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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1906.

VOLUME LXXVII.

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.

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		George H. Thomas...	Schuyler.
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1906.

STATE, EX REL. WILLIAM SUMPTION ET AL., RELATORS, V. JOHN SMITH ET AL., RESPONDENTS.

FILED JUNE 20, 1906. No. 14,614.

1. **Repairs of county bridges** contemplated by sections 114 and 115 ch. 78, Comp. St., are such as may be made at once, and without considerable cost.

2. **Bridges:** REPAIRS: MANDAMUS. The boundary line between Colfax and Butler counties is the south bank of the Platte river, which flows between those counties. The bridge over the river between these counties was rebuilt in 1904 at a cost of about $22,000. In the following spring, by the movement of ice in the river, nearly one-half of the bridge was carried away. In an action of mandamus to compel the supervisors of Colfax county to repair the bridge, it is *held* that the action cannot be maintained without notice to both counties under section 116, ch. 78, Comp. St., and the counties must be joined in the action.

ORIGINAL application for a writ of mandamus to compel respondents, as county supervisors, to repair a bridge. *Writ denied.*

George W. Wertz, for relators.

C. J. Phelps, for respondents.

SEDGWICK, C. J.

The relators applied to this court for a writ of mandamus to compel the respondents, who are the supervisors

of Colfax county, to repair a bridge across the Platte river between that county and Butler county, and to place the same in condition for public travel, and to care for and preserve the material of which said bridge was constructed. The decision of the case is placed mostly upon propositions of law, and for an understanding of the principles involved the issues are sufficiently stated in the findings of fact. The matter was referred to the Honorable John J. Sullivan to take the evidence and report findings of fact and conclusions of law. His findings of fact are as follows:

"First. That the bridge in question was constructed in the fall of 1904 at a cost of about $22,000. The bridge consisted of 112 spans; 110 spans 24 feet long, and two spans 20 feet long. It was a pile bridge, the piles being from 16 to 32 feet in length, the average length of the piles being 24 feet. The height of the decking above the water was between 7 and 8 feet. The piles were driven in the sand and did not reach hardpan. During the outflow of ice in the spring of 1905, 44 spans of the superstructure were entirely carried away, and 75 piles were also carried away. 33 spans were more or less injured, leaving of the 112 spans only between 50 and 60 spans intact. To reconstruct and repair the bridge so as to make it passable would cost about $2,700. To restore it to its original condition would cost about $5,000. This bridge (and its predecessors) is on the public road extending from Colfax county into Butler county, and is used chiefly by the citizens of Butler county to reach the city of Schuyler. Heretofore the entire expense of building and repairing this bridge and its predecessors has been borne by Colfax county, Schuyler precinct, and the citizens of Schuyler. The bridge was completely carried away during the outflow of ice in the spring of 1883, and again in 1903, and parts of it have been washed out and injured very frequently since the construction of the original bridge in 1871. The permanency of this bridge, if restored to its original condition, depends entirely upon the character of the breakup and outflow of ice in the spring. It might not stand for

more than a year, and it might stand for several years. This is a matter that is altogether problematical and cannot be determined in advance. Second. That the south bank of the Platte river is the dividing line between Butler and Colfax counties. The north end of the bridge is in Colfax county, and the south end of the bridge is in Butler county. Third. The bridge in question is the only bridge across the Platte river for a distance of 15 miles on either side. Fourth. There are sufficient available means at the disposal of respondents to enable them, after rebuilding and repairing all other bridges in the county that stand in urgent need of immediate reparation, to rebuild, reconstruct, repair and make passable that part of the Platte river bridge which was washed out and damaged in 1905. But, respondents have not sufficient means, after doing the immediately necessary work of reconstruction and reparation of smaller bridges, to reconstruct and repair the Platte river bridge in such a manner as to afford any reasonable expectation that the new structure would be permanent, or any persuasive probability that it would even withstand the next breakup and outflow of ice. Fifth. The refusal of respondents to rebuild and repair is not grounded upon or justifiable by the lack of means to make the bridge passable, but is, in part, grounded upon the lack of means to make it passable and probably permanent. They think it unwise and inexpedient to exhaust their available resources in the erection and reparation of a structure which according to the evidence might not stand for a year, and under the most favorable conditions would probably not stand for more than a few years. Sixth. Respondents had actual knowledge of the condition of the Platte river bridge long before this action was instituted, and they had refused to repair it, although frequently requested so to do by a large number of the citizens of Schuyler. Seventh. The notice mentioned in section 114, ch. 78, Comp. St. was given by relators to respondents before this action was commenced, but it does not appear that any such notice was ever given to the

county board of Butler county or to any member of that board."

The referee's conclusion of law upon these facts was: "First. That the duty to repair the Platte river bridge is a joint duty imposed by statute upon Butler county and Colfax county, and cannot therefore be enforced by mandamus without giving the notice required by section 116, ch. 78, Comp. St. Second. That the repairs contemplated by sections 114 and 115, ch. 78, Comp. St., are repairs of such a slight character that they may be made at once and without any considerable cost. Third. That the peremptory writ of mandamus should not be granted."

The reasons given by the referee in the opinion accompanying the report appear to justify the conclusions reached. They are as follows: "By section 87, ch. 78, Comp. St., the cost of building and maintaining bridges like the one here in question must be paid by the counties in which they are situate. The next section provides that the counties whose duty it is to build or repair any such bridge 'may be proceeded against jointly' for any neglect of duty in relation thereto. Sections 114, 115 and 116, ch. 78, Comp. St., provide that it shall be the duty of adjoining counties to commence repairing bridges on the line between them within 24 hours after notice has been served by three citizens or taxpayers of the state upon the member of the county board of each county in whose district part of the bridge is located. These statutory provisions seem to indicate quite clearly a legislative policy that the joint duty with respect to bridges on the dividing line between counties should be enforced by action against both counties. The wisdom and justice of such a policy is, of course, an argument in favor of its existence. While the act of 1889 (sections 114, 115, 116 and 117) seems to impose an absolute duty to repair immediately upon notice, any bridge on the line between adjoining counties, it must, I think, be subjected in construction to such limitations as will bring it into harmony with other provisions of the road law. If repairs are to be made under the act of 1889

without opportunity for competitive bidding, the legislature must have had in contemplation such repairs as might be rightfully so made under preexisting statutes. It could hardly have been the intention of the legislature to authorize a single commissioner to create an obligation that might, perhaps, amount to thousands of dollars against his county, or to require him to commence within 24 hours after notice a work of any considerable magnitude. This view is strengthened by section 85, ch. 78, Comp. St., which authorizes the county board, in cases of pressing necessity occasioned by extraordinary high water or other causes, to declare an emergency, and proceed at once to buy materials and hire labor for the repair of bridges. This latter statute was evidently intended to meet a condition not covered by the act of 1889, to create a power not previously existing. It authorizes, in cases of great necessity, as I understand it, the expenditure of large sums of money upon bridges, without advertisement or competitive bidding. The case of *Dutton v. State,* 42 Neb. 804, cited by counsel for relators, does in part support their claims, but it overlooks entirely the proposition established by later decisions that a bridge between counties is an indivisible unit within the meaning of the law relating to the cost of constructing and repairing such bridges. The author of the opinion does not seem to give much attention to the provisions of the statute bearing upon the point decided, and I cannot believe the conclusion reached is either just or in accord with the intention of the legislature."

The relators filed exceptions to the findings of the referee. The first exception relates to the sufficiency of the evidence to support the finding that it would cost about $5,000 to restore the bridge in question to its original condition. It is unnecessary to discuss the evidence upon this point, since there is no doubt under this evidence that the repairs necessary to put this bridge in its original condition, or even in a passable condition, would be much greater than the repairs contemplated by sections 114 and 115, ch. 78, Comp. St., referred to in the referee's

second conclusion of law. The other exceptions of the relators relate to the conclusions that the duty to repair the bridge is a joint duty imposed by statute upon both counties, and that this duty cannot be enforced by mandamus without giving the notice required by section 116 of said ch. 78.

We think that the reasons given by the referee are sufficient to justify these conclusions. It follows that the relators were not entitled to the relief demanded, and the writ is therefore denied.

WRIT DENIED.

SOUTH OMAHA NATIONAL BANK V. HARRY E. MCGILLIN ET AL.

FILED JUNE 20, 1906. No. 13,578.

1. **Chattel Mortgages:** VALIDITY. A chattel mortgage on a specified number of cattle, describing them by age and brands, and reciting that "the above described stock are in my undisputed possession, free from all liens and incumbrances, and kept on my premises on section No. 4, township No. 5, range No. 38, Chase county, Nebraska," is not void on its face for uncertainty of description.

2. ———: ———. If it is made to appear that such mortgage was in fact given on a specified number of cattle out of a larger number of the same kind and description, or, in other words, on a part only of a herd of cattle of the same kind and bearing the same description, it is void as to third persons, unless there has been a separation or a delivery of the cattle mortgaged to the mortgagee.

3. ———: SELECTION. While such a mortgage is void as to third persons, it is not void between the parties thereto. It gives to the mortgagee the right of selection, and, when he has exercised that right, the lien of the mortgage attaches and will prevail over all after acquired interests in the mortgaged property.

4. ———: PRIORITIES. When two such mortgages are executed on parts of the same herd of cattle, the mortgagees have an equal right of selection, and the one first exercising that right is entitled to the possession of the cattle so selected by him, to the exclusion of the rights of the other, if need be.

5. ———: ASSIGNMENT: PRIORITIES. If, however, the mortgagee in such mortgage transfers the same to a third party, and afterwards takes the second mortgage on the same description of property, he takes his right of selection subject to the right so transferred to the first assignee. And if he afterwards assigns the second mortgage, such assignee will take no greater right than his assignor had.

6. Instructions announcing a contrary rule disapproved.

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

Brome & Burnett and *A. G. Ellick,* for plaintiff in error.

McCoy & Olmstead, contra.

BARNES, J.

One Harry McClelland was engaged in buying, selling and raising cattle on a ranch situated in Chase county, Nebraska. For the purpose of furthering his business he borrowed money from the Shelley-Rogers Commission Company of South Omaha, Nebraska, to whom he gave his four promissory notes, secured by chattel mortgages upon cattle which he described as in his possession and on his ranch. The first note was for $3,531.51, dated April 19, 1902, due November 7 following. The mortgage securing this note was on "eighty-one head of four year old steers, branded one or both of the following brands: — or H." The second note was for $3,099, dated September 5, 1902, due April 9, 1903. The mortgage securing this note was on "ninety-three head of cattle, described as follows: All two and three year old steers, branded — on right hip." The third note was for $2,832.62, dated October 13, 1902, due April 23, 1903, and the mortgage securing this note was on "one hundred eleven head of cattle of the following description: All long two year old steers, branded — on right hip." The fourth note was for $4,681.35 dated October 30, 1902, due May 8, 1903, and the mortgage securing it

was on "one hundred sixty-two head of cattle, to wit: 85 steers, four years old, branded 2 or H, ave. 1175 ; 11 steers, two years old, branded — on right hip; 8 steers, one year old, branded — on right hip; 19 cows, five to six years old, branded Dd or II; 27 heifers two years old, branded — on right hip; 12 calves of 1902 (six steers, six heifers)." Each of the mortgages contained the following: "The above described stock are in my undisputed possession, free from all liens and incumbrances, and are kept on my premises on section No. 4, township No. 5, range No. 38, in Chase county, Nebraska." The mortgages were all duly filed in the office of the county clerk of Chase county on or about the date of their execution. The first two notes, together with the mortgages given to secure their payment, were assigned before maturity, for a valuable consideration, to the South Omaha National Bank, and it appears that there was due and unpaid upon them at the commencement of this action the sum of more than $6,000. The two notes and mortgages last above described were sold and assigned to the Commercial National Bank of Fremont, for value, before maturity, and the evidence shows that neither of them had been paid when this action was commenced. All of the notes were indorsed or guaranteed by the Shelley-Rogers company, which became insolvent or failed and went out of business in the spring of 1903. After such failure the agent of the Commercial National Bank of Fremont went to McClelland's ranch and took possession, with his consent, of 134 head of cattle, there found, under and by virtue of its mortgages. Among the cattle so taken were 99 head, which in some measure answered the description contained in the two mortgages first above described. The South Omaha National Bank thereupon demanded possession of the cattle, which it claimed were described in its said mortgages, and, being refused such possession, instituted a suit in replevin against the Commercial National Bank of Fremont, Harry McClelland and Harry E. McGillin, in whose possession the cattle were found. The two last named persons disclaimed any inter-

est in the property, and the suit proceeded between the two mortgagees. On issues properly joined a trial was had to a jury, which resulted in a verdict in favor of the defendant. There was a judgment on the verdict, and the plaintiff brings the case to this court by petition in error.

There was nothing which appeared upon the face of the mortgages which would render any of them invalid. The defendant, however, on the trial below claimed that the mortgages held by the plaintiff were void for uncertainty of description, and attempted to show that at the time they were executed there was a greater number of cattle on McClelland's ranch, bearing the brands and corresponding to the ages of the cattle described in the plaintiff's mortgages, than were covered by those instruments. In other words, that each of the mortgages covered but a part of a herd of cattle bearing the particular brands and corresponding to the ages of the cattle described therein. And it may be stated that, had the testimony clearly established such fact, then as to third persons the mortgages would have been void for uncertainty of description. An examination of the record shows that McClelland, by his testimony, attempted to aid the defendant in rendering the plaintiff's mortgages void, but in our minds it is doubtful if his evidence was sufficient to accomplish that purpose. He testified that he was doing a large business, and had from 500 to 600 cattle on his ranch most of the time; that he was constantly buying and selling. But, when asked if he had more than 81 head of four year old steers, branded "—" or "H," on his ranch at the time he executed the first mortgage, he was unable to say positively that he had any more than that number. The same may be said as to his evidence in regard to the 93 head of three year old steers, branded "—" on right hip, as described in the plaintiff's second mortgage. We do not deem it advisable, however, to state our view of the weight of this evidence, for the reason that the case may be tried again, and the question thus raised is one that should be submitted to, and left for, the determination of the jury under proper instructions.

If, when McClelland executed plaintiff's mortgages, he had no more cattle on his ranch of the age, kinds and brands set forth and described therein, then the mortgages were not void for uncertainty, and the plaintiff has a prior lien on so many of the cattle in controversy as were covered by said mortgages. *Peters v. Parsons,* 18 Neb. 191; *Wiley v. Shars,* 21 Neb. 712. If, on the other hand, McClelland had in his possession and on his ranch a greater number of cattle of the same brand, kind and description as those described in the plaintiff's mortgages at the time of their execution, or, in other words, if the mortgages described only a part of his herd of cattle of the same kind, brands and ages, quite another question is presented. We are satisfied from an examination of the authorities that a mortgage of the kind above described is void for uncertainty of description as to third persons, but is not void between the parties thereto. While it is not a completed instrument, in that the lien of the mortgage is not fixed and established, yet it gives to the mortgagee, or his assignee, the right of selection, and, whenever he has exercised that right and made such selection, a valid mortgage lien is thereupon created by virtue of such instrument and the selection made thereunder.

It will be borne in mind that all of the mortgages were given to the Shelley-Rogers Company. After the assignment of the mortgages to the plaintiff, the mortgages which were assigned to defendants were taken. If the mortgagor had as many cattle of the same kind, brands and ages as were described in both mortgages, then the mortgagees would have equal rights of selection. If after the mortgagee had obtained a right of selection under his first mortgage, and had assigned that right to the plaintiff, he took another mortgage which gave him a further right of selection from the same descriptions of cattle, this right would be subject to the right of selection which he had assigned in the first mortgage, and he could transfer to the second assignee no greater right than he himself possessed. In such case, the assignee of the second mortgage would

acquire the right only to select the number of cattle of the common description in excess of the number which the assignee of the first mortgage would be entitled to select thereunder. If both have equal rights of selection, the one who first exercises his right of selection will obtain a priority of lien on the property described in common in the two mortgages. *Brittain D. G. Co. v. Blanchard, Shelley & Rogers Co.*, 60 Kan. 263, 56 Pac. 474; *Avery v. Popper & Bro.*, 92 Tex. 337, 48 S. W. 572.

It appears from the evidence, without dispute, that the officer in executing the order of replevin herein found and took from the possession of defendants 11 or 12 five year old steers. None of these were, or could be, in the nature of things, covered by either of the defendant's mortgages. The officer also found and took possession of 34 head of four year old steers. Now, if these steers were branded only with a bar on the right hip, the jury might have found from the evidence that they were animals covered by the plaintiff's second mortgage. It is clear from reading the descriptions contained in the defendant's mortgages that none of these animals could be covered thereby. So that, even if the defendant had obtained a priority by reason of first exercising its right of selection, yet such right did not extend to the selection of cattle not embraced, described in, and intended to be covered by its mortgages. So it would seem from the evidence taken at the trial that, as to at least 11 head of five year old steers and 34 head of four year old steers, the plaintiff may have been entitled to recover. With the evidence in this condition, the court instructed the jury, in substance, that the description of the cattle in plaintiff's chattel mortgages should be such as to enable third parties to identify them, aided by such inquiry as each mortgage indicated; and that, if McClelland owned and had in his possession on the premises described in said mortgages a large number of steers of a very similar description as those described and enumerated in either of the plaintiffs mortgages, then they should find for the defendant. It seems clear that this instruction

was not warranted by the evidence. The court also gave other instructions which are inconsistent with the rules above announced and constitute reversible error.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

OMAHA LOAN & BUILDING ASSOCIATION ET AL., APPELLEES, V. HORATIO K. HENDEE ET AL., APPELLANTS.

FILED JUNE 20, 1906. No. 13,980.

1. **Judicial Sale: CONFIRMATION.** It is ordinarily the duty of a court, where a judicial sale is fairly conducted and is made in conformity with the decree, to ratify such sale.

2. **———: VACATION.** The foregoing rule, however, is subject to certain exceptions; and, where it is made to appear that there was a misunderstanding between the parties, by reason of which one of them was prejudiced without fault on his part, the court, in the exercise of its equity jurisdiction, may deny confirmation and set aside the sale.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed with directions.*

McDonald & Woodland, for appellants.

Charles W. Haller and *Charles S. Lobingier, contra.*

BARNES, J.

This controversy arises over an order of the district court for Douglas county confirming a sale of real estate made under a decree of foreclosure of that court. It appears that in March, 1900, the appellants went into possession of the real estate in question, the same being a house and lot in one of the additions to the city of Omaha, under a contract of purchase with one G. S. Benewa; that

they paid a considerable part of the purchase price, and that an arrangement was finally made between them and Benewa, by which he took the title to the property, obtained a loan thereon from the Omaha Loan & Building Association, the appellants agreeing to pay the loan according to its terms, and, when the same was paid, Benewa was to deed the property to them. Since taking possession of the premises the appellants have at all times claimed and occupied the same as their homestead. For a failure to make the payments due to the building and loan association, an action was instituted in the district court, and a decree of foreclosure was rendered therein in favor of said association and against Benewa and the appellants. The execution of the decree was stayed for nine months on application of the appellants, and, when the stay was about to expire, they entered into negotiations for the purpose of obtaining a loan on the premises with which to pay off and satisfy the decree. Such negotiations resulted in the purchase of the decree by Mr. Lobingier, who took an assignment of the same, together with all of the rights of the plaintiff thereunder. The decree seems to have remained *in statu quo* until the month of October, 1903, when the decree was assigned to Ida M. Cronk, and, without further notice to appellants, an order of sale was issued thereon. The premises were sold on the 10th day of November, 1903, and notice was given to the appellants of the hearing of an application to confirm the sale on the 19th day of March, 1904. The appellants appeared, resisted the motion for confirmation, and filed objections thereto, duly verified, which in form and substance amounted to a petition to set the sale aside on account of fraud and misrepresentation practiced upon them.

The allegations contained therein are in substance as follows: That in September or October, 1902, the appellants entered into an agreement with the assignee of the decree, by the terms of which they were to pay $12.50 a month; that said payments were to be applied, first, upon

the interest on the sum paid for the assignment of the decree in question, together with taxes and costs; second, upon repairs made upon the premises; and, third, upon the principal of the loan or payment made for them by said assignee; that, when the principal sum so paid for the decree was reduced to $750, said assignee was to give them a title to the premises, and take a mortgage thereon to secure the payment of that amount; that, pursuant to the agreement, they made the payments therein stipulated up to and including the month of January next preceding the application to confirm the sale; that it was agreed by the said assignee that no sale of the premises should be ordered, and, when they made their November payment in 1903, they were told that no notice of sale had been ordered to be made; that the assignee was not going to have the premises sold, and would not have them sold so long as the payments were made according to the terms of the agreement. They further charged that said representations and statements were false and fraudulent, and made for the purpose of misleading and deceiving them; that said assignee well knew at the time that an order of sale had been issued, and notice thereof had been inserted in the "Royal Woodman" in each of the issues of the paper published in the month of October preceding; that said statements did mislead and deceive them; that they did not know that notice of sale had been published, and did not know that the sale had taken place, until notice of the motion to confirm the same was served upon them. They further alleged that at the time they made their November payment they told said assignee that they did not want to make a payment in December, but would make payment for two months in January following; that such payment was made in January, and they would not have made the same had they known that the premises had been sold. They further alleged that they would have inquired as to such sale but for the misrepresentations so made to them by said assignee; that, by reason of the action taken by said assignee in ordering the sale of the

premises, the agreement between them was broken; that appellants were taken by surprise to their damage and injury, and for that reason the sale was irregular and void, and should be set aside. They prayed for an order vacating the sale and holding it for naught; that an accounting be had, and an order entered allowing them sixty days within which to pay the amount found due into court, and that upon such payment a deed be made by the sheriff to them and the premises thus conveyed to them without further action of the court. The assignee of the decree accepted the issue thus tendered, and a hearing on the merits was had upon affidavits and other documentary evidence. Whereupon, the trial court overruled the objections of the appellants, and made an order confirming the sale. The case comes here by appeal for a trial *de novo*.

Under the present statute, and our rules governing appeals in equity cases, we are in no manner bound by the view of the trial court as to the sufficiency or the weight of the evidence, where it consists wholly of affidavits, depositions, and other written testimony. In the instant case, no oral evidence was taken, and we are therefore in as good a situation to judge of the weight and probative force of the testimony as was the trial court. Section 681*a* of the code; *Grandin v. First Nat. Bank*, 70 Neb. 730; *Faulkner v. Simms*, 68 Neb. 299. We desire to say, before proceeding further with this opinion, that it would seem that a question of this importance should not be tried on a motion and affidavits only; that, where such objections are presented, the district court should require pleadings to be filed, direct an issue to be made up, and upon such issue proceed to trial as in other cases. In this case, however, the parties having elected to proceed on the motion and by affidavit evidence, and having so tried the issue without objection, we have concluded to take the case as we find it, and decide anew the question presented.

The evidence contained in the record is so voluminous as to make it impracticable to quote it, and we must con-

tent ourselves with a statement of its tenor and effect. It seems clear to us that it preponderates in favor of the contention of appellants to the extent of showing that there was such a misunderstanding on their part as resulted in their failure to purchase at the sale, though not to the extent of showing fraud or bad faith on the part of Mr. Lobingier. To our minds it fairly shows that the agreement with appellants was entered into substantially in the manner and form set forth in their motion; that in order to carry out such agreement the purchase and assignment were made of the decree of foreclosure in question; that Benewa was procured to make a deed of the premises, subject to the decree; that the sum of $12.50 a month was collected from appellants, and, while the payments were somewhat irregular, they appear to have been made in full, or substantially so, until long after the sale of the premises complained of took place. Indeed, the payments were made up to within one month of the time of the application for a confirmation of the sale; that Ida M. Cronk, who claims as owner of the decree, purchased the same *pendente lite* from Mr. Lobingier. It seems clear from the affidavits of the appellants, of Mr. Ed P. Smith, and Mr. W. A. Spencer, that the appellants understood that no order of sale would be issued on the decree and that the premises would not be sold thereunder as long as the payments agreed upon were kept up. It also appears from other evidence contained in the record that it was agreed that, when the amount paid for the decree, with interest thereon, should be reduced to $750, the premises would be conveyed to appellants, and a mortgage thereon taken back to secure the payment of that amount; that an assignment of the decree was made to Ida M. Cronk, and without notice, and immediately thereafter an order of sale was issued thereon, under which the sale in question herein took place; and it would seem that such proceedings had the effect to deprive appellants of further opportunity to comply with their contract and redeem their home from

the lien of the decree. The foregoing facts would seem to render it unjust and inequitable to confirm the sale in question, and there is thus presented to us the question of the power of the court to deny the confirmation and set aside the sale.

In ordinary cases, on a motion to confirm a sale of real estate under a decree of foreclosure, the court will consider only such matters as relate to the regularity of the sale, and this may be stated to be the general rule applicable to such cases. To this rule, however, there are exceptions, and it has often been held that, in an equitable proceeding of this nature, the court will refuse to confirm a sale where it was unfairly conducted; and there would seem to be no good reason why such power should not be exercised when it appears that through a misunderstanding between the parties one of them was prejudiced without fault on his part.

In 2 Jones, Mortgages (6th ed.), sec. 1639, we find the following: "The most general principle on which the courts act in setting aside the sale and ordering a new one is that equity will not allow any unfairness or fraud, either on the part of the purchaser, or of any other person connected with the sale."

In *Aderholt v. Henry,* 82 Ala. 541, the court said: "But, when there is some impropriety or irregularity attending the sale, affecting its fairness, ~~or surprise or~~ misapprehension caused by the conduct of the purchaser, or misconduct on his part, or on the part of any person connected therewith~~;~~ or when the sale is conducted in violation of the decree, or in disregard of the rights and interest of some of the parties; or, when from any cause, it would be inequitable to permit it to stand, it becomes the duty of the court, on settled principles, to vacate the sale, ~~though~~ a conveyance may have been made, upon proper application, before confirmation, in the suit in which the sale was made."

In *Paulett v. Peabody,* 3 Neb. 196, it was held: "Judicial sales should be conducted with the utmost fair-

ness and good faith. Indeed the rules which govern them are not less stringent than in ordinary cases. If a sale is made under a decree of the court, and there is shown to have been false representations, or undue concealment, in the conditions or particulars of the sale, by any person interested therein, to the injury of another, the sale should be set aside, if application is made before the conveyance is executed." To the same effect are *Frasher v. Ingham,* 4 Neb. 531; *Aldrich v. Lewis,* 28 Neb. 502; *Goble v. O'Connor,* 43 Neb. 49, and *McKeighan v. Hopkins,* 19 Neb. 33.

From the foregoing authorities it seems clear that we have not only the power, but it is also our duty, to set aside the sale in question. The judgment of the trial court is therefore reversed, the sale is set aside and held for naught, and the cause is remanded to the district court, with directions to take an accounting of the amount due upon the decree in question, that the appellants be allowed sixty days within which to redeem the premises in question from the lien of such decree, and, in default of such payment within said time, the assignee be given leave to proceed to enforce her decree according to law.

JUDGMENT ACCORDINGLY.

ROYAL HIGHLANDERS, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

FILED JUNE 20, 1906. No. 14,642.

1. **Taxation: EXEMPTIONS: BENEFICIAL ASSOCIATIONS.** A fraternal beneficiary association, conducted for the mutual benefit of its members and for the purpose of providing a fund by the payment of stated dues and fees from such members for the payment of a special amount upon the death of each member to a beneficiary named by him, is not a charitable association, and its property and funds are not used exclusively for charitable

purposes so as to be exempt from taxation by the laws of this state.

2. **Statutes:** CONSTRUCTION. Where the legislature has passed an act providing for a new system of raising revenue, and has thereby changed the former methods of procedure relating to matters of taxation, the courts in construing its provisions are not bound by any administrative construction of the former revenue law.

3. **Taxation:** CREDITS. Under the rule established by the decisions of this court for the taxation of credits, a fraternal beneficiary association is entitled to set off the amount of its outstanding beneficiary certificates, matured and unmatured, against securities in its fidelity or mortuary fund, set apart and devoted exclusively to the payment of such certificates.

APPEAL from the district court for Hamilton county: ARTHUR J. EVANS, JUDGE. *Reversed.*

Hainer & Smith, for appellant.

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

Brome & Burnett, amici curiæ.

BARNES, J.

This case is before us on appeal from a judgment of the district court for Hamilton county affirming the order of the board of equalization of that county in the matter of the assessment of the property of appellant (Royal Highlanders, a domestic fraternal beneficiary association) for taxation for the year 1905. It appears that the association is duly organized under the laws of this state, and has its home office and principal place of business at Aurora, in Hamilton county; that in May, 1905, in response to the demand of the county assessor of said county, the association delivered to him a schedule of its property, from which it appears that it was the owner of certain lots in the city of Aurora, Hamilton county, Nebraska, and the building situated thereon, of the cost and value of $21,238.56; that it had on hand furniture,

fixtures and office supplies of the value of $1,200; that it had money in the banks of Aurora amounting to $13,666.31; that it owned securities deposited as a credit with the auditor of public accounts of the state of Nebraska, amounting to $455,900, which credit was its mortuary fund, deposited under the provisions of the statutes governing the affairs of such associations, the same having been collected and set apart for the payment of its debt due and to become due on the beneficiary certificates issued to and held by its members. All of said property was claimed by the association to be exempt from taxation, for the reason that it was used exclusively for charitable purposes. It was further claimed that the mortuary fund so deposited with the auditor of public accounts was not subject to taxation, because the association had the right to set off the amount of its obligations or debts due and to become due on said beneficiary certificates against said credit, which would leave it no net credit for taxation. Thereupon the assessor duly entered all of said property on the tax lists of said county for assessment. Thereafter the association appeared before the county board of equalization and filed its petition and protest, claiming said property, and all thereof, as exempt, for the reasons stated in its schedule. The board made an order sustaining the assessment as made by the assessor, and the association appealed to the district court for Hamilton county. To maintain its position in that court, the association filed its petition, setting forth more particularly and at large the matters contained in its protest, and prayed for a judgment declaring its property wholly exempt from taxation, and reversing the order of the county board. To this petition the attorney general and the county attorney of Hamilton county filed a general demurrer, which was sustained. The association excepted, elected to stand upon its said petition, offered evidence in support of all of the allegations thereof, which evidence was excluded, and thereupon the court rendered judgment against the association, affirming the order of the board of

equalization, and dismissing the appeal of the association at its costs.

It may be stated, in passing, that it clearly appears from the petition that the appellant is a fraternal beneficiary association, organized under the provisions of chapter 43 of the Compiled Statutes of this state, having a lodge system with ritualistic form of work, and a representative form of government; that it is formed, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit; that, for and in consideration of certain stipulated payments in the form of fees and dues, it issues beneficiary certificates on the lives of its members, payable after their death to beneficiaries named therein, in mannner and form as provided by its by-laws and the statutes of this state governing such associations; that it has its fidelity or mortuary fund, amounting to $455,900, deposited with the auditor of public accounts, which fund is set apart and pledged by said association and by-laws for the payment of its beneficiary certificates due and to become due, and constitutes a trust fund for that purpose, and for no other; that of its credit balance at the banks, $12,174.98 belongs to said fund, and the remainder thereof, amounting to $491.34, represents a fund used for the purpose of paying the running expenses of the association. The foregoing is an abridged statement of the facts shown by the record, but is quite sufficient as a basis for this opinion.

1. Appellant's first contention is that its entire property is exempt from taxation because it is used exclusively for charitable purposes. This question must be determined, not by what the association professes to be, but by what it really is, and the nature of the business it conducts. The general trend of judicial opinion in this country is that organizations like the appellant are, in effect, mutual insurance companies. In *State v. Live Stock Ass'n,* 16 Neb. 549, it was held that an association which insured only the property of its members by a policy in the form of a certificate of membership, for a premium paid simply

as an admission fee, and by assessing its members to pay for the losses sustained by such certificate-holders, was to all intents and purposes a mutual insurance company. Again, in *State v. Farmers Benevolent Ass'n*, 18 Neb. 276, the court, speaking of associations like the appellant, said:

"The courts have with a great degree of unanimity treated all such organizations as substantially life insurance companies, applying to them and to the mutual relations of the members the rules and principles applicable to the contract of life insurance."

The appellant classes itself as exclusively a charitable organization, but from an examination of its by-laws, called "Original Edicts," it appears that it is conducted for the sole benefit of its members and their beneficiaries. Its declared purposes are: "First. To unite for mutual benefit and fraternal protection all white persons of sound physical health and exemplary character between the ages of 18 and 65, and to bestow substantial benefits upon the beneficiaries of its membership admitted between the ages of 18 and 48 years who are entitled thereto. Second. To cheer and aid the unfortunate, to comfort and provide for the sick and aged, and to bury with becoming honor the dead of our membership. Third. To educate its members socially, morally, and intellectually, promulgating by ritualistic degrees the principles of prudence, fidelity and valor. Fourth. To establish and maintain funds for the purpose of paying all benefits provided for the members and their beneficiaries, and to defray the expense of management and promotion." All of these purposes are confined to its members, and are dependent upon the payment by them of the assessments required by the by-laws. Beneficiary members get what is paid for, and nothing more. If they cease to pay, they cease to receive. Members continue to pay for the benefit of another, not because of any charitable or benevolent impulse, but because they expect, upon their death, that those whom they are interested in, or bound by law or ties of affection to provide for,

will receive the amount which it is agreed in the beneficiary certificate will be paid by the association to such beneficiary. This is neither charity nor benevolence. Payment to the beneficiary does not depend upon his or her financial condition. A wealthy child or widow of the assured member would be entitled to claim the amount named in his certificate equally with one poor or needy. This benefit is paid because of so much money and so many assessments paid by the assured member. This benevolence or charity is purely of a commercial character; it does not seek out the needy, but invites only the able-bodied and healthy. It is a business arrangement; the beneficiary receives payment because of a contract obligation on the part of the association to make such payment. In *State v. Miller,* 66 Ia. 26, the court held that the Ancient Order of United Workmen, an association of practically the same character as the appellant, is a life insurance company, and that its fraternal character was simply an incident to its many purposes. In *Robinson v. Templar Lodge,* 117 Cal. 370, 59 Am. St. Rep. 193, the court said of an association similar in character and regulations to the appellant, concerning payments to be made to it:

"These benefits are not charities in the strict sense. They are dues, which the society becomes obliged to pay in certain events. It is a matter of right, and not of grace. A consideration is paid, and the lodge reserves no right to withhold payments when the conditions arise."

It seems clear therefore that the appellant is not what may be termed purely or exclusively a charitable organization. It further appears from an examination of its by-laws that its funds are divided into two classes, as follows: "The finance of the fraternity shall be divided into two funds: The fidelity fund and the general fund." The fidelity fund of the association is its mortuary fund, and is set apart for the payment of its beneficiary certificates due and to become due, while the general fund is used for organizing, maintaining and promoting the best interest,

growth and welfare of the fraternity, in other words, for the payment of the expenses of carrying on its business. So we are of opinion that the property of the appellant is not exempt from taxation by reason of its being used exclusively for charitable purposes.

2. It is further contended that we are bound by the administrative construction of our former revenue law. It is said, in substance, that our constitution was adopted in 1875; that the legislature of 1879, acting under the provisions of said instrument relating to taxation, framed a general revenue law, and exempted from taxation all property used exclusively for charitable purposes; that said revenue law has been so construed that no one has ever thought of taxing the funds of a fraternal beneficiary society until the year 1904; that the present revenue act is, in substance, the same as the former one; that the courts are bound by such administrative construction, and should not now hold the property of such associations subject to taxation. The doctrine of estoppel by construction is well established, and the argument of counsel based thereon comes with much force. Indeed, it might be held conclusive, were it not for the fact that in the year 1903 the legislature, by the adoption of the new revenue law, established more effectual methods than those which theretofore obtained in regard to matters of taxation. It is a fact, within the common knowledge of all, and one of which we may take judicial notice, that formerly so much property escaped taxation as to render the revenue of the state insufficient to pay the expenses incurred in conducting its ordinary business affairs, and we were confronted with a continually increasing state debt. This created a universal demand throughout the state for a new revenue law. In answer to this demand the legislature at its session of 1903 adopted our present system. While so much of the present act as designates what property shall be taxed, and what shall be exempt from taxation, is practically the same as those provisions contained in the former revenue law, yet the new act

contains such minute directions for listing, valuing and assessing property for taxation as to render it extremely difficult for any person or corporation to avoid the payment of taxes upon all of his or its property, and the adoption of the new law has resulted in the taxation of the property of appellant and other like associations. The power of the state to make such changes from time to time in its revenue laws, and adopt such new methods in regard to matters of taxation as may be found necessary to raise an amount of revenue sufficient for its needs, cannot be questioned. The legislature having exercised such power, neither taxing officers of the state nor the courts are bound by construction of the former law.

It is further urged that it was the intention of the legislature in passing the present law to completely exempt fraternal beneficiary associations from taxation, and our attention is called to the provisions of the act relating to the taxation of what are called old line insurance companies. It is insisted that, when the legislature provided for taxing such old line insurance companies upon their gross premiums for the preceding year, and exempted fraternal beneficiary associations and other like societies from that provision, the intention was not to tax such associations at all. It seems to us, however, that excepting such associations from those special provisions constitutes no evidence of an intention not to tax them, but, on the other hand, it shows an intention to tax them the same as all persons, corporations and other domestic associations are taxed. If the legislature had intended to exempt them from taxation, it certainly would have expressed such intention and thus put the question beyond all doubt. So we are of the opinion that the property of mutual benefit associations organized under the laws of this state is taxable the same as the property of individuals, corporations and other domestic associations.

3. Finally it is contended by the appellant that it is entitled to set off the amount of its outstanding beneficiary certificates, matured and unmatured, against its fidelity

or mortuary fund. This is the only remaining question for our determination. It is the settled law of this state that the word "credits," as used in our present revenue law, means "net credits"; that "the taxpayer may deduct from his gross credits the amount of his *bona fide* debts in order to determine the true value of his credits for assessment." *State v. Fleming,* 70 Neb. 523; *Lancaster County v. McDonald,* 73 Neb. 453. The state insists that this fund is money loaned and invested, and therefore must be taxed. Money loaned or invested within the ordinary meaning of the term is money or capital laid out with a view of obtaining a profit or income therefrom. The fact that the fund in question has assumed the form of bonds, mortgages and other securities does not of itself fix its nature or determine its use. It is the use to which it is put that determines its character. That this fund is not loaned or invested for profit, within the ordinary meaning of the term, seems clear. As above stated, the fidelity or mortuary fund of the association is set apart by its by-laws and the laws of this state as a trust fund for the payment of its beneficiary certificates. This fund must be kept and conserved for that particular purpose. The statute provides how it shall be invested for its preservation, and the manner in which it may be withdrawn from time to time for the purpose of paying the beneficiary certificates of the association as they become due. It is a credit which was created for that particular purpose, and no other. A like question was before the supreme court of Alabama in *Alabama Gold Life Ins. Co. v. Lott,* 54 Ala. 499, where it was held that a life insurance company, when its solvent credits are assessed for taxation, is entitled to have deducted therefrom its premium reserve. The same question was before the supreme court of Iowa in *Equitable Life Ins. Co. v. Board of Equalization of City of Des Moines,* 74 Ia. 178. The court said:

"It is plain that the legislature enacted this statute to secure to the policy-holders the performance of the obligation to pay the amount secured by the policy. This

statute, therefore, recognizes the existence of a debt from the company to the policy-holders, and provides for securing its payment through this reserved fund. To us it seems plain that the plaintiff is indebted to each of its policy-holders, and the aggregate amount of such indebtedness equals this reserved fund, which should be deducted from plaintiff's money and credits in listing the same for taxation."

In *Michigan Mutual Life Ins. Co. v. Common Council of Detroit,* 133 Mich. 408, the question of the right of a mutual life insurance company (organized for profit), under a statute practically like our own, to set off its reserve fund credits against its mortuary debts for the purpose of taxation was before the court, and it was held that it had the right to deduct the amount of its policies from its premium reserve; that the reserve fund of the company represents its indebtedness to its policy-holders, and should be exempt from taxation.

It is contended by the state, however, that the foregoing decisions furnish no authority for the determination of the question involved in the instant case; that they apply only to old line life insurance companies, and the reason given for such contention is that the policies of old line companies have a present surrender value, while the beneficiary certificates of fraternal associations have no such value. It seems to us that this is a distinction without a difference. It is difficult to understand why old line insurance companies, which are organized for the purpose of gain and profit, should be accorded the privilege of the set-off, and that right denied to beneficiary associations, which are organized solely for the purpose of conserving the interests of their members and are prohibited by law from being conducted for the purpose of gain. It seems clear to us therefore that the beneficiary certificates issued to the members of the appellant association create a debt against it, for the payment of which the fund or, in other words, the credit in question is specifically pledged. So we are of opinion that the certificates create a *bona fide*

debt, payable out of the particular credit or fund known as the fidelity or mortuary fund of the association, and may, for the purpose of taxation, be set off against credits or securities in such fund. We are also of opinion that all of the property of the association which has not been segregated, set aside, transferred to, and become a part of the securities in its mortuary fund is taxable under the provisions of our present revenue law. It follows that the trial court erred in sustaining the demurrer to the appellant's petition, and in rendering judgment affirming the order of the board of equalization.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

SEDGWICK, C. J., dissents.

LETTON, J., concurring specially.

I concur in the view expressed in the opinion of Mr. Justice BARNES as to fraternal beneficiary associations, such as the Royal Highlanders, not being charitable associations and entitled to exemption from taxation for that reason. I also agree that this court is not bound by any administrative construction of the former revenue law for the reasons set forth in his opinion. With the conclusion reached I also concur, but, since I do so mainly upon grounds not mentioned in his opinion, I deem it proper to briefly state my views.

The question whether or not the securities held in pledge by the Royal Highlanders, or other domestic fraternal beneficiary associations, or whether the reserve held by domestic old line life insurance companies, are taxable as the property of the respective associations or corporations, is purely one of statutory construction. The controlling question for the court to determine is, what was the intention of the legislature with respect to the subject matter? To ascertain this intention is the sole duty of the court in

the premises, and, when this is determined, the construction must stand until such time as the legislature may determine that the court has incorrectly interpreted the meaning of its language, and enacts a new provision so clear and specific that all may understand. To ascertain the intention of the lawmaker, we must consider the whole statute, its purpose and object, and the means provided in the act for attaining the desired end. Uniformity in taxation is essential under our constitution, and it must be presumed that the legislature intended, as nearly as possible, taking into consideration the innumerable phases, conditions, and forms in which property appears, to secure uniformity. In accomplishing this result, it is proper to classify property, individuals or corporations, and by sections 58, 59, 60 and 61 of the law under consideration this classification has been made so far as concerns insurance companies. These sections have been the subject of consideration in *State v. Fleming,* 70 Neb. 523, and in *Aachen & Munich Fire Ins. Co. v. City of Omaha,* 72 Neb. 518, and they were upheld as a proper exercise of the taxing power in that behalf. By section 59 all *foreign* life and accident insurance companies, except fraternal beneficiary associations and mutual assessment companies, were placed in one class, and by section 61 all *domestic* life, fire, accident, or surety companies, except fraternal beneficiary associations and mutual assessment companies, were placed in another class. By the provisions of section 59 each foreign company is required to pay into the state treasury 2 per cent. of the gross amount of premiums received by it during the preceding calendar year for business done in this state. This is a business tax imposed under the second clause of section 1, art. IX of the constitution, and such companies are also liable for taxation upon all their property within the state the same as other corporations or individuals. *State v. Fleming, supra,* and *Aachen & Munich Fire Ins. Co. v. City of Omaha, supra.* Section 61 provides that all domestic companies shall be taxed in each local political subdivision where the agent conducts the busi-

ness, upon their gross premium receipts for the preceding year, less premiums on canceled policies and reinsurance, such gross receipts less reinsurance and cancelation to be taken as an item of property of that value, and be assessed and taxed on the same percentage of such value as other property. This tax also is a business tax, and each of such domestic companies is liable also to be taxed upon its tangible property the same as any other individual or corporation within the state.

No specific provisions are made for taxation of fraternal beneficiary associations, or mutual assessment companies, having no capital stock, making no dividends, and whose scheme of insurance does not contemplate the return of any profits to policy-holders. The tangible property of such associations and mutual companies, whether domestic or foreign, is to be taxed, therefore, the same as the property of other persons and corporations. It is made compulsory upon domestic corporations carrying on the business of life insurance under the old line plan to accumulate and keep on hand a fund for the purpose of meeting their outstanding obligations to policy-holders, and, although not compulsory in the case of domestic fraternal beneficiary associations or mutual assessment companies, it is a matter of common knowledge that a number of such associations or companies, including the Royal Highlanders, voluntarily have accumulated a fund, variously designated as a mortuary, reserve, or emergency fund, for the purpose of meeting liabilities to their certificate-holders as they mature, in order to prevent such frequent assessments as experience has shown may be caused by epidemics of disease or widespread calamities. Whether held by old line companies or associations formed upon the assessment plan, these funds are set apart to meet obligations of a certain nature. They are not the property of the company or association for general purposes, but are devoted to a specific end. In the case of foreign life insurance companies, these accumulations are held in other states or countries and are not within the reach of the taxing officers of this state. In this

state such companies, therefore, merely pay 2 per cent. upon the gross amount of premiums received during the preceding year, into the state treasury as a business tax, and are otherwise assessed only upon their tangible property within this state, which may or may not exist, since its existence is not essential to carrying on business. They are relieved from all local taxation, except upon tangible property, unless taxed by local ordinances upon their business. Domestic companies, however, are taxable in each county, town, city, village, and school district, where an agent conducts their business, upon their gross receipts, less reinsurance and return premiums, on the same percentage of value as other property, and in addition thereto are taxed upon their tangible property.

It will be seen, from a comparison of these provisions with reference to the taxation of foreign and domestic life insurance companies, that if the law is construed so that the special reserve or mortuary funds of domestic companies and of domestic fraternal beneficiary associations, accumulated, reserved, and set apart to meet their liability to their policy and certificate-holders, are to be taxed as the property of such companies and associations, a heavy burden is placed upon domestic organizations from which foreign are exempt. The business tax which domestic companies are required to pay may be as great as, or greater than, that exacted from foreign companies, depending upon local conditions. It is not to be presumed that the legislature intended to impose a heavy burden upon domestic enterprises of this character from which those organized in other states are free. It would be doing violence to common sense to believe that its intention was to make a hostile discrimination against citizens of this state in favor of citizens of other states. It may be said that foreign companies are taxed in the states or countries of their domicile upon such funds, but, as is pointed out in the opinion of my brother BARNES, in several states where net credits are the subject of taxation the amount of liabilities to policy-holders has been held entitled to be properly

offset against gross credits in the form of such securities. It may further be said that the methods of taxation of insurance corporations in other states are so various and diverse that it is almost impossible to say whether or not such accumulations are subject to any portion of the taxes paid by such companies. Many of the states provide for the taxing of insurance corporations, not by the value of their tangible property, but by franchise, business, or license taxes alone, and so far as I can determine from an examination of the statutes, in the main such funds, if taxed at all, are not taxed directly, as is sought to be done in this case. While, in the case of ordinary business, and if considered without relation to the sections of the revenue law relating to the subject of insurance taxation, it may be questioned whether contingent liabilities are such debts as would be entitled to be offset against credits, yet, considering the subject of insurance taxation as a whole, the conclusion reached by my brother BARNES seems to me to express the legislative intent.

With respect to the taxation of insurance companies and fraternal beneficiary associations, as well as in many other respects, the provisions of the revenue law of 1903 are far from clear and definite, and may be expected to give rise to many controversies. If the construction now placed upon the law fails to evidence the purpose of the lawmakers, the remedy lies with the legislature. The resources of the English language are vast and rich and flexible enough so that it may express its intention in phrase so clear and plain that an ordinary man may understand, and thus relieve the court from liability to a misconstruction of its meaning, and the taxpayers of the state from unnecessary litigation.

STATE OF NEBRASKA V. JOHN F. DECKER.

FILED JUNE 20, 1906. No. 14,316.

Habeas Corpus: REVIEW. The procedure to obtain a review in this court of a final order made by a district court or judge in a proceeding in habeas corpus must be such as is required to be followed for a like purpose in civil actions. Sections 483 and 515 of the criminal code are not applicable thereto.

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

James L. Caldwell, F. M. Tyrrell and *Charles E. Matson,* for plaintiff in error.

Charles O. Whedon, contra.

AMES, C.

One John F. Decker had been arrested and was detained by the sheriff of Lancaster county, and in the common jail of that county, upon a warrant issued by a justice of the peace, and charging him with having committed the offense of perjury while testifying as a witness upon the trial of a civil action in the district court for that county. Decker applied to the district court for, and obtained, a writ of habeas corpus under which to have inquiry made into the legality of his detention. The sheriff to whom the writ was directed made due return thereto, producing the person of the petitioner as therein commanded, and the court, after a hearing involving the taking of 166 pages of typewritten testimony, decided that there was no reasonable or probable cause for the accusation made in the warrant, and on the 23d day of February, 1905, ordered that the prisoner be discharged from custody. The county attorney, who was present at the hearing, took exceptions to certain orders and rulings of the court during the progress thereof, and afterwards caused a bill of exceptions of the same to be made up and settled by the district judge

in the manner prescribed by section 483 of the criminal code. On June 8, 1905, before the late act regulating appeals to this court had taken effect, the county attorney caused said bill of exceptions, together with a transcript of the proceedings in connection with which it was prepared, to be filed with the clerk of this court, as well as a petition in error in which it is recited that the county attorney and deputy county attorney "proceed under the provisions of section 515 of the criminal code," and in which they assign certain errors as having been committed by the court during the progress of the hearing, and complain that the court was without jurisdiction to make or render an order of discharge of the prisoner. But the document, which is signed by the county attorney alone, and in his official character only, does not expressly pray the judgment of the court upon its assignments or for a recaption of the accused.

It was decided by this court in *In re Van Sciever,* 42 Neb. 772, that a final order by a district court, or judge, made in a proceeding in habeas corpus, was reviewable in this court by proceedings in error, but that such a proceeding is a civil action and the procedure applicable to obtaining a review in this court is that provided by the code. It follows that the suit in this court must be prosecuted by or on behalf of some one having an interest in the controversy, that is, the petitioner, or some person or persons claiming a right to his custody, and that a bill of exceptions, if one is required, must be made and settled in the manner provided by statute for the making of such documents in civil actions. Sections 483 and 515 of the criminal code, to which alone the procedure in this case was attempted to be made conformable, are not applicable to such actions as the present, and this court is therefore without jurisdiction.

It is recommended that the petition in error be dismissed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the petition in error be

DISMISSED.

THOMAS C. JOHNSON, APPELLEE, V. A. H. HIGGINS, APPELLANT.

FILED JUNE 20, 1906. No. 14,400.

1. **Specific Performance: DEFAULT.** Neither party to an executory contract for the purchase and sale of lands can put the other party in default without a readiness and offer to perform on his own part, but for the purposes of an action for a specific performance a formal, technical tender is not indispensable, and an express repudiation of the contract and refusal to perform it by one party excuses the other from any subsequent formal offer or tender.
2. ———: TENDER. It is not indispensable in an action for the specific performance of an executory contract for the purchase and sale of lands that the plaintiff should have been capable of performance at the date the contract was entered into, if he was able, ready and willing and offered to perform at the time and in the manner stipulated in the agreement.
3. **Vendor and Purchaser: CONTRACT.** An executory contract for the sale of a body of lands which includes the family homestead of the vendor and which is not signed and acknowledged by his wife is not wholly void, but is obligatory upon him, except with respect to the homestead tract, and such a contract is therefore not open to the objection of want of mutuality.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. C. Robinson and *C. H. Whitney,* for appellant.

W. D. Funk and *A. A. Welch, contra.*

AMES, C.

There is no substantial dispute about the facts in this case. Johnson, the appellee, was the owner in fee of 387

acres, including his family homestead, of lands situated in Cedar county in this state and was also the owner of leases from the state of 520 acres of adjoining school lands, but he was indebted to one Abbott, who held as security an assignment of the leases and also a mortgage on the lands owned in fee. There was, besides, a small judgment against Johnson which would have been a lien upon his lands except for its dormancy. This state of facts was known to A. M. Merrill and the appellant, Higgins, who in May, 1902, entered jointly into a written contract with Johnson for the purchase of the land and leases for an agreed price of $15,000, of which $500 was paid in cash and the residue was agreed to be paid on March 1, 1903, upon conveyance and assignment to them of an unincumbered title to the land and leases. Mrs. Johnson, the wife of the appellee, did not sign the contract. The first day of March fell on Sunday, but on the third day of the month Johnson, having provided himself with a deed properly executed and acknowledged by himself and wife and purporting and competent to convey the title to the lands in fee to his vendees, sought out the latter for the purpose of consummating the sale pursuant to the contract. At and before that time there had been some conversation relative to an extension of the time of payment of the mortgage debt upon the existing security and the deduction of the amount thereof from the purchase price, upon an assumption of it by the purchasers, but no definite or final agreement to that effect had been made, and an abstract with which Johnson had armed himself showed the continued existence of the mortgage, and the leases and the assignments of the latter were still in the possession of Abbott, who, it was at first contemplated by the parties, should be satisfied for the indebtedness to him, out of the purchase price, simultaneously with the making of the conveyances contemplated by the contract of sale, and who was at the same instant to assign the leases and execute a release and discharge of the mortgage. This arrangement was known and satisfactory to Abbott,

who was willing and ready to comply with it. On the 3d of March Higgins told Johnson that Merrill was away from home, but that on his return on the following day they would inform him, Johnson, what they desired or intended to do. On the next day Johnson informed both his vendees that he was able, ready and willing to complete the transaction, including the payment and satisfaction of the dormant judgment, and the procurement of the presence of Abbott and his discharge of the mortgage and assignment of the leases, and the delivery of the above mentioned deed executed and acknowledged by himself and wife, upon the payment by them of the residue of the purchase price, or he would comply with any arrangement they should be able to make with Abbott for the extension of the mortgage debt and its deduction from the purchase price. Both these offers the vendees declined, and they then informed the vendor that they had finally decided not to carry out the contract of purchase. Eight days later, on the 12th of the month, this action was begun by Johnson to obtain a specific performance of the contract, which he was at the time of the trial and had been at all times able, willing and ready to perform on his own part. Merrill had departed from the state and was not served with process, but judgment as prayed was rendered against Higgins, who prosecutes this appeal.

Time was not of the essence of the contract. A formal tender of the deed and of assignments of the contracts was not incumbent upon the plaintiff, at least until his vendees had signified a readiness and willingness to perform the contract on their part. The delivery of these instruments and the payment of the purchase price were required by the contract to be simultaneous acts. Neither party could have put the other in default without having first offered performance on his own part, but an offer made in good faith and with ability to perform, if declined by the opposite party, excused a formal tender. *Frenzer v. Dufrene,* 58 Neb. 432; *Harrington v. Birdsall,* 38 Neb. 176; *Wasson v. Palmer,* 17 Neb. 330; *Kellogg v. Lavender,*

9 Neb. 418. When the vendees notified Johnson that they repudiated the contract and would not comply with its obligations, they excused him from making any subsequent formal offer or tender. The law does not require the doing of a vain thing.

Counsel for defendant contends that the contract containing a stipulation for a conveyance of the vendor's homestead as well as other lands, and not having been signed and acknowledged by the wife, was void as to the homestead, and therefore lacked that degree of mutuality requisite for the maintenance of this action. In other words, it is urged that, unless the right and obligation of specific performance are existent and reciprocal at the date a contract is entered into, they can never come into being at all, and authorities of undoubted weight and respectability are cited in support of this proposition; but decisions equal in number, and of at least equal weight, might be cited to the contrary, and these latter have, moreover, received the approval of and been adopted by this court. In *Bigler v. Baker,* 40 Neb. 325, this court, in an opinion by Mr. Justice POST, after discussing the question at some length and citing many decisions, say: "But the true rule is believed to be that want of mutuality in such cases is not a valid objection, even to decree of specific performance, where the moving party has performed all of the conditions imposed upon him, and brought himself clearly within the terms of the agreement." This decision was cited and expressly reaffirmed in the recent case of *Watkins v. Youll,* 70 Neb. 81, and ought not to be longer questioned. But the lack of mutuality supposed by counsel has never existed in the contract in suit. The absence of the signature and acknowledgment of the wife did not avoid the entire instrument, but affected it, so far as the rights of the vendees were concerned, simply as would have done an omission of a description of the homestead from the covenant to convey. With this exception their right to demand specific performance or to recover damages for a breach of the contract was precisely the same

as in any other case. This is the point essentially involved and decided by this court in the recent case of *Lichty v. Beale,* 75 Neb. 770. They are not in a position to complain because the plaintiff, before he could demand specific performance, was compelled to offer more than, under the contract, they could have required of him. No fraud is charged or was practiced. At the time the vendees entered into the contract, they were not ignorant of the facts and are presumed to have known the law. They knew, therefore, to what extent the agreement was reciprocally obligatory, and upon what terms and conditions specific performance could be successfully demanded of them, and no reason has been suggested why they should be released from their covenants.

Other propositions urged by the defendant are involved in the foregoing and therefore do not require separate treatment. The decree requires that the defendant accept the conveyance and assignments stipulated for in the contract and pay to the plaintiff, or into court for his use, the unpaid residue of the purchase price, with interest and costs, and that in default of such payment execution issue therefor. Of course, upon the instant that such payment shall be made or compelled, the title to the land and leases will vest in him and the identical transaction contemplated by the contract will have been consummated.

It is recommended 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.

ASMUS WIESE, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.*

FILED JUNE 20, 1906. No. 14,232.

1. **Adverse Possession:** MERGER. The party in possession of land as owner has a right to protect that possession by the purchase of any outstanding claim or lien against the property. There is not thereby any break in possession, nor does the adverse occupant rely upon his purchase title in preference to the one which he previously possessed. He joins the two together and possesses whatever title both may give him. *Oldig v. Fish*, 53 Neb. 156, followed and approved.

2. **Public Lands:** RAILROAD GRANTS: PATENTS. The act of congress of July 1, 1862, 12 U. S. Statutes at Large, p. 489, ch. 120, and July 2, 1864, 13 U. S. Statutes at Large, p. 356, ch. 216, granting land to the Union Pacific Railroad Company and to the Sioux City & Pacific Railroad Company, transfers a present legal title, when the terms of the grant are complied with and the lands are identified by a map of definite description filed in the general land office. A patent to such land, when finally issued, relates back to the date of the grant.

3. **Adverse Possession.** When one tenant in common conveys the whole estate in fee with covenants of seizin and warranty, and his grantee enters and holds exclusive possession, the entry and holding must be deemed adverse to the title and possession of the cotenant.

4. **Public Lands:** LIMITATIONS. The title of the United States government is fully divested by a grant *in præsenti* of all lands within the place limits of the grant and not within the exceptions therto; and subsequent proceedings affecting the patent to such lands in the interior department do not not suspend the running of the statute of limitations in favor of one claiming under the grant.

APPEAL from the district court for Washington county: EDMUND M. BARTLETT, JUDGE. *Affirmed.*

William G. Clark and *Charles A. Clark & Son*, for appellants.

James H. Van Dusen, contra.

* Pending on error in the supreme court of the United States.

OLDHAM, C.

This is an action to quiet title to certain land situated in Washington county, Nebraska, which was included within the land grants made by the United States government to the Union Pacific Railroad Company and the Sioux City & Pacific Railroad Company by acts of congress of July 1, 1862, 12 U. S. Statutes at Large p. 489, ch. 120, and July 2, 1864, 13 U. S. Statutes at Large, p. 356, ch. 216. The land lies within 20 miles of the right of way of the Union Pacific Railroad, and within 10 miles of the right of way of the Sioux City & Pacific Railroad. It is admitted that each of the two railroad companies had fully complied with the provisions of the acts of congress prior to January 1, 1870. No patent for the land was issued until September 23, 1897, when a patent was issued at first by mistake to the Missouri Valley Land Company, as successor to the Sioux City & Pacific Railroad Company, but this patent was canceled by order of the land department and returned to the government, and a patent was issued jointly to the Union Pacific Railroad Company and the Missouri Valley Land Company, as successor to the Sioux City and Pacific Railroad Company. After full compliance with the terms of the grant, the Union Pacific Railroad Company filed its map of definite location and listed the land in controversy as its own. In 1882 it entered into a contract of sale of the land in controversy with one John Japp, for $10 an acre. On the completion of the payments on this contract, it executed to him a warranty deed for this land. The deed was recorded in Washington county in 1888. After the purchase of the land, Japp went into possession thereof and began farming and cultivating the land continuously from the time of his purchase up to 1891, when he conveyed the land for a consideration of $1,200 by a warranty deed to plaintiff Wiese, who placed the deed on record and entered into possession of the premises, which he has occupied, fenced and improved and continuously cultivated to the present

time. Plaintiff claims the land by adverse possession and this color of title. Defendant, Iowa Railroad Land Company, claims an undivided interest in the land by mesne conveyances from the Sioux City & Pacific Railroad Company. At the trial in the court below the title was quieted in the plaintiff, and to reverse this judgment defendants have appealed to this court.

There is little or no conflict in the testimony contained in the bill of exceptions, the controversy being as to questions of law, rather than those of fact. It clearly appears that on the completion of the terms of the grant the Union Pacific Railroad Company made its map of definite location and filed the same in the general land office, and that it listed the land in controversy and conveyed it as land which it had received under the grant. The land was not listed by the Sioux City & Pacific Railroad Company until after the conveyances to plaintiff and his grantor. It appears from the record that the land in controversy had been claimed as indemnity school land by the state of Nebraska, but that this claim had been canceled and denied by the land department before the conveyance by the Union Pacific Railroad Company to plaintiff's grantor, so that, as far as the record discloses, there was no contest pending in the land department affecting the validity of the grant to either of the railroad companies when the land was conveyed to plaintiff's grantor.

On September 16, 1894, plaintiff Wiese undertook to make a cash entry of the land in controversy at the receiver's office of the United States land office at O'Neill, Nebraska, under the act of congress of March 3, 1887, entitled "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes." 24 U. S. Statutes at Large, p. 556, ch. 376. The right to a cash entry of this land as a forfeited grant was contested before the land department by the Sioux City & Pacific Railroad Company. While the entry was allowed at the land office in the first instance, the

commissioner of the general land office at Washington canceled the entry on the 23d day of August, 1896, and directed the United States land office at O'Neill to note such cancelation on its records.

It is claimed by defendants that this application for a cash entry at the land office at O'Neill was a recognition of the outstanding title in the United States government, which tolled the statute of limitations. In support of this proposition we are cited, as a controlling case among others, to the opinion of this court in *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371. In this case it was held that the recognition of the title of the record owner of the land by the railroad company in seeking to condemn the land was such a recognition as would arrest the statute of limitations, even if it had commenced to run. Here the recognition was of the title of the record owner of the premises. In the case at bar, the attempt on the part of Wiese to procure the outstanding patent from the United States was in no sense a recognition of the title of the Sioux City & Pacific Railroad Company. At the time the application for the cash entry was made, Wiese and his grantor had been in possession of the land, claiming it as their own, for the full statutory period of limitation. Even if the application had been made before the full period of occupancy had run, so far as the rule in this state is concerned, such effort to procure an outstanding title would not have impaired the right to rely upon the statute. In *Oldig v. Fiske*, 53 Neb. 156, which reviews our former decisions, it is said: "A party in possession of land as owner certainly has a right to protect that possession by the purchase of any outstanding claim or lien against the property. There is not thereby any break in the possession, nor does the adverse occupant rely upon his purchased title in preference to the one which he previously possessed. He joins the two together and possesses whatever title both may give him."

The contest between the two railroad companies concerning these overlapping land grants appears to have

been instituted after the conveyance of the land in controversy by the Union Pacific Railroad Company. This contest was finally determined in *Sioux City & P. R. Co. v. Union P. R. Co.*, 4 Dill. (U. S.) 307, by holding both companies as tenants in common of the overlapping grants. It was under this view of the conflicting rights of the two companies that a joint patent to the land was subsequently issued to the two companies by the direction of the secretary of the interior.

It is further contended by counsel for the defendants that the title to the land in controversy remained in the government until the issuance of the patent in 1897, and, on the contrary, it is contended by counsel for the plaintiff that, on the compliance with the terms of the grant by the different railroad companies and the filing of the map of definite description in the general land office, the title of the general government was divested and the railroad companies took the lands by grants *in præsenti*. The question of interpretation of grants by this act was before the supreme court of the United States in the case of *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, and it was there held, in an exhaustive opinion by Field, J., that the act of July 1, 1862, 12 U. S. Statutes at Large, p. 489, ch. 120, granting lands to the Union Pacific Railroad Company, transfers a present legal title, and when the lands are identified by the location of the road, such title attaches as of the date of the grant. In this case it was held that the lessee of the railroad company might maintain ejectment for lands within the grant, although the patent had not yet issued from the general government. In the opinion it is said:

"In the legislation of congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justifies its recognition

and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government."

In *French v. Fyan,* 93 U. S. 169, it is said by Miller, J.: "The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp-lands, under that act, relates back and gives certainty to the title of the date of the grant."

Now, applying the principle announced in these cases to the facts in issue, we must conclude that, on the full compliance with the terms of the grant and the identification of the lands by the map of definite description filed in the land department, the title to the lands passed as of the date of the grant to the railroad companies, and the patent subsequently issued but evidences such fact.

It is further urged, however, by counsel for the defendants that, even if the patent when finally issued by the general government should be construed to relate back to the time of the grant as between the two contending railroad companies, it is inequitable and unjust to permit the relation for the purpose of supporting plaintiff's claim to title by adverse possession. And in support of this contention we are cited to the case of *Gibson v. Chouteau,* 13 Wall. (U. S.) 92. This was a case in which the right of one claiming adversely to the grant and patent, which had been long contested in the land department of the United States, was held not entitled to have the final award of the patent dated back to the time of the grant for the purpose of aiding his claim to a title by adverse possession. In reversing a contrary holding by the supreme court of Missouri, it was said by the same learned judge who delivered the subsequent opinion in *Deseret Salt Co. v. Tarpey, supra:*

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of per-

sons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder."

In the case at bar, each of the contending parties relies on the same grant of the land in controversy, that is, the congressional grant of 1862 and 1864. The land is within the place limits of this grant to the grantors of each of the contending parties. When, as pointed out before, there appears to have been no contest over the acquisition of this land by the congressional grant, the Union Pacific Railroad Company listed the land as its own, and conveyed the same for a valuable consideration to plaintiff's immediate grantor by a deed purporting to convey the entire interest in the land. It is a proposition well recognized by the weight of authority, as well as by the courts of this state, that, when one tenant in common conveys the whole estate in fee with covenants of seizin and warranty and his grantee enters and claims and holds exclusive possession, the entry and holding must be deemed adverse to the title and possession of the cotenant and amount to a disseizin. *Kittredge v. Proprietors of Locks & Canals on Merrimack River,* 34 Mass. 246; *Hanson v. Ingwaldson,* 77 Minn. 533, 80 N. W. 702; *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996; *Beall v. McMenemy,* 63 Neb. 70. Now, at least at the time that the deed from the Union Pacific Railroad Company, purporting to convey the entire estate in this land, was placed on record, defendants' grantor was served with notice of the adverse claim to the entire land by its cotenant, but, so far as the record discloses, the first time that defendants' grantor asserted any claim to the land of any nature, other than its compliance with the terms of the grant, was in the year 1894, when it contested plaintiff's right to a cash entry. In this contest, defendants' grantor contended that the land was within

the terms of the grant and that it had not been forfeited, nor had it ever been conveyed by contestant to the plaintiff. When the contest over this certificate had been terminated by the cancelation of the plaintiff's application, by order of the commissioner of the land office in 1896, no further effort was made by defendants' grantor to evict plaintiff from the possession of the land, or to assert its right therein as a cotenant, until the filing of its answer in the instant suit on the 5th day of October, 1903.

In view of these facts, we think that the doctrine of relation is taken out of the reason of the rule announced in *Gibson v. Choutcau, supra:* First, because there was a privity of interest between the original grantors of the contending parties, each claiming under the terms of the same grant, and, second, because defendants' grantor, by neglecting to list the land in the overlapping grant, permitted plaintiff's grantor, the Union Pacific Railroad Company, to sell and dispose of the land for a valuable consideration to John Japp, and permitted Japp to convey the land for a valuable consideration to plaintiff. This laches in the assertion of its cotenancy in the land in controversy by defendants' grantor, in addition to the intervening rights that plaintiff has acquired in reliance on the title of his grantors, make it, in our view, both just and equitable that the patent issued later should relate back to the date of the grant for the purpose of quieting plaintiff's title. Defendants seek to execuse the laches of their grantor in asserting its claim to the land, by alleging that, up to the time of the final issuance of the patent, the land in controversy was within the exclusive jurisdiction of the land department of the United States. If the grant were one which the department of the interior had paramount authority to determine, this contention would be well founded; but, as the grant in question was one *in præsenti* and as the land in controversy was within the place limits, and not within the exceptions of the grant, the title of the general government was fully divested by this grant, and any subsequent proceedings in the interior

department should not and would not toll the statute of limitations. *Saye v. Rudnick,* 91 Minn. 330, 100 N. W. 106; *Southern P. R. Co. v. Whitaker,* 109 Cal. 268.

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.

CARSTEN WRICH, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.*

FILED JUNE 20, 1906. No. 14,233.

Wiese v. Union P. R. Co., ante, p. 40, followed and *held* to control the issues in this case.

APPEAL from the district court for Washington county: EDMUND M. BARTLETT, JUDGE. *Affirmed.*

William G. Clark and *Charles A. Clark & Son,* for appellants.

James H. Van Dusen, contra.

OLDHAM, C.

This is a companion case to *Wiese v. Union P. R. Co., ante,* p. 40, and the two cases were presented together in the oral argument. The two cases were tried together in the district court, and a judgment quieting the title in the plaintiff was rendered in each of them. The facts, so far as they affect the conclusion to be reached, are practically the same. In this case the plaintiff, Carsten Wrich, purchased the land by contract from the Union Pacific Rail-

*Pending on error in the supreme court of the United States.

road Company in 1881, and received his deed in 1890. He took possession immediately after his purchase and has claimed the land as his own ever since. In September, 1893, plaintiff Wrich undertook to make a cash entry of the land in the same manner as his neighbor Wiese did, so that every question involved in the controversy is fully covered in the opinion in *Wiese v. Union P. R. Co., supra.*

For the reasons given in that opinion, 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.

EDMUND JOHNSON, APPELLANT, V. JUDSON CARPENTER, APPELLEE.

FILED JUNE 20, 1906. No. 14,363.

1. **Process**: IMPEACHMENT OF RETURN. Under the provisions of section 370 of the code, affidavits are admissible in evidence to impeach the return of an officer to the service of a summons in proceedings for revivor.
2. ———: ———. The return of an officer to the service of a summons in the original action may be impeached in a proceeding to revive the judgment.

APPEAL from the district court for Butler county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

W. T. Thompson, for appellant.

Matt Miller, contra.

OLDHAM, C.

This was a proceeding to revive, on motion and affidavit, a judgment entered in the county court of Butler county,

Nebraska, in a cause within the jurisdiction of a justice of the peace, in which Judson Carpenter was plaintiff and Ed. Johnson, defendant. The suit was on an open account, and was instituted on the 6th day of November, 1891. Summons was returned on November 13, 1891, showing that it had been served on defendant, "by leaving at his usual place of residence, the within named defendant, a certified copy of this summons and all the indorsements thereon." Defendant failed to appear, and judgment by default was entered against him on November 24, 1891. On July 10, 1900, a motion and affidavit for a conditional order of revivor was filed by the plaintiff in the county court of Butler county, and on this motion and affidavit it was ordered by the court that the judgment be revived unless sufficient cause should be shown by defendant against the revivor. Notice of this proceeding was served on the defendant in Merrick county, Nebraska, by the sheriff of that county, and on the 23d day of August, 1900, defendant appeared specially for the purpose of challenging the jurisdiction of the court, for the reason that the real and true name of the defendant was Edmund Johnson, and not Ed. Johnson, and for the further reason that the county court of Butler county never had any jurisdiction over the defendant to enable it to pronounce any valid judgment against him, because no summons was ever legally served upon the defendant at his usual place of residence, or at any other place. In support of this motion defendant filed affidavits tending to show that he had removed from Butler county, on the 29th of October, 1891, and had established a residence at Beaver Crossing, in Seward county, Nebraska, and was residing there at the time the summons was left at his former place of residence in Butler county. Several affidavits were filed in support of this allegation. Plaintiff filed three counter-affidavits, but none of these went further than to show that the service of summons had been had at the place where defendant resided in Butler county, and there was no traverse of the defendant's allegation that he had sold his place in

Butler county, and had removed with all his household goods to Seward county eight or ten days before the summons was attempted to be served. The county court, however, overruled the objections of the defendant and entered an order reviving the judgment. To reverse this judgment of the county court defendant prosecuted his petition in error to the district court for Butler county, where, on a hearing by the court, the judgment of the county court was affirmed and the petition in error dismissed. To reverse this judgment defendant appeals to this court.

It is conceded that, from the showing made in the affidavits, defendant was not a resident of Butler county at the time the summons was attempted to be served, but the contention is that proof of the failure of service of process can not be made on *ex parte* affidavits. It is not necessary to determine whether or not this objection was waived in the county court by filing counter-affidavits on behalf of the plaintiff, as we think that the provisions of section 370 of the code are sufficient to permit the use of affidavits either in attacking or in supporting the return of an officer on a summons in a proceeding for revivor. This section provides: "An affidavit may be used to verify a pleading, to prove the service of a summons, notice, or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law." In *Walker v. Lutz,* 14 Neb. 274, the return of a sheriff to a summons that he had served it by leaving a copy at the defendant's usual place of residence was attacked by defendant in a motion challenging the jurisdiction of the court. The motion was supported by affidavits and sustained by the district court. The judgment of the district court was affirmed, and the principle announced that "a sheriff's return to a summons that he served it by leaving a copy at the defendant's usual place of residence is not conclusive as to the fact of residence, but the defendant may show that the place where the copy was left was not

at the time his residence." In this case the only evidence offered to challenge the jurisdiction of the court was in the form of affidavits, and it was held sufficient to support the judgment of the trial court. We have also held that, in a revivor proceeding, the defendant may dispute the return of the officer by showing that the original summons was not served at his usual place of abode. *Haynes v. Aultman, Miller & Co.*, 36 Neb. 257; *Encwold v. Olsen*, 39 Neb. 59; *Wittstruck v. Temple*, 58 Neb. 16. It follows from what has been said that the affidavits filed in support of the special appearance were competent evidence as to defendant's place of residence at the time the summons was attempted to be served, and that he was entitled to show in the revivor proceeding the invalidity of the original judgment for want of jurisdiction over the person of the defendant.

We therefore recommend that the judgment of the district court dismissing the petition in error be reversed and the cause be 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.

REVERSED.

DAISY D. MOORE ET AL., APPELLANTS, V. HENRY J. FLACK, APPELLEE.

FILED JUNE 20, 1906. No. 14,378.

1. **Marriage:** EVIDENCE. Evidence examined, and *held* insufficient to show a common law marriage between plaintiff's mother and the deceased.

2. **Bastards:** ACKNOWLEDGMENT OF PATERNITY. A writing to constitute an acknowledgment of paternity within the provisions of section 31, ch. 23, Comp. St. 1903, must be one in which the paternity

is directly, unequivocally and unquestionably acknowledged. *Lind v. Burke*, 56 Neb. 785, followed and approved.

3. ———: ———: EVIDENCE. Evidence of a writing, claimed to have been addressed by the deceased, Robert Moore, to the mother of an illegitimate child and said to contain the words, "Take good care of our boy, and call him Thomas Moore, and I will give him a good start some day," examined, and *held* insufficient to constitute a valid acknowledgment of paternity within the meaning of the statute.

APPEAL from the district court for Kearney county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

James Clay, E. C. Calkins, John Lathrop and *Joel Hull*, for appellants.

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

OLDHAM, C.

On the 18th day of August, 1889, Robert Moore, a former resident of the state of Kentucky, died intestate in Kearney county, Nebraska, seized in fee of a quarter section of land situated in that county. Thereafter J. W. Gilman was duly appointed administrator of the estate, and administration of the estate was finally closed and the administrator discharged in January, 1891. During the progress of the administration the right of heirship to the estate was contested between one John F. Moore, who claimed the estate as a half brother of the deceased, and a minor named Daisy D. Moore, plaintiff herein, who claimed to be the daughter and sole heir of the deceased. The minor claimant was represented in the contest by a guardian *ad litem*, who is her attorney in the present suit. The contest over the heirship was continued from term to term in the county court, and evidence was taken, and the county court found in favor of the alleged half brother and against the claims of Daisy D. Moore. Thereafter the lands in controversy passed by mesne conveyances from John F. Moore to the present defendant, Henry J. Flack,

who purchased them on July 12, 1892, and has since occupied and cultivated the lands as his own. In January, 1903, Daisy D. Moore filed her petition in the district court for Kearney county, alleging ownership of the lands in dispute as the daughter and sole heir at law of Robert Moore, deceased. The petition was subsequently amended and asked, in substance, to set aside the former decree of the county court that declared John F. Moore the sole heir at law of Robert Moore, deceased, alleging that said decree was procured by fraud and perjury, and asking to have all mesne conveyances from John F. Moore to defendant Flack canceled and held for naught, and that the title to the lands in controversy be quieted in her. Another alleged child of Robert Moore, named Thomas Moore, intervened in the suit, and filed a petition in which he alleged that he was the illegitimate son of the deceased, that he had been recognized in writing as such by the deceased in the presence of a competent witness, and that because of such recognition he was entitled to the inheritance as the sole heir at law of Robert Moore, deceased. He further alleged that he was an infant in Kentucky at the time of the proceeding in the probate court of Kearney county, Nebraska, and that he had neither personal nor constructive notice of such proceeding, and that within one year after his arriving at his majority he had intervened in the suit to assert his rights. He also alleged that John F. Moore, to whom the inheritance had been awarded in the county court, was a bastard and not a legitimate half brother of Robert Moore, deceased. Defendant answered each of these petitions, alleging his ownership of the lands by mesne conveyances from John F. Moore, and pleaded the proceeding in the county court as a bar to the claims of both plaintiff and intervener. On issues thus joined there was a trial to the court, and a judgment for the defendant, and the petitions of both plaintiff and intervener were dismissed. To reverse this judgment the plaintiff and the intervener have prosecuted their separate appeals to this court.

We will separately examine the claims of each of the contestants in the light of the evidence revealed in the bill of exceptions. The proof offered in support of the claims of heirship is contained in depositions taken at various places, and from these depositions it appears that Robert Moore, deceased, was born and raised in Rowan county, Kentucky; that he was never married; that his father and mother had each departed this life before his death; that he was the natural father of both plaintiff and intervener, the former by a widow, named Mrs. Steele, and the latter by Miss Omie Oney.

Plaintiff, in support of her claim of heirship, alleged a common law marriage between the deceased and her mother. This claim, however, is wholly unsupported by competent testimony. The evidence of Mrs. Steele, the mother of plaintiff, shows that she never was married to the deceased; that she never claimed to be his wife while she lived with him in Kentucky; that, while he visited her frequently and was the father of her child, yet she makes no claim that they lived together as husband and wife, or that he ever held her out to the world as such. What she does claim is that the deceased promised that he would marry her if she would come to Nebraska with him, and that he would get a minister to perform the ceremony, but that soon after arriving in this state he took sick and died without having any ceremony performed. According to Mrs. Steele's testimony the deceased only lived about ten days after arriving in Nebraska. She further testified that she was drawing a pension as the widow of her former husband (Steele), who was a soldier in the United States army during the rebellion. To our minds this evidence is wholly insufficient to support the claim of a common law marriage between plaintiff's mother and the deceased, and it will therefore be unnecessary to determine whether or not plaintiff is estopped by the judgment of the county court to again assert her right of heirship in the lands of the deceased.

As this disposes of plaintiff's petition, we will now

examine the contention of the intervener and the sufficiency of the testimony offered to support his claim under section 31, ch. 23, Comp. St. 1903, which provides: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child." It appears from the testimony that the deceased had been adjudged the father of the intervener in a bastardy proceeding instituted against him in the county court of Rowan county, Kentucky; and it was the recollection of the county judge presiding at the trial that the deceased had admitted in court that he was the father of the child. But there is no evidence that such admission was made, if at all, in writing. The intervener also introduced the deposition of one Allan Gearheart, who testified that he had resided for many years in Rowan county, Kentucky, and that he had known the deceased, Robert Moore, since 1870; that he last saw him at Farmers, Rowan county, Kentucky, shortly before he went to Nebraska, and he further testified as follows: "(6) The last time you saw Robert Moore, did you or not have any conversation with him relative to Omie Oney's bastard child Thomas? If so, state all the facts fully. A. Yes, sir. We were talking about Omie Oney's bastard child in Farmers, Rowan county, Kentucky, and he (Robert Moore) said he wanted to get the child away from her. He said it was his child. He said he had had the child adopted by her consent and he wanted me to assist him in getting the child away. (7) Did he or not say or do anything else on that occasion in this connection? A. Yes, sir. He wrote her (Omie Oney) a note. (8) Where is that note, if you know? A. I don't know where it is. I gave it to Omie Oney. (9) Do you remember what was in the note, or the substance of what was in it? A. Yes, sir; in part. (10) Do you remember the substance of what was in the note? A. Yes, sir. (11) Please state all that was in the note, or substance of same; what you did with the note. A. It says: 'I am going to leave. I have to leave you. I

bid old Kentucky good bye for a while. I don't just know when I will be back. Take good care of our boy, and call him Thomas Moore, and I will give him a good start some day.' And I gave the note to Omie Oney, and read it for her. She could not read. (12) Is what you have stated all of the substance of what the note contained? A. It is all that I remember. (13) How far was Farmer, Rowan county, Kentucky, from where Omie Oney lived at that time? A. Five miles west. (14) Did Omie Oney at that time live near a postoffice or telegraph station? A. Not nearer that Moorehead, three miles. (15) How often did she (Omie Oney) go to the postoffice? A. I don't know that she ever went. * * * (18) Were you or not very intimate with Robert Moore? A. Yes, sir. We were particular friends. (19) Did you or not ever see Robert Moore with Thomas Moore? If so, state the facts relative thereto. A. Yes, sir, I have seen him with the child and nursing the child. After Omie Oney moved on my place, Robert Moore would come over and stay two days at a time with the child, staying at my house at night."

Witness on cross-examination said that the letter was written and signed in his presence. He also testified that he knew that Omie Oney could neither read nor write and that was the reason that he read her the note. He said there were other things in the note, but not very many, and that he had not thought of the note during the 16 years intervening between the day he read it and the day he gave his deposition. Omie Oney testified that she could neither read nor write, but that she remembered the contents of the note, just as stated by Gearheart, and that she put the note away in a paper box with some other papers, and that it was lost, and she was unable to find it. It is clear that the evidence with reference to the bastardy proceeding is wholly insufficient to show an acknowledgment within the provisions of section 31, *supra*. So the only question is as to the sufficiency of the testimony of Gearheart and Omie Oney to establish an acknowledg-

ment, in writing, by the deceased of the paternity of the intervener. There are many facts and circumstances surrounding this alleged writing which are, in themselves, neither satisfactory nor clearly convincing either as to the exact contents of the writing or as to the probability of its ever having been executed. While it is true that the witness of the instrument is unimpeached, and the mere fact that he testified by deposition should not, and does not, in any manner impair the credibility of his testimony, yet the circumstances surrounding the writing sought to be proved are of such a nature as to demand that proof of the contents of the note, as alleged, should be very carefully scrutinized. At the time the communication is alleged to have been written, intervener's mother was living on a place owned by the witness Gearheart, and both the witness and the deceased knew that she was wholly illiterate, and it is hard to conceive what object deceased would have had in sending Gearheart with a written message to read to her when he might as well have communicated with her orally.

But, passing from the dubious circumstances surrounding the proof of the writing to its contents, the question arises: Is it a sufficient recognition to create an heirship within the meaning of section 31, *supra?* The material portion of this note as testified to is: "Take good care of our boy, and call him Thomas Moore, and I will give him a good start some day." In *Lind v. Burke,* 56 Neb. 785, the sufficiency of an acknowledgment of paternity under this section of the statute was examined into, and, while the question as to whether the instrument must have been acknowledged with the intent to create a right of heirship was not determined, yet it was there said:

"We are satisfied that a writing, to fulfil the requirement of the law * * * must be at least one in which the paternity is directly, unequivocally, and unquestionably acknowledged." It is further said in the opinion: "It must not be forgotten in this examination that it is not because the person can be shown to be the offspring, or is

in fact the illegitimate child, that it may assert heirship, but because it has been in writing acknowledged; and hence the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity."

Under the rule here announced, the writing relied on is clearly insufficient. The reference to intervener as "our boy" in the note is not a clear and unequivocal acknowledgment of the paternity of the boy. Nor is the request that the child be named Thomas Moore equivalent to an acknowledgment that Robert Moore was the natural father of the child. Nor is the promise that "I will give him a good start some day" inconsistent with any other theory than that the writer of the note was the father of the child. In the later case of *Thomas v. Estate of Thomas,* 64 Neb. 581, it was decided that it was immaterial whether or not the writing was made with the intent to constitute an heirship, but the rule of strict construction of writings of this nature, when made, as announced in *Lind v. Burke, supra,* was not modified.

We are therefore of opinion that the evidence offered by the intervener is insufficient to establish his claim of heirship, and 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.

ORRELIOUS A. HERING, APPELLEE, V. EMMA SIMON, APPELLANT.

FILED JUNE 20, 1906. No. 14,395.

1. **Costs.** Attorney's fees cannot be taxed as costs against the successful litigant in an action at law or in equity.

2. ———. In an action in equity the trial court has a sound discretion in taxing the costs of the action to the different litigants, but this discretion is subject to review when unreasonably or arbitrarily exercised.

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

Kirkpatrick & Hager, for appellant.

George A. Adams and *George W. Berge, contra.*

OLDHAM, C.

This was an action for the specific performance of a contract for the sale of real estate. Issues were joined on the petition of plaintiff Hering and the separate answer of defendant Emma Simon. The general finding of the trial court was, in substance, that the facts adduced in evidence did not warrant a specific enforcement of the contract, but that they did warrant its annulment and cancelation, and a decree was entered annulling and canceling the contract. After this decree, the court made the following additional finding: "That the defendant, Emma Simon, is not entirely without fault in the premises; that while in the discretion of the court the said contract should not be ordered to be specifically performed, the said defendant, Emma Simon, ought to pay the costs of this litigation and reasonable attorney's fees of the plaintiff in the sum of $200; that the plaintiff is entitled to judgment against her in that amount." This finding was followed by an order and judgment awarding a recovery by plaintiff from defendant in the sum of $200 for attorney's fees and the

costs of the action. From this judgment for costs and attorney's fees defendant has appealed to this court.

There is no complaint as to the general judgment and decree, and the appellee has not seen fit to favor us with a brief in support of the finding and judgment in favor of plaintiff for attorney's fees and costs. We have examined the evidence contained in the record and are satisfied that the decree refusing specific performance and canceling the contract is supported by the testimony; but the rule in this jurisdiction against taxing attorney's fees as costs in a legal or equitable action, unless provided for by statute, is too well established to require the citation of authorities, and there is no statute which in any case permits the taxing of attorney's fees against the successful litigant. While in equity cases the court has a sound discretion in taxing the costs of the litigation, yet this discretion, when arbitrarily or unreasonably exercised, is subject to review. From our examination of the record in this case, we are of opinion that it is unjust and inequitable to tax the entire costs of the trial of the cause against the defendant, but we think it both just and equitable that each of the litigants should pay his own costs.

We therefore recommend that the judgment of the district court, in so far as it awards plaintiff a recovery of attorney's fees and the entire costs of the action, be reversed and the cause remanded, with directions to enter a judgment against each party for his own costs.

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, in so far as it awards a recovery of attorney's fees and the entire costs of the action, be reversed and the cause be remanded, with directions to enter a judgment against each party for his own costs.

JUDGMENT ACCORDINGLY.

ELLA GREGORY ET AL., APPELLEES, V. VILLAGE OF FRANKLIN, APPELLANT.

FILED JUNE 20, 1906. No. 14,403.

Cities: DETACHING TERRITORY: REVIEW. A judgment of the district court in a proceeding under the statute, section 101, art. I, ch. 14, Comp. St. 1903, to detach territory from a municipal corporation, will not be impeached upon appeal in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of fact or of law. *Michaelson v. Village of Tilden*, 72 Neb. 744, followed and approved.

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

H. Whitmore, for appellant.

Albert R. Peck and *H. W. Short, contra.*

OLDHAM, C.

On the 23d day of January, 1905, the plaintiffs in the court below filed their petition under the provisions of section 101, art. I, ch. 14, Comp. St. 1903, asking that their respective pieces of land, therein described, be detached from the village of Franklin, in Franklin county, Nebraska, alleging as reasons therefor that "the said lands and all of the same are used for agricultural and farming purposes only and are not benefited by such incorporation in any manner; that they nor any of said described tracts are used for village purposes; that they are not properly subject to being included in said corporate limits of said village of Franklin, and your petitioners and applicants are a majority of the legal voters, and the only owners and occupants of any and all of said tracts of land; and, further, your petitioners and applicants allege the facts to be that said tracts, nor any of them, have ever been surveyed or platted into blocks or lots for town or village purposes; but that, while not legally subject to such, the said tracts,

and each and every of them, have been listed and assessed with village taxes for each and every year since the incorporation of said village of Franklin." The village, for answer to this petition, alleged that it was duly incorporated in July, 1883; that all the pieces of land described in plaintiff's petition were included within the legal limits of said village at the time of its incorporation; that the village has ever since that time exercised corporate powers over such lands; and that at the time of the incorporation of said village its population was only 290, but that its population had increased until it now contained more than 900 inhabitants; that none of the plaintiffs, except the Franklin County Agricultural Society, owned any of the land described in their petition at the time of the incorporation of the village, but that each and all of them severally became owners of said land a long time afterwards with full knowledge that the same were included within the corporate limits of the village. It further alleged that the land owned by the agricultural society has never been assessed for village purposes; that the land of plaintiff Gettle contains 40 acres, and has a residence and a flouring mill thereon, and immediately joins the platted part of the village; and that the land of plaintiff Rose contains 40 acres, and corners with the platted part of the village, and has located thereon a residence and also a park, which is used for public assemblages, camp meetings, dances, etc.; and that the remainder of the lands are used for agricultural purposes. The answer further alleged that all the land described in the petition is suburban in character and is adaptable to being cut up into residence lots containing a few acres, but admits that none of the land has been platted and that, except as above stated, it is used for agricultural purposes. There was a reply to this answer in which all the facts pleaded, except the adaptability of the land for suburban residences, were admitted. Plaintiffs thereupon filed a motion for judgment on the pleadings. According to the record, the court took the case under advisement until the succeeding term, when he

entered judgment as prayed for in plaintiffs' petition. There is no bill of exceptions containing any evidence offered in the proceeding, and, as there was no issue of fact, except as to the adaptability of the land for suburban residences if surveyed in small tracts, it is probable, although the judgment does not so recite, that the case was determined on the pleadings alone.

Section 101, *supra,* is a provision for disconnecting territory from cities and villages, which is rather administrative than judicial in its nature. It makes a provision by which a majority of the legal voters residing on any territory within and adjacent to the corporate limits of any city or village, if they desire to have the same disconnected therefrom, may file their petition in the district court of the county in which the city or village is situated, praying to have such territory disconnected, and that on the filing of such petition a notice shall be served on the village within ten days, and if on the receipt of the notice the village or city, by a majority vote of all members elected to the common council or board of trustees, consent that such territory be disconnected, the court then shall enter a decree disconnecting the territory, without cost to the village. It further provides that, if the village desires to contest the severance of the territory, it shall file its answer within 30 days after service of a copy of the petition, and that issue shall thereupon be joined and the cause shall be tried by the court as a suit in equity. The act also provides for a review of the judgment of the district court either on appeal or by error proceedings. In construing proceedings under this section of the statute, we held, in the recent case of *Michaelson v. Village of Tilden,* 72 Neb. 744:

"A judgment of the district court in a proceeding under the statute, section 101, art. I, ch. 14, Comp. St. 1903, to detach territory from a municipal corporation, will not be impeached upon appeal in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of fact or of law."

There is certainly nothing before us in this record that shows either a mistake of law or fact by the trial judge. The right to have unplatted farm lands disconnected from the corporate limits of cities and villages has been asserted by this court in actions entirely independent of this section of the statute. See *Village of Osmond v. Smathers,* 62 Neb. 509, and *State v. Dimond,* 44 Neb. 154. The answer of the village does not allege that the village was in debt at the time the application for severance was made, or that public money had been expended in grading and improving the streets and sidewalks of the village along the lands owned by the plaintiffs, nor was there any allegation that improvement bonds of any nature had been voted upon the city by the acquiesence of the owners of the property sought to be relieved from corporate taxation. In fact, there is nothing in the answer of the village which interposes an equitable objection to the prayer of the petition.

We are therefore of opinion that the judgment of the district court should be affirmed, which we accordingly recommend.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

BENJAMIN F. MOORE, APPELLEE, V. ROBERT F. NEECE ET AL., APPELLEES; FRED W. CLARKE, APPELLANT.

FILED JUNE 20, 1906. No. 14,423.

Judicial Sales: APPRAISEMENT. Where lands constituting one body are used as a single tract, ordinarily they may for judicial sale be appraised together. *Smith Bros. Loan & Trust Co. v. Weiss,* 56 Neb. 210, followed and approved.

APPEAL from the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Albert W. Crites, for appellant.

W. H. Fanning and *Allen G. Fisher, contra.*

OLDHAM, C.

This is an appeal from an order of confirmation of a sale in a mortgage foreclosure proceeding. Two objections are urged in the brief of the appellant. The first is that the appraisers did not actually view the land appraised. The only evidence filed in support of this allegation was the affidavit of the foreman of the mortgaged ranch, who testified that he did not see the appraisers on the ranch on the day of the appraisement, and that he thought that if they had been there he should have seen them. This evidence is wholly insufficient to impeach the return of the appraisement, which shows that it was made on actual view of the premises.

The next objection urged is that the mortgaged premises were not sold in separate tracts of 40, 80 or 160 acres each, after application had been made to the sheriff by the owner of the equity of redemption to so sell the mortgaged property. The evidence offered on this objection showed that the entire tract of land covered by the mortgage contained about 2,080 acres, was a cattle ranch situated in Sioux county, Nebraska, composed of contiguous tracts of land forming one ranch, and that it had been inclosed and buildings erected upon it in the year 1886 by the Bartlett Richards Cattle Company; that it had been several times transferred as a single property, and was known as the "Lower 33 Ranch" on Running Water river; that the value of the property depended on its use as a whole for feeding and raising cattle, and that to subdivide it into quarter sections would tend to destroy its value as a ranch. Under this showing the rule announced in the early case of *Laughlin v. Schuyler,* 1 Neb. 409, requiring separate and independent tracts of land covered by a mortgage to be sold separately, has no application. But the facts in the

case bring it within the rule announced in *Smith Bros. Loan & Trust Co. v. Weiss,* 56 Neb. 210, wherein it was said: "Where lands constituting one body are used as a single tract, ordinarily they may, for judicial sale, be appraised together."

We therefore conclude that the learned trial court was justified in overruling the objections to the confirmation of the sale, and 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.

WILLIAM STANSBURY V. M. S. STORER ET AL.

FILED JUNE 20, 1906. No. 14,190.

Petition: DEMURRER. A petition alleging the making of a verbal building contract and partial performance thereof by the plaintiff, and claiming damages on account of defendant's failure to perform the same, is not subject to demurrer because it fails to allege the time within which the contract was to be performed.

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

Cole & Brown, for plaintiff in error.

S. A. Searle, contra.

EPPERSON, C.

The defendants in error as plaintiffs sued the plaintiff in error as defendant in the district court for Nuckolls county upon two causes of action. Plaintiffs alleged that they had entered into a contract with the defendant whereby the plaintiffs, as builders, were to furnish mate-

rial for and construct a building for defendant; that pursuant to the provisions of the contract they began the construction of the building, furnished labor, and also furnished material which was subsequently appropriated by the defendant. Plaintiffs under their first cause of action claimed damages for the value of the material appropriated by defendant, the labor employed upon the building, and the loss of profits occasioned by the defendant's failure to comply with the contract. For a second cause of action the plaintiffs alleged that an injunction suit was instituted by the defendant against the plaintiffs to restrain the plaintiffs from proceeding with the construction of the building; that an injunction bond was given in such proceeding upon the issuance of a temporary restraining order; that such temporary order was subsequently dissolved; that the plaintiffs were damaged to the extent of $400 on account of expenses incurred in resisting the injunction, for which they allege the defendant is liable on the bond. In answer to the first cause of action defendant denied the making of the contract; denied that plaintiffs furnished material or did any work under the terms of such contract; and, in answer to the second cause of action, admitted the institution of an injunction suit; alleged that it was undetermined, that at the time of the filing of such answer it was pending in this court, and that no action had accrued in favor of the plaintiffs against the defendant by reason thereof. A trial was had to a jury, which found due the plaintiffs on their first cause of action $483.55, and upon the second cause of action $250, a total of $733.55, for which amount a judgment was rendered in favor of plaintiffs. The defendant alleges many errors of the trial court and seeks a reversal of the judgment.

By instruction No. 8 the court charged the jury, in substance, that the measure of plaintiffs' damages on account of the materials furnished and work done was the loss of profits which they would have made in carrying out the contract, that is, $1,158 agreed compensation less the amount it would have cost them to furnish the labor and

material for its performance. Defendant alleges error in the giving of this instruction for the reason that it assumes that the contract was made, which, being denied, was a question for the jury to determine. The sum of $1,158 was the contract price alleged by plaintiffs and denied by defendant. However, considering this instruction with others given by the court, the jury were clearly and properly charged in effect that, before they could find for the plaintiffs, they must find that the contract alleged by them had been made, and that, in case they should so find, then they should measure the damages according to the rule laid down in instruction No. 8. This assignment of error, therefore, is without merit.

The court gave instruction No. 3, requested by the plaintiffs, which contained the following: "The jury are further instructed that, in case you find from the evidence that the plaintiffs and defendant entered into the contract for the construction of the building referred to, and that the defendant prevented the plaintiffs from performing the same without fault on the plaintiffs' part, the plaintiffs are entitled to recover, under their first cause of action, the value of the labor and materials used and appropriated by the defendant as measured by the contract price, as you shall find the same from the evidence." The defendant overlooks the first few lines of this instruction, and complains of that part beginning: "Plaintiffs are entitled to recover," claiming that in substance the court said to the jury: "That there is a contract; that there is an agreed contract price; that the plaintiffs herein appropriated materials and labor." This contention, if we understand it, is wholly without merit.

Similar objections are made to instructions Nos. 4 and 5, relative to the items subject to recovery and the date of the contract; such instructions to govern in the event that the jury found that the contract was in fact made. An instruction given by the trial court, or a part thereof, should not be isolated from other instructions or other parts of the same instruction, but all should be read

together, and if, as a whole, the law applicable to the facts and the pleadings is fully and properly given, as they were in this case, no reversible error is committed by the court.

Defendant contends that the court erred in overruling a demurrer to the petition, claiming that there is a misjoinder of causes of action, and that the petition does not state facts sufficient to constitute a cause of action. Plaintiffs failed to allege the time within which the contract was to be performed. The omission of such an allegation did not render the petition demurrable. The two causes of action were connected with the same subject matter, and therefore the petition was not subject to demurrer for misjoinder.

After the issues had been formed and the case ready for trial, the defendant filed a motion for leave to amend his answer by alleging that in January, 1900, and while the injunction suit above referred to was pending, and while there was also pending another suit between the same parties relating to an entirely different matter, the parties hereto settled their differences. The court overruled this motion. The settlement which defendant sought to plead by the proposed amendment was made in January, 1900, almost five years before the amendment was offered. There was no abuse of discretion in the refusal of the trial court to permit the amendment to be made.

To defeat the second cause of action, the defendant relied upon the fact that a supersedeas had been had of a judgment entered *nunc pro tunc,* dismissing the injunction suit in which the bond sued on had been given. No competent evidence was introduced showing that the proper bond had been filed. Defendant now contends that, as the petition failed to allege the termination of the injunction suit, evidence that the judgment therein had been superseded was not required. An examination of the pleadings discloses that the facts relative to the injunction suit were made an issue by the answer and reply. Possibly, however, the burden was upon the plaintiffs to show that their second cause of action had accrued. It is unneces-

sary to decide this proposition for the reason that the evidence introduced by defendant, including the opinions of this court in *Stansbury v. Storer & Ellis,* 70 Neb. 603, and *Stansbury v. Storer & Ellis,* 3 Neb. (Unof.) 100, proves that the injunction suit was in fact finally determined in 1899. This suit was instituted in 1903. The court instructed the jury as a matter of law that the injunction suit had terminated at the time this suit was instituted. Under the evidence, the instruction was proper.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

JAMES C. BRINKWORTH ET AL., APPELLANTS, V. EMANUEL SHEMBECK, APPELLEE.

FILED JUNE 20, 1906. No. 14,356.

Liquor License: BURDEN OF PROOF. The burden of proof is upon an applicant for liquor license to prove that he is a man of respectable character and standing, when by remonstrance such fact is denied.

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

E. O. Kretsinger, for appellants.

Rinaker & Bibb and *Hazlett & Jack, contra.*

EPPERSON, C.

A petition signed by 34 persons was presented to the city council of the city of Beatrice, praying that a license be

granted to one Shembeck to sell malt, spirituous and vinous liquors in the Second ward of said city. It was stated in the petition that the petitioners were resident freeholders of said ward; that said Shembeck is a man of respectable character and standing, and a resident of the state of Nebraska; and it was prayed that a license be granted to him. The city council granted the license as prayed. On appeal to the district court, the order of the council was affirmed, and remonstrants bring the case to this court for review. Many assignments of error are argued in the brief of counsel, but, as we view the case, it is only necessary to consider the one which challenges the sufficiency of the evidence to support this petition.

Our statute provides for the granting of a license upon the application by petition of a majority (or 30) of the resident freeholders of the precinct where the sale of such liquor is proposed to take place, setting forth, among other things, that the applicant is a man of respectable character and standing, and praying that license shall be granted to him. In the case at bar no evidence was introduced to show that applicant was a man of respectable character and standing, or that he was a resident of the state. These allegations of the petition were specifically denied by remonstrants, and the applicant's character and standing were assailed by an allegation that he was a common and habitual drunkard. The question presented for decision is whether under these allegations it devolved upon the applicant to prove that he is a man of respectable character and standing. This court said in *In re Tierney*, 71 Neb. 704: "The licensing board has no right to grant a license until it has made satisfactorily to appear that the person to whom the license is to be granted, and who is to run the saloon, is a man of respectable character and standing, and that he is a resident of the state." See also *In re Krug*, 72 Neb. 576.

In 11 Am. & Eng. Ency. Law (1st ed.), p. 661, it is said: "Where the statute requires that every applicant for a liquor license shall be a 'fit person to be intrusted with the

sale of intoxicating liquors,' on application being made to obtain a license to retail liquors, and a remonstrance filed thereto on account of the alleged immorality and unfitness of the applicant, the burden is upon such applicant to prove his innocence." See also *Goodwin v. Smith*, 72 Ind. 113, 37 Am. Rep. 144; Black, Intoxicating Liquors, sec. 162. The record in the present case does not disclose that the board passed upon the character and standing of the applicant. The law requires the applicant to allege that he was of respectable character and standing, and the burden of proving this allegation by a preponderance of the evidence was upon him. There is a total failure of proof upon this point.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to cancel the license and dismiss the petition.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to cancel the license and dismiss the petition.

REVERSED.

PETER J. POELS ET AL., APPELLANTS, V. CHARLES B. WILSON, APPELLEE.

FILED JUNE 20, 1906. No. 14,385.

Verdict: REVIEW. When the amount of damages awarded by a jury cannot be ascertained from the facts proved, the verdict should be set aside.

APPEAL from the district court for Seward county: ARTHUR J. EVANS, JUDGE. *Reversed.*

McGilton, Gaines & Storey and *M. D. Carey,* for appellants.

C. H. Aldrich and *Norval Bros., contra.*

EPPERSON, C.

In June, 1903, the defendant shipped to London 223 head of fat cattle. Through arrangements with plaintiff's agent in New York, the cattle were consigned to the plaintiff, a commission firm engaged in London in selling cattle and other animals for slaughter. At New York the plaintiff advanced $82.62 a head, making a total of $18,424.26. At London one of the cattle was crippled in unloading. It was slaughtered and marketed as dressed beef by the plaintiff. The other cattle were sold by plaintiff in the Deptford market. The total proceeds, after deducting plaintiff's commission and expenses, amounted to $386.22 less than the sum advanced to defendant by the New York agent. After the sale of the cattle the defendant, who accompanied them to London, requiring a sum of money to pay the expenses of his return trip, received $252.72 from the plaintiff. The plaintiff instituted this action to recover the said sums of $386.22 and $252.72. The plaintiff alleged that the $252.72 advanced to the defendant was a loan. Defendant contends that prior to the sale he instructed the plaintiff to sell the cattle by dressed weight; that plaintiff disregarded these instructions and sold the cattle as live weight; that by reason thereof the defendant was damaged in the sum of $3,825, which he sets up as a counter-claim, and for which he asks judgment against the plaintiff. A trial was had in the district court for Seward county, which resulted in a verdict and judgment for defendant in the sum of $692.58. The plaintiff prosecutes error to this court, and contends that the verdict is not supported by the evidence.

Plaintiff argues that the verdict is not supported by the evidence for the reason that no proof was adduced to

show the measure of damages. The evidence shows the weight of the cattle at the time of shipment from Nebraska, and testimony was introduced to prove the difference between the weight on foot and dressed weight. From all of this the defendant computes the number of pounds which his cattle would have weighed dressed, and asks the jury to allow him 12 cents a pound therefor. The only evidence in the record which tends to show the value of dressed beef in London was the testimony of the defendant and some of his witnesses to the effect that Mr. Poels, plaintiff's manager and member of the firm, told them on the day of the sale that the best dressed beef was worth 12 cents a pound, and, further, that the offal was worth $15 a head. This evidence is not very satisfactory. There is no claim of fraud. The parties were not negotiating for the sale and purchase of the cattle. Their relationship was that of principal and agent. Each was interested in securing the highest price. The statements of plaintiff's manager were admitted in evidence for the purpose of proving market prices. The competency of such evidence is very doubtful, but unnecessary for us to determine, as the verdict must be set aside for the failure of other necessary proof. Nowhere does it appear what would have been the cost of slaughtering and dressing the cattle. There is considerable evidence tending to show the relative value of the isolated crippled steer and the other cattle, and to the effect generally that the isolated steer was worth $25 less than the others. Plaintiff accounted to defendant for the crippled steer in the sum of $89.16. Defendant's evidence shows that this particular steer was inferior to at least 140 head of the cattle sold on foot. In the account returned by plaintiff to defendant, no charge was made for slaughtering and marketing this steer, and defendant contends that the sum received for this one animal was a sufficient guide for the jury in measuring the damages. Such a conclusion, however, can be drawn only by an unreasonable inference. While it appears from the account rendered to the defendant that $89.16 was the net

proceeds of the crippled steer, yet, when we consider that that was only a small part of a very large transaction between the parties wherein numerous items of expense were charged, we cannot conclude that all of the 223 head of cattle could have been disposed of and a return made to the defendant herein at that rate. There may have been gratuitous services rendered, or expenses paid by plaintiff without specific charge therefor. We conclude that there was not sufficient proof as to the measure of damages, and that the verdict should not be sustained.

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

AMES and OLDHAM, CC., concur.

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

REVERSED.

WILLIAM C. REED, APPELLEE, V. PERRY R. BURRELL ET AL., APPELLANTS.

FILED JUNE 20, 1906. No. 14,398.

Government Monuments: EVIDENCE. When a government monument, being the corner between two adjoining landowners, has been obliterated, its location may be proved by testimony of witnesses acquainted therewith.

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

Starr & Reeder, for appellants.

W. S. Morlan, C. H. Tanner and *L. M. Graham, contra.*

EPPERSON, C.

This is an action in ejectment. The land in controversy is a tract of about two acres, which plaintiff claims is a part of the southeast quarter of the northeast quarter of section 28, town 7, range 27, Frontier county, to which he holds a deed. Two questions of fact were at issue: (1) Was the land a part of the southeast quarter of the northeast quarter above referred to? (2) If so, had defendant acquired title thereto by adverse possession? The verdict and judgment were for the plaintiff, and the defendant appeals to this court.

1. The land is a narrow strip bounded on the north by the channel of Medicine creek, which defendant contends is the boundary line. Plaintiff offered in evidence a plat of the premises, which was admitted over objection. The plat showed certain distances not measured by the witness who made the plat, but, as to the controlling fact, that is, the location and dimensions of the tract involved, the map was shown by several witnesses to be substantially correct, and as to the defense of adverse possession the admission of the plat was not prejudicial.

2. Several witnesses testified as to the location of the boundary line as shown by the corner monument established by the federal government. One witness, who formerly owned plaintiff's land, testified that he had perpetuated the government monument, first by a cedar post, and later by a gas pipe, the original mark being about to be obliterated on account of the construction of a public highway. All of the above evidence was objected to by defendant, who now alleges error in the admission thereof. It is of general knowledge that the government surveys are often irregular, and that the quarter section monuments do not in all instances indicate a point midway between the section corners. In case of a dispute as to the location of a division line, the government monument controls, and, where it has become obliterated, its former location may be established as any other fact in issue.

This court had similar evidence under consideration in the case of *Kittell v. Jenssen,* 37 Neb. 685, in which it is said: "Where a government corner between two adjoining landowners has been obliterated, the exact location of the corner may be determined by the jury from the evidence in an action of ejectment." The evidence complained of was properly admitted, and, with other evidence, established the fact that the land in controversy was a part of the southeast quarter of the northeast quarter of section 27 aforesaid.

3. The defendant entered upon the southeast quarter of said section in March, 1889, and contends that at that time he took possession of the land in controversy, and since then has been in the open, notorious, exclusive, adverse possession thereof, and introduced evidence tending to support this contention. We consider it unnecessary to review the evidence in detail. The land involved was not under cultivation. It was inclosed with defendant's land, and, being on the banks of the creek, was used by the defendant as a watering place for his cattle. A gate was established on the section line at the east end, which does not appear to have been necessary for the use of the defendant. Plaintiff passed over the land in going to and from his fields lying west thereof. Plaintiff testified that, as the land was not under tillage, he suffered the defendant to use the same as a place for watering cattle. One witness, who owned plaintiff's land in 1899, testified that at that time he had a conversation with the defendant in which witness spoke of the boundary line as being where plaintiff now contends that it is; that defendant then recognized such as true, and that witness verbally gave to defendant the privilege of using the land. This testimony is not denied by the defendant. The evidence presented a question of fact for the jury to determine, and we do not feel warranted in interfering with the verdict.

4. Many other assignments of error are argued relating to the instructions of the trial court and the admission of

evidence. We have examined all of these assignments and fail to find prejudicial error.

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.

LINCOLN TOWNSHIP, APPELLANT, V. KANSAS CITY & OMAHA RAILROAD COMPANY ET AL., APPELLEES.

FILED JUNE 20, 1906. No. 14,377.

1. **Railroads: FORECLOSURE SALE: LIABILITY OF PURCHASER.** A railroad corporation which succeeds to the property and rights of another railroad corporation through the medium of a sale upon a decree of foreclosure, or other judicial sale, is not answerable for the general debts of the corporation whose property and franchises are thus acquired.
2. **Parties.** The right of a township in this state to maintain an action to recover the value of bonds voted by the electors of the township to aid in the construction of a railroad doubted.

APPEAL from the district court for Kearney county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Joel Hull and *E. C. Calkins,* for appellant.

J. W. Deweese and *J. L. McPheely, contra.*

DUFFIE, C.

The plaintiff and appellant is one of the organized townships of Kearney county, Nebraska. Its petition filed in the district court in this case is very voluminous, but the material facts may be briefly stated as follows: In the year 1887 the Burlington & Missouri River Railroad Com-

pany, which then was and still is a part of the Chicago, Burlington & Quincy system, owned and operated all the railroads in Kearney county. About this time the defendant, the Kansas City & Omaha Railroad Company, was organized and projected a line from Fairfield in Clay county to Alma in Harlan county. It solicited aid from the people of Lincoln township and, as an inducement to voting bonds, represented to the electors of the township that the road would be operated in close traffic connection with the St. Joseph & Grand Island Railroad, and with the Union Pacific Railroad and the various other lines known as the Union Pacific system; that it would give the people of the township the advantage of a competitive road, and increase their facilities for reaching competitive markets and the interchange of business with the various towns and cities reached by the roads of the Union Pacific system. Acting upon these inducements the electors of the township on March 26, 1887, voted aid to the extent of $23,500. The road was constructed, the aid bonds delivered to the company, and the road operated according to the representations made until about June 1, 1902. It is further alleged that the Kansas City & Omaha Rail-Road Company had issued bonds and secured them by a mortgage upon its road and franchises, and that the mortgage was foreclosed in the United States circuit court for the district of Nebraska in 1896, and the road and its franchises sold to the Kansas City & Omaha Railway Company; that said new company took possession about September, 1896, and continued to operate the same in traffic connection with the Union Pacific and Grand Island systems, and in competition with the Chicago, Burlington & Quincy system, until July 1, 1902; that on that date the Kansas City & Omaha Railway Company ceased to operate the road and surrendered it to the Burlington & Missouri River Railroad Company, which road has ever since operated the same as a part of the Chicago, Burlington & Quincy system. It is further alleged in the petition that the circuit court of the United States, in its

decree foreclosing the mortgage made by the Kansas City & Omaha Railroad Company, expressly reserved to said court the right to retake and resell all said property, rights and franchises in satisfaction of any judgment which might thereafter be found against said Kansas City & Omaha Railroad Company upon any liability then existing against said company. Upon the theory that the representations made by the agents of the Kansas City & Omaha Railroad Company to secure the voting of bonds in aid of its construction constitute a contract between the company and the township and its electors, and that said contract has been breached by the failure of that company and its successors in the ownership of the road to operate the same in connection with the Union Pacific and Grand Island systems, and in competition with the Chicago, Burlington & Quincy system, this action was brought to recover the value of the bonds donated to said road. A demurrer to this petition was overruled, after which the defendants answered, and a trial resulted in a judgment for the defendants which we are asked to review.

It is true that in *Wullenwaber v. Dunigan,* 30 Neb. 877, and in *Nash v. Baker,* 37 Neb. 713, an action was maintained by a taxpayer to enjoin the issue of bonds voted in aid of a railroad company, upon the ground that false and fraudulent representations had been made by the company through its officers and agents by which the electors were induced to cast an affirmative vote upon the proposition. But in these cases the one whose property was to be affected, whose rights were endangered, was the plaintiff in the action. After a somewhat extended examination, we have failed to find any case which is a precedent for the one under consideration. The cases cited and relied upon by this court in its opinion in *Wullenwaber v. Dunigan, supra,* are all cases where the interposition of the court was sought to protect a plaintiff against the enforcement of a right claimed by the defendant, but grounded upon fraudulent acts of the railroad company or those of its agents. *Curry v. Supervisors of Decatur County,* 61

Ia. 71, 15 N. W. 602, and *Sinnett v. Moles,* 38 Ia. 25, were cases to enjoin the collection of a tax voted in aid of a railroad company, the electors being induced to this course by false and fraudulent representations made by the company through its agents. *Wickham v. Grant,* 28 Kan. 517, and *Melendy v. Keen,* 89 Ill. 395, were actions upon obligations given by the defendants to aid a railroad company in the construction of its line. The defendants pleaded that the obligations were obtained from them through false and fraudulent representations made by the agents of the company, and this defense was held good. *Sandford v. Handy,* 23 Wend. (N. Y.) 260; *Vreeland v. New Jersey Stone Co.,* 25 N. J. Eq. 140, and *Davis & Co. v. Dumont,* 37 Ia. 47, hold that subscriptions to the stock of a corporation, if procured by fraud, will be set aside. *Burhop v. City of Milwaukee,* 18 Wis. 453, holds that a court of equity may relieve the cloud of a mortgage given a railroad company to secure a note executed as a stock subscription to the corporation when fraudulently obtained. And *McClellan v. Scott,* 24 Wis. 81, holds that fraudulent representations made by a railroad company relating to its pecuniary condition are a ground for avoiding a contract of sale of land obtained thereby. None of these cases is authority in support of the claim of the plaintiff in this action. In each of them the action was brought or the defense maintained by the party directly interested and who would have been damaged by the enforcement of the contract. Another feature of these cases which does not obtain here was that fraud was the ground of the action. In this case no charge of fraud is made. From 1887 to 1896 the original company to which this aid was voted operated its road, and performed every condition upon which the aid was obtained and every representation made to the electors. Through no fault of its own and because of its inability to pay its just obligations, its property was sold under a decree of the United States circuit court and passed to another corporation, which operated the road from 1896 to 1902, apparently to the full satisfaction of everyone concerned. No

charge of fraud is made in the foreclosure proceedings nor in the organization of the new company which bought in the property, nor is there any circumstance connected with these transactions giving rise to even a suspicion of fraud. The defendants, then, are liable, if at all, not because of any fraud perpetrated, but for breach of contract, and it is familiar law that claims for breach of contract cannot be awarded priority over the bondholders of a railroad company, nor do they become an enforceable claim against a corporation which succeeds to another on foreclosure proceedings. In *Austin v. Tecumseh Nat. Bank,* 49 Neb. 412, this court said:

"In order to render a newly organized corporation liable at common law 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, 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 a note in the above case found in 59 Am. St. Rep. 543, 558, numerous cases are cited in support of the rule that a railroad corporation which succeeds to the property and rights of another railroad corporation through the medium of a sale upon a decree of foreclosure, or other judicial sale, is not answerable for the general debts of a corporation whose property and franchises are acquired.

It is claimed by the appellant that the state, in granting a franchise to the Omaha & Kansas City Railroad Company, extended the privilege which its charter conferred, upon the condition that the company, on its part, should faithfully perform all the public functions required of it by law, and that this required it to operate its road in competition with that of the Chicago, Burlington & Quincy Railway Company. Conceding this to be true, it is evident that an action for damages for breach of contract is

not an appropriate action to enforce such duty, and that the payment of damages would not tend in the least to that end.

There are other considerations which lead us to believe that the judgment of the district court should be affirmed. While the question was not argued, it is one of first impression that the plaintiff cannot sustain the action. It has not been damaged in its corporate capacity, or in any other way, so far as we can see from any matter alleged in the petition or offered in evidence. What interest has it in the alleged contract which entitles it to damages for a breach? It is true that the bonds were issued in the name of Lincoln township, but the electors of the township voted the bonds and the property owners have paid the same. What will be done with any money recovered by the plaintiff? To the credit of what fund will it be placed? Will the township itself become the absolute owner or will it be distributed among those from whom it was collected? Under what authority does the township prosecute this action for the taxpayers, the real parties in interest? What authority has it to distribute the fund and to whom shall distribution be made? Are the present owners of the land, who probably bought and fixed the price in contemplation of this tax, to receive it, or such portion of it as they have paid, or does the whole amount assessed against any particular tract belong to the owner at the time the aid was voted? Under what statute is it made the duty of the township to bring this action, or where, in our laws relating to municipalities, is authority found for a township to bring and maintain an action in which it has no direct interest? To us it seems quite plain that the owners of the property upon which the tax was levied, and who had paid the tax making up the fund, are the real parties in interest and the only ones who have any right to complain of a breach of the contract, if the representations which induced the voting of aid constitutes a contract in such a sense that a failure to observe its terms entitles the electors to complain and to maintain an action for damages. We

incline to the belief that the demurrer to the petition should have been sustained.

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.

ANNA E. SHEPPERD ET AL., APPELLEES, V. BANKERS UNION OF THE WORLD, APPELLANT.*

FILED JUNE 20, 1906. No. 14,386.

1. **Insurance: ASSESSMENTS.** The monthly assessments required from the members of a beneficial society may be increased, when it is found that such increase is necessary to meet the needs of its business honestly administered.

2. ———: ———. The constitution and by-laws of a beneficial society provided that on the death of a member the amount due on his certificate should be ascertained by deducting from its face value the monthly assessments from the death of the member to the expiration of the life expectancy of such member with 4 per cent. interest thereon. The constitution and by-laws were afterwards changed, increasing the monthly assessments to be collected, but providing that such increased assessments should be collected only from members thereafter joining, the old members to continue to pay at the old rate and on their death the increase over the old rate to be deducted from their certificate. *Held*, That the society had the right, in settling with the beneficiaries of a deceased member, to deduct from the certificate the difference between the rate of the monthly assessments in force when the certificate was issued and the increased rate provided by the amendment computed from the time when the new rate went into effect up to the date of the death of the member, but not for the remainder of the life expectancy of such deceased member.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JR., JUDGE. *Reversed with directions.*

*See opinion on rehearing, p. 90, *post*.

Weaver & Giller, for appellant.

Montgomery & Hall, contra.

DUFFIE, C.

This action was brought by the beneficiaries named in a certificate of insurance issued by the Bankers Union of the World to Mrs. Sarah B. Shepperd for $1,000, of date March, 1902. During the life of Mrs. Shepperd she paid the monthly assessments provided by the by-laws of the society up to the time of her death. Section 7 of the constitution and by-laws of the society, relating to the payment of certificates on the death of a member, provides the following method of arriving at the amount due upon the certificate: "For the purpose of creating a reserve fund to guard against poor risks, protect healthy members, equalize the costs to all, and absolutely insure the perpetuity of the union, all insurance of the Banker's Union of the World will be adjusted and paid on the following plan: Should any member holding a policy die before having lived out his expectancy of life, based on his age at entry, according to the American experience table of mortality, there shall be deducted from the death benefit payable on such policy held by said member a sum equal to the amount of one payment (at the rate paid by the member) for each month of the unexpired period of such life expectancy with 4 per cent. on the unpaid balance of said sum." It is alleged in the answer that Mrs. Shepperd's life expectancy when the certificate was issued was 31 years. She died in October, 1903, and 29 years and 5 months prior to the expiration of her life expectancy. Under the method provided for computing the amount due upon the certificate under section 7 of the constitution above quoted, there would be deducted from the face value of the certificate the regular monthly payments for 29 years and 5 months, together with 4 per cent., and the remainder would be the amount due the beneficiaries. After this certificate was issued to Mrs. Shep-

perd and after the payment of a number of monthly assessments, the constitution and by-laws of the order were regularly amended so as to require the payment of a larger monthly assessment from members of all ages to be immediately collected from all members thereafter joining. As to the old members, the additional monthly assessment was not required to be paid in cash, but on the death of the member the additional amount was charged up against his certificate and deducted therefrom. Under this amendment the defendant claims the right to deduct from the face value of the certificate in suit the increased monthly assessments from the date of the amendment up to the time of the expiration of Mrs. Shepperd's life expectancy, the claim of the plaintiffs being that there should be deducted from the face value of the certificate an amount to be computed on the balance of her life expectancy at the rate in force when she joined the order. This, as we understand, makes a difference of about $220.

It is insisted by the beneficiaries, and the authorities are quite uniform to the effect, that no action taken by the order which will decrease the amount of the certificate or the amount due thereon at the time of the death of the insured is permissible. In *Pokrefky v. Detroit Fireman's Fund Ass'n,* 121 Mich. 456, 80 N. W. 244, it is held that the by-laws existing at the time the deceased became a member were a part of his contract with the association, which could not be changed against his protest, by a by-law subsequently enacted so as to deny the right of his beneficiaries to the entire proceeds of the certificate levied at his death. In *Morton v. Supreme Council, Royal League,* 100 Mo. App. 76, 91, 73 S. W. 259, the supreme court of Missouri said:

"There are numerous well-considered opinions in which it is ruled that subsequent by-laws undertaking to reduce the amount to be paid in certain contingencies do not take effect on previous contracts, and that a stipulation to comply with future regulations means the member will comply with such as relate to his duties as a member, but

does mean that the society may interfere with the essential purpose of the contract, namely, the indemnity covenanted to be paid." To the same effect are, *Campbell v. American Benefit Club Fraternity,* 100 Mo. App. 249, 73 S. W. 342; *Pearson v. Knights Templar & Masons Indemnity Co.,* 114 Mo. App. 283, 89 S. W. 588; *Strauss v. Mutual Reserve F. L. Ass'n,* 128 N. Car. 465, 39 S. E. 55. In *Parish v. New York Produce Exchange,* 169 N. Y. 34, 61 N. E. 977, it is said:

"These cases, as we understand them, establish a principle, which we deem well supported in reason, that the power of a corporation such as this one to amend its by-laws is a power to regulate within reasonable bounds, not a power to destroy the contract rights of its members."

Langan v. Supreme Council A. L. H., 174 N. Y. 266, 66 N. E. 932, and *Weber v. Supreme Tent, K. M.,* 172 N. Y. 490, 65 N. E. 258, both New York cases, are to the same effect. Experience in the conduct of these beneficiary associations has demonstrated that the amount of the monthly assessments first agreed upon fails in many cases to produce a sufficient income to provide for the death benefits of the members. From an examination of the authorities we incline to the belief that, where an honest conduct of the business demonstrates that the assessments levied and agreed to be paid by the members first joining are not sufficient to meet the obligations of the society, then in such cases the constitution and by-laws may be so amended as to require additional monthly assessments to be paid. In an extended brief prepared by Frank H. Bacon, the author of Bacon on Benefit Societies and Life Insurance, he presents strong legal and equitable reasons for such a rule. The increased assessment operates alike on all members of the society. Each member of the society is subject to the same burden and entitled to participate in its benefits, and those who do not care to assume the additional expense may abandon the society, having had the benefit of their insurance up to the date of the increased burden being imposed. The burden and the benefit are equally distributed. In

Reynolds v. Supreme Council, Royal Arcanum, 192 Mass. 150, 78 N. E. 129, the supreme court of Massachusetts upheld the right of the society to increase the assessment beyond the amount levied when the plaintiff became a member. The case is well considered and is the latest expression found on the subject.

In the case under consideration the society said to its old members: We will not require you to pay the additional assessment from month to month as in the case of new members, but will charge you up with the additional amount and deduct it from the face of your certificate at the date of death. This, we think, is such a reasonable amendment to the constitution and by-laws as the courts ought to sustain. Whether the increased assessment may be charged up against the certificate of a deceased member after death and to the end of the life expectancy of such member presents a different question. On the death of the member the contract of insurance matures. By the payment of assessments and compliance with the rules of the order the benefits of the contract then accrue to the beneficiaries in all its terms. To allow a deduction from the face value of the certificate greater than was contemplated when the contract was made would be to annul the contract in its most important phase. The amount to be paid as monthly assessments is a rule of the order which must be complied with by all the members, and if the amount is increased during the life of the member it is a change of rule or by-law to which he has assented on joining the association, and during his lifetime he is to be governed by that rule. To allow the face value of his certificate to be decreased by the amount of an increased assessment charged against him after death would, however, in our opinion, be an indirect method of avoiding the contract made when he joined the order and an indirect method of avoiding payment of the amount contracted to be paid upon the policy when it was issued. The contract evidenced by the certificate alone cannot be changed or

annulled by a change of the by-laws. *Hale v. Equitable Aid Union,* 168 Pa. St. 377, 31 Atl. 1066.

We recommend a reversal of the judgment and that the cause be remanded to the district court, with directions to enter a judgment in favor of the plaintiffs for the face value of the policy, less the amount of the increased assessments from the time when ordered to the death of the insured, and less the original assessments contracted to be paid from the death of the insured to the expiration of her life expectancy.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded to the district court, with directions to enter a judgment in favor of the plaintiffs for the face value of the policy, less the amount of the increased assessments from the time when ordered to the death of the insured, and less the original assessments contracted to be paid from the death of insured to the expiration of her life expectancy.

JUDGMENT ACCORDINGLY.

The following opinion on motion to modify opinion was filed February 8, 1907. *Affirmed on condition:*

JACKSON, C.

The judgment was for the plaintiff and is for $11.10 in excess of the amount which the plaintiff was entitled to recover under the rule announced in our opinion. The plaintiff has filed a motion to be allowed to remit that sum, and that thereupon the judgment of reversal be vacated, and that the judgment be affirmed, less the remittitur.

It is recommended that the judgment of reversal be vacated, that a remittitur be authorized, and upon such remittitur being entered that the judgment of the district court be affirmed for the sum of $743.13.

By the Court: For the reasons stated above, the motion to modify the opinion is sustained and judgment of reversal vacated. Ordered that the plaintiff be allowed to enter a remittitur of $11.10 from the judgment within thirty days, and if such remittitur is filed the judgment of the district court is affirmed for $743.13, otherwise the judgment is reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

ANNA BARBER, APPELLEE, V. VILLAGE OF FRANKLIN, APPELLANT.

FILED JUNE 20, 1906. No. 14,402.

Cities: DETACHING TERRITORY. The fact that the owner of unplatted land, used exclusively for agricultural purposes for some years, tacitly submitted to its inclusion in the incorporated limits of a town does not estop him from proceeding under the statute to have it disconnected therefrom.

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

H. Whitmore, for appellant.

Flansburg & Williams, contra.

DUFFIE, C.

Anna Barber, in her petition, states that she is the owner of fractional lots 4, 5, 6 & 7 of section 6, township 1, range 14 west of the sixth P. M.; that said premises are used entirely for agricultural purposes, and are now, and for several years last past have been, alfalfa meadow; that these several tracts are included in the corporate limits of the village of Franklin, but are not in anywise benefited by said incorporation and should not properly be included in

the limits of the village; that they are not used for village purposes, and have never been platted or subdivided as village lots, blocks or tracts. She asks that they may be detached from the village of Franklin and disconnected therefrom. The village filed answer, alleging that it was incorporated in July, 1883, and that the tracts described in plaintiff's petition were included within its corporate limits, and that since that date the village has exercised corporate powers and functions over said land; that plaintiff was a resident of the village at the time of its incorporation, knew that her lands were incorporated and knew that her lands were included in the corporation. It is further alleged that the lands are mostly smooth, level lands and adjoin the platted part of the village, except that a railroad right of way lies between about one-half of plaintiff's lands and the platted part of the village; admits that the land described in the petition is yet unoccupied as residence land, is unplatted and being used for agricultural purposes. The case was submitted to the court upon the petition and answer, and judgment entered as prayed in plaintiff's petition. The village of Franklin asks us to review the judgment upon petition in error.

It is insisted that, having tacitly submitted to the inclusion of these lands within the incorporation, plaintiff cannot at this time object that they were improperly included or ask that such lands be now disconnected from the village. *McClay v. City of Lincoln*, 32 Neb. 412, and *South Platte Land Co. v. Buffalo County*, 15 Neb. 605, are authorities in support of the contention that, where one tacitly consents that his land may be included within an incorporated town and takes no action to disaffirm for some years thereafter, he has no standing in court to ask that the lands be disconnected. We do not think that these cases go to the extent claimed. In each of these cases an injunction was sought against the imposition of municipal taxes upon lands included within the corporate limits, upon the ground that they were agricultural lands and were improperly included in the corporation. If we understand

the opinions, it is held merely that the court, on an application for an injunction against a collection of municipal taxes, will not examine the validity of the corporation or the right to include within the corporate limits lands claimed to have been improperly included. This would be attacking the validity of the corporation in a collateral proceeding, and is not allowable. The plaintiff below is proceeding under our statute to have her lands disconnected. This is a right conferred by statute and, while the case is triable as a suit in equity, no equitable defense has been interposed to the relief which she is asking. It is not shown that any indebtedness has been incurred and is still outstanding against the village upon the strength of these lands being subject to taxation to bear its proportion of that expense. It is not alleged that the lands have been in anywise benefited by being included in the corporation or that corporate improvements have been extended over them. The fact that the party has submitted for some years to municipal taxation from which she was in nowise benefited is not an argument in favor of longer imposing upon her the burden of municipal taxes.

We think the district court was right in disconnecting her lands and relieving them from the burden of municipal taxation, and recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

FRANK R. WILD, GUARDIAN, APPELLEE, V. STORZ BREWING COMPANY, APPELLANT.

FILED JUNE 20, 1906. No. 14,405.

Deed as Mortgage: DOWER. B. and wife conveyed certain real estate to H. and N. by warranty deed as security for a debt which was fully paid prior to the decease of the husband. No reconveyance was ever had, and by certain mesne conveyances made by N. and the heirs of H. the title finally vested in the defendant, who had notice that the conveyance to H. and N. was made as security only, and was not intended to be an unconditional conveyance. *Held*, That the widow of B. was etitled to dower in such real estate.

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

Hamilton & Maxwell and *J. H. Grimm*, for appellant.

J. H. Wild, W. G. Hastings and *W. S. McGintie, contra.*

DUFFIE, C.

In November, 1887, Charles B. Bailey and Lydia, his wife, conveyed two lots in the town of DeWitt to Alexander Hawes and Wm. R. Nelson. The conveyance was by warranty deed, but was in fact a mortgage made to secure Hawes and Nelson against liability upon a note on which they had become security for Bailey. Sometime after the conveyance Mrs. Bailey was committed to the insane asylum, and Frank R. Wild is her guardian. In due time Bailey paid the note upon which Hawes and Nelson were sureties, and thereafter, and apparently at the request of Bailey, Nelson conveyed his interest in the lots to George A. Hunt, and by several mesne conveyances the title held by Nelson finally vested in Nicholas Aebig by deed of March 2, 1901. In the meantime Hawes had deceased and Aebig commenced an action in the district court for Saline county against his heirs, alleging in the petition that the deed from Bailey and wife to Hawes and Nelson was made as security

only; that the debt which it was made to secure had been fully paid and the mortgage thereby satisfied. A decree to this effect was entered in the district court on May 9, 1901, and the defendants in the action were directed to convey to the plaintiff the lots in question, and in default of such conveyance the decree was to stand in lieu thereof. Aebig and wife conveyed the lots to the Storz Brewing Company by warranty deed of date November 5, 1901, and on or about that date the company took possession of the lots and have remained in possession to the present time. Charles B. Bailey departed this life November 11, 1901, and this action was commenced in April, 1904, to establish the widow's right of dower in the lots and to recover from the Storz Brewing Company damages for detaining the same. Eugene F. Bailey filed a cross-petition in the action, claiming to be the owner in fee of said lots as the only heir of his deceased father. The district court dismissed his cross-petition, and, as we think the evidence fully sustains the decree in that respect, this phase of the case will not be further noticed. A decree was entered finding Lydia Bailey, the widow of Charles B. Bailey, entitled to dower in the lots, and his widow is not, therefore, entitled to a ant, the Storz Brewing Company, in the sum of $276.66 as damages for detaining the same.

The principal questions discussed in the briefs of the parties are the right of the widow to dower and the amount thereof. It is insisted by the appellant that Lydia Bailey, by joining with her husband in the deeds conveying the lots to Hawes and Nelson, barred her dower interest. It is urged that Charles B. Bailey was never, subsequent to the date of these deeds, seized of "an estate of inheritance" in the lots, and his widow is not, therefore, entitled to a dower interest. *Crawl v. Harrington,* 33 Neb. 107, and *Hall v. Crabb,* 56 Neb. 392, are relied upon as authorities in support of this claim. In each of the cited cases the land in which dower is claimed was held by the deceased spouse under executory contracts of purchase, and this court held that such contracts did not vest in the holder a

freehold estate out of which dower might be claimed. In each of these cases the deceased spouse never possessed the legal title. They never held more than an equitable interest in the land in which dower was claimed, while in the case under consideration the husband was the owner in fee, and, being so, seized of the legal estate, pledged it as security. It is true that this pledge was effected by means of an absolute conveyance, but to one acquainted with the facts, and having knowledge that the conveyance was intended as a mortgage, and not as an unconditional transfer of the title, the form of the instrument creating the pledge is immaterial.

Sections 3-6, ch. 23, Comp. St. 1905, clearly provide for dower to the widow in lands owned by the husband in fee, but incumbered by mortgage. If, instead of conveying by deed by way of security, Bailey had executed an ordinary mortgage upon these lots to Hawes and Nelson, no one would, under our statute, question the widow's right of dower in the equity. On principle we cannot see how any different rule would apply to a purchaser of the lots in question, who had notice that the conveyance to Hawes and Nelson was by way of security, and not intended to operate as an unconditional conveyance of the title to them. That the Storz Brewing Company had knowledge that this conveyance was by way of security only is abundantly shown by the evidence, the abstract of title furnished prior to its purchase containing the proceedings had in the district court for Saline county in the case brought by Aebig to have such conveyance declared a mortgage. Relating to the amount of damages allowed for detaining the dower of the widow, section 24, ch. 23, Comp. St. 1905, is as follows: "Such damages shall be one-third part of the annual value of the mesne profits of the lands in which she shall so recover her dower, to be estimated in a suit against the heirs of her husband from the time of his death, and in suits against other persons, from the time of her demanding her dower of such persons." There is no competent evidence in the record that demand of dower was made upon the

Storz Brewing Company prior to the commencement of this action. It is true that one of the witnesses testifies to a letter written to the company sometime previous to the commencement of the action, but the letter was not produced and a copy thereof was improperly admitted in evidence over the objection of the defendant.

We recommend that the decree of the district court be modified so as to allow damages to the plaintiff on account of the dower of his ward at the rate of $20 quarterly from the commencement of the action, and that in all other respects the decree stand affirmed.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified so as to allow damages to the plaintiff on account of the dower of his ward at the rate of $20 quarterly from the commencement of the action, and that in all other respects the decree stand affirmed.

DECREE MODIFIED.

FRANK D. TAYLOR, APPELLEE, V. J. E. HOVER, APPELLANT.

FILED JUNE 20, 1906. No. 14,411.

Instructions defining adverse possession examined, and *held* not prejudicial to the defendant.

APPEAL from the district court for Sarpy county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Charles L. Hover, for appellant.

Charles A. Goss and *James Hassett, contra.*

DUFFIE, C.

Frank D. Taylor commenced this action against J. E. Hover to recover possession of tax lot G, in section 21,

township 14, of range 13 east of the sixth P. M. in Sarpy county. His petition alleges a legal estate in the above described premises and that he is entitled to the possession thereof. The answer was a general denial. A verdict was returned in favor of the plaintiff, upon which judgment was entered giving him possession of the premises, and the defendant has appealed.

The defendant claimed title by adverse possession. Relating to this defense the court instructed the jury as follows: "It is incumbent upon the defendant, before he can recover, to satisfy you by a preponderance of the evidence that he and those under whom he claims have, for a period of ten years before the commencement of this action, been in the open, actual, continuous, notorious, exclusive and hostile possession of the land in controversy, claiming the same as their own, as against the true owner and all other parties." In another instruction the court defined "hostile" as follows: "The word 'hostile,' when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will or that he is an enemy of the person holding the legal title, but means an occupant who holds and is in possession, claiming to hold the land against all other claimants." The only error relied on is the use of the word "hostile" in the first instruction above quoted. This word has usually been used by the courts to define a possession adverse in its nature. In *Ballard v. Hansen,* 33 Neb. 864, the use of the word was criticised as applied to an adverse possession; but in *Hoffine v. Ewings,* 60 Neb. 729, its use, with the explanation contained in other instructions, was held to be without prejudice to the party claiming adversely to the legal title. In the case at bar the undisputed evidence discloses that Hover entered into possession of the land in dispute under a deed from one Preston. This deed bears date March 4, 1902. Preston rented the land from the owner of the legal title for the year 1901. He entered as tenant of the legal owner. He continued in possession after the expiration of his lease, and there is nothing to

show that his possession was based on any claim of right, title or ownership. His possession being taken under a lease from the legal owner, the presumption is that it continued in subordination to the legal title in the absence of evidence showing that he claimed a greater estate. The record is silent, or practically so, of any acts on the part of Preston tending to show that he asserted title as against the true owner, or claimed ownership in himself prior to his conveyance to the defendant and appellant. The instructions of the court were not prejudicial to the defendant, and the verdict of the jury is clearly supported by the evidence.

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.

LINCOLN COUNTY V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED JUNE 20, 1906. No. 14,269.

1. Taxation: ILLEGAL LEVY. Where a county board has levied the full amount of tax allowed by law for a county general fund, and also designedly levies a larger amount of bridge tax than is necessary for use in that fund, and immediately transfers a large part thereof to said general fund, the tax so unnecessarily levied and transferred is levied for an illegal and unauthorized purpose and is void. *Chicago, B. & Q. R. Co. v. Lincoln County*, 66 Neb. 228.
2. ———: PAYMENT UNDER PROTEST: RECOVERY. In such case, in a suit brought to recover the illegal tax paid under protest, it devolves upon the county to point out what portion, if any, of the tax was levied for a legal and authorized purpose, and upon its failure to do so the plaintiff is entitled to a verdict for the full amount paid.
3. ———: LEVY. It is the duty of a county to levy, within certain

limits, the taxes required for certain purposes each year, and the fact that its funds had been improvidently expended or illegally diverted in the past does not relieve it of such duty.

4. Review: EVIDENCE. Where evidence necessary to sustain a verdict has been erroneously excluded upon a general objection, the party at whose instance the evidence was excluded will not be heard to complain that the verdict, for want of such evidence, is not sufficiently sustained.

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

L. E. Roach, A. Muldoon and *J. G. Beeler,* for plaintiff in error.

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

ALBERT, C.

The plaintiff railroad company, the defendant in error in this court, filed its petition against Lincoln county, purporting to state two causes of action. The first is out of the way and requires no further mention. The second is based on section 144, art. I, ch. 77 of the revenue act of 1897, corresponding to section 162 of the same article and chapter of the present revenue law, providing for the recovery of taxes levied for an illegal and unauthorized purpose, when paid under protest. The allegations constituting the second cause of action are, in substance, that in the year 1897 the county board levied a tax of nine mills on the dollar for county purposes, and two mills on the dollar for bridge purposes, and that the tax upon the property of the plaintiff for bridge purposes amounted to the sum of $312.14; that the bridge levy for 1897, as well as several years prior thereto, was designedly made higher than was necessary for the purpose of transferring the surplus arising therefrom to the general county fund, and that $1,850 of the bridge levy for 1897 was in fact transferred to the general fund. A general demurrer to this cause of action was sustained, but the judgment thereon

was reversed, this court holding that, "where a county board has levied the full amount of taxes allowed by law for a county general fund, and also designedly levies a larger amount of bridge tax than is necessary for use in that fund, and immediately transfers a large part thereof to said general fund, the tax so unnecessarily levied and transferred is levied for an illegal and unauthorized purpose and is void." *Chicago, B. & Q. R. Co. v. Lincoln County,* 66 Neb. 228. After the cause was remanded to the district court, the issues were made up and a trial had to a jury.

There is no conflict in the evidence. It shows conclusively that from 1894 to 1897, inclusive, the county levied each year a tax of nine mills on the dollar for general purposes, which is the maximum allowed therefor by the law then in force, as well as by that in force at the present time. Section 77, art. I, ch. 77, Comp. St. 1897; sec. 136, art. I, ch. 77, Comp. St. 1905. There was also a levy each year for bridge purposes, and a transfer of large sums from the bridge to the general fund of the county. The county board in January of each year made an estimate of expenses in accordance with the provisions of subdivision 6, sec. 25, art. I, ch. 18, Comp. St. The following shows the official estimate for bridges each of those years, the amount levied therefor, the amount transferred from the bridge to the general fund, and the date of each estimate, levy and transfer:

ESTIMATE.

1894	Jan. 12	$11,000.00
1895	Jan. 31	12,000.00
1896	Jan. 30	12,000.00
1897	Jan. 14	10,000.00

LEVIES.

1894	July 10	$7,796.96
1895	June 29	9,639.79
1896	July 7	8,811.08
1897	July 7	5,101.89

TRANSFERS.

1894	Jan.	3	$2,000.00
	Jan.	18	1,000.00
	Mar.	29	2,500.00
	Dec.	4	2,000.00
	Dec.	21	500.00
1895	Feb.	14	1,000.00
	Apr.	9	1,000.00
	Apr.	12	1,000.00
1896	Oct.	28	1,000.00
	Feb.	21	2,500.00
	Aug.	26	350.00
	Oct.	9	400.00
1897	Feb.	20	1,850.00

In addition to the foregoing, the plaintiff offered to show that the estimate for bridge purposes for the year 1898 was $8,000; that in June, 1898, the county board made a levy of nine mills on the dollar for general purposes, and one mill for bridges; that on the 7th day of July, thereafter, the county board transferred $3,000 from the bridge to the general fund. This evidence was excluded at the defendant's instance. The court directed a verdict for the plaintiff for the full amount of the bridge tax assessed against its property for 1897. The defendant county now appeals.

Taking into account the fact that the board each year levied the maximum allowed by law for general county purposes, the amount levied each year for bridge purposes, the large excess thereof transferred each year to the general fund, the dates at which the transfers were made, with reference to the dates of the estimates, and the dates of the levies, there is but one reasonable inference to be drawn from the record, and that is that each year prior to 1897 the board designedly made an excessive levy for bridge purposes, with a view to transferring a portion of the fund realized therefrom to the general fund, and thereby to evade the law limiting the levy for general purposes to nine mills on the dollar valuation. In other words, we think the record shows conclusively that, while

a levy was made ostensibly for bridge purposes each of those years, a portion thereof was in fact intended for general purposes, and the levies for those years would clearly come within the rule stated on the former appeal and hereinbefore quoted. But we are dealing with the bridge levy of 1897, which the trial court in effect found was entirely illegal and void. The question now presented is whether the evidence justifies that finding. It will be recalled that no evidence was received of the transfer of any portion of the amount realized from the bridge levy of 1897 to the general fund. All transfers of bridge funds shown by the evidence were from previous levies, the latest being $1,850, which was made on the 20th day of February, 1897, some four months before the levy in question. The record presented on the former appeal showed that this transfer was from the levy of 1897, but the evidence now shows that it was from a previous levy.

We do not think such transfers, in and of themselves, vitiate the levy of 1897. The law makes it the duty of the county board to levy the necessary taxes for general purposes each year. The fact that the board has been improvident, or has made an illegal use of funds in the past, does not relieve it of this duty. When it meets to levy taxes, the question is not what has become of revenues collected in the past, but what amount of revenue is required for the different purposes for the current year. The necessities may be urgent, and they are none the less so because funds which should be available to meet such necessities have been illegally expended or diverted. To hold otherwise would be to place it within the power of the county board to emasculate the county, and render it impotent to discharge its functions as a political subdivision.

We think, however, the court should have received the evidence showing the transfer of the $3,000 from the bridge to the general fund on the 7th day of July, 1898. That transfer was of a portion at least of a balance on hand after meeting the expenses chargeable to the bridge fund

to that date. It must have been derived from the levy of 1897, or previous levies, because the transfer was made on the date of the levy of 1898, and the difference in the fund could have been realized therefrom. From the fact that the county had a remainder of at least $3,000 of the bridge fund at the date of the levy for 1898, taken in connection with the evidence showing the previous transactions of the board, the only reasonable inference is that the bridge levy for 1897 was designedly made excessive, for the purpose of transferring a portion at least to the general fund, for which the maximum amount allowed by law was levied at the same time. In other words, had such evidence been received, the only reasonable inference from the entire record would be that one purpose of the levy in question was to evade the law limiting the amount to be levied for general purposes in any year to nine mills on the dollar valuation. Had the board proceeded directly to levy a tax for general purposes in excess of the amount allowed by law, the tax to the extent of the excess would be held to have been levied for an illegal purpose. *Dakota County v. Chicago, St. P., M. & O. R. Co.*, 63 Neb. 405, and cases there cited. That it proceeded by indirection, and made the levy ostensibly for bridge purposes, does not better its position. The evidence necessary to make out plaintiff's case and that the bridge levy for 1897 was designedly excessive, and made with a view to transfer a portion thereof to the general fund, was excluded on a general objection interposed by the defendant. Consequently, for the purpose of testing the sufficiency of the evidence to sustain the verdict, that evidence should be treated precisely as though it had been received, because a party will not be heard to complain of a judgment against him because of the want of evidence which was excluded at his instance. *Sours v. Great Northern R. Co.*, 81 Minn. 337; *Missouri, K. & T. R. Co. v. Elliott*, 102 Fed. 96, 42 C. C. A. 188; *Jobbins v. Gray*, 34 Ill. App. 208; *Claflin v. Farmers & Citizens Bank*, 24 How. Pr. (N. Y.) 1.

It is true that, even had an excessive levy been expressly made for general purposes, it would have been illegal only to the extent of the excess. It is also true that, even considering the evidence excluded at the defendant's instance as part of the evidence in the cause, it does not show the exact portion of the bridge levy for 1897 which the board intended to divert to the general fund. But we think the defendant is in a position somewhat analogous to that of one who wrongfully intermingles his goods with those of another, and the rule in such case is that all the inconvenience of the confusion is thrown on the party who produced it, and, generally, it is for him to distinguish his own property or to lose it. Here, if any portion of the bridge tax for 1897 was actually required for bridge purposes, it was included with that which was in fact levied for the illegal purpose of transferring it to the general fund. The defendant or its agents were in possession of the facts, and it was for the defendant to show what portion of the levy, if any, was legal, and having failed to do so, the plaintiff was entitled to a finding that the entire bridge tax for 1897 was levied for an illegal purpose.

It is recommended that the judgment be affirmed.

JACKSON, C., concurs.

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

AFFIRMED.

W. T. HAUPTMAN V. ALBERT PIKE.

FILED JUNE 20, 1906. No. 14,299.

1. **Sales: FALSE REPRESENTATIONS.** Where the defense is that the defendant had been induced to buy certain personal property by the false and fraudulent representations of the plaintiff, his vendor, the fact that such representations were made two days before the

sale was consummated would not of itself justify the exclusion of evidence thereof.

2. ———: ———. Ordinarily, in such case, the defendant is entitled to trace the negotiations to their inception, where the evidence thereof tends to establish such defense.

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

F. W. Bartos and *Hall, Woods & Pound,* for plaintiff in error.

A. S. Sands and *Hazlett & Jack, contra.*

ALBERT, C.

Suit was brought by the payee against the maker of a promissory note to recover the balance due thereon. The answer admits the execution and delivery of the note. As a defense thereto it is alleged in the answer that the consideration therefor was a certain team of horses sold and delivered by the plaintiff to the defendant; that at and prior to the sale and delivery thereof the plaintiff, to induce the defendant to buy the said team, falsely and fraudulently represented that the said horses, and each of them, were "perfectly sound, gentle and without blemish"; that the defendant bought the said team, and gave the note in suit, relying upon said representations and believing the same to be true; that the said representations were false, in that one of the horses at the time was lame, spavined, vicious, and dangerous to handle; but by reason of said false representations the defendant has sustained damages in excess of the balance due on the note. The reply is a general denial of the facts pleaded as an affirmative defense. The jury found against the defendant on his affirmative defense, and returned a verdict for the full amount of the balance due on the note. Judgment went accordingly. The defendant brings error.

That the note was given for the consideration stated in the answer is conceded. That one of the horses was lame

and vicious is a fact which the jury could well have found from the evidence. The nature of the representations made by the plaintiff with respect to the team and whether the defendant relied upon them are among the principal questions litigated. The defendant testified in his own behalf. It appears from his testimony that about two days before he bought the team the plaintiff called upon him, and asked him if he wanted to buy a team; that he answered in the affirmative, whereupon the plaintiff informed him that he had a team to sell. After testifying to those facts, the defendant was interrogated as to the representations made by the plaintiff at that time. The answer was excluded, whereupon the defendant made the following offer: "Defendant offers to prove by this witness that on the last day of February, at defendant's residence in Saline county, the plaintiff represented to this defendant that he had a bay team of horses to sell, or a horse and a mare, that were sound, free from blemishes, and free from vice; that in pursuance of said representations the defendant two days afterwards went over to the plaintiff's place in the evening to buy said team, and did buy it on the strength of the representations made by the plaintiff, not only at the time he bought them, but representations made at his house before that time." To the foregoing offer the plaintiff interposed this objection: "Plaintiff objects to the offer, as far as the same relates to any conversation or conversations had prior to the purchase and sale of the team mentioned, and to the conversation or purported conversation had two days before the transaction at the house or home of the defendant, as incompetent, irrelevant and immaterial." The objection was sustained and the ruling in that behalf is now assigned as error. It would seem that the court excluded the evidence on the theory that representations made two days before the sale took place were too remote. That theory is not tenable. The gist of the defense is that the defendant was induced to buy the team by certain false and fraudulent representations made by the plaintiff. Of

necessity, representations which are the inducement, or part of the inducement, to a sale must precede it; generally they are a part of the negotiations leading up to it. Such negotiations may cover a longer or shorter period, but, in either case, it is competent for the party charging fraud to trace them to their inception, if necessary, to prove the charge. See *Sellar v. Clelland,* 2 Colo. 532; *Kost v. Bender,* 25 Mich. 515; 14 Am. & Eng. Ency. Law (2d ed.), 198. The plaintiff contends, however, that he admitted the representations included in the offer while testifying in his own behalf. The evidence pointed to sustain that contention does not do so. It shows that he represented the horses to be sound, "as far as he knew." That is essentially different from the unqualified representations which the defendant offered to show. It is also claimed that the defendant was afterwards permitted to testify to matters covered by his offer. A careful reading of his testimony satisfies us that such is not the case, and that both he and counsel regarded the ruling of the court upon the offer as final, and were governed by it during the after progress of the trial.

Complaint is also made because the court sustained a motion to strike two clauses from the answer on the ground that such portions tendered other and different issues than those litigated in the county court where the case was first brought and tried. As to one clause, no complaint was made in the motion for a new trial that it was thus stricken; as to the other, it is impossible to ascertain from the record whether it was material in the connection in which it was used, because the connection in which it stood is not shown. For these reasons, we cannot determine the correctness of the ruling of the trial court on this motion. Other questions are argued, but they are not of a character requiring notice at this time.

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

DUFFIE and JACKSON, CC., concur.

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

REVERSED.

PATRICK E. NEALON, APPELLEE, V. LYDIA MCGARGILL ET AL., APPELLEES; DELA F. MCINTYRE, INTERVENER, APPELLANT.*

FILED JUNE 20, 1906. No. 14,383.

1. Evidence examined, and *held* sufficient to sustain the decree of the district court.
2. Error: REVIEW. Where the only parties affected by alleged errors in a decree are satisfied, others will not be heard to complain.

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

W. F. Critchfield and *T. P. Lanigan,* for appellant.

Abbott & O'Malley, T. J. Doyle and *J. R. Swain, contra.*

ALBERT, C.

This suit was brought by Patrick E. Nealon against Lydia McGargill and William McGargill for the specific performance of a contract to convey certain real estate. Ellen Nealon and Dela F. McIntyre became parties by intervention. The following is the substance of the allegations of plaintiff's original petition: That on the 16th day of July, 1902, the defendant, Lydia McGargill, was the holder of the legal title to said premises, and that at said time she sold the same under an oral agreement to the plaintiff for the sum of $1,000 cash and other valuable considerations, viz., $300 cash to be paid to defendants for the use and benefit of Ellen Nealon, the mother of the plaintiff and of the defendant, Lydia McGargill, and the

*Rehearing allowed. See opinion, p. 115, *post.*

additional sum of $100 per annum to be paid to the said defendant, Lydia McGargill, during the lifetime of the said Ellen Nealon, for the use and benefit of said Ellen Nealon, said annuity to be secured by a mortgage on the above described premises; that, upon payment of said sums of money and the securing of said annuity to said Ellen Nealon, defendant agreed to convey said premises to the plaintiff by a deed of general warranty, subject to a mortgage of $1,000 which plaintiff agreed to assume and pay; and that at the time the said oral contract was so made the plaintiff had an equitable interest in said land, which interest was acquired as follows: In March, 1892, said land belonged to said Ellen Nealon, and at said time she orally agreed with plaintiff that if he would stay on said land and work it, and take care of and support her, later on she would deed said land to plaintiff, and, in pursuance of said agreement with said Ellen Nealon, the plaintiff worked said land from March, 1892, until the time of filing his petition herein, always relying upon said agreement; and that during said time he took care of the said Ellen Nealon and supported her, and made valuable improvements on the land and paid a mortgage on the same; that all of said labor was done and money expended with the distinct understanding with the said Ellen Nealon that said land was ultimately to become the property of the plaintiff; that the plaintiff, by reason of the agreement entered into with the defendant, Lydia McGargill, entered into possession of said premises, and has continued in possession of same, with the assent of the defendant, from that time until the the time of filing said petition; that there is still due the defendant on said contract the sum of $71, and to the defendants for the use and benefit of Ellen Nealon the sum of $300 and the mortgage on the said premises for the payment of $100 per year during the lifetime of said Ellen Nealon; that the plaintiff has duly performed all of the conditions of the contract on his part, and now brings said sums of $71 and $300 and said mortgage into court and offers the same to the defend-

ants, and prays that they may be required to accept the same and convey the land. Afterwards the plaintiff filed an amendment to his said petition, in which he alleged that in 1894 the said Ellen Nealon agreed to convey said property to said plaintiff, and that in the year 1898, it was further verbally agreed between the plaintiff and the said Nealon that, in consideration of the services which plaintiff had then rendered in working upon and managing said farm, and the further agreement then and there made that the plaintiff should pay to the said Ellen Nealon $600, when called upon so to do, for the use and benefit of said Lydia McGargill, and continue to support the said Ellen Nealon and provide her a home upon said premises, the said Ellen Nealon would convey the legal title to said premises to the said plaintiff. To the petition of the plaintiff and the amendment thereto the defendants, Lydia McGargill and William McGargill and intervener Ellen Nealon, all filed answers amounting in substance to general denials. The intervener, Dela F. McIntyre, filed an answer, denying the allegations of plaintiff's petition, and setting forth a written contract between himself and Lydia McGargill by the terms of which said Lydia McGargill had agreed to sell and convey the said premises to the said Dela F. McIntyre; that a cash payment had been made upon said contract and retained by said Lydia McGargill; that he was ready and willing to perform the terms of his contract and offered in court to do so. To the answer of Dela F. McIntyre, the plaintiff replied, denying generally all the allegations therein contained, and alleging that, at the time the alleged contract between said intervener and Lydia McGargill was made, the intervener had notice of plaintiff's rights in the premises.

The findings and decree of the court are, in substance, that the plaintiff, Patrick E. Nealon, was the owner in fee of said premises, and that the defendants, Lydia McGargill and William McGargill, and the intervener, Dela F. McIntyre, had no interest in said premises, and that the plaintiff, Patrick E. Nealon, provide and set apart com-

fortable and suitable apartments in the dwelling house upon said premises for the intervener, Ellen Nealon, and furnish to her proper and suitable maintenance and support during her lifetime, and, in the event the said Ellen Nealon refuses to live upon said premises and to make her home with the said Patrick E. Nealon, then the said Patrick E. Nealon should pay her the sum of $200 per annum for each year during her lifetime, $100 of said sum to be paid on the first day of September of each year, the same to be made a lien upon said premises, and, in case of default in said payment, the same to be enforced by filing a motion in this cause calling the attention of the court to the default in the payment of said sum, and citing the plaintiff to appear; and that the defendants, Lydia McGargill and William McGargill, and the intervener, Dela F. McIntyre, pay the costs of the suit. The defendants and interveners appealed from the decree. Subsequently, however, the intervener, Ellen Nealon, entered into an agreement in writing with the plaintiff, which contemplates the carrying out the terms of the decree, and in which she asks that the decree, so far as it concerns her, be affirmed. The controversy at present, therefore, is between the plaintiff and the intervener, McIntyre, and the defendants, Lydia and William McGargill, the latter having no interest, however, save as the husband of his codefendant.

Ellen Nealon, one of the interveners, is the mother of the plaintiff and the defendant, Lydia McGargill, and the common source of title of all the claimants herein. She conveyed the legal title to the land in controversy to the defendant, Lydia, early in the summer of 1902. From the latter's own testimony it is clear that by such conveyance she took the bare legal title, her mother retaining whatever beneficial interest she had in the premises at that time. The contract under which the intervener McIntyre claims an interest in the land was entered into between him and the defendants, Lydia McGargill and her husband, more than a year afterwards. The immediate object of the con-

veyance from the mother to her daughter, Lydia, was to effect a loan on the property, the mother being of an age that made it difficult to obtain a loan in her own name. At the time of the conveyance the plaintiff was, and for many years had been, in possession of the land, claiming to be the owner thereof by virtue of certain agreements between him and his mother. After the conveyance by the mother to Lydia, the latter and her husband negotiated a loan of $1,000 on the land, executing the necessary papers and receiving a draft for the amount of the loan. Before the draft was cashed the plaintiff notified the loan company of his claim to the land, and the company recalled the draft and refused to make the loan, unless the plaintiff would join in the mortgage and execute a relinquishment of his claim to the land, which he finally did. He testified that he executed the mortgage and relinquishment in pursuance of the following agreement between himself and his mother and sister, Lydia, the principal defendant; that he should execute said mortgage, assume and pay the debt thereby secured, allow the proceeds of the loan to be paid to his sister, Lydia, for the benefit of herself and mother, pay the mother $300 cash, and $100 each year so long as she lived, payment thereof to be secured by mortgage on the land, and that, in consideration thereof, the title in fee should be conveyed to him. His testimony is strongly corroborated by other witnesses, one of whom is the agent through whom the $1,000 loan was negotiated. This witness testified to a conversation had with the defendant, Lydia, at about the time the loan was made, in which she told him of an agreement she had made with the plaintiff, and stated the terms substantially as they were given by the plaintiff on the witness stand. Another witness testified to a similar conversation had with the defendant, Lydia, at about the same time, in which she again stated the terms of her agreement with the plaintiff. This defendant does not unequivocally deny this conversation, but when asked with respect to it said: "I do not believe it was

said in those words, quite." The testimony satisfies us that the parties actually entered into this agreement.

The plaintiff joined in the loan, and to meet the terms of the loan company executed a relinquishment of his interest in the land, but retained possession. The proceeds of the loan were paid to the defendant, Lydia, save $71 which was paid out for taxes on the land. Lydia and her mother then refused to carry out their part of the contract. When the suit was brought the plaintiff paid $371 into court for the defendants, for the use of his mother, that being the amount of the cash payment required by the terms of the contract and the $71 paid out of the loan for taxes. The contract of July, 1902, was an adjustment of the conflicting claims of the parties thereto to the land. Each of these claims appears to have been put forth in good faith, and none at the time was entirely free from doubt. The contract therefore was founded upon a sufficient consideration. It is binding upon the mother who, as we have seen, has signified her willingness to abide by the decree. *A fortiori* it is binding on the defendant Lydia and her husband, because at the time they had no interest in the land, save that Lydia held the legal title in trust for her mother. It is also binding upon the intervener, McIntyre, because the contract under which he claims was made with Lydia and her husband about a year after plaintiff's contract was made. At that time plaintiff was in possession claiming under his contract. In addition to the notice imparted by such possession, the evidence sufficiently shows that before McIntyre's contract was made he was fully informed of plaintiff's contract by the plaintiff himself, so that he cannot be regarded as an innocent purchaser, nor as standing in any better position than his grantor. It may be said, in passing, that he has invested only $200 in the land. In view of the evidence, it seems to us a finding against the defendants and the intervener, McIntyre, was inevitable. The evidence against the other intervener, the mother, is somewhat weaker, as she would not be bound, perhaps, by the admissions of the defendant,

Lydia. But, as we have seen, she is satisfied with the decree.

It is contended, however, that the contract enforced by the decree is not that pleaded by the plaintiff. The plaintiff has paid his cash payment of $300 and the $71 paid out of the $1,000 loan for taxes into court. He has fully performed his part of the contract of July, 1902, so far as he owes any performance thereof to the defendant. The portion unperformed is for the exclusive benefit of the mother. The decree is more liberal to her than the contract. In that respect alone does it depart from the terms of the contract. Both she and the plaintiff are satisfied with it, and its variance from the terms of the contract does not concern the other parties.

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 rehearing was filed November 10, 1906. *Former judgment modified and cause remanded with directions:*

DUFFIE, C.

Our attention has been called to the fact, not noticed in the briefs filed in this case, that the appellant paid $200 on his contract of purchase which has been set aside by the court. Plaintiff, on commencing this action, paid into court the sum of $371 which has not been disposed of by the decree. It is quite apparent that Lydia McGargill and Ellen Nealon have had the benefit of the payment made upon this land by the intervener and appellant. Equity requires the repayment of this money upon the cancelation of his contract of purchase, and the money paid into

court for the benefit of the defendants should be used for that purpose. The defendants and intervener were jointly taxed with the payment of all the costs. Under our statute an intervener who fails in his action can be charged only with the costs made by his intervention. Code, sec. 50*b*. The decree of the district court and the judgment of this court heretofore entered will be so modified as to require the payment to the appellant of $200 from the money deposited in court by the plaintiff, and to direct the district court to ascertain the amount of costs made by the intervention of the appellant and to tax him with the payment of such costs, and for this purpose the case will be remanded to the district court.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court and the judgment of this court heretofore entered are modified and the cause is remanded to the district court, with directions to require the payment to the appellant of $200 from the money deposited in court by the plaintiff, and, further, to ascertain the amount of costs made by the intervention of the appellant and to tax him with the payment of such costs.

JUDGMENT ACCORDINGLY.

ADONIS D. HOWARD ET AL., APPELLEES, V. OMAHA WHOLESALE GROCERY COMPANY, APPELLANT.

FILED JUNE 20, 1906. No. 14,387.

Evidence examined, and *held* sufficient to sustain a finding of agency.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JR., JUDGE. *Affirmed.*

A. S. Churchill, for appellant.

Stillman & Price, contra.

ALBERT, C.

At the time of the transaction which gave rise to this suit the plaintiffs were selling merchandise at retail in Montana, and the defendant, a corporation having its principal place of business in Omaha, was selling groceries at wholesale. On the 3d day of March, 1903, one A. A. Sheard called upon the plaintiffs, representing himself to be the defendant's agent, soliciting orders in its behalf. The plaintiffs dealing with him in his capacity as such agent ordered a bill of goods aggregating $374.79. According to the terms of the order $96.32 was paid on the bill by the plaintiffs to Sheard when the order was given; the remainder was to be paid upon the delivery of the goods to the plaintiffs in Montana. The goods were never delivered, and the plaintiffs brought suit to recover the $96.32 paid on the purchase price. The suit was defended on the theory that Sheard was not the agent of the defendant and had no authority to bind it in the premises. A jury was waived, and the court found for the plaintiffs and gave judgment accordingly. The defendant appeals.

The sole question presented by the record is whether there is sufficient evidence to sustain a finding that Sheard was the defendant's agent, authorized to take the order in question and receive the cash payment thereon. It appears from the evidence that at the time the order was given Sheard was actively soliciting orders for the defendant in Montana, and had taken similar orders from other parties, receiving cash payments thereon. A suspicion arose that he had no authority to take orders and receive payments thereon on behalf of defendants, and on the 7th day of March, 1903, four days after the transaction in question, he was arrested on the complaint of a third party in Montana for obtaining money under false pretenses concerning his relations with the defendant. While he was in the custody of the sheriff in Montana, in order to show that the charge was unfounded, he telegraphed the defendant, stating that he was in the custody of the

sheriff, and asking: "Will you fill all orders that I collect 25 per cent. on?" The defendant through its manager in Omaha wired this answer: "We will fill all orders on which 25 per cent. is collected, and apply the same on the price of the order." This answer came through the hands of the sheriff, and when it was exhibited to the authorities Sheard was released. On the 9th day of March, 1903, the plaintiffs wrote the defendant as follows: "20 Ranch, Forsyth, Mont., March 9, 1903. Omaha Wholesale Grocery Co., Omaha, Neb. Dear Sirs: On the 3d day of March I ordered the inclosed bill of goods from Albert A. Sheard who represented himself as one of your salesmen. I gave him a check for ($96.32-100) ninety-six dollars and thirty-two cents, made out to the Omaha Wholesale Grocery Co. Do you authorize him to sign the company's name and collect such checks. This bill of goods was to be delivered at Rosebud, Mont., the 15th day of April, C. O. D., for the balance of the bill ($278.45) two hundred seventy-eight dollars and forty-five cents, as we paid in the check two dollars and fifty cents ($2.50) express on silver (he said he was allowed to give away), and also one dollar for error in the bill. Will the goods be at Rosebud as ordered in bill on the 15th day of April. Please answer this at once, and oblige, yours respectfully, A. D. Howard & Co."

In reply to the foregoing, the plaintiffs received from the defendant the following: "Omaha, Neb., Mar. 14, 1903. A. D. Howard & Co., Forsyth, Mont. Gentlemen: Mr. A. A. Sheard has handed us your note and order for a bill of groceries. Said bill amounts to $374.79 and shows amount collected, $96.32, leaving a bal. as shown by your note of $278.47. Owing to the trouble caused by the unwarranted proceedings of one Mr. Philbrick in having Mr. Sheard arrested and placed in jail for making these collections, we do not feel that we can ship goods up there without the pay for them, and must ask you to kindly send us a draft for the balance of your bill $278.47, on receipt of which we will ship your goods at once. We

respectfully refer you to the Union Nat'l Bank of this city as to our standing and reliability. In doing business where people are so conservative, we believe in returning the compliment and using the same conservative methods and trust they may prove entirely satisfactory to you, as it is the only way we can accept your order or ship the goods. Awaiting your favor, we are, yours very truly, Omaha Wholesale Grocery Co."

The defendant's letter admits the receipt of the order through Sheard, and acknowledges the payment which had been made to him thereon. It shows resentment at his arrest in Montana, and characterizes it as "unwarranted." When we recall that he was arrested on the suspicion that his claim of authority to sell goods and collect money for the defendant was false and fraudulent, the defendant's characterization of his arrest as "unwarranted" becomes significant. The letters and telegram were all competent evidence. To our minds they are amply sufficient to establish Sheard's authority to take the order and receive the cash payment thereon. In fact they hardly admit of any other reasonable inference. Incompetent evidence was also received for the same purpose, but as the trial was to the court, without a jury, the reception of such evidence was not prejudicial.

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.

ELIZABETH E. ROWND ET AL., APPELLANTS, V. WILLIAM HOLLENBECK ET AL., APPELLEES.

FILED JUNE 20, 1906. No. 14,396.

1. **Findings**: REVIEW. The findings of the trial court on conflicting evidence in an action at law will not be disturbed on appeal unless manifestly wrong.
2. **Sale**: RESCISSION. Where by the terms of a contract of sale payment of the price is to precede a delivery of the goods, the repudiation by the vendor of a substantial condition of the contract on his part to be performed will justify a rescission of the contract by the vendee.
3. **Evidence** examined, and *held* sufficient to sustain the findings of the trial court.

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

Harrison & Prince, for appellants.

O. A. Abbott and *Henry Mitchell, contra.*

ALBERT, C.

This action was brought by Elizabeth E. Rownd and Willis E. Rownd against William Hollenbeck to recover the balance due on a contract for the sale of certain chattels. It is alleged in the petition that on the 23d day of January, 1904, the plaintiffs sold to the defendant, Hollenbeck, the hotel furniture, fixtures, etc., in the St. James Hotel in Grand Island, for which said defendant agreed to pay the plaintiffs the sum of $2,700, $50 cash in hand, and the remainder on the 25th day of January, 1904; that said defendant had paid the $50, but had failed and refused to pay the remainder, or any part thereof. The pleadings and the evidence show conclusively that Vinnie Makely was the real vendee, and that Hollenbeck and another party merely acted as her agents. She was permitted to intervene, and the real controversy is between

her and the plaintiffs. In her answer to the petition she alleges that a memorandum of the contract of sale was reduced to writing and that it was as follows: "Grand Island, Neb., January 23, 1904. Received of Henry Mitchell, agent, the sum of fifty dollars in cash as part payment on our hotel furniture and fixtures now in the St. James Hotel, Grand Island, Nebraska, the balance of the purchase price to be paid on Monday, the 25th of this month. The full purchase price to be paid for the furniture and fixtures is (2,700) twenty-seven hundred dollars, and the property to be sold includes all the property invoiced by Mr. Groff, Henry Mitchell and Mr. and Mrs. Rownd, also the dishes and table linen, kitchen furniture and fixtures not specifically listed; also the coal now in basement, and the organ now in the parlor. The dishes to be in accordance with the list shown Henry Mitchell, and the beds to be equipped as follows: Each bed to have three sheets, also each bed to have two pillows, four pillow cases, two comforters, one counterpane; and to assign over the insurance now on the property without charge, also the partitions in the pool-room and the one separating the parlor from the dining room. Made in duplicate on the day and year above written. We agree that the property shall be free from all taxes and incumbrances. To give possession to buyer February 1, 1904. Mrs. W. E. Rownd, W. E. Rownd. Witness: E. J. A. Hasenyager." The intervener also alleges that the inventory referred to in the foregoing memorandum was reduced to writing, and a copy thereof is set forth in her answer. It contains a long list of furniture, fixtures, etc., with the agreed price of each article set opposite thereto. The last item on the list is as follows: "For lease of building, $265.20." The aggregate value of the items shown by the inventory set forth in her answer is $2,700. She further alleges that on the 25th day of January, 1904, the date fixed by the terms of the contract for the payment of the remainder of the purchase price, she offered to pay the plaintiffs said remainder, provided they would pay certain taxes for the

years 1902, 1903, which were liens upon the property, discharge and procure a release of 6 chattel mortgages which were apparent liens thereon, and transfer their leasehold interest in the hotel to her, and that they refused to comply with these conditions; that upon their refusal she deposited the balance due on the contract in one of the banks at Grand Island, payable to their order upon a compliance on their part with said conditions; that on the 4th day of February, 1904, the plaintiffs having failed and neglected to comply with said conditions and to perform their part of the contract of sale, she rescinded the contract. Her answer also includes several counterclaims, among which is one for $50 paid on the purchase price. The plaintiffs replied to the intervener's answer, denying, among other things, that an assignment or transfer of their leasehold interest in the hotel was included in the inventory or contemplated by the contract of sale. The cause was tried to the court without a jury, and the trial resulted in a finding for the intervener, and a judgment in her favor for $50 and interest. The plaintiffs appeal.

One point in dispute between the plaintiffs and the intervener is whether the plaintiffs' leasehold interest in the hotel was included in the contract of sale. That the plaintiffs made and signed the memorandum of the contract of sale set out in the intervener's answer is admitted. That memorandum on its face makes no mention of the lease, but is not complete in itself. It refers to an invoice taken by "Mr. Groff, Henry Mitchell and Mr. and Mrs. Rownd" (plaintiffs). The evidence shows that these parties took an inventory of the property. When the inventory was taken Mrs. Rownd, one of the plaintiffs, undertook to keep a list of the property, and another was kept by Mr. Groff and Mr. Mitchell. There is no substantial difference between these lists, save that the list kept by Groff and Mitchell includes the item, "For lease of building, $265.20" while that kept by Mrs. Rownd does not include that item. The plaintiffs both testify positively that the item referred to was not listed when the inventory was taken, and that

it was not the intention of the parties that it should be included in the contract. Groff, who assisted in taking the inventory, also testified that it was not mentioned in his presence, but his testimony is of a negative character because he was only there a portion of the time and was not there when the inventory was completed. The testimony of Mr. Mitchell is to the effect that he was acting for the intervener; that after the other items had been listed it was found that they footed up to $2,435.80; that was less than the plaintiffs cared to take for their property, and they then told him that they wanted $3,000 for it, and that in order to raise the inventory to that amount they would include their leasehold interest; that he rejected that proposition, but made them a counter proposition to the effect that he would raise the inventory to $2,700 if they would include the leasehold interest; that they agreed to do this, and the leasehold was inventoried at $265.20, the difference between the aggregate valuation placed on the other items of property and $2,700. His testimony is corroborated by circumstances, one of which is that it is the most reasonable explanation of the fact that the amount which the intervener was to pay for the property was finally placed at $2,700. However that may be, whether the leasehold was included is a question that turns on the credibility of the witnesses. This is not an appeal in equity, bringing the case here for trial *de novo,* but an appeal from a judgment in an action at law. The finding of the trial court, therefore, has all the force and effect of a verdict of a jury, and it is well settled that a verdict of a jury on conflicting evidence will not be disturbed on review unless manifestly wrong. *Travelers Ins. Co. v. Snowden,* 60 Neb. 263; *Hart v. Weber,* 57 Neb. 442; *Allsman v. Richmond,* 55 Neb. 540. In this case the finding is amply supported by the evidence.

As before stated, that the plaintiffs made and signed the memorandum is admitted; that the inventory set forth in the intervener's answer, which, among other items, contains the plaintiffs' interest in the leasehold, is the

inventory referred to in the memorandum, and therefore a part of the written evidence of the contract, is established by the finding of the trial court, abundantly sustained by the evidence. Consequently, we must proceed on the theory that the leasehold was included with the other items of property which the plaintiffs agreed to sell to the intervener for $2,700. Proceeding upon that theory, the conclusion reached by the district court necessarily follows. The contract is executory, save as to the cash payment of $50 on the purchase price. The plaintiffs are seeking to enforce this contract against their vendee so far as it is favorable to themselves, while at all times repudiating a substantial condition thereof on their part to be performed. In other words, they are seeking to recover the price, and at the same time intending to withhold delivery of a substantial part of the property for which the price was to be paid. It is well settled that a person who purchases goods with a preconceived intention of not paying for them is guilty of a fraud upon his vendor. *Thompson v. Rose,* 16 Conn. *71, 41 Am. Dec. 121; 24 Am. & Eng. Ency. Law (2d ed.), 1100, 1101, and notes. The converse must be true, that one who obtains payment for goods with the preconceived intention of not delivering them or withholding delivery of a substantial portion is guilty of a fraud against his vendee. According to their own testimony, the plaintiffs never intended to transfer the lease. The record therefore (and we speak from it alone) places the plaintiffs in the position of asking the court to assist them in perpetrating a fraud upon their vendee. That the court will not lend its aid to such ends goes without saying. The plaintiffs' intention not to transfer the lease justified the intervener in treating the contract as at an end, and entitled her to a return of the $50 paid on the contract.

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.

N. S. BROWN ET AL., APPELLEES, V. EDWARD BROWN ET AL., APPELLEES, GEORGE BROWN ET AL., INTERVENERS, APPELLANTS.

FILED JUNE 20, 1906. No. 14,418.

1. Wills: PRETERMITTED CHILD: BURDEN OF PROOF. The burden of proof is upon a pretermitted child or grandchild to show that the omission to make provision for him in the will was unintentional. *Brown v. Brown*, 71 Neb. 200.
2. Witnesses: OBJECTION TO COMPETENCY. An objection to evidence on the ground that it is incompetent does not go to the competency of the witness.
3. ———: CONFIDENTIAL COMMUNICATIONS: WAIVER. The provisions of section 333 of the code against the disclosure of confidential communications may be waived by the party in whose favor they were enacted, and a party calling the attorney who has prepared his will as a witness thereto thereby impliedly consents that such attorney may disclose the facts and circumstances attending its execution, when the same is offered for probate or subsequently.
4. Evidence examined, and *held* sufficient to sustain a finding that claimants were intentionally omitted from the will.

APPEAL from the district court for Hamilton county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

M. F. Stanley and *O. A. Abbott,* for appellants.

Hainer & Smith and *J. H. Edmondson, contra.*

ALBERT, C.

This case is here on a second appeal. The facts are stated at some length in the opinion disposing of the first appeal. See *Brown v. Brown,* 71 Neb. 200. The questions presented by the record are: (1) Are the two grandchil-

dren, George and Mabel Brown, designated in the former opinion as interveners, included as beneficiaries under the residuary clause of the will? (2) If not thus included were they intentionally omitted from the will by the testator? The district court resolved both those questions against the interveners, and entered a decree accordingly. The interveners appeal.

The first question, while not necessary to a decision on the former appeal, is discussed at some length in the opinion. At that time we reached the conclusion that the interveners were not included in the residuary clause. We are satisfied with the conclusion and think a further discussion of the question at this time would be profitless.

The second question is one of fact, and it is now contended that the finding of the trial court thereon is not sustained by sufficient evidence. As held on the former appeal, the burden of proof is upon the interveners to show that their omission from the will was unintentional. The principal testimony relied on as showing that fact is that given by the widow of the testator. She testified that toward the close of his life, and at the time the will was made, he was very forgetful; that he would go to town, come home again, and forget for what he had gone. What seems to be the material portion of her testimony as to the testator's testamentary intentions is as follows: "Q. You may state whether you ever heard him say anything about his intention as to his children and grandchildren, as to remembering them in his will or anything in regard to that matter? A. Well, I did not hear him mention the children, but he says, 'I want my heirs, my grandchildren, to have their money'; he did not mention them, but he said 'all of them.' He says, 'all of them,' all of my grandchildren, I want them to have $100 apiece.' Q. Did he say to you at any time what would be the result if he didn't do that? A. He never mentioned their names, he just told me over and over again, 'I will my grandchildren,' he says, 'all of them $100 apiece.'"

Cross-examination: "Q. You knew Mr. Brown had made

his will, about the time it was made, did you not? A. I know pretty near when it was made. Q. He brought a copy of that will home with him after it was made? A. Yes; he did. Q. And you and he read that copy over, and knew what was in it? A. I knew pretty near what was in it, but he had it made over after that, he come to town, and after he got back he says, 'I made that will some different.' And I says, 'How?' And he says, 'I willed my grandchildren, all of them $100 apiece.' He fetched the deed (will) home in his pocket. Q. And he kept that among his papers at home? A. Yes; he kept it locked up. And that is the words he says to me when he got home, he says, 'I want my grandchildren to have $100 apiece.' Q. And a copy of that will was among his papers after he died? A. Yes, sir. Q. And it was where he could have access to it any time he wanted it? A. Yes, sir. Q. Do you know of his reading it over several times? A. No, I don't, he never read it but once that I know of. Q. When was that, just after it was made? A. Just after the last will was made after he changed the will. Q. He first had a will in which he left them all out? A. Yes, sir. Q. And he wanted to do that in his first will? A. Yes, sir; and then he made it again and he says, 'I must will my grandchildren all of them $100 apiece.' Q. There was some of his grandchildren in Iowa that he didn't want to leave anything? A. I suppose so—the silly one I suppose. Q. And you and he had talked that matter over? A. I don't know. Well, he did say, too, that Charlie was silly, and he didn't need it, that's about all he ever said about Charlie." The testimony of the wife, as to the testator's memory, is corroborated by several other witnesses who give many specific instances showing extreme forgetfulness on his part.

On the other hand, the attorney who prepared the will for the testator, and who signed it as a witness, testified on behalf of the appellees. Among other questions, he was asked: "You may state what, if anything, was said at the time of the preparation of that will with regard to the

grandchildren of Henry S. Brown, deceased, and being the children of the deceased son by the name of Albert Brown, who had died prior to the death of his father and prior to the making of that will?" The interveners objected on the ground that the evidence was incompetent and immaterial. The objection was overruled, and the witness answered as follows: "We had a great deal of conversation at the time about his will, the terms and provisions of the previous will, and also of this will, were discussed fully. He told me of his sons who were dead, and he gave me the names of his grandchildren, six who are mentioned in the will as drawn, and told me the provision which he wished to make for them. As I now recall it, he did not give me the names of those grandchildren who were not provided for by the will, but acquainted me with the fact that there were other grandchildren. Then, in taking the memorandum, I called his attention to the fact that he had already made one will which was unsatisfactory, and also called his attention to the fact that I advised him at the time that it would prove so, and suggested to him the advisability and wisdom of his stating to me all the facts and circumstances, that I could better prepare his will, that he wasn't making provision for all of his grandchildren. He was a very quiet and determined sort of a man, and sat and eyed me for a little time, and then said: 'Mr. Hainer, I have told you how I wanted this will drawn. I can't talk about it without getting angry, and I don't want to be angry when I am making my last will. You make that will as I told you.' And, complying with that peremptory order, I prepared the will. That was the substance and conclusion of the conversation respecting the grandchildren."

The objection to the foregoing evidence is couched in the most general terms. The intervener's brief merely calls attention to the fact that the evidence was admitted over their objection. As the issue was whether the interveners had been omitted from the will by oversight or inadvertence, we think evidence of what was said at the time

the will was drawn, so far as it goes to show that they were before the mind of the testator at that time, would be competent and material. The competency of the witness who testified to such facts is not challenged by the general objection interposed, because the rule is that an objection to the competency of evidence, does not, ordinarily, go to the competency of the witness. *Chicago, K. & N. R. Co. v. Behney,* 48 Kan. 47; *Cornell v. Barnes,* 26 Wis. 473; *Carter v. New York E. R. Co.,* 134 N. Y. 168. But, had the objection gone to the competency of the witness, it would have been unavailing. It is true, he is the attorney who prepared the will for the testator, and the communications made to him with respect thereto and for his guidance in drawing the will are in the nature of confidential communications, but he was also called as an attesting witness and signed the will as such. While section 333 of the code prohibits the disclosure of confidential communications made to a practicing attorney, and certain other classes of professional men, the next section provides that such prohibition may be waived by the party in whose favor it was enacted. When a will is offered for probate, the witnesses thereto may be examined at length as to the mental capacity of the testator, and the facts and circumstances attending its execution. And the testator, by permitting his attorney to become a witness to the will, thereby consented that he might be examined as a witness to such matters after his death. *McMaster v. Scriven,* 85 Wis. 162, 39 Am. St. Rep. 828; *Blackburn v. Crawfords,* 3 Wall. (U. S.) 175; *Denning v. Butcher,* 91 Ia. 425, 59 N. W. 69; *In re Will of Coleman,* 111 N. Y. 220; *Daniel v. Daniel,* 39 Pa. St. 191; See also *Western T. A. Ass'n v. Munson,* 73 Neb. 858. Indeed, it has been held that the general rule excluding confidential communications made to an attorney does not apply to communications made while giving instructions for drafting a will, especially when those attacking the will seek to take advantage of the privilege. 3 Jones, Evidence, sec. 773. But it is not necessary to go to that extent in this case, the waiver to be implied from permitting

the attorney to attest the will as a witness being sufficient ground for the admission of the evidence in question. The witness above referred to also testifed that he prepared the will and gave it to the testator, who took it home with him, and came back the next day and signed it, retaining a carbon copy. The original was filed with the county judge.

A son of the testator was also examined as a witness, and testified to a conversation had with the testator after the will was made. The testator showed him a copy which he had retained, and reference was then made to the omission of any provision for the interveners and another grandchild, who is not a party to this proceeding. In that conversation, the reason given by the testator for not providing for the latter grandchild was that the child was confined in an insane asylum, which appears to have been true. The witness then asked him why he had not provided for "brother Bert's" children (the interveners). The witness thus gave the testator's answer: "They had trouble, and, well it was something about some money matters that they had their difficulty, and he said that he couldn't conscientiously give those children anything." There is other evidence tending to show that there was some difficulty between the testator and one or both of the parents of the interveners, but the nature of this trouble, its origin, and whether it was of a serious character or otherwise, is not made clear by the evidence. There is also evidence to the effect that the testator had sufficient memory to remember his near kin, knew his children and grandchildren, where they lived and how they were situated in life. Several witnesses were called who testified that he was a man of fair memory, one at least going to the extent of saying that he would consider him equal to if not above, the average man in the transaction of business matters. His family physician testified that he was a man of fairly good memory, and seemed to be very careful and methodical. That the will was admitted to probate conclusively establishes the fact that the testator was of sound mind and memory when it was executed. In

short, taking the entire evidence as to the state of the testator's memory when he made the will, the inference we draw therefrom is that his memory was about such as one would expect to find in a man of his years, and that, in the absence of a more reasonable explanation, the omission of these grandchildren from the will might be accounted for on the theory of forgetfulness on the part of the testator. But that theory, at best, would rest largely on conjecture. It is met by the positive testimony of the attorney who prepared the will, and of the son who talked with the testator concerning its provisions after it was made. The testimony of these witnesses is irreconcilable with the theory that the omission of the interveners from the will was due to oversight or forgetfulness, and we find nothing in the record that would justify us in rejecting their evidence. Giving the evidence of these two witnesses the weight to which it is entitled upon the facts and circumstances disclosed by the record, and considering it in connection with the other evidence adduced, we consider it amply sufficient to sustain the finding of the trial court. We have not overlooked the testimony of the wife of the testator as to the statement made to her by the testator as to his testamentary intentions and the provisions of the will after it had been made. According to her testimony, although he retained a copy of the will, he never showed it to her. He may have had what seemed to him good reasons for concealing or misstating its contents. But, however that may be, laying aside the usual presumptions attending the findings of the trial court, the evidence satisfies us that the omission to provide for the interveners is not due to accident, mistake or forgetfulness on the part of the testator, but that such omission was intentional.

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.

CITY OF MCCOOK V. ROSELAND PARSONS.

FILED JUNE 20, 1906. No. 14,346.

1. Cities: PRIVATE CROSSINGS: LIABILITY. A city is not liable for damages sustained by reason of a defective crossing from private property into a public street.
2. ———: PERSONAL INJURY: INSTRUCTIONS. In an action against a city for damages sustained by reason of a personal injury, an instruction from which the jury might infer that the city would be liable for negligently permitting a walk in general use by the public over property not shown to be within the corporate limits of the city to become and remain in a dangerous condition, is prejudicial error.

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

J. S. LeHew and *Boyle & Eldred,* for plaintiff in error.

Starr & Reeder, contra.

JACKSON, C.

Roseland Parsons recovered judgment against the city of McCook in an action for damages, alleged to have been sustained by reason of falling from a defective walk, and the city brings error.

The station grounds of the Burlington railroad company at the city of McCook are approached from the north by Main avenue on the west, and Marshall street on the east. Railroad street extends east and west on the north side of the station grounds. Marshall street terminates on the south side of Railroad street. Main avenue is the principal thoroughfare from the city to the station.

The railroad station is at the west end of the depot grounds on a line with the east side of Main avenue. East of the depot is a lunch room and the residences of railroad employees on the depot grounds. The residences are surrounded by a small railroad park inclosed by a fence. The park extends east to a line about parallel with the center of Marshall street and to a line six feet south of the south line of Railroad street. The space between the park and and the south line of Railroad street is occupied by a ditch or waterway, running east and west. The distance across the bottom of the ditch at the east end of the park is six feet. On the east side of the block, directly north of the depot grounds, a sidewalk extends from the north to a point about 40 feet north of the south line of the block. At the east end of the railroad lawn the company many years ago constructed, and has since maintained, for the convenience of its employees, a three foot plank walk extending from the platform on the south side of the depot to a point seven feet south of the south line of Railroad street. From that point it constructed a bridge extending in a northwesterly direction across the waterway. The bridge is connected with a culvert extending from the north end of the bridge in a northwesterly direction to the end of the sidewalk on the west side of Marshall street. The walk at the east end of the railroad lawn, the bridge across the waterway and the culvert for one-half the distance across Railroad street were always maintained, to the time of the accident at least, by the railroad company, whose employees were under instructions from the company to maintain this walk and bridge in good repair. On the southeast corner of the second block, immediately north of the depot grounds, is the National Hotel, of which, at the time the accident occurred, the defendant in error was proprietor. One of the passenger trains over the Burlington road was due at McCook shortly after midnight. Defendant in error went to the depot for the purpose of meeting that train and soliciting patronage for his hotel. Upon returning to the hotel, he went along the

walk east of the railroad park, and testified that it was so dark that, in attempting to cross the bridge, he approached the outer edge, when a decayed plank gave way and precipitated him into the ditch below, where he fell on a piece of scantling lying in the bottom of the ditch, and sustained the injuries because of which the action is brought. Concerning the fall, he testified that it was about seven feet and a half from where the walk made the turn to where he fell. The walk over which Parsons was traveling at the time of the accident was used, not only by the employees of the railroad company, but by all other persons who might wish to enter the depot grounds from Marshall street. The culvert extending from the bridge to the sidewalk on Marshall street was of plank and was used as a walk by persons traveling that way.

The plaintiff in error objected to the introduction of any evidence on behalf of the defendant in error, for the reason that the petition failed to state facts sufficient to constitute a cause of action. The objection was overruled, and proper exceptions taken. This objection has been properly preserved in the record, and is included in the assignments of error. The objection, in our opinion, is well taken. It does not appear from the petition either that the depot grounds or the place where the accident occurred were within the corporate limits of the defendant city, and the objection to the introduction of evidence should have been sustained.

At the trial the court instructed the jury as follows: "I instruct you, if you find from the evidence that the place where plaintiff claims he was injured was a traveled way and walk that had been in general use by the public for many years before the alleged accident, that such walk was and has been used generally by persons having occasion to go from one part of the city to another, and particularly along Marshall street to the railroad depot or vicinity, so that said walk became known and was used as a common public way for the travel of foot passengers, then, under such conditions, so far as this case is con-

cerned, said walk became and was a public walk of the city. If you should determine from the evidence, however, that said walk was not generally used as a public way for pedestrians and had not become known as a public walk, then the city would not be liable in this case; for the law imposes upon the city no obligation to construct, maintain or repair any approach from a railroad company's property to the sidewalks of the city, or from other private property." This instruction was at least misleading. The jury might easily infer from the language employed that, although the accident to Parsons occurred on the railroad ground, still, if it was on a traveled way in general use by the public for many years before the accident, the city might be liable if it had negligently permitted the walk to become in a dangerous condition. User alone does not constitute a public way, and a city is not ordinarily liable for an accident occurring on an approach from private property into a public street. *Goodin v. City of Des Moines,* 55 Ia. 67. There is no evidence that the city ever asserted jurisdiction or assumed authority over the walk on the company's right of way and depot grounds, and consequently no estoppel arises as against the city.

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

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

CYRUS E. RUSSELL, APPELLANT, V. ADDIE RUSSELL, APPELLEE.

FILED JUNE 20, 1906. No. 14,354.

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

APPEAL from the district court for Jefferson county: WILLIAM H. KELLIGAR, JUDGE. *Decree modified.*

John C. Hartigan, for appellant.

John Heasty, contra.

JACKSON, C.

The plaintiff appealed from a decree denying him a divorce and the custody of minor children, and requiring him to pay his wife for her support and the maintenance of the children the sum of $20 a month, and to provide his family with electric light and fuel. Submitted with the main question is an application on the part of defendant for the allowance of attorney's fees in this court, together with a showing that the allowance for support made in the trial court has only been partially paid. At the time of the trial both parties were residents of Jefferson county. The decree required the defendant to retain the children within the state and afford plaintiff reasonable opportunity to visit them on suitable occasions, and from the affidavit of plaintiff it appears that since the rendition of the decree the defendant has removed with the children to Greeley county, and that fact is urged as a reason why he should no longer be required to pay the amount allowed for maintenance.

The evidence fully justifies the conclusion reached by the trial court that the plaintiff was not entitled to divorce. The parties had not lived together for some months prior to the commencement of the divorce proceedings. The

plaintiff is and has been employed for a number of years as engineer in an electric lighting plant at Fairbury. His duties require him to be in attendance at his labors in the nighttime. He became suspicious of the fidelity of his wife, and proved some indiscretions on her part, which she frankly admitted. The evidence, however, fails to show anything of a criminal nature. It is easy to understand how a man employed as he was, being required to work in the night and sleep in the daytime, and thus deprived of such association with his family as ordinarily falls to the lot of the husband, might more readily be induced to misconstrue the acts and associations of the wife than he otherwise would. He was receiving a salary of $70 a month, and prior to the divorce proceedings he contributed to the support of the family $20 a month out of his salary and furnished them with electric light and fuel, as he is now required to do by the decree of the court. The fact that he was to continue providing light for the home was doubtless due to the nature of his employment, and, since the defendant has removed with the children to Greeley county, the decree should be modified so that he no longer be required to furnish electric light. It would no doubt be impossible for him to do so, nor would it be convenient to attend to furnishing fuel. The removal of the family, however, to the county of Greeley should not operate to relieve him from otherwise performing the decree. Such removal is not a violation of the order of the court.

It is recommended that the decree be modified, and that the plaintiff hereafter be required to pay to the defendant the sum of $24 each month, and the sum of $50 as fees for counsel representing the defendant in this court.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified, and the plaintiff is required to hereafter pay to the defendant the

sum of $24 each month, and the sum of $50 as fees for counsel representing the defendant in this court.

DECREE MODIFIED.

JOHN M. MACFARLAND, APPELLEE, V. ALEXANDER A. ALTSCHULER, APPELLANT.

FILED JUNE 20, 1906. No. 14,384.

Attorneys: PARTNERSHIP: ACCOUNTING. In the absence of an express agreement to the contrary, any professional service rendered by a member of a firm of lawyers should be presumed to be for the benefit of the firm.

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

I. J. Dunn, for appellant.

Weaver & Giller and *John M. Macfarland, contra.*

JACKSON, C.

This action is for an accounting between former partners. The principal controversy is over the construction of a written agreement entered into by the parties at the time the partnership was formed. That part of the agreement over which this contention arises is in this language: "It is agreed between the parties hereto that they form a partnership in the practice of law in the city of Omaha, and to share and share alike in the profits therefrom. That so far as the business of John M. Macfarland is concerned, said business and all fees due and to become due is to be shared alike by the parties hereto, excepting the fees due said Macfarland in the *Bohln* and *Cunningham* cases." At the time this agreement was entered into Macfarland was of the Douglas county bar and maintained his office in the city of Omaha, while Altschuler was of the Lancaster county bar and maintained his office in the

city of Lincoln. Shortly after signing the memorandum of partnership agreement, Altschuler removed to Omaha, and the business of the firm was conducted under the name of Macfarland & Altschuler. Each member of the firm, at the time the partnership was formed, had unfinished business pending in the courts, and the most important question is whether, under the terms of the written agreement, the appellant should be required to account to the firm for fees received by him on account of unfinished business which he had on hand at the time the partnership was formed. The trial court required him to so account, and in that respect the decree is manifestly just. In the absence of an agreement to the contrary, any professional service rendered by a member of a firm of lawyers should be presumed to be for the benefit of the firm, and such course was, without doubt, contemplated by the partners in this case. The exception in favor of Macfarland in the *Bohln* and *Cunningham* cases strengthens the conclusion reached.

The account stated by the district judge includes items of fees collected for services, a portion of which was rendered by individual members of the firm, after the dissolution of the partnership, in litigation where the firm had been retained prior to dissolution, as well as those received by appellant on account of business which he had on hand, where a portion of the services had been performed prior to the partnership agreement, and it is urged that these amounts should be diminished by the value of the services performed, both before the partnership and after its dissolution. It appears, however, in the decree that after the account was stated by the trial judge it was announced that the case would be reopened, if desired by either party, for the purpose of receiving evidence as to the fair and reasonable value of such services; that each party disclaimed any desire to offer further evidence, and the account was accordingly stated without reference to the value of the services involved. In view of this condition of the record we do not think either party should now be permitted to complain. The account is stated from a mass

of testimony covering more than 600 pages of typewritten matter, and some of it, at least, from conflicting evidence. The important witnesses testified in open court, and the trial judge had opportunities for determining their credibility not enjoyed by this court. We have examined the evidence with care, and think that the conclusions of the trial court should be adopted, with the exception of two items in the account charged against the appellant. He is charged in the statement of account with $1,600 in fees in what is called the *Bentley-Baker* case. The finding is based solely upon the testimony of the appellee that appellant informed him that he had received $1,600 in fees in that case. On the other hand, the sworn testimony of the appellant, in accounting for cash received in that case, discloses that he received, as a matter of fact, only $1,000, and our conclusion is that he should be charged in the account with the sum of $1,000 only. He is also charged with the sum of $31 for services in *Kindrich v. Seigel-Cooper Co.* It appears that all fees received in that case were paid out in costs and expenses, and that it is not a proper charge. In all other respects the decree has ample support in the evidence. The total sum which the decree requires the defendant to account for is $1,460.50, while the total of the sums which the plaintiff is required to account for is found in the decree to be $1,180.76, including a personal indebtedness of the plaintiff to the defendant amounting to $613.61, secured by chattel mortgage on the plaintiff's library. By the decree the chattel mortgage is canceled, and the plaintiff is given judgment for $279.74.

We recommend that the decree be modified, by requiring the defendant to account for the sum of $1,145 only, and that he have a judgment in this court for a remainder of $35, and a decree foreclosing the chattel mortgage for that amount.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is modified, by requiring the defendant to account for the sum of $1,145 only, and that he have judgment in this court for a remainder of $35, and a decree foreclosing the chattel mortgage for that amount.

JUDGMENT ACCORDINGLY.

GERTRUDE MCDOWELL, APPELLANT, V. JAMES T. MARKEY ET AL., APPELLEE.

FILED JUNE 20, 1906. No. 14,393.

Mortgages: FORECLOSURE: EVIDENCE. In an action to foreclose a real estate mortgage, the plaintiff is required to allege and prove, as against the owner of the equity of redemption, that no proceedings at law have been had for the recovery of the debt secured by the mortgage.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

R. R. Dickson and *Charles Battelle,* for appellant.

M. F. Harrington, contra.

JACKSON, C.

On December 11, 1902, the plaintiff instituted this action in the district court for Holt county to foreclose a real estate mortgage given March 30, 1889, to secure the payment of a promissory note payable to the Nebraska Mortgage & Investment Company April 1, 1894. The petition contains this allegation: "That there has been no action at law to collect said bond or interest, neither has any been commenced nor has the same been paid." The defendant, James F. Shoemaker, answered, admitting the

execution of the note and mortgage, and denying the other allegations of the petition. He pleads title to the real estate acquired through a judicial sale in a proceeding to foreclose a tax lien, and that in the tax foreclosure the Nebraska Mortgage & Investment Company was made a party defendant and properly served with summons; that no assignment of the mortgage had ever been recorded, and that the lien of the mortgage was divested in that proceeding. The reply put in issue the allegation of proper service on the Nebraska Mortgage & Investment Company. The finding in the district court was against the plaintiff, who has appealed.

It appears that the note secured by the mortgage was assigned soon after its execution, and later became the property of the plaintiff. No assignment of the mortgage was ever recorded in Holt county, and no notice is brought home to the plaintiff in the tax foreclosure that any one other than the Nebraska Mortgage & Investment Company had any interest in the mortgage. The mortgage company became insolvent, and its affairs were wound up by a receiver appointed in the federal court. It was a Dodge county concern, and in the tax foreclosure service was had on the receiver in Douglas county, and on the mortgage company by leaving a copy at its last place of business in Dodge county. The premises where the summons for the mortgage company was left were, at the time of the service, occupied by a jeweler, and had not been occupied by the mortgage company for some years. There is no pretence of service on any officer of the company, although the president of the company, at the time of the service, was a resident of Dodge county, and it is claimed that the service on the mortgage company was void, and therefore that the lien of the mortgage has never been divested. We do not think it necessary to determine that question. It does appear that proper service was had in the tax foreclosure on the owner of the title, and Shoemaker, who purchased at the judicial sale, acquired, at any rate, the equity of redemption.

The only evidence offered in support of the allegation that no proceedings at law had been had for the recovery of the debt secured by the mortgage is found in the testimony of the witness Meredith, who testified that the note and mortgage came into his possession for collection about the 20th or 25th of May, 1902, and that no action at law had been commenced to collect the note after it came into his possession. That, it will be observed, was more than eight years after the maturity of the note. This evidence does not meet the requirements of the statute.

It is the contention of the appellant that Shoemaker is a mere lien-holder, and that as between lien-holders no proof was required that no proceedings at law had been had for the recovery of the debt, citing our holding in *Chaffee v. Sehestedt,* 4 Neb. (Unof.) 740; but, as we have already determined, Shoemaker, on any theory of the case, was the owner of the equity of redemption, and, having denied the allegation of the petition that no proceedings had been had for the recovery of the debt, it was incumbent on the plaintiff to make proof of that fact as against him. *Pratt v. Galloway,* 1 Neb. (Unof.) 168, 172.

The decree 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.

FARMERS & MERCHANTS IRRIGATION COMPANY, APPELLEE, V. UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT.

FILED JUNE 20, 1906. No. 14,407.

Principal and Surety: BONDS: ESTOPPEL. Where a bonding company, with knowledge of an informality in the execution of a bond by its agent, receives and retains the premium paid for the bond, it is estopped in an action on the bond from urging such informality as a defense.

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

George C. Gillan, for appellant.

E. A. Cook, contra.

JACKSON, C.

The appellant is a bonding company. It gave power of attorney authorizing Charles F. Horner, together with George C. Gillan, both of Dawson county, to execute and deliver bonds required in judicial proceedings. On October 5, 1903, the appellee recovered judgment before the county judge of Dawson county against Andrew Anderson, and, for the purpose of prosecuting an appeal to the district court, Anderson and his attorney applied at Mr. Horner's office for an appeal bond. Horner was absent, but his clerk, after taking a property statement from Anderson and receiving payment of the premium, prepared and delivered to Anderson's attorney a bond in due form, signed: "United States Fidelity & Guaranty Co., By Chas. F. Horner, S., Attorney in Fact." There is a conflict in the evidence as to the fact of delivery; Horner's clerk testified to having told Anderson's attorney that it would be necessary to secure the signature of Mr. Gillan to make the bond effective, while the attorney asserts with equal force that no such statement was made. His testimony has some support in the fact that no blank space appeared on the bond for Gillan's signature. The bond

was presented to the county judge, and by him approved October 10, 1903, and Anderson was thereby enabled to, and did, prosecute his appeal, which on March 13, 1904, was dismissed, and the fact of dismissal certified to the county court, where execution was issued and returned, "No property found." From a judgment on the bond, the surety company appeals.

It interposed the defense that the power of attorney authorized the execution of bonds only by the joint act of Horner and Gillan, neither of whom, it is alleged, signed the bond in suit. It was disclosed in evidence that the bond, while appearing on its face to have been executed on behalf of the company by Horner as attorney, was in fact signed in his name by the clerk. Mr. Anderson's attorney, who was a witness on behalf of the appellee, testified to a previous conversation with Mr. Horner relative to procuring bonds in judicial proceedings; he was told by Mr. Horner that his clerk had authority to execute the bonds. This statement is not denied, and in view of the attitude of the appellant we do not think it important. Mr. Horner was informed of the execution and delivery of the bond on the next day after the delivery. His testimony in that respect is: "Q. When Mrs. Shanklin told you about the execution of the bond, did you report its execution to the company? A. I did. Q. When? A. Immediately or nearly so, within a very short time. Q. Did you report to them how the bond was executed, how it had been signed, or did you send them a copy of the bond? A. I sent them the application, and they then asked for a copy of the bond. Q. Did you furnish them a copy of the bond? A. I did. Q. Did you receive any communication from the company? A. I did. Q. Is it not true that the company complained that you had not taken security enough for this bond? Wasn't that the complaint that the company made? A. That is true. Q. Is it not true that the company did not make any other complaint, except that you didn't take security enough? A. That is also true. Q. You say you tendered back to Mr. Rhea the money. When did you do

that? A. Well, it was a long time after this bond was executed, I really cannot say when. Q. By a long time, what do you mean? Several weeks? A. Yes, sir; it was more than several weeks. Q. Several months? A. I think so; yes, sir. Q. Did you go to the county judge and say to him that the bond had not been properly executed? A. I did not. Q. Never spoke to him about it? A. I think I did, but it was after the bond was approved. Q. How long after? A. It was some time after. Q. What do you mean by some time? A. Well, it was months after. Q. When you learned of the execution of this bond, did you go to the plaintiff in this case, or to myself as its attorney, or any of its agents, and inform them that the appeal bond had not been properly executed? A. I did not, unless Mr. Rhea was one of the parties named."

The record discloses that Rhea was attorney for Anderson in the proceedings where the bond was obtained, and therefore did not represent the appellee.

Concerning the complaint about the bond, Mr. Rhea testified that there was a complaint made some time after the bond had been approved, that the company was not satisfied that it was secure, and requested him to have Anderson come in and give a chattel mortgage; that no one on behalf of the bond company ever tendered the premium back to him. It appears then that, with a full knowledge of all the facts, the bond company retained the premium, and made no complaint of any informality in the execution of the bond, and it should now be estopped from insisting on any such informality as a defense. It enabled Anderson to prosecute his appeal, the county judge, in good faith, approved the bond, and the appellee, relying upon the sufficiency of the bond, refrained from any attempt to enforce its judgment until after the dismissal of the appeal.

It is clear that the judgment of the district court is 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.

JOSEPH STEGER, APPELLEE, V. JOSEPH KOSCH, APPELLANT.*

FILED JUNE 20, 1906. No. 14,414.

1. **Statute of Frauds:** SALE OF LAND: POSSESSION. Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result from the contract of purchase, and not the lease. *Lewis v. North*, 62 Neb. 552.
2. **Evidence** examined, and *held* not to support the decree of the trial court.

APPEAL from the district court for Butler county: BENJAMIN F. GOOD, JUDGE. *Reversed and dismissed.*

L. S. Hastings and *C. H. Aldrich*, for appellant.

A. M. Walling and *W. M. Cain, contra.*

JACKSON, C.

The plaintiff had a decree in the district court for the specific performance of an oral contract for the sale of real estate. The allegations of the petition relied upon to relieve the contract from the statute of frauds are, in substance, that the plaintiff entered into the possession of the lands with his family, and made valuable improvements thereon and paid a part of the purchase money. From the evidence it appears that the plaintiff was at one time the owner of the premises, which were heavily incumbered by mortgage. Being unable to meet the mortgage indebtedness, he sold the land to one Klosterman, but remained in possession as Klosterman's tenant, and was so possessed

* Rehearing allowed. See opinion, p. 150, *post.*

when Klosterman sold the land to the defendant in February, 1899. The lease with Klosterman entitled the plaintiff to remain in possession as tenant during that year. He was paying an annual rental of $640. By the contract of purchase from Klosterman, the defendant succeeded to the landlord's right and became entitled to collect the rent for the year 1899.

After the purchase of the premises by the defendant, plaintiff remained in possession, and has paid as rent each year to the defendant the sum of $640 until 1904, with the exception of a single year, when, owing to a partial failure of crops, the defendant waived the payment of $200 on the rental account. The defendant demanded an additional 25 cents an acre rental for the year 1904, and notified the plaintiff that he would demand a further increase for the year 1905. The rent for the year 1904 is unpaid. The plaintiff is still in possession of the premises, and on his behalf the testimony tends to prove that on the 4th day of November, 1899, the plaintiff and his wife were requested by Klosterman to go to the office of Hastings & Hall, in David City, and execute a quitclaim deed to the land in dispute, for the purpose of perfecting his title, which it was thought was defective because of a decree of the district court for Butler county, rendered after the original conveyance from the plaintiff and his wife to Klosterman, subjecting the land to certain of the plaintiff's debts; that Klosterman, the defendant, the plaintiff and his wife met at the office of Hastings & Hall, where the quitclaim deed was prepared; that plaintiff's wife objected to signing the deed unless the defendant would sign a contract agreeing to reconvey the land to the plaintiff when the plaintiff might be able to pay for it; that the defendant said no such contract was necessary, that he would reconvey the land to plaintiff at any time within five, ten or fifteen years upon payment to him by the plaintiff of what he had in the land; that he wanted his money and not the land; that the quitclaim deed was thereupon signed and delivered. On behalf of the defendant there is evidence

tending to prove that in April, 1899, the plaintiff and defendant had a conversation in which the plaintiff expressed a desire to purchase the land; that the defendant told him he might purchase the land at any time within five years from that date for what the land was worth; that he so informed the plaintiff's wife when the quitclaim deed was executed, and that no other or different agreement was ever made. The defendant's first wife was a sister of the plaintiff, and for many years they had enjoyed friendly and confidential relations. The defendant has appealed from the decree, and contends that the decree is not supported by the law and the facts.

This contention seems to be well taken. There is no explanation in the evidence of the plaintiff's possession of the premises other than his possession as a tenant, and, having been in possession as a tenant at the time when the plaintiff alleges the contract of purchase was made, the presumption is that he continued in possession as a tenant. *Bigler v. Baker,* 40 Neb. 325. Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result from the contract, and not the lease. *Bigler v. Baker, supra; Lewis v. North,* 62 Neb. 552. There is a failure to prove any payments on account of the contract of purchase. The only payments made by the plaintiff were for rent, and the trial court in effect so found. The defendant paid $8,106.25 for the land, and it is admitted that he subsequently paid taxes amounting to $334.83, besides paying for some improvements and repairs. The decree provides for a conveyance upon the payment of $8,156.25 purchase money, $640 rent for the year 1904, and certain items of personal indebtedness not in any manner involved in the transactions concerning the land. It was proved at the trial, without controversy, that the land at that time was worth $16,000. The plaintiff testified that each year after the alleged contract of purchase he planted trees on the farm;

as affecting his claim of right, however, it is significant that he did the same thing each year while he was the tenant of Klosterman. He repaired fences and made certain other improvements, including a corncrib of about the value of $250. The defendant testified that he was requested to build the corncrib, but declined to do so; that he gave the plaintiff permission to build the crib, with the understanding that he might move it at the termination of his lease or that he would buy it, as the plaintiff might desire.

Construing the evidence in the light most favorable to the plaintiff, if falls short of proving any performance of the contract on his part such as the law requires to take an oral contract for the sale of lands out of the statute of frauds, and we recommend that the decree of the district court be reversed and the cause dismissed.

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed February 21, 1907. *Judgment of reversal and dismissal adhered to:*

DUFFIE, C.

The former opinion by Mr. Commissioner JACKSON is reported, *ante,* p. 147. On motion for rehearing, filed by the appellee, we recommended a reargument of the case, fearing that an injustice might have been done. On the reargument, it is strongly insisted that our former opinion overlooked the nature of the consideration for the promise on the part of Kosch, which is the basis of the action. It is said: "It is undisputed that plaintiff was in possession under Klosterman asserting an equity in the property in question by virtue of an option to pur

chase from the latter. That claim was recognized by Klosterman, who, in a suit by a creditor of the plaintiff, testified that he was under contract to reconvey to plaintiff upon payment of what he had in the land. Shortly thereafter Klosterman contracted to sell and convey to the defendant, Kosch, who undertook to purchase for the use and benefit of the plaintiff, his brother-in-law. Klosterman was, however, unwilling to convey, and Kosch unwilling to purchase, without the relinquishment of the plaintiff's claim. The parties accordingly met at the office of Hastings & Hall, where plaintiff and wife, after much urging and hesitation, quitclaimed their interest to Klosterman upon the express promise of the defendant, Kosch, to convey to plaintiff within the period of five or ten years upon the payment of $8,000, the price of the conveyance to him." If this claim is supported by the evidence, if Steger actually had a contract with Klosterman for the purchase of this land which a court of equity would recognize and enforce, and he surrendered his right therein and quitclaimed his interest to Kosch, the consideration being Kosch's agreement to reconvey upon the payment of $8,000, then we were in error in our former opinion, and the decree of the district court should be affirmed.

This necessitates an examination to some extent of a voluminous record, and the writer has gone through the bill of exceptions with great care in order to ascertain what the facts are relating to the evidence attending the conveyance made by quitclaim deed from Steger and wife to Kosch. Originally, Steger entered into possession of this land by purchase from Klosterman. He defaulted in payments to be made, and thereupon Klosterman took a reconveyance from him. While the evidence is not entirely clear upon the point, it appears that after this reconveyance Steger made some claim that Klosterman had obtained it by fraud, by misrepresenting the paper which Steger and his wife signed and acknowledged, and that thereupon Klosterman agreed to reconvey at any

time when payment of the full amount of the original purchase money agreed upon between them was made, with interest. The testimony bearing most closely upon this point grew out of the fact that a judgment creditor of Steger commenced an action to set aside the deed made by Steger to Klosterman, alleging that it was fraudulent and for the purpose of defeating his claim. One of the witnesses, on the trial of the case at bar, testified to the effect that Klosterman, on the trial of the creditor's suit, testified that he was under contract to reconvey the premises to Steger. On the other hand, witnesses testified that Steger, on that trial, testified that his reconveyance of the land to Klosterman was made in good faith because he was unable to pay for the land, and that Klosterman had refunded to him some of the money which he had paid on the purchase in full settlement of all equity which he had in the land; that the conveyance was an absolute one, and that he remained on the premises as tenant of Klosterman. There is evidence tending to show that Klosterman surrendered to Steger all evidence of indebtedness given by Steger for the purchase price. What evidence might have been produced on this question, had Steger brought an action against Klosterman alleging that his reconveyance was obtained by fraud and that Klosterman had agreed to reconvey, we cannot say; but certainly, from the evidence relating to the transaction between these parties contained in the record of this trial, no court would be justified in finding that any such contract existed between the parties as would justify a decree for a specific performance.

In the creditors' suit the court, instead of declaring the conveyance void as to the plaintiff's judgment and the judgment a first lien upon the land, entered a decree setting aside the conveyance from Steger to Klosterman, and ordering a sale of the premises if the amount of the judgment creditor's claim was not paid within a time limited by the decree. After this decree was entered Kosch commenced negotiating with Klosterman for the purchase

of the land, and the agreement of purchase was finally concluded. Counsel for Kosch, with commendable caution, in view of the character of the decree entered in the creditor's suit, advised Kosch that to make his title entirely clear it would be advisable to take a quitclaim deed from Steger and wife, and, as we gather from the evidence, it was in view of the terms of this decree, and not because the parties supposed that Steger had any actual interest in the land, that the quitclaim deed from Steger to Kosch was executed, and for which Kosch paid $8,000 which appears to have been the actual value of the land.

An examination of the plaintiff's petition in this case discloses that no claim was made that Steger was in possession of the land under any contract of sale between himself and Klosterman, and that the quitclaim deed was made to convey any interest vested in him by such a contract. No claim of that kind was made in the original brief filed by the appellee, and upon the oral argument, when the case was first submitted, Mr. Commissioner JACKSON interrogated counsel for appellee as to whether, at the time of making this quitclaim deed, Steger was claiming any interest in the land derived from Klosterman, or any other party, and such a claim was distinctly disavowed. We cannot avoid the conclusion, from an examination of the petition, which is entirely silent as to any claim of this character, as is also the original brief filed on behalf of appellee, that the claim is now made, based on evidence that, incidentally, crept into the record on the trial of the case, but which was not directed to any issue of that character raised by the pleadings. The action was not founded on any such theory. The written opinion of the trial court does not touch upon the question. It was not advanced upon the trial, either in the district court or on the first submission of the case in this court, and a careful examination of the whole record convinces us that the plaintiff's claim to specific performance was based solely upon the alleged naked oral promise of Kosch to convey this land to the plaintiff upon the payment of

$25 an acre. That such oral promise cannot be enforced, even if established by uncontroverted proof, is sufficiently shown in the original opinion.

We recommend that the opinion first filed in this case be adhered to.

ALBERT and JACKSON, CC., concur.

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

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1906.

STATE, EX REL. SPENCER LENS COMPANY, RELATOR, V. EDWIN M. SEARLE, JR., AUDITOR, RESPONDENT.

FILED SEPTEMBER 21, 1906. No. 14,872.

ORIGINAL application for a writ of mandamus to compel respondent, as auditor of public accounts, to draw a warrant in payment of an allowed claim in favor of relator. Respondent demurred. *Demurrer overruled and writ allowed.*

Clark & Allen and *Roscoe Pound,* for relator.

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

PER CURIAM. Demurrer overruled. Writ allowed. Opinion to be filed later.

The following opinion was filed November 10, 1906:

Colleges and Universities: EXPENDITURES. The money donated by the United States to the university of Nebraska by an act of congress approved March 2, 1887, and acts supplemental thereto, known as the "Experimental Station" fund, may be expended by the board of regents for the purposes expressed by the donation, without other or more specific legislative appropriation than that implied by section 2, art. VIII of the constitution, and contained in section 19, ch. 87, Comp. St. 1905.

BARNES, J.

This is an application for a writ of mandamus to compel the respondent, the auditor of public accounts, to draw a warrant in payment of an item of indebtedness due from a certain fund donated to the university of Nebraska by the United States. The fund in question was created by an act of congress, known as the "Adams" bill, which is supplemental to a bill passed and approved March 2, 1887, by which the university of Nebraska receives from the treasury of the United States $15,000 annually for the purpose of carrying on experimental work in agriculture. The board of regents allowed the account and charged it against said fund. The auditor approved of the same, but declined to issue a warrant for its payment on the sole ground that the legislature had not specifically appropriated the fund in question for that purpose. So, the only question involved in this suit is whether the money received from the United States under the act of congress above mentioned can be expended by the university without a specific appropriation. The original bill, to which the Adams bill is supplemental, provides: "The sum of fifteen thousand dollars per annum is hereby appropriated to each state, to be specially provided for by congress in the appropriations from year to year, * * * out of any money in the treasury proceeding from the sales of public lands, to be paid in equal quarterly payments, * * * to the treasurer or other officer duly appointed by the governing boards of said colleges to receive the same." 24 U. S. Statutes at Large, p. 441, ch. 314. And the Adams bill contained the following directions: "The sums hereby appropriated to the states and territories for the further endowment and support of agricultural experiment stations shall be annually paid in equal quarterly payments on the first day of January, April, July, and October of each year by the secretary of the treasury, upon the warrant of the secretary of agriculture, out of the treasury of the United States, to the treasurer

or other officer duly appointed by the governing boards of said experiment stations to receive the same, and such officers shall be required to report to the secretary of agriculture on or before the first day of September of each year a detailed statement of the amount so received and of its disbursement, on schedules prescribed by the secretary of agriculture." 34 U. S. Statutes at Large, p. 63, ch. 951. Chapter 87, Comp. St., provides for the establishment of the university of Nebraska, and declares that the general government thereof shall be vested in the board of regents. By section 4 of said chapter it is provided: "The board of regents shall have full power to appoint their own presiding officer and secretary. And they shall constitute a body corporate to be known as 'the regents of the university of Nebraska,' and as such may sue and be sued, and may make and use a common seal, and alter the same at pleasure. They may acquire real and personal property for the use of the university, and may dispose of the same whenever the university can be advantaged thereby." It is further provided by section 2, art. VIII of the constitution: "All lands, money, or other property granted, or bequeathed or in any manner conveyed to this state for educational purposes, shall be used and expended in accordance with the terms of such grant, bequest, or conveyance." So, it seems clear that the board of regents not only has the power to accept the fund in question, but it is also its duty to do so and to expend it for the purposes declared by the acts of congress above mentioned.

It was stated on the hearing that from 1887 to 1899 the treasurer of the United States paid the money directly to the board of regents, who expended it without depositing it in the state treasury. During the year 1899, however, the state treasurer was made custodian of the university funds, and since that time the fund in question has been paid by the secretary of the United States treasury to the treasurer of this state in compliance with a resolution of the board of regents. It is contended by the respondent that, the fund having been paid to the state

treasurer, it cannot be expended by the board without a specific appropriation thereof by the legislature, and to sustain that contention our attention is directed to *Regents v. McConnell,* 5 Neb. 423; *State v. Liedtke,* 9 Neb. 468; *State v. Babcock,* 17 Neb. 610; *State v. Moore,* 46 Neb. 373. From an examination of those cases we find that in each of them the fund in question was money paid into the state treasury as taxes, and therefore it belonged to the state until specifically appropriated by the legislature to the use of the university, while in the case at bar the fund never belonged to the state. It was donated by the United States to the experiment station of the university for a specific purpose, and was paid to the state treasurer as the agent of the board of regents and custodian of the funds of the university. It never was, and is not now, any part of the funds of the state. The legislature of 1899, recognizing this fact, and presumably intending to put the whole matter at rest, passed a general law in which, after classifying the other funds of the university, it was provided as follows: "The agricultural experiment station fund shall consist of all moneys which may come into the possession of the state treasurer on and after July 1, 1899, accruing under an act of congress approved March 2, 1887, entitled 'An act to establish agricultural experiment stations in connection with the colleges established in the several states under the provisions of an act approved July 2, 1862, and the acts supplemental thereto'; also all moneys which may hereafter be received by virtue of any act of congress supplemental to said agricultural experiment station act and for the same purposes. The said experiment station fund is hereby appropriated to be applied exclusively to the uses and objects designated by the said act or acts of congress relating thereto, and the same shall at all times be subject to the orders of the board of regents for expenditure for said uses only." Section 19, ch. 87, Comp. St. 1905. In view of the nature of the fund in question, of section 2, art. VIII of the constitution, and the acts of the legislature above quoted, it seems clear that

in general terms the expenditure of said fund by the board of regents is clearly authorized, and no other or more specific appropriation is neccessary.

For the foregoing reasons, the demurrer to the relator's petition is overruled, and as the respondent has elected to stand on his demurrer the writ of mandamus is awarded in accordance with the prayer of the petition.

JUDGMENT ACCORDINGLY.

ROBERT BICE V. STATE OF NEBRASKA.

FILED SEPTEMBER 21, 1906. No. 14,603.

Assault: EVIDENCE. To sustain a conviction for assault with intent to inflict great bodily injury, as defined by section 17*b* of the criminal code, the evidence must show an attempt to inflict an injury of a greater and more serious character than an ordinary battery.

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

M. F. Harrington, for plaintiff in error.

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

BARNES, J.

Robert Bice was convicted in the court below of an assault upon one James Adkins with intent to inflict great bodily injury, and was sentenced to a term of imprisonment in the state penitentiary. He has brought the record to this court for review, and will hereafter be called the defendant.

It is first urged that the verdict is not sustained by sufficient evidence. The information on which he was tried charged a violation of section 17*b* of the criminal

code, and we have held in several cases that the words "great bodily injury," as employed in that section, imply an injury of a greater and more serious character than an ordinary battery. *Murphey v. State,* 43 Neb. 34; *Likens v. State,* 63 Neb. 249.

A careful consideration of the entire testimony contained in the bill of exceptions satisfies us that the offense of which the defendant was convicted was not established on the trial beyond a reasonable doubt. It appears that the defendant and the prosecuting witness were in the village of Spencer, in Boyd county, Nebraska, on the 1st day of August, 1905, and happened to meet on the street, in front of a saloon conducted by one Joseph Corab. Both had been drinking, but the defendant was the more intoxicated. When he saw Adkins he said, in substance: "Here is a man who has been shunning me for a couple of months, and I am going to lick him right here." Some further talk ensued, in which the defendant threatened to lick the prosecuting witness, who at first was not disposed to fight. Seeing, however, that the defendant was determined to lick him, as he called it, he told him to pick his ground. The defendant threw off his vest, and struck at Adkins, but missed him, and thereupon clinched him, thus attempting to throw him to the ground. He failed in his attempt, for when the parties clinched it was found that Adkins was the better man. To use his own words: "I picked Bob up, and threw him down on the sidewalk, and choked him." He also said he thought at that time the defendant was trying to get his revolver out, and that he threatened to shoot. About that time parties interfered and took Adkins off from the defendant. As soon as they released him, however, he went back and turned the defendant over, and, as he says, "attempted to take the gun away from him." Up to this time the defendant had not drawn his revolver. The bystanders again seized the prosecuting witness and pulled him away from the defendant, who thereupon arose to his feet, and tried to draw his revolver. As soon as he had it in sight, a man by the name of Shan-

non grabbed it, took it away from him and delivered it to one Doctor Snyder. There were several parties hold of Adkins at the time, and after the defendant's revolver was taken away, he slipped around, and struck Adkins in the face with his fist. He thereupon turned away and went down the street, where he met the marshal, who arrested him for being drunk and disorderly.

There is no evidence in the record which shows or tends to show there had been any ill feeling between Adkins and the defendant previous to this time; and the testimony shows, without dispute, that no difficulty had theretofore occurred between them. It is reasonably clear, also, that neither the prosecuting witness nor the defendant knew that the other was in town until they met in front of Corab's saloon. It further appears that since the affray the parties have been on speaking terms, and, to use Adkins' own words, on one occasion at least, "drank out of the same bottle." There is no evidence tending to show that the defendant armed himself with a revolver for the purpose of assaulting Adkins at or before the time the difficulty occurred. On the contrary, the defendant's son, who came to town with him, testified that they brought the revolver to town in order to get some cartridges that would fit it, as they did not know its caliber. It would also seem from the testimony that if the defendant had not been drinking he would have had no difficulty with Adkins. That Adkins thought nothing of the matter is clear, because he made no complaint against the defendant, and only appeared and testified against him in obedience to a subpœna served on him for that purpose.

In the case of *Likens v. State, supra,* the assault was there made with a butcher knife. The prosecuting witness was slightly wounded, but the court held that the evidence was not sufficient to justify a conviction for assault with intent to inflict great bodily injury.

In the case of *Smith v. State,* 58 Neb. 531, the evidence tended to show that the accused saw the prosecuting witness driving some of his stock. He thereupon went home,

unhitched his team, hitched one of his horses to a road cart, in which he had placed a shotgun, jumped into the cart, and drove along the road after the parties who had the stock, until he overtook them, when he alighted from the cart, took therefrom the shotgun, and accosted Jenkins, who was along the highway behind the stock. The accused called Jenkins vile names, and demanded that the stock be released. He punched Jenkins on the legs and in the sides with the barrel of the gun. Jenkins took hold of the gun, and the accused struck him a number of times on the head and in the face. The court said: "The record before us discloses an aggravated assault and battery by him, but not an assault to do great bodily injury; hence the sentence must be reversed and the cause remanded."

The case of *People v. Lennon,* 71 Mich. 298, is an instructive one. In that case the court said:

"We find no evidence in the case warranting a conviction of the respondent of any greater offense than assault and battery. * * * Ryerse was not hit by a bullet, and there is no testimony showing that respondent meant to shoot him. Ryerse was not hurt, to speak of, and was more to blame than defendant. * * * There was testimony tending to show that there had been trouble for some time between the Ryerse family and Lennon. Lennon claimed that for a long time he had been the subject of many indignities and outrages on the part of Ryerse and his father, and others who were in league with them. * * * He therefore, on the morning of July 5, stopped Ryerse as he was passing his house, and expostulated with him; asked him, 'How long are you going to torment me in this way?' Ryerse gave him an insulting answer, which led to blows. Ryerse claims Lennon struck first, and the respondent swears that Ryerse assaulted him, backing him towards his gate, and 'punching' him in the face. Lennon testifies that he was sickly, and scared; that he considered his life in danger, as he was so weak that he felt that one good blow, 'the least thing in the world, would lay me out; it would knock me dead.' He claims he fired his

pistol the first time to scare Ryerse, but, as Ryerse kept on afterwards following him up and striking him, he struck Ryerse on the ear with the revolver, and it went off the second time accidentally. Whether Ryerse first assaulted Lennon or Lennon first struck Ryerse on this morning of July 5, is immaterial. At the best, Lennon was only guilty of assault and battery."

In the case at bar the evidence is insufficient to show, beyond a reasonable doubt, that when the defendant assaulted Adkins he had the intention to inflict upon him great bodily harm within the meaning of the statutes. It is true that he drew his revolver during the affray, and when he was getting the worst of the encounter, but before he could use it so as to endanger the life of Adkins it was wrested from him. So if he had formed, at that instant, an intent to inflict great bodily harm upon Adkins he neither had the means nor the present ability to carry out his intent. To our minds, the case made is one of ordinary assault and battery; and, being of opinion that the evidence does not sustain the verdict, it is unnecessary to consider any of the other errors assigned.

The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

DANIEL MARTLEY ET AL., APPELLANTS, V. WILLIAM MARTLEY ET AL., APPELLEES.

FILED SEPTEMBER 21, 1906. No. 14,362.

Wills: CONSTRUCTION. When there is an irreconcilable repugnancy between the clauses of a will, the later will prevail over the earlier. Such a repugnancy will not be raised by construction, but the instrument will, if possible, be so interpreted as to give effect to all its provisions.

APPEAL from the district court for Dodge county: JAMES G. REEDER, JUDGE. *Reversed with directions.*

George L. Loomis, for appellants.

F. W. Button, contra.

AMES, C.

In 1882 William Martley died in Dodge county, in this state, the owner of a tract of land situate in that county, and leaving a will, afterwards duly admitted to probate, of which the following is a copy of so much as pertains to this litigation: "The property of which I am possessor, I bequeath in the following manner, to wit: I do give to my beloved wife, Catherine Martley, the one hundred and twenty acres which she shall possess during her life, and at her death shall revert to the children of whom we are father and mother, and in case she marries will only be entitled to her proper share, thus giving the children the sole control of their share. The personal property to be kept for the children except when it is necessary to be sold to pay expenses. I do hereby order that no part of my property, real estate or personal shall be given to my son, William, except one dollar which I do freely give him. The real estate is to be divided among the boys, William excepted." On the final settlement of the estate in 1883, the county judge entered an order adjudging the fee of the land to be, in equal parts, in four sons of the deceased, not including William, who was and is admitted to have been expressly excluded by the terms of the instrument. Several daughters of the testator and his wife Catherine also survived him, and the foregoing construction of the will by the county court seems to have been acquiesced in by all parties until shortly before the beginning of this suit, but the life tenant continued to occupy the premises, so that the sons named in the order have not entered into possession. In 1903 this action was begun by the four sons to quiet title in the fee of the land in themselves as against all the other heirs at law of the testator, who, it is alleged, are claiming ownership in the same as devisees

under the will. The defendants, except William, who made default, answered by way of cross-bill, asserting such ownership. There was a reply which raised no essential issue, and there being no dispute of fact the cause was submitted to the court upon the pleadings, the object being to obtain a construction of the will. The district court adjudged that all the children of the testator who survived him, except William, acquired equal interests in the land as devisees.

The sole question is whether there is an irreconcilable repugnancy between the first and the last of the above quoted clauses of the will, it not being disputed or doubted that, if there is such, the last will prevail. *Griffin v. Pringle,* 56 Ala. 486; *Parks v. Kimes,* 100 Ind. 148; *Jordan v. Woodin,* 93 Ia. 453; *Covert v. Sebern,* 73 Ia. 564; *Davis v. Boggs,* 20 Ohio St. 550. To our minds, the question is one of such extreme doubt and obscurity that we are unable to solve it satisfactorily. It is a cardinal rule that repugnancy is not to be raised by construction, but the argument of counsel for defendants and appellees that there are no words of gift or devise in the last clause, but that such are to be found in the first clause only, by the terms of which, if it stood alone, the estate would have devolved in equal shares upon all the children, and that effect may be given to the last clause by supposing it to have been intended solely to emphasize the preceding exception of William, does not strike us convincingly. Technical words are not always of controlling force in the construction of a will, and there appears to us to have been no occasion for emphasizing the preceding sentence, which is free from ambiguity or the possibility of misinterpretation, and by which William is expressly excluded from all participation in the estate of the testator, except the nominal sum of $1. Is it not at least equally or, rather, more probable that by the last clause the testator intended to except his daughters as well as William from participation in the land which was the family homestead? To confine the last clause to the mere office of emphasis is to give it

no legal meaning at all, and to assign it to no obvious purpose or intent of the testator; but to suppose it to have been intended to express an exception, is at once to raise it to dignity and importance and to satisfy another elementary rule of testamentary construction, to wit, that every provision of the will shall, if possible, be given effect. On the whole, this view more nearly satisfies our minds than does that adopted by the learned trial judge, and we therefore recommend that the judgment of the district court be reversed and the cause remanded, with instructions to enter a decree in accordance with the prayer of the petition.

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 the cause remanded, with instructions to enter a decree in accordance with the prayer of the petition.

JUDGMENT ACCORDINGLY.

RICHARD CLEVE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 21, 1906. No. 14,408.

1. Carriers: LIVE STOCK: BURDEN OF PROOF. In an action to recover damages from a carrier for injury sustained by live stock in transit, which are accompanied by the owner or his agents, the burden is on the owner to show that the loss complained of was occasioned by the carrier's negligence.

2. ———: DELAY IN SHIPMENT: EVIDENCE. In order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that

purpose. *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364, followed and approved.

3. Evidence examined, and *held* insufficient to sustain the judgment of the trial court.

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

J. W. Dewcese, Frank E. Bishop and *John C. Watson,* for appellant.

W. W. Wilson, contra.

OLDHAM, C.

This was an action for damages instituted by the plaintiff in the court below against the defendant railway company for the loss of two fat steers in the shipment of cattle from Nebraska City to Chicago. The cattle were shipped on the 8th day of August, 1899, and it was charged in the petition that the cattle died from overheat on account of delay in the shipment. Defendant's answer was in the nature of a general denial and plea of the statute of limitations. The cause was submitted to the court without the intervention of a jury, and at the close of the evidence judgment was entered for plaintiff. To reverse this judgment defendant appeals to this court.

Several alleged errors in the proceeding are called to our attention in the brief of the railway company, only one of which, however, it will be necessary to examine, in view of the conclusion about to be reached, and that one is that the evidence is not sufficient to sustain the judgment of the trial court. The testimony offered by plaintiff in the court below tended to show that on the 8th day of August, 1899, he shipped, under contracts entered into with the Burlington & Missouri River Railroad in Nebraska, eight carloads of stock from Nebraska City to Chicago. The stock were accompanied by two tenders during the entire shipment, and plaintiff himself accompanied the stock as far as Shenandoah, Iowa, at which point he took a passenger train to Chicago, the place of destination.

It appears from the testimony that the weather was hot when the shipment was made, but that all the stock were loaded in good condition, in suitable cars, properly bedded, at Nebraska City, at about 1 or 2 o'clock in the afternoon, on the day of the shipment. It further appears from the testimony that two stops were made between Nebraska City and Hamburg, Iowa, where the shipment was transferred from the branch to the main line of the road. Plaintiff and one of his tenders, McCarthy, testify that, when the train reached Hamburg, it remained on a side-track between two rows of box cars for about 30 or 40 minutes, and that the cattle became heated by reason of the fact that the box cars prevented the air from circulating through the stock cars. There is no competent evidence, however, that complaint was made either to the conductor of the train, or to the station agent, of this delay, nor is there any testimony that the delay was unnecessary and unusual. Plaintiff does say that he told the tenders to tell the conductor to move the train or the cattle would suffer from the heat. Mr. McCarthy, the only tender who testified, admitted that he did not notify the conductor of the train of the probable injury from this delay, or request him to move either the train or the box cars that impeded the circulation of the air. He thought, according to his testimony, that Mr. Cleve, the owner of the cattle, had entered complaint. On the other hand the conductor in charge of the train denied that any complaint was made to him of the delay at Hamburg, or that the delay there was unnecessary or for a longer time than was required to water and take on another car. It is shown in the evidence that one steer got down at Hamburg, and that this steer was dead when the train reached Stanton, about 7 o'clock in the evening. It is also in evidence that another steer got down near Stanton, and that this steer died shortly after the shipment was received in Chicago. There is no evidence in the record as to when the shipment, on schedule time, should have arrived in Chicago. Plaintiff, however, testified that it

was a slow shipment and stopped at all the stations, but there is no evidence that the stopping at each station was unnecessary or unusual in the transportation of live stock from Nebraska City to Chicago. There is no complaint of any failure to feed or water the cattle during the shipment, and it is admitted that the two attendants of the cattle were furnished with transportation by the company under the contracts of shipment. In fact, the cattle were shipped under three contracts, by consent of the agent of the defendant, in order that transportation might be furnished to plaintiff and his two tenders, who accompanied the cattle.

Now, the question arises as to whether or not this evidence is sufficient to show actionable negligence on the part of the defendant railway company. The authorities are not exactly uniform on the question as to whether or not the common law liabilities of carriers attach to railway and transportation companies in receiving and transmitting live stock. In Michigan it is held that a railway company is only required to transport live stock with reasonable diligence and to use ordinary care, prudence, and skill. *Heller v. Chicago & G. T. R. Co.*, 109 Mich. 53; *Sisson v. Cleveland & T. R. Co.*, 14 Mich 489. This rule appears to be favored in Kentucky and Tennessee. *Louisville & N. R. Co. v. Harned*, 23 Ky. Law Rep. 1651; *Baker & Stratton v. Louisville & N. R. Co.*, 10 Lea (Tenn.), 304. The clear weight of authority, however, is that in the transportation of live stock the liabilities of a common carrier attach, and this rule was adopted in this state in the early case of *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117, wherein it was held that, when the railway company undertakes to carry live stock for hire, it assumes all the duties and liabilities of a common carrier with reference to such property, and it is liable for injuries thereto occasioned by the negligence of its servants. The general rule of absolute liability of a common carrier for the safe delivery of property committed to it for carriage is qualified when applied to live stock, and

made subject to the exception that it is not an insurer against injury resulting from the inherent nature or propensities of the animals, and without fault of the carrier. As to the presumption arising from loss or injury to stock while being transported by a common carrier, the authorities are at variance, one line holding that the presumption is that due care has been exercised by the carrier, and that the burden is on the plaintiff to show negligence on the part of the carrier. See *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. 87, and *Crandall v. Goodrich Transportation Co.*, 16 Fed. 75, and cases there cited. On the other hand, it has been held that, when loss or damages accrued during a shipment of live stock, the burden is upon the carrier to show that the cause of the loss or death was within the exceptions qualifying its general liability. *Moulton v. St. Paul, M. & M. R. Co.*, 31 Minn. 85, 16 N. W. 497; *Lindsley v. Chicago, M. & St. P. R. Co.*, 36 Minn. 539; *Burke v. United States Express Co.*, 87 Ill. App. 505; *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642; *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; 5 Thompson, Commentaries, Law of Negligence, sec. 6576.

While the weight of American authority seems to favor the rule that in cases involving loss or injury to animals during transit the carrier has the burden of showing that the injury was occasioned without its fault, yet a distinction is made between live stock committed exclusively to the care of a common carrier and live stock shipped under a contract by which the owner, in person, or by his employees, accompanies the stock for the purpose of caring for them during transit. This distinction has been recognized by this court in the case of *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608, in which it was held that, where the shipper of stock does not agree to furnish a caretaker and some of the animals die, or are injured for want of care or protection in transit, the carrier must bear the loss. In rendering this opinion, it was said by SULLIVAN, J., "that the rule is not doubted that, where the owner

is in charge of live stock in transit, the burden is on him to show a loss caused by the carrier's negligence." In the still later case of *Chicago, St. P., M. & O. R. Co. v. Schuldt,* 66 Neb. 43, the above quotation was cited with approval, and it was further held that common carriers of live stock have a right to limit by contract the assumption of liability that accrues to them merely as bailees, and not strictly as common carriers. We think these cases establish the rule in this jurisdiction that, where by contract the shipper accompanies his live stock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, sustained was occasioned by the negligence of the carrier. Now, the only negligence alleged against the carrier in the case at bar is that of delay in the shipment. In the case of *Johnston v. Chicago, B. & Q. R. Co.,* 70 Neb. 364, the rule was laid down that, "in order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose."

We think, under this rule, the evidence introduced was wholly insufficient to sustain the judgment, and we therefore recommend that the judgment of the district court be reversed and the cause be remanded for further proceedings.

AMES and EPPERSON, CC., concur.

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

REVERSED.

WILLIAM R. STARR, APPELLANT, V. CHESTER W. DOW ET AL., APPELLEES.

FILED SEPTEMBER 21, 1906. No. 14,413.

1. **Conditional Sales: VALIDITY.** A contract for the sale and delivery of personal property upon condition that the title is to remain in the vendor until the purchase price is paid, is invalid, as against purchasers in good faith, judgment and attaching creditors of the vendee, without notice, unless a copy of the contract is verified and filed in the manner pointed out in section 26, ch. 32, Comp. St. 1903. *Peterson v. Tufts*, 34 Neb. 8, followed and approved.

2. **Bill of Sale: VALIDITY.** A bill of sale received in payment of an antecedent debt protects the vendee to the same extent as had there been a new consideration, if taken in good faith and without an intention to defraud the other creditors of the vendor. *Rachman v. Clapp*, 50 Neb. 648, followed and approved.

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

Boyle & Eldred, Fayette I. Foss and *Starr & Reeder*, for appellant.

W. S. Morlan, contra.

OLDHAM, C.

This was an action in replevin, originally instituted before a justice of the peace in Red Willow county, to recover the possession of a number of crated buggies and spring wagons. The cause was appealed to the district court where, on a trial had to the court and jury, a verdict was directed for the defendant, and judgment entered on the verdict. To reverse this judgment the plaintiff has appealed to this court.

Plaintiff claims title to the property in dispute under a bill of sale executed and delivered to him by James McClung on the 10th day of October, 1903, and filed for record on the 12th day of October, 1903. Defendant Van

Brunt claimed title under an unrecorded contract of conditional sale with McClung. The evidence shows that for some time before the 10th day of October, 1903, McClung had been engaged in selling wagons and buggies in Indianola, Nebraska, and that the vehicles in dispute had been purchased under contract from the defendant, Henry H. Van Brunt, a wholesaler and jobber doing business in Council Bluffs, Iowa; that after disposing of a number of the wagons and buggies purchased under this contract, McClung quit business, and went to Denver, Colorado, for treatment in a Keeley institute; that on his way to Denver he stopped at McCook, and had a settlement with his attorney (who is plaintiff in this cause) for legal services rendered during a period of about 16 years and for money loaned to him during that period by his attorney; that in this settlement plaintiff was retained for further services in behalf of McClung's daughter in a cause then pending; that in settlement for these services McClung executed and delivered to plaintiff a bill of sale on the vehicles in dispute as well as on other property. Plaintiff testified that at the time he received the bill of sale McClung told him that he was not in debt to anyone, and that he had no knowledge of defendant's claim against McClung for the purchase price of these vehicles. Afterwards defendant's agent came to Indianola, and took possession of the vehicles and stored them in a warehouse owned by defendant Dow, where they remained until this action was instituted.

It appears from the testimony that, before the purchase of the goods in dispute, McClung had been dealing for some time with the McCormick Harvester Company, and that on information which defendant obtained from that company he extended credit to McClung for four and six months on the goods consigned, and that at the time the bill of sale was made to plaintiff payment was not due on the contract under the credit extended. There is no testimony whatever in the record of any fraud having been perpetrated on defendant in the purchase of the goods or in

procuring the credit extended on them. As before stated, the contract of conditional sale was never filed for record, so that the question for consideration is well stated in the brief of the appellee, wherein it is said: "The case involves but a single issue and that a very simple one: Was the appellant a *bona fide* purchaser of the property which is the subject of controversy?"

The only evidence introduced on the question of the *bona fides* of the purchase was that of plaintiff himself, and he testified that McClung was in debt to him for services and borrowed money in an amount in excess of $400, the price named in the bill of sale, and that he took the bill of sale in satisfaction of all claims against McClung for services already rendered as well as those to be rendered on behalf of his daughter in the suit then pending, which services, he says, were subsequently rendered. In *Peterson v. Tufts,* 34 Neb. 8, it was said:

"A contract for the sale and delivery of personal property upon condition that the title is to remain in the vendor until the purchase price is paid, is invalid, as against purchasers in good faith, judgment and attaching creditors of the vendee, without notice, unless a copy of the contract is verified and filed in the manner pointed out in section 26, ch. 32, Comp. St. 1891."

While it is true that the testimony of plaintiff as to the items which constituted his claim against McClung is neither so clear nor so convincing as to remove all suspicion concerning the good faith of the transaction, yet, in our view, there was sufficient evidence to warrant the submission of this issue to a jury under proper instructions. Since there is no proof of fraud in originally procuring the goods from the defendant Van Brunt, and, as this court has said in *Rachman v. Clapp,* 50 Neb. 648, "A bill of sale received in payment of an antecedent debt protects the vendee to the same extent as had there been a new consideration, if taken in good faith and without an intention to defraud the other creditors of the vendor," we think the question of the *bona fides* of the sale was one

of fact for the jury, and 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.

MIRAGE IRRIGATION COMPANY, APPELLEE, V. ELMER E. STURGEON, APPELLANT.

FILED SEPTEMBER 21, 1906. No. 14,422.

1. Evidence examined, and *held* sufficient to sustain the judgment.
2. Case Distinguished. *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, examined and distinguished.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

C. Patterson and *A. W. Crites*, for appellant.

W. W. Wood, contra.

OLDHAM, C.

This is a controversy between the plaintiff, a corporation organized under the laws of Nebraska for the purpose of constructing and operating an irrigation canal in Sheridan and Dawes counties, and the defendant, who is a stockholder and director in the corporation. In December, 1900, the plaintiff was in debt for construction work on its canal in the sum of $2,643 and without funds to meet the indebtedness, and on the 29th day of that month, at a regular meeting of the board of directors, an assessment of 10 per cent. on the face value of all the stock was

levied by the board of directors. The defendant was a member of the board and participated in the meeting which made the levy. The stock seems to have been fully paid up at the time this additional levy was made, and defendant was the owner of 35 shares of the capital stock. His certificate of stock, at the time of the purchase, contained the following recital: "This certificate of stock is issued and accepted on the further condition indorsed on the back of this certificate." And on the back of the certificate was the following indorsement: "This stock is subject to assessment over and above its par value, for maintenance of the canal, and may be sold for all delinquent assessments so levied." When this assessment was made, defendant had a claim against the corporation for $150 for construction work on the canal. The assessment of 10 per cent. on his stock was charged against him on the books of the company in the sum of $356.13, and he was given credit for the $150 due him for his work. On April 27, 1901, at a session of the board of directors, at which defendant was present, it was agreed between plaintiff and defendant that his assessment should be paid by the $150 due him on the books and his agreement to pay the balance of $206.13 on a note, which had been given by the plaintiff to one Thomas Cuff, and which was then in the hands of DeLoss Barber for collection. Under this agreement defendant was credited for the full amount of his assessment on the books of the company and gave the following receipt to plaintiff: "Hay Springs, Neb., Apr. 27, 1901. Rec'd of Mirage Irrigation Co. Two Hundred Six & 13-100 Dollars to be credited on Cuff note. $206.13. (Signed) E. E. Sturgeon." After the execution and delivery of this receipt, defendant refused and neglected to make any payment on the Cuff note, and the company was compelled to pay it in full. It thereupon brought the case at bar in the county court of Sheridan county to recover from defendant the $206.13 and interest. The case was tried in the county court, and taken by appeal to the district court for Sheridan county, where

a jury was waived and trial had to the court, which resulted in a judgment for the plaintiff. To reverse this judgment defendant has appealed to this court.

Defendant's sole contention is that the assessment on the paid-up capital stock was absolutely void, and that his agreement to settle the same with the board of directors was a mere *nudum pactum*. The general rule is that a corporation cannot levy an assessment upon the holders of fully paid-up stock, unless the power to do so is conferred by the charter, or articles of association, or a valid statute, or by consent of the stockholders or members. 2 Clark and Marshall, Private Corporations, sec. 402. In the case at bar the assessment was made by consent of all the directors present, defendant being one of them, and was done in conformity with the provisions contained in the stock certificates at the time they were purchased by the defendant. The case of *Enterprise Ditch Co. v. Moffitt*, 58 Neb. 642, relied upon by defendant, is not in conflict with the conclusion about to be reached, because in that case there was no by-law or provision of the articles of incorporation at the time the stock was issued and purchased which provided for a levy on the fully paid-up capital stock. And it was properly held in that case that a retroactive by-law of this nature could not be passed which would operate on stock issued before its enactment. The facts in the case at bar clearly take it without the rule in that case.

We are therefore of opinion that the evidence is sufficient to sustain the judgment of the trial court, and we recommend that its judgment 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.

ANDREW RAMOLD V. EDGAR CLAYTON.

FILED SEPTEMBER 21, 1906. No. 14,230.

Review: HARMLESS ERROR. When the verdict returned by the jury is the only one justified by the evidence, errors in the giving and refusing of instructions are not prejudicial.

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

John V. Morgan and *Roddy & Bischof,* for plaintiff in error.

L. F. Jackson, contra.

EPPERSON, C.

Defendant is the owner of a farm in Otoe county. Camp creek, a natural watercourse, flows through his premises. Plaintiff is the owner of a tract of land lying about 80 rods south of defendant's said farm. Plaintiff alleged that in May, 1903, defendant diverted the waters of Camp creek by the construction of dikes so as to cause them to flow upon his premises to his damage. Defendant denied the illegal construction and maintenance of the dams, and alleged that the overflow on plaintiff's land was in no way due to the acts of the defendant, but was due to an unprecedented flood in the month of May, 1903. The cause was tried in the district court for Otoe county, and a verdict returned for defendant.

One of the instructions given to the jury, which plaintiff now assigns as error, is as follows: "You are instructed that the uncontradicted evidence in this case shows that after the rain on the afternoon of May 26, 1903, the flood waters of Camp creek were over both the east and the west dikes along the banks of said creek, at the point in said creek where the dam built in April, 1903, formerly stood.

And so far as the alleged damages to plaintiff's land and crops from the flood waters resulting directly from this particular rain the defendant would not be liable." An examination of the evidence convinces us that this instruction was correct. It is undisputed that at the time of this unprecedented flood the banks of Camp creek did not confine the waters thereof, and that the dams and embankments constructed by defendant in no way contributed to the volume of water that was then thrown upon plaintiff's land, but, on the contrary, were swept away by the torrent. The undisputed evidence shows that this flood of May 26 was very destructive. The plaintiff's corn crop was almost entirely destroyed. One of his neighbors with difficulty rescued his cattle from drowning. A bridge over Camp creek, above the dams complained of, was carried several rods, and away from the channel of the stream. Some witnesses say that dikes ten feet high would not have withstood the flood waters. Property which in no way could have been affected by the alleged acts of the defendant was destroyed. The evidence shows that the rainfall in that vicinity in May, 1903, varied from one-half of an inch to an inch on several different dates until May 26, when occurred the extraordinary flood referred to above. It is not shown that plaintiff was damaged, as alleged in his petition, except by this extraordinary flood. The only evidence indicating that the acts of the defendant caused the water to flow from Camp creek at any other time upon plaintiff's land appears in the testimony of plaintiff himself. He testified as to dams and dikes constructed by the defendant, and said that upon every little rain the water came to and upon his land from Camp creek; but the evidence does not show that such diversion of the water damaged either his crops or his land. For this reason, no other judgment than the one rendered could have been sustained by the evidence. It is a rule well established that, when the verdict returned is the only one justified by the evidence, errors in the giving or refusal of instructions are not prejudicial.

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.

SARAH A. GRIFFITH, APPELLEE, V. WILLIAM E. GRIFFITH, APPELLANT.

FILED SEPTEMBER 22, 1906. No. 14,417.

1. **Divorce:** EVIDENCE. Continued threats of personal violence indulged in by a husband toward his wife, and accusations of crime and the use of profane language, such as is described in the opinion, *held* sufficient to support the wife's petition for a divorce on the grounds of cruelty.
2. **The condonation** of a wife's wrongs, not subsequently repeated, will bar the husband from obtaining a divorce therefor.

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

Reavis & Reavis, for appellant.

Francis Martin, contra.

EPPERSON, C.

The plaintiff, Sarah A. Griffith, brought this action in the district court for Richardson county to obtain a divorce from her husband, William E. Griffith, alleging as a ground therefor that defendant had been guilty of extreme cruelty toward her. Defendant answered, denied the acts of cruelty, and by way of cross-petition alleged that plaintiff had been guilty of adultery on several occasions, and prayed for a divorce on that ground. The lower

court found for the plaintiff, entered a decree of divorce as prayed in the petition, and dismissed defendant's cross-bill, and allowed the plaintiff alimony which, if she is entitled to recover, is conceded to be reasonable. Defendant appeals to this court and contends: (1) That the decree in plaintiff's favor is not sustained by the evidence; (2) that the proof conclusively shows that plaintiff was guilty of infidelity as alleged in the cross-petition.

1. The evidence offered in support of plaintiff's petition was to the effect that defendant often cursed plaintiff, frequently came home intoxicated, and by insinuative and profane language accused her of having wrongfully entertained men at their home during his absence; that he often told her he did not care for her, threatened to break her head open, and made other threats of personal violence; accused her of having a bad disease; that he did nothing toward making her life enjoyable. Such it appears has been his conduct to a greater or less extent since their marriage in 1888, increasing, as time advanced, in the display of anger, jealousy and making of threats, until the plaintiff, through fear of her husband, left his home, and soon thereafter instituted this suit. This evidence is denied by the defendant; but plaintiff's testimony was corroborated, and we consider that the proof supported plaintiff's petition, and showed that the conduct of defendant was so abusive that the legitimate ends and objects of matrimony were destroyed, and that the decree of the trial court should be affirmed, unless the proof discloses that plaintiff committed adultery as alleged in the cross-petition, and that such acts, if proven, were not connived at or condoned by the defendant.

2. Defendant introduced testimony which he claims was sufficient proof of plaintiff's guilt on at least three occasions with three different men. Counsel for defendant cannot successfully contend, in view of the denial of the wife and the finding of the district court on conflicting evidence, that the proof conclusively shows that plaintiff was guilty of adultery with two of these parties. It is,

however, earnestly contended that the evidence proves the charge made against the plaintiff and one Hammontree, and that the judgment below should, therefore, be reversed, and a decree of divorce ordered for defendant. Hammontree was unmarried and about 22 years of age. In the summer and fall of 1902 he was employed by Griffith as a farm hand, and during that time lived with defendant and his wife on their farm in Richardson county. There was a letter introduced in evidence, written by plaintiff in June, 1903, addressed to Hammontree, who then lived in Missouri, containing many affectionate terms, and lascivious throughout. The general import of it is so vile that this opinion will not be polluted with its reproduction, and yet in this letter there is no direct reference to any former illicit relations between the parties, but by insinuation we must reach the conclusion, either that illicit relations had been sustained during the time Hammontree was residing with defendant's family, or that plaintiff desired to inform Hammontree of her lascivious disposition that he might be induced to return to the employ of the plaintiff's husband. The evidence at least showed a disposition on the part of the plaintiff to commit adultery, and further, that such was her disposition when her alleged paramour was residing in the family. The proof discloses that at such time, and during the absence of the husband, the opportunity existed for such illicit relations, but the credible evidence falls short of showing a disposition on the part of young Hammontree to indulge in such relations. We consider it unnecessary, in our view of the case, to determine whether or not the defendant's charge of adultery is true. If true, then by his own conduct he condoned the offense. He testified that at one time he discovered his wife and Hammontree in a position which would be sufficient to convince a husband of ordinary intelligence that his wife and Hammontree were sustaining improper relations. He also testified to compromising circumstances in her conduct toward other men, and these facts, he testified, convinced him at the time that his wife

had been guilty of adultery with these different men, but it seems that the defendant attached but litle importance to these matters. He says: "Q. You felt in your soul that she was guilty? A. Yes, sir. Q. Yet you continued to live with her as your wife? A. Yes, sir. Q. You didn't think it amounted to much or made much difference if she was unfaithful to you, did you? A. I suppose those things ought to be overlooked * * * Q. You were perfectly willing to overlook all those things and take her back to your bosom again, wasn't you? A. Yes, sir." The evidence further shows, and it is admitted by defendant, that several months prior to the separation of these parties the defendant desired to employ an unmarried man to do farm work and to bring him to their home; that the plaintiff positively refused to cook for an unmarried man, giving as her reason that her husband was always suspicious of single men and made false accusations against her. On one occasion, after defendant had seen conduct which he now says convinced him of his wife's infidelity in her relations with an employee, he continued the employment and permitted the young man to remain, as before, a member of the family. Thus we find that the husband, believing his wife unfaithful, continued the relationship of husband and wife, and permitted the man whom he believed to be his wife's paramour to remain in his household where there were many opportunities for illicit relations. He further testified: "Q. You were willing to overlook the things you complain of now if she only would be good in the future, is that it? A. Yes, sir." The evidence fails to disclose that after such condonation his wife continued to be unfaithful. The marriage relations were continued. Having thus condoned his wife's transgressions, the defendant is not in a position to now obtain a divorce for these reasons. As was said by Parsons, C. J., in (*anonymous*) 6 Mass. *147 (quoted in 2 Bishop, Marriage, Divorce and Separation, sec 285): "It would be injustice to the wife, and immoral in the husband, to claim and enjoy, as his peculiar marital rights, the society of his wife, after a

knowledge of her offense, and afterwards to cast her off for that same offense." The condonation established the marital relations existing between the parties, restoring to the erring wife all rights to the respect and protection of the husband, the same as it was prior to the commission of the wrong; and, unless wrongs of the same nature are again committed, the condonation will operate to bar the husband from alleging them against her.

Plaintiff herein did not plead condonation, nor did she offer evidence to prove it. The absence of such a plea on her part, however, does not prevent the court from considering the same. It appeared from the defendant's own testimony that, were these charges of infidelity true, he had condoned them, and under such circumstances the court will of its own motion consider such facts in its decision of the case. In 2 Bishop, Marriage, Divorce and Separation, sec. 631, it is said: "By reason of the suit being triangular, and the public being a party to it, a fact of condonation appearing is fatal to the plaintiff's claim, though the defendant has not pleaded it; not because the latter has any just right to take the objection, but because public policy does not permit the divorce. And the public, which does not plead, objects through the conscience of the judge. Chancellor Walworth went so far as to say that if there is reason to believe this defense exists, the court, *ex officio,* may at any time before a final decree direct an inquiry to ascertain the fact." Nor does the husband's condonation exempt him from liability in an action for divorce founded on his own wrongs. It is not the sense of this opinion to approve in any way the deplorable conduct of the wife shown by the evidence, but a court of justice cannot refuse relief to one simply because the evidence raises a strong presumption, or even proves, that such an one formerly indulged in sin and crime.

We are of opinion that the defendant is in no position to urge to a court of equity the infidelity of the plaintiff, 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.

GORDON BROTHERS v. FRANK E. WAGEMAN.

FILED SEPTEMBER 21, 1906. No. 14,285.

1. **Constitutional Law: EXEMPTIONS: WAGES.** The act of 1889 for the better protection of the earnings of certain employees (secs, 531*c*-531*f* of the code), makes it "unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature" against a certain class of employees to assign, or by any means dispose of, such claim, or to institute or prosecute in this state or elsewhere any action thereon by any process seeking to seize, attach or garnish the wages of such employees earned within 60 days prior to the commencement of such proceeding, for the purpose of avoiding the effect of the exemption laws of the state, and provides that any one violating the act shall be liable to the party injured through such violation "for the amount of the debt sold, assigned, transferred, garnished, or sued upon, with all costs and expenses and a reasonable attorney's fee," and be subject to criminal prosecution. *Held*, Constitutional, following *Singer Mfg. Co. v. Fleming*, 39 Neb. 679; *Bishop v. Middleton*, 43 Neb. 10.

2. **Claim Defined.** A claim is a demand made of a right or supposed right calling on another for something due or supposed to be due. It implies that the right is in dispute and is suggestive of debate, contention and of something left for future determination. An account which one claims to hold against an employee is an account or claim within the meaning of said act.

3. **Assignment of Claim: ACTION.** In an action brought against a creditor under the foregoing provisions, the plaintiff alleged and proved that the defendant claimed to hold an account against him; that the defendant assigned such account to some person unknown to the plaintiff; that thereafter suit was instituted thereon in another state by a certain party other than the defendant claiming to own the account; that in said suit the exempt wages of the plaintiff were attached for the satisfaction of said account. *Held*, Sufficient to make a *prima facie* case under the provisions of section 531*e*, and this is true although the process under which the wages were attached was irregularly issued and served.

4. **Judgment of Justice's Court: AUTHENTICATION.** A transcript of a justice of the peace to be receivable in evidence need not be authenticated in accordance with the provisions of section 414 of the code which relates to judgments of courts of record. It is receivable in evidence if it conforms to the requirements of section 415 which relates specifically to judgments of justices of the peace of another state.

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

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

Charles O. Whedon, for plaintiff in error.

Guile & Guile, contra.

ALBERT, C.

This action is grounded on the act of 1889 (laws 1889, ch. 25), entitled "An act to provide for the better protection of the earnings of laborers, servants, and other employees of corporations, firms, or individuals engaged in interstate business," which constitutes sections 531*c*-531*f* of the code. The act makes it "unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature" against any such employee to assign, or by any means dispose of, his claim or debt, or to institute or prosecute in this state or elsewhere any action upon such claim or debt by any process seeking "to seize, attach, or garnish the wages of such person or persons earned within 60 days prior to the commencement of such proceedings, for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions." It further provides that any one violating the act "shall be liable to the party injured through such violation of this act, for the amount of the debt sold, assigned, transferred, garnished, or sued upon, with all costs and expenses and a reasonable attorney's fee," and to criminal prosecution and fine. The petition, omitting the formal parts, is as follows: "Comes now the plaintiff, and for

his cause of action against the defendant alleges that the defendant is a partnership formed for the purpose of trade and doing business in the county of of Lancaster, state of Nebraska; that plaintiff is a resident of Havelock, Nebraska, the head of a family, and a mechanic employed by the Chicago, Burlington & Quincy Railway Company, a corporation engaged in interstate commerce; that the defendant herein, claiming to have an account of indebtedness against this plaintiff for the sum of $21.14, did on or about the 1st day of February, 1904, assign said alleged account of indebtedness to some person, firm, or corporation unknown to this plaintiff in violation of, and for the purpose of, evading the laws of the state of Nebraska; that on the third day of February, 1904, one G. Leudtke instituted garnishment proceedings before A. J. Liddil, a justice of the peace in and for Jackson county, Missouri, to collect from this plaintiff the amount claimed to be due on the alleged account of indebtedness unlawfully assigned by defendant, and interest, and that wages earned by plaintiff and in the hands of the Chicago, Burlington & Quincy Railway Company were garnished, seized and applied to the payment of the alleged account of indebtedness, interest and costs; that the wages garnished and seized as aforesaid were exempt to this plaintiff, and earned less than 60 days prior to the institution of the garnishment proceedings instituted by the aforesaid G. Luedtke before A. J. Liddil, a justice of the peace in and for Jackson county, Missouri; that the amount of wages garnished and seized as aforesaid is $32.37, which amount, together with $100 attorney's fee, plaintiff seeks to recover of defendant. Plaintiff, therefore, prays judgment against the defendant for the said sums of money, amounting in all to the sum of $132.37, together with costs of this action." A general demurrer interposed to the petition was overruled, whereupon the defendant answered denying generally all the allegations of the petition. The verdict was for plaintiff, and judgment went accordingly. The defendant brings error.

It is first contended that the petition fails to state a cause of action, and consequently that the court erred in overruling the defendant's demurrer. The omissions relied upon as sustaining this contention are: (1) That the defendant was a creditor or a holder of some evidence of indebtedness, book account or claim against the plaintiff; (2) That the defendant assigned or transferred its claim, for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions; (3) that the said claim had been assigned to Luedtke, the party who instituted the proceedings in garnishment in Missouri, or that he was the holder thereof or had any interest therein; (4) that the justice of the peace before whom such proceedings were instituted had jurisdiction of the subject matter.

As to the first, it seems to be without substantial merit. The statute covers claims of every name and nature. The word "claim" is defined by Webster as "A demand made of a right or supposed right; calling on another for something due or supposed to be due, as a claim for wages or services." It implies that the right is in dispute, and is suggestive of contention, litigation and something left for future determination. *Prigg v. Pennsylvania,* 41 U. S. 539. Consequently, the allegation "that the defendant herein claimed to have an account," etc., is equivalent to a charge that it had a claim of some nature against the plaintiff.

As to the second, while the petition does not specifically charge the defendant with having assigned such claim for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions, it does charge that such assignment was made for the purpose of evading the laws of the state of Nebraska. The greater includes the less. If the defendant desired a more specific statement in this regard, the remedy was by motion.

As to the third, it is more substantial, and we were at first disposed to hold that it was vital. But section 531*e* of the code is as follows: "In any proceeding, civil or criminal, growing out of a breach of sections one or two of

this act, proof of the institution of a suit, or service of garnishment summons, by any person, firm, or individual, in any court of any state or territory other than this state, or in this state, to seize by process of garnishment, or otherwise, any of the wages of such persons as defined in section one of this act, shall be deemed *prima facie* evidence of an evasion of the laws of the state of Nebraska and a breach of the provisions of this act on the part of the creditor or resident in Nebraska causing the same to be done." The preceding section makes it unlawful for any person or persons to aid, assist, abet, or counsel a violation of this act for any purpose whatever. Taking into account the entire act, its remedial character and the nature of the transactions against which it is leveled, it is thought it was the intention of the legislature to make the acts enumerated in section 531*e* *prima facie* evidence of a violation of the statute on the part of the original creditor, every subsequent holder of the claim, and all other persons. This construction is not unreasonable, and imposes no great hardship upon the original creditor or a subsequent holder of the claim. Where a disposition of the claim is made in good faith, and without any intention on the part of the creditor to evade the exemption laws of the state, those facts may be shown to rebut the presumption arising under the statute. This construction appears to have been placed upon the statute early in its history. See *Bishop v. Middleton,* 43 Neb. 10. It is true it opens the door to the practice of imposition upon creditors and the holders of such claims, as it enables unauthorized persons to do certain acts without their knowledge and consent, by which a *prima facie* case may be made against them. But the same may be said of the presumption often said to arise from the recent possessions of stolen property. In defense of both these presumptions, it may be said, experience has taught that the general good resulting from their indulgence far outweighs any occasional individual hardship. Adopting this construction, it was not necessary for the plaintiff to charge that the defendant

had assigned the claim to Leudtke, or that his title thereto was traceable to the defendant, because the fact that suit had been instituted thereon in another state whereby the exempt wages of the plaintiff had been seized raises a presumption of a violation of the act, and, as was said in *Bishop v. Middleton, supra,* "It is not necessary to plead what the law presumes."

The fourth criticism, namely, that the petition contains no allegation that the justice of the peace in Missouri had jurisdiction also appears to be unfounded. The petition shows the institution of the garnishment proceedings in another state whereby the exempt wages of the plaintiff were seized. The amount of the claim is within the jurisdiction of a justice of the peace in this state, and, in the absence of a showing to the contrary, the presumption is that it was also within the jurisdiction of the justice of the peace in Missouri. In short, the petition shows that the very acts prohibited by the statute, and which, when established, make a *prima facie* case against the defendant, were done, and consequent damages. That is all that is required.

The plaintiff offered in evidence what purports to be a transcript of the proceedings had before the justice of the peace in Missouri in the case brought against him there by Leudtke. The certificate of the justice in due form is attached thereto, which is followed by another certificate which is as follows: "State of Missouri, County of Jackson, ss: I, J. L. Phelps, clerk of the county court within and for the county and state aforesaid, the same being a court of record, and having a seal, do hereby certify that A. J. Liddil, who has signed the foregoing instrument, was at the date thereof a justice of the peace within and for Blue township, in the county of Jackson, and duly commissioned to act as such, and that I am well acquainted with his handwriting, and I verily believe the signature thereto to be genuine. In witness whereof I have hereunto set my hand and affixed the (seal) seal of said court at Kansas City, Mo. this 15th day of June, 1904. Jas. L.

Phelps, Clerk, F. J. Kast, Deputy Clerk." The defendant objected to the reception of the evidence on the ground that it was not duly authenticated. The objection was overruled, and this ruling was assigned as error. The argument upon this assignment is based on sec. 414 of the code, which prescribes the manner in which judgments of of a court of record of a sister state shall be authenticated. But the specific provision for the authentication of a judgment of a justice of the peace of another state is in the next section; hence, the argument upon this point is beside the mark. The authentication appears to conform substantially to the latter section and is sufficient we think.

It is also claimed that the transcript is insufficient to show the institution of the garnishment proceedings before the justice of the peace in Missouri because the service of the notice in garnishment appears to have been made by a "deputy constable" who appears to have served it by "declaring to the Chicago, Burlington & Quincy Railway Company," plaintiff's debtor, that it was summoned as garnishee in said proceeding. Section 531*e* enumerates the acts which, when proved, shall be deemed *prima facie* evidence of a violation of the act in question. Among those acts are "proof of the institution of a suit, or service of garnishment summons, by any person, firm, or individual, in any court of any state or territory other than this state." There the distinction is made between the institution of a suit and the service of process. Where the suit is instituted, and where by process, however defectively served, the exempt wages are seized, as they were in this case, the presumption of a violation of the act arises. It would be a travesty on justice to permit a party to invoke the aid of a court in another state, and by such aid seize exempt wages, and then come in and defend against a violation of the act by showing some irregularity in the service of the process of the foreign court. The suit was instituted before the justice of the peace and was effective for the purpose for which it was instituted. That being true, proof that the suit was instituted makes a *prima facie* case

against the defendant. The defendant offered no testimony. That adduced by the plaintiff is abundantly sufficient to sustain the verdict.

The constitutionality of the act under which this suit was brought is vigorously assailed by the defendant. It was thus assailed in *Singer Mfg. Co. v. Fleming,* 39 Neb. 679, and *Bishop v. Middleton, supra.* It was upheld in the former in an exhaustive opinion, which was adhered to in the latter. We are satisfied with the conclusion reached in those cases and regard the question as settled. The act has been in operation for more than 15 years and, while it has been characterized as harsh and oppressive, yet no case has come under our notice, and we doubt if one can be found, where any person, innocent of an intention to evade the law, has suffered from its provisions. It has proved a wise and salutary piece of legislation, without which the law exempting wages from seizure by attachment or on execution would afford little or no protection to a large class of wage earners.

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.

DE LAVAL SEPARATOR COMPANY, APPELLEE, V. FRANK JELINEK, JR., APPELLANT.

FILED OCTOBER 4, 1906. No. 14,370.

Contract: WRITTEN MEMORANDUM: EVIDENCE. If a written memorandum confirmatory of a previous oral agreement does not purport to recite the whole of the latter, oral testimony is admissible to supply omitted covenants not inconsistent with the writing.

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

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

M. H. Fleming, contra.

AMES, C.

The petition alleges that the plaintiff and defendant entered into a written contract, a copy of which is annexed to the pleading, by which the plaintiff agreed to furnish to the defendant certain machines to be sold by the latter within certain territory in this state, and the proceeds of such sales accounted and paid for at the prices specified in the agreement; and that the plaintiff had furnished to the defendant a certain number of such machines pursuant to the contract, for a part of which, aggregating in price $340.90, he had failed and refused to account for or pay, and for which amount and costs the plaintiff prayed judgment.

The defendant answered, admitting that the plaintiff had furnished to the defendant such machines to be sold by him within the territory described, and to be accounted and paid for at the prices named, and that the plaintiff had furnished the number stated in the petition, and that for the number so furnished, aggregating in price $340.90, the defendant had not paid. But the defendant averred that the written document was not the contract under which the said machines were furnished by the plaintiff and received by the defendant, but only a memorandum of a part of said contract; that the contract was oral, and was entered into by and between the defendant and an agent of the plaintiff at a time prior to the making of the written memorandum, and contained stipulations or covenants not embodied or intended by either of the parties to be embodied in the writing; the sole purpose of the latter being to describe the character of the plaintiff's employment and the territory in which he was employed

to sell the machines, and the prices at which he should sell and account and pay for the same, but that the oral agreement stipulated that the defendant should have the exclusive right to make such sales within the territory named for so long a time as such arrangement should be satisfactory to both parties thereto, which stipulation was not contained in the writing. The defendant further alleged that, pursuant to such agreement, he had expended a large amount of time and money in promoting sales of such machines within the prescribed territory, and in negotiating such sales to be thereafter consummated, and that said employment had at all times been satisfactory to both parties to said agreement, and the plaintiff had not at any time expressed dissatisfaction therewith or had reason so to do, but that the plaintiff had nevertheless arbitrarily and unjustifiably put an end to such employment, at some time previous to the bringing of the action, and had since said time refused to furnish said machines to the defendant for sale, but had furnished them exclusively to another person for sale in the prescribed territory, to the damage of the defendant in the sum of $2,000, for which sum the defendant prayed judgment by way of counterclaim or set-off.

When the plaintiff had rested its case, the defendant offered to prove the matters pleaded as a counterclaim, but the plaintiff objected on the ground that the answer does not state facts sufficient to constitute a counterclaim, and the court sustained the objection and directed a verdict for the plaintiff, upon which a judgment was rendered, from which the defendant has appealed. The sole ground, as it appears, upon which the objection was sustained and the instruction given is that the answer is an attempt to contradict or vary the terms of a written contract by oral testimony. Manifestly it attempts to do no such thing, but does attempt to show that the writing does not express the entire agreement of the parties, nor purport so to do. If it does so purport, it is doubtless as conclusive in that respect as it is with regard to any other matter con-

cerning which it speaks; but if it does not so purport, then the question whether it does contain the entire agreement, and, if not, what are the omitted terms of the contract, are questions of fact to be determined in like manner as any other fact that is or might be put in issue by the pleadings.

The memorandum is in the form of a letter written by the plaintiff to the defendant and signed by both parties in duplicate. It begins by acknowledging the receipt of an order from the defendant for a number of the machines, and continues: "We also have advice from Mr. Graham (an agent of the plaintiff) of his verbal arrangment with you for the sale of our baby machines in that section, and are informed by him of your intention to devote every reasonable effort to the business. This being understood, we take pleasure in confirming Mr. Graham's arrangement, outlining below the discounts, terms and conditions which will govern until further notice, such being applicable to baby separators only and in no sense to power or factory sizes or Alpha machines." Then follows a schedule of terms and discounts, and of the times and manner of making orders and settlements and payments, and a description of the territory in which, and the prices at which, sales were to be made, and a direction to the defendant to sign an inclosed duplicate of the letter and return it to the plaintiff. The letter does not say that it expresses all the terms of the "verbal arrangement" between Graham and the defendant, which it "confirms" without limitation, and whether it does so must be ascertained by inference or by evidence *aliunde*. It appears to us that no certain inference as to the duration of the "arrangement" can be drawn from the language of the document itself. There are at least three possible suppositions: First, it may have been intended to continue until some definite and specified time; second, it may have been intended to be terminable arbitrarily at any time by one or either party as the plaintiff insists; or, third, it may have been intended to continue indefinitely so long as it should be reasonably satisfactory to both parties, as the defendant contends.

And, again, upon which of these intents the minds of the parties met, may have been left to be gathered by inference from the language of the memorandum, or may have been expressed in the "verbal arrangement," which the writing confirms, but which in its entirety it does not express or by necessary implication purport to give. Which of these conjectures is true can only be ascertained, if at all, from a knowledge of what was said and done at the time the arrangement was agreed upon. The memorandum is in terms a confirmation of a previous oral agreement, and of itself naturally, if not necessarily, raises the inquiry, what was that agreement?

We are of opinion, therefore, that the court erred in excluding the offered evidence from the jury and in directing a verdict for the plaintiff, and recommend that the judgment be reversed and a new trial granted.

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.

FRANK ANDERSON, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED OCTOBER 4, 1906. No. 14,404.

1. **Master and Servant:** ASSUMPTION OF RISKS. A servant engaged in a hazardous occupation assumes the risk of injury to himself from all its obvious dangers.
2. **Evidence** examined, and *held* to be insufficient to support the verdict.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

Greene, Breckenridge & Kinsler, for appellant.

Weaver & Giller, contra.

AMES, C.

There is but one question in this case. The facts relative to it are not in dispute, and briefly but comprehensively stated are that the plaintiff was a middle-aged man of ordinary mental and physical endowments and of many years' experience as a railway switchman, in which capacity he had been for several months in the service of the defendant company and engaged in switching, coupling and uncoupling of cars at a point where the accident about to be mentioned happened. The tracks and roadbed of defendant company at that place were, and had been during all the time of the plaintiff's service, illy constructed, badly out of repair and obviously hazardous to the company's employees. The roadbed was winding and uneven, was continuously overflowed or partly submerged by water from a nearby sewer, and there were holes in and irregularities of the surface, more or less filled with mud, and caused, some of them, by the protrusion of the cross ties or the ends of them above the surface at some places and by corresponding depressions at others. So many and great were these defects that the cars, when moved over the tracks, swayed and rocked from side to side to a degree rendering it dangerous for the plaintiff to walk along the tops of them as he was frequently obliged to do in the discharge of his duties. It is the settled and undisputed law of this state that of injuries arising from any of these known and obvious defects the plaintiff, by continuing in his employment with knowledge of them, assumes the risk. *Norfolk Beet-Sugar Co. v. Hight,* 56 Neb. 162; s. c. 59 Neb. 100.

Plaintiff on a certain day stepped in between two cars, one of which was moving, for the purpose of making a coupling of them, and, in attempting to retreat from that position, lost his balance so as to be unable to mount the approaching car, as he had intended doing, and was swayed around and caught between its side and a platform of a nearby building, receiving injuries for which he re-

covered a verdict in this action. He testifies that from his sensations at the time of the accident he is satisfied that the loss of his equilibrium was due to his stepping into a hole in the roadbed just outside the railway rail and some six or eight inches deep. But he did not see such a hole either at that time, or before or after the event. But he says that he knew, and had previously known, that in that immediate locality the dirt was in places washed away so as generally to leave spaces between the ends of the ties, some of which were rotten and sticking up, and that the track there was generally out of repair and in bad condition. This is the substance of the whole of the evidence on behalf of the plaintiff with respect to the cause and the manner of the happening of the accident.

Now, accepting the doctrine of the above cited case as a major premise, the plaintiff cannot recover unless either one or the other of two inferences can reasonably be drawn from the foregoing evidence, that is to say: either that a hole such as he supposes, but of such a character as not to be obvious to him, had existed there for such a length of time, and so obviously to the defendant and its servants that they were guilty of negligence in allowing its continuance, or else that such a hole had been negligently made by the defendant or its servants without the knowledge of the plaintiff and so recently as to escape his notice. The latter of these suppositions there is no pretense of evidence to support, and the former of them is manifestly absurd. There is a third possible supposition, but it is involved in the former of those just mentioned and is disposed of with it. It may be assumed that such a hole as is suggested existed without the actual knowledge of either the plaintiff or his employer, but was the natural and probable result of the conditions of the locality with which he was familiar. In that case, danger of its production and of injury from it were risks which he assumed from the nature of his employment. In addition to the foregoing, a witness for the defense testified, with-

out contradiction, that he examined the place immediately after the accident and that there was no hole there. Presumably what the plaintiff mistook for a hole was a space between two protruding ends of cross-ties.

We are therefore of opinion that the evidence is insufficient to uphold the verdict, and recommend that the judgment be reversed and a new trial granted.

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.

LORENZO L. HILE, APPELLANT, V. M. N. TROUPE, COUNTY TREASURER, ET AL., APPELLEES.

FILED OCTOBER 4, 1906. No. 14,525.

1. **School Lands: REDEMPTION.** A lessee of school lands or his assignee under a lease executed pursuant to the act of February 24, 1883 (laws 1883, ch. 74), who is delinquent of payments reserved in the instrument, is entitled to redeem from a forfeiture incurred by such delinquency at any time before such lands shall be actually resold or released.

2. ———: LEASE, RECORDING ASSIGNMENT OF. An assignment of a lease of school lands that was executed prior to the passage of the act of March 5, 1885 (laws 1885, ch. 85), is not affected by the provisions of that act requiring such assignments to be recorded in the office of the commissioner of public lands and buildings.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

H. M. Sinclair, for appellant.

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

AMES, C.

In December, 1883, one Reed became a lessee of a certain tract of school land of this state pursuant to a statute then in force, and his lease became by purchase and mesne assignment the property of the plaintiff herein in November, 1889. At that time no default of the covenants of the contract had been committed by the assignors of the plaintiff, and he at once entered into, and has since continued in, possession of the lands and has made lasting and valuable improvements thereon, claiming a right thereto as owner of the interest created by the lease and as assignee of the instrument. Continuously, also, from that time until the year 1904, he paid the annual instalments of rent reserved by the lease, which sums were received and accounted for, without objection, by the proper official authorities, as belonging to the public educational funds of the state. The plaintiff became delinquent of an instalment of rent stipulated by the contract to be paid for the year 1904, and thereupon the lands were, by authority of the board of educational lands and funds, advertised for sale or lease, pursuant to the statute, as having been forfeited. Notice of a declaration of such forfeiture by the board having been served upon the plaintiff, he at once, and before the time specified in the advertisement for offering the lands, tendered to the treasurer of the county in which the lands lie the full amount of all delinquencies, interest, penalties and costs that had accrued under the lease, as a redemption from such forfeiture. But the treasurer, acting under the advice and instruction of the state board, refused the tender and declined to accept the money offered, for the sole expressed reason that the time for such redemption had expired. The board thereupon proceeded to offer said lands at public auction, and pursuant to that procedure executed a lease of them to one Max Schlund, who by virtue of his lease claims a right to the possession of them and of the improvements situated thereon. This is an action upon a

petition setting forth the foregoing facts, and against the state board, the county treasurer and the lessee, Schlund, to obtain a judicial decree for redemption. A general demurrer to the petition was sustained, and the suit dismissed. The plaintiff appeals.

The statute in force at the time the lease in suit was executed enacted a procedure for the declaration of forfeitures in cases of delinquencies in payments of rents, but with the following proviso: "Provided, the owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies and costs *at any time before such land is again sold or leased.*" Laws 1883, ch. 74, sec. 20. This proviso remained in force until 1903, when it was amended by substituting for the portion thereof printed in italics the words "at any time before such land is advertised to be leased at public auction" (laws 1903, ch. 100, sec. 17), and the statute as theretofore existing was then repealed. But the matter with which the legislature was dealing was not the exercise of governmental functions merely, but one having reference to the rights and obligations of the state as a party to certain contracts, and it is a well-settled principle that a state is as powerless, under the operation of section 10, article I of the constitution of the United States, to impair by law its own contractual obligations as it is to affect in like manner the contracts of natural persons. *Davis v. Gray,* 83 U. S. 203; *Hall v. Wisconsin,* 103 U. S. 5; *People v. Stephens,* 71 N. Y. 527. And it is a principle much older than the constitution of the United States "that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embaces alike those which affect its validity, construction, discharge, and enforcement." *Von Hoffman v. City of Quincy,* 71 U. S. 535, 550. This language is authoritative and binding, not only upon this court, but upon every branch and functionary of the state government. And it

is said by the same high authority: "Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, * * * impairs its obligations." *Green v. Biddle,* 8 Wheat. (U. S.), *1, *84. It is clear therefore that the right of redemption created by the above quoted proviso in the statute in force when the lease in suit was made became incorporated with and a part of that instrument. The proviso had nothing to do, as the attorney general contends that it did, with mere procedure or with the remedy by which the state was and is entitled to declare and enforce a forfeiture and a resale or release of the land; but it is entirely distinct therefrom and expressly designed to preserve to the lessee the valuable right to atone for his delinquencies and to redeem his land from forfeiture at any time during the pendency of such proceedings and before their termination by an actual resale or release. That such a right is a contractual one, which is valuable and vested and protected by the above mentioned constitutional guaranty, the authorities leave us no room to doubt. *Bronson v. Kinzie,* 1 How. (U. S.) *311; *Howard v. Bugbee,* 24 How. (U. S.) 461; *Cargill v. Power,* 1 Mich. 369; *Moody v. Hoskins,* 64 Miss. 468; *Dorrington v. Myers,* 11 Neb. 388; *Von Hoffman v. City of Quincy, supra.* The act of 1903 was therefore, in the respect mentioned, inoperative upon the lease in question.

The statute enacted in 1883, and in force at the time the lease in suit was executed, contained no regulation with reference to the record of assignments of such instruments, nor requirement that they should contain any stipulation or recital relative to that subject, but in 1885 the legislature passed a new and comprehensive act "to provide for the registry, sale, leasing and general management of all lands and funds set apart for educational purposes, and for the investment of funds arising from the sale of such lands" (laws 1885, ch. 85), and to repeal an

act having a similar title passed in 1883, the latter being the statute first above mentioned. The new act provided a considerable amplification of the procedure established by that which it superseded, and contained several restrictions and regulations not found in the latter, and required, among other things, that leases issued pursuant to it should contain a stipulation or recital that "no assignment of such lease contract shall be valid unless the same be entered of record in the office of the commissioner of public lands and buildings." Laws 1885, ch. 85, sec. 14. But the act contained no general provision relative to the record of assignments of leases not containing such stipulation or recital, nor any, except that already quoted, with respect to those containing it, so that the requirement did not by its terms apply to the record of assignments of any leases except such as should be thereafter executed pursuant to its authority. If the legislature intended that the regulation with respect to the record of assignment should have prospective operation only, and should be applicable solely to leases thereafter to be executed and containing the required recital, it could have chosen no more apt language for the expression of that purpose. It cannot be supposed to have been intended to have unrestricted retroactive operation, because the legislature was incompetent to invalidate previously executed assignments of then existing leases, and no practical object would have been accomplished by requiring such a record by persons holding or obtaining leases through mesne assignments, because a record of the immediate assignment, without a record of those intermediate, would not have disclosed a chain of title or have furnished the state board or the public with any useful information. The plaintiff's title was acquired through two mesne assignments, both of which were executed before the passage of the act of 1885, and to neither of which can that act, by any possible construction, be said to have been applicable, and we think that it had no application to the immediate assignment to the plaintiff.

This conclusion relieves us from a necessity, which might otherwise have been imposed upon us, of deciding the questions of estoppel which were much discussed in the briefs and arguments of counsel on both sides. We may say in passing, however, that we much doubt that equity would permit a forfeiture for failure to record an assignment after there had been 13 years' occupancy under it in good faith, accompanied by the payment of that many years' rent charges, and the erecting of lasting and valuable improvements. It may be observed in this connection that it is not the lease that the statute avoids for failure to record an assignment, but merely the unrecorded assignment, and we doubt if the court would permit an extension of a forfeiture to the lease itself, or make a failure to record in a case like this, in which the assignee was known to be actually in possession and had made payment of instalments of rent which the state had accepted without objection, a cause for disturbing the plaintiff, except at the instance of some person having a better right. It is a matter of indifference to the state who has the bare legal title to the leasehold, or who furnishes the redemption money, so long as the latter is not a mere volunteer having no interest, which the plaintiff certainly is not. But, for reasons already stated, we do not find it necessary to express an opinion upon these questions, and therefore refrain from so doing. We are satisfied that upon the facts alleged in the petition and admitted by the demurrers the plaintiff is entitled to the relief prayed in his petition, and recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

EPPERSON, C., concurs.

OLDHAM, C., not sitting.

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

court be reversed and the cause remanded for further proceedings.

REVERSED.

GEORGE E. NORWOOD V. BANK OF COMMERCE OF LINCOLN, NEBRASKA.

FILED OCTOBER 4, 1906. No. 14,351.

1. **Note: BONA FIDE PURCHASER.** To defeat a recovery on a promissory note in the hands of an indorsee, who takes it before maturity for a valuable consideration, in the ordinary course of business, without notice, it is not sufficient to show that it was taken under circumstances which might excite suspicion in the mind of a prudent man, but it must be shown that the indorsee took the paper under circumstances showing bad faith or want of honesty on his part. *Dobbins v. Oberman*, 17 Neb. 163, followed and approved.

2. **Evidence** examined, and *held* not sufficient to show bad faith or want of honesty in the purchase of the note in controversy.

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

Cole & Brown, for plaintiff in error.

S. L. Geisthardt and *W. F. Buck, contra.*

OLDHAM, C.

This action was begun in the district court for Nuckolls county, Nebraska, to recover the amount alleged to be due upon a certain promissory note, executed by the defendant and payable to the Leader Fence Machine Manufacturing Company, and alleged to have been indorsed for a valuable consideration to the plaintiff before maturity. Defendant, for answer to plaintiff's petition, admitted the execution of the note, and denied that the note was purchased for value, and without notice, by the

plaintiff before its maturity. The answer further alleged, in substance, that the note was given without consideration; that defendant was induced to sign the note by the representations of the agent of the fence company that the note would not be negotiated, and that it would be simply held as security for such machines as defendant would sell for the company for a period of six months; that it was agreed at the time of the execution of the note that defendant was to act as the agent of the fence company and sell its machines in a certain portion of Nuckolls county; that the machine company agreed to furnish machines to the defendant for sale at the price of $6 apiece, with the freight prepaid, and to send a man to aid the defendant in the sale of the machines; and that the machines were represented to be first class in every particular, and that they would build and construct in an easy and practical manner any sort of a wire fence, and that they would sell readily, and that the company would furnish wire to him for building fences at two and one-half cents a pound; that defendant relied on all these representations when he signed the note, and that all such representations were false; that it was further represented that, if defendant did not sell any machines within six months, the company would return his note and take back the machines delivered to his order. It was further alleged that defendant had offered to return all machines and all property delivered to him by the company and had kept his tender good. There is no allegation in the answer that the maker of the note and the indorser thereof were solvent and known to be solvent at the time of the purchase of the note. Plaintiff filed a reply in the nature of a general denial of the new matter set up in the answer, and alleging the purchase in good faith, without notice in the ordinary course of business. On issues thus joined there was a trial to the court and jury, and at the close of the testimony the court directed a verdict for the plaintiff, and entered judgment on the verdict. To reverse this judgment defendant brings error to this court.

At the trial of the cause plaintiff assumed the burden

of proving the *bona fides* of the purchase of the note before maturity, and for this purpose offered in evidence the deposition of Morris Weil, president of the plaintiff bank, whose testimony on the material issues is as follows: "Q. I show you here a paper, identified by the reporter as Exhibit 1, purporting to be a promissory note for $100 dated February 14, 1903, signed G. E. Norwood, and I ask you who is the holder and owner of this note? A. The Bank of Commerce. Q. Look at the indorsement there, the words 'Leader Fence Machine Mfg. Co., by J. M. Barber, Mgr.' I will ask you if you know whose signature that is? A. Yes. Mr. J. M. Barber. Q. Who is this J. M. Barber? A. He is the manager of the Leader Fence Machine Manufacturing Company. Q. When did the Bank of Commerce purchase that note? * * * With reference to the maturity, when was it, before or after? A. Long before. Q. What consideration, if any, did the Bank of Commerce give for it, cash or what? A. Cash. Q. In what way did the Bank of Commerce get it with reference to its being in the regular course of business? A. Mr. Barber presented this note with others and we purchased them of him in the regular course of business. Q. What knowledge or notice, if any, did you or the bank have of any defense of any kind to the payment of this note? A. None whatever. Q. Did you know of any reason of any kind why the maker should not pay the note? If so, state. A. None whatever."

Cross-examination: "Q. Do you know where Mr. Barber came from when he came to sell this note? A. I do not. Q. Had you seen him before that? A. Yes, sir. Q. Where and when? A. In the bank, at a previous time. Q. Had he made some arrangement, or had some conversation with you relative to the purchase of certain notes that he might obtain? A. No, sir. Q. Did you have any intimation of any kind that he would bring certain notes to you to purchase? A. No, sir. Q. What was the nature of his conversation with regard to this paper? A. He presented us a bunch of paper, and asked us on what basis we would

purchase them. We figured on them, and purchased them. Q. Did he tell you, or make you acquainted with the nature of his business at these times? A. Yes, sir. Q. What business did he say he was engaged in? A. Manufacturing machines for making wire fence. Q. Did you know anything of this company at the time that he came there? A. Yes, sir. Q. Did you inquire into the nature and character of the company? A. Yes, sir. Q. And you knew that he was the manager? A. Yes, sir. Q. Did you buy the note from him before you found out the financial responsibility of the maker? A. Yes, sir. Q. How much did you pay for the note? A. It was bought together with others. Q. What others? A. There were five different sets of notes presented at that time for discount. Q. How much did you say you paid for the note? A. It was bought with others and not bought separate. Q. Have you any idea how much you paid for this note? A. For the aggregate? Q. Yes. A. I have. Q. How much did the notes aggregate that you purchased at that time? A. I believe $1,900. Q. That was the face of the notes? A. Yes, sir. Q. What did you pay for them? A. $900. Q. How did you pay it? A. In cash. Q. Do you know anything about this man Barber's financial standing? A. Yes, sir. Q. What do you know about him? A. His record is good. Q. When you answer that, do you mean with reference to the company that he acted as manager for, or his own responsibility? A. The company and his own responsibility. Q. Both together? A. Yes, sir. Q. Did you ascertain that fact before you purchased the notes? A. Yes, sir. Q. I believe you answered that you did not make any inquiry about the maker of this note? A. Not before purchasing. Q. Did you, of any of those notes that you purchased? A. No, sir. Q. Did you know anything about their character or standing financially? A. Only the affidavits that were attached to those notes. You might not call it an affidavit, but a memorandum obtained from one of the officers, if I am not mistaken, that the makers of these notes had property in their own names, and were responsible

people." This was all the testimony offered on the *bona fides* of the transfer of the note, which was negotiable in form.

Defendant then took the stand on his own behalf and testified that the note was given to a Mr. Fiefield, who was an agent of the Leader Fence Machine Manufacturing Company, and offered to prove by himself and others that Fiefield, representing the fence machine company, made the representations alleged in the answer to procure defendant's signature to the note; and that the machines, for which the note was given, were an entire failure and did not build fences as represented, were not practical in any way, and were absolutely worthless; and also that the machines were to be sent to Nelson, freight prepaid, which was not done; and that as soon as defendant had discovered the fraud and misrepresentations he offered to return the machines and supplies that he had received from the company. This offer of proof was denied by the court, and, no other testimony being offered, the court directed a verdict for the plaintiff for the amount of the note and interest. In the case of *Violet v. Rose,* 39 Neb. 660, after a careful and painstaking review of the former decisions of this court, the rule was established that, where fraud is alleged in the inception of the note, the burden is on the plaintiff to prove the *bona fides* of the transfer; but, where a want of consideration is relied upon, the burden is on the defendant to show the *mala fides* of the transfer. It is also determined in this case that the order of proof, where failure of consideration is pleaded against an indorsee, rests in the sound discretion of the trial court, that is, that the court may permit testimony tending to show a failure of consideration before evidence tending to impeach the good faith of the indorsement has been offered. Now in the case at bar plaintiff on his own volition introduced evidence, already set out in this opinion, tending to show the good faith of the purchase of the note in suit, and the only evidence offered by defendant touching on this question was such as was elicited from plaintiff's pres-

ident on his cross-examination. This testimony was that the president of the bank had purchased this note with others aggregating $1,900, for the sum of $900; that he knew that the party offering the notes was the general manager of the payee of the note, and that the payee was engaged in the manufacture of fence machines; and that both the general agent and the payee were reported to be solvent. Now, as before stated, there was no allegation in the answer that the maker of the note was solvent, or that the makers of any other of the bunch of notes purchased by plaintiff were solvent. The only thing touching on this question was the answer of plaintiff's witness that certain property statements were attached to the notes. Defendant offered no testimony directly tending to show that any of the makers of the notes purchased by the bank were in fact solvent and known to be so by the plaintiff at the time of the purchase. If all the evidence offered had been admitted, it would have constituted no defense against an indorsee under the law merchant. In *Dobbins v. Oberman,* 17 Neb. 163, it is said that, to defeat a recovery on a promissory note in the hands of an indorsee who takes it before maturity for a valuable consideration, "it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part." This doctrine has been quoted with approval in *Rublee v. Davis,* 33 Neb. 779; *Martin v. Johnston,* 34 Neb. 797, and *First Nat. Bank v. Pennington,* 57 Neb. 404. The only evidence offered, which in any way tends to impeach the good faith of the purchase of the note in suit was the discount which the indorsee received on the whole bunch of notes purchased. These notes, presumably, were for small sums on different persons, residing at considerable distance from the place of business of the indorsee, so that the cost of collection might reasonably have been taken into consideration in estimating the discount on the paper. The note in suit bore no interest

by its terms, and there is no evidence that any of the others differed in this respect.

The question of the solvency of the makers was not placed in issue by the proof offered, so that the only question to determine is whether or not the discount for which the notes were purchased, standing alone, is sufficient to show bad faith in their purchase, while the purchase of negotiable paper on a known solvent maker for a sum materially less than the face of the paper is often referred to by judges and text-writers as a circumstance tending to show bad faith in its purchase; yet, unless the consideration is grossly inadequate, this circumstance alone is not sufficient to establish the *mala fides* of the transfer.

We are therefore of the opinion that the evidence offered was wholly insufficient to show either bad faith or want of consideration in the purchase of the note, and, consequently, it is immaterial whether the evidence offered by defendant tending to show a want of consideration as between the original parties to the note had been admitted or excluded, for in either event an instruction directing a verdict for the plaintiff should have been given. 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.

AMERICAN BONDING COMPANY OF BALTIMORE, APPELLANT, v. BELLE M. PULVER ET AL., APPELLEES.

FILED OCTOBER 4, 1906. No. 14,428.

1. **Depositions.** A deposition to be admitted in evidence must be reduced to writing by the officer taking the deposition, or by the witness giving the testimony, or by a disinterested person, in the presence of the officer.

2. ———: CERTIFICATE. A certificate to a deposition, which fails to show that the deposition was reduced to writing by the officer, or by the witness, or by a disinterested person, in the presence of the officer, and which further fails to show that the deposition was taken at the time and place named in the notice, is fatally defective.

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

Hall & Stout and *J. H. Robb,* for appellant.

M. D. King and *J. L. McPheely, contra.*

OLDHAM, C.

This was a suit in the nature of a creditor's bill seeking to set aside the conveyances of a tract of land in Kearney county, Nebraska, from defendant Belle M. Pulver to Christ Doyle, and from Ruth A. Doyle, the widow and devisee of Christ Doyle, to James E. Pulver, the husband of Belle M. Pulver. The petition alleged that these transfers were made without consideration and for the purpose of hindering and delaying the plaintiff, who was a judgment creditor of Belle M Pulver. The answer was in the nature of a general denial. There was a trial of the issues to the court, and at the close of the testimony plaintiff's bill was dismissed. To reverse this judgment of the district court plaintiff has appealed to this court.

An alleged error of the district court in suppressing the deposition of William M. Reinhardt, which was relied upon by the plaintiff to establish its claim as a purchaser and assignee of the judgment against Belle M. Pulver and others, is the only assignment relied upon for a reversal of the judgment. It is conceded that without the evidence contained in this deposition plaintiff's testimony was insufficient to sustain a judgment in its favor, so that the only question to be determined is whether or not the district court erred in suppressing this deposition. The notice to take the deposition was of a statutory form, and was to

the effect that on Monday, the 1st day of May, 1905, the plaintiff would take the depositions of William M. Reinhardt and other witnesses therein named before competent authority at the office of the American Bonding Company in the city of Baltimore, state of Maryland, at the hour of 10 o'clock A. M., with authority to adjourn from day to day until all such depositions shall have been taken. A copy of this notice was duly served upon the attorneys of the defendants. The certificate to the deposition of William M. Reinhardt, taken under this notice, was as follows: "State of Maryland, City of Baltimore, Sct.: I, Millard Leonard, a duly qualified notary public of the state of Maryland, in and for the city of Baltimore, do hereby certify that William M. Reinhardt was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, and that the above deposition by him subscribed to, as above set forth, was reduced to writing by my official stenographer, J. C. Hayne, under my dictation and supervision, in my presence, and was subscribed to in my presence, and was taken in my office in Baltimore city, and that I am not counsel or attorney for either party. In testimony whereof, I hereunto subscribe my name and affix my notarial seal, this first day of May, A. D. 1905. (Seal) Millard Leonard, Notary Public." Section 385 of the code provides: "The officer taking the depositions shall annex thereto a certificate showing the following facts: First. That the witness was first sworn to testify the truth, the whole truth and nothing but the truth. Second. That the deposition was reduced to writing by some proper person (naming him). Third. That the deposition was written and subscribed in the presence of the officer certifying thereto. Fourth. That the deposition was taken at the time and place specified in the notice." A substantial compliance with these requirements of the statute is a necessary prerequisite to the admission of a deposition in evidence in the trial of a cause. An examination of the provisions of the section just quoted shows what are the essential requirements of a certificate to a

deposition. The certificate must show that the witness was sworn to testify to the truth, and "second, that the deposition was reduced to writing by some proper person." The provision requiring a proper person must be read in connection with section 380, which says: "The deposition shall be written in the presence of the officer taking the same, either by the officer, the witness, or some disinterested person." Here is a limitation on the authority to write the deposition, even in the presence of the officer, and this limitation is that either the officer must write it, or the witness must write it, or some disinterested person must write it, and then it must be subscribed by the witness. Now, the certificate in the case at bar shows that the deposition was reduced to writing by J. C. Hayne, the official stenographer of the notary, but it does not show that J. C. Hayne was a disinterested party. And, if he were not a disinterested party, he was not a proper person within the meaning of section 385 of the code, above quoted. The fourth provision of section 385, *supra,* is that the certificate shall show that the deposition was taken at the time and place specified in the notice. The notice, as before set out, provides that the deposition should be taken at the office of the American Bonding Company in the city of Baltimore, while the certificate shows that the deposition was taken "in my office in Baltimore city," meaning the office of Millard Leonard, notary public. It therefore appears that the certificate was irregular in not showing that the testimony was reduced to writing by a disinterested party, or a proper person, and also defective in not showing that it was taken at the time and place in the notice specified.

We are therefore of opinion that the trial judge was justified in suppressing the deposition, and 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.

J. H. KEITH, TRUSTEE, ET AL., APPELLEES, V. JOSEPH BRUDER ET AL., APPELLANTS.

FILED OCTOBER 4, 1906. No. 14,430.

1. **Judgment: REVIVOR.** The successor of a deceased judgment creditor may, after the expiration of a year, revive an action by a bill or a supplemental petition.
2. **Petition** examined, and *held* sufficient to sustain the judgment.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Lewis C. Chapman, for appellants.

R. R. Dickson and *O. A. Williams, contra.*

OLDHAM, C.

This was an action instituted in the district court for Holt county, Nebraska, in the nature of a bill of revivor of a judgment entered in said court on the 30th day of November, 1891, for the foreclosure of a deed of trust executed and delivered to secure the payment of a promissory note therein described. It appears from the petition filed that all the parties in interest were duly served and in court at the time of the original decree of foreclosure; that thereafter an order of sale was duly issued upon the decree and the sale had, at which the beneficiary, the legal holder of the note, was the purchaser by his attorney; that thereafter the sale was confirmed and deed issued to the executors of the holder of the note, who had departed this life before the sale was had; that thereafter, it being made to appear to the court that the holder of the note, A.

A. Low, who had been a resident of the city of Brooklyn, New York, had departed this life before the sale, the deed and order of confirmation of the sale were set aside, and the action was revived in the name of A. A. Low and Seth Low, the executors and administrators of the estate of the deceased. This order was entered on the 2d day of December, 1896, and a new order of sale was directed, but no sale was had under this order. On the contrary, the executors of the Low estate, under a provision of the will authorizing them to dispose of the personal and real property of the deceased, conveyed by deed the interest of the deceased in the lands in controversy to H. M. Henley, the plaintiff in interest in the present cause of action. Plaintiff filed this deed for record and thereafter, in January, 1903, instituted the present action by an original bill, in which he alleged the above stated facts and prayed the court that he be subrogated to the rights of the original judgment creditor; that the former void deeds be canceled, and that an alias order of sale be issued for the enforcement of the judgment. His prayer for relief was contested by defendants Bruder and wife, the owners of the equity of redemption in the lands, who filed a general demurrer to the petition. The demurrer was overruled, and a judgment was entered granting the relief prayed for in the plaintiff's petition. To reverse this judgment defendants have appealed to this court.

The sole question presented is as to the sufficiency of the petition to support the judgment. The contention seems to be that a judgment can only be revived on motion or on supplemental petition, but not by an original bill. The petition plainly on its face states a meritorious cause of action entitling plaintiff to equitable relief, unless he is foreclosed of such relief by the provisions of the code governing the revivor of actions. While the action was not brought within one year of the time the right accrued, as provided for in sections 456 to 470 of the code, yet the summary method pointed out in these sections of our statute have been held not to prescribe an exclusive method of

revivor. *Hayden v. Huff,* 62 Neb. 375, and cases there cited. On the contrary, it was held in the case just cited that an action for revivor after the expiration of one year might be maintained either by a supplemental petition or by an original bill, as was done in the case at bar.

We are therefore of opinion that plaintiffs' petition is sufficient to sustain the judgment, and 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.

LINCOLN TRACTION COMPANY V. WILLIAM H. BROOKOVER.*

FILED OCTOBER 4, 1906. No. 14,283.

1. Carriers: NEGLIGENCE: BURDEN OF PROOF. In an action for damages against a street railway company for a personal injury caused by the alleged negligent starting of one of its cars when the plaintiff, a passenger, was in the act of alighting, the defense being a general or special denial, the burden of proof never shifts, but remains with the plaintiff to prove that the injury was received substantially as alleged.

2. ———: ———: INSTRUCTION. When, in an action for damages for a personal injury inflicted while the plaintiff, a passenger, was in the act of alighting from a street railway car, the evidence is conflicting as to where the plaintiff alighted, an instruction that "plaintiff became a passenger of the company, and continued to be its passenger up to and including the act of alighting at his proper stopping place," is erroneous.

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

Clark & Allen, for plaintiff in error.

Rose & Comstock, contra.

*Rehearing allowed. See opinion, p. 221, *post.*

EPPERSON, C.

This action was instituted by the defendant in error against the plaintiff in error in the district court for Lancaster county to recover damages for a personal injury caused by the alleged carelessness of the plaintiff in error. Plaintiff in the court below alleged that he was a passenger upon one of defendant's street cars west bound from Vine street in the city of Lincoln to the intersection of O and Sixteenth streets; that, while he was in the act of alighting at his place of destination, defendant's employees negligently, carelessly, and unlawfully, and without warning to plaintiff, and without stopping a sufficient length of time to permit the plaintiff to safely alight, started said car suddenly and with a jerk, the force of which unbalanced the plaintiff and threw him violently upon the pavement. For answer, the defendant alleged: First, a general denial; and second, admitted that the plaintiff was a passenger on defendant's car, and alleged "that, while the car was moving rapidly, and before it reached the crossing, the plaintiff left his seat in the car, walked to the platform, and negligently and carelessly stepped therefrom while the car was in motion as aforesaid, and fell upon the street, and whatever injuries the plaintiff received, if any, were caused by his negligence and carelessness in alighting from the car while it was in motion." The evidence was conflicting. The plaintiff testified that the injury was substantially as alleged in the petition. This was corroborated by other witnesses. Several witnesses for the defendant testified that it occurred as alleged in the second paragraph of the answer. The court gave instruction No. 10, in the first paragraph of which the jury were told that the burden of proof was on the plaintiff to establish the facts alleged in his petition and, in the second paragraph, that "the burden is upon the defendant to show that the plaintiff stepped from the car while in motion, and that the plaintiff was negligent in so doing, which negligence contributed proximately to his injury,

unless the plaintiff in making his own case has shown that said act in stepping from the moving car, if you find from the evidence that he did so step, was negligence which contributed to his injury as the proximate cause." That part of the instruction which relates to the burden being upon the defendant is alone objected to. In connection with this instruction, counsel for plaintiff places much stress upon the second paragraph of the answer, contending that it amounts to a plea of contributory negligence, and that under such a plea the instruction was proper. This also seems to have been the theory of the trial court. Contributory negligence is such an act or omission on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. The defense alleged in the second paragraph of the answer was not such a plea, but a special denial of the matters alleged in the petition. The answer was a very poor pleading, but as it was not assailed by motion we must consider it as it is, and not as it should have been. The plaintiff having alleged that his damages were sustained by the negligence of the defendant, the burden of proving it and of establishing such fact by a preponderance of the evidence rested upon him, and his duty in this respect was not lessened by the mere fact that the defendant had interposed a special denial. The burden of proof did not shift during the trial. It is true that the defendant introduced evidence to prove the fact alleged in his special denial, but such evidence would have been admissible under the general denial. The instruction was prejudicial. Under it the jury might reasonably say that, even though the evidence was evenly balanced as to the manner the accident occurred, yet the burden of proof, in view of the instruction, being upon the defendant, the defendant must fail, when, as a matter of law, had the evidence

appeared to the jury as evenly balanced, the verdict should have been for defendant. The instruction here complained of was similar to the instruction disapproved by this court in *Lincoln Traction Co. v. Webb*, 73 Neb. 136. In the opinion therein, delivered by BARNES, J., it is said: "The rule seems to be well settled that the burden of proof never shifts, but remains with the party holding the affirmative. When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon him to establish it by proof." By the instruction in the case at bar the court virtually told the jury that the burden was upon the plaintiff to establish that he received the injury substantially as alleged in his petition, and that the burden was upon the defendant to prove that plaintiff was guilty of the negligence alleged in the special denial. Both could not be true. Evidence of the latter of equal weight with the evidence of the former should have defeated the plaintiff.

The court gave instruction No. 7, excepted to by the defendant. That part assigned as error reads as follows: "The plaintiff, on the evening when the accident in controversy happened, became a passenger of said company, and continued to be its passenger up to and including the act of alighting at his proper stopping place." Under the petition it will be observed that the plaintiff desired to alight at the junction of Sixteenth and O streets, and, according to his evidence, he did alight at that place. It was the defendant's theory, supported by evidence, that the plaintiff voluntarily jumped from the car before it reached that point and while the car was in motion. This instruction was prejudicial. The question as to where the plaintiff alighted was a material one in this case, and it was a question for the jury to determine. From the instruction the jury might reasonably infer that the trial court was of the opinion that the plaintiff did remain on the car until the junction was reached.

For the reasons above stated, we recommend that the

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

AMES and OLDHAM, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed March 21, 1907. *Former judgment vacated and judgment of district court affirmed:*

1. Trial: INSTRUCTIONS. The court should instruct the jury upon all the issues presented in the pleadings and evidence.
2. Pleading: CONTRIBUTORY NEGLIGENCE. An answer in a personal injury case, which sets forth an act or omission of the plaintiff, characterizes it as negligent, and alleges that it caused or contributed to the injury complained of by the plaintiff's petition, is sufficient to tender the affirmative issue of contributory negligence.
3. Instructions. The true meaning of instructions is to be determined, not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case.
4. ———. An instruction which, if standing alone, might be erroneous, may not be so when considered with other instructions upon the same subject given in connection therewith.

BARNES, J.

In the argument upon the motion for rehearing it was made manifest that the opinion, *ante,* p. 217, does not clearly set forth the points which it was intended to determine. The petition alleged that the plaintiff was a passenger upon one of the defendant's street cars going west upon O street from Vine street to the intersection of Sixteenth street; "that, while he was in the act of alighting at his place of destination, defendant's employees negligently, carelessly and unlawfully, and without warning to plaintiff, and without stopping a sufficient length of time to per-

mit plaintiff to safely alight, started said car suddenly and with a jerk, the force of which unbalanced the plaintiff and threw him violently upon the pavement." The contention of the defendant was that the evidence in his behalf upon the trial strongly tended to show that the plaintiff did not ride to the intersection of Sixteenth street, but, on the other hand, alighted from the car before reaching that place and while the car was in motion and not at a regular stopping place. The defendant further contended that the only issue of fact tried to the jury was whether the plaintiff's allegation that he rode to the proper stopping place, and the place of his destination, before attempting to alight was true, and insisted that upon that issue the burden of proof was upon the plaintiff; whereas the defendant contended the instruction given, which was quoted in the former opinion incorrectly placed the burden of proof upon the defendant, upon the sole issue actually tried. It was this reason that led the court to adopt the conclusion reached in the former opinion. We are satisfied upon further examination of the case that this was an error. There can, of course, be no doubt that the answer of the defendant was an ordinary plea of contributory negligence. It contains all of the elements of such a plea, and there can be no doubt that, if the sole issue tried was presented upon the affirmative allegations of the plaintiff's petition to the effect that the plaintiff rode to his destination to the intersection of Sixteenth street and there alighted from the car, the answer of the defendant might be treated as a general and specific denial of that issue, and upon that issue, of course, the burden of proof would be upon the plaintiff. We are satisfied, however, that, while the evidence introduced upon the trial was largely directed to the question whether or not the defendant continued upon the car until it stopped at the intersection of Sixteenth street, his final destination, still, as the issues in the case were presented and tried, the instruction given by the court upon the question of contributory negligence was justified by the general issues presented and was not erro-

neous. The defendant alleged that, "while the car was moving rapidly, and before it reached the crossing, the plaintiff left his seat in the car, walked to the platform, and negligently and carelessly stepped therefrom while the car was in motion as aforesaid, and fell upon the street, and whatever injuries the plaintiff received, if any, were caused by his negligence and carelessness in alighting from the car while it was in motion." This presented the issue of contributory negligence, and there was evidence in the record tending to support it. It was therefore proper for the court to instruct upon that issue, and as the instruction given by the court fairly presented that issue to the jury, it was properly given.

As another reason for reversing the judgment of the district court, it was held in the former opinion that the court erred in giving the seventh paragraph of his instructions, which reads as follows: "The defendant company is a common carrier of passengers, and as such is required to exercise the utmost skill, diligence and foresight consistent with the business in which it is engaged for the safety of its passengers, and becomes liable for the slightest negligence in that regard. The plaintiff, on the evening when the accident in controversy happened, became a passenger of said company, and continued to be its passenger up to and including the act of alighting at his proper stopping place." It is the last paragraph of the instruction that was disapproved, and such disapproval was based on the expression, "at his proper stopping place." It was said: "The question as to where the plaintiff alighted was a material one in this case, and it was a question for the jury to determine. From the instruction the jury might reasonably infer that the trial court was of the opinion that the plaintiff did remain on the car until the junction was reached." We have reexamined the record, and find that paragraph 8 of the instructions, immediately following the one complained of, correctly submits the disputed issue as to whether plaintiff stepped off the car while it was in motion, or attempted to alight

therefrom after it had stopped at the crossing. By the concluding part of the ninth paragraph of the instructions, the jury were also told to determine whether "the plaintiff stepped from a moving car." By the tenth instruction, defining the burden of proof, the jury were again told to determine whether the plaintiff stepped from the car while it was in motion. Again, this question was submitted to the jury by a special request for findings, which appears in the record as follows: "Did the car on which the plaintiff was a passenger come to a stop at the intersection of O and Sixteenth streets before the plaintiff alighted?" To this special interrogatory the jury answered, "Yes." The next special inquiry was: "Did the car start while he was in the act of alighting?" This was also answered, "Yes." It is a well-established rule that instructions must be construed together, and if, when taken as a whole, they correctly announce the rules applicable to the issues and the evidence they will be upheld, even though a single paragraph standing alone may be faulty. *Bartley v. State,* 53 Neb. 310; *Love v. Putnam,* 41 Neb. 86. The true meaning of instructions is to be determined, not by a separate phrase or paragraph, but by considering all that is said on each particular subject or branch of the case. The instruction in question was intended to serve the single purpose of defining the relationship of carrier and passenger. If the expression, "at his proper stopping place," had been left out of the instruction, it would have been absolutely correct. That it ought not to have been used there can be no doubt. But after examining the whole record, and construing the instructions together as a whole, we are of opinion that the jury could not have been, and were not, misled thereby.

For the foregoing reasons, our former judgment is vacated and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

HORACE BROCKWAY, APPELLEE, V. HENRY REYNOLDS ET AL., APPELLANTS.

FILED OCTOBER 4, 1906. No. 14,421.

1. **Justice of the Peace: APPEAL: PLEADING.** On appeal to the district court a defendant is not required to allege a counterclaim in the same language in which it was pleaded in the inferior court. It is sufficient if the identity of the counterclaim is preserved.
2. **Depositary: ACTION: DEFENSES.** The depositary of funds in escrow is entitled to prove any facts which would defeat the plaintiff's claim thereto.

APPEAL from the district court for Dawes county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

Albert W. Crites and *Ernest M. Slattery,* for appellants.

J. E. Porter and *D. B. Jenckes, contra.*

EPPERSON, C.

This action was instituted before a justice of the peace in Dawes county, and taken on appeal to the district court. The plaintiff alleged that he issued his check on the Commercial State Bank of Crawford in the sum of $125, payable to the defendant, Pitman; that said check was deposited with the defendants, Reynolds and Slattery, with a written agreement providing that the check should be delivered to Pitman whenever he procured the transfer to the plaintiff of a certain mortgage deed and the notes secured thereby; that Pitman never secured the transfer of said mortgage and notes; that it was then beyond his power so to do; that Pitman indorsed the check in controversy, and that defendants negotiated the same without plaintiff's knowledge or consent, and that the amount thereof was paid from the plaintiff's funds. The defendant Pitman filed a counterclaim, in which he alleged that on or about the 7th day of January, 1901, the plaintiff agreed to pay him the sum of $100 for his deed conveying

to the plaintiff the legal title to the land described in the plaintiff's petition; that the deed and purchase price were deposited with defendants, Reynolds and Slattery, to become effective upon plaintiff's receiving the sheriff's deed to the same premises; that on or about the 25th day of March, 1901, the plaintiff, without the knowledge or consent of the defendant, Pitman, and for the purpose of cheating and defrauding the defendant out of the sum of $100, represented to Reynolds and Slattery that he wanted to show the said deed to his attorneys for examination, and if they would let him take it for that purpose he would return it in a short time. Upon such representations the deed was delivered to plaintiff, who converted the same to his own use, and caused it to be recorded; that plaintiff forbade Reynolds and Slattery to pay the $100 purchase price to Pitman. He prayed judgment against the plaintiff for $100. The plaintiff filed a motion to strike the defendant's counterclaim from the files, for the reason that it set forth a separate and distinct contract not pleaded in the court below. This motion was allowed, and the counterclaim stricken. The counterclaim alleged in the inferior court omitted the reference to the obtaining of the sheriff's deed pleaded in the district court, and failed to allege when the delivery of the deed was to be made under the agreement. Otherwise, the counterclaim alleged in the district court was substantially as that in the justice's court.

It has been held by this court that a cause of action on appeal need not be alleged in the same language used in the inferior court, but if the identity of the cause of action is preserved the pleading is sufficient. *Citizens State Bank v. Pence*, 59 Neb. 579; *Levi v. Fred*, 38 Neb. 564. In the case at bar the counterclaim alleged was the fraudulent procuring of the deed by the plaintiff from the depositary, for which the plaintiff had agreed to pay a fixed price. By the counterclaim alleged in each court the defendant, Pitman, sought to recover the amount. The court's order striking the counterclaim from the files was

wrong, and for this reason the judgment of the district court should be reversed as to the defendant, Pitman.

Defendants Reynolds and Slattery filed their separate answer, claiming $25 for services rendered plaintiff, and alleging that the defendant, Pitman, demanded of them $100 of the amount deposited, as the consideration for the deed delivered to plaintiff. After the court struck out the counterclaim of the defendant, Pitman, Reynolds asked leave to amend the prayer of their answer, by asking judgment against the plaintiff for the additional $100 as a protection to them against the claim of Pitman. This the court refused.

There was evidence introduced to the effect that $100 of the $125 deposited was to be used to pay for Pitman's deed, the other $25 to pay Pitman for his services in procuring an assignment of a mortgage on the same land; the whole amount to be delivered to Pitman, whenever he should procure the assignment of the mortgage to plaintiff. There was also evidence that, in the event that Pitman failed to procure the assignment of the mortgage, the check was to be returned to plaintiff, unless he should then elect to pay $100 for the deed. There was evidence, also, showing that the plaintiff fraudulently obtained possession of the deed from Reynolds and Slattery. Whether such evidence might be overcome by plaintiff, we are unable to say, as he was not required to refute it. Consideration of the same was taken from the jury by the rulings of the trial court. It appears that the plaintiff has procured Pitman's deed to certain land. He agreed to pay for same, but has not done so, and, according to the judgment of the district court, will avoid paying for it, or will subject the defendants to further and unnecessary litigation. If the defendants' theory of the case is right, then $100 of the amount deposited by the plaintiff with Reynolds and Slattery belongs to Pitman, and defendants should have a judgment against the plaintiff for a dismissal of his case, and for interest and costs. But the trial court refused defendants a hearing on their theory of

the case, and gave judgment to the plaintiff for the amount sued for, less the amount due to Reynolds and Slattery for services performed. As the depositary of the funds in escrow, Reynolds and Slattery were bound to account to Pitman for his property deposited with them, and were entitled to prove any facts which would defeat the plaintiff's claim thereto, and show the title to the deposited funds in their codefendant. Evidence of Pitman's claim to the $100 deposited should have been submitted to the jury.

We recommend that the judgment of the trial court be reversed for a new trial upon the pleadings, including the counterclaim stricken from the answer of the defendant, Pitman, upon his refiling the same.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons appearing in the above opinion, the judgment of the district court is reversed for a new trial upon the pleadings, including the counterclaim stricken from the answer of the defendant, Pitman.

REVERSED.

H. A. MERRILL, APPELLEE, V. LIZZIE A. CONROY ET AL., APPELLANTS.

FILED OCTOBER 4, 1906. No. 14,442.

Newspaper. The Omaha Daily Record is a "newspaper," within the meaning of section 497 of the code. *Hanscom v. Meyer*, 60 Neb. 68, and *Turney v. Blomstrom*, 62 Neb. 616, followed.

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

John T. Dillon, for appellants.

Wharton, Adams & Morgan, contra.

EPPERSON, C.

This is an appeal from a decree of confirmation entered in the district court for Douglas county. Appellants

object to confirmation on the ground that The Omaha Daily Record, the paper in which the notice of sale was published, is not a "newspaper" within the meaning of section 497 of the code, and section 11420, Ann. St.

Our statutes nowhere define the word "newspaper." The paper in question has been regularly published in the city of Omaha for 20 years and in general circulation in Douglas county. Among its subscribers are bankers, real estate agents, rental agents, architects, bonding companies, public and private contractors, public service corporations, and attorneys. It contains a large and varied advertising list covering many lines of business, and publishes news concerning city ordinances, resolutions of the city council, building improvements, transfers of real and personal property, building permits, court proceedings, probate matters, public sales, together with brief items of local and foreign news of general interest, and miscellaneous items of interest to the general reading public on political, social, moral, religious and other subjects. The publication here involved is quite similar to those considered by this court in *Hanscom v. Meyer,* 60 Neb. 68, and *Turney v. Blomstrom,* 62 Neb. 616. In our opinion the rule there announced requires the affirmance of this judgment. The Omaha Daily Record is a "newspaper" within the meaning of the law as construed by this court in the cases above cited. See also *Hall v. City of Milwaukee,* 115 Wis. 479, where authorities from other jurisdictions are reviewed.

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.

CHARLES E. LEAR, APPELLEE, V. BROWN COUNTY, APPELLANT.

FILED OCTOBER 4, 1906. No. 14,713.

Judgment: PLEADING. The orders or judgments of a court of general jurisdiction may be pleaded in general terms without alleging jurisdictional facts.

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

William M. Ely, for appellant.

M. F. Harrington, contra.

EPPERSON, C.

Appellee, Lear, an attorney at law, filed his claim against the county of Brown, and from a decision of the county board an appeal was taken to the district court, where he alleged in his petition, among other things, "that on the —— day of ——, 1903, one Fred M. Hans was indicted for the crime of murder in the district court for Brown county, Nebraska, and that thereafter this plaintiff was duly appointed by the district court for Brown county, Nebraska, to aid and assist the county attorney of said county in the trial, preparation and prosecution of the said Fred M. Hans upon said charge, and that he assisted in the prosecution of said cause and in a second trial of Fred M. Hans for murder in the year 1905; that, prior to filing said claim, the judges of said court before whom said cause was tried duly certified that said services were rendered by plaintiff, and such certificate was duly presented to the said county board with said claim." The county demurred to this petition, and upon the demurrer being overruled elected to stand thereon. Judgment was rendered for appellee, and the county appeals, assigning as error the overruling of the demurrer to the petition.

Section 9144, Ann. St., among other things, provides: "That the county attorney of any county may, under the direction of the district court, procure such assistance, in the trial of any person charged with the crime of felony, as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such compensation as the county board shall determine for his services to be paid by order on the county treasurer." Appellant contends that the petition is insufficient because it does not contain an allegation that the assistance in the trial of a felony cause was procured by the county attorney. Under section 9144, *supra,* in order to charge the county with the compensation of an assistant for the county attorney in the trial of felony cases, the services must be procured by the county attorney under the direction of the district court, and the district judge must certify that such services were rendered. The petition fails to allege that the services of appellee were procured by the county attorney, but alleges its equivalent —that appellee assisted the county attorney after the appointment by the court. The appointment alleged in the petition is equivalent to the direction required by the statute. And as the district court is a court of general jurisdiction its orders and judgments may be pleaded in general terms and will be presumed to be regular. *Bennett v. Bennett,* 65 Neb. 432. The appointment by the court is but the legal effect or determination of the court's proceedings in the matter, and jurisdictional facts need not be pleaded.

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.

CITIZENS INSURANCE COMPANY ET AL. V. MARTIN HERPOLSHEIMER ET AL.

FILED OCTOBER 4, 1906. NOS. 14,347, 14,348, 14,349.

1. **Trial:** HARMLESS ERROR. An attorney employed by the insured to make out proof of loss refused to surrender the policies of which he had possession, claiming a lien thereon for professional services. In a suit brought against the insurance companies, the attorney was made a party defendant, and filed an answer and cross-petition asking judgment against the plaintiffs for the amount due him for his services and that it be made a lien on any judgment which the plaintiff might obtain against the defendants. The defendants asked that the issues made by their answers and those made by the answer and cross-bill of the attorney be tried separately. This the court denied, and proceeded to take evidence on all the issues made by the several parties. *Held*, Not reversible error.

2. **Pleading:** AMENDMENT. At the conclusion of the evidence the defendants asked leave to file an amendment to their answers to conform to the proof before the court. The trial was to the court without a jury. The application to amend was taken under advisement by the court and thus held until the final determination of the case, when an order was entered allowing the amendment, but reciting that "it would be considered as denied by the plaintiffs." *Held*, That a motion for judgment on the pleadings in favor of the defendants was properly overruled, as the effect of the order allowing the amendment to be filed was to grant such leave only on condition that the statements in the amendment should be considered denied by the plaintiffs without any formal pleading to that effect being filed, and the defendants could not have any benefit from the amendment without recognizing the condition.

3. **Insurance:** DEMAND: MERGER. All verbal demands for an appraisement and for an examination of the insured under oath touching the cause and origin of the fire are merged in a subsequent written demand therefor.

4. A written demand for the examination under oath of the insured, made jointly by three insurance companies, and which omits to name the time and place for such examination, or the person before whom it is to take place, is not a sufficient demand.

5. **Trial:** EVIDENCE: REVIEW. In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will

consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted.

6. **Insurable Interest.** A party to whom goods are consigned for sale on commission, and who is required to account to the owner for all goods received, has an insurable interest therein.

7. **False swearing** in the proof of loss cannot be predicated on a claim made for the retail price of the goods, and for freight, drayage, washing, setting up, etc., where such claim is made in good faith under the advice of an attorney regularly employed to advise and assist in making such proof.

8. **Findings:** REVIEW. The findings of a court in a case tried to the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and will not be set aside when there is evidence to support them.

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

Greene, Breckenridge & Kinsler and *Hall, Woods & Pound,* for plaintiffs in error.

Field, Ricketts & Ricketts, contra.

DUFFIE, C.

These actions are brought on policies of fire insurance issued by the several plaintiffs in error to the defendants in error on their stock of buggies, wagons, plows, harvesters, and all other merchandise usually kept in a business of this kind, like harness, binding twine, etc. The Herpolsheimers were insured in different companies for $8,000, $1,000 of which was in the Citizens Insurance Company, $2,000 in the Phenix Insurance Company, and $1,000 in the Reliance Insurance Company. The remainder of the $8,000, aside from $3,000, carried by the Citizens Insurance Company in a separate policy not involved in these actions, was carried in other companies. On the night of August 21, 1904, a fire occurred, whereby certain of the insured property was wholly destroyed and other parts thereof damaged. F. P. Olmstead, an attor-

ney at Hastings, was employed to advise and assist the Herpolsheimers in their preparation of proofs of loss and in attempting to adjust the same with the several companies. Afterwards other attorneys were employed, and Olmstead refused to surrender to the plaintiffs the policies which had been placed in his hands. When suit was brought on the policies involved in this action, Olmstead was made a party defendant in order, as stated by the defendants in error, that the policies might be available on the trial and the defendant companies discharged from further liability thereon. Olmstead filed an answer and cross-bill, setting up an attorney's lien on the policies for legal services performed, and asking that he might have judgment for the amount of his claim against the Herpolsheimers and that it be made a lien on any amount recovered by them. As his claim has been fully settled and disposed of it will not be further noticed, except so far as it is necessary to discuss the claim made by the plaintiffs in error that they were prejudiced by his claim being litigated in the same suit in which they were defending against a recovery on the policies by the Herpolsheimers. The case against the Citizens Insurance Company was tried to the court without a jury, and the other cases were submitted by stipulation on the same evidence, and the stipulation further provides that they are to be submitted to this court upon the same brief. The court found against the plaintiffs in error, and entered judgment for $946.79 on each $1000 of the amount of the insurance. The policies contain the following provision: "This entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." At the conclusion of the evidence plaintiffs in error asked leave to amend their answers to conform to the proof. The amendment alleged false statements on the part of the defendants in error, in that their sworn proof of loss was false and fraudulent in many particulars specifically set out in

the amendments offered. These amendments were lodged with the clerk March 14, 1905, but the court held the same under advisement until the final decision of the cases on the merits on April 8, 1905. From the journal entry it appears that the court then made the following disposition of the application to amend the answers: "At the conclusion of the evidence the defendant company requested leave to file a supplemental answer charging the plaintiffs with false swearing in their proof of loss. Ruling at the time was reserved. The defendant company has placed in the hands of the clerk the proposed supplemental answer. Leave is now given the defendant company to file the same. It will be considered as denied by the plaintiff."

After the entry of judgment plaintiffs in error filed a motion for judgment on the pleadings, grounded upon the fact that defendants in error had filed no reply to the allegations of the amended or supplemental answers, and the first assignment of error argued in the brief is based upon the refusal of the court to sustain said motion, and to enter judgment in favor of the plaintiffs in error. It is urged that under our practice all material allegations of an answer not denied by the reply stand admitted; and it was held in *Grant v. Bartholomew,* 57 Neb. 673, that, "though the evidence disproves the material allegations of new matter in the answer, such evidence will be disregarded, unless such new matter is denied by a reply." That a material allegation in the petition not denied by the answer, or in the answer not controverted by the reply, stands admitted, is the rule of our code which the plaintiffs in error insist shall be applied in these cases. To this contention we cannot agree. Aside from the fact that leave to file this amendment was not given until the entry of final judgment in the case, when the defendants in error had no opportunity to file a reply, is the provision of section 144 of the code, providing for amendments, which directs the court to allow them on such terms as shall be just. When leave was asked to file the

amendments in question, the court took the matter under advisement and did not pass upon the question until it had finally disposed of the case. It then allowed the amendment to be filed upon condition that the allegations therein contained should be considered denied. If the plaintiffs in error wish to avail themselves of any benefit from their amendments they must accept the conditions imposed by the court in allowing the same. It is not unreasonable to attach to the filing of an amended pleading, under the facts above set out, a condition that the allegations contained in the amendment shall be considered denied without the filing of any formal pleadings by the opposite party controverting its allegations. Any other course would have worked a grave injustice to the defendants in error, who were not present and had no opportunity to reply.

When the case was called for trial, the plaintiffs in error requested that the issues made between the Herpolsheimers and the companies, and the issues raised by the pleadings filed by Olmstead, be separately tried. This was refused by the court, and such refusal is assigned as error. It is insisted, and there is some force in the suggestion, that Olmstead and the Herpolsheimers tried the case on inconsistent and conflicting theories, and that plaintiffs in error had to meet each of those theories and were placed at a disadvantage in consequence thereof. We cannot avoid the suspicion, after reading Olmstead's pleadings in the case, that plaintiffs in error were quite contented that Olmstead should remain a party to the suit and establish, if he could, the allegations of his cross-bill. That his presence in the action was more embarrassing to the defendants in error than to the companies is quite apparent from an inspection of the record; but in any event Olmstead had no claim against the companies, and the most he could do was to establish the amount due him for legal services from the Herpolsheimers, and have this claim made a lien upon any judgment that might be entered against the companies in their favor. That it was

reversible error to join the trial of these two claims is not apparent.

Assignments 3, 5 and 6 each relate to alleged errors in the introduction of testimony. As the case was tried to the court without the intervention of a jury, the admission of incompetent or irrelevant evidence is not reversible error. In *Willard v. Foster*, 24 Neb. 205, it is said: "In causes thus tried, it has been often held by this, as well as other courts, that error for the admission of improper evidence would not lie. The court must necessarily have an opportunity to examine each article of evidence offered, even for the purpose of rejecting it; and so the duty of acting and deciding the cause, upon the legal and relevant evidence selected from the mass that may have been introduced, may be as well discharged by the court upon the final consideration of the cause, as to pause in the course of the trial, to pass upon the admissibility of the several matters offered in evidence." This has been the uniform rule of this court, as evidenced by numerous cases since the decision in *Willard v. Foster, supra*.

The fourth assignment relates to the finding of the district court that the Herpolsheimers had an insurable interest in what is known as the "Acme harvester repairs." The evidence is sufficient to establish the findings of the court that the Acme harvester repairs were received by the Herpolsheimers under a contract by which they were authorized to sell the same and give title thereto; that they were to receive as their compensation the amount of the sale, less a fixed price for the goods, and they were liable to account for the stipulated price if the goods were not accounted for. This, no doubt, under the authorities, gave the Herpolsheimers an insurable interest in the goods. In *German Ins. Co. v. Hyman*, 34 Neb. 704, it was held that "an interest, to be insurable, does not depend necessarily upon the ownership of the property. It may be a special or limited interest disconnected from any title, lien, or possession. If the holder of an interest in property will suffer loss by its destruction he may indem-

nify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest." The fact that the contract between the Acme company and the Herpolsheimers required them to insure the property in the name of the Acme company is a matter solely between these parties, in which the insurance companies are not interested.

The seventh assignment relates to alleged errors of the court on its finding of damages to the binding twine, the value thereof and the admission of testimony in relation thereto. None of the twine was burned. The damage thereto was by water. A portion of the twine, perhaps one-half of it, was taken out of the burned building, put upon a wagon, and removed to what is known in Hastings as the "Minneapolis Thresher Building." One or more witnesses testified that this portion of the twine had not been damaged by water. Other witnesses controverted this, and said that all the twine had been watersoaked. Several witnesses testified that they had had experience with binding twine, and that after being wet it had no commercial value. It further appears that the Herpolsheimers proffered this twine to the companies at the cost price, or that the twine be placed in the hands of any dealer the companies might select, to be sold by him to the best possible advantage, and the difference between what it brought and its value before the fire determine the damages. If the twine was not damaged, or not damaged to the extent claimed by the plaintiffs, this proposition was entirely fair, and practically gave the insurance companies the privilege of ascertaining the damage by their own agent.

Relating to false statements in the proof of loss, which is assignment No. 8, the alleged false swearing is based upon the fact that in the proof of loss many of the items constituting it were placed at a sum in advance of the fac-

tory cost, and that the proofs made claim for the loss of the Acme harvester repairs, in which, it is claimed, the defendants had no insurable interest. It is shown by the evidence that Mr. Olmstead, the attorney engaged by the Herpolsheimers to prepare the proofs of loss, advised them that they were entitled to the retail price of the goods, and for freight, drayage, washing, setting up, etc. The Herpolsheimers acted upon this advice and, nothing appearing to show their lack of good faith in so doing, they cannot be charged with wilful false swearing. That they had an insurable interest in the Acme repairs we have already determined.

The ninth assignment relates to finding No. 6 by the district court, which is in the following words: "That plaintiffs did not, nor either of them, refuse to submit to examination under oath by any person named by the defendant company, and to subscribe the same." September 14, 1904, M. M. Hamlin, an adjuster representing the several companies, made a written request upon the plaintiffs in error for an appraisement of the loss, and this written request also demanded a sworn examination of the Herpolsheimers in the following language: "We further demand that you submit to a sworn examination under oath regarding the cause or origin of said fire, and such other facts and information as may be necessary for the above companies to form an intelligent opinion of same." Hamlin claims to have made a verbal demand upon both the Herpolsheimers and their attorney, Olmstead, for an examination at his hotel in Hastings, and during his stay there, and he testified that Olmstead refused to allow his clients to be examined under oath. Olmstead testified that he met Hamlin on several occasions, "and that, whenever he suggested or demanded that the plaintiffs in the case should be examined under oath by the insurance company, I made him the tender that they would appear anywhere and at any time, and answer any questions that they would put to us, in the city of Hastings." It further appears from the testimony of Hamlin that, when talking

with Olmstead about the appointment of appraisers and the demand for a sworn examination of the Herpolsheimers, Olmstead told him to put his demand in writing, and that thereupon he prepared the paper containing the demand for a sworn examination and served the same upon the Herpolsheimers and their attorney. This written demand must be regarded as merging all former verbal requests and as the final demand made upon the defendants in error for a sworn examination. That it was not sufficient is abundantly shown by the authorities.

In *Aetna Ins. Co. v. Simmons,* 49 Neb. 811, it is said: "But if the clause in the policy under consideration be one with which the insured must comply in order to recover, then it was incumbent upon the insurance company to fix a time and a place and to name some person authorized by law to administer oaths before whom the examination of the insured should be had. The insurance company did none of these things. Doubtless the time fixed for the examination must have been within a reasonable date after the company received notice of the fire. Doubtless the place of the examination would have been at a reasonably convenient place in the county where the assured resided. It remains to be said of the question under consideration that a fair construction of the clause of the policy is that the insured shall submit to examination under oath at such reasonable place as may be designated by the company or its representative. We reach the conclusion that the insurance company, by failing to demand this examination within a reasonable time after the fire, and by failing to designate a time and place and an officer before whom such examination should occur, has not put itself in a position to urge the refusal of the insured to submit to an examination as a defense to this action."

The written demand shows for itself that no time or place was named for the examination, no person before whom it should take place is named, and, however willing the parties may have been to acquiesce in the demand, it left them in ignorance of the person before whom they

should appear, or the time and place of their appearance. The court therefore correctly found that the plaintiffs did not refuse to submit to an examination under oath by any person named by the defendant companies.

The eleventh assignment complains of the amount of the judgment entered by the district court, claiming it to be excessive. It would unduly extend this opinion, and be of no benefit to the profession, to review the evidence relating to the amount of loss and damage. If the question was before us as an original proposition, we would not, perhaps, give judgment for the full amount allowed by the district court. There is, however, evidence amply sufficient to sustain its findings, and in this state of the case we cannot interfere. The case was apparently tried with care, and certainly nothing was omitted on the part of the defendants below in making their defense.

No reversible errors being shown in the record, we recommend an affirmance of the judgments in the several cases.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgments of the district court are

AFFIRMED.

DAVID T. BRINEGAR ET AL., APPELLEES, V. JOHN E. COPASS, APPELLANT.

FILED OCTOBER 4, 1906. No. 14,416.

Waters. The overflow waters of a stream, especially where they run in a well-defined course and again unite with the stream at a lower point, must be regarded as a part of the watercourse from which the overflow comes and cannot be regarded or dealt with as surface water. *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, approved and followed.

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

Reavis & Reavis, for appellant.

A. J. Weaver and *E. Falloon, contra.*

DUFFIE, C.

John E. Copass, the appellant, owns 80 acres of land in Richardson county lying in the valley of the Nemaha river. Brinegar, one of the appellees, owns the farm adjoining on the west. The river runs through a portion of Brinegar's farm, and it also forms the south boundary line of the Copass land. The river is subject to overflows, and at such times the flood waters run from Brinegar's land eastward upon and over the land of Copass. Some four or five years prior to the commencement of this action, Brinegar and Copass built an embankment or dike on the bank of the river on the land of Brinegar for the purpose of preventing an overflow. This dike was constructed at the joint expense of Brinegar and Copass, but, partly on account of complaint of adjoining landowners that the dike caused a serious overflow of their lands, and of threatened suits for damages, Brinegar determined to cut the dike, and, thereupon, Copass commenced the construction of an embankment along the west line of his land running from the river to the foothills. This embankment was constructed wholly upon his own land and from dirt taken from the west side of the embankment, thus forming a ditch the whole length of the dike, which, Brinegar claims, has the effect of allowing the water of the river to enter the ditch and overflow a considerable area of his farm. This action was brought by Brinegar to enjoin the construction of said dike and ditch, and Tiehen, who owns a large body of land on the opposite side of the river, intervened in the action, alleging that the effect of the dike would be to overflow about 320 acres of his best

land during times of high water, and he joined with the plaintiff in asking an injunction. A decree was entered by the district court requiring Brinegar to destroy the old dike or embankment that was erected by himself and Copass, and requiring Copass to destroy and tear down the embankment described in plaintiff's petition, and from this decree Copass has appealed.

In an able and exhaustive brief filed by the appellant it is argued that the overflow of waters of the stream are surface waters against which every proprietor has a right to protect himself and we are asked to review the case of *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237, in which it was said: "The flood water of the Nemaha river involved in this case *held* not to be surface water, but a constituent part of such stream—a natural watercourse." The courts of the different states are apparently hopelessly divided upon the question of whether flood waters are a part of the stream from which the water finds its way to the adjoining lands to be dealt with as water of a running stream, or whether they are surface waters and subject to the rules applicable thereto. In the case cited the question was fully examined and the conclusion therein reached after elaborate argument by counsel and apparent careful consideration. We see no reason for departing from the rule of that case, and a quite exhaustive examination of the question convinces us that the courts which formerly held to the surface water theory are modifying or overruling their former decisions and getting in line with those that regard overflow waters as a part of the river itself. It is true that flood waters may become entirely separated from the stream and so have lost their identity with it. When it has spread over the adjoining country, settled in low places, and become stagnant, it can no longer be treated as a part of the stream, and the rules with respect to watercourses can then no longer be applied. But overflow waters from a natural stream in times of flood or freshet, flowing over or standing upon adjacent lowlands, do not cease to be part of the stream unless or until sep-

arated therefrom so as to prevent their return to its channel. 3 Farnham, Waters and Water Rights, sec. 879. In *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 68 L. R. A. 138, the supreme court of West Virginia made an elaborate examination of the authorities, and approved the rule announced in *Chicago, B. & Q. R. Co. v. Emmert, supra,* and Judge Baker, of the United States district court for the district of Indiana, refused to follow former decisions of the supreme court of that state, and, in an able opinion, held that the flow of a river, when swollen beyond the low water mark by the hard rains which fall in wet seasons, or by the melting of snows, does not constitute surface water which may be turned by embankments. *Cairo, V. & C. R. Co. v. Brevoort,* 62 Fed. 129, 25 L. R. A. 527. In a late case, *Fordham v. Northern P. R. Co.,* 66 L. R. A. 556 (30 Mont. 421), the supreme court of Montana reviews the cases upon the subject and announces the following rule: "Flood water of a river which forms a continuous body with the water flowing in the ordinary channel, or which has departed from the channel presently to return, must be regarded as a part of the stream in considering the right to obstruct its flow." The evidence in this case establishes, we think, without any controversy, that the waters of the Nemaha river, in times of freshet, flow across the Copass land and empty into the Nemaha river again about a mile distant therefrom. This, we think, under all the authorities, constitutes such overflow a constituent part of the stream, and we have been cited to no authority, nor have we, in our search, been able to find a case holding that overflow water, which leaves the ordinary bank of the stream in times of freshet, again joining the stream at a lower point thereon, is regarded or held to be surface water. The holding of the district court was undoubtedly right, and we recommend an affirmance of the decree.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

CHARLES D. MORROW, APPELLANT, V. ALEXANDER LAVERTY, APPELLEE.

FILED OCTOBER 4, 1906. No. 14,426.

1. Evidence examined, and *held* not only to support, but to require the judgment appealed from.
2. Verdict: EVIDENCE: REVIEW. Where the verdict returned is the only one which could be sustained under the evidence, errors assigned in giving or refusing instructions will not be discussed.

APPEAL from the district court for York county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

France & France and *Meeker & Wray,* for appellant.

Hainer & Smith and *F. C. Power, contra.*

DUFFIE, C.

In 1901 the plaintiff and appellant was the owner of a stock of drugs, together with the store fixtures, located in a building in the town of Ashland, Nebraska. The defendant and appellee owned a quarter section of land in Sherman county, Nebraska, upon which were certain improvements. At that time both parties resided in Ashland, and on the 29th of March, 1901, the plaintiff traded his drug stock and store fixtures to the defendant for the Sherman county land, giving a mortgage on the land for $568 as boot money. In August, 1903, plaintiff brought this action against the defendant in York county, where service was obtained, alleging in his petition that the defendant fraudulently misrepresented the value of the land, the nature and value of the improvements thereon, and the

rental value thereof. He further alleges that, while the defendant represented the land to be worth $23 an acre, its fair market value did not exceed $900; that its rental value was not more than $50 per annum, while the defendant represented it to be $200; that his stock of goods and fixtures were worth $4,000, and that he has been damaged by the false and fraudulent representations of the defendant, upon which he relied in making the exchange, in the sum of $3,668, for which sum he prays judgment. His petition further states that at the time of making the trade, and for some time previous thereto, he was addicted to the use of intoxicating liquors to such an extent as to be greatly weakened in mind and body, and that he had no reasonable or adequate comprehension of the nature of the transaction, of which the defendant had knowledge and took advantage. The answer, after admitting the trade as alleged by plaintiff, asserts that, prior to the exchange, the plaintiff made a personal examination of the Sherman county land and fully acquainted himself with the situation, character and value thereof and the improvements thereon, and had full and actual knowledge thereof; that he had taken possession thereof and, until a short time before commencing the suit, had collected the rents, issues and profits therefrom, and had then sold the same. The answer further contains a general denial of all facts alleged in the petition and not admitted in the answer. For reply, the plaintiff admits that he visited the land prior to the trade, but says that he was in such an enfeebled condition from the excessive use of intoxicating liquors that he was unable to comprehend the situation, character or value of the land or the improvements thereon. A trial to a jury resulted in a verdict for the defendant, upon which the district court entered judgment, and the plaintiff has appealed to this court.

The evidence is quite voluminous, but may be epitomized as follows: The plaintiff, who is a physician, came to Ashland sometime in the fall of 1900, and purchased a drug store from one Hull. About two months prior to the

trade in question he was married and set up housekeeping. Harry Hull and R. Overton were his clerks in the drug business. Neither of the clerks were called to show excessive drinking by the plaintiff, and the only witnesses offered on that question having personal knowledge of the fact were the plaintiff himself and his two sisters, neither of whom were in Ashland after the early part of March, 1901, and but a short time prior to that date. The sisters testified that he was drinking heavily, and gave it as their opinion that as a result he was incapacitated from doing business. The plaintiff himself testified that for some time prior to the trade he had been drinking to excess and that he "was weakened both physically and mentally in that way"; at the same time he admits that he did all the buying for his store up to the time of the trade, that he waited on customers, and attended generally to the business. It is conceded that prior to the trade he accompanied the defendant on a visit to the land, and had every opportunity to examine it and to inspect the improvements thereon. Relating to this trip the plaintiff himself testified as follows: "I haven't any recollection of seeing this land. I remember we started for the land, but I never knew where we got to or when we came back. About the only thing I remember was that I was in a caboose and that I was very sick; that is about the only recollection I have of the trip." In order to visit the land the parties went by train from Ashland to Lincoln, from Lincoln to Litchfield, and from there by wagon to the land in question, a total distance of about 170 miles. The defendant, who was with him during the whole trip, says that he was perfectly sober during the time; that they had no liquors with them; that they drove from Litchfield to the land, drove over it, made an examination of the land, then drove to the house, the plaintiff going in, remaining some time, after which they drove back to Litchfield, got a hasty supper and, as the passenger train east did not stop at that station, took a freight train to Ravenna where they boarded the passenger sometime about midnight, getting

back to Ashland the next morning. Dr. Meredith, a resident of Ashland, went to Lincoln on the same train with Morrow and Laverty on their trip out to see the land. He conversed with the plaintiff, who told him that "he was on his way to look at a piece of land he was about to trade his drug stock for, * * * that if the land was what he expected he was going to trade. * * * He was not intoxicated; there was no indication of intoxication." George Rightnour, a tenant on the land in question, testified that Morrow and Laverty came to the land in a buggy; that they drove over the farm after which they drove to the house where the plaintiff alighted, went into the house and remained some time; that he made inquiries about the soil, its productiveness, and other general inquiries about the farm. Questioned about the plaintiff's condition as to sobriety, he said he did not observe any evidence of intoxication, that his walk was "sober and straight" and his conversation intelligent. The next morning after returning from Sherman county the trade was made. The papers evidencing the transfer were drawn by H. A. Wiggenhorn, president of the Farmers & Merchants Bank of Ashland, and executed by the parties in the waiting room of the bank. Mr. Wiggenhorn states that, so far as he observed, the plaintiff was perfectly sober, that he saw nothing unusual about him, and that his conversation was perfectly rational.

Aside from the improbability of a person being so much under the influence of liquor, or so weakened physically and mentally by its use as to be unconscious of his doings and surroundings for a period of 48 hours, the fact that during that time he made a journey by railroad and wagon of more than 300 miles, without such condition attracting the attention of those with whom he came in contact and conversed, is ground amply sufficient to warrant a finding by the jury against the truth of his contention. If, as admitted, the plaintiff visited and examined the farm for which he traded, and if, as found by the jury, he was in condition to know and comprehend the

business upon which he was engaged, then, as said by the trial court in his instructions to the jury, it will be presumed that he acted upon his own judgment of the character and value of the land and improvements thereon, instead of the representations made by the defendant.

Complaint is made of certain rulings of the court in refusing evidence offered by the plaintiff, and the admission of evidence offered by the defendant. Certain of the instructions to the jury were also excepted to by the plaintiff. A discussion of these assignments would be of no benefit to the profession. A careful reading of the whole record produces an abiding conviction that the verdict returned by the jury is the only one which a court could sustain, and, this being the case, the errors complained of in the instructions, if error there was, are without prejudice and immaterial.

We recommend an affirmance of the judgment.

ALBERT, C., concurs.

JACKSON, C., not sitting.

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

AFFIRMED.

JOHN SEBESTA ET AL., APPELLEES, V. SUPREME COURT OF HONOR, APPELLANT.

FILED OCTOBER 4, 1906. No. 14,443.

1. An affidavit, under our statute, must have attached the certificate of the officer before whom taken that the oath was administered by such officer.
2. To constitute suicide by one not insane, there must be intentional self-destruction.

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

W. B. Risse and *A. L. Tidd* for appellant.

Matthew Gering, contra.

DUFFIE, C.

The appellees, who were plaintiffs in the court below, brought this action to recover from the appellant, the Supreme Court of Honor, the amount of a certificate issued to Anton Sebesta. They claim to recover on the certificate as the only heirs at law of the insured. The answer set up two defenses: First, that appellees were not the beneficiaries under the certificate; and, second, that the deceased committed suicide. The appellees are all residents of Bohemia, and claim to be the father, mother, brother, and sisters of the deceased. To avoid the expense of taking a formal deposition to prove this relationship, the parties entered into a stipulation that the affidavit of the plaintiffs in the Bohemian language and a translation thereof into English might be offered in evidence by the plaintiffs in proof of such relationship to the same extent and in the same manner as if the depositions of the said plaintiffs were regularly taken upon proper notice and before proper authority, the defendant reserving the right to object to the competency, relevancy or materiality of the testimony disclosed by such affidavit. Under this stipulation a paper signed by the plaintiffs, and reciting their relationship to the decedent, was offered in evidence and received by the court, over the objections of the defendant, as an affidavit of the parties. The jurat attached is in the following language: "I hereby declare that I am personally acquainted with Johann Schebesta and his wife, Katharina Schebesta, senior, householders; Joseph Schebesta, laborer, and Augustine Schebesta, laborer, all living in Hradaschitz, M. C. 59; and Katharina Holub-nee-Schebesta, householder, in Hradaschitz, M. C. 29, and that they have signed this instrument with their own hands. Horazdiowitz, June 24, 1904. Josef Rosenauer, Imperial Notary Public. Fee 1 K. 80t. (Stamp.)"

It will be noticed that the jurat attached to the so-called affidavit does not recite that the parties were sworn by the notary or that the statements therein contained were made under oath. The defendant insists that the paper presented was not an affidavit within the meaning of our statute, and that the same was improperly admitted. This requires us to determine the method in which an affidavit must be authenticated in this state. Section 367 of the code defines an affidavit in the following language: "An affidavit is a written declaration under oath, made without notice to the adverse party." Section 371 is as follows: "An affidavit may be made in and out of this state, before any person authorized to take depositions, and must be authenticated in the same way, except as provided in section 118." Section 118 relates exclusively to an affidavit verifying pleadings and, by its terms, needs no authentication further than the certificate of the officer taking the same, which is sufficient proof, whether he have a seal or not, that the affidavit was duly made, that the name of the officer was written by himself, and that he was in fact such officer. Section 384 relates to the method of authenticating depositions. It provides that, when taken here or elsewhere before an officer having a seal of office, the depositions shall be admitted in evidence upon the certificate and signature of such officer under his seal. If he have no seal and the deposition be not taken in this state, then it shall be certified and signed by the officer, and shall be further authenticated either by parol proof adduced in court or by the official certificate and seal of any secretary or other officer of state keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal attesting that such judicial or other officer was, at the time of taking the same, within the meaning of this chapter, authorized to take the same. Section 385 provides that the officer's certificate, among other things, shall show that the witness was sworn. The so-called affidavit in this case recites the following: "John Sebesta, Katharina Sebesta, Sr., Katharina Sebesta, Jr.,

Frank Sebesta, Augustine Sebesta and Joseph Sebesta, being each duly sworn upon their oaths depose and say that they reside at Hradesic, Kingdom of Bohemia," etc. Defendant in error insists that this recital of the statements in the affidavit being made under oath, and the certificate of the notary showing that the paper was signed by the parties, raises the presumption that they were duly sworn. *Bantley v. Finney,* 43 Neb. 802; *Turner v. St. John,* 8 N. Dak. 245; *Cox v. Stern,* 170 Ill. 442, and *Kleber v. Block,* 17 Ind. 294, are cited to show that the jurat is no part of an affidavit, and need not be attached. It is undoubtedly true that the courts are nearly unanimous in holding that the jurat is no part of an affidavit, and that where no jurat is attached parol evidence may be used to show that it was in fact sworn to, when the statute does not require written evidence of that fact, but they all agree that it must in some manner appear that the oath was in fact administered. As suggested in *Cox v. Stern, supra,* and in *Turner v. St. John, supra,* it is only when no form is prescribed for the affidavit, or for preserving the evidence of the oath, that parol proof may take the place of the official certificate. It is, we believe, fundamental law that parol testimony will not be received to establish any fact of which the statute requires written evidence. *Rosholt v. Corlett,* 106 Wis. 474. It is also well established that parol proof is not admissible to supply defects or omissions in the certificate to a deposition. 13 Cyc. 970; *Pingry v. Washburn,* 1 Aik. (Vt.) 464, 15 Am. Dec. 676. Another suggestion might be offered relating to the requirements of our statute. In the enactment of section 384 of the code, the legislature had under consideration the matters which might be established by parol proof in authenticating a deposition, and it provided that parol proof might be adduced in court of the official character of the officer before whom the deposition is taken, but the official acts done by the officer must, under the provisions of that section, be shown by his own certificate. *Holmes v. Crooks,* 56 Neb. 466. In the opinion in *Bantley v. Fin-*

ney, supra, the provisions of section 371 were apparently overlooked; at least the effect of that section was not discussed or referred to. We are clearly of the opinion that under the provisions of our statute an affidavit must bear upon its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.

The objection urged against the instructions of the court cannot, with the exception of the tenth instruction, be considered. In the motion for a new trial the objections were taken to the instructions *en masse* and, as some of them are clearly right, the exceptions, under frequent decisions of this court, are unavailable. The policy contained a provision that the order would not pay benefits to members who committed suicide, whether sane or insane, unless committed in delirium resulting from illness, or while the member is under treatment for insanity or has been judicially declared to be insane. In all cases not within the exception, the money contributed to the benefit fund by the member shall be returned and paid the beneficiary out of said fund in lieu of the benefits. Defendant asked an instruction in the following language: "You are instructed that if you believe from the evidence that said Anton Sebesta committed suicide by taking internally match heads of phosphorous matches, it is immaterial whether he was sane or insane, and your verdict should be for the defendant, unless you find that such match heads were taken while said Sebesta was in a delirium resulting from illness." The court modified this instruction by inserting after the word "matches" the following phrase: "With intent to kill himself." The court did not err in modifying the instruction. There was no sufficient evidence to submit to the jury the question of the insanity of the deceased, and all the authorities agree that suicide by a person not insane means an intentional self-destruction.

For the error in admitting in evidence the so-called affi-

davit, we recommend a reversal of the judgment appealed from and that the cause be remanded for another trial.

ALBERT and JACKSON, CC., concur.

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

REVERSED.

UNION PACIFIC RAILROAD COMPANY V. JOHN T. CONNOLLY.

FILED OCTOBER 4, 1906. No. 14,205.

1. **Verdict.** A verdict is the unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of the trial of a cause, and under our practice must be in writing and signed by the foreman.

2. ———. A mere statement by the foreman in open court that the jury have agreed, without stating the nature of the decision they have agreed upon, is not a verdict.

3. **Trial:** WAIVER. On the trial of a cause where two parties were joined as defendants, the jury were called into court and asked if they had agreed upon a verdict. The foreman answered that they had agreed as to one of the defendants, naming him, but not as to the other, not stating the nature of their decision. The court expressed a doubt as to its right to receive a verdict as to one defendant without a verdict as to both, and asked counsel for suggestions, and, receiving no response, it discharged the jury without receiving a verdict as to either defendant. No objection was made or exception taken to such course. *Held*, That the error, if any, was waived.

4. **Verdict.** After the jury were discharged the foreman delivered a package of papers to the bailiff, who in turn delivered them to the court. Among the papers was what purported to be a verdict in favor of one of the defendants, signed by the foreman. It was delivered at a time and under such circumstances as to afford no opportunity to poll the jury or apply the ordinary tests to determine whether it was the unanimous decision of the jury. *Held*, The trial court properly refused to treat the paper purporting to be a verdict as the verdict of the jury.

5. **Railroads:** REASONABLE CARE: QUESTION FOR JURY. Where a railroad company for many years has permitted the public without objection to cross its tracks at a certain point, not in itself a public crossing, it owes the duty of reasonable care toward those using such crossing, and whether such care has been exercised is ordinarily a question for the jury.

6. ———: ———: ———. The mere fact that warning of the approach of a freight train or portion of a freight train, backing upon and over such crossing, was given by ringing the bell and sounding the whistle does not of itself show that the defendant company had discharged its full duty to those using the crossing. Whether, in view of the time, place and circumstances, further precautions were required is, ordinarily, a question for the jury.

7. **Negligence:** EVIDENCE. That the crossing was located in a populous district and over a system of tracks and switches within the corporate limits of a city; that it was in common use day and night by a large number of people; that such use had been so extensive and long continued that the defendant company was chargeable with notice of it; that a portion of a freight train was backed upon and over the crossing without displaying any lights on the rear car, or having any person stationed on such car, or at the crossing, to give warning of its approach—would warrant the inference of negligence on the part of the company operating the train, although the bell was rung and whistle sounded.

8. **Evidence** examined, and *held* sufficient to sustain a finding that plaintiff was injured as a proximate result of a failure on the part of the defendant company to give due warning of the approach of a train backing upon and over such crossing, and that the plaintiff was not guilty of contributory negligence.

9. **Harmless Error.** Where contributory negligence is relied upon as a defense, it is error to instruct the jury that, where negligence on the part of the plaintiff is disclosed by him in making his case, the burden of proof is upon him to show that he was not guilty of contributory negligence; but as to the defendant it is error without prejudice.

10. **Instructions:** REVIEW. An instruction which states that it is the duty of a person at a railway crossing to look and listen for approaching trains is not erroneous because of the omission to state the direction in which such person is required to look, especially when a more specific instruction is not asked by the complaining party.

11. **Harmless Error.** Where the entire answer of a witness to a ques-

tion is excluded, but substantially the same matter, so far as competent, is received in answer to a subsequent question, the error in excluding the former answer, if any, is cured.

12. **Evidence: REVIEW.** Certain evidence tendered by the defendants examined, and *held* properly excluded.

13. **Damages.** On the facts stated, *held* that a verdict of $27,500 as damages for an injury resulting in the amputation of both legs about five inches below the knee is not excessive.

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

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

T. J. Mahoney and *J. A. C. Kennedy, contra.*

ALBERT, C.

On the 11th day of August, 1902, John T. Connolly was struck and run over by a train, or part of a train, of freight cars operated by the Union Pacific Railroad Company, while attempting to cross the tracks of said company at South Omaha. One foot was entirely cut off in the accident, and both legs were so mangled as to necessitate their amputation about five inches below the knee. He brought suit against the railroad company and Elmer E. Fair, the engineer of the train which inflicted the injury, for damages resulting therefrom, charging that such injuries were occasioned by the negligent operation of the train and the defendant's road at the place where the accident occurred. The plaintiff alleges in his petition that he was struck by the train while crossing the tracks on a crossing which at the time was, and for many years had been, in common use as a public crossing. The negligence charged against both defendants is that the train in question was backed upon and over this crossing without any warning of its approach by the ringing of the bell or sounding of the whistle. The charges of negligence against the defendant company alone are: (1) That the train was backed upon and over the crossing without dis-

playing any light at the end of the train approaching the crossing; (2) that no employee was stationed at the end of such car to give warning of the approach of the train; (3) that it had no flagman or watchman stationed at the crossing. The defendant company filed a petition and bond for the removal of the cause to the federal court on the ground of diverse citizenship, claiming that Fair had been made a party defendant for the sole purpose of evading the jurisdiction of that court. The cause was removed but upon plaintiff's motion was remanded to the state court. The defendants answered separately, denying the charges of negligence, and alleging contributory negligence. The cause has been tried four times in the district court. At the second trial, and after the jury had deliberated for some time, they were brought into court and asked whether they had agreed upon a verdict. Fair's attorney was not present at the time. The foreman answered that they had agreed as to the defendant Fair, but not as to the defendant company. They were then asked as to the possibility of their reaching an agreement upon further deliberation. They indicated that there was none. Thereupon, the presiding judge remarked: "I think I shall have to discharge you." The attorney for the defendant company then called the attention of the court to the statement of the foreman that they had agreed as to the defendant Fair, but the court expressed a doubt as to its right to receive a verdict as to one of the defendants without a verdict as to both, and asked counsel if they had anything to suggest. Receiving no response, the court discharged the jury. Afterwards, the foreman of the jury delivered a package of papers containing, among other things, a formal verdict in favor of the defendant Fair to the bailiff, who in turn delivered it to the court in the absence of counsel. They came into court shortly afterwards and their attention was called to this verdict. Plaintiff objected to receiving it as a verdict on the grounds that it had not been presented until after the jury had been discharged; that it had not been presented

at such time or in such a way as to afford the usual opportunities for determining whether it was the verdict of the jury, and that it was not the verdict of the jury. The record does not disclose what ruling was made on plaintiff's objection to receiving this verdict, nor what action was taken thereon by the court, but, as Fair was a party to the subsequent litigation in the district court, we infer that the objection was sustained and that the court refused to receive the verdict. The defendant company then filed a second petition and bond for the removal of the cause to the federal court on the ground of diverse citizenship. The court overruled this petition and retained the cause for trial. At the opening of the last trial the defendants objected to the jurisdiction of the district court on the ground that the cause was one properly removable to the federal court, and that the jurisdiction of the state court had been ousted by the filing of the second petition and bond for removal. This objection was overruled. At the close of the testimony adduced by the plaintiff in making his case a motion was made by the defendant company for a verdict, which was overruled. Testimony on behalf of the defendants was then offered and received. At the close of the trial the defendant company again asked for an instruction directing a verdict in its favor, which was denied. The trial resulted in a general verdict for the defendant Fair, and a verdict and judgment against the defendant company for $27,500. The company brings error.

The first three assignments of error are so intimately related that they should be considered together. They are based on the following rulings: (1) The refusal of the court to receive a verdict as to the defendant Fair at the second trial. (2) Overruling the defendant company's second petition for removal to the federal court. (3) Overruling the objections made to the jurisdiction of the court at the last trial. It will be recalled that the cause had been once removed to the federal court and by that court remanded to the state court for trial. The second

petition for removal on its face contains nothing that was not presented by the first petition. It is not claimed that the defendant company was entitled to a second order of removal on the same state of facts which had been held insufficient by the federal court when the cause was removed on the first petition, but that the defendant Fair was no longer a party to the controversy after the so-called verdict on the second trial, and, consequently, when the second petition for removal was filed, the controversy was solely between the plaintiff, a citizen of Nebraska, and the defendant company, a citizen of the state of Utah. In short, the second petition for removal was presented on the theory that Fair was eliminated from the controversy by the so-called verdict in his favor at the second trial. There is more than one reason why this theory cannot be sustained. In the first place, no verdict was rendered at that trial. A verdict is "the unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of a trial of a cause." Bouvier, Law Dictionary. Section 291 of the code provides: "The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict." Section 290 is as follows: "When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by the foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk asking each juror if it is his verdict. If anyone answers in the negative, the jury must be sent out for further deliberation." At the second trial, when the jury were brought into court and asked if they had agreed upon a verdict, the foreman merely said they had agreed as to the defendant Fair, but not as to the defendant company. No decision as to any matter lawfully submitted to them was reported to the court at that time; they merely reported that they had agreed upon a decision. It does not appear that at that time their decision had been reduced to writing or signed

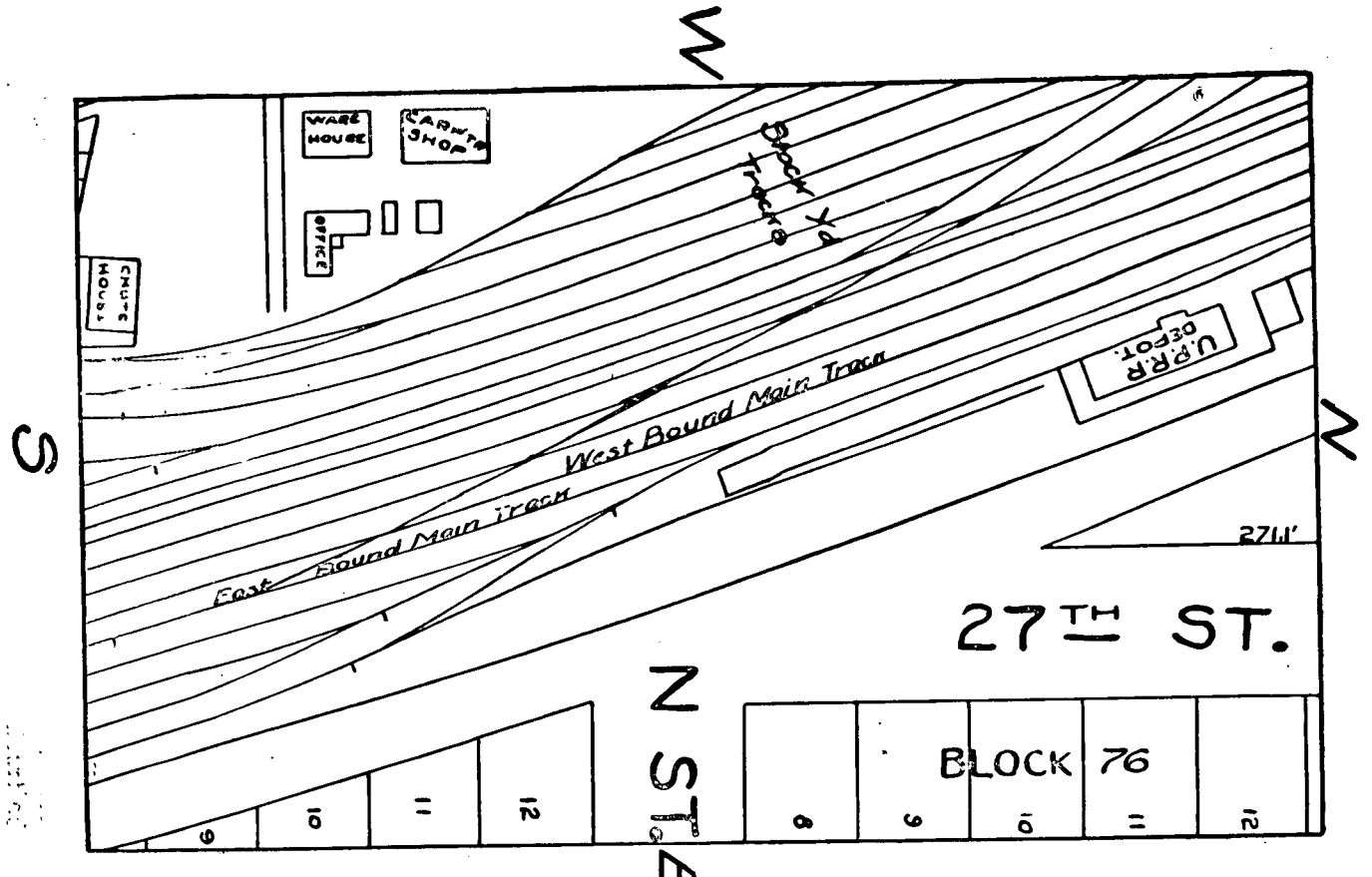
by the foreman. Certainly no verdict was announced, nor was any opportunity given to test the unanimity of their finding, and they were discharged without any one but themselves knowing the nature of their verdict with respect to Fair. It may be that the trial court at that time should have called for the verdict as to Fair, and that if it was in due form it should have been received, notwithstanding the inability of the jury to agree as to the other defendant. But, although the court openly manifested its intention not to call for or receive a verdict as to Fair and to discharge the jury, no protest or objection was made by any party to the record, nor was any exception taken to the rulings of the court in that regard. On the contrary, when the court asked counsel for suggestions as to the course to be pursued in the circumstances, its request met with no response, although the attorney for the party now complaining was present in court at the time. The error, then, if any, is one of which the defendant company cannot now be heard to complain. As to the so-called verdict subsequently delivered to the bailiff and by him delivered to the court, it was delivered to the court after the jury had been discharged. It was delivered at a time and under such circumstances as made it impossible to apply the tests prescribed by sections 290, 291, *supra,* to determine whether it was in fact the unanimous decision of the jury on any matter lawfully submitted to them, and the court properly ignored it. It might be said, in passing, that we find no exception to any ruling of the court in that behalf. It would follow, then, that as no verdict in favor of Fair had been rendered when the second petition for removal was filed and submitted, the theory upon which that petition was presented, namely, that Fair had been eliminated from the controversy by a verdict in his favor, falls to the ground.

Three other assignments are in effect as follows: (1) That the court erred in overruling the motion of the defendant company for a verdict at the close of the testimony adduced by the plaintiff in making his case. (2)

That the court erred in refusing to direct a verdict for the defendant company at the close of the trial. (3) That the evidence is insufficient to sustain a verdict in favor of the plaintiff and against the defendant company. As to the first, the rule is that if the defendant at the close of the testimony adduced by the plaintiff in making his case asks the direction of a verdict against the plaintiff, and after an adverse ruling on his motion introduces testimony in his own behalf, he thereby waives the error, if any, in the overruling of such motion. *Union P. R. Co. v. Mertes,* 35 Neb. 204, 39 Neb. 448.

The other two assignments both go to the sufficiency of the entire evidence to sustain the verdict and may be considered together. That the plaintiff sustained the injuries hereinbefore mentioned by being run over by a freight train, or part of a freight train, operated by the defendant company on its tracks at South Omaha between 3 and 4 o'clock in the morning of August 11, 1902, is conclusively established. The accompanying diagram represents with a fair degree of accuracy the *locus in quo.* The lines running diagonally from the northwest to the southeast of the diagram represent a system of tracks and switches maintained by the defendant company and the stock yards company at South Omaha; each track is represented by a single line instead of a line for each rail. The lines lying to the east belong to the defendant company; those to the west, to the stock yards company.

It is insisted that the place where the injury occurred was not a public crossing, and that plaintiff in attempting to cross the tracks at that point was a mere trespasser, or licensee, to whom the defendant company owed no duty. The defendant company's passenger station, the hotels, stores, etc., of the city are on the east side of the tracks. N street is the principal retail street, and the passenger station is not two blocks north of it. The stock yards, packing houses, and the offices and buildings used in connection therewith, and other places of business are west of the tracks. The evidence shows that for many years the


W
S
N
WARE HOUSE
CARPTR SHOP
OFFICE
CHUTE HOUSE
Back Yd Tracks
U.P.R.R DEPOT
West Bound Main Track
East Bound Main Track
271'
27TH ST.
N ST.
BLOCK 76
9
10
11
12
6
9
10
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route taken by the plaintiff in attempting to cross the tracks had been in common use by pedestrians crossing and recrossing the tracks at all hours of the day and night, and that from 400 to 500 people cross the tracks by this route every morning and evening. The use of this crossing by the public had been so extensive and long continued that it could not have been without the knowledge of the defendant company, and as it never objected to such use, nor took any steps to prevent it, such use must have been with its consent. In short, the evidence shows that the defendant company for many years and without objection permitted the public to cross its tracks at this point. That being true, it was bound to exercise reasonable care in the operation of its trains to guard against injury to those using the crossing. *Taylor v. Delaware & H. C. Co.*, 113 Pa. St. 162; *Keller v. Erie R. Co.*, 90 N. Y. Supp. 236; *Clampit v. Chicago, St. P. & K. C. R. Co.*, 84 Ia. 71. See also the following: *McCarty v. New York C. & H. R. R. Co.*, 76 N. Y. Supp. 321; *Boggero v. Southern R. Co.*, 64 S. Car. 104, 41 S. E. 819; *Bullard v. Southern R. Co.*, 116 Ga. 644, 43 S. E. 39; *Kroeger v. Texas & P. R. Co.*, 30 Tex. Civ. App. 87, 69 S. W. 809; *Blankenship v. Chesapeake & O. R. Co.*, 94 Va. 449, 27 S. E. 20; *Thomas v. Chicago, M. & St. P. R. Co.*, 103 Ia. 649, 72 N. W. 783; *Hooker v. Chicago, M. & St. P. R. Co.*, 76 Wis. 542, 44 N. W. 1085; *Jones v. Charleston & W. C. R. Co.*, 61 S. Car. 556, 39 S. E. 758; *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641; *Swift v. Staten Island R. T. R. Co.*, 123 N. Y. 645; *Chicago, B. & Q. R. Co. v. Russell*, 72 Neb. 114.

The evidence relied upon to show negligence in the operation of the train causing the injury and to sustain the charge of contributory negligence covers a large portion of a bill of exceptions containing over 1,000 pages. We cannot undertake to review it at length, but a somewhat extended statement of the facts and evidence can hardly be avoided in view of the questions presented. On the morning of the accident the plaintiff and some other stockmen arrived at South Omaha on a Burlington

freight train from the west. One car of stock belonging to the plaintiff was attached to the train. This train pulled in west of the tracks, shown by the diagram, and discharged its passengers two blocks north and about three blocks west of N street. The plaintiff and some of his companions on leaving the train went east, crossing the tracks by what is known as the L street viaduct to Twenty-seventh street, thence down that street to N street. It was necessary for the plaintiff to go to the chute house, located diagonally across the tracks from the corner of Twenty-seventh and N streets, in order to make arrangements for the disposition of his car-load of stock, which arrived on the train he had just left. He and one of his companions crossed the tracks and went to the chute house. At least one member of the party remained on the other side. While the plaintiff and his companions were in the chute house, the defendant company's freight train, which it is claimed caused his injuries, arrived from the west, moving north, according to the diagram, on what is designated as the "east bound main track." This train consisted of at least 35 cars, 16 of which were loaded with stock for the South Omaha market. The stock cars were from four to six cars behind the engine, and the remainder of the train was behind the stock cars. In order to cut out the stock cars and shift them from the tracks of the defendant company to those of the stock yards company, it was necessary for the train to pull north some distance beyond the point where the plaintiff was injured, switch over to the west bound track, back down that track to some distance south of said point, then uncouple the rear stock car from the cars following it, and pull north of the point where the plaintiff was injured a sufficient distance to enable a switch engine to move the stock cars to the stock yards tracks. After this was done the engine, with the four or six cars attached to it, was backed south on the west bound track, and past the point where the plaintiff was injured, to take up that portion of the train that had been left standing there while the stock cars were being shifted.

While the train was being thus shifted about, one of the defendant company's passenger trains passed through South Omaha, moving northward through the city on the east bound main track. That the plaintiff was struck and run over by the freight train, or some portion of it, while the passenger train passed over the crossing where the accident occurred is, to our minds, conclusively established, if not tacitly admitted. The plaintiff's theory is that he was struck by the rear car as the engine backed down the west bound main track with the four or six cars to take up the remaining cars after the stock cars had been set out. The defendant's theory is that the plaintiff was struck by the caboose at the rear of the freight train as it backed down the west bound main track the first time in order to cut out the stock cars, or that he fell under the train at that time while attempting to crawl between, over or under the cars while the train was in motion. The evidence is conclusive that the caboose was well lighted and that the usual signals of warning were given as the train backed down and over the crossing the first time. So that if the plaintiff was injured at that time his injury is no way traceable to any negligence on the part of the defendant company. If he fell under the train while attempting to crawl between the cars, or over or under the train while it was backing down, it goes without saying that the company would not be liable. The question, then, is whether the evidence is sufficient to sustain a finding that he was struck by the rear of the four or six cars that were backed down to make up the train after the stock cars had been cut out.

The plaintiff testified that the accident occurred between 3 and 4 o'clock in the morning; that he and his companion left the chute house on the morning of the accident and started to cross the tracks to N street for the purpose of going to their hotel. They took what the evidence shows was the usual route taken by pedestrians crossing the tracks from the chute house. On the way they met a man who said to them: "Now, boys, look out for the train,"

and as he spoke they looked south and saw the passenger train, hereinbefore mentioned, approaching on the east bound main track. There was then one or two tracks between them and the east bound main track. The following is a portion of his testimony as to what occurred from that time forward: "308. Q. As you continued on toward the foot of N street, from the time you met Mr. Paxton until you reached the point where you got hurt, what, if anything, did you do in the way of keeping watch upon your surroundings? A. I kept watching up and down the tracks both ways, as we walked on. 309. Q. What, if anything, did you do during that time to observe what, if anything, there was to the north of you? A. There were cars to the north of us. 310. Q. What did you do as you came along there? A. I just kept looking backwards and forwards up and down the track. 311. Q. Constantly? A. Yes, sir. 312. Q. And, in doing that, state whether or not there were any objects to the north of you? A. There were. 313. Q. What were there? A. I suppose, cars. 314. Q. Were they in motion or standing still? A. They appeared to be standing still. 315. Q. Were there any lights upon any of those cars that you saw to the north of you as you came on to the northeast? A. None that I saw; no, sir. 316. Q. Were there upon any of those cars? A. No, sir. 317. Q. Did you observe any of them move at all, while you were coming along in that direction? A. I did not. 320. Q. What was the condition of your sight? A. I had good eyesight. 321. Q. State whether or not you also watched this train that you spoke of as you continued to move on to the northeast. A. This passenger train, or this train that was coming? Yes, sir. 322. Q. This passenger train? A. Yes, sir. 328. Q. Did you get far enough to know whether you could cross in front of that train? A. I did. 331. Q. What were you doing up to the time that you were struck, from the time that you met Mr. Paxton? A. I had been traveling right along up until just that moment. I could not say positively whether I had just stopped, or was just in the act of stop-

ping, when I got hurt. 332. Q. If you had stopped, what was it for? A. To let this train go by. 333. Q. That is the train that was coming up from the south? A. Yes, sir. 334. Q. State whether or not you had kept up your looking to the right and left as you came along in that way until you were struck? A. I had. 336. Q. Up to the time you were so struck had you seen any car or train moving to your left or to the north of you? A. I had not. 337. Q. Had you seen any light upon any car to the north of you up to that time? A. I did not. 338. Q. Or did you at the time you were struck? A. No, sir. 542. Q. I am not sure but that I covered this question, but I will ask it again. Referring to the time of the injury, state whether or not at any time, from the time you started from the chute house until you were struck and run down, there was any light upon any car, or near any car, to the north of you? A. No, sir. 543. Q. And whether there was any light shining about you at or immediately before you received the injury or were knocked down? A. Nothing but the passenger, a light from the passenger train. 545. Q. None but that? A. None but that; no, sir. 546. Q. Any from the other side? A. No, sir. 1090. Q. You have ridden upon trains a good many times? A. Yes, sir. 1091. Q. You know they show some signals on the rear of all trains both by day and by night? A. Yes, sir. 1092. Q. You have noticed them on the rear of the caboose, have you? A. I have. 1093. Q. And the red lights that they display by night? A. Yes, sir. 1094. Q. And on this morning in question, as you started across the tracks, did you see something that would indicate to you to the north of the course that you were taking, that that there was a passenger train standing there, a passenger coach, or a caboose, by reason of the red lights on the rear end? A. I did not. 1095. Q. And as you continued on in that direction after the time you had met Mr. Paxton until you were struck, did you see anything of that kind to the north of you? A. I did not."

The testimony of his companion, covering the same

period, is as follows: "1277. Q. From the time that you and Connolly left the chute house until the time he was knocked down and run over, had you observed cars standing upon any of the tracks either way from you, as you came along? A. Yes, sir. 1278. Q. Which way had you observed cars standing? A. They were to our left. 1279. Q. To the left up the track? A. Yes, sir. 1280. Q. Did any of the cars which stood up to your left at the time have any lights on them? A. No, sir. 1288. Q. And was there any light or lantern upon any of those cars to your left as you came across? A. I did not see any. 1289. Q. What was the condition of your eyesight? A. My eyesight was good. 1295. Q. What sort of a view, if any, did you get of the car that knocked Mr. Connolly down? A. O, we did not get any view of it. It all occurred, you know (snapping his fingers), in an instant. I just saw this big black object passing over Connolly. 1296. Q. Coming right down on you? A. Yes, sir. 1297. Q. Was there any light on that that you could see? A. I saw none. 1298. Q. Was there any light flashed about you, at or immediately before you saw this big black object coming down on Connolly? A. No, sir. A. (continued) No, sir, there was no light."

Their companion who had remained on N street east of the tracks testified that he was there waiting for them to return when the passenger train came in; that at the same time he saw a freight train backing south on one of the tracks west of the track on which the passenger train was approaching; that he could see only the rear car, and that it displayed no lights, nor was there any person on the rear or top of the car; that after the passenger train had gone by he heard cries in the direction of where the accident occurred, and ran over, found the plaintiff lying beside the track, injured as before stated, and assisted in carrying him to the station and subsequently to the hospital. Another witness testified that he heard plaintiff's cries immediately after the accident, and upon investigation found him lying beside the rails of the west bound track.

We think it cannot fairly be said that the inference that the plaintiff was struck and run over by that portion of the freight train, consisting of four or six cars and the engine, which backed down and over the crossing after the stock cars had been cut out, is not one which might reasonably be drawn from the foregoing evidence. Of course, that evidence does not stand uncontradicted. It is irreconcilable with many facts and circumstances to which the witnesses produced by the defendants testified. On the other hand, it may be said that the testimony adduced by the defendants to rebut plaintiff's theory as to how the accident occurred is not, in every instance, easily reconcilable with the undisputed facts. The most that can be said on this branch of the case is that the evidence is conflicting and that it turns on the credibility of the witnesses. The jury were permitted to view the *locus in quo*. To pass upon conflicting evidence and the credibility of witnesses is within the peculiar province of the jury. On such questions their finding will not be disturbed unless clearly wrong. We consider the evidence ample to sustain plaintiff's theory as to how the accident occurred. Consequently, it stands as one of the questions settled by the verdict that the plaintiff was struck by the cars while the engine and the four or six cars were backing south on the west bound main track. That the rear car of that portion of the train displayed no lights, and that no person was stationed thereon, or at the crossing, to give warning of its approach to the crossing, are facts conclusively established by the evidence and practically conceded. The accident occurred in a populous community and within the limits of a considerable city. It occurred in the nighttime, and at a crossing in common use at all hours, and where, as we have seen, the defendant company was charged with the duty of exercising reasonable care to avoid injury to those crossing its tracks. It is true, it seems to be conceded that the bell was rung and the whistle sounded to give warning that the train was moving. But the mere fact that the statute requiring such warnings was complied with does

not of itself show that the defendant had discharged its full duty to those using the crossing. It was bound to use reasonable care not to endanger those who might be lawfully upon its tracks at the crossing, and whether, in view of the time, place and circumstances, precautions in addition to those prescribed by the statute were required, was a question for the jury. *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362; *McCarty v. New York C & H. R. R. Co.*, 76 N. Y. Supp. 321; *Bullard v. Southern R. Co.*, 116 Ga. 644, 43 S. E. 39; *Missouri P. R. Co. v. Geist*, 49 Neb. 489. The crossing was in common use day and night. It was across tracks in constant use, and in a populous and busy community. That due care required more than ringing the bell and sounding the whistle to give warning of a freight train backing toward and over such crossing in the nighttime is certainly not an unreasonable inference in view of all the facts and circumstances. *Chicago, B. & Q. R. Co. v. Russell*, 72 Neb. 114.

But the defendant company contends that, even though its negligence be established, the evidence discloses such negligence on the part of the plaintiff contributing to the injury as to preclude a recovery. This contention is based on certain inferences which counsel draw from the the testimony of the plaintiff and the man who accompanied him across the track, who are the only ones having actual knowledge of their acts after meeting the man who warned them to look out for the train. After reviewing their testimony at some length, counsel sum up in these words: "This testimony in short discloses that Connolly was familiar with the tracks at the point where the accident occurred, and so thoroughly had in mind the danger of crossing the tracks at that point that he mentioned it to Moore after leaving the chute house; that he knew the trains were liable to pass up and down the tracks at any moment; that he knew the noise made by the passenger train might drown the noise of signals made by any other train, and yet the conclusion, from the manner in which he was struck and thrown down, is irresistible that, when

the passenger train was a block and a half away, he was standing still between the rails of the west bound track, watching the headlight of the train approaching from the south, and taking no note of any train approaching from the north." It is undisputed that the plaintiff had been shipping stock from Wyoming to South Omaha for some ten years, was familiar with the tracks where the accident occurred, and was fully alive to the fact that for a pedestrian to cross the tracks was attended with more or less danger. It may be conceded, too, that the conclusion which counsel characterize as irresistible is one that might reasonably be drawn from the evidence. But we are unable to concur in the view that it is irresistible. We have heretofore set out a portion of the testimony of the plaintiff and his companion. Detached portions of the plaintiff's testimony might be interpreted to mean that "he was standing still between the rails of the west bound track, watching the headlight of the approaching train from the south and taking no note of any train approaching from the north," at the time he was struck by the freight train. But taking his evidence as a whole, it may reasonably be inferred therefrom that, after meeting the man who warned them to look out for the passenger train, they continued their way across the tracks until they reached a point from which they could see that they could not cross in front of that train; that he was struck by the freight train at the instant he stopped, or was about to stop, to wait until the passenger train had passed the crossing; that from the time he left the chute house up to the very instant he was struck he looked constantly up and down the tracks, north and south, to guard against danger from approaching trains; that, owing to the noise of the passenger train, the darkness, the nature of the plaintiff's surroundings at the time, and the failure of the defendant company to display any light on the rear of the freight train, or to station any person there, or at the crossing, to give warning of its approach, the plaintiff failed to discover that it was approaching until he was

struck. We do not wish to be understood to say that the foregoing facts are conclusively established, nor even that they are the most reasonable inferences to be drawn from the evidence. The most that we would be understood to say in this connection is that such facts are not unreasonable inferences from the evidence of the plaintiff and his companion. The settled rule in this state is that, where different minds might reasonably draw different inferences from the same state of facts, whether such facts establish negligence is a question for the jury, and not for the court. *Chicago, B. & Q. R. Co. v. Landauer,* 36 Neb. 642, 39 Neb. 803; *Elliott v. Carter White Lead Co.,* 53 Neb. 458, and cases there cited. From the vantage ground of afterwards, it is easy to see how the plaintiff might have avoided the injury. When he saw the incoming passenger train he might have gone to some place of safety and waited for it to pass. He might, possibly, have stood between the tracks, or in the triangle formed by one of the switches nearby, or on other safe ground. But it must be kept in mind that a person having occasion to pass over a crossing like the one in question, where trains are constantly passing and repassing, can seldom wait for the tracks to be perfectly clear. He is not always able to tell just when he is between the rails of one track or between different tracks, nor to determine with accuracy the safest course to pursue. He is threatened with danger from every point, and cannot give his undivided attention to any one source of danger. His attention is distracted by unusual sights and sounds, and conditions are not favorable to the exercise of the best judgment. He has a right to presume that those operating trains will use due care for his safety. The law does not require him to exercise unerring judgment nor the highest degree of care, but merely that he exercise such care as a man of ordinary prudence would exercise under like circumstances. The jury have said by their verdict that the plaintiff exercised due care. That is their inference from the evidence. Other minds might reasonably reach a different conclusion,

but it cannot be said, we think, as a matter of law, that negligence on the part of the plaintiff is the only reasonable inference to be drawn from the testimony of these men.

The defendants offered the evidence of a witness taken at a former trial of the cause. Among other things this evidence shows that the witness had a conversation with the plaintiff immediately after the accident, in which he told how the accident occurred. One question to the witness was: "State to the jury what you heard Mr. Connolly (plaintiff) say." The answer was: "Well, me and Coulter walked up to him and says—asked him how this happened, and Connolly spoke very low. I am pretty certain that he said they tried to get through the cars, and crawled through the cars somewhere, and my impression was, at the time, they went over the bumpers between the cars." An objection to the answer offered was sustained, and the defendant company now complains of this ruling. That part of the answer stating the "impression" the witness had at the time was clearly incompetent. As to the rest, substantially the same matter was subsequently received as a part of the testimony of the witness. The ruling therefore deprived the defendant company of nothing it was entitled to.

The defendant company called the plaintiff's attorney as a witness, and after showing by him that on the former trials of the cause he had made the opening statement to the jury, in which he had stated that it was a freight train that run over the plaintiff, offered to show that he had never stated that it was four, six or eight cars that had run over him, previous to the last preceding trial. The offer was rejected, and the defendant company now claims it was entitled to show this fact, in view of its theory that it was the entire train, and not the portion attached to the engine after the stock cars were cut out, that inflicted the injury. We do not pretend to say how far a client may be bound, if at all, by an opening statement made by counsel at a former trial. But he certainly could not be preju-

diced by the fact that his attorney failed to distinguish clearly between a train and part of a train, or to state the number of cars constituting what he designated as a train. We think the evidence was properly excluded.

Several assignments of error are based on rulings of the court permitting the plaintiff to introduce the testimony of the conductor of the freight train taken on a former trial. This testimony was offered on rebuttal, and was in reference to the length of the train, the movements of the cars that remained with the engine when the train was divided at South Omaha to cut out the stock cars, the length of time required for the train to run from South Omaha to Council Bluffs, and the time it registered at Council Bluffs that morning. The objection urged against this testimony is that it was not proper rebuttal. We think it was. The defendants produced a larger amount of testimony tending to support the theory that the plaintiff had been injured either by being struck by the rear car while the whole train of some 36 cars was backing over the crossing, or by crawling between, over, or under the cars of that train. Had either of those theories been established, the plaintiff, as we have seen, would have been convicted of contributory negligence. The conductor's evidence offered in rebuttal tended to negative those theories and was properly received.

The defenda nt. company complains of an instruction given by the court in these words: "The burden of proof is upon the plaintiff to establish by a preponderance of the evidence: (1) That the place where the plaintiff was injured was a crossing over defendant's railroad track which had been commonly used by pedestrians for such a length of time that defendant knew of its said common use, or by the exercise of reasonable care should have known it; (2) that the plaintiff was injured substantially as alleged; (3) that said injury was caused by the negligence of the defendants, the railroad company and Fair, or by defendant railroad company in some one or more of the ways charged in the plaintiff's petition; and (4)

the amount of damages occasioned thereby to the plaintiff, the defendants, and each of them, having alleged that, if the plaintiff received the injuries as alleged, the injuries were the result of the negligence of the plaintiff which contributed thereto; and the burden of proof of negligence on the part of the plaintiff is upon the defendants to establish by a preponderance of the evidence, unless you find that the evidence introduced by the plaintiff discloses negligence on his part which in any way caused or contributed to his injury, then it devolves upon the plaintiff, before he can recover, to prove by a preponderance of the evidence, not only that the negligence of the defendants, or either of them, caused his injury, but also that he himself was free from any negligence on his part that contributed to his injury, and, in this case, you are instructed that, as a matter of law, the negligence of the defendant Fair, if you find from a preponderance of the evidence that he was negligent, would be the negligence of the railroad company." The first criticism of this instruction is that while the only joint charge of negligence against the defendants was the failure to ring the bell or sound the whistle on the train causing the injury, all the others being against the company alone, this instruction permitted a recovery against the defendant company alone, not only on the charges exclusively against it, but on the charge made against the defendants jointly. The criticism seems to be unfounded. The office of this instruction was to inform the jury as to the burden of proof. By subsequent instructions the jury were positively directed that on the matter of negligence in failing to ring the bell and sound the whistle, if they found such negligence, both defendants would be liable, but if there was no negligence in that particular, or if there was negligence in that particular, but it was not a proximate cause of the injury, neither defendant would be liable on the joint charge, and that plaintiff could not recover except on some other charge of negligence.

Another criticism on this instruction is that the rule

stated in the fourth paragraph as to the burden of proof on the question of contributory negligence is at variance with that announced by this court in *Rapp v. Sarpy County,* 71 Neb. 385, and *City of Beatrice v. Forbes,* 74 Neb. 125, where the doctrine that the burden of proof on the question of contributory negligence, under certain circumstances, may shift to the plaintiff was repudiated. In so far as the rule stated by the district court is at variance with the rule announced in those cases, it is more favorable to the defendants than it should have been, and they cannot be heard to complain of it on that ground.

Still another criticism of this instruction is that it "is upon the burden of proof and not upon the effect, as between the parties, of contributory negligence on the part of the plaintiff below that may be disclosed by the evidence, the instruction saying, in effect, that if the evidence introduced by the plaintiff does disclose contributory negligence, then the burden of proof is upon him to show that in fact he was not guilty of contributory negligence." While this part of the instruction is not framed in the clearest language, we do not think the jury were misled by it to the defendant company's prejudice. Negligence "which in any way caused or contributed to his (plaintiff's) injury" would not necessarily be contributory negligence. An act or omission, to constitute contributory negligence, must be something more than a remote cause in the chain of circumstances (*Lowrimore v. Palmer Mfg. Co.,* 60 S. Car. 153, 38 S. E. 430), but must be such as operates as the proximate cause, or one of the proximate causes, and not merely as a condition. *Smithwick v. Hall & Upson Co.,* 59 Conn. 261, 12 L. R. A. 279, 21 Am. St. Rep. 104. See, also, 2 Words and Phrases Judicially Defined, 1544. This part of the instruction, then, reasonably admits of the construction that, if the plaintiff's testimony disclosed that the injury was in any way related to any negligent act or omission of his, the burden of proof was upon him to show that such act or omission was not the proximate cause, or one of the prox-

imate causes, operating to produce the injury. This was at least as favorable as the defendants had a right to ask.

The court instructed the jury that it was the duty of the plaintiff to look and listen for the approach of trains, and the defendant company complains because the jury were not specifically instructed as to the directions in which he was required to look. If a more explicit instruction was desired on this point the party desiring it should have tendered one covering the ground. Neither of the defendants did so, and the instruction as it stands is not erroneous.

On the question of damages, the court instructed the jury as follows: "If you find for the plaintiff under the evidence and these instructions, in determining the amount of his recovery, you should take into consideration the nature and extent of his injuries, the fact that certain injuries are permanent, plaintiff's natural expectancy of life, any mental or physical pain which you find from the evidence he has suffered resulting from the injury, any expense necessarily incurred on account of the injury for surgical and medical care and hospital fees as shown by the evidence, his loss of earnings in the carrying on of his business since the injury which the evidence shows to have been caused by the injury, together with such future loss of earnings due to the injury as you find from the evidence to a reasonable certainty will be caused by the injury, and return a verdict for the plaintiff in such an amount as you so find under the evidence and these instructions will be a fair and reasonable compensation for such expense, loss of earnings in the past, and such loss of earnings in the future as you find to a reasonable certainty will result from his injuries, together with fair and reasonable compensation for such pain and suffering as you find to be established by the evidence. If you find for the defendants, or either of them, you will so state in your verdict." The objections lodged against this instruction are that it does not give any rule by which to estimate damages in cases of this kind, nor by which the

present value of future earnings may be determined. Instructions on the question of damages in cases of this character must of necessity be more or less indefinite. The instruction given is at least as definite and certain and as favorable to the defendants as that approved by this court in *City of South Omaha v. Sutliffe*, 72 Neb. 746. No instruction was tendered by any of the parties covering the same subject, and the complaint now made against it should be overruled.

Complaint is made of certain acts of the trial judge committed, not while the trial was actually in progress, but during intermissions and adjournments. The complaint is that during such times he unduly manifested a friendly feeling, or interest, in the plaintiff in the presence of the jurors. This complaint was included in the motion for a new trial, and was supported by affidavits, which were met by counter affidavits. While these affidavits show that the learned judge treated the plaintiff with more familiarity and consideration than is generally shown a litigant by the trial judge, yet it does not appear that his treatment of the plaintiff differed substantially from that accorded by him to all others with whom he came in contact during the trial. While the record falls far short of convicting the trial judge of misconduct, or of showing that the defendant company was prejudiced by his conduct toward the plaintiff, it shows the advisability of a trial judge maintaining a proper distance between himself and the litigants before him in order to guard against the appearance of evil liable to arise from a failure to do so.

The attorneys for the plaintiff were also charged with misconduct in the motion for a new trial. That matter was submitted to the trial court on conflicting evidence, and its finding thereon cannot be disturbed.

It is also claimed that the court erred in overruling challenges for cause to certain jurors. Their examination on *voir dire* is set out at length in the record. This opinion is already too long, and it must suffice to say that the ex-

amination of these jurors, taken as a whole, shows that it was not error to overrule the challenges.

It is strenuously contended that the verdict of $27,500 is excessive. As we have seen, as a result of the accident both plaintiff's legs were amputated a few inches below the knee. At the time of the injury plaintiff was 31 years of age, in robust health. He had a life expectancy according to the Carlisle table of over 33½ years. He had been raised on a cattle ranch in Wyoming and was engaged in raising stock in that state. He owned 160 acres of land and held two sections under a lease. He had a herd of some 75 horses and 100 cattle which grazed upon his own land and miles of uninclosed land in that vicinity. His evidence shows that the returns of his business netted him, annually, from $400 to $600 over and above what was required for the support of himself and family, and over and above the increase of his herds. He earned considerable breaking horses for cavalry use; his injury cut off that source of income. Many of the things he could do for himself in the conduct of his business he must now hire done. That he will sustain a direct pecuniary loss of at least $1,000, annually, as a result of the accident is a reasonable inference from the evidence. At his age an annuity of $1,000, payable quarterly, would cost $18,876. In addition to this, he has paid out considerable sums and suffered other losses in consequence of the accident. Although the accident occurred some years ago, as a result he still suffers considerable bodily pain, which, according to his testimony, keeps him awake until he is worn out toward morning. The bodily pain he suffered, and still suffers, from the injury is a proper element of damage. There is no hard and fast rule for estimating the amount to be allowed for that element. The most that can be said is that the jury must be governed by reason and common sense. In *Swift & Co. v. Holoubek,* 62 Neb. 31, a boy between 14 and 15 years old recovered a judgment for $11,500 for the loss of three fingers and part of a hand, leaving the thumb and index finger capable of some use.

This court reduced the judgment to $7,500. In *Chicago, B. & Q. . Co. v. Krayenbuhl,* 70 Neb. 766, an infant four years old recovered a judgment for the loss of a foot. This court, after ordering a remittitur, fixed his recovery at $9,000. In *New Omaha T.-H. E. L. Co. v. Rombold,* 68 Neb. 54, this court held that a verdict of $15,000 was not excessive for the loss of a foot in the case of a man earning $65 a month, whose earning capacity was not thereby entirely destroyed. In the case of *Texas & N. O. R. Co. v. Kelly,* 30 Tex. Civ. App. 21, 80 S. W. 1073, a man 54 years of age, or 23 years older than Connolly, earning from $1,200 to $1,500 a year, was so injured that both his legs were paralyzed, and it was held that a recovery of $30,000 was not excessive. In *Ehrman v. Brooklyn City R. Co.,* 14 N. Y. Supp. 336, a child 3½ years old suffered injury causing the amputation of one leg above the knee. It was held that a verdict for $25,000 was not excessive. In *Illinois C. R. Co. v. Souders,* 79 Ill. App. 41, a woman 54 years old, who kept a boarding house, received a permanent injury to her arm and her lungs, but she did not lose either hand or foot. It was held that a recovery of $20,000 was not excessive.

In *Kalfur v. Broadway F. & M. A. R. Co.,* 54 N. Y. Supp. 503, a child 18 months old lost one leg above the knee. It was held that a recovery of $15,941.25, was not excessive. In *Chicago City R. Co. v. Wilcox,* 33 Ill. App. 450, a boy six years old lost one leg. It was held that a recovery of $15,000 was not excessive. In *Roth v. Union Depot Co.,* 13 Wash. 525, a child nine years old lost one leg. *Held,* That a recovery of $15,000 was not excessive. In *Western Union T. Co. v. Engler,* 75 Fed. 102, plaintiff suffered a compound fracture of his leg, causing the bone to protrude and denuding the periosteum. Many pieces of bone were taken out, and pieces continued to work out for 20 months afterwards. There was no amputation and amputation was not necessary, but it appeared that the plaintiff would probably be permanently lame. It was held that a recovery of $15,000 was not excessive. In *Chicago, B.*

& Q. R. Co. v. Dunn, 106 Ill. App. 194, it was held that $15,000 was not excessive for the loss of one leg. In *Howe v. Minneapolis, St. P. & S. S. M. R. Co.,* 62 Minn. 71, it was held that a verdict for $14,500 was not excessive in the case of a young man permanently disabled, but who lost neither hand nor foot. In *Smith v. Metropolitan Street R. Co.,* 86 N. Y. Supp. 1087, it appeared that the plaintiff was injured in a collision between a street car and a vehicle. He was in the hospital about two months, but was unable to return to his regular business until about 10 months after the injury. It appeared that he would not likely fully recover from his injuries, but that he was not permanently disabled. It was held that a recovery of $20,000 was proper. In *Alberti v. New York, L. E. & W. R. Co.,* 43 Hun (N. Y.), 421, a man 30 years of age was injured so that his legs were permanently crippled, but not lost. It was held that a verdict of $25,000 was not excessive. In *Williamson v. Brooklyn Heights R. Co.,* 65 N. Y. Supp. 1054, it was held that a verdict of $22,500 was not excessive in the case of a boy 11 years old who lost one leg. In *Stewart v. Long Island R. Co.,* 66 N. Y. Supp. 436, it was held that $18,000 was not excessive in the case of a young man whose arm was permanently disabled and who suffered some nervous injury. In view of the actual pecuniary loss that must necessarily follow an injury of this kind to a man of plaintiff's age, business and situation in life, the physical pain and manifold inconveniences he has suffered and must continue to suffer, the recoveries upheld by this and other courts in similar cases, we cannot say that the damages awarded are excessive.

After a careful examination of the record, we are satisfied that it contains no reversible error, and recommend 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.

DENNIS A. DRISCOLL, APPELLEE, V. MODERN BROTHERHOOD OF AMERICA, APPELLANT.

FILED OCTOBER 4, 1906. No. 14,409.

1. **Waiver.** A waiver of a condition will not be implied from an act not inconsistent with an intention to insist upon performance.
2. ———. The acts relied upon as constituting a waiver must be those of the person whose rights are affected by it, or of some one duly authorized to act for him.
3. **Beneficial Association:** CERTIFICATE, DELIVERY OF. Where the constitution of a beneficial association requires the initiation of a member as a condition precedent to the delivery to him of a benefit certificate, the unauthorized delivery of such certificate to him by a subordinate officer before initiation will not operate as a waiver of such condition.
4. ———: MEMBERSHIP: ESTOPPEL. A secretary of a subordinate lodge by virtue of his authority to receive payment from members of their dues and assessments has no authority to receive such payments from nonmembers, and in case he does, and without the knowledge or consent of the association, or if his acts in that behalf are repudiated by it, it is not thereby estopped to deny that the persons thus making payment are members.
5. An agent cannot ratify his own unauthorized acts.

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

H. M. Sinclair, for appellant.

Thomas C. Patterson, contra.

ALBERT, C.

The plaintiff (appellee) brought this action against the defendant on a beneficiary certificate which purports to

have been issued to him by the defendant on the 30th day of April, 1904. The certificate on its face is, in effect, a life and accident insurance policy insuring the plaintiff's life in the sum of $3,000, and indemnifying him in one-fourth that sum against certain bodily injuries resulting from accidental causes, the loss of an eye being included among such injuries. The defendant is a fraternal-beneficiary association organized and carried on for the sole benefit of its members and their beneficiaries, having a lodge system, with ritualistic work and a representative form of government, and, according to the stipulation of the parties, at the date of the certificate was doing business in this state under the provisions of section 91, ch. 43, Comp. St. 1905, relating to associations of that character. The constitution requires applications for membership to be accompanied by certain fees and to be voted upon by the subordinate lodge. If the vote be favorable to the applicant he shall then be examined by the local physician, and if recommended by him the application shall be forwarded to the head physician of the association. If the application be accepted by the head physician he shall forward it to the supreme secretary of the order, who shall forthwith issue a benefit certificate in such amount as the head physician shall authorize, not above a given amount, for the applicant, and transmit the same to the subordinate lodge through which the application was made. The constitution also provides that upon receipt of the certificate by the subordinate lodge the president thereof shall notify the applicant and he shall be initiated at a regular or special meeting, but that at any time before initiation the lodge may refuse to initiate him, in which case the certificate shall be returned to the supreme secretary with a certificate of the action of the subordinate lodge, and the initiation fee returned to the applicant. If the applicant fails to report for initiation within 60 days after his certificate has issued he forfeits his membership fee, and if he still desires to become a member must make another applica-

tion, in which case the fees paid on his first application are credited on the second. As soon as admitted to membership each member is required to deposit with the secretary of the subordinate lodge the amount of one benefit assessment, monthly *per capita* tax, the local dues for one month, and certain dues to the reserve fund. Thereafter he is required to pay certain assessments, monthly dues, and a *per capita* tax. The assessments, the *per capita* tax and a portion of the membership fee are to be remitted by the secretary of the subordinate lodge to the secretary of the supreme lodge. The constitutional requirements with respect to the terms and conditions upon which members may be received into the order, the initiation of candidates for membership, and the payments required upon admission to membership, are followed by these provisions:

"Sec. G. The liability of this fraternity for the payment of benefits upon the death or injury of a member shall not begin until all the acts, qualifications, and requirements prescribed for the applicant in the above division, and in all the laws, rules and regulations and ritual of the fraternity shall have been fully complied with by him, and until all acts therein prescribed for the lodge shall have been fully complied with by it, and until his application shall have been approved by the lodge and head physician, and a benefit certificate issued as provided in section C. of this division and delivered to applicant while in good health. And no officer of this fraternity is authorized or permitted to waive any of the provisions of this division or of these laws, or any other of the laws of this fraternity which shall relate to the contract of insurance between the members and the fraternity."

The plaintiff's application for membership was favorably acted upon by the subordinate lodge in this state and approved by the local physician, as well as by the head physician of the association, and his beneficiary certificate, bearing date of April 30, 1904, and duly signed by the proper officers, was forwarded by the supreme secre-

tary to the secretary of the subordinate lodge. The plaintiff had paid all membership fees required by him up to that time. On the morning of the 19th day of May, 1904, at plaintiff's solicitation the certificate was delivered to him by the secretary to whom he paid, at the same time, the initiation fee. A few days afterwards he paid the secretary the advance assessment and monthly dues which the constitution requires a member to pay upon his initiation. He subsequently paid the secretary the assessments and dues for June and July of the same year as they became due according to the laws of the association. He was not initiated as a member until July 17, 1904. The initiation fees were remitted to the supreme secretary August 27, 1904, who at once returned them to the local secretary with a letter denying that plaintiff had ever been a member and directing that the money be returned to him. On the evening of May 19, 1904, and after he had received his certificate, the plaintiff met with an accident which resulted in the loss of one of his eyes. His claim for indemnity was rejected by the association on the ground that liability on the certificate had not attached when the accident occurred. The defense interposed to the suit brought on the certificate was based on the same ground. A trial to the court without a jury resulted in a finding and judgment for the plaintiff. The defendant association appeals.

The constitution of the association, as well as the statute under which it is conceded it does business, restricts the benefits of the association to its members and their beneficiaries. It is a secret order and it is a matter of common knowledge that initiation is a condition precedent to membership in an order of that character. To speak of of an uninitiated member of a secret order would involve a contradiction of terms. The plaintiff appears to concede that membership in the order is a condition precedent to a recovery on his certificate and that the constitution contemplates that initiation shall precede mem-

bership, but insists that it was competent for the association to waive the requirement as to initiation, and that by the delivery of the certificate, the acceptance and retention of the fees, dues and assessments paid by him, it did waive such requirement and is now estopped to deny that he was a member in good standing when the accident occurred. So far as the membership fee paid by the plaintiff is concerned, the constitution, as we have seen, expressly provides that in case an applicant shall fail to report for initiation within 60 days after his certificate is issued he shall forfeit the membership fee, subject, however, to his right to have it credited on the membership fee for a second application. Consequently, the retention of this particular fee by the association is not inconsistent with an intention on its part to insist upon initiation as a condition precedent to liability on the certificate. A waiver of a condition will not be implied from an act not inconsistent with an intention to insist upon its performance. *Kilpatrick v. Kansas City & B. R. Co.*, 38 Neb. 620. Besides this money was not retained by the home office, but was returned, as we have seen, to the local secretary.

It remains, then, to inquire whether the delivery of the certificate to the plaintiff by the secretary of the subordinate lodge and the retention of the payment subsequently made by the plaintiff to such secretary amount to a waiver of the provision requiring initiation. One of the essential elements of a waiver is that the acts relied upon as constituting a waiver be those of the persons whose rights are to be affected by it, or of some one duly authorized to act for him. The association is a corporation and, consequently, can act only through its officers or agents. Such officers or agents may bind it while acting within the scope of their authority, but not beyond. The authority of each is defined and limited by the constitution of the association which is a part of the contract upon which the plaintiff seeks to recover. He is therefore chargeable with notice of such limitations and no question of ostensible authority arises. That the constitution of the association

contemplates that the certificate shall remain in the custody of the subordinate lodge, and not be delivered to the person upon whose application it was issued, clearly appears from the provision which authorizes such lodge to reject the applicant when he offers himself for initiation and requires it, in such case, to return the certificate to the supreme secretary. The duties of the secretary of a subordinate lodge as defined by the constitution are to receive payment of dues, assessments, etc., from members of his lodge, keep the records and perform such other acts as usually pertain to the office of secretary. He is not a general agent with authority to bind the association generally, but a special agent with authority to bind his principal while acting within the scope of his authority as defined by the constitution which, as before stated, is a part of plaintiff's contract. He has no authority to admit members to the order nor to waive any of the requirements for membership. He was a mere custodian of the certificate without authority to deliver it pending plaintiff's initiation. Plaintiff received the certificate with full knowledge of the secretary's lack of authority to deliver it at that time. The delivery of the certificate was not the act of the association or of any one authorized to act for it in that behalf, and therefore lacks an essential element of a waiver.

We come now to the acceptance and retention by the secretary of the subordinate lodge of the dues and assessments paid by plaintiff subsequent to the date of the delivery to him of the certificate. The record does not show that any of these payments were brought to the knowledge of the supreme lodge. It does show that two of them were brought to the notice of the supreme secretary who at once repudiated them on the ground that the plaintiff was not a member of the association. The reception of these payments stand, then, merely as the acts of the secretary of the subordinate lodge. He had authority to receive such payments from members of the association, and while acting within the scope of such authority could bind his

principal. But, having no authority to admit members into the association directly, there is nothing in the nature of his authority to receive payments from actual members, from which authority to confer membership by indirection, or to waive any of the constitutional requirements with respect thereto can be implied. The question of ratification does not arise, because the acts relied upon as a ratification, as well as those claimed to have become binding by such ratification, were the unauthorized acts of the same agent, and it is elementary that an agent cannot ratify his own unauthorized act. A different question might arise, were it shown that these payments had been accepted or retained with the knowledge or consent of the association. But such is not the case. The plaintiff's position, as disclosed by the record, is that of one who has knowingly dealt with an agent acting beyond the scope of his authority, and whose acts were repudiated by the principal as soon as they became known to him. Neither waiver nor estoppel against the principal can be predicated on that state of facts. The decision might be put on the ground that no waiver or estoppel is pleaded by the plaintiff, but, as the case must go back for a new trial, we thought best to discuss what appeared to us the more important features of the case.

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

DUFFIE and JACKSON, CC., concur.

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

REVERSED.

BELLE S. B. HARVEY, APPELLANT, V. CORDELIA J. GODDING ET AL., APPELLEES.

FILED OCTOBER 4, 1906. No. 14,420.

1. **Judgment Lien:** APPEAL. An appeal by a judgment defendant to this court does not in the absence of a supersedeas, operate to prolong the life of the judgment lien.

2. ———: ———: REMAND. The provision of section 509 of the code, relative to a judgment lien dating from the filing of a special mandate from this court in the lower court, has exclusive reference to the special mandate required by section 594 thereof, in case this court, upon reversal of a judgment in whole or in part, renders such judgment as the lower court should have rendered, instead of remanding the cause with directions to the lower court to render such judgment.

3. **Execution Sale:** DORMANT JUDGMENT. A sale of real estate under an execution issued on a dormant judgment is void as to one who acquired title to the property from the judgment debtor during the life of the judgment lien. *Gillespie v. Switzer*, 43 Neb. 772, and *Link v. Connell*, 48 Neb. 574, modified.

4. **Attachment Lien:** DORMANT JUDGMENT. In an action aided by attachment, upon the entry of judgment the attachment lien is merged in that of the judgment, and thereafter the lien is a mere incident to the judgment and ceases to exist when the judgment becomes dormant.

5. **Fraudulent Conveyance:** HUSBAND AND WIFE. A gift from a husband to his wife executed when the former was solvent, and not made in contemplation of insolvency or of engaging in some hazardous enterprise, will be upheld, if not excessive, considering the husband's circumstances at the time the gift was made.

6. Evidence examined, and *held* to establish the *bona fides* of a conveyance from a husband to his wife.

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

E. F. Warren, for appellant.

W. F. Moran and *W. A. Corson, contra.*

ALBERT, C.

The plaintiff, Belle S. B. Harvey, brought this suit to quiet the title to certain real estate in Otoe county. The controversy is between her and the defendant Cordelia J. Godding and we shall refer to them hereafter as plaintiff and defendant, respectively. The defendant Asa Godding is the husband of Cordelia J. Godding, and claims some interest by virtue of such relationship, but not otherwise. The defendant Mohrman is in possession of the property claiming as tenant of Mrs. Godding. Plaintiff's husband is the common source of title. The plaintiff claims under a deed executed and delivered to her by her husband on the first day of June, 1895, which was filed for record and recorded on the 17th day of December, 1897. The defendant bases her claim of title to the property upon the following state of facts: On the 14th day of December, 1892, the First National Bank of Omaha commenced an action aided by attachment against the plaintiff's husband. The writ was levied upon the property in question on the 19th day of December of the same year. On the 25th day of March, 1895, a judgment was rendered against the plaintiff's husband for a certain amount and an order entered directing a sale of the attached property. The judgment defendant prosecuted error to this court, without a supersedeas, where the judgment of the district court was affirmed on the 20th day of October, 1898. For some reason a mandate did not issue until the 5th day of January, 1900, when one issued commanding the district court "to cause execution to issue carrying into effect your (its) said judgment," and which was filed in the district court on the 2d day of April, 1900. The first writ issued to enforce the judgment was an order of sale issued on the 7th day of September, 1901, whereunder the property was sold. The sale was confirmed and a sheriff's deed executed to the purchaser on the 9th day of November of the same year. The purchaser at the sheriff's sale subsequently conveyed to the defendant. The district court dismissed the bill, and the plaintiff appeals.

The plaintiff contends that, because more than five years had intervened between the date of the judgment against her husband and the issuance of the order of sale thereon, the judgment was dormant and not a lien against the property when the order of sale issued, and, consequently, that the sale of the property under such order of sale was ineffective to divest her title. On the other hand, the defendant contends: (1) That the period during which a judgment remains alive and continues to be a lien upon the real estate of the judgment debtor is to be computed in this case from the second day of April, 1900, the date upon which the mandate from this court was filed in the district court commanding the district court to enforce the judgment against the plaintiff's husband, and, consequently, that the judgment was alive and a lien upon the property when the order of sale issued and the sale was made thereunder. (2) That, even if the judgment had become dormant, and had ceased to be a lien against the property at the time the order of sale issued, the sale and subsequent proceedings under said judgment are not void, but merely voidable, and cannot be assailed in a collateral proceeding.

The defendant's first contention is based on one of the provisions of section 509 of the code. That section, so far as is material at present, is as follows: "No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of five years next after its rendition, shall operate as a lien upon the estate of any debtor, to the preference of any other *bona fide* judgment creditor (or purchaser); but in all cases where judgment has been or may be rendered in the supreme court, and any special mandate awarded to the district court to carry the same into execution, the lien of the judgment creditor shall continue for five years after the first day of the next term of the district court to which mandate may be directed." The defendant insists that the mandate from this court on the judgment against plaintiff's husband

was a special mandate within the meaning of the foregoing section. Dictum may be found sustaining this position, but we do not think it is tenable. We think the special mandate referred to in that section is the special mandate required in section 594 of the code. That section is as follows: "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment; and the court reversing such judgment or final order shall not issue execution in causes that are removed before them on error, on which they pronounced judgment as aforesaid, but shall send a special mandate to the court below, as the case may require, to award execution thereupon; and it shall be the duty of the judges of the supreme court to prepare and file their opinion in every case as brought before them, within sixty days after the decision of the same, and no mandate shall be sent to the court below until the opinion provided for by this section has been filed. The court to which such special mandate is sent, shall proceed in such case in the same manner as if such judgment or final order had been rendered therein, and on motion and good cause shown, it may suspend any execution made returnable before it by order of the supreme court, in the same manner as if such execution had been issued from its own court, but such power shall not extend further than to stay proceedings until the matter can be further heard by the supreme court." The foregoing section deals with cases wherein this court has rendered a judgment of reversal. In such cases it is optional with this court either to proceed to render such judgment as the court below should have rendered or to remand the cause to the court below for such judgment. It provides that in case the former course is pursued and the proper judgment rendered in this court, this court may not issue execution on such judgment, but shall issue a special mandate to the court below to award execution

"thereupon." By the provision of section 509, therefore, in case this court should render "such judgment as the court below should have rendered," instead of remanding the cause for such judgment, the judgment rendered by this court would continue to be a lien on the property of the judgment defendant for five years from the date of filing the special mandate in the district court. The two sections should be read together, the one providing a means whereby judgments rendered in this court may become a lien upon the real estate of the debtor in the county from which the proceedings in error were prosecuted, the other as fixing the period during which the lien shall continue. Both sections refer to a "special mandate." The latter shows the sense in which the makers of the code used the term. There is nothing in the code to indicate that they used it in any other sense. It is clear to us that the special mandate referred to in section 509 is the special mandate required by section 594 to be issued to the lower court commanding it to execute a judgment rendered by this court upon the reversal of a judgment of such lower court in whole or in part, and has no application to a case like that of the plaintiff's husband, where the only judgment of this court was one affirming the judgment of the lower court and which called for no special mandate. As execution on the judgment against the plaintiff's husband was not stayed pending his appeal to this court, it would follow that the judgment became dormant and ceased to be a lien upon his property at the end of five years after its rendition and before the order of sale in question issued.

The defendant's second contention involves this question: Is a sale of real estate under an execution issued on a dormant judgment void, or merely voidable, as to a grantee of the judgment debtor who took title from the judgment debtor while the judgment was alive and a lien on the property? Three cases decided by this court are relied on as sustaining the proposition that a sale thus made is not void, but merely

voidable. The first is *Gerecke v. Campbell,* 24 Neb. 306. That case, however, is not in point. There an execution had issued on a dormant judgment and had been levied on a crop of growing corn. The judgment debtor thereupon paid the judgment, and the levy was released. He afterwards brought suit against the justice who issued the execution, claiming that he had paid the judgment under duress. The question finally presented was whether the execution was void, or merely voidable, and this court held that it was voidable, but not void. It will be observed that there the execution was assailed by the judgment debtor himself. Here a sale of real estate under an execution issued on a dormant judgment is assailed by the plaintiff, who held title to the property as grantee of the judgment debtor when the execution issued and the sale thereunder was made. The distinction between the two cases is obvious. The second case relied on is *Gillespie v. Switzer,* 43 Neb. 772, and the third is *Link v. Connell,* 48 Neb. 574. In these cases the sales sought to be avoided were each made under a decree of foreclosure of a mortgage. In each case the sale was attacked by one claiming title by conveyance, mediate or immediate, from the mortgagor subsequent to the mortgage, and on the ground that more than five years had intervened between the date of the decree and the date of the issuance of the order for the sale of the property. Both cases might have been disposed of on the ground that the provisions of the code with respect to the time when a judgment becomes dormant and ceases to be a lien on the real estate of the judgment debtor have no application to a decree in equity for the sale of specific real estate, as was held in *Herbage v Ferree,* 65 Neb. 451. But the court put both decisions on substantially the same ground, namely, that a sale of real estate to satisfy a judgment which has bcome dormant under the provisions of section 482 of the code is voidable only, and cannot be assailed in a collateral proceeding. There is ample authority for the foregoing rule, if limited to the judgment debtor.

But outside of the two cases cited we have been unable to find a single case where it has been applied to the judgment debtor's grantee who held title when the execution issued and the sale thereunder was made. The rule as thus extended is utterly irreconcilable with the doctrine that, when a judgment becomes dormant, its lien is lost as against a mortgage executed by the debtor and recorded during the life of the judgment lien (*Flagg v. Flagg,* 39 Neb. 229), and that, when a dormant judgment is revived, it is not a lien on real estate conveyed by the judgment debtor after the rendition of the judgment and before it had become dormant (*Halmes v. Dovey,* 64 Neb. 122). Even where execution issues during the life of the judgment lien, but the sale made thereunder takes place after the time fixed by statute for the termination of such lien, except in the state of Missouri, it has been uniformly held, both in this country and England, that the title acquired by such sale is precisely the same as though the judgment had never been regarded as a lien, and that such sale does not operate to divest a title acquired from the debtor during the life of the judgment lien. 2 Freeman, Executions (3d ed.), sec. 205; 2 Freeman, Judgments (4th ed.), sec. 394*a*. In *Tucker v. Shade,* 25 Ohio St. 355, the court said: "It is well settled that the title of a purchaser from the judgment debtor is, on the judgment becoming dormant, discharged from the lien, and that the subsequent revivor of the judgment will not affect such title." We are satisfied that the rule announced and applied in *Gillespie v. Switzer,* and in *Link v. Connell, supra,* is too broad, and that it should be modified and restricted so as not to apply to those whose rights in the property have been acquired from the debtor during the life of the judgment lien.

The fact that the action in which judgment was taken against plaintiff's husband was aided by attachment, and that the judgment contains an order for the sale of the attached property, would not continue the lien beyond the period fixed by statute nor bring the case within the

rule announced in *Herbage v. Ferree, supra.* In that case the court was dealing with a decree in equity entered in a suit where the relief sought and obtained was the foreclosure of a mortgage lien. Here we are dealing with a judgment rendered in an action at law. When the judgment was rendered the attachment lien was merged in that of the judgment, differing from an ordinary judgment lien only in that it related back to the levy of the attachment. A judgment lien is a mere incident and cannot exist independently of the judgment. When the judgment becomes dormant the lien ceases to exist.

Another defense urged to the plaintiff's suit is that the conveyance of the property in question to her was made without consideration and in fraud of her husband's creditors, including the judgment creditor hereinbefore mentioned, and, for that reason, she cannot be heard to assail the validity of a sale made under an execution issued in favor of such judgment creditor. That the plaintiff's husband was insolvent when this conveyance was made is conclusively established. Consequently, the burden is upon the plaintiff to show that the conveyance was made in good faith. *National Bank of Commerce v. Chapman,* 50 Neb. 484. The evidence is uncontradicted that in 1882 the plaintiff's husband was worth more than $2,000,000 over and above his debts. His business was prosperous and not attended by unusual hazards. At that time he made a gift to his wife, the plaintiff in this suit, of a large tract of land in this state. It is not claimed that this gift was made in contemplation of insolvency nor that it was excessive in view of the husband's financial condition and that a part of his wealth had come to him through her. The plaintiff held title to this tract of land until the spring of 1891. At that time her husband and one of the corporations with which he was connected had become involved in debt, and it was arranged between him and the plaintiff that she should sell the land and allow him to use the proceeds temporarily to discharge some of his indebtedness. The sale was made and the

money loaned by the plaintiff to her husband. Her husband's affairs became more and more involved until 1893, when he was forced to mortgage his holdings to raise money and to satisfy his creditors. As he says in his testimony, the properties were put in groups, each covered by a mortgage. The property in suit then belonged to him, and, intending to execute a mortgage thereon to secure a note of $1,200 to be turned over to the plaintiff to secure a part of his indebtedness, he executed a mortgage, describing the property as "lots 1 and 2 of block 15, in the town of Syracuse," etc., instead of lots 1 and 2 of block 15, Gray's Second Trustee's addition to the town of Syracuse, the true description. This note and mortgage were turned over to the plaintiff for the purpose stated. Her husband, unable to meet his obligations, conveyed the fee title to this property to the plaintiff by its true description on the 1st day of June, 1895, which is the conveyance under which she now claims. The evidence adduced by the plaintiff explanatory of the conveyance of the property to her is uncontradicted, and, while some discrepancies are shown, the explanation in the main appears reasonable and straightforward, and sufficient to overcome the presumption arising from the fact that the transaction was between husband and wife. That the money loaned by the plaintiff was derived from a sale of property which she had received as a gift from her husband is immaterial, because the gift was made when he was solvent and not contemplating insolvency, and was not excessive in view of his circumstances at the time. *Morse v. Raben,* 27 Neb. 145; *Jones v. Clifton,* 101 U. S. 225; *Sexton v. Wheaton,* 8 Wheat. (U. S.) 227. The plaintiff was one of her husband's creditors and he had a right to make a preference in her favor. *Clarke Drug Co. v. Boardman,* 50 Neb. 687; *National Bank of Commerce v. Chapman,* 50 Neb. 484.

In view of the evidence and the law governing this case, as we understand it, the plaintiff is entitled to the relief prayed. It is therefore recommended that the decree of the district court be reversed and the cause

remanded, with directions to enter a decree in favor of the plaintiff.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff.

JUDGMENT ACCORDINGLY.

CHARLES S. FRYER, APPELLEE, V. WILLIAM I. FRYER, APPELLEE; COLUMBIA NATIONAL BANK ET AL., APPELLANTS.

FILED OCTOBER 4, 1906. No. 14,684.

1. **Deeds: VALIDITY.** Where a grantor places his deed on record for the purpose and with the intent of passing title to his grantee pursuant to a valid agreement between them, actual manual delivery and formal acceptance are not essential to the validity of the conveyance. Following *Issitt v. Dewey*, 47 Neb. 196.
2. **Evidence** examined, and *held* to bring the case within the foregoing rule and to sustain the findings of the trial court.

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

Wilson & Brown, A. J. Sawyer and *N. Z. Snell,* for appellants.

George A. Adams, contra.

ALBERT, C.

This is an appeal from a decree of foreclosure whereby the lien of plaintiff's mortgage is given priority over the respective judgment liens of the two banks, defendants herein. The mortgage is in the form of an absolute conveyance to the plaintiff by the defendant, William I.

Fryer, and his wife of certain real estate in the city of Lincoln, was signed and acknowledged by the grantors on the 22d day of April, 1901, and was filed for record on the 28th day of April, 1902, by William I. Fryer, who had retained it in his possession after it was signed and acknowledged, and after it was recorded, was forwarded to him at Denver, Colorado, where he had taken up his abode. Plaintiff resides in the state of Iowa. On the 18th day of December, 1902, each of the defendant banks brought an action against William I. Fryer, who was the fee owner, and caused a writ of attachment to issue which was levied on the premises covered by the mortgage. In each of these cases judgment was given in favor of the plaintiff therein and an order entered for the sale of the premises for the satisfaction of the judgment. In the present suit the contest is between the plaintiff and the two banks as to the priority of their respective liens, and is now narrowed down to the single question whether there had been a delivery of the mortgage to the plaintiff before the levy of attachments on the property. The two banks join in an appeal, and contend that, while the evidence shows the mortgage was signed, acknowledged and recorded some time before their attachments were levied, it is insufficient to sustain a finding that it was delivered to the plaintiff before that date.

Appellants' contention seems to be based on the fact that the plaintiff never saw the mortgage nor had actual manual possession of it until after this suit had been pending for some time, and long after the levy of the attachments. But the authorities are uniform that actual manual delivery is not essential to give effect to a deed. In *Issitt v. Dewey,* 47 Neb. 196, it was held that, where the grantor places his deed on record for the purpose and with the intent of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance. In the case at bar the evidence is conclusive that at the date of the mortgage deed the mortgagor, William I. Fryer, was indebted to the

plaintiff on two notes, aggregating $5,000, for borrowed money, and that at the time such indebtedness was contracted it was agreed between the parties that William I. Fryer should convey the property in suit to the plaintiff as security for the debt, and file the conveyance for record. William I. Fryer testified on behalf of the plaintiff, and, while portions of his testimony would indicate that he had no clear recollection of what he did with the instrument after it was forwarded to him at Denver, toward the close of his testimony he testified positively that it had been forwarded to the plaintiff before the date of a certain payment made by him, which was made September 21, 1902, and almost three months before the attachments were levied. It was after learning of this testimony that plaintiff made search and found the instrument among his papers. His statement, received in evidence as a part of his testimony, accounting for his failure to discover it earlier, is to the effect that it must have been received by another member of his household and placed among his papers during his absence from home. The record further shows that at least two months before the attachments were levied William I. Fryer had importuned the plaintiff to reconvey a portion of the mortgaged premises to the latter's wife, and that plaintiff had refused to do so. The evidence, we think, is amply sufficient to show that the instrument was placed on record by William I. Fryer with the intent and for the purpose of passing the title to the plaintiff, and to render evidence of an actual manual delivery and formal acceptance unnecessary, under the rule announced in *Issitt v. Dewey, supra.*

The appellants further contend that, even if it be found that the mortgage deed had become effective previous to to the levy of their attachments, still they should have priority with respect to one of the lots included therein because of an alleged agreement between the plaintiff and William I. Fryer, whereby the former agreed, in consideration of the payment of a substantial portion of

the mortgage debt, to reconvey such lot and release it from the lien of the mortgage. There is no evidence tending, even remotely, to show such an agreement, save a bare claim to that effect put forward in a letter written by William I. Fryer to the plaintiff. And, even were such claim given the force of evidence tending to establish the agreement, there is an utter want of evidence to show that William I. Fryer had complied with the conditions upon which the reconveyance was made contingent, according to his own letter in which his claim thereto was put forth for the first and only time.

The decree of the district court seems amply sustained by the evidence, and we recommend its affirmance.

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

THOMAS F. KECKLER, APPELLANT, V. MODERN BROTHERHOOD OF AMERICA, APPELLEE.

FILED OCTOBER 4, 1906. No. 14,440.

Directing Verdict. Where there is an entire failure of proof to sustain a material allegation of the plaintiff's petition put in issue by the answer, the action of the district court in directing a verdict for the defendant will be sustained.

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

A. N. Sullivan, for appellant.

Byron Clark, contra.

JACKSON, C.

The defendant is a fraternal-beneficial association organized under the laws of Iowa with authority to transact

business in Nebraska. It issues certificates providing for indemnity in case of death, benefits for total disability occasioned by old age, and accident insurance. It is, by its charter, exempted from liability for accident to those of its members who, when received into the order, have a defective hand, arm, foot, leg or eye. On March 15, 1901, the plaintiff applied for membership through a local lodge in Cass county. The medical examination disclosed that his right eye was injured when he was an infant six years of age, causing a loss of sight in that eye. On April 8, following the application and examination, the supreme lodge issued its certificate containing provisions for payment of death loss and permanent disability benefits. Through that portion of the certificate providing for accident insurance had been drawn diagonally ten red ink lines. The certificate in this condition was delivered to the plaintiff, who on September 14, 1903, sustained an injury resulting in a broken leg. He claimed liability on the part of the association, which was denied; hence this action.

The petition, omitting the formal parts, is as follows: (1) "The plaintiff complains of the defendant, for that at the time hereinafter mentioned defendant was and now is a corporation duly organized with lawful authority to issue policies of life and accident insurance. (2) On or about the 8th day of April, 1901, said defendant, in consideration of the sum of $15, made and delivered to plaintiff its policy of insurance in writing on the life of plaintiff and against accident, in the sum of $100, if plaintiff should by accident receive a broken leg. (3) On or about the —— day of September, 1903, and while said policy was in full force, said plaintiff received a personal injury, accidently resulting in a broken leg, being an accident insured against by said policy of insurance. (4) The plaintiff duly performed all the conditions of said policy on his part to be performed. (5) Plaintiff has made due proof of said accident in conformity with the requirements of said policy. Said policy is hereto at-

tached, marked Ex. A, and made a part of this petition. (6) No part of said insurance has been paid, and there is now due from defendant to plaintiff thereon the sum of $100, together with interest thereon at 7 per cent. from October 1, 1903, on which sum plaintiff prays judgment, with costs of suit."

The answer put in issue the liability for accidents. At the close of the evidence the court directed a verdict for the defendant and entered judgment thereon. The plaintiff appeals.

As we view the case, the court took the only course justified by the evidence. It seems to be the contention of the plaintiff that the red lines in the contract are for ornamental purposes. This is hardly consistent with the fact. The purpose of these lines on the face of the certificate was clearly to eliminate the feature of accident insurance as provided by the fundamental law of the order. It is an ordinary method of reforming printed blanks to conform to actual contracts. The action being to recover on an express contract, the written instrument failed to sustain the plaintiff's cause of action, and we recommend that the judgment appealed from 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.

FIRST NATIONAL BANK OF PLATTSMOUTH, APPELLEE, V. ESTATE OF FREDERICK D. LEHNHOFF, APPELLANT.*

FILED OCTOBER 4, 1906. No. 14,444.

Contract: CONSIDERATION. The doing of that which the creditor of a corporation is required by law to do before he could maintain an action against the stockholders of the corporation is not a sufficient consideration to support a promise.

* Rehearing allowed. See opinion, p. 307, *post*.

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

A. L. Tidd and *Matthew Gering,* for appellant.

Byron Clark, contra.

JACKSON, C.

The Plattsmouth Brick and Terra Cotta Manufacturing Company, a corporation doing business in Cass county, was insolvent. It was indebted to the First National Bank of Plattsmouth and the Bank of Cass County. The First National Bank contemplated an action against the stockholders of the manufacturing company for the purpose of recovering the amount of indebtedness of that company to the bank. Certain of the stockholders of the manufacturing company submitted to the creditor banks the following written proposition: "Plattsmouth, Neb., May 11, 1903. We, the undersigned stockholders, do each agree with each other and the First National Bank of Plattsmouth and the Bank of Cass County of Plattsmouth, or either of them accepting in writing hereon this proposition, that if they will refrain from suing us as stockholders of the Plattsmouth Brick & Terra Cotta Manufacturing Company until the assets of said corporation are exhausted in suits by each of them to be maintained upon their respective notes against the corporation, when the deficiency is ascertained, we will prorate among ourselves, based upon our holdings of stock in said corporation, such deficiency and pay it. J. G. Richey, W. J. White, F. D. Lehnhoff, A. Baxter Smith, D. Hawksworth, Fred Goos per Henry, T. H. Pollock, H. B. Burgess." The First National Bank accepted the proposition, and proceeded in an action at law in the district court for Cass county to recover judgment against the manufacturing company, upon which execution was issued and all of the assets of the company sold. In the meantime F. D. Lehnhoff, one of the stockholders whose name

appeared on the agreement with the bank, died, and his estate was in process of administration. The First National Bank filed its claim against Lehnhoff's estate for the proportionate share due the bank under the terms of the written agreement. From an order allowing the claim an appeal was taken to the district court, where a jury trial resulted in a verdict and judgment favorable to the bank. The executrix appeals.

It appears from the evidence that Lehnhoff's subscription to the capital stock of the manufacturing company was fully paid up, and that his name on the written agreement was in fact signed by his son, George Lehnhoff. It is urged on appeal that the written agreement was without consideration and for that reason unenforceable, and that George Lehnhoff was without authority to sign the written agreement on his father's behalf. The claim of want of consideration for the written agreement arises out of an application of section 4, art. XI*b* of the constitution. The provisions of that section are: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." It is said that the agreement to defer action against the stockholders until the remedy against the corporation had been exhausted is a contract to observe the mandatory provisions of the constitution; that no action on behalf of the bank could be maintained in any event against the stockholders until judgment had first been obtained against the corporation and the corporate property exhausted. The constitutional provision invoked on behalf of the estate has been several times construed by this court. In *Globe Publishing Co. v. State Bank,* 41 Neb. 175, an action against the stockholders of a corporation direct for a debt due from the corporation, where it was claimed the liability of the stockholders arose by reason of a failure to

publish the annual notice provided by statute of its existing debts, it was held that the creditor had no right of action against the stockholders until it had reduced its claim against the corporation to judgment and until execution issued upon such judgment had been returned wholly or in part unsatisfied. In *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353, an action to enforce the special liability of a stockholder in a banking corporation under the provisions of section 7, art. XI*b* of the constitution, it was held that before the special liability could be enforced against individual stockholders the assets of the corporation must first be exhausted under the provisions of section 4 here being considered; while in *State v. German Savings Bank,* 50 Neb. 734, it was held that before the receiver of a banking corporation could enforce the liability for unpaid subscription of the capital stock the indebtedness of the bank must first be ascertained in a proper proceeding for that purpose.

It does not appear with any degree of certainty upon what theory the banks originally claimed liability of the stockholders of the manufacturing company for the debts of the company, but the inference is that they supposed the stockholders to be liable generally for the debts of the insolvent corporation and that they might maintain an action against the stockholders direct because of that liability. It does not seem to be important, however, in the determination of this case. Our decision, to be in harmony with the former holdings of this court, must be that the bank on its own behalf could not maintain an action against the stockholders without first exhausting its remedy against the corporation itself. The agreement on the part of the bank to do that which by law it was required to do before it could maintain an action against the stockholders was not a sufficient consideration to support the promise in its behalf. *Esterly Harvesting Machine Co. v. Pringle,* 41 Neb. 265.

It is urged by the appellee, however, that the contract is enforceable independently of the consideration already

discussed, because of its being a mutual promise between the stockholders with each other for the benefit of the bank. The rule thus invoked is applicable to subscription lists where a common object is to be obtained for the benefit of all. The case of *Armann v. Buel,* 40 Neb. 803, does not support the contention of appellee. There the purpose of the subscription was to procure for a railroad corporation a tract of land for the erection thereon of a depot and switch grounds. The agreement was with the owner of the land, who conveyed the title to the railroad company, and the improvements contemplated were made. It is said in the body of the opinion: "A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of a right, will be sufficient to sustain the promise." None of these elements are found in the contract in suit.

Again, it is urged that the contract provided for an extension of the time of payment of the debt of the company and that such extension affords a sufficient consideration, but that fact does not appear. On the contrary, the agreement clearly contemplated immediate action against the corporation.

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

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed June 7, 1907. *Judgment of reversal adhered to:*

1. Contract: CONSIDERATION. An agreement without benefit, advantage or detriment to either party is without consideration and not enforceable.

2. Mutual promises, not for a common object or purpose and not mutually advantageous or detrimental, are without consideration and not enforceable.

AMES, C.

This case has been submitted upon reargument from a former decision pursuant to an opinion by Mr. Commissioner JACKSON, *ante*, p. 303. No new or additional propositions of law are urged, and the recital of facts contained in the former opinion is accepted by counsel as sufficiently complete and accurate, so that a restatement of them is at present uncalled for. The principal contention is that this court erred in holding that the agreement copied in a former opinion lacks a consideration requisite to render it obligatory as a contract. Counsel urges that an adequate consideration is furnished by an obligation assumed by the plaintiff to exhaust by suits the corporate assets of the brick company for the satisfaction of the claim of the former. But we do not find a promise, expressed or implied, to that effect in the agreement. The promise, although by its terms requiring acceptance by the plaintiff and, in fact, expressly accepted by it, is, notwithstanding, wholly unilateral by the subscribing stockholders. The document would not have been changed in legal effect if it had been made to read: "Although the First National Bank and the Cass County Bank, which are creditors of the Plattsmouth Brick and Terra Cotta Manufacturing Company, have and can acquire, by reason of that fact, no legal claim against us or any of us, who are stockholders of that company, yet, if said banks, or either of them, shall see fit to pursue their or its legal remedies against the company to the exhaustion of its assets, we will contribute proportionally to our holdings of stock to the payment of so much of such indebtedness as shall not be satisfied by the means aforesaid."

It is obvious that, tested by the rule announced by this court in *Armann v. Buel*, 40 Neb. 803, a promise in that form, or substantially to that effect, can have no legal

force. It is left, as it was, before the agreement was made, a matter of choice to the creditor whether it will pursue the course suggested, and a matter of indifference, as respects stockholders' liability, whether it does so or not. The creditor promises no suspension or forbearance of any legal right or remedy which it has, or is capable of acquiring, against either the corporation or its stockholders, or any of them, and as a corollary the subscribers to the agreement obtained no benefit or advantage by their promise.

The second proposition urged by counsel, and also discussed and decided in the former opinion, that the agreement is enforceable as expressing mutual promises by the subscribers to contribute toward the attainment of a common object, seems to us to be ill founded, for the reason that it is apparent, as well from the nature of the transaction as from the language of the instrument, that the object that the subscribers had in view was to make provision for the satisfaction of supposed legal obligations against them severally which, in fact, did not exist. The object was not to accomplish a mutual and common purpose, but to be discharged from supposed separate and several personal liabilities of each. If such liabilities had existed; the stockholders' obligation as such would have continued unaffected, and could have been enforced, and could have been satisfied, in exactly the same way and for precisely the same amount in the presence as in the absence of the agreement, and against such liability the agreement would have provided no indemnity, so that the essential element of mutuality is wholly lacking.

We recommend, therefore, that the former decision of this court be adhered to.

JACKSON and CALKINS, CC., concur.

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

REVERSED.

MARY A. TOPPING, APPELLANT, V. JACOB COHN, APPELLEE.

FILED OCTOBER 4, 1906. No. 14,549.

Second Appeal: LAW OF CASE. Points necessarily determined by this court upon appeal become the law of the case and will not ordinarily be departed from in the further course of litigation. *Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530.

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

John C. Watson, for appellant.

W. F. Moran and *A. P. Moran, contra.*

JACKSON, C.

A judgment favorable to the plaintiff was reversed by a former opinion of this court, in which the case is fully stated. *Topping v. Cohn,* 71 Neb. 559. Amended pleadings were filed in the district court presenting substantially the same issues, excepting a plea of former adjudication in the answer. A second trial resulted in a judgment for the defendant, and the plaintiff appeals.

The evidence taken at the former trial, with additional evidence affecting only the question of adverse possession, is the basis of the present judgment. We are asked to review our former opinion, but find no satisfactory reason for doing so. No facts were adduced from the additional testimony tending to strengthen the plaintiff's case or change the conclusions formerly reached, and adhering to the established rule that points necessarily determined by this court upon appeal become the law of the case and will not ordinarily be departed from in the further course of litigation, we recommend that the judgment be affirmed.

DUFFIE, C., concurs.

ALBERT, C., not sitting.

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

AFFIRMED.

CENTRAL GRANARIES COMPANY, APPELLANT, V. LANCASTER COUNTY, APPELLEE.*

FILED OCTOBER 18, 1906. No. 14,314.

1. **Taxation:** ASSESSMENT. Section 66, ch. 73, laws 1903, provides that grain brokers shall be assessed on the average amount of capital invested in the business for the preceding year, instead of on the amount of grain on hand on the first day of April.
2. **Double Taxation.** Taxing a grain company on its real estate and other tangible property, on the amount of its average capital, and also on the grain contained in its elevators on the first day of April, is, to the extent of the grain so assessed, double taxation, from which, in a proper proceeding, the courts will grant relief.

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

Hall, Woods & Pound, for appellant.

F. M. Tyrrell, J. L. Caldwell and *C. E. Matson, contra.*

BARNES, J.

The appellant is a corporation organized and existing under the laws of this state. Its main office is in Lincoln, Lancaster county, Nebraska. It owns and operates about 50 elevators, mostly in this state, and its business is that of buying, cleaning, selling and shipping grain to the various markets of the world. It owns and operates elevators at some 40 different towns, situated in several different counties throughout the state. It also owns elevators at Lincoln, Rulo and Holdrege, called cleaning elevators. The manner of conducting its business is such that in handling, disposing of and shipping its grain to market it all passes through the cleaning elevators at Lincoln, Rulo or Holdrege. It buys no grain at its Lincoln cleaning elevator, and the grain that goes through this elevator comes from some of its outside elevators, situated

See opinions on rehearing, pp. 319, 327, *post.*

in other counties in different parts of the state, where it is originally purchased. In 1904 appellant made its return under oath to the assessor of Lancaster county of its property subject to taxation in that county, which return was in substance as follows:

Capital stock	$350,000	
Surplus and profits	70,000	
Total valuation of stock		$420,000
Property assessable in Lancaster county (itemized)	$83,265	
Property outside of Lancaster county otherwise assessed	336,735	
Total valuation of stock		$420,000

The assessor of Lancaster county raised the amount of the property scheduled as assessable in that county $10,000 to cover the grain in appellant's elevator in the city of Lincoln. Objections thereto were filed with the board of equalization. A hearing was had, the objections were overruled, and the case was appealed to the district court, where a trial resulted in the dismissal of the appeal, an affirmance of the order of the board of equalization, and an appeal therefrom was taken to this court.

The bill of exceptions establishes the following uncontroverted facts: First. The appellant's capital stock and surplus was $420,000, which represented all of its property. $83,265 worth of that property was situated and taxable in Lancaster county. The remainder of it, to wit, $336,735 worth, was not used in Lancaster county, but was located and used in other counties. Second. The appellant's Lincoln elevator is a transfer and cleaning house, and no grain goes into that elevator except grain in transit, on its way from the company's elevators situated in other counties. Third. That the item in controversy, to wit, $10,000 worth of grain in appellant's Lincoln elevator, was grain in transit. It is claimed by appellant that this grain in transit was purchased by, or represented a part of,

the $336,735 of capital located and used in counties other than Lancaster, and had theretofore been assessed in said counties. It is contended by the appellee that the testimony does not sustain the foregoing claim.

We find that F. D. Levering, appellant's assistant treasurer, testified in substance that the capital stock and surplus of the company in 1904 was $420,000; that his company owned and was then operating from 45 to 52 elevators in Nebraska and Kansas, 8 or 9 in Kansas and the remainder in Nebraska; that the only elevator the company had in Lancaster county, outside of Lincoln, was at Waverly; that the only place the company buys grain in Lancaster county is Waverly; that it was not using any of its capital in buying grain in Lincoln; that the company bought no grain in Lincoln; that all of the capital of the company other than the amount invested in permanent improvements was used in buying grain at points outside of the city of Lincoln; that all of its capital, except the listed items reported and assessed in Lancaster county, to wit, $336,735, was invested in grain elevators and grain outside of Lancaster county; that all of this portion of the company's capital was located and was being used by the company in other counties than Lancaster; that it was invested in elevators, cribs, scales, gas engines and grain.

E. J. Herring, who was in the employ of the appellant company, and who has especial charge of the assessment of its property in this state and Kansas, testified as follows: "Q. At the company's outlying elevators in other counties than Lancaster county, do you know what method the assessors of the various counties adopted in arriving at the amount of capital stock the Central Granaries Company was using at these elevators located in these various counties? A. Yes, sir. Q. State to the court whether or not the assessors where these various elevators were located arrived at the amount of capital that you had invested at that particular point by taking into consideration the whole year's business, or volume

of business for the year, in getting at the amount, the average amount of capital invested to the first day of April? A. Yes, sir. Q. And for those computations do you furnish the books to the assessors at these various places? A. Yes, sir; we did. Q. And did they take into consideration, in arriving at the amount of capital that you had invested there, all of the grain purchased during the year, from April 1, 1903, to April 1, 1904? A. Yes, sir."

On cross-examination the witness further stated: "A. They took the average capital, the corn cribs, the elevator, the gas engine, and the bank account, and the horse power, and any other tangible property we had. Q. And added it to the average capital or subtracted it? A. Added it to the average capital. Q. Did they add the real estate? A. We have no real estate. Elevators are personal property. Q. They added the personal property to the average capital? A. Yes, sir. Q. And the cash on hand? A. Yes, sir. Q. And the grain on hand? A. No, sir; I did not say that. Q. That is a part of your tangible property, is it not? A. No, sir; that is figured in this average capital."

The only evidence introduced by the appellee was the testimony of the county assessor, the instructions of the state board to county assessors, and the intructions of the Lancaster county assessor to his deputies. None of this testimony in any way controverts the evidence above quoted. From the foregoing, we are of opinion that the evidence is sufficient to show, *prima facie,* that appellant was assessed in the various counties where it was engaged in business (outside of Lancaster county) to the amount of $336,375 as average capital employed in its business in said counties.

The appellant contends that the action of the taxing officers of Lancaster county in adding $10,000 to its schedule for grain in its Lincoln elevator subjects it to double taxation to that extent, and the district court erred in refusing to grant it the relief prayed for by its

petition. If its property in other counties had theretofore been assessed for taxation in the manner provided by law, then its contention is well founded.

That appellant is a grain broker, within the meaning of section 66, ch. 73, Laws 1903, commonly called the "New Revenue Law," and should be assessed in the manner therein pointed out, is beyond question. That section reads as follows: "Every person, company or corporation engaged in the business of buying and selling grain for profit, shall be held to be a grain broker, and shall, at the time required by this act, determine under oath the average amount of capital invested in such business, exclusive of real estate or other tangible property, assessed separately, for the preceding year, and taxes shall be charged upon such average capital the same as on other property. For the purpose of determining the average capital of such grain broker the county assessor or deputy assessor shall have the right to inspect all books of account and the checkbooks of such grain broker and shall determine and fix the amount of such capital by such inspection." As we have already seen, the appellant, before it returned its schedule to the assessor of Lancaster county, listed $336,375 of its average capital in other counties. And this brings us to the consideration of what is meant by, or included in, the words "average capital" as used in the section of the revenue law above quoted. It would seem that the legislature recognized the difficulty which would arise in attempting to assess grain brokers on the amount of grain on hand on the first day of April. If that method of assessment should be adopted, then it is safe to say that grain dealers would have no grain on hand at that time. If the plan of assessing the capital stock of corporations dealing in grain, wherever such company or corporation is located, should be adopted, we might find all of such capital was invested in grain, stored in various elevators throughout the state, which would have to be assessed where located and this would result in

double taxation. So, in order to adopt a method which should be fair to the broker, and at the same time tax the whole of his property, the legislature, by the section in question, provided for taxing the average capital used in the business for the previous year, wherever such business was conducted. In order to properly carry out that plan, it further provided that the broker should furnish his checkbooks and all his books of account to the assessor, who is required to determine "by inspection" the amount of such average capital. The law does not, in terms, provide for the taxation of both the average capital used by the broker in his grain business and the grain purchased therewith, and such could not have been the intention of the legislature. The average capital used in the business evidently means the money used in buying grain, and all of the money so used. By taxing this average capital, it makes no difference what amount of grain is on hand on the first day of April of each year. On that day it may have all been sold, and yet, by taxing the average capital in the place of the grain, the broker would be required to contribute his just proportion to the public revenue. The average capital today may be represented by money, while tomorrow it may be invested in grain purchased and on hand. Again, on the next day the grain may be sold, and the proceeds thereof will then constitute a part, or perhaps the whole, of the broker's average capital. Again, it would seem that the legislature has made a clear distinction between that part of the broker's capital used in the business, that is to say, in buying, selling, shipping and handling grain, and that part of it invested in other tangible property convenient and necessary for the purpose of conducting such business. We take it that by the words "average capital" is meant so much of the whole capital of the grain broker as is used in handling grain, and not that portion which is invested in tangible property for the purpose of successfully conducting the grain business. In construing a statute the court should, if

possible, give a reasonable meaning to all of its words and phrases. All tangible property must be taxed as such, unless otherwise provided by law. The law in question clearly implies that all of the tangible property of the grain broker, except grain purchased and sold, must be taxed as such. And to hold that the grain which he may happen to have on hand must be taxed, in addition to the average capital used in its purchase, would render the words "other tangible property assessed separately" meaningless. That grain is tangible property no one will dispute. But it seems clear that it was intended by the legislature that it should not be embraced in the words above quoted. So, we are of opinion that the average capital required to be listed by the grain broker was intended by the legislature to cover and stand in the place of all grain purchased and sold by him. To assess such grain, in addition to the assessment of his average capital, as above defined, amounts in fact to double taxation, which no one will contend is permissible.

It is contended by the appellee that the rule that a taxpayer who appeals to the district court from the action of the board of equalization in matters of assessment has the burden to show that the decision of the board is erroneous, requires us to affirm the judgment of the district court. It is a sufficient answer to this contention to say that the evidence contained in the record establishes *prima facie,* at least, the contention of the appellant; and where there is no dispute as to the facts, and the record shows forth the action of the board, together with the evidence on which such action is based, the matter then becomes a question of law to be determined by the reviewing court, and not one of fact. In such a case the presumption invoked has no application. It appears from the record that the reason given by the assessor for adding the $10,000 in question to the appellant's schedule was that he was not satisfied that the appellant's average capital had been properly assessed in other counties throughout the state. Neither the

assessor nor the board of equalization of Lancaster county has any power or jurisdiction to review the action of the assessors and boards of equalization in other counties, and when it was shown by the appellant's evidence that it had listed its average capital in such outside counties, and it was there assessed, that fact raised the presumption that the taxing officers of such counties had correctly performed their duty.

Lastly it is contended by the appellee that the tax on the average capital of grain brokers, provided for by the section in question, is a tax on the business, or, in other words, a business tax, and is not a property tax within the meaning of the constitution; that, in addition to such business tax, it was proper, and it had the right, to tax the grain in question. That the legislature has the power to provide for taxing the business of grain brokers is beyond question. But that it has not done so seems clear. A business tax is defined to be a tax on the privilege of carrying on a business or employment, and is commonly imposed in the form of an excise tax on the license to pursue the employment. It is usually a specific sum, or a sum whose amount is regulated by the business done, or the income or profits earned. Such, for instance, as 2 per cent. on the gross premiums of an insurance company, or any given per cent. on the volume of the particular business conducted. The statute in question, however, makes no such provision. On the contrary, it states in plain terms that "taxes shall be charged upon such average capital the same as on other property." The average capital is thus treated as property, and the amount of the tax levied thereon depends upon the rate of taxation for all state, county and municipal purposes, the same as though levied on real estate, or other tangible property.

We are therefore of opinion that the district court erred in dismissing the appeal herein, and that the appellant is entitled to the relief sought.

For the foregoing reasons, the judgment of the district

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

REVERSED.

LETTON, J., dissents.

The following opinion on rehearing was filed July 12, 1907. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Taxation:** CLASSIFICATION: CONSTITUTIONAL LAW. The classification (laws 1903, ch. 73, sec. 66) of "every person, company or corporation engaged in the business of buying and selling grain for profit" as a "grain broker," for purposes of assessment, and providing for the assessment of the average capital of grain brokers, is not unconstitutional.

2. ———: ASSESSMENT. The amount of capital invested in a business ordinarily is the whole amount of money invested and used in carrying on that business. The average capital of a grain dealer is defined by section 66 of the revenue law to be the average amount which the total investment in the business of the grain dealer exceeds the tangible property which can be separately assessed at the time of assessment. The assessor, from the examination pointed out in the statute, must find what capital of the business there was, if any, from time to time during the tax year, not including in the computation the tangible property on hand and capable of assessment at the time of assessing, and the average or mean of the capital so found is to be assessed as property in addition to the tangible property.

SEDGWICK, C. J.

The facts in this case, so far as the essential questions of law involved are concerned, may be found in the former opinion, *ante,* p. 311. A rehearing was granted, new briefs have been filed, and oral argument heard thereon. The plaintiff is a corporation engaged in buying and selling grain. It operates a large number of grain elevators located in different counties of the state. Among them it operates an elevator in Lancaster county for the transfer and cleaning of grain in transit to eastern markets. It returned to the assessor of Lancaster county for taxation a statement of its capital stock, its surplus

and profits, and an itemized statement of its tangible property assessable in Lancaster county. In this statement was not included $10,000 worth of grain in its Lincoln elevator. The assessor added this property to the schedule, and whether he erred in so doing is the question to be decided. Section 66, ch. 73, laws 1903, is quoted in the former opinion. Several of the provisions of this section have been debated in this case.

1. The section of the statute under consideration provides that "every person, company or corporation engaged in the business of buying and selling grain for profit, shall be held to be a grain broker," and it is largely from this provision that attorneys for defendant draw their argument that the taxation imposed by this section on average capital is an occupation tax. Section 1, art. IX of the constitution, authorizes the legislature to tax peddlers, auctioneers, brokers, and others named, "in such manner as the legislature shall direct." It is, however, not to be supposed that the purpose of the legislature in providing that a dealer in grain "shall be held to be a grain broker" was to enable it to levy an occupation tax upon grain dealers, and so evade the above provision of the constitution. To determine what class of persons may be included in the term broker for the purpose of levying an occupation tax, it would be necessary to ascertain the true definition of the word broker as that term was generally understood at the time of the adoption of the constitution. The legislature could not enlarge its power to levy an occupation tax by extending the meaning of the words employed in the constitution beyond their reasonable and generally accepted significance when adopted. A different purpose is apparent in adopting a specified term to be applied to dealers in grain. The fact that the words "grain broker" are used instead of some other words is of no significance. By this section the legislature provides a manner to ascertain the value of the property of "persons, companies or corporations engaged in the buying and selling

of grain for profit," in some respects different from that employed in general. They are classed as grain brokers and are to be assessed upon their average capital. If the legislature has power to "require the assessment of average capital" instead of the assessment of the property owned at some specified time, and if there is a special and sufficient reason for using this method in assessing those engaged in buying and selling grain for profit, a reason that does not apply to assessment in general, then there can be no doubt of the power of the legislature to so classify such interests for assessment. *Rosenbloom v. State,* 64 Neb. 342. Some reasons are stated in the former opinion for assessing average capital invested in dealing in grain. In addition to what is there said, we quote the following very apt suggestions from the plaintiff's brief: "But the capital invested in the business is continually changing form from money to grain and then back to money. Hence, if taxed as grain, at a time when the grain on hand had all or for the most part been sold, but a fraction would be reached; if taxed as money, when a large amount of grain was on hand, but a fraction would be reached; if assessed both as grain and as money, the one being a mere form of the other, the same capital would be taxed twice; if assessed by taking the sum of the grain and the money on hand April 1, the danger would be that money is easily juggled and concealed. If an arbitrary date were taken, there would be a likelihood that grain brokers would have very little grain on hand and very little money on deposit on that day." It is, however, contended in the defendant's brief that the assessment of average capital is not the assessment of property within the meaning of the constitution, and therefore it is beyond the power of the legislature to provide for assessment in that manner, except as an occupation tax. This argument is not convincing. It will be conceded that the legislature might require the property owned by the taxpayer on the 1st day of May, or on any other specified day of the year, to

be valued for taxation, as well as to select the 1st day of April for that purpose. The requirement of the constitution is that the value of the taxpayer's property for assessment shall be "ascertained in such manner as the legislature shall direct." Property necessarily fluctuates in value, and ownership is changed from one person to another, so that if the average value during the year could be accurately ascertained it would furnish the true basis for taxation. Taking the value of each individual on some given day of the year is supposed to be, in ordinary cases, the most practicable method of reaching a just equalization of property for assessment.

2. A very important question in this case, and one that has been very much debated, is what is meant by average capital as used in the statute referred to. In our former opinion it was said: "Average capital used in the business evidently means the money used in buying grain, and all of the money so used." It is also considered in that opinion that grain in elevators is a part of the average capital of the business, and, being assessed as a part of such average capital, it cannot be separately specifically assessed. This led us to the conclusion that the assessor erred in placing the grain in plaintiff's elevator in Lincoln upon the schedule for assessment. The average capital of the business is generally understood to mean all of the money invested in the business and would include all property used in the business.

There is in New York a general statute which provides that nonresidents of the state doing business therein shall be taxed on the capital invested in such business as personal property. It was held that by the words "capital invested in such business" was meant the money which was put into the business with the intention that it shall be used in the transaction of the business. *People v. Feitner,* 67 N. Y. Supp. 893. This is the ordinary use of the word capital. Does the use of these words in this section of the statute and the connection in which they are used require us to infer a different meaning? It is

said that the words "other tangible property" used in connection with the words "real estate" in specifying what shall not be included in the average capital must be construed to mean other *like* tangible property, that is, other tangible property of the character of real estate. It is suggested that the connection in which these words are used and the subject matter of the section indicate this intention of the legislature. The constitution requires that all property of every nature be in some manner valued for taxation, and be required to bear its share of the public burden. The construction thus contended for does not seem to be more usual and natural than to consider the words used as equivalent to "all tangible property including real estate." If, in ascertaining the average capital for assessment as such, we include all tangible property that is capable of being assessed separately, including real estate, and deduct the value of all property already separately assessed, the object of the legislature would seem to be reached. This is analogous to the manner prescribed for assessing banks. The value of the capital stock of a bank for assessment is ascertained by taking the sum of its liabilities from the sum of its assets, and from this valuation of the stock, when so ascertained, is deducted for assessment the value of the tangible property that is otherwise assessed which enters into the valuation placed upon the assets. This, of course, gives the same valuation of capital stock for assessment as would be obtained by excluding all tangible property otherwise assessed in computing the assets of the bank, and we see no reason for giving any other construction to the section of the statute under consideration. This construction of the statute requires that the tangible property of a grain broker, including real estate, be assessed in precisely the same manner as the property employed in other ways is assessed.

A similar idea is found in the statutes of the state of Louisiana. Their revenue act contains the following declaration: "In assessing mercantile firms the true intent

and purpose of this act shall be held to mean, the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a fair average on the capital, both cash and credit, employed in the business of the party or parties to be assessed." The supreme court of that state had occasion to construe that statute in *Swift & Co. v. Board of Assessors,* 115 La. 322, 38 So. 1006. The court also discussed the meaning of the words "a fair average on the capital employed in the business." A definition of average is quoted from the Standard Dictionary: Average is "obtained by calculating the mean of several amounts, numbers, or quantities." The plaintiff in that case was engaged "in buying and selling of fresh meat shipped to the city of New Orleans in carload lots." The question involved was as to the proper method of ascertaining the fair average capital employed in the business. In the statement of the case by the court the following language occurs:

"In assessing the merchandise or stock in trade, the taxing authorities took the total amount of meat received during the previous year, and divided the same by 12, thus reaching what is called the 'average' value of stock on hand during the previous year." In regard to this method of obtaining the average value, the court said: "The assessors' contention is that the monthly receipts of merchandise during the year should be added together, and their sum total divided by 12. This method necessarily counts merchandise sold during the month as a part of the stock on hand at the end of each month, and is an assessment of the amount of purchases, rather than of stock on hand. As the money or credits received from sales are also taxable, this method would lead to double taxation, in contravention of the express provisions of section 7, which declares that no property shall be taxed twice in the same year.' Under the assessors' rule, a merchant whose entire capital is $5,000 might be taxed on $10,000 on stock in trade, if he each month sold $5,000

of merchandise, and reinvested the proceeds in other merchandise. On the same theory a butcher or other vendor of perishable commodities, who buys and sells from day to day $100 worth of stock, might be taxed on $3,000 of capital. The circumstance that the merchant or dealer turns over his capital every six months, or every month, or every day does not affect the question. His capital, plus profits or minus loss, remains the same; and it is this average capital, represented by merchandise, money, rights, credits, which the statute intends to reach."

The court said that their statute does not provide "that the capital *eo nomine* shall be assessed, but that all the elements which enter therein shall be so valued as to represent a fair average of the capital employed." The same may be said of our statute, if we look to its intention and results. While our statute names "average capital," and declares that "taxes shall be charged" thereon, and so, when taken literally, requires average capital to be assessed in that name as an element of property, still the result and the manifest intention of the statute is to enable the assessing authorities to ascertain the proper assessable value of all the property used in the business. We may then say with the Louisiana court: "The meaning of the proviso, therefore, is that the average amount of stock, money, rights, credits, etc. (including real estate), which may vary through the year, shall be taken as the basis of assessment." That is, all property, real and personal, used in the business is to be assessed, and if the assessor, from the examination of the books, etc., which the statute requires him to make, finds that the property so assessed is less than the property (including money on hand or in bank, and real estate) in use in the business at other times during the preceding tax year, he ascertains from the books of account and checkbooks of the grain broker how much more property has been in use in the business at other times during the year than is so used at the time of the assessment. For instance, if he finds no grain, or but a small quantity, on

hand at the time of the assessment, and that at other times during the year there have been large quantities of grain on hand, and that all other elements of the net assets of the business have remained substantially constant, he should ascertain from the accounts, etc., how much this excess of grain on hand has been from time to time, and the average or mean of this excess (in the statute denominated "average capital invested") should be added to the assessment of the visible and tangible property. The true average capital would be the average sum invested in the business from time to time. The statute, however, points out the way to find what part of the true average capital has not been reached by the assessment of the tangible property found at the time of assessment, and requires the assessment to be corrected by adding this excess. If this is the true interpretation of the statute, then the assessor should value for taxation all of the property of the person, company or corporation engaged in the buying and selling of grain for profit, including real estate and grain on hand, and should then ascertain, in the manner that the statute points out, whether the average capital invested in the business during the preceding tax year was greater than the capital which he has so assessed, and, if he finds that it was greater, then he should add to his assessment such excess of the average capital invested. In this case the plaintiff omitted from its statement of property for taxation the amount of its grain on hand, and the assessor properly added this amount to the assessment. By its judgment the district court approved of this action on the part of the assessor and was right in so doing.

The judgment heretofore entered in this case is vacated and the judgment of the district court affirmed.

JUDGMENT ACCORDINGLY.

BARNES, J.

For the reasons given in our former opinion, I dissent from the foregoing conclusions.

The following opinion on motion for rehearing was filed October 16, 1907. *Rehearing denied:*

1. **Taxation:** AVERAGE CAPITAL. The average capital of grain dealers, mentioned in section 66 of the revenue law (laws 1903, ch. 73), is not the average of the total capital used in the business, but is the excess of such capital over the real estate and other tangible property which can be viewed by the assessor and "assessed separately."
2. **Average capital** is not average purchases, nor average sales, and cannot be found by adding together the amount of purchases or the amount of sales during the year, and dividing the sum by an arbitrary divisor.
3. **Average capital** is the average of the amount of cash and all other property of every kind used in carrying on the business; and, if there is an excess of this average of capital over the amount of real estate and other tangible property that can be viewed by the assessor, then such excess is to be added for assessment.

SEDGWICK, C. J.

The appellant has filed in this case a brief in support of a motion for a rehearing. From this brief it appears that the opinion herein is not at all understood by counsel for appellant. Speaking of the opinion the brief says: "It is vague, hazy, indefinite, and muddy as it can be, and I speak respectfully. It furnishes no definite rule or guide that can be followed either by the assessor or the grain broker." The case is one of very much importance. The opinion is supposed to be a guide for assessors in all parts of the state in assessing grain dealers. If the court has failed to so state its views as to enable the learned and able counsel for appellant to understand them, it would seem to be desirable to attempt to make the opinion clearer, so that assessors, who are not supposed always to possess the legal acumen of appellant's counsel may be able to understand the construction which the court attempts to give to this statute. Counsel understand that the average capital of a grain dealer is to be found by adding together all the purchases

of grain during the year and dividing the total amount by some indefinite number selected at random. An extended illustration of this proposition advanced by counsel is given in the brief, and we will quote it in full as a basis of our explanation of the views of the court. It is as follows: "Let me give a practical concrete illustration of this proposition, for the purpose of testing its accuracy, and of showing that the above statement is correct. Let it be admitted that the volume of business at Friend, Nebraska, for the year 1905, was $65,000, that is, that there was purchased at that point by the appellant during the year 1905, altogether, $65,000 worth of grain. This was made up of a great number of items that were purchased during the year and is the aggregate of all of the different purchases made by that company at that point during the year. Now, if we use 20 as the divisor for the purpose of getting the average capital on any given day (I take 20 as the divisor because that is the number used in this county and many others), I shall get the average capital, which will be $3,250. Now, suppose one of the items that goes to make up the $65,000 is a $5,000 purchase of grain which is still in the elevator at the date of assessment. Should this grain be assessed separately as tangible property? If so, then the assessment would stand thus:

Average capital	$3,250
Amount on hand as tangible property	5,000
Total assessment	$8,250

Can it be successfully contended by anyone that in this method or process you have not assessed the $5,000 of grain twice, once as average capital and once as tangible property?" This proposition of counsel shows two important particulars in which the court has been misunderstood:

First. We do not consider that average capital can be found by adding the total of purchases during the year and dividing that amount by any number whatever,

much less by an indefinite number selected at random. If the grain dealer should purchase $10,000 worth of grain each day during the year, or on each one of 300 days during the year, and should sell the grain so purchased on each succeeding day, the total amount of purchases would be $3,000,000, and if we select the divisor at random, say 20, "because that is the number used in this county and many others," we would have an average capital of $150,000, whereas the capital needed for such transactions during the year would be only $20,000. The amount received for the second day's sale could be used for the third day's purchase. It is very plain that the average of the purchases would not be the average of the capital invested, and this fundamental error runs through the entire brief. The average capital could not in any event be ascertained by using an arbitrary divisor. In the above demonstration taken from the appellant's brief the divisor 20 is used "because that is the number used in this county." Manifestly counsel would have as readily accepted any other number as a divisor. If he had happened to have selected 25 as a divisor the average capital would have been $2,600 instead of $3,250. If he had taken 12, the number of months in the year, as a divisor, as was done in the Louisiana case cited in the opinion, the average capital would have been $5,416.66⅔; and, again, if he had selected 52 as a divisor, the number of weeks in the year, the average capital would have been $1,250. Manifestly the average capital used in a given business cannot be ascertained by such methods.

Second. Counsel understands the opinion to mean that the average capital used in the business is to be ascertained by some method and is to be assessed at all events, and, in addition to this average capital, the real estate and all tangible property is to be assessed also, whereas the view of the court is that all tangible property of a grain dealer is to be assessed in precisely the same manner as the property of other persons and corporations is assessed. In addition to this, the assessor is to ascer-

tain whether this result is a fair assessment of the grain dealer's property used in the business. If he finds no grain or cash on hand, and all other elements of the property used in the business remain substantially constant during the year, it would be manifest that by assessing the tangible property found by the assessor he would not have reached all of the property used in the business. It is only in such case that he is required to assess average capital, and it is not the total average capital that he is to assess, but it is the average amount of capital invested in the business, exclusive of real estate and other tangible property assessed separately. If the real estate and other tangible property which is assessed is not equal to the money and property used in the business on an average during the year, then he is to add to the value of the real estate and tangible property an assessment of the average amount of capital in excess of the real estate and tangible property. This average amount of capital in excess of the real estate and tangible property he is to determine from the books of account and checkbooks, as pointed out in the statute. In determining this excess of capital above the amount which he finds as tangible property, he is not confined to the purchases of grain nor to the sales of grain, nor is he to use arbitrary divisors. If the grain dealer is to be assessed only upon the property in sight on any given day, and we suppose that he is dishonest enough to seek to avoid taxation, his cash and grain can be so manipulated by him as to bring about that result. If, on the other hand, we suppose (which would, of course, generally be the case) that he is honest and does not resort to manipulation, then he might be in some cases unjustly taxed. But the law does not assume that he will accumulate grain on the first day of April for the purpose of swelling his assessment. There are, of course, manifest difficulties in the way of accurately determining in all cases the average amount of capital used during the year in excess of the real estate and other tangible property which the assessor can view on the first

day of April. The legislature evidently supposed that this difficulty in determining the excess of the capital used is not so great as to make it necessary to allow grain dealers to escape a fair assessment by placing their grain and cash beyond the view of the assessor on the first day of April. No scheme of assessment is perfect. If it comes as near an exact equality of assessment as the circumstances of the case will admit, and no manifest injustice is done, it is all that is required.

We think that the statute in question meets this requirement, and that the construction which we have given it is the correct one.

The motion for rehearing is

OVERRULED.

HERMAN STEINKUHLER V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1906. No. 14,648.

1. **Criminal Law: JEOPARDY.** To constitute a former jeopardy, it must appear that the defendant was put upon trial before a court having jurisdiction, upon an indictment or an information sufficient in form and substance to sustain a conviction, and that the jury were impaneled and sworn, and thus charged with his deliverance.
2. **Intoxicating Liquors: ILLEGAL SALE: EVIDENCE: INSTRUCTIONS.** In a prosecution under section 20, ch. 50, Comp. St., for keeping intoxicating liquors for sale in violation of law, the possession of such liquors by the accused is presumptive evidence of guilt in the district court, as well as before the examining magistrate, unless the accused shall satisfactorily account for and explain the possession thereof, and that they were not kept for an unlawful purpose, and it is not error for the district court to so instruct the jury.
3. **Criminal Law: INSTRUCTIONS.** Where, in a criminal prosecution, the court has instructed the jury that the state must prove all of the material averments of the information, naming them, beyond a reasonable doubt, it is not error to afterwards instruct that the burden of proof to establish one of such material averments is

on the state, without again qualifying such statement by the words "beyond a reasonable doubt."

4. ———: ———. It is not error for the court to refuse to give an instruction relating to the matter of a crime for which the defendant is not on trial.

5. Evidence examined, and found sufficient to sustain the verdict.

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

W. F. Moran and *A. P. Moran,* for plaintiff in error.

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

BARNES, J.

It appears from the record in this case that on the 7th day of November, 1904, a complaint was filed before the county judge of Otoe county, charging the plaintiff, Herman Steinkuhler, hereafter called the defendant, with a violation of section 7170, Ann. St., by unlawfully keeping intoxicating liquors for sale. He was arrested, brought before the court, and in due time a preliminary examination was had, which resulted in his being bound over to appear at the next regular term of the district court to answer to said charge. On February 6, 1905, the county attorney of Otoe county filed an information in said court, charging him with a violation of said section; and on the 14th of that month a jury was regularly impaneled to try the cause. After the state had introduced all of its evidence and rested its case, the defendant moved the court to dismiss the information, and discharge him, for the reason that the complaint did not state a cause of action. The court overruled the motion; the defendant rested his case without the introduction of any evidence, and thereupon the county attorney asked leave to file an amended information, which was granted. A juror was withdrawn, and the case was continued until the next regular term of court. Thereafter the county attorney filed an amended information, to which the defendant interposed a plea in

bar, which set out the former information in full, and alleged that the defendant had been theretofore placed in jeopardy by reason of the former proceedings. The state demurred to this plea; the demurrer was sustained, and the defendant excepted. Thereafter a jury was impaneled, and the cause tried, over the defendant's objections. The trial resulted in a conviction; the defendant was sentenced to pay a fine of $100 and costs of the prosecution, and, to reverse said judgment, he has brought the case here by petition in error.

1. Defendant first contends that the court erred in sustaining the state's demurrer to his plea in bar. It appears from the record that the original information charged the defendant with a violation of the section of the statute above mentioned, upon information and belief only. The charging part thereof was as follows: "Be it remembered that A. A. Bischof, county attorney in and for Otoe county, and in the second judicial district of the state of Nebraska, who prosecutes in the name and by the authority of the state of Nebraska, comes here in person into court, at this, the February term, A. D. 1905, thereof, and, for the state of Nebraska, gives the court to understand and be informed that he has reason to believe, and does believe, that intoxicating liquors, to wit, beer, whiskey and alcohol were unlawfully and wilfully kept by one Herman Steinkuhler, in a certain one story frame building (describing it) in the village of Burr, in said county, * * * and that said liquors above described were intended to be, and were, then and there being, by and under the direction of said Herman Steinkhuler, unlawfully and wilfully sold." It will be observed that the information above mentioned, in form and substance, was the same as the one in *Sothman v. State,* 66 Neb. 302, where it was said:

"An information upon which the party charged is to be put on trial, which, instead of charging an offense in positive terms, merely charges that the county attorney 'has reason to believe and does believe' that the acts con-

stituting the offense have been committed by the accused, is vulnerable to a demurrer."

So, it seems clear, that the original information in this case was insufficient to charge the defendant with the commission of any offense against the laws of this state. The rule is fundamental that a prosecution had upon an information which does not charge a person with a crime is no bar to a subsequent prosecution upon a valid information. Maxwell, Criminal Procedure, p. 566. To show a former jeopardy it must appear that the party was put upon trial before a court having jurisdiction, upon an indictment or an information sufficient in form and substance to sustain a conviction, and that the jury was impaneled and sworn, and thus charged with his deliverance. 17 Am. & Eng. Ency. Law (2d ed.), p. 584; *Dulin v. Lillard,* 91 Va. 718. So, we are of opinion that the trial court did not err in overruling the defendant's plea.

2. As a second cause for reversal, defendant claims that the trial court erred in giving instruction No. 5, on his own motion, which is as follows: "It is admitted by the defendant on the stand that certain whiskey was found in his possession on the 7th day of November, 1904, and, so far as the allegation in this information charges the defendant with having whiskey in his possession for the purpose of selling the same on said day, you are instructed that, after the state has shown that the defendant was in the possession of whiskey in his place of business on the 7th day of November, 1904, the law presumes that such liquors were kept in violation of law, and unless the defendant has satisfactorily accounted for, and explained the possession of such liquors, then you would be justified in believing that said whiskey was kept for the purpose of sale. But if, after weighing all the testimony on this point, you believe that the defendant has satisfactorily accounted for the possession of said whiskey, and believe it was not kept by him for the purpose of sale, then you should return a verdict of not guilty, so far as keeping whiskey is concerned."

It is argued by the defendant that the jury should have been instructed, in substance, that, after weighing all of the evidence, if the jury believed that the possession of the whiskey by the defendant had not been satisfactorily accounted for, and that the jury still believed, beyond a reasonable doubt, that the whiskey was kept for the purpose of sale, then the defendant should be found guilty. This is all the argument made in support of the second assignment of error, and we are left somewhat in doubt as to the defendant's reason for urging it. It may be said, however, that this question seems to have been settled by *O'Neill v. State,* 76 Neb. 44, and *Peterson v. State,* 64 Neb. 875, where it was held that, "in a prosecution under section 20, ch. 50, Comp. St., for keeping intoxicating liquors for sale in violation of law, the possession of such liquors by the accused is presumptive evidence of guilt in the district court, as well as before the examining magistrate, unless the accused 'shall satisfactorily account for and explain the possession thereof, and that they were not kept for an unlawful purpose.'"

Again, the record discloses that the court gave the usual charge as to the presumption of innocence, and a further instruction that the jury must be convinced of the truth of all of the material averments of the information (setting out and describing them) beyond a reasonable doubt. So, reading all of the instructions together, we are unable to see how the defendant could have been prejudiced by the instruction complained of.

3. Defendant's third complaint is that the court erred in giving instruction No. 7, on his own motion. By that instruction the jury were told that beer and whiskey were both intoxicating liquors, as that term is used in the statutes. But whether or not the liquids introduced in evidence, known as "Ino," "Hop Ale," and "Nerve Tonic," are intoxicating liquors was a question of fact to be determined from all of the evidence in the case, and the burden of proof was on the state to establish the fact that such liquids were intoxicating liquors, and that said liquors

contained sufficient alcohol to produce intoxication when drunk by an individual. The objection urged against this instruction is, in substance, that the jury should have been told that the state must prove that the liquids therein described were intoxicating beyond a reasonable doubt. It is a sufficient answer to this objection to say that by the instruction complained of the court did not attempt to inform the jury that the fact in question could be established by a preponderance of the evidence. The jury were told that the burden of proof was on the state to establish this fact, and by paragraph No. 3 of the instructions the court had already stated that this fact must be established by the state beyond a reasonable doubt. So, it seems clear that the jury could not have been misled by this instruction.

4. The fourth assignment of error urged is that the court erred in not giving instruction No. 3, requested by the defendant, which is as follows: "You are instructed that, before you can convict the defendant for selling intoxicating liquors without a license, the state must establish, beyond a reasonable doubt, that the liquors introduced in evidence, except the whiskey, contained alcohol in sufficient quantities to produce intoxication of a human being." This assignment cannot be sustained, because the prosecution in this case was not one for selling intoxicating liquors without a license, but was for the crime of keeping such liquors for sale, as defined by section 7170, Ann. St. The instruction treats alone of the crime of selling intoxicating liquors without a license, and has no application to the charge on which the defendant was being tried, and the evidence adduced in support of it. Therefore it seems clear that the court was justified in refusing to give this instruction.

5. Lastly, it is contended that the evidence is insufficient to sustain the verdict. It would serve no useful purpose to quote the evidence contained in the record in order to show that it was sufficient to sustain the conviction. It is enough to say that at the time the warrant

was issued the officer who served it seized, and took charge of, a large quantity of whiskey, consisting of some 30 or more quart bottles; some liquid contained in ordinary beer bottles, labeled "Ino"; a considerable number of such bottles, labeled "Hop Ale," and a liquid called "Nerve Tonic." Now, while some of the defendant's witnesses testified that these liquids were not intoxicating, yet others testified that they had purchased them of the defendant frequently, at his place of business; that they looked like beer and tasted like it, although they did not think they were intoxicating. The bill of exceptions also contains the testimony of the state chemist, who analyzed samples of these liquors and found that all of them contained more or less alcohol, some of them containing about the same proportion thereof as was found by him in "lager beer." It should be stated, at this point, that the defendant alleges error in the introduction of this evidence, but as no reasons are given to support this assignment we are constrained to disregard it, and hold the evidence to be competent. It was further shown that the bottles of liquids in question were procured by the defendant of the "Storz Brewing Company" of Omaha, Nebraska, and that he receipted at the express office for, and took into his possession the whiskey which was found in his place of business. It is true that the defendant's brother and another witness testified that the whiskey belonged to them, yet, notwithstanding this testimony, the jury were justified in disbelieving these witnesses, and in finding that the liquors belong to, and were kept by, the defendant with the intent and for the purpose of unlawfully selling them.

From an examination of the whole record, we are satisfied that the defendant had a fair trial; that the evidence was sufficient to sustain the verdict; that the record contains no reversible error, and therefore the judgment of the district court is

AFFIRMED.

WILLIAM H. THOMPSON, APPELLEE, V. LYDIA E. POPE, EXECUTRIX, APPELLANT.

FILED OCTOBER 18, 1906. No. 14,566.

1. **Executors: APPEAL: BOND.** An executor and residuary legatee who has given a bond to pay the debts and legacies of the testator under section 5030, Ann. St., may appeal from a judgment of the county court allowing a claim against the estate without giving an appeal bond.
2. **Cases Distinguished.** *Buel v. Dickey*, 9 Neb. 285, and *Herdlitchka v. Foss*, 2 Neb. (Unof.) 428, distinguished.

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

Patterson & Patterson, F. Dolezal and *J. J. Sullivan*, for appellant.

C. G. Ryan and *Martin & Ayres, contra.*

LETTON, J.

James H. Pope died in 1904 in Merrick county, Nebraska, leaving a last will and testament which was duly probated in that county. In the will, his wife, Lydia E. Pope, was named as executrix and also as the residuary legatee of the estate. Upon the probate of the will she gave a bond as executrix and residuary legatee to pay the debts and legacies of the estate under the provisions of section 5030, Ann. St., which bond was duly approved. A number of claims were filed against the estate, one being that of William H. Thompson, the appellee, for legal services rendered the estate. The claim was objected to by the executrix, she alleging that such services had been rendered by the claimant for her personally and were not proper matters of charge against the estate of James H. Pope. After a hearing the county court found for the claimant and allowed the claim for the sum of $1,047.99 against the estate. From this judg-

ment the executrix appealed to the district court, but did not file any bond upon such appeal, relying upon the provisions of sections 4825 and 5190, Ann. St. Section 4825 provides generally for appeals from a probate court in all matters of probate jurisdiction, and further provides that an executor, administrator, guardian or guardian *ad litem* shall not be required to enter into bond in order to enable him to appeal. Section 5190 provides as follows: "Every executor or administrator who may have given bond in this state with surety agreeable to law, shall be authorized in all cases of appeal from one court to another, by him made, to prosecute the same without filing an appeal bond. Such appeal to be prosecuted to the district court as appeals are now taken from courts of justices of the peace." The question to determine is whether a residuary legatee who has given the bond prescribed by section 5030 to pay the debts and legacies, instead of the bond provided for in section 5029 —which applies to executors generally, and is conditioned in substance that they shall return an inventory of the estate, shall administer the same according to law and out of the same pay the debts and legacies, render an account within one year, and perform all orders and decrees of the probate court—may appeal from the allowance of a claim against the estate by the county court without executing and filing an appeal bond.

The general rule with reference to giving of appeal bonds by executors and administrators is that wherever the judgment which is appealed from affects only the assets of the decedent in his hands for administration, no appeal bond is required, for the giving of a bond might render the executor personally liable to an amount greater than the assets of the estate in his possession; but that where an executor or administrator is in a position in which a personal judgment or decree can be rendered against him and in which he may or ought to be responsible out of his own funds, then he should be required to give an appeal bond the same as other persons. *Wade*

v. American Colonization Society, 4 S. & M. (Miss.) 670; *Pugh's Exrs. v. Jones,* 6 Leigh (Va.), 299; *Erskine v. Henry,* 6 Leigh (Va.), 378; *Pugh v. Ottenkirk,* 3 Watts & Serg. (Pa.) 170. In this case the court say: "It is the character of the suit that determines this right (to appeal without bond), and that does not depend on the mere naming the party as executor or administrator in the process or declaration, but upon the cause of action as developed in the pleadings, and whether the recovery is sought in a representative or individual capacity." In *Rhea v. Brown,* 4 Neb. (Unof.) 461, it is said: "It may well be said that section 44, ch. 20, and section 234, ch. 23, Comp. St., rightly construed mean only that executors, administrators and guardians are not required to give bond when they appeal in their representative capacities, and that when they appeal in their personal capacities, from judgments rendered against them personally, they should give bond the same as other litigants." It is contended by the appellee that an executor and residuary legatee who has given a bond to pay the debts and legacies becomes vested with a perfect title to the entire estate of the deceased, free from any claim, lien or charge of creditors and legatees; that the estate of the deceased becomes virtually administered upon by the giving of the bond, and that the executor becomes personally liable for all the debts. It is argued that this being so the claim is in effect against him personally, and that he is no more entitled to an appeal without bond than any other litigant. On the other hand, it is contended that the representative character of the executor does not cease with the giving of a bond to pay the debts and legacies as residuary legatee; that the estate is not thereby administered, but that the only effect of the bond is to relieve the executor from the filing of an inventory or accounting for the estate, and that the ordinary course of administration, so far as the filing and allowance of claims is concerned and the closing of the estate, proceeds as in other cases.

In this connection it is important to consider the statutory provisions with reference to the rights of creditors in the estate of a deceased person. Section 4988, Ann. St., provides: "Every person of full age and sound mind, being seized in his own right of any lands, or any right thereto, or entitled to any interest therein descendable to his heirs, may devise and dispose of the same by his last will and testament in writing; all such estates not disposed of by will shall descend as the estate of an intestate, being chargeable in both cases with the payment of all debts." Section 5017 is as follows: "All the estate of the testator, real and personal, shall be liable to be disposed of for the payment of his debts and the expenses of administering his estate." By succeeding sections it is provided in substance that the estate given by the will to any devisees or legatees shall be held liable to the payment of the debts and expenses, in proportion to the amount of the devise or bequest; that devisees or legatees who shall, with the consent of the executor, have taken possession of the estate before such liability is settled, shall hold the same subject thereto and shall be held to contribute for the payment of debts and expenses. The statute further provides that if the personal estate not disposed of by last will shall amount to more than $500, and more than certain allowances to the widow and children of the deceased, the same shall be applied to the payment of debts, funeral expenses and expenses of administration, and that the residue, if any, shall be distributed among the heirs. It will be seen, therefore, that as to both the real estate and the personal property of the deceased, the statute especially provides that the estate is charged with and subject to the claims of creditors.

The view has been taken that the giving of a bond to pay the debts and legacies by an executor and residuary legatee administers the estate; that the bond is substituted for the assets, and that creditors and legatees thereafter cannot follow the estate, but are confined to a remedy upon the bond. It is said by the appellee that

this question has already been determined in this state in the cases of *Buel v. Dickey,* 9 Neb. 285, and *Herdlitchka v. Foss,* 2 Neb. (Unof.) 428. *Buel v. Dickey* was an action upon the bond of a residuary legatee, and it was claimed by him that unless assets were shown to have come into his hands he was not liable upon the bond, but it was held that the bond was conclusive evidence of assets with which to meet the debts and legacies of the testator, citing *Jones v. Richardson,* 5 Met. (Mass.) 247, and *Colwell v. Alger,* 5 Gray (Mass.), 67. It is true it is said in the opinion that by giving this bond he "deprived the court of all control over his management of the property, which, whether much or little, practically became his own to dispose of as he saw fit. The probate court, it is true, could fix a time within which the payment of debts and legacies should be made, and order it done; but beyond this the court could not go, except upon proper application to authorize forcible collection by suit on the bond," but this was unnecessary to the decision and is mere dictum. In *Herdlitchka v. Foss,* 2 Neb. (Unof.) 428, two points were decided: First, that the legacies in controversy were made a charge upon the land of the deceased; and, second, that the bond which was given did not comply with the provisions of the statute with reference to the giving of bonds by an executor and residuary legatee under section 5030, Ann. St. There was an obiter remark that when a bond under this section is given the bond takes the place of the property, so far as creditors and other legatees are concerned, citing *Buel v. Dickey, supra,* but the point was not in issue in this case and was not decided. The question, then, is of first impression in this state.

In order to a proper determination of the question involved, a consideration of the history of the statutory provisions is necessary. Our statutes with reference to the collection and administration of the estates of deceased persons derive their origin in the first place from Massachusetts. It has been said that they have come to us by

way of New Hampshire, Michigan and Wisconsin, but, whether this be so or not, the fact is that, while modifications and changes have been made in matters of procedure, a number of the most important provisions are identical with laws of Massachusetts which date back for many years. The first statute with reference to wills in the colony of Massachusetts Bay was passed in 1649. This act provided penalties for neglect upon the part of executors to make probate of wills in the county court or to file a true inventory of the deceased's estate, and against any one alienating or embezzling any lands or goods of the deceased, and provided for the administration of intestate estates. In 1685, as an addition to this act, it was provided that the court might summon any executor who had offered a will for probate, requiring him to give bond with sufficient sureties for paying all debts or legacies, or to make and exhibit unto the court upon oath a just and true inventory of the estate of the deceased, and provided penalties for refusal or neglect. Ancient Charters and Laws of Massachusetts Bay, p. 204. A later statute, 2 Anne (1703), Ancient Charters and Laws, *supra,* p. 377, reenacted the foregoing provisions and prescribed other matters of procedure in case of defaulting executors, and a still later law imposed penalties for the failure to file inventory. 12 Geo. II (1738), Ancient Charters and Laws, *supra,* p. 518. The first Massachusetts case which has any bearing upon the question is *Gore v. Brazier,* 3 Mass. *523, *542, decided in 1807. A Massachusetts statute of 1783 provided that the real estate of any deceased person shall be liable to be taken by execution upon judgments recovered against executors or administrators for debts of the deceased, the same as in other cases. Another provision enacted that the real estate of which any person should die seized should be chargeable with all the debts of the deceased, and that an executor who is residuary legatee might give bond to pay the debts and legacies. The executor and residuary legatee of the estate of one Gill, who

had given bond to pay the debts and legacies, sold certain real estate belonging to the estate. Afterwards a creditor of the deceased recovered judgment against the estate and caused an execution to be levied on the real estate. The action was for a breach of the covenants in the deed made to the purchaser by the residuary legatee. It is said by Chief Justice Parsons: "The last objection that remains to be considered, is grounded on the probate bond given in this case for the payment of debts and legacies. And if the giving of this bond is in law a discharge of the testator's lands from a lien imposed upon them by the statute, the defendant must recover. But we are all of opinion that this bond is no discharge of the lien. Before the provincial statute of 1 and 2 Anne, ch. 5, all executors were bound to inventory and account for the testator's estate. This was necessary to furnish the creditors and legatees with evidence to charge them with waste, if any assets were embezzled or unaccounted for. When the legacies are specific, or to be ascertained without inventory or account, and the executor be the residuary legatee, if the legatees and creditors can be secured, there can be no occasion for an inventory or account. In this case that statute relieves the executor from this duty, on his giving bond with sureties to the judge of probate for the payment of the debts and legacies. * * * This lien remains in full force, and the benefit to be derived by a creditor or legatee from the bond is merely cumulative."

In 1819 *Thompson v. Brown,* 16 Mass. *172, was decided. The court held that a license to an executor and residuary legatee who had given bond to pay debts and legacies was void; that such an executor ought not to have a license to sell the real estate and discharge his obligations; that a license was unnecessary since he could convey a perfect title without it. It was said by Parker, C. J., speaking of the bond given by the residuary legatee: "The bond so given is the security intended by the statute for the creditors and legatees. * * * We think it clear that no executor, who is residuary devisee, and

has acquired a perfect title to the estate, by giving the bond required by law, for the payment of the debts and legacies, ought to have license to sell the real estate, to discharge his obligations. Nor is such license in any degree necessary; as an executor, so circumstanced, may sell without such license." The statement that the executor "acquired a perfect title to the estate," while in one sense true, was unnecessary to a decision of the case and has been the source of much confusion in later decisions.

Again, in 1827, in the case of *Clarke v. Tufts,* 5 Pick. (Mass.) 337, following the case of *Thompson v. Brown, supra,* the same judge writing the opinion said: "The legislature has made such bond a substitute for the estate of the deceased, so that there is no longer any lien upon the real or personal estate of the testator by his creditors, after the executors shall have conveyed the same to *bona fide* purchasers. Whether such creditors, having obtained judgment and execution against an executor who has given such bond, can levy upon the estate devised, before any conveyance of it, may be matter of inquiry in some future action." The doctrine of these cases, so far as they hold that the bond is substituted for the estate and the lien discharged, is apparently inconsistent with *Gore v. Brazier, supra,* and neither opinion cites that case. Yet, in view of the above query in *Clarke v. Tufts, supra,* it may be questioned whether Judge Parker intended his language to convey the meaning which has been ascribed to it.

In 1834 a commission which had been appointed to revise the statutes of Massachusetts reported to the legislature, and in this report embodied a statutory provision that the giving of a bond to pay the debts and legacies by the residuary legatee should not discharge the lien upon the real estate of the testator for the payment of his debts, except where sold to a *bona fide* purchaser. With reference to this new section the commissioners say in their report: "This section is new in terms; but it is in con-

firmation of the construction given by the supreme court to the corresponding provision in the statute of 1788, ch. 24. See 3 Mass. *523, *542. The exception as to land conveyed by the executor is not noticed in that case but it may be necessary in order to enable the executor to pay the debts and legacies according to the condition of his bond. * * * When an administrator has sold a piece of land belonging to the intestate for the payment of his debts, that piece is forever discharged from the lien, although the proceeds of the sale should be wasted, and never applied to the payment of the debts. The creditors in such a case have the remedy against the administrator and his sureties. So in the case under consideration, the land having been once lawfully appropriated for the payment of the debts, ought to be forever discharged; and the creditors should look for their remedy to the executor and his sureties." The recommendation of the commission was embodied in the revised statutes of 1836 as section 4, of ch. 63, so that since that time in Massachusetts the statutory provision has been declaratory of the law as announced in *Gore v. Brazier, supra.* The first case arising after the passage of this act was *Jones v. Richardson,* 5 Met. (Mass.) 247, decided in 1842, wherein it is said by Chief Justice Shaw: "Perhaps it may be said, that by the express condition of the bond, the executor and his sureties are bound to pay the debts and legacies; that creditors or legatees have a remedy, in the name of the judge of probate, on the bond; and that such is their only remedy. But this is opposed, both by the statute and by a long course of decisions." Later Massachusetts cases, *Holden v. Fletcher,* 6 Cush. (Mass.) 235; *Alger v. Colwell,* 2 Gray (Mass.), 404; *Colwell v. Alger,* 5 Gray (Mass.), 67; *National Bank of Troy v. Stanton,* 116 Mass. 435; *Thayer v. Winchester,* 133 Mass. 447; *Jenkins v. Wood,* 134 Mass. 115; *Jenkins v. Wood,* 140 Mass. 66; *Collins v. Collins,* 140 Mass. 502, are in harmony with *Gore v. Brazier, supra.* In *Collins v. Collins,* 140 Mass. 502, decided in 1885, Collins had made a will by which

he gave his wife, who was residuary legatee and executrix, a legacy of $500 in trust for his granddaughter, an infant. The executrix gave the statutory bond to pay the debts and legacies. She died without having paid the legacy, and the defendant was appointed administrator *de bonis non* with the will annexed, and gave the usual bond. The legacy not having been paid, the granddaughter sued the administrator *de bonis non* for its payment. The first defense relied on was that by the giving of the statutory bond the wife made the estate her own, and that it could not be followed into the defendant's hands by a legatee having no specific charge upon it. The court held that this defense could not be maintained, saying: "It is true that the bond made the executrix personally liable upon it to the extent of its penalty, but that is not sufficient to exonerate the estate unless the statutes provide that it shall have that effect. We find no such provision. On the contrary, it is expressly provided in the Pub. St. ch. 129, sec. 7, that the lien of creditors on the real estate shall be preserved, except on such part as shall be sold to a *bona fide* purchaser for value." It will be seen therefore that the supreme court of Massachusetts has finally returned to the sound basis of *Gore v. Brazier, supra,* and has apparently ignored the language in *Thompson v. Brown* and *Clarke v. Tufts, supra.*

In the state of Michigan, one of the first cases in which the proper construction of the statutory provisions under consideration was involved was *Hatheway v. Weeks,* 34 Mich. 237. This case was decided in 1876, and held, citing *Colwell v. Alger, supra,* that the giving of a bond as residuary legatee and executor to pay the debts and legacies conclusively admits assets, and that such executor by the giving of the bond became the absolute owner of the property of deceased. This case was followed in a series of cases arising out of the settlement of the estate of Gilbert Hatheway. See *McElroy v. Hatheway,* 34 Mich. 399; *Wheeler v. Hatheway,* 54 Mich. 547. These cases held in substance that by the giving of such a bond

the residuary legatee becomes the owner of the estate of the deceased, that the property is discharged from any liability for the debts of the deceased, and that the creditors and legatees cannot look to the estate of the deceased undisposed of in his hands, but must rely exclusively upon him and his bondsmen for the payment of their claims. In 1889, however, the question was reexamined in the case of *Lafferty v. People's Savings Bank,* 76 Mich. 35, and it was held by the court, two of the five judges of the court dissenting, that the title of a residuary legatee is not absolute, but is held subject to the payment of the testator's debts; that upon his removal the title to the property of the testator remaining undisposed of in his hands reverts to the estate and becomes vested in the administrator *de bonis non;* that he cannot be sued personally for a debt due from the testator, but only officially as executor; that his authority to sell real estate belonging to the estate is as executor, and not personally, and that an estate is not regarded as administered until the assets have been collected and applied as required by law or the will of the testator, and that until fully administered the probate court has jurisdiction in the matter of the proceedings. The opinion is lengthy and elaborate. It cites and examined the course of legislation and litigation in Massachusetts upon the points involved. In the dissenting opinion the argument is made that the laws of Michigan are not identical with those of Massachusetts, and that it is violating all the rules of decision to override what has been considered the law of Michigan and follow the decisions of another state, and that to overrule the prior cases would be to throw the laws as declared into confusion. The dissenting opinion further points out differences in the method of probate administration in Michigan from those prevailing in the state of Massachusetts. From this resume it appears that the courts of Massachusetts and Michigan now take the same view of the effect of these statutes. In Wisconsin, how-

ever, the doctrine of *Thompson v. Brown, supra,* is still adhered to. *Cole's Will,* 52 Wis. 591.

To give the law the effect contended for by the appellee would nullify the sections which make the estate of the deceased liable to the claims of creditors, and would substitute in many cases the uncertainty and vexation of an action upon a bond for the certainty of a recourse to the estate of the deceased remaining undisposed of in the hands of the executor. Such construction, to our mind, would be unfair to creditors. In many, and, perhaps, in most instances credit is extended upon the faith of the estate of the debtor, and with the expectation and reliance upon the part of the creditor that in case of death the property of the deceased will be subject to the payment of his just demands. The idea that the giving of such a bond removes the liability of the assets of the estate to be subjected to the payment of the debts of the testator, and substitutes therefor the personal responsibility of the executor and his sureties to the amount of the penalty in the bond, finds no support in any statute, but seems, so far as the writer can ascertain, to have taken its origin in the opinion of Parker, C. J., in the case of *Thompson v. Brown, supra,* and this doctrine was promptly repudiated by the people of the state of Massachusetts upon the recommendation of the commissioners to revise the laws. We are convinced that the reasoning of the later cases, *National Bank of Troy v. Stanton, supra,* and *Collins v. Collins, supra,* and *Lafferty v. Peoples Savings Bank, supra,* is much to be preferred to that of Chief Justice Parker or to the implications in the earlier Michigan cases. The giving of a bond to pay the debts and legacies by an executor and residuary legatee, therefore, is merely cumulative and adds the security of the bond to the provisions already made for the preservation of the rights of creditors. It is true, as was said in *Buel v. Dickey, supra,* that by the giving of this bond the executor relieved himself of the duty of returning an inventory of the estate and that the property practically became his own to dis-

pose of as he saw fit, but this does not close the administration. The condition is similar to one of ordinary administration wherein the executor has been ordered by the probate court to sell sufficient of the personal property to pay the debts. The property that he disposes of for that purpose carries with it a perfect title, but that which remains in his hands is still subject to be sold for the debts of the estate. And so with an executor who has given bond to pay the debts and legacies. If he fail to do so and there remain in his hands, undisposed of, assets of the estate, the creditor may have the same remedies against him as in other cases by citation and removal and the appointment of an administrator *de bonis non*, and may have the remaining assets applied in satisfaction of his debt. Hence, when such an executor appeals from the allowance of a claim he appeals in his representative capacity as executor, even though he has a direct personal interest in reducing the amount of the claims against the estate in order that the mass of his residuary estate may be larger. In taking an ordinary executor's bond, the county court should look to the assets and fix the penalty at an amount sufficient to guarantee a faithful administration of the trust and to account for the proceeds of the estate, but, in case of the bond of an executor and residuary legatee, the interests of the creditors and legatees are to be looked to and the bond should be ample to cover all probable claims against the estate. It is true the bond is an admission of assets, but it may be questioned whether it is an admission of assets to a greater amount than the penalty in the bond.

Upon the whole case, we are of opinion that an executor and residuary legatee who has given bond under the provisions of section 5030, Ann. St., is absolved from the necessity of giving an appeal bond in cases which involve a contest upon claims against the estate. The judgment of the district court dismissing the appeal is therefore erroneous, and it is reversed and the cause remanded for further proceedings.

REVERSED.

NINA V. WILSON, ADMINISTRATRIX, APPELLEE, V. WILLIAM WHITE ET AL., APPELLANTS.

FILED OCTOBER 18, 1906. No. 14,451.

1. **County Court:** APPEAL: JUDGMENT. Upon an appeal from a judgment of a county court rendered in a cause prosecuted before the county judge in his capacity as a justice of the peace, a recovery cannot be had in excess of his jurisdiction in that capacity.
2. **Trespass:** JOINT LIABILITY. Several owners of animals who have constituted of them a common or joint herd are jointly liable for trespasses committed by such herd.

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

John M. Tucker, E. D. Clarke and *Robert G. Easley,* for appellants.

Walcott & Morrissey, contra.

AMES, C.

This is an appeal from a judgment rendered in the district court on an appeal from a judgment of a county court in an action to recover damages for a trespass. It sufficiently appears from the transcript returned by the county judge that the suit was begun before him in his capacity as a justice of the peace. A copy of the summons is not included therein, but it appears that a bill of particulars praying judgment for $200 was filed on the 28th day of April, and that the process was issued on that day and made returnable on the 7th day of May following, and was duly served and returned within that time. The defendants appeared at the time named in the writ and proceeded to trial without pleadings on their part, and suffered a recovery for the amount demanded, from which they prosecuted an appeal to the district court. In the latter court the judge permitted a petition to be filed claiming damages in the sum of $246, for which amount

the plaintiff recovered a verdict and judgment, from which this appeal is prosecuted.

Due objection and exception was taken in a motion for a new trial to the order of the court permitting an amendment of the petition increasing the claim of damages beyond $200 and to the amount of the recovery in excess of that sum. We think the court erred in overruling the objection. The case falls clearly within the principle of *Union P. R. Co. v. Ogilvy,* 18 Neb. 638, and the cases there cited. It is evident that the county court upon the record before it was without jurisdiction to render a judgment in excess of $200, and this limitation of power adhered to the case in the district court, and has been held to be, as to the excess, a want of jurisdiction over the subject matter.

The plaintiff, as administratrix of her deceased husband, was in possession of a tract of land upon which she was cultivating a forty-acre field of corn. The defendants were in the joint, or at least common, occupation of an adjoining cattle range, and each of them owned animals going to make up a herd that pastured the range, and that committed the trespass and inflicted the damage complained of and for which the recovery was had. There is practically no dispute as to these facts, but it is objected in this court for the first time that there is a misjoinder of parties defendant, or, in other words, that the trespasses were several because of the several ownership of the animals, and that a recovery cannot be had against all the defendants in one action. We will not inquire whether the objection, if it had been valid, would have been waived by failure to make it in the lower courts or either of them. It is clear to us that it would not have been valid if it had been so made. The defendants jointly created the herd, and jointly permitted it to depasture the range and to trespass upon the plaintiff's land. It is manifestly impossible to ascertain in what degree the animals of each contributed to the resulting injury. *Jack v. Hudnall,* 25 Ohio St. 255.

We recommend that the plaintiff be required to remit, as of the date of the rendition of the judgment in the district court, all in excess of $200 and interest thereon from the date of judgment in the justice's court, and that upon her failure so to do within 30 days from this date the judgment stand reversed and a new trial granted, but that upon her having filed with the clerk of this court within the time aforesaid a remittitur to that amount the judgment stand affirmed.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the plaintiff be required to remit, as of the date of the rendition of the judgment in the district court, all in excess of $200 and interest thereon from the date of judgment in the justice's court, and that upon her failure so to do within 30 days from this date the judgment stand reversed and a new trial granted, but that upon her having filed with the clerk of this court within the time aforesaid a remittitur to that amount the judgment stand affirmed.

JUDGMENT ACCORDINGLY.

LEWIS C. MARQUIS, APPELLANT, V. TRI-STATE LAND COMPANY ET AL., APPELLEES.

FILED OCTOBER 18, 1906. No. 14,358.

1. **Sales: FRAUD: RESCISSION.** 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.

2. **Petition** examined, and *held* obnoxious to a demurrer *ore tenus*.

APPEAL from the district court for Scott's Bluff county. HANSON M. GRIMES, JUDGE. *Affirmed.*

Gardner & White, for appellant.

Wright & Wright, W. A. Dilworth and *J. E. Kelby, contra.*

OLDHAM, C.

This was an action for the rescission of a contract of sale of six shares of stock in the Winters Creek Irrigation Company, a corporation doing business in Scott's Bluff county, Nebraska, coupled with an application for an injunction to restrain the transfer of the stock on the books of the company. The material allegations of the petition, for which equitable relief is prayed, are that, at and before the sale of the shares of stock to the defendants, plaintiff was the owner of a large tract of land in Scott's Bluff county, on which he resided, and which was irrigated from the waters of the Winters Creek Irrigation Company's ditches; that the shares of stock owned by him were of the par value of $100 a share; that by reason of plaintiff being a stockholder in the irrigation company, he was enabled to assist in fixing rates for water rent to be charged by the company, and by having such rates made very low and reasonable the price of the lands owned by plaintiff and irrigated from the ditches was considerably enhanced; that for this reason his six shares of stock were of a peculiar value to him much in excess of their par value; that the defendants Leavitt and Frank, as agents and managing officers of the Tri-State Land Company, for the purpose of cheating and defrauding plaintiff in the purchase of his shares of stock, falsely represented to him that they had purchased, and owned and controlled, a majority of the shares of the capital stock of the irrigating company, and for this reason could and would control and fix the water rent to be charged by

the company, but that, notwithstanding this fact, they would pay plaintiff $700 for his six shares of stock; that the defendant Tri-State Land Company owned but a small tract of land under the ditches, and that its interest in the company would be to advance the water rent on lands irrigated under it; that if in fact the defendants had controlled a majority of the stock, plaintiff's six shares would have been of but little value and not worth to exceed $700; that plaintiff, believing and relying on the above representations, sold and assigned the stock in controversy to the Tri-State Land Company for the sum of $750, receiving in payment thereof a check on the Nebraska National Bank of Omaha; that it was specially agreed at the time of the sale that, if the defendants did not control a majority of the stock, they would redeliver the six shares of stock to the plaintiff for the amount paid for the same; that, as a matter of fact, the defendants did not own and control a majority of the shares of capital stock of the corporation; and that, when plaintiff learned such fact, he tendered back the amount of the purchase price received and demanded a redelivery of the stock. The prayer of the petition was for a rescission of the contract, and an injunction restraining the transfer of the stock on the books of the company from the plaintiff to the Tri-State Land Company. The court below sustained an objection to any testimony under the pleadings and dismissed the action. To reverse this judgment plaintiff appeals to this court.

The sole question involved is, does the petition, liberally construed, state a cause which entitles plaintiff to a recission of his contract? The theory on which plaintiff alleges a peculiar value to him in his six shares of stock in the irrigating company is that he owns a very large tract of land which is under the ditches of the company, and that his being a stockholder in the company gave him a voice in keeping down the price of water for irrigating purposes, that is, that it enabled him to enhance the value of his land at the expense of the ditch company.

The next proposition alleged is that the defendants own little land under the ditches; and that, if they control the management of the company, they will raise the price of rents for the purpose of enhancing the value of the stock of the irrigating company; and that, if defendants control the ditch, plaintiff's shares of stock would not be worth to exceed $700. There is no allegation in the petition as to how many shares of stock defendants did own, or how many shares of stock were issued by the irrigation company, but the mere conclusion that defendants did not own a majority of the stock is set forth in the petition, as well as the allegation that defendants promised that plaintiff might rescind if they did not get a majority of all the stock. There is no allegation that plaintiff did not have access to the books of the company to ascertain the number of shares of stock owned by the defendants when he sold his own shares, and there is no allegation that plaintiff was unable to purchase other shares of stock for the same price that he received for his own.

The only theory on which plaintiff's stock was of special value to him was for the purpose of preventing defendants from controlling the affairs of the company and increasing the rent charged for water on the lands under the ditch. And if, as alleged in the petition, the defendants do not control a majority of the stock, then none other than a mere theoretical injury resulted to plaintiff from the sale of his shares of stock to the defendants.

In the recent case of *Jakway v. Proudfit*, 76 Neb. 62, we had occasion to examine into the nature and character of false representations which would authorize a rescission of a contract and we there quoted with approval the rule announced in 14 Am. & Eng. Ency. Law (2d ed.), p. 140, in which it is said: "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."

We therefore conclude that the learned trial court was fully justified in holding plaintiff's petition obnoxious to a demurrer *ore tenus*, and we recommend that the judgment 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.

PORT HURON MACHINERY COMPANY, APPELLANT, V. OSCAR BRAGG, APPELLEE.

FILED OCTOBER 18, 1906. No. 14,432.

1. Evidence examined, and *held* sufficient to sustain the judgment of the trial court.
2. Sales: BREACH OF WARRANTY: REVIEW. Action of the trial court in the admission of evidence examined, and *held* not prejudicial.

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

A. J. Sawyer and *A. J. Shafer*, for appellant.

James I. Rhea, contra.

OLDHAM, C.

This was an action in replevin. The facts underlying the controversy are that in the spring of 1903 defendant Bragg purchased from the plaintiff a threshing engine, and made a payment on his contract of purchase by turning over to the company an old engine which he owned, and secured the remainder of the agreed price by executing notes in the gross sum of $1,400, payable at various times, and secured by a chattel mortgage on the engine and also on certain live stock owned by the defendant.

Default being made in the payment of the notes, the company took into its possession the engine, and demanded possession of the horses and cattle described in the chattel mortgage, which was denied, and it thereupon instituted the case at bar. Defendant answered plaintiff's petition with a general denial, and also pleaded specifically breaches of the warranty contained in the written contract of purchase, and alleged a rescission of the contract because of such breaches. On issues thus joined there was a trial to the court and jury, and a verdict and judgment for the defendant. To reverse this judgment plaintiff has appealed to this court.

The written warranty, the breach of which was alleged and relied on by defendant as a ground for rescission of the contract, contained the following condition: "If operated by competent persons," and the contest of fact raged around the question as to whether the machine failed to operate successfully because of defects in the alignment and construction of the engine, or because of the want of skill in its management by defendant Bragg. On this question there was a sharp conflict in the testimony. The evidence offered by defendant, however, tended to show that he had worked around steam threshing engines and machines for 14 years, and that he had owned and operated a J. I. Case engine for six years before the purchase of the engine in dispute; that plaintiff's agent had conversed with him as to his experience in managing threshing engines before the purchase, and knew, not only from defendant himself, but also from general inquiry, as to the extent of defendant's experience and his success in handling threshing engines before the contract was made. Under this state of the record we cannot, as urged by appellant, say that, as a matter of law, there is not sufficient evidence in the record to show that the engine was operated by competent persons. The evidence offered by the defendant tended to show that the engine did not work well from the start; that it wore heavily on the gearing and made a jarring noise, as if it

were not in correct alignment, and that on passing over soft and muddy ground the gearing broke under the strain. The evidence also shows that he made timely complaint, in substantial compliance with the terms of the warranty, of the failure of the engine to work properly, and that plaintiff's agent responded to the complaint, and attempted to adjust the alignment of the engine and put it in proper working order, but that, on a subsequent trial, it failed to work satisfactorily, and plaintiff's agent responded to a second complaint and again attempted to, or, as claimed by the plaintiff, did put the engine in proper working order. This claim, however, is denied by the defendant. It also shows that on a third notice, contained in two registered letters directed to the company at Lincoln, Nebraska, the plaintiff refused to make further repairs on the engine, and that, on the receipt of such refusal, defendant notified plaintiff that he had rescinded the contract and that the engine was at its disposal. Plaintiff objected to the evidence of the notification by registered letter directed to Lincoln, Nebraska, because the contract required notice to be given by registered letter to the general office of the company at Des Moines, Iowa. We think this objection is untenable, in view of the fact that plaintiff actually received the notices and answered them, and in its answer refused to further repair the engine, for the alleged reason that the engine was in proper condition and that the only fault was in its management by defendant. Objection is also urged against the action of the trial court in permitting the defendant to express his opinion on the merits of the engine because, it is alleged, there is no evidence tending to show that he had expert knowledge of the operation of an engine. We think the evidence already set out, as to defendant's experience in managing a threshing engine, was sufficient to qualify him to give his opinion, for whatever it was worth, on the alignment of the engine.

The six instructions given by the court on its own mo-

tion are objected to in a group, without any words tending to separate them. Consequently, under the well established rule of this court, we need only examine the first one, which properly stated plaintiff's cause of action, to overrule this objection. The only real question in issue here is as to the sufficiency of the evidence to support the verdict. We have examined the record carefully, and are satisfied that it contains competent testimony tending to establish defendant's claim.

We therefore recommend that the judgment of the trial 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.

JOSEPH RUSHO, APPELLANT, V. CHARLES U. RICHARDSON ET AL., APPELLEES.

FILED OCTOBER 18, 1906. No. 14,458.

1. **Pleading: AMENDMENT.** Action of the trial court in permitting amendment of the pleadings during the progress of the trial examined, and *held* not prejudical.
2. **Evidence examined, and *held* sufficient to sustain the judgment of the trial court.**

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

A. S. Moon, A. R. Humphrey and *E. J. Clements,* for appellant.

Beall & Shinn and *H. M. Sullivan, contra.*

OLDHAM, C.

This is an action in replevin. The facts underlying the controversy are that on the 2d day of July, 1904, a

judgment was rendered in the district court for Custer county, Nebraska, in favor of Tolef Olsen and against one Gustave W. Wilde in the sum of $2,500, and costs; that at the time of the rendition of this judgment Wilde was the owner of a stock of general merchandise in the village of Sargent in Custer county, Nebraska. On the 8th day of July, 1904, Wilde sold his stock of merchandise for $1,250 in cash to Joseph Rusho, who is the plaintiff in this action. On the 11th day of July, 1904, an execution was issued on the judgment in favor of Olsen and against Wilde, and placed in the hands of the defendant sheriff, who, by his deputy, levied the execution on the stock of goods in Sargent, formerly owned by Wilde, and then in possession of plaintiff Rusho. When the goods were seized on this execution, Rusho replevied them from the sheriff and his deputy. There was a trial to the court and jury, and a verdict and judgment for the defendant. To reverse this judgment plaintiff has appealed to this court.

When the petition was filed, defendants answered, denying "the material allegations in the plaintiff's petition," and also specifically denying in numerous allegations plaintiff's ownership. As the pleading then stood, it was defectively drawn, but amounted to an amplified general denial. After the trial of the cause had begun, the court, over plaintiff's objections, permitted defendants to file a general denial, coupled with specific allegations of fraud in the alleged purchase of the stock of goods by plaintiff from Wilde. The action of the trial court in permitting this amendment, and in overruling the plaintiff's motion for a continuance on the ground of surprise, is alleged against as error in the appellant's brief. The defective answer first filed had not been attacked either by motion or demurrer, and in a replevin action, under a general denial, fraud in the purchase of the goods by plaintiff may be shown without being specifically pleaded. The answer first filed was sufficient to inform plaintiff that defendants relied on a general denial, even though it was defectively pleaded. When the court permitted the defense

of a general denial to be properly pleaded, there was nothing in this action, standing alone, to show so much of surprise to the plaintiff as would warrant us in holding, in the absence of any other showing, that the court acted arbitrarily, and in violation of the sound discretion reposed in it, in refusing plaintiff's request for a continuance because of this alleged change in the issues.

It is next urged that the evidence is not sufficient to sustain the judgment. The evidence shows that plaintiff Rusho was engaged in the mercantile business in the village of Taylor, about 11 miles distant from Sargent; that he was not acquainted with Wilde until the day he made the purchase of the stock of goods in controversy; that plaintiff's son, the day before the purchase, advised his father to go over to Sargent and buy the goods from Wilde; that plaintiff took $1,250 in money with him and went over to Sargent, arriving there about 10 o'clock in the morning, July 8, 1904; that after arriving at Sargent and looking over the stock of goods, he offered Wilde $1,250 for it, without taking any invoice, and then telephoned to Mr. Moon, his attorney at Taylor, to come to Sargent and prepare a bill of sale for them. Mr. Moon arrived about 2 o'clock in the afternoon, and drew up a bill of sale for the entire stock of goods, which was delivered to Rusho, and Rusho had the $1,250 counted and delivered to Wilde in the presence of Mr. Moon and the railroad station agent, who had been called in to witness the purchase. The evidence shows that at the time of the transaction Wilde was insolvent, and that Rusho knew of the judgment against Wilde in the district court, but says that he did not know how much the judgment was. After receiving the bill of sale from Wilde, there is evidence that Rusho advised Wilde to get out of the country as quickly as possible and to go to the Rocky Mountains, and that, acting on this suggestion, Wilde went out into the country, and stayed all night at a farm house, and took the train next day for Bonesteel, South Dakota. There is also evidence that as soon as Rusho got posses-

sion of the stock of goods he began to dispose of them in job lots and prepare to take what was left over to Taylor. There is evidence tending to show that the stock of goods was actually worth betweeen $2,500 and $3,000.

Under all these facts and circumstances connected with the purchase of the goods, we think the evidence is sufficient to sustain the verdict of the jury, which found, in substance, that the transaction was entered into by the plaintiff with full knowledge of the fraudulent intent of Wilde in making the transfer. As these are the only alleged errors pointed out in the brief, we recommend that the judgment of the trial 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.

WILLIAM WEATHERINGTON, APPELLANT, V. ARTHUR B. SMITH ET AL., APPELLEES.*

FILED OCTOBER 18, 1906. No. 14,590.

1. **Homestead: CONVEYANCE.** Section 4, ch. 36, Comp. St., provides that the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife.
2. **Estoppel** will not supply the want of power, or make valid an act prohibited by express provision of law. *Whitlock v. Gosson*, 35 Neb. 829, followed and approved.
3. **Homestead: ABANDONMENT.** A departure from the homestead for pleasure, business or health, does not constitute an abandonment thereof. *Blumer v. Albright*, 64 Neb. 249, followed and approved.
4. ———: ———. Neither spouse can abandon the homestead for the other without his or her free consent.

*Rehearing allowed. See opinion, p. 369, *post*.

5. Vendor and Purchaser: BONA FIDES. If a party relies upon a record to establish his title to realty and to relieve him of knowledge of secret liens known to his grantor, the record itself must show a chain of conveyances which discloses a perfect title in the grantor.

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

Flansburg & Williams, for appellant.

R. L. Keester, J. G. Thompson, Henry W. Pennock and *J. E. Kelby, contra.*

OLDHAM, C.

This was an action to quiet title in a quarter section of land situated in Harlan county, Nebraska. There is no disputed fact in the record. Everything that is essential to the determination of the cause is either admitted in the pleadings or was testified to, without contradiction, at the trial in the court below. The facts established by the record are that plaintiff, William Weatherington, homesteaded the land in controversy in the year 1883, and resided thereon with his wife and minor children; that later in the same year, for the purpose of transferring the legal title from himself to his wife, he conveyed the premises to one Flansburg for the express consideration of $600, and Flansburg, as a part of the same transaction, reconveyed the premises to the wife, Mrs. Eliza Weatherington; that in 1890 Mrs. Weatherington and her husband executed a mortgage on the premises to secure a loan of $770, due five years after date; that they continued to live with their family on the premises until 1891, when plaintiff Weatherington was adjudged insane by the board of insanity of Harlan county and committed to the asylum at Lincoln, where he remained until 1894, when he was transferred to the asylum at Hastings, where he was confined and treated until July, 1904, when he was adjudged sane and restored to his liberty;

that after the incarceration of Weatherington in the asylum his wife and family continued to reside on the homestead until 1894, when they removed to their friends and relatives in the state of Illinois, without any intention of returning to Nebraska, but with the intention of establishing a domicile in Illinois; that on the 10th day of October, 1896, Mrs. Weatherington, while residing in Illinois, made a warranty deed of the premises, subject to the mortgage and taxes then due, to Albert Cross and Alexander Johnston, for a consideration of $500, which was a fair and reasonable consideration for the lands. This deed contained the following stipulation and recital: "Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state, with the exception of the crops now on said land, which I hereby reserve. (Signed) Mrs. Eliza Weatherington." This deed was acknowledged before a notary public of Hancock county, Illinois, but neither in the deed nor in the acknowledgment thereof is Mrs. Weatherington referred to as being single or unmarried. The record also shows that Cross and Johnston had knowledge of the fact that plaintiff, Weatherington, was an inmate of the insane asylum at the time they received this conveyance; that they entered into possession of the premises under this conveyance, paid off and discharged the mortgage thereon, and later, in 1899, for a fair and valuable consideration conveyed the premises by warranty deed to defendant Smith, who had no actual knowledge of Weatherington's rights, but took the land relying on the record title thereof.

After plaintiff Weatherington had been discharged from the asylum he was taken to his family in Illinois, but did no act indicating an adoption of the Illinois residence as his home. He went from there to the state of Ohio to transact some business, and then returned to Nebraska, and on the 1st day of December, 1904, instituted the case at bar, in which he asked to have the title to the land quieted in himself, and the deed from himself and wife to

Flansburg, and the deed from Flansburg to Mrs. Weatherington, and the deed from Mrs. Weatherington to Cross and Johnston, and the deed from Cross and Johnston to defendant Smith, canceled and held for naught, and for an accounting for the rents and profits of the premises. At the close of the testimony the court entered a decree canceling the deed from Mrs. Weatherington to Cross and Johnston, and the deed from Cross and Johnston to defendant Smith, and rendered an accounting, in which defendant Smith was credited with the mortgage debt, and interest and taxes paid, and improvements made upon the land, and charged with the rents and profits actually received from the land. The decree quieted the title to the premises in Eliza Weatherington, subject to the homestead right of the plaintiff, and subject to the remainder due on the mortgage debt after deducting the rents and profits. From this decree defendant Smith has appealed to this court, and plaintiff Weatherington has filed a cross-appeal, in which he complains of the action of the trial court in refusing to cancel all the deeds alleged against and quiet the title to the premises in him.

Section 4, ch. 36, Comp. St. 1903, provides: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." The requirements of this section of the statute have been strictly adhered to in a long line of decisions in this court. See *Aultman & Taylor Co. v. Jenkins*, 19 Neb. 209; *Swift v. Dewey*, 20 Neb. 107; *Larson v. Butts*, 22 Neb. 370; *Whitlock v. Gosson*, 35 Neb. 829; *Giles v. Miller*, 36 Neb. 346; *Clarke v. Koenig*, 36 Neb. 572; *Violet v. Rose*, 39 Neb. 660; *Havemeyer v. Dahn*, 48 Neb. 536; *Teske v. Dittberner*, 63 Neb. 607. The appellant Smith, while conceding the trend of these decisions, contends that, as he was a purchaser for value from his grantors, who were then in possession of the land, and as he had no actual knowledge of the state of the title, other than such as the record disclosed, he took

the land free from the secret equities existing between his grantors and the plaintiff. In other words, his contention is that the record of title, on which he relied at the time of his purchase, estops the plaintiff from asserting his homestead right as against this defendant. In *Whitlock v. Gosson, supra,* POST, J., speaking for the court said:

"Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law. The statute in effect declares a conveyance or incumbrance of the family homestead by the husband alone void not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead right as against the grantee or mortgagee."

In *Blumer v. Albright,* 64 Neb. 249, it is held that a departure from the homestead for pleasure, business or health, does not constitute an abandonment thereof, and that neither spouse can abandon for the other without his, or her, free consent. In the still later case of *Palmer v. Sawyer,* 74 Neb. 108, it is held that, where a homestead right once exists, the person entitled to it cannot be divested thereof by any act or influence beyond his own volition.

Now, while it is clear from the evidence that Mrs. Weatherington departed from Nebraska with the intention of abandoning her homestead, and had such intention at the time she executed the deed to Cross and Johnston, it is equally clear that plaintiff Weatherington, at the time of the execution of such deed, was merely absent from the homestead for treatment for his mental disorder, without the legal capacity to contemplate an abandonment of his homestead right. As the wife could not abandon for the husband without his consent, his right remained unimpaired by her attempted change of domicile. Again, if we should concede that an estoppel by record could be invoked to defeat the homestead right of either spouse under the law of this state, it is a rule universally recognized that, if a party relies upon a record to establish his title to realty and to relieve him of

knowledge of secret liens known to his grantor, the record itself must show a chain of conveyances which discloses a perfect title in the grantor. Now, the record in this case showed, first, a patent from the general government to plaintiff Weatherington; second, a conveyance by Weatherington and his wife to Flansburg; third, a conveyance from Flansburg to Eliza Weatherington; fourth, a mortgage signed by Eliza Weatherington and plaintiff, as her husband; fifth, a deed from Eliza Weatherington to Cross and Johnston, executed in Illinois, in which she did not describe herself as being single or unmarried. This chain of title would, we think, have warned a prudent man relying upon it that Mrs. Weatherington had a living husband at the time of the conveyance made to her in 1883, and that this husband was still alive when the mortgage was executed in the year 1890, or six years before her conveyance to Cross and Johnston, which she executed as Mrs. Eliza Weatherington, without claiming to be single or unmarried. It seems to us that prudence would have suggested to one relying on this record an inquiry concerning the whereabouts of Mrs. Weatherington's husband before making a purchase of the premises. We therefore conclude that the plaintiff's homestead right in the premises, never having been abandoned or waived by himself, remains intact and unaffected by the attempted abandonment by his wife and the record of the conveyance made by her.

As there is no complaint concerning the items contained in the accounting by either of the litigants, this disposes of the appellant's case; and with reference to the plaintiff's complaint in his cross-appeal, it is sufficient to say that the evidence clearly shows that he was in full possession of his mental powers at the time he conveyed the legal title to the land through a conduit to his wife. While, in fact, no consideration passed for this conveyance, it was made for the express purpose of vesting the legal estate in the wife, and as her deed to Cross and Johnston was absolutely void, neither she nor the plaintiff can be estopped by it.

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

AMES, C., concurs.

EPPERSON, C., dissents.

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

AFFIRMED.

The following opinion on rehearing was filed June 7, 1907. *Judgment of affirmance adhered to:*

Homestead: ABANDONMENT: CONVEYANCE. Neither the husband nor the wife can abandon the family homestead and thereafter sell and convey the same to another to the exclusion of the homestead right of an insane spouse.

BARNES, J.

Our former opinion, *ante,* p. 363, fully states the facts in controversy in this case. We were urged on the rehearing to reverse our former judgment, and establish the rule that under our homestead law, where the wife becomes the head of the family by reason of the insanity of the husband, she may abandon the homestead, change the domicile, and convey the homestead to a purchaser without the knowledge or consent of the husband. Section 4, ch. 36, Comp. St. 1905, provides: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." It has ever been the policy of this court to strictly adhere to the letter and spirit of this statute. Speaking of this act the court said, in *Whitlock v. Gosson*, 35 Neb. 829:

"Here is a plain prohibition against the incumbrance of the homestead without the joint act of both husband and wife. It contains no exception with respect to an absent or insane husband or wife."

And it was held in that case that Mrs. Gosson, who was

confined in an asylum for the insane at Kankakee, in the state of Illinois, and had never been a resident of the state of Nebraska, was entitled to an interest in the husband's homestead, which he could neither incumber nor convey.

In *Palmer v. Sawyer,* 74 Neb. 108, it was said: "A homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance with the terms of the law conferring it. When these things exist *bona fide,* the essential elements of the homestead right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition."

In the case of *Way v. Scott,* 118 Ia. 197, the plaintiff claimed title to the premises in question by virtue of a sheriff's deed based upon a mortgage executed by one Scott, the owner of the homestead, and in the execution of which Ann Scott, his wife, did not join. At the time the mortgage was executed, the wife was confined in an insane asylum. The court said:

"We think the evidence clearly shows an abandonment of the homestead by the father, but the wife was entitled to the same right therein until it was cut off by proper proceedings, and the fact that she was then in an insane asylum would not deprive her of this right."

The authorities seem to be unanimous that the insanity of one spouse does not withdraw him or her from the protection of the homestead law, and a conveyance of the homestead, and a conveyance by the other is void.

We are asked, however, to hold that the domicile of an insane husband may be changed by the wife from one state to another, without his knowledge or consent and without his bodily removal. The courts have been very reluctant to assent to involuntary changes of the domicile of minors, or of persons *non compos mentis,* and yet this rule would put it in the power of any woman, if her husband should be so unfortunate as to become insane, to sell the home, which he may have acquired by years of toil, against his will, remove him from the state of his domicile and require

him to spend his life among strangers in such place as she might select. If this is the law, the misfortune of the husband, or wife, as the case may be, would become the means of perpetrating a grave wrong and injustice upon such unfortunate. We are inclined to think that a greater evil is liable to result from a weakening of the barriers against the alienation of the home by the homestead act than could accrue to purchasers of real estate who have not sufficiently investigated the title thereto before their purchase. Indeed, such a rule would furnish an ingenious and convenient method of avoiding the effect of the homestead act, and would enable a husband, or a wife, to deprive an insane spouse of valuable property rights. We do not think a case can be found which supports the rule which we are asked to establish. It is said in *Dorrington v. Myers,* 11 Neb. 388:

"Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law."

In the case at bar the wife apparently abandoned the husband, for she left him in the insane asylum and departed from the state of his residence. As was said in *Palmer v. Sawyer, supra:*

"When a homestead has been selected by the head of a family, he becomes invested with a right or an estate in said homestead, which cannot be defeated by the death or abandonment of the home by other members of the family who occupy it at the time of its selection."

While it is possible that the homestead in question would have been lost by a foreclosure of the mortgage, which had been given thereon by both the husband and wife, if Mrs. Weatherington had not sold it, yet that contingency should not influence us in our decision of this question. If such an event had happened it would have been the result of the voluntary action of both husband and wife, and a failure to realize a sufficient sum from

the foreclosure sale, over and above the mortgage and taxes, to afford them their homestead exemption would have been one of the usual incidents connected with the fluctuations of property values. Again, it appears, that at the time Mrs. Weatherington sold the homestead to Cross and Johnston, and when they sold it to Smith, she had acquired no other homestead, and there is no evidence that she then had any such intention. So the only homestead Weatherington could assert any right to was the original one, which he had selected and established upon the land in question.

For the foregoing reasons, we are of opinion that our former judgment is right, and it is therefore adhered to.

AFFIRMED.

SEDGWICK, C. J., dissenting.

The facts in this case are not in dispute. They are quite fully stated in the former opinion, *ante*, p. 363. It appears that for about three years after Mr. Weatherington became insane Mrs. Weatherington maintained herself and children upon the homestead, when she removed the family therefrom, and went to the state of Illinois and established a home there, without any intention of returning to the premises in question. The fourth paragraph of the syllabus of the former opinion is:

"Neither spouse can abandon the homestead for the other without his, or her, free consent."

This is the principal proposition discussed in the former opinion, and in its support two cases are cited: *Blumer v. Albright*, 64 Neb. 249; *Palmer v. Sawyer*, 74 Neb. 108. The provision of the statute that "the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife" (Comp. St. ch. 36, sec. 4) is quoted in the opinion, and many of the numerous decisions of his court enforcing that provision of the statute are cited. This language of

the statute is plain and unambiguous, and there is no doubt that it has been correctly construed and applied in the decisions cited. If, then, this was the homestead of the parties at the time that Mrs. Weatherington conveyed it to Cross and Johnston, there is no doubt that the statute quoted applies, and if neither party can under any circumstances abandon the homestead for the other, then these premises having been the homestead of Mr. Weatherington must continue to be so until voluntarily abandoned by him or conveyed by the joint deed of husband and wife. The record shows that in 1894, after Mr. Weatherington had been in the asylum at Lincoln for about three years, he was considered incurably insane and was for that reason transferred to the asylum at Hastings. Thereupon Mrs. Weatherington, finding herself alone with her family of young children, the season at that time being unfavorable and the farm unproductive, and she being unable to maintain the family in the homestead, attempted to abandon the homestead and establish another home. Two years after she had taken this action, the mortgage and taxes being due upon the land, she faced the alternative of either selling the land for its fair value, subject to the mortgage, or losing it altogether. She held the legal title in the land. It is not necessary to consider whether she had paid Mr. Weatherington a consideration therefor. The transfer of title from him to her through an intermediary, whether a sale or gift, would leave Mr. Weatherington no interest in the land, except such as he at that time had under the homestead law.

The object of the homestead law is to preserve a home for the family. Its humane purposes are for the benefit of the children, as well as for the head of the family. It may be abandoned or conveyed without the consent of the minor members of the family, because their very helplessness renders them incompetent to judge of their own best interest, and not because the law is less tender of their rights or their welfare than it is of the homestead

right of the spouse of the owner of the legal title. To accomplish its beneficent purposes it has been uniformly held that the homestead law must be liberally construed. That construction must be adopted, if possible, which will preserve the home. When it becomes manifest that through unfortunate circumstances the home must be abandoned or entirely lost to the family, common prudence dictates that so much of its value be saved as possible and invested in a new home. There is a provision of the statute which is of great importance in view of such conditions. The proceeds of a sale of the homestead retain the homestead character until, within a specified time, a new home may be obtained. The misfortune which drove Mr. Weatherington away from his home was one of the very many misfortunes which compelled the entire family to abandon it. There is no doubt that the head of a family may under such circumstances choose another home, and that it is the duty of all the members of the family to acquiesce in that choice. Under the homestead law the husband is generally considered the head of the family. If he, for good reason, deems it best to abandon the homestead for another, and the wife is dissatisfied and determined to retain her homestead right, it would no doubt be necessary for her to take some measures to declare such intention. If she remained in the home her intention would be manifest, but if she voluntarily left the home, although she did not accompany the family to the new home, the presumption would exist that she had abandoned the home also; if she was incompetent to exercise any volition in the matter, and it was plainly in her interest, she might be removed with the family, and the abandonment of the homestead would be complete. If "neither husband nor wife can abandon the family homestead, and thereafter sell and convey the same to another to the exclusion of the homestead right of an insane spouse," as the syllabus of the present opinion states, then, in all cases where the homestead is abandoned by the family and afterwards conveyed by the

spouse in whose name the legal title is held, it will be necessary to inquire whether the other spouse was sane at the time, and so competent to voluntarily abandon the homestead. In *Blumer v. Albright, supra,* the husband and wife with their two children left the homestead, where they resided, to go to another town to enable the husband to enter into a business for a term of years. They procured no other home, and the question was whether they had abandoned their homestead. It appeared that the wife had at all times refused to abandon the homestead, had continually declared that she reserved it as her home and expected to return. The husband was so far incapacitated by excessive drink and bad habits that it was at least doubtful whether, as against the interests of the home, he should be regarded as the head of the family, and it was decided that there was no abandonment of the homestead on the part of the wife. In *Palmer v. Sawyer, supra,* the wife was deceased, and the husband with three minor children occupied the premises claimed as a homestead. Afterwards one of the children died, and the other two having arrived at majority, left the home, leaving their father alone in possession and occupancy of the homestead. The question was whether his right of homestead had been extinguished by the fact of his family leaving him, and it was decided that he still retained his homestead right in the property. The language used in these opinions, and relied upon in the former opinion in this case, was perhaps correct in the sense in which it was used in those opinions, but it has no application, and was not intended to have application, to circumstances such as are involved in this case.

The husband is not always the head of the family. "A head of a family is one who controls, supervises, and manages the affairs about the house." 21 Cyc. 467. A married woman on whom a family is dependent for maintenance is the head of the family, the husband being an invalid. *Schaller v. Kurtz,* 25 Neb. 655. And in *State v. Houck,* 32 Neb. 525, where the husband was a cripple,

and unable to work, and contributed nothing for the support of the family, which was supported entirely by the wife, she was held to be the head of the family within the meaning of the exemption laws, and, so, where a husband had been insane and had recovered from the insanity so far as to live at home with his wife and family, but did nothing toward his own support or that of the family, and the wife with the help of the children carried on the farm on which they lived, she was held to be the head of the family and entitled to the exemptions allowed by statute. *Temple v. Freed*, 21 Ill. App. 238.

In *McKnight v. Dudley*, 148 Fed. 204, the circuit court of appeals of the sixth circuit said: "It is true the husband is designated as the head of the family and given the right to choose a reasonable place of abode, but, of course, this right exists only while he is sane. When he was placed in the asylum, his wife became the head of the family, the burden of support fell upon her and the right to choose a place of abode went with it."

A liberal construction of our statutes for the purpose of preserving the home will consider the wife, who is supporting herself and her minor children, as the head of the family when for any reason the husband is entirely incapacitated to take that position. The head of a family whose spouse is utterly incapacitated may change the domicile of the family when circumstances beyond her control compel such action. When Mrs. Weatherington removed the family to Illinois, she changed the domicile of the family. Her husband had been incapacitated for three years. It was believed by those most capable of judging that he would never be competent to act rationally for himself or for the family. When the homestead had been abandoned for two years, and a new home was being procured, she sold her farm and made her home in Illinois for nearly ten years longer, before any question was raised as to her right to abandon the homestead. Five years after the farm was abandoned as a homestead this plaintiff bought it in good faith, for full value, and

without notice of any latent claims. The title so purchased ought to be protected.

There are other important matters involved in the case which seem to demand a reversal of the judgment, and I cannot concur in disregarding them.

WILLIAM PRANTE, GUARDIAN, V. OSCAR LOMPE, GUARDIAN.

FILED OCTOBER 18, 1906. No. 14,298.

1. **Insane Persons:** GUARDIAN, APPOINTMENT OF: PARTIES. In a proceeding on a petition for the appointment of a guardian for an alleged feeble-minded person, his next of kin are proper parties and may appear in court and oppose the granting of the petition.
2. **Trial:** WAIVER. It is error for the county court to hear a petition for the appointment of a guardian for an alleged feeble-minded person prior to the hour set for the hearing upon the stipulation of such feeble-minded person acting without counsel, waiving the time of hearing.
3. **Probate Court:** APPEAL: PROCEDURE. Where a judgment of a county court is reversed by a district court in a proceeding in error, the district court may retain such cause for trial. This rule applies to matters of probate jurisdiction as well as to civil actions.

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

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

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

EPPERSON, C.

On January 10, 1905, William Prante filed a petition in the county court of Nemaha county, alleging that Harmon Ray is a resident of that county, and is possessed of personal property of the value of $10,000 and the owner of real estate of the value of $100,000; that the mental powers of the said Ray have been failing for some time;

and on account of mental disease and mental delusions he has become mentally incompetent to have the charge and management of his property; that said Ray has two children, aged respectively 14 and 8 years, and residents of Thayer county, Nebraska. The petition concludes with a prayer that a time may be fixed for hearing of said petition; that notice of its pendency be given to said Ray and his minor children, as required by law, and that on the hearing thereof A. M. Engles and John McConnell should be appointed guardians. The county court fixed January 27, 1905, for the hearing of said petition, and made an order requiring a notice thereof to be served upon said Ray and his children. On the day fixed for hearing, Ray appeared with his counsel and asked that the case be continued. This request was granted, and the hearing adjourned until February 28, at 10 A. M. On February 28, at 45 minutes after 8 o'clock in the forenoon, Ray and the petitioner, Prante, appeared and asked that the petition be immediately heard. Ray stated in open court that he wished the litigation to cease; that he wanted a guardian appointed, and requested the appointment of Prante, and did not wish to await the arrival of his attorneys or to be represented by them. The court thereupon proceeded with the hearing; found for the petitioner, and appointed William Prante guardian. As shown by the record, the hearing was had and the judgment announced appointing a guardian to take charge of more than $100,000 worth of property, depriving the alleged incompetent person of his liberty to the extent of placing him under guardianship, all within the short space of 25 minutes. At 10 minutes after 9 A. M., J. S. Stull came into court and filed an answer, sworn to by Ray on the preceding day, and W. F. Buck came also and said that he was attorney for Oscar Lompe, the guardian of Ray's children, filed an answer in behalf of said children and their guardian, asked that the cause be opened, the judgment set aside, and the case retried. This request, on the objection of both Ray and Prante,

was refused. Lompe then prepared and filed a formal motion asking that the findings and judgment of the court be set aside for irregularities in the proceedings, among other things alleging that the hearing was had in the absence of Lompe's and Ray's attorneys; that it was heard prior to the hour previously fixed, and that Ray had been wrongfully induced to consent to Prante's appointment. The court overruled the motion, and Lompe prosecuted error proceedings in the district court to reverse the judgment of the county court. Upon the hearing there, the district court found that the county court erred in hearing the case prior to the hour fixed and in refusing to hear the case on its merits on the request of Lompe. A judgment of reversal was entered, and the district court further ordered that the cause be retained for further proceedings. The petitioner, Prante, prosecutes error to this court.

Prante contends that the district court erred in reversing the judgment of the county court; that neither Ray's children nor their guardian were necessary parties to the proceedings in the county court and have no right to complain; that by the service of notice upon the alleged incompetent person the court acquired jurisdiction under the provisions of section 5384, Ann. St., and that therefore the court was not required to await the arrival of the hour appointed for the hearing to permit the next of kin to appear. Section 5384, *supra,* provides only for service of notice upon the alleged incompetent person. Under a very similar statute of Michigan the supreme court of that state has held that the petition for the appointment of a guardian was insufficient if it fail to allege the names of the next of kin (*In re Bassett,* 68 Mich. 348); and, further, that the next of kin were necessary parties, and that notice to them was indispensable to the court's jurisdiction (*In re Meyers,* 73 Mich. 401). Our statute nowhere expressly provides that notice shall be given to the next of kin, nor does it provide that the petition for the appointment shall be signed

by the next of kin. The court may be given jurisdiction of the subject matter upon a petition filed by a friend of the alleged incompetent person. We do not consider it necessary in the case at bar to determine whether or not under the provisions of the statutes of this state it is necessary to give notice of the proceedings to the next of kin. The county court has general jurisdiction in matters pertaining to guardianship, and it is its duty to protect the interests of the alleged incompetent person, and, further, to see to it that all proceedings in which the alleged feeble-minded person is interested are regular in every respect. Incident to this general jurisdiction, it is within the power of the court, even though it may not be required by statute, to give notice to the next of kin of the alleged incompetent person, that they may appear and protect his rights. Especially should this be done when the petition is filed by one other than the next of kin.

In the case at bar the county court, in the wise exercise of his discretion, directed a notice to be served on Ray's children, who were his next of kin. They were parties to the proceeding, and had a right to rely upon the order of the court adjourning the hearing to a subsequent day, and, further, had a right to appear and make a showing at the hour fixed for the hearing. It would be an absurdity to say that the next of kin have no interest in the proceedings and that they should be denied the privilege of appearing in behalf of their kindred. Ray's children were heirs apparent, and as such had an interest which would entitle them to appear and be heard. The court was required to determine not only Ray's incapacity to care for his own property, but must also determine whether he was a resident of the county and whether the proposed guardian is a suitable person. These issues were tendered in Lompe's answer. No one, other than the insane person himself, who must be considered incapable of acting for himself, is more interested in all these questions than the next of kin. They are interested, not only as heirs apparent, but also from a humanitarian standpoint, in

seeing that their unfortunate kinsman is put under the control of one who will diligently look after his property and interests. On account of incomplete legislation regarding procedure in such cases, the responsibility of the courts is great, and it is their duty to hear, not only the petitions filed by the next of kin, but also objections made by such relatives in good faith for the benefit of the ward, or for the conservation of his property. An alleged feeble-minded person may himself employ counsel and oppose the application for the appointment of a guardian, and, when he does so, should be heard by the court. But an incompetent person can no more stipulate away his statutory rights for a hearing, nor waive jurisdictional rights, than he could execute a binding contract. An adjudication of incompetency made by the court prior to the hour fixed for the hearing, and so heard upon the stipulation of the incompetent person acting without counsel, is an irregularity patent on the face of the record, and of this irregularity the next of kin, or their guardian, may complain.

Plaintiff further contends that the district court, upon finding reversible error in the judgment of the county court, should have remanded the case to the lower court instead of holding the cause for trial *de novo*. Where the entire case is taken to the appellate court, as it is in the statutory proceedings of appeal from a judgment adjudging one insane, there can be no doubt but that the appellate court acquires jurisdiction under the provisions of section 4823, Ann. St., to try the case *de novo*. The same course is proper upon reversal of a judgment of the county court in error proceedings. *Maryott & McHurron v. Gardner*, 50 Neb. 320. It is a rule of practice established in this state that the district court shall, upon the reversal of a judgment of the county court, hold the case for trial upon the merits. Such is not an exercise of original jurisdiction. In *Ribble v. Furmin*, 69 Neb. 38, it is said in the opinion by POUND, C.:

"The legislature evidently intended that causes should

be settled finally in the district court when taken there by appeal or error and that parties should not be compelled to go back and forth from the lower to the higher tribunal in matters involving small sums as is so often the case in the more important causes brought in the district court and reviewed in the supreme court."

It therefore follows that the judgment of the district court in reversing the judgment of the county court and holding the case for trial on the merits is right, and we recommend that it 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.

ERNEST H. TRACY ET AL., APPELLANTS, V. W. J. DEAN, APPELLEE.

FILED OCTOBER 18, 1906. No. 14,434.

1. **Real Estate Agents:** CONTRACTS. To entitle a real estate broker to recover a commission for the sale of real estate he must prove a sale of the land on such terms as would entitle him to a commission under the provisions of a written contract between himself and the owner.
2. **Evidence.** Correspondence set out in the opinion *held* insufficient to entitle the plaintiff to recover a commission.

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

Mapes & Hazen, for appellants.

M. D. Tyler, contra.

EPPERSON, C.

Plaintiffs are real estate brokers, and brought this suit to recover a commission alleged to be due by reason

of a sale of defendant's property, situate in the city of Norfolk. The case brought shows the following facts: On September 28, 1901, plaintiffs wrote defendant (Exhibit A) as follows: "Do you wish to sell your residence property in this city? If so, kindly name your lowest price for cash, also your price on time, and terms, both subject to a commission of 5 per cent. on the first thousand and 2½ per cent. on balance. If you will make the price right, we think we may be able to make a sale. An early reply will greatly oblige." On October 3, 1901, defendant replied (Exhibit B) as follows: "In reply to yours of Sept. 28, will say that my price on my Norfolk property is $2,000. Will sell on time if satisfactory payment can be made, or will give you an option for 6 months at $1,800 cash, meaning by this that I am to receive $1,800 cash, you all above that you can get. Let me hear from you. It has been in hands of Lamont." On May 21, 1902, plaintiffs again wrote the defendant a letter (Exhibit C) regarding this property as follows: "We have been endeavoring all winter to effect a sale on your property at $2,000, but, so far, have been unable to do so, as it is priced a little bit strong considering other properties which have been sold in town of about the same character. We have an offer now of $1,250 cash and two vacant lots, 45 by 122 each, block one, Bear and Mathewson's addition to Norfolk, on 10th street facing east. These lots are in the block where Dan Koenigstein now lives, and two new houses costing about $1,500 each have been built between his house and this property, which is the southeast corner of the block. The lots are probably worth $600 to $650. Kindly advise us whether you will consider proposition of this kind, allowing us a commission for the same, and greatly oblige." To this letter the defendant wrote and mailed, May 31, 1902, the following reply (Exhibit D): "It is impossible for me to form a correct judgment concerning the offer you have on my property without knowing more about the lots. I will be in Norfolk in a few days, and then if the offer

is still open it will not take me long to decide. If I find the lots are worth $600, I will probably make the trade." Within a few days after the mailing of the letter last above set out, plaintiff visited Norfolk, and rented the property in question to one Hoffman. Later defendant conveyed his property to Hoffman, and received therefor $1,300 in cash and the lots described in plaintiff's letter (Exhibit C). The deal was finally consummated through correspondence between defendant and Hoffman. While in Norfolk the defendant did not negotiate with plaintiffs, nor call upon them to render assistance in bringing about a sale. There is some conflict in the evidence as to whether the increase of $50 in the cash payment was brought about through the efforts of the plaintiffs, but, as we view the case, it is immaterial.

Before the plaintiffs may recover they must show a written contract, subscribed by the parties, wherein is set forth the compensation to be allowed by the owner in case of a sale by the broker or agent. Ann. St. sec. 10258. The plaintiffs rely upon the correspondence above set out to show such a contract. At most, such correspondence amounted to an agreement to pay a commission in the event that the plaintiffs would sell the property for more than $1,800 within six months from and after the date of defendant's first letter (Exhibit B). Even had the time therein limited been extended by parol agreement, plaintiffs have failed to show that they are entitled to a commission. The evidence does not disclose that the lots taken by the defendant as a part of the consideration for the sale of his property exceeded $500 in value, and therefore, giving the correspondence the most liberal construction favorable to plaintiffs, they did not earn the commission under its terms.

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

MEADE PLUMBING, HEATING & LIGHTING COMPANY ET AL., APPELLANTS, V. JAMES M. IRWIN ET AL., APPELLEES.*

FILED OCTOBER 18, 1906. No. 14,336.

1. **Appeal: ESTOPPEL.** A party is not estopped to prosecute his appeal by the fact that he accepts the amount of a judgment which the appellee concedes to be due him; the appeal in such case involving only his right to a further recovery.

2. **Principal and Agent: LIABILITY OF AGENT.** An agent cannot be held liable on a contract made on behalf of his principal where the other contracting party knows of the relation and enters into the contract intending to hold the principal to its performance.

3. **Mechanics' Liens: CONTRACT.** The materialman, in order to be entitled to a mechanic's lien, must contract for the work and material with the owner or an agent of the owner authorized to make the improvement.

4. **Judgment: MODIFYING AFTER TERM.** The district court cannot, after the adjournment of the term at which a judgment is entered, amend the same by changing the award of costs to one of the parties, except for some reason mentioned in section 602 of the code as ground for vacating or modifying a judgment.

5. **Cross-Appeal.** Under our former practice a party might take a cross-appeal, after the filing of the transcript by the appellant, by filing a brief in due season assailing the decree so far as it affected his interest. In order to perfect his cross-appeal the brief should be filed in due season.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed as to costs.*

Horace F. Bishop and *Ricketts & Ricketts*, for appellants.

Hall, Woods & Pound, contra.

* Rehearing allowed. See opinion, p. 391, *post.*

DUFFIE, C.

At the October, 1904, term of the district court for Lancaster county a decree was entered finding due the plaintiffs from the defendants James M. Irwin and Emma McGahey the sum of $125 for work done and material furnished in the improvement of a building on lot 10 in block 98 in the city of Lincoln. A mechanic's lien for said amount was also foreclosed and the property ordered sold in satisfaction thereof, and for the costs of suit. Irwin is the owner of the property, and defended upon the ground that he had not ordered or authorized the making of the improvement for which the lien was claimed. Mrs. McGahey, who ordered the improvement, claimed that it was to be furnished at a cost not to exceed $125, which amount she tendered in her answer, the plaintiffs' claim being for $248.26. January 26, 1905, the plaintiffs procured an order of sale on this decree and placed the same in the hands of the sheriff, who returned the same on February 15 with the following indorsement: "Judgment having been paid into court this writ is herewith returned. Return 50c. Mileage 10c. Nicholas Ress, Sheriff." January 30, 1905, and after final adjournment of the October, 1904, term, which occurred January 7, 1905, the defendants filed a motion for an order taxing all the costs to the plaintiffs, for the reason that on the commencement of the action the defendants herein filed an answer tendering to the plaintiffs the sum of $125, and that since recovery for that amount only had been had they should not be taxed with the costs. February 16, 1905, the court sustained the motion so far as to require the plaintiffs to pay one-half the costs of the suit, and thereupon the plaintiffs took an appeal to this court, and insist that they may not only have the order requiring them to pay one-half of the costs reviewed, but also the original decree; and the defendant Irwin claims, upon cross-appeal that the decree establishing a mechanic's lien against his property was erroneous,

and insists that we review and set aside the judgment of the district court in that regard.

The defendants insist that the plaintiffs cannot accept the benefit of the judgment in their behalf and at the same time appeal therefrom, while the plaintiffs contend that as the defendants did not controvert their claim to to the extent of $125, the amount for which judgment was given, they were entitled to accept that amount, and still appeal from the decree and obtain the opinion of this court upon its right to the remainder which it claims to be due. The same question was before this court in *Weston v. Falk,* 66 Neb. 198, and the present chief justice, who wrote the opinion on rehearing (66 Neb. 202), quoted with approval the language of the supreme court of North Dakota in *Tyler v. Shea,* 4 N. Dak. 377, as follows:

"The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment. * * * It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from. * * * The appellant waived his right to appeal if he obtained any benefit under the judgment which on the appeal may be taken from him."

Numerous authorities may be cited in support of this rule, among which are, *Reynes v. Dumont,* 130 U. S. 354; *Embry v. Palmer,* 107 U. S. 3; *United States v Dashiel,* 70 U. S. 688; *Mellen v. Mellen,* 137 N. Y. 606, 33 N. E. 545. We hold, therefore, that taking out execution for the amount of the decree does not estop the appellant from appealing to this court.

Coming now to the merits of the plaintiff's claim, the evi-

dence is uncontradicted that what was called a proposition for plumbing work and material was published in the "Lincoln Journal" by the Meade Plumbing, Heating & Lighting Company. Mrs. McGahey saw the advertisement, and had several conversations with Mr. Meade, at that time a partner in the business. These conversations finally resulted in an agreement, by the terms of which the Meade Plumbing, Heating & Lighting Company was to furnish a bath room in the house, the price of the bath outfit, fixtures, labor, etc., being agreed upon, but the depth of sewerage, the number of hours of labor required to complete the job, and the exact amount of material required not being known to Mrs. McGahey, it was agreed that in no event should the cost of the improvement exceed the sum of $125. Some time after the contract was made Mr. Wiltamuth, another member of the firm, took a copy of their so-called proposition to the home of Mrs. McGahey and procured her signature thereto. It is claimed that Mrs. McGahey was the agent of Irwin, and that this constitutes a valid and binding written contract between the parties, which cannot be impeached or modified by parol evidence tending to show that the price for the work and material should not exceed $125. Conceding this to be true, still we think that the decree of the district court gave the plaintiffs more than they were entitled to under the pleadings and the evidence. In their petition it is alleged as follows: "Plaintiffs show to the court that at the time of furnishing said plumbing supplies and performing said skill and labor the fee title to said premises stood, and now stands, in the name of the defendant, James M. Irwin; that he had entrusted the sole care, management and control of said premises to the defendant Emma McGahey, with full power and authority to cause repairs to be made thereon, and that said contract so made between the defendant Emma McGahey and the said Meade Plumbing, Heating & Lighting Company was made by the authority of the

defendant James M. Irwin and was fully satisfied by him."

It is apparent that Mrs. McGahey is not personally liable upon a contract made by her as the agent of Irwin, and which plaintiffs insist she had full power to make. On the theory on which the case was brought and prosecuted, Mrs. McGahey was not liable to the plaintiff, and judgment should not have gone against her for any amount; and, this being so, the plaintiffs cannot complain that she was not held to pay a greater sum. The evidence is undisputed that Irwin, a resident of the state of Illinois, is the owner of the premises on which the lien is claimed. He is the brother of Mrs. McGahey, who has three daughters. In 1888 one of them was pursuing a course of study in the state university. The defendant Irwin, uncle of this girl, in order to assist her in completing her education, gave over to her the rents derived from this property. When she had completed her education, he made the same arrangements with respect to one of her sisters; and upon the graduation of the latter he gave Mrs. McGahey, his sister and codefendant, authority to collect the rents accruing from this property for the benefit of the youngest daughter. The last arrangement was in effect when the contract in question and the improvements made in pursuance of it were made, and is the extent of Mrs. McGahey's authority to act for her codefendant with respect to this property, save that for a portion of the time she had paid the taxes out of the rents derived from the property. Both she and Irwin deny that she had authority to contract for the repair or improvement of the property on his behalf, and that he had no notice or knowledge of the contract with the plaintiffs or of the improvements made in pursuance of it until after the improvements had been completed. The most that can be said of the evidence on this point is that Mrs. McGahey had the bare authority to collect the rents accruing from this property and pay them over to her daughter. It will not be claimed, we think, that such

authority carried with it implied authority to bind the owner by contracts for improvements. It is true, the improvements inure to the benefit of the owner of the fee, but the same may be said of improvements made by a tenant; but a tenant cannot subject the interest of his landlord in the premises to a mechanic's lien. *Waterman v. Stout,* 38 Neb. 396; *Moore v. Vaughn,* 42 Neb. 696; *Schrage v. Miller,* 44 Neb. 818. See also *Rust-Owen Lumber Co. v. Holt,* 60 Neb. 80. It follows, then, that the finding and judgment against Irwin was erroneous, but as we find nothing in the record showing a cross-appeal, and his brief assailing the decree was not filed in due season, he is not entitled to have the decree reviewed. *Goos v. Goos,* 57 Neb. 294.

The second ground of complaint by the appellants is that the district court had no jurisdiction to alter or amend the decree relating to costs after the term at which the decree was made. We have no doubt of the correctness of this position. Any mistake made by the clerk in taxing fees in favor of or against a party may be corrected by the court on motion at any time; but an award of costs in favor of a party is a part of the judgment as much as the award of damages, and this cannot be changed after the term, except for some statutory cause allowing the court to set aside or modify its judgment at a subsequent term. This question was before the supreme court of Iowa in *Fairbairn v. Dana,* 68 Ia. 231, where it was sought to modify a judgment awarding costs. The court said:

"It will be observed that the movers are not seeking relief against one or more items of costs which were erroneously or illegally taxed to them; but, in effect, they ask that the provision of the judgment which renders them liable for the costs be set aside and canceled. If a provision in a judgment for the recovery of costs by the successful party against his adversary is an adjudication of the legal rights of the parties, it is clear, we think, that the court has no power at a subsequent term to

modify or change it, except for one of the causes enumerated in section 3154 of the code as ground for vacating or modifying a judgment."

Section 3154 of the Iowa code, referred to in the above quotation, is in substance the same as section 602 of our code, relating to the vacation and modification of judgments after the term at which they were entered. In our opinion, the district court has no jurisdiction upon the showing made to modify the decree, so far as it awarded costs to the plaintiff, at a term subsequent to the rendition of the decree.

We recommend, therefore, that the order of the district court requiring the plaintiffs and appellants to pay one-half of the costs be reversed and that the cause be remanded, with directions to set aside such order and to execute the decree in favor of the plaintiffs for the taxable costs of the case, and that it stand affirmed as to all other matters.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order of the district court requiring the plaintiffs and appellants to pay one-half of the costs is reversed and the cause remanded, with directions to set aside such order and execute the decree in favor of the plaintiffs for the taxable costs of the case, and that it stand affirmed as to all other matters.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed April 4, 1907. *Former judgment vacated and judgment of district court reversed with directions:*

1. **Cross-Appeal: FILING BRIEFS.** By our former practice governing appeals in equity cases one could prosecute a cross-appeal by filing his brief in due season assailing the decree appealed from.

2. ———: ———. **Such a brief will be held to have been filed in due**

season where appellant neither objects to service and filing thereof, nor moves to have it stricken from the record as having been filed out of time.

BARNES, J.

The Meade Plumbing, Heating & Lighting Company et al. brought this action in the district court against James M. Irwin, his sister, Mrs. Emma McGahey, and others to recover the sum of $248.26, and foreclose a mechanic's lien on a certain house and lot in the city of Lincoln, owned by said Irwin. A judgment was rendered in favor of the plaintiffs for the sum of $125, and costs, against Irwin and Mrs. McGahey, and the plaintiffs had a decree for a foreclosure as prayed. From that judgment and decree the plaintiffs appealed to this court, and a former hearing resulted in an affirmance of the decree, except as to costs. As to that matter the district court was directed to tax all of the costs to the defendants. Our former opinion, *ante*, p. 385, contains a full statement of the facts, hence no further statement is required. It was there stated that the plaintiffs were neither entitled to a judgment against Irwin, nor a decree of foreclosure against his property, but as there was nothing in the record showing a cross-appeal, and as his brief assailing the decree was not filed in due season, he was not entitled to have the decree reviewed, and therein lies the error of our former judgment.

It appears that the transcript in this case was filed June 21, 1905. The plaintiffs filed their brief on January 27, 1906. Defendants filed their brief and cross-appeal March 7, 1906. Plaintiffs filed their reply on April 14, and the hearing was had in its regular order on April 17 of the same year. No objection as to time was made by plaintiffs when defendants' brief was served and filed, and no motion was made to strike because the brief had been filed out of time. So the plaintiffs cannot now challenge the defendants' right to assail the decree. While both parties were delinquent, in point of time, as to

filing briefs, yet we are satisfied that under the circumstances, as detailed above, the defendants filed their brief assailing the decree in due season. *Hahn v. Bonacum*, 76 Neb. 837; *Goos v. Goos*, 57 Neb. 294; *McDonald v. Buckstaff*, 56 Neb. 88. The record discloses that the defendants' brief was entitled "Appellees' Brief on Cross-Appeal," and from an examination of its contents it further appears that the decree was assailed, and affirmative relief was asked for thereby. That this amounted to the taking or prosecution of a cross-appeal seems clear under our system of appeals in equity cases in force before the statute of 1905, regulating appeals, went into effect. The plaintiffs, by filing the transcript and the whole record in this court, opened the decree, so that the whole case stood for trial *de novo*. *Armstrong v. Mayer*, 69 Neb. 187.

Coming now to consider the merits of the controversy, we are satisfied with what was said in our former opinion as to the plaintiffs' right to recover against Irwin and have a decree foreclosing the mechanic's lien. We quote therefrom as follows: "The most that can be said of the evidence on this point is that Mrs. McGahey had the bare authority to collect the rents accruing from this property and pay them over to her daughter. It will not be claimed, we think, that such authority carried with it implied authority to bind the owner by contracts for improvements. It is true, the improvements inure to the benefit of the owner of the fee, but the same may be said of improvements made by a tenant; but a tenant cannot subject the interest of his landlord in the premises to a mechanic's lien. *Waterman v. Stout*, 38 Neb. 396." It follows, then, that the judgment against Irwin should be reversed.

This brings us to the consideration of the question of the costs. It appears that Mrs. McGahey, with whom the contract for the plumbing in question was made, offered to pay the plaintiffs $150 in satisfaction of their claim. This offer was refused. There is no competent evidence of a tender in the record, or that such tender was kept good.

It does appear, however, that she offered to pay the plaintiffs $125 after the action was commenced, and brought that sum into court, and tendered it by her answer. This was in effect an offer to confess judgment for that amount, and to authorize the court to render a judgment against her for that sum. The plaintiffs having failed to recover a greater amount were not entitled to recover costs after the filing of her answer, and it was error for the district court to render judgment against her for any part of the costs accruing after that time. It further appears that she has paid the amount of the judgment into court, and that the same has been accepted by the plaintiffs.

For the foregoing reasons, our former judgment is vacated, the judgment of the district court is reversed and the cause remanded, with directions to that court to dismiss the action as to defendant Irwin, and render judgment against the plaintiffs for all the costs which accrued after the filing of the defendant McGahey's answer.

JUDGMENT ACCORDINGLY.

E. L. HOLYOKE, EXECUTOR, APPELLANT, V. MARY IDA SIPP ET AL., APPELLEES.

FILED OCTOBER 18, 1906. No. 14,399.

Wills: EXECUTION: PROBATE. A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate.

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

Talbot & Allen, for appellant.

A. S. Tibbets and *John S. Bishop, contra.*

DUFFIE, C.

E. L. Holyoke, the executor named in a paper purporting to be the last will and testament of William Robertson, has appealed from an order of the district court for Lancaster county refusing to admit the will to probate. John Krummack and W. J. Adamson were the subscribing witnesses. The testator and subscribing witnesses were employed in the freight house of the Burlington & Missouri River Railway Company at Lincoln. The witnesses testified that Robertson brought the paper to them there and requested their signatures. It does not appear that the witnesses were employed in the same room, and neither can testify that they subscribed their names in each other's presence. This, under our statute, is immaterial. *Dewey v. Dewey,* 1 Met. (Mass.) 349; 1 Jarman, Wills (5th ed.), p. 209. Their testimony is also lacking in certainty as to whether the testator declared that the paper on which he desired their signatures was his last will and testament, but we are satisfied that from previous conversations with him both the witnesses understood that it was his last will and testament, and that they were requested to attest it as such. This we think not fatal in view of the attestation clause attached, and the same may be said of the failure of the witnesses to remember with certainty whether the will was signed by the testator when the same was signed and attested by them. The attestation clause attached to the will is in the following language: "Signed and acknowledged by the above testator in the presence of us present and in the presence of each other subscribe our names this 21st day of April, 1900, A. D. at Lincoln, Neb. U. S. A. John Krummack, Jr., William J. Adamson."

It clearly appears from the evidence that the testator wrote his own will, and this probably accounts for the fact that the attestation clause is not as full and formal as in general use, but it states with certainty that the will was signed by the testator in the presence of the wit-

nesses, and acknowledged by him, and that their names were subscribed in his presence. These are the essential requirements under our statute to the making of a valid will. See Ann. St., sec. 4992. There being no satisfactory evidence discrediting the facts set out in the attestation clause of the will, the force and effect to be given its recitals are thus stated in 1 Underhill, Law of Wills, sec. 201: "Where one or more of the witnesses are absent, the will may be admitted to probate upon the presumption of regularity arising from a perfect and formal attestation clause which recites that all statutory requirements were complied with, supplemented by proof of the handwriting of the testator and of that of the absent witnesses. So, when the subscribing witnesses are present at the probate and admit the genuineness of their signatures, but deny or are unable to recollect some or all of the facts which were attendant upon the execution, so that one or both of them are unable or unwilling to testify with positiveness and of their own knowledge that all the requirements of the statute were complied with, a presumption of due and proper execution will arise from the recitals of a perfect attestation clause, which becomes conclusive in the absence of satisfactory proof to the contrary." Numerous cases are cited by the author supporting this rule.

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

ALBERT and JACKSON, CC., concur.

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

REVERSED.

FRANK SHUTT ET AL., APPELLANTS, V. AUGUSTUS LOCKNER, APPELLEE.

FILED OCTOBER 18, 1906. No. 14,437.

1. Landlord and Tenant: WITHHOLDING POSSESSION: DAMAGES. The measure of damages for the wrongful eviction of a tenant by his landlord, or for wrongfully withholding possession of the leased premises, is ordinarily the rental value of the property for the unexpired term, less the amount of rent reserved by the lease.

2. ———: ———: ———. In a proper case special damages in addition may be awarded, where such damages are certain and the natural result of the wrong complained of.

APPEAL from the district court for Butler county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Matt Miller, for appellants.

L. S. Hastings and *A. M. Post, contra.*

DUFFIE, C.

The single question presented in this case is the measure of damages to which the plaintiffs are entitled for failure of the defendant to give them possession of 160 acres of hay land under a lease for the year 1901. It is alleged in the petition that plaintiffs on March 27, 1901, leased the premises from the defendant for the term of one year for the sum of $480, one-half of this sum to be paid September 1, 1901, and the remainder November 1, 1901; that on or about April 15, 1901, the defendant leased the premises to one Powell and refused to give the plaintiffs possession; that Powell cut and appropriated the hay on said premises, and that plaintiffs have been damaged to the amount of $2,870 by defendant's breach of contract. After the plaintiffs had introduced their evidence and rested, the court directed a verdict in their favor for $1, and from a judgment entered on the verdict the plaintiffs have appealed to this court.

The plaintiffs' evidence was amply sufficient to establish the making of the lease and the refusal of the defendant to give them possession. On the question of damages, they offered to prove the amount of hay grown on the land and the value of the same on the ground. They also offered to show the expense of harvesting the hay and hauling the same to the railroad station, and the market value of the hay on the market, less the cost of transportation. These offers were refused by the court. No evidence was offered that the rent reserved was less than the rental value of the land at the time of the alleged breach on the part of the defendant, and the rejected evidence was offered as a basis for the recovery of profits as such. It is urged by the plaintiffs that their measure of damages is the profit they were prevented from realizing in not being allowed to cut and market the hay, and that the court erred in not allowing them to introduce evidence to show what that profit would have been. The defendant insists that their measure of damage is the difference, if any, between the rent reserved and the value of the lease at the date of the breach.

In *Cannon v. Wilbur,* 30 Neb. 777, it was said: "Ordinarily, where a tenant is wrongfully evicted by his landlord, the measure of the tenant's damages is the rental value of the property for the unexpired term, less the amount of rent reserved by his lease." While apparently conceding that this is the general rule of damages applicable in this class of cases, it is earnestly insisted by the plaintiffs in this particular instance that the profits were definite and certain and recoverable as damages. When the case was tried, the hay on the leased premises had matured, had been harvested, and its market value had been determined, and, in the sense of their knowing what profit or loss the plaintiffs would have made, the lapse of time had furnished them with evidence of the amount of hay which the land had produced and its market price. It is a universal rule that only such damages are recoverable for a breach of contract as naturally result from the breach.

Kingsley v. Butterfield, 35 Neb. 228. In this case the breach occurred in April, and before the hay had matured. At that time the right of action for the breach accrued to the plaintiffs. "Had the action been commenced and tried at that time, the amount of hay which the land would produce, the market value of the hay when harvested, and other elements which would enter into the question of whether the plaintiffs would profit or lose from their venture were matters of conjecture and speculation. Clearly no rule of law administered by our courts would allow damages to be predicated on opinions that might be formed relating to these questions. The fact that these questions had been determined by lapse of time when the case was tried does not in the least change the rule of law as to the evidence admissible to establish the plaintiffs' damage." *Kitchen Bros. Hotel Co. v. Philbin,* 2 Neb. (Unof.) 340; *Shaw v. Hoffman,* 25 Mich. 162, and other similar cases are relied on by the plaintiffs in support of their claim that evidence of their profits, had they been allowed to cut and market the hay, should have been received by the court. In these cases the tenants were in possession of the leased premises, conducting an established business, when the breach and eviction occurred. By the breach and eviction they not only lost the benefit of their lease, but their business was also broken up and injured or destroyed, and this destruction of their business was allowed as an element of damage. That one may recover for an injury to a profitable business is not a question for debate, and, where a wrongful eviction by a landlord has this effect, damage may be recovered therefor. We do not wish to be understood as holding that evidence of the probable crop of hay the land would produce and the ordinary market value thereof might not be shown as facts to be considered by the jury in arriving at the value of the use of the land during the term, and if the rejected testimony had been offered for this purpose it would undoubtedly have been received. *Snodgrass v. Reynolds,* 79 Ala. 452. What we do hold is

that under the circumstances of this case prospective profits, which plaintiffs claim to have lost, was not a proper element of damage. Jones, Landlord and Tenant, secs. 140-171. There being no evidence that the value of the lease was greater than the rent reserved, and no part of the rent having been paid, the plaintiffs were entitled to nominal damages only, and the court properly directed a verdict for $1.

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.

MARVIN H. MEAD, APPELLEE, V. IDA M. BREWER ET AL., APPELLANTS.

FILED OCTOBER 18, 1906. No. 14,448.

1. **Tax Certificate: FORECLOSURE: LIMITATIONS.** An action to foreclose a tax sale certificate may be commenced at any time within five years from the date when redemption from the sale may be made by the owner.
2. **———: PURCHASE OF TITLE: MERGER.** Where the holder of a tax sale certificate purchases and takes from the owner a conveyance of the patent title, his tax lien becomes merged in the legal title so conveyed to him, and he cannot assert it in hostility to the claim of a third party holding another tax lien against the premises.

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

T. S. Nightingale, for appellants.

R. J. Nightingale, contra.

DUFFIE, C.

On February 23, 1905, Marvin H. Mead, the plaintiff and appellee, commenced an action in the district court for Sherman county to foreclose a tax sale certificate issued on the sale of certain lots in Loup City for the delinquent taxes of 1895-1897, both inclusive. The certificate is dated March 6, 1899, and it is argued that our statute requires an action of this character to be commenced within five years from the date of the certificate, and that the action is barred. It is true that the language of the statute implies that an action to foreclose a lien should be commenced within five years from the date of the tax certificate, but as early as 1889 this court held that the statute should be construed to mean that such an action may be brought at any time within five years after time for redemption from the sale has expired. *D'Gette v. Sheldon,* 27 Neb. 829. This holding has been followed in numerous cases to the present time. In one of the later cases, *Darr v. Wisner,* 63 Neb. 305, we were urged to reverse our former holding, and then said: "The terms of the statute appear to the mind of the writer to support appellant's contention, and were the question a new one, we would hold that the action should be brought within five years from the date of the certificate; but by repeated decisions of this court the rule is well established, and is so recognized by the profession, that an action to foreclose a tax lien is barred within five years after the time to redeem from the tax sale has expired." The first holding has been so long and frequently followed that, regardless of our own opinion, we do not feel called on to reverse it.

The record shows a second sale of the same premises to Frank E. Brewer made September 10, 1903, for the delinquent taxes of 1898 to 1901, both inclusive. Brewer filed his cross-petition asking that his tax sale certificate be foreclosed. At the time of this last sale one O. P. Mason was the owner of the fee title, and on November

20, 1903, Brewer purchased the premises from Mason and took a conveyance from him. The district court held that his tax lien merged in the legal title thus acquired. It is a general rule that, where a person acquires a greater and lesser estate in the same property, this constitutes a merger of the two estates. *Mathews v. Jones*, 47 Neb. 616. It is true in this case that, after demand had been made upon Brewer for redemption from the plaintiff's lien, and shortly prior to the commencement of this action, he conveyed this land to his sister subject to the taxes of the years named in his tax sale certificate, and he now insists that this, together with his failure to surrender his certificate for cancelation, was evidence of his intention not to merge his tax lien in the fee estate. The merger, if it occurred, took place when he purchased from Mason, and the failure to file his certificate with the treasurer for cancelation is not, we think, evidence sufficient to overcome the legal presumption of merger arising from his purchase of the legal estate, even if nonmerger could be allowed as against the claim of the plaintiff and in hostility to his claim.

In *Boucher v. Trembley*, 140 Mich. 352, it was held that the purchase of the patent title by the holder of a tax deed merged the tax title in the legal or patent title, so that the purchaser took title subject to the equity of one in possession to claim for improvements made on the premises. This would not probably be held in those states where the making of a tax deed invests the holder with a new and independent title superior to all outstanding liens and equities held by others against the land; but in Michigan the owner of the legal title has a right of redemption for six months after the making of his tax deed, and because of this provision of the statute the Michigan court held that the tax deed, for six months after its date, operates only as a lien against the property which merges in the legal title when the same is bought in by the tax purchaser, and that it cannot be asserted in opposition to an equitable claim against the land held

by a third party. On the same principle, Brewer will not, after acquiring the legal estate in the land in question, be allowed to hold his tax lien independently of his legal title for the purpose of defeating the prior lien held by the plaintiff and appellee under his tax certificate.

We think the decree of the district court was, under our former decisions, the only one which could be entered in the cause, and therefore recommend its affirmance.

JACKSON, C., concurs.

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

AFFIRMED.

ISAAC G. TRAUERMAN ET AL., APPELLANTS, V. NEBRASKA LAND & FEEDING COMPANY, APPELLEE.

FILED OCTOBER 18, 1906. No. 14,449.

Sales: RECOVERY OF MONEY PAID. It is a rule generally enforced that a purchaser who has advanced money in part performance of a contract, and who refuses to proceed, the seller being ready and willing to perform on his part, cannot recover back money so advanced; but to subject the purchaser to this penalty or forfeiture it should clearly appear that he has wholly abandoned the contract and wilfully refused to proceed thereunder.

APPEAL from the district court for Cherry county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

Allen G. Fisher, for appellants.

Albert W. Crites, contra.

DUFFIE, C.

This is the second appeal in this case. The first trial resulted in a judgment for the plaintiffs, and upon appeal to this court the judgment was reversed and the case

remanded. A full and clear statement of the facts in the case by Mr. Justice BARNES may be found in 70 Neb. 795. Upon the second trial judgment went in favor of the defendant, and the case is now here on appeal taken by the plaintiffs below.

As will be seen by the statement of facts given in the first opinion, the suit is to recover $1,000 advanced by the plaintiffs as earnest money or part payment made by them upon a purchase of 500 calves to be delivered to them by the defendant at Irwin on October 22, 1900. On the trial the plaintiffs attempted to show that at the time of entering into the written contract, and for the same consideration, there was a further oral agreement that the delivery might, at their request, be delayed for a week or ten days. We held on the former appeal that this evidence was incompetent as varying the terms of the written contract. No material additional evidence was introduced in support of the plaintiff's claim on the second trial, and at the conclusion of the evidence the court directed a verdict for the defendant. The evidence is clear that sometime prior to the 22d day of October, when delivery of the calves was to be made, defendant wrote to the plaintiffs that it had secured the calves and would be at Irwin to make delivery at the time specified. At the time called for by the written agreement defendant had the calves at Irwin ready to deliver, but the plaintiffs were not there to receive them or to make payment for the remainder due. Thereafter, not being able to arrive at a settlement of their dealings, this action was commenced by the plaintiffs to recover the money advanced. The only question, therefore, presented by this appeal is whether a party who has made part payment upon a purchase of property, and who fails to perform on his part, can recover the money so advanced. On this question the authorities, while not numerous, are generally to the effect that he cannot.

In *Hansbrough v. Peck*, 5 Wall. (U. S.) 497, it is said: "The party who has advanced money, or done an act in

part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

In *Haynes v. Hart*, 42 Barb. (N. Y.) 58, the plaintiff attempted to recover money advanced as part of the purchase price of a canal boat. A demurrer to his petition was sustained upon the ground that it showed a breach of the contract on his part. On appeal, the court said: "The plaintiff cannot recover on the ground of his own breach of the agreement; and the contract does not provide for a repayment of the money paid in part performance, in case of a rescission according to the stipulations of the contract. Nor will the law imply a promise in such a case. To allow the plaintiff to recover back the purchase money paid, in a case like this, would be to offer an inducement to a purchaser to violate his agreement. It would give him the use of the canal boat for a year without compensation, and put it wholly in his power to perform or not at his pleasure. I think no case can be found where a purchaser has been allowed to recover back partial payments after a default in making further payments, when the vendor has merely kept the property agreed to be sold, or sold it to another, in consequence of such default. In order to entitle a purchaser to recover under such circumstances he must show that the other party has been guilty of some breach on his part, or of some act in hostility to the contract."

In *Walter Bros. v. Reed & Gerard*, 34 Neb. 544, it is said: "If a purchaser has advanced money in part performance of a contract, and without fault on the part of the seller refuses to proceed, the seller being ready and willing to perform on his part all the stipulations of the agreement, the purchaser cannot recover back what he has paid."

In *Lexington Mill & Elevator Co. v. Neuens*, 42 Neb.

649, this court, after referring to the case of *Walter Bros. v. Reed & Gerard, supra,* said: "In view of the frequency with which it might be supposed this question would arise, the authorities elsewhere are remarkably few and the cases wherein the principle has been involved are not harmonious. Had the case rested upon the defendant's counter-claim, in ascertaining his damages, the fact that he had already received the $100 might be one for consideration; but this instruction related to the plaintiff's cause of action and not to the counter-claim, and if, instead of alleging performance on its part, the plaintiff had alleged in the petition that it paid the $100 and then refused to receive the grain, such a petition would have been demurrable. It would trace the right to recover through the plaintiff's own breach of contract. We are satisfied with the rule announced in *Walter Bros. v. Reed & Gerard,* and the instruction given was correct, in view of that rule."

In the cases above cited the purchaser had absolutely refused to proceed further in performance of his contract. In the case we are now considering, a few days prior to the time fixed for delivery the plaintiffs wrote defendant requesting that the delivery be delayed for a few days as their business was such that they could not be present to receive the calves. Defendant made no response to this request, but proceeded to tender delivery at the time and place named in the contract. Plaintiffs not being there to receive the calves and make final payment, defendant drove them away, and now has possession of the same and of the $1,000 paid thereon. While it is clear from the record that plaintiffs failed to observe the strict terms of their contract, it is not at all clear that they absolutely repudiated it. There is evidence from which it might be inferred that at a later date they were ready and willing to receive and pay for the calves, and if this state of facts can be established to the satisfaction of a court and jury we hardly think the case one in which the rule demanding forfeiture of the advanced payment would apply. What-

ever damages the defendant may have sustained in consequence of the failure of the plaintiffs to promptly receive and pay for the calves according to the strict terms of the contract should, of course, be allowed it; but to say that a forfeiture of the entire advance payment should be imposed upon the plaintiffs, without clear proof that they had repudiated the contract and refused to proceed thereunder, is going further than we think the rule requires or we are disposed to go.

We recommend a reversal of the judgment and remanding the cause for a second trial.

ALBERT and JACKSON, CC., concur.

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

REVERSED.

FREDERICK H. WEEKE ET AL., APPELLANTS, V. HENRY W. WORTMANN, ADMINISTRATOR, ET AL., APPELLEES.

FILED OCTOBER 18, 1906. No. 14,410.

1. **Probate Court:** APPEAL. An appeal lies from a final order or judgment of a county court in probate matters to the district court, whether such order or judgment be upon the merits or otherwise.
2. **Petition** examined, and *held* to state a cause of action for relief against an order of the probate court alleged to have been procured by fraud and imposition.

APPEAL from the district court for Thayer county: LESLIE G. HURD, JUDGE. *Reversed.*

Baldwin & Torgerson, Charles H. Sloan and *T. C. Marshall,* for appellants.

R. D. Sutherland and *J. T. McCuistion, contra.*

ALBERT, C.

On the 6th day of January, 1902, Henry William Weeke died intestate in Thayer county. He left a widow and one child, a son, plaintiffs in this case. On the 11th day of January of the same year the plaintiffs and four of the defendants entered into an agreement in writing for the distribution of the estate, which is as follows: "This agreement entered into this 11th day of January, 1902, between the heirs of Henry William Weeke, deceased: Witnesseth, that the undersigned have agreed, and do hereby covenant and agree, with each other, to settle the estate of Henry W. Weeke, as follows: (1) All debts shall be paid. (2) The widow, Kathrina E. Weeke, shall receive all the household goods, $200 in cash, and one-third of the remainder of the estate. (3) Out of the remainder of the estate, Lottie Knoerenschild shall receive $200, and Frederick H. Weeke shall receive $500. (4) The state remaining after the widow shall have her portion, and the said sums have been paid Lottie Knoerenschild and Frederick H. Weeke, shall be divided into five equal parts. Mrs. Minnie Wortmann shall receive one-fifth, Herman H. Burstadt shall receive one-fifth, Lottie Knoerenschild shall receive one-fifth, Henry H. Stockham shall receive one-fifth, and Frederick H. Weeke shall receive one-fifth. In witness whereof, we have hereunto set our hands, at Deshler, Nebraska, the day and year first above written." Afterwards the other defendant was duly appointed administrator of the estate by the county court of Thayer county. On the 24th day of October, 1902, the administrator rendered a final account, which was approved and allowed on the 18th day of November, 1902, and an order of distribution was entered in accordance with the written agreement hereinbefore set out. He made distribution in accordance with such order, each distributee receipting for his share, and on the 10th day of January, 1903, was discharged from his trust. On the 9th day of February, 1905, the plain-

tiffs filed their petition in the county court, praying that the order allowing the administrator's final account, the order of distribution, and that discharging the administrator, be vacated and set aside. A demurrer was interposed and sustained, and the cause dismissed.

The plaintiffs appealed to the district court. Their petition filed in the district court alleges the death and intestacy of the decedent, plaintiff's relationship to him, and that they are his sole and only heirs at law. It also alleges the making of said agreement for distribution, the appointment of the administrator, the proceedings in the matter of said estate had in the county court and hereinbefore mentioned, and the distribution of the estate in accordance with the order of the county court. The petition also contains the following allegations:

"(10) That the plaintiff, Frederick H. Weeke, is mentally weak, easily influenced, deceived and defrauded, and is of weak mind and memory, and on or about the 11th day of January, 1902, the defendant Henry W. Wortmann, with intent to cheat and defraud this plaintiff, presented to him an agreement, marked 'Exhibit G' and made a part hereof, and falsely and fraudulently, and with the intent to cheat and defraud this plaintiff, represented to him that Minnie Wortmann, who is the wife of the defendant Henry W. Wortmann, and Herman H. Burstadt and Henry H. Stockham, who are brothers-in-law of the defendant Henry W. Wortmann, and Lottie Knoerenschild, his sister-in-law, were heirs of said estate of Henry William Weeke, deceased, and entitled to share therein, and that unless the plaintiff would sign said agreement the whole estate would be squandered and wasted in litigation, and that if plaintiff would sign said agreement, and also have said defendant Henry W. Wortmann appointed administrator of said estate, he, the plaintiff, would be greatly benefited thereby and receive $500 more than he was legally entitled to; that plaintiff, Frederick H. Weeke, believing and relying on said false and fraudulent representations, as aforesaid, was de-

ceived thereby and was fraudulently induced to sign said void agreement, without any consideration therefor, the inducements for signing said void agreement being only the aforesaid false and fraudulent representations, and that said void agreement was thereafter used by the defendant, Henry W. Wortmann, fraudulently, to induce, by fraud and deceit, the said county court to approve his final report as administrator, and said court was by said fraud and deception thereby induced on the 18th day of November, 1902, to make the order of distribution. * * * Said plaintiff was thereby defrauded of the sum of $9,000 by the said defendants, all of whom shared in the proceeds, as shown by the various receipts of the defendants, copies of which are hereto attached, marked 'Exhibit H' and made a part hereof, and that said defendants were not in fact heirs of said estate, and were not entitled to share in the proceeds of said estate, and said money was procured by fraud and deceit, and said plaintiff, Frederick H. Weeke, was wronged and defrauded thereof and thereby.

"(11) That the defendant Henry W. Wortmann, well knowing the mental weakness of this plaintiff, Frederick H. Weeke, and with intent to cheat, wrong, and defraud said plaintiff, employed one Henry Bredenbeck, who, acting under the advice and direction and on behalf of said defendant, went to the home of the plaintiff about the 24th day of November, 1902, and represented to said plaintiff that the law required him, said plaintiff, to sign a certain receipt, a copy of which is hereto attached, marked 'Exhibit I' and made a part hereof, and that he had to sign the same to get any money from said estate, and that by signing the same he would receive $500 more than he was entitled to under the laws of the state of Nebraska, all of which was false and untrue and made for the purpose of cheating and defrauding said plaintiff, and was made at the instigation and under the direction of said defendant, and for the purpose of deceiving the county judge, and to thereby obtain the approval of the

aforesaid false and fraudulent final report of Henry W. Wortmann, as administrator. In fact and in truth said plaintiff signed said receipt without any consideration, and relying upon the false and fraudulent representations aforesaid, and said receipt was used by said defendant before the county court in procuring the final order of discharge set out in 'Exhibit F,' and said order was thereby obtained from said court by fraud and deceit.

"(12) That the defendant, Henry W. Wortmann, during all the time that he was acting as administrator of said estate, and for a long time theretofore, knew that said plaintiff was mentally weak, and easily deceived, influenced and imposed upon, and the same was also known by all of the defendants, and that all of the defendants well knew that said plaintiff was the sole heir-at-law of the said Henry William Weeke, deceased, and that the defendants were none of them heirs to the said estate, or any part thereof, and that said defendants with intent to cheat and defraud this plaintiff, in the manner aforesaid, conspired together, and were each and all of them instrumental in perpetrating said fraud and in sharing in the proceeds thereof.

"(13) That the plaintiff Frederick H. Weeke had no knowledge of said fraud until within the last six months prior to the commencement of this suit in the county court."

They also tendered an answer to the defendant administrator's petition for discharge, setting forth substantially the same matters as those alleged in their petition for the vacation of the orders of the county court. The defendants demurred on three grounds: (1) That the facts stated are insufficient to constitute a cause of action; (2) that the court had no jurisdiction of the subject matter; and (3) that it had no jurisdiction over the person of the defendants. The demurrer was sustained, and the plaintiffs electing to stand on their petition, judgment was given for the defendants. The plaintiffs appeal.

Neither the petition nor any other part of the record

shows upon what grounds the defendants, who entered into the agreement with the plaintiffs for a distribution of the estate, claimed any portion thereof. But some light is thrown on this question by the brief filed in their behalf, from which it appears that the wife of the deceased, who is one of the plaintiffs in the case, had married twice before she married the deceased, and had children by both former husbands; that upon her marriage to the deceased her children by her former husbands were taken into his home and brought up as members of his family, and they and the plaintiff, Frederick H. Weeke, the one child of the deceased, were raised together as brothers and sisters. It is also stated in the brief referred to that upon the marriage of the deceased he appropriated all the property left by the former husbands of his wife, and that the estate left by him includes the estates of the former husbands. But, as before stated, these things are not matters of record, and we refer to them merely as offering an explanation of the somewhat extraordinary state of facts set forth in the petition.

We think the petition states a cause of action in favor of the plaintiff, Frederick H. Weeke. It shows that the plaintiffs are the sole and only heirs at law of the deceased; that the order of distribution made by the county court was based on the written agreement entered into between the plaintiffs and four of the defendants, whereby the latter were allowed to share as heirs in the distribution of the estate; that the defendant administrator, in pursuance of a conspiracy to which all the defendants were parties, and for the purpose of inducing the plaintiff, Frederick H. Weeke, to enter into said agreement, falsely and fraudulently represented to him that the other defendants were joint heirs with said plaintiff and entitled to share with him in the distribution of the estate; that said plaintiff was weak minded and, in consequence, easily influenced; that relying on the said false and fraudulent representations, and believing them to be true, said plaintiff was thereby induced to enter into

the agreement in question; that he did not discover that said representations were false until about six months before the commencement of this suit. The foregoing facts stand admitted by the demurrer and in view of the defendants' claim that those of them who had joined in the agreement had been brought up under the same roof with the plaintiff, Frederick H. Weeke, his charge that he relied upon the representations and believed them to be true is not inherently improbable. Those facts standing admitted, it is clear that the orders of the county court, based upon the agreement and obtained in the manner charged, were procured by fraud practiced by the defendants, and entitle Frederick H. Weeke to relief.

It is contended that the district court acquired no jurisdiction of the subject matter on appeal from the judgment of the county court. If we understand the argument on this point, it involves the proposition that an appeal will not lie from the judgment of a county court rendered in a matter within its exclusive original jurisdiction unless there has been a hearing upon the merits, and that error is the exclusive remedy in such case. We do not think there is any authority for that proposition. While the constitution gives county courts exclusive original jurisdiction in probate matters, section 17, art. VI, provides: "Appeals to the district courts from the judgments of county courts shall be allowed in all criminal cases on application of the defendant; and in all civil cases, on application of either party, and in such other cases as may be provided by law." Section 42, ch. 20, Comp. St., provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any person against whom any such order, judgment, or decree may be made, or who may be affected thereby." The constitution certainly authorizes the foregoing section, and the only condition precedent to an appeal, according to this section, is a final order, judgment, or decree, without regard to whether the hearing

was upon the merits or otherwise. As to the jurisdiction of the district court over the person of the defendants, as we have seen, it had jurisdiction of the subject matter. The defendants entered a general appearance. Our attention has not been called to anything that was lacking to give the court complete jurisdiction over the person of defendants. A considerable portion of the argument in this case is based on matters entirely outside the record. We cannot go into such matters. The point we decide is that the petition states a cause of action in favor of the plaintiff, Frederick H. Weeke, and against the defendants, and that the demurrer thereto was erroneously sustained.

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

DUFFIE and JACKSON, CC., concur.

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

REVERSED.

SARAH STRAWN, EXECUTRIX, ET AL., APPELLANTS, V. FIRST NATIONAL BANK OF HUMBOLDT, APPELLEE.

FILED OCTOBER 18, 1906. No. 14,431.

Action: MISJOINDER. In an action by several plaintiffs against a bank for an accounting on certificates of deposit, where it is evident from the petition that assignments of fractional parts of the separate demands have been made by each plaintiff to his co-plaintiffs, and that the interest of each in the total sum is equal to the amount of the certificate originally held by him, and that the purpose of such assignments was to enable them to join in a single action, *held* that a demurrer for misjoinder of causes of action was properly sustained.

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

R. S. Maloney and *Reavis & Reavis,* for appellants.

Francis Martin and *Edwin Falloon, contra.*

JACKSON, C.

It appears from the petition that each plaintiff had a time check drawn on the defendant bank by one Samuelson, and that each check represented an independent and distinct transaction in nowise connected with the issuing of the other checks. It is alleged that the checks are in fact certificates of deposit upon which the bank is liable. Each of the plaintiffs assigned a fractional part of his claim to his coplaintiffs, but it is conceded that the interest now claimed by each in the sum of the checks equals the amount of the check held by him in the first instance. They joined as plaintiffs in an action against the bank to recover on these checks. The defendant interposed a demurrer to the petition on two grounds: First, that the petition does not state facts sufficient to constitute a cause of action; and second, that several causes of action are improperly joined. The demurrer was sustained in the district court and the action dismissed. The plaintiffs appeal.

Each plaintiff claims an interest in all of the checks or certificates of deposit, whatever they may be termed, and it is urged that, while their rights arising under the partial assignments would not be enforced in an action at law without the consent of the bank, a court of equity will take cognizance of these assignments and compel an accounting. In the absence of the assignments set out in the petition the plaintiffs could not have joined either at law or in equity in a single action against the bank, and it is evident from the face of the petition that the partial assignments were made for the express purpose of enabling

them to join in a single action, each for his own benefit and on behalf of the others, but equity will not sustain assignments for that purpose. *Hoagland v. Van Etten,* 22 Neb. 681. We are convinced from a reading of the petition that the assignment of fractional parts of the claims of the plaintiffs against the bank has not changed the relation of the parties and has resulted in a misjoinder of causes of action.

The judgment of the district court dismissing the bill 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.

FRED CORDSON V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1906. No. 14,678.

1. **Information.** Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.

2. **Incest.** Section 204 of the criminal code, which declares that a father who shall rudely and licentiously cohabit with his own daughter, shall be guilty of incest, and which provides a punishment therefor, is valid and is sufficient in form and substance to create the offense therein described. *State v. Lawrence,* 19 Neb. 307, followed.

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

Hiram Chase, for plaintiff in error.

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

BARNES, J.

Fred Cordson, hereafter called the defendant, was tried by the district court for Thurston county, and found guilty of the crime of incest, as defined by section 204 of the criminal code. He was thereupon sentenced to the state penitentiary for a term of seven years. To reverse that judgment he has brought the case here by petition in error. The record contains no bill of exceptions, and defendant's petition contains but one assignment, to wit, "That the court erred in overruling defendant's motion in arrest of judgment."

His first contention is that the information on which he was tried does not state facts sufficient to charge him with the commission of any crime. To this it is sufficient answer to say that the information charges him with the commission of the offense in the language of the statute creating it. It is a well-established rule that to charge a statutory offense it is sufficient if it be charged in the language of the statute. In *Bolen v. People,* 184 Ill. 338, it was said: "An indictment charging the accused with the crime of incest in the language of the statute is sufficient, though it fails to allege the act was feloniously or knowingly committed, since the crime of incest was not a felony at common law and is indictable only by virtue of the statute." It will be observed in passing that section 204 of our criminal code is a literal copy of the statute of Illinois. In *Leisenberg v. State,* 60 Neb. 628, it was said: "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute." To the same effect are *State v. Lauver,* 26 Neb. 757; *Wagner v. State,* 43 Neb. 1; *Chapman v. State,* 61 Neb. 888, and *State v. Davis,* 70 Mo. 467. So the defendant's first contention must fail.

The defendant's second contention is that the section of the criminal code on which this prosecution is based is void, and, to use his own words, "is but a futile attempt

on behalf of the legislature to provide punishment for a father's incestuous relations with his daughter, and the words used by the legislature come short of the purpose." This contention cannot be sustained, for the whole matter was put at rest by the decision in *State v. Lawrence,* 19 Neb. 307, where the validity of that section was upheld. As above stated, section 204 is a literal copy of the Illinois statute, and we find that for more than half a century its validity has been upheld by the courts of that state. We are satisfied with the rule in *State v. Lawrence, supra,* and the reasons there given to support it, and therefore decline to overrule that decision.

It is also claimed in the defendant's brief that the court did not accord him the constitutional right of being confronted by the witnesses against him. As before stated, the record contains no bill of exceptions, and the transcript is silent upon that question. So there is nothing before us to overcome the presumption of the regularity of the proceedings of a court of general jurisdiction, and we therefore cannot consider that matter. In fact, so much of the record as we have before us contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

PHILIP MCINTYRE V. L. K. MOTE, SHERIFF.

FILED NOVEMBER 10, 1906. No. 14,797.

Appeal: PRACTICE. Under the practice of this court, where the record contains no bill of exceptions and the pleadings are sufficient to support the judgment of the trial court, it will be affirmed.

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

Philip McIntyre, pro se.

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

LETTON, J.

This is a proceeding in error to review a judgment of the district court for Dawes county refusing to discharge the petitioner, Philip McIntyre, upon a writ of habeas corpus. The petitioner alleges that he was not convicted of any crime or offense and that he is illegally deprived of his liberty, having been brought from the state of Virginia into this state without any demanding writ from the governor of Nebraska or rendition writ of the governor of Virginia, contrary to the laws and constitution of the United States and of the state of Nebraska. He prays that he may be discharged from such illegal custody, and not molested until he has had time to return to the state of Virginia. At the hearing, the district court found in favor of the regularity and sufficiency of the proceedings and writ whereunder the petitioner was held, denied his petition and remanded him to the custody of the jailer to await trial upon the information pending against him. No bill of exceptions was preserved, and no motion for a new trial filed. Under the practice of this court, where the record contains no bill of exceptions and the pleadings are sufficient to support the judgment of the trial court, it will be affirmed.

The petition in error and the brief of the petitioner are couched in somewhat rambling and confused language, and it is difficult to see what particular point the petitioner seeks to raise thereby. Nevertheless, and though not required to do so, we have examined the return of the sheriff to the writ, which sets forth the proceedings under which the petitioner was arrested and is detained. It appears that on April 26, 1905, Allen G. Fisher filed his complaint against the petitioner in the district court for Dawes county, in substance charging the petitioner with forging a bill of exchange for $250, and uttering and publishing the same as true and genuine, with the unlawful intent to defraud. Afterwards there was filed by leave of court an information by the county attorney

of Dawes county, under section 585 of the criminal code, charging Philip McIntyre as a fugitive from justice with the same crime as in the complaint, and the clerk was directed to issue a bench warrant for the apprehension of the said McIntyre upon the charges in the information as a fugitive from justice of the state of Nebraska. This warrant was issued May 1, 1905. On the 20th of December, 1905, the governor of Virginia issued his warrant of rendition, reciting the proceedings in the district court for Dawes county, Nebraska, a request upon him by the governor of this state for the rendition of the accused, and directing the officers of the state of Virginia to arrest McIntyre, to afford him an opportunity to sue out a writ of habeas corpus, and afterwards to deliver him into the custody of L. K. Mote, the sheriff of Dawes county. The return of the sheriff further shows that in pursuance thereof he presented the warrant of rendition to one Tomlinson, an officer of the city of Richmond, Virginia, who thereupon arrested McIntyre, gave him an opportunity to sue out a writ of habeas corpus, and afterwards delivered McIntyre to him, and that by virtue of the warrant of rendition and the bench warrant he brought the petitioner to this state and now holds his body in the county jail. The proceedings set forth in the return seem in all respects to be regular and in accordance with law. Under the provisions of section 373 of the criminal code the return of the officer must be considered as *prima facie* evidence of the facts therein cited. No facts inconsistent therewith or contradictory thereof have been shown to exist. The petitioner therefore does not seem to be unlawfully restrained, but, on the contrary, appears to be legally confined by virtue of the complaint, the information and the warrant based thereupon.

The judgment of the district court is

AFFIRMED.

FREEMAN P. KIRKENDALL ET AL., APPELLEES, V. ERNEST S. WEATHERLEY ET AL., APPELLANTS.

FILED NOVEMBER 10, 1906. No. 14,341.

1. **Assignment: EXECUTION: VALIDITY.** A voluntary assignment for the benefit of creditors, executed in a sister state according to the laws thereof, is ineffectual to convey real property situated in this state, unless it is executed and recorded in such manner as would render it so effectual if made in this state.
2. **Election of Remedies: ESTOPPEL.** A creditor, by participating in an insolvency proceeding begun in a sister state by a voluntary deed of assignment insufficient in form to be effectual to convey real property situated in this state, may become estopped to impeach a purported title of a purchaser of such property acquired in good faith in the progress of such proceedings.
3. **Mortgages: EQUITY OF REDEMPTION: FORECLOSURE.** Although by express stipulations in a trust deed or mortgage of land situated in this state the legal title and right of possession of such land may be conveyed to the trustee or mortgagee, yet the equity of redemption of the mortgagor cannot be extinguished by adversary proceedings other than judicial foreclosure.
4. ———: ———: **DEED TO MORTGAGEE.** When by express stipulations the legal title and right of possession of land situated in this state are conveyed to a trustee in a trust mortgage, the trustee may, with the knowledge and acquiescence of the mortgagor, without fraud or collusion, or the intent or effect to injure or defraud third persons, convey such legal title and right of possession to the mortgagee in consideration of a release and discharge of the mortgage debt, and in such a case a conveyance of the premises by the mortgagor, either directly or through a third person, to the mortgagee with the intent and purpose to extinguish the equity of redemption will have that effect.

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

Joel W. West, Guy R. C. Read and *Jacob Fawcett*, for appellants.

William Baird & Sons and *Baldrige & De Bord, contra.*

AMES, C.

The Lewis Investment Company is, or was, an Iowa corporation having its principal place of business at the city of Des Moines, in that state. It became insolvent, and on the 24th day of December, 1895, executed to one Nelson Royal, for an express nominal consideration of one dollar, a general assignment of all its property wherever situated, for the benefit of creditors, and reciting the trusts and powers usual in such instruments. Royal was a private citizen and a resident of the city named. At the time of the execution and delivery of said instrument the corporation was the owner of a city lot in the city of Omaha, in this state, but the assignment was filed for record in Douglas county on the same day as 1896, some ten months after its execution, but it was as to form and substance in conformity with the statute of the state of Iowa relative to the subject of voluntary assignments for the benefit of creditors. On the 26th day of August, 1896, Royal, pursuant to a judicial order rendered by one of the Iowa courts, conveyed the lot, or attempted so to do, to one Sage, and Sage afterwards deeded it to one Smith. The former of these deeds was filed for record in Douglas county on the same day as the assignment, but the latter not until September, 1902. Smith executed a lease of the premises to Kirkendall, one of the plaintiffs below and appellee, who went into and is now in possession of the same. The other plaintiff below and appellee is the executor of the will of Smith, now deceased. At the time of the execution of the assignment the Lewis Investment Company was indebted to the Des Moines National Bank upon certain promissory notes which the latter afterwards sold and assigned to defendant and appellant, Weatherley, who in 1904, begun in the district court for Douglas county a suit in foreign attachment thereon against the investment company, and caused a levy to be made upon the Omaha lot. The action proceeded regularly to judgment, sale and confirmation,

and the issuance of a writ of assistance to put the purchaser, who is the plaintiff in attachment, into possession, when this suit was begun by the tenant and the executor of the lessor to perpetually restrain the process and obtain a decree quieting their title and possession. The defendant filed a cross-bill, praying similar relief in his own behalf, and upon the issues thus joined there was a trial, resulting in a judgment for the plaintiffs, from which this appeal is prosecuted.

The statute of this state relative to voluntary assignments enacts that "no voluntary assignment for the benefit of creditors hereafter made shall be valid unless the same shall be made in conformity to the terms of this act." Comp. St., ch. 6, sec. 1. It further provides that every such assignment shall name as assignee the sheriff of the county in which the assignor or one of several assignors resides, "and within 24 hours after its execution it shall be filed for record in the clerk's office of the county in which the assignee resides" (sec. 6), and within 30 days thereafter in the clerk's office of every county in which there shall be real estate of the debtor, and that a failure of such record within the time aforesaid shall avoid the instrument as to the property situated in any such county. It is likewise enacted that "real estate so assigned shall be described in the deed of assignment in such manner as would be requisite in an ordinary deed of conveyance thereof" (sec. 3). None of these requirements was complied with in the instrument under discussion, so that it is quite evident that if it had been executed in this state it would have been wholly ineffectual for any purpose. *Sager v. Summers,* 49 Neb. 549. And if in such a case it had complied with all of them except that with respect to description, it would without doubt have been insufficient to convey the lot in suit. Saying nothing about the other requirements, can omission to comply with those relative to description and recording be excused and the instrument upheld for the reason that the assignor was a nonresident of the

state or a foreign corporation? The evident policy of the law is to compel the immediate identification of the real property sought to be conveyed, and facilitate, not only the record of the instrument, but also the ascertainment by mere inspection whether such record has been duly made. One obvious object of this regulation is that creditors may be speedily advised whether lands of the debtor situate in any particular county are or will be claimed by the assignee. The statute makes no exception. Can the court make one? We think not. An elementary and nearly, if not quite, universal rule of law is that instruments intended to affect the title of real estate must, to be effectual, conform to the law of the state or country in which the land is situated, or be such as that law authorizes or prescribes. This proposition is, we think, too well settled to require the citation of authorities in its support. We know of no principal or authority that exempts voluntary assignments for the benefit of creditors from this rule. Nor do we know of any law which limits the right of seizure of property, which a debtor has made an ineffectual attempt to convey, to creditors who are residents of the state. Citizens of each state have all the privileges of citizens of every other state, among which, undoubtedly, are the rights to apply to the courts of the latter and to have the aid of their process for the enforcement and the collection of their demands and the protection of their persons and property.

But the payee of the notes, which were the foundation of this suit in attachment, retained them until after their maturity and proved them in the Iowa insolvency proceeding. No dividend was declared or paid in that proceeding, but *Green v. Gross,* 12 Neb. 117, is cited as authority that the bank, and also, of course, its assignee, is estopped from afterwards attacking the title to any of the property, the proceeds of the sale of which might have contributed to the fund in the distribution of which it would have participated, both because of its residence

in the state of Iowa and because of demand for such participation. We have already given briefly our reason for not being able to concur in the first of these propositions, but the second is not so easily brushed aside. An assignment in insolvency under state authority differs from a proceeding in bankruptcy under the federal statute in the important particular that it does not affect creditors compulsorily. They participate, if at all, voluntarily, and if they refrain from so doing their demands and their remedies thereon are unaffected, except to the extent that the debtor's property is lawfully withdrawn from their reach by the due operation of the insolvency laws, just as it might have been so withdrawn from any one of them by a precedent judicial seizure of it by one more diligent. But voluntary participation may have important consequences. An instance is easily conceivable in which the bulk of the property belonging to an insolvent and attempted to be assigned by him is real estate lying outside the state. Suppose that such had been the case in the present instance, and that the bank had obtained a dividend, say of 50 per cent. of its claim, from participation in the distribution of the proceeds of the sale of such foreign lands; could it afterwards impeach the title of the purchaser and obtain satisfaction of the residue of its claim by a resale of the property? Counsel for the attachment plaintiff argue that the doctrine of estoppel, whatever its force in other cases, has no application in this instance, because of the fact that no dividend was declared or paid, and cite *Thompkins v. Adams,* 41 Kan. 38, in support of this contention. But no such exception is made in this court in *Green v. Gross, supra,* and we think such a one would be impracticable. It would permit a creditor to speculate and experiment with inconsistent remedies; pursuing one until he became dissatisfied with it, and then abandoning it for the other, or prosecuting one until he obtained partial satisfaction, and then resorting to the other for the recovery of the remainder of his claim. Such a course would be manifestly unjust both to other credi-

tors of the insolvent and to a purchaser in good faith and for value relying upon the sufficiency of the insolvency proceedings in which the attachment plaintiff had participated. We are of the opinion that in such cases the rule of law relative to the election of remedies is applicable, subject, of course, to its own peculiar limitations and exceptions; but as to these last no issue is made or tendered by the pleadings.

In November, 1894, the investment company executed to one Lewis, as trustee, a trust mortgage upon the lot in controversy and other property to secure the payment of certain indebtedness. The instrument purports to have conveyed to the trustee the entire title, legal and equitable, together with the right of possession of the premises described in it, with authority to sell and convey the same at private sale at his discretion, and apply the proceeds to or toward the payment of the obligation secured thereby. In the summer of 1896 there was a conference between the creditor under this mortgage and Lewis, the trustee, who was also president of the corporation, and Nelson Royal, the assignee in insolvency, at which time it was agreed that the obligation of the investment company should be satisfied and discharged upon the execution and delivery by the trustee and by the assignee, severally, of deeds of conveyance of the property in question in fee simple to one W. H. Sage, one of the predecessors in title to the plaintiffs in this suit. On the 11th day of July, 1896, the district court for Polk county, Iowa, granted an order, upon the application of the assignee, purporting to authorize him to carry the arrangement into effect, so far as he was concerned, by the execution and delivery of his contemplated deed, which he accordingly did on the 26th day of the following August; and on the 31st day of the same month, Lewis consummated the transaction by executing his deed to Sage, who then went into possession of the Omaha lot and has remained so, by himself or his tenants or grantees, until the present time. By this transaction, which appears to

have been entered into fairly, voluntarily and in good faith, considerable other property of the investment company included in the trust deed appears to have been released from the lien of that instrument and an obligation against the company of something like $20,000 in amount to have been satisfied and discharged.

Counsel for the attachment plaintiff, defendant herein, contends that the power of private sale contained in the trust mortgage was void, and that the deed of Lewis, trustee, to Sage was therefore ineffectual; but in response to this contention several objections may be urged. The statute of this state, sec. 55, ch. 73, Comp. St. 1903, does not prohibit a conveyance of the legal title and right of possession to a mortgagee, but merely enacts that such a conveyance shall not be presumed in the absence of express stipulation (*Felino v. Newcomb,* 64 Neb. 335), and the courts have held that, even in the presence of such stipulations, the mortgagor's equity of redemption cannot be extinguished by adversary proceedings other than judicial process of foreclosure. But does this rule prevent an amicable adjustment of the debt by a voluntary release and quitclaim of the equity of redemption? Is not the equitable rule exclusively for the benefit and protection of the mortgagor and persons in privity with him in blood or by covenant? In the absence of fraud or collusion, can a stranger avail himself of it to the disturbance or impairment of an amicable settlement upon a valuable consideration, and of a state of affairs satisfactory to both mortgagor and mortgagee? Would not the mortgagor and his privies, and more certainly his attachment and execution creditors, be estopped? There is nothing in the statute, and we know of no principle of law or equity, that forbids or impeaches such a transaction, when entered into or acquiesced in in good faith, and without an intent or effect to injure or defraud creditors or third persons.

For nearly eight years before the suit in foreign attachment was begun the plaintiffs and their predecessors

had been in possession claiming ownership under both the foregoing claims of title. Nothing is alleged impeaching the good faith of either or any of them, nor is there any denial of the plain and unequivocal implications of the record that the mortgagor, the assignee in insolvency and the remaining creditors of the former, in fact, all persons interested, except the plaintiff in attachment, have, with full knowledge of all the facts, at all times acquiesced, and still do so in the transaction and in the title sought to be conveyed and assured thereby. Neither is it averred that the land in controversy was, at the time the equity of redemption was released and conveyed, of a value in excess of the amount of the obligation which, in consideration of the transaction, was released and discharged. Nor is it denied that said release and discharge were effectual. We are unable to understand upon what principle of equity the title thus intended to be conveyed to, and quieted in, the mortgagee can at this late day be disturbed.

In conclusion, it may be well to add that it is not to be inferred from the fact that the foregoing matters of substance have been considered and decided that the court countenances the practice sought to be inaugurated in this case by the issuance of a writ of assistance to put a purchaser at a judicial sale in foreign attachment into possession of real property supposed to have been sold. The writ of assistance is the process of a court of equity, and not of a court of law. The plaintiff in this court was not a party to the attachment suit, but during and before the pendency of that action was and had been in the possession of the premises claiming adversely to both the plaintiff and the defendant and to all the world. It is clear, beyond the possibility of dispute, that he was entitled to his day in court in some regular form of action at law or in equity before his title could be affected or his possession disturbed.

We therefore 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.

MANLIUS SQUIRE, APPELLANT, V. MICHAEL H. MCCARTHY ET AL., APPELLEES.*

FILED NOVEMBER 10, 1906. No. 14,394.

Tax Lien: FORECLOSURE: REDEMPTION. When an action by a county to foreclose a tax lien upon a tract of land has proceeded to judgment of foreclosure and sale, and a sale has in fact been had, though not yet confirmed, the tax lien has become merged in the decree, and the taxpayer's right to discharge the same by payment of the tax to the county treasurer in the ordinary way is superseded by his right to judicial redemption which must be obtained, if at all, by means of procedure appropriate thereto.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

R. R. Dickson, for appellant.

M. F. Harrington, contra.

AMES, C.

The plaintiff was the owner of a tract of land in Holt county, in this state, upon which general state and local taxes were delinquent for the years of 1897 and 1898, and in January, 1900, the county begun an action to foreclose the public lien for these taxes in the manner approved by this court in *Logan County v. McKinley-Lan-*

*Rehearing allowed. See opinion, p. 431, *post.*

ning L. & T. Co., 70 Neb. 399. Constructive service was made by publication, and the action proceeded regularly to decree, sale and confirmation, and to a deed to the purchaser who went into possession of the premises. The plaintiff did not know of the pendency of the action until after the lapse of a year and a half from the date of the sheriff's deed. Between the time of the sheriff's sale and the confirmation thereof the plaintiff paid the amount of the delinquent taxes, interest and penalties to the county treasurer, and received the usual treasurer's receipt therefor. The money for this payment was remitted by mail, and, although there was a memorandum on the tax list indicating the pendency of the action, he was not informed of it and, of course, made no attempt to redeem from the decree. The purchaser at the sale has not been reimbursed or tendered the amount of his bid, and has conveyed the premises by deed. This is an action by the former owner of the land, seeking upon the foregoing facts to attack the proceedings in foreclosure and the title thereby created, and to quiet his own title against them. There was a judgment of dismissal, and the plaintiff appeals.

Counsel for appellant admits having made diligent and extended, but wholly unsuccessful, search for authority in support of his suit, and we are ignorant of any, or of any principle upon which his action can be maintained. The jurisdiction of the court in which the foreclosure action was had is not now open to question, nor is the validity or conclusiveness of its judgment of foreclosure and sale. Without doubt, the tax lien became merged in the decree, and the plaintiff's right to pay the taxes, by ordinary methods, to the treasurer was superseded by his right to judicial redemption, which object could have been obtained only by the pursuit of such procedure as is prescribed by statute or the rules of court, or adapted to the making of redemption from judicial liens, decrees or sales. Any other course would lead to inextricable confusion, and subject titles resting upon

such decrees and sales to such infirmity and insecurity as to render the procedure practically ineffectual.

Some attempt was made to show that the appraisement upon which the judicial sale was made was fraudulently low, but we think it was ineffectual. It is certainly insufficient to justify a collateral attack.

It is therefore 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.

The following opinion on rehearing was filed May 24, 1907. *Former judgment of affirmance vacated and judgment of district court reversed with directions:*

1. **Tax Lien**: FORECLOSURE: REDEMPTION. Before a tax sale had been had by the county treasurer, Holt county brought an action to foreclose an alleged tax lien on the plaintiff's land, which action proceeded to decree and sheriff's sale. After the sale and before the confirmation the plaintiff, in ignorance of these facts, paid to the county treasurer the full amount of the taxes and interest charged against the land. The treasurer accepted the money and issued receipts in due form therefor without notifying the plaintiff of the pendency of the action which was prematurely brought. *Held*, That the acceptance of the money by the county treasurer and the issuance of the tax receipts operated as a satisfaction of the decree so far as the plaintiff is concerned, and that he is entitled to have the sheriff's deed set aside in equity, the land being still in the hands of the original purchaser.
2. ———: ———: EQUITY. In such case, the loss, if any, is attributable to the negligence of the county treasurer, and the wrongful act of the county in attempting to foreclose its lien before its right to do so legally accrued, not to the failure of the taxpayer who was within his legal right and should be protected.

LETTON, J.

The plaintiff, who is a resident of Wisconsin, in 1891 became the owner of a tract of land in Holt county,

Nebraska. He has paid taxes on the same from 1892 to and including the year 1901, but he allowed the taxes for the years 1897, 1898 and 1899 to become delinquent. In May, 1900, he sent by mail to the county treasurer sufficient money to pay the taxes for each of these years, with accrued interest to date, and with one dollar extra fee for each receipt allowed by statute to the treasurer for payment of taxes by letter. In January, 1902, after he had sent the money for the payment of the taxes for 1901, he was informed by the county treasurer that the land had been assessed to M. H. McCarthy for the year 1901, and upon making further inquiry he received another letter from the county treasurer informing him that his land had been sold under tax foreclosure proceedings in 1900 to McCarthy, and that the sale had been confirmed and a deed made. He then brought this action to set aside the sale.

In January, 1900, the county attorney of Holt county began an action in the name of that county to foreclose a tax lien on the land for the delinquent taxes of 1897 and 1898. A decree was rendered on March 13, 1900, upon constructive service for $2,782, the land was sold at sheriff's sale on May 28 for $100.60, and on July 16 the sale was confirmed. The plaintiff sent the money to pay these taxes to the county treasurer in May, as he testifies, but the treasurer's books show that the taxes were paid on the 4th day of June, 1900, so that after the sale and before the confirmation the county had accepted, through its treasurer, the payment of the taxes and interest. The action to foreclose was improperly and prematurely brought, for the reason that at the time it was begun the county had not acquired the right to maintain it by the purchase of the land at treasurer's sale. *Logan County v. Carnahan,* 66 Neb. 685, 693. If the land had been sold at treasurer's sale for the tax of 1898 the right to foreclose would not have accrued until November, 1900, more than six months after the payment by plaintiff. So that if the usual and orderly course of tax

collection had been followed no action of this nature could have been begun until long after the time at which the plaintiff paid his taxes. By the negligence of the county treasurer the plaintiff was not notified of the pendency of the action when he paid the taxes, and was allowed to rest in apparent security until after the sale had been confirmed and a deed made to the purchaser. The title to the land has not passed from the purchaser at sheriff's sale as was erroneously stated in the former opinion, but is still held by him in his own right. The condition that presents itself then is: In whom is the superior equity? Is it with the owner of land who has paid his taxes before any sale of the land by the county treasurer upon which an action to foreclose might properly be begun, and who relied, and had the right to rely, upon the proper discharge of duty by the county officers, or is it with the purchaser at sheriff's sale under a decree which was clearly erroneous, but not absolutely void, and whose purchase was confirmed by the court after the taxes had been paid and the money accepted by the plaintiff in the suit, and without knowledge on the part of the court of such facts as would have made it improper and unjust to confirm the same? The statute makes no specific provisions with reference to the manner of redemption by landowners when proceedings are pending to foreclose tax liens, nor is any person designated who may receive money in redemption other than the county treasurer; hence, the plaintiff, when he attempted to pay his taxes, had a right to rely upon information of any foreclosure proceedings being furnished him by the officer of the county charged by law with the duty of collecting taxes. The taxpayer apparently did everything that the law required him to do. He paid to the proper officer the amount shown by the tax books that was chargeable against the land, with interest to date, and in addition paid the statutory fee which the treasurer is allowed to collect from nonresidents for the payment of their taxes, and this he did before the land had

been sold at tax sale by the treasurer and before anyone had a right to foreclose a tax lien. On the other hand, the county brought an unwarranted action, and obtained a decree which, though not justified by the facts, was not void for want of jurisdiction, under the ruling in *Logan County v. McKinley-Lanning L. & T. Co.*, 70 Neb. 399. It was the plain duty of the county treasurer to give to the plaintiff, at the time he paid the taxes, information that such an action had been begun, and he should not be compelled to suffer on account of the nonperformance of this duty by the agent of the county. In a similar case the supreme court of Iowa has said:

"The purpose of the law, in divesting the estate of a landowner upon sales and deeds executed thereunder for delinquent taxes, is to coerce the negligent and unwilling citizens to obedience of the law in payment of their taxes. It is not directed against those who, in the exercise of proper diligence, and in good faith, attempt to obey the law and discharge their duty as good citizens by the payment of taxes levied upon their property. If the landowner pays, tenders, or in good faith and without negligence attempts to pay his taxes, and is defeated in his efforts to discharge them by the fault and negligence of the officers charged with the duty of receiving the money and making proper records thereof, a sale and deed of the property will not be enforced." *Corning Town Co. v. Davis*, 44 Ia. 622.

And so in an Illinois case, the landowner called upon the county clerk, whose duty it was to inform him of the amount necessary to be paid to make redemption and whose duty it was to receive the money. The full amount which this officer required was paid and a certificate of redemption issued, but a subsequent tax had not been included upon which a tax sale was afterwards had. The action was to set aside a deed based upon this subsequent sale. The court say: "Here was a mistake of an officer for which appellees were in no manner responsible. For this mistake shall they lose their land, or is it within

the power of a court of equity to relieve as against that mistake, and thus protect appellees in the title to their land?" *Gage v. Scales,* 100 Ill. 218. See also *Converse v. Rankin,* 115 Ill. 398; *Freeman v. Cornwell,* 15 Atl. (Pa.) 873; *Bubb v. Tompkins,* 47 Pa. St. 359; *Dietrick & Wilson v. Mason,* 57 Pa. St. 40; *Hintrager v. Mahoney,* 78 Ia. 537, 43 N. W. 522. When the officer charged with the duty of collecting the taxes took from the plaintiff the full amount of the same, with interest, and issued his official receipt, he acknowledged the settlement of the claim of the county against the land, and what was done thereafter in the legal proceedings was as much without authority as if full redemption had been made. It was the fault of the officer, not of the plaintiff, that allowed the proceedings to continue, and the plaintiff should not suffer on account of the officer's lapse. The confirmation was made by the court under a misapprehension of the facts, and is such a manifest wrong as equity will relieve against while the land is still in the hands of the original purchaser at the sale. *Sayre v. Elyton Land Co.,* 73 Ala. 85.

If full payment had been made of the taxes, interest and costs, this would have constituted a full redemption of the property and the order of confirmation would have been made without authority of law. 23 Cyc. 1495. We think, so far as the owner of the land is concerned, he is in the same situation as if he had made full payment. The order of confirmation was made without authority as against the plaintiff and he is entitled to bring this action in equity to set the same aside.

The county is not a party to this action and, hence, the equities cannot be fully adjusted as between the parties. It may be said, however, that the county is not entitled to a double payment of the taxes and the plaintiff may have recourse upon it by proper proceedings. The defendant is not shown to have been at fault in any degree, while the plaintiff's troubles would not have occurred had he paid his taxes before they became delinquent. As a

condition of the relief, therefore, the plaintiff should be required to pay into court for the benefit of the defendant the amount of the purchase money paid for the land, with interest at 7 per cent. from the date of payment, and also the costs of this action in the district court.

The former judgment of this court is vacated, and the judgment of the district court is reversed and the cause remanded, with directions to enter a decree quieting the title to the land in the plaintiff upon his complying with the foregoing conditions.

JUDGMENT ACCORDINGLY.

WILLIAM L. CANHAM, APPELLEE, V. OTTO BRUEGMAN ET AL., APPELLANTS.

FILED NOVEMBER 10, 1906. No. 14,415.

1. **Action for Damages:** PETITION: SUFFICENCY. In an action for damages by a vendee against a vendor of horses infected with the disease of glanders, a petition is not obnoxious to a general demurrer because of an omission of an averment that before or at the time of the sale and delivery complained of the vendor had knowledge that the animals were so infected.

2. **Statutes:** REPEAL. Section 3171, Ann. St., enacting a penalty for selling glandered horses or permitting them to run at large, was not superseded or repealed by a subsequent act to prevent the importation, selling or permitting to run at large of any domestic animal afflicted with a contagious disease, being sections 3174 to 3177 of said statutes, the latter being general in its terms, while the former has a special and particular object.

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

W. D. Funk and *W. R. Ellis,* for appellants.

W. L. Henderson and *O. W. Rice, contra.*

AMES, C.

This is an action by the vendee of a team of horses against the vendors thereof to recover damages on the ground that at the time of the sale and delivery of the animals they were, without the knowledge of the plaintiff, infected with a certain malignant and contagious disease, known as "glanders," of which both of them soon afterwards died, after having communicated the disease to a certain other animal belonging to the plaintiff which, in consequence thereof, died. A general demurrer to the petition having been overruled, the defendants elected not to plead further, and the amount of the plaintiff's damages having been agreed upon by the parties, other evidence with respect thereto was waived, and the court rendered a judgment for that sum, from which the defendants appealed.

The statute, section 3171, Ann. St., enacts: "It shall not be lawful for any person to use, let, sell, or permit to run at large any horse, mule, or ass diseased with glanders. Any person violating the provisions of this section shall pay a fine of not less than five nor more than fifty dollars, and shall be liable for all damages." The sole ground for the contention that the petition does not state a cause of action is that it omits to aver that before or at the time of the sale and delivery of the horses the vendors had knowledge of their diseased condition. The statute quoted, which contains no express exception and has reference to but one disease, was passed in 1867 and has never, unless by implication, been repealed. In 1883 another act was adopted, making it a misdemeanor punishable by fine and imprisonment to import into the state, or to sell, transfer or to permit to run at large, any animal infected with any infectious disease, and rendering any person *knowingly* violating any of the provisions of the act liable in a civil action for all damages resulting from such violation. It is argued that the two acts are not necessarily in conflict, the later of them being gen-

eral in its scope and having reference to all animals and to all infectious diseases, while the former is special and specific, both as to a single disease and with respect to the animals subject to infection with it, and, hence, it is inferred that the legislature intended a different and more absolute rule of liability in cases of glanders than is imposed by the later enactment. However this may be, we think that under the liberal rules of pleading and procedure provided by the code, a petition in such a case is sufficient if it alleges the cause of action in the language of the statute. Knowledge, in the absence of all other evidence, may well enough be inferred by the court and jury, as it would be by most other persons, from the commission of the prohibited act. And the rule in such cases is that, in a civil action, it is sufficient to declare in the language of the act, unless there is an exception which the plaintiff is required to negative.

We 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.

LOUISA LARSON, ADMINISTRATRIX, APPELLANT, V. THOMAS L. SLOAN, APPELLEE.

FILED NOVEMBER 10, 1906. No. 14,453.

Appeal: FINAL ORDER. An order sustaining a general demurrer to a petition, not followed by a judgment of dismissal or other final disposition of the case, is not a final order or judgment, and is not reviewable in this court.

APPEAL from the district court for Thurston county: GUY T. GRAVES, JUDGE. *Affirmed.*

E. J. Smith and *R. G. Strong,* for appellant.

Curtis L. Day, contra.

AMES, C.

This is an action to recover damages on an appeal bond given in a forcible detainer suit, in which the appellant failed upon his appeal. There was a general demurrer to the petition in this case which was sustained, but at a subsequent term of court, and before any other steps of importance had been taken in the cause, the court, upon application and notice to the defendant, granted a rehearing upon the demurrer, and after further consideration, and at a still subsequent term, overruled it. The defendant declined to appear further in the case by pleading or otherwise. The court afterwards, and presumably after hearing proof in the cause, rendered a judgment for the amount prayed in the petition, with interest, and costs, and the defendant appealed to this court.

No motion for a new trial was made in the lower court and no bill of exceptions was filed or prepared. In this court the defendant criticises the petition somewhat, rather for uncertainty than for insufficiency of statement, but in so far as it is defective, if it is so at all, its deficiencies were capable of being supplied by proof admitted without objection, and we are bound to presume that the evidence sufficed in that regard, and do not feel called upon to discuss the matter further. Indeed, counsel for the defendant, who submitted his case without oral argument, treated this branch of it in a few brief and, to our minds, somewhat obscure paragraphs, the full purport of which we, perhaps, do not fully understand.

His main contention is that the order sustaining the demurrer to the petition was a final order or judgment, over which the court lost control with the adjournment of the term at which it was made, so that after that event it was reviewable only by proceedings in error in this

court, and that the order at a subsequent term vacating it and overruling the demurrer, and the still subsequently rendered judgment, from which he appeals, were both, for that reason, without jurisdiction in the court to render them and are void. His brief contains an able and exhaustive criticism and review of the decisions of this court, beginning with *Smith v. Sahler,* 1 Neb. 310, and *Sprick v. Washington County,* 3 Neb. 253, which are the origin and foundation of the contrary practice, and which, as he considers, besides having been rendered in ignorance of or inadvertence to the true rule of law, have since then been the subject of unwarranted inference by the bench and profession. Granting, for the sake of the discussion, or rather for the purpose of evading a discussion, the justice of his strictures, we are of opinion that less harm will be likely to result from adherence to a mistaken view of the law than would arise from a sudden and radical change of an important rule of practice that has been universally acquiesced in for nearly 40 years.

We are therefore of opinion that the judgment of the district court is right, and recommend that it 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.

JAMES A. STONE, APPELLANT, V. MARY C. SNELL ET AL., APPELLEES.

FILED NOVEMBER 10, 1906. No. 14,455.

1. **Vendor and Purchaser:** OPTION. A mere option for the purchase of land, indeterminate as to time and accompanied by a deed deposited in escrow, is terminable at any time upon reasonable notice by the vendor.
2. ———: LEASE. A vendee of land in the possession of a tenant takes the title subject to the unexpired term.

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

H. C. Vail, for appellant.

John Kavanaugh, J. R. Swain and *T. J. Doyle, contra.*

AMES, C.

Godkin owned a farm which was incumbered by several mortgages, and which he contracted on the 8th day of November to sell to Stone for an agreed purchase price, out of which the mortgages were to be paid. A written memorandum of the contract did not specify when the transaction was to be completed, but it seems to have been stipulated or understood that it was not so to be until releases could be procured and the mortgages discharged, so as to clear the title to the land. Godkin executed a deed and deposited in escrow with Green, to be delivered to Stone when the transaction should be in other respects consummated, and removed to the state of Idaho, where he took up his residence. There were some obstacles and delay in computing the amount of the liens and procuring releases, so that the purchase price was not paid nor the deed delivered until the 10th day of the following March. In the latter part of January

Godkin became apprehensive that the sale would fall through and that he would lose the use of the land for the then ensuing season. He therefore notified Green, who held the papers in escrow, that he should lease the premises if the sale should not be perfected on or before the first of March following, and also wrote to his agent, Lanigan, that if the sale was not concluded by the first day of March the latter should rent the land for the ensuing year, and Lanigan accordingly did rent it to one Snell, and put the latter in possession of it and of the buildings. A part of the land had been sowed to fall wheat, and the tenant, as a part of the leasehold agreement, refunded to Lanigan $16, the cost of the seed wheat used in the sowing. This money Lanigan afterwards returned to Snell, saying that he preferred not to remain responsible for it, and that the latter should pay it to Godkin or to whomsoever should be shown to be entitled to it. Parrot, after the deed was delivered, undertook to dispossess Snell by putting his furniture out of the house, and by cultivating some of the land himself, and by beginning in the name of the purchaser an action in forcible detainer which was prosecuted to a final judgment in favor of the defendant. He also begun and prosecuted to an adverse conclusion a suit in equity to restrain the tenant, who had reoccupied the house, from occupying and cultivating the land, on the ground that the latter was a trespasser in so doing. Finally, this suit was brought by the purchaser, Stone, to recover in replevin the above mentioned crop of wheat and also a crop of oats sown by his agent, Parrot. The case was tried to the court without the intervention of a jury, and resulted in a general finding and a judgment in favor of the defendant, from which the plaintiff has appealed.

The foregoing facts are established without substantial conflict of the evidence, and leave in our minds no doubt of the correctness of the judgment appealed from. Unquestionably Godkin had, at the time the lease was entered into, the title and the actual or constructive pos-

session of the premises. He had notified the purchaser, through their mutual agent, Green, that, in effect, he should regard the negotiation at an end and the agreement to sell as rescinded, unless the transaction should be consummated by the first of March. Our attention has not been called to a copy of the memorandum in the record, but counsel do not contend that he had not a right so to do. The conduct of the parties leads directly to the inference that what the plaintiff had was an option to purchase, which was indeterminate as to time, and from which either was entitled to withdraw upon reasonable notice at any time. It is said that the lessee was cognizant of all the facts. If so, he was cognizant of this fact among others. Godkin therefore had a right to make the lease at the time he did make it, and when, afterwards, the purchaser accepted the deed he took it subject to the term. Whether the conveyance operated as an assignment of the rent it is not now necessary to decide. Neither is it requisite to determine what was the effect of the adjudications in the former litigations, since both terminated in favor of the present plaintiff. If the memorandum had been of such a character as to amount to an executory contract of sale conveying an equitable title, a different question would have arisen, but, aside from the conduct of the parties, the fact that it stipulated no specific time of performance is a circumstance strongly indicative that it was not such. From what appears upon the face of the record, the plain inference is that the negotiation was at an end on the first day of March. When, on the 10th of the month, it was resumed on the part of Stone by his payment of the purchase money and acceptance of the deed, the tenant was in possession, and the purchaser had at least constructive knowledge of that fact. The rights of the tenant were not therefore affected by the transaction. To what extent, if any, the vendor became obligated by acceptance of the purchase price and acquiescence in the delivery of his deed of warranty is a question not now presented for

decision. We are satisfied that the judgment is right, and recommend that it 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.

THOMAS LANGAN, APPELLANT, V. VILLAGE OF WOOD RIVER ET AL., APPELLEES.

FILED NOVEMBER 10, 1906. No. 14,480.

Liquor License: POWER OF VILLAGE TRUSTEES. It is competent for a board of village trustees to provide by ordinance for a trial, before themselves, of a complaint against a saloon-keeper for alleged violation of the regulations of the statute and ordinances with reference to the sale of intoxicating liquors, and upon his conviction, as a result of such trial, to revoke his license.

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

O. A. Abbott, for appellant.

Charles G. Ryan, contra.

AMES, C.

Plaintiff procured from the trustees of the village of Wood River a saloon license for the municipal year, 1905, and engaged in the traffic of retail liquor dealer thereunder. An ordinance in force in the city at the time enacted that the license should be revoked if the licensee or any of his employees should enter the room in which the business should be conducted on any day between certain hours, of if he should be guilty of violation of certain other regulations of the traffic made by the statute or by the ordinance. Another ordinance provided that, upon

complaint having been made and filed with the trustees of any such violation by the licensee or his servant, notice thereof should be given him of a time and place when and where witnesses would be examined and an investigation made as to the truth of the accusation, and that if the latter should be established the license should be revoked. Such a complaint against the plaintiff was filed with the board and notice thereof served upon him, in response to which he appeared before them, and by agreement the matter was set down for hearing at a then future day; but before the arrival of that date the board was restrained by a temporary injunction, issued out of the district court, from further proceeding. Subsequently a general demurrer to the petition in the injunction suit was sustained and the action dismissed. From the judgment of dismissal the plaintiff prosecutes this appeal.

The only material issue raised by the demurrer is whether the ordinance assuming to confer upon the board jurisdiction to hear, try and determine the question of violation and forfeiture is valid, or, in other words, whether the exercise of the functions involved in such a proceeding have been, or could have been, conferred upon the board of trustees by the village charter. This question was set finally at rest by *Miles v. State,* 53 Neb. 305. The statute, the ordinance, the material facts and the procedure in that case were substantially identical with those in this, and the contention of the plaintiff in error (appellee here) was upheld. It is therefore 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.