 13, and provides for contingencies not mentioned in the last named section. By

section 13 the mayor is made *ex officio* a member of the council and it is his duty to preside over its meetings, and appoint its standing committees. It is further provided by that section that the council may elect a president *pro tempore* who shall preside over its meetings in the absence of the mayor, and shall exercise the powers of the mayor on his absence from the city; while section 27 makes a further provision that the president of the council shall exercise the powers and duties of a mayor, not only in his absence, but in case of his disability, or where there is a vacancy in the office, until such vacancy is filled. So it seems clear that the only conflict between the two sections is where one speaks of a president *pro tempore* of the council, and the other designates the officer as president of that body. This distinction or discrepancy, if such it may be called, does not seem to be of sufficient consequence to entitle the relator, in the absence of any pecuniary interest on his part, to the extraordinary writ of mandamus by which to control the discretion of the city council and regulate his methods of procedure. The question seems to be one of mere fancy, rather than of substantial right. We seldom make use of maxims to illustrate a point, but it would seem *"de minimus non curat lex"* should be applied in this case.

Lastly, it is contended by the relator that section 13, as amended, and subdivision 53 of section 129 of the charter are in direct conflict, and therefore the amendment in question must be declared void. Section 129 is entitled "Ordinances," and provides: "In addition to the powers herein granted, cities governed under the provisions of this act shall have power by ordinance: * * * (subdivision 53) To elect one of the members of the city council as president of the council, and who shall preside at all meetings of the council, and have equal privileges with the other members of the council, and in the absence of the mayor from the city shall perform the duties of mayor." It seems clear, from the language above quoted, that subdivision 53 does not, of itself, create a president

of the city council or prescribe his duties; that it is without force and effect until the council has exercised the power or privilege conferred thereby. Ordinance No. 107 having been repealed the subdivision in question is inoperative, and, therefore, in no manner conflicts with the provisions of section 13, as amended.

As above stated, the city council has, since the commencement of this action, repealed ordinance No. 107, and for the purpose of harmonizing its methods of procedure with the provisons of the amended charter, on February 8 of the present year, passed an ordinance, known as "Ordinance No. 346," by which it is provided: "The council is hereby authorized to elect one of the members of the council as president *pro tempore* of the council, who shall preside at all meetings of the council in the absence of the mayor, and, while so presiding, shall have the same privileges as other members of the council. He shall perform such duties as are usually performed by a presiding officer. In the absence of the mayor from the city, or in any case when the mayor is from any cause disqualified from acting as mayor, the president *pro tempore* of the council shall be *ex officio* mayor, and all his acts, while so acting as mayor, shall be as binding upon the council and upon the city as if done by the mayor." From the foregoing it appears that, at the time the peremptory writ was allowed, there was no provision either of ordinance or statute authorizing the president to preside over the city council, and appoint its standing committees. It is contended, however, by the relator that ordinance No. 346 is void, because the inducement to its passage was the amendment to section 13 of the charter, above mentioned. As before stated, we have already held that the amendatory act in question, as a whole, is valid and constitutional, and we are satisfied that without invoking its provisions the powers conferred upon the city council by other provisions of the charter are broad enough to authorize it to pass the ordinance in question. It stands to reason that the city council, a legislative body, has the inherent power, by ordinance, to

provide for and establish rules for its own procedure; and the rules thus adopted will not be interfered with or set aside by the courts, unless they are directly, or by necessary implication, in conflict with some provision of the statute. Again, we find, from an examination of the published volume of city ordinances, which is in evidence herein, that at the time this action was commenced there was an ordinance in force in the city of Lincoln, known as "Rule 33" by which it is provided: "Standing committees shall be appointed by the mayor, from the councilmen, at the beginning of the municipal year." And by section 5 of said ordinances the mayor is required to preside at all meetings of the city council, and is given the casting vote when that body is equally divided.

So we are of opinion that the relator was not entitled to any relief when this action was commenced; that ordinance No. 346 is valid, and both the relator and the respondent are bound by the method of procedure therein provided for.

For the foregoing reasons, the judgment of the district court is reversed, the writ is denied, and the cause is hereby dismissed at the costs of the relator.

JUDGMENT ACCORDINGLY.

GEORGE VON HALLER V. STATE OF NEBRASKA.

FILED MARCH 22, 1906. No. 14,496.

1. **Instructions: RECORD.** Where the evidence has not been preserved by a bill of exceptions, the presumption is that instructions to the jury which refer to the testimony are based upon and supported by the evidence in the case.
2. **Instructions** set forth in the opinion examined, and *held* not erroneous.

ERROR to the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

A. W. Jefferis and *Hamer & Hamer,* for plaintiff in error.

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

LETTON, J.

The plaintiff in error was found guilty of murder in the second degree upon an information charging murder in the first degree. No bill of exceptions was preserved. In his petition in error and brief he argues that the court erred in giving the thirteenth, fourteenth and a part of the twentieth instruction to the jury, and in the refusal of the 13th instruction requested by him.

1. Instruction numbered 13 is as follows: "If you are satisfied from the evidence in this case, or if the evidence raises in your mind a reasonable doubt that, while the defendant was in the pursuit of his lawful business, the deceased Maurice D. Rees made an unlawful attack upon the defendant, and opened fire upon the defendant with a revolver which the deceased then held in his hand, and if from the nature of the attack a reasonable person, a person of ordinary courage, judgment and observation, in the position of the defendant, and knowing what he knew, and seeing what he saw, would have been justified in believing that there was a design on the part of the deceased to take the life of the defendant, or to do him great bodily harm, then, under such circumstances, the defendant would have been justified in believing himself in danger of his life, or of suffering great bodily injury, and would have had the legal right to kill his assailant, and if, under such circumstances, the defendant shot and killed the said Maurice D. Rees, such killing, under such circumstances, would be justifiable on the ground of self-defense, and you should acquit the defendant." The defendant urges that by this instruction the jury were required to do an impossible thing. They were first to be satisfied from the

evidence that, while the defendant was in the pursuit of his lawful business, the deceased made an unlawful attack upon him, etc., and they are also told that, if the evidence raises in their minds a reasonable doubt as to these facts, they will acquit, and that the instruction therefore directs the jury to perform the impossible. We think this criticism is unwarranted, and that the instruction means that, if the jury are satisfied from the evidence as to the truth of the facts narrated, then they should acquit the defendant, or that, if the evidence only raises a reasonable doubt as to whether the defendant killed the deceased under such circumstances, they should acquit the defendant. The use of the following language is also criticised: "If from the nature of the attack a person of ordinary courage, judgment and observation, in the position of the defendant," and it is said that it is prejudicial to the defendant, because it requires the defendant, when unlawfully attacked, to use ordinary courage instead of ordinary prudence. We do not think that this instruction is erroneous in this regard. While the expression "a person of ordinary prudence" is often used in this connection, the use of the expression "a reasonable person of ordinary courage, judgment and observation" describes merely an ordinary man, and is only another form of words conveying substantially the same idea, which is that the defendant was only held to the exercise of the same degree of reason, bravery, judgment and discretion as that of the average individual. *State v. Crawford*, 66 Ia. 318.

2. The fourteenth instruction is, in substance, to the effect that, if the jury believe beyond a reasonable doubt that the defendant was the first aggressor, and if a person in the position of deceased would have been justified in believing there was a design on the part of the defendant to take his life, and in believing himself in danger of his life, and that, under such circumstances, the deceased shot at the defendant, such shooting, under such circumstances, would be no justification for the defendant to return the fire and kill the deceased, on the ground that

it was done in self-defense. Since the evidence is not before us, we are unable to tell whether or not this instruction was based thereupon; but, since nothing appears to the contrary, we must presume that the circumstances in evidence justified its giving, and we cannot say that as an abstract proposition of law it is erroneous. If the evidence showed that the defendant was the aggressor to such an extent that the deceased was justified in shooting at him under the apparent necessity of preserving his own life, such shooting alone would be no justification for the killing of the deceased.

3. The twentieth instruction is also assailed as being an invasion of the province of the jury. This instruction is as follows: "It is your duty carefully to scrutinize and dispassionately weigh the testimony of all the witnesses, giving to the several parts of the evidence such weight as, in your judgment, they should receive. Weight of evidence depends upon the credibility of witnesses, their accuracy of observing and remembering, their interest, bias, or prejudice, if any, and their means of knowing the matters concerning which they testify. You are the sole judges of the credibility of the witnesses. You are not bound to accept as true any statement, simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any of the witnesses as absolutely true, if, for any good reason, it appears unreliable or untrue. Yet, you have no right to reject the testimony of any of the witnesses without good reason, and should not do so until you find it irreconcilable with other testimony which you find to be true." The last sentence is the one to which exception is taken and which is claimed to be erroneous. That part of the instruction objected to is not free from ground for criticism, but, in the absence of the testimony, we cannot discern in what manner the defendant was prejudiced thereby.

4. Complaint is made because instruction numbered 13, requested by the defendant, was refused. This instruction refers to something that apparently had been said in

the argument of counsel, and, since the argument has not been preserved, we cannot presume that it was unwarranted. The presumption is that it was properly refused, and, in the absence of a showing to the contrary, we must so hold. The judgment of the district court is

AFFIRMED.

MARTHA C. LAWRIE V. LININGER & METCALF COMPANY.

FILED MARCH 22, 1906. No. 14,238.

Trial: REVIEW. Upon an examination of the record, it is *held* that the matters in issue were fairly submitted to the jury upon the evidence.

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

M. S. Gray, Charles H. Sloan and *F. W. Sloan,* for plaintiff in error.

R. S. Mockett, T. C. Marshall, W. J. Birkner and *O. C. Torgerson, contra.*

AMES, C.

Lininger & Metcalf Company, plaintiff below, was a corporation engaged in the sale of agricultural implements and machinery at Omaha, Nebraska, and the defendant below, Martha C. Lawrie, was its agent for the sale of such goods at Davenport, Nebraska, her husband, J. W. Lawrie, having general charge and conduct of her business. One Vanskiver made a written order or application for the purchase of a threshing machine outfit for the specified price, in the aggregate, of $1,072, with a direction that the same should be shipped to him at Davenport by rail and in the care of the defendant Martha C. Lawrie. The order or application was for-

warded to the plaintiff, and the machinery shipped in compliance therewith, but was lost or destroyed in course of transportation by means of a railroad wreck. At the suggestion of the plaintiff and by agreement between it and J. W. Lawrie, the latter presented a claim in the name of the defendant against the railroad company for the value of the machine, and received from that company on account of the transaction $882 which was turned over to the defendant, but no part of which has been remitted to the plaintiff. This action was brought by a petition alleging a sale and delivery of the property by the plaintiff to the defendant for the agreed price of $1,072, and giving the defendant credit on account of the sale for several items, aggregating $380.15, and praying for judgment for a balance of $691.15. The items conceded by the petition as credits were certain sums in the nature of discounts from the sale price of the machine, an item of commission on the sale of another machine sold to Vanskiver to replace the one destroyed, and a balance due from the plaintiff to the defendant on general account arising out of unspecified transactions. The answer denies each and every allegation in the petition, except as specifically admitted to be true, but makes no specific admission, except that the plaintiff is indebted to the defendant in an item of $69.70 credited in the petition, but denies that this indebtedness accrued in the manner alleged in the petition, and alleges that the plaintiff is indebted to the defendant in the sum of $189.72 "on general account," making a total of $259.42, for which judgment is prayed as upon a set-off. There is no reply in the record, but the case seems to have been tried as though there had been one, and no advantage because of its absence is sought in this court. There was a trial to a jury, which resulted in a verdict for the plaintiff for the sum sued for, with interest, and the defendant prosecutes error.

No evidence was offered by either party touching the items of credits and set-off, but the whole controversy at

the trial seems to have been over the question whether the transaction between the parties, considered as a whole, did not amount to, and was not treated and understood by them as, a sale and delivery of the machine by the plaintiff to Mrs. Lawrie instead of to Vanskiver, whose name alone was signed to the written order or application for it. It is not contended that that issue was not fairly submitted by the court to the jury by instructions, except that the defendant complains in this proceeding that the court refused to instruct the jury, in effect, that the transaction did not amount to a sale, unless the defendant had been shown by the evidence to have authorized her husband to present the claim in her name as owner of the machinery against the railroad company. But it appears that the defendant knew of the transaction at the time, or soon after, and apparently acquiesced in it, the money derived from it finally coming into her hands, and the court instructed the jury generally that the defendant was not bound by any act of her husband as her agent which it did not appear from the evidence that he had authority from her to do, and we think the defendant was not entitled to have the particular act in question singled out and dwelt upon as though the right of recovery was solely dependent upon previous express authority for doing it. It was proper, we think, that the jury should be instructed, as was done, to consider all the evidence touching the relations and conduct of the parties having a tendency to show their intentions and their contract obligations, if any, implied thereby.

We recommend that the judgment be affirmed.

OLDHAM and EPPERSON, 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.

W. R. GOLDIE V. A. G. STEWART ET AL.

FILED MARCH 22, 1906. No. 14,050.

Process: AMENDMENT: ELECTION. Where a plaintiff in an action is given leave to amend a defective affidavit for service by publication and a defective return of a service of summons, but fails to make such amendment, he will be deemed to have elected to stand on the original affidavit of publication and the original return of summons.

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

F. A. McMaster and *Joy & Burton,* for plaintiff in error.

McCarthy & McCarthy, contra.

OLDHAM, C.

This was an action to foreclose a real estate mortgage on certain lands situated in Dixon county, Nebraska. The petition was sufficient in form, and service by publication was asked for against defendants William A. Dean and Emma E. Dean, his wife, who were the owners of the lands in controversy. An affidavit for service by publication, alleging that William A. Dean and Emma E. Dean were nonresidents of the state of Nebraska, was filed by C. L. Joy, one of the attorneys for the plaintiff, and was subscribed and sworn to before F. A. McMaster, a notary public of Dixon county, who was also an attorney for the plaintiff. On this affidavit a summons, returnable on the 23d day of February, 1903, was issued to the sheriff of Dixon county, who thereupon deputized Frank A. Blanchard of Sioux City, Iowa, to serve the same on the defendants, who were residents of the state of Iowa. By this summons defendants were required to answer the plaintiff's petition on the 16th day of March, 1903. On the 11th day of February, 1903, this summons was returned, verified in the following manner:

"Subscribed and sworn to before me and in my presence on this 11th day of February, 1903. (Seal.) C. L. Joy, Notary Public."

Defendants William A. Dean and Emma E. Dean filed a special appearance, excepting to the jurisdiction of the court, on the 14th day of March, 1903. This special appearance attacked the sufficiency of the affidavit for service by publication, the sufficiency of the return to the service of summons, and the sufficiency of the copy of summons served upon defendants. The motion was supported by the affidavits of defendants, to which the copy of summons was attached. On the 11th day of May, 1903, before the exceptions to the jurisdiction by defendants had been disposed of, the plaintiff filed a motion, asking leave of the court to amend his affidavit for notice by publication for the reason that the record shows that the affidavit on file was sworn to before one of the attorneys in the case. He also asked leave to amend the return of Frank A. Blanchard to the service of summons by having the return verified before an officer duly authorized to administer the oath. The motion further asked that all these entries be made *nunc pro tunc*. The special appearance and the motion to amend the affidavit and the return of the service of summons were considered together at the time the leave was asked, and the court found that the affidavit for publication was defective and voidable, that the return of the officer to service of summons was insufficient, that the copy of summons served upon said defendants was not properly certified by the seal of the clerk of the district court for Dixon county, and that the court was without jurisdiction of the persons of defendants William A. Dean and Emma E. Dean. The court also entered the following judgment and finding on plaintiff's motion to amend the process: "Plaintiff's motion to amend his affidavit for publication and return of officer *nunc pro tunc* coming on to be heard contemporaneously with special appearance is overruled; but plaintiff is given leave to amend both affidavit

and return of summons." Plaintiff never tendered an amended affidavit and return, but, instead, prosecuted error from this order to this court. His petition in error was dismissed in an unofficial opinion reported in 5 Neb. (Unof.) 523, on the ground that the order quashing the service was not a final order. At a subsequent term of the district court held on June 6, 1904, the plaintiff appeared by his attorney and asked for a default against defendants William A. Dean and wife. The motion was refused by the trial court on his own instance, and plaintiff offered to introduce testimony against these defendants tending to show their liability. This offer was denied by the court for the reason that he had no jurisdiction of the persons of these defendants, and the court thereupon dismissed the plaintiff's petition as to defendants William A. Dean and Emma E. Dean. To reverse this judgment plaintiff brings error to this court.

Plaintiff's contention is that, while the process by which he sought to obtain jurisdiction of defendants Dean and wife was defective, yet it was voidable and not void, and therefore he should have been permitted to amend his process by a *nunc pro tunc* entry made in the first instance. Even if this contention should be deemed meritorious, for the sake of the argument, we are still unable to see how plaintiff has placed himself in a position to complain of the action of the trial court in refusing to make a *nunc pro tunc* entry in connection with his leave to amend. By our former decision of this case, we held that the refusal to allow the amendment of the process *nunc pro tunc* was not a final order which could be reviewed by this court. Now, when the mandate accompanying this decision was returned, plaintiff did not tender any amended affidavit for publication or any amended return of service of summons, but, on the contrary, he moved for a default against the defendants on the process which had been quashed by the court. Defendants properly made no further appearance in the case. While, as contended by counsel for plaintiff in error, the same

liberal rule that applies to amendments of pleadings under the code is ordinarily applied to amendments to process, it is also true that, when leave to amend a process is granted and no amendment is made, the party will be deemed to have elected to stand on the original process, the same as he would on an original pleading which he had failed to amend after leave to do so was granted. Under this rule, plaintiff stood asking for a default on a defective process, which had been successfully attacked by special appearance before answer day. Consequently, he is in no position to complain of the action of the trial court in denying his motion for a default, or in refusing to admit evidence tending to show the liability of the defendants, or in dismissing the action as to them.

It is urged by plaintiff in error that, unless he had been permitted to amend his process *nunc pro tunc*, his cause of action would have been barred by the statute of limitations, and that an amendment as of the date at which leave to amend was granted would have availed him nothing as against such a plea. Be this as it may, there is no way by which we have a right to anticipate what defense defendants would have interposed against plaintiff's prayer for a foreclosure of the mortgage, had they been legally served. They might have pleaded the statute of limitations, or they might have pleaded payment of the indebtedness, or they might have denied the execution of the mortgage; and whether or not the refusal to allow the amendment of the process *nunc pro tunc*, if error at all, was prejudicial to plaintiff could only be determined after defendants were properly in court and had pleaded to the cause. Plaintiff should have amended his process so as to give the court jurisdiction over the persons of the defendants, and, having done so, if they pleaded the statute of limitations as a defense, he could then have insisted on his right, if he had any, to have the amendment relate back to the date of the original process. If the court had refused him such right, and sustained the defense of limitation and rendered a judgment in favor of the defendants

on such plea, then plaintiff would have had a final order of the court prejudicial to his right, which he could have presented for review. But, having tendered no amendment, his right to a default stands on the validity of his original process.

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.

DAVID BRADLEY & COMPANY, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MARCH 22, 1906. No. 14,080.

Specific performance of a contract for the sale of real estate will not be awarded at the suit of the vendee or his assignee, where the evidence discloses gross laches in making the payments stipulated for in the contract, where time is made of the essence of the contract by the agreement of the parties.

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

John N. Baldwin and *Edson Rich,* for appellant.

Flickinger Bros. and *Baldrige & De Bord, contra.*

OLDHAM, C.

This was an action for specific performance of certain land contracts entered into by the Union Pacific Railway Company with one Michael O'Neill, and assigned by him to plaintiff, David Bradley & Company, to secure an indebtedness from O'Neill to the plaintiff. There was a trial of the issues to the court, and a judgment for the

plaintiff, and a finding that plaintiff was entitled to a specific performance of the contracts sued upon; that the value of plaintiff's interest in the contracts was equal to the amount of the indebtedness which the contracts were given to secure, and a decree that, if the defendant should pay the amount of plaintiff's debt and interest within 20 days of the judgment, the lien should be canceled and satisfied, and that, if defendant should fail to pay the indebtedness for more than 20 days from the date of the judgment, plaintiff should be decreed a specific performance of the contracts on payment of the amounts found due thereon from plaintiff. To reverse this judgment defendant has appealed to this court.

The facts underlying the controversy are that on the 31st day of May, 1884, the Union Pacific Railway Company sold to Michael O'Neill two sections of railroad land in Deuel county, Nebraska, the sale being evidenced by eight separate contracts, each for a particular quarter section of the land. These contracts provided for the payment of the purchase price in ten equal annual payments, with interest on the deferred payments. The contracts contained, among others, the following condition: "And it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients of this contract, and in case the second party shall fail to make the payments aforesaid, and each of them, punctually, and on the strict terms and times above limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid strictly and literally, without any failure or default, then this contract, so far as it shall bind said first party, shall become utterly null and void, and all rights and interests hereby created or then existing in favor of or derived from the second party, shall utterly cease and determine." O'Neill made the first payment on these contracts in cash and three subsequent payments for the years 1886, 1887, and 1888 and no other payments have ever been made on the contracts. On the 25th of February, 1886, O'Neill,

with the consent of the railway company, assigned the contracts in dispute to Charles A. Wilson, of Chicago, Illinois, as collateral security for the sum of $2,900 owed him by O'Neill, and on the 14th day of October, 1892, O'Neill made a conveyance of his interest in the contracts in dispute to plaintiff David Bradley & Company, to secure an indebtedness of $957.75 owed to said company. This instrument was made subject by its terms to the prior assignment of the contracts to Charles A. Wilson, and was duly recorded in Deuel county. After O'Neill ceased making payments on the contracts in issue, the railway company corresponded with Charles A. Wilson and urged him to make the deferred payments on the land. After considerable correspondence with Wilson and after one of the employees of the railway company had called personally upon him, Wilson, not caring to make any further payments to protect his security, returned the contracts to the company, with a letter urging it to give O'Neill until the 15th of August, 1893, either to pay up all the contracts or to make payments as he was able on a portion of them. In response to this request, the company refrained from canceling any of the contracts when received. O'Neill, however, never made, nor attempted to make, any further payments on any of the contracts. The company then made an effort to get the plaintiff, David Bradley & Company, to pay the balance due on the contracts. In 1896 the plaintiff wrote to the land department of the Union Pacific Railway Company to get the amount of the indebtedness on the contracts. The railway company informed plaintiff of the amount due, in a letter stating that on the receipt of the amount a deed to the land would be issued to the plaintiff. It appears that on the receipt of this information plaintiff sent one of its traveling agents to examine the land and report its probable value; but, when the report was received, the plaintiff, as it claims, declined to pay on the contracts and take a deed, because it feared that the receivers of the Union Pacific Railway Company had not sufficient au-

thority to execute a valid conveyance. After this the employees of the railway company's land department made several requests to plaintiff to complete the contracts and notified plaintiff that the contracts would be canceled if they were not paid.

In 1899 the Union Pacific Railway Company was succeeded in the ownership and control of the railway system and the lands in dispute by the Union Pacific Railroad Company, which company canceled the contracts, and sold the land to William Law on the 18th day of October, 1899. Later William Law assigned his contracts of purchase to James G. Piercey, the present owner, whom plaintiff attempted to make a party defendant in the present suit. On February 23, 1901, plaintiff by its attorneys, sent the following communication to the railroad company: "Feb. 23, 1901. B. McAllister, Esq., Land Commissioner, U. P. Ry., Omaha, Neb. Dear Sir: Our clients, David Bradley & Co., in 1892, procured an assignment of the contracts of one M. O'Neill to sections one and thirteen in Twp. 12, R. 44, Deuel county, Nebraska, which assignment was placed of record in Deuel county and recorded in book 1, page 211. The contracts number from 78,703 to 78,776, and from 75,307 to 75,310, inclusive, and were made to secure to David Bradley & Co. the sum of $957.75, due on said date. They wish to redeem and pay the balance due on the O'Neill contracts to your company and receive from it a deed for the property. Please advise us as to what amount will be necssary to redeem one or both of said sections under the O'Neill contracts, and oblige, yours very truly, Flickinger Bros." The railroad company replied to this letter, as follows: "Omaha, Neb., Feb. 25, 1901. Messrs. Flickinger Bros., Council Bluffs, Iowa. Gentlemen: In reply to your favor of the 23d inst., would say, that Sec. 13-12-44 has been sold and contract is in good standing, and Sec. 1 is for sale at $1.75 per acre, as per terms on inclosed slip. Yours truly, B. A. McAllister, Land Com'r." After this correspondence the present suit was instituted.

There are many reasons, in our view, why the judgment of the district court in this cause should not stand, one of which, however, will suffice for the conclusion reached. By the terms of the contracts of purchase of the lands in controversy, time and punctuality of payment are made of the essence of the agreement. While it is true, as contended by counsel for appellee, that forfeitures are never favored, either in equity or at law, and while it is also true that very slight proof will be held sufficient to show a waiver as to the date of payment on a contract of purchase of real estate, because of the disfavor in which forfeitures are regarded in courts of equity, yet this rule is always made to depend on a showing of diligence in fact by the vendee in making the payments and the further showing of a reasonable excuse for the failure of a strict compliance with the letter of the contract. This principle is clearly set forth in 1 Story, Equity Jurisprudence (12th ed.), sec. 776, as follows: "It is true that courts of equity have regard to time, so far as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance, or if he comes, *recenti facto,* to ask for a specific performance, the suit is treated with indulgence, and generally with favor by the court. But then, in such cases, it should be clear that the remedies are mutual; that there has been no change of circumstances affecting the character or justice of the contract; that compensation for the delay can be fully and beneficially given; that he who asks a specific performance is in a condition to perform his own part of the contract; and that he has shown himself ready, desirous, prompt, and eager to perform the contract. Even where time is of the essence of the contract, it may be waived by proceeding in the purchase after the time has elapsed; and if time was not originally made by the parties of the essence of the contract, yet it may become so by notice, if the other party is afterwards guilty of improper delays in completing the purchase." This doctrine has been recognized and approved by this court in our

holdings in *McAusland v. Pundt,* 1 Neb. 211; *Morgan v. Bergen,* 3 Neb. 209; *Canfield v. Tillotson,* 25 Neb. 857; *Brown v. Ulrich,* 48 Neb. 409; *Whiteman v. Perkins,* 56 Neb. 181, and *Jewett v. Black,* 60 Neb. 173.

Now, under the undisputed facts in the case at bar, plaintiff took an assignment of O'Neill's interest in the contracts in issue, subject to Wilson's lien of $2,900 in 1892, for collateral security of a *bona fide* indebtedness existing between O'Neill and plaintiff. Under this assignment plaintiff had a right to discharge the Wilson lien and to protect its security by making the deferred payments on the contracts. Diligence in business would have suggested that, when the assignment was taken by the plaintiff, it should have inquired as to the condition of the payments, for a default of which a forfeiture was provided by the plain terms of the contracts; but it apparently made no such inquiry at the time it received the assignment. This tardiness of inquiry is sought to be explained by saying that the plaintiff naturally thought that O'Neill or Wilson would make the payments as they came due. If we should accept this wholly unsatisfactory excuse for the want of any inquiry at that time, we are next confronted with the fact that in 1896, eight years after the contracts were subject to forfeiture for nonpayment of six out of ten instalments due thereon, plaintiff did make inquiry as to the exact status of the contracts, and received the information asked for from the land department of the railroad company, with an offer, even at that late date, to make plaintiff a deed to the land if it would pay the amount then due. And, again, for two years after this communication the agents of the company frequently requested plaintiff to comply with the belated terms of payment, and plaintiff continued to neglect the offer, claiming as an excuse for its gross laches that it doubted the authority of the receivers in charge of the property to make a valid conveyance of the lands. Now, if we were content to treat this latter excuse as a reasonable and conscientious explanation of plaintiff's delay, we are still con-

fronted with the further fact that from 1899 down to the date of the letter set forth in the opinion plaintiff still continued to sleep on its rights, even after the lands had passed to the defendant, whose authority to make a conveyance thereof is not and cannot be questioned.

From all these facts we are compelled to find that plaintiff has been guilty of gross laches in protecting its security against the overdue payments on the contracts, during a period of nine years, and we are unable to resist the suggestion that, but for the recent rise in value of lands in western Nebraska, this suit would never have been instituted. Here is a fair portrayal of plaintiff's diligence, as reflected from the record. While the gates of opportunity stood long ajar for the full protection of its security, it doubted the quality of mercy offered, and slumbered and slept. When all reasonable doubt as to the authority to make the conveyance was removed by the purchase of the property by the defendant, it turned over, and continued to snore, and nothing but the powerful restorative of a sudden rise in the price of western lands sufficed to arouse it from its Rip Van Winkle sleep.

Finding no equity or conscience in the bill, we recommend that the judgment of the district court be reversed and the plaintiff's petition dismissed.

AMES and EPPERSON, 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 plaintiff's petition be dismissed.

REVERSED.

JOHN A. MCCREARY ET AL., APPELLANTS, V. JOHN A. CREIGHTON ET AL., APPELLEES.

FILED MARCH 22, 1906. No. 14,108.

1. Case Followed. *Shelby v. Creighton*, 65 Neb. 485, approved and followed so far as applicable to the present issues.
2. Infants: JUDGMENT: VACATING: LIMITATIONS. A judgment of a court of competent jurisdiction against a minor defendant properly served and represented will not be set aside on account of the minority of the defendant, unless the action for that purpose is commenced within one year after the minor arrives at the age of twenty-one years, as provided in section 442 of the code; after that time a judgment against a minor defendant will be set aside only for such causes as are sufficient to set aside a judgment against an adult.
3. ———: JUDGMENT. A minor, suing as a plaintiff on a cause of action, will be bound by the judgment rendered therein the same as an adult would be, if the suit was brought and prosecuted in good faith for the minor's benefit.
4. Judgment: RES JUDICATA. Prior judgment rendered in the matter of the estates of Edward Creighton and of Mary Lucretia Creighton, and pleaded as a defense in this action, examined, and *held* to constitute a bar to the cause of action instituted by the plaintiffs herein.

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

Henry P. Stoddart, for appellants.

Woolworth & McHugh, J. J. O'Connor and *J. A. C. Kennedy, contra.*

OLDHAM, C.

Plaintiffs in this action are four of the six surviving children of Mary A. McCreary, and as such children are legatees of the will of Mary Lucretia Creighton, wife of Edward Creighton, deceased. They bring this action for an accounting against John A. Creighton, as administrator of the estate of Edward Creighton, and against John

A. Creighton, Hermann Kountz, and James Creighton, as executors and trustees of the will of Mary Lucretia Creighton. The other two surviving children of Mary A. McCreary having refused to join as plaintiffs in the action were named as defendants. There was a trial of the issues before one of the judges of the district court for Douglas county, Nebraska, and a judgment in favor of defendants, from which plaintiffs have appealed to this court.

A suit, involving practically the same issues and instituted by Mary B. Shelby, daughter and only child of Joseph Creighton, and likewise a legatee of the will of Mary Lucretia Creighton, was before this court for review and adjudication in the case of *Shelby v. Creighton,* 65 Neb. 485, to which reference will be made as to such of the issues as are common to the two cases.

The facts underlying the controversy are that on the 5th day of November, 1874, Edward Creighton, a resident of Douglas county, died, intestate, seized and possessed of a very valuable estate of both personalty and realty. John A. Creighton was duly appointed and qualified as administrator of the estate in Nebraska. Deceased left a widow, Mary Lucretia Creighton, but no children surviving him, and, according to the laws of this state, the personalty all descended to the widow. On January 23, 1876, Mary Lucretia Creighton, widow of Edward Creighton, died testate, leaving a will, which was duly admitted to probate in Douglas county, and in which John A. Creighton, Hermann Kountz, and James Creighton were named as executors and trustees of the funds of the estate. By this will, about three-twentieths of the estate was to be held in trust by the executors of the will and the interest thereon was to be paid to Mary A. McCreary, sister of Edward Creighton, during her life, and at her death the trust funds were to be distributed among her children on their coming of age. Mary A. McCreary departed this life on November 15, 1898.

At the time of his death, Edward Creighton was pos-

sessed of an interest in the partnership firm, known as "Edward Creighton & Company," which owned a large herd of cattle and horses and ranch furniture and fixtures in the state of Wyoming. On the 19th day of January, 1875, one Charles H. Hutton applied to the probate court of Albany county, Wyoming, for letters of ancillary administration on the estate of the intestate situated in the territory, now state, of Wyoming. At this time Thomas A. McShane, a member of the partnership firm, was in possession of the herd of cattle in Wyoming, and resisted the application of Hutton for letters of administration, claiming the right, under the statutes of Wyoming, to administer upon the estate as a surviving partner of the firm. The provisions of the statutes of Wyoming, under which this application was made and granted, are set out in the opinion in *Shelby v. Creighton, supra*, and need not be repeated here. Suffice it to say that McShane filed his bond, which was duly approved, and entered upon the administration of the affairs of the partnership and continued such administration until the year 1877. The letters of administration issued to Hutton were revoked by a final order of the supreme court of the territory of Wyoming. On the 16th day of January, 1877, an application was made by McShane and other surviving partners for an order of the court to sell the partnership property in the city of Cheyenne on the 25th day of January following. When this sale was had, John A. Creighton, through his confidential clerk, bid the sum of $75,000 for the property, and, being the highest bidder, the property was sold to him. The sale was duly reported to the Wyoming court and was confirmed. Thomas A. McShane was appointed administrator *de bonis non* of the estate of Edward Creighton situate in Wyoming, and received from himself, as such administrator, the proceeds of the sale of the property and transmitted the same, by order of the Wyoming court, to John A. Creighton, the local administrator of the estate in Douglas county, who likewise transmitted the proceeds of the sale to the executors and trustees of the

will of Mary Lucretia Creighton. The executors and trustees then distributed the proceeds of the sale according to the provisions of the will. Thomas A. McShane thereafter made a final settlement of the estate of Edward Creighton in the territory of Wyoming and procured his discharge as administrator.

Thereafter, on the 8th day of April, 1879, John A. Creighton filed in the county court of Douglas county a final account of his doings as administrator of the estate of Edward Creighton, and asked for an allowance of the account and for his final discharge as such administrator. On the 10th day of May, 1879, Mary A. McCreary appeared by her attorney and filed her objections to the allowance of this account. An amendatory and supplementary account was filed by the administrator on November 17, 1879, and on the first day of March, 1880, Mary A. McCreary filed objections to the amended and supplementary account. Upon the hearing of the objections, the court found that several of the interested parties were not before the court, and accordingly ordered that a suit be brought in a court of competent jurisdiction, to which all parties in interest should be made parties, for the determination of the issues arising on the objections to the final account of the administrator. On December 2, 1880, in compliance with this order, Mrs. McCreary, for herself and all others similarly situated, instituted a suit, involving the identical issues now sought to be relitigated by her children, in the district court for Douglas county. Mr. McCreary, father of the plaintiffs, appeared as next friend of all the children, and on his application they were made parties plaintiff in the action. The coexecutors of John A. Creighton, namely, Hermann Kountz and James Creighton, also appeared by their attorney as parties plaintiff in the cause. During the pendency of this suit, it appears that John A. Creighton paid $50,000 to Mrs. McCreary in compromise of her claim against him, and this sum was added to the trust fund of her estate and subsequently distributed. The case, however, proceeded

to judgment, and, as appears from the record, all the testimony taken was considered by the court and the cause was argued by counsel for plaintiffs and defendant, and the court on full consideration of the issues found in favor of the defendant and rendered judgment on such finding on the 2d day of April, 1883. In the same year the final account of John A. Creighton, as administrator of the estate of Edward Creighton, was allowed and he was discharged by the probate court. In this proceeding, also, the plaintiffs were represented by a duly appointed guardian *ad litem*. No appeal was ever taken from either of these orders or judgments, and no suit was instituted to reopen these judgments until 1902, when the instant suit was filed.

In June, 1882, the trustees of the will of Mary L. Creighton tendered their resignation to the district court for Douglas county. Mary A. McCreary and all her children were made parties defendant in this suit, and a guardian *ad litem* was appointed for the minor defendants. Mrs. McCreary and her children in this action filed a petition, asking that John McCreary, plaintiffs' father, be appointed trustee of Mrs. McCreary's interest in the estate, instead of those resigning. After proof as to a proper administration of the trust was taken, the trustees were discharged, and John McCreary was appointed in their stead. John McCreary accordingly executed his bond and proceeded with the administration of the trust. The youngest of the plaintiffs arrived at majority on August 18, 1893, a little more than nine years before this suit was instituted. In the year 1893, the father, as trustee, made a distribution among the children according to the terms of the will. On January 10, 1895, plaintiffs and the other children of Mrs. McCreary, all being of full age, joined in signing a release of the sureties on the bond of their father as trustee of their interests in Mrs. Creighton's will.

Now, the questions which we are asked to readjudicate are: First, as to the validity of the proceedings of the probate court of Wyoming in the ancillary administration

of the estate in that territory by Thomas A. McShane; and, second, as to the validity of the purchase of the herd of cattle by John A. Creighton. Both of these questions were before this court in *Shelby v. Creighton, supra,* and with reference to the first it was there said:

"The decree of the probate court of Albany county, Wyoming, settling and allowing the account of T. A. McShane as surviving partner, is analogous to a decree settling and allowing the final account of an administrator. Such decrees are conclusive, upon all parties, of every matter involved, until reversed or set aside in a direct proceeding. * * * The decree settling and allowing the final account of T. A. McShane as surviving partner, while a part of the probate proceedings, was in effect an adjustment of the partnership accounts, and necessarily involved the question of his relation to the firm. * * * In our opinion, the decree is as conclusive upon that proposition as one adjusting the accounts between partners, entered by a court of equity in a suit between partners, brought for that purpose would be."

With reference to the bid of John A. Creighton, the Nebraska administrator, it was held that at most the sale under this bid was only voidable, and that an affirmance of the sale would be implied by an unreasonable delay of the *cestuis que trust* in disaffirming it.

We are next asked to examine the facts as to whether there was but one herd of cattle owned by the firm of Edward Creighton & Company, or whether there were two herds, as alleged by the plaintiffs, with the situs of one in Wyoming and the other in Nebraska. While this question seems to have been adverted to in the opinion in *Shelby v. Creighton, supra,* yet, as the testimony in that case is not before us, we will examine it in the light of the evidence contained in the bill of exceptions. The evidence, we think, clearly shows that there was but one herd of cattle and but one brand used by the firm of Edward Creighton & Company. The home ranch was located in Wyoming. It is true that at times portions of this herd

of cattle would stray eastward over the line and into this state, and it is true, as shown by the testimony, that some of these cattle were from time to time assessed for taxation in Cheyenne county, Nebraska, the boundaries of which county then extended to the Wyoming line. It is also true that a side ranch, or corral, was used by this company on Pumpkin Creek, in Nebraska; but the evidence clearly shows that this was merely an auxiliary to the home ranch, that herders were sent to this side ranch to round up the cattle that had drifted eastward into Nebraska, and that all of the business of the company was transacted from the home ranch in Wyoming. We have examined the testimony on this question, notwithstanding the fact that the identical question as to the existence of a herd of cattle in Nebraska belonging to this company was passed upon by the county court of Douglas county on the objections to the approval of the final report of John A. Creighton, as administrator, and was also passed upon specifically in the judgment and finding of the district court for Douglas county in the suit of Mary A. McCreary and others, referred to in the statement of this cause. There is no sufficient evidence in the record to show fraud or collusion in procuring any of the various judgments above set forth, all of which have been pleaded in bar of the present action. In the suit which Mary A. McCreary filed in the district court for Douglas county, these plaintiffs were impleaded as parties plaintiff by their father as next friend, and in every suit in which they were defendants they were represented by a competent, honorable, and learned member of the bar as guardian *ad litem*.

It is suggested that all these plaintiffs were minors when all these proceedings were had, except the one in which they released the bond of their father as trustee of their mother's portion of the estate of Mrs. Creighton. A judgment against a minor may be set aside on a slight showing of defense, where the application is made for that purpose within one year of the time the minor reaches the age of 21 years, as provided for in section 442 of the code. After

this period has expired, practically the same showing must be made to set aside a judgment rendered against a minor as is required when the judgment is rendered against one of full age. Now, while all of the judgments pleaded in bar, except one, were rendered against plaintiffs while they were minor defendants, yet in each of these cases the estate under which they claim was properly represented, and a judgment binding upon the estate is, of necessity, binding upon all shares of such estate bequeathed to residuary legatees. The general rule is that, when minors are plaintiffs in a cause of action and the suit is brought and prosecuted in good faith for their benefit, they will be bound by the judgment the same as adults would be. *Kingsbury v. Buckner*, 134 U. S. 650, and *Corker v. Jones*, 110 U. S. 317.

Against the judgment in the case in which these minors were plaintiffs, it is suggested that the minors did not know that the mother had received the $50,000, "peace money," from defendant John A. Creighton during the pendency of the suit. And from this fact they ask us to infer that the proceeding in the district court was a mere sham trial and not a good-faith judgment. This $50,000 was carried forward into the trust funds of the estate and was distributed as such by the executors, and plaintiffs have all participated in their share of the distribution. This judgment has stood unassailed for 20 years, for 14 years after the eldest, and nine years after the youngest plaintiff had reached their majority.

We think, in view of these facts, that plaintiffs are clearly estopped, not only by the judgments pleaded in bar of this action, but also by their own laches in bringing this suit. We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

G. SAM ROGERS V. CITY OF OMAHA.

FILED MARCH 22, 1906. No. 14,221.

1. Cases Distinguished. *Hurford v. City of Omaha*, 4 Neb. 336, *Goodrich v. City of Omaha*, 10 Neb. 98, *McGavock v. City of Omaha*, 40 Neb. 64, examined, approved and distinguished.
2. Cities: CONTRACTS: LIABILITY. Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received. *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, followed and approved.

ERROR to the district court for Douglas county: HOWARD KENNEDY, JR., JUDGE. *Reversed.*

W. A. Saunders and *Fawcett & Abbott*, for plaintiff in error.

John P. Breen, W. H. Herdman and *A. G. Ellick, contra.*

OLDHAM, C.

This was an action brought by the plaintiff in the court below against the city of Omaha to recover a balance alleged to be due on a contract for grading Mason street, between Eleventh and Thirteenth streets in said city, entered into between defendant city and plaintiff's assignors, Cash Brothers. The petition discloses that the balance sued for represents the amount unpaid upon certain warrants issued to the plaintiff's assignors, drawn against a fund which the city undertook to create by special assessment upon the property abutting upon the street graded. This assessment had been declared null and void before the institution of this suit. The city answered, pleading that the contract sued upon was *ultra vires* and void, that by the terms of the contract plaintiff's assignors agreed to accept the warrants in full consideration of the contract. It also pleaded the statute of limitations. On

issues thus joined, there was a trial to the court below and judgment for the defendant. To reverse this judgment plaintiff brings error to this court.

There is practically no disputed fact in the record. In 1873, it is conceded, the grade in controversy was established by proper ordinance. In 1893 a petition asking for a change of the grade at the place mentioned, and purporting to be signed by the owners of a majority of the feet frontage of the property abutting upon the proposed change of grade, was presented to the city council, having been examined and certified to by the city engineer. In conformity with the request of the petition, an ordinance was properly enacted establishing the changed grade of the street, and, in strict formality with the provisions of the statute regulating cities of the metropolitan class, a contract was awarded to Cash Brothers, assignors of the plaintiff, on March 8, 1898. The work was completed under this contract, and was accepted and approved by the city in July, 1899. One-half of the contract price of the changed grade was paid for from the general fund of the city, and warrants were issued on a special fund to be levied on the abutting owners for the other half of the contract price of the improvement. The city made an effort to raise a fund to pay these warrants by special assessment. This special levy, however, was enjoined by one of the property owners, for the reason that the petition was not signed by the owners of a majority of the feet frontage abutting on the grade. On a trial on the injunction it was made perpetual, for the reason that a number of the signatures on the petition were made by agents of the property owners without any authority to do so. These special fund warrants were registered for payment on October 27, 1899, and payment was refused for lack of funds. This action was instituted on November 25, 1903. The trial judge to whom the issues were submitted found against the city on the plea of limitations, but held that the contract was *ultra vires* and void. The defense of limitations was practically abandoned by the city

on the argument and in the briefs filed in this court. And we think that the ruling of the trial judge on this defense is fully sustained by the holding of this court in *City of Omaha v. Clarke,* 66 Neb. 33; *Rogers v. City of Omaha,* 75 Neb. 318.

The contention urged by the city here is that the contract for the grading was *ultra vires* and void, and, being void, it is incapable of ratification, and defendant is therefore not estopped to plead its illegality. On the other hand, the plaintiff contends that the contract was within the general powers conferred upon the municipality by the statute governing cities of the metropolitan class, and that the informality in the passage of the ordinance establishing the changed grade was a mere irregularity in the exercise of its powers actually conferred. That section 109, ch. 12*a,* Comp. St. 1897, in force at the time the grade was changed and the contract entered into, confers plenary powers on the mayor and council of the city in the matter of opening, grading, and repairing streets, alleys, and avenues, is without question; but the contention of the city is that so much of section 116, ch. 12*a,* Comp. St. 1893, as provides that "the grade of no street or part of a street shall be changed unless the consent in writing is first obtained of the owners of lots or lands abutting upon the street or part of street where such change of grade is to be made, who represent a majority of the feet front thereon, and not then until the damages to property owners which may be caused by such change of grade shall have been assessed," is a limitation on the general powers conferred. With reference to the limitation contained in section 116, *supra,* it is contended by plaintiff that it is confined to the right to levy a special assessment on property abutting on the changed grade, and is in nowise in derogation of the general powers conferred to open, widen, grade, and improve streets, alleys, and avenues, within the city. *Hurford v. City of Omaha,* 4 Neb. 336, cited by the city in support of its contention, was a case in which the objection was made to the special levy of an assessment for the cost

of the changed grade by an abutting property owner, and, so far as this right was concerned, it was held by this court that the provision of the statute requiring a petition signed by a foot frontage majority of the owners was mandatory. There is nothing in the opinion, however, that deals with the right of the city to change a grade or to enter into a contract for such purpose by general taxation. In *Goodrich v. City of Omaha,* 10 Neb. 98, the question raised was as to the power of the city to provide a fund for paying damages occasioned by a change of the established grade of one of its streets by special assessment, and it was held in this opinion that the damages occasioned by the changed grade must be paid from the general funds of the city, and not from a special levy on abutting proprietors. *McGavock v. City of Omaha,* 40 Neb. 64, involved the right of an abutting property owner to recover in an action at law for damages occasioned by a change in the grade of the street. In the opinion it is said:

"We have no doubt that the advisability or wisdom of the establishment or change of grades are matters for the city council to pass upon, and come wholly within their province, and cannot be questioned; but with the subject of damages others are concerned and must be considered."

Plainly, in the opinions just quoted from, the limitations are regarded as safeguards to property owners from special burdens, rather than as an attempted limitation of the general powers of the mayor and council over the streets and alleys of the city.

There is a clear distinction between contracts outside of the powers conferred upon municipal corporations and contracts within the general scope of the powers conferred, but which have been irregularly exercised. Contracts falling entirely outside of the powers delegated to the corporation are absolutely null and void, and no right of action against the corporation can be founded upon them. The rule with reference to the liability of the corporation on contracts within the general scope of the powers granted, but which have been irregularly exercised, is

well stated in 2 Dillon, Municipal Corporations (4th ed.), sec. 936, as follows: "A municipal corporation as against persons who have acted in good faith and parted with value for its benefit, cannot, * * * set up mere irregularities in the exercise of power conferred; as, for example, its failure to make publication in all of the required newspapers of a resolution involving the expenditure of moneys. Such failure might have the effect to invalidate a local assessment upon the abutter, * * * but as regards a *bona fide contractor with the city,* who had expended money for its benefit in respect of a matter within the scope of its general powers, the contract would not be *ultra vires* in the true sense of that term; and the city would be estopped to set up as a defense its own irregularities in the exercise of a power clearly granted to it." This doctrine is supported in an able and exhaustive opinion of the court of appeals of the state of New York, in *Moore v. Mayor,* 73 N. Y. 238, and is recognized by state courts generally. The principle has been recognized in this state in *Clark v. Saline County,* 9 Neb. 516; *Grand Island Gas Co. v. West,* 28 Neb. 852; *Second Congregational Church v. City of Omaha,* 35 Neb. 103; *Lincoln Land Co. v. Village of Grant,* 57 Neb. 70. In the latter case it is said:

"Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received."

The defense of payment by the delivery of the void warrants is not strongly urged in this court, nor would it profit much to urge it here. Had valid warrants been delivered against a fund created, a different proposition would be presented. But payment in void warrants is within the ban of the lesson taught by the Master, as recorded in the eleventh and twelfth verses of the eleventh chapter of the Gospel according to St. Luke, wherein it is said: "If a son shall ask bread of any of you that is a

father, will he give him a stone? Or if he ask a fish, will he for a fish give him a serpent? Or if he shall ask an egg, will he offer him a scorpion?"

For the above reasons, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, 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 be remanded for further proceedings according to law.

REVERSED.

O. O. HEFNER V. ED ROBERT.

FILED MARCH 22, 1906. No. 14,229.

1. **Contract:** TENDER: WAIVER. When no other place is specified in a contract for a tender, the law will presume that the tender should be made at the place of the contract; but an unconditional refusal to accept the tender at any place waives the necessity for a technical tender at the place of the contract.
2. **Tender, Withdrawal of.** Where a tender other than money is made, the tenderer must, if possible, keep the property in condition to make the tender good while an action for rescission is pending. If, after making the tender, he exercises acts of ownership over the property tendered, inconsistent with the theory that he is holding the property for delivery to the party to whom it was tendered, such conduct amounts to a withdrawal of the tender.

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

W. H. Pitzer, *William Hayward* and *Byron Clark*, for plaintiff in error.

John C. Watson and *E. F. Warren, contra.*

OLDHAM, C.

This is an action to recover on a written contract for the purchase of a horse, entered into between plaintiff and defendant, as follows: "Omaha, Neb., March 24, 1902. This contract entered into by and between Ed Robert, of Guthrie Center, Iowa, and O. O. Hefner, of Omaha, witnesseth as follows: That O. O. Hefner has this day sold the imported shire horse named 'Girton Royal Tom,' for the sum of $1,300, upon the following terms and divisions, payable, $800 in one coach horse, $100 cash in hand, and $400 due in one year, with six per cent. interest from date. This contract notes that the horse, 'Girton Royal Tom,' is blemished in hind leg. He further agrees that in case the horse does not recover from this affliction he shall be turned back to O. O. Hefner for $600 cash in hand and Ed Robert's note of $400 of even date herewith, due in one year at six per cent. It is further provided that if horse recovers from blemished condition of hind leg, then Ed. Robert shall pay to O. O. Hefner his promissory note of $400. O. O. Hefner, Ed. Robert." The petition sets up that, in compliance with the foregoing contract, plaintiff tendered back to defendant the horse described therein for the reason that the horse did not recover from the blemish mentioned in the contract, and that defendant absolutely refused to accept said horse, when so tendered. The answer, in substance, admitted the contract, denied the tender, and alleged that defendant was willing to rescind the contract, if plaintiff would fulfil the terms of the contract and redeliver the horse. Plaintiff, for reply to this answer, alleged that, after the tender of the horse and the refusal of the defendant to accept the same he had given the horse away because he was of no value. On issues thus joined there was a trial to a jury in the district court for Otoe county, a verdict for the plaintiff for the amount sued for, and a judgment on the verdict. To reverse this judgment defendant brings error to this court.

On the question of plaintiff's offer to rescind the con-

tract and tender back the horse, and defendant's unconditional refusal to accept such offer, there was a direct and sharp conflict in the testimony. But, as this question was properly submitted to the jury, we are bound, as a reviewing court, to accept the conclusion of the triers of the fact that the offer to rescind, for the reasons contained in the contract, was made by the plaintiff and unconditionally refused by the defendant. This determined question of fact disposes of the first contention urged in defendant's brief, which is that the tender should have been made at the place of the contract. It is urged by counsel for the defendant that, when no other place is specified for a tender as antecedent to the right of rescission, the law will presume that the tender should be made at the place of the contract. We have no quarrel with this suggestion, when modified by the further doctrine that, if an unconditional refusal is made to accept the tender at any place, it is not necessary to resort to the useless formality of a technical tender at the place of the contract.

But the serious, and we think fatal, objection to plaintiff's right to recover on a rescission of the contract alleged upon is the fact that, after having made a tender of the horse in controversy, and after having been notified of defendant's refusal to accept it, plaintiff, instead of keeping himself in position to make his tender good during the pendency of the action which he instituted against the defendant, converted the tender to his own use and disposed of it, as he alleges, by giving it away to another, so that, when the trial came to a final issue, he was unable to make his tender good. When his tender was refused, if plaintiff desired to rescind the contract, it was his duty to keep the tender good, that is, to keep the property in such condition, if possible, that it might be redelivered to the owner, when the cause was finally determined. In other words, he must, from the date of his tender, treat the property as though it belonged to the party to whom it was tendered. Any act of his inconsistent with this theory amounts in law to a withdrawal of the tender.

Hunt, Tender, secs. 448-454. *Curtiss v. Greenbacks,* 24 Vt. 536. Under this view of the case, we think that plaintiff is not entitled to recover on his petition for a rescission of the contract. He withdrew the tender by exercising acts of ownership over the horse after the tender. Having done this, he is not entitled to rescind, but must sue, if at all, for damages on the contract.

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

AMES and EPPERSON, 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 be remanded for further proceedings according to law.

REVERSED.

SAMUEL WILLMS, GUARDIAN, APPELLANT, V. GEORGE PLAMBECK, EXECUTOR, ET AL., APPELLEES.

FILED MARCH 22, 1906. No. 14,144.

1. **Wills: PROBATE: SETTING ASIDE: BURDEN OF PROOF.** In an action of an equitable nature to set aside the probate of a will on account of fraud, the burden of proof rests upon the applicant to show that the court admitting the will to probate was without jurisdiction, or that some wrong was committed in the proceeding, which amounts to a fraud, prejudicial to the rights of the applicant.
2. **Evidence** examined, and found insufficient to support the petition.

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

Jefferis & Howell, for appellant.

McCoy & Olmsted, contra.

EPPERSON, C.

On the 10th day of July, 1899, Peter Glandt, a citizen of Douglas county, who was then very sick and confined to his bed, executed an instrument afterwards admitted to probate as his last will and testament. He recovered from this illness, and for three years or more attended to the ordinary affairs of life. He died on January 22, 1903, leaving surviving him eight adult children, who are beneficiaries under the will, and three minor grandchildren, who were the only children of a deceased daughter. They, too, are beneficiaries under the will of their grandfather, but not to as great an extent as they would participate, had no will been made. Soon after his death a petition was filed in the county court of Douglas county for the probate of this will. Notice of this petition was published under the direction of the county court of Douglas county three successive weeks prior to the day of hearing in the Western Laborer, a weekly newspaper printed and published in said Douglas county. On the 3d day of February, 1903, the county court appointed for the three grandchildren a guardian *ad litem,* who on the same day filed a written acceptance of the appointment. On the 21st day of February, the time mentioned in said notice, the guardian *ad litem* appeared in the county court, filed his answer to the petition for probate of the will, denied that the alleged will was the last will and testament of said Peter Glandt, denied each and every allegation in said petition, and asked that the court require affirmative proof of all the matters set out and of the genuineness of said will. The county court received the evidence of but one of the three attesting witnesses, and admitted the will to probate. Subsequently, appellant was appointed guardian of the three grandchildren, and as such guardian, on the 16th day of July, 1903, instituted this action in the county court to set aside and annul the probate of the will. From the judgment of the county court an appeal was taken to

the district court for Douglas county, and a trial had, resulting in a dismissal of appellant's cause.

The action is equitable in its nature. In his petition appellant alleged that the notice for the probate of the will was published in an obscure paper, printed and published in the city of Omaha and circulating almost exclusively in the labor circles, and having no circulation in the vicinity where his wards reside; that the selection of the guardian *ad litem* was at the instigation of the proponent, and that the appointment prior to the completion of the notice was without jurisdiction and void; that the court had no jurisdiction to admit the will to probate as he did upon the evidence of only one of the three attesting witnesses, the guardian *ad litem* having filed his answer as above shown; and further alleged that said purported will, when the same was presented for probate, was mutilated and destroyed, in that a part of the fourth sheet constituting said will was torn off; that deceased had revoked and destroyed said will by erasing his name therefrom by running a heavy ink line through his name; and that he was the victim of undue influence exerted by some of his children, beneficiaries under said will; and also alleged that the guardian *ad litem* made no investigation concerning the execution of said will, nor the rights of said minors. The lack of diligence cannot be chargeable to these children, and it is unnecessary for them to tender an excuse for not appearing on the date of the probate of the will. Appellant does not state in his petition that the proceedings complained of were fraudulent. But the admission to probate of a will, which had, in fact, been mutilated or otherwise revoked, would have been a gross violation of the rights of the grandchildren. And for these reasons the petition stated a cause of action, and, had the evidence sustained such allegations of fact, the probate of the will should have been set aside and the children permitted to file objections.

The evidence presented by the appellant shows the will written upon several sheets of ordinary ruled paper. The

fourth sheet is shorter than the others, four lines at the bottom having been cut off after the same had been written. There is also a heavy ink line intersecting the lower portion of the letters forming the given name of the deceased and the first two letters of his surname. Upon these facts the appellant asks the court to find that said instrument was mutilated by the deceased, and that the ink line was drawn through his name for the purpose of canceling his signature and revoking said will. The evidence introduced by the appellees, however, shows to our satisfaction that the ink mark was placed upon said paper, prior to the signature of the deceased, as a guide line for him to follow in affixing his signature thereto. We are favored with the original will, which is presented in the bill of exceptions, and, also, by the original signature of the deceased to several checks, in which the same peculiarities exist. Appellees also present the testimony of the amanuensis, who testified that the fourth sheet of this will, when signed, was in the same condition as it now appears; that in preparing it he had written a provision which was objected to by the deceased, and to remedy the same, he had cut off the objectionable portion; and that the line intersecting the signature was drawn before the execution thereof as a guide line. The evidence fails to establish undue influence exercised by the children and beneficiaries of the deceased. To entitle the appellant to the relief sought, it is necessary to prove the facts alleged by a preponderance of the evidence. We do not mean to say that he must prove, by a preponderance of the evidence, facts sufficient to defeat the will upon contest, but the foundation of the action is the alleged irregularity in the probate proceeding. The burden of proof rested upon the appellant to show that the county court was without jurisdiction to admit the will to probate, or that some wrong was committed in the proceeding, which amounts to a fraud, prejudicial to the rights of his wards. Such alleged wrongs were prejudicial only in the event that the children had reasons for contesting their grandfather's will.

Appellant contends that he is required to make, in order to obtain a new trial, only a *prima facie* case, showing that reasons for a contest existed, and cites in support thereof *Ritchey v. Seeley,* 73 Neb. 164. The decision therein was upon matters occurring after judgment, and the rule there followed is not applicable to cases such as this. Counsel also cites *Western Assurance Co. v. Klein,* 48 Neb. 904, wherein it appears that the real ground for a new trial was the existence of some of the reasons specified in section 602 of the code. But before the applicant could avail himself thereof he should produce evidence to show at least a *prima facie* valid defense or cause of action. Substantially to the same effect it has been held that not only must the parties seeking to open a judgment show that irregularities occurred, but it is necessary to allege and prove a valid cause of action or defense, and to secure an adjudication that the cause of action or defense is *prima facie* valid. *Gilbert v. Marrow,* 54 Neb. 77; *Clark v. Charles,* 55 Neb. 202; *Delaney v. Updike Grain Co.,* 5 Neb. (Unof.) 579. In this case the alleged irregularities are not admitted by the appellees, and must therefore be proved, the same as any other allegation of fact, and, in addition thereto, the appellant must show some valid cause for the contest of the will and convince the court that the cause of contest is *prima facie* valid, or that sufficient grounds existed to refuse the probate of the will. The notice of the petition for probate was published under the direction of the county court, and no evidence is produced to show that such order was procured by the fraud of the interested parties. It was shown, however, that said paper did not circulate in the vicinity where the children resided; but such evidence was insufficient to impeach the notice thus published.

The guardian *ad litem* was appointed subsequently to the first publication of said notice and prior to the last, and this, appellant argues, was an irregularity sufficient to defeat the probate of the will. None of the interested parties have the right to name or dictate to the court the

appointment of a guardian *ad litem.* A mere suggestion, however, is not improper, and, unless evidence is produced showing the perpetration of some fraud or wrong by the guardian *ad litem,* the judgment of the court will not be set aside for a mere irregularity as to the time of his appointment. We agree with counsel that the duties of the guardian *ad litem* require the same energy and exertion in behalf of his wards, and demand the same skill and integrity, as though he had been acting under an express reretainer from a client; but such duties do not require him on the hearing to insist upon issues which have no foundation in law nor in fact; and by a careful examination of the evidence we fail to find where any duty has been neglected by the guardian *ad litem* in this case. The appellant's attorney, who ably presented this cause to the trial court, failed to produce evidence regarding the execution of the will, or the circumstances surrounding the making thereof, other than was presented to the county court upon the hearing of the petition for probate.

Appellant contends that, inasmuch as this guardian *ad litem* had filed the general denial and demanded proof of the due execution of the will, the court could not legally admit the will to probate upon the evidence of but one subscribing witness. The appointment and appearance of a guardian *ad litem* was not a condition precedent to the admitting of the will to probate, and it does not appear in the proof that the failure to call other attesting witnesses was prejudiced to the children.

The evidence produced upon the trial, in our opinion, did not support the allegations of the petition, and we recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

JOHN A. NELSON, APPELLANT, V. ISAAC SNEED, APPELLEE.

FILED MARCH 22, 1906. No. 14,224.

Highway: PRESCRIPTION. "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land." *Engle v. Hunt*, 50 Neb. 358; *Bleck v. Keller*, 73 Neb. 826.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Reversed with directions.*

W. F. Moran, for appellant.

John C. Watson, contra.

EPPERSON, C.

The plaintiff owns lot 12, in block 116, in Greegsport addition to Nebraska City. This lot is 120 feet north and south, and 48 feet east and west. Plaintiff brought this action in the district court for Otoe county to enjoin the defendant from trespassing upon this lot and lot 11 abutting it on the west, and from destroying plaintiff's fences and gates erected thereon. There was a judgment in the court below for defendant, and the plaintiff brings the case here on appeal.

Running north and south on the east side of lot 12 there was platted and dedicated to the public, several years ago, a highway, known as "Second Street," and abutting the lot on the south was a highway, running east and west, known as "Sixth Avenue." Three years prior to the filing of this suit plaintiff constructed, near the southeast corner of the lot, a gate in a line of fence running east and west. The evidence conclusively shows that the fence and gate are south of the south line of plaintiff's property, and clearly within Sixth avenue. The defendant claims that

for 14 years he and the public generally have traveled upon the road as it is now used by him, and which was obstructed by the aforesaid gate, and that the public had by ten years' user acquired a prescriptive right thereto. Prior to the institution of this suit plaintiff locked his gate and forbade the defendant going upon the premises. Defendant, believing the road he was accustomed to travel was a public highway, forcibly opened the gate and continued to use the road until enjoined.

The only question presented is whether the public has acquired a prescriptive right to the use as a highway of the strip of land upon which the defendant was accustomed to travel, by user thereof for a period of time sufficient to bar an action to recover possession thereof. The fact that the gate was situated upon property not belonging to the plaintiff, and the fact of its destruction by the defendant, we consider of no particular importance. Irregularity in the habits of the Missouri river is responsible for this trouble. When Greegsport addition to Nebraska City was platted about 40 years ago, the premises in controversy were at a distance of about 250 feet west from the west bank of the Missouri river. From time to time this wily stream encroached upon its bank until in the spring of 1898 it reached and submerged the greater portion of Second street, which abutted the plaintiff's lot. The evidence is undisputed that during all this time there has been used for travel, by those having occasion to pass plaintiff's property, a road along the west bank of the river, which would change as the river changed. This use was not by the public generally, and it seems it was limited to the defendant and one of his neighbors, and to others occupied in hauling ice or wood in certain seasons. There was no evidence that the road was ever worked by the city authorities, nor that Second street was ever used for travel until it became the west bank of the river. The road had no definite location, and there were no fences or other monuments indicating the lines of the alleged highway. The defendant testified that for fourteen years he had used the

driveway where it is now located. Many of his witnesses, however, and many of plaintiff's witnesses testified, and we think the proof clearly shows, that the road as now used through plaintiff's property was not used until 1898, when the travel was driven to the present location of the road on account of a sudden change of about 35 feet by the river to the west. Even had the defendant used a part of plaintiff's lot for 14 years, he failed to establish that such use was adverse to the occupancy of the plaintiff or his grantors, and that it was limited to a particular or defined way or track, without substantial change. It is a well established rule in this state that "to establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land." *Engle v. Hunt,* 50 Neb. 358; *Bleck v. Keller,* 73 Neb. 826.

There is some doubt as to how much of the road is upon the plaintiff's property. That it runs through the north part of the lot is not questioned. There is a conflict in the evidence of civil engineers as to the south part. This difference arises on account of an uncertainty as to the location of the line between lot 12 and Second street. It is peculiar that there should be a difference in the plats made by competent surveyors, but such is the case. One plat shows the east line of lot 12, 25 feet from the river, leaving a portion of the road in controversy east of lot 12. This plat was made by one who was not called to testify, but was verified by the testimony of a competent civil engineer who had measured the distances, but who fails to show that his survey was based upon any established monument. We accept as conclusive on this point the plat verified by the county surveyor which, though not very satisfactory, shows a survey made by the witness who took for his starting points the line of Second street north and south of the property in controversy. His survey shows that the high

land, or west bank of the river, begins at a point only four feet east of the southeast corner of plaintiff's lot, and continues in a northerly direction, bearing slightly to the west, extending west of the northeast corner of said lot, a distance of about 20 feet, the west bank of the river intersecting the east line of the lot at a point about midway. Substantially all of Second street east of lot 12 is submerged; and as the objectionable road is along the bank of the river, it necessarily traverses the plaintiff's property from north to south. From the proof we conclude that the use by the plaintiff and the public of the land in controversy had not been of such a character as to establish a prescriptive right thereto, and the prayer of the petition ought to have been granted.

We therefore recommend that the judgment of the district court be reversed, with directions to the court below to enter a decree granting the perpetual injunction asked by plaintiff.

AMES and OLDHAM, CC., concur.

By the Court: For reasons appearing in the foregoing opinion, the judgment of the district court is reversed and the district court directed to enter a decree granting the perpetual injunction prayed for by plaintiff.

REVERSED.

WILLIAM J. STAATS ET AL., APPELLANTS, V. STANLEY B. WILSON, APPELLEE.*

FILED MARCH 22, 1906. No. 14,237.

1. **Partition: JUDGMENT: RES JUDICATA.** The judgment of the court, unappealed from, in a suit for partition of real estate, fixing the shares of the interested parties and making partition of the land, is final, and the parties thereto are estopped from claiming a greater interest, even though the proceedings of the court were

*Rehearing allowed. See opinion, p. 210, *post*.

irregular and the shares of the parties determined according to the provisions of an unconstitutional act of the legislature.

2. Estoppel. A widow who succeeded to a homestead valued at $2,000, for the purpose of procuring the absolute title thereto, paid the heirs $666.66, which they accepted, believing that such payment vested the absolute title in the widow; the heirs retained the payments so made, and remained silent for more than ten years. *Held*, That the heirs are estopped from now asserting title to the homestead against the widow's grantee, who purchased in good faith.

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

John H. Barry and *Edwin Falloon*, for appellants.

C. Gillespie and *John Gagnon, contra.*

EPPERSON, C.

Christopher Hoagland died intestate in Richardson county in 1891, seized in fee simple of the northwest quarter of section 26, township 3, range 13, in said county. He left surviving him his widow and six sons and daughters, and the children of a deceased son. While the administration of his estate was pending, his widow filed her application in the county court of Richardson county for the appraisement of the homestead, as provided by section 30 of the Compiled Statutes of 1889. Appraisers were appointed by the court and filed their written appraisement of the southwest 40 acres of said land, which they valued at $2,000. On March 16, 1892, the widow filed her written acceptance of the appraisement, and paid to the administrator the sum of $1,000, being the excess of the appraised value over and above $1,000, which she evidently considered she was entitled to as her homestead interest. The administrator distributed to the heirs the $1,000 surplus paid by the widow, except one-third thereof, which the widow of said deceased claimed or deducted at the time of payment. On the 23d day of April, 1892, John C. Hoagland, one of the heirs at law of said deceased, instituted an action in the district court for Richardson county for the

partition of the entire quarter section of land. In this action all the necessary parties were joined, and personal service of summons was had upon Mary Staats and Sarah Staats, two of the children and heirs of said deceased.

To this petition the widow filed her separate answer, alleging the facts above set forth as to the appraisement of the southwest quarter of said 160 acres, and the payment by her to the administrator of the $1,000, and of her election to retain the homestead so appraised, claiming that it descended to her in absolute title, and that the court had no jurisdiction in that action over the said 40 acre tract. She further claims that, as widow of the deceased, she owned an undivided one-third of the balance of said land, and prayed for a judgment confirming her share, and asked that the same be set off to her. To this answer the plaintiff replied by general denial. Mary Staats and Sarah Staats made no appearance in said proceeding. Upon trial of that cause the court found that the southwest quarter of said quarter section of land was the homestead of the widow, and, as to the balance of said land, that the widow is the owner and entitled to the undivided one-third part, and that the children of said deceased were each the owner of a one-seventh part, and by his judgment confirmed the interest of the parties, respectively, and appointed referees to make partition into the requisite number of shares. Later the referees made their report, showing that they had made partial partition by allowing to the widow the southeast quarter of the northwest quarter of section 26, which was of no greater value than one-third the total value of the entire premises to be partitioned, and reported that the balance of said land cannot be partitioned without great prejudice to the owners thereof. The court confirmed this report and ordered the referees to sell the balance of said land as provided by law. This order was complied with, and the remaining 80 acres sold for the sum of $3,448, which sale was reported to and confirmed by the court November 30, 1892. The referees were di-

rected to make their deed to the purchaser and distribute the proceeds of the sale to the parties according to their respective shares. On the first day of March, 1894, the widow, by her warranty deed, conveyed to the defendant all of the land so claimed by her. It is apparent that the widow, the administrator, the heirs and the courts attempted to follow the provisions of the Baker act of 1889, which was by this court declared unconstitutional in the case of *Trumble v. Trumble,* 37 Neb. 340. The widow died in 1901.

On the 26th day of March, 1903, plaintiffs herein instituted this action in the district court for Richardson county for a partition of the said south half of said quarter section of land, so conveyed to the defendant by the widow, claiming each to own a one-seventh part thereof. They admit that the defendant owns the other five-sevenths, the other heirs having conveyed to him whatever interest they possessed. The plaintiff Sarah Staats claimed as heir and George F. Staats as the grantee of Mary Staats. The plaintiffs contend that the proceedings in the probate court and the early partition case were void and of no effect, because they were conducted under the provisions of the Baker act, which in the light of subsequent adjudication is known to be unconstitutional, and that they are entitled now to a division of the property, the same as though the former proceedings in partition and the attempted assignment of the homestead had never been had.

The defendant contends, among other things, that the rights of the widow, to which he succeeded, were adjudicated by a competent court, that the plaintiffs were estopped from claiming title to the land in controversy. The judgment of the lower court was for defendant, and plaintiffs appeal.

The rights of the parties hereto depend upon their conduct and the proceedings had, which differ as to the two tracts of land, the southwest quarter known as the homestead, and the southeast quarter assigned in the partition

case. The title of the widow to the southeast quarter, if any she had in addition to dower, was acquired by the assignment of the same to her in the partition case. In that case the court had jurisdiction over all of the interested parties. They, and none other, owned the property and were entitled to a partition thereof. The widow had a dower interest in and to the 120 acres of land. This should have been assigned to her. She claimed a greater interest, and asked the court to give her one-third absolutely; the plaintiffs herein, or those to whose title they succeeded, did not oppose the application of the widow. The court, being fully vested with jurisdiction, granted her petition, and set off to her in actual partition the 40 acres, being one-third of the land involved. The court found that she was legally entitled to the land assigned to her. The court therefore erred, and, had proceedings in error been prosecuted, the judgment would have been reversed. The court's jurisdiction did not depend on the unconstitutional Baker act. The judgment was not void, but erroneous. *Brandhoefer v. Bain,* 45 Neb. 781. It is not subject to collateral attack. By the judgment in that partition case the title confirmed in each of the parties thereto became *res judicata.* In other words, had the Baker act never existed, and had the court proceeded as it did, its proceedings would have been irregular and subject to reversal in a direct proceeding. In the absence of proceedings to review, its judgment would have stood as final, so far as it affected the parties thereto or their grantees. The fact that the legislature had passed a void act does not render the judgment less effective than it would have been had no such act been passed.

Plaintiffs contend that a judgment in partition proceedings is not final. Section 811 of the code, relating to actions in partition, provides—"After all the shares and interests of the parties have been settled * * * judgment shall be rendered confirming those shares and interests, and directing partition to be made accordingly." Section 839 provides: "When all the parties in interest

have been duly served, any of the proceedings herein prescribed shall be binding and conclusive upon them all." Section 840 provides: "The judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof, subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common." This language is so plain that no judicial interpretation is required.

As to the homestead forty, a different and more difficult question is presented. The proceedings for partition in which the homestead was mentioned did not finally dispose of same to the extent of adjudicating the rights of the plaintiffs herein. The records of the county court do not show an assignment to the widow, but show that the land of the deceased descended to the heirs, subject to the homestead of the widow. The defendant's grantor claimed the homestead as the widow of the deceased, and by reason of the payment of the $666.66 distributed to the heirs in payment for that part thereof which she thought she was not entitled to as widow. Her attempt to procure an assignment of the homestead and the payment of the $666.66 was prior to the early partition suit, which, as heretofore shown, disposed of the balance of the estate. That the deceased had a homestead interest in his land to which his widow succeeded there is no doubt. At the time she elected to take the 40 acre tract as her homestead and paid the surplus to the administrator, and upon payment of a share thereof to the said Mary Staats and Sarah Staats, each of them executed a voucher in which payment thereof was acknowledged as "the portion due me of the sum paid by Ella M. Hoagland, widow of said Christopher M. Hoagland, by reason of her election to retain homestead under and by virtue of section 30, chapter 23 of the Compiled Statutes of 1887, as amended by act of 1889, $95.23." Had the Baker act been constitutional, it would have vested title in the widow. The receipt of this fund by these heirs is not

denied, neither is it denied that they received their distributive share of the proceeds of the purchase price paid for the north half of the quarter section.

The conduct of the widow and the heirs regarding the homestead amounted to a partial parol partition of the land with owelty. Each was competent to contract and had an interest which she had a legal right to dispose of. The heirs accepted money advanced by the widow which otherwise they would not have received, and parted with title which otherwise they would have retained. Their conduct vested an equitable title to the homestead in the widow which, in our opinion, she could have confirmed by a proper proceeding in her lifetime. Parol partitions are unsatisfactory and should be discouraged, but, when indulged by one who retains the benefits thereof, and who acquiesces therein for a considerable time, operate as an estoppel. Freeman, Cotenancy and Partition (2d ed.), sec. 398; *Whittemore v. Cope,* 11 Utah, 344. The heirs knew that their mother, the widow, claimed absolute title. They received a just compensation for their interests. They stood by and saw the plaintiff take possession, and probably knew the terms of his purchase. The conscience of this court knows no rule that will permit them to recover.

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.

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

EPPERSON, C.

The facts in this case are stated in the former opinion reported *ante,* p. 204. A rehearing was granted, additional briefs filed and the case again argued orally.

1. Plaintiffs contend that in the partition case instituted by John C. Hoagland the court did not have the jurisdiction to set off to the widow the S. E. ¼ of the N. W. ¼ of the Hoagland land. It is admitted that the court had jurisdiction of the parties and the subject matter; but it is argued that the court had no jurisdiction to assign to the widow the 40 acres or one-third in value of all the land partitioned, when by law the widow was only entitled to a dower interest in the land. Such decree, it is argued, is null and void and may be attacked collaterally. Counsel cite *Cizek v. Cizek,* 69 Neb. 800, in support of their contention. It was there held:

"In a suit arising under the provisions of chapter 25, Comp. St. 1901, the district court has not jurisdiction to award real estate of the husband to the wife in fee as alimony, and a decree in so far as it attempts so to do is void and subject to collateral attack."

The *Cizek* case is not analogous to the case at bar. The statute giving the district court the power to grant alimony does not provide that real estate belonging to the husband may be set off to the wife as alimony or in lieu of alimony, and the question considered in *Cizek v. Cizek, supra,* was: "Is the power to give the husband's real estate to the wife by decree in a divorce suit implied in the power which the statute expressly confers to give alimony?" The order awarding specific real estate to the wife as alimony was held void and subject to collateral attack. It was a special matter not presented by the pleadings and foreign to the issues. In the Hoagland partition case, which is assailed in the case at bar, the only issue presented was the widow's right to have the 40 acres in controversy set off to her as her interest in her late husband's estate. The court had jurisdiction, under the statutes quoted in our former opinion, to ascertain and confirm the shares of the parties. Can it be said that by erroneously decreeing to her more than she was entitled to the court exceeded its jurisdiction? By the order confirming in the widow the 40 acre tract as her share, the court kept

within the issues raised by the pleadings and within the statute giving it power to order partition.

2. As to the homestead forty we see no error in our former opinion. The heirs received $666.66 for their interest in land worth $2,000. Their interest was subject to the widow's life estate. It is not shown that the amount received was inadequate. In *Wamsley v. Crook,* 3 Neb. 344, 352, it is said:

"It is a well settled rule of law that one cannot be permitted to receive both the purchase money and the land. And the application of this principle of estoppel 'does not depend upon any supposed distinction between a void and voidable sale. The receipt of the money, with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience and therefore binds the rights of the party in one case as well as in the other.'"

This case was cited with approval in *McMurtry v. Brown,* 6 Neb. 368; *Yanow v. Snelling,* 34 Neb. 280. Plaintiffs received their share of the $666.66 from the widow, who thought she was buying their interest. They thought they were selling, and they were. They never returned the purchase price. It is evident that the decree of the district court was right. Our former opinion affirming that decree should be adhered to, and we so recommend.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

OLIVE N. JUDKINS, APPELLEE, V. WILLIAM H. JUDKINS, APPELLANT.

FILED MARCH 22, 1906. No. 14,208.

Evidence examined, and *held* to support the decree entered.

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

H. M. Sullivan, for appellant.

J. R. Dean and *Aaron Wall, contra.*

DUFFIE, C.

The plaintiff filed her bill against the defendant and appellant claiming a divorce on the ground of cruelty. The defendant's answer is in the nature of a cross-petition, asking that he be divorced from the plaintiff. The court made the following finding: "The court finds that the conduct of each of the parties toward the other has been such that they are not entitled to relief by a court of equity. That neither of said parties has fulfilled the duties which rest upon them under and by virtue of their marriage relation, and that because of the ill treatment of each toward the other neither is entitled to the relief for which they here pray." A decree was entered dismissing both the plaintiff's bill and the defendant's cross-bill.

A careful reading of the evidence contained in a voluminous record leads us to believe that the decree was the only one which could be entered in the case. We are not entirely satisfied with the finding that the husband's conduct toward his wife is deserving of censure. It is evident that he was frugal and saving, and not as liberal in expenditures on account of his wife and family as his circumstances might justify. However, he provided her with such help as was necessary when it could be obtained, and lent his own assistance in the performance of her house-

hold duties. The wife appears to be what one of the witnesses denominates "a chronic complainer." She was dissatisfied with her surroundings, with the defendant's conduct and refusal to be more liberal in his expenditures of money, and evidently would not be satisfied with the most kind and liberal treatment. While this was the case, and while, so far as we can see, there was no occasion or excuse for her separating from her husband, she was not guilty of any act which under our statute entitled him to a divorce. While she had left his home without just cause, as we view the evidence, the desertion had not continued for two years when the cross-bill was filed. The case is an unfortunate one, but the evidence does not disclose sufficient facts upon which to grant relief to either party.

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.

BEAUFORD H. BUSH, APPELLANT, V. SPENCER G. GRIFFIN, ET AL., APPELLEES.

FILED MARCH 22, 1906. No. 14,141.

1. **Adverse Possession: EVIDENCE.** While the fact that one claiming title by adverse possession failed to pay taxes on the land during his occupancy would not of itself necessarily defeat his claim, it is entitled to weight as tending to show that he did not intend to claim title as against the rightful owner.
2. ———: ———. Where such occupant entered originally without color of title or claim of right, and the acts relied on to show entry and occupation were consistent with a mere intention to trespass from time to time until interfered with by the true owner, his testimony that he intended to take possession and hold and occupy as owner, uncorroborated by acts necessarily indicating such intention, is not sufficient to require a finding in his favor. *Knight v. Denman*, 64 Neb. 814.

3. Evidence examined, and *held* to bring the case within the foregoing rule.

APPEAL from the district court for Hayes county: HANSON M. GRIMES, JUDGE. *Affirmed.*

C. A. Ready, F. I. Foss and *R. D. Brown,* for appellant.

W. S. Morlan, contra.

ALBERT, C.

This suit was brought in March, 1903, to quiet the title to a quarter section of land in Hayes county, the plaintiff claiming title by adverse possession, the defendants tracing their title to a patent from the government. It appears in the evidence that the plaintiff settled near this land in 1886. At that time the land in question, as well as most of the land in that vicinity, was wild, a part of the public domain and open to settlement. Between that time and 1890 the plaintiff built and extended his fences so as to include a portion of the quarter section in dispute and other lands to which he had no title with his own. In 1889 one Marshall preempted this quarter section, and the following year proved up, made a loan on the land and left the country. The plaintiff afterwards, in the same year, extended his fences so as to include the entire tract, and has ever since been in possession using it in connection with other lands for grazing purposes. The plaintiff continued to extend the boundaries of his ranch, paying little or no attention to titles, so that at present it consists of almost 3,000 acres, of which the plaintiff can show paper title to less than 700 acres. The remainder belongs mostly to non-residents; a portion of it, however, is still government land. The loan made to Marshall was foreclosed and the land sold in pursuance of the decree, and the sheriff's deed based on such sale, and under which the defendants claim title, was executed on the 14th day of November, 1892. The plaintiff was not a party to the foreclosure suit.

With the exception of one year, 1902, the plaintiff paid no taxes on the land. He took possession under no claim of right. As we have seen, he was in possession of a portion of the land when Marshall preempted it. The record shows that he recognized Marshall's right to preempt the land, as well as Marshall's title acquired by virtue of the preemption. At the time he extended his fence so as to take in the whole tract, which was after Marshall had left, he made no claim to the land. His examination at this point is, in part, as follows: "Q. After Marshall (the man who preempted the land) proved up and went away you put the whole fence around the quarter, did you? A. I moved the fence out of the cañon, and moved it on the line (taking in the whole tract). Q. And took it inside of your ranch. Just before Marshall went away did you say anything to him about fencing this land in? A. No, I never asked him anything about fencing it. Q. Never asked him anything about it? A. Never did. Q. When you fenced it in what title did you claim at that time? A. I didn't claim any title. Just fenced it in. Q. When you fenced it in you didn't claim any title? A. No, sir. Q. When was it you did claim title to it? A. I have been claiming it as my pasture ever since I fenced it. Q. You didn't claim any title to it when you fenced it? A. Not before I fenced it, but after I *fenced* it I did. Q. By what right did you claim it at that time? A. Well, adverse. Q. What right did you claim to have to it? A. I didn't claim I had any right at all, only I just fenced it. Q. The facts are Marshall went away, and there was nobody living there, and you thought you would fence it in? A. That is it. Q. And you kept it fenced ever since? A. Yes, sir. Q. You never paid anybody anything for it? A. I never paid anything only some taxes."

From the evidence just quoted, taken in connection with the facts hereinbefore stated, it seems clear to us that the purpose of the plaintiff in taking possession of the land was not to hold it as against the rightful owner, but merely

to use it, as he was using other lands in which he had no claim or color of title, as long as he could without interference from the owner. We have seen that he inclosed and used government land in the same way. He certainly asserted no claim or title to such lands, but stood ready to surrender possession to any one claiming under the government, just as he surrendered that portion of the land in question which he had previously inclosed to Marshall, when the latter preempted it in 1889.

Another thing that inclines us to this view is that for more than ten years after taking possesion of the land he paid no taxes. While that fact of itself would not defeat his claim of title by adverse possession, still it is of weight as tending to show that he did not intend to claim title as against the rightful owner. As was said in *Todd v. Weed,* 84 Minn. 4:

"The land, being a government subdivision, was presumably taxed separately from other lands, but defendant never paid the same. On the contrary, they were annually paid by plaintiff or his predecessor in title. The failure to pay taxes is, of course, not conclusive against the person claiming title by adverse possession. But such failure, where the land is assessed separately, is strong and forcible evidence that the possessor did not intend to claim title adversely to the owner. * * * If the payment of taxes tends to show an intention to claim title—and clearly it does—the failure to pay them would *a fortiori* tend to show the converse of the proposition."

It appearing, then, that the plaintiff took and retained possession without any claim of right or color of title, and with no intention of holding it as against the owner, but merely to use it for his own purposes as long as he could, the case falls within the rule announced in *Knight v. Denman,* 64 Neb. 814:

"Where such occupant entered originally without color of title or claim of right, and the acts relied on to show entry and occupation were consistent with a mere intention to trespass from time to time until interfered with by

the true owner, his testimony that he intended to take possession and hold and occupy as owner, uncorroborated by acts necessarily indicating such intentions, is not sufficient to require a finding in his favor."

The opinion from which the foregoing is taken is by Commissioner POUND, and contains not only an exhaustive review of the authorities on the question under consideration, but clear and cogent reasoning in support of the rule stated. The plaintiff, however, insists that the facts in that case are, in many respects, different from those in the case at bar. They are; and it may be said that two cases seldom involve precisely the same state of facts. But that does not destroy the value of the former as a precedent as long as they have enough facts in common to furnish the essential elements of some rule announced in the one and invoked in the other. The facts in this case cover every essential element of that rule and bring the case, it seems to us, squarely within it. The decree seems to be fully justified by the record, and it is recommended 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.

BEAUFORD H. BUSH, APPELLANT, V. HENRY BROWN ET AL., APPELLEES.

FILED MARCH 22, 1906. No. 14,142.

Case Followed. This is a companion case to *Bush v. Griffin, ante*, p. 214, decided at this sitting, and is governed by the same rules.

APPEAL from the district court for Hayes county: HANSON M. GRIMES, JUDGE. *Affirmed.*

C. A. Ready, F. I. Foss and *R. D. Brown,* for appellant.

W. S. Morlan, contra.

ALBERT, C.

This is a companion case to *Bush v. Griffin, ante,* p. 214, and was submitted at the same time on the same briefs. While a judgment of affirmance in this particular case might be placed on other grounds, it is also governed by the rule applied in that case, hence, a discussion of other features is not required.

It is recommended that the decree 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.

MATTHEW GERING V. SCHOOL DISTRICT.

FILED MARCH 22, 1906. No. 14,170.

1. Compromise: CONSIDERATION. A compromise, whereby one party agrees to pay and the other to receive a certain sum in satisfaction of a doubtful claim, rests upon a sufficient consideration.
2. ———: ———. But if the claimant, knowing that his claim is groundless, forces the other party to a compromise by threats of suit, there is no consideration and the compromise will not be enforced.
3. ———: ———. Forbearance to prosecute proceedings for the reversal of a judgment is a sufficient consideration for a compromise, and, unless the good faith of the claimant in pressing his claim is put in issue, whether he intended to prosecute such proceedings is immaterial.
4. Judgment: RES JUDICATA. One of the essentials of a judgment offered in support of a technical plea in bar is that it was rendered in a suit involving the same subject matter as that in which the plea is interposed, and, lacking that element, it is not available in support of such plea.

5. ———: ———. Where the second action is on a different claim or demand, the judgment in the former operates as an estoppel only as to those matters in issue upon the determination of which the judgment was rendered.

6. ———: ———: BURDEN OF PROOF. In such cases the rule is that, if there be any uncertainty in the record as to the issues actually tried or adjudicated in the former suit, the whole subject matter of the action will be at large, unless the uncertainty be removed by extrinsic evidence, and the burden of proof is upon the party relying upon the estoppel to show that a question raised in the present suit was litigated and determined in that in which the judgment was rendered.

7. Action: COMPROMISE; INTIMIDATION: EVIDENCE. In an action upon the promise of a school district to pay a certain amount in composition of a doubtful claim, one of the defenses was that the claimant secured the adoption of a resolution for the compromise by threats and intimidation, and there is evidence tending to support such defense. *Held*, That evidence as to his reputation in the vicinity, as to being peaceable or otherwise, was properly received.

8. Declarations of parties made at a meeting where such resolution was adopted, tending to show that they were intimidated and for that reason left the meeting and refrained from voting on the resolution, are properly receivable in evidence as a part of the *res gestæ*.

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

A. N. Sullivan and *Jesse L. Root*, for plaintiff in error.

Byron Clark, contra.

ALBERT, C.

From July, 1894, to July, 1897, C. Lawrence Stull was treasurer of defendant school district. At the close of his term he attempted to retain certain funds of the district to pay himself for labor performed for the district and interest paid on its registered warrants. Stull and his surety were sued for funds thus retained. A counterclaim and set-off for the amount of Stull's claim was interposed. In the district court Stull confessed

and paid judgment for the amount of the defendant's claim. The costs accrued to that time amounted to $32.79. Immediately thereafter the suit proceeded on Stull's claim against the district, terminating in a verdict for defendant. The costs incurred in that contest amounted to $158.84. June 1, 1899, a motion for a new trial was overruled and judgment rendered on said verdict. The annual meeting of the electors of defendant district in 1899 was held June 26. There was presented to and adopted by said electors a resolution reciting the litigation between defendant and Stull and instructing the school board of defendant to settle with said Stull by paying him the sum of $61.25 and all the costs in said suit. Mr. Stull thereupon forbore to prosecute error proceeding to this court, and thereafter the moderator and director of the district executed a warrant for the sum of $252.88, including therein, not only the $61.25 due Stull, and the costs of the action, $158.84, which Stull had not paid, but the $32.79 adjudged against Stull at the time he confessed judgment in favor of the district. The treasurer refused to pay or register this warrant. Stull sought to compel by mandamus the registration of said warrant. The court refused the writ, because the warrant was for a greater sum than the district was liable for under its settlement, and because Stull had not paid the $158.84. Thereafter, to prevent sale of his property on execution, Stull paid the costs, $158.84, the district was to pay, and the $32.79 he was liable for. A second mandamus suit was disposed of, because the district had not authorized a warrant in the sum of $252.88. Stull thereafter became indebted to plaintiff, and sold and assigned to him his claim against defendant. In the county court Judge Douglass rendered judgment in favor of Mr. Gering. In the district court one jury disagreed, but at the November, 1904, term of said court a verdict was rendered in favor of the school district. The petition embraces the facts just stated, and prays judgment against the defendant school district.

Among other matters set up in the answer are the following: "Defendant further denies that at the time the alleged resolution was pretended to have been passed there was any school district meeting or election of said district in session; but in this alleges that said school district meeting, by reason of the threats and intimidations of said Stull, was adjourned, and a majority of the electors had returned to their homes through fear; * * * and that, if any such resolution was passed, it was passed after said meeting had adjourned and said electors were driven away by the actions of the said Stull and others with him, and that said resolution was never adopted or passed by said district, or a majority of the lawful electors thereof, either at said meeting or at any other time." The defendant also pleads an estoppel based on the two judgments in the proceedings in mandamus. The cause was tried to a jury, who returned a verdict for the defendant. The plaintiff prosecutes error.

From the foregoing statement it will be seen that the consideration relied on by the plaintiff to support the alleged settlement between Stull and the school district was the abandonment of his right to prosecute error to this court from the judgment dismissing his action against the district, and for costs, rendered in the district court for Cass county on the 1st day of June, 1899. The court instructed the jury that there were five issues of fact involved in the case, and which they were called upon to determine, and that the burden of proof was upon the plaintiff to establish each of such issues by a preponderance of the evidence. One of such issues was thus stated by the court in its instructions to the jury:

"Was C. Lawrence Stull, on or about the 26th day of June, 1899, intending and preparing to have reviewed in the supreme court of Nebraska, in the ordinary manner, a judgment rendered against him in the district court for Cass county, Nebraska, June 1, 1899, in which case the said Stull was plaintiff and school district 28 in Cass

county, Nebraska, was defendant?" It seems clear to us that the trial court erred in submitting the foregoing question to the jury. It is well settled, in fact is elementary, that the compromise of doubtful claims is valid, the mutual release of their respective rights by the parties and the avoidance of the expense and annoyance of litigation being a sufficient consideration for the composition. But it is also elementary, that to render such compromise valid the parties must concur in supposing the right to be doubtful, for if the claimant, knowing his demand to be groundless, forces the other party to a settlement by threats of suit the compromise will not be upheld. *Fitzgerald v. Fitzgerald & Mallory C. Co.*, 44 Neb. 463; *Prater v. Miller*, 25 Ala. 320, 60 Am. Dec. 521; *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453; *Tucker v. Ronk*, 43 Ia. 80. If Stull's *bona fides* in asserting his claim against the school district had been put in issue, we can readily see, in the light of the foregoing rule, how his intentions with respect to prosecuting an appeal would be material. But no such theory was submitted to the jury; that is to say, no instructions were given covering the theory that his claim was groundless, and that he, knowing it was groundless, forced a compromise by threats of further litigation. In fact, in more than one instruction the court recognized Stull's forbearance to prosecute error as a sufficient consideration to support the compromise contemplated by the resolution adopted at the school meeting. But in each of such instructions the jury were told in effect, that the validity of the compromise would depend on whether at the time, Stull intended and was preparing to prosecute error from the judgment. We are unable to see how his intentions or his preparations to prosecute error could be material in such circumstances. At the time the compromise was made Stull had a right to institute proceedings for a reversal of the judgment. It is elementary that if a person has a right at law his forbearance to institute legal proceedings to enforce or protect it is a valid consideration and sufficient to support a composition. The right

to have a judgment against him reviewed in an appellate court was a legal right, and forbearance to institute proceedings for that purpose was a valuable consideration. *Read v. French,* 28 N. Y. 285; *Russell v. Daniels,* 5 Colo. App. 224; *Matthews v. Merrick,* 4 Md. Ch. 364. The consideration for the compromise was the forbearance of his right to prosecute error, and not the abandonment of an intention to do so. A party may in good faith assert a claim against another for damages for breach of contract. If both concur in the belief that it is a doubtful claim, it will support a compromise, although the party asserting the claim may have had no intention of resorting to an action to enforce it. The value of a consideration does not always consist of its value to the party who surrenders it, but sometimes consists wholly of its value to the party to whom it moves. In this case, while Stull may have had no intention of carrying the litigation to this court, yet the defendant had a perfect right to protect itself against a change of his intentions in that regard, and assure itself beyond a peradventure that the litigation was ended. For these reasons, we think the district court erred in submitting the question of Stull's intentions with respect to instituting proceedings for the reversal of the judgment to the jury.

But the defendant contends that the plaintiff must fail in any event, for the reason that he is concluded by the judgments rendered in the two proceedings in mandamus instituted by Stull, his assignor, because, as he asserts, the issues in those cases were precisely the same as those raised in this action. The argument upon this branch of the case is somewhat confusing because of the failure to distinguish between a judgment urged as a technical bar to another action and one that is urged merely as conclusive upon the parties as to one or more of the issues involved. This distinction is made clear in *Cromwell v. Sac County,* 94 U. S. 351, quoted at some length in *Hanson v. Hanson,* 64 Neb. 506, and is recognized by all text writers. Without stopping to enumerate all the essentials

of a judgment which will constitute a technical bar to another action between the same parties or their privies, it may be said that all writers agree that there must be an identity of subject matter; that is, the subject matter of the suit in which the judgment was rendered, must be the same as that involved in the suit in which the judgment is urged as a bar. *Hamilton Nat. Bank v. American L. & T. Co.*, 66 Neb. 67, 82, and authorities cited. But, where the second action is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the judgment was rendered. *Cromwell v. Sac County, supra*, and *Hanson v. Hanson, supra.*

In the present case, the plaintiff's claim is based on a contract. His two applications for a writ of mandamus were based on the alleged refusal of the respondents to perform a plain ministerial duty. It is quite clear therefore that the subject matter involved in those proceedings was different from that involved in the case at bar, and that the judgments rendered therein are not available in support of a technical plea in bar of this suit. Those judgments, then, if available to the defendant in this case for any purpose, are available only to the extent that some material issue was litigated and determined in one or both of those actions, and as to any such issue the judgment or judgments by which it was determined are conclusive upon the parties. But, from an examination of the record in the two mandamus cases, it is impossible to determine upon what grounds the applications were denied. From the pleadings it is clear that some of the issues raised are identical with some of those raised in the present action. But in addition to such issues there was involved in each application the further issue whether the respondents were in default of an official duty which the court would enforce by mandamus. From the nature of the pleadings the applications might have been denied for reasons in nowise affecting the merits of the present cause; for example, on the grounds alleged in the petition

filed in this case. The rule is that, if there be any uncertainty in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which judgment was rendered, the whole subject matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined. *Russell v. Place,* 94 U. S. 606; *Lewis v. Ocean N. & P. Co.,* 125 N. Y. 341; *Bell v. Merrifield,* 109 N. Y. 202, 4 Am. St. Rep. 436; 1 Freeman, Judgments (4th ed.), sec. 276; *Belleville & St. L. R. Co. v. Leathe,* 84 Fed. 103; *Geary v. Bangs,* 138 Ill. 77; *Augir v. Ryan,* 63 Minn. 373. The burden of showing that a question raised in the present suit was litigated and determined in the former trial is upon the party alleging it. *Ryan v. Potwin,* 62 Ill. App. 134; *Zoeller v. Riley,* 100 N. Y. 102, 53 Am. Rep. 157. The record utterly fails to show that any of the material issues involved in this case were determined in the mandamus proceedings. It follows, then, that the judgments rendered upon those applications not only constitute no bar to this action, but are not, upon the record presented, conclusive upon any of the issues involved.

Complaint is made because the court, over defendant's objection, admitted evidence to the effect that Stull had a reputation in the neighborhood where he resided for being of a quarrelsome disposition. One of the theories of the defense was that Stull, plaintiff's assignor, and others instigated by him, in order to secure the adoption of the resolution for the compromise of Stull's claim against the school district, so conducted themselves at the school meeting as to raise a reasonable apprehension that opposition to the resolution would result in a breach of the peace on their part, and, in consequence, that a large number of the electors, some of whom were women, left the meeting before a vote was taken on the resolution, which would have been defeated but for such intimidating tactics. There may be some doubt whether the answer presents

the foregoing theory of the defense. But we are not required to pass upon that question. Neither do we care to embarrass the parties in the future progress of the litigation by any expression of opinion as to the sufficiency of the evidence to warrant a submission of that theory to the jury. But, assuming the sufficiency of the answer in that regard, and that the evidence tends to show that Stull and his followers thus conducted themselves, then, evidence as to his reputation, as to being peaceable or otherwise, would tend to show the effect of such conduct on the minds of the electors, and for that purpose such evidence was properly received. Counsel assert that evidence of that character is never admissible in a civil action. That is a mistake. In *Golder v. Lund* 50 Neb. 867, this court said:

"We can certainly see no reason why it is not proper, in support of such a defense, to make proof of the plaintiff's character in a civil action for assault and battery as much as in a prosecution for homicide; but in such cases the proof must be of the plaintiff's general reputation."

Complaint is also made because the court received evidence of statements made by some of the electors upon leaving the meeting as to their reason for leaving, to the effect that they were leaving because they expected trouble over the resolution. It is argued that such statements are self-serving declarations and hearsay. But the statements were made at the meeting by electors who were a part of the meeting. They appear to have been made spontaneously, and, in view of the theory of the defense above stated, were properly received, we think, as a part of the *res gestæ*. In *Mathews v. Great N. R. Co.,* 81 Minn. 363, where declarations of a party as to his reason for going to a certain place were received in evidence, the court, in passing upon the competency of such evidence, said:

"The evidence was competent, for it falls within the rule that when it is material to show the purpose or reason

for the departure of a person, or of an act done by him, his declarations of his purpose, or reason for so doing, made at or about the time he acts, if made in a natural way, and without any circumstances of suspicion, are admissible as original evidence." Citing 1 Greenleaf, Evidence (16th ed.), secs. 162*d*, 162*e*; *State v. Hayward*, 62 Minn. 474; *O'Connor v. Chicago, M. & St. P. R. Co.*, 27 Minn. 166; *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. Rep. 909; *Commonwealth v. Trefethen*, 157 Mass. 180.

Other questions are discussed, but the probablity that they will arise upon another trial is too remote to justify discussing them at this time.

For the error in the charge to the jury hereinbefore pointed out, it is recommended that the judgment of the district court be reversed and the cause remanded for a new trial.

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 a new trial.

REVERSED.

EDITH M. WILLITS, APPELLEE, V. LEE C. WILLITS, APPELLANT.*

FILED MARCH 22, 1906. No. 14,180.

1. **Marriage Contract.** While our law defines marriage as a civil contract, it differs from all other contracts in its consequences to the body politic, and for that reason in dealing with it or with the status resulting therefrom the state never stands indifferent, but is always a party whose interest must be taken into account.
2. **Marriage: VALIDITY.** A marriage, where one of the parties is under age of consent, but who is competent by the common law, is not

*See order as to attorney's fees, p. 235, *post*.

void, but merely voidable, and until annulled by a court of competent jurisdiction is valid for all civil purposes.

3. ———: ANNULMENT: SUPPORT OF OFFSPRING. A court annulling a marriage at the suit of a husband who was under the age of consent when the marriage was solemnized may require him to pay a reasonable amount for the support and nurture of the issue of such marriage.

4. **Suit Money:** EXPENDITURES. In such case the court may also require the husband, if the circumstances of the party warrant it, to pay reasonable suit money to enable the wife to make a defense, and to reimburse her for expenditures on behalf of the family during the existence of the marriage relation.

5. **Suit money** may be allowed, in the sound discretion of the court, at any stage in the litigation and may be included in the final decree.

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

Flansburg & Williams, J. G. Thompson and *Gomer Thomas,* for appellant.

W. S. Morlan and *R. L. Keester, contra.*

ALBERT, C.

The petition on which this cause was submitted is substantially as follows: That on the 15th day of November, 1903, the plaintiff and defendant were married in Harlan county, Nebraska, and immediately thereafter the defendant without just cause or excuse abandoned the plaintiff, and has ever since neglected to contribute any sum whatsoever for her support and maintenance; that on the 30th day of June, 1904, the plaintiff gave birth to a male child, the issue of the defendant, which is in her custody. That the plaintiff is in ill health, and without means of support for herself and the child, and without the necessary means of prosecuting the suit; that the defendant is the owner of a large amount of real and personal property, of about the value of $40,000, and that his income therefrom and his earnings amount to at least $5,000 a year.

The prayer is for a reasonable allowance for the support of herself and child, and for such other relief as may be deemed equitable.

The answer admits the marriage between the parties and the birth of the child. By way of a cross-bill the defendant alleges that on the evening of the marriage between himself and the plaintiff he called upon the plaintiff at her father's house, whereupon the plaintiff's father accused the defendant of being the father of the plaintiff's unborn child, and threatened him with bodily injury unless he, at once, contracted a marriage with the plaintiff; that the defendant, believing that he was in danger of death or great bodily injury, and influenced by such fears, was then and there induced to contract a marriage with the plaintiff; that immediately after the marriage ceremony was performed he left the plaintiff, and that they never cohabited together as husband and wife. The defendant further alleges that at the time the said marriage was contracted he was under the age of 18, being only 17 years, 4 months and 11 days old, and that the plaintiff was over the age of 18 years. The defendant's guardian, upon order of the court, was joined as a party defendant.

The court made no finding on the question of duress, and while it is quite clear from the evidence that the defendant in contracting the marriage was influenced somewhat by fears of a prosecution for bastardy, those fears were born rather of a consciousness of guilt than of any threats made by the plaintiff's father. In other words, we think the evidence justifies a finding that the defendant contracted the marriage in the hope of escaping a prosecution for bastardy, and not because of any fear of the plaintiff's father or other relatives. The court found, as was necessary in view of the evidence, that the defendant at the time of the marriage was under the age of 18 years, and entered a decree annulling the marriage, but requiring the defendant to pay plaintiff the sum of $150, which she had expended for lying-in expenses and for the support of the child up to the commencement of the suit, and that he

provide for the support of the child, as follows: $150 a year for the period of five years from the date of the decree; the sum of $120 a year for the next five years, and the sum of $100 a year for the next four years, should the child live so long. The court further ordered that the defendant should pay the further sum of $100 as suit money for the benefit of the plaintiff's attorneys, and all costs. Defendant appeals.

The defendant takes the ground that, the court having found that he was under the age of 18 years when the marriage was solemnized, and entered a decree of annulment, the decree relates back to the date of the marriage, and places him in precisely the same position with respect to his liability to the plaintiff and for the support of the child that he would have occupied had the marriage never been contracted. In other words, his contention amounts to this, that by virtue of such finding and decree the plaintiff was never his wife, and the status of the issue of the marriage is merely that of an illegitimate child of the plaintiff and, consequently, he is required to provide for neither of them, either *pendente lite* or otherwise. This position seems to be untenable. While our law (Comp. St. 1905, sec. 1, ch. 52) defines marriage as a civil contract, it differs from all other contracts in its far reaching consequences to the body politic, and for that reason in dealing with it or the status resulting therefrom the state never stands indifferent, but is always a party whose interest must be taken into account. There can be no doubt that a decree of annulment leaves the parties in many respects as though the marriage had never taken place; in just what respects is not necessary to determine at this time. But a marriage, where one of the parties is under the age of consent, but who is competent by the common law, is not void, but merely voidable. Comp St. 1905, sec. 2, ch. 25. It is valid for all civil purposes, until annulled by a judicial decree. *State v. Lowell,* 78 Minn. 166, 79 Am. St. Rep. 358 (extended note); *Gathings v. Williams,* 5 Ired. (N. Car.) 487, 44 Am. Dec. 49, and notes.

We cannot overlook the fact that during the period of the recognized validity of such a marriage the rights of third parties—children who are the issue of what at the time was a lawful relation—frequently intervene, and that such rights would be prejudiced by placing the parties to the marriage contract in precisely the same position they would have occupied but for the marriage. There would be neither reason nor justice in a rule that would visit the consequences of a mutual indiscretion exclusively upon the wife. This case illustrates the iniquity of such a rule. The defendant is a young man of considerable fortune, and one whose age, judging from the evidence before us, cannot be accurately measured in years. The plaintiff is a young woman entirely without means of support. They are the parents of a child, born while the marriage was merely voidable. The plaintiff now addresses a prayer to the conscience of the court for an annulment of the marriage, a release from his liability for the support of his child, and incidentally, that the whole burden of its support and nurture be cast upon the shoulders of the plaintiff. Such a prayer does not appeal very strongly to the enlightened conscience of this age. It is in sharp conflict with the maxim, "He who seeks equity must do equity," as well as with sound public policy, which requires courts jealously to guard the rights of infants and take due precautions to prevent their becoming a public charge. It would seem that the lawmakers foresaw such contingencies and undertook to provide against them by the enactment of section 15, ch. 25, Comp. St. 1905, which is as follows: "Upon pronouncing a sentence or decree of nullity of a marriage, and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper, concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain." The foregoing section is sufficient in itself, we think, to

justify a decree requiring the father of a child to provide for its support in cases of this character.

But the defendant contends that the allowance of $150 to the plaintiff for her own use and $100 for suit money is wholly unauthorized. So far as the suit money is concerned the defendant takes the position that, because the wife's suit was not brought for a divorce, but merely for maintenance, she is not entitled to suit money. Whatever the rule may be with regard to an allowance for suit money in an action brought merely for maintenance, it is well settled that in an action by the husband to annul a marriage the wife is entitled to alimony *pendente lite* and counsel fees, and the fact that the defendant proceeds by cross-petition instead of an original suit does not change the rule. See *Eliot v. Eliot,* 77 Wis. 634; *Wabberson v. Wabberson,* 57 N. Y. Supp. 405; *Higgins v. Sharp,* 164 N. Y. 4; *Allen v. Superior Court,* 133 Cal. 504; *Arey v. Arey,* 22 Wash. 261. It is intimated that the statute contemplates the allowance of alimony *pendente lite* before the final decree in the district court, and that a provision therefor in the final decree is erroneous. A different rule was announced in *Brasch v. Brasch,* 50 Neb. 73, where the court said:

"What sum a husband may be required to pay to his wife for her support during the pendency of a divorce suit, for her reasonable and necessary expenses in prosecuting or defending the action and for counsel fees and when such sums shall be paid—*i. e.,* whether before the final hearing of the action and as a condition precedent to the right of the husband to further prosecute or defend—are matters entirely within the discretion of the district court; and it is equally within the discretion of that court to postpone until the final hearing of the case the allowance, if any, made the wife for expenses and counsel fees in prosecuting or defending the action, and to render a judgment or decree against the husband at the time of disposing of the suit for such sum as appears to be reasonable and necessary; and the allowance made

by the district court for the temporary support of the wife or for expenses and attorney's fees will not be disturbed, unless it appears that the court has abused its discretion."

As to the allowance to the plaintiff of $150 for her own use it appears to have been made for the reason that she has incurred indebtedness to that amount "in the maintenance and support of the child and lying-in expenses." As before stated the marriage was valid until anulled by the court. Until it was annulled, therefore, the defendant was liable for the expenses of his family and the support and maintenance of his child. The expenses on which the court based the allowance of $150 were a part of the family expenses. In other words, the plaintiff had incurred indebtedness to the amount of $150 to defray expenses for which the defendant was liable. It does not seem at all unreasonable that the court in severing the relations between the parties should make provision whereby the defendent would be required to reimburse her or to relieve her from the burden of such indebtedness.

The plaintiff also complains of the decree because, as she insists, the allowance for the support of the child is insufficient and because of its omission to provide for permanent alimony. So far as the allowance for the support of the child is concerned, it is subject to revision from time to time (Comp. St. 1905, sec. 16, ch. 25), and we think, for the present, it should be permitted to stand. As to the claim for permanent alimony, such alimony is allowed in divorce proceedings in lieu of the common law right of support. *Greene v. Greene*, 49 Neb. 546, and citations. To support his wife is one of the obligations assumed by the husband by virtue of his marriage contract, and where, as in this case, the marriage is voidable, a release from such obligation is a part of the relief sought by the husband in a suit to annul the marriage. Permanent alimony is a statutory innovation, and we find no statutory authority for its allowance in a suit brought to annul a voidable marriage.

In our judgment the decree, in view of all the circumstances, is in no respect erroneous, and we 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.

The following order was entered April 5, 1906:

ALBERT, C.

The motion made in this court for an allowance to the plaintiff for suit money was not called to our attention, either by brief or otherwise, and for that reason was not considered in the original opinion. Subsequently, our attention was called thereto and a further hearing had. We have no doubt that the plaintiff is entitled to a reasonable allowance for attorneys' fees for the services of her attorneys in this court, and are of the opinion that an allowance of $100 therefor would be reasonable.

It is therefore recommended that the plaintiff be allowed the sum of $100 as attorneys' fees for the services of her attorneys in this court and that the same be taxed as part of the costs in this court in favor of her attorneys.

JACKSON, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the plaintiff be allowed the sum of $100 as attorneys' fees for the services of her attorneys in this court, and that the same be taxed as part of the costs in this court in favor of her attorneys.

MARY FITZGERALD V. KIMBALL BROTHERS COMPANY.

FILED MARCH 22, 1906. No. 14,235.

1. **Principal and Agent:** EVIDENCE. The declarations of an alleged agent are not admissible in evidence for the purpose of establishing or enlarging his authority.
2. **Contract:** EVIDENCE. The authority of an agent to execute a contract cannot be established by evidence of his declarations as to the nature of a conversation carried on between him and his alleged principal by telephone during the negotiations.
3. ———: RATIFICATION. Knowledge by the principal of the material facts is an essential element of an effective ratification by him of the unauthorized act of his agent. *O'Shea v. Rice*, 49 Neb. 893.
4. **Evidence** examined, and *held* insufficient to sustain a finding that the alleged agent had authority to bind the defendant by the contract in suit.

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

James Manahan and *T. J. Doyle*, for plaintiff in error.

Mockett & Polk, contra.

ALBERT, C.

This is an action on a written contract which purports to have been executed on behalf of the defendant, plaintiff in error, by James Manahan, as her attorney. It is thus signed: "Mary Fitzgerald, Admx., by James Manahan, Atty." The contract provides for the construction of an elevator by the plaintiffs in a building on the property hereafter mentioned, for which the defendant, by the terms of the contract, undertook to pay $850. The plaintiffs performed their part of the contract, and upon the refusal of the defendant to pay the stipulated price brought this action. Whether Mr. Manahan had authority to bind the defendant by the contract in suit was the principal question litigated below. The jury resolved that question

in favor of the plaintiffs and returned a general verdict in their favor. From a judgment thereon the defendant prosecutes proceedings in error.

It appears from the record that in 1901 the defendant was, and for many years had been, administratrix of the estate of her deceased husband, and as such had charge of certain real estate in the city of Lincoln which she leased, managed and kept in a state of repair. Prior to the date of the contract a mortgage on this real estate had been foreclosed in the federal court. A stay of the order of sale was agreed upon whereby the defendant's right to redeem was extended, in the expectation that the property in that time could be sold for more than sufficient to satisfy the decree. The alleged contract was made September 30, 1901, and while this stay was in force. James Manahan, who, it is claimed, signed the contract as defendant's attorney, was at that time, and for many years had been, the attorney and, to some extent, the business adviser of the defendant as administratrix of her husband's estate, and as such had represented her in the foreclosure proceedings just mentioned. According to the testimony adduced on behalf of the plaintiff, Mr. Manahan, acting in his such capacity, participated in the negotiations leading up to the alleged contract, a part of which was conducted by the defendant in person or, at least, in her presence. Afterwards, at the date of the contract, an agent of the plaintiff called at Mr. Manahan's office, with the contract in question ready for the signatures. A Mr. Muldoon, who was bookkeeper and, as is said in the evidence, general office man of the defendant as administratrix, was also present at the time. The defendant at that time had not assented to the contract nor is there any evidence tending to show that up to that time she had authorized Mr. Manahan, or any other person, to enter into the contract either as agent or attorney for her in her representative capacity or otherwise. The plaintiff's agent was produced as a witness for the purpose of showing what occurred at Mr. Manahan's office at the time re-

ferred to, and his testimony is now relied upon as establishing the fact that Mr. Manahan was duly authorized to execute the contract on behalf of the defendant. His examination touching that matter, so far as is material, is as follows: "Q. Was it (the contract) gone over by you, Manahan and Muldoon? A. Yes, sir; it was gone over and talked over and the price fixed. Q. What did Mr. Manahan do after you and he and Muldoon had gone over Exhibit 12 (the contract) on September, 1901? A. He spoke about the price, and called up Mrs. Fitzgerald about the matter. Q. What did Manahan say at that time over the 'phone? A. He stated that Kimball was here with the contract ready to fix up the elevator matter. I don't remember just what words he used, but it was that we were ready to close the matter, and wanted to know if we should go ahead with the contract. Q. After the telephone conversation, what did he say to you? A. He turned around and said that Mrs. Fitzgerald said it was all right. Q. Again, handing you Exhibit 1, I will ask you who signed 'Mary Fitzgerald, Admx, by James Manahan, Atty,' if you know? A. Mr. Manahan signed it." This evidence was all received over the defendant's objections. The testimony of Mr. Manahan, who was called by the defendant, is to the effect that he informed the agent that he did not think Mrs. Fitzgerald would sign the contract, that she did not want the elevator; but that he finally telephoned the defendant, informed her of the presence of the agent and the subject of their conversation, and asked for instructions; that her reply was to the effect that under no circumstances would she assent to a contract involving any personal liability on her part, but that, if the plaintiffs were willing to put in the elevator and look to the building itself for their pay, it would be all right; that he informed the agent as to the nature of the defendant's reply, and stated to him that the building ought to be able to pay for the elevator, and that as he was representing the estate in the foreclosure proceedings he would sign the contract as attorney. He further testified that the agent assented to this, and the contract

was accordingly signed as hereinbefore shown. As to what passed between the defendant and Mr. Manahan in their conversation over the telephone on the occasion mentioned, her testimony is substantially the same as his.

It also appears in evidence that the defendant, as administratrix, had previously leased the building to a third party, and one of the conditions of the lease was that she should provide an elevator answering to the description of that in the contract in suit. There is evidence tending to show that when the lease was made she had such contract in her possession in the form of an unaccepted bid, and stated to the lessee, in effect, that she intended to accept it. Shortly after the elevator was constructed, the property was sold under the decree of foreclosure and entirely absorbed in the satisfaction of the decree. While the contract purports to bind the defendant in her capacity as administratrix, it is conceded that it is not binding upon the estate, and the suit is against her personally. Consequently, the power, or lack of power, of an administratrix to bind the estate by contract, as well as the power of such officer to delegate her authority, are questions that require no discussion at this time. What seems to be the decisive question in the case is whether the defendant authorized Mr. Manahan to execute the contract.

One item of evidence relied on by the plaintiffs to establish such authority is the testimony of its agent, hereinbefore set out at some length, as to what Mr. Manahan has stated concerning the result of his conversation with the defendant over the telephone just before the contract was signed. Such statement, at most, was a mere declaration of of the alleged agent as to his agency and the extent of his authority. As such, it was incompetent and should have been excluded, because, while the declarations of an agent during the transaction of business for his principal, within the scope of the agency, if made in relation to such business, are frequently admitted as part of the *res gestæ,* they are never admissible to prove the fact of agency itself; that fact must be established *aliunde.* 1 Jones, Evidence, sec.

256. His statements, ordinarily, are not admissible for the purpose of establishing or enlarging his authority. Nor can his authority be established by showing that he claimed to have the powers which he assumed to exercise. His acts and statements cannot be used against the principal until the fact of agency has been established by other evidence. Mechem, Agency, sec. 100. This court has often held that agency cannot be established by the declarations of the alleged agent. *Anheuser-Busch Brewing Ass'n v. Murray,* 47 Neb. 627; *Barmby v. Wolfe,* 44 Neb. 77; *Norberg v. Plummer,* 58 Neb. 410; *Nostrum v. Halliday,* 39 Neb. 828; *Burke v. Frye,* 44 Neb. 223. The fact that his alleged declarations were with respect to a conversation between him and his alleged principal over a telephone would not change the rule. They were still mere declarations made without the sanction of an oath. It would be a very dangerous rule that would permit an alleged agent to bind another by his mere statement of what the person for whom he pretended to act said to him over a telephone.

Our attention is called to the evidence tending to show that the plaintiffs' bid for the construction of the elevator, with other bids for the same work, was gone over in the presence of the defendant, and her statements to the effect that she intended to accept it; that she had leased the property to a third party with the understanding that an elevator answering that description was to be constructed. Such evidence merely tends to show that she contemplated making a contract, but throws no light whatever on the question of Mr. Manahan's authority to make a contract for her.

The plaintiffs also put forward the claim that the contract was ratified by the defendant. One of the essential elements of ratification is knowledge on the part of the principal of the material facts. *O'Shea v. Rice,* 49 Neb. 893. An agent cannot bind his principal beyond the limits of his actual or apparent authority; and the declared willingness of a principal to ratify a conditional contract will not operate as a ratification of an unconditional contract

of which he is ignorant. *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685; *Bullard v. De Groff,* 59 Neb. 783. The defendant in this case no doubt saw the work progressing, but it was upon a building in which it does not appear she had any interest, save as administratrix of the estate of her husband. She had authorized Mr. Manahan to allow the work to proceed only in the event that the plaintiffs would look to the building itself for payment. It does not appear that it was ever brought to her knowledge that he had exceeded his authority, and she had a perfect right to assume, as she saw the work progress, that it was progressing according to the terms of the contract she had authorized Mr. Manahan to make.

The plaintiff bases some argument on the doctrine of ostensible authority. We are unable to find anything in the record upon which that argument can be based. Mr. Manahan was not the defendant's general agent and was clothed with no ostensible authority to bind the defendant personally. The plaintiff's agent knew this, and knew that he was receiving specific instructions over the telephone. It is an elementary rule of the law of agency that one dealing with an agent possessing no ostensible authority whereby those dealing with him may be misled is bound at his peril to ascertain the extent of his authority. Mechem, Agency, sec. 276. It seems to us that there is an utter lack of evidence showing Mr. Manahan's authority to bind defendant, and, as that is a vital point in the case, that the verdict cannot stand.

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

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.

REVERSED.

JOSEPH F. PARKINS, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED MARCH 22, 1906. No. 14,361.

1. **Pleadings:** CONSTRUCTION. Where a party fails to test the sufficiency of a petition by demurrer, but answers to the merits and proceeds to trial on the theory that it tenders a certain issue, which is litigated and submitted to the jury, if by any reasonable construction of the language the pleadings can be construed to raise such issue they will be held to do so.

2. **Sales:** TENDER: EVIDENCE. Evidence examined, and *held* sufficient to sustain a finding that the commodity which the plaintiff was able, ready and willing to deliver in pursuance of a contract of sale answered the requirements of such contract.

3. ———: ACTION: BURDEN OF PROOF. In an action for breach of contract for refusal on the part of the vendee to accept the goods tendered, the burden of proof that the goods tendered met the requirements of the contract is upon the plaintiff.

4. ———: REFUSAL TO ACCEPT. Where the goods tendered do not meet such requirements, the vendee may refuse to accept them, and is not required to assign any ground for his refusal.

5. **Estoppel:** BURDEN OF PROOF. Where a party pleads and relies on an estoppel, the burden of proof is upon him to establish the facts upon which the estoppel is based.

6. **Measure of Damages.** In an action for breach of contract of sale for refusal on the part of vendee to accept the goods, where the vendor procures the goods from third parties, the measure of damages is the difference between the cost at which plaintiff could have procured and delivered the goods at the time and place specified by the contract and the contract price, with interest from the date of the accrual of the action. *Wittenberg v. Mollyneaux*, 59 Neb. 203, denying the right to interest for breach of contract, modified.

7. **Nominal Damages.** In such cases, the computation must be based upon data furnished by the pleadings and the evidence, and if they fail to furnish such data no recovery can be had beyond nominal damages.

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

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

F. T. Ransom, Weaver & Giller, H. Z. Wedgwood and *W. R. Patrick, contra.*

ALBERT, C.

This is the second time a judgment in this case has been presented to this court for review. See *Parkins v. Missouri P. R. Co.,* 4 Neb. (Unof.) 1, 13; 72 Neb. 831. For convenience we reiterate so much of the former statement of facts as may be necessary to understand the discussion which follows. On the 5th day of October 1892, the parties entered into a contract in writing as follows: "This agreement made this 5th day of October, A. D. 1892, by and between the Missouri Pacific Railway Company, party of the first part, and Joseph F. Parkins, lessee of the Springfield Gravel Company, party of the second part, Witnesseth: That the said party of the second part agrees to deliver to the party of the first part, in such amounts as may be designated from time to time by said party of the first part, 50,000 yards, cubic measure, of good, clean, marketable gravel, such as shall be in the judgment of the superintendent of the said party of the first part suitable for ballasting the roadbed of said party of the first part, to be delivered on board cars and measured on the cars by the party appointed by the said Missouri Pacific Railway Company to receive the same; the said gravel to be delivered in two years from this date, but times and amounts of delivery of gravel within such period to be determined by the party of the first part as it shall need the same from time to time. In consideration of the premises, the said party of the first part agrees to pay for said gravel 45 cents a cubic yard delivered on the cars as aforesaid, the payments to be made monthly for the gravel furnished during the preceding month. In witness whereof the parties hereto have set their hands this 5th day of October, 1892."

In pursuance of this contract the plaintiff in 1892 delivered to the defendant about 2,000, and in 1893 about 14,000, cubic yards of gravel, and in subsequent years a quantity sufficient to make the total amount delivered 21,816 cubic yards. None of the gravel delivered in 1892 was used for ballast, and of that delivered in 1893 only about 15 per cent. was used for that purpose. But the whole amount delivered in 1894, and it would seem at least a portion of that delivered in 1895, was used for ballasting the defendant's roadbed. In June, 1894, in response to plaintiff's request to take more of the gravel, the defendant placed its refusal on the ground of a lack of coal, owing to a strike then prevailing among the coal mines in certain localities. In the following September it refused a like request on the ground of the then prevailing business depression, and suggested an extension of the contract for another year. A few days later it renewed its refusal on the same ground, and agreed to extend the contract for another year, and by virtue of such extension the contract was extended to October 5, 1895. In the spring of 1895 the plaintiff again urged the defendant to take more of the gravel, and in response was informed that the defendant had not yet decided how much ballast it could take for use in that year, but that it would not be able to take very much, for the reason "that this company, in line with all others, has got to keep pretty close to shore on account of decreased earnings." The testimony of the plaintiff tends to show that the defendant at no time during the life of the contract, as extended, objected to receiving the remainder of the gravel on any ground other than those just mentioned. On the other hand, evidence adduced by the defendant tends to show that the gravel was unsuitable, both in fact and in the judgment of its superintendent, for ballasting its roadbed; that it made complaint of the gravel on those grounds to the plaintiff in the latter part of 1894 or early in 1895, and early in the summer of the latter year on the same grounds refused to accept the remainder of the gravel, and notified the plaintiff, not only of such

refusal, but of the grounds upon which it was based. After this notice is claimed to have been given, the defendant ordered more of the gravel, but it was not used for ballast, but appears to have been taken under the contract. Some appears to have been taken as late as 1898. The defendant having refused to accept the remainder of the 50,000 cubic yards of gravel, the plaintiff in 1899 brought this action, assigning the defendant's refusal to take the remainder of the gravel as a breach of the contract and asking damages.

In his amended petition the plaintiff sets forth the terms of his contract with the defendant and the extension thereof for one year, the quantity of gravel he furnished the defendant thereunder, including that furnished after the time the contract had expired by the terms of the extension, payment for the quantity of gravel furnished and the refusal of the defendant to accept the remainder of the 50,000 yards under the contract. The petition also contains the following averments: "Plaintiff says that the gravel furnished, and received and paid for by defendant under the terms of said contract as aforesaid was all of the same kind and quality and was all accepted and received by defendant under the terms of said contract and was used by the defendant for the purpose of ballasting its roadbed, and was acceptable and suitable in the judgment of its superintendent for that purpose. Plaintiff further states that he was at all times during the period provided for the delivery and acceptance of said gravel, and the extension of the time of the delivery of the same, ready, willing and able to furnish to the defendant the remainder of said gravel, to wit, 30,000 cubic yards of the same kind and quality as provided for in said contract, and as was delivered and accepted by the defendant in the 20,000 yards hereinbefore mentioned as having been delivered and accepted by defendant." The damages are laid at $9,000.

The answer admits the execution of the contract; that defendant received a certain quantity of the gravel thereunder and paid for the same, and denies all allegations not admitted. Among other affirmative allegations in the an-

swer are the following: "That it was imposible to determine, without using the same, whether the gravel furnished by plaintiff was suitable for ballasting the roadbed of defendant company, and for that purpose a portion of such gravel was received, used and paid for, to the extent taken; that after using the same it became evident, and it was the judgment and opinion of the superintendent of this defendant company, that the gravel furnished by the plaintiff was not suitable for ballasting defendant's roadbed, and was not in accordance with the contract made between the parties, and said plaintiff was notified that the gravel furnished by him was not, in the judgment of the defendant's superintendent, suitable for ballasting the roadbed of this defendant, and that no more of such gravel would be taken or used for such purpose, and the gravel so furnished by said plaintiff was, as a matter of fact, unfit and unsuitable for the purpose for which the same was contracted to be purchased, and said plaintiff was so informed, and the contract was terminated; that under the terms and conditions of said agreement the superintendent of defendant company was made the sole judge as to the gravel being fit and suitable for the purpose of ballasting defendant's roadbed."

Among other things the reply contains the following: "And, further replying to said answer, alleges that under the terms of such contract and in accordance therewith the plaintiff delivered to the defendant the 21,816 yards of gravel hereinbefore mentioned under said contract, which the defendant received, accepted and paid for as provided by the contract. That during the time for the delivery of the gravel under said contract the plaintiff demanded of defendant that it take and pay for the remainder of the gravel, and the defendant refused so to do, and assigned and asserted at the time as the only reason for such refusal that it was impossible for the defendant to take the remainder of the gravel under said contract on account of the dearth of coal for engine use on defendant's railway, the financial panic existing at the time, and decreased

earnings of defendant's railway; * * * that by reason of such conduct and attitude of the defendant the said defendant is estopped now to assert, or claim, or plead as a defense to plaintiff's said action that it refused to receive said gravel for the reason that said gravel was not suitable, in the judgment of the superintendent of defendant, for ballasting defendant's roadbed, or to assign, assert or plead any other reason than the said asserted and assigned reasons for its refusal to receive the remainder of said gravel called for in said contract."

A trial resulted in a verdict and judgment for the plaintiff in the sum of $11,220.65, and defendant appeals.

It is first contended that the petition upon which the cause was submitted does not state facts sufficient to constitute a cause of action. This contention is based in part upon a construction which the defendant insists should be placed upon the contract in suit. Such construction is that the contract did not bind the defendant to take 50,000 cubic yards of gravel, even though the gravel offered answered all the requirements of the contract, but only such quantity and at such times as might be determined by the defendant itself. We do not think the contract admits of this construction. Thus construed the contract practically would leave it optional with the defendant whether to take any of the gravel, and, to that extent, the contract would be unilateral and binding on neither party. The contract expressly provides for the delivery of 50,000 cubic yards of gravel within two years. The clauses, "such amounts as may be designated from time to time by said party of the first part," and, "but times and amounts of delivery of gravel within such period (two years), to be determined by the party of the first part as it shall need the same from time to time," are not to be taken as giving the defendant an option to take none of the gravel, or only such portion of the 50,000 yards as it might see fit to take, but merely as providing for a delivery of the entire 50,000 yards by instalments, and to enable the defendant to accommodate the delivery of the instalments to its requirements.

It is also contended that there is no averment in the petition to the effect that the remainder of the 50,000 yards of gravel, which the defendant stood ready and willing to deliver under the contract, was suitable, in the judgment of the defendant's superintendent, for ballasting its roadbed. We have set out that portion of the petition relied on as covering this ground. It shows that the gravel actually furnished the defendant under the contract was of the quality specified in the contract, and suitable, in the judgment of the superintendent, for ballasting the defendant's roadbed. Then follows the allegation to the effect that the remainder of the 50,000 yards of gravel, which plaintiff was ready and willing to furnish, was of the same kind and quality as provided in the contract, and "as was delivered and accepted by the defendant in the 20,000 yards hereinbefore mentioned as having been delivered and accepted by the defendant." The petition upon which the cause was submitted the second time stands just as it stood when the first trial was had. Before answering, the defendant filed a special, as well as a general, demurrer, but withdrew both before a ruling was had thereon, and answered. At both the first and the second trial one of the principal questions litigated was whether the gravel had been approved by the defendant's superintendent, and it appears from the evidence adduced, and instructions respectively tendered by the parties, that they, as well as the court, proceeded on the theory that the pleadings presented that issue. Where a party fails to test the sufficiency of a petition by demurrer, but answers to the merits and proceeds to trial on the theory that the petition tenders a certain issue, and such issue is litigated, if by any reasonable construction of the language the pleadings can be construed to raise that issue they will be held to do so. This is only another way of saying that this court will, when possible, adopt a construction of the pleadings in which the parties themselves have concurred. Tested by this rule, the petition tenders the issue in question.

Another question raised is whether the verdict is sus-

tained by sufficient evidence, the defendant contending that there is a total lack of evidence tending to show that the remainder of the 50,000 cubic yards, which the plaintiff was ready to furnish, was suitable, in the judgment of the defendant's superintendent, for ballasting its roadbed. To appreciate the force of this contention it should be kept in mind that the defendant expressly stipulated in the contract for gravel suitable in the judgment of its superintendent, for ballasting its roadbed, and that the plaintiff, instead of attempting to allege and prove that the gravel was in fact suitable for such purpose, and that the approval of the superintendent was capriciously or arbitrarily withheld, or any other facts that would excuse a showing of such approval, placed himself squarely upon the proposition that the remainder of the gravel was suitable, in the judgment of defendant's superintendent, for the purpose specified. We think the evidence is sufficient to sustain a finding in favor of the plaintiff upon that point. It is true there is no evidence that the superintendent ever expressly gave it as his opinion that the gravel was suitable for ballast. On the contrary, the evidence of the superintendent himself is to the effect that the suitability of the gravel for that purpose could only be determined after an actual test, and that late in 1894, or early in 1895, he reached the conclusion, after such test, that the gravel would not answer that purpose. Besides, there is a large amount of expert testimony to the effect that the gravel was in fact unsuitable for ballast. But opposed to all such evidence are the facts that the defendant accepted a large portion of the gravel in instalments and during the life of the contract, and that a considerable portion of the gravel thus accepted was used for ballast and was put to such use by the superintendent or under his orders. These facts, coupled with the further fact, which the testimony of the plaintiff tends to establish, that during the life of the contract the defendant's refusals to accept the remainder of the gravel were based exclusively on other grounds, reasonably warrant the inference that the superintendent considered the gravel

suitable for the purpose for which it was intended by the terms of the contract.

The defendant, in this connection, claims that its contract with the plaintiff was made with reference to what is known as the Springfield Gravel Company pit, and with the understanding that the gravel delivered under the contract should be taken from that pit, and that contrary to such understanding a portion of the gravel delivered prior to 1894 was taken from what is known as the Union Pacific or Birkhauser pit. Should it be conceded that the parties contracted with reference to the Springfield Gravel Company pit, defendant's complaint that a portion of the gravel was taken from another pit is unavailing at this time. There are two Union Pacific pits, the old and the new. The gravel in the old pit appears to be inferior, while that in the new seems to be at least equal to that in the Springfield pit. The gravel furnished by the plaintiff, aside from what was taken from the Springfield pit, was all taken from the new Union Pacific pit. It was taken from that pit with the defendant's full knowledge, and was never objected to on that ground. In fact, when the contract in suit was extended, it was at the defendant's suggestion that plaintiff procured an extension of his lease of the Union Pacific pit in order that he might continue to furnish defendant gravel therefrom if he saw fit. It would seem, therefore, that defendant's complaint that a portion of the gravel was taken from the Union Pacific pit has no just foundation.

After stating the substance of the petition, answer and reply at some length the court gave the jury this instruction: "You are instructed that the burden of proof is upon the plaintiff in this case to show by a preponderance of the evidence all the material allegations in his petition which are denied in the defendant's answer, before he can recover; that is to say: (1) That the plaintiff must thus prove that he was able, ready and willing to furnish to defendant under the terms of the contract between said parties the remainder of the 50,000 cubic yards of gravel

not delivered; (2) That the same was good, clean, marketable gravel, and, in the judgment of defendant's superintendent, suitable for ballasting the roadbed of defendant company; (3) that he has sustained damages in some amount by reason of the failure of the defendant to accept the remainder of said gravel, and that such damages have not been paid. Likewise, the burden of proof is upon the defendant to establish by a preponderance of the evidence all the material allegations of new matter contained in its answer, which are denied in plaintiff's reply; that is to say: (1) The defendant must prove that it objected and refused to take the remainder of the gravel under said contract for the reason that the same was not good, clean, marketable gravel or, in the judgment of the defendant's superintendent, not suitable for ballasting the roadbed of defendant company; and (2) that it so notified plaintiff prior to October 5, 1895."

In another paragraph of the charge, after presenting plaintiff's theory of the case, the court used this language: "But if, on the other hand, you believe from all the evidence in the case that that portion of the gravel which was delivered to and accepted by the defendant was not good, clean, marketable gravel, or was not, in the judgment of defendant's superintendent * * * suitable for ballasting the roadbed of defendant company as provided in said contract, and that the defendant refused to take any more of said gravel for that reason, and you should further find that the defendant so notified plaintiff prior to October 5, 1895, then said contract would be thereby terminated, and your verdict should be for the defendant."

These instructions taken together may be reduced to this proposition: That, although the remainder of the gravel which the plaintiff was able, ready and willing to furnish, did not meet the requirements of the contract, the plaintiff, nevertheless, would be entitled to a verdict, unless the defendant had shown by a preponderance of the evidence that it had based its refusal to accept the gravel on that ground, and he had so notified the plaintiff prior to

October 5, 1895. These instructions were intended to cover both the plaintiff's theories, namely, that the remainder of the gravel was suitable in the judgment of the defendant's superintendent, for ballasting its roadbed, and that the defendant, by basing its refusal on other grounds, is estopped to deny that it was thus suitable. As to the former theory, the plaintiff now disclaims any attempt to show that the approval of the superintendent was arbitrarily or capriciously withheld, but places himself squarely on the proposition that the gravel was suitable, in the superintendent's judgment, for that purpose. Consequently, in order to show a breach of the contract, the burden of proof was upon him to show that the gravel answered that requirement of the contract. If it did not answer that requirement then the tender of such gravel, or what amounts to a tender, was not a tender of performance on his part of the contract, and the defendant had a right to refuse it, and was not required to give any reason for its refusal. Consequently, an instruction which required the defendant to show that it had based its refusal on a specific ground, and given notice to the plaintiff of the ground on which its refusal was based is erroneous.

The theory of estoppel is presented by that portion of the reply heretofore set out, and, as to such theory, the court appears to have been of the opinion that, if the remainder of the gravel was of the same quality as that which had been accepted and paid for by the defendant under the contract from time to time, and the defendant had placed its refusal to accept the remainder on the ground of a scarcity of coal or money, or upon any other ground than that it was not of the quality called for by the contract, or was unsuitable, in the opinion of its superintendent, for ballast, and continued to place its refusal on such ground until after the expiration of the contract, it would not be permitted to shift its ground after the contract had terminated. Assuming that such acts on the part of the defendant would give rise to an estoppel, the burden of establishing the facts constituting the estoppel

would rest upon the plaintiff. One of those facts is that the defendant's refusal was based exclusively on grounds other than that the gravel did not answer the requirements of the contract, or was unsuitable, in the judgment of the superintendent for ballast. And no matter how strong a *prima facie* case the plaintiff may have made on the question of estoppel, the burden of proof never shifted to the defendant, but remained with the plaintiff to the end of the trial. That being true, an instruction, or set of instructions, which required the defendant to show by a preponderance of the evidence that its refusal to take the remainder of the gravel was not based exclusively on matters outside the contract, and that it so notified the plaintiff, is erroneous.

It appears in evidence that on the day the plaintiff concluded to contract with the defendant, he procured a lease for two years of the Springfield Gravel Company pit, by the terms of which he was to pay his lessor 30 cents a yard for all screened, and 25 cents a yard for all unscreened gravel "sold, loaded and shipped" from this pit by the plaintiff during the life of the lease. Later the plaintiff leased the Union Pacific or Birkhauser pit, paying $250 for the privilege of taking gravel therefrom in such quantities as he saw fit for a term ending September 1, 1893. Both leases were afterwards extended to meet the extension of the contract in suit; the first on the original terms, the second without any further consideration. It also appears that the plaintiff was under a contract in writing with another party, whereby such other party was to take the gravel from the Springfield pit and load it on the defendant's cars, according to the contract in suit, for 15 cents a yard. But in addition to plaintiff's undertaking to pay 15 cents for such services, the contract contained the following: "All expenses of measuring and weighing to be paid for by the party of the first part (plaintiff). The party of the first part agrees to furnish all material at the pit for building and repairing all traps required by the party of the second part for the convenient and rapid load-

ing of the gravel; to furnish the use of boarding house, stables, blacksmith shops and tools, without expense to party of the second part while performing the above described work and to be paid by days wages for all cleaning up of the gravel pit and all extra work done and to keep the railway track in good repair, so that cars can easily be moved on the same. And the said party of the first part agrees to pay the said party of the second part for all loss of time while waiting for cars, and for all repair of tracks for material to build or repair track, and for all damages for the cancelation of this contract before there are 2,000 cars of gravel loaded." There is no evidence upon which to base an estimate of what it would have cost the plaintiff or what it would have been reasonably worth to comply with the foregoing provisions. There is testimony tending to show that the reasonable cost of taking the gravel from the Union Pacific or Birkhauser pit, and delivering it on board defendant's cars, to the place plaintiff was required to deliver it, would have been about 20 cents a yard. But whether this included the additional expenses contemplated by that portion of the contract for loading gravel just quoted is not quite clear. There is no evidence as to the value of the services of the plaintiff in superintending or overseeing the carrying out of his contract with the defendant.

On this state of the record the court gave two instructions as to the measure of damages. They are substantially the same in principle and one is as follows: "You are instructed that uncontroverted evidence in this case shows that there were delivered by the plaintiff to the defendant under the contract sued on 21,816 yards of gravel, and that amount was received and paid for by the defendant. Now, if you find for the plaintiff, you will determine from the evidence the amount of plaintiff's damages in the following manner: You will determine from the evidence what it would have cost the plaintiff to have furnished and delivered to the defendant within the time limited in the contract the remainder of 50,000 cubic yards of gravel con-

tracted for, and, if you find such cost would have been less than the contract price between plaintiff and defendant under said contract, you will deduct such cost of furnishing and delivering the gravel from the contract price; upon this difference between the cost and contract price you will calculate simple interest at the rate of 7 per cent. per annum from October 5, 1895, to the 6th day of March, 1905, that being the first day of the present term of this court, and this interest you will add to the difference between the contract price and the cost price, and the sum resulting therefrom will be the amount of damages you should return in favor of the plaintiff." Aside from the matter of interest, which we shall notice presently, we think the instruction correctly states the rule for the measure of damages in cases of this character. In such cases—that is, in cases where the plaintiff procures the commodity to be furnished from third parties—upon the vendee's wrongful refusal to accept the goods, the measure of damages is the difference between the agreed price and what it would cost the plaintiff to procure and deliver the goods according to the terms of the contract. 3 Sutherland, Damages (3d ed.), sec. 648; *Allen v. Murray,* 87 Wis. 41; *Danforth v. Walker,* 37 Vt. 239. But it would seem that the evidence is not sufficiently clear to admit of an application of the rule in this instance. From what has already been said it appears that, while the price at which the plaintiff procured, or might have procured, the gravel at the pits is sufficiently clear, its delivery to the defendant would have involved elements of expense which cannot be computed from the data furnished by the record.

It is contended that the instruction under consideration is erroneous, in that it directed the jury to allow interest on whatever damages they found. Whether interest is allowable in an action for unliquidated damages is a question upon which the courts of this country are not in accord, and upon which the decisions of the same court are frequently in conflict. In regard to interest in actions for breach of contract under the title of "Damages," in 13 Cyc.

p. 85, it is said: "The decisions are very conflicting as to the allowance of interest by way of damages in cases of breach of contract, unless the rate or amount is fixed in the contract itself. The allowance of interest in such cases was formerly a question somewhat within the discretion of the jury; but it is now considered more a question of law for the court. The better rule on this subject seems to be that such interest as damages will be allowed, especially where the damages are capable of being definitely ascertained." See authorities there cited.

Many of the authorities denying interest in such cases merely hold against the allowance of interest *eo nomine*, leaving it inferable that the jury might include interest in the general award of damages. Other cases, disallowing interest, appear to proceed on the theory that damages are awarded in part, at least, as a punishment against the wrongdoer, and that, so long as the damages are uncertain and ascertainable only by verdict, it would be unjust to allow interest. Another line of decisions appear to be based on the provisions of local statutes with respect to interest, in that such statutes do not contemplate the allowance of interest, on unliquidated claims. But it would be a hopeless task to attempt to analyze the decisions on this question or to classify them according to fixed principles. We can only say with the author above quoted: "The better rule on this subject seems to be that such interest as damages will be allowed, especially where the damages are capable of being definitely ascertained." In reaching this conclusion we have not overlooked *Wittenberg v. Mollyneaux*, 59 Neb. 203, where the court announced this doctrine:

"If the right to damages for breach of a contract is matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation but by suit, interest may not be allowed for time precedent to the settlement of the right to a recovery and the ascertainment of the amount."

In support of that rule the court in that case cited,

Shipman v. State, 44 Wis. 458; *Vietti v. Nesbitt,* 22 Nev. 390, 41 Pac. 151; *Swinnerton v. Argonaut L. & D. Co.,* 112 Cal. 375, 44 Pac. 719; 2 Sutherland, Damages (3d ed.), sec. 347; *Pacific Postal T. C. Co. v. Fleischner,* 66 Fed. 899; *Hooper v. Patterson,* 32 Pac. (Cal.) 514.

As to the Wisconsin case, the rule as there announced is not in harmony with some of the former, as well as some of the later, cases of that court. *Hinckley v. Beckwith,* 13 Wis. 34,was an action for breach of contract, and the court held that the allowance of interest was discretionary with the jury. The theory that interest is a matter of discretion with the jury is examined and repudiated in *Dana v. Fiedler,* 12 N. Y. 40, 62 Am. Dec. 130, the court holding that it was allowable as a matter of law. A later Wisconsin case, *Allen v. Murray, supra,* was also an action for breach of contract, and the court approved an instruction permitting the jury to allow interest, following *Hinckley v. Beckwith, supra.* The Nevada case was an action to recover the amount due on a contract, and interest was disallowed because the claim did not fall within the provisions of the statute of that state allowing interest. The court, however, there recognize the rule of allowing interest in actions for damages, merely as damages. The California case is based on a line of decisions of that state, one of which is *Cox v. McLaughlin,* 76 Cal. 60, 18 Pac. 100. In that case, the court quotes 2 Sutherland, Damages (3d ed.), sec. 347, where, after laying down the rule that interest is not allowable on unliquidated claims, the author adds: "The allowance of interest as damages is not dependent on this rigid test." In *Brady v. Wilcoxson,* 44 Cal. 239, the court, although denying the right of interest on an unliquidated claim prior to judgment said: "On such demands, interest, *eo nomine,* cannot be allowed."

It would seem, then, that the rule in *Wittenberg v. Mollyneaux, supra,* while supported by the single Wisconsin case it cites, is in conflict with both the previous and subsequent holdings of that court, and that the other authorities it cites as supporting the rule recognize the

right to allow interest in actions sounding in damages, not, however, as interest, but merely as a part of the damages. The practical value of the distinction is not quite clear.

It seems to us that the case at bar, in itself, furnishes a strong argument for the abandonment of the rule announced in *Wittenberg v. Mollyneaux, supra.* Had the contract been carried out, as extended, plaintiff would have completed the delivery of the 50,000 yards of gravel by October 5, 1895, and the breach occurred, if there was a breach, not later than that date. Plaintiff's right to compensation in the way of damages accrued at that time, and the amount then required to compensate him for a loss sustained by the breach would have been, as we have seen, the difference between what it would have cost him to procure and deliver the balance of the gravel and the agreed price. Every day payment was deferred enhanced the damages to the extent of the value of the use of the money. The suit was begun in October, 1899, and was not finally tried until the March term, 1905, of the district court. In other words, at the time this case was finally submitted the money which would have been required to compensate the plaintiff when his cause of action arose had been withheld from him for almost ten years. The fundamental idea lying at the root of the whole doctrine of damages in this jurisdiction is compensation. Punishment of the wrongdoer has no place in the doctrine. The purpose of the law is to make the condition of the party aggrieved, as nearly as may be, what it would have been had the contract been performed. In other words, to see that the plaintiff suffers no loss in money or property by reason of the breach of his contract. It is no answer to the claim for interest, as part of the amount required to make good his loss, to say that the amount required to compensate him was unascertained and could only be ascertained by verdict, and, consequently, the defendant was unable to make a tender of the amount, because that very uncertainty is one of the consequences of

the defendant's own wrong, and, if loss must fall upon one or the other by reason of such uncertainty, it is but just that it should fall on the wrongdoer, rather than upon his victim. Neither does the statute stand in the way of the allowance of interest as damages in such cases. The interest is a part of the damages sustained, and it is wholly immaterial by what name the specific item of damages is designated. But whatever damages are allowed, and by whatever name they are called, they are allowed as compensation, and any scheme of compensation, whereby it is sought to place the plaintiff in as favorable a position as he would have occupied had the contract been performed, that does not take into account the value of the use of the money for the time it has been withheld subsequent to the accrual of the action is obviously defective and inadequate.

We do not wish to be understood as holding that interest is recoverable in all actions sounding in damages. It is not necessary to go to that length in this case. No doubt a distinction may be drawn between actions for damages for assault, libel, alienation of affections, breach of promise to marry, and the like, where the damages, of necessity, are more or less within the discretion of the jury, and those where they are mathematically computed from data furnished by the evidence. This case falls within the latter class, and we think the true measure of damages is the difference between what it would have cost the plaintiff to procure and furnish the gravel according to contract and the contract price, plus the interest on such difference from the accrual of the action. If we are correct thus far, then the case of *Wittenberg v. Mollyneaux, supra,* to the extent that it conflicts with the views here expressed, should be overruled. In that event, there is no error in the instruction of the trial court on the subject of interest of which the defendant may justly complain.

Other errors are assigned and discussed. Some of them relate to questions already considered, the others to such

as are not likely to arise in their present form at another trial, so it would be unprofitable to extend this opinion to greater length.

For the errors pointed out, it is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings.

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.

REVERSED.

WILLIAM LUTJEHARMS, APPELLEE, V. M. E. SMITH, APPELLANT.

FILED MARCH 22, 1906. No. 14,227.

1. **Principal and Agent: RATIFICATION OF CONTRACT: ESTOPPEL.** A principal who ratifies a contract of his agent is thereafter, in the absence of fraud, estopped from denying the authority of the agent to enter into the contract.
2. **Specific Performance.** Where the vendee of real estate is willing to accept the title of the vendor, the courts will not refuse to compel a specific performance of a contract because of a defect in the title.

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

J. G. Thompson and *Flansbury & Williams,* for appellant.

John Everson, contra.

JACKSON, C.

The action is one to enforce the specific performance of a contract for the sale of real estate. On August 28, 1903,

O. H. Myers, a real estate agent at Alma, wrote the appellant as follows: "Mr. Smith, Burley, Wash. Dear Sir: I have a man who would like to buy your land in Mullally township if you will make the price right, so what is the very least cash net to you that you will take for the farm, and I will try to get my commission above your price. Make price right and I have a buyer. Give me your net price and I will get my commission above it. Also send me the legal numbers of your land. Please let me hear at once, direct from you. Respt., O. H. Myers." Appellant answered: "Burley, Wash., Sept. 3, 1903. Mr. O. H. Myers, Alma, Neb. Yours of the 28 inst. received and contents noted. My price is $2,500 for land in sections 26 & 27; E. ½ of N. E. ¼, E. ½ of S. E. ¼ section 27 and N. ½ of S. W. ¼ of section 26. I also have 80 acres in section 25 for which I want $600 N. ½ of S. W. ¼. If farm is sold all together $3,000 takes the entire 320 acres. I reserve right to sell at any time. Yours respectfully, M. E. Smith, Burley, Wash." Upon receipt of this communication Myers entered into an agreement with the appellee for the sale of the land. He received $50 on the purchase price and gave the appellee the following memorandum: "Alma, Neb., Sept. 7, 1903. Received of Wm. Lutjeharms $50 to bind contract of sale for the E. ½ of N. E. ¼, E. ½ of S. E. ¼ of section 27 and N. ½ of S. W. ¼ of section 26, and S. ½ of S. W. ¼ of section 25, all in town 2 range 17, Harlan county, Nebr. Purchase price to be $3,100, said $50 paid to be applied on purchase price; and balance of purchase price to be paid as soon as good warranty deed and abstract is delivered, showing said land to be free of all incumbrance. Full possession of land to be given Mar. 1st, 1904. M. E. Smith, O. H. Myers, Agent. Subscribed and sworn to before me this 7th Sept., 1903. Mary A. Fennessy, Notary Public, Harlan County, Neb. (Seal.) My Commission expires August 27, 1907." He wrote the appellant this letter: "Alma, Neb:, Sept. 7, 03. Mr. Smith, Burley, Wash. Dear Sir: I have today sold your land in Mullally township this county for $3,100

cash. $50 has been paid and a contract of sale given and placed on record at the court house, the balance of the money will be paid as soon as you get your deeds and abstracts here. Make deed to William Lutjeharms, and send same to the Bank of Alma, at Alma, Neb., and the balance of your money will be ready. Send your abstracts to S. L. Roberts and have them brought down to date. Mr. Roberts is the best abstractor in Alma. Mr. Lutjeharms wants full possession on March first, 1904. This sale includes the 320 acres. Respt., O. H. Myers." The appellant answered as follows: "Burley, Wash., Sept. 14, '03. Mr. O. H. Myers, Alma, Nebr. Dear Sir: Your communication of the 7th inst. is rec'd and am well pleased with the result of your negotiations as well as your promptness in the matter. The patent for the 160 A. in sec. 27 is in the land office at McCook and I shall be obliged to send for it, or if it will suit you as well can send you the papers and let you get it. The 80 A. in sec. 25 was homesteaded by my mother and willed by her to my sister and myself as joint heirs. My sister will probably be here next Sat., Sept. 19, and we will then fix deed and send to Wis. for the necessary proof of our legal right to the land from my mother. Now as to an abstract, the land has never changed hands, my papers having come directly from the government, and I do not feel like standing the expense of securing an abstract. If Mr. Lutjeharms wishes to stand the expense all right, but I do not consider an abstract under these conditions necessary, as any one can with very little trouble refer to records and rec. all needful information. I will stand all expense incurred by having records brought up to date. Hoping this may prove satisfactory to you and thanking you for your trouble in the matter, I remain, Yours respectfully, M. E. Smith." Upon receipt of this communication Myers wrote and forwarded appellant the following letter: "Alma, Neb., Sept. 18, 1903. Mr. Smith, Burley, Wash. Dear Sir: In reply to yours of 14th will say: We will get patent from McCook, or if you have started to get the patent, go

ahead and get it. It makes no difference to us, just so the sale is closed all right, soon as possible. Make deeds and send to Bank of Alma, with full instruction regarding closing of sale. Instruct bank to pay me $100 commission, pay all necessary expense, such as you stated you would pay, taxes, if any are due, and get records to date. Mr. Lutejeharms will pay for abstract. Please let me hear at once. Respt., O. H. Myers." He answered as follows: "Burley, Wash., Sep. 22, 1903. Mr. O. H. Myers, Alma, Neb. Mr. Myers I received notice the same day that I rote you last (the 14 inst.) from F. P. Fox of Republican that he had sold same the land. Pleas see Mr. Fox and see if the matter can be straeightened without eny hard feelings in the neighborhood. Now if you will look at my first letter you will find that I stated that I would not hold the land for you so I am not to blame in the least. Yours truly, M. E. Smith. P. S. The reason I did not write you before was that I was in hopes that you would insist on my furnishing abstracts." Thereupon appellee instituted this action, of which appellant was informed by a communication from the agent Myers. Upon being informed of the commencement of the action, appellant wrote, on the back of agent's letter, this communication to Mr. F. P. Fox: "Burley, Wash., Oct. 14. Mr. F. P. Fox, Republican, Neb. Just received this now Leola wrote the letter and I signed it as I was eatin breakfast but in same letter stated that I would not furnish abstracts so it shows that I was not well pleased, and I do not consider the sale cloased but perhaps the courts would hold that I was bound as they excepted the conditions now that letter myne was dated the 14 the same as your & Hausermans was now unless we can show that the land was in your hands for sale and I had no right to sell without notifying you (that is close deal) perhaps they have us on their hip now do as you think best and I am with you. M. E. Smith." The trial resulted in a decree requiring the performance of the contract, and the case is here for review.

It is urged that the agent was not authorized to enter

into a written contract for the sale of appellant's land. It seems unnecessary, however, to determine that question. The letters contain all the elements of a contract, which was in all respects ratified by appellant, with the single exception of that portion of it which required him to furnish an abstract of title. He said, however, in that regard: "I do not feel like standing the expense of securing an abstract. If Mr. Lutjeharms wishes to stand the expense all right." The only reasonable deduction to be drawn from his letter of September 14, 1903, is that he would carry out the terms of the agreement made by his agent, except the item of expense for an abstract. This was expressly waived in the next letter to him; in other words, the conditions of sale proposed by him were accepted. His subsequent communication to Myers discloses that he considered his obligation to convey the land complete, provided the abstract was not insisted upon. His letter to Fox discloses that he treated his conditions of sale as having been accepted and that he was bound thereby, unless a possible defense suggested by him could be interposed. The appellee tendered in court $3,050, the remainder agreed upon as the purchase price. The conclusion is irresistible that there was an unqualified acceptance of the terms of sale proposed by the appellant himself, and that he is bound thereby. It is urged, however, that it appears from one of appellant's letters that he does not own a portion of the land. The rule, however, is that where the vendee is willing to accept the vendor's title, the vendor cannot set up as a defense to the action a defect in his title. *Gartrell v. Stafford,* 12 Neb. 546.

The judgment of the district court was right, and we recommend that it 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.

OSCAR MIDDLEKAUFF, APPELLANT, V. FRANK ADAMS ET AL., APPELLEES.

FILED MARCH 22, 1906. No. 14,553.

Evidence examined, and *held* to sustain the conclusions of the trial court.

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

H. D. Rhea and *Oscar Middlekauff*, for appellant.

John A. Sheean, W. A. Stewart and *E. C. Calkins, contra.*

JACKSON, C.

This is an appeal from the judgment of the trial court denying a writ of mandamus to compel the city council of the city of Lexington to revoke a liquor license, and to fix a time for hearing a remonstrance against the issuing of the license. There is some conflict in the evidence, but it may reasonably be said that the following facts are established by the record: The relator is an attorney at law residing in the city of Lexington. He was employed by one saloon-keeper to prosecute remonstrance proceedings against the granting of a license to W. J. Horrigan, another saloon-keeper. He prepared and filed with the city clerk on April 29, 1905, a remonstrance, stating facts sufficient to prevent the issuing of a license. The remonstrance was signed: "David Cole, Remonstrator. Oscar Middlekauff." On May 1 following two additional remonstrances were filed, one signed: "David Cole, Remonstrator," and the other "David Cole, Remonstrator, by Oscar Middlekauff." At 4 o'clock P. M. of that day, at a meeting of the city council, the time for hearing the several remonstrances was set for 7 o'clock P. M. on the following day, and the council adjourned until 7 o'clock P. M.

of May 1, by agreement, to consider the matter of the qualifications of certain signers of the petition of the applicant, that being one of the grounds upon which the remonstrance was based. When the council convened on the evening of May 1, the parties all agreed that the petition contained a sufficient number of freeholders, and the record shows the following, among other proceedings: "David Cole, remonstrator, against the petition of W. J. Horrigan filed a written withdrawal of all objections against issuing of the license to W. J. Horrigan. Remonstrators against the granting of license having withdrawn their remonstrances, it is moved by Neilson, and seconded by McElhiney (members of the council), that saloon license be granted to W. J. Horrigan." On this motion all the members of the council voted aye, and the clerk was ordered to issue the license.

The relator was present in the council chamber when these proceedings were had, and made no objection or protest, and the council adjourned. After adjournment the relator complained that the proceeding was illegal, and on the following day filed a new remonstrance, with a præcipe demanding subpœnas for witnesses, and that the council take action on his remonstrance. This request was refused, and the refusal resulted in the petition for mandamus. He now insists that he was one of the original remonstrators, and that his remonstrance was never withdrawn, and that the action of the council taken at the evening meeting on May 1 was illegal. There are two answers to this contention: First, that he was present when the resolution was adopted showing the withdrawal of all remonstrances, and permitted the council to act on the assumption that they were withdrawn, and made no objection to such course; second, the council proceeded upon the theory that he was an attorney for the remonstrator, and that he appeared in that capacity only. He was advised prior to the evening meeting that the remonstrator Cole had signed a written withdrawal of all remonstrances interposed by him against the issuing of the

license, and might, had he desired to do so, have prepared and filed a remonstrance on his own behalf. This he failed to do, and while final action was taken by the council in advance of the time fixed for hearing the remonstrances, yet when they did act they were lawfully assembled, clothed with power to issue licenses, and all remonstrances having been withdrawn there was no occasion for further delay, and so far as the record discloses the action of the council was taken in the utmost good faith. The trial court found all the issues in favor of the respondents, and the finding had ample support in the evidence.

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

IN RE E. A. BUTLER ET AL.

FILED APRIL 5, 1906. No. 14,598.

1. **Depositions: NOTARIES: POWERS.** In the taking of depositions notaries public are not exercising judicial functions, and do not constitute a law court. Their powers are derived solely from the statute. *Courtnay v. Knox*, 31 Neb. 652.

2. **Notaries: CONTEMPT: PENALTY.** When a witness fails to attend before a notary public in obedience to a subpœna issued by that officer, he may be punished as for a contempt; but such punishment cannot exceed a fine of $50, and the notary is not authorized by statute to commit the witness to the county jail therefor.

ORIGINAL application for a writ of habeas corpus. *Writ allowed.*

H. M. Sullivan and *Mockett & Mattley,* for petitioners.

R. A. Moore, contra.

BARNES, J.

This is an original application for a writ of habeas corpus. The petitioners were arrested on a complaint made before one J. R. Rhodes, a notary public in and for Custer county, Nebraska, charging them with having failed and refused to obey a subpœna issued by said officer in the matter of taking certain depositions. They were found guilty by the notary, and were committed to the common jail of Custer county. To regain their liberty they prosecute this proceeding.

It appears from the return of the respondent that on the 12th day of December, 1904, R. A. Moore and James Ledwich, as plaintiffs, gave the petitioners, as defendants, notice that they would take their depositions, in an action alleged to be pending in the district court for Custer county, at the hour of 10 o'clock A. M., on the 14th day of December, 1904, before one J. R. Rhodes, a notary public, at his office in the village of Ansley, in said county. It also appears that a subpœna corresponding to said notice was issued by the notary and served on the petitioners. It further appears that on the 13th day of December, 1904, a notice to take the depositions of the same persons, in the same case, before the same officer, on the 16th day of December, 1904, was served on one H. M. Sullivan, the attorney for the petitioners; that said fact was communicated to them by their attorney, and for that reason they failed to appear before the notary on the 14th day of December according to the subpœna above mentioned. Afterwards, on the said 14th day of December, and after the time mentioned in the first notice and subpœna had expired, R. A. Moore appeared before the notary and made the following complaint (omitting the title): "State of Nebraska, Custer County, ss.: I, R. A.

Moore, on oath depose and say that I am one of the plaintiffs mentioned in the above suit; that on the 12th day of December, 1904, I caused a notice to be issued and served on the defendants that plaintiff would take the depositions of E. A. Butler, William Mattley and Arthur Barks, before J. R. Rhodes, a notary public of Ansley, Custer county, Nebraska, on the 14th day of December, 1904, at the hour of 10 o'clock A. M., and that said witnesses were personally served with a subpœna signed by said notary; that the return to the notice and subpœna is hereby made a part of this showing; that said witnesses have failed, and wilfully and knowingly refused to appear before said notary and submit to an examination, and affiant asks that the said notary issue an attachment for said witnesses, and that they be arrested, and brought before said notary, and be fined for said contempt; that by disobeying said subpœna said witnesses are in contempt of court, and he asks that they be compelled to appear and submit to an examination, as by law provided." Signed and sworn to by R. A. Moore. After filing the complaint above quoted, the notary issued a warrant for the arrest of the petitioners, which warrant was in the words and figures following: "State of Nebraska, Custer county, ss.: To the Sheriff or any Constable of said County: You are hereby commanded to arrest forthwith E. A. Butler, William Mattley and Arthur Barks, and bring them before me, J. R. Rhodes, a notary public in and for the village of Ansley, county of Custer, and state of Nebraska, to show cause why they should not be punished for contempt for disobeying the order of said notary public in subpœnaing said witnesses to appear before him to take their depositions to be used in a cause pending in the district court for Custer county, Nebraska, wherein R. A. Moore and James Ledwich are plaintiffs and Nettie Barks and Arthur Barks and E. A. Butler & Co. et al. are defendants, on the 14th day of December, 1904, at 10 o'clock A. M., such behavior tending to interrupt the due course of the trial of said cause. Given under my hand and official

seal this 14th day of December, 1904. J. R. Rhodes, Notary Public. (Seal.)"

The petitioners were thereupon arrested, and brought before the notary. The hearing of said contempt proceeding was continued from time to time, until the 19th day of December, 1904, when the cause was tried, and the petitioners were adjudged to be in contempt, and were committed to the common jail of Custer county. The foregoing are the facts established by the petition, the return of the sheriff of Custer county, the respondent herein, together with the testimony taken on the hearing before us.

The petitioners now contend, among other things, that the judgment or order of the notary, and the warrant of commitment thereon, by which they are restrained of their liberty, are void, because the notary was without jurisdiction to make such order of commitment. We think this contention is well founded. The rule is fundamental that in taking depositions notaries public are not exercising judicial functions, and do not constitute a law court. Their powers are solely derived from the statute. *Courtnay v. Knox*, 31 Neb. 652. Keeping in mind this rule, we find from an examination of the statutes that section 356 of the code provides: "Disobedience of a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer by whom his attendance or testimony is required." It is further provided by section 358 of the code: "The punishment for the contempt mentioned in section 356 shall be as follows: When the witness fails to attend in obedience to the subpœna (except in case of a demand and failure to pay his fees), the court or officer may fine the witness in a sum not exceeding $50. In other cases, the court or officer may fine the witness in a sum not exceeding $50 nor less than $5 or may imprison him in the county jail, there to remain until he shall submit to be sworn, to testify, or give his deposition." It will be observed that the complaint on which the petitioners were arrested and brought

before the notary charged them with failing and refusing to obey the subpœna above mentioned. This is the only charge contained in the complaint, and is the one described in the warrant. It seems clear that for that offense the officer could impose no greater punishment than a fine of $50 and that he had no power or authority to commit the petitioners to the county jail therefor. In *Ex parte Mallinkrodt,* 20 Mo. 493, where the petitioner was committed to jail by a notary public for contempt in not producing certain books and papers in answer to a *subpœna duces tecum,* issued by the notary, to give testimony in an action pending in the circuit court of St. Louis, it was held:

"The power of notaries, in taking depositions, is strictly statutory. They can do nothing not expressly authorized and under the circumstances which authorize it. There is no power given to an officer taking depositions to commit a witness for refusing to produce books."

The only power given the notary by our statutes in case of a refusal of the witness to obey a subpœna is to fine him not to exceed the sum of $50. It follows that the order of the court based on the complaint and warrant set forth in the respondent's return was without authority of law and is void.

It is contended for the respondent that the order of the notary and warrant of commitment show that the petitioners were found guilty of the offense of refusing to testify, and therefore the order was valid. The record itself is a sufficient answer to this contention. It is not shown that the petitioners were directed or ordered to be sworn. It is not shown that they refused to be sworn or give their testimony. The record does not show that a single question of any kind, seeking to elicit their testimony, was propounded to them. In fact the only question before the notary at the time his order of commitment was made was whether or not the petitioners were in contempt for refusing to obey the subpœna. As was said in *Crites v. State,* 74 Neb. 687, a proceeding to punish for con-

tempt is criminal in its nature, and the rules governing criminal proceedings are applicable thereto. It is essential to the validity of contempt proceedings that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support; that the record must show forth the facts constituting the offense. That the record in this case fails to comply with these well known requirements, and is not sufficient to sustain the order of commitment, there can be no question. The petitioners being unlawfully restrained of their liberty must be discharged from custody, and it is so ordered.

JUDGMENT ACCORDINGLY.

STATE, EX REL. CITY OF RED CLOUD, RELATOR, V. EDWARD M. SEARLE, JR., AUDITOR, RESPONDENT.

FILED APRIL 5, 1906. No. 14,643.

1. Cities: LIGHTING SYSTEM: BONDS. Cities of the second class and villages in this state have the option to vote bonds to the amount of 5 per cent. of the assessed valuation of their taxable property to establish a heating or lighting system, under the provisions of sections 1-5, art. V, ch. 14*a*, Comp. St. 1903, or limit the amount of such bonds to 2½ per cent. of such valuation by proceeding under chapter 33, laws 1905.
2. ———: BONDS: REGISTRATION. Bonds, designated electric light bonds, to the amount of 5 per cent. of such assessed valuation, which the record fairly shows were voted and issued under the provisions of the act of 1903, *held* valid and entitled to registration.

ORIGINAL application for a writ of mandamus to compel respondent to register certain bonds. *Writ allowed.*

L. H. Blackledge, for relator.

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

BARNES, J.

This is an original application for a writ of mandamus to compel the auditor of public accounts to register a series of electric light bonds voted by the city of Red Cloud, a city of the second class, having less than 5,000 inhabitants. It appears from the petition of the relator that on the 9th day of January, 1906, the city of Red Cloud voted bonds to the amount of $10,000 (which is 5 per cent. of the value of its taxable property) to "construct and establish a system of electric lights in and for said city"; and on the 12th day of March, 1906, presented said bonds, together with their history, to the respondent for registration and certification, as provided by law; that the auditor refused to register them, for the following reason: "This department cannot register electric lighting bonds of your city presented for registration by Mr. L. H. Fort, for the reason that you have voted them under the wrong statute. The statute providing for the voting of electric lighting bonds says: 'That but two and one-half per cent. of the assessed valuation can be voted.'" And thereupon this application was made.

To the relator's petition the respondent has filed a general demurrer, which raises the question as to whether the relator has power, under the statutes now in force, to vote electric light bonds to the amount of 5 per cent. of the taxable value of its property, as shown by the last previous annual assessment thereof. It appears that the legislature, at its session of 1889, passed an act authorizing any city of the second class to establish, maintain, operate and control a system of electric lights, and to vote bonds for that purpose. The act by its terms limited the amount of such bonds to 2½ per cent. of the taxable value of the property of such city, as shown by the last previous annual assessment. Laws 1889, ch. 19. In the year 1901 the legislature passed an act authorizing cities of the first and second class to establish and maintain a heating or lighting system; to vote bonds for that purpose, limiting the

bonds so voted to an amount not exceeding 5 per cent of the taxable value of the property of such city. Laws 1901, ch. 22. That act did not purport to amend or repeal the law of 1889, but was a separate and independent act. In the year 1903 the legislature amended the last-mentioned act so as to make it apply to villages as well as to cities of of the first and second class. Comp. St. 1903, ch. 14*a*, art. V, secs. 1-5.

It is apparent that the legislature did not intend, by the act last above mentioned, and the amendment thereto, to repeal the act of 1889, authorizing the construction and establishment of electric light systems, because at its session of 1905, it passed an act amending the law of 1889 (Comp. St. 1905, ch. 14, art. I), as follows:

Sec. 124. "Any city of the second class in this state and any village shall have the power and is hereby authorized to establish and maintain a system of electric lights for such city or village; and the city council of such city or the board of trustees of such village shall have the power to levy a tax not exceeding five mills on the dollar in any one year for the purpose of establishing, extending, and maintaining such system of electric lights."

Sec. 125. "Where the amount of money which would be raised by the levy provided for in section 124 would be insufficient to establish a system of electric lights as contemplated herein in any city or village in this state, such city or village may issue its bonds bearing not to exceed five per cent. interest and maturing in twenty years, but payable at any time after the expiration of ten years, at the option of the city or village, for the purpose of raising a sum sufficient to establish such electric light system; provided that the aggregate of bonds issued for such purpose shall not exceed two and one-half per cent. of the taxable value of the property of such city or village as shown by the last previous annual assessment."

It will be seen by a comparison of these acts, that they are unlike in several particulars. One provides for establishing and maintaining a heating or lighting system, and

authorizes cities of the first and second class and villages to vote bonds therefor to the amount of 5 per cent. of their assessed valuation; provides, that such bonds may bear 6 per cent. interest, and shall run for 20 years, but shall be payable at the option of the municipality at any time after 5 years; while the other only authorizes cities of the second class and villages to vote electric light bonds, expressly limits the amount of such bonds to 2½ per cent. of the taxable value of the property of such city or village, provides that such bonds shall not bear more than 5 per cent. interest, and makes them payable in 20 years, with an option to the municipality to pay them at any time after 10 years. Again, one provides specifically how contracts for the construction of the system mentioned therein shall be let; while the other makes no such provision. It is thus apparent that the legislature in passing each of these acts recognized the existence of the other, and there can be no doubt that the legislative intention was that the provisions of both acts should be enforced. It may seem that the point raised by the respondent is extremely technical, yet we must give it our careful consideration.

By a rule of statutory construction it is made our duty to hold each of the acts in question valid, and give to each of them all the force and effect possible. Under this rule it seems clear that cities of the second class and villages have an option, to vote bonds to the amount of 5 per cent. of their assessed valuation to establish a heating or lighting system, under the provisions of section 1-5, art. V, ch. 14*a*, Comp. St. 1903, or bonds to the amount of 2½ per cent. of such valuation to construct and establish an electric light system, under the provisions of the act of 1905 above mentioned. So it only remains for us to ascertain from the record which act the bonds in question were voted and issued under. The history of the bonds shows that the proclamation and notice of the election stated at the outset that the amount of the bonds should be 5 per cent. of the assessed taxable property of the city, and that the vote should be taken and the bonds issued under the provisions

of sections 1-5 above referred to; that the proposition contained in the proclamation and notice of election was duly adopted by the electors of the city; that the bonds were made payable in 20 years with an option to pay them at any time after 5 years as provided by the act of 1903, and state upon their face that they are voted and issued under the provisions of that act. It may therefore be said that the record fairly shows that the bonds were voted and issued under the act of 1903, and not under the act of 1905. So we are of the opinion that the bonds were properly voted and issued under the act authorizing the city to vote bonds to the amount of 5 per cent.; that the objection of the respondent was not well taken, and that the relator is entitled to the relief prayed for. For the foregoing reasons, the peremptory writ of mandamus is hereby allowed.

WRIT ALLOWED.

SYLVESTER H. KNEELAND v. WILLIAM W. WEIGLEY.

FILED APRIL 5, 1906. No. 14,095.

1. **Attachment: OBJECTION TO JURISDICTION.** Where the only ground alleged for the issuance of an attachment is that the defendant is a nonresident, he is not entitled to make a special appearance or to answer, attacking the jurisdiction of the court upon the sole ground that he is not the owner of the property seized under the writ.
2. *Welch v. Ayres*, 43 Neb. 326, modified.

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

L. B. Stiner and *Tibbets Bros. & Morey*, for plaintiff in error.

Epperson & Sons and *S. W. Christy, contra.*

LETTON, J.

This was an action brought to recover upon a judgment rendered in the state of New York. Certain real estate in

Clay county was attached under an order of attachment issued upon an affidavit the ground of which was that the defendant is a nonresident of the state. The defendant made a special appearance objecting to the jurisdiction of the court, which was overruled. An answer was thereafter filed by the defendant, the first defense therein setting forth in substance the same matters and objections to jurisdiction which were set forth in the special appearance. These allegations are in substance as follows: That the plaintiff is a resident of the state of New York and had never been a resident of Nebraska; that the only service is by publication upon the alleged levy of an attachment upon certain real estate in Clay county made on May 19, 1903; that the defendant at said time had neither title nor ownership, legal or equitable, to said premises or any portion thereof, nor the possession of any part thereof, nor any right, title, claim or interest of any kind in or to said premises; that the defendant did not have on May 19, 1903, or at any time since, any property or debts owing to him in the state of Nebraska; that upwards of 20 years ago he purchased said real estate and in 1876 sold the same to his brother, James P. Kneeland, and Alice Kneeland, his wife, retaining the naked legal title for the purpose of securing the purchase price; that in 1877 James P. Kneeland and family entered upon the possession of the premises as the owners thereof and have ever since occupied the same as such owners; that in 1895 he received full payment of the balance of the purchase price, but that he retained the naked legal title until December 15, 1902, when he executed deeds to the premises to his brother and his wife, which were recorded on March 9, 1903, and that he has had no interest in the land since 1876, except a lien for the purchase price as before set forth, and that on May 19, 1903, defendant was absolutely without any right, title, claim, lien or interest, of any name, nature or description, in or to the premises; that by reason thereof this court has acquired no jurisdiction over his person or the subject matter of the action. The second defense was a general

denial. A general demurrer was filed to the first defense, which was sustained by the court, to which the defendant duly excepted. Afterwards the cause was heard upon the pleadings and the evidence, judgment rendered for the plaintiff and the attached property ordered sold. From which judgment and order the defendant has brought these error proceedings.

The only assignment of error which it is necessary to consider is that the district court erred in sustaining the demurrer to the first defense set forth in the answer. Under the provision of the third subdivision of section 77 of the code, jurisdiction of a defendant in an action for the recovery of money cannot be acquired by service by publication unless the defendant is a nonresident of the state, having property in this state, or debts owing to him, which are sought to be taken by some provisional remedy or to be appropriated by judicial proceedings.

The plaintiff in error contends that the facts set forth in the first defense show conclusively that the court never acquired any jurisdiction, and that hence his special appearance should have been sustained and the demurrer overruled. The principles governing jurisdiction in cases of this kind are lucidly set forth by Justice Miller in *Cooper v. Reynolds,* 10 Wall. (U. S.) 308. It is shown in the opinion that by jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought, that jurisdiction of the person is obtained by the service of process or by the voluntary appearance of the party in the case, and that jurisdiction of the *res* is obtained by a seizure, under process of the court, whereby it is held subject to such order as the court may make in the cause. In *Darnell v. Mack,* 46 Neb. 740, in a clear and convincing opinion by IRVINE, Commissioner, the former decisions of this state are reviewed and the principles laid down in *Cooper v. Reynolds, supra,* approved and adopted. The doctrine laid down in *Darnell v. Mack, supra,* though often assailed, has become the settled law of this state, and we believe it to be sound.

Plaintiff in error argues, upon the authority of *Welch v. Ayres,* 43 Neb. 326, that, where the defendant asserts that he has no property within the state, it is competent for the court to hear testimony upon this question for the purpose of determining whether or not it ever acquired jurisdiction. It will be observed that the statement of this proposition in *Welch v. Ayres, supra,* was not necessary to a decision of the case. In that case the court held that, since the defendant had filed a motion to dismiss the suit, he had made a general appearance in the action, and that this was a waiver of defects in the service by publication and gave the court jurisdiction of the person of the defendant, so that the proposition relied upon in this case was *obiter dictum.* Judge NORVAL cites as authority for his position the case of *National Bank of New London v. Lake Shore & M. S. R. Co.,* 21 Ohio St. 221. In that case the action was brought against certain nonresidents of the state of Ohio and a notice of garnishment was served upon a railway company. The railway company answered as garnishee, denying that it held any railway stock, property or credits of the defendant in its possession or under its control, and alleged that at a previous date the defendant had transferred all his stock in said company to another person and had held none since that date. Judgment by default was rendered against the defendant and an order made for the sale of 40 shares of stock of said railway company as property attached belonging to the defendant. Afterwards, under an order of court, the sheriff sold to the plaintiff the 40 shares referred to, and this action was brought against the railway company to recover the value of said 40 shares, claiming that at the time of the garnishment the defendant was the owner of the stock, that the transfer made by him was without consideration and made with intent to defraud the plaintiff, and that by virtue of the proceedings and sale the stock became the property of the plaintiff, and that the defendant wrongfully refused to transfer and deliver the same to the plaintiff when requested so to do. The defendant denied

the jurisdiction of the court, that the attachment defendant was the owner of the stock, that he had fraudulently transferred the same and that any interest had passed to the plaintiff by the sale under the attachment. Trial was had and a judgment rendered for the plaintiff for the value of the stock. This judgment was reversed for the reason that the plaintiff was not entitled to the relief sought in an action of that form. Upon the question as to jurisdiction the court say:

"The question under consideration being as to the jurisdiction of the court, and not as to the regularity of its proceedings, it is important, it appears to me, to keep distinctly in mind the fact that this action was *in personam* —an action for the recovery of money, and not a proceeding *in rem* merely. * * * In the attachment proceeding against Butler, it was claimed by the plaintiff that he was the owner of the stock and that claim was verified by affidavit. The garnishee in his answer denied that the defendant owned any stock to its knowledge. Afterwards, upon the trial of the cause, the court heard testimony and found that he was the owner although it stood in the name of his wife. The record does not disclose the testimony that was offered, but we are of opinion that it was competent for the court to inquire into this jurisdictional fact, and having found it in favor of the jurisdiction, the subsequent judgment and order were not void."

This case was decided before the principles which govern actions affecting the property of nonresidents sought to be reached by attachment proceedings had been announced in *Pennoyer v. Neff,* 5 Otto (U. S.), 714, now recognized as the leading case upon the subject. It seems to us that the Ohio court was in error when it said that the action was one *in personam.* It was in form an action *in personam,* but, unless the defendant was summoned within the state, or personally appeared, it was an action *quasi in rem,* and a judgment would be of absolutely no force or validity as affecting the person. Further, the reasoning of the court is based upon the assumption that jurisdiction of

the *res* was not obtained by the seizure, but by the publication, which is contrary to the doctrine of *Darnell v. Mack, supra.*

Since, if the defendant does not own the property which has been attached, he can suffer no possible injury by the attachment proceedings, it is very generally held that an attachment defendant is not entitled to have the attachment quashed for the sole reason that he is not the owner of the property seized. See cases cited in note to 4 Cyc. p. 775. In *McCord, Brady & Co. v. Bowen,* 51 Neb. 247, it is pointed out that, while a defendant in attachment may deny the truth of the facts set forth as the grounds for attachment, such as that he has fraudulently conveyed his property, it is not competent for him to move the discharge of an attachment upon the ground alone that the property attached does not belong to him. Whatever the grounds set forth in the affidavit for attachment may be, the defendant has a right to deny their existence and to have that issue tried, regardless of whether or not he owns the property attached, but, where the grounds for the attachment are not denied, the fact that the defendant does not own the property which may have been seized under the writ is not a good ground for him to move for a dissolution of the attachment, for the reason that if the property is not his he has no interest in its seizure or discharge. The same reason applies with equal force against the propriety of permitting a nonresident defendant to attack the jurisdiction of the court over the *res* upon the ground that it belongs to someone else. If it is not his he cannot suffer any loss or damage by the levy of the attachment. The whole proceeding would be absolutely void, both as to jurisdiction over the property and over his person. If the action proceeds to judgment and order of sale of the attached property, and the defendant has in fact no interest in the real estate seized, he is not concerned. We are not unaware that in *Harris v. Taylor,* 35 Tenn. 536, and *Schlater v. Broaddus,* 7 Martin (La.), 527, the contrary view was taken, but we think ours is upon better

reason. We have held that, where an attachment is issued and levy made upon real estate belonging to the debtor, whether held in his own name or not, the creditor acquires a lien upon the interest of the debtor in the land, which he may enforce after the recovery of the judgment, and the fact that the party holding the legal title to the land is a nonresident of the state is immaterial, since in such case service may be had by publication. *Keene v. Sallenbach,* 15 Neb. 200. The question of title should be tried in a case in which the facilities afforded for the ascertainment of truth by the examination and cross-examination of witnesses may be had, and not upon affidavits, as might be done if we consented to the doctrine of the plaintiff in error and held that it might be tried upon objections to jurisdiction made by special appearance.

The doctrine of *Welch v. Ayers, supra,* is modified in accordance with these views. The special appearance was properly overruled and the demurrer sustained. The judgment of the district court is

AFFIRMED.

EMMA PETERSEN, APPELLEE, V. SOREN T. PETERSEN, APPELLEE, AND J. A. C. KENNEDY, APPELLANT.

FILED APRIL 5, 1906. No. 14,168.

Divorce: DISMISSAL: INTERVENTION. When, in an action by a wife for a divorce, the parties become reconciled and resume marital relations before issue joined, it is not error for the court to dismiss the suit at the instance of the plaintiff, and such a dismissal carries with it a pending application for temporary alimony, which the plaintiff's attorney is not entitled to revive, by means of intervention, and prosecute for his own benefit.

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

T. J. Mahoney and *J. A. C. Kennedy,* for appellant.

J. O. Detweiler, contra.

AMES, C.

May 31, 1904, Emma Petersen begun an action in the district court for Douglas county against Soren T. Petersen with whom, she alleged in her petition, she had lived for more than ten years then last past as his wife, and by whom during that time she had been recognized as such publicly and in such manner as to establish a lawful marriage between him and herself, but alleging that he had been guilty of certain breaches of duty toward her in that relation on account of which she was entitled to a decree of divorce and alimony, for which she prayed. The petition also contained a prayer for temporary alimony to enable the plaintiff to maintain and carry on her action. On the next day the defendant was served with a copy of the petition together with a notice that the application for temporary alimony would be urged upon the attention of the court three days later, viz., on June 4. On the latter date the hearing of the application was, at the request of the defendant, postponed until June 10. On the 6th of June the parties met and effected a reconciliation, which was ratified on the same day by a formal celebration of their marriage in conformity with the statute. What their relations had been before that time does not appear, otherwise than by the allegations of the petition in response to which no pleading was ever filed, but on the 18th of the month the plaintiff filed in the court a formal written application to dismiss the action at her own costs, which motion the court on the same day denied, because of the pendency of a petition by J. A. C. Kennedy, attorney for the plaintiff, for leave to intervene and prosecute a claim against the husband for an allowance of a sum of money, as for alimony, to compensate him for his services in the beginning and prosecution of the suit. To this application the defendant filed a general demurrer, which was afterwards sustained, and the petition for an intervention was dismissed, as was also the action, at the renewed request of the plaintiff. The intervener Kennedy prosecutes error.

The proceeding by the plaintiff in error differs in no essential particular from a suit at law prosecuted by him against the husband to recover as upon a *quantum meruit* for services rendered to the wife in the divorce suit. No order for alimony has ever been made, and no fund has ever been paid into court or in any way raised or created upon which he can pretend to have acquired any lien. Whether such a fund ever would have been created even if the action had proceeded, rested wholly in the discretion of the trial court. Her application for temporary alimony created no right, and even if an allowance therefor had been granted, the money would have been awarded, not to her attorney, nor necessarily for attorney's fees alone, and the amount of the latter would have been the subject of a contract expressed or implied between her attorney and herself. The husband would have incurred no obligation to his wife's attorney, but in the discretion of the court might have been compelled to contribute to the relief of her necessities.

Intervener cites no authority in support of his claim, but several are cited in opposition thereto, among which are: *McCulloch v. Murphy,* 45 Ill. 256; *Thompson v. Thompson,* 3 Head (Tenn.), 527; *Carden v. Carden,* 37 S. W. (Tenn. Ch. App.) 1,022; *Anderson v. Steger,* 173 Ill. 112, 50 N. E. 665. The case of *Aspinwall v. Sabin,* 22 Neb. 73, cited by plaintiff in error, goes, we think, to the very extreme in this direction, but still falls short of reaching the end he seeks to attain. In that case an award of alimony specifically as fees to the plaintiff's attorneys had in fact been made apparently for services already rendered. That is to say, the court had adjudged the right of counsel to compensation and the amount of it against both the plaintiff and the defendant, and the subsequent reconciliation of the parties and their dismissal of the action did not have the effect to satisfy or annul that judgment. In *Waters v. Waters,* 49 Mo. 385, cited by plaintiff in error, the husband was plaintiff in a divorce suit which he had prosecuted so far as to compel his wife to obtain

the services of counsel for the preparation of her defense. He was, therefore, himself at least morally responsible for the creation of the obligation which he was called upon to discharge, and a claim for which was pending when he dismissed his suit. It is not unlikely that he was liable at law and independently of the divorce statute as for a necessity furnished to his wife at his instance, but, in any view, the case is so different from the one at bar as not to be in point. The same considerations apply to *Powell v. Lilly,* 68 S. W. (Ky.) 123, and other cases from the same state, also cited by plaintiff in error. In this case the wife was plaintiff, and, in the absence of proof, there is no presumption that the defendant, if he were her husband, had been guilty of such *quasi* criminal conduct as justified an application to the court for a dissolution of the marriage tie. Proof thereof, if any existed, did not rest in the breast of the plaintiff in error, and was not supplied by the unsupported allegations of the petition and application, but could have been elicited, if at all, only by such an investigation into the marital and domestic history of the plaintiff and defendant as, after reconciliation and the resumption of the marital relations, would have been plainly and offensively repugnant to public policy.

We are of opinion therefore that the court did not err in sustaining the demurrer and dismissing the intervention, and recommend that the judgment be affirmed.

OLDHAM and EPPERSON, 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.

LANCASTER COUNTY ET AL. V. JENNIE E. BROWN.

FILED APRIL 5, 1906. No. 14,174.

Taxation: APPEAL: EVIDENCE. On an appeal by a property owner from a county board of equalization to the district court, on the sole ground that his property has been valued for taxation at a sum in excess of its real value, the sole question to be tried is, "What was the actual value of the property in the market in the ordinary course of trade?" This question is to be tried, in such a proceeding, in the same manner in which similar issues are tried in ordinary adversary actions between private persons, and evidence tending to show at what sums other similar property in the neighborhood had been valued for taxation, in the same year, by the assessor and his assistants and by the county board of equalization is incompetent and immaterial.

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

J. L. Caldwell, Charles E. Matson and *F. M. Tyrrell,* for plaintiffs in error.

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

AMES, C.

Jennie E. Brown was, in the year 1904, the owner of certain dwelling house property situate in the city of Lincoln, which the county assessor and his deputy valued and returned for taxation at the sum of $31,850. She made complaint to the county board sitting as a board of equalization that the property did not exceed $20,000 in value and asked to have the valuation reduced to that sum. The county board took the matter into consideration and after hearing testimony reduced the amount to $25,000. From an order of the board fixing the valuation at the last named sum an appeal was taken to the district court where pleadings were filed as in cases of appeals in ordinary adversary cases. The sole issue upon such pleading was raised by a denial in the answer of the following allegation

in the petition: "The complainant alleges that the valuation of said premises as returned by the assessor and as reduced by the board of equalization for the purposes of taxation for the year 1904 is largely in excess of the actual value of said property as defined by the statute. That the value of said property in the market in the ordinary course of trade does not exceed the sum of $20,000." As the result of a trial the court sustained the contention of the plaintiff and adjudged the value of the property to be $20,000.

The county prosecutes error in this court upon two contentions: First, that the judgment is not supported by the evidence; and, second, that the court erred in excluding evidence tending to show at what sums other similar property in the neighborhood had been valued for taxation in the same year by the assessor and his assistants and by the county board of equalization. The latter contention cannot, in our opinion, be maintained. The statutes under which the proceeding is had, and having a bearing upon the questions involved in the controversy, are the following sections from the revenue act of 1903. (Comp. St. 1903, ch. 77, art. I.)

Section 12. "All property in this state not expressly exempt therefrom shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at twenty per cent of such actual value. * * * Actual value as used in this act shall mean its value in the market in the ordinary course of trade."

Section 124. "Appeals may be taken from any action of the county board of equalization to the district court within twenty days after its adjournment, in the same manner as appeals are now taken from the action of the county board in allowance or disallowance of claims against the county. * * * The court shall hear the appeal as in equity 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,

and any decision rendered therein shall be certified by the clerk of the court to the county clerk, who shall correct the assessment books in his office accordingly."

We find nothing in these enactments indicating a legislative intent that upon the trial of an issue like that presented in this case the district court shall make use of the functions of a board of equalization, and, except to aid in the exercise of such functions, the evidence offered could have been of no advantage. It was not evidence of the value of the property in question nor even of the value of the property to which it directly referred, but, at most, of the opinion as to the value of the latter mentioned property of persons who were not produced as witnesses in court or otherwise subjected to examination or cross-examination, and about whose competency or credit the court could officially, at least, know nothing. The sole issue raised by the pleadings was the question, "What was the actual value of the property in the market in the ordinary course of trade?" We can discover no ambiguity in the pleadings. The inquiry is very narrow and one with which the courts are accustomed to deal, and without doubt it should be tried and determined in all respects in the same manner in which similar questions are treated in ordinary actions between private litigants. Under the issues in this case the court has nothing to do with theories of taxation or questions of proportional valuation or methods of equalization. *Grimes v. City of Burlington,* 74 Ia. 123, 37 N. W. 106; *Lyons v. Board of Equalization,* 102 Ia. 1.

As respects the sufficiency of the evidence, seven competent witnesses were sworn, none of whom estimated the property at more than $20,000 in market value. No attempt was made to refute them, except by cross-examination as to the separate value of the buildings and conjectural values of the lots considered as unimproved, by which means some of them were induced to admit that the sum of the two items exceeded their valuation of the whole. It is not difficult to understand how such may

have been the case, or how the naked lots might have found a more active and competitive market than the same ground incumbered by large and expensive buildings. At all events, the cross-examination affects only the credibility of the witnesses, which the trial court was at least quite as capable of deciding upon as are we, and which we do not regard as having been shaken.

We are unable to discover any error in the record, and recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, 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.

S. D. MERCER COMPANY, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED APRIL 5, 1906. No. 14,228.

1. **Judgment:** RES JUDICATA. The rule is well settled, both in this state and elsewhere, that a judgment is an estoppel only as to those matters actually in issue and tried and determined in the action in which it is rendered.
2. **Limitation of Actions.** Section 16 of the code is applicable to ordinary civil actions only.
3. **Cities:** ASSESSMENT: RELEVY. The Omaha charter of 1897 (Comp. St. 1897, ch. 12*a*, sec. 192) contained sufficient authority for the relevy of a special assessment which was attempted to be levied under a former act, but failed because of irregularity in procedure.

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

W. A. Saunders and *Albert Swartzlander,* for appellant.

Harry E. Burnam and *I. J. Dunn, contra.*

AMES, C.

In 1893 the legislature enacted a statute commonly called the "Omaha Charter," by which that city was empowered to create sewer districts and to construct sewers, and for the purpose of providing funds for the payment of the cost of the same to levy special assessments upon abutting property to the extent of the benefits accruing to it therefrom. By this statute it was enacted that, whenever any taxes or special assessments levied in any former year should remain uncollected by reason of any defect, error or irregularity or lack of power in making a levy of the same, the mayor and council should have power to relevy the same upon the same assessment upon which such former levy was attempted to be made, and that such new levy should be in lieu and stead of the former levy. Comp. St. 1893, ch. 12*a*, sec. 94. In conformity with this statute a sewer district, including certain property of the plaintiff, was created and a sewer constructed therein, and proceedings were had by which the amount of special benefits accruing to the property was ascertained, and thereupon an attempt was made to levy a special tax or assessment upon the property for a corresponding amount. In 1897 the charter was repealed and another enacted in its stead which contains the following provision: "The provisions of this act shall not be so construed as to impair or affect the validity of any tax or assessment heretofore made or levied under the acts by this act repealed, but all such taxes and assessments shall be and remain as valid and binding as if this act had not been passed, and shall be collected and enforced in the manner provided, or which may hereafter be provided by law for collecting and enforcing the same." Comp. St. 1897, ch. 12*a*, sec. 192.

In 1898, after the new act had gone into effect, the plaintiff begun an action in the district court to enjoin the collection of the tax and to cancel the same of record, alleging as reasons therefor two grounds: First, that the property was not benefited by the sewer and that the city was

therefore without right, power or authority to make the levy; and, second, that the mayor and council had undertaken to exercise their powers in so defective and irregular a manner as to render their action ineffectual and void. If the city had been wholly without power, any procedure in the matter by the mayor and council, however formal it might have been, would have been quite nugatory, and the particular sins of omission and commission of which it was accused in the petition would have been immaterial. There was an answer and a reply, and a trial and findings and a decree for the plaintiff perpetually enjoining the tax complained of. Among the findings was a general one that all the allegations of the petition were true. But it is clear that among such allegations the court did not intend to include the conclusion of law that the mayor and council were without power, jurisdiction or authority to levy any taxes upon the property of the plaintiff to defray the cost of improvement, because the court further found especially and inconsistently with that conclusion that "no sufficient or legal notice was given of any meeting of the city council as a board of equalization" of assessments in said sewer district, in so far as the property of the plaintiff was affected thereby, and that therefore an ordinance assuming to levy the tax complained of was, in so far as it purported to affect that property, null and void. And the decree was carefully and explicitly limited to an annulment of the taxes attempted to be levied by that ordinance, and to perpetually enjoin any future attempt at collecting such taxes, and to adjudging the title of the plaintiff quieted against the same.

It is, we think, quite clear from an inspection of the findings and decree themselves that all that the court adjudged, or intended to adjudge, was that the mayor and council had proceeded irregularly and unlawfully, which is equivalent to an adjudication, or at least implies, that it was within their competence to proceed regularly and lawfully. The rule is well settled, both in this state and

elsewhere, that a judgment is an estoppel only as to those matters actually in issue and tried and determined in the action in which it is rendered. *Wilch v. Phelps*, 16 Neb. 515; *Slater v. Skirving*, 51 Neb. 108; *Packet Co. v. Sickles*, 5 Wall. (U. S.) 580; *Russell v. Place*, 94 U. S. 606; 1 Herman, Estoppel and Res Judicata, sec. 252.

The foregoing action did not finally terminate until March 3, 1902, and on the 11th day of the same month proceedings were begun by the mayor and council to equalize and relevy the tax in the manner provided by statute, when this action was begun in which it is sought to restrain them from so doing. There was a judgment below for the defendant dismissing the bill and the plaintiff appeals. Appellant argues three grounds for reversal: First, that the matter is adjudged by the former suit; we have already given our reasons for thinking that contention is not sound. Second, that the procedure is barred by the statute of limitations, but he cites no statute having applicability to it. Section 16 of the code has exclusive reference to ordinary civil actions. *Price v. Lancaster County*, 18 Neb. 199. Third, that the act of 1897 repeals the former charter without saving clause, and that therefore the right of the city to levy the tax in question has been taken away. But we think the above quoted clause from the new charter is a sufficient saving clause. The mayor and council have begun the proceeding, sought to be enjoined, for the purpose of enforcing and collecting an assessment attempted to be made under the former act, but which did not fail and was not assailed until after the enactment of the new, and it is provided that the repeal shall not impair or affect the validity of any assessment theretofore made, but that such procedure may be had for its enforcement as the new law provides. The language employed is not the most accurate that could have been chosen, but there is no doubt in our minds about the legislative intent, which should, of course, be carried into effect.

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

OLDHAM and EPPERSON, 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.

NOBLE W. IRVING ET AL., APPELLEES, V. ELLA M. BOND ET AL., APPELLANTS.

FILED APRIL 5, 1906. No. 14,263.

Contract: PAYMENT. When one has an option to pay a debt in money or by the conveyance of property, and voluntarily deprives himself of power to make the conveyance, his obligation to pay cash becomes absolute.

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

Charles W. Haller, for appellants.

John Q. Burgner, George A. Magney and *Baldrige & De Bord, contra.*

AMES, C.

Appellants Bond and wife owned a dwelling house property in Omaha, and entered into a contract with the appellee Irving, a contractor, for the making by the latter of certain changes and repairs of and upon the building. The language of the contract, which is in writing, is not well chosen and is somewhat ambiguous, but we think that a fair interpretation of it is that appellants were to pay Irving for his services and materials to be furnished under the instrument the sum of $1,225, of which $225 was to be paid in cash, and the remaining $1,000

by a conveyance to him of a certain other dwelling house, known as the "Poppleton Avenue" property. Irving substantially performed his contract, but before he had completed it the Bonds had conveyed the latter mentioned property to the appellee Mrs. L. J. Sackett, for a consideration price of $400. Irving then perfected a mechanic's lien upon the property he had repaired and begun this action, making Mrs. Sackett a party defendant, and seeking to foreclose his lien or to obtain specific performance of his contract, or to obtain such other relief as the court was competent to award him. At the instance of Mrs. Sackett, title and possession of the Poppleton avenue property was quieted in her, and in this part of the decree all parties acquiesce. The court also stated the account between Irving and the Bonds, charging the latter with the contract price of $1,225 and crediting them with such amounts as they had paid on account of the same, and rendered a decree of foreclosure for the residue therof. The Bonds appeal to this court.

Mrs. Bond testified on the trial that, in her opinion, the value of the Poppleton avenue property did not exceed the sum of $400 at which it was sold to Mrs. Sackett, and the principal contention of the appellants is that, since the property was agreed to be taken by Irving in satisfaction of $1,000 of his contract price, they should have been charged upon the account with only its actual value, and that the amount of the decree was therefore too large by the sum of $600. But we think the court did not err. As we understand the contract, and as we have no doubt that the parties understood it, appellants had an option to pay $1,000 of the contract price in money or by conveyance of the property in question. Having voluntarily deprived themselves of the power to make a conveyance, they have now no alternative but to satisfy their obligation in cash. Such a transaction differs in some respects from an ordinary executory contract for the purchase and conveyance of land. In the latter case the vendee is entitled, at his option, to have specific per-

formance, if that is possible, but in the former he is not so entitled; but in either case, if the consideration has been paid or performed, and the vendor is guilty of a breach, the vendee may demand restitution and interest, so that the practical distinction is inconsiderable. *Terrell v. Frazier,* 79 Ind. 473; *Pinney v. Gleason,* 5 Wend. (N. Y.) 393; *Stuart v. Pennis,* 100 Va. 612, 42 S. E. 667; *Thompson v. Guthrie,* 9 Leigh (Va.), 101, 33 Am. Dec. 225.

There are certain alleged errors of small items in the statement of the account which we do not very well understand, and which counsel did not take pains to explain by oral argument. Their aggregate is not considerable, and the trial court who had the advantage of hearing the witnesses and making an original investigation presumably did not err with respect to them. On the whole, we discover no error and recommend that the judgment be affirmed.

OLDHAM and EPPERSON, 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 T. CATHERS, APPELLANT, V. AUGUST H. HENNINGS, CITY TREASURER, APPELLEE.

FILED APRIL 5, 1906. No. 14,576.

1. **Statute:** TITLE. It is competent to embrace in one act every detail of legislation connected with, or having direct reference to, the subject expressed in the title.

2. **Cities:** INCORPORATION. In an act incorporating a certain class of cities, and prescribing and regulating their duties, powers and government, it is competent to enact that the treasurer of the county in which the only city of that class is situated shall be *ex officio* treasurer of the city.

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

Frank T. Ransom, for appellant.

John P. Breen and *W. H. Herdman, contra.*

AMES, C.

In 1905 the legislature enacted for the government of the city of Omaha a new law (laws 1905, ch. 14) entitled "An act incorporating metropolitan cities and defining, prescribing and regulating their duties, powers and government and to repeal" all prior statutes on the subject. The act purports to be and, if valid, is comprehensive and complete in itself, providing a complete scheme of government for the one city in the state which answers to the description of municipalities to which it professes to apply. From this scheme the offices of tax commissioner and of locally elective city treasurer, which had existed under a former law, are omitted, and in lieu of the latter it is enacted, in effect, that the treasurer of Douglas county in office when the act shall go into force, and his successors in office, from time to time to be elected and qualified, shall be *ex officio* treasurer of the city also. The act destroys the tenure of the present city treasurer, and directs him to turn the moneys and effects of his office over to the county treasurer to be administered by the latter as the statute provides. This action is by the appellant, who describes himself as a resident and taxpayer of the city, and is brought on behalf, not of himself only, but of all other persons similarly situated and interested, for the purpose of obtaining an injunction perpetually to restrain the city treasurer from obeying the requirements of the act. A general demurrer to the petition was sustained by the district court and the action dismissed.

The sole object of the action is to assail the constitutionality of the new charter. It is first contended that the

title is not broad enough to cover all the subjects of legislation contained in the act, but this objection surely cannot be upheld. The title is more, rather than less, comprehensive than that which was upheld in *State v. Palmer,* 10 Neb. 203, and which has served as a model for titles of acts providing for the incorporation and government of municipalities in this state for more than 25 years. It is analogous to a title to "provide a system of revenue" or to "provide a criminal code." It has never been seriously doubted, so far as we know, that such a title is broad enough to embrace every detail of legislation connected with or having direct reference to the object therein expressed as the subject of the act.

It is next objected that the act, in so far as it has reference to the office of city treasurer, is in conflict with that clause of section 10, art. V of the constitution, which forbids the appointment or election of any public officer by the legislature, and it is said that the designation, by the act, of the county treasurer as *ex officio* city treasurer is practically an appointment to the latter office by the legislature. This argument appears to us to be far-fetched. It is rather a designation of the territorial qualifications of electors who shall be entitled to choose a city treasurer for Omaha. Similar statutes have been in force in this state from the beginning, as, for example, the school law, which provides that city and village treasurers shall be *ex officio* treasurers of school districts composed in whole or in part of the same or conterminous territory as the city or village in which they are situated. If this objection is valid, it applies with at least equal force to that provision of this and the last preceding charter of the city of Omaha providing for the appointment by the governor of a board of fire and police commissioners for the city, which might, perhaps, be contended by counsel to be also a subject not embraced within the title to the act.

It is further contended that the act attempts to confer new powers and duties upon a county officer in violation of the principle announced in *Haverly v. State,* 63 Neb.

83. The objection applies with at least equal force to the clause just mentioned, with reference to the appointment of a fire and police board. But, in reality, the principle of the decision cited is not involved in this controversy. In that case it was attempted, in an act passed and purporting to be for the creation and government of municipalities, to regulate the powers and prescribe the duties of a county officer with respect to his functions as such—to say in what districts certain assessors should be chosen for the assessment of property for county taxation. In the present instance nothing of the kind is undertaken, but, the county treasurer having had conferred upon him the office of city treasurer also, the act merely prescribes and regulates his powers and duties in the latter capacity and with reference to the affairs of the city entrusted to his charge. It is urged, too, that, as the school law enacts that the city treasurer shall be *ex officio* treasurer of the school district, the charter by vacating the office of city treasurer deprives the school district of a treasurer also, but, as we have attempted to show, the city office is not vacated, the only change effected being in the manner of filling it.

A great number of instances are pointed out in which it is claimed that doubts and inconveniences will arise with respect to the extent and validity of the powers and duties of various city and school district officers and the time and manner of their exercise under the new charter, and the sufficiency of the adaptation of means and procedure to the change in organization caused by the substitution of the new treasurer for the old and by the abolition of the office of tax commissioner, but it will be soon enough to discuss these questions when they are brought to the attention of the court by some one having a direct interest in them, and in a suit in which they shall be properly in issue, so that a decision of them will have the force of a judicial adjudication, which we are of opinion cannot be done in a suit by one who is merely an unofficial resident and taxpayer. It is indeed urged, and the district court

was convinced, so it is said, that the plaintiff has not sufficient interest to maintain the present suit, but we have thought it prudent for the public interest to express an opinion on the main issues, leaving that question undiscussed and only inferentially decided. We are satisfied that the act is not void, and that the change it makes in the manner of choosing a city treasurer is not in violation of the constitution, and recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, 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.

STATE, EX REL. WILLIAM G. URE, APPELLEE, V. JOHN C. DREXEL, COUNTY CLERK, ET AL., APPELLANTS.
STATE, EX REL. EMMET G. SOLOMON, APPELLEE, V. JOHN C. DREXEL, COUNTY CLERK, ET AL., APPELLANTS.

FILED APRIL 5, 1906. Nos. 14,593, 14,594.

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

Fawcett & Abbott and *W. W. Slabaugh,* for appellants.

John P. Breen and *W. H. Herdman, contra.*

AMES, C.

These cases arose under chapter 46, laws of 1905, by which it was attempted to extend for definite periods the terms of office of two of the county commissioners of Douglas county. At the expiration of the terms for which said commissioners had been elected, the appellees applied to the district court for Douglas county for writs of man-

damus to compel the printing of their names as candidates upon ballots to be voted at a primary election of the republican party in that county. The court held the act to be void in the particular mentioned and granted the writ. The respondents appealed. The case is ruled by *State v. Plasters*, 74 Neb. 652. No useful purpose would be accomplished by repeating here the reasons there adduced. It is recommended that the judgments be affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgments of the district court be

AFFIRMED.

UNITED STATES FIDELITY & GUARANTY COMPANY v. HENRY RIECK.

FILED APRIL 5, 1906. No. 14,159.

Foreclosure: APPEAL: SUPERSEDEAS. A surety on a waste bond given to supersede an order of confirmation of sale in a foreclosure proceeding is not liable to the mortgagee, nor to the purchaser at the sale, for taxes assessed against the property pending the final confirmation of the sale in the supreme court.

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

McGilton, Gaines & Storey, for plaintiff in error.

Charles Battelle and *William Baird & Sons, contra.*

OLDHAM, C.

This was an action by the purchaser at a mortgage foreclosure sale against the surety on an appeal bond to recover the amount of the taxes which accrued pending the appeal from the order of confirmation in the supreme

court. There was a judgment for the plaintiff in the court below, and to reverse this judgment defendant brings error to this court.

The sole question presented is whether or not the sureties on a bond for appeal from a confirmation of a sale of real estate are liable for the taxes assessed against the property pending the appeal. The condition of the bond for appeal in such cases, before the amendment of 1903, was that, if the defendant "will prosecute such appeal without delay, and will not during the pendency of such appeal commit, or suffer to be committed, any waste" on the real estate in controversy, then this obligation to be void, otherwise to remain in full force and effect. The bond was executed on the 6th day of March, 1901, and on December 3, 1902, this court affirmed the order of the district court. When the mandate was returned the purchaser at the sale received his deed, and paid the taxes which had accrued pending the appeal, and brought this action against the surety on the bond to recover the amount of the taxes so paid. There was no allegation that the appeal was not prosecuted diligently, the sole contention being that defendant is liable for waste because of his failure to pay taxes pending the appeal.

In determining the question as to whether or not a mortgagor in possession is liable to the mortgagee, or a purchaser at a foreclosure sale, for taxes accruing prior to the final confirmation of the sale, it is necessary to determine the rights and liabilities of each to the other under the laws of this state. In the first place, it is the property and not the person that is liable for taxes on realty in this state. In the second place, in this state a mortgage is treated as a security for the debt, and the title to the real estate remains in the mortgagor until final confirmation of the sale. Both of these propositions are too well established to require the citation of any authorities, so that if there be any liability to the plaintiff on the appeal bond declared upon it is for a breach of the condition against waste pending the appeal, or, stated

differently, because the failure to pay taxes by the mortgagor while in possession pending the final confirmation of the sale constitutes a permissive waste of the inheritance. The term waste, as used in the statute, and in the bond given in conformity with the provisions of the statute should be construed according to its accepted legal significance. In 1 Blackstone, Commentaries (Chitty's ed.), p. *284, the definition of the term is: "Waste is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments to the disherison of him that hath the remainder or reversion in fee simple or fee-tail." In 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1348, the term is defined as follows: "Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by a person rightfully in possession by virtue of a temporary or partial estate—as, for example, a tenant for life or for years." In 1 Washburn, Real Property (4th ed.), p. *108, it is said: "But whatever the act or omission is, in order to its constituting waste, it must either diminish the value of the estate, or increase the burdens upon it, or impair the evidence of title of him who has the inheritance. Waste, in short, may be defined to be whatever does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance." An action to recover for waste, within the meaning of any of these generally accepted definitions, must be brought by the owner of the fee for some act of omission or commission done by one in possession under an inferior estate, or by a mortgagee or other lien holder to protect his security, or recover for an injury thereto, where the security would be or is rendered inadequate by the commission of such waste. Now, while the mortgagor remained in possession of the mortgaged premises pending the final confirmation of the sale, he was then holding as owner of the fee, with a right to redeem at any time before the sale

was finally confirmed and the deed ordered, and his position toward the mortgagee and the purchaser at the foreclosure sale was that of a debtor to a creditor, and not that of one in possession by an inferior estate to the remainderman or the owner of the inheritance.

If the security was inadequate the plaintiff had his remedy by application for a receiver to collect the rents and profits of the mortgaged premises pending the final determination of the appeal. But, instead of availing himself of this remedy, he has chosen to sue the surety on the appeal bond for a breach of the conditions against waste, and, in our view, he cannot recover, because the action of waste must be founded upon the violation or nonperformance of some duty or obligation that the person in possession owes to the owner of the inheritance. A tenant for years might by the terms of his lease owe the duty of paying taxes to the landlord, but in the absence of a stipulation to that effect in the lease such duty would not attach. Between the remainderman and a tenant for life it is universally held that it is the duty of the tenant for life to pay the taxes on the inheritance, and that on the neglect of the tenant for life to do so an action in the nature of waste may be maintained against him by the remainderman. This right, however, is founded on the reciprocal duties existing between a tenant for life and the owner of the inheritance. But, as before pointed out, the relationship of remainderman and tenant of an inferior estate does not exist between mortgagee and mortgagor under the laws of this state. In *Kersenbrock v. Muff*, 29 Neb. 530, it was held that the mortgagee could not maintain a personal action against the mortgagor for taxes paid by the mortgagee. The opinion says:

"While the payment under the mortgage created a lien in favor of the plaintiff on the mortgaged premises for the amount, it did not establish the relation of debtor and creditor. The mortgagee cannot look beyond the land and enforce the amount paid for taxes by a personal judgment against the mortgagors."

This conclusion is supported by the holdings in *Clark & Leonard Investment Co. v. Way,* 52 Neb. 204, and *Woodworth v. Northwestern M. L. Ins. Co.,* 185 U. S. 354.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to the court below to dismiss the plaintiff's petition.

AMES and EPPERSON, 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 the court below to dismiss the plaintiff's petition.

REVERSED.

HERBERT E. TAYLOR V. W. L. HUNTER ET AL.

FILED APRIL 5, 1906. No. 14,271.

Error: REVIEW. Where an examination of the pleadings filed and the evidence offered in support thereof shows that the party complaining procured a judgment more favorable to him than the law and the evidence warranted, we will not, at his request, examine alleged errors of the trial court in receiving testimony and in giving and refusing instructions.

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

Joshua Palmer, F. I. Foss and *R. D. Brown,* for plaintiff in error.

Frederick Shepherd, contra.

OLDHAM, C.

This was an action for damages for fraud and deceit alleged to have been practiced upon plaintiff by the defendants in selling him three and one-half shares of the capital

stock of the Hunter Printing Company, the material allegation being that no such company was ever legally incorporated, and that this fact was well known to the defendants, who falsely represented to the plaintiff that the Hunter Printing Company was legally incorporated under the laws of the state of Nebraska. Defendants answered with a general denial and other special defenses not necessary to be set forth in view of the conclusion about to be reached. There was a trial of the issues to the court and jury, and a verdict and judgment for plaintiff in the sum of $47. To reverse this judgment plaintiff brings error to this court.

The evidence contained in the bill of exceptions shows that, for several years before the purchase of the shares of stock alleged upon, plaintiff had been in the employ of a printing company managed by defendant Hunter; that the name and control of the company had changed several times during the course of his employment; that, some years before the sale of the stock complained of, the company had been duly and legally incorporated under the name of the Lillibridge-Hunter Printing Company, with a capital stock of $15,000; that under this name it had continued in business until Lillibridge sold his shares of stock in the corporation to defendant Hunter. At the time of this sale and transfer of stock, the minutes of the corporation show that the name was changed from the Lillibridge-Hunter Printing Company to the Hunter Printing Company. The amended articles of incorporation, however, were never filed for record with either the secretary of state or the county clerk of Lancaster county. The stock certificate sold and delivered to plaintiff had been printed as a certificate of stock in the Lillibridge-Hunter Printing Company, but when delivered to plaintiff the name Lillibridge was scratched out with a pen and the name Hunter Printing Company left in the certificate. Afterwards the articles of incorporation were amended and the amended articles filed, changing the name of the corporation to the Hunter-Woodruff Printing Com-

pany and increasing the capital stock from $15,000 to $25,000. And still later the articles of incorporation were again amended, changing the name from the Hunter-Woodruff Printing Company to the Woodruff-Collins Printing Company, and increasing the capital stock from $25,000 to $50,000.

It appears that the stock was purchased while plaintiff was in the employ of the company under the management of defendant Hunter; that at that time plaintiff was receiving $12 a week for his services in the company. Mr. Hunter offered to raise his wages to $15 a week, and to reserve $3 a week to be credited to him on the purchase of the stock in the corporation, if he would remain in its employ. He continued in the employ of the company until the amount of stock due him was four and one-half shares of the par value of $100 a share. He then quit the employ of the company and accepted a position in Chicago, Illinois. When he left for his new position he traded one of his shares of stock to M. Hunter, and retained the three and one-half shares, on which this suit was founded. After plaintiff had gone to Chicago the articles of incorporation were amended and the name changed to the Hunter-Woodruff Printing Company, and plaintiff was given an additional one and one-half shares of the Hunter-Woodruff Printing Company stock as a dividend, which he still retains. The three and one-half shares of the Hunter stock were carried on the books of the new company to his credit, and a four per cent. dividend on his five shares of stock was paid him, and received and retained by him. After the company had again increased its capital stock and filed its amended articles of incorporation, changing its name to the Woodruff-Collins Printing Company, plaintiff returned to Nebraska and tried to sell his shares of stock to Mr. Hunter and to Mr. Woodruff. Mr. Hunter declined to purchase his stock because he had retired from the firm, but offered to try and find a purchaser for him, if plaintiff would leave the stock in his hands. Plaintiff thereupon instituted this suit against

defendants Hunter and Baker, president and secretary, respectively, of the Hunter Printing Company, charging fraud and deceit.

There is not a scintilla of evidence in the record sufficient to sustain any charge of either fraud or deceit against either of these defendants in the transaction. Consequently, the verdict in favor of the plaintiff for $47 was a pure gratuity to him. It is not complained of by the defendants, however, and for that reason it will not be set aside. Plaintiff's cause of action, if any, is one for an accounting with the Woodruff-Collins Printing Company for his proportionate share of the stock and dividends in that corporation. The fact that he is entitled to no relief whatever under the allegations and proof in the case at bar renders further examination of the alleged errors at the trial unnecessary.

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

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

UNITED STATES FIDELITY & GUARANTY COMPANY V. WILLIAM MCLAUGHLIN ET AL.*

FILED APRIL 5, 1906. No. 14,184.

Official Bonds: CONSTRUCTION. A bond given for the faithful discharge of the duties of one legally entrusted with state and county funds is an official bond, and the statutory provisions relative thereto enter into and become a part of the contract.

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

* Rehearing allowed. See opinion, p. 310, *post.*

O. B. Polk and *R. S. Mockett,* for plaintiff in error.

T. J. Doyle, contra.

EPPERSON, C.

From January, 1900, until January, 1902, the defendant in error, McLaughlin, was the county treasurer of Lancaster county, and at the beginning of his term appointed one Edgar Waugh an assistant in his office. Waugh was required by his principal to execute the bond herein sued on, with the plaintiff in error as surety, whereupon he entered upon the duties of the position, and was authorized to sign and issue official tax receipts in the name of his principal, and in fact to perform all the official duties of the county treasurer except to sign checks. The bond fixes the maximum liability of the obligors at $1,500, and contains the following preamble and conditions: "Whereas Edgar Waugh of Denton, Nebraska, hereinafter called the employee, has been appointed to the position of deputy treasurer in the service of William McLaughlin, treasurer Lancaster county, Nebraska, hereinafter called the employer, and has been required to furnish bond for his honesty in the performance of his duties in the said position. * * * Now, therefore, * * * the company shall * * * make good and reimburse to the employer all and any pecuniary loss sustained by the employer * * * by any act of fraud or dishonesty on the part of said employee in connection with the duties of the office or position herein before referred to, and occurring during the continuance of this bond or any renewal thereof, and discovered during said continuance or within six months thereafter." This bond and a renewal thereof covered a period of two years ending in January, 1902, during which time Waugh dishonestly appropriated sums aggregating $4,000 collected by him by reason of his position. His dishonesty was not discovered until 1904, and when the amount embezzled was ascertained defendant in error

paid the amount thereof to the county treasurer of said county.

Plaintiff in error contends that the condition in the bond, limiting its liability to such wrongs of the employee as shall be discovered within six months from the expiration of the time covered by the bond, is effective as a limitation upon its liability. The soundness of this proposition, in our opinion, depends upon the nature of the position held by the employee, which in fact governs the character of the bond. If the instrument is not an official bond, then it seems that the contention of the plaintiff in error is correct. On the other hand, if it is an official bond, then the statutory provisions enter into and become a part of the contract, imposing upon the surety all the statutory obligations incident to the contract.

Counsel for plaintiff in error in his briefs and oral argument contended that the bond was personal, given for the benefit of defendant in error, and that it was never required nor recorded as an official bond, and that Waugh was not in fact a deputy treasurer. Waugh was not the chief assistant in McLaughlin's office, nor was he officially designated as deputy treasurer. He was, however, an assistant or clerk authorized to act for and in the name of his principal, intrusted with the duty of handling public funds. He was a public officer. Section 21, ch. 10, Comp. St. 1905, contains the following provision: "Any officer or person who is intrusted with funds belonging to the state or any county thereof, which may come into his posession by an appropriation or otherwise, shall be responsible for the same upon his bond, and when any officer or person is intrusted with any such funds and there is no provision of law requiring him to give a bond in a certain specified sum, he shall give bond in double the amount of the sum so intrusted to him, which * * * in case of county funds * * * shall be approved by the county commissioners and deposited in the county clerk's office." The bond in controversy was given for the faithful performance of the duties of one who was

intrusted with funds belonging to the state and county. The rules governing such instruments are the statutory provisions fixing the liability of public officers, and the law pertaining thereto enters into and becomes a part of the contract. *Holt County v. Scott,* 53 Neb. 176. Under chapter 10 of the Compiled Statutes sureties on an official bond are liable to the person wronged by the officer's unlawful conduct discovered within the period of the limitation for actions thereon. The provision in the bond here in controversy, which purports to excuse the obligors from liability for wrongs not discovered within six months after the expiration of the time, is of no effect. By reason of the bond Waugh was given the official position he held, with all the benefits thereof, and with the opportunity, which otherwise he would not have had, to convert the public funds to his own use. The plaintiff in error, as surety upon said bond, was by its terms estopped from denying that Waugh was a public officer; that the bond was not payable to the proper party; and that it was not approved by the county commissioners as provided by law. *Holt County v. Scott,* 53 Neb. 176; *Paxton v. State,* 59 Neb. 460.

There is no error in the record, and 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.

The following opinion on rehearing was filed October 18, 1906. *Judgment of affirmance adhered to:*

1. **Official Bonds: ESTOPPEL.** In an action on a bond, given to the county treasurer by one in his employ, to recover for a default in the transaction, as deputy, in the name of the treasurer, of business pertaining to the treasurer's office, a recital in the bond that the principal is deputy treasurer in the service of the treasurer of the county will estop the sureties on the bond to deny that he was in fact such deputy treasurer and that the bond was an official bond.

2. ———: CONSTRUCTION. A clause in the bond of a deputy county treasurer, which limits the right of action thereon, for default of the deputy treasurer, to such default as shall be discovered during the continuance of the bond or within six months thereafter, cannot be enforced.

SEDGWICK, C. J.

In the oral argument which was allowed upon the motion for rehearing, and in the brief filed in support of the motion, it was strenuously contended that the bond sued upon is not an official bond. In the former opinion herein it is said that whether the condition in the bond limiting its liability to such wrongs of the employee as shall be discovered within six months from the expiration of time covered by the bond is effective as a limitation of liability "depends upon the nature of the position held by the employee, which in fact governs the character of the bond. If the instrument is not an official bond, then it seems that the contention of the plaintiff in error is correct." Upon a reinvestigation of the record we do not find it necessary to determine that question. There appears to be some merit in the contention that such a limitation would not be enforced even in a private contract. The object of the limitation appears to be to secure to the obligor in the contract an opportunity to investigate the circumstances of the alleged default within a short time after its occurrence. It does not in direct terms limit the time in which the action may be brought. If the fraud or dishonesty of the employee is discovered within the time specified, action may be brought thereon at any time within the limitations of the statute. Whether this amounts to an attempt to deprive the courts by contract of jurisdiction to enforce the terms of that contract, or to adjudicate the damages caused by its breach, is a question that it does not appear to be necessary to determine in this case.

We think that it was correctly determined in the former opinion that the defendant is not in a position to contend that the contract in suit is a private bond. It ap-

pears that the bond was never filed with or approved by the county board. It was not made payable to the county, that is, the county was not named as the obligee in the bond; and, also, it appears from the evidence that one McGuire was duly appointed deputy county treasurer, and gave a bond as such which was approved by the county board, and took the oath of office and was duly qualified. He appears to have succeeded one Manley, who apparently acted as deputy for a few months of the first part of Mr. McLaughlin's term. The statute provides that the county treasurer may have a deputy, and if this statute should be construed as limiting the county treasurer to one deputy, and if it appears that Mr. Waugh was appointed after these deputies were qualified, and the validity of his appointment was brought directly and not collaterally in question, his right to act as such deputy might reasonably be questioned. The bond in suit recites that "Edgar Waugh * * * has been appointed to the position of deputy treasurer in the service of William McLaughlin, treasurer, Lancaster county, Nebraska, * * * and has been required to furnish a bond for his honesty in the performance of his duties in said position." The evidence shows that his employment was confined wholly to the duties of the office of county treasurer. He performed every duty that the county treasurer could perform with the exception of signing checks upon the bank account of the treasury. As a part of such duties he collected the taxes, the conversion of which to his own use constituted the default for which the action is brought. He gave the taxpayers receipts for their money, which he executed in the name of the county treasurer, signing himself as deputy. The bond plainly contemplated that he should perform such services, and the recital in the bond that he was to perform such services as deputy treasurer would estop the sureties upon the bond to deny that he held such a position. The surety cannot be heard now to assert as a defense that Waugh was under these circumstances a second deputy and that the treasurer had no

authority to appoint such second deputy. Mr. McLaughlin made good to the county the loss caused by Waugh's defalcation. If he had not done so, there could be no doubt that the county might have maintained an action upon this bond, executed in the name of its treasurer to secure the safety of the county funds.

The question of the proper construction of the clause "and discovered during said continuance or within six months thereafter," in view of the other conditions and the manifest purpose of the undertaking, has been much discussed. The statute prescribes the conditions of bonds to be given by deputy county treasurers. Section 20, ch. 10, Comp. St. 1905, provides: "Deputies shall, except as otherwise especially provided, give bonds in the same manner and for the same sum as their principals." Section 12 of the same chapter provides: "All official bonds shall be obligatory upon the principal and sureties, for the faithful discharge of all duties required by law of such principal, for the use of any persons injured by a breach of the condition of such bonds." Section 3 requires that bonds of county officers must be "with such conditions as required by this act, or the law creating or regulating the duties of the office." Actions on official bonds may be brought within ten years after the cause of action accrues. Code, sec. 14. The policy of the law undoubtedly is to require the deputy treasurer to give a bond protecting the public against his default, if discovered, and action be brought thereon within the time limited by the statute. A provision in such a bond, which is in violation of the statute, and requires an official duty of the officer which is not required by law, and places a limitation upon the right of action given by the statute, is against public policy, and void. In *Fidelity & Casualty Co. v. Consolidated Nat. Bank,* 71 Fed. 116, which was upon a bond containing similar provisions, the defalcation was discovered within six months after the term for which the bond was given had expired, the construction and force of this clause of the bond was therefore not involved. The bond contained the

further provision: "That any claim made under this bond or a renewal thereof, shall embrace and cover only for acts and defaults committed during its currency, and within twelve months next before the date of the discovery of the act or default upon which such claim is based." The trial court appears to have recognized the validity of this clause of the bond, and the circuit court of appeals assumes its validity in discussing errors assigned in the giving of an instruction. The action was upon a private bond; and whatever view we might take as to the effect of such a clause in the bond of an employee of a bank, we cannot recognize the case as giving a proper construction of the official bond of a deputy county treasurer under our statutes.

We think our former conclusion is right, and it is adhered to.

AFFIRMED.

MARYLAND CASUALTY COMPANY V. BANK OF MURDOCK.

FILED APRIL 5, 1906. No. 14,204.

1. **Appearance.** A written offer to confess judgment in favor of the plaintiff, filed by the defendant in an action to recover money, is a general appearance which will give the court jurisdiction over the person of the defendant.
2. **Evidence** examined, and *held* sufficient to justify the trial court in submitting the case to the jury.

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

Montgomery & Hall, for plaintiff in error.

C. S. Polk, contra.

EPPERSON, C.

This was an action instituted by the defendant in error, hereafter called plaintiff, against the plaintiff in error,

hereafter called defendant, in the district court for Cass county upon a contract of indemnity or policy of insurance against burglary. The process which the plaintiff relied on was a summons served on the auditor of public accounts. A special appearance was filed by the defendant, which was overruled, and the same objectionable service was alleged in the answer. However, prior to the filing of the answer, the defendant filed a written offer to confess judgment for $25.

The first question for our consideration is whether or not the offer to confess judgment was a general appearance or a submission to the jurisdiction of the court. The offer was filed for the purpose of saving costs to the defendant in the event that the final adjudication would result in the recovery of no greater sum, and for this purpose the defendant thereby invoked the power of the court. The party filing an offer to confess judgment recognizes the authority of the court to render judgment for the amount due on the cause presented. As the defendant thus entered a general appearance we deem it unnecessary to consider the defendant's objections to the process.

By the contract defendant indemnified plaintiff against damages to its bank building or contents by burglars, and also against loss of money abstracted by burglars making entry into a certain safe by the use of tools or explosives directly thereupon. On the night of the 25th of January, 1904, and during the time covered by the contract, burglars entered plaintiff's building, and damaged the same to the extent of $25, and abstracted from the safe described in the contract money amounting to $1,489.30. The defendant acknowledged its liability for the $25 damage committed to the premises, but denied liability for the money stolen, alleging that the safe from which the money was abstracted was not entered by the use of tools or explosives directly thereupon.

The question tried was whether or not the burglars resorted to the use of tools applied directly upon the safe.

The officer in charge of the bank testified that on the evening preceding the night of the burglary he locked the safe by a time lock, and no evidence was given directly to the contrary. It was the uncontradicted evidence that, if the safe had been locked, it could not have been opened, except by the use of tools or explosives. The defendant argues that, as the safe presented no marks or other signs of violence applied thereto, it necessarily results that the safe had not been locked, as the bank officer testified, and therefore no tools or explosives had been used. There was some evidence indicating that it was possible to open the safe in controversy by striking the same with a heavy hammer or other instrument after changing it to a certain position, and this evidence was sufficient, in our opinion, to submit to the jury, and for this reason the court did not err in refusing to instruct the jury to return a verdict for the defendant. We are not called upon to decide this case upon the evidence, for thereby we would usurp the office of the jury. We are only required to ascertain whether or not the proof adduced upon the trial contains sufficient evidence to justify the trial court in submitting the case to the jury; and, believing it sufficient, to be consistent, we must uphold the verdict. It necessarily follows that the court did not err in giving instructions excepted to by defendant in substance, that the only issues of fact for them to try were as follows: First. Was the safe, from which it is alleged the money of the plaintiff was taken by burglars, opened by the use of tools or explosives used directly upon said safe? Second. What amount of money, if any, was taken from the said safe?—and that they must find such facts established by a preponderance of the evidence before the plaintiff may recover; and that, if they find that the safe in controversy was opened by the burglars in any other manner except by the use of tools or explosives used directly thereupon, then they should return their verdict for the defendant. These instructions were proper, and, with others not challenged, fairly submitted the questions in the controversy to the jury.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

SCHOOL DISTRICT, APPELLANT, V. JENNIE COWGILL ET AL., APPELLEES.

FILED APRIL 5, 1906. No. 14,259.

1. **Injunction: TITLE TO OFFICE.** The title to public offices, and the rights to exercise the functions thereof by persons claiming title thereto by election, cannot be determined in a suit for injunction.
2. **An injunction suit cannot be maintained to restrain the teaching of school by a qualified teacher under a contract signed by *de facto* officers of the school district.**

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

G. Norberg and *W. A. Garrett,* for appellant.

A. J. Shaffer and *H. M. Sinclair, contra.*

EPPERSON, C.

This action was instituted in the name of school district No. 77 of Phelps county by Homer Fuqua, who claims to be treasurer of said school district. He seeks to restrain the defendant Mrs. Cowgill from teaching the school, and the defendants Doe and Hornbeck, respectively, from acting as treasurer and moderator of that school district. Upon the institution of the suit a temporary order of injunction was issued, which upon trial was dissolved, and the plaintiff's action dismissed. Defendants introduced in

evidence a contract signed by Mrs. Cowgill, as teacher, and by her codefendants as treasurer and moderator, respectively, which contract provided for an eight months' school. Under the terms of the contract Mrs. Cowgill taught the school five weeks, when this suit was instituted. The defendants Doe and Hornbeck, who signed the contract for the school district, claim their offices by reason of an election thereto at the annual school district meeting of 1904. The evidence shows that they were elected to these offices without objection by *viva voce* vote, declared elected and qualified. Doe gave his official bond to the director, who made no objections to the sufficiency thereof, and Hornbeck filed with the director his written acceptance. About two months later, at a special meeting in which six electors participated, one Hottenstein was chosen moderator. The electors present also elected a treasurer, who did not attempt to qualify. Later the director and Hottenstein appointed Fuqua treasurer. He filed a bond, and now claims that he is the treasurer of said school district, contending that the defendants Doe and Hornbeck are not the officers they claim to be, because elected by *viva voce* vote, instead of by ballot as provided in sec. 1, subd. III, ch. 79, Comp. St. 1903.

The director of the district refused to recognize Doe and Hornbeck as officers, and refused to cooperate with them in attending to the business of the school district, and for this reason, if in fact they were the legally qualified treasurer and moderator, the contract they made with the defendant Mrs. Cowgill was legal. We are therefore expected to determine in this an injunction suit whether or not the contracting officers, when they executed the contract, were legally authorized so to do. In other words, to have granted the plaintiff's petition, the trial court would have been required to inquire collaterally as to the right of the contracting officers to exercise the function of the offices, and to have found that they were not such officers. Mr. Fuqua, who is prosecuting this suit, claims the office of treasurer by an appointment from the director and moder-

ator. The evidence discloses the fact that two persons claim the office of moderator. If Mr. Hottenstein was not moderator, then Fuqua's appointment was void, and plaintiff would have no standing in court. These problems cannot be solved in an injunction suit. In 2 High, Injunctions (4th ed.), sec. 1312, we find the following: "No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers, * * * such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum for determining disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a *quo warranto.*" In the case of *Burke v. Leland,* 51 Minn. 355, the supreme court of Minnesota refused to entertain an action for injunction to restrain persons assuming to act as members of the village council, the plaintiff claiming that such persons had not been duly and lawfully elected. That court said:

"It is well settled that the question of their title to the office, and right to exercise its functions, cannot be determined in a suit for an injunction or in *mandamus* proceedings. *State v. Williams,* 25 Minn. 340. The defendants could only be restrained from the performance of acts shown to be unlawful or unauthorized, if attempted to be performed by a lawfully elected council."

But plaintiff contends that the acts of defendant, Mrs. Cowgill, in teaching and using the schoolhouse for school purposes, assisted by her codefendants, amounted to a continuing trespass, and therefore it is entitled to the restraining order. But whether or not they are trespassers depends upon their rights to the offices they claim, and, as above stated, that question cannot be inquired into in this

action. If Mr. Fuqua desired seriously an adjudication of the rights of the parties claiming the offices, he should have resorted to the remedy provided by statute in a direct proceeding, wherein the necessary parties were made litigants. The defendant, Mrs. Cowgill, who is a qualified teacher, presented as a defense a contract signed by officers, who were able to and did put her in possession of the schoolhouse for school purposes, and who claim the offices by an election at the annual meeting. If not officers *de jure* they were *de facto*. Proof of the contract was a sufficient defense to the plaintiff's action as to the defendant Mrs. Cowgill.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND ET AL., APPELLANTS.

FILED APRIL 5, 1906. No. 14,261.

1. **Cities: SIDEWALKS: NOTICE: EVIDENCE.** Proof by affidavit required by a city ordinance of the publication of a notice to nonresident property owners to construct sidewalks is not conclusive; but the fact of publication may be proven by other evidence.

2. **Sidewalks: ASSESSMENTS: DEFECTIVE NOTICE.** Under a city ordinance providing that the city council may cause the construction of certain sidewalks along the street line of lots belonging to nonresidents and assess the costs thereof to the property, if the same were not constructed by the owner within 15 days after the publication of a notice to him, the city council obtained the right to construct such improvements and assess the costs thereof, even though the notice named a date for the construction thereof

by the owner less than 15 days subsequent to the last publication. The provisions of the city charter and ordinances become a part of the notice, and the property owner is bound thereby.

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

O. C. Redick, for appellants.

W. W. Slabaugh, John P. Breen and *W. H. Herdman, contra.*

EPPERSON, C.

The proper authorities instituted an action in the district court for Douglas county under the scavenger laws of 1903 for the sale of several tracts of land for the payment of state and county taxes, and the general and special taxes levied for municipal purposes by the city of Omaha. Among the tracts of land are several lots belonging to the appellant, who filed his answer in the district court, objecting to the sale of his property for the payment of certain special taxes levied thereon by the city council. Ordinance 4,244 of the city of Omaha established a mode of procedure for the construction of sidewalks in said city. It provided in substance that, whenever the city council and mayor deemed it expedient, they could require the construction of sidewalks in front of or adjacent to any premises, along any street in the city, by resolution; that upon the passage of a resolution, notice should be served on the owner of the premises adjacent to or abutting such sidewalk; and that said notice should state that after the expiration of 15 days from the service thereof the sidewalk ordered to be laid would be laid by the contractor holding a contract with the city of Omaha and that the costs of the laying of such sidewalk would be assessed upon the property described. In the event that the owner was a nonresident of the city of Omaha, the ordinance provided that such notice should be published in the official papers of the city for ten days,

and made it the duty of the board of public works to cause affidavits to be made of the service of the notice, and to carefully preserve the same in the office of the city board.

At the time of the construction of the sidewalks in controversy, appellant was a nonresident of the city of Omaha. The affidavit showing publication of notice to appellant indicated that it had been published but six days, and this appellant contends is conclusive as to the publication. Neither the statute nor the ordinance makes it necessary as a condition precedent to the construction of the sidewalks by the city, nor the taxation of the property, that the proof of publication be filed; the ordinance does provide that the affidavit shall be filed and preserved in the office of the board of public works, but it was the publication of the notice, and not the filing of the affidavit, which conferred jurisdiction upon the city authorities to construct the sidewalk and levy the taxes complained of. The affidavit was presumptive evidence, but not conclusive as to the publication of the notice. The ordinance provided a mode which is sufficient, but not exclusive. The rule as to notices required by city ordinances is no more stringent than the rule governing notices required by statutes. In the case of *Larimer v. Wallace,* 36 Neb. 444, it is held: "Proof by affidavits of posting public notices is not exclusive. The statute merely provides a mode which is sufficient, but does not provide that it shall supersede all other forms of proof." And as the evidence introduced by the appellee shows the publication of the notice for the time required by the ordinance, we are convinced that the failure to file the affidavit with the city authorities as provided by the ordinance does not constitute a reason for declaring that the city council was without jurisdiction to levy the tax.

The last publication of the notice was on November 3, and notified the appellant that he would be required to construct a sidewalk on or before November 9, or that the city authorities would construct the same as provided by law, and levy a special assessment upon his lots to pay the

costs thereof. The ordinance provided that the improvements should be made by the city authorities after the expiration of 15 days from the giving of the notice, and, on account of this irregularity as to time, appellant claims that the notice is insufficient to give the city authorities jurisdiction to levy the special taxes. One section of the ordinance made it the duty of the owner of the premises to construct the sidewalk within 15 days after the service or publication of the notice so to do. The proof shows that the city did not order the sidewalk constructed until 30 days later than the last publication. This is analogous to the case of *Eddy v. City of Omaha,* 72 Neb. 550, modified on rehearing, 72 Neb. 559. In that case this court had under consideration a notice required by an ordinance providing that the publication should give a 30 days' notice; the notice construed recited that the thirty days would expire on a day, less than 30 days subsequent to the publication. Upon rehearing the court said:

"Appellant now argues that, though the notice informed the property owners that the 30 days would expire at noon on August 31, this was a mere irregularity, because the charter, the ordinance and the notice itself informed them that they had 30 days from the publication of the notice within which to designate said material; citing *Armstrong v. Middlestadt,* 22 Neb. 711, and *Scarborough v. Myrick,* 47 Neb. 794. We are of the opinion that this argument is sound. That if, in fact, 30 days had elapsed before the council took any action upon the matter, the recital in the notice that the time would expire several days before the 30 days elapsed would be merely an irregularity, and would not prevent the council from acquiring jurisdiction."

Applying this rule to the case at bar, it follows that the notice was sufficient to inform the appellant that, in the event he did not construct the improvements required within the time provided by the ordinance, the city would do so and tax his property for the payment thereof. After the expiration of 15 days from the last publication the city

had the right to and did construct the improvements. It necessarily follows that the appellant's property was liable to taxation for the payment thereof, and we recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

OTIS K. HOLLIDAY V. WILLIAM A. MCWILLIAMS.

FILED APRIL 5, 1906. No. 14,202.

1. Lands: SALE: CONTRACT: EVIDENCE. The written contract required by section 74, ch. 73, Comp. St. 1905, may be evidenced by letters passing between the parties.
2. ——: DESCRIPTION. Where such letters contain data from which a description of the land placed with an agent for sale or barter can be ascertained with certainty, the contract may be enforced.

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

John Everson, for plaintiff in error.

R. L. Keester, contra.

DUFFIE, C.

The petition upon which the plaintiff seeks to recover states that in December, 1903, the defendant was the owner of a farm of about 520 acres in Platte county, Nebraska, and orally represented to plaintiff that he desired to trade said farm for town property or a stock of goods; that if plaintiff would find for him a trader for said land at prices, terms and conditions to be fixed by the defendant, and with whom defendant would consummate a suitable

exchange, he would pay the plaintiff the sum of $300 as a compensation; that the promise was afterwards renewed and confirmed by letters and correspondence passing between plaintiff and defendant, copies of which are attached to the petition. It is alleged that plaintiff found a trade which was suitable and satisfactory to the defendant and that defendant consummated a trade in February, 1904; that deeds were exchanged between defendant and the party furnished by plaintiff, and the exchange of properties fully consummated on February 10, 1904. Judgment is asked for $300 and 7 per cent. interest from February 10, 1904.

The letters attached as exhibits are, first, one from plaintiff to defendant dated January 9, 1904, in the following words: "W. A. McWilliams, Munroe, Neb. Dear Sir: When we were at Burwell you wanted me to look you up a trade in our town for your farm and I spoke of J. Egleson having a stock of hardware and three storerooms combined that he might trade. I spoke to Mr. Egleson about it and he talked favorable and wanted your address to write to you, so when he writes give him what information you can and invite him to see what you have and I believe we can make a trade with him. Let me hear from you when you get word from him and I will see if I can't get him to go and see what you have. If his letter is favorable you might send me those photographs of the farm and I could show him what the farm looks like. Yours truly, O. K. Holliday."

McWilliams' reply to this letter was written from Monroe, Platte county, Nebraska, under date of January 23, 1904. After excusing delay, he urges Holliday to get his man to go and see the farm, describes the farm as being all fenced and cross-fenced, 200 acres under cultivation, 160 acres in hay, mostly alfalfa, balance pasture. He then adds: "I will give him a trade and put in my land at $50 per acre. We have a mortgage on it that amounts to about its cash value. There is 517.70 acres according to government patent. This mortgage can be

renewed easily. The farm will carry it easily. The accretions from the river, mostly covered with grass, make the farm about 530 acres. We want pay for what the patent calls for although we have a deed for all. Do your best and do it quickly. Have him come up at once to see the farm and if he likes it, will go back with him and trade with him if I find his property fairly near what he says it is, but he must see my farm first and see if he wants it or not, as I mean just what I say and will trade as I said above. Respectfully, W. A. McWilliams. The land is only three miles from the county seat."

Under date of January 26, 1904, the plaintiff replied to this letter, saying that he thought that Mr. Egleson, his customer, would visit the land in two or three days. He further states that he understood from the talk he had with McWilliams that the land was close to Columbus and that some hotel there had better be named where Egleson could meet McWilliams. He also suggests that McWilliams write to Egleson, telling him where he would meet him, and to have Egleson write a day ahead.

In reply to this letter McWilliams wrote the following: "Monroe, Platte county, Nebraska. O. K. Holliday, Alma, Nebraska. Dear Sir: Please observe closely what I write. I have just received a letter from Mr. F. E. Herron. He is asking me to pay him a regular commission. Now I cannot afford to allow him to come in for a commission for I cannot afford to take any less. So if you can handle Mr. Egleson and get him away from Herron and get Egleson and bring him up and stop at Clothier Hotel in Columbus, wire me at Monroe at least a half day in advance when you will be there and I will meet you there, take you to see the land and bring you to Monroe where we will draw up the particulars. You urge me to go back with you and I will go and if his property is fairly near what he says it is I will then and there close the deal with him. If you cannot, then notify me by return mail and if you will take $100 for your share I will give Herron the other

$200 for him to bring him. Let me know without the least delay. Land is selling quite often here for $75 per acre. The land I am offering is all black sandy loam soil. The only thing that can be said is that the farm was farmed by a man who was not able to farm it last year and of course he could not mow the farm along the roads and lanes as he should. When you get him to Monroe take him to the bank of Monroe and ask Mr. W. Webster about the land."

In reply Holliday wrote under date of January 30, the material parts of the letter being as follows: "Now you please to pay close attention to what I say and that is this: I don't divide my commission with Mr. Herron or anyone else. Mr. Herron is to get his pay from Mr. Egleson as he told me he intended to pay him if the deal was made." The letter further states that the writer had seen Egleson and that he thought Egleson would visit the land the next day.

Replying to this McWilliams wrote as follows: "I will say in reply to your letter just received, that I will not pay any commission to anyone unless they are able to get their man and keep them until the deal is closed and they must help to close it. So if you are working Mr. H. J. Egleson for me in this deal you must keep at him and keep him in your hands and you must stay with him and close the deal. I am not offering and do not need anyone to work me in this deal or any other. So if you have your man put him up and if you are the means of making the trade I will pay what we agreed upon. If you are not the means of getting the trade with me I will pay you nothing. You must earn your money if you want it. In other words, you must work the deal through to a finish or you have not earned your money."

A demurrer was interposed to the petition, which was sustained by the court, and, the plaintiff electing to stand on his petition, judgment was entered dismissing his case and he has brought the record here for review. Defendant, in support of his demurrer, relies on section 74, ch.

73, Comp. St. 1905, as follows: "Every contract for the sale of lands, between the owner thereof, and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent."

In *Bradley v. Bower,* 5 Neb. (Unof.) 542, it was held that a contract sufficient to meet the requirements of the statute above quoted may be created by letters between the parties, and may be sufficient though the same papers are not signed by both. We are inclined to believe that the letters above quoted from are sufficient to show a contract of agency and the amount of the commission agreed upon. It is true that McWilliams does not, in express terms, say that he will pay Holliday $300 for finding the party with whom he may trade the land, but in one of the letters he does say that, if Holliday will take $100 for his share, he will give the other $200 to Herron if Herron can secure Egleson as a customer—a statement in the nature of an admission that $300 was the commission agreed upon—and in his last letter he makes a distinct and express agreement to pay the commission if Holliday is the means of securing a trade. The only objection that can reasonably be made to the contract evidenced by these letters is the failure to specifically describe the land, and this, we believe, under the holding of many courts in cases involving the same principle, is not fatal to the plaintiff's case. In actions brought for the specific performance of contracts to convey real estate, the land must be described in the contract with such clearness and accuracy that it can be identified and its boundaries determined beyond the possibility of future controversy; and yet there are many cases in which no specific description of the land has been given, where it has been referred to in general terms, in which it has been held that the action could be maintained. The rule

undoubtedly is that that is definite and certain which can be made certain by parol proof which does not contradict what appears in writing. As stated in *Gerrish v. Towne,* 3 Gray (Mass.) 82:

"Where general terms only are used to designate the subject matter of the agreement or conveyance, or the description is of a nature to call for evidence to ascertain the relative situation, nature and qualities of the estate, then parol evidence is not only admissible, but is absolutely essential to ascertain the true meaning of the instrument, and to determine its proper application with reference to extrinsic circumstances and objects. In such cases parol evidence is not used to vary, contradict or control the written contract of the parties, but to apply it to the subject matter, and thereby to render certain what would otherwise be doubtful and indefinite." To the same effect is the holding of our own court in *Ballou v. Sherwood,* 32 Neb. 666, and *Adams v. Thompson,* 28 Neb. 53; *Ruzicka v. Hotovy,* 72 Neb. 589.

It clearly appears from the letters above quoted from that photographs of the buildings had been taken and that the letters were written in view of these photographs. The farm is described as located three miles from the county seat (Columbus), as fenced and cross-fenced, 200 acres under cultivation, 160 acres in hay, mostly alfalfa, and the balance in pasture; that there are 517.70 acres according to government patent, and that by accretions from the river there are really 530 acres. From this data and from the county records, it seems quite clear that the land could be fully identified and a specific description ascertained.

We conclude, therefore, that the court erred in sustaining the demurrer to the plaintiff's petition, and recommend that the judgment be reversed and the cause remanded, with leave to the defendant to answer if he be so advised.

ALBERT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with leave to the defendant to answer if he be so advised.

REVERSED.

A. A. KANNOW & SONS V. FARMERS COOPERATIVE SHIPPING ASSOCIATION.

FILED APRIL 5, 1906. No. 14,222.

1. **Contract**: MISNOMER. The contract upon which suit was brought described the plaintiff as Farmers Cooperative Shipping Association of *Alma, Nebraska*, its true name being Farmers Cooperative Shipping Association. *Held*, That, if a misnomer, it was immaterial under the circumstances, as the record and the circumstances under which the contract was made were conclusive that the defendants knew the corporate body with which they contracted and did business. 1 Thompson, Corporations, sec. 294.
2. **Evidence**. No proof is needed of admitted facts.
3. ———: ACCOUNTS. An expert accountant may testify to the results of an examination and computation of complicated accounts, the books, checks or memoranda making up the account being first introduced in evidence. *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713.

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

Starr & Reeder, for plaintiffs in error.

John Everson, contra.

DUFFIE, C.

The Farmers Cooperative Shipping Association, a Kansas corporation, brought suit against A. A. Kannow & Sons, alleging in its petition that the parties entered into a written contract, by the terms of which the defendants were to purchase grain, as agents for the plaintiff, from August 10, 1903, to June 1, 1904; that the grain was to

be purchased and shipped from Alma, Nebraska, and vicinity, under the control and instructions of the plaintiff and at prices fixed from time to time as the occasion demanded; that defendants were to receive one and three-fourths cents a bushel for the grain so bought and shipped; that this employment continued until September 16, 1903, when the same was terminated by the plaintiff, for the reason that the defendants, in violation of their contract and instructions, wrongfully and corruptly paid sums greatly in excess of the amount they were allowed and instructed by plaintiff to pay for wheat; that during the time of the continuance of the agency defendants purchased 8,432 bushels and 19 pounds of wheat which was paid for by checks drawn by the defendants upon the funds of plaintiff in the Harlan County Bank at Alma, Nebraska; that checks have been drawn and paid to the amount of $4,749.52; that defendants have paid out of plaintiff's funds the sum of $373.15 in excess of what they were authorized to pay, making a total of $5,122.67 of plaintiff's money used by the defendants during their employment. It is further alleged that defendants have shipped to the plaintiff 6,919 bushels of wheat, of the value of 3,726.63 and no more, and that they have converted to their own use and refused to deliver to the plaintiff the remainder of the wheat so purchased, and have refused to repay the plaintiff the sum of $373.15 paid out in excess of the amount authorized, all to the plaintiff's damage in the sum of $1,248.48, for which judgment is prayed. The contract of agency is in the following words: "Alma, Nebraska, July 25, 1903. This article of agreement made and entered into the day and year above written by and between the Farmers Cooperative Shipping Association of Alma, Nebraska, and A. A. Kannow & Sons, agree to buy, weigh, receive, store and ship grain for a compensation of one and three-fourths cents per bushel, from the time of the beginning to receive the grain until June 1, 1904. This agreement being made subject to approval of C. B. Hoffman, General Manager,

Enterprise, Kansas. A. A. Kannow, for A. A. Kannow & Sons. Geo. T. Ashby, Pres. F. C. S. A. E. E. Arnold, Secy. F. C. S. A."

The answer of the defendants is quite lengthy and, among other matters, alleges that the petition does not state a cause of action; that there is a defect of parties plaintiff, a defect of parties defendant, a general denial, matters in avoidance, and two counterclaims which the district court directed the jury to disregard. There was a judgment for the plaintiff below for $897.67, and the defendants have taken error to this court.

The first point made in the brief of plaintiff in error is that the action is brought by a Kansas corporation, while the agreement upon which it is based was made by the defendants with a Nebraska corporation. It will be noticed that in the agreement above set out the Farmers Cooperative Shipping Association is described as, "of Alma, Nebraska," while the petition in the case alleges that the association is a Kansas corporation. Nowhere in the answer of the defendants is it alleged that the agreement which it made with the Farmers Cooperative Shipping Association was with a Nebraska corporation, and the only indication that such is the case is that in the agreement the Farmers Cooperative Shipping Association is followed by the words, "of Alma, Nebraska," which was evidently no part of the corporate name and was clearly a mistake of the party drafting the agreement, as the evidence shows, without conflict or contradiction, that the corporation named in the agreement is a Kansas corporation and that such was the understanding of every one having any connection with the case. The answer of the defendants clearly establishes that they were at all times aware that this agreement was with, and what they did under it was for, a Kansas corporation. Why they should attempt a defense excusing their nonperformance of a contract, and seek to enforce a counterclaim against a party with whom no contract was made, is not explained nor is it subject to explanation. The fact that the words,

"of Alma, Nebraska," followed the corporate name of the plaintiff in the action did not change the character of the contract or the legal rights of the parties, as long as no one was misled thereby, and all proceedings had under the contract were with full knowledge of the actual status and location of the corporation plaintiff. It is an undoubted rule that, where an action is brought on a written instrument by one not a party to it, in order to maintain a suit the plaintiff's interest in the instrument must be made to appear affirmatively by proper allegations in the petition. But this rule, we think, has no application to this case, as the party bringing the action was the real party in interest and the party with whom defendants contracted.

Objections were made to the introduction in evidence of certain letters passing between the defendants and C. B. Hoffman, general manager of the plaintiff. The objection was that the letters were not sufficiently identified as coming from the defendants. It appears from the record that an attachment issued in this action and was levied upon certain real estate of the defendants. On a motion made to dissolve the attachment the letters referred to were used as evidence, and were placed in the hands of the court reporter. The attorney for the plaintiff below afterwards secured these letters from the reporter and sent them to Mr. Hoffman at Kansas City, where his deposition was taken and the letters attached as exhibits. This is clearly established. On the trial of this case Mr. Kannow himself testified that the letters turned over to the court reporter on the hearing of the motion to dissolve the attachment were, so far as he knew, all the correspondence that had taken place between his firm and Mr. Hoffman. It thus stands admitted on the record that these letters were sent by Kannow & Sons to Hoffman, and it can hardly be claimed that proof of admitted facts is necessary.

Relating to the character of the grain purchased by Kannow & Sons, it need only be stated that Mr. Kannow's

own testimony shows that it was wet and damp at the time of purchase, that it became moldy, and that some that remained upon his hands after the termination of his agency was worth "not to exceed a half dollar a bushel at top price, and that some of it was not worth over 25 to 35 cents—was not equal to rye."

Objection is also made to the evidence of Mr. Senter, a witness for the plaintiff below, who made a computation from the weigh-checks issued by defendants to those from whom wheat was purchased, and upon which they procured their pay from the Harlan County Bank. These checks were in evidence. They were issued by Kannow & Sons, and contained a statement of the amount of wheat had from the seller, the price paid, the character of the wheat, and other items material to the state of the account between the parties. It is urged that this was usurping the province of the jury who alone had the right to make the computation. Mr. Senter was the auditor of the plaintiff corporation and an expert accountant. He was not allowed to state deductions and inferences of his own judgment, but merely the result of his computation, and we think, under the authorities, that his evidence was admissible and that the court did not err in receiving it. 2 Elliott, Evidence, sec. 1053; *Jordan v. Osgood,* 109 Mass. 457; *Frick v. Kabaker,* 116 Ia. 494.

These are the principal errors relied upon for a reversal of the case. Other matters of minor importance are discussed, but a careful examination of the whole record convinces us that there was no prejudicial error requiring a reversal of the case, and that the verdict of the jury is amply sustained by the evidence and might have been for a larger sum.

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.

CATHERINE MARTIN V. ANTHONY MARTIN.

FILED APRIL 5, 1906. No. 14,223.

1. **Instructions:** PROCEDURE. All instructions should be read to the jury in open court, and where, after retiring, the jury desire further instructions on the law of the case, they should be brought into court, there to receive such instructions. If, in answer to a request, further insructions are sent to the jury room by the bailiff in charge, the record should show the consent of the parties to this procedure.
2. **Adverse Possession.** One who has acquired absolute title to land by adverse possession for the statutory period does not impair his title by thereafter paying rent to the owner of the paper title.
3. **Deed:** ACKNOWLEDGMENT. As between the parties a deed of real estate, not a homestead, is good without being acknowledged.
4. ———: DELIVERY. A delivery of a deed by the grantor to a third person for the grantee, with directions to deliver it to such grantee, constitutes a sufficient delivery of a deed of conveyance.

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

M. S. Gray, J. F. Peters and *Mockett & Mattley,* for plaintiff in error.

Morning, Berge & Ledwith, M. H. Weiss and *T. C. Marshall, contra.*

DUFFIE, C.

Catherine Martin, the plaintiff in error and plaintiff in the court below, brought this action in ejectment against her son Anthony Martin to recover possession of the northwest quarter of section 17, township 4, range 2 west, Thayer county, Nebraska. Michael J. Martin, the deceased husband of the plaintiff, was the patentee of this land and in his will, which was duly probated in the state of Pennsylvania where he lived and died, and also in Thayer county, Nebraska, where the land is situated, he

gave to the plaintiff a life estate therein. The petition is the usual petition in ejectment, and the answer, in addition to a general denial, sets up the following defenses: That in February, 1878, the land, which was then worth not to exceed $500 and was wholly unimproved, was owned by Michael J. Martin, the father of the defendant; that about that date Michael J. Martin, who was then located in Pennsylvania, proposed to the defendant that he go west and locate, and, as an inducement thereto, promised defendant the land described in the petition on the condition only that the defendant would locate in the state of Nebraska, and remain and establish himself, and improve the land in question; that about that time the said Michael J. Martin made and executed to the defendant a deed to said land and conveyed the same to the defendant in fee simple, which deed, before its delivery to the defendant, fell into the hands of one John J. Martin, who concealed it for many years, and then, as a condition of its delivery, undertook to extort money or property from the defendant. It is further alleged that the defendant accepted the proposal of his father, and left the state of Pennsylvania and went to Thayer county, Nebraska, in February, 1878; entered into possession of the land in dispute, and has ever since been in the actual, open, exclusive, continuous, hostile, notorious and adverse possession of the same; that in 1878 he broke up and put the land in cultivation, and has ever since cultivated the same, planted fruit and ornamental trees thereon, and that the same is in a high state of cultivation; that his father, during his lifetime, made no claim of ownership, nor did he demand rent for said land, and that since his father's death in 1886 the plaintiff has never demanded possession from the defendant nor rent for use of the premises. He alleges that he has acquired title by adverse possession, that the plaintiff's action is barred by the statute of limitation and asks to have his title quieted. The reply was a general denial. The jury returned a general verdict for the defendant, and a finding that at the date

of the commencement of the action defendant was the owner and entitled to the possession of the premises. The jury also returned certain special findings to the effect, first, that in January, 1878, Michael J. Martin promised and agreed to give the defendant the land in dispute on the condition above set out, and that the defendant, acting under such agreement, entered into the actual possession of said land and performed the condition of said agreement; second, that Michael J. Martin and his wife, Catherine, in January, 1878, made and executed a deed to the land in dispute to the defendant, that said deed was delivered to John J. Martin for the purpose of being delivered to Anthony Martin, the defendant, and that Michael J. Martin intended to have it so delivered; third, that the defendant, for more than ten years prior to the commencement of the action, had been in actual adverse possession of the land under a claim of ownership. Judgment was entered on the verdict and special findings of the jury in favor of the defendant and the plaintiff has brought the case here for review.

After the jury had been instructed and had retired to consider their verdict, they sent the following communication to the court by the bailiff having them in charge: "Is a will made in one state in force and effective in another state, the will having been probated in the state in which it was executed?" In relation to this the record contains the following: "And which said request and question being presented in open court, all parties being represented by counsel, the same was by the court called to their attention, and, upon due consideration whereof, the court, upon his own motion and in answer to the above question and request of the jury, gave the following instruction in writing, said instruction being sent to the jury room by the court through the bailiff, to wit: 'The jury is instructed, in answer to the attached question, that the probate of a foreign will in this state is the statutory and legal method of proving the facts creating a right of inheritance, and, when probated here in Ne-

braska, all the rights thereunder relate back to the time when the same became effective in the original jurisdiction;' to which act of the court, in the giving of such supplemental instruction, the plaintiff then and there duly excepted."

The method of giving this instruction is assigned as error. It is urged that our statute requires all instructions to be in writing and to be read by the court to the jury, and much force is placed upon section 287 of the code, to the effect that if the jury, after they retire, desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information upon the point of law shall be given. The precise question here presented has never before been raised and passed on by the court. Aside from the requirements of our statute, it is a general principle, which obtains everywhere, that all instructions to the jury shall be delivered in open court. 11 Ency. Pl. & Pr. 275; *Hopkins v. Bishop,* 91 Mich. 328, 51 N. W. 902. We do not mean to say that, where, as often happens, the court is engaged in a trial when a request like that in question is presented, he cannot, by consent of parties, send his answer to the jury by the bailiff in charge thereof; but the record ought to show that consent was given, in order that no controversy may thereafter arise. The exception taken by the plaintiff is not clear and definite, the language being, "to which act of the court, in the giving of such supplemental instruction, the plaintiff then and there duly excepted." It is possible that this should be considered as an exception to the method of instructing the jury, instead of to the substance of the instruction given, and if it be construed as an exception to the method there can be no doubt that the court was in error in proceeding as it did. The error, however, was without prejudice, in view of the special findings of the jury. Not only did they find that the defendant had been in the actual adverse possession of the premises for more than ten years prior to the commencement of the action, but

they found also that the plaintiff and her husband, during his lifetime, made and delivered to the defendant a deed of the premises conveying to him the fee title. In this condition of the case, any error committed by the court in the manner of instructing the jury upon other points in the case is immaterial.

Objection was made to the introduction of the deed of Michael J. Martin to the land in controversy, for the reason that the same was acknowledged before a justice of the peace, and no certificate was attached, as required by statute, showing the official character of the justice. The signatures of the grantors were proved. It is familiar law that, except in the conveyance of a homestead, the acknowledgment is not essential to the validity of a deed. It only goes to the right to have the deed recorded. As between the parties a deed without any acknowledgment is good.

Complaint is made of the refusal of the court to give the following instruction asked by the plaintiff: "You are instructed that if you find from the evidence that the defendant did, at any time within ten years next preceding the filing of this suit, to wit: November —, 1903, recognize or acknowledge the legal estate and right of possession of the plaintiff, in any manner, by the payment of rent for the use of said land to plaintiff or to any other person, or that the defendant recognized the right of plaintiff or any other person, in any manner whatsoever, by the payment of rents, or any acts of the defendant in connection with said land, or the use thereof, inconsistent to the claim of defendant, that he is the owner, then the claim of defendant that he is the owner of said land by adverse possession cannot be sustained, and you must find the legal estate and right of possession to be in plaintiff." In argument it is insisted that any act of the defendant recognizing ownership by the plaintiff within ten years prior to the commencement of the action defeats his claim of title to the land by adverse possession. There was evidence from which the jury might have found that the de-

fendant, at the request of his mother, paid rent to his sister within ten years prior to the commencement of the action, but the evidence was conclusive that the defendant had entered into possession of the land in 1878 or 1879, and held actual possession from that time to the date of the trial. If, as he contends, and as the jury were warranted in finding, his possession was under a claim of ownership, then his title had accrued and become perfect many years prior to the commencement of the action. The law is well settled that recognition of title in the former owner by one claiming adversely, after he has acquired a perfect title by adverse possession, will not divest him of title. In *Riggs v. Riley,* 113 Ind. 208, 15 N. E. 253, it is held that, where, by open and continuous adverse possession of land under claim of ownership for over 20 years by a person and his grantors, he has gained title thereto in fee, payment of rent by him thereafter for two years to the person having the paper title, and a subsequent survey procured by the latter without objection on the part of the former, will not defeat the title already gained by adverse possession. In *School District v. Benson,* 31 Me. 381, 52 Am. Dec. 618, it is said: "But the title, obtained by disseizin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed." And in *London v. Lyman,* 1 Phila. (Pa.) 465, it is said: "Adverse possession for twenty-one years is a title, it cannot be defeated by a subsequent recognition of a previous title, which, originally rightful, has lost that character by a delay to enforce it." There was no error in refusing the instruction. Other instructions to the effect that the jury must find the defendant's possession to be actual, open, continuous and adverse for at least ten years next immediately preceding the commencement of the action were refused, but as the court had instructed to the same effect on its own motion, and also that the burden was upon the defendant to establish the adverse character of his holding, there

was no need of repeating the same and no error in refusing to do so.

In its third instruction the court said to the jury: "The third defense interposed by the defendant is that Michael J. Martin, now deceased, and his wife, Catherine Martin, conveyed the premises to him by deed of general warranty, a copy of which is attached to the petition, marked "Exhibit A," and that by reason and by virtue of said deed he became seized of the premises and is owner thereof." In her brief the plaintiff says: "As we have pointed out, this is contrary to the answer of the defendant, is contrary to the statement of the case by the court, and is not claimed by the defendant in instructions asked by him of the court. The answer simply pleads two defenses: First, a parol agreement to convey the land; and, second, the statute of limitations. The deed was simply plead as an incident to the parol agreement and was not set up as a defense, and it has never been claimed by the defendant in this case that the deed was delivered." The plaintiff must have overlooked the fourth paragraph of the defendant's answer, as follows: "In pursuance of the proposition above set forth, the said Michael J. Martin, at or about the time last aforesaid, made and executed to this defendant a deed to the land described in plaintiffs' petition, a copy of which deed is hereto attached, marked "Exhibit A," and made a part hereof, and thereby conveyed to this defendant an absolute title in fee simple to the premises described in plaintiff's petition, which deed as aforesaid, before its delivery to this defendant, fell into the hands of one John J. Martin, who concealed it for many years and then, as a condition of its delivery, undertook to extort money or property from this defendant as a condition precedent to the delivery of said deed." A pleading alleging that a deed was made and executed sufficiently pleads a delivery, *Brown v. Westerfield,* 47 Neb. 399, and there was evidence to sustain a finding by the jury that the deed was actually delivered by the grantors to John J. Martin, with directions to deliver it to the

defendant. That this is the theory upon which the case was tried is evident from the third instruction of the court, in which he informed the jury that, in order to be effective to pass title, a deed must be delivered, and that a delivery must be shown by a fair preponderance of the evidence; and if the deed was delivered by Michael J. Martin to defendant Anthony Martin, either by himself or by some one authorized and directed to do so, it would be sufficient.

It is insisted that the judgment and verdict are not supported by the evidence. The witnesses contradicted each other on many material points and there are letters in the record, signed by the defendant, addressed to his mother and other relatives, which are not fully and clearly explained. It is quite well established that the defendant cannot write except to sign his own name, and that these letters were written by his wife, some of them without his knowledge or at least not at his dictation or direction. These letters point quite clearly to a recognition of his mother's title, and the explanation is, as above stated, that they were written without his direction or consent. There is also evidence of his payment of rent, but not before the statute of limitations ran in his favor, provided, as found by the jury, he has asserted title to the land in question since his occupancy in 1878 or 1879. On the other hand, there is evidence tending to show that he visited his father just prior to his death in 1886, and was then told that this land was his, and that the deed had been delivered to John J. Martin for delivery to him, and that he received letters to the same effect directing him to request delivery of the deed from his brother John. There is also evidence tending to show that the plaintiff had stated, after the dismissal of another action involving title to this land, that they had always intended this tract for the defendant; that the land was his and that she would not have brought an action had she not been persuaded by some of her other children. Probably we would have been better satisfied with a verdict for the plaintiff, but

from the conflicting and contradictory testimony given by witnesses who were, to a certain extent, interested in the result, some of whom, we regret to say, must have testified knowingly to facts which had no existence, as the conflicting statements could not possibly have been through error or forgetfulness on their part, it is a case in which the facts and the credibility of the witnesses are particularly suited for the determination of a jury, who saw and heard the witnesses and who were more or less acquainted with many of them. Under the rule so well and long established, that this court will not set aside the verdict of a jury found on conflicting evidence, regardless of our own opinion of what the verdict should be, we cannot interfere with the findings of the jury.

The petition in error contains more than 100 assignments. We cannot attempt to notice them all, and many of them relate to the same matter. The special findings, we think, dispose of the matters material to a disposition of the case. That there were some rulings on questions of evidence which were technically incorrect may be true, but these errors could have no weight with the findings of the jury on the question of the making and delivery of a deed to the premises by defendant's father, and the finding on that question is conclusive of the case.

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.

MODERN WOODMEN OF AMERICA V. LIZZIE WILSON.

FILED APRIL 5, 1906. No. 14,225.

1. **Insurance, Application for: CONSTRUCTION.** Questions in an application for insurance which, with the assured's answers thereto, are made a part of the contract of insurance are to be construed most strongly against the insurer.
2. **Good Faith: QUESTION FOR JURY.** Where such questions are so framed or placed that the assured may have honestly mistaken their true import, and gave answers thereto which are in fact untrue, but true as he may have reasonably understood the questions, it is for the jury to say, in the light of the entire transaction, whether in making his answers he acted honestly and in good faith, and without intention to misrepresent or conceal any material fact.
3. **Application: ANSWERS.** In answer to a question in such application calling for the names of the ailments for which the assured has been treated and the names of the physicians who treated him therefor, the assured is not required to give the name of every ailment, however trifling, or of every physician he has consulted, but may confine his answer to such ailments as are of a serious character.
4. **Evidence** examined, and *held* sufficient to sustain a finding that the answers of the assured were given honestly, in good faith, and without any intention to deceive the insurer.

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

Talbot & Allen and *B. D. Smith,* for plaintiff in error.

Barnhart & Free and *W. W. Quivey, contra.*

ALBERT, C.

This is an action on a beneficiary certificate issued to the plaintiff's husband by the defendant, a fraternal insurance association, in which the plaintiff is named as the beneficiary. The application upon which the certificate was issued was made by the assured on the 22d day of January, 1902, and is in writing on a blank furnished by

the association. The blank application contained a large number of questions which the assured was required to answer, a blank space for his answer following each question. Among the questions and answers, shown by the application, are the following:

"(14) Have you within the last seven years been treated by or consulted any physician, or physicians, in regard to personal ailment?" "Yes." "If so, give dates, ailment, and physician's or physicians' name and address." "1900, Dr. Allen. Grip."

"(15) Are you now of sound body, mind, and health, and free from disease or injury, of good moral character and exemplary habits?" "Yes."

"(21) Have you been an inmate of any infirmary, sanitarium, retreat, asylum or hospital?" "No."

Then follows this statement: "I have verified each of the foregoing answers and statements from 1 to 28, both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any benefit certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract."

The application is attached to the certificate and is expressly made a part of the contract evidenced thereby. The certificate contains these express provisions: "That the Modern Woodmen of America is a fraternal-beneficiary society, incorporated, organized and doing business under the laws of the state of Illinois, and legally

transacting such business in the state where said member resides; that the application for membership in this society made by the said member, a copy of which is hereto attached and made part hereof, together with the report of the medical examiner which is on file in the office of the head clerk, and is hereby referred to and made part of this contract, is true in all respects, and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty and to form the only basis of the liability of this society to such member, and to his beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate. (2) That if said application shall not be literally true in each and every part thereof, then this benefit certificate shall, as to the said member, his beneficiary or beneficiaries, be absolutely null and void." The assured died on the 14th day of December, 1902, a little less than eleven months after the date of his application. Payment on the certificate was refused, hence this suit. The defense now relied upon is that the answers hereinbefore set out, of the assured to questions in the application made by him, were made by him in regard to matters within his knowledge and material to the risk, and that such answers are incomplete and untrue.

It conclusively appears from the evidence that the assured suffered from some bodily ailment from late in 1899 to midsummer of the following year. During that period he was treated, successively, by Dr. Alden, who is mentioned in the answer numbered 14, and four or five other physicians. About ten days of the latter part of this period the assured was treated at the home of one of the physicians in the city of Norfolk. Whatever may be the proper designation of the place in which he was treated at that time, in the evidence it is sometimes designated as a sanitarium, and again as the home of the doctor. He left the doctor's home or sanitarium the latter part of June, 1900, and according to the doctor's evidence he was cured of his ailment, and practically sound and well. From that

time until the date of his application he was engaged in farming and other heavy work, and the evidence would sustain a finding that, to himself and others, he seemed to be in good health. There is considerable conflict in the evidence as to the nature and severity of the ailment for which the assured was treated during the period mentioned. Some of the physicians testified that it was pernicious anemia, which is classified as an incurable disease; others that it was merely jaundice, and readily yielded to treatment. It is inferable from the evidence that whatever may have been the technical name of the ailment, or its nature, it originated in an attack of *la grippe*. The evidence also leaves room for a difference of opinion as to the nature of the ailment of which the assured died; one line of testimony tending to show that it was pernicious anemia, another that he died of an ailment resulting from injuries received after his application had been accepted. The jury returned a verdict for the plaintiff, and from a judgment rendered thereon the defendant prosecutes error. The court submitted the case to the jury on the theory that incomplete or untrue answers to questions in the application would not defeat a recovery on the certificate unless such answers, or some of them, were intentionally incomplete or false and made with intent to deceive. Whether that theory is sound is the question now presented by the record.

The theory upon which the trial court submitted the cause is now vigorously assailed; the defendant contending that the honesty and good faith of the assured in making the answers in question are eliminated from the case because such answers are in regard to matters which were within the personal knowledge of the assured and untrue. In support of this contention the defendant invokes the rule announced in *Royal Neighbors v. Wallace,* 73 Neb. 409, which is as follows:

"An untrue answer in an application for life insurance in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk will avoid the policy."

In that case a distinction was shown between untrue answers in regard to matters of opinion or judgment and those in regard to matters shown to have been within the knowledge of the applicant, and the court reached the conclusion that the former, if made in good faith and without intention to deceive, would not avoid the policy, but that the latter, if material to the risk, would defeat a recovery. But while the doctrine announced in that case would necessarily eliminate the question of the good faith and honesty of the assured as to untrue answers in regard to matters within his knowledge, it would not eliminate the question of his honesty and good faith as to the construction to be placed upon the questions propounded in the application. Every practitioner knows that it frequently happens that an apparently false answer is given to a question simply because the witness gathers a different meaning from the question than that his interrogator intended to convey. Hence, ordinarily, the first question that arises when the truthfulness of an answer is challenged is whether the party giving the answer understood the question. The assured is dead and is not here to explain why he answered as he did. The questions are not of his framing, but of the defendant's, thought out and elaborated in the quiet of an office, where every word was examined and carefully weighed. The assured was a farmer, and many of the words and the combinations in which they were used undoubtedly were new to him. Under such circumstances it is highly probable that the assured failed to grasp the true import of some of the questions. As the questions are made a part of the contract and were prepared by the defendant, they should be construed most strongly against it. *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338. And where any of such questions are so framed or placed that the assured may have honestly mistaken their true import, and gave answers thereto which are in fact untrue but true as he may have reasonably understood the questions, it is for the jury to say, we think, in the light of the entire transaction, whether in making his answers

he acted honestly and in good faith, and without intention to misrepresent or conceal any material fact.

Applying the foregoing rule to question numbered 14, and the answer thereto, which we repeat: "Have you within the last seven years been treated by or consulted any physician, or physicians, in regard to personal ailment?" "Yes." "If so, give dates, ailment and physician's or physicians' name and address." "1900. Dr. Alden. Grip."—in the first place it is somewhat involved, consisting in fact of five questions. It is followed by a space for an answer which is barely sufficient to give the name and address of one physician, ailment and date. We have already shown that the assured was ill from the latter part of 1899 until near the middle of the following summer, and that the illness apparently began with an attack of *la grippe*. His illness during that period was practically continuous, and it is not surprising that he should consider *la grippe* as the ailment from which he suffered during the whole period. However, in another part of the application, when asked whether he ever had jaundice, the assured referring to the same illness answered, "Yes." But the evidence shows that the assured, as well as some of his physicians, considered that during the whole period he was suffering from some of the consequences of the attack of *la grippe*. Dr. Alden was one of the physicians who attended him during that period, and was also the medical examiner of the local lodge who took the application. In his report on the examination of the assured for membership he made a somewhat extended statement in regard to the assured's answer that he had had jaundice. Taking into account the nature of the question, which might leave some doubt in the ordinary mind as to whether it called for the name of each physician who had attended the assured during the same spell of sickness, the limited space left for the answer, which is of itself a hint that the answer be brief, and that at the date of the application the assured was apparently in sound health, it is not an unreasonable inference that,

in giving a general designation of the ailment with which he had been afflicted during that period, the date, and the name of an attending physician who could furnish information with respect to it, the assured honestly supposed that he had given all the information sought to be elicited, and had made a full and complete answer to the question. Besides, the defendant itself would seem to have inclined to that view because, while a subsequent answer showed that the assured had had jaundice, and the medical examiner forwarded a statement with respect to that answer with the application, the defendant with the knowledge of the fact before it that the answer to question 14 was not full and complete made no objection on that ground, but accepted the assured and issued the certificate. In view of all these facts and the circumstances surrounding the transaction we think it was for the jury to say whether the assured's answer to question 14 was made honestly and in good faith, and without any intention to deceive the defendant. Besides, courts have not been disposed to hold the assured to a high degree of strictness with respect to questions of this character. It is well settled that in answer to such questions the assured is not required to give the name of every physician he has consulted or every ailment for which he has been treated but may restrict his answer to serious ailments. *Blumenthal v. Berkshire Life Ins. Co.*, 134 Mich. 216, 96 N. W. 17, and cases cited.

In the next question: "Are you now of sound body, mind and health, and free from disease and injury, of good moral character and exemplary habits?"—the space left for the answer is barely sufficient for the word, "Yes." This clearly shows that the company required a categorical answer. The question itself shows that it called for the opinion of the applicant. The applicant at that time, so far as is disclosed by the evidence, may have been, or at least may reasonably have supposed himself to be, in good health and free from disease. The space left for his answer precludes the idea that it was intended that he should give a history of his past ailments. There is nothing in the

record that would warrant the court in holding that the answer was not given in good faith and according to the applicant's condition as he understood it at that time.

We come now to the last question: (21) "Have you been an inmate of an infirmary, sanitarium, retreat, asylum or hospital?" The space left for the answer to that question also indicates that the association required a categorical answer, and the answer is, "No." We have seen that the assured in 1900 was treated at the home or sanitarium of a certain physician for a period of about ten days. We have also seen that this place is sometimes referred to as the home of such physician and sometimes as his sanitarium. This physician testified that he had treated the assured in June, 1900, in the city of Norfolk, and, when asked at what particular place in that city, answered, "At my sanitarium at my home." When asked if he maintained a hospital or sanitarium in that city, he answered, "I did in the year 1901," the year following his treatment of the assured. Taking this evidence all together, we infer that at the time the assured was treated by this physician in Norfolk, the place where he was treated was not commonly known as a hospital or sanitarium, but merely as the doctor's private home where, in special cases, he received patients for treatment. And it is highly probable that the assured knew the place by the name by which it was commonly known and that he would have been surprised had he been told that by entering the doctor's private home for treatment he became an inmate of "an infirmary, sanitarium, retreat, asylum or hospital." The question immediately preceding the one under consideration, "Have you ever taken any treatment for tobacco, morphine, cocaine or opium habit?"—throws some light upon the construction which the assured placed upon the inquiry as to whether he had ever been an inmate of an infirmary, etc. It carries with it a suggestion of the popular conception of the institutions where such habits are commonly treated, which is entirely different from that of the private home of a physician where patients are occasionally received for

treatment. We consider the evidence ample to warrant a finding that the assured's answer to the question under consideration was given in good faith and truthfully, as he understood the question. It is true the jury found specially that the place was a sanitarium, but that is a mere matter of a difference in definitions, and does not necessarily contradict the general finding that the assured's answers were given honestly, in good faith, and without any intention to deceive.

Complaint is made of the refusal of the court to give certain instructions tendered by the defendant, but as such instructions, each and all, conflict with the theory upon which the court submitted the case, and which, in our judgment, was the proper theory upon which to submit it, they require no extended notice at this time.

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

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

CHARLES HERPOLSHEIMER V. JOHN P. CHRISTOPHER.*

FILED APRIL 5, 1906. No. 14,028.

Contract: ABANDONMENT. A contract will be treated as abandoned, where the acts of one party, inconsistent with its existence, are acquiesced in by the other.

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

Ricketts & Ricketts, for plaintiff in error.

George W. Berge, contra.

* Rehearing allowed. See opinion, p. 355, *post.*

JACKSON, C.

The plaintiff in error is the owner of a farm of 480 acres in Lancaster county. In November, 1901, he leased the premises to the defendant in error for the period of one year, commencing March 1, 1902. The lease was in writing and contained no covenants to put the defendant in error in possession, nor for the quiet enjoyment thereof. The rent was payable in cash at stated periods and promissory notes were given for the amount agreed upon. At that time another tenant was in possession under a written lease, terminating on the date at which the defendant's lease commenced. The tenant in possession refused to surrender the premises on the termination of his lease and the landlord instituted forcible detention proceedings and had judgment for possession on March 18, 1902. The tenant appealed to the district court, gave the statutory bond, and remained in possession, and thereupon the defendant in error on April 4, 1902, demanded a return of the notes given by him in payment of rent for the period covered by his lease. The notes were canceled and surrendered. On May 24, 1902, the forcible detention case was heard on appeal in the district court, where judgment was rendered by agreement in favor of the landlord, and thereafter the defendant in error sued the plaintiff in error for damages because of an alleged violation of the terms of his lease. His right to recover was based upon an allegation of the refusal of the landlord to give him possession of the premises at the beginning of his term, and the action so brought proceeded to trial upon that issue. At the close of the plaintiff's evidence the defendant moved for a directed verdict. Before a ruling on this motion, the plaintiff asked and procured leave of court to amend his petition. By the amended petition the right to recover was based upon an allegation of a prior outstanding lease to the tenant in possession. Issues were joined upon that allegation, plaintiff was permitted to reopen his case and introduced further evidence in support of that issue. The

trial resulted in a verdict and judgment for the plaintiff, and the defendant prosecutes error.

Several questions are presented by the record, but the most important and controlling one, in our judgment, arises out of the acts of the defendant in error in demanding the return of his notes, and as a result the cancelation of his lease. Prior to the surrender of the notes some negotiations were had between the parties looking to a settlement of the controversy, and the defendant in error made some claim for damages, and his demands in that respect were discussed between defendant in error and a son of the plaintiff in error, with counsel. These negotiations, however, terminated in a peremptory demand for the return of the notes. Such demand and compliance amounted, in our judgment, to an abandonment of the contract by mutual consent. The provisions of the contract no longer remained in force, they could not be binding on one party unless they were equally binding on the other. The rule is that a contract will be treated as abandoned, where the acts of one party, inconsistent with its existence, are acquiesced in by the other. *Hall v. Eccles,* 46 Neb. 880. Certainly no right of possession to the leased premises thereafter existed in favor of the defendant in error, and in that behalf it is worthy of notice that a large portion of the demand for damages accrued after the abandonment of the contract, and the rule is that, in an action by a tenant against his landlord for an interruption of the tenant's right of possession, failure to prove that he had a continuous right of possession is fatal to the tenant's case. *Ives v. Williams,* 53 Mich. 636.

We are convinced that the judgment of the district court was wrong, and we recommend that the judgment be reversed and the cause remanded.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing

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

REVERSED.

The following opinion on rehearing was filed March 21, 1907. *Judgment of reversal adhered to:*

1. **Lease: COVENANT.** Ordinarily there is an implied covenant in a lease that the demised premises shall be open to entry by the lessee at the time fixed in the lease as the beginning of the term.
2. **The measure of damages** for a breach of this implied covenant is the difference between the rental value of the premises and the rent reserved in the lease. The lessee may also recover such special damages as he pleads and proves to have necessarily resulted from the breach of the agreement.
3. **Question for Jury.** Under the evidence in this case, *held* that the question whether the plaintiff rescinded the contract and abandoned the claim to damages should be submitted to the jury.

LETTON, J.

A brief statement of the facts in this case and of the proceedings at the trial is contained in the former opinion, *ante,* p. 352. The plaintiff began the action upon the theory that there was an implied covenant on the part of the lessor, Herpolsheimer, to put the lessee, Christopher, into possession of the demised premises when the term began, and that, since he was kept out of possession by a former tenant wrongfully holding over, he was entitled to recover damages for a breach of the implied covenant. The defendant contends that no such covenant is implied and that the lessor is not compelled to eject a wrongdoer for the benefit of the lessee; that it is the lessee's duty, if he desires possession, to procure it himself by virtue of the right granted him by the lease, and, hence, that no right of action for damages accrues for the failure of the lessor to put him into possession. During the trial, the court, upon a motion to instruct for defendant being made, apparently adopted the defendant's view of the law, but plaintiff asked leave to amend, and was

permitted to amend, his petition so as to count upon a prior lease to Spelts, the tenant whom the defendant claimed was holding over, for the same term demised to plaintiff. A rescission of the contract by the plaintiff, in asking for and receiving his notes given for the rent, was pleaded as a defense, as well as a general denial. The court instructed the jury that it was not incumbent upon the landlord to put the tenant in possession as against a tenant holding over, but that, if it found that there was a prior and paramount lease made for the same term to Spelts by the defendant, then the plaintiff would be entitled to recover. It appeared from the evidence that Herpolsheimer brought and prosecuted to a successful determination a forcible entry and detainer suit against Spelts, and that Christopher was consulted about bringing the suit, and encouraged the prosecution of the same and was present at the trial. By another instruction the jury were told that the defense of rescission had not been established. The court also instructed with reference to the allowance of certain items of special damages based upon the plaintiff's contention that he had rented the farm for the special purpose of using it for stock raising and farming on a large scale and that upon the first of March he was compelled to move to his brother's farm, and from thence, about the first of April, to a farm which he purchased, and incurred extra expenses and damage by so doing.

We are convinced from an examination of the testimony and the instructions of the court that the jury could never have arrived at the verdict which they reached if they had followed the court's instructions, and that the verdict should be set aside and a new trial granted for that reason alone, unless the former opinion is correct in holding that the evidence clearly showed a rescission of the contract by the plaintiff and that, consequently, he had no cause of action. Upon this point, we are convinced that the question whether a rescission and abandonment of the contract by the plaintiff took place at

the time the notes were delivered to him is a question of fact which should have been submitted to the jury. If the intention of the plaintiff was to rescind the contract, abandon the lease and waive any claim for damages he might have, this would be a perfect defense, but if at the time he accepted the notes he did not waive or abandon his right to damages, but left the question open for settlement and negotiation, then the acceptance of his notes would not operate as an abandonment or rescission, but would merely go to reduce the amount of his recovery. There is evidence in the record of a claim for damages being made upon the defendant, together with a demand for the return of the notes and an acknowledgment by the defendant's attorneys of such a claim still being pending at the time of the surrender of the notes, sufficient, we think, to justify the submission of the question to the jury.

Since there must be a new trial, and since the question is one of first impression in this state, we think it proper at this time to determine which of the conflicting doctrines shall be adopted, as to whether or not there is an implied covenant in a lease by which a lessor agrees to put the lessee in possession, or to have the demised premises open for his possession on the day that the term begins. There is an irreconcilable conflict among the courts of this country upon this point. Perhaps the greater weight of authority is in line with the courts of New York, which hold that, if a lessee is prevented from taking possession of the demised premises by a tenant wrongfully holding over, it is not the duty of the landlord to oust the wrongdoer; that the right to possession at the end of the existing term is in the lessee, and not in the lessor, and that, when the landlord has given to the tenant the right to possession, he has done all that he is required to do as against third persons not claiming under prior and superior rights derived from him. This is the law in New York, New Hampshire, Maryland, Vermont, Illinois and Pennsylvania. *Gardner v. Keteltas,* 3

Hill (N. Y.) 330; *Pendergast v. Young,* 21 N. H. 234; *Sigmund v. Howard Bank,* 29 Md. 324; *Underwood v. Birchard,* 47 Vt. 305; *Cozens v. Stevenson,* 5 Serg. & Rawle (Pa.) 421; *Gazzolo v. Chambers,* 73 Ill. 75. Jones, Landlord and Tenant, sec. 366, and note; 1 Taylor, Landlord and Tenant (9th ed.), sec. 305. The courts of England, however, and of Missouri, Alabama, Indiana, Michigan, Texas, California and Arkansas hold that there is an implied covenant that, when the time comes for the lessee to take possession according to the terms of his lease, the premises shall be open to him. That he is not liable for rent until he has been afforded an opportunity to enter, and that he is under no obligation to maintain an action against a tenant holding over to recover possession. Jones, Landlord and Tenant, sec. 367. In *Coe v. Clay,* 5 Bing. (Eng.) 440, the defendant had agreed to let the plaintiff certain premises, and this was an action for not letting him into possession by reason of a preceding tenant wrongfully holding over. The report states with commendable brevity: "The court were all clearly of opinion, that he who lets, agrees to give possession, and not merely to give a chance of a lawsuit"; and the verdict was upheld. See, also, *Jenks v. Edwards,* 11 Exch. (Eng.) *775. There is an interesting discussion of this question in *King v. Reynolds,* 67 Ala. 229, in which the relative merits of the English and New York rule are considered, and the English rule adopted. The following are cases upholding this view: *Coe v. Clay,* 5 Bing. (Eng.) 440; *Jenks v. Edwards,* 11 Exch. (Eng.) 775; *L'Hussier v. Zallee,* 24 Mo. 13; *Hughes v. Hood,* 50 Mo. 350; *King v. Reynolds,* 67 Ala. 229; *Spencer v. Burton,* 5 Blackf. (Ind.) *57; *Clark v. Butt,* 26 Ind. 236; *Vincent v. Defield,* 98 Mich. 84; *Hertzberg v. Beisenbach,* 64 Tex. 262; *Rice v. Whittemore,* 74 Cal. 619; *Rose v. Wynn,* 42 Ark. 257. We deem it unnecessary to enter into an extended discussion, since the reasons *pro* and *con* are fully given in the opinions of the several courts cited. We think, however, that the English rule is most in consonance with good conscience, sound

principle and fair dealing. Can it be supposed that the plaintiff in this case would have entered into the lease, if he had known at the time that he could not obtain possession on the first of March, but that he would be compelled to begin a lawsuit, await the law's delays and follow the case through its devious turnings to an end before he could hope to obtain posession of the land he had leased? Most assuredly not. It is unreasonable to suppose that a man would knowingly contract for a lawsuit, or take the chance of one. Whether or not a tenant in possession intends to hold over or assert a right to a future term may nearly always be known to the landlord, and is certainly much more apt to be within his knowledge than within that of the prospective tenant. Moreover, since in an action to recover possession against a tenant holding over the lessee would be compelled largely to rely upon the lessor's testimony in regard to the facts of the claim to hold over by the wrongdoer, it is more reasonable and proper to place the burden upon the person within whose knowledge the facts are most apt to lie. We are convinced therefore that the better reason lies with the courts following the English doctrine, and we therefore adopt it, and hold that, ordinarily, the lessor impliedly covenants with the lessee that the premises leased shall be open to entry by him at the time fixed in the lease as the beginning of the term.

Under the facts presented in this case, we think the court erred in submitting the question of whether there was a prior lease made by Herpolsheimer to Spelts under which Spelts claimed possession after March 1. The evidence shows that the plaintiff was an interested participant in the action for forcible entry and detainer against Spelts, although it was brought in Herpolsheimer's name, and that he was present at the trial, and we think that the successful result of that suit settled this issue as between Herpolsheimer and the plaintiff on the one side and Spelts upon the other. The instruction of the court upon this branch of the case, that the plaintiff, if the jury be-

lieved he had been so active in the suit, would be estopped and concluded to allege and prove that Spelts held over under a lease paramount to the lease held by the plaintiff, properly stated the law, but the evidence upon this point was so clear as not to require its submission to the jury. This issue, for both the reasons given, should therefore be eliminated upon a new trial.

As we view the case, the issues to be tried are narrow. The fact that the lease was made, as alleged, is not disputed; neither is the fact that Herpolsheimer did not give Christopher the opportunity to take possession when his term commenced, and that Christopher, after it had become evident that it was impossible for him to obtain the place in time to farm during that year, obtained another farm, and demanded the return of his notes and damages for the breach of the contract. The only points necessary therefore to determine are: (1) Did the plaintiff rescind and abandon the contract and his claim for damages? (2) If not, what is the proper measure of damages to which he is entitled? In such a case, ordinarily, the measure of damages is the difference between the rental value of the premises and the rent that the plaintiff agreed to pay. By rental value is meant, not the probable loss of profits that might occur to the lessee, but the value, as ascertained by proof, of what the premises would rent for, or by evidence of other facts from which the fair rental value may be determined. But special damages may also be allowed if pleaded and proved. The plaintiff pleaded a number of items of special damages. The eighth and ninth instructions given by the court lay down the law correctly as to the plaintiff's right of recovery for damages and as to the measure thereof. We are inclined to the view, however, that some of the items of special damages which the plaintiff was allowed to prove at the trial were too remote to be considered, and that the inquiry should have been limited to the extra cost and expenses necessarily incurred by plaintiff in the removal to his brother's farm, and the extra cost of the care and

maintenance of his family, and of his live stock, over what it would have been if he had obtained the defendant's farm as agreed; also, for the loss of his time during the period that he was awaiting the result of the suit against Spelts, and until he obtained another farm, since the evidence shows diligence on his part as soon as he found that Spelts had taken an appeal. 3 Sutherland, Damages (3d ed.), sec. 865; *Rose v. Wynn,* 42 Ark. 257; *Adair v. Bogle,* 20 Ia. 238; note to *Taylor v. Bradley* (39 N. Y. 129), 100 Am. Dec. 428.

Several other points are argued by defendant, but we do not think them of weight. We adhere to the judgment of reversal.

REVERSED.

WILLIAM VOGT v. W. H. BINDER, ADMINISTRATOR.

FILED APRIL 5, 1906. No. 14,219.

Judgment: REVIVOR. Proceedings to revive a judgment should not be had in the name of an administrator, except where the administrator has succeeded to the rights of the decedent.

ERROR to the district court for Thurston county: GUY T. GRAVES, JUDGE. *Reversed with directions.*

C. L. Day and *Thomas L. Sloan,* for plaintiff in error.

J. M. Curry, contra.

JACKSON, C.

In September, 1897, certain judgments were rendered before a justice of the peace in Thurston county against the plaintiff in error and in favor of one Hattenhauer. These judgments were afterwards assigned to Nick Fritz. Hattenhauer died in 1900, and after his death Fritz undertook to enforce collection of the judgments by execution. He was, however, perpetually enjoined from so doing until

the judgments were revived, it having been held by this court that such procedure was necessary. *Vogt v. Daily*, 70 Neb. 812. Thereupon, Fritz procured a revivor of the judgments in the name of the administrator of Hattenhauer's estate. From the judgment of revivor the plaintiff in error prosecuted error to the district court, where the revivor was affirmed, and this proceeding is instituted to reverse the judgment of the district court.

The only question presented is the correctness of the judgment of revivor in the name of the administrator. It is contended that, because Fritz was the party in interest, the judgment should have been revived in his name. By section 45 of the code it is provided: "An action does not abate by the death, marriage, or other disability of a party or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In the case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife; and, in the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action." This section has been several times construed, and it has been repeatedly held that the transfer of interest after the action is commenced does not prevent the action from being continued to final termination in the name of the original plaintiff. *Magemau v. Bell*, 13 Neb. 247; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb. 276; *Harrington v. Connor*, 51 Neb. 214. If, therefore, the cause of action had been assigned to Fritz before judgment, the action might have proceeded to judgment in the name of Hattenhauer, and, had Hattenhauer been living at a time when it might have been necessary for his assignee to procure a revivor of the judgments, such proceeding might have been taken in his name, because a proceeding to revive a judgment is but a continuance of the

action in which the judgment was obtained. 12 Am. & Eng. Ency. Law (1st ed.), 150*h*.

But the question here is whether such proceeding might be taken in the name of the administrator. By section 463 of the code it is provided: "Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names." This section of the code was under consideration in *Rakes v. Brown,* 34 Neb. 304, an action to quiet the title to real estate. Pending the action the plaintiff died, and the administrator, as the representative of the deceased, procured an order of revivor in his name, and it was in substance held that the administrator was not entitled to have the action revived in his name, because the title of the land passed directly to the heirs of the deceased, and there was no showing of a necessity to sell the real estate to pay the decedent's debts. As affecting the right to proceed in the name of the administrator, there seems to be no difference in principle between the case of *Rakes v. Brown, supra,* where there was involved a proceeding to revive before judgment, and the case at bar, where it is sought to revive after judgment. The assignee of the judgments had a right to proceed under the provisions of section 472 of the code to revive the judgments in his own name, but it does not seem to be the policy of the law to permit the office of an administrator to be used in revivor proceedings, except where he has succeeded to the rights of the decedent.

We conclude that the order of revivor in the name of the administrator was unauthorized, and we recommend that the judgment of the district court be reversed and the cause remanded with instructions to enter judgment vacating the order of revivor and dismissing the revivor proceedings.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to enter judgment vacating the order of revivor and dismissing the revivor proceedings.

JUDGMENT ACCORDINGLY.

ERNEST PEYCKE ET AL. V. EDGAR SHINN, ADMINISTRATOR.

FILED APRIL 5, 1906. No. 14,266.

1. **Contract:** CONSTRUCTION. A contract for potatoes in car-load lots at an agreed price per bushel for all that may be loaded during the week, under which the seller has loaded and shipped four car-loads, is entire in the sense that either party had the right to a full performance.
2. **Agent's Authority:** EVIDENCE. The authority of an agent may be shown by the letters of his principal, and it is a sufficient foundation for the introduction of such letters in evidence to show that they were received in due course of mail in answer to letters written by the agent to the principal, and duly mailed to the address of the party sought to be bound.

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

Charles S. Elgutter, for plaintiffs in error.

Altschuler, Fleharty & Moriarty, contra.

JACKSON, C.

This is the second appearance of this case. Our former opinion is reported in 68 Neb. 343. The facts necessary to be noticed are: That Peycke Brothers, of Omaha, had a branch house at Kansas City, and maintained a place of business both at Kansas City and Omaha. H. O'Berste was buying potatoes in Arkansas, and in the spring of 1898

entered into an agreement with Peycke Brothers, of Omaha, to buy potatoes for them in car-load lots for an agreed compensation of $10 a car. He was provided with funds from the Omaha office, and completed all purchases except the ones in suit, by payment of cash. The business was carried on entirely by correspondence through the mails and telegrams. Peycke Brothers informed him in advance of prices which he was authorized to pay, and shipments were made to the firm at Kansas City. On June 10, 1898, Peycke Brothers telegraphed O'Berste: "Mailing money Ozark tomorrow. Don't want onions. Looking for lower prices potatoes not above 50 for next week." On the 16th of that month O'Berste, while passing through Russellville, Arkansas, heard that potatoes were being loaded there, and, having 20 minutes at that station, he sought the dealer, J. L. Shinn, and contracted with him for potatoes at an agreed price of 50 cents a bushel for all that Shinn could load that week, and, as O'Berste was not to remain there, he directed Shinn to ship the potatoes to Peycke Brothers at Kansas City and draw on them for the purchase money. On June 14 Peycke Brothers, Omaha, telegraphed O'Berste: "Can use 10 cars this week's shipment at 40." This telegram was received by O'Berste on the 16th, after he had entered into the contract with Shinn, and it appears that he advised Shinn of the receipt of the telegram and wired him that the house would not confirm the order. Shinn, however, answered that it was too late, that two cars had already gone. Shinn loaded two more cars that week, but the bills of lading for the last two cars were not delivered until the following Monday. Sight drafts were attached to the bills of lading and forwarded to a bank in Kansas City for collection. The first two cars were received by Peycke Brothers and the drafts on them were paid. Upon the arrival of the last two cars, Peycke Brothers at Kansas City telegraphed Shinn: "We did not authorize you to draw for 50 cts. a bushel. Wire bank deliver us bills of lading quick." On the following day they telegraphed: "Potatoes too heavily loaded. Becoming

heated. Must be sold quick. Wire bank deliver us bills of lading tonight so can place early morning trade." Upon receipt of the latter telegram, Shinn wired the Kansas City bank to release the bills of lading, the potatoes were turned over to Peycke Brothers, and the drafts returned unpaid to Shinn. The potatoes were sold, and Peycke Brothers remitted to Shinn the sum of $134.94 as the proceeds of the sale, less charges and commission. Shinn credited that amount to Peycke Brothers, and sued that firm in Douglas county for the difference between the amount remitted and the contract price. While the suit was pending Shinn died, and the action was revived in the name of his administrator. The plaintiff had judgment for the full amount of his demand, and defendants prosecute error.

There are two principal contentions as to the merits of the controversy: First, as to the authority of O'Berste to bind his principal by an agreement to pay 50 cents a bushel at the time he entered into the contract; and, second, that the transaction relative to the last two cars amounted to a consignment on commission. Both of these contentions are untenable. At the time the contract was made, O'Berste had express authority from his principal to buy potatoes during that week for 50 cents a bushel. The contract was clearly within the scope of his authority as agent, with the single exception that he ordinarily paid cash; but the defendants were not prejudiced by this departure. The agent was supplied with the necessary funds to pay for the potatoes, and might have done so, had he chosen to remain at Russellville until the potatoes were loaded and weighed. The course pursued by him however, was one best adapted to the circumstances, and was ratified by his principal when the first two car-loads were received and the sight-drafts honored without question. Furthermore, payment of the drafts for the two latter cars was waived by Shinn, and Peycke Brothers received the potatoes knowing that they had not been paid for by their agent. There was involved no question of a lack of good faith, and the evidence discloses a complete accounting be-

tween O'Berste and his principal, so there seems to be no reason why the contract should not be enforced.

It is urged, however, that Shinn knew, before the last two cars were shipped, that Peycke Brothers had revoked the authority of O'Berste to pay 50 cents a bushel for the potatoes. Such action, however, was too late, after the contract was made in good faith. In that connection, too, it is worthy of notice that there is involved in the issue no question of the difference in price between the price agreed upon and the one which the agent was authorized to pay in the telegram of June 14. Peycke Brothers treated the shipment, not as a sale, but as a consignment on commission, and they should not now be permitted to urge, after litigation has commenced, that their liability, in any event, was only for 40 cents a bushel. As to the claim that the last shipment should be treated as a consignment on commission, because of the fact that Shinn authorized delivery without payment, thus rendering the contract separable, such action on the part of Shinn could not have the effect contended for. The contract was still entire in the sense that either party had the right to full performance. *Williams v. Robb,* 104 Mich. 242, 62 N. W. 353.

The other questions urged relate to the admission and sufficiency of the evidence. It will be observed that the action was against Ernest Peycke and Julius Peycke, doing business under the firm name and style of Peycke Brothers, while the transaction was with Peycke Brothers, and it is said that no evidence is to be found in the record that Ernest Peycke and Julius Peycke were doing business under the name of Peycke Brothers. The correspondence, however, from Peycke Brothers was on printed letterheads; the printed portion, in so far as it is material, is in this form:

"Ernest Peycke. Julius Peycke.

Peycke Bros.,
Wholesale Brokerage and Commission,
Omaha, Neb.,

Des Moines, Ia. Kansas City, Mo."

It is evident that they thus held themselves out as doing business under the name of Peycke Brothers. No evidence was offered on their behalf, except the introduction of certain letters, which they procured to be introduced on the cross-examination of one of the plaintiff's witnesses, as will be hereafter noticed. The evidence afforded by their own letterheads, considered with other facts in the case, we think sufficient.

Again, it is urged that no foundation was laid for the introduction of the letters received by O'Berste from Peycke Brothers. In our former opinion (68 Neb. 343.), this question was the controlling one in the determination of the case, and it was held that no sufficient foundation was disclosed by the record. The first paragraph of the syllabus is as follows:

"Where it is sought to establish a contract by letters, there must be evidence tending to prove that they are in the handwriting of the defendant, or that they came from him or his authorized agent, or were received in due course of mail, in answer to letters duly mailed to the address of the party sought to be bound."

At the second trial we think the plaintiff was entirely within that rule. The testimony of O'Berste is direct and positive that the letters introduced were received in answer to letters from him addressed to Peycke Brothers at Omaha. Furthermore, the defendants produced on the cross-examination of O'Berste the identical letters written by him, had them identified, and they were offered and received as a part of the cross-examination. We entertain no doubt that the letters were properly received.

The only remaining question is as to the admissibility of the letters of administration. It is said that they were not properly authenticated, and that it was not shown that Jacob L. Shinn, therein named, was the J. L. Shinn of this action. It is not suggested wherein the letters are not properly authenticated. They are certified by the county clerk, *ex officio* clerk of the probate court, as well as by the judge of that court, under seal. There is also attached the

certificate of the secretary of the state of Arkansas, under the seal of the state, that the officers so certifying are the officers which they represent themselves to be. The record does not contain the original pleadings, and we are not advised of whether the action was originally brought in the name of Jacob L. Shinn or J. L. Shinn, nor is the record of the revivor contained in the transcript, so that we are unable to determine whether there is any merit in the objection or not, and, with the record before us, we feel that the judgment should not be disturbed on that question alone.

We were not favored with a brief on behalf of the defendant in error, and are therefore ignorant of the views entertained by his counsel. We are satisfied, however, that the judgment is right, and recommend that it 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.

WINFIELD S. HADDIX V. STATE OF NEBRASKA.

FILED APRIL 18, 1906. No. 14,445.

1. **Jury: TALESMEN.** When the trial court finds that the regular panel of jurors will be exhausted, and that it will be necessary to call talesmen for the trial of a cause pending, it is proper to order the sheriff to call a specified number of talesmen for that purpose in anticipation of such failure of the regular panel. The fact that the sheriff called as such talesmen, pursuant to the order of court, persons having the qualifications of jurors, who had been, before the order was made, requested by the sheriff to attend court for that purpose, is not sufficient ground for challenge, unless it appears that the sheriff is interested in the cause, or there is some evidence to show that the sheriff acted from an improper motive.

2. ———: CHALLENGE. Upon a trial for murder in the first degree, it is sufficient ground for challenge of a juror that he has such opinions as would preclude him from finding the accused guilty of an offense punishable with death.

3. **Evidence:** OBJECTIONS. Upon sustaining an objection to an offer of testimony, the court may allow part of the offered testimony without stating the reason for excluding the remainder.

4. **Remarks by the Court** in the presence of the jury, reflecting upon the evidence of an expert witness, will not be held prejudicial, if there is no evidence before the jury to render the expert evidence applicable to the issue being tried.

5. **Accused as Witness:** IMPEACHMENT. If the defendant testifies in his own behalf in a criminal case, he may be impeached as any other witness. If it is sought to show that he has made statements out of court inconsistent with his testimony, the statement supposed to have been made by the defendant, and to which his attention has been called while testifying, must be incorporated in the impeaching question, so that the question can be answered with yes or no by the impeaching witness.

6. **Criminal Law:** TRIAL. If it appears to the court that a juror, for any cause, has failed to hear the evidence given by a witness, the witness should be required to repeat his evidence or such part thereof as the juror has failed to hear. But, unless it clearly appears that the evidence or some part of it has not been heard by all the jurors, the court is not required, on its own motion, to cause the evidence to be repeated.

7. **Homicide:** INSTRUCTIONS. Upon the trial of an indictment charging murder in the first degree, the defendant may be convicted of a lesser degree of homicide, if the evidence warrants it. If the evidence is not sufficient to support a conviction of murder in the first degree, the jury should be so instructed. The court should submit to the jury those issues of fact upon which their finding, when made, would be allowed to stand as supported by the evidence. But, when the evidence is such as to make it proper to submit to the jury the question of the defendant's guilt of murder in the first degree, instructions submitting that question will not be erroneous because the jury found the defendant guilty in the second degree only.

8. ———: ———. When the defendant is found guilty of murder in the second degree only, prejudice will not be presumed because of several repetitions in the instructions of principles of law applicable to an issue of murder in the first degree, if the evidence was such as to justify the submission of both issues to the jury.

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

H. M. Sullivan, A. R. Humphrey and *Aaron Wall,* for plaintiff in error.

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

SEDGWICK, C. J.

This defendant was convicted of murder in the second degree in the district court for Custer county, and has brought the record of his conviction here for review upon petition in error. The bill of exceptions is a large one, and it shows that the evidence taken upon the trial in many matters of detail was conflicting. No contention, however, is made in the briefs that, if the issue was properly presented to the jury, the evidence is insufficient to support the conviction. The fact that the defendant shot and killed Melvin Butler, the deceased, was not contested upon the trial. Justification for the act was urged upon the theory of self defense. These two men were neighbors, their farms upon which they lived were separated only by the line between Custer and Sherman counties. There had been, prior to the homicide, some controversy between them, and evidently some bitterness of feeling toward each other, arising from various causes, among which was a dispute as to the right of the public to use a roadway which crossed the defendant's land. We would infer from the evidence that both men were in good standing in the community in which they lived; intelligent, vigorous men, jealous of their personal rights, and not much troubled with personal cowardice. Their contention and strife with each other, arising apparently from insufficient causes, and not justifiable on the part of either, have led to the death of one, and the conviction of the other for murder. It is seldom that this court is called upon to review the

record of a homicide that presents more features of human interest than this. These men were not in the highest walks of life, but they seem to have been useful members of society; and each had a wife and family of young children who appear to have needed and enjoyed his care and protection. The trial court was evidently impressed with the importance of the case with which it had to deal, and manifested more than usual care to guard the interest of the state, and to thoroughly and impartially investigate the facts bearing upon the question of the defendant's guilt; and at the same time to protect the defendant in all of his rights, and safeguard him against an unjust conviction. After such a trial, the jury has found the defendant guilty. The homicide occurred in a personal conflict between the defendant and the deceased. It appears beyond any reasonable doubt that the defendant, armed with a shotgun, went to the place where the disputed road crossed his land, where he knew that the deceased with his young daughter and two other persons would probably attempt to pass. Whether the defendant then had it in his mind to punish the deceased for an affront which he supposed the deceased had recently given to the defendant's family was a disputed matter. It does not seem probable from all the circumstances of the case that such was his intention. It would seem more probable that he intended to prevent the deceased from crossing by the disputed road.

It was contended upon the trial that the defendant's purpose in going where he did was to look after and protect his young children, whom he expected to be returning home at that time. There is no doubt that the deceased's children were away from home, and that they might return by the way the defendant went, and it seems probable that the defendant may have supposed that he might meet them; but, however that may be, there is no doubt that the evidence justified the jury in finding that the defendant expected and intended to meet the deceased and to prevent his passing over the road in dispute. The deceased was armed with a pistol, as was also the young

man who accompanied him, and as soon as they arrived at the line of the defendant's land, the deceased and the defendant began shooting at each other. It would be difficult to determine from the evidence with certainty which party began the shooting, but the evidence shows, and the defendant admits, that he purposely shot the deceased, intending to kill him. This the defendant says it was necessary to do, and was done by him to save his own life. Under these conditions, and in the light of antecedent and surrounding circumstances, it was the peculiar province of the jury to determine the motives of the defendant, and to ascertain whether his action was prompted by anger and a desire for vengeance, or by the instinct of self-preservation, made necessary by conditions for which he was not responsible. This great and important duty seems to have been conscientiously performed by the jury. Defendant's counsel necessarily assumed that this verdict must not be disturbed, unless the defendant's rights have been neglected, or unwarranted burdens put upon him in the trial in some of the particulars of which they complain. The questions presented in the brief can be best considered in the light of the conditions to which attention has been called.

1. In the brief of the state, which was filed but a few days before the hearing, it was pointed out that the bill of exceptions was not properly identified. The attention of the court was called to the matter upon the argument by the defendant's attorneys, and leave was requested to withdraw the bill of exceptions for further identification. This being a prosecution for a felony, and the request to withdraw the bill of exceptions for further certification having been made at the first opportunity after attention was called to the defect by the brief of the state, leave was granted and the certification has been corrected acordingly.

2. It appears that, for causes not shown in the record, jurors had been excused so that but two remained of the regular panel. Several days before the session in which the defendant was tried, the sheriff notified sixty qualified

residents of the county to appear at the ensuing session of the court to act as jurors. Afterwards, and before this case was called for trial, the court caused an order to be entered upon the record directing the sheriff to call sixty qualified jurors as talesmen for the trial of this case. When the case was called for trial, and the two jurors of the regular panel had been called, the court directed the sheriff to call other jurors, and he filled the panel from persons present in the courtroom, who had appeared there in pursuance of his former notice to them to so appear. These jurors were objected to by the defendant on the ground that they had not been properly summoned. The contention is that, when the sheriff directed these men to appear in court, no order had been made authorizing him so to do, and that his action was wholly unwarranted, and the same men having been called by him as jurors, the result was that the sheriff as a private individual, without authority from the court, selected the jurors to sit in the trial of this case.

It was held in *Pflueger v. State,* 46 Neb. 493, that the trial court may order the calling of talesmen before the regular panel is exhausted, when it appears that the regular panel will be exhausted, and that such talesmen will be necessary; but there is no provision in our law for the calling of such talesman by the sheriff without authority from the court. His action, therefore, in notifying these men to appear in court before any order had been made directing him so to do was extra official, and would have no force or effect in qualifying these men to act as jurors. When, however, he was directed by the court to call talesmen, it was his duty to exercise his discretion in selecting qualified electors of the county. His action in calling these talesmen from the number of those men who were already in the courtroom, pursuant to his unauthorized notification, would not disqualify them as jurors, unless irregularity in first notifying them to appear, without authority for so doing, should be held to raise the presumption that the defendant was, or might have been, prejudiced thereby. In as early a case as *Burley v. State,* 1 Neb. 385, it was held

that jurors must be selected in the manner prescribed by law, and, in case they were not so selected, it was "not material whether any injustice was thereby suffered by the prisoner," and it has frequently since been held that, if any rule of the law is violated in the selection of a jury, prejudice to the defendant will be presumed. In this case, however, it does not appear that any provision of the statute was violated. It was not the duty of the sheriff to call individuals as jurors before he had been ordered so to do by the court; and it may be that slight circumstances tending to show that the sheriff was interested or partial in the case, or that the defendant was in any manner prejudiced by this action of the sheriff, might require the court to exclude jurors so chosen. But we find no such circumstances in this record. There is nothing to indicate that the sheriff had any personal interest whatever in the prosecution, or that the defendant suffered, or could have suffered, any prejudice from the sheriff's action in the matter. We think, therefore, that the court did right in refusing to interfere with the discretion of the sheriff in calling talesmen in compliance with its order.

3. It appeared upon the *voir dire* examination that some of the jurors called had conscientious scruples against the infliction of the death penalty, and for this reason they were excused by the court. It has frequently been held that the trial court must exercise its discretion in such matters, and that if it appears from the examination of the jurors that it is probable that a juror may, under the influence of his conscientious scruples, unduly hesitate in determining the facts which might lead to the infliction of the death penalty, disapproved by the conscience of the juror, such juror should be excused. *Bradshaw v. State,* 17 Neb. 147; *Hill v. State,* 42 Neb. 503; *Dinsmore v. State,* 61 Neb. 418; *Rhea v. State,* 63 Neb. 461. The language of the statute is: "In indictments for an offense the punishment whereof is capital, that his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death" shall be good cause for challenge. Cr. code,

sec. 468. It is manifest that it was not intended by the legislature that jurors, otherwise qualified, should be excluded from this service because of sentimental feelings against the infliction of such punishment, nor because, even, of fixed opinions that such penalties are not justifiable upon moral grounds, unless it appears that the juror is so prejudiced against such penalties as to "preclude him from finding the accused guilty," and it may be that this statute has in some cases been too liberally applied. The question, however, presented in this record is whether, under any circumstances, any conviction or prejudice of the juror, however strong, even if it would preclude the infliction of the death penalty, should be ground for challenge. It is conceded in the argument that, when the statute provided no other punishment for murder in the first degree than the death penalty, the exclusion of a juror under such circumstances was required. The contention is that, since the change in the statute leaving it to the discretion of the jury whether the death penalty should be inflicted in each particular case, the statute allowing this ground of challenge has no application. This contention is predicated upon the theory that the discretion of the jury in this regard is an absolute discretion and that in all cases the juror may, without other reason than his personal feelings in the matter, reject the death penalty and inflict imprisonment only as the punishment for murder. This does not seem to be the theory of the law. No doubt the tendency of modern legislation is toward less severe penalties; and many thoughtful and earnest minds are impressed with the belief that the taking of human life is in no case justifiable; but this idea has not been embodied in the laws of this state. The theory of our law is that there are instances in which the infliction of the death penalty is not only justifiable, but demanded. The change in the statute which requires the jury to exercise its discretion in the matter implies that in some instances life imprisonment is an adequate penalty even for murder in the first degree. The discretion of the jury, therefore, will be controlled by the circumstances of

the particular case, and not by the whim of the individual juror. A juror, then, who has such opinions as to preclude him from inflicting the death penalty in any case, necessarily is of opinion that our law is wrong, and is not, therefore, qualified to administer it. The amendment of the statute in question was made in 1893, and since that time *Hill v. State, supra,* was decided, and in that case it was declared that "the provision of the criminal code making conscientions scruples of a juror against capital punishment ground of challenge for cause in prosecutions for murder was not repealed by the amendment of 1893, conferring upon the jury discretion to fix the punishment, upon conviction for murder in the first degree, at imprisonment for life instead of the death penalty." The later cases follow the same rule.

4. A young son of the defendant was called as a witness in his behalf, and testified that sometime in the month before the homicide, as he was going home from a ball game, and was not far from the farm of the deceased, he was frightened by the deceased. The substance of the conduct of the deceased on that occasion was told by the witness in this language: "He just called at me three times and whistled, he called the first time and I stopped, and then I started to run, and he called twice and whistled at me." The witness then ran home and was not further interfered with. Upon the redirect examination, the witness was asked why he was afraid of him. This was objected to as calling for a conclusion of the witness, and the objection was sustained. The defendant then made an offer of proof by the witness, the substance of which was that the witness believed at the time that the deceased desired to punish him for taking down a fence of the deceased and not replacing it. The ruling of the court upon the offer was to the effect that the defendant might show the facts in regard to taking down the fence by the witness and replacing it by the deceased; but the court refused to allow the witness to testify that it was for this reason that he was afraid that the deceased intended to injure him. There was, of

course, no error in this ruling of the court, and the defendant's exceptions thereto were properly overruled. It is, however, insisted that, although it should be thought that the exclusion of the evidence as offered was not erroneous, still the language used by the court was prejudicial to the defendant as containing an intimation "that the witness had been guilty of reprehensible conduct toward the deceased." The language said to have been used by the court was: "The offer is denied, except to this extent that the witness may be permitted to testify, if counsel desire him to, that he had passed along near there the day before and had kicked down the fence which Butler had put up." The acts of the witness recited by the court were recited in the defendant's offer of proof, and the objection made is that the court failed to call attention to the mitigating circumstances that would justify the witness in taking down the fence of the deceased. But these matters were not competent in evidence, and it would seem to have been improper for the court to have recited them.

5. Two of the state's witnesses testified to having heard the defendant shout to the deceased and the parties with him in threatening language on the evening of, and shortly before, the homicide. These witnesses were at the time at their home, which was possibly half a mile or more from the residence of the defendant, near which he is alleged to have been at the time. On the theory that there was an elevation of ground between the witnesses and the defendant that might intercept the sound of the defendant's voice, the defendant offered a witness as an expert who testified, in substance, that such obstruction would interfere with the passing of sound from one place to another, and would, in the opinion of the witness, render it impossible for the sound of the defendant's voice to have been heard as testified to by the state's witnesses. The defendant alleges that, while this expert was testifying, the court, in passing upon a question raised upon the evidence, used these words in the hearing of the jury: "A country boy on a hill can tell more about how sound travels, or how far

you can hear a voice, than the philosophers who have written books on the subject." It is manifest that such language from the court would be improper and might, if the evidence offered was material to the issue, be prejudicial to the defendant. It is denied that the court used such language. If such language had been used by the court, it would, of course, be of no importance in the case, except as reflecting upon the weight to be given the evidence offered by the expert witness; and in this case it could not have been prejudicial because, as far as we can see, the evidence of the expert has no relevancy to the question being tried. We have been unable to find, and our attention has not been called to, any clear and substantial evidence from which the jury could have found that there was any elevation of land between the defendant and the witnesses that could have obstructed or deflected the sound of the defendant's voice. It is shown that the defendant's house was situated upon low land; that between his residence and the home of the witnesses the surface of the earth is very uneven; that a deep canyon or draw extends through the territory, and that there are elevations of ground that some might call hills and others would not, but to what extent the ground is elevated is not shown. It appears uncontradicted in the evidence that the home of the witnesses is situated on an elevated plateau; that this elevation is greater than that of any of the ground between the two residences; how much greater is not shown, but one witness testified that there was no elevation of ground between them that would prevent the witnesses hearing sound that came from the vicinity of defendant's residence. The expert witness in question had no knowledge of the physical features of the territory between the two residences. A finding that there was an elevation that would interfere with a direct line from one of these residences to to the other would be based upon guesswork, and not upon the evidence in this record. The evidence of the expert, therefore, had no bearing upon the issue and might have been wholly excluded. It follows that the defendant could

not have been prejudiced by the supposed remarks of the trial court.

6. Testimony was offered for the purpose of impeaching the evidence of the defendant who was sworn as a witness in his own behalf. The defendant had testified to the circumstances surrounding the homicide and, among other things, had stated that the controversy did not arise from the dispute as to the alleged road over the defendant's land, but that, on the other hand, he had started out from his home to look after his children, and accidentally came in contact with deceased. A witness was called who had been with the defendant soon after the homicide, and had conversation with him, and, after showing these facts, this witness was asked this question: "Did the defendant tell you on the car that night, coming from Mason City, words like these: 'That he had some trouble with this man over a road; that he went down to the gate with a gun, and that he killed him; that he went to open the gate to go through, and that he killed him; that Butler went to open the gate?'" This question was clearly objectionable, for several reasons. The exact words which it was claimed that the defendant had used should have been incorporated in the question propounded to the witness, and the question, having been put to the witness so indefinitely as it was, naturally called for the indefinite and wholly improper answer of the witness: "Well, that is about the substance of it." Past experience in the trial of such questions has led to the conclusion, which has long ago become an unvarying rule, that such mode of impeachment, being dangerous and liable to lead to prejudice, should not be allowed, except with the strict observance of the technical rules with which the law has protected a witness whose testimony it is sought in this manner to impeach. When, however, it is sought to enforce these technical rules against the party offering the evidence, it is necessary likewise to lay the same restrictions upon the objector. The objection made to this question was: "Defendant objects for the reason that the question suggests a confession or

admission, and that the same is a part of the state's main case, and is not proper rebuttal testimony; that no foundation was laid for the introduction of the testimony when the defendant was on the stand." It will be noticed that no objection was made to the form of the question. The defendant having consented to the use of so indefinite a question, it cannot be said that he was prejudiced by an answer, the indefiniteness and indirectness of which was suggested by, and the natural result of, the question itself. There was, therefore, no error in refusing to strike out the answer of the witness on the ground that it was not responsive, and incompetent, irrevelant and immaterial. The evidence, if offered as a part of the state's case, would, of course, have been competent as an admission of the defendant against his interest; but, in the condition of the evidence at the time, it would have been manifestly unjust to the defendant to have admitted the evidence as affirmative proof of the defendant's guilt, and, so far as it might have been thought to have been offered for that purpose, the objection sufficiently raises the question and should have been sustained.

7. While the testimony was being taken in the case, defendant's counsel suggested to the court that one of the jurors was asleep. The court, thereupon, sent the sheriff to awaken the juror. The juror appeared at the time to have his eyes closed and head bowed, but, as the sheriff reached the juror, and before he had been interfered with by the sheriff in any way, he resumed his attentive position, and no further action was taken by the court thereon. The defendant now insists that, although he did not request the court so to do, the court should of its own motion have questioned the juror, and, if it appeared that the juror had failed to hear any part of the evidence that had been given, the court should have caused the evidence to have been reintroduced; but this contention cannot be sustained. The proof offered by the defendant upon this matter is somewhat contradicted, but, even if we take it as true, it does not sufficiently appear that the

juror failed to hear the evidence given by the witness, and, if he did, the defendant could not by his silence acquiesce in the continuance of the trial without further action on the part of the court, and afterwards urge that he was prejudiced by the want of such action. It follows that this assignment in the motion for new trial was properly overruled.

8. It is earnestly contended that the court erred in those instructions in which the elements of murder in the first degree were explained to the jury. There were four of these instructions, and possibly a part of some of them might properly have been omitted. It is not contended that they contained any erroneous statement as to the law, nor is it denied that the evidence was in such condition as to make it proper to submit that question to the jury. The argument seems to be that, since the jury have found the defendant guilty of murder in the second degree, thereby excluding the conclusion of his guilt of the higher degree, it follows that the instructions defining murder in the first degree were unnecessary, or at least that some of them, or some part of them, might have been dispensed with. Of course, there is no merit in such a contention, and possibly it was not intended to insist upon this suggestion. The principal contention appears to be that there was "practically a reiteration and repetition of the first instruction given upon that point." The instructions as a whole present an unusually clear explanation of the principles of law underlying the questions of fact to be submitted to the jury, and we cannot find any such repetition in the statement of these principles as could be said to prejudice the defendant.

It appears that the whole matter was fairly submitted to the jury, and without any prejudicial error that would require a reversal of the judgment.

AFFIRMED.

WILLIAM MILLER V. ELI HENDERSON ET AL.

FILED APRIL 18, 1906. No. 14,275.

Costs. When a plaintiff in an action in a justice's court, in which no set-off is pleaded, recovers a judgment from which the defendant appeals, and the plaintiff has judgment also in the district court, he is entitled to recover costs in the latter court without regard to the amount of his judgment therein.

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

O. A. Williams, for plaintiff in error.

A. E. Garten, contra.

AMES, C.

In a money action, plaintiff recovered a judgment in justice's court from which the defendant appealed. On a trial in the district court the plaintiff also recovered a verdict, but by a sum less by more than $20 than the amount of the judgment appealed from. In the latter court judgment was rendered for the plaintiff for the amount of the verdict, and for costs. From the order taxing costs the defendant prosecutes this proceeding.

We discover no error. The right of a litigant in a common law action to recover costs is exclusively statutory. *City of Hastings v. Mills,* 50 Neb. 842. Section 620 of the code enacts: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property." Section 986 of the code provides: "If, on an appeal by the plaintiff, from a judgment in his favor, he shall not recover a larger sum than twenty dollars exclusive of interest since the rendition of the judgment before the justice, he shall be adjudged to pay all costs in the district court including a fee of five dollars to the de-

fendant's attorney; and in case the defendant shall demand a set-off greater than twenty dollars, and he appeals from a judgment in his favor, and does not recover twenty dollars, he shall, in like manner, pay all costs in the appellate court, including a like fee to the plaintiff's attorney." And section 1,013 is as follows: "If any person appealing from a judgment rendered in his favor shall not recover a greater sum than the amount for which judgment was rendered, besides costs and the interest accruing thereon, every such appellant shall pay the costs of such appeal." Each of these two latter quoted statutes constitutes an exception to the first quoted, but neither is applicable in the present case because the plaintiff, who was sucessful in justice's court, did not appeal, and no set-off was pleaded. We have been cited to no other statute bearing on the question and know of none, and therefore recommend that judgment of the district court be affirmed.

OLDHAM and EPPERSON, 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.

AMANDA PRINGLE V. MODERN WOODMEN OF AMERICA.*

FILED APRIL 18, 1906. No. 14,294.

1. **Beneficial Associations: FORFEITURE: WAIVER.** It is a settled law of this state that if a beneficiary insurance association, like the defendant in error in this action, continues to collect dues and mortuary assessments from a member who has forfeited his beneficiary certificate, after knowledge of such forfeiture by its officers or agents intrusted with the duty of making assessments, it shall be held to have waived such forfeiture, without regard to any restrictions or limitations incorporated in its certificates of membership or by-laws with respect to the power or authority of such persons to make such waivers.

* Rehearing allowed. See opinion, p. 388, *post*.

2. **Principal and Agent.** It is the duty of an agent to communicate to his principal every fact affecting the transaction intrusted to his care which comes to his knowledge in course of or during its performance, and this duty, in an action between the principal and the adverse party, the agent is, with certain exceptions noted in the opinion, conclusively presumed to have obeyed.

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

G. C. McAllister, for plaintiff in error.

W. H. Thompson and *T. S. Allen, contra.*

AMES, C.

There is no conflict in the evidence with respect to the facts essential to the determination of the rights of the parties to this action which was tried by the court alone, a jury having been waived.

Frank W. Pringle was a member of the defendant society holding a beneficiary certificate in favor of his mother, the plaintiff, which contained a clause to the effect that it shall become null and void if, while such a member, he should become convicted of a felony. While such member he was convicted of a felony, in consequence of which he was sentenced to serve a term in the Nebraska state penitentiary, where he died about six months afterwards. After Pringle had been arrested for the offense of which he was subsequently convicted, but before his trial, he deposited with the clerk of the local camp a sum of money sufficient to pay his dues and assessments, thereafter to accrue, for the term of four months, and directed the clerk so to apply it as such obligations should mature. This direction the clerk obeyed by remitting the required sums monthly to the head camp; such remittances being made all, or nearly all, of them after the conviction and with the knowledge by the clerk of that fact. After the fund had become exhausted, the plaintiff paid to the clerk two successive instalments which were received and trans-

mitted by him to the head camp in the usual manner. Pringle died on the 6th day of September, without ever having been in default of dues or assessments, and a member in good standing, so far as appeared from the books and records of the order, and was buried by, and with the rites and ceremonies of, the local camp as having died in full fellowship therewith. After his death an officer or agent of the head camp made or attempted to make a tender to the plaintiff of the sums accepted as dues and assessments after the date of conviction. The evidence with respect to what occurred in this transaction and as to the formal sufficiency of the attempted tender, is somewhat conflicting, but, in our view of the matter, the fact is not material. A suit on the membership certificate resulted in a judgment for the defendant.

In our opinion, the case is ruled by *Modern Woodmen of America v. Colman,* 64 Neb. 162. It was there held, and it was twice reaffirmed in the same case, that "it is a settled law of this state that if a beneficiary insurance association, like the plaintiff in error in this action, continues to collect dues and mortuary assessments from a member who has forfeited his beneficiary certificate, after knowledge of such forfeiture by its officers or agents intrusted with the duty of making assessments, it shall be held to have waived such forfeiture, without regard to any restrictions or limitations incorporated in its certificates of membership or by-laws with respect to the power or authority of such persons to make such waivers." And it is said in the opinion: "It cannot be regarded as material upon what ground or for what reason such forfeiture was incurred." *Field v. National Council, K. L. S.,* 64 Neb. 226, and *Royal Highlanders v. Scovill,* 66 Neb. 213, both cited and chiefly relied upon by the plaintiff in error herein, are not in conflict with the principles above quoted. In the former of these cases the officer of the local body, charged with collection of dues and mortuary assessments, had undertaken by agreement with the insured to extend the time within which payment of them

should be made, and the latter relying upon such agreement had died several months in arrears. It was correctly held that the local official had no authority to waive or amend the by-laws of the association or the contract of the parties. In the latter of the cases cited the insured, a woman, was in suspension for default of overdue payments, and the contract stipulated that she could not be reinstated unless when in good health. The husband persuaded the local officer to accept the delinquent dues on the day of her death, concealing from him the fact of her mortal illness and dying condition, and the payment was repudiated as soon as the fact became known. There is no question as to the correctness of these decisions, but the cases are as unlike the one at present under discussion as can well be imagined. There is a plain distinction between the cases cited and the *Colman* case and the one at bar, which is not always observed by counsel or even by the courts. It is not held in any of them that the agent has authority to waive a forfeiture or any condition of the policy or contract. But as is shown at some length in *Hargadine, McKettrick Dry Goods Co. v. Krug,* 2 Neb. (Unof.) 52, it is the duty of an agent to communicate to his principal every fact affecting the transaction intrusted to his care which comes to his knowledge in the course of or during its performance, and this duty, in an action between the principal and the adverse party, the agent is conclusively presumed to have obeyed, except when, in extreme cases, it is shown that the agent, with the knowledge of the opposite party, has repudiated his agency or has acted fraudulently under such circumstances as to apprise the latter that the communication has not been, and probably will not be, made, or it is the intent of the latter that it shall not be made, or he is in some way implicated with the default of the agent. There are no circumstances in this record bringing the case within the exceptions. There is no evidence that the insured or his beneficiary acted fraudulently or in confederation with the local agent, or suspected, or had reason so to do, that

he would neglect his duty in any respect. In the absence of this exception the presumption is that the clerk of the camp seasonably communicated the fact of Pringle's conviction to the head camp and that the latter, by accepting and retaining the money without objection until after the death of the insured, waived the forfeiture. This, which is the doctrine of *Modern Woodmen of America v. Colman, supra,* and the cases there cited, and of a long line of other cases in this court, is accurately applicable to the case at bar, and requires that the judgment of the district court be reversed and a new trial granted, which we recommend be done.

OLDHAM and EPPERSON, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed July 12, 1907. *Judgment of reversal adhered to:*

1. **Beneficial Associations: AGENTS.** A subordinate lodge of a mutual benefit society and its clerk, who is designated by the supreme lodge to receive and forward dues and assessments from certificate holders, are agents of the supreme lodge.

2. **Forfeiture: WAIVER.** The collection of dues and assessments from a member of the order, convicted of a felony, by the clerk of such subordinate lodge, with full knowledge of that fact, which are forwarded to and retained by the supreme lodge until after the death of the member, amounts to a waiver of a forfeiture of his benefit certificate on the ground of such conviction.

BARNES, J.

For a full statement of the facts involved in this controversy, see our former opinion, *ante,* p. 384, where we held that the forfeiture relied on to defeat a recovery on the benefit certificate in suit was waived. A rehearing was allowed, and it is now strenuously contended that the

acts of the local camp and its clerk did not have that effect. It is claimed that the forfeiture clause contained in the by-laws of the association was self-acting, and when the deceased member was convicted of a felony it *ex proprio vigore* expelled him, and he was no longer a member of the order. This may be conceded, and yet there may be a recovery in this case. The association had the power to waive the forfeiture, retain the member, and continue his benefit certificate in force. And so the real question for determination is, has there been such a waiver?

It appears that Frank W. Pringle became a member of the defendant association in May, 1900, and the benefit certificate in question was issued and delivered to him on the 30th day of June, of that year. He paid all of his dues and assessments up to and including the 15th day of April, 1901, when he was convicted of a felony. He was, up to that time, a member of the association in good standing, and, desiring to continue so and keep his certificate in force for the benefit of his mother, he, together with the clerk of his local camp, examined the by-laws of the order for the year of 1897, which were then in the hands of that officer and were the only by-laws to which they had access, but found nothing therein to prevent him from keeping up his payments and retaining his membership. He thereupon deposited with the clerk a sum of money sufficient to pay his dues and assessments for some months, with instructions to forward the same to the head camp as required. When the money so left with the clerk was exhausted, the beneficiary was notified of that fact, and she thereafter continued to make the necessary payments until after Pringle's death, which occurred on the 6th day of September, 1901. It further appears that he was buried under the auspices of the order by the local camp, with full knowledge on the part of the members thereof of the foregoing facts. Thereafter proofs of death were forwarded to the head camp, with a demand for the payment of the benefit certificate, which was refused, for the reason that the deceased was not a member of the order

at the time of his death. An attempt was made to return the amount paid to the association by the deceased and his beneficiary after his conviction, but she refused to receive or retain the money thus tendered.

That the clerk of the local camp who, as shown by the record, was authorized to collect dues and assessments and forward them to the head camp was the agent of the association is too well settled by authority to be now an open question. *Bragaw v. Supreme Lodge, K. L. H.*, 128 N. Car. 354, 54 L. R. A. 602; *Trotter v. Grand Lodge of Iowa, L. H.*, 132 Ia. 513; *Coverdale v. Royal Arcanum*, 193 Ill. 91; *Supreme Tent, K. M. W., v. Volkert*, 25 Ind. App. 627; *Wagner v. Supreme Lodge, K. L. H.*, 128 Mich. 660; *Stylow v. Wisconsin O. F. M. L. Ins. Co.*, 69 Wis. 224; *Knights of Pythias v. Kalinski*, 163 U. S. 289. It is also well settled that such local camp or lodge of such an organization is the agent of its governing body. *Coverdale v. Royal Arcanum, supra.* The local camp and its clerk being the agents of the association, the conclusive presumption, in the absence of fraud, is that they seasonably communicated the fact of Pringle's conviction to the head camp. Indeed, the clerk testified that the governing body knew of that fact, and his statement stands unchallenged, except by the evidence of one C. W. Hawes, the head clerk of the association. A like state of facts has often been held to amount to a waiver of a similar forfeiture clause. In *Supreme Lodge, K. H., v. Davis*, 26 Colo. 252, it was held that a benevolent association which issues a benefit certificate to a member on condition that he is under a certain age waives the right to make an objection on this point by acceptance of assessments after knowledge that the member was above the age stated when the certificate was issued; that subordinate lodges and their officers who collect assessments for, and which are accepted by, the supreme lodge are agents of such governing body, and notice to such agents will be deemed notice to their principals.

Supreme Tent, K. M. W., v. Volkert, supra, was a case

where the by-laws of the association, which were a part of the contract of insurance between it and its members, provided that if a member should engage in the sale of intoxicating liquors his certificate should become void from the date of engaging in such occupation, without any action on the part of the officers of the society, and that the receipt of assessments from such member after his engaging in a prohibited occupation should not be a waiver of the condition. The assured engaged in the business of selling intoxicating liquors, which fact was known to the local authorities to whom he paid his dues, and the society retained and received the last assessment, with notice of the fact that the member died while engaged in the prohibited occupation. It was held that the association was estopped from asserting that the certificate was forfeited.

In *Alexander v. Grand Lodge, A. O. U. W.,* 119 Ia., 519, it was said: "One asserting the right to pay under a valid certificate, and allowed to do so by the officer having authority to determine whether or not such payments should be received, is certainly justified in relying on the statement of such officer, and the association is estopped from insisting by way of defense on any fact which would have been a proper ground for refusing, when the dues are offered, to recognize the certificate as valid, provided such fact is known to the association through such officer, or there is such notice of the fact as to charge the association or its officers with knowledge thereof."

In *Trotter v. Grand Lodge of Iowa, L. H., supra,* it was held that the rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applies to fraternal or lodge insurance. And whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends not on the intention of the insurer against whom it is asserted, but on the effect which its conduct or course

of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake.

In *Modern Woodmen of America v. Colman,* 68 Neb. 660, we held that a forfeiture incurred by the holder of a life insurance policy or contract is waived, if the company, with knowledge of the facts, subsequently collects premiums, dues or assessments on account of the contract, and retains them, without objection, until after the death of the insured; that it is the duty of the agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed. This is the foundation of the rule, necessary to public safety, that notice to an agent in the course of his employment is notice to his principal.

It is contended, however, that, Pringle's membership having terminated by reason of his conviction and the forfeiture clause contained in the by-laws of the association, the clerk of the local camp was not, as to him, the agent of the head camp, and had no authority to receive dues from him after the date of his conviction. It appears, however, that the head camp had failed to furnish the clerk with the by-laws of the order adopted in 1899, or thereafter, which contained the forfeiture clause in question. So, when the deceased applied to the agent of the association to ascertain whether he could pay his dues and assessments, and keep his benefit certificate in force, it was found, on examination of the by-laws, that he could do so. Again, Pringle's conviction did not have the effect of removing the clerk of the local camp from office, and he was as much the agent of the association thereafter as he was before that event took place. He was required to collect all dues and assessments from members of the local camp and forward them to the association, and, finding nothing in the by-laws furnished him by that body which prohibited it, he decided, in good faith, that he was required to receive the

dues and assessments tendered by the deceased and his beneficiary. They were so received by him and forwarded to the head camp, which received and retained them until after Pringle's death. The clerk of the local camp was thus acting as agent for the association, with at least ostensible authority to accept the dues and assessments in question, and his acts should be held to be binding upon his principal. It also appears that the local camp received its part of the dues paid by the deceased; continued to treat him as one of its members, and has never offered to return any of the money thus received. It would, therefore, seem clear that the forfeiture relied on by the defendant has been waived, and this rule is amply sustained by the authorities.

So, we are of opinion that our former judgment was right, and it is adhered to.

REVERSED.

LETTON, J., dissenting.

Frank W. Pringle became a member of the order upon June 23, 1900. At the time he became a member he agreed "to conform in all respects to the rules, laws and usages of the society now in force or which may hereafter be enacted and adopted by the same, and that this application and the laws of this society shall form the sole basis of my admission to membership therein and of the benefit certificate to be issued me." There was a further agreement that if he should be expelled from the order he should forfeit his rights under the certificate. In his application he states: "I fully understand the object, organization, mode of action and laws of this society, and particularly that part of the laws defining the qualifications for and the restrictions upon its membership. * * * I further understand and agree that the laws of this society now in force enter into and become a part of every contract of indemnity by and between the members of the society and govern all rights thereunder." These statements were a

part of the application and were signed by the applicant, together with the further signed agreement that the application and statements should be taken as a part of the contract. At the time of his admission into the order section 326 of the by-laws provided as follows: "If any person after becoming a member of this society shall be convicted of a felony, he shall by such conviction be expelled from the society, without any action being taken by the local camp, executive counsel, head camp or any of the officers of this society." And section 328 provided: "In case of expulsion because of conviction of a felony, the member shall never again be reinstated." Section 274 provided, in substance, that the camp clerk should not knowingly receive dues "from a member who shall have been convicted of a felony after his adoption into this society, provided, however, that the receipt, retention or transmission to the head camp of such dues or assessments shall not have the effect of waiving the forfeiture of the certificate of such member or secure to him any such rights whatever." There is no evidence in the record showing that at the time Pringle became a member of the order he did not fully understand and know the contents of the by-laws and the foregoing provisions and his signed declaration is to the effect that he was so informed. In April, 1901, he was convicted of horse stealing, and died in the penitentiary in September, 1901. In July, 1901, and after the date at which the local clerk testifies Pringle and he examined the by-laws, a new by-law was adopted as section 248, revision of 1901, as follows: "No local camp nor any of the officers thereof shall have the right or power to waive any of the provisions of the by-laws of this society."

1. In the absence of any evidence to contradict Pringle's statement that he knew what the by-laws were in 1900 when he joined the order, I do not think the testimony of the clerk that, about the time of the conviction he examined his 1897 copy of the by-laws and found nothing to prevent him from accepting the dues, is of much importance. Both he and Pringle evidently had some rea-

son for looking up the by-laws in that respect. No reason is suggested why he should think of such a law being in existence, unless he had at some time been informed of it, and I think the inference to be drawn from this fact supports the statement in Pringle's application that he knew what the by-laws were. Pringle knew when he entered into the contract that if he was convicted of a felony his certificate would be void. He knew also that the clerk had no right or authority to take money from him in payment of dues or assessments after that event. By a subsequent by-law which was binding upon him, the power of the clerk to waive any of the provisions of the contract or waive a forfeiture was expressly taken away. The collection of the assessments by the local clerk therefore was beyond the scope of his authority, which was known to the insured, and which, in the absence of ratification by his principal, did not bind it. If the evidence preponderated that the head camp knew of the forfeiture and accepted the money with that knowledge, I would concur in the opinion, but I do not so read the record. This was the condition in *Supreme Tent, K. M. W. v. Volkert,* 25 Ind. App. 627, referred to in the opinion, and with this doctrine I have no quarrel. There is no evidence of ratification of the unauthorized act. The money sent in by the clerk was returned immediately upon knowledge of the facts, and the forfeiture was never waived. These views are supported by *Farmers & Merchants Ins. Co. v. Bodge,* 78 Neb. ——; *Graves v. Modern Woodmen of America,* 85 Minn. 396; *Field v. National Council, K. L. S.,* 64 Neb. 226; *Royal Highlanders v. Scovill,* 66 Neb. 213; *Elder v. Grand Lodge, A. O. U. W.,* 79 Minn. 468; *Knights of Honor v. Oeters,* 95 Va. 610; *Borgraefe v. Knights of Honor,* 22 Mo. App. 127; *Harvey v. Grand Lodge, A. O. U. W.,* 50 Mo. App. 472; *Hall v. Western Travelers Accident Ass'n,* 69 Neb. 601. I think it would be extremely dangerous to the welfare of all the members of beneficial associations if the power is indirectly conferred upon local clerks to change or annul the terms of the contract, as seems to be the ef-

fect of the opinion. We have held that this cannot be done to the detriment of the member by a body made up of the officers of the lodge and some elected representatives. *Lange v. Royal Highlanders,* 75 Neb. 196. If this cannot be done by the formal action of such a body, is it consistent or logical to say that it may be done by any local camp clerk? Moreover, the organization possesses social and fraternal, as well as insurance features, and its members are associated together in the work of the local camp. Most law-abiding citizens have a just and well-founded aversion to social association with criminals, and the provisions of the contract which seek to protect them from such association should be given full force and effect, and the unauthorized act of a subordinate agent should not deprive the other members of the protection proposed by this by-law. It is probable also that by reason of an increased mortality in prisons the insurance risk is increased as long as the criminal is incarcerated, and the society has the right to protect itself and its members from such an increase of the hazard caused by the act of the insured.

The by-law is salutary, is in the interests of the whole membership of the association, and should be enforced, unless waiver by the principal is shown.

MISSOURI PACIFIC RAILROAD COMPANY V. CASS COUNTY.

FILED APRIL 18, 1906. No. 14,240.

1. **Railroads: CROSSINGS AT HIGHWAYS.** Under section 110, ch. 78, Comp. St., it is the duty of a railroad company to make and keep in repair suitable crossings with approaches, notwithstanding the highway was laid out after the railroad was built. The public authorities are required to build that part of the highway within the right of way which they would have been required to make had the railroad not been constructed. *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412, followed and approved.

2. ———: ———: LIABILITY OF COUNTIES. Under the provisions of this section of the statute, a railroad company cannot recover damages from a county for the cost of putting in cattle-guards, erecting sign-posts, building wing-fences, planking the track, and constructing the necessary approaches at a public crossing.

3. Compensatory damages should be allowed for the land taken from the right of way for a public road.

4. Measure of Damages. Where, in making the proper approaches to the railroad track, it is necessary to grade through all, or nearly all, the width of the right of way on either side of the track, the railroad company should be allowed such sum for damages as the county would have been compelled to expend in grading the public road had the railroad never been built.

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

B. P. Waggener, J. W. Orr and *A. N. Sullivan,* for plaintiff in error.

Jesse L. Root and *C. A. Rawls, contra.*

OLDHAM, C.

This action originated before the board of county commissioners of Cass county on a claim for damages filed by the Missouri Pacific Railroad Company on account of the crossing of its right of way by a section line road in said county. There is no question involved as to the regularity of the proceedings in opening the highway, and plaintiff's claim for damages was duly filed in conformity with the statute. Appraisers, duly appointed, awarded plaintiff the sum of $250 as compensation for the crossing of the road over its right of way. The county board, however, refused to allow plaintiff any damages, and an appeal from this final order was prosecuted to the district court for Cass county. A jury was waived and trial had to the court, with a finding and judgment for the plaintiff for one cent damages. To reverse this judgment plaintiff brings error to this court.

It appears from the testimony that there is a natural depression of the surface of the ground at the point where the section line road crosses plaintiff's right of way, and that the railroad track had been graded about 15 feet above the surface of the surrounding lands. The claims urged by the railroad company are for the cost of grading from the railroad track to the highway within the right of way, for the expense of putting in cattle-guards, wing-fences and sign-posts, for planking the track, and also for the amount of land taken from the right of way by the condemnation proceedings, being a strip containing about four-tenths of an acre. There was testimony offered tending to show that the value of land at the place of the crossing was from $65 to $75 an acre. The contest was as to whether or not plaintiff was entitled to recover for these items of damage under the laws of this state.

Plaintiff contends that all the items of damage claimed are extra burdens cast upon it by the opening of the public road across its right of way long after the establishment of its roadbed. Plaintiff relies on section 6, art. XI, of the constitution, which provides that "the exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature, of the property and franchises of incorporated companies already organized, or hereafter to be organized, and subjecting them to the public necessity the same as of individuals," and urges that under this section the property of corporations is put in the same class as the property of individuals so far as condemnation proceedings are concerned, and can only be taken for public purposes for a just compensation. On the contrary, it is contended by the county that the plaintiff corporation took its franchise subject to the dominant right of eminent domain in the state and subject to such burdens as the state might impose upon it in the reasonable exercise of its power of police regulation of railroad and other corporations; that such regulation is defined by section 110, ch. 78, Comp. St. 1905, which is as follows: "Any railroad corporation,

canal company, mill owner, or any person or persons who now own, or who may hereafter own or operate, any railroad, canal, or ditch that crosses any public or private road shall make and keep in good repair good and sufficient crossings on all such roads, including all the grading, bridges, ditches, and culverts that may be necessary, within their right of way."

That statutes imposing conditions similar to those contained in this section have been almost universally upheld by state courts of last resort, as well as by the supreme court of the United States, is now beyond question. This identical section of the statute was before this court in the case of *State v. Chicago, B. & Q. R. Co.,* 29 Neb. 412, and was there declared to be a constitutional enactment that applied as well to roads constructed after the railroad track had been laid as to those in existence at the time of its construction. The doctrine of this case is in harmony with the great weight of authority, and we see no reason at this time to depart from it. *Chicago, B. & Q. R. Co. v. City of Chicago,* 166 U. S. 226, 17 Sup. Ct. Rep. 581; *New York & N. E. R. Co.'s Appeal,* 62 Conn. 527, affirmed as *New York & N. E. R. Co. v. Bristol,* 151 U. S. 556, 14 Sup. Ct. Rep. 431; *Lake Shore & M. S. R. Co. v. Sharpe,* 38 Ohio St. 150; *Baltimore & O. R. Co. v. State,* 65 N. E. (Ind.) 508; *Chicago, M. & St. P. R. Co. v. City of Milwaukee,* 97 Wis. 418.

In *State v. Chicago, B. & Q. R. Co., supra,* referring to the provisions of the statute above quoted, it is said: "Under that act it is the duty of a railroad company to make and keep in repair suitable crossings with approaches, notwithstanding the highway was laid out after the railroad was built. The public authorities are required to build that part of the highway within the right of way which they would have been required to make had the railroad not been constructed.

The authorities are in nowise uniform in the conclusions reached as to the particular items of damage which should or should not fall within the provisions of the statute.

The weight of authority, however, is that under statutes similar to our own such items of damage as are necessitated and occasioned by the operation of the railroad, as the erection of sign-posts, the construction of wing-fences and cattle-guards, and the building of approaches from the public road to the railroad track, are within the clear letter of the statute and must be borne by the railroad company without compensation. With reference to the costs that necessarily would have been expended by the public in making the highway, had the railroad never been constructed, the opinions are divergent; but, as the exercise of the police power under this section of the statute frequently casts onerous burdens on public service corporations, and as the doctrine announced by this court, when the statute was first interpreted, is supported by the authority therein quoted (*People v. Lake Shore & M. S. R. Co.*, 52 Mich. 277) and, though a deviation from the letter, is in harmony with the spirit of the enactment, we see no reason for changing the rule which has long been acquiesced in. Applying these principles to the items of damage claimed in the case at bar the trial court was clearly right in excluding from the estimate the cost of putting in cattle-guards, building wing-fences, and constructing necessary approaches from the highway to the track. We think, however, that for the land condemned within the plaintiff's right of way for public use there should have been compensatory and not mere nominal damages awarded. It matters not whether the right of the plaintiff in the land was a mere easement or a fee simple title. It had acquired its right by its own condemnation proceedings and was entitled to the uninterrupted use and enjoyment of the right of way, subject only, as all property is, to the right of eminent domain; and, when even a small portion of the land composing its right of way is taken from it and dedicated to another and different public use, actual and not nominal damages should be allowed.

With reference to the claim for the entire cost of grad-

ing within the right of way, it would seem from the principles announced in *State v. Chicago, B. & Q. R. Co., supra,* that the company should have been allowed damages only for so much of the grading and filling across its right of way as would have been necessary had no railroad ever been constructed at the place of the crossing. There is evidence introduced by the county, some of which tends to show that the cost of opening and maintaining the road at this point would have been trivial had there been no railroad grade. Other testimony, however, tends to show that it would have been necessary to do some grading and to put in either a culvert at the place of crossing the track or a bridge a little further west, which would have cost the public not to exceed $100 as testified to by one of defendant's witnesses. Whatever the evidence shows would have been the necessary cost of constructing the public road at that place, had the railroad never been built, should be allowed the plaintiff on a retrial of this cause.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings under this opinion.

AMES and EPPERSON, 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 under this opinion.

REVERSED.

JOHN W. FARLEY V. JOHN WEISS, JR.

FILED APRIL 18, 1906. No. 14,273.

1. **Vendor and Purchaser: FRAUD.** Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as a basis of a mutual agreement.
2. **Instructions examined, and *held* not prejudicial.**

ERROR to the district court for Boone county: JAMES R. HANNA, JUDGE. *Affirmed.*

W. W. Thompson and *H. C. Vail,* for plaintiff in error.

J. S. Armstrong and *A. E. Garten, contra.*

OLDHAM, C.

This was an action instituted by the plaintiff in the court below against the defendant for damages for fraud and deceit alleged to have been perpetrated upon plaintiff by defendant by misrepresentations as to the character, quality, improvement, and value of a forty-acre tract of land situated in Garfield county, Colorado, which was deeded to plaintiff by defendant at the agreed price of $1,200 in part payment for a one-half interest in a stock of merchandise situated in Cedar Rapids, Nebraska, which plaintiff traded to defendant. The petition alleged that plaintiff was without any knowledge of the value, character or improvement on the land; that defendant falsely represented that the land contained improvements in the nature of a house and outbuildings and that nine acres of the land were in alfalfa and under irrigation, and that the land was of the reasonable value of $1,200; that defendant had been on the land, and had personlly examined it and knew the condition thereof; that plaintiff, relying on these representations, accepted the land without making any further investigation as to its value, character, or im-

provements; that the representations as to the improvements and character of the land were false; and that the land, in fact, was not worth to exceed $50. Defendant admitted the transfer of the land at the agreed price of $1,200, but alleged that he warned plaintiff at the time of the trade that he (the defendant) knew but very little about the land, and that what he told him as to the improvements and value were based on information that he (the defendant) had received from third parties, and not on his own knowledge. Defendant also alleged that he warned plaintiff that he had better examine the land before accepting it, but that the plaintiff, being anxious to close the deal, accepted the deed without making any further investigation as to the character and value of the land. On issues thus joined, there was a trial to the court and jury, a verdict for the plaintiff for $1,150, judgment on the verdict; and to reverse this judgment defendant brings error to this court.

It is conceded in the brief filed on behalf of the defendant that the testimony as to the alleged fraudulent representations of the land, while in sharp conflict, is sufficient to sustain the judgment, and the only alleged error in the proceedings, for which a reversal of the judgment is asked is the giving of paragraph eight of instructions by the court on its own motion. This instruction is as follows: "You are instructed that if you believe from the evidence that the real estate in question was purchased on the personal representations of the defendant, and such representations were false as to value and improvements, and the plaintiff did not know the land, and had no opportunity to examine it and was prevented from examining the property or making inquiries as to its condition or value by a trick or fraud of defendant, the measure of damages that the plaintiff is entitled to recover is the difference in value between the land as represented and as it actually is." It is apparent that this instruction, construed with other instructions given, is correct and in harmony with the holdings of this court in *McKnight v. Thompson,* 39 Neb. 752;

Hoock v. Bowman, 42 Neb. 80; *Stochl v. Caley,* 48 Neb. 786, but the contention is that so much of the instruction as submitted the question of plaintiff having been prevented by trick or fraud of defendant from making other inquiries or examination of the land himself is wholly unsupported by the evidence, and should not, for that reason, have been given for the consideration of the jury. This instruction was given in connection with others requested by the defendant, which told the jury in substance that, if defendant told plaintiff that the representations as to the land were only such as he had learned from others and were not based on his own personal information, then the jury should find the issues for the defendant. It is without dispute in the testimony that defendant had made a personal examination of the land before the trade was entered into, and that plaintiff had never seen the land, which was located in another state and at a considerable distance from the place where the trade was made. Plaintiff rested his cause on alleged misrepresentations made by defendant as to facts within the knowledge of the defendant, and wholly unknown to plaintiff. The court, having given defendant's theory of the transaction to the jury in instructions, which were not complained of, was fully justified, as we deem it, in presenting plaintiff's theory in the instruction complained of. In *Meade v. Bunn,* 32 N. Y. 275, it is said:

"The omission, by one of the parties to an agreement, *to make inquiries* as to the truth of facts stated by the other, cannot be imputed to him as negligence. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement."

The doctrine announced in this case has been quoted with approval by this court in the case of *Hoock v. Bowman, supra,* and, we think, correctly states the law. It is beyond dispute from the testimony in the case at bar that defendant had, or should have had, personal knowledge of the character and improvement of the land which he traded

to plaintiff. It is also clear from the testimony that the defendant knew at the time of the trade that plaintiff had no knowledge, or opportunity of knowing, as to these facts. And as to whether defendant made the statements on his own knowledge or on mere representations of third parties was submitted to the jury in the instructions above referred to. Hence it seems to us to have been proper to fully submit plaintiff's theory, a part of which was that he was prevented from making a further investigation as to the nature and improvement of the land because of his reliance on the misstatement of facts communicated to him by the defendant.

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

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

MORRIS MEYER V. OMAHA FURNITURE & CARPET COMPANY.

FILED APRIL 18, 1906. No. 14,270.

1. **Replevin:** PARTIES: SUBSTITUTION. In a replevin suit, where the plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff. *Flanders v. Lyon & Healy*, 51 Neb. 102, followed and approved.

2. **Statute:** CONSTRUCTION. The provisions of section 24 of the code are special in their character, to be strictly construed, and the prescribed mode of procedure must be closely followed. *Church v. Callihan & Co.*, 49 Neb. 542, followed and approved.

3. **Petition:** CAPACITY TO SUE: DEMURRER. An objection to a petition in which the requirements of section 24 of the code are not strictly followed, in alleging plaintiff's capacity to sue, can be raised by a demurrer which sets forth that the petition fails to show that plaintiff has the legal capacity to sue.

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

W. S. Shoemaker, for plaintiff in error.

G. W. Shields, contra.

OLDHAM, C.

This was an action in replevin instituted by the Omaha Furniture & Carpet Company against Morris Meyer and others before a justice of the peace in Douglas county, Nebraska. The affidavit alleged that the plaintiff was the owner and entitled to immediate possession of certain chattels by virtue of a lease executed by one of the defendants, Mrs. J. C. McCandless. The writ was issued under this affidavit, and the property was taken and turned over to the Omaha Furniture & Carpet Company as provided by law. But one of the defendants, Morris Meyer, appeared before the magistrate. This defendant claimed a special property in the chattels replevied, under a mortgage executed to him by Mrs. McCandless. At the trial in the magistrate's court, it was shown by the testimony of Henry J. Abrahams that there was no corporation, partnership, or associations of persons doing business in the state of Nebraska under the name and style of Omaha Furniture & Carpet Company, and that the business was owned and controlled by Henry J. Abrahams. Plaintiff's attorney asked to have Abrahams made a party to the action. This request was denied by the magistrate, and judgment was rendered in favor of the defendant Meyer for the amount of his special property in the chattels replevied. An appeal was taken from this judgment by the Omaha Furniture & Carpet Company to the district court, where plaintiff filed a petition in which it alleged that plaintiff "is an unincorporated institution wherein Henry J. Abrahams is the proprietor, doing business under the said name of Omaha Furniture & Carpet Company," and that "the plaintiff is the owner of the following described

goods and chattels, to wit," (describing the goods replevied in the justice's court). The petition then set out the lease and the breach of the conditions thereof, under which the plaintiff claims title and the right to immediate possession of the goods replevied. Defendant filed a motion to strike this petition from the files, because it shows on its face that plaintiff was not the real party in interest. On this motion being overruled, defendant was given leave to demur instanter, and he did so, alleging as grounds for demurrer that plaintiff had no legal capacity to sue; that the petition showed upon its face that it was not prosecuted in the name of the real party in interest, and that the petition failed to state a cause of action against the defendant. This demurrer was overruled, and a judgment entered in favor of the plaintiff. To reverse this judgment defendant brings error to this court.

There is nothing in the affidavit on which the writ of replevin was issued to show that Abrahams was in anywise connected with the Omaha Furniture & Carpet Company, and it was held by this court, in the well-considered case of *Flanders v. Lyon & Healey,* 51 Neb. 102, that "in a replevin suit, where the plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff over defendant's objection." When the cause was removed by appeal to the district court, plaintiff did not ask leave to substitute Abrahams as the plaintiff in the cause of action, but, on the contrary, filed a petition in which he plainly attempted to state facts sufficient to show the authority of the Omaha Furniture & Carpet Company to maintain the action in its own name. The allegations with reference to the business and organization of the company have already been set out and the question is whether or not these allegations, taken as true, are sufficient to show its right to maintain this action. The right of the plaintiff to amend his petition to correct any error in his pleadings or process is not questioned, but whether or not the amendment, when made, was sufficient to show plaintiff's right to maintain the action is the vital question.

Section 24 of the code provides as follows: "Any company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued by such usual name as such company, partnership, or association may have assumed to itself or be known by, and it shall not be necessary in such case to set forth in the process or pleading, or to prove at the trial, the names of the persons composing such company." This section of the statute has been interpreted by this court, and we have held that its provisions are special in their character, to be strictly construed, and the prescribed mode of procedure must be closely followed. *Church v. Callihan & Co.*, 49 Neb. 542. *Burlington & M. R. R. Co. v. Dick & Son*, 7 Neb. 242. We have also held that an objection to a petition in which the requirements of this section were not strictly followed, in alleging the capacity to sue, might be raised by a demurrer, which sets forth that the petition did not show that the plaintiff had the legal capacity to sue. *Sanborn & Follett v. Hale*, 12 Neb. 318. Now, it is plain from a reading of the petition that it does not follow the requirements of section 24 of the code, in that it does not allege that plaintiff is a company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state. We are therefore of opinion that the court erred in overruling defendant's demurrer, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

AMES and EPPERSON, 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.

GEORGE E. QUINN V. MARY EDITH EGGLESTON.

FILED APRIL 18, 1906. No. 14,286.

Bastardy: EVIDENCE: VARIANCE: INSTRUCTION: REVIEW. Where there is a variance between the testimony of the complaining witness given at the preliminary and her testimony at the trial in a bastardy proceeding, if the defendant requests the court to instruct the jury on this variance as affecting the credibility of the complainant, it is error to refuse such instruction.

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

Dorsey & McGrew, for plaintiff in error.

G. W. Prather, contra.

OLDHAM, C.

This was a bastardy proceeding instituted by Mary Edith Eggleston against defendant, George E. Quinn, in which she charged the defendant with being the putative father of a bastard child born to her on October 1, 1904. There was a trial of the issues to the court and jury, with a verdict of guilty, judgment on the verdict; and to reverse this judgment defendant brings error to this court.

The first allegation of error called to our attention in the brief of defendant is that there is not sufficient evidence to support the judgment. An examination of the testimony contained in the bill of exceptions convinces us that there is sufficient competent evidence to sustain the verdict, and that the trial court did not err in refusing to direct a verdict for defendant when the testimony was all in.

The only question urged in the brief that we think challenges serious consideration was the refusal of the trial court to instruct the jury, at defendant's request, as follows: "You are instructed that if you find from the evidence that plaintiff made statements at her examination before the county judge differing from her testimony given

before you at this trial, you have the right to consider such evidence as evidence tending to impeach the truth of plaintiff's testimony." In *Stoltenberg v. State,* 75 Neb. 631, on complaint of Dorothy Kruse, the question of defendant's right to have the provisions of section 5, ch. 37, Comp. St. 1903, given in instruction to the jury, when requested, was before this court and considered in a carefully prepared opinion by LETTON, C., and it was held error to refuse to instruct in accordance with any of these provisions, when any such instruction was requested and was applicable to the testimony offered. In the case at bar, the child was born on the 1st day of October, 1904. At the preliminary examination, the complainant gave different dates at which she claimed to have had sexual intercourse with the defendant in the months of October and November, 1903, but gave no date of intercourse in the month of December following. At the trial in the district court, the complaining witness testified to having intercourse with defendant about the 23d of December, 1903. while it is true, as contended by counsel for the complainant, that the fact of intercourse in December is not necessarily contradictory of anything testified to at the preliminary examination, yet there is a substantial difference between the testimony given at the preliminary and at the trial. In view of this fact, we think that, under the doctrine announced by this court in *Stoltenberg v. State, supra,* the court should have given the instruction requested, or one of similar import. As we view it, where there is material variance between the testimony given at the preliminary and the testimony given at the trial in a bastardy proceeding, if the defendant requests the court to instruct the jury on this variance as affecting the credibility of the complainant, it is error to refuse such instruction.

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

AMES and EPPERSON, 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.

CONTINENTAL TRUST COMPANY, ADMINISTRATOR, APPELLANT, V. SOREN T. PETERSON, APPELLEE.*

FILED APRIL 18, 1906. No. 14,475.

1. Interlocutory Order: APPEAL. An order setting aside a judgment under the provisions of section 602 of the code is an interlocutory and not a final order, and cannot be reviewed by this court on appeal.
2. Corporation as Administrator. A corporation cannot act as an administrator of the estate of a deceased person under the laws of this state.

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

H. P. Leavitt, for appellant.

J. O. Detweiler, contra.

OLDHAM, C.

On February 16, 1893, Francis E. Reisdorph procured a judgment in the district court for Douglas county against Soren T. Peterson, appellee in the present cause of action, for the sum of $1,500. The case was taken to this court on error proceeding, and the judgment of the district court was affirmed on December 23, 1896. Thereupon, David Van Etten, who was of counsel for plaintiff Reisdorph, filed an attorney's lien upon the judgment for the sum of $1,150. Reisdorph, the judgment plaintiff, had removed from the state of Nebraska to the territory of Oklahoma

* Rehearing allowed. See opinion, p. 417, *post.*

before his judgment was affirmed by this court. On February 12, 1897, Van Etten filed his petition in the district court for Douglas county against Reisdorph, asking judgment for the amount of his lien and interest. With this petition he filed an affidavit for an order of attachment on the ground of nonresidence, and attempted to procure service by publication on defendant Reisdorph, and also had a summons in garnishment served on appellee Peterson, the judgment debtor. An answer was filed in this suit for, and signed by, Francis E. Reisdorph, and attorney Van Etten took judgment for the amount of his claim and interest. Here the matter rested for some time. On July 1, 1902, Francis E. Reisdorph departed this life in the territory of Oklahoma. On Septembr 15, 1902, Van Etten caused an execution to issue on his judgment against Reisdorph, which was returned unsatisfied. On September 19, 1902, he filed an affidavit for garnishment in aid of execution and had summons served on appellee Peterson, as garnishee. Peterson answered, suggesting the death of Reisdorph and denying the validity of the garnishment proceedings. Judgment was rendered, however, against the garnishee, and he was adjudged to pay into court the sum of $2,060.77, and certain costs. Thereafter, an execution was issued on this judgment and levied on certain property of appellee Peterson. Pending objections to a confirmation of the sale of the property so levied upon, Peterson settled the judgment with Van Etten and received a receipt for the full amount of the judgment. On July 16, 1904, the Continental Trust Company, appellant herein, filed a motion for a revivor of the judgment of Reisdorph against Peterson, alleging that it had been appointed administrator of the estate of Francis E. Reisdorph, deceased, by the county court of Douglas county, Nebraska, and that no part of the judgment had ever been paid. On this motion an order was entered reviving the judgment, unless Peterson should show cause to the contrary before August 15, 1904; and it was directed that notice of the motion and conditional order of revivor be served upon Peterson. The

sheriff of Douglas county served the notice of this motion and conditional order of revivor personally on Peterson, who, however, failed to appear on the 15th of August, when the order was made final. Thereafter, an execution was issued on the judgment and levied on the real estate of the appellee Peterson. On November 26, 1904, at a succeeding term of the district court, appellee Peterson filed a motion to have the execution, which was issued on the order of revivor, recalled, and to set aside the final order of revivor and to have an accounting. This motion was sustained in so far as to set aside that part of the order of revivor that attempted to find that the garnishment proceeding against Peterson was null and void and of no effect, and that he was entitled to no credit on the judgment for the money he had paid to Van Etten. The execution was recalled, and Peterson was given permission to answer in the revivor proceedings. From this order the Continental Trust Company has appealed to this court.

The various contentions urged under this most peculiarly complicated record may be summarized as follows: Appellant contends that its right to sue as an administrator is not subject to collateral attack; that the order of revivor was a final order, which could not be set aside or modified on motion after the term; that the answer alleged to have been filed by Reisdorph in the suit against him by Van Etten in the attachment proceeding was a forgery, and that the garnishment proceeding based on this judgment was a nullity and constituted no defense as a payment of the Reisdorph judgment.

On the contrary appellee contends that the plaintiff below, being a corporation, could not, under the laws of this state, be appointed as administrator of the estate of Reisdorph, and that the order of the county court making this appointment was *coram non judice* and conferred no right on plaintiff to maintain the action, and that the order of the district court setting aside and modifying its former judgment in the revivor proceeding, which order was appealed from, was properly entered under subdivision 3

of section 602 of the code, and that the order was interlocutory and not final in its nature. He further denies that the answer filed by Reisdorph was a forgery, and contends that, even if the garnishment proceeding in aid of the execution on the judgment was irregular, Peterson is subrogated by his payment of the judgment to Van Etten to all the rights Van Etten would have had against the estate, and that, in any event, he is entitled to whatever lien Van Etten had against the judgment for attorney's fees, and that this lien attached to and inured in the judgment from the date of its filing, and that the judgment can now only be revived subject to this lien.

At the threshold of a discussion of the varied questions involved in the controversy we are confronted by the proposition that the order of the court setting aside its former judgment under the provisions of section 602 of the code has been held by this court in numerous recent cases to be a mere interlocutory order, and not subject to review on appeal or error in this court. *Rose v. Dempster Mill Mfg. Co.*, 69 Neb. 27; *Browne v. Croft*, 3 Neb. (Unof.) 133; *Merle & Heaney Mfg. Co. v. Wallace*, 48 Neb. 886.

For this reason alone we might dismiss this appeal and leave some other vexatious questions involved in the case for a subsequent review, if the case should reach this court again. But, as a dismissal of the appeal would leave the cause on the docket of the district court for Douglas county for further proceedings on the action to revive the judgment, we think it not improper to determine at this time at least one of the issues that contending counsel have urged with ability and zeal. It is necessary for the future conduct of the case to determine whether or not, under the laws of this state, a corporation can be appointed administrator of the estate of a deceased person. At common law a corporation could not act as an executor or administrator for the reason, given by Blackstone, that "it cannot take an oath for the due execution of the office." 1 Blackstone's Commentaries (Chitty's ed.), p. *447. It is true that in many of the American states the right of a corpora-

tion to act as an executor or administrator has been conferred by statute, and where so conferred its right has been upheld. *Killingsworth v. Portland Trust Co.,* 18 Or. 351; *Minnesota L. & T. Co. v. Beebe,* 40 Minn. 7. All the cases, however, which have been called to our attention, in which the right has been upheld, were based on statutory authority in the jurisdiction in which the administrator or executor was appointed. Our statute, section 178, ch. 23, Comp. St. 1905, is as follows: "Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled to the same in the following order: *First.* The widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust. *Second.* If the widow, or next of kin, or the person selected by them shall be unsuitable or incompetent, or if the widow or next of kin shall neglect, for thirty days after the death of the intestate, to apply for administration, or request that administration be granted to some other person, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it. *Third.* If there be no such creditor competent and willing to take administration, the same may be committed to such other person or persons as the judge of probate may think proper." We cannot doubt that the *persons* named in this section of the statute, who might, under different conditions, be appointed as administrators, were intended by the framers of this act to be real and not artificial persons. It is required by section 196 of this same chapter that an administrator must return under oath within three months a true inventory of the estate. Section 282 requires an administrator to enter an account of his doings in the estate and "that such account shall have annexed thereto the oath of the executor or administrator." There are numerous other duties required of an administrator under the decedent act that could not, in their very nature, be

performed by other than a natural person. The text-writers on executors and administrators generally agree that, in the absence of a statute authorizing such action, a corporation cannot act in such capacity. *Fidelity I., T. & S. D. Co. v. Niven,* 5 Houst. (Del.) 163; *President and Directors of Georgetown College v. Browne,* 34 Md. 450; *In re Thompson's Estate,* 33 Barb. (N. Y.) 334.

It is urged, however, by counsel for the appellant, that the appointment of plaintiff below, even if irregular, is not subject to collateral attack, and we are cited in support of this contention to our recent decision in the case of *Larson v. Union P. R. Co.,* 70 Neb. 261. In this latter case, the question arose as to whether or not the administrator appointed was the next of kin to the deceased and the court held, in a well prepared opinion by ALBERT, C., that, the county court having acted within its jurisdiction in making the appointment, its judgment could not be called in question in a collateral proceeding. This authority would dispose of the question, if there were any classes of corporations that might be appointed administrators under the laws of this state, because then the county court would be acting within the limits of its jurisdiction, and its judgment would be proof against a collateral assault. But, in our view of the case, no such authority is conferred by the statute, and, as the county court is one whose authority is bounded by the four corners of the statute, whenever it travels beyond these limits, its acts are a mere nullity. We therefore conclude that the attempted appointment of the corporation as administrator was a mere nullity and conferred no right on the appellant to maintain this action.

We therefore recommend that the appeal be dismissed.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the appeal is

DISMISSED.