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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1907—JANUARY TERM, 1908.

VOLUME LXXX.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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

LINCOLN, NEB.
STATE JOURNAL COMPANY, LAW PUBLISHERS.
1909.

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By Harry C. Lindsay, Reporter of the Supreme Court,
For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

SAMUEL H. SEDGWICK, CHIEF JUSTICE.
JOHN B. BARNES, CHIEF JUSTICE.*
CHARLES B. LETTON, ASSOCIATE JUSTICE.
MANOAH B. REESE, ASSOCIATE JUSTICE.*

COMMISSIONERS.

DEPARTMENT NO. 1.

EDWARD R. DUFFIE.
AMBROSE C. EPPERSON.
EDWARD E. GOOD.

DEPARTMENT NO. 2.

JACOB FAWCETT.
JOHN H. AMES.
ELISHA C. CALKINS.

OFFICERS.

WILLIAM T. THOMPSON ..... Attorney General
WILLIAM B. ROSE ..... Deputy Attorney General
HARRY C. LINDSAY ..... Reporter and Clerk
HENRY P. STODDART ..... Deputy Reporter
VICTOR SEYMOUR ..... Deputy Clerk

*After January 9, 1908.

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME.

NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Gage, Jefferson, Johnson, Nemaha, Pawnee and Richardson.	Leander M. Pemberton.....	Beatrice.
		John B. Raper.....	Pawnee City.
Second.....	Cass and Otoe.....	Harvey D. Travis...	Plattsmouth.
Third.....	Lancaster.....	Albert J. Cornish	Lincoln.
		Lincoln Frost.....	Lincoln.
		Willard E. Stewart...	Lincoln.
Fourth	Burt, Douglas, Sarpy and Washington.	George A. Day.....	Omaha.
		Lee S. Estelle.....	Omaha.
		Howard Kennedy....	Omaha.
		William A. Redick...	Omaha.
		Willis G. Sears	Tekamah.
		Abraham L. Sutton..	South Omaha.
		Alexander C. Troup..	Omaha.
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran..	York.
		Benjamin F. Good...	Wahoo.
Sixth	Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck..	Fremont.
		George H. Thomas...	Schuyler.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Wayne.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
		James N. Paul.....	St. Paul.
Twelfth.....	Buffalo, Custer, Dawson and Sherman.	Bruno O. Hostetler...	Kearney.
Thirteenth ..	Banner, Cheyenne, Deuel, Keith, Kimball, Lincoln, Logan, McPherson, Morrill, Perkins and Scott's Bluff.	Hanson M. Grimes...	North Platte.
Fourteenth...	Chase, Dundy, Furnas, Frontier, Gosper, Hayes, Hitchcock and Red Willow.	Robert C. Orr.....	McCook.
Fifteenth	Box Butte, Brown, Cherry, Dawes, Holt, Keya Paha, Rock, Sheridan and Sioux.	James J. Harrington	O'Neill.
		William H. Westover	Rushville.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOL. LXXIX.

EDDY, WILLARD

EDMUNDS, J. H.

TRACY, JAMES ALBERT

RULES OF THE SUPREME COURT.

1. SITTINGS OF THE COURT.—The regular public sessions of this court will be held on the first and third Mondays of each month at 9 o'clock A. M. standard time, during each term, except at the beginning of the respective terms, when the first day of the session shall be on Tuesday.

2. SUBMISSION OF CASES.—A cause shall be regarded as regularly reached for submission at the expiration of the time hereinafter provided for the service and filing of briefs. Any cause may, however, be submitted upon the written stipulation of the parties thereto providing for such submission on printed briefs accompanied by or containing an agreed printed abstract of the record and evidence upon which the case is to be determined.

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

4. ORDER OF HEARING.—The court, in advance, shall, by order, designate what cases shall be submitted and when, having reference to the order of time in which such cases were originally docketed. Advanced cases and cases in which rehearings shall have been granted will be placed on the call for the sitting of court next following the

expiration of the time for serving briefs as provided by the rules.

5. ADVANCEMENT OF CASES.—Criminal cases will stand advanced for hearing without motion. The court will, on motion, which motion shall be submitted without argument, advance for hearing cases which have previously been regularly upon the docket of the court. The court will likewise advance cases within the original concurrent jurisdiction of this court, which have been prosecuted in the district court and brought to this court by appellate proceedings. The court may also in its discretion advance other cases if they involve questions of public interest; but this power will not be exercised, except in cases of grave import and serious urgency, and may also advance cases where it is apparent that if not advanced, the litigation may be fruitless.

6. TIME FOR ORAL ARGUMENT.—In the oral argument of a cause, the time allowed the parties on each side shall not exceed thirty minutes, unless for special reasons the court shall extend the time. Oral arguments on a motion will be limited to five minutes on a side.

7. MOTIONS.

a. *Notice of.*—Every application for an order in any case shall be in writing, and, except as to motions for a rehearing, shall be granted only upon the filing of such application at least two days before the hearing, together with due proof of service of notice on the adverse party or his attorneys at least three days before the hearing. Motions will be heard only during the first week of each sitting of the court.

b. *Form of.*—The notice herein provided for shall conform to the provisions of section 574 of the code, and shall be accompanied by a copy of the motion, with copies of all affidavits which are to be used upon the hearing. It may be served by a bailiff of this court, or by any sheriff or constable in this state, or by any person; in the latter case, however, the return must be under oath. Fees for service of said notice shall be allowed and taxed as for the service of summons in proper cases.

c. *Mandamus—Notice.*—In all cases of application to this court for a writ of mandamus, a reasonable notice must be given to the respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it is otherwise ordered.

d. *For Rehearing.*—All motions for rehearing must be printed, and may be filed as of course at any time within forty days from the filing of the opinion or rendition of the judgment of the court in the case. Such motion must specify distinctly the grounds upon which it is based and include the brief in support thereof. Fifteen copies must be filed with the clerk. In original cases, where the error assigned is that the court erred as to the legal principles involved or in its application of the law to the facts, the foregoing provisions shall apply; but as to all other assignments the motion must be made as provided in section 316 of the code, and may be typewritten.

8. MANDATES.—No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court, or stipulated by the parties.

9. BRIEFS.

a. *Time of filing.*—At the time of docketing each *civil* case the clerk of this court shall estimate the probable date on which the same will be reached for hearing, and thereupon fix and enter on the appearance docket the time, to be known as "Rule Day," within which the plaintiff, appellant or relator shall serve his brief of points, which shall be separately stated and numbered, together with his citations in support thereof, on the opposite party or his attorney of record, which rule day shall be not less than ninety days before the date of hearing so estimated by the clerk. Within sixty days after rule day, or within sixty days after such service, the opposite party shall serve his brief on the first party, who may reply

thereto within ten days thereafter, at his own expense, except in case of cross-appeal, when costs shall be taxed as usual for the answer brief of cross-appellee.

b. *Criminal cases.*—In criminal cases the fortieth day after the docketing of the case shall be rule day, by which day the plaintiff in error shall serve his brief. The state shall serve its brief in thirty days thereafter.

c. *Advanced cases.*—In advanced cases rule day shall be the thirtieth day after the order of advancement is entered, unless the court shall otherwise order, by which day the appellant shall serve his brief. Appellee shall serve his brief in thirty days thereafter.

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

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

f. *Leave to File.*—A party in default for want of briefs shall only be permitted to serve and file them out of time by leave of court, upon satisfactory showing of diligence, and at his own costs.

g. *How Printed.*—All briefs shall be printed on good book paper, on pages eight inches wide and eleven inches long, small pica type, leaded lines; the printed matter to be four inches wide and seven inches long, with a margin of two inches on each side and end; but the type in

which extracts are printed may be small pica solid or brevier leaded. The heading of each brief shall show the title of the cause, the county from which the cause was brought, the name of the trial judge, the names of counsel filing the brief, and shall also indicate in whose behalf the brief is filed.

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

i. *Cost of Printing.*—When the parties or their attorneys shall furnish their printed briefs in conformity to the rules of this court, or briefs and printed abstracts under stipulation for submission as provided for in rule 2, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. *No costs shall be taxed for printing briefs not printed, served and filed in conformity with the foregoing rules.* When unnecessary costs have been made by either party, the court will, upon application, order the same to be taxed to the party making them, without reference to the disposition of the case.

10. SECURITY FOR COSTS.—In each case brought to this court the appellant, or relator, shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of $50, with one or more sureties, conditioned for the payment of the costs of this court, which bond, in cases brought on error or appeal, must be approved by the clerk of this court. The obligation of the surety shall be complete simply by indorsing the summons in error or notice of appeal, or by the execution of a

formal bond for costs, and such surety shall be bound for the payment of all costs which may be adjudged against the appellant, or relator, whether either of them obtain judgment or not, and after final judgment this court on motion of the appellee, or respondent, or any other person having a right to such costs, or any part thereof, after ten days' notice of such motion may enter up judgment in the name of the appellee, or the respondent, or the legal representatives of either, against the surety for costs, his executors, or administrators for the amount of the costs adjudged against the appellant, or the relator, or so much thereof as may remain unpaid, and for accruing costs. Execution may be issued on such judgment as in other cases for the use and benefit of the persons entitled to such costs. But these provisions shall not apply in causes where a bond or undertaking has been filed in the court below in accordance with the provisions of sections 588 and 677 of the code, where such bond is conditioned to pay costs, but in such causes the transcript filed must show the giving of such bond or undertaking, with the names of the sureties thereon. Besides the security for costs above required to be given when a cause is docketed, the party docketing such cause shall deposit with the clerk $10 to cover clerk's costs that may be made by such party in the cause; and, if the deposit shall at any time be exhausted by the party making the same, the clerk may from time to time require such party to deposit a further sum of $5. Upon the termination of a cause, any sum remaining from such deposit not applicable to clerk's costs incurred by the party making the deposits shall be returned to him.

11. CAPITAL CASES: SUSPENSION OF SENTENCE.—In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it shall be the duty of the clerk to enter the constitutional suspension of sentence upon the journal, and he shall immediately transmit to

the officer charged with the execution of the sentence a certified copy of such suspension.

12. QUESTIONS NOT INVOLVED IN LITIGATION.—Only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question.

13. PRECIPE.

a. *On Appeal.*—The party or parties appealing shall file with the transcript a precipe, which shall state the court from which the appeal is taken, the date of the judgment appealed from, the names of all parties and their relations to the case as they appeared in the court below. The precipe shall also specify the party or parties appealing, and designate all others made parties to the appeal as appellees.

b. *On Cross-Appeal.*—Coparties of appellants may join in the appeal or take cross-appeal, or any appellee may take cross-appeal, by filing with the clerk of this court within thirty days before the time fixed as rule day a precipe, which shall designate the name of such party as cross-appellant, and the names of all adverse parties as cross-appellees.

14. NOTICE OF APPEAL.—Upon the filing of said transcript and precipe, where no notice of appeal has been filed in the district court within ninety days after the rendition of the judgment or decree, the clerk shall issue a notice of appeal, which shall designate as appellants the names of the parties joining in the appeal, and as appellees the names of all other parties. It shall also designate the court from which the appeal is taken, the date of the judgment appealed from, and separately state the names of the parties plaintiff and the parties defendant, respectively, in the district court. The notice shall be returnable within thirty days after it is issued, and shall be served upon the appellees named therein, or their attorney or attorneys of record in the district court. The service shall be made by the sheriff of the county in which the

parties or attorneys may be found, and as provided by law for the service of summons in civil actions in the district court. The issuing and service of the notice may be waived by writing, signed by the parties to be served; but neither such waiver nor the filing of notice of appeal in the district court will dispense with the filing of the precipe.

15. ATTORNEYS OF RECORD BELOW ATTORNEYS IN THIS COURT.—The attorneys of record and guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties, respectively, in this court, until others are retained or appointed and notice thereof served on the adverse party.

ADMISSION OF ATTORNEYS.

1. ADMISSION OF ATTORNEYS: TIME OF EXAMINATION.—Examinations of applicants for admission to the bar will be held on the second Tuesday of June and the third Tuesday of November each year; provided, however, that the commission may hold examinations at such other times and at such places as the commission, or a majority thereof, shall deem advisable; applications of candidates for such examinations being on file with the clerk of this court as provided in rule 2.

2. APPLICATION AND SHOWING: CERTIFICATE OF SPONSORS.—Each applicant for admission shall at least four weeks before the day set for examinations file with the clerk of this court a written request, in his own handwriting, and subscribed by himself, for admission, together with his personal affidavit as to his age, residence, and time and place of study, or admission, and period of practice in courts of record in another state or a territory, and the certificate or affidavit of at least two citizens of good standing in the community where the applicant resides, or formerly resided, that they are well acquainted with him and that he is of good reputation in that community and that they believe him to be of good moral character.

3. ADMISSION ON EXAMINATION: SHOWING BY APPLICANT AND PRECEPTOR: EDUCATIONAL QUALIFICATIONS: REPUTABLE LAW SCHOOL.—Each applicant for admission upon examination shall, in addition to making the showing set out in rule 2, make proof by his own affidavit, and by the affidavit or certificate of his preceptor or preceptors, that he has regularly and attentively studied law under his or their personal direction or supervision in a reputable law school, or in the office of a practicing attorney, or partly in such school and partly in such office, for a period of at least three years, at least one year of which office study shall have been passed in a law office in this state; provided, also, that each applicant shall prove either by school, college or teacher's certificate or diploma, or in examination before the bar commission, that he has had preliminary education, other than legal, equivalent to that involved in the completion of the first three years of a high school course accredited by the state department of public instruction. A reputable law school, within the meaning of the act for admission to the bar, is one having a three years' course of study of not less than thirty-four weeks a year, and actually requiring for admission to regular class standing a preliminary education equivalent to a Nebraska high school course of three years, and requiring of each regular class recitation averaging at least ten hours a week. If it be shown by the affidavit of the applicant that his preceptor is dead, or that for other satisfactory reasons his certificate cannot be obtained, there may be substituted therefor the certificate of any member in good standing of the bar of the county in which the applicant pursued his studies, and who may be personally cognizant of the facts.

4. OTHER PROOF OF CHARACTER AND QUALIFICATIONS OF APPLICANT.—None of the facts required for qualifying an applicant for admission shall be conclusively established by the foregoing proof, but the applicant shall in his application give the names and addresses of at least three persons, other than those whose certificates he presents,

of whom inquiry can be made in regard to the applicant's character and other qualifications.

5. PAYMENT AND DISBURSEMENT OF FEES.—The applicant shall also, with his application, deposit with the clerk the sum of $5. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the chief justice in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, one dollar and fifty cents; to each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding $5 a day. The secretary shall receive a salary of $50 per annum.

6. ADMISSION FROM ANOTHER STATE OR TERRITORY.—Any practicing attorney in the courts of record of another state or a territory having professional business in either the supreme or district courts of this state may, on motion to such court, be admitted for the purpose of transacting such business, upon taking the required oath. Any such attorney having become a resident of this state, desiring to be admitted to practice generally in the courts of this state, must make his application as required by these rules, and present proof by satisfactory certificate that he is a licensed practitioner in a court of record of another state or a territory where the requirements for admission when he was admitted were equal to those now prescribed in this state, or that he has practiced law five full years under license in any state or territory within ten years next preceding the date of his application.

7. REGISTRATION AT COMMENCEMENT OF STUDY: FORM: FAILURE TO REGISTER: CHANGE OF PRECEPTOR: FEE.—The clerk of this court shall keep a register in which every person applying for admission upon examination as hav-

ing studied in the office of a practicing attorney in this state must have registered at the beginning of his term of study, unless good cause, other than ignorance of this rule, satisfactory to the commission, be shown to the contrary. Such register shall disclose the name of the student, his residence, and the name and address of the attorney in whose office he is studying. The application for registration shall be in writing, and may be formal or informal. In case of change of preceptor or removal from one office to another, such change must be notified to the clerk, who will note it on the register. The clerk may require a fee of fifty cents from every applicant registered.

8. COMMISSION: APPOINTMENT: DUTIES.—The court will, on or before the opening of the September term in each year, appoint a commission composed of five (5) persons, learned in law, to conduct examinations for the ensuing year. The commission so appointed shall, prior to the examinations, examine the proofs of qualifications filed in accordance with the foregoing rules, and may make such further investigations as to the qualifications of any applicant as it shall deem expedient. On the day appointed, it shall commence the examination of applicants. The method of conducting the examinations shall be left to the discretion of the commission, it being expected that the commission will, in the conduct of such examinations, and in the investigation of the qualifications of applicants, take care that no person shall be recommended for admission who has not in all particulars shown himself to be well qualified.

9. REPORT.—As soon as practicable after the conclusion of the examination the commission shall make a written report to the court of its conclusion, and all persons who shall be recommended for admission by a majority of the commissioners shall thereupon be admitted to practice on taking the oath prescribed by law.

10. REJECTION OF APPLICANT: FURTHER CERTIFICATE.—If an applicant shall be rejected, he shall not again be

admitted to an examination for one year from the time of such rejection, and until he shall file a certificate that he has studied law for one year since his rejection.

11. GRADUATES OF THE COLLEGE OF LAW.—Graduates of the College of Law of the University of Nebraska and Creighton College of Law shall make application and present proofs of qualifications in the same manner as other applicants. If found otherwise qualified by the commission, they shall be admitted without examination.

In Memoriam.

JOEL W. DEWEESE.

At the session of the supreme court of the state of Nebraska, November 6, 1907, there being present Honorable SAMUEL H. SEDGWICK, chief justice, Honorable JOHN B. BARNES and Honorable CHARLES B. LETTON, associate justices, the following proceedings were had:

MAY IT PLEASE YOUR HONORS:

Your committee appointed to prepare and present at this time resolutions which shall express our love, respect and esteem for our deceased brother, Mr. JOEL W. DEWEESE, respectfully beg leave to submit the following:

Resolved, That by the death of JOEL W. DEWEESE the state has lost a loyal, patriotic, high-minded, Christian citizen, the profession of the law an honest, earnest, conscientious and learned brother, his family a loving, tender and indulgent husband and father.

Resolved, That in his daily walk and conversation he was always guided by a high and delicate sense of honor, a noble rectitude of purpose, and a kindly consideration for the feelings of others. He had great generosity for human weakness. He was always kind, generous and forgiving, a nature free from malice, a soul with no taint of resentment. His plain, simple, sweet, gentle nature was his distinct characteristic, and made him a marked man.

Resolved, That, while MR. DEWEESE was quiet and unobtrusive in manner, modest and unassuming in his demeanor, yet he was a man of indomitable courage, great earnestness of purpose, strong moral fiber, and unswerving in his convictions of duty. His life was such as to point a splendid example of noble, unselfish high-mindedness, and should serve as an inspiration to those who survive him.

Resolved, That we tender to his family and relatives our deepest sympathy and sorrow over this their greatest affliction.

Resolved, That these resolutions be spread upon the records of this court as a lasting tribute to his character and worth, and copies thereof be furnished to the widow and children of the deceased.

C. J. GREENE.
N. K. GRIGGS.
F. M. HALL.
W. J. MORLAN.

F. M. HALL:

Again the business of the court is suspended, and we pause for a few brief moments at the bier of our departed brother to lay a flower upon his grave that now holds all that is mortal of him, while his spirit has winged its flight to the great Father who gave it.

Again we are reminded how futile are all things earthly—pomp and pride, success, position, riches—all is vanity. In the presence of death how paltry, weak and insignificant do all these things seem. They are powerless to comfort, console or assuage our sorrow. We realize at such times what phantoms we have been pursuing and wherein we have failed to lay hold of the great verities of life, the things that endure and make for righteousness. At such times as this the words of the Psalmist force themselves upon us with special emphasis: "What *is* man that thou art mindful of him, and the son of man that thou visitest him; for thou hast made him a little lower than the angels and hast crowned him with glory and honor."

The real consolation from the death of a man like MR. DEWEESE comes not from his intellectual greatness, not from his great achievements, not from his great ability and learning as a lawyer, not from the manner in which he wrung verdicts from the juries and decrees and judgments from courts; what do all these amount to now?—but rather from the thought that he was a man of strong but simple faith in God. This point was his guide and inspiration.

He was an honest, earnest, consistent Christian man. His life was built upon this broad and solid foundation; his conduct, acts and deeds were shaped and controlled by this unseen, but, no less to him, real and positive power. It was this that gave color to his thoughts and controlled his conduct in all his relations in life. It gave to him a quiet and easy dignity and pose, a serenity and self-possession that few men enjoy. It was his simple faith in God that put into his character the gentle gianthood of true nobility.

We need more such men. The times in which we live are robust; they are marked by strenuosity and force. Weakness is considered ignoble and indolence a crime. All men are beginning to feel that they must build up a good stock of vigorous, tenacious fiber into their characters or under the pressure of the times go to the wall. It is considered that we must get a tonic into our blood either by exercise or a stimulant, and that we must each possess a brain capable of mastering facts with an almost lightning rapidity. Oftentimes men stop here, and

consider themselves thoroughly equipped for life because they have a strong, well-trained intellect. This is a fatal mistake. The affections, the conscience, the heart, must be as strong and quick and resolute as the body, and the mind as vigorous and keen, or the character of a man will be smitten into ruins by the first storm that assails it.

MR. DEWEESE had been schooled in the Christian religion, not so much of the church or of the letter, but of the man. The God man it is that furnishes the stuff which the character for the times needs to be made of; the changeless word of the changeless God I believe to be the greatest formative force in human character. When we have told all we know about the glory of the intellect and the marvels it has accomplished, after all, the heart is the throbbing center of the man. "Call the roll of the deeds that have made this world ring with applause, and you will find that it is the heart behind them that put into those deeds the quality that is immortal. Who is the true patriot? The man who with colossal brain coldly calculates how he may make the varied resources of his country enrich his private coffers? No; it is he who with quick sympathy labors for the solidarity, the all-round good of his country, and whose heart beats to the music of the battle drums and the flutter of the flag of human liberty." "Surely these times need men and women with fixed purposes in life, unmoved by the outer greatness of this visible world and unbridled by its social pomp, glitter and false glory, and who, believing in God, in the Book, and in a fast hastening eternity, and in some distinct truths that reach out into the future life's illimitable joy, and who are able now and here to point to some great facts and truths made real in their daily lives that make full proof of that eternity in which they so confidently believe."

J. W. DEEWESE was born September 10, 1843, in Morgan county, Illinois. His parents moved to Iowa one year later. He lived on a farm during his minority, and when 19 years of age enlisted in company G of the Twenty-Third Iowa infantry, and went into rendezvous at Des Moines, Iowa, in September, 1862, marching with his regiment to the then terminus of the Chicago, Burlington & Quincy Railway at Ottumwa, Iowa. His commanding officer for a time, as well as his intimate friend, was Captain J. A. T. Hull, now a member of congress from the Des Moines district, and now chairman of the committee on military affairs. He was mustered in as a private, and mustered out as a sergeant in 1865. MR. DEWEESE served three years with his regi-

ment, and with it participated in the battle of Miliken's Bend, famous for the butchery of the negro troops by the confederates. He served with the army of the Tennessee and of the Cumberland, and was with General Grant's army through the seige of Vicksburg and at its capture.

At the close of the war he at once entered college at the Central University, located at Pella, Iowa, and remained in school until 1867, when he entered what was then the Iowa law school conducted by Judges Wright and Cole of the Iowa supreme court. This Iowa law school, by its consolidation with the state university of Iowa in 1868, became a part of the state university, making MR. DEWEESE an alumnus of the state university. He was admitted to practice by the supreme court of Iowa in July, 1868, and at once entered into the practice at Pella, Iowa, with Thomas Ryan, under the firm name of RYAN & DEWEESE. About a year afterwards he removed to Prairie City, Iowa, and in 1870 he began the practice alone, and remained there until his removal to Lincoln in 1879.

He married Rebecca Ryan in November, 1869, and leaves surviving him four children—two boys and two girls. He was not blessed with overabundance of this world's goods in his earlier years, and had no influential or wealthy friends to help him, but was almost wholly dependent upon his own efforts to obtain an education, and, aside from what little he had saved while in the army, had to make his own way while attending college and law school. This he did by working on a farm during vacation or in teaching singing schools in that part of Iowa. By dint of hard work and strict economy he fitted himself for his position at the bar. He was always a close student, stood well in his classes, and was always most popular with his teachers and and fellow students.

In 1876, and again in 1878, he was elected to the Iowa legislature. Here as elsewhere he was a close student, a hard worker, and noted for being clear-headed, fair-minded and conscientious in his career; always painstaking in his work and fair to all interests. It was while so serving that he made the acquaintance of the late "Tom Potter," then general manager of the Chicago, Burlington & Quincy Railway system, and it was Mr. Potter who urged him to go to a large place and one more suited to his abilities. It was Mr. Potter who directed him to Mr. Marquette, and gave him a highly complimentary and commendatory letter of introduction to Mr. Marquette. He came to Lincoln in the spring of 1879, and the law firm of MARQUETTE, DEWEESE

& HALL was organized about a year later, and continued until the death of Mr. Marquette in December, 1894.

MR. DEWEESE was a man of cheerful disposition, optimistic and hopeful in his make-up, simple in his tastes, genial and companionable in the home, the office, and in all his relations with men, always quiet, gentle and dignified in the courtroom, considerate and respectful to the court and opposing counsel, always upholding the honor and dignity of his beloved profession. His candor and simple honesty in presenting his cause never failed to impress both court and jury. He was clear and fair in his statement of his case, rather than forceful. His whole conduct and demeanor in trying a cause always impressed the jury with his sense of fairness and justice. He always prepared his cases with great care, and never knowingly attempted to deceive or mislead the court; the real man showed forth in every move that he made.

MR. DEWEESE was the most even tempered man I ever knew. It was my privilege to be associated with him as a partner in the practice of the law for more than 15 years, and I do not know that I can pay him a greater tribute than to say that during all those years I never saw him out of patience, not even petulant or irritated; never heard him use a cross word to any one, not even to the clerks in the office. He was uniformly kind, gentle and considerate to every one. He was so well-poised that he was never unduly elated over success or unnecessarily cast down by defeat. I shall remember him as a quiet, even-tempered, well-balanced, high-minded Christian gentleman of high character and strong moral fiber, whose fair name was never tarnished by an ignoble act. He was modest and unassuming, lacking somewhat in what we might call aggressiveness, but, upon the whole, he was a well-balanced man of sound judgment and sane views of life, not easily swerved from the course that duty marked out.

The special corporate interest that he so ably represented for many years withdrew him very largely from public view. He was never given to mixing much in public affairs or to the discussion of public questions. He had none of the qualities of an advocate or an orator. His strength as a lawyer lay along different lines and in other directions. During the latter years of his life he had almost entirely withdrawn from the general practice of the law, and was devoting all of his strength and energy to the special interest that he represented. Therefore but little was seen or known of him by the general public.

I had noted during the last year of his life that he seemed to

be constantly losing ground. At each time that I would meet him in our daily intercourse from week to week and month to month he seemed to be in worse condition than when I saw him before, but at each time that I inquired as to the condition of his health I was always met with the same reply, given in the same cheerful, hopeful, genial way, with no tinge or taint of discouragement or loss of hope. This hopeful disposition stayed with him to the end.

He has gone, but he left behind him for our instruction the lesson of his beautiful life of sympathy and service. His sun went down in the evening of a well-spent life to rise again in the radiant light of a new morn.

N. K. GRIGGS:

My first meeting with MR. DEWEESE was in a court room, in the southern part of this state, shortly after he had entered the service of the Burlington. An incident, transpiring then, has remained fixed in my memory, largely because of the insight it gave me of his tact, a trait which my closer acquaintance with him led me to observe the more. He was acting as counsel for his company, defending, of course, in a case where he had against him an exceedingly aggressive opponent, who for present purpose, may be called the "Captain." During the trial MR. DEWEESE made some objection which sent his antagonist into a vehement tirade, lasting nearly half an hour, the main point in which was that railroad companies were always interposing objections for the purpose of thwarting justice, a contention, by the way, somewhat new then. When the Captain had finished, all looked to MR. DEWEESE, expecting an address from him in reply. In lieu of this, however, he simply looked up and said: *Why, Captain, you know that the one lone privilege remaining to railroad companies, these days, is the right to object; that is all that is left, all. And you surely do not want to take this last one away, do you?* It was not so much what he said, but how he said it, that was so telling, for his manner was more than half sad, his voice even appealing. The result was an instantaneous outburst of merriment on the part of all present, the Captain himself joining in the laughter. The objection of MR. DEWEESE was, of course, permitted to stand, but that was in the long, long ago.

In part, because of our common employment, and, in part, by reason of our common affiliation with the same religious body, the relations between us were long of the most intimate and confidential char-

acter. Knowing him thus well, I had the amplest possible opportunity of taking fair measurement of him, alike in his professional career and private life. The one great point in his character was his exceeding kindliness. Never, as I believe, did he lose his temper or become ruffled, even though he had reason to believe that injustice was being done either to him or to his cause; nor ever did he stoop to be anything less than a perfect gentleman. His language was always chaste, proper to homely fireside and circle of culture. As a lawyer, he was sturdy in his assertions of his client's rights, yet exceedingly deferential to his opponent and his opponent's views. And, while resourceful in the court room, his success was more largely due to his kindly tact than to any other cause. So high his honor, that his most bitter adversary would cheerfully accord to him the tribute of never resorting to aught but honorable means to achieve victory.

Of all those holding positions of eminence in this state, it is probable that he was the least widely known. He came and went, in the discharge of his grave duties, so quietly and unobtrusively that his comings and goings went almost unnoted. Fame he did not seek, notoriety he even carefully avoided. Of his personal acquirements, let it suffice to say that he had traveled widely, read much, and had pronounced convictions upon every great question inviting the attention of the most thoughtful. It was, indeed, a rare privilege to be one of the favored few permitted to know, or to fathom, his views upon themes the most profound. Well do I recall the regret he once expressed to me that the question of the resurrection of Jesus, to his mind the most momentous of all questions, was not oftener discussed from the pulpit. All who knew him intimately could not but feel that he was of an exceptionally religious temperament, with views of the life to come as fixed as they were optimistic. And no one, in all Lincoln, was more faithful in the discharge of Christian duty than was he. Indeed, just as he sought his office upon the week day, faithfully and quietly, and even to the very last, for the discharge of his secular duties, so, in like manner, did he go to the church of his choice upon the Lord's day to worship, then remaining to teach his class in the Sunday school.

But, to me, the chief charm in his character was his gentleness and manliness. He had a smile and kindly word for all. He spoke well of others, never ill. He did not conceive for worthy act unworthy motive. No child but would gladly go to him, and even the street cur

knew instinctively not to fear him. Of no other within my knowledge could the lines be more appropriately applied than to him:

All honor to the one,
Whose daily duty done,
Has blessing for the many,
And a grief for none.

And yet, with all his kindliness and simplicity, he was, in the very best sense, a brave man, ready to face, without complaint, any trial placed in his way. Only a few days before he went to his duty beyond I visited with him, and, though knowing then that the end for him was doubtless near at hand, he spoke as cheerfully and patiently as though across his path no gloom was falling. Surely in him was proof of the fact that the gentlest are ever the bravest.

There stands in a church in Strassburg a wonderful work of art in honor of Marshal Saxe. There the marble is made to portray that dauntless one of war as stepping, unawed, into the open tomb, while hands of France are striving in vain to stay his going. And yet, not more befitting that beautiful creation to stand in honor of that soldier, than would it be to grace our own Wyuka as tribute to Brother DEWEESE. For no less fearless was he, in answer to duty's call, than was the great soldier, and even more willingly here would hands of love outreach to stay our brother's going, than would all of those of France to stay the step of that intrepid marshal.

SEDGWICK, C. J.

Speaking for the court, it is proper to say that MR. DEWEESE had the full confidence of the courts before whom he appeared.

In presenting his causes he wasted no time with trivial details, nor with immaterial matters. He went direct to the vital point in his case, and presented it with clearness and ability. He always had the manner of a man who believed he had a just cause, and sought no unfair advantage. No one could doubt his sincerity. He was therefore interesting, and commanded the careful attention of his hearers.

The committee has suitably expressed the high regard in which he was held by the members of his profession throughout the state. I think his character and attainments were as highly esteemed by all courts in which he was accustomed to appear.

It is entirely appropriate that the report of the committee, and these proceedings, be spread upon the records of the court, and it is so ordered.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1907.

STATE, EX REL. JOHN L. SUNDEAN, RELATOR, V. GEORGE C. JUNKIN, SECRETARY OF STATE, RESPONDENT.

FILED NOVEMBER 9, 1907. No. 15,336.

Elections: CANDIDATES: BALLOTS. If an individual has filed the application required by section 5 of the primary election law (laws 1907, ch. 52), and has duly qualified himself to be the candidate of a political party, and the requisite number of members of another party file a petition complying with section 45 of that act, asking that the name of the same person be also placed upon the ballot of their party, it is the duty of the officer making up the ballot to place the name of the person so designated upon the ballots of both political parties.

ORIGINAL application for a writ of mandamus to compel respondent to place the name of relator on the primary election ballot. *Writ allowed.*

George L. Loomis and *A. S. Tibbets,* for relator.

W. T. Thompson, Attorney General, W. B. Rose and *Grant G. Martin, contra.*

SEDGWICK, C. J.

The relator filed an application in this court for a writ of mandamus against the respondent to require him, as secretary of state, to place the name of the relator on the ballot at the primary election held on September 3, 1907,

as a candidate of the people's independent party for the office of regent of the university, and also to place the relator's name as a candidate for the same office upon the democratic primary ballot. The writ was allowed for the reasons hereinafter stated. The relator is a qualified voter, resident of the city of Wahoo, in Saunders county, in this state, and on the 20th of July, 1907, he filed with the respondent, as secretary of state, a written application to have his name placed upon the primary ballot as candidate of the people's independent party for the said office. This application was filed pursuant to section 5 of the primary election law (Comp. St. 1907, ch. 26, sec. 117*f*), and contained the necessary representations to entitle him to have his name placed upon the ballot as requested in his application. Afterwards, on the same day, a petition was filed, signed by 25 qualified electors of the democratic party, asking the respondent to place the name of the relator upon the primary ballot to be voted by the democratic electors of the state for the same office. This petition was filed pursuant to section 45 of the primary election law (Comp. St. 1907, ch. 26, sec. 118*s*), and contained the statement that the relator was a candidate, for the same office, of the people's independent party. The section referred to contains the following language: "When the name of the candidate appears on a petition presented by a political party or members thereof with the required number of signers and it is expressly stated in said petition that the candidate is a candidate of two or more parties, each of which shall be entitled to nominate a candidate, then it shall be the duty of the officer making up the ballot to place the name of such candidate or candidates upon the ballot in the same manner as now provided for in the general election law for ballots at the general election." With this petition the relator filed his affidavit as follows: "State of Nebraska, Lancaster County, ss.: John L. Sundean, being first duly sworn, deposes and says that he affiliates with the parties named in the within certificate, to wit, the people's independent

party and the democratic party, and that he will abide by the results of the primary election to be held on September 3, 1907, in the state of Nebraska, and if elected will qualify and serve as regent of the university of Nebraska. John L. Sundean. Subscribed in my presence and sworn to before me this 20th day of July, 1907. (Seal.) A. S. Tibbets, Notary Public."

The respondent refused to place the name of the relator upon the ballots of both parties, and the question so presented was whether the same person, being otherwise qualified and having complied with the statute, is entitled to become the candidate for nomination of more than one political party at a primary election. The language above quoted from the primary election law is perhaps not entirely clear in its phraseology. There are other expressions in the statute not constructed with the view of harmonizing the form of expression used with the provision quoted. We think, however, that the purpose of the legislature in introducing into the act the language which we have quoted cannot be mistaken nor misunderstood. Unless the effect of this language is to allow more than one political party to have the same candidate for an office, it can have no purpose or meaning. The act provides: "This statute shall be liberally construed so that the real will of the electors may not be defeated by an informality or failure to comply with all provisions of law in respect to either the giving of any notice or the conducting of the primary or certifying the results thereof." Comp. St. 1907, ch. 26, sec. 117*a*. If a petition with the required number of signers is presented by the members of a political party, asking that the name of an individual shall be placed upon the ballot of that party as a candidate for nomination, and also stating that the person so designated is a candidate of two or more parties, naming the parties, and each of the parties so named is entitled to nominate a candidate, "then it shall be the duty of the officer making up the ballot to place the name of such candidate or candidates upon the ballot." Comp. St., ch. 26, sec. 118*s*, *supra*.

Unless we consider that this means that the name is to be placed upon the ballot of each of the parties of which he is alleged to be a candidate, the necessary steps having been taken to make him a candidate of such parties respectively, we can give the language used no meaning and the whole provision becomes nugatory. If, therefore, he has qualified himself to be the candidate of a party by the application provided for in the statute, and the members of another party to the requisite number petition to have the name of the same candidate placed upon the ballot of the petitioners, specifying in the petition the fact, as the statute requires, that he is also the candidate of another party, then his name must be placed upon the ballots of both such parties as a candidate.

It was the duty of the respondent to place the name of relator upon the ballot of the people's independent party, and also upon the ballot of the democratic party, as a candidate for the office of regent of the university, and the writ was therefore allowed.

WRIT ALLOWED.

STATE, EX REL. CHARLES T. DICKINSON ET AL., RELATORS, v. GEORGE L. SHELDON, GOVERNOR, ET AL., RESPONDENTS.

FILED NOVEMBER 9, 1907. No. 15,450.

Elections: NOMINEES. The same person may be the candidate of more than one political party for nomination at a primary election, but he cannot be the nominee of any party unless he receives the requisite number of votes cast by that party.

ORIGINAL application for a writ of mandamus to compel respondents to canvass and certify the votes cast for relators as candidates for judge of the district court. *Writ denied.*

Charles T. Dickinson and *John O. Yeiser, pro se.*

W. T. Thompson, Attorney General, W. B. Rose and *Grant G. Martin, contra.*

SEDGWICK, C. J.

These relators, Charles T. Dickinson and John O. Yeiser, were candidates for nomination on the republican ticket to the office of judge of the district court of the Fourth judicial district at the primary election held on the 3d day of September, 1907. They each filed with the secretary of state an application in writing, asking that their names, respectively, be placed on the official primary ballots as candidates of the republican party for the said office. Thereafter petitions were filed with the secretary of state signed by the required number of electors affiliating with the democratic party, the petitions reciting that the relators were candidates of the republican party, as aforesaid, and requesting that the names of the relators be placed on the official primary ballot of the democratic party as candidates for the said office. Accordingly the names of these relators were placed upon both the republican and democratic official ballots as candidates for nomination to the said office, and were voted for both by republicans and democrats. Each of two other candidates upon the republican ballot received more republican votes than either of these relators, but, if the votes received by each of the relators upon both ballots be counted together, then each of the relators received more votes upon both ballots than either of the two candidates referred to received upon the republican ballots. The other two candidates referred to received no democratic votes, and so these relators claim that all of the votes received by each of them upon both ballots should be counted together for the person so receiving them, and that they are entitled to certificates of nomination upon the republican ballot. This is an application to this court for a peremptory writ of mandamus requiring the respondents, members of the state canvassing board, to canvass and certify the votes as contended by the relators. The attorney general demurred to the petition for the writ, which was sustained and the writ denied, and it is

thought that the matter is of sufficient importance to require a brief statement of the reasons for this action of the court.

The relators cited and greatly relied upon *State v. Yankee,* 129 Wis. 662. The court in that opinion, after quoting from their statute, used this language: "This provision certainly means what it says; and so the words, 'the greatest number of votes at a primary,' necessarily include the votes for persons whose names are not printed on any ballot, but are written in on the primary ballot of his party, as well as those that are written in and also printed on the ballot of some other party." The relators understand this language to mean that a candidate whose name is printed upon the ballot of one party can be voted for by writing his name into the ballots of another party, and that such votes are to be added to and counted with his votes upon the ballot upon which his name is printed pursuant to nomination papers filed by him; that is, if a candidate files nomination papers as a candidate of one political party, and his name is printed upon the ballot of that party, and he does not file nomination papers as a candidate of any other party, but his name is written in upon the ballot of some other party, then the votes which he receives by writing his name in the ballot of the other party are to be added to the votes which he receives as the candidate of the party upon whose ballot his name is printed and for which he has filed nomination papers, and that the total of these votes is to be counted in his favor as the candidate for the party upon whose ballot his name is printed. We do not so understand the language used by the Wisconsin court. Indeed, if this was the meaning of the court, the proposition would be *dictum* merely, because this point was not before the court in that case. The point determined in that case was that the voters could write into their party ballot the names of the persons for whom they desired to vote, and such votes should be counted for the persons whose names were so written in, although the names of such persons were not

printed upon the ballot. The name of the relator, Pray, was not printed upon either ballot as candidate for district attorney, but was written into 26 ballots of the democratic party regularly cast, and, as no person whose name was printed on the ballot of that party as a candidate and who had filed nomination papers received 26 votes of that party, it was held that the relator, Pray, having received the highest number of democratic ballots cast, was entitled to be the nominee upon the ballot at the election as the democratic candidate for the office of district attorney. The other relator, who was a candidate for the office of county treasurer, was similarly situated and was declared to be the nominee of the democratic party for that office. Neither of these candidates was a candidate for the republican nomination and neither received any votes of that party, and therefore in that case the question which is presented here was not raised or considered. The language quoted from the opinion is not very precise, but the manifest meaning is that votes should be counted where the name of the candidate was written in on the ballot, although that name is not printed on the ballot, as well as in cases where the name is both printed and written upon the ballot. In either case the person nominated as "the candidate of a party" must receive the highest number of votes for that office cast by the voters of that party.

The point here presented is not left in doubt by the provisions of our statute. "The person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election." Comp. St. 1907, ch. 26, sec. 117*z*. He must receive the greatest number of votes *"as the candidate of a party,"* and then he becomes the "candidate of *that party* for such office." He may be the candidate of different parties at the primary election. He may receive some votes as the candidate of one party and some votes as the candidate

of another party. If he receives the requisite number of votes of one party as its candidate for nomination, he becomes the nominee of that party. This may result in making him the nominee of more than one party, and, if so, his name goes upon the ballot at the election as the nominee of both parties. The primary elections of the different parties might be held on different days. There are practically as many primary elections held as there are political parties represented at the primaries. Although the same person may be the candidate of more than one party, he cannot be the nominee of any party unless he receives the requisite number of votes of that party. Our primary law provides for what is called the "closed primary." It is supposed that the members of each political party will participate in nominating the candidates of that party, and the voters of one party are not allowed to nominate the candidates for another party. Each voter must declare his party affiliations, and thereupon he receives a ballot of that party, and may vote for whomsoever he pleases as a candidate of the party. If the name of the candidate for whom he desires to vote is not printed upon the ballot, and such candidate has not filed any nomination papers, he may still, under the Wisconsin decision cited, vote for such candidate by writing his name upon the ballot which he casts. It is not necessary now to determine whether this would be a proper construction of our statute. There were seven judges to be chosen at the general election in the Fourth judicial district, and only seven candidates could be nominated by the republican party. There were seven candidates of that party who each received more republican votes at the primary election than were received by either of the relators. Their application, therefore, to have their names placed upon the official ballot at the general election as republican nominees was properly denied.

WRIT DENIED.

HENRY STEELE V. STATE OF NEBRASKA.

FILED NOVEMBER 9, 1907. No. 15,242.

1. **Burglary:** STOREHOUSE. A vat six or eight feet deep and six feet in diameter, constructed of heavy oak timbers, which is partly sunk in the ground, having a hinged cover secured in place by a lock, and which is used for storing hides, awaiting sale, is a "storehouse," within the meaning of that word, as used in section 48 of the criminal code.

2. **Trial:** WITNESSES: CREDIBILITY: QUESTIONS FOR JURY. The fact that a witness testifies to matters on his cross-examination which are somewhat inconsistent with his direct evidence does not warrant the court in rejecting his testimony altogether, for it is the province of the jury to determine the matter of the credibility of the witnesses, and the weight which should be given to their evidence.

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

D. W. Livingston and *A. P. Moran,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

BARNES, J.

Henry Steele, who was the defendant in the district court, was convicted of the crime of burglary, and brings the case here for review. He was charged in the information with breaking and entering a certain storehouse and stealing therefrom four certain hides, of the value of $20. It appears from the evidence that the hides in question were stored, awaiting sale, in a structure or repository originally constructed for a beer vat; that it was built of heavy oak timbers, was six or eight feet deep by six feet in diameter, was partly sunk in the ground, and had a hinged cover which was secured in placed by a lock. This receptacle had been continuously used for storing hides

for about eight years, and was being used for that purpose when the burglary in question took place. It also appears that the lock above mentioned was broken, and four of the hides contained in the structure were stolen therefrom.

It is strenuously contended that this repository was not a storehouse, within the meaning of the section of the criminal code upon which the prosecution was based. It is said that it is not a house, and therefore cannot be a storehouse. We find, however, that the word "storehouse" is defined by the adjudicated cases to be a house in which things are stored; a building for the storing of grains, foodstuffs, or goods of any kind; a magazine; a repository; a warehouse. *State v. Sandy,* 25 N. Car. 570; *Ray v. Commonwealth,* 75 Ky. 397; *Johnson v. State,* 19 Ala. 527. In *Benton v. Commonwealth,* 91 Va. 782, 21 S. E. 495, it was said that the word storehouse includes a meathouse where meat is stored and kept. The term storehouse, as used in our statute, necesarily means some kind of a structural barrier to the ingress of the public. A repository or receptacle where goods are stored is a storehouse. Such a structure need not be a house or a building, strictly speaking. It is enough if it is shown to be a structure properly barred from entrance by the public, where goods are stored and kept. In Bishop, Statutory Crimes (3d ed.), sec. 293, it is said: "In popular language, and by the better opinion in legal, this word (warehouse) signifies an apartment or building for the temporary deposit of goods. Therefore, a cellar wherein they are kept to be removed when wanted for sale, * * * is a warehouse." It is said in 1 Wharton, Criminal Law, sec. 794*c*, that the word storehouse is a wider and more comprehensive term than warehouse. And in *Metz v. State,* 46 Neb. 547, we held that a corncrib is a storehouse. The defendant in this case, in order to obtain the hides which were stolen, was obliged to break the lock, or, in other words, break and enter the vat, and such breaking and entering of the structure in question constitutes burglary, within the meaning of the section of the criminal code defining that crime.

Defendant's second contention is that the district court erred in refusing to instruct the jury that the receptacle which contained the hides alleged to have been stolen "is not a storehouse, within the meaning of the statute defining and describing burglary." What we have said in disposing of the first assignment obviates the necessity of any discussion of this question, and it is sufficient to say that the instruction was properly refused.

Finally, it is urged that the court erred in not excluding the evidence of the witness E. G. Mueller as to the matter of the identification of the stolen hides. It is said that, although the witness positively identified them in his direct examination, yet on his cross-examination he admitted that he had not seen the cattle killed. While such an admission may have had a tendency to discredit the evidence of the witness, yet the court could not for that reason reject his evidence; and its probative force was properly left for the determination of the jury. The same may be said of the evidence of the witness Wells, of which a like complaint is made.

As we read the record, the defendant was given a fair and impartial trial, and the judgment of the district court is therefore

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND ET AL., APPELLANTS.

FILED NOVEMBER 9, 1907. No. 14,747.

1. Cities: ORDINANCES: VALIDITY. An ordinance of the city of Plattsmouth recited that it was passed under and by virtue of an act which was afterwards declared unconstitutional. Irrespective of the power granted by the unconstitutional law, the city council had the power under the previous statute to enact the ordinance. *Held*, That the mistake in reciting the power to act did not operate to deprive the city council of the power which it actually had under the existing law.

2. Taxation: TAX SUIT: PLEADING. In an action under the scavenger

law for the collection of delinquent city taxes, the presumption is that the tax was legally levied and assessed, and the burden is upon the defendant to plead and prove affirmatively facts showing the lack of authority upon the part of the city authorities to levy the tax.

3. Cities: INCORPORATION: ANNEXATION OF TERRITORY: COLLATERAL ATTACK. Where the existence of a municipal corporation is not questioned by the state, it cannot be brought in issue by a private individual in a collateral proceeding, nor can the validity of annexation proceedings be tested in such a suit, where the evi-evidence shows acquiescence in the proceedings and the payment of taxes levied by the corporation for several years.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Former judgment of reversal vacated and judgment of district court affirmed.*

A. L. Tidd, W. C. Ramsey and *Matthew Gering,* for appellants.

C. A. Rawls and *H. D. Travis, contra.*

LETTON, J.

The facts are stated in the first opinion by Mr. Commissioner ALBERT, 78 Neb. 703. In that opinion it is said: "The amendatory act of 1885, under which the city attempted to extend its limits by ordinance so as to include defendant's land, conferred no authority to annex adjacent territory by ordinance, and, as there was no valid law then in force conferring such authority, the attempted annexation was unauthorized," and the conclusion is largely based upon this premise. On rehearing our attention has been called to the fact that at the time the annexation ordinance was passed the act of March 2, 1881 (laws 1881, ch. 23), was in force, providing for the annexation of property contiguous to the corporate limits of cities such as Plattsmouth. This act provides in substance that, whenever the owner or owners and inhabitants, or a majority thereof in numbers or value, of any territory lying contiguous to the corporate limits of any city or village, whether the

territory be subdivided or remains unsubdivided, desire to annex the territory to any city, they shall cause an accurate plat to be filed in the office of the city clerk, with a written request for the annexation. The city council at the next regular meeting shall vote upon the question of annexation, and if a majority vote for annexation an ordinance shall be prepared and passed declaring the annexation, and a certified map and copy of the ordinance shall be filed and recorded in the office of the county clerk or recorder of the county. Thereupon the annexation shall be deemed complete. The power to act, therefore, was granted to the city authorities and existed at the time of the passage of the ordinance of annexation. The ordinance recited that it was passed by virtue of an act passed in 1885, which act was void. *City of Plattsmouth v. Murphy,* 74 Neb. 749. But the mistake in reciting the power to act did not operate to deprive the city council of the power which it actually possessed under the existing law. *Delamater v. City of Chicago,* 158 Ill. 575. The recital was unnecessary and may be disregarded as surplusage.

Upon whom is the burden of proof in this case? The petition is made by the statute (Ann. St., sec. 10651), *prima facie* evidence that all the statutory requirements with reference to the levy and assessment of the taxes have been complied with, and the burden is placed upon the person seeking to escape from the payment of the taxes levied to show wherein they are not properly chargeable. The defendant relies upon the invalidity of proceedings taken to include his property within the limits of the municipal corporation to escape the payment of city taxes. If the action were *quo warranto,* brought by the attorney general on behalf of the state to inquire into the validity of the incorporation, the burden of proof would be upon the respondents. *State v. Davis,* 64 Neb. 499. But this case is not of that nature. In an injunction suit to prevent the collection of a tax, or in a proceeding such as this looking to the same result, the presumptions are

all in favor of the authority, validity and regularity of the action of the city authorities, and their lack of the same must be affirmatively shown. The passage of the ordinance of annexation is presumptive proof of the existence of the statutory prerequisites. *Tierney v. Cornell,* 3 Neb. 267. It is incumbent on the defendant, therefore, to plead and prove the lack of authority to act on the part of the officers of the city. The general rule is that parties will not be permitted to attack collaterally the incorporation of a city or village, or the manner in which adjoining property has been annexed thereto. This principle has been followed and applied by this court in the following cases: *South Platte Land Co. v. Buffalo County,* 15 Neb. 605; *McClay v. City of Lincoln,* 32 Neb. 412; *County of Lancaster v. Rush,* 35 Neb. 120; *State v. Dimond,* 44 Neb. 154; *Sage v. City of Plattsmouth,* 48 Neb. 558. It is pointed out in the latter case that some importance was attached in the decisions in the former cases to the length of time during which the owners of land had acquiesced in the proceedings, but this did not affect the general principle that the proper method in which to question the validity of the incorporation was by a direct proceeding in *quo warranto.* Some expressions in the case of *Chicago, B. & Q. R. Co. v. City of Nebraska City,* 53 Neb. 453, seem to be in conflict with the rule announced by all the preceding cases in this court, and none of them is mentioned in that opinion. In that opinion it is said: "Where the statute points out the mode of procedure for the extension of the boundaries of a city, the same must be substantially followed, else it will be of no validity," and it is said in the opinion, in substance, that one of the facts necessary to jurisdiction had not been affirmatively shown to exist.

An interesting question is presented as to whether these cases are directly in conflict, and, if so, as to which announces the better doctrine. A somewhat extended examination of the cases cited in the briefs of counsel, and of a number of other cases, shows that the holdings of the American courts are not entirely in harmony as to the

wisdom and propriety of allowing collateral attack to be made upon the validity of the acts of municipal corporations in annexing territory. The cases seem to fall into several classes: First, a few hold as the *Nebraska City* case does, that in the absence of any one of the jurisdictional prerequisites the act of the city council in annexing territory is void, and that it can be attacked collaterally by an injunction proceeding, and at the suit of a private citizen. *Forsythe v. City of Hammond,* 142 Ind. 505, 30 L. R. A. 576; *City of Indianapolis v. McAvoy,* 86 Ind. 587. In another class, the cases go entirely upon the doctrine of laches and *de facto* incorporation, the idea being that where a corporation is actually exercising corporate powers over certain territory, either by the levy and collection of taxes or other methods, and the persons living thereon have acquiesced therein for a long period of time —in the reported cases, varying from four to thirteen years—a private individual, by reason of his acquiescence and laches, will not be permitted to attack the incorporation collaterally and contend that the incorporation is not valid. Of these cases are *Kuhn v. City of Port Townsend,* 12 Wash. 605; *State v. Henderson,* 145 Mo. 329; *School District v. State,* 29 Kan. 57; *State v. City of Pierre,* 15 S. Dak. 559; *Coe v. Gregory,* 53 Mich. 19; *McCain v. City of Des Moines,* 128 Ia. 331; *Mendenhall v. Burton,* 42 Kan. 570. Another class, of which an example is *State v. Leatherman,* 38 Ark. 81, go further, and hold that, even where the incorporating body possessed no jurisdiction and the order was void, still laches and delay will render an attack upon the same ineffective, even by proceedings in the nature of *quo warranto,* and that "the state herself may, by long acquiescence, and by the continued recognition through her own officers * * * be precluded from an information to deprive it of franchises long exercised in accordance with the general law." See, also, *State v. Des Moines,* 96 Ia. 521, and authorities cited. In still another class, the element of time appears to be thought immaterial, it being considered that the public

may be deceived by a *de facto* organization, as well the day after its completion as a long time thereafter. *Colcr v. Dwight School Township,* 3 N. Dak. 249, and cases cited.

Many of these cases are cases involving the collection of taxes, but collateral attack on municipal corporations is sometimes attempted in other cases, such as in actions to enforce municipal ordinances, in injunctions to restrain corporate officers from alleged illegal action, or in mandamus proceedings to compel official action. An instance of the latter class is *State v. Whitney,* 41 Neb. 613. This was an application for a writ of mandamus to compel certain city officers to canvass the vote of relator for the office of councilman of the city of Alma. The defendants denied that Alma was a city, but alleged that it was a village having less than the necessary number of inhabitants to constitute it a city of the second class. It had, however, been acting as such a city. It was held: "Where the existence of a municipal corporation is not questioned by the state it cannot be put in issue by a private individual in a collateral proceeding." To the same effect are *Osborn v. Village of Oakland,* 49 Neb. 340; *Cleveland, C., C. & St. L. R. Co. v. Dunn,* 63 Ill. App. 531. The authorities upon all branches of this question are collected in two recent text books: McQuillin, Municipal Ordinances, sec. 349, and note, and 1 Abbott, Municipal Corporations, sec. 32, and note. In the latter work it is said: "The rule of law invariably is that the state alone can question the right of the public corporation to exist and perform its duties and exercise its rights, and then in a proceeding brought for that purpose. And also that the question of legal corporate existence cannot be raised in a case or proceeding as collateral to the main issue or through collateral attack." So, also, it is said by Judge Cooley in his work on Constitutional Limitations (5th ed.), p. *254: "In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appears to

be acting under color of law, and recognized by the state as such." This is the doctrine which has been adopted by this court.

The evidence offered by the defendant shows that he never requested nor consented to the annexation of his property to the city of Plattsmouth, but the answer does not allege, and the proof fails to show, that "a request in writing, signed by a majority of the property owners and inhabitants in numbers and value of the territory described in the plat," had not been filed in the office of the city clerk, and there is also a lack of pleading and proof that a certified map and copy of the ordinance were not filed in the office of the county clerk of Cass county. In the absence of evidence to show that these requirements of the law were not complied with, the presumption of regularity applies. Even under the doctrine of the *Nebraska City* case, it is only in the absence of a step which is held to be jurisdictional that a collateral attack can be made upon the annexation. The city council had power to pass the ordinance of annexation if certain conditions were complied with, and there is no affirmative proof that these conditions were not performed. Further, the defendant is plainly guilty of laches. He paid the city taxes from 1888 to 1894, inclusive, and has taken no steps to question the validity of the incorporation, though the ordinance was passed 19 years ago. If the defendant desired to contest the validity of the annexation of his property to the city, he should have done so long ago. *Strosser v. City of Fort Wayne,* 100 Ind. 443.

The former opinion went upon the theory that the annexation proceedings were not merely defective and voidable, but *ultra vires* and void, and followed the *Nebraska City* case. It is now obvious that an act of the legislature was then in force which gave the city council power and authority to annex property to the city of Plattsmouth by ordinance when certain conditions had been performed, and it is not affirmatively shown that these prerequisites had not been complied with.

For these reasons, as well as for the reason that the annexation proceedings are not subject to collateral attack 19 years afterwards in a private action resisting the payment of taxes, the former judgment is set aside and the judgment of the district court affirmed.

JUDGMENT ACCORDINGLY.

WESTERN UNION TELEGRAPH COMPANY, APPELLANT, V. DODGE COUNTY, APPELLEE.*

FILED NOVEMBER 9, 1907. No. 14,922.

1. **Taxation**: TELEGRAPH COMPANIES: ASSESSMENT. In assessing the property of a telegraph company having property in more than one state, the value of the whole property as an entirety should be considered, and the relation which the value of the property in the taxing district under consideration bears to the value of the entire property should also be considered.

2. ———: ———: ———. In arriving at the value of the property of a telegraph company in a taxing district, the total gross and net receipts of the system as a whole, as well as in the particular district, may be considered, and so also may the amount of the company's stock and bonds and the market value thereof.

3. ———: BOARD OF EQUALIZATION: EVIDENCE. Equalization boards of a taxing district may obtain information of the value of the taxable property under consideration from the best and most reliable source at their command, and the strict rules of evidence applied by the courts in ordinary cases are not applicable to the evidence offered or received by such boards. The district court on appeal may receive proof of any pertinent fact tending to show the value of the property.

4. **Evidence** examined, and *held* sufficient to sustain the finding of the district court.

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

* Rehearing allowed. See opinion, p. 23, *post.*

Courtright & Sidner, for appellant.

John W. Graham, contra.

DUFFIE, C.

The Western Union Telegraph Company made a return to the county assessor of Dodge county showing the actual value of its property, including franchises, in said county on the 1st day of April, 1905, to be $9,281.20, and assessed valuation $1,856.24. The actual valuation was raised by the board of supervisors to $46,406 after a hearing at which the company was represented. Thereupon the company appealed from the action of the board to the district court. Upon the trial the court fixed the actual value of said property at $54 a wire mile, or $40,500 for the entire property. From this finding and judgment of the district court the company has appealed.

The court found specially, first, that the appellant has 80 miles of pole lines and 750 miles of wire in Dodge county; second, that there are 1,200,000 miles of wire in the United States owned by appellant, and that the average value throughout the United States is $54 a wire mile, including franchises; third, that the gross earnings of said system in Nebraska from all sources are $10.50 a wire mile, and the net earnings for said system in said state are $1.36 a wire mile; fourth, that the value of the tangible property of appellant in Dodge county is $12,850; fifth, that the actual value of appellant's property in Dodge county subject to taxation, including franchise value, should be $54 a wire mile, or $40,500. It is insisted by appellant that as the value of its tangible property in Dodge county is but $12.850, or $17.13 a wire mile, that the difference between this sum and $54 a wire mile was fixed by the court as the franchise value of plaintiff's property. We cannot agree that this is entirely true. The court, in arriving at the value of appellant's property, took evidence showing the value of its stock and bonds, and this showed the average value per

pole mile of the entire system to be $610.17. Second, evidence was taken of the net earnings of the company. This showed the average value per pole mile capitalized on a 4 per cent. basis to be $989.15; on a 5 per cent. basis, $791.32; on a 6 per cent. basis, $659.43. Evidence was also taken of the asset or cost value of all appellant's property embraced in its whole system. This showed the average value per pole mile to be $685.31, and the cost value per pole mile of its system in the United States, including cable and foreign lines, makes the average value per wire mile in the United States $54. If either or all of these methods were proper in arriving at the value of appellant's property in Dodge county, the first system would give for 80 pole miles, at $610.17 a mile, a gross valuation of $48,813.60. The second method would give a gross valuation of $52,754.40. The third method a gross valuation of $54,824.80; and the fourth method 750 wire miles, at $54 a mile, gives a gross valuation of $40,500, or the sum found by the court. Section 10477, Ann. St., provides that the gross receipts of express, telegraph and telephone companies shall represent the franchise value of such companies, which shall not be otherwise assessed. This provision of the statute was held unconstitutional in *Western Union T. Co. v. City of Omaha,* 73 Neb. 527, and the assessing authorities are now driven to some other method of ascertaining franchise values. It has long been the rule, not only here, but elsewhere, that in assessing railroad and telegraph property the entire property of the company is to be taken into consideration. In *State v. Savage,* 65 Neb. 714, it is said: "In assessing railroad and telegraph property, it is the duty of the state board of equalization to secure all reasonable and necessary reliable information relative to the value of the entire property of each corporation assessed, and assess such property as a unit or as one property. * * * Where railroad and telegraph properties are situated in more than one state, it is necessary to consider and determine the value of the whole property, wherever situated, as an entirety,

and then determine what proportion of the whole property is situated and used in this state and subject to taxation therein; the relation such part bears to the whole property as to its value being the basis on which the assessment is to be made. The market value of the stocks and bonds of a railroad corporation is an important factor, with other pertinent information, by which to determine the fair cash value of the property assessed which is represented by such stocks and bonds. The earnings of a railroad company is evidence of a most important character in determining the true value of the property from which the earnings accrue, and is one of the chief elements which give value to the property, and should be considered in determining the value for assessment purposes of the entire property which is assessed."

From the above quotation it will be seen that the value of the entire property considered as a whole, the value of its stock and bonds and the amount of its earnings, should be considered in arriving at the value of the property. It is true that no expert who had knowledge of the value of appellant's entire property testified upon the trial, but an expert accountant was called, who gave a statement of the amount and value of the stock and bonds of the appellant corporation on April 1, 1905, basing his computation upon figures taken from Poor's Manual and other standard publications. Objection is made to this upon the ground that such evidence was incompetent. Assessors and equalization boards must act upon the best and most reliable information at their command. Poor's Manual is resorted to by the commercial world as an authority upon the amount and value of the stocks and bonds of the several leading corporations in this country, and whatever is good evidence for those dealing in such stocks and bonds cannot be regarded as either immaterial or incompetent for the taxing authorities to act upon. Boards of equalization are not governed in their investigation of the values of taxable property by the strict rules of evidence applied by courts of law in the trial of ordi-

nary cases, and upon appeal from their findings the court may receive evidence of any pertinent fact tending to show the true value of the property. On April 1, 1903, the Western Union Telegraph Company filed with the auditor of state a report of the taxable value of its property in Dodge county. This is the last report of values made by the company previous to the return made to the assessor of Dodge county, and it shows 77.69 pole miles, of the value of $9,376.90. To the introduction of this report the appellant objected, and it now insists that the evidence is incompetent. We think the presumption must obtain that the physical condition of appellant's property in Dodge county was not allowed to deteriorate between 1903 and 1905, and certainly its value as an income producer has not depreciated during the past two or three years of commercial activity which has pervaded the whole country. It is so well known that the courts of the state will take judicial notice of the fact that previous to the enactment of our present revenue law the assessed value placed on taxable property was many times below its actual value. Under our present system the true actual value is returned, and 20 per cent. of this is taken as the assessed value. Twenty per cent. of the actual value found by the court in the case under consideration would place the assessed or taxable value of the appellant's property in Dodge county at about the figure placed upon it by appellant's officers in 1903. This evidence, while not of the most satisfactory character, had some tendency to show the taxable value of the property in the estimation of the officers of the company and was properly admitted.

Aside from this, we cannot say that the value fixed by the court is not fair and just. It may be true that there are many miles of the lines owned by the company of greater value physically and as an income producer than the same number of miles in Dodge county. At the same time there must be as great or a greater number of miles of much less value, and we cannot say that the board of

equalization or the court did not arrive at a correct determination in placing the value at that figure it did.

Discovering no reversible error in the record, we recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed July 17, 1908. *Former judgment of affirmance adhered to:*

1. **Taxation:** TELEGRAPH COMPANIES: ASSESSMENT. The net earnings of a telegraph company for a single year standing alone is not a proper criterion by which to determine the actual value of its telegraph system.

2. ———: ———: ———. The income derived from messages sent from and received at stations in a given district, which comprises only a part of a great telegraph system, is not the proper measure of the gross earnings of that part of the system within the district, where the lines within the district are used for the transmission of messages having neither origin nor destination in the district.

3. ———: ———: ———. The fact that the net earnings of a telegraph company are 13 per cent. of its gross earnings does not justify the conclusion that the net earnings of a particular district, comprising only a part of the telegraph system, are but 13 per cent. of the gross earnings of such part of the system, in the absence of evidence that the ratio of the net earnings to the gross earnings within the given district is the same as that for the entire system.

4. **Evidence:** BOARD OF EQUALIZATION: PRESUMPTION. The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action.

5. **Taxation:** BOARD OF EQUALIZATION: APPEAL: BURDEN OF PROOF. Where a taxpayer appeals from the action of the board of equalization in fixing the value of his property for taxation, the burden is upon the appellant to show that the action of the board is erroneous.

6. **Former opinion** in this case, *ante*, p. 18, adhered to.

GOOD, C.

This is a rehearing of the case reported *ante,* p. 18. The appellant in asking for the rehearing acquiesced in all the principles of law laid down in the former opinion, but contended that this court, as well as the district court, erred in applying the law to the facts as disclosed by the record. The district court found that the appellant had 80 miles of pole lines and 750 miles of wire in Dodge county; that it had 1,200,000 miles of wire in the United States, and that the average value throughout the United States was $54 a wire mile, including franchise; that the gross earnings of the system in Nebraska were $10.50 a wire mile. It also found the value of the tangible property of the appellant in Dodge county was $12,850, and that the actual value of appellant's property in Dodge county, subject to taxation, including franchise value, was $54 a wire mile, or $40,500. Appellant complains only of the finding which fixed the value of its lines in Dodge county at $40,500, or $54 a wire mile, and contends that the evidence does not warrant this finding. It further contends that the evidence does not warrant the finding of the value of the Dodge county lines to exceed $22 a wire mile. The evidence shows the gross and net earnings of the entire system in the United States to be $24 and $3.24, respectively, a wire mile, and that the earning capacity of the lines in Dodge county is a fair average for the state of Nebraska. Appellant urges that, because the earnings per wire mile in Dodge county are far below the average earnings per wire mile for its entire system in the United States, the court should not have found the value per wire mile in Dodge county equal to the average value per wire mile for its entire system, but should have found the value of the lines in Dodge county to be in such proportion to the average value per wire mile of the whole system as the net earnings of the Dodge county lines bore to the average net earnings per wire mile for the system as an entirety. The evidence shows the value of the tangible property of

the appellant in Dodge county to be a trifle over $17 a wire mile, and the district court in fixing the actual value at $54 a wire mile clearly included nearly $37 a wire mile as representing the value of the intangible property. The record is barren of any fact which would show the value of the tangible property of appellant's entire system in the United States. We are unable to ascertain from the record what is the value of its tangible property for the entire system per wire mile, or what proportion of the value of its entire system is represented by tangible, or what proportion by intangible, property. We cannot say whether the proportion of tangible property in Nebraska is greater or less than in the entire system. Appellant's argument that its property was overvalued by the district court rests largely upon one factor, namely, that the alleged net earnings per wire mile in Nebraska are very much less than the net earnings per wire mile for the entire system. If the evidence established the facts contended for by the appellant, we concede that the factor of earning capacity would be a potent one in fixing the actual value of the lines in Nebraska.

We find ourselves unable to view the record as does the appellant. In the first place, the testimony as to the earnings relates to but a single year. There are many reasons which might affect the relative earnings of the different parts of a vast telegraph system, and the earnings of each part might vary from year to year. The expenses of operation are likely to vary, and the net earnings for the entire system might be very small for one year and large the next. A particular district might show a loss for one year and a large profit for the next. So it seems clear that the net earnings for a single year would not be a proper criterion for determining the value of a telegraph system or for a particular part thereof. There is still a greater obstacle to appellant's contention. We do not think there is competent evidence in the record from which either the gross or net earnings of the lines in Nebraska can be ascertained. Appellant's witness testified

that the gross and net earnings of the lines in Nebraska were $10.50 and $1.36, respectively, a wire mile. But upon what does he base this testimony? He obtains the gross earnings by taking the income from messages which have been either sent from or to a station in Nebraska. No account is taken of the transcontinental messages which go over the wires in Nebraska, which have neither origin nor destination in Nebraska. We are unable to say that the income from messages going from or coming to Nebraska stations represents the gross earnings of the wires in Nebraska. To illustrate: Suppose appellant has a line of poles carrying a dozen or more wires across a district in which there is no telegraph station; the wires may be in constant use and yielding a large profit, yet, according to appellant's theory, there would be neither net nor gross earnings in this district, because no messages were sent from or received within the district. In addition to this, we think it is inferable from the evidence that the witness in fixing the gross earnings for Nebraska lines took into account only the money received in the stations in Nebraska. There is nothing in the record to show what proportion of the messages sent from Nebraska were prepaid, nor what proportion of the messages received were collected for in this state. Under these circumstances, the testimony of the witness as to the gross earnings in Nebraska was of no practical value. His testimony as to net earnings presents a greater state of chaos. It was shown that for one year the net earnings of the entire system were 13 per cent. of the gross earnings. There is no evidence to show that this proportion of the gross earnings would be applicable to Nebraska. Nor is there anything in the record from which it can be determined that this percentage would hold good for a series of years. We think it is apparent that the witness assumed that the percentage for one year was applicable for Nebraska, and used that as a basis for determining the net earnings of the lines in Nebraska for one year. Appellant has attempted, therefore, to fix the net earnings of the lines in

Nebraska by taking a certain percentage of the alleged gross income. The gross income taken as a basis is not shown to be correct, nor is the percentage shown to be applicable to the Nebraska lines. It amounts to this: That the witness has multiplied one error by another. No one will assume that the result is correct.

Certain other facts disclosed by the record, while not conclusive, have some persuasive force which tends to sustain the findings of the district court in fixing $54 a wire mile as the value of the system in Dodge county. It is shown that the average number of wires per pole in the United States is something less than six, while in Dodge county the number of wires per pole averages a little more than nine. We think it fair to assume that a business corporation like the appellant would not string nine or more wires to its system of poles if five or six were sufficient to transact its business. If five or six wires per pole per mile for the entire system produces a net income of $3.12 a wire mile, it would appear that a system where nine or more wires are used would produce as great, if not a greater, income than a system of a less number of wires per pole. It may be that the evidence in the record is not sufficient to affirmatively show that the value of appellant's plant in Dodge county is $54 a wire mile, as found by the trial court, but of this the appellant is not entitled to complain. The rule of law seems to be quite well settled that, in the absence of evidence to the contrary, the presumption is that public officials faithfully and legally perform their legal duties, and that in making an assessment the board of equalization proceeded upon sufficient and competent evidence to justify its action. *State v. Western Union T. Co.*, 96 Minn. 13, and cases there cited; *State v. Savage*, 65 Neb. 714. In *Lancaster County v. Whedon*, 76 Neb. 753, it was held that, where a taxpayer appeals from the action of the board of equalization in the matter of assessment of property for taxation, the burden is upon the appellant to show that the decision of the board is erroneous. It would follow that the

presumption obtains that the value fixed by the board of equalization of Dodge county was correct, in the absence of evidence to the contrary. The burden of proof being upon the appellant to satisfy the trial court that the board of equalization had erred in fixing the valuation of its property, the appellant is not in position to complain, unless it has produced evidence to overcome the presumption. As the district court fixed a lower valuation upon appellant's property than the valuation fixed by the board of equalization, the error, if any, was against the appellee, and not against the appellant.

We have been asked to formulate and state a plan for determining the value of the property of telegraph companies for assessment in this state. The law requires that their property shall be listed at its actual value, and, where the legislature has not formulated or fixed any plan by which such value may be ascertained, it would appear that any course is open to the parties interested to pursue any plan and offer any evidence whereby the actual value may be determined. It is not within the province of the court to lay down or formulate any rule which must be followed for the purpose of ascertaining the actual value for purposes of assessment. To do so would be to usurp the functions of the legislative branch of the government.

The record fails to disclose any error of the district court prejudicial to the appellant. We recommend that the former opinion be adhered to, and that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the former opinion in this case is adhered to, and the judgment of the district court is

AFFIRMED.

E. R. HITCHCOCK, APPELLANT, V. VALENTINE ZINK ET AL., APPELLEES.

FILED NOVEMBER 9, 1907. No. 14,958.

1. **Highways:** IMPROVEMENT. A public road is for use by the traveling public, and may be improved to accommodate footmen, as well as those using it for teams, wagons or other vehicles.

2. ———: SIDEWALKS. A sidewalk constructed outside the traveled way for teams, but within the boundaries of the road, does not constitute an additional burden added to the easement possessed by the public in the land over which the road passes.

3. ———: ———. The owner of the fee cannot complain that a sidewalk is being constructed along a public road by private parties, where permission to build the walk has been granted by the board of county commissioners.

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

George A. Adams and *E. R. Hitchcock,* for appellant.

S. P. Davidson and *J. C. Moore, contra.*

DUFFIE, C.

The village of Sterling is located upon the eastern part of section 26, township 6 north, of range 9 east, in Johnson county, Nebraska. For more than 20 years prior to the commencement of this action there had been in use a public road running east from the village of Sterling along the east and west half section line of section 25, in said township and range, and extending east for more than two miles from the corporate limits of the village. The plaintiff and appellant is the owner of the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 25; the road before mentioned running between these two tracts. A burial ground, known as the "Sterling Cemetery," is located on the road

just east of the plaintiff's north 40, and this cemetery has been in use for more than 20 years. The road in question is the only avenue leading from the village to the cemetery, and the evidence discloses that the road, for a part of the distance between the village and the cemetery, passes over low, wet ground, making it inconvenient, if not impassable, for footmen during a wet or rainy period. For the purpose of improving the road and beautifying the cemetery grounds, the ladies of Sterling and that vicinity organized themselves into a voluntary association (not incorporated), and procured from the board of county commissioners permission to build a sidewalk along said road from the corporate limits of the village to the west boundary line of the cemetery, on either side of said highway, and, if built on the south side, then north across the highway to the south line of the cemetery grounds. Acting on this permission, the association purchased material, and the defendants, acting in its behalf, were about to commence the construction of a sidewalk along the south side of the road, when the plaintiff brought this action, asking an injunction to prevent the improvement being made. Upon the trial of the case the plaintiff's petition was dismissed, and he has appealed to this court, alleging that the highway was never established by the public authorities or by any proceedings of record; that it is a highway by user only; that the ground taken by the walk is not, and never was, a part of the highway, never having been used by the traveling public, and never dedicated to public use.

In this connection, it is sufficient to say that in his petition he alleges that there is running through the plaintiff's land east and west, and near the center thereof, a public highway, and that defendants have commenced grading for and laying a brick and stone sidewalk "through said land on the south side of said highway, and are threatening to continue, and are continuing, to grade for and build said sidewalk by digging cuts, building grades and laying brick therein and thereon." Aside from the evidence

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showing the use of this highway for 20 years and more is this allegation of the petition distinctly recognizing its character as a public road, and distinctly alleging that the walk complained of is being laid "on the south side of said highway," and that defendants "are digging cuts, building grades and laying brick therein and thereon." It is clear that the plaintiff is estopped by the allegations of his petition from denying the public character of the road, or claiming that the sidewalk is being constructed outside the limits thereof.

It is further urged that defendants are building this walk as private individuals and in a private capacity, and utterly without right or authority. The roads of this state are under the control and supervision of the board of county commissioners where located, and authority derived from such board to make improvements in the road which better accommodate public travel is a sufficient defense as against this claim. Acting by permission of the county authorities having charge of the road, the defendants must undoubtedly be regarded as agents of the county in making the improvement, and not as trespassers upon the highway.

It is also said that the walk obstructs the plaintiff's ingress and egress to and from his land, to his serious damage, and materially interferes with his use thereof. The rule is that, where an owner of land dedicates it to the public for a road or street, he impliedly grants the attendant right to make such use of it as shall suitably fit it for travel. *Warren v. City of Grand Haven*, 30 Mich. 24; *City of Boston v. Richardson*, 13 Allen (Mass.), 146. And "where land is seized under the power of eminent domain, compensation is measured upon the theory that the officers representing the public may so prepare and maintain it that the public may safely and conveniently use it as a passageway." Elliot, Roads and Streets (2d ed.), sec. 465. A public road is for the use of the public and may be used as the public convenience requires, either as a way for footmen or for driving purposes. The statutes of our

state require the public authorities to keep the roads in good repair and safe for use. There is no more objection to the improvement of a road for footmen than for the passage of vehicles, and the construction of a sidewalk along a public road is not an additional burden added to the easement which the public have acquired therein. In *Ryan v. Preston,* 69 N. Y. Supp. 100, it was held that a bicycle path along a public highway is not an additional burden. And in *Pillsbury v. Brown,* 82 Me. 450, 9 L. R. A. 94, the building of a sidewalk within the limits of a road established by prescription was held not to constitute a trespass. It has also been held that, if public necessity or convenience requires the improvement of a highway, it is immaterial at whose expense it is made. *Pillsbury v. Augusta,* 79 Me. 71; *Gay v. Bradstreet,* 49 Me. 580. If the improvement was negligently constructed to the injury of the plaintiff or his estate, he undoubtedly has a remedy for the wrong done him, but he cannot maintain an injunction against a proper improvement made upon a public highway. The complaint that the walk obstructs his ingress and egress to and from his land is fairly met, we think, by the evidence to the effect that the walk is no obstruction, and the defendants, during the building of the walk, offered to construct crossings at such points as the plaintiff might designate, which offer was refused upon the ground that defendants had no right to construct the walk and that this action was pending to enjoin the work of construction. We have no doubt of the right of the public authorities to improve the road in the manner complained of, or of permitting it being done by other interested parties. The walk is not an obstruction to public travel, but a great convenience to foot passengers. It does not constitute an additional burden upon the servient estate held therein by the plaintiff. He cannot complain of the improvement made, and can only insist that it shall not be done in a negligent or careless manner, to his injury.

We discover no error in the action of the district court,

and recommend an affirmance of the judgment appealed from.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

LOLA M. HUNT, APPELLEE, V. STATE INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 9, 1907. No. 14,953.

1. **Second Appeal:** LAW OF CASE. The rules previously announced in this case (*Hunt v. State Ins. Co.*, 66 Neb. 125) *held* decisive of the questions now at issue.
2. **Insurance:** AGENTS. A local agent of the defendant insurance company procured a certificate of authority from the state auditor before the policy in suit was issued, and was holding such certificate at the time the policy was issued, but failed to procure a renewal certificate of authority in subsequent years, but continued to act as the agent of the defendant company, and the company recognized him as their agent and accepted all business coming through his agency, and never canceled his contract of agency. *Held*, That the company is bound by his acts and conduct in dealing with policy holders.

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

R. E. Evans and *C. J. Garlow*, for appellant.

T. F. Bevington and *William P. Warner, contra.*

EPPERSON, C.

On a former hearing this case was remanded to the district court for a new trial. *Hunt v. State Ins. Co.*, 66 Neb. 125. A trial was had, resulting in a judgment for the plaintiff. Defendant appeals.

It is again urged that the policy of fire insurance sued on was rendered void by reason of a change in the occupancy of the dwelling house insured. The evidence now before us relative to the agent's knowledge of the change in the occupancy of the premises in controversy is the same as that given at the former trial, and this question was disposed of adversely to the contention of defendant when the case was before the court on rehearing. Reasons for the conclusion reached may be found in the opinion of Mr. Commissioner POUND, and need not be repeated here.

But defendant now contends that the alleged local agent was not the defendant's agent when the occupancy was changed, and therefore notice to him was not sufficient to bind the defendant. The evidence shows that the auditor of this state did not issue a certificate to the said agent, authorizing him to act as such, subsequent to the year 1891, as provided by statute. The evidence shows that the alleged agent issued the policy to the plaintiff in 1891, and continued soliciting business for the company until after the plaintiff's loss, sending in notices of changes in the policies issued by him as agent, including one indorsement upon the policy in question. We find, moreover, the deposition of one of the officers of the defendant company in which he says that the agency in controversy continued from its inception (long prior to the date of plaintiff's policy) until the agent removed from the state, which was after the loss complained of. Defendant recognized him as its agent and received the benefits of his efforts in soliciting insurance. He was a recording agent authorized to issue policies and collect premiums. It is bound by his acts and conduct to the same extent that it would be had he procured a certificate from the auditor for each of the years he was so acting.

In 1893 plaintiff leased the premises to one Shook, and requested the occupant, Anderson, to vacate. On August 23 Anderson was engaged until about 9 o'clock P. M. in removing his effects. The house burned a few hours later. Shook was to take possession as soon as the house was

vacated. Defendant contends that the house was vacant when it burned, and thereby the policy was rendered void by an express provision to that effect. Anderson and his wife were the only witnesses who knew what, if any, of their effects remained in the house and were burned. At most, it appears that only a few articles were in or about the house, and these he intended to remove the next morning. Their testimony was not given at the last trial, but the testimony they gave at the former trial was read in evidence. Therefore the same evidence in regard to their removal from the premises was before this court when Mr. Commissioner POUND said: "But there was some dispute as to whether the tenant had removed all his effects; and whether, under the circumstances, there was a vacancy, or a mere temporary cessation of occupancy until the tenant was fully removed and some one else could be put in, was a question for the jury." *Hunt v. State Ins. Co., supra.* The rules announced in the opinion referred to became the law of the case, and we see no reason for departing therefrom. The question was submitted to the jury as this court previously held it should be.

Many errors are assigned which we need not discuss. We have carefully examined the record with reference to the assignments and find no prejudicial error.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

HOMER H. NORTHUP ET AL., APPELLEES, V. EDWARD W. BATHRICK, APPELLANT.

FILED NOVEMBER 9, 1907. No. 14,963.

1. **Pleading:** VERIFICATION. The verification of a pleading is not jurisdictional, and the failure to verify is waived unless objection is made before trial.

2. **Estoppel:** PRINCIPAL AND AGENT. By correspondence, plaintiffs, who are real estate brokers, arranged with a landowner for a sale of his land to a stranger, and during the negotiation demanded a certain sum as their commission, which, upon consummation of the sale, was paid to them. *Held*, That the plaintiffs will not be heard to say that they were not the agents of the vendor.

3. **Replevin:** DEFENSES. A replevin action against a tenant for the possession of grain due from him as rent may be defeated by a showing that the title and right to possession is in a third person.

4. **Principal and Agent.** An agent, having authority to sell both real and personal property for a certain sum, cannot, without the consent of his principal, take over to himself the personal property upon receiving the authorized sum for the real estate.

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

W. S. Morlan, for appellant.

John Stevens, Jr., contra.

EPPERSON, C.

Plaintiffs, Northup and Renie, were successful in the lower court in this an action of replevin to recover from defendant, Bathrick, about 800 bushels of wheat, and the latter appeals.

In 1905 plaintiffs were engaged in the real estate business at Arapahoe, Nebraska. J. W. Tomblin, a nonresident of this state, owned a farm of 320 acres a few miles from that village. The defendant occupied it as tenant,

giving $50 and one-third of the crop as rent. May 2, 1905, plaintiffs sent Tomblin the following telegram: "What is your best price on half-section north of Arapahoe? Can get you thirty per acre. Answer." Tomblin replied: "Sell thirty-five per acre including crops. Half on time at seven if desired." Plaintiffs sold the land, and on May 25 wired Tomblin: "We have sold your farm at thirty-five. Will write you fully." Plaintiffs thereupon wrote Tomblin explaining the terms of sale. The price received was $35 an acre and the crop, the purchaser paying $6,200 in cash, and giving a mortgage for the remainder. The letter instructed Tomblin to send deed, abstract, and assignment of the lease either to the plaintiffs or to the First National Bank of Arapahoe. The name of the grantee was to be inserted in the deed later, and the assignment of the lease was to be in blank. In the event the papers were forwarded to the bank, the bank was to be directed to turn over $305 to the plaintiffs as commission when the deal was closed. May 31 Tomblin forwarded the deed, the abstract, and the assignment of the lease, with a letter containing, among other things, the following: "When sale is consummated you can pay Northup and Reinie $305. Com." This sum was paid to plaintiffs, and it was understood by all parties that $305 was the usual commission and that plaintiffs were entitled to the same. When the deal was finally closed, the name of the purchaser, Robert Goethe, was inserted as grantee in the deed, and the names of plaintiffs were inserted as assignees of the lease. When Tomblin became aware of the fact that the purchaser of the land was not to receive the benefits accruing under the lease, but that all benefits were to go to his agents, the plaintiffs herein, he instructed the defendant, his tenant under the lease, not to turn over the rent to the plaintiffs, and, upon defendant's refusal to deliver one-third of the wheat, plaintiffs brought this action, with the result as hereinbefore stated.

1. It is argued by plaintiffs that the judgment should

be affirmed for the reason that defendant failed to verify his answer. The failure to verify the pleading did not oust the court of jurisdiction. *Johnson v. Jones*, 2 Neb. 126; *Dorrington v. Meyer*, 8 Neb. 211. Besides, this objection to the answer was not raised before trial, and cannot now be considered. *Schwarz v. Oppold*, 74 N. Y. 307.

2. After sending the telegrams and letters preserved in the record, and receiving and acting upon Tomblin's answers thereto, and accepting the sum requested and obtained by plaintiffs from Tomblin as commission, plaintiffs will not be heard to say that there was no contract of agency. See *Quertermous v. Taylor*, 62 Ark. 598, 37 S. W. 229.

3. Neither can it be claimed that defendant should be required to surrender the property to plaintiffs because his landlord (Tomblin) did not intervene and establish his right to possession. The rule is well established that in replevin the plaintiff must rely upon the strength of his own title, and cannot rely upon the weakness or lack of title of his adversary. *St. John v. Swanback*, 39 Neb. 841; *Johannson v. Miller*, 45 Neb. 53; *Herman v. Kneipp*, 59 Neb. 208. Defendant was in possession of the wheat as tenant of Tomblin, and it was competent for him to challenge the plaintiffs' title and defeat it by showing title and the right of possession in a third person. *Sutro v. Hoile*, 2 Neb. 186; *Fuller v. Brownell*, 48 Neb. 145.

4. Defendant seeks a reversal for the reason that the judgment is not supported by the evidence; that the evidence shows that plaintiffs did not in fact make a sale of the crops, but, under a pretense to him that the crops were sold or the rents assigned, attempted to appropriate the same to their own use. No rule is better settled than that an agent is required to disclose to his principal all the information he has touching the subject matter of the agency, and that his relation to his principal forbids his becoming a purchaser thereof for his own benefit, in any way, without the full knowledge of the principal of this fact. *Jansen v. Williams*, 36 Neb. 869, and cases there

reviewed and approved. In *Rockford Watch Co. v. Manifold*, 36 Neb. 801, Mr. Commissioner IRVINE said: "The evidence does not disclose any fraud or even unfairness in his (the agent's) conduct, but such transactions upon the part of an agent are voidable at the option of the principal without regard to the existence of actual fraud. They are voidable, not because there *was* fraud, but because there *might be*, and because the law, upon grounds of public policy, will not permit an agent to assume a position where conflicting interests will expose him to the danger of sacrificing his principal to himself. The doctrine extends to all cases of agency with almost the same force as to cases of trusts, and has been applied in every adjudicated case, so far as we are aware, to agents for the purpose of selling goods or land. It has been held to apply to public sales as well as private, and even to an agent empowered to sell at a stipulated price. The principle is well stated in Pomeroy's Equity Jurisprudence (2d ed.), sec. 959, where a vast number of authorities are collated." Mr. A. C. Freeman has annotated this question in the American State Reports. See authorities collected in his excellent note to *Kimball v. Ranney*, 80 Am. St. Rep. 549 (122 Mich. 160). The reasons for the doctrine are stated by RYAN, C., in *Jansen v. Williams*, *supra*, and repetition here is unnecessary. Under the rule established by the authorities, we are clearly of the opinion that plaintiffs in the case before us should not have taken the assignment of the lease without their principal's knowledge or consent, nor claimed title to the crop which their principal supposed he was selling to his grantee. In fact the crop never was sold, and, when the principal became aware of the true situation, he was entitled to disregard the apparent assignment and retain control of the property, and plaintiffs were not justified in attempting to dispossess his tenant. In will best serve "the general interests of justice and the safety of those who are compelled to repose confidence in others" to adhere strictly to the rule of the authorities above cited;

for, "if such a transaction as is exhibited by the undisputed facts of this case could stand for a moment, the well-established rules that an agent to sell cannot himself become a purchaser, and that one who undertakes to act for another in any matter shall not in the same matter act for himself, would be so easy of evasion, and breaches of them so readily covered up by contrivances, that they would cease to be of any practical value. When agents, and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it. Thus only can these rules be made useful in promoting fair dealing on the part of agents and trustees, and in preventing frauds." Rapallo, J., in *Bain v. Brown,* 56 N. Y. 285. The reasons for the rule apply with greater force to the case at bar. The agents here parted with nothing of value, but attempted to acquire title without paying any consideration whatever to their principal.

Plaintiffs attempt to justify their conduct in this way: They claim that Tomblin parted with his title to the land and to the crop to Goethe, the purchaser, and that they acquired title to the crop from Goethe for a valuable consideration. This contention is not sustained by the evidence. There is nothing in the record tending to show that the purchaser acquired the assignment of the lease and then transferred his interest therein to the plaintiffs. It is undisputed that the lease was assigned in blank and plaintiffs' name inserted without the knowledge or consent of Tomblin, their principal, and that the purchaser never knew that the crops were offered with the land, or that Tomblin intended to sell the crops or assign his lease. The claim of plaintiffs rests upon indefensible grounds and cannot be sustained.

The judgment of the district court should be reversed

and the cause remanded for further proceedings, and we so recommend.

DUFFIE and GOOD, 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.

PLATTE COUNTY INDEPENDENT TELEPHONE COMPANY, APPELLANT, V. LEIGH INDEPENDENT TELEPHONE COMPANY, APPELLEE.*

FILED NOVEMBER 9, 1907. No. 14,765.

Injunction: CONTRACT, BREACH OF: STATUTE OF FRAUDS. A court of equity will not enjoin the breach of an oral contract which by its terms is not to be performed within one year from the making thereof.

APPEAL from the district court for Colfax county: JAMES G. REEDER, JUDGE. *Affirmed.*

J. J. Sullivan and *C. J. Garlow,* for appellant.

Thomas & Cain, contra.

GOOD, C.

Appellant commenced this action in the district court for Colfax county against the appellee, alleging that both plaintiff and defendant were corporations organized under the laws of Nebraska and engaged in the general telephone business, plaintiff in Platte county, and defendant in Colfax county; that the principal place of business of the

* Rehearing allowed. See opinion, p. 46, *post.*

plaintiff was the city of Columbus, and that of the defendant the village of Leigh; that about the first of June, 1904, plaintiff and defendant entered into a contract by which it was agreed that the telephone lines of the respective parties should be connected at the town of Creston, in Platte county, in the exchange there maintained by the plaintiff, and whereby the subscribers of the plaintiff were to be furnished telephone facilities and service over the lines of the defendant, and the patrons of the defendant were to be furnished similar facilities and service over the lines of the plaintiff, and that the said contract was to be continued in force for five years from its date; that in pursuance of and as a part of said agreement plaintiff changed its telephone lines from Columbus to Creston from a grounded to a metallic circuit, and defendant extended its lines from Leigh to Creston and connected with plaintiff's exchange. Plaintiff further averred that in November, 1904, it sold its Creston exchange to the defendant for the consideration of $1,250, to be paid in stock of the defendant company to be thereafter issued, and that in pursuance of said contract it turned over to the defendant its telephone exchange at Creston, and that the inducement for the sale of the Creston exchange was the alliance and interchange of business between the two companies, and that this was considered as an inducement to the sale was understood by both parties at the time of the sale. It also averred that some months thereafter the defendant company entered into a contract with the Nebraska Telephone Company, whereby those two companies had formed a business connection and alliance to the exclusion of the plaintiff, and that under and by virtue of the agreement between the defendant and the Nebraska Telephone Company the plaintiff and its patrons will be cut off and excluded from the use of the lines of the defendant company, and that it will be denied the right of interchange of business with the defendant and its patrons, as contemplated by the contract between the parties to this action. These allegations were followed by appropriate allegations as to

the nature of the damages and injuries plaintiff will sustain if the defendant is permitted to disconnect the telephone lines of the parties to this action, and plaintiff prays for an injunction restraining the defendant from carrying into effect its agreement with the Nebraska Telephone Company, in so far as said contract contemplates the exclusion of the plaintiff from the use of the lines of the defendant company, and in so far as it contemplates the exclusion of the patrons of the defendant company from the use of the lines of the plaintiff company, and a suspension of the interchange of business between the companies plaintiff and defendant. Defendant answered, admitting the corporate existence of the parties and the general nature of the business of each, and admitted an oral agreement with the plaintiff, whereby it was to connect its telephone system with that of the plaintiff at Creston, and denied all the other allegations of the plaintiff's petition. It also pleaded affirmative allegations, which need not be noticed. There was a trial to the court, resulting in findings and judgment in favor of the defendant, dissolving the temporary injunction that had been issued at the commencement of the action, and dismissing the action of the plaintiff. To reverse this judgment plaintiff appeals to this court.

With reference to the second contract, whereby the sale of the Creston exchange was said to have been made, it is sufficient to say that the evidence fully discloses that, while negotiations were had between the parties for the sale of the exchange, they never ripened into a sale, and we have, therefore, only to deal with the rights of the parties as affected by the first agreement made in June, 1904, for the interchange of business between the two companies. The Nebraska Telephone Company is not made a party to this action, nor is any alleged contract between the defendant and the Nebraska Telephone Company set out in the pleadings, nor are the terms of any such contract disclosed by the evidence. Plaintiff asks that defendant be enjoined from carrying out its contract with

the Nebraska Telephone Company, in so far as the said contract might require the defendant to disconnect its lines from the plaintiff's lines, and to refrain from interchange of business with the plaintiff. But, without the Nebraska Telephone Company being made a party, and without the contract between it and the defendant being brought before us, we are at a loss to understand how we could hold such a contract inoperative, or to enjoin the carrying out of any of its provisions between the parties to it. We take it, however, that the real point aimed at by the plaintiff is to enjoin a breach of the contract of June, 1904, between the plaintiff and defendant.

It is a familiar doctrine that courts of equity will interfere to prevent the breach of an executory contract, where the breach thereof by one party would work irreparable injury to the other, especially where an award of damages for a breach thereof would not adequately compensate the injured party. But, in order to invoke the aid of a court of equity to restrain the breach of a contract, it must first be shown that a valid and subsisting contract susceptible of enforcement exists between the parties. In the present action the evidence discloses that the agreement of June, 1904, between the parties was not in writing, and the record leaves the court in doubt and uncertainty as to the period of time the contract was to run. Plaintiff alleges in its petition that the contract was to extend for a period of five years from its date. One of its witnesses states that it was to run for five years, and one that it was to run for three years, but in any event the contract by its terms was one not to be performed within one year from the making thereof.

Defendant has invoked the protection of the statute of frauds. Section 5957, Ann. St. 1903, reads in part as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: First, every agreement that, by its terms, is not to be performed within one year from the

making thereof." Plaintiff seeks to avoid the force of the statute by contending that the contract had been practically executed, and that the conditions thereof had been performed, and the respective parties were doing business and serving their respective patrons over each other's lines, and that the division of tolls and settlements and manner of management were incidents and minor matters growing out of the real contract. It is true that there were several matters mentioned as a part of the contract, to wit: That a certain subscription list should be turned over by the plaintiff to the defendant, and that plaintiff should change its telephone lines between Columbus and Creston from a grounded to a metallic circuit, and that the defendant should build and extend its lines from Leigh to Creston; but, as we view it, the main object of the agreement was the interchange of business between the two companies, and the matters of building the lines and connecting the two telephone systems together were incidental to the main contract, to wit, the exchange and interchange of business. In fact, it is a breach of contract to interchange business against which the plaintiff asks relief. It appears clear to us that the plaintiff has wholly failed in its attempt to show that the contract is not within the statute of frauds, and that the contract falling under the ban of the statute is void, and that no rights can be asserted under it, and that a breach of it cannot be enjoined.

While holding the contract void and unenforceable under our statute, we do not wish to be understood as expressing any opinion upon the right of the appellant to compel by proper action an exchange of business between the two companies upon equitable terms. The issues raised in the pleadings with reference to the second contract are not urged by the appellant, and are, therefore, not considered.

For the reasons given, the judgment of the district court was right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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 May 7, 1908. *Former judgment of affirmance adhered to:*

1. **Statute of Frauds:** EXECUTED CONTRACT. Where an oral contract has been fully performed by the parties, or by one of them, it is not void under our statute of frauds, even though incidental matters growing out of the contract, such as a division of profits, may be required by its terms for a series of years.
2. **Injunction:** CONTRACT, BREACH OF. The breach of an oral contract by one of the parties will not be restrained, where the terms of the contract are in doubt, or so indefinite and uncertain that a court would not decree specific performance thereof.

DUFFIE, C.

A rehearing was granted in this case, and it has been again argued and submitted. The facts are fully set out in the opinion of Mr. Commissioner GOOD, *ante*, p. 41. We have again carefully examined the evidence contained in the bill of exceptions, and fully considered the briefs and arguments made upon the second presentation of the case, and are satisfied that our first opinion, with perhaps some modifications, should be adhered to.

In our former opinion we held that the contract between the parties was void under our statute of frauds, for the reason that it could not be fully performed within one year from the making thereof. Further consideration of the case impresses us with a doubt of the correctness of this holding. So far as the plaintiff is concerned, the contract was apparently performed on its part; and in the exhaustive opinion of this court in *Kendall v. Garneau*, 55 Neb. 403, it is said: "That portion of our statute of frauds which brings within its inhibition verbal or unsubscribed agreements which by their terms are not to be performed within one year from the time of making does not

extend to agreements wholly performed on one side within the year." It is true that as a result of the agreement entered into between the parties the revenue derived from an interchange of business was to be divided between the two companies on a basis of one-fourth to the defendant and three-fourths to the plaintiff, and this disposition of the income arising from the use of the lines was to continue during the life of the agreement. We do not think that this can be urged as a reason for holding the contract void, any more than could an oral partnership agreement for a term of years, but which was fully consummated by each of the partners contributing their share of the capital stock and engaging in the business contemplated by the agreement, be held void because of the future division of profits and losses. The fact that the profits and losses arising from the conduct of the business is to be divided between the partners in proportion to the amount contributed by each is a mere incident arising from the consummated contract. While there is some conflict in the opinions, the weight of authority seems to be that no written articles are necessary to constitute a copartnership which is to take effect immediately; while a written agreement is necessary to bind parties to enter into a future copartnership which is not to commence until after the expiration of a year. *Smith v. Tarlton & Finley,* 2 Barb. Ch. (N. Y.) 336; *National Bank v. Van Derwerker,* 74 N. Y. 234; 1 Bates, Law of Partnership, secs. 208, 209. It would seem that the same principle should govern the present case.

On another branch of the case we said in our former opinion that "it is a familiar doctrine that courts of equity will interfere to prevent the breach of an executory contract, where the breach thereof by one party would work irreparable injury to the other, especially where an award of damages for a breach thereof would not adequately compensate the injured party. But, in order to invoke the aid of a court of equity to restrain the breach of a contract, it must first be shown that a valid and subsisting contract

susceptible of enforcement exists between the parties." This is the undoubted rule followed by all courts. 22 Cyc. 855. The evidence regarding the length of time which the contract between the parties was to run is extremely conflicting, and no one can tell whether it was to continue three years or five. The plaintiff in its petition alleged that the contract was to continue for five years. One of the plaintiff's witnesses testified that it was to run five years, and one for three years. The defendant's witnesses all testified that the contract between them was to continue for an indefinite time, and we are unable to say from the evidence before us what length of time the contract was to continue. Such a contract could not be specifically enforced, and if it could not be specifically enforced a breach therefore by one of the parties will not be restrained, at least, if the party against whom relief is asked has performed on his part for a reasonable length of time, and the record is barren of any evidence on this point.

It is also urged in the argument that defendant is a common carrier of news, and that it cannot refuse to interchange business with the plaintiff; that public policy and the requirements of business demand that telephone companies shall connect and interchange with each other. The case was not brought nor tried upon such a theory. The action was founded wholly upon the contractual relations said to exist between the parties. When the right of the plaintiff to compel an interchange of business with defendant company is presented to us in a proper action, it will be time enough to determine that question. It would be unfair to the defendant and to the trial court to base a decision upon a question that was never presented to the district court. Whether an interchange of business between the defendant company and the Nebraska Telephone Company, or with the plaintiff, or with both these companies, would be most conducive to the public interest was not an issue in the case, and is not for us at this time to determine.

We recommend an adherence to the former opinion.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

WALTER W. HACKNEY, APPELLEE, V. MITCHELL S. MCININCH ET AL., APPELLANTS.

FILED NOVEMBER 9, 1907. No. 14,801.

APPEAL from the district court for Nemaha county: WILLIAM H. KELLIGAR, JUDGE. *Rehearing denied.*

M. S. McInnich and *H. A. Lambert,* for appellants.

Stull & Hawxby, contra.

GOOD, C.

In his motion for a rehearing herein, appellant alleges that our opinion in this case (79 Neb. 128) is based on the erroneous assumption that Jones acquiesced in Hackney's taking possession of the land in question on March 8, 1905; and insists that as Jones was still in possession of the premises, as the tenant of McInnich, injunction would not lie to dispossess him. We are now inclined to the view that the opinion assumes a state of facts slightly different from that shown by the record. It would seem that Jones did not, at least openly, acquiesce in Hackney's putting Andrews in possession of the premises, but this, in our view of the case, is wholly immaterial. It appears that in 1903 the Bedford heirs were the owners of the land which was then leased to Mrs. Gilbert, who sublet it to Jones. Some time in November, 1903, McInnich took

an assignment from Mrs. Gilbert of her interest under the lease. He therefore became the tenant of the Bedford heirs. Mrs. Gilbert's lease expired on the first day of March, 1904, and thereafter neither McIninch nor Jones had any shadow of right to the possession of the premises. Hackney in the meantime had become the owner by purchase from the Bedford heirs, and McIninch, without having surrendered possession to him, assumed to assert some superior right thereto. But there is no evidence in the record to justify any conclusion, or even a suspicion, that he ever had a shadow of right to the land. He and Jones no longer claimed as tenants of Hackney, or as tenants of Hackney's grantors. They therefore became either tenants at sufferance or mere trespassers. Neither Jones nor McIninch recognized Hackney as the landlord. In this view of the case, we are of opinion that it mattered not whether Jones acquiesced or consented to Hackney's taking possession, and the only remaining question is: Did Hackney obtain possession in March, 1905?

From an examination of the record, we are of the opinion that Hackney and his tenant, Andrews, obtained possession of the land at that time. If this be true, Jones and McIninch were mere trespassers, and their repeated trespasses, assaults and threats against Hackney and his tenant were sufficient to justify the issuance of an injunction. Had McIninch or Jones claimed to be the tenant of Hackney, then Hackney might not have been entitled to that remedy. It seems clear, however, that neither McIninch nor Jones, until they had surrendered possession to Hackney, was in position to assert any title adverse to that claimed by him. They do not assert or claim any rights as tenants of Hackney, and they are in no position to assert any rights adversely to him. In fact, they had none to assert, except the rights of trespassers, and, when the rightful owner has obtained possession of land as against trespassers who repeatedly interfere with his peaceable enjoyment thereof, he is entitled to have his possession protected by an injunction. Such appears to

be the situation in this case, and we recommend that a rehearing be denied.

DUFFIE and EPPERSON, CC., concur.

By the Court:

REHEARING DENIED.

ELIZA J. ELLIS, APPELLANT, V. CITY OF KEARNEY, APPELLEE.

FILED NOVEMBER 9, 1907. No. 14,874.

Cities: INJURY: NOTICE. The maxim that physical incapacity to perform a duty enjoined by law excuses nonperformance, is not available to extend the time, or afford an opportunity, to fix a statutory liability upon another. *Schmidt v. City of Fremont*, 70 Neb. 577, followed and approved.

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

Hamer & Hamer, for appellant.

H. M. Sinclair, contra.

GOOD, C.

Eliza Ellis brought this action against the city of Kearney to recover for injuries sustained by falling into a hole in one of the streets of said city. A demurrer *ore tenus* was sustained, and judgment rendered for the defendant in the court below. The plaintiff appeals to this court.

The defense relied upon by the defendant was that no notice in writing of the accident or injury complained of was given, as required by section 39, art. III, ch. 13, Comp. St. 1907. Kearney is a city of the second class having more than 5,000 and less than 25,000 inhabitants,

and section 39, above referred to, is applicable to cities of that class. Said section is as follows: "No city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within such city, unless actual notice in writing of the accident or injury complained of, with a statement of the nature and extent thereof, and of the time when and place where the same occurred, shall be proven to have been given to the mayor or city clerk within thirty (30) days after the occurrence of such accident or injury." It will be observed that by the terms of this section cities of the class to which Kearney belongs are not liable for damages arising from defective streets or other public places within the city, unless actual notice in writing of the accident or injury complained of, with a statement of the nature and extent thereof, and of the time and place where the same occurred, is given to the mayor or city clerk within 30 days after the occurrence of the accident or injury. It is conceded that no notice in writing, as required by this statute, was given until nearly three months after the injury was sustained. The plaintiff seeks to avoid the effect of this statute by pleading that she was unconscious for nearly three months after the accident complained of, and is therefore excused from giving the notice in writing within the time prescribed. She also seeks to avoid the statute by alleging that oral notice was given to the mayor within ten days after the accident.

This case is disposed of by the case of *Schmidt v. City of Fremont,* 70 Neb. 577. It was there held: "The maxim that physical incapacity to perform a duty enjoined by law excuses nonperformance, is not available to extend the time, or afford an opportunity to fix a statutory liability upon another." It was expressly decided therein that no recovery could be had against a city of more than 5,000 and less than 25,000 inhabitants for injuries arising from a defective sidewalk, unless the notice required by section 39, *supra,* was given within the prescribed time.

In that case the person injured was a boy ten years of age. The notice in writing was not given until the thirty-seventh day after the accident. It was held that no recovery could be had. See, also, *Swancy v. Gage County*, 64 Neb. 627.

We think the construction placed upon this statute in that case is conclusive of the issues in the case at bar. The plaintiff asks this court to hold that the oral notice would suffice. To do so would be to nullify the statute. It is not the province of the courts to make the law, or read into it exceptions not intended by the lawmakers. It follows that the judgment of the district court is right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

UNITED STATES SUPPLY COMPANY, APPELLEE, V. J. E. VLASNIK ET AL., APPELLANTS.

FILED NOVEMBER 9, 1907. No. 14,927.

Appeal: JUDGMENT ON PLEADINGS. Where a general demurrer is sustained to an answer and judgment by default entered on the allegations of the petition for want of further plea by defendant, error in sustaining the demurrer should be held to be without prejudice, if, on the pleadings as they stood with the answer on file, plaintiff was entitled to judgment for a sum not less than that for which judgment was taken.

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

Isaac Powers, H. F. Barnhart and *E. A. Houston,* for appellants.

W. A. Meserve, contra.

JACKSON, C.

The plaintiff's action is on an account for goods sold and delivered at an agreed price of $925.70, upon which the defendants are credited with $794.55, leaving a remainder of $131.15, for which sum, with interest, the plaintiff asked judgment. An itemized statement was attached to the petition, and is as follows:

"725 ft. 8" Blk. Std. Wrt. I. Pipe. 61x2½
2 8" Ludlow I. B. Br. Mtd. Gates 50x5
1 8" 45 O. C. I. Flanged Ell Drilled
2 8" Flanges Drilled to fit do.
1 8" Long sweep Ell.
20 ft. 6" Blk. pipe perforated ¾x6"
slots 5 to circumference of tip
2" between rows, beak joint.
2½ ft. ⅛ Rainbow Pack
1 18" Trimo Wrench."

The answer was, first, a general denial, and, second, an allegation that "on or about the 9th day of July, 1903, the plaintiff, through its salesman and duly authorized agent, sold the defendants herein 725 feet of 8" black standard wrought-iron pipe, which 8" black standard wrought-iron pipe weighed 28.18 pounds a foot, and the same was purchased at the stipulated sum of $789.36; that thereafter, contrary to and in violation of said order, contract and agreement between the defendants and said agent acting for and on behalf of the plaintiff, the plaintiff shipped to the defendants at Niobrara, Nebraska, 725 feet of well casing, weighing less than 28.18 pounds a foot, and not more than 24 pounds a foot, and pipe of a cheap and inferior grade, instead of 8" black standard iron pipe, as provided for in said order and contract and agreement aforesaid, and that the well pipe so shipped to defendants was of the market value of $658.21, and no more; that the defendants did not discover the grade of said well pipe, nor that the same was only 24 pounds and less than 28 and a fraction pounds a foot, and was not 8" black standard

wrought-iron pipe, until too late to countermand said order, and not until after the same was delivered to the defendants, but, notwithstanding the violation of said order and agreement, the defendants, soon after receiving said merchandise, paid the plaintiff the sum of $658.21, the full market price and value of the casing so shipped, and the defendants are not now indebted to the plaintiff in the sum of $131.45, or in any sum or amount whatsoever." The trial court sustained a general demurrer to the answer, and the defendants declining to plead further, the plaintiff had judgment by default on April 24, 1906, for the sum of $152.90, from which the defendants appeal.

The trial court may have erred in sustaining a general demurrer to the answer, which put in issue the purchase of the articles contained in the itemized statement other than the pipe there described, but, as we view the case, it was error without prejudice. It appears from the answer of the defendants that they contracted to purchase of the plaintiff 725 feet of iron pipe at an agreed consideration of $789.36, and that, after discovering the fact that the pipe was not of the quality agreed upon, they retained it without complaint, and paid $658.21 of the purchase price. If the pipe was not of the kind and quality ordered, the defendants should have refused to receive or retain it, but, having accepted it with the knowledge of its quality, they are bound for the contract price. *Roman v. Bressler,* 32 Neb. 240; *Hazen v. Wilhelmie,* 68 Neb. 79. The plaintiff therefore could have taken judgment on the pleadings for the difference between the contract price and the amount paid, which is the sum of $131.15. This, it will be noticed, is the exact sum for which the plaintiff prayed judgment, and with interest computed at the lawful rate from the date when the account would commence to draw interest is somewhat more than the amount for which the plaintiff actually took judgment.

It is insisted, however, by defendants that in no event

was the plaintiff entitled to judgment by default. They appeal to section 134 of the code, relating to proof of allegations of value, but there is no question of value involved; it is one of contract price, concerning which there is no dispute.

It follows that the judgment of the district court should be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

MARY JACOBSEN, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED NOVEMBER 9, 1907. No. 14,957.

1. **Cities:** INJURY: NOTICE. A statutory notice is not rendered void by the inclusion of surplusage which has not misled the party notified to his prejudice.
2. **Appeal:** EVIDENCE. Incompetent testimony concerning a matter about which there is no dispute is not ground for reversal.
3. **Cities:** WALKS: ABANDONMENT. In the circumstances of this case there appears to have been no abandonment or vacation of a pathway for pedestrians along which the city had previously constructed and maintained a sidewalk.

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

H. E. Burnam, I. J. Dunn and *J. A. Rine,* for appellant.

W. H. De France, contra.

AMES, C.

Along a certain portion of the south side of St. Mary's avenue, near its intersection with Jackson street, in the city of Omaha, the city had, until some time in 1898, maintained a wooden sidewalk between these two streets

and Nineteenth street. There was at this place a triangular tract of ground, which the city bought in the year named and devoted to street purposes, and the tract thus became a junction place for the three streets; the sidewalk space thus became the hypothenuse of a right angle triangle, of which the outer boundaries of Jackson street and Nineteenth street were the other two sides. Immediately after the purchase, the city caused the tract, including the sidewalk strip mentioned, to be paved with wooden blocks set upon a concrete bed or base, thus adapting the whole to vehicular traffic, but it did not then or thereafter take any official or formal action purporting to be a vacation or abandonment of the strip as a public way or sidewalk for foot passengers, and the public have continuously used it as such from thenceforward, although there were properly maintained sidewalks on Jackson and Nineteenth streets, along the other two sides of the triangle. After a short time the wooden blocks rotted away, and the surface of the concrete bed became worn and uneven with holes and protuberances, so that the same was, and was permitted to remain, an unsafe passageway for pedestrains. After this state of affairs had existed for some time, and while it continued, the plaintiff, in the day time, and with the exercise of care and caution, having in view the dangers of her situation, attempted to walk along this strip from St. Mary's avenue to Jackson street, which was covered with a light blanket of snow, then falling, when she slipped or stumbled on one of the protuberances and fell to the ground, suffering personal injuries, to recover damages for which this action was brought. There was a verdict and judgment for the plaintiff, from which the defendant appealed.

So far as we can understand from the briefs of counsel, there is no substantial dispute about the foregoing facts, and we think they are established without contradiction and are all that require to be considered on this hearing. There are four alleged errors urged by counsel for appellant in his brief. One of them is to this effect: A statute

provided that such an action should not be maintained, unless within a specified time after the accident there should have been served upon the city a written notice of the injury, and of the nature and extent thereof, and of the time when and place where it had occurred. A notice was served in due time, which recited all that the statute required, but proceeded to state, as a cause of the accident, that the sidewalk was negligently and defectively constructed and maintained, and ice and snow had been permitted to accumulate thereon. This additional matter was irrelevant to the requirement of the statute and so mere surplusage, of which the city may not complain, unless it was misled thereby to its prejudice, and the record does not show it to have been so. All that counsel complains of is that it might have done so, which is perhaps true, but there is no present practical occasion for speculating about it. The petition charges that the defendant "negligently failed to construct or maintain a sidewalk or safe way for foot travel along and in front of said triangular tract of ground and in St. Mary's avenue, which failure covered a period of about four years." This allegation informed the defendant of the exact nature of the wrong complained of, which, as we have said, was proved without substantial, if any, contradiction. We do not think it a detraction from the sufficiency of the pleading or proof that the city had, until four years previously maintained a sidewalk along the strip mentioned. We do not think it a case involving the question whether the city is compelled to construct and maintain a walk upon a pathway voluntarily chosen by pedestrians, but which is not and has never been set apart for such use by the city. This pathway had been so set apart and been so used until the space was paved with wooden blocks, and such pavement, as long as it was kept in repair, doubtless served well enough the purposes of pedestrians so that the pavement itself did not operate to withdraw it from such use or to warn foot passengers that it had been abandoned therefor, which in fact it had not been.

Another contention is, that the plaintiff was guilty of contributory negligence in continuing to pursue the way after she discovered its dangerous condition, but the danger was not so great or so imminent as to render such use negligence *per se*. The plaintiff testified that she employed such care and circumspection after she discovered the condition of the way, which she did not do until after she had entered upon it, as prudence and care for her own safety seemed to require. The question was one for the jury, which they have answered in her favor, and we think the evidence in that regard supports their verdict.

Finally, it is objected that the court permitted a witness to testify that the condition of the pathway, several months after the happening of the accident, was rough and uneven. If there had been any substantial conflict as to its having been in that condition at the time of the accident, the objection would, perhaps, be well taken, but we think the matter is clearly beyond dispute, so that the error, if any, was without prejudice.

We do not discover that the court failed to submit the issues fairly to the jury or committed any other prejudicial error, and we recommend that the judgment be affirmed.

CALKINS, C., concurs.

FAWCETT, C., not sitting.

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

AFFIRMED.

F. W. FITCH, APPELLANT, V. EUCLID MARTIN, ADMINISTRATOR, APPELLEE.

FILED NOVEMBER 9, 1907. No. 15,211.

Trial: FRAUD: DISMISSAL. Fraud or imposition upon the court and against defendant, practiced by a plaintiff during the progress of the trial of his cause, does not justify the dismissal of his action without a determination of its merits.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Judgment of dismissal vacated and cause remanded with directions.*

A. S. Churchill and *Byron G. Burbank,* for appellant.

F. H. Gaines and *E. G. McGilton, contra.*

AMES, C.

This is an appeal to the district court from a judgment of a county court disallowing a claim against the estate of a deceased person. After the trial had proceeded so far that the cause had been submitted to the jury for deliberation upon their verdict, the claimant or plaintiff was accused of having secretly and fraudulently made a material alteration in an alleged book of accounts of transactions between himself and the deceased, after it had been offered and received as documentary evidence in the progress of the trial. The trial judge thereupon, with the aid of a committee of lawyers appointed by himself, made an investigation into the subject of the charge, as a result of which he became convinced, and made a determination or finding, that the accusation was true. In consequence of such finding, and of his own motion, as the record recites, the judge discharged the jury from further consideration of the case and entered a judgment dismissing the appeal. A motion to vacate the dismissal and for a new trial having been overruled, the plaintiff appealed to this court.

The constitution of this state contains the three following provisions: Article I, sec. 13. "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without delay."

Article I, sec. 24. "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied."

Article VI, sec. 17. "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 the law."

It is nowhere provided that the rights thus guaranteed shall be forfeited by deceit or imposition practiced upon the court, or attempted so to be, or even by the commission of forgery, perjury or other criminal offense. Such penalties as the statute does or shall provide for any such acts must, we suppose, be inflicted, if at all, after trial and conviction by due course and process of law, and not as the result of a summary investigation in a proceeding unknown to the statute and instituted by the judge upon his own motion. The proceeding and judgment are attempted to be justified in this instance as being an exercise of the inherent powers of the court to protect itself from the consequences of deceit and imposition, and to prevent its ordinary process and proceedings from being made use of as the instruments of fraud or oppression. It is unnecessary to attempt to decide, at present, what are the nature and limitations of the powers of the court in this respect, but we think it is safe to say that they do not extend so far as entirely and finally to deprive a litigant of the right to have his suit heard, tried and determined according to the usual course and practice of the courts in similar cases.

Counsel cite but one decision in support of their contention, viz., *Gage County v. King Bridge Co.*, 58 Neb.

827. But we think that decision is not conclusive, or, indeed, in point, in the present controversy. The appeal, which was dismissed in that case, was from an order of a county board allowing a claim against their county. Now, a taxpayer has no natural or constitutional right to prosecute such an appeal, which concerns a matter in which he has no special individual or personal interest, but the statute permits him to carry on the proceeding in the name and behalf and as a representative of the public, that is to say, of the whole body of the county. And when, in the case cited, the court discovered that the appellants were not in fact doing what the statute contemplated, and that they were not in reality prosecuting the appeal in the interests of or as representatives of the public, but for the accomplishment of unlawful and extortionate ends of their own, it refused to permit them to proceed further. By so doing the court bereft the appellants of no right or property, but at the uttermost deprived them of a privilege which has been conferred upon them, not for their own end alone, but for the public benefit, from which end they had perverted it.

The cases cited in *Gage County v. King Bridge Co., supra,* appear to us to be in point neither in that case nor in this. The appeal in *Johnson v. St. Paul City R. Co.,* 68 Minn. 408, was dismissed because it was without merit, that is to say, because the judgment sought to be appealed from was entered in obedience to a mandate from the supreme court and was consequently not subject to review. The court properly described the appeal as frivolous. In *Stewart v. Butler,* 59 N. Y. Supp. 573, the New York supreme court at special term, that is to say, a trial judge, entered an order staying a suit at law under such circumstances, as the opinion recites, as would have justified or probably induced a court of equity perpetually to enjoin the prosecution of a multiplicity of vexatious suits at law. What afterwards became of this case we do not know, nor have we an accurate knowledge of the powers or jurisdiction of the New York courts or of their methods

of procedure, but it is evident that there was exerted in that case a power or jurisdiction quite different in both its nature and origin from that exercised by either of the Nebraska courts in the cases under consideration. We think none of the cases mentioned is a precedent for the order of dismissal in the case at bar, which we think to be also without justification by principle. We, of course, intend to intimate no opinion with respect to the truth or falsehood of the accusation against the plaintiff.

Much of the briefs and oral arguments of counsel was concerned with orders made by the trial judge with reference to the withdrawal and amendment of pleadings. These orders are, however, interlocutory, and subject to vacation or modification during the future progress of the cause. Whether they, or any of them, are erroneous, we do not think it necessary or prudent to express an opinion until there shall have been presented a record containing a judgment within the jurisdiction of the district court to render. Even error thus committed may be cured by other steps in the procedure, and may finally turn out to be without prejudice.

We recommend that the judgment of dismissal be vacated and set aside, and the cause remanded, with instructions to reinstate the cause and proceed with it according to law.

CALKINS, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of dismissal is vacated and set aside, and the cause remanded, with instructions to reinstate the cause and proceed with it according to law.

JUDGMENT ACCORDINGLY.

L. P. ALBRIGHT, APPELLANT, V. STATE LIFE INSURANCE COMPANY, APPELLEE.

FILED NOVEMBER 9, 1907. NO. 14,959.

Insurance: CONTRACT: PAROL EVIDENCE. Where, in a written application for life insurance, the applicant agrees that no statements, promises or information made or given by the person soliciting or taking such application shall be binding on the company, unless embodied in the application and presented to the company at its home office as a part thereof, the applicant cannot show that such application was conditioned upon an agreement not contained therein, made by the agent soliciting the application, that the company was to make a real estate loan for the amount of the policy.

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

L. H. Blackledge and *J. S. Gilham,* for appellant.

Crane & Boucher and *Fred Maurer, contra.*

CALKINS, C.

On the 10th day of September, 1903, one J. W. Howard, who was a soliciting agent for the defendant, a life insurance company, and authorized to take applications for life insurance policies and collect the first premium therefor, orally represented to the plaintiff that the defendant would make him a $4,000 loan if he would take out a $4,000 policy, to be secured by a mortgage at the rate of 5 per cent. Howard was provided by the defendant with blank applications and receipts for the first year's premium, but it does not appear that he had authority to solicit for loans or that he was provided with any forms issued by the defendant for that purpose. The plaintiff thereupon signed an application for a policy of life insurance in the sum of $4,000, and executed his note payable to "J. W. Howard, agent," March 1, 1904, in the sum of $236.92, the amount of the first annual premium. The

application contained the provision: "I agree that no statements, promises or information made or given by the person soliciting or taking this application shall be binding on the company, unless such statements, promises or information be reduced to writing and presented to the officers of the company at the home office with this application, and that this application and the policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto." Howard thereupon took one of the ordinary receipts of the defendant, which, as printed, acknowledged the receipt of the first annual premium and provided that the insurance would be in force from the date of the approval of the application by the medical director, and that, in case the policy should not be issued, the money paid would be refunded, and inserted therein: "Received of L. P. Albright note for $236 in favor of J. W. Howard, agent; this note not to be negotiated nor collected until policy is issued and $4,000 loan has been made to the applicant." The plaintiff made upon a blank form in ordinary use an application for a loan, which was delivered with the application for insurance to the agent Howard. What became of the application for a loan does not appear, but the application for the insurance was in due course received by the defendant.

The next transaction appearing in the record is a letter from the president of the defendant company, dated December 11, 1903, and addressed to the plaintiff, as follows: "Replying to your letter of December 8, in which you say you gave an agent of ours, whose name you do not mention, an application for a policy of $4,000, conditioned that the home office would loan you $4,000 at 5 per cent. on real estate in your city by March 1, next, was duly received. None of our agents has authority to make any such contract for loans, and we would not accept a loan under any such conditions. Our loan department and insurance department are run entirely separate, and if you

were to take $100,000 of life insurance it would not influence us at all in making you a loan, except such as could be made on your policy at the proper time. I am glad you wrote me about this matter before complications could arise. I wish you would send me the name of the agent. Yours truly, A. M. Sweeney, President." After receiving this letter the plaintiff, on December 23, 1903, appeared before the medical examiner of the company at Red Cloud, Nebraska, to whom his application had been returned, and submitted to a medical examination, signing that portion of the application relating to his family history. The report of the examiner being satisfactory, the application was accepted by the company and a policy of insurance was issued on January 13, 1904, and sent to the plaintiff by mail. This policy the plaintiff returned to the company, but without letter or explanation, and when the company requested such explanation he wrote on the back of its letter, dated March 30, 1904: "I return herewith policy. Your agent has bound you by contract which must be carried out before I accept policy." Meanwhile the note had passed into the hands of the First National Bank of Omaha, and the plaintiff was compelled to pay the same. It does not appear who received the proceeds of the note, but it bears the indorsement in blank of J. W. Howard, agent, and George J. Crane, who was the state agent of the defendant. After the payment by the plaintiff of the note in question, in February, 1905, he brought this action to recover from the defendant the amount which he was required to pay thereon, on the ground that the defendant had failed to fulfil the contract or return the note given by him. The issues being made up upon this plea, there was a trial to a jury, and, the plaintiff having given testimony tending to establish the foregoing facts, the court at the conclusion thereof directed a verdict for the defendant; and the plaintiff brings this appeal from the judgment rendered upon such verdict.

It is not claimed that the soliciting agent, Howard, had any actual authority from the defendant to make any

agreement for the loan of money upon the security of real estate, and the power of soliciting applications for life insurance clothed him with no apparent authority to make such contracts, or to condition contracts for life insurance upon the making of loans. The application which the plaintiff signed, and which alone appears to have come to the defendant's notice, was complete in itself and contained no stipulation respecting any loan to be made to the plaintiff upon real estate security. In it the plaintiff agreed that no statements, promises or information made or given by the person soliciting or taking the application should be binding on the company, unless the same should be reduced to writing and presented to the defendant at the home office as a part of such application. It is not suggested why this was not a reasonable and just provision and one which should be enforced by the court. The agreement to make a loan of its funds upon real estate security is not germane to the contract of life insurance, and the two branches of business should be, and by all reputable companies are, kept entirely separate. A life insurance company is a trustee for its policy holders, and for it to promise real estate loans to induce applications for its policies would be an unfaithful exercise of its stewardship. After being informed by the defendant that no agent had authority to make any such contract, and that the defendant would not make a loan under any such conditions, the plaintiff presented himself for medical examination and signed the certificate as to his family history indorsed upon his original application, and it might well be held that, the defendant having thereupon issued its policy of insurance and placed itself under the liability thereby created, the plaintiff would be estopped to claim that the contract contained any other stipulation or condition than that embodied in the application and policy. But it is not necessary to determine that question, as the stipulations in the application excluded any other condition or agreement. The plaintiff relies on the cases of *New York Life Ins. Co. v. Baese,* 31 S. W. (Tex. Civ.

App.) 824, and *New York Life Ins. Co. v. Rohrbough & Co.*, 2 Willson, Civ. Cas. Ct. App. (Tex.) 167. Neither of these cases is in point. In the first the company did not issue the policy, and in the second it does not appear that a written application was made, though it seems that the company knew that the solicitor had promised to issue a policy conditioned that the insured might travel without restriction, and it refused to issue a policy in that form.

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

AMES, C., concurs.

FAWCETT, C., not sitting.

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

AFFIRMED.

ROY L. STEWART, APPELLEE, V. CHARLES E. WALKER ET AL., APPELLANTS.

FILED NOVEMBER 9, 1907. NO. 14,964.

1. **Mortgages: REFORMATION: SUBSEQUENT PURCHASER.** Where a mortgage purports to give the amount, date of execution and maturity, and the rate of interest borne by the notes it secures, and is so recorded, the mortgagee may not in a suit against a subsequent purchaser of the premises, who has no notice except such as is afforded by the record, show that the notes intended to be secured matured at an earlier date or bore a higher rate of interest than was specified in the mortgage.

2. ———: **ESTOPPEL.** The statements contained in a mortgage recorded by the mortgagee are his declarations to all subsequent purchasers, and he is estopped, as against one who has bought the premises relying upon such record, to assert that his interest is greater or his lien more onerous than was described in such mortgage.

3. ———: **MISTAKE: EQUITY.** If a mortgagee accepts and records a mortgage which describes the notes it secures as maturing at a later date or bearing a lower rate of interest than is actually

named in such notes, the mistake is his, and under the rule that, where one of two innocent persons must suffer, the one who has made a mistake possible is the one who must bear the loss, the mortgagee must suffer the consequences of such error, rather than the innocent purchaser who has relied upon the record.

4. **Vendor and Purchaser:** RECORDS: EXAMINATION BY AGENT. It is not necessary for a purchaser of real estate to personally inspect the public records. He may do this by his agent or attorney; and a person who prepares an abstract of title from the record for his examination is the agent of such purchaser.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed and dismissed.*

S. P. Davidson and *C. H. Epperson,* for appellants.

L. C. Chapman, W. E. Stewart and *S. S. Stewart, contra.*

CALKINS, C.

On the 5th day of May, 1905, the defendants' grantor executed a mortgage to plaintiff's assignor, which contained the condition that the same should be void upon the payment of the sum of "$2,633.33, with interest thereon at the rate of 6 per cent. per annum according to the tenor and effect of seven promissory notes of even date herewith, one for the sum of $166.66; one for the sum of $166.66; one for the sum of $333.34; one for the sum of $333.34; one for the sum of $333.34; one for the sum of $333.34, and one for the sum of $1,270, due in 1, 2, 3, 4 and 9 years, respectively." This mortgage was duly recorded on the 6th day of May, 1905, and on the 1st day of August, in the same year, the mortgagee executed a written assignment thereof, purporting to transfer the same and the notes therein described to the plaintiff, which assignment was duly recorded on the day of its execution. The notes which the mortgage was really given to secure were dated on the 4th day of April, 1905, and were due, two on the 1st day of March, 1906, one on the 1st day of March, 1907, one on the 1st day of March, 1908, one on the 1st day of March, 1909, and one on March 1, 1913. The

principal of these notes was the same as described in the mortgage, and they each bore interest at the rate specified in the mortgage, except one of the $166.66 notes, which was drawn to bear interest at the rate of 8 per cent. per annum. The mortgagor on the 7th day of August, 1905, conveyed the premises by a deed without covenants to one Neilson, who on the 23d day of January, 1906, by a similar deed conveyed the premises to the defendant Furer, who took the title with no other notice of the date, amount, date of maturity and rate of interest of the debt secured than that afforded by the record of the mortgage and its assignment. On the 16th day of March, 1906, the plaintiff commenced suit to foreclose the mortgage, alleging that the notes were actually dated April 5, 1905, and became due on the 1st day of March, instead of the 1st day of May, as specified in the mortgage, and that the misdescription thereof in the mortgage resulted from an error of the scrivener who drew the same. He prayed for a reformation of the mortgage and a decree of foreclosure and sale for the amount of the entire debt, which was rendered by the district court, from which judgment the defendant Belle Furer brings this appeal.

1. The principal question in this case is whether, where a mortgage purports to give the amount, date of execution and maturity, and the rate of interest borne by the notes it secures, and is so recorded, the mortgagee may, in a suit against a subsequent purchaser of the premises who has no notice except such as is afforded by the record, show that the notes intended to be secured were dated and matured at an earlier day, and bore a higher rate of interest than was specified in the recorded mortgage, and have the same enforced accordingly. Whatever the rule may be in reference to mortgages which do not purport to give these particulars, we are satisfied that, where the mortgage states the amount, date of maturity, and rate of interest borne by the notes secured thereby, it may not, as against a purchaser without notice, be reformed in any particular which makes the burden of the lien more oner-

ous than it appeared to be from the recorded mortgage. The only rational interpretation of the recording act is that the real mortgage must be recorded, and the very fact that the plaintiff asks to have the mortgage reformed is a confession that the mortgage which he is seeking to enforce was never recorded, and is therefore void as against subsequent purchasers without notice. In the earlier cases a tendency appears to hold the mortgage invalid, unless it truly describes the debt to be secured; but the modern and better doctrine seems to be that, if there is a real debt to be secured, it may be enforced as against a subsequent purchaser, if the amount be no larger than is indicated by the mortgage and the conditions no more onerous. We are cited to cases which hold that a debt may be enforced although less in amount than that specified in the mortgage, to cases which hold the mortgage valid where no amount is specified, and to cases where a mortgage is held good which secures a contingent liability; but no case has been brought to our attention which conflicts with the rule above laid down, unless it be the case of *Hinricks v. Brady,* 20 S. Dak. 599, where it was held that a purchaser of the premises was bound by the provisions of the notes that they should draw increased interest after maturity, and that overdue interest payments should also draw increased interest, although this provision was not mentioned in the mortgage. This case appears to have been decided on the authority of *Rickctson v. Richardson,* 19 Cal. 330, where it was held that, when a mortgage mentioned interest without naming the rate, subsequent purchasers were liable for the principal and the conventional interest stipulated in the notes. The opinion expressly concedes the rule that, where a note is described in a mortgage as it is made or recorded as a note for a given sum, the mortgagee cannot set up as against a subsequent purchaser a different and larger debt, for the plain reason that a party dealing with or in respect to the property from an inspection of the mortgage contracts in reference to its terms, and cannot

be supposed to know or suspect that the real fact is different from the recorded account of it. The court there held that there was no intendment under the laws of California that, when interest is the subject of stipulation, no particular rate is agreed on, and, there being no rate specified in the mortgage, that the conventional rate obtained. We are inclined to the view that, where no rate is specified, the legal rate would prevail in this state, but it is not necessary to determine that, for in *Ricketson v. Richardson, supra,* no rate is specified, while in *Hinricks v. Brady, supra,* a rate was specified with no intimation that it was to be changed after due. The latter case, while professedly resting upon the authority of the former, went one step further.

2. The purpose of recording a mortgage is to give notice of the lien to subsequent purchasers and incumbrancers. It was said by MAXWELL, J., in *Edminster v. Higgins,* 6 Neb. 265: "The policy of our law is to discourage secret liens, and to require all instruments affecting the title of real estate to be entered of record"; and that "the law thus places a means within the reach of every one desiring to purchase real estate of ascertaining the condition of its title." The mortgagee receiving a mortgage and recording the same in pursuance of the statute is responsible for the statements therein contained respecting the nature and extent of his lien. The declarations contained in the mortgage are his declarations to all subsequent purchasers, and, under a familiar rule of equity jurisprudence, he is estopped to assert against subsequent purchasers that his interest is greater than he declared it to be by the statements contained in the mortgage which he himself caused to be recorded for the very purpose of notifying such subsequent purchasers of the existence and extent of his lien. It is suggested that the intending purchaser should inquire of the mortgagee concerning the lien. Conceding, for the argument, that this is true in respect to those matters not covered by the mortgage, why should the intending purchaser interrogate the mortgagee con-

cerning those matters which the mortgagee has already formally declared and caused to be entered in the record? If the mortgage declares, as in this instance, that the notes bear even date therewith and are due at specified periods from such date, and that they bear interest at the rate of 6 per cent. per annum, there is no reason why the intending purchaser should be required to go to the mortgagee to ascertain if the facts stated in the mortgage, which he caused to be recorded for the purpose of giving notice, are true.

3. The construction of the recording act contended for by the plaintiff contravenes the well-settled principle of equity jurisprudence that, where one of two innocent persons must suffer from the consequences of a mistake, the person who made the mistake possible is the one who must bear them. It was the fault of the mortgagee if the mortgage which he took did not correctly describe the notes it was intended to secure, and if there is to be a loss in consequence of that mistake he should bear it, and should not be allowed to shift the burden upon the innocent purchaser.

4. The plaintiff contends that the defendant did not rely upon the record, because she did not personally examine the same. It appears that her husband, who acted for her, procured an abstract of the record which correctly exhibited the facts recited in the mortgage as to the debt it secured. It is conclusively presumed against a purchaser that he had notice of the facts stated in the record, and there is no reason suggested why the presumption should not obtain in his favor as well; but if it is necessary for a purchaser to examine the record he may do it by an agent, and that is what happens when he relies upon an abstract made from the record. There is no merit in this contention.

We therefore recommend that the judgment of the district court be reversed and the plaintiff's action dismissed.

AMES, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the plaintiff's action dismissed.

REVERSED.

ERWIN O. BODE V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1907. No. 14,951.

1. **Embezzlement:** INFORMATION. In a prosecution for embezzlement under section 124 of the criminal code, it is not necessary to allege in the information that the city whose funds are embezzled is an organized city.
2. ———: ———. Information examined, its substance stated, and *held* not vulnerable to the objection that "it fails to allege that the accused embezzled and converted the public money in question while holding it as city treasurer."
3. **Criminal Law:** INSTRUCTIONS. Instructions must be considered and construed together, and if then they correctly announce the rule applicable to the issues and evidence they will be upheld, even though a single paragraph standing alone might be faulty.
4. ———: EVIDENCE. In a prosecution for embezzlement, or other crime, where the books, records, papers and entries are voluminous and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, an expert accountant may be allowed to examine such books, etc., and testify as to the result of his examination, and as to particular entries therein, shown to be in the handwriting of the defendant, when such books are in the courtroom subject to inspection by the accused, and the particular entries are also introduced in evidence.
5. ———: ADMISSIONS. Voluntary admissions or confessions of the accused tending to establish his guilt may usually be received in evidence against him, and the fact that such admissions contain statements tending also to show the commission of an offense other than the one for which the defendant is on trial does not render them inadmissible.
6. **Evidence** examined, and *held* sufficient to sustain the verdict.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

F. Martin and E. Ferneau, for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin and *R. C. James, contra.*

BARNES, J.

Erwin O. Bode was prosecuted for the crime of embezzlement as defined by section 124 of the criminal code. His trial resulted in a conviction, and from the judgment and sentence of the district court he brings the case here for review.

The defendant's first contention is, in substance, that the information on which he was tried is fatally defective, in that it fails to charge that the money in question belonged to an organized city. There is no merit in this contention. The use of the word "organized" in the statute qualifies the word "city" and is mere surplusage, since a city must be organized in order to be a city, a distinct entity, capable of owning property susceptible of embezzlement. Again, where a city is organized by special legislative act, the courts will take judicial knowledge of such organization. In *People v. Potter,* 35 Cal. 110, which was a prosecution for embezzlement, it was said: "A legislative act by which a city is incorporated is a public act of which courts are bound to take judicial notice." The city of Falls City was organized by a special act of the legislature of the then territory of Nebraska, which was approved February 12, 1867, and has ever since said date been exercising the powers and duties of an organized city of its class. This being true, the information which charges that the money in question belonged to the city of Falls City, Nebraska, in effect alleges that it was the money of an organized city. Section 412 of the criminal code provides: "No indictment shall be deemed invalid * * * for want of the averment of any matter not necessary to be proved," and proof of the organization of the city of Falls City was unnecessary. It therefore follows

that the omission of the allegation mentioned does not affect the validity of the information.

The second objection urged against the information is that it fails to allege that the defendant embezzled and converted the money in question to his own use while holding it as city treasurer. The information alleges that the accused was the city treasurer of Falls City from September 27, 1902, to May 3, 1906, and that on or about the 2d day of May, 1906, in Richardson county, state of Nebraska, then and there being, and then and there as such officer being charged with the collection, receipt, safekeeping, transfer and disbursement of the public moneys of the said city of Falls City, the defendant did then and there fraudulently, unlawfully and feloniously convert to his own use and embezzle the sum of $6,000 of said public money, the property of said city of Falls City, which said money had then and there come into the possession and custody of the said defendant by virtue of said office, and in the discharge of the duties thereof. So it clearly appears that the information is not open to this criticism.

Defendant's third contention is that the court erred in giving the seventh paragraph of the instructions requested by the state, which reads as follows: "The court instructs you that it is not necessary for the state to prove what has become of the city money, if you believe that any of such money has been diverted by the defendant. It is not essential for the state to show you what the defendant did with said money. It is only necessary that the state prove to you, beyond a reasonable doubt, that the defendant was the city treasurer during the time intervening between September 27, 1902, and May 2, 1906, and that, while such treasurer, money came into his possession as such city treasurer which he has not accounted for, and which he has failed and refused to turn over to the proper officer of the city at the expiration of his term of office. If you believe these facts from the evidence, beyond a reasonable doubt, then you are instructed that it makes no difference

what the defendant may have done with the money." The basis of defendant's criticism is that the court attempted to cover the whole case by this instruction, and the argument proceeds upon the theory that many elements necessary to constitute the crime charged are omitted therefrom. If defendant's criticism was true, his point would be well taken; but a reading of the whole charge clearly shows that there was no attempt to cover the entire law of the case by this instruction. The purpose was, as appears from the paragraph itself, to inform the jury that if they found, beyond a reasonable doubt, that the defendant had, while city treasurer of Falls City, obtained public money belonging to said city and had not accounted for it, and had failed and refused to turn it over to his successor at the expiration of his term, it was immaterial what particular use he had made of it. In other paragraphs of the instructions all of the elements of the crime with which the defendant was charged were clearly and specifically set forth. So it appears that the jury must have understood the purpose of the instruction complained of and could not have been misled thereby. Such an instruction standing alone may have been faulty, in that it was incomplete and did not cover all of the elements of the offense. Yet, when we consider it with the remainder of the charge, it could not result in any prejudice to the defendant, and the giving of it was not reversible error. *Carleton v. State,* 43 Neb. 373; *Bartley v. State,* 53 Neb. 310.

It is also contended that the court erred in giving the ninth paragraph of the instructions requested by the prosecution. Practically the same objections are made to this request that were urged against the one just quoted. What we have said as to the giving of that instruction disposes of this contention, and it will receive no further consideration.

It is further claimed that the court erred in permitting the witness Wiggins to testify to the contents of the books of the city treasurer's office; to single items therein, and

to his conclusions therefrom. An examination of the bill of exceptions convinces us that this objection is without merit. Wiggins was a qualified expert accountant, and as such made an examination of the city treasurer's books which the defendant kept during his term of office, and turned over to the witness for that purpose. He testified as to the result of his investigation, and, when he was questioned about particular entries, and objection was made, the entries themselves were put in evidence. His examination was conducted and his evidence was given along the lines approved in *Bee Publishing Co. v. World Publishing Co.*, 62 Neb. 732, and *Mendel v. Boyd*, 71 Neb. 657. The same may be said generally of the evidence of the witness Holland, of which complaint is also made. It is further claimed, however, that the evidence of Holland and one Jussen was prejudicial, because it appeared that they were liable on the defendant's official bond. The record shows that, when that matter was sought to be inquired into, the court excluded the evidence, and Jussen was only permitted to testify to what occurred in the presence of the accused and his own voluntary statements as to what use he had made of the city's money. Usually defendants' own admissions and confessions are competent evidence against him; so that we find no error in receiving the evidence complained of.

By his supplemental brief the defendant contends that the court erred in permitting the witness Holland to testify that the defendant told him he had paid certain school district warrants, and had afterwards sold them and placed the money thus obtained to the credit of E. O. Bode & Son. It is argued that this was evidence of a distinct crime other than the one for which the defendant was being tried. We do not think this contention is tenable. Holland testified to a certain conversation between himself, one Jussen and the defendant, and the statement of which complaint is now made was a part of that conversation. It is difficult to see how the statement objected to could have been eliminated and the remainder of the ad-

mission or confession of the defendant introduced in evidence. His whole statement related to his alleged defalcation, and as such was properly received.

It is further claimed that the court erred in refusing to give the ninth instruction requested by the defendant. The substance of this request was that the verbal admissions of the defendant, if any, should be viewed by the jury with great care, that "they may be evidence of very little value, depending upon the circumstances surrounding the making of the admission whether the person in speaking was understood just as he meant it, that the meaning of what was said was fully and properly understood by the person who heard it." There may be cases where an instruction of this nature would be proper and perhaps necessary, but such is not the case here. The defendant's admissions were clear, distinct and unequivocal, and it was not claimed on the trial that he had not made them in the manner and form related by the witnesses, or that they were made doubtful in meaning, or had been misunderstood. So there was no reason or necessity for the instruction, and the defendant could not have been prejudiced by the court's refusal to give it.

Finally, it is contended that the verdict is not sustained by sufficient evidence. Of this assignment it is sufficient to say that the record shows beyond a reasonable doubt that the defendant was city treasurer of Falls City, Nebraska, from the 27th day of September, 1902, to the 2d day of May, 1906; that, while acting as such officer, he received and obtained possession of the public funds, money belonging to said city, amounting to $6,065.76, which he failed, neglected and refused to account for and turn over to his successor in office upon a proper demand therefor.

So, finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

HOSMER H. HENDEE V. STATE OF NEBRASKA.

FILED NOVEMBER 20, 1907. No. 15,130.

1. **Embezzlement**: INFORMATION. The estate of a deceased person, pending administration, is a legal entity; and, in charging a violation of section 121 of the criminal code, it is sufficient, as to the matter of ownership, to allege that the money or property embezzled belonged to such an estate.
2. ———: ———. An information based on the provisions of the section above named, which charges, in the language of the statute, that the property in question came into the possession of the defendant "by virtue or under color of his relation as an officer," is not void for duplicity, and is sufficient in that respect to sustain a conviction.
3. ———: ———. In charging the embezzlement of a certificate of deposit belonging to an estate, it is sufficient to describe the instrument as it appeared at the time it came into the possession of the accused, and subsequent indorsements, procured by him, need not be set forth in the information.
4. ———: EVIDENCE. Bill of exceptions examined, and evidence found sufficient to sustain the conviction.

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

Grimm & Son and *A. J. Sawyer,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

BARNES, J.

The defendant below, Hosmer H. Hendee, was convicted of the crime of embezzlement, and brings the case here for review.

The prosecution was based on an alleged violation of section 121 of the criminal code, which reads in part as follows: "If any * * * officer elected or appointed to any office of public trust in the state * * * shall embezzle or convert to his or her own use any money, property, rights in action, or other valuable security or effects whatever,

belonging to any individual, or company, or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, * * * every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, taken, or secreted, or of the value of any sum of money payable or due upon any right in action so embezzled." The information contained two counts. It was alleged in the first count, in substance, that the defendant was the duly elected, qualified, and acting county judge of Saline county, and was an officer elected to an office of public trust in the state of Nebraska; that by virtue or under color of his relation as such officer there came into his possession certain money, of the value of $52.85, belonging to the estate of one George Smith, deceased; that he fraudulently, wilfully, unlawfully, intentionally and feloniously embezzled and converted the same to his own use. In the second count it was charged in the same form and manner that there came into the possession of the defendant one certain certificate of deposit issued by the First National Bank of Friend, Nebraska, for the sum of $3,300, with interest thereon at the rate of 2 per cent. per annum, of the value of $3,333, belonging to the estate of George Smith, deceased, and being the property of said estate, and that the defendant did embezzle and convert the same to his own use. It appears that a motion to quash the information and both counts thereof was filed and overruled; that the defendant demurred to both counts of said information, and his demurrer was also overruled, and these rulings are assigned as error. The demurrer fairly raises two important questions, which will be considered in the order in which they were presented.

It is first contended that the charge of ownership of the money and certificate of deposit in question, which is alleged to be in the estate of George Smith, deceased, renders the information fatally defective, in that it fails to

state facts sufficient to charge the defendant with the commission of any crime whatsoever. It is claimed that an estate of a deceased person is not an individual within the meaning of the statute above quoted, and the ownership of the money and property should have been alleged to be in the administrator of the estate. In support of this contention defendant cites *State v. Mims*, 26 Minn. 191. We find that this question did not arise and was not decided either directly or indirectly in that case. We do find, however, in *People v. Hall*, 19 Cal. 425, also cited by counsel, that the question was before the supreme court of California, and it was there said: "This was a case for altering the brand of a horse with intent to steal it. The indictment charges the property as that of an estate. This is insufficient. The charge should be of altering the brand of the animal as that of a particular individual, or that the owner of the animal was unknown. For this error the judgment must be reversed and the cause remanded." The foregoing is the opinion of the court in full, and it will be observed that no reasons are given for the holding, and no authorities cited to support it. Some of the text-books, following that case, announce the rule therein stated. Since the adoption of the code, however, the supreme court of California has disregarded that decision. In *People v. Smith*, 112 Cal. 333, 44 Pac. 663, it was alleged in the complaint, for grand larceny, that the property in question belonged to the estate of W. C. Elledge, deceased, while in the information it was alleged that it belonged to the executor and executrix of the estate. The defendant claimed a variance. The court held that there was no variance, and said: "In each the offense was described with sufficient certainty to identify the act, and the alleged ownership was in effect the same, namely, in the estate of W. C. Elledge, deceased." This decision was followed and approved in *People v. Prather*, 120 Cal. 660, 53 Pac. 259. It is but fair to say, however, that section 956 of the criminal code of California provides: "When an offense involved the commission of, or an attempt to commit, a

private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." And, while those decisions may be said to be authorized by the section of the code above quoted, yet it was said in *People v. Leong Qoung,* 60 Cal. 107, which was a case of grand larceny: "The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense." Again, in *Billings v. State,* 107 Ind. 54, it was said: "To our minds, it seems reasonable that the estate of a decedent should be regarded as an artificial person. It is the creation of law for the purpose of enabling a disposition of the assets to be properly made, and, although natural persons, as heirs, devisees, or creditors, have an interest in the property, the artificial creature is a distinct legal entity. The interest which natural persons have in it is not complete until there has been a due administration, and one who forges the name of the decedent to an instrument, purporting to be a promissory note, must be regarded as having intended to defraud the estate of the decedent and not the natural persons having diverse interests in it, since he cannot be presumed to have known who those persons were or what was the nature of their respective interests. The fraudulent intent is against the artificial person, the estate, and not the natural persons who have direct or contingent interests in it." So it would seem from the foregoing that the courts now hold that it is proper to allege ownership of property in the estate of a deceased person. The allegation of ownership was sufficient to identify the crime and advise the defendant of the charge against him. Section 412 of the criminal code provides, among other things: "No indictment shall be deemed invalid, * * * when there is sufficient matter alleged to indicate the crime or person charged; * * * nor for any other defect or imperfection which does not tend to the prejudice of the

substantial rights of the defendant upon the merits." We are of opinion that it is sufficient in charging the embezzlement of property under the provisions of section 121 of the criminal code, belonging to the estate of a deceased person, to allege the ownership either in the estate or in the administrator of the estate, if there be one.

The second point raised by the demurrer, as well as by the motion to quash the information, is based on the allegation that the money and certificate of deposit in question came into the possession of the defendant "by virtue or under color of his relation as such officer, to wit, the county judge of Saline county, Nebraska." It is contended that both counts of the information are duplicitous, and are too vague and indefinite to apprise the defendant of the crime with which he is sought to be charged. The reason for the rule invoked by the defendant is that in case of an aquittal or conviction the judgment may be pleaded in bar to another prosecution based on the same facts. To charge the commission of an offense in the disjunctive form has always been condemned by the rules of criminal pleading and by the courts, and it is insisted in this case that, if the information is sustained, our decision will form a precedent which will authorize the state to charge a defendant "with having stolen a horse or a cow or a sheep from the estate of John Doe, deceased, who in his lifetime was the owner of three quadrupeds." In support of this contention counsel cites *Clifford v. State*, 29 Wis. 327. In that case, the prosecution was based on a complaint which charged that the defendant did "vend, sell, deal *or* traffic in, and give away, for the purpose of evading the act, spirituous, ardent *or* intoxicating liquors *or* intoxicating drinks, viz., rum, gin, brandy, whiskey, ale and beer *or* wine," and it was held that disjunctive allegations in such cases are not allowed. It was further held that, where a statute makes it an offense to vend, sell, deal or traffic in certain liquors, the word "or," being used to connect synonymous expressions, may properly be retained, and the offense charged in the words of the statute. It

was said in the opinion: "Where a statute makes it a crime to do this or that, or the other, mentioning several things disjunctively, all of which are punished alike, it is a general rule that the whole may be charged *conjunctively* in a single count, as constituting but a single offense. * * * But *disjunctive* allegations in such cases are not allowed; the only exception being where the word 'or' is used in the sense of 'to wit,' that is, in explanation of what precedes, and making it signify the same thing. In the latter instance a complaint or indictment which adopts the words of the statute is well framed. * * * Within this exception would fall the word 'or' in the statute, and in this complaint, as used between the words 'deal' and 'traffic in,' these last words being synonymous, or meaning the same thing."

In the case at bar, the words "by virtue and under color," as applied to the expression "of his or her relation as officer," etc., may be said to mean one and the same thing, to wit, the obtaining of money or property by reason or because of such official relation. The offense with which the defendant was charged is embezzlement, and is punished in the same manner, whether he obtained possession of the money and property embezzled by virtue of his relation as an officer, or under color of such relation. The information follows the language of the statute, and is sufficient to define the offense. It also seems clear that but one crime is charged, and the defendant cannot be prosecuted again for any offense based on the facts alleged in the information and involved in this prosecution. Again, the defendant was sufficiently advised of the nature of the charge to enable him to properly prepare his defense, and, while it would have been sufficient to have alleged that he came into possession of the money and property in question under color of his relation as an officer, yet the charge as made follows the descriptive language of the statute, and such description is violative of none of the defendant's substantial rights. It would further seem that the legislature, by the adoption of section

121, intended to create the distinct and separate offense of embezzlement by an officer, elected or appointed to any office of public trust in this state, of any money or property obtained by him by reason of his relation as such officer, as distinguished from that described in section 124, which defines the offense of embezzlement by a public officer of money or property obtained under and by virtue of his office, and the facts alleged and the evidence produced upon the trial in this case bring it directly within the provisions of the former section. We are aware that the question is a difficult one, and that our holding, at first blush, may seem to trench upon the general rule contended for, yet in fact the charge contained in the information is not duplicitous, and is, in our opinion, sufficient to sustain the conviction.

The foregoing effectively disposes of the rulings on the defendant's motions to quash the information and in arrest of judgment. This brings us to the consideration of defendant's further contention that there is a fatal variance between the certificate of deposit described in the information and that instrument as introduced in evidence by the state, in this, that in the description of the instrument no indorsement was mentioned, while the certificate in evidence appears to have been indorsed by W. W. Stephens, as administrator of the estate of George Smith, deceased. The record discloses that, when the deceased departed this life, he was the owner and in possession of the certificate of deposit in question, which was payable to the order of himself; that the coroner of Saline county, who found it upon his person, took it into his custody, and delivered it unindorsed to the defendant as county judge. The defendant, having obtained possession of the instrument in that condition, retained it from that time forward, and never delivered it to the administrator or accounted for it to the estate of decedent. This was in effect a conversion of it, and the indorsement which he induced the administrator to sign was but a means of converting it into cash, or, in other words, of obtaining its

proceeds in that form. By refusing or failing to deliver the certificate to the administrator and by withholding it from the estate, defendant was guilty of converting it to his own use, and the indorsement was not necessary to consummate the crime charged in the information. So it may be said that the indorsement, not being a part of the certificate when it was issued and when it was obtained by the defendant, was not a necessary part of the information.

Again, defendant is charged with the conversion of the certificate, not the money payable upon it, and a general description of the property thus converted by him was sufficient. The principle announced in *Hess v. State,* 5 Ohio, 5, 22 Am. Dec. 767, seems to be decisive of this matter. In that case the defendant was indicted for selling and delivering to another certain counterfeit bank notes, and for having in his possession, for the purpose of selling, two other counterfeit bank notes purporting to be of the Bank of the United States, issued by one H. Biddle, president, and one McIlvaine, cashier, and payable to order. It was urged that the bills offered to the jury varied from those described in the indictment, and one of the variances relied upon was the omission to describe, in the indictment, the indorsement on one of the notes, and the appearance of the words, "Pay to bearer, Thomas Wilson." The indictment set out the face of the note, but the indorsement was not alluded to at all. The court said: "The indorsement is no more a part of the note than the number, the figures in the margin, or the water-marks, and they need not be set out. Even in an indictment for forging a promissory note, the indorsement need not be set out, for it is no part of the note. * * * Neither shall it be required to set these things forth in an indictment for having them in possession. The variance objected to is not perceived." It was also stated on the oral argument that the certificate of deposit was valueless without the indorsement, and it was no offense to embezzle a thing without value. This contention does not merit serious

consideration. The value of the instrument to the estate unindorsed was the amount of money payable thereon, and it was the estate that was defrauded by its conversion. We are therefore of opinion that the variance complained of was immaterial.

Finally, defendant contends that the evidence does not sustain the verdict. The record discloses, and it was practically admitted on the argument, that the coroner of Saline county took charge of the body of George Smith, deceased, in that county on or about the 14th day of January, 1905; that he found thereon $52.85 in money, the certificate of deposit in question herein, and some other property of no particular value; that he immediately wrote a letter to the defendant as county judge of Saline county, asking his advice as to what should be done with the money and property of the deceased; that in response to the inquiry the defendant wrote a letter to him, from which we quote as follows: "This Mr. George Smith was an old resident of Saline county, and a property owner, and his estate will have to be administered upon by the county court, and whatever property he had should be under the control of the county judge, who will have to see to the administration of his estate, and, in the absence of relatives, is the only one entitled to the possession and control of the property until an administrator is appointed. No inquest being held, the matter stands just the same as if you had not been there at all, except that you are entitled to pay for your trip, and I shall allow it as part of the expenses attending his death. The other claims, whatever they may be, ought to be filed with me, and, as I have jurisdiction over all probate matters in this county, whatever you found should be turned over to me as county judge, you taking my receipt therefor. You have no right, where no inquest was held, to sell any property. I am glad you went over there, and that you took possession of the property, otherwise some one might have robbed the estate. The deceased has relatives living in England. I hope I have made this plain to you. The

statute requires you to deliver the property to those entitled to its care and possession, and, in this instance, there being no relatives living here, the county court is the party entitled to, and whose duty it is to have possession of, the property and see that the estate is properly probated. Yours truly (Signed), Hosmer H. Hendee." On receipt of this letter the coroner called the defendant up by telephone, and made an appointment to meet him at De Witt, in said county, on the 25th of that month. It also appears that a petition for the appointment of an administrator of the estate of the deceased was filed in the county court on the 17th day of January, 1905, and on the 25th the coroner and the defendant met at De Witt, and the money and certificate of deposit were turned over to the defendant, who gave the coroner therefor the following receipt: "Jan. 25, 1905. Rec'd of L. N. Smith, $52.85 cash; one deposit check for $3,300; one watch and bunch of letters, etc.—the property of George Smith, deceased. Hosmer H. Hendee, County Judge." From that time forward the defendant retained possession of the money and certificate of deposit in question, and not only neglected and failed, but also refused, on demand, to turn the same over to the administrator of the estate, who was duly appointed, and qualified on the 22d day of February, following. As soon as the administrator was appointed, the defendant induced him to sign an indorsement on the back of the certificate of deposit, which he had theretofore prepared; that he thereafter obtained the money due thereon from the bank which issued it, and has never in any manner accounted for it to any one.

Basing his contention on the facts above stated, defendant says that he was not entitled to the possession of the money and certificate in question by virtue of his office as county judge; that he obtained possession wrongfully, or under a mutual mistake of law, and, his possession being wrongful, he could not be guilty of the crime of embezzlement. To support this contention he cites *Moore v. State,* 53 Neb. 831, and *State v. Bolin,* 110 Mo. 209, 19 S.

W. 650. In *Moore v. State* the prosecution was based on section 124 of the criminal code, and it was charged in the information that Moore, by virtue of his office as auditor of public accounts, was charged with the collection, safe-keeping, transfer and disbursement of the public money alleged to have been embezzled. It was found, however, that the constitution positively prohibited the auditor from collecting or receiving the money in question, that the accused was not within the class described in that section, and so the prosecution failed. We think it may be safely said of that case that the defendant obtained the money in question under color of his relation as such officer, and, if Moore had been charged with and tried for a violation of the section on which the prosecution in this case is based, we do not see how it would have been possible for him to have escaped from a just punishment for his wrongful acts. In *State v. Bolin, supra,* the defendant, a justice of the peace, was prosecuted for the embezzlement of $200 belonging to the county school fund. It appears that a justice of the peace in Missouri has no jurisdiction to handle public school money, and no control over it by virtue of his office. Every one who dealt with him knew that he had no control of the public school money, and his office gave him no color of right to demand or take it. In this state a county judge is given exclusive jurisdiction over the matter of estates and the administration thereof, both by the constitution and the statutes. Having such jurisdiction, defendant's office gave color to his claim made to the county coroner that he had a right to the possession of the money and property in question. His office of public trust gave him the colorable pretext by which he induced the coroner to deliver it to him. Color, in law, means not the thing itself or the right to the thing, but only an appearance thereof. When the defendant demanded possession of the estate of the deceased from the coroner, he appeared to be acting officially, and professed to be so acting. Thus, by means of his relation as an officer, he obtained possession of the money and

property, which he afterwards embezzled, and it seems clear to us that the undisputed facts of this case bring it fairly within the provisions of the section of the criminal code on which the prosecution was based.

It appearing from the record that the information was sufficient, that the defendant has had a fair and impartial trial, that the evidence fully sustains the verdict, the judgment of the district court is therefore

AFFIRMED.

JOHN P. BRIDGES V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1907. No. 15,168.

1. **Criminal Law:** VERDICT. Where the state in a criminal prosecution elects to proceed upon one of several counts contained in the information, and by the instructions of the court the jury are told, in effect, that their verdict must respond to the charge contained in that count, a verdict of guilty, as charged in the information, is sufficient.

2. **Jury:** QUALIFICATIONS. An opinion based upon newspaper reports does not afford cause for a challenge, where it is shown that such opinion will not interfere with the juror's rendering a fair and impartial verdict upon the evidence under the instructions of the court.

3. **Incest:** EVIDENCE: INSTRUCTIONS. Where, in a prosecution of one charged with the crime of incest, the court instructs the jury that they should not convict the defendant on the uncorroborated evidence of the prosecutrix, it is proper to conclude the instruction with the words: "This does not necessarily mean that it must be corroborated by an eye-witness to the particular act of intercourse, but it is necessary that she should be corroborated as to the material facts and circumstances, which tend to support her testimony, and which tend to establish or corroborate the truth thereof, and such corroboration can be by either direct testimony or by circumstantial evidence."

4. **Criminal Law:** INSTRUCTIONS. Where an instruction tendered by the defendant contains a statement not warranted by the evidence, it is not error for the court to modify the instruction by striking out such unwarranted statement, and give it as thus modified.

5. **Incest**: ACCOMPLICES. A girl less than 16 years of age, who under physical and moral coercion has maintained incestuous relations with her father, is not an accomplice in crime.

6. **Evidence** contained in the bill of exceptions found sufficient to sustain the verdict.

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

C. W. Seymour and *John C. Watson,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

BARNES, J.

The defendant below was convicted of the crime of incest, and has brought the case here by petition in error.

The information contained three counts. The first charged the defendant with what is commonly called statutory rape; the second count contained a charge of rape as defined by the common law, with an additional allegation that the victim was the defendant's daughter; while the third count charged him with the crime of incest as defined by section 203 of the criminal code. The defendant filed a motion to quash the information for duplicity. The state thereupon elected to proceed to trial upon the third count alone, and the motion was therefore overruled. The jury returned a verdict of "guilty, as charged in the information," and the defendant assigns error for that the verdict does not respond to the count of the information on which the prosecution elected to go to trial. It is insisted, under the rule announced in *Williams v. State,* 6 Neb. 334, that, where there are distinct offenses charged in different counts of the information, as in the case at bar, the jury must either return a general verdict of not guilty, or respond specially to each charge in the information. Since the decision in *Ford v. State,* 79 Neb. 309, the above rule has been abrogated in this state, for *Williams v. State, supra,* and *Casey v. State,* 20 Neb. 138, were expressly

overruled by that decision. The rule by which this question is now governed is, where several counts are included in the same information, a conviction on one count may be sustained, although the jury ignore the others; and a judgment upon one of several counts, with no verdict as to the others, operates as an acquittal on the other counts. Again, as above stated, the defendant was prosecuted upon the third count of the information, which charged a violation of the provisions of section 203 of the criminal code, and by the instructions of the court it was made plain that the charge contained in that count was the one to which the verdict of the jury must respond. So, for the purpose of the trial, the case stood as though there was only one count contained in the information, and the verdict of guilty, as charged, clearly responded to that count.

It is next contended that the trial court erred in overruling defendant's challenge of the juror Meyer for cause. It appears that Meyer had read the newspaper accounts of the transaction, and for that reason alone had an impression or opinion as to the guilt or innocence of the defendant, which he said would require some evidence to remove. The juror further stated that the fact that any one was accused of having committed so heinous a crime would, to a certain extent, create in his mind a prejudice against him. However, in response to questions propounded by the court, the juror clearly stated that his impression or opinion was founded solely on newspaper accounts, and, if retained as a juror, his impression so formed would not interfere with his rendering a fair and impartial verdict upon the evidence and the instructions of the court. It seems clear, therefore, that the juror brought himself within the rule announced in *Bohanan v. State,* 18 Neb. 57, *Basye v. State,* 45 Neb. 261, 277, *Bolln v. State,* 51 Neb. 581, and *Barker v. State,* 73 Neb. 469. The challenge, therefore, was properly overruled.

It is further contended that the court erred in giving the first and second paragraphs of his instructions, for the reason that they treated the information and all of its

counts as an entirety. We do not so understand them. They clearly defined the crime charged in the count on which the defendant was prosecuted, and by the third paragraph of the instructions the jury were plainly told that in order to find the defendant guilty the state must prove all of the elements of the crime (describing them as set forth in that count) beyond a reasonable doubt. So it is apparent that the jury were not misled by the instructions complained of.

Complaint is also made of the giving of the seventh instruction, which treats of the necessity for corroboration. An examination of the instruction shows that the jury were clearly informed that they could not convict the defendant upon the uncorroborated evidence of the prosecutrix, and this statement was followed by a definition of that term which has been many times approved by this court.

Defendant further insists that the court erred in refusing to give the tenth instruction tendered by him, in modifying it, and finally giving it as modified. It appears that when accused of his misconduct by the prosecutrix and her grandmother, to whom she first related her story, the defendant fled to another state. Later on he returned to Nebraska, but not to his former home, and was finally arrested in a county other than that of his residence. The instruction on that point, as tendered by him, contained the following: "You may look on it as evidence of fear, or of summary punishment at the hands of his accusers." The words quoted were stricken from the instruction by the court, and as thus modified the charge was left in the form usually given in such cases. The record contained no evidence showing, or tending to show, that there was any excitement in the community where the defendant lived on account of the charge made against him, or that his accusers ever threatened him with any summary punishment whatsoever. Therefore the court properly modified the request, and did not err in giving it in its modified form.

Finally, it is contended that the verdict is not sustained by sufficient evidence. It would serve no good purpose to quote the evidence in this case with all of its disgusting details. It is sufficient to say that the prosecutrix, who appears to be a bright, intelligent girl, nearly 16 years of age, testified that her father (the defendant) took undue liberties with her person from time to time, as opportunity offered, from July until December, 1906; that on Christmas night of that year he got into bed with her, and, against her protest, partially accomplished his purpose. Again, in the absence of her grandmother from the house, between Christmas and the first day of January following, he came to her bed and repeated the transaction; and, finally, on the night of the 2d of January, 1907, he again got into bed with her and fully consummated the act of sexual intercourse with her. She testified that in so doing he broke the bed down, and it appears that, when her grandmother returned to the home on the following morning, she found the bed in that broken condition. It further appears that about a week thereafter the prosecutrix told her grandmother and her aunts what her father had done to her. It further appears that defendant, when accused of the crime by the members of his household, fled to an adjoining state, and was finally arrested in a county other than that of his residence. Again, the prosecutrix was examined immediately after she made her complaint by two reputable physicians, who found nothing in her condition tending to render her evidence incredible. Her grandmother testified that she heard a conversation, in which the defendant was directly accused of having taken improper liberties with the girl, which he failed to deny. It was therefore the province of the jury to consider all of the evidence and determine its weight, sufficiency and effect, and, having done so, a finding of guilt should not be disturbed by a reviewing court. It is said that a conviction cannot be had in such a case upon the uncorroborated testimony of an accomplice. But, as we have seen, such is not the case here. In *Schwartz v. State,* 65 Neb. 196,

an instruction informing the jury that the prosecutrix, who had, under physical and moral coercion, maintained incestuous relation with the defendant, who was her father, was not an accomplice, was held to state a sound and relevant proposition. The facts disclosed by the evidence in the case at bar bring that question clearly within the foregoing rule.

A careful examination of the record fails to disclose any reversible error, and the judgment of the district court is

AFFIRMED.

JOHNSON COUNTY, APPELLEE, V. CHAMBERLAIN BANKING HOUSE ET AL., APPELLANTS.

FILED NOVEMBER 21, 1907. No. 14,965.

1. **Banks:** BONDS: EXECUTION. The cashier of a bank is the proper officer to execute a bond on its behalf to secure a deposit of public money made therein, and the bank will be bound by such execution, in the absence of some rule or regulation adopted by the directors or stockholders requiring special authority on the part of the cashier to execute such bonds, and notice of such fact brought to the attention of the obligee therein.

2. **Bonds:** SURETIES. A surety signing a bond after other sureties have executed the same affirms the genuineness of the previous signatures.

3. ———: ———: LIABILITY. A surety who signs a bond upon the condition that it is to be signed by other sureties is not released from liability thereon because the others did not sign, unless notice of the condition on which his signature was obtained is brought home to the obligee.

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

L. C. Chapman, S. P. Davidson, J. B. Douglas and *E. M. Tracy,* for appellants.

J. C. Moore and *Hugh La Master, contra.*

DUFFIE, C.

This case was before us on a former appeal taken by the plaintiff from a judgment dismissing its petition. The judgment was reversed and the case remanded for further proceedings. The opinion on the former appeal is found in 74 Neb. 549. When the case again reached the district court, the defendants filed separate answers. Graff and Taylor, two of the sureties, in their answers alleged, first, that the bond was not signed by the Chamberlain Banking House by any one having due authority. The answer of Taylor contained the further allegation that the cashier and teller of the bank represented to him that one W. R. Barton was also to sign the bond as surety before delivery thereof, and both of these sureties allege it was represented to them that the name of the bank was signed by a party having due authority. As a second defense, the answers allege that the bank is in the hands of a receiver; that the suit in which the receiver was appointed is still pending and undetermined, and that this suit cannot be maintained in consequence of the pendency of such action. As a third defense, defendants allege that the plaintiff has received 19 per cent. of the debt sued for in the way of dividends paid by the receiver of the bank by order of the court; fourth, a general denial. A demurrer was interposed to the first, second and third counts or defenses alleged in these answers, which was sustained by the court, and the case went to trial upon the issue made by the general denial. The trial resulted in a judgment for the plaintiff, and the defendants Graff and Taylor have appealed.

The first assignment of error relates to the action of the district court in sustaining the demurrer interposed to the alleged defense set up in the answer, viz., that the name of the bank was not signed to the bond by any one having authority. The bond shows upon its face that the name of the bank was signed by "Charles M. Chamberlain, Cashier," that it is conceded that said Chamberlain was

cashier of the bank at the time the bond was executed, and the proof shows that the name of the bank attached to the bond is in his handwriting. As said in the former opinion, "the bank can contract only by its agents," and the cashier is the proper agent to execute a bond on its behalf. This being so, the bank, as said Judge AMES, is without doubt bound by such signature. But, even if the name of the bank was attached to the bond by a person who had no authority, still the sureties would not be released because of such want of authority. In *Selser v. Brock,* 3 Ohio St. 302, it was held that a surety who had signed his name to a promissory note after the names of others in effect affirmed the genuineness of the previous signatures, and could not avoid liability by showing that such names had been forged by the principal, but of which the creditor had no knowledge. And in *Bigelow v. Comegys,* 5 Ohio St. 256, it was held that a surety on a replevin bond could not set up the defense that he was induced to sign the bond upon the fraudulent representation of the principals that a cosurety was responsible and had already signed it, when, in fact, his signature was a forgery. The same principle was held by the supreme court of Indiana in *Helms v. Wayne Agricultural Society,* 73 Ind. 325. These cases were approved and followed by this court in *Lombard v. Mayberry,* 24 Neb. 674, and such is the settled law of the state. The court did not err in overruling the first defense set out in the answer of the sureties.

The second defense, that the suit was prematurely brought because of the pendency of the receivership action, is not relied upon in the briefs of defendants, and all that need be said relating to that question is that the present suit was commenced September 2, 1902, while the action in which the receiver was appointed was commenced September 11, 1902.

And the fact alleged in the third defense, that the plaintiff has received dividends from the receiver and credited the same on the amount due from the bank, cannot be regarded as an accord and satisfaction of its claim, and is a

matter going to benefit the defendants and of which they cannot complain.

The fact that the cashier and teller of the bank represented to Taylor that one Barton would also sign the bond is no defense, unless knowledge of such representation was brought home to the county. The fact that Taylor may have been induced to sign the bond by fraudulent representations made to him by officers of the bank does not affect the right of action against him by one not a party to the fraud. *Martin v. Campbell,* 120 Mass. 126; *Casoni v. Jerome,* 58 N. Y. 315. In Brandt, Suretyship and Guaranty (1st ed.), sec. 355, it is said: "A bond, perfect on its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him on inquiry as to the manner of its execution." There are cases which hold that if the body of the bond contains the names of sureties, and the parties so named have not signed and executed the bond, this is a circumstance sufficient to put the obligee upon inquiry and charge him with notice of the condition (Brandt, Suretyship and Guaranty (1st ed.), sec. 357), but the bond in this case was perfect on its face, and there was no fact which would in anywise put the county upon inquiry as to whether the sureties whose names appeared upon the bond signed upon the condition that other sureties were to join therein.

The several special defenses alleged by the defendants and contained in the first, second and third counts of their answers were not good in law, and the court did not err in sustaining the demurrer interposed against the same.

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

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

AMY M. PAULE, APPELLANT, V. MARY M. SCOFIELD, APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,971.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. An order confirming the sale of real estate by a court having jurisdiction of the parties and subject matter, in the absence of fraud, cures all defects and irregularities in the appraisement, and is conclusive upon all the parties to the suit and those claiming under them, until reversed or set aside.

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

Allen G. Fisher, for appellant.

Albert W. Crites and *E. M. Slattery, contra.*

DUFFIE, C.

In October, 1887, William E. Baker, the owner of the southwest quarter of section 14, township 31 north, of range 51 west, in Dawes county, Nebraska, executed two mortgages thereon, both running to the American Investment Company. The first mortgage, made to secure a loan, was transferred to Benjamin Wheeler, the investment company retaining the second mortgage, given for commission on the loan, and foreclosing the same in the year 1891. The service in this foreclosure proceeding was by publication, and the decree gave a lien upon the land subject to the first mortgage. May 8, 1891, the decree was set aside and defendants allowed to defend. In December, 1891, a second decree was entered, but through some mistake or oversight was not journalized at the time nor until June, 1902, when a decree *nunc pro tunc* was journalized.

Soon after the second decree was pronounced, an order of sale was issued under the first decree, which, as already stated, had been set aside, and an appraisement, sale, confirmation and deed made thereunder to the investment company. The title obtained by this deed was conveyed to Wheeler, the holder of the first mortgage, and by him to Mary M. Scofield, and to clear and perfect the record Wheeler executed a release of his first mortgage. Mrs. Scofield took immediate possession of the land and has since continued in possession. Baker's original title, through sundry mesne conveyances, came to one Eugene Paule, the husband of appellant, who brought an action in ejectment against Mrs. Scofield. Pending this action, the court entered the *nunc pro tunc* decree of foreclosure above referred to, and another appraisement and sale was had thereunder, Mrs. Scofield becoming the purchaser. At this sale a surplus of $78.56 was reported by the sheriff and paid into the court, and this sum was claimed by C. C. Thomas, Paule's assignee, and was taken out and receipted for by their attorney in that action. Thereafter Thomas assigned to the plaintiff and appellant all right of action by him held against the defendant for any remainder of the surplus due him and arising from the sale of said mortgaged premises, and she brought this action, alleging that there was a further surplus due Thomas and belonging to her under said assignment, amounting to more than $500. This claim is made upon the theory that the old appraisement should govern the sheriff in making his sale under the *nunc pro tunc* decree, and that the surplus should be computed with reference thereto, rather than with reference to the new appraisement under which the sale was actually made. The old appraisement, which was made subject to taxes and first mortgage, showed the value of defendant's interest in the land to be $165.28, while the new one, under which the sale was made and under which the plaintiff waived all liens, showed the value of such interest to be $200. A further claim is made that Wheeler, having released the first mortgage, the

amount thereof, viz., $200, should be added to the value of defendant's interest under the first appraisement. From a judgment dismissing her petition, plaintiff has appealed. The record shows that Thomas and appellee both appeared when the court confirmed the last sale and fixed the amount of the surplus at $78.56, and directed that it be paid over to Thomas or his attorney.

We regard the order confirming the sale and awarding a surplus of $78.56 to Thomas as a final adjudication of the amount of the surplus arising from the sale under the decree, which cannot be questioned in a collateral proceeding. It is evident that plaintiff, claiming through Thomas, has no greater rights than were held by him when he assigned to her. Thomas, appearing at the confirmation, accepted the benefit of the order awarding the surplus. There is no showing that he then labored under any misapprehension of his rights or that he was not fully aware of all the proceedings had in the case. In *Watson v. Tromble,* 33 Neb. 450, it is said: "An order confirming a sale of real estate by a court having jurisdiction of the parties and subject matter, in the absence of fraud, cures all defects and irregularities in the appraisement and is conclusive upon all the parties to the suit and those claiming under them, until reversed or set aside." This we think conclusive of the case and of the plaintiff's right to question the appraisement under which the sale was made. Aside from this, the claim of the plaintiff, that the appraisement should have been made and the surplus adjusted upon the theory that the first mortgage had been canceled, is without equity. Wheeler, who took title under the first invalid sale, conveyed his supposed title to the defendant, and, that the first mortgage which he then held might not cloud her title, he executed a release thereof. This release was made in the interest of the defendant. Whatever equitable right there was which could be grounded upon the first mortgage inures to the benefit of the defendant, and not to the plaintiff or any one with whom she was in privity.

We are satisfied that the judgment of the district court was right, and recommend its affirmance.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

WILLIAM A. HARRISON ET AL., APPELLANTS, V. FREDERICK J. HARRISON ET AL., APPELLEES.

FILED NOVEMBER 21, 1907. No. 14,992.

1. **Specific Performance:** ORAL CONTRACT: EVIDENCE: PERFORMANCE. The law is well settled in this state that an oral agreement to convey real estate will be specifically enforced where the evidence of such agreement is clear and satisfactory, and the plaintiff has fully performed on his part.
2. ———: ———: ———. Where the acts performed by the plaintiff tend to show, not only that there was an agreement, but also throw some light on the nature of that agreement, the evidence cannot be said to rest wholly in parol, the parol evidence being auxiliary to the proof afforded by the case itself.
3. **Declarations against interest** cannot be annulled or explained away by counter declarations.

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

Charles F. Stroman and *Gilbert Bros.*, for appellants.

Power & Meeker, F. J. Harrison and *E. F. Harrison, contra.*

DUFFIE, C.

This action was brought to partition the southeast quarter of section 29, township 10, of range 2, in York county, Nebraska. The land was owned by James Harrisen, who died intestate in February, 1905, leaving as his

only heirs the plaintiffs William A. Harrison, a son, Hattie E. Shepardson, a married daughter, and the defendant Frederick J. Harrison, his youngest son. The following facts are not in dispute: The wife of James Harrison, the decedent, and the mother of the children above named, died in 1873, in the state of Iowa, where the family then lived. At the time of their mother's death William A. Harrison was about six years old, Frederick J. about three years, and Hattie but a few weeks old. Some four years after the death of their mother, the children William A. and Hattie E. came to York county, Nebraska, with their grandfather, Frederick J. and his father remaining in Iowa until about seven years later, when they also came to York county. The father never remarried, and, after moving to York county, James Harrison, who was a stone mason, continued to work at his trade, boarding most of the time at restaurants and hotels up to the year 1893. In the year 1890 James Harrison and Frederick J. went to Denver, Colorado, where Frederick secured employment as an apprentice to a plumber of that city, and during his employment there for less than a year gained some knowledge of the trade. In the summer of 1891 he came to Lincoln, Nebraska, and his father returned to York county. The farm in question was purchased by the father in the year 1892, and in the spring of 1893 he and his son Frederick J. moved upon the farm, living there together until 1898, when Frederick J. was married, bringing his wife to the farm, where they continued to live with the father until his death in February, 1905. In the meantime William A. Harrison had married, and was living in the state of Colorado. The daughter Hattie had married one Shepardson and was living with her husband in York county, some three or four miles distant from her father's farm. After the death of James Harrison, Frederick J. continued in possession of the farm, asserting title thereto under an alleged oral agreement with his father. This action for partition was commenced by his brother and sister, and in an answer

and cross-bill filed by Frederick J. it is alleged that, from the time that his father came to York county in 1884 until the latter part of 1891, he continued to work at his trade as a mason in the city of York, boarding and lodging first at one place and then another, having no fixed place of abode, and none of his children or other relatives with him; that, during the latter part of the year 1891 and the early part of 1892, his father urged him to give up his plan of pursuing the plumber's trade, and to make arrangements so that they could live together during the remainder of his father's life, and, as an inducement to do so, his father offered to purchase a farm in York county where they would make a home and live together; that, in consideration thereof, upon the father's death, the farm should become the property of the said Frederick J. Harrison; that he accepted this proposition and came to York county from Lincoln in the spring of 1892, and, with his father, selected the farm in question, his father paying $4,000 therefor; that the farm was leased at the time, so that they did not occupy it until the spring of 1893, when they took possession together under their said oral agreement, and from that time forth defendant continued in possession with his father and occupied the same until his father's death. It is alleged that he fully performed the agreement upon his part, and that, because of said agreement and his performance thereof, he became the owner of said farm, and that the plaintiffs have no right, title or interest therein. The prayer is for a decree quieting his title. The district court entered a decree quieting title in the defendant Frederick J. Harrison, from which the plaintiffs have appealed.

In a brief of exceptional merit plaintiffs insist that this court has gone to extreme lengths in enforcing oral agreements for the conveyance of real estate, and that there is danger of wholly ignoring the statute of frauds and the statute of wills in a too liberal policy of allowing the title to real estate to be questioned or ordered transferred from one party to another on evidence which is wholly oral. It

is said that there were special equities in the case of *Kofka v. Rosicky,* 41 Neb. 328, and in *Teske v. Dittberner,* 63 Neb. 607, which appealed to the court for a relaxation of the rigid rule requiring evidence of the clearest and most satisfactory character to justify a court in decreeing specific performance of an oral contract for the conveyance of real estate; but, as is well said in *Kofka v. Rosicky, supra,* the statute of frauds should not be so rigidly adhered to as to accomplish a fraud against one of the persons affected by the contract to which it is sought to be applied, and the discretion of the court ought to be applied to each particular case when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties. The statute itself recognizes the right of a court of equity to establish a claim against, or a right to a conveyance of, real estate by oral evidence in providing that "nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance." Comp. St. 1905, ch. 32, sec. 6. By a series of decisions ending with *Peterson v. Estate of Bauer,* 76 Neb. 661, this court has firmly established the rule that oral contracts relating to interests in real estate will be specifically enforced when the evidence establishing such a contract is clear and satisfactory. In the case last cited it is said by Mr. Justice LETTON: "It is impossible to reconcile the views of the various courts of the United States upon the questions presented, but this court has adopted the rule in *Kofka v. Rosicky, supra,* and we are content to abide by the doctrine of that case as being the most apt to prevent injustice and to do equity. In such a case, if the trial court, bearing in mind the ease with which claims may be presented when the other party to the alleged contract is dead, carefully scrutinizes the evidence and weighs the same, taking fully into consideration the nature of the claims and the known inaccuracy of memory with reference to oral statements made years before the time of the trial, we think the evil

consequences to estates which may accrue and which the counsel for the defendant so strongly set forth may be greatly minimized. The difficulty of proving contracts made many years before, when the lips of both participants are sealed, one by death and the other by the law, operates to the disadvantage of the claimant, and it may prevent a just recovery in as many cases as the ease with which claims may be trumped up may operate to spoliate estates." That this court does not stand alone in the rule adopted is shown from the following cases: *Rhodes v. Rhodes,* 3 Sandf. Ch. (N. Y.) 305; *Winne v. Winne,* 166 N. Y. 263, 82 Am. St. Rep. 647; *Twiss v. George,* 33 Mich. 253; *Svanburg v. Fossceu,* 75 Minn. 350, 74 Am. St. Rep. 490; *Brinton v. Van Cott,* 8 Utah, 480; *Davies v. Cheadle,* 31 Wash. 168; *McCullom v. Mackrell,* 13 S. Dak. 262; *Bryson v. McShane,* 48 W. Va. 126, 49 L. R. A. 527; *Howe v. Watson,* 179 Mass. 30.

It being settled that the statute of frauds does not stand in the way of the enforcement of contracts of the character alleged by the defendant, the important question in this case is: Does the evidence entitle him to the relief awarded by the district court? In the fall of the year 1891 the defendant was rooming with C. J. Wineingen in the city of Lincoln. One evening during the fall he brought his father to the house, where he remained with him during the night. Mr. Wineingen testified that in a talk between himself, the defendant and defendant's father, had during the evening and before bedtime, the old gentleman said that "he wanted Fred to go with him and live with him; that he had no home; that he had one boy that he tried to help, but it seemed that he did not take any interest in him, and thought if he could get Fred to go home with him he was going to buy a farm, or had a farm; I won't say as to that, but he wanted to get him with him to live with him, and if Fred wanted to get married he would have a home with Fred, and Fred would have what was left." Mrs. Wineingen testified that the old gentleman said "that he had come to see if he could get Fred to

go home with him; that he told Fred that he would get a farm if he would come and go home with him and stay with him, and he said that when he was through with it Fred could have it." Again she said: "He said he had come down to see if he could not persuade Fred to go home with him, and that he would buy a piece of land or farm if he would come and live with him. He said: 'When I am through with it, it shall be his.'" This conversation between the old gentleman and witness was had in Fred's presence. The following morning Fred and his father met C. W. McKee at the depot in Lincoln. The following question was asked McKee: "Will you please tell the court just what conversation you had, what was said between James Harrison, Fred's father, and yourself in Fred's presence there at the time, and what Fred said?" He answered: "Why, yes; Fred introduced me to his father, and we stood and talked a little bit, as people generally when they meet; I don't know as I can recall, something about the weather, how he was getting along, what he had been doing, something to that effect, and Fred Harrison says: 'What do you think?' he said: 'The old man is going to take me home with him.' I said: 'Is that so? Maybe that will be a very good thing.' Then Mr. Harrison, Fred's father, said: 'I came down here to persuade Fred to go home with me,' and, he says, 'I am going to buy a farm,' he said, 'and I want Fred to make a home for me as long as I live, and when I am gone,' he said, 'the farm is Fred's.'" Sidney Roberts, who met them on this occasion, testified that Fred introduced him to his father; that the old gentleman said that he wanted to make a home for him and Fred; that he had no particular home, and that he would like to get a place where he could make a home; that he thought he could get a place near York; that Fred would stay with him, and when he died he would give Fred the farm; that when he died Fred could have it, it would be Fred's place. "I told Fred it would be a good idea for him to go with his father; and he replied that he believed that he would." Mrs. Briley testified that some

time in the year 1892 Fred and his father came to her house after the supper hour, and Fred's father apologized for making her get an extra supper, and stated why it was; that they had been out in the country looking at a farm that he was intending to buy. He then went on and told her that he was going to buy a farm to make him and Fred a home; that he had got tired of boarding around and knocking around for a home; that he and Fred always got along well together, and that it would be nice for them both to have a home. During the time that Fred and his father were in possession of the farm the father talked with his neighbors relating to the arrangement under which they were living there. Mr. E. F. Chittenden testified that "he would come down Sundays and take dinner or supper, and, when he got to talking about the farm, I asked him why it was that he would go and buy a farm. He was not able to run it. He was a stone mason, and not able physically to work it. He told me that he bought it with the expectation of having it for Fred. He had made arrangements for Fred to take care of him, and he was to have the farm. That is what he told me, I think, two or three times, or that once anyhow." Further on he testified that the old gentleman said that Fred should have the farm when he was through with it himself; that Fred was to take care of him as long as he lived, and he expected Fred to have the farm; that is the reason he had it, not for his own use to farm himself, but he expected Fred to have it; that Fred was to have the place for taking care of him. Mr. Benner testified that "James Harrison came to his place one day and seemed to be tired; that he asked him why he did not keep his money when he had it, and not lay it out in a farm, as he was not able to work; that the old gentleman replied that he bought it for Fred."

The fact that Fred abandoned the plumber's trade and went to live with his father upon the farm, where he worked without pay of any kind for five years, or until his marriage in 1898, is a circumstance which, we think, strongly corroborative of the claim that this service was

performed under the agreement alleged in the answer and cross-bill and testified to by the witnesses. It is not usual for a young man, after attaining his majority, to go on a farm, and live alone with his father, having no women folks to look after the housework, without pay as the services are performed or an agreement for remuneration in the future. Defendant testified on cross-examination that after his marriage in 1898 he received one-half the crop raised upon the farm, but he explained that this was under an agreement made at that time, his father recognizing that he should have a portion of the crop in order to properly care for his wife and supply her with such household necessities as she might require. All the circumstances make the defendant's claim consistent and probable. His father had reached an advanced age. He had no home. He was living at boarding houses and hotels, with no one but strangers to look after his wants. It was natural that he should desire a permanent home and the companionship and care of some near relative. Under these circumstances it is not difficult to believe that he should make such a contract with Fred as the witnesses have related. It is hardly fair to presume that he would ask his son to abandon a trade, which he had partially learned, to live with him without pay until his death; and, as before stated, it is hardly probable that one who had his own way to make in the world would care to give up some years of his life to the care of a farm without some inducement held out to him to do so. The evidence, we think, conforms to the rule stated in Waterman, Specific Performance of Contracts, sec. 261, that the act performed tends to show, not only that there was an agreement, but also throws light on the nature of that agreement, so that neither the fact of an agreement nor even the nature of that agreement rests solely upon parol evidence, the parol evidence being auxiliary to the proof afforded by the circumstances of the case itself. A reading of the record convinces us that the agreement was made as alleged; that there has been complete perform-

ance on the part of the defendant, and that he is entitled to a specific performance of the contract.

The testimony of the neighbors to declarations of James Harrison that the farm was bought for Fred and that Fred was to have it after his death was taken by the court upon the principle that declarations against interest are always admissible, and that such declarations on the part of the decedent were in derogation of his absolute title to the farm; that he recognized and admitted that defendant had an equity in the land. The plaintiffs offered to show that on one or more occasions the decedent had made statements to the effect that he would not give his property to one child; that he would divide it equally among his children; that he stated that they wanted him to give the place to Fred, but he would not get it, and other similar declarations claimed to have been made by him. The court refused to receive this testimony, and error is claimed. *Foster & Foster v. Nowlin,* 4 Mo. 18, is cited as an authority to the effect that declarations made by a party since deceased, declaring that certain property belonged to him, was admissible and competent to rebut other evidence of his declaration to the contrary. We do not think that the weight of authority sustains this holding. In *Wilson v. Patrick,* 34 Ia. 362, it was held that antecedent declarations of a party that he was absolute owner of certain property were not admissible to counteract his admissions that he owned it as security only; and in *Nutter v. O'Donnell,* 6 Colo. 253, it is said that declarations against interest cannot be annulled or explained away by counter declarations. The rule announced in *Foster & Foster v. Nowlin, supra,* is no longer the law in Missouri, as that case is disapproved and the principle repudiated in *Turner v. Belden,* 9 Mo. 797.

The evidence satisfies us that the decree entered by the district court was the proper one, that there is no reversible error in the record, and we recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

VERONA UNANGST, APPELLANT, V. LINUS E. SOUTHWICK, APPELLEE.*

FILED NOVEMBER 21, 1907. No. 14,907.

1. **Process:** RETURN: IMPEACHMENT. There is a strong presumption that the return of an officer to a writ served by him is true, but the same may be impeached in a collateral proceeding by clear and convincing evidence.
2. **Mortgages:** FORECLOSURE: REDEMPTION. Defendant, through his agent, for a valuable consideration, promised not to purchase a mortgage upon plaintiff's homestead nor to interfere with plaintiff's purchase thereof. Afterwards, in violation of his agreement, he purchased the mortgage, and upon foreclosure of it bought the land. *Held*, That plaintiff, who was not served with notice of the foreclosure suit, is entitled to redeem by the payment to defendant of the amount paid for the mortgage, with interest at 7 per cent. per annum.
3. **Vendor and Purchaser:** DURESS. Evidence examined, and *held* insufficient to show that plaintiff's contract to convey land in settlement of her husband's indebtedness was secured by duress.

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

H. M. Sullivan, for appellant.

Hoagland & Hoagland, contra.

EPPERSON, C.

In 1899 or 1900, the plaintiff's husband, George T. Unangst, purchased of Harris & Company certain cattle, giving his notes secured by mortgage upon the cattle. Harris & Company sold their notes and mortgage to the

* Rehearing allowed. See opinion, p. 119, *post*.

First National Bank of Friend, Nebraska, and guaranteed payment. The indebtedness was renewed from time to time by and in the name of Harris & Company, but remained the property of the defendant bank. August 11, 1903, the time for the payment of the indebtedness was extended for 90 days and additional security given upon personal property and real estate. One hundred and sixty acres of the land mortgaged soon thereafter became Unangst's homestead, which was incumbered by a prior mortgage of $600. August 14, 1903, the defendant bank brought three replevin actions against different parties to recover personal property alleged to have been included in the bank's mortgage, and four complaints were also filed by defendant before a magistrate, charging Unangst with feloniously selling a portion of the mortgaged property. Unangst waived preliminary hearing upon these charges and gave bond for his appearance. Soon after the institution of these several suits, negotiations were begun for a settlement, which was consummated about October 20, 1903, but was not reduced to writing. The replevin actions were dismissed. The defendant bank surrendered the notes given by Unangst and released its mortgage on the homestead. Unangst transferred certain personal property to the bank, and conveyed all of the land described in the mortgage, except the homestead, and his wife, plaintiff herein, as a part of the settlement, conveyed to the bank 160 acres of land belonging to her. December 8, 1903, Southwick, defendant herein and president of the defendant bank, instituted an action to foreclose the prior $600 mortgage upon the homestead, which mortgage had been assigned to him. A decree of foreclosure was entered, under which the land was sold to Southwick and the sale, over the objections of the defendant, George Unangst, confirmed. Plaintiff herein, the wife of the said George Unangst, began this action August 3, 1905, and seeks to redeem the homestead from the $600 mortgage foreclosed by Southwick, alleging that, as part of the agreement of settlement, defendant promised not to pur-

chase the mortgage foreclosed; that defendant purchased the same contrary to their agreement, and paid therefor only $200; that plaintiff was not served with summons in the foreclosure suit; and plaintiff asks that she may be permitted to redeem on the payment of $200. She also seeks to set aside the transfer of her land to the defendant Southwick, alleging, in substance, that she conveyed the same because of the criminal prosecutions instituted against her husband and defendant's promise to discontinue the same upon settlement; that the criminal actions were instituted for the purpose of extorting money and property in excess of the amount due, and, further, in consideration of the defendant's promise not to interfere with and prevent her purchase of the first mortgage upon the homestead. The judgment in the lower court was for the defendant, and plaintiff appeals.

As to the homestead: Defendant contends that the foreclosure suit settled the question here in controversy; and that the sheriff's return to the summons may not be collaterally assailed. This question has been settled by this court. In *Wilson v. Shipman,* 34 Neb. 573, it is held: "The return of an officer on a summons that he had personally served a copy of the same on the defendants may be contradicted and disproved by the defendant; but it must be clear from the evidence and circumstances that the return is untrue, otherwise it is the duty of the court to sustain it." It is true the summons therein was issued by an inferior court, but in announcing the rule no distinction is made between a summons of an inferior court and one of a court of general jurisdiction. In *Holliday v. Brown,* 33 Neb. 657, 34 Neb. 232, a summons of a district court was assailed in an action upon the judgment based thereon, and it was held that a party not served was not bound thereby. See *Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co.,* 50 Neb. 283. These decisions we think are right and should be adhered to. The return of the sheriff shows that the summons here in controversy was served personally upon the plaintiff herein. There is

a strong presumption that the return of the officer is true, and it cannot be impeached except by clear and convincing evidence. At the time of the purported service, the sheriff had for service the summons in the foreclosure suit and also a notice for the appointment of a receiver. The sheriff testified that he handed a copy of each paper to the plaintiff in the presence of her husband and one other witness. The husband and the other witness corroborate the plaintiff, who testified that the sheriff handed to her a copy of the notice for the appointment of the receiver, but no copy of the summons. Upon all the evidence, the trial court found that the summons was not served upon the plaintiff herein, and we consider such finding fully sustained by the evidence.

There is a conflict in the evidence as to the terms of the settlement made by the parties. Defendant had a mortgage on the homestead and on 320 acres of other land, and also upon considerable personal property. It was the intention of all parties that plaintiff and her husband should settle the latter's indebtedness to defendant by conveying a part of the property. At the time of the settlement all parties knew that the $600 first mortgage upon the homestead could be satisfied for $200. It appears from plaintiff's evidence that prior to the consummation of the settlement she learned that defendant Southwick had negotiated for and arranged to buy the first mortgage, then in the hands of one Williams, to be transferred whenever the $200 was paid therefor. She and her husband, desiring to retain their homestead and knowing that defendant had negotiated for the mortgage, insisted that he should not purchase the mortgage, but permit them to redeem the same and take the homestead free from defendant's mortgage; that plaintiff, to save her homestead, deeded 160 acres of her own land to the defendant, which, with other lands, as above stated, was taken by defendant in full settlement of the indebtedness. The negotiations for settlement were conducted mostly for defendant by Mr. Gilchrist, who was in the employ of Harris & Com-

pany. Witness Hartzell testified that Mr. Gilchrist told him that it was the proposition to put Mrs. Unangst's place in the mortgage and throw the other place out, that she would turn over her place instead of that. Witness Bailey testified that Gilchrist told him after the consummation of the settlement that they (the defendants) had agreed to let the first mortgage alone. Defendant negotiated for the purchase of the $600 mortgage to protect his own lien. Before redeeming therefrom, his settlement with Unangst was complete and he needed no protection from the mortgage. Thereafter the adventure was but a speculation with him. He and his agent Gilchrist deny ever having said anything to the Unangsts about the $600 mortgage, and never agreed not to purchase. Be this as it may, he either violated his contract not to buy, or procured the settlement by wrongfully withholding from plaintiff and her husband the fact that he had negotiated for and intended to buy it, and thereby procure not only the 480 acres plaintiff was satisfied to convey, but in addition thereto the other 160 acres—their homestead. Defendant's attorney testified that on the final settlement defendant wanted a deed to this land to save foreclosure, and that "Mr. Unangst refused to deed that, and for the purpose of getting a settlement we cut that out of the proposition." Mr. Williams, who acted as agent for defendant Southwick in negotiating for the purchase of the $600 mortgage, and who was called as a witness by the defendant, corroborates the evidence of the plaintiff's husband, and contradicts the deposition of Gilchrist to the extent that there was a controversy between Gilchrist and Unangst as to the mortgage. At the time of the settlement Mr. Williams had the mortgage in his possession, and subsequently thereto turned it over to the defendant. And, further, Gilchrist told witness that he expected the defendant's negotiation for the mortgage would make trouble. This witness had told Unangst that he held the mortgage for Southwick upon the payment of $200. This fact, and the other circumstances indicating that defendants,

through their agents, knew that the Unangsts considered that they were saving their home farm, argues that the plaintiff's conduct in the settlement and her theory of the contract were reasonable and true. It is apparent from the situation that the only object plaintiff herein would have in substituting her own land for the homestead was that the latter might be spared to her. The finding of the trial court as to this fact was also for plaintiff, and we are convinced from the evidence that Mr. Gilchrist, who was agent for defendant, as part of the consideration for the settlement and especially to procure for his principal the plaintiff's land which she conveyed to the defendant Southwick, promised that plaintiff and her husband should not only have a release of defendant's mortgage, but that defendant would not purchase the $600 mortgage. The trial court considered the facts insufficient to permit the plaintiff to recover; but good faith and honest dealing required the defendant to abandon all claim to the defendant's homestead and to the prior mortgage thereon. Defendant having purchased the mortgage in violation of the contract for settlement, and foreclosed the same and procured an order confirming the sale thereof, the plaintiff is entitled to redeem, and is entitled to an order quieting the title thereof in her husband upon the payment of defendant's actual expenditure in the purchase of the mortgage, with interest.

Plaintiff herein also seeks to set aside the conveyance of her land to the defendant, because a part of the consideration therefor was the dismissal of the criminal suits against her husband; and, further, because the fact that the criminal cases were pending and the alleged promise of defendant to dismiss amounted to duress. There is no merit in this contention. In the first place, plaintiff in this same action seeks specific performance of a part of the contract of settlement by asking affirmative relief based thereon as above shown, and to which she is entitled only upon an adjudication that the contract was legal. And again, the evidence shows that plaintiff's husband was as

active as defendant in bringing about a settlement of his indebtedness, and that he had no fear of a conviction on the criminal charge. It is not shown that defendant procured by the settlement any advantage other than the saving of the expense of foreclosing its mortgage. Neither is it shown that defendant procured the settlement by threats of criminal prosecution. The record contains no evidence that the pending criminal suits controlled the plaintiff's conduct, or that her mind was overcome by threats, or that any undue advantage was taken of her or her husband. At most, under plaintiff's evidence, she substituted her land for the purpose of preserving her homestead. Considering the first mortgage worth but $200—the price for which all parties knew it could be had—there was no substantial difference in the value of their interests in the two properties. This court has ever condemned the conduct of persons using the criminal code for their own financial advantage, but judicial condemnation is uncalled for here. It does not appear that defendant instituted the criminal cases for the purpose of collecting money, nor did he threaten to prosecute them in case the settlement was not had. She deeded her land for a legal and adequate consideration—the canceling of the liens against her homestead. In *Morse v. Woodworth*, 29 N. E. 525 (155 Mass. 233), cited with approval and quoted at length by this court in *Hargreaves v. Korcek*, 44 Neb. 660, it was held: "Where defendant, by such threats of arrest and imprisonment as would overcome the mind and will of an ordinary man, compels a settlement which plaintiff would not have made voluntarily, plaintiff, even though guilty of the embezzlement, may avoid such settlement on the ground of duress." In the opinion it is said: "The question in every such case is whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful; and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement." None of the elements of

duress is shown in the case at bar, and plaintiff is not entitled to have her deed canceled.

That portion of the judgment of the district court denying plaintiff the right to redeem the first mortgage for $200 should be reversed, and the cause remanded, with instructions to permit plaintiff to redeem from the sale of the homestead property by paying defendant the amount of his expenditure, to wit, $200 paid for the prior mortgage, with interest at 7 per cent. per annum from November 1, 1903, the date of the purchase.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, that portion of the judgment of the district court denying plaintiff the right to redeem from the first mortgage upon the payment of $200 is reversed, and the cause remanded, with instructions to enter a decree permitting plaintiff to redeem from the sale of the homestead property by paying defendant $200 paid by him for the prior mortgage, with interest at 7 per cent. per annum from November 1, 1903. In all other respects the judgment of the district court is affirmed, with costs in this court taxed against the defendant.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed June 4, 1908. *Former judgment modified and judgment of district court affirmed:*

1. **Process: RETURN: IMPEACHMENT.** The return of an officer cannot be impeached except by clear and convincing evidence.
2. **Opinion Modified.** The former opinion in this case, *ante*, p. 112, is modified.

EPPERSON, C.

Upon rehearing and further consideration of this case, I am convinced that a part of our former opinion, *ante*, p. 112, is wrong. This is an action to redeem from a

mortgage upon land owned by plaintiff's husband and occupied as a homestead. The land had been purchased at judicial sale by the defendant Southwick, who owned and foreclosed the mortgage. The sale had been confirmed and a deed issued to the purchaser. Plaintiff's alleged cause of action arose prior to the foreclosure. It is apparent that to recover she must prove that she had not been served with summons and had not appeared in the foreclosure case. The evidence bearing upon this question consisted of the sheriff's return of the summons showing personal service and his own testimony in support thereof. The plaintiff, her husband, and sister, who were present at the time of the service of the papers, testified that she was served only with notice of the application for the appointment of a receiver, and was not served with summons. At the same time and in the presence of the plaintiff all witnesses agree that both notice and summons were served upon the plaintiff's husband.

The error in our former opinion is the application to this case of the rule announced in the first paragraph of the syllabus. Similar evidence was held in *Wilson v. Shipman,* 34 Neb. 573, insufficient to impeach the officer's return to a court of inferior jurisdiction. The sheriff went to the home of the parties for the express purpose of serving the summons and the notice of the application for a receiver upon the plaintiff herein and her husband. It seems improbable that he would serve upon the plaintiff only the notice of the application for receiver and make his return showing the service of the summons upon her. He had the opportunity to serve it. In the summons, both the husband and wife were named as defendants. We fear that it would be a dangerous precedent to adhere to a rule which would permit an officer's return to be superseded by such evidence as this. It would offer an opportunity for the practice of fraud and perjury, and the due administration of justice might be considerably hampered by dishonest litigants, who, after making no response to the process of the court, would appear collaterally and defeat

the officer's return. However, we do not charge such motives to the plaintiff, but the circumstances in this case strongly corroborate the sheriff's return. Although the lower court found that the summons in the foreclosure suit was not served upon the plaintiff herein, we are now convinced that the evidence in support of such finding is not clear and convincing. Again, it appears from the testimony of the plaintiff that at the time of the service of the summons and the notice that she saw and read the summons served upon her husband. She had received notice of the application for the appointment of a receiver in the same case. Thus, it appears that she received, directly from the process of the court, actual notice of the pendency of the suit. The facts relied upon by the plaintiff herein should have been pleaded as a defense to the foreclosure suit, or would have entitled her to appear therein and enforce her rights to redeem. She should have made use of that opportunity.

We therefore recommend that the former opinion be modified, as suggested, and that the judgment of the district court be wholly affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons above given, the former opinion in this case is modified, as suggested, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

LINUS E. SOUTHWICK, APPELLEE, V. GEORGE F. UNANGST ET AL., APPELLANTS.

FILED NOVEMBER 21, 1907. No. 14,941.

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

H. M. Sullivan, for appellants.

Hoagland & Hoagland, contra.

EPPERSON, C.

Defendants appeal from an order overruling the motion of the defendant George Unangst to set aside a judicial sale and a confirmation of such sale. The clerk certified that the record here presented was a true and perfect transcript. It does not contain a copy of the objections filed, nor is there a bill of exceptions presented. No reason is given for setting aside the sale, except that the notice of sale was not published as required by law, and this question was not presented to the lower court.

The land involved herein is a part of the subject matter of another action between some of the same parties. *Unangst v. Southwick, ante,* p. 112. It appears that appellants desire and believe that they are entitled to delay the confirmation until the other action is disposed of. The other action is between Verona Unangst and plaintiff herein, and is to redeem the land in controversy. The fact of its pendency furnishes no reason for delaying the confirmation upon the motion of George T. Unangst, nor does the confirmation of the sale to the plaintiff herein prevent redemption by Verona Unangst.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

IN RE ESTATE OF WILLIAM NECKEL.
ELIZABETH NECKEL, ADMINISTRATRIX, APPELLEE, V. AUGUSTA N. STEARNS, APPELLANT.

FILED NOVEMBER 21, 1907. No. 14,983.

Witnesses: COMPETENCY. Under the provisions of section 329 of the code, an interested party may testify only to such conversations and transactions had with the adverse party's decedent as were testified to by some witness called by the representative, or to such facts as may be presented in the preserved testimony of the deceased.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

E. W. Simeral and *C. W. Haller, contra.*

EPPERSON, C.

At his death, and for five months previous thereto, the deceased, William Neckel, resided in Omaha with his daughter, the appellant. Four days prior to his death, a grandchild, the son of one of the appellees, a boy about eleven years of age, in the presence of his aunt, the appellant found $385 in money hidden by the deceased in a house in which he had previously resided for a number of years. The boy carried the money to his grandfather. After the decedent's death the appellant handed the $385 to her brother, one of the appellees, and asked him to take care of it for her. Thereafter she demanded a return of this money. He refused, and later gave the money to the administratrix of his father's estate. A few hours before the

father's death the appellant obtained from him $214, which she later, acting upon the advice of counsel, turned over to the administratrix. She brings this action, demanding a return to her of the sum of the two items referred to above. She alleges that for several years prior to his death the deceased collected rent from several houses belonging to her, with the understanding that he was to use what he needed and turn over the remainder to her; that the sums above named were proceeds from this rental which was not used by deceased, and that the same was turned over to appellant by him.

The only question presented by appellant is that the court erred in striking out her testimony regarding a conversation and transaction between the deceased and herself. Such evidence was incompetent under the provisions of section 329 of the code, unless it fell within the exception permitting an interested party to testify when the representative of the deceased has called a witness who shall have testified regarding the same. The executor called the boy who found the money, and he testified that he took the money to the deceased, "and said: 'What do you think I got?' and handed him the money and he stuck it in his apron quick. He groaned and said: 'Where did you find it?' and I said: 'I got it up in the old house,' and she (meaning the appellant) gave me a dollar." In rebuttal appellant testified: "Q. State what was first said, and by whom, about the boy handing him the money? A. He said: 'Why did you let the boy in the house? This was your money that I had saved out of the rent. I did not want Will to know it.' " Appellant testified that this statement of the deceased was made in the presence of the boy, and following the statement testified to by him. And she further said that a few hours later her father gave her the money. Her evidence in this regard was stricken from the record. It cannot be said that the statements testified to by the boy constituted a conversation or transaction between appellant and deceased. It is not contradictory to appellant's contention that deceased gave her the money.

The boy testified to no conversation wherein either party said anything whatever regarding the ownership of the money or relative to the giving of the money by the deceased to appellant. He testified to the existence of the money in the possession and control of the deceased. Her testimony related to a transaction whereby she became the owner of the money. The boy testified to no such transaction, and the only information we have that such a conversation took place is the testimony of the appellant. The fact that the conversation or transaction relied upon immediately followed the conversation testified to by the witness called by the administratrix does not render admissible testimony which otherwise would be barred. Appellant was competent to testify to the transaction and conversation mentioned in the boy's testimony, but she could go no further. *Dickenson v. Columbus State Bank*, 71 Neb. 260. The court did not err in striking the testimony. Neither does the evidence support appellant's contention regarding the $214, and we recommend that the judgment be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

IN RE ESTATE OF CHRISTOPHER O'BRIEN.

MARGARET O'BRIEN, ADMINISTRATRIX, APPELLANT, V. D. W. SPERLING, GUARDIAN, APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,947.

1. **Guardian and Ward: LOANS.** Section 27, ch. 34, Comp. St. 1907, requires a guardian to apply to and receive from the county court an order authorizing him to loan the funds of his ward. If he loans his ward's funds without such authority, and a loss ensues, he is liable therefor.

2. ———: ———. The personal direction and supervision of the county judge in making loans for a guardian is not equivalent to an order of the court authorizing the loans.

3. ———: ———: ANNUAL REPORTS: APPROVAL. The approval by the county court, without notice to those interested, of the usual annual reports of a guardian, wherein he reports loans of his ward's funds without an order of the court, is not equivalent to an order of the court authorizing the guardian to make such loans.

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

Allen G. Fisher and *F. O'Linn*, for appellant.

A. W. Crites, contra.

GOOD, C.

This is an appeal involving the final settlement of a deceased guardian's account. It originated in the county court of Dawes county, Nebraska. Christopher O'Brien was the guardian of two minors. Several years after his appointment he died, and his widow was appointed administratrix of his estate. D. W. Sperling was appointed as guardian of said minors to succeed to the trust of the deceased guardian O'Brien. At the instance of the newly appointed guardian, the administratrix of the deceased guardian was cited by the county court to make a final report on behalf of the deceased guardian. Such a report was filed, and thereupon exceptions were taken to certain items of credit in the report. Hearing was had in the county court, and the final report made by the administratrix was in all things approved, and the exceptions were overruled. Thereupon the new guardian, without giving any appeal bond, appealed to the district court. There the administratrix of the deceased guardian moved to dismiss the appeal, because no undertaking for appeal had been given by the guardian. This motion was overruled. No new pleadings were filed in the district court, and a hearing was had in the district court upon the report and ex-

ceptions that had been filed in the county court. The district court sustained certain of the exceptions and overruled others. The administratrix of Christopher O'Brien, deceased, appeals to this court.

The first contention is that the district court was without jurisdiction, because the guardian appealing from the county court did not enter into an appeal undertaking, and that the district court erred in refusing to dismiss the appeal for the failure to give such an undertaking. Section 44, ch. 20, Comp. St. 1905, relating to appeals from the county court, among other things, provides that an executor, administrator, guardian or guardian *ad litem* shall not be required to enter into any bond in order to enable him to appeal. The appeal in this case was on behalf of the estate of the minor wards, and the guardian was appealing in his trust capacity, as guardian, and under this section of the statute no bond was required in order to permit him to appeal. The objections that the district court was without jurisdiction and that it erred in refusing to dismiss the appeal are without merit.

The next question, and the principal one in issue in the case, arises out of this state of facts: Christopher O'Brien, the first guardian, soon after his appointment received a considerable sum of money for his wards. Among other investments that he made with the trust funds were two loans upon real property in the city of Chadron. One was made to Shelton for $750, and the other to Chapin for $500. The one for $500 to Chapin was secured by a third mortgage upon hotel property, and the one to Shelton for $750 was secured by a first mortgage upon a building called the "Packing House," but there seems to have been a considerable amount of unpaid taxes upon this property. No formal application was ever made to the county court to authorize these investments, and no order of the county court was ever made directing or authorizing the investment of the trust funds in these mortgages. All the mortgages on the Chapin property were foreclosed in one action, but the property failed to bring sufficient to pay more than

the first mortgage, and there was a total loss of the trust funds loaned upon the Chapin property. Interest was paid for a time on the Shelton mortgage, but the mortgagors failing to make further payments, O'Brien procured a conveyance of the premises to him as guardian. Several items of expense for insurance, taxes and repairs upon this property were incurred, all of which items, together with said loans, were in the credit column of the final report of the guardianship filed by the administratrix of the deceased guardian. The newly appointed guardian made objection to the items of the two loans above mentioned and of the expenses incurred for taxes, insurance and repairs upon the property so taken over, and took exceptions thereto. The district court disallowed these items upon the ground that the loans had never been authorized by the county court, and ordered that the account be restated so as to charge the former guardian in said account with each of the items of $750 and $500 for the loans, and the items of expense, aggregating $107.36, together with interest thereon.

The appellant contends, first, that no order of the county court is necessary to authorize a guardian to invest trust funds, that it is only necessary that he should act with good faith and prudence in making investments, and that, if a loss results from loans thus made, without fault of the guardian, he is not chargeable with such loss; secondly, that the county judge orally and personally directed and supervised the making of the loans in question, and that the guardian reported the loans in his annual reports, which were approved by the court, and that these acts were equivalent to a prior order of the county court to make the loans in question. In many jurisdictions it has been held, in the absence of a statute requiring it, that a guardian is not required to apply to the court making his appointment for authority to invest funds, and that he will be protected if he acts in good faith and exercises that caution and prudence that is usually exercised by ordinarily prudent persons. In those states where a statute requires the guard-

ian to apply to and obtain the authority of the court before making the investment, it has been held that the guardian is liable for a loss if he makes the investment without proper authority, and that good faith and care and prudence will not protect him.

Section 27, ch. 34, Comp. St. 1907, is in the following language: "The courts of probate in their respective counties, on the application of a guardian, or of any person interested in the estate of any ward, after such notice to all persons interested therein as the court shall direct, may authorize or require the guardian to sell and transfer any stock in public funds, or in any bank or corporation, or any other personal estate or effects held by him as guardian, and to invest the proceeds of such sale, and also any other moneys in his hands, in real estate or in any other manner that shall be most for the interest of all concerned therein, and the said court may make such further orders and give such directions as the case may require for managing, investing, and disposing of the estate and effects in the hands of the guardian." This section of the statute was before this court for construction in the case of *Hendrix v. Richards*, 57 Neb. 794. It was there held that a transfer of the personal property of a minor by a guardian must be authorized or directed by the proper court of probate. In that case a guardian, who held a note and mortgage for his ward, resigned the guardianship, retaining the note and mortgage, and delivered to his successor a sum of money in lieu of the note and mortgage as a consideration therefor. A subsequent owner of the land mortgaged paid the amount of the mortgage to the former guardian, but previous to such payment had caused the probate records to be searched and found that no order had been made authorizing the sale and transfer of the note and mortgage. It was held, in an action by the administrator of the deceased minor to foreclose the mortgage, that the foregoing facts constituted no defense. A careful examination of this section of the statute, above quoted, shows that it applies to the invest-

ment of any moneys in the hands of the guardian in real estate or in any other manner that shall be most for the interest of all concerned therein. If it is necessary for a guardian to have the authority of the probate court to make a valid sale or transfer of any of the personal property of his ward, then it would seem, under this section of the statute, to be necessary to have the authority of the county court in order to invest the funds of his ward's estate.

The evidence discloses that the county judge advised and acted for the guardian in making the loans in controversy, that he made the abstracts of title and drew the papers. Appellant contends that this is sufficient compliance with the statute. It is apparent that the action of the county judge in advising the loans was based upon his own knowledge and his own judgment as to the value of the property and the desirability of the loans, and possibly might have been influenced by the fact that he was receiving compensation for performing this work. Reference to the section of the statute above quoted will disclose that it was the intention of the legislature that there should be a hearing before the court and notice given to those interested, that an investigation as to the desirability of the proposed loans should be had before the court, that evidence might be taken upon this question of those qualified to give an opinion, and that the court after hearing the evidence should render a judicial act in directing or refusing the order to make the loans. In the present instance, the county judge acted as a broker for the guardian and did not act in a judicial capacity, and his personal acts in advising and directing the loans are not equivalent to a judicial order. A county judge should not counsel or advise any litigant in his court in any matter which the statute commits to him for judicial action.

The question next arises as to whether or not the approval by the court of the annual reports of the guardian, in which were disclosed the loans in controversy, is equivalent to a prior authorization by the court. It appears

that the reports filed were the usual annual reports of the guardian, that no hearing was had upon such reports, that no investigation was made, and that no notice was given to any one interested in the estate of the filing of the reports or the approval thereof by the court. We do not wish to be understood as holding that the court might not, upon a proper application and hearing thereon after due notice, make such an order as would be equivalent to a prior authorization. But, so far as appears in this case, the approval of these reports was *ex parte*. It has been held by this court in *Bachelor v. Schmela,* 49 Neb. 37, that a substantial difference exists between the final settlement of the accounts of an executor, administrator or guardian and those made annually or at stated periods. A final settlement is made pursuant to notice to persons interested in the estate, is in the nature of a judgment, and is conclusive as to all matters included therein until reversed or set aside in a direct proceeding, or impeached on account of fraud. But an interlocutory, *ex parte* accounting is subject to re-examination so long as the administrator's accounts remain unsettled. The approval of the guardian's report was, therefore, not equivalent to a prior authorization.

The action of the district court in ordering the guardian's account surcharged with the amounts of the loans should be affirmed. But we think that complete justice requires that the guardian's account should be surcharged with the items of the two loans, together with interest thereon from the time they were made at 7 per cent. per annum, and his account should be surcharged with the items of expense for taxes, insurance and repairs upon the property, together with interest thereon at the rate of 7 per cent. per annum from the date of each item. Upon the other hand, it appears from the record that the guardian collected some interest upon these loans and some rents from the property, with which he is charged in the account. From an examination of the record we are unable to ascertain the exact amount of these items. He is

entitled to have the present account credited with the amount of these items. It would be neither equitable nor just that the estate of the minors should hold the guardian liable for the amount of these loans and the interest thereon, and at the same time retain any of the benefits arising from these loans.

We recommend that the cause be remanded to the district court, with directions to ascertain the amount of the items of rent and interest, with which the guardian stands charged in the account, and to enter judgment in conformity with the views herein expressed.

DUFFIE 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, with directions to the district court to ascertain the amount of the items of interest and rents and to enter judgment in conformity with this opinion.

REVERSED.

THOMAS E. HAURIGAN, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.*

FILED NOVEMBER 21, 1907. No. 14,948.

1. **Pleading: CONSTRUCTION.** A petition which seeks a recovery for several breaches of one contract states but one cause of action, and is not subject to a motion to separately state and number.
2. **Carriers: DISCRIMINATION: MISTAKE.** Section 10009, Ann. St., does not render void a contract between a railroad company and a shipper to transport merchandise for less than the usual and regular freight rate, where such rate has been agreed to by mistake of the railroad company without intending any discrimination against other shippers. Where such contract had been entered into and the freight transported in pursuance thereof, if the railroad company compels the payment of freight charges in excess of the contract rate, such excess may be recovered by the shipper.

* Rehearing allowed. See opinion, p. 139, *post.*

3. Appeal: EVIDENCE: HARMLESS ERROR. Rulings on the admission of evidence examined, and *held* not to be prejudicially erroneous.

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

B. T. White, C. C. Wright and *B. H. Dunham,* for appellant.

Grant G. Martin and *R. J. Stinson, contra.*

GOOD, C.

Plaintiff brought this action against the defendant to recover damages for a breach of contract. From a judgment in favor of the plaintiff the defendant appeals.

Plaintiff's cause of action grows out of the shipment of a car-load of sweet potatoes from Fremont to Hastings. He alleges in his petition that he made an oral agreement with the defendant to transport a car of potatoes from Fremont to York by way of David City, with a stop-over privilege at the latter city, for which he was to pay the sum of $24 freight and $5 for the privilege of stopping at David City to unload a portion of the potatoes; that the defendant wrongfully billed the car to David City, instead of to York; that at David City he was compelled to pay the sum of $24 before being permitted to open the car and unload a portion of the potatoes, and was informed that he would have to pay the additional sum of $24 to transport the remainder of the potatoes to York. The agent of the defendant further advised the plaintiff that the rate to Hastings was the same as to York, and that Hastings, being a larger city, would be a more desirable market for the potatoes. Thereupon the plaintiff consented to have the car rebilled to Hastings, instead of to York. By an error of the defendant's agent the potatoes were sent to York, instead of to Hastings, and, when plaintiff reached Hastings some days later, he ascertained, upon inquiry from the defendant's agent, that the car had not arrived. Some delay occurred before the potatoes could be for-

warded to Hastings. When they reached Hastings, the plaintiff was compelled to pay, as freight, the sum of $37.50 before being permitted to enter the car to receive them. The plaintiff also avers that he had cleated the end doors of the car so as to hold them open for the purpose of permitting air to circulate through the car and thereby prevent the potatoes from heating and spoiling, and that the defendant, its agents or employees, wrongfully closed the end doors of the car so that no air could circulate through it, and that, by reason of the wrongful closing of the doors and the wrongful and negligent delay in the transportation of the potatoes to Hastings, the potatoes became heated, damaged and spoiled. Defendant first moved to require the plaintiff to separately state and number his causes of action. This motion was overruled. Thereafter the defendant answered, admitting that it collected the charges for freight, as alleged by plaintiff, and averred that the charges for freight collected were the rates and charges in force and effect at the time when the said consignment of potatoes was shipped, and that they were the regular rates and charges then demanded and collected by the defendant from all persons and the public generally for like and contemporaneous service, and that the arrangement and agreement between the agent of the defendant and the plaintiff for the transportation of the said car of potatoes for a less sum was unlawful, void and unenforceable under the laws of the state, as constituting an unjust discrimination in favor of the plaintiff, and alleged that the injuries and damages sustained were due to the inherent nature and tendency of the potatoes to rot and decay, and to the negligent acts of the plaintiff, and not to any fault or negligence of the defendant, and denied all the other allegations of the petition.

The first assignment of error relates to the overruling of the defendant's motion to require the plaintiff to separately state and number his causes of action. Whether this was error depends upon whether more than one cause of action is set forth in the petition. An examination of

the allegations convinces us that the damages sought to be recovered arise out of a single contract, and that all the acts complained of are breaches of that contract. It is true that the original contract provided for the transportation of the potatoes to York, with a stop-over privilege at David City, but by mutual consent the original contract was changed so as to make the city of Hastings the final destination, instead of York. The contract provided for the transportation for a specified sum to the city of York. The agent of the defendant at David City informed the plaintiff that the rate to Hastings would be the same as to York, so that by mutual consent the contract was modified and changed to make Hastings the final destination. As we view it, it is the same as if the contract had originally been made at Fremont to ship the potatoes to Hastings, with a stop-over privilege at David City. The law imposes upon the defendant the duty of transporting freight without unnecessary delay and to use due care to transport it safely. This duty and obligation imposed by law became and was a part of the contract. This court has held in the case of *Denman v. Chicago, B. & Q. R. Co.*, 52 Neb. 140, that an action for damages occasioned by delay in shipping freight may be grounded on the contract. The same would undoubtedly be true of an action to recover damages for negligent handling and caring for the merchandise while being transported. All of the damages sought to be recovered arise from the breach of the one contract, and constitute but separate items of one cause of action. We think the rule of law applicable to the case is set forth in Bliss, Code Pleading (2d ed.), sec. 118, as follows: "It is a rule that a cause of action—as, one springing from a single contract—cannot be so split as to authorize more than one action; and the same rule would make it improper to so divide a single cause of action, by separate statements in one complaint, as to show more than one cause of action. * * * 'All damages arising from a single wrong, though at different times, make but one cause of action; and all debts and demands already due

by the same contract make one entire cause of action.'" The rule is thus stated in Maxwell, Code Pleading, p. 256: "When the causes of action all grow out of and are a part of the same wrong, they are but separate items of damage, and not different causes of action. Thus, where sheep were sold upon the representation and warranty that they were sound, but were in fact all affected with the hoof-rot, but the plaintiff, relying upon the defendant's representations and warranty, turned the sheep so purchased into his field with a large number of other sheep, whereby they became diseased, and the pasture injured, it was held that there was but one cause of action, although there were a number of items of damage"—citing the case of *Wilcox v. McCoy,* 21 Ohio St. 655. The motion to separately state and number was properly overruled.

The second ground urged for a reversal of the case is that the rate agreed upon for the shipping of the car of potatoes was less than the regular rate charged to the public, and the contract was therefore, under the statutes of Nebraska, void, and no action for the breach thereof could be maintained. Section 10009, Ann. St., among other things, provides: "No railroad company within this state shall * * * directly or indirectly charge to or receive from any person or persons, or association or corporation any greater or less sum, compensation, or reward than is charged to or received from any other person or persons, association or corporation for like and contemporaneous service in the receiving, transporting, storing, delivering or handling of freights." Section 10010 provides that any railroad company, officer or agent wilfully violating any of the provisions of this act shall be liable to the party injured for all damages sustained, and also be liable to a severe penalty for the violation of the law. The defendant contends that section 10009 makes it unlawful for the railroad company to transport freight for a less sum than the regular rates charged to the public generally, and that any contract so to do is absolutely void. There are many eminent and respectable authorities that hold to this

doctrine and have so construed statutes very similar to our own. The doctrine is not without sound reason to support it. Upon the other hand, there are strong reasons to hold the railroad company to its contract as made. Our statutes do not require that the railroad company shall publish its tariff sheets, and, even if they did so, the classifications of freight are so numerous and complex that the ordinary and occasional shipper will be unable to ascertain the freight rate upon any commodity, except by applying to the company or its agents for information. If one contemplates a shipment of merchandise and applies to and receives from the railroad company information as to the rate, he then has his opportunity to elect whether he will ship or not. To say that a railroad company may, by mistake or inadvertence, quote a less rate than the usual or regular rate, and thereby induce a person to ship merchandise, and then to permit the railroad company, after the shipper has been placed in a position where he cannot retrace his steps, to collect the usual or greater rate, would be to cause the innocent to suffer injury for the negligent or wrongful act of the company, and to permit the company to profit by its own misconduct. If the railroad company, by negligence or mistake, may induce one to ship goods and merchandise by quoting him a less rate than the regular rate, and then collect the full rate, we see no reason why it might not wilfully and intentionally quote a lower rate for the purpose of securing the shipment, and then exact the regular rate. We do not think it is sound policy to permit the innocent to be thus lured to their injury and possible financial ruin by such methods. We think the rule is that, where, by mistake or inadvertence, the company has induced a person to ship goods by quoting a less rate than the regular rate, it should be held liable for the consequences. The object of the statute was to prevent discrimination. Under the law no penalty attaches to the railroad company unless the violation was wilful. The loss for the fault or mistake of the company should be visited upon it, and not upon the innocent party. The

view here expressed finds support in the case of *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293, *Illinois C. R. Co. v. Seitz*, 214 Ill. 350, and 2 Hutchinson, Carriers (3d ed.), sec. 594. In the latter authority, commenting on the last case cited, it is said: "This rule is at variance with the decisions under the interstate commerce act, but it is more in accordance with justice and reason, and does not make the state acts swords of offense against the shipper as is the interstate commerce act in that respect." In *Bayles v. Kansas P. R. Co.*, 13 Colo. 181, 22 Pac. 341, it was held, under a constitutional provision forbidding "undue or unreasonable discrimination" by railroad companies in freight charges, a contract by a railroad company to carry freight at a rate less than its published schedule is not void as being unjust discrimination and against public policy in the absence of evidence that such special rate is an exclusive privilege. We think it was the evident intention of the legislature, by the enactment of the statutes referred to, to prevent a railroad company from making unjust discriminations, and that it was not the legislative intent or purpose to permit a railroad company to quote a lower rate than the usual or regular rate, and thereby induce a person to ship freight, and then use the statute as an instrument to enable it to collect a greater rate. It was not the intention of the legislature to permit a railroad company, by its negligent and wrongful acts, to injure another to its own profit. We are of the opinion that the plaintiff, notwithstanding the statute, was entitled to recover the freight charges paid in excess of the contract rate.

Appellant contends that there was error in the admission of certain evidence as to the amount of damages sustained. The plaintiff was permitted to answer the following question: "Q. Now, taking all these matters into consideration, you may state what the difference in the value of the potatoes would be if they had arrived in Hastings in good condition. A. $250." It will not be contended that the admission of this evidence was not erroneous, but,

in view of the fact that counsel for the defendant had previously examined the plaintiff upon his competency to testify, and had brought forth from him the fact that from 130 to 150 bushels of potatoes were spoiled, and that their market value was $1.50 a bushel, which was not contradicted, and, in view of the fact that the total amount of recovery, including the excessive freight charges, was $59, it cannot be said that the admission of this evidence wrought any prejudice to the defendant.

Appellant also contends that there was no competent proof that the end doors of the car were closed by the defendant or its employees. The undisputed evidence shows that the doors were cleated open by the plaintiff before the car left David City, and that the doors were closed and fastened when he first saw the car in Hastings. During the interim the car had been in the control of the defendant and its employees, and it was responsible for the proper care of the car and care of the merchandise therein. We do not think other evidence upon this point was required of the plaintiff.

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

DUFFIE and EPPERSON, CC., concur.

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 26, 1908. *Affirmed on condition:*

1. **Carriers:** DISCRIMINATION: MISTAKE. Under section 10009, Ann. St., a contract between a railroad company and a shipper to transport merchandise for a less rate than that usually and regularly charged to others for similar and contemporaneous service is void, even though such rate was agreed to by mistake; and an action will not lie against the carrier for a breach of the contract, if it exacts the regular rate.

2. **Cases Disapproved.** The second paragraph of the syllabus in this case, *ante*, p. 132, overruled, and the holding in *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293, disapproved.

GOOD, C.

This is a rehearing of the case reported *ante,* p. 132. A statement of the facts will be found in the former opinion. The rehearing was sought and granted upon the propositions laid down in the second paragraph of the syllabus to that opinion. It was there held that section 10009, Ann. St., did not render void a contract between a railroad company and a shipper to transport merchandise for less than the usual and regular freight rate, where such rate has been agreed to by mistake of the company without intending any discrimination against other shippers. It was also held that, where such contract was made and freight transported pursuant thereto, if the railroad company compelled payment of freight charges in excess of the contract rate, such excess could be recovered by the shipper in an action for breach of the contract. Section 10009, Ann. St., so far as the same is material to a consideration of this case, is as follows: "No railroad company within this state shall * * * directly or indirectly charge to or receive from any person or persons, or association or corporation any greater or less sum, compensation, or reward than is charged to or received from any other person or persons, association or corporation for like and contemporaneous service in the receiving, transporting, storing, delivering or handling of freights." Section 10010, Ann. St., provides severe penalties for any railroad that shall violate any of the provisions of the act, and makes it liable to the party injured for all damages sustained. In the present case the rate was fixed by inadvertence and mistake at a less rate than the regular charges made to other persons and to the public for like and contemporaneous services. But the mistake was discovered by the railroad company before the charges were collected, and it then exacted the full regular rate before it would deliver the freight to the consignee. The action was to recover for a breach of the contract. In the former opinion it was held that, because

the contract was entered into by mistake, and because there was no intent or purpose to discriminate, the contract was not void as being in conflict with the provisions of the statute above quoted, and that the shipper in such an action could recover any excess of the contract rate which was collected by the railroad company.

It is a familiar rule of statutory construction that the court should consider the evil sought to be prevented, and ascertain and give effect to the legislative intent. There can be no doubt that the evil aimed at by this legislation was the unfair and unjust preference and advantage which accrued to favored shippers by rebates and freight rates lower than those given to other shippers. The purpose of this legislation was to put a stop to and make unlawful any discrimination in freight rates. The legislature evidently deemed it wise to prohibit any discrimination, and to say that all shippers shall be placed upon an absolute equality so far as freight rates are concerned. The statute provides that the railroad company shall not be permitted to *receive* from any person or persons a greater or less sum than is received from other persons. If the railroad company, after discovering the mistake, had received only the contract rate, which was less than the usual and regular rate charged to the public generally and to other persons for like and contemporaneous service, it would have done so knowingly and wilfully, and it would thereby have rendered itself liable to the penalties provided by section 10010, *supra*. This provision and the effect thereof were overlooked in the former opinion. The result of that holding would be to require the railroad company to wilfully violate the statute and render itself liable to the penalties therein provided.

The provisions of section 10009, above quoted, are very similar to the provisions of the second section of the interstate commerce act as it originally existed, and as amended by the Hepburn act of June, 1906. That section has frequently been before the federal and state courts

for interpretation. Construing that act, the supreme court of Kansas, in the case of *Chicago, R. I. & P. R. Co. v. Hubbell,* 54 Kan. 232, said: "The sole question to be considered in this case is whether the plaintiff, having obtained, through a mistake of a clerk of the St. Joseph, St. Louis & Santa Fe Company, a rate on shipments of coal $1 a ton below the customary rate, can enforce a contract giving him such special rate against the plaintiff in error, which received and transported the coal, and paid to the connecting company its charges without notice of any special agreement. * * * The claim of the plaintiff below rested solely on his special contract, and he now urges that he will be subjected to a financial loss by this operation if his special contract is not enforced. He also urges that, having been induced to make the shipment by the agent of the railroad company, if the rate quoted him was a mistake, the company rather than he should suffer for it. * * * We think the question as to whether or not the plaintiff knew of the existence of the joint tariff at the time he shipped the coal is wholly unimportant. There was an established rate governing all shipments. * * * Under the act of congress, all contracts discriminating either against or in favor of any shipper are unlawful, and the persons making such contracts on behalf of the corporation are liable to punishment. It was the plaintiff who was seeking to enforce the unlawful contract. * * * The contract, being in violation of the express provisions of the law, was utterly void between the immediate parties to it." In *St. Louis & S. F. R. Co. v. Ostrander,* 66 Ark. 567, 52 S. W. 435, it was held that, where a lower rate than the published rate was quoted by a railway company, the contract was illegal and could not bind the company whose agent made the rate, and that it is immaterial whether the rate was made knowingly or not. It was there intimated that, if any action at all existed, it was against the company for wrongfully misrepresenting the rate. In the case of *Savannah, F. & W. R. Co. v. Bundick,* 21 S. E. 995

(94 Ga. 775), it is said: "Inasmuch as the interstate commerce act prohibits not only contracting for, but also collecting, a less rate of freight on interstate shipments, * * * a common carrier * * * is not precluded from collecting from a shipper the full schedule rate because, by mistake, a less rate was named to him by the carrier at the point of shipment, and also inserted in a bill of lading signed both by the carrier and the shipper, no fraud or wilful deception having been practiced or attempted. On discovery of the mistake, after the shipment, but in time to correct it at the point of destination, it may there be corrected by the exaction of the full schedule rate." In this case the court further said: "It makes no difference whether Bundick was or was not ignorant that the rate named to him was an unlawful one. Under no circumstances would he be entitled to the benefit of a rate which was denied to other customers. To so hold would be in the very teeth of the statute, and would utterly defeat its purpose to prevent just such discrimination." Other cases announcing practically the same doctrine are the following: *Missouri, K. & T. R. Co. v. Bowles,* 1 Ind. Ter. 250, 40 S. W. 899; *Southern R. Co. v. Harrison,* 119 Ala. 539, 24 So. 552; *Houston & T. C. R. Co. v. Dumas,* 43 S. W. (Tex. Civ. App.) 609; *Bullard v. Northern P. R. Co.,* 10 Mont. 168; *Kizer v. Texarkana & Ft. S. R. Co.,* 66 Ark. 348, 50 S. W. 871; *Myar v. St. Louis S. W. R. Co.,* 71 Ark. 552, 76 S. W. 557; *Southern R. Co. v. Wilcox & De Jarnette,* 99 Va. 394, 39 S. E. 144; *Ward v. Missouri P. R. Co.,* 158 Mo. 226, 58 S. W. 28. The United States supreme court has also taken a similar view of the interstate commerce act, in the case of *Texas & P. R. Co. v. Mugg,* 202 U. S. 242. It was there held that a common carrier may exact the regular rate for an interstate shipment, although a lower rate was quoted by the carrier to the shipper, who shipped under the lower rate so quoted. This doctrine was reaffirmed in *Texas & P. R. Co. v. Abilene Cotton Oil Co.,* 204 U. S. 426, and *Texas & P. R. Co. v. Cisco Oil Mill,* 204 U. S. 449.

A contrary construction was placed upon the second section of the interstate commerce act by this court in the case of *Missouri P. R. Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293. The former holding in the instant case was largely induced by the construction placed upon the interstate commerce act in the case last mentioned, together with the fact that it seems abhorrent to one's sense of fairness and justice that a carrier should escape liability where it either negligently or wilfully quotes to a shipper, who is ignorant of the regular rate, a less rate, and thereby induces him to make a shipment that he would not otherwise make, and then exacts of the shipper the regular rate to his financial loss and possible ruin. The contract seems to be clearly one for a less rate than that usually and regularly charged to other persons for similar and contemporaneous service, and would be in direct violation of the statute. To hold otherwise would be to defeat the very object of the statute, which was to prevent the discriminations and preferences among shippers. After a careful consideration of the subject, we think the better view is that the contract, in so far as it sought to fix a rate less than the regular rate, was void. If the action in *Missouri P. R. Co. v. Crowell Lumber & Grain Co., supra,* was based upon a breach of a contract, as it appears to have been, it ought no longer to be followed as a precedent, and the second paragraph of the syllabus in this case, *ante,* p. 132, should be disapproved and overruled.

The recovery in this case included other items than the difference between the contract rate and the regular rate. This difference in rates, in this instance, amounted to $32.50, and that item is included in the judgment rendered for the plaintiff. To this extent the judgment is erroneous.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial, unless the appellee enters a remittitur of $32.50 within 30 days of the date hereof, and, if such remittitur

is entered within that time, the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that, if the plaintiff shall enter a remittitur of $32.50 in this court within 30 days, the judgment of the district court shall be affirmed, and that, if the plaintiff shall fail to enter such remittitur within 30 days, said judgment shall be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

W. IRVING FISHER ET AL., APPELLEES, V. OLIVER W. FISHER ET AL., APPELLANTS.

FILED NOVEMBER 21, 1907. No. 14,962.

1. **Wills:** DEVISE: CONDITION PRECEDENT. A devise in a will in the following language: "In case my said son Oliver shall keep, care for and support me during the remainder of my life, as a consideration therefor, I give, devise and bequeath to my said son Oliver the south half, * * * but if my said son shall fail to keep, care for and support me during all of the remainder of my life, said south half * * * shall become a part of the residue and remainder of my estate"—*held* to be a devise upon a condition precedent and requiring substantial performance to vest title in the devisee.

2. ———: CONSTRUCTION. A will should, if possible, be construed so as to give effect to each and every part thereof.

3. ———: WORDS OF LIMITATION. Unless a different intention is apparent, words of limitation in a devise will be given their usual and ordinary meaning.

4. ———: CONDITION PRECEDENT: WAIVER. As a general rule, waiver of performance of a condition precedent to the vesting of a devise must be shown either from the will or a codicil.

5. ———: ———: NONPERFORMANCE. Nonperformance of a condition

that must be performed during the life of the testator is not excused by devisee's ignorance of the condition.

6. **Evidence** examined, and *held* insufficient to show substantial performance of the conditions of the devise.

7. **Partition**: TRIAL. In an action of partition, where the defendant answers, claiming title in himself, and waives a jury and participates in a trial of all the issues to the court without objection, he will be held to have waived any right he may have had to have the title first determined.

8. ———: WILLS: JURISDICTION. The district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties to the land under the will.

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

W. P. Warner, E. R. Bevens and *Shull, Farnsworth & Sammis,* for appellants.

Wright, Call & Sargent and *John V. Pearson, contra.*

GOOD, C.

James Oscar Fisher, a resident of Dakota county, Nebraska, died testate, leaving him surviving seven children. This action was instituted by six of said children and their spouses against the remaining child and his spouse to partition 160 acres of land in said county disposed of by the will of said testator. There is no controversy, except as to one eighty-acre tract. The plaintiffs contend that the 80 acres in controversy were devised to all the children in equal shares under the tenth, or residuary, clause of the will. The defendant answered, and claimed the 80 acres in controversy in fee under the sixth clause of the will, wherein it was devised to the defendant Oliver W. Fisher upon certain conditions, performance of which was alleged by the defendants. Plaintiffs had judgment for partition, and the defendants appeal.

The controversy in this case largely hinges upon the interpretation to be given to the sixth paragraph of the will of James Oscar Fisher, and particularly to that

portion of said paragraph which relates to the 80 acres in controversy. The rule is general that in interpreting or construing a will the great object is to ascertain, if possible, the testator's meaning and intention, and, if lawful, to give effect thereto. In arriving at an understanding of the intention of the testator and the meaning of the language used in his will, it is the duty of the court to take into consideration all the facts and circumstances surrounding the testator at the time of the making of the will. In order, therefore, to get a clear understanding of the conclusions, which will hereafter be stated, we will first set forth the salient facts as disclosed by the record.

James Oscar Fisher was 74 years of age at the time of his death, on October 7, 1902. The will was made in September, 1900. Testator died possessed of 480 acres of land, and of personal property of the value of about $9,000. He had resided upon the land in Dakota county for a great many years previous to his death. His wife died in 1889. His family consisted of four daughters and three sons, Oliver being the youngest child, and 11 years of age at the death of his mother. The daughters in their turn, after the death of their mother, took charge of the household affairs of their father until they were all married. Then one of the married daughters with her husband occupied the home jointly with the father until a few months before his death, when the youngest son, Oliver, was married, and he and his wife made their home with his father, she having the management of the household affairs. The testator was a man of more than ordinary intelligence, and had been admitted to the bar. He was a man of robust health until the year 1898, when he suffered a stroke of paralysis, from which he was confined to his bed for a short time, and was thereafter afflicted with the disease called "creeping paralysis." From the effects of his illness he became slightly crippled, and somewhat enfeebled, and performed no active work after the year 1898. It appears that he had several slight "strokes" or attacks, from time to time, which temporarily disabled

him. After his first stroke of paralysis he was sensitive to the extremes of temperature. In cold weather he sometimes became chilled and benumbed, and his limbs required rubbing to restore the circulation. In hot weather he sometimes was so affected by the heat that he had to be assisted to a chair or other place of repose. In the main, however, his health was good, and he was able to go about alone; hitched up and unhitched his horse; frequently drove to Dakota City, and sometimes to Sioux City, apparently on an average of two or three times a week; frequently visited his friends in the neighborhood unaccompanied, and made trips by railway to visit his children; and at one time went to Hot Springs for treatment, staying several weeks and being unattended by any member of his family.

Oliver W. Fisher during all of his life had lived and made his home with his father, and, after the death of his mother, occupied the same room and slept with his father until May, 1902, when Oliver was married. He personally attended to the wants and needs of his father, particularly at night, rubbing his limbs when he became cold, assisting his father at times in changing his clothing, particularly his underclothing and shirts, and in lacing his shoes, and on a few occasions, for a day or two at a time, the father was unable to control the action of his bowels and kidneys, and Oliver attended to his needs and wants in that respect. Generally he hitched up the horse for his father and afforded him such care as would be expected from a dutiful son.

In September, 1900, while the father was ill and confined to his bed, he made a will, which was drawn by Judge Evans of Dakota City. Twelve days later he made another will, also drawn by Judge Evans, which was admitted to probate, and now requires interpretation in this action. By the provisions of this will he devised 80 acres to each of his three sons, and an additional 80 acres conditionally to Oliver. Another 80 was devised to two daughters jointly, and still another 80 to all his children

in equal shares. Substantial bequests were made to each of his children. The sixth clause of his will is in the following language: "Sixth, I give, devise and bequeath to my beloved son, Oliver W. Fisher, all my household furniture that shall remain after that portion thereof heretofore bequeathed to my said daughter Mary shall have been set aside and allotted to her. I also give, devise and bequeath to my said son Oliver my horse called 'Jim' and my mare called 'Coally' and the colt now running at her side; also the north half of the northeast quarter of section fourteen (14), township twenty-eight (28), of range eight (8) east, in Dakota county, state of Nebraska, and in case my said son Oliver shall keep, care for and support me during the remainder of my life, as a consideration therefor, I give, devise and bequeath to my said son Oliver the south half of the southeast quarter of section eleven (11), township twenty-eight (28) of range eight (8) east, in said Dakota county, but if my said son shall fail to keep, care for and support me during all of the remainder of my life, said south half of the southeast quarter of eleven (11) shall become a part of the residue and remainder of my estate and be disposed of as hereinafter provided, and my son shall have no claim against my estate for such care, keeping and support which shall not be fully paid for by the other portions of this bequest and devise." From this it will be observed that the south half of the southeast quarter of section eleven is devised to Oliver upon a condition that he should "keep, care for and support" the testator during the remainder of his life, and that, if Oliver should fail to "keep, care for and support" the testator during all the remainder of his life, then said tract of land should become a part of the residue of the estate, which was disposed of by the tenth clause of the will in equal shares to all his children. Under the sixth clause of the will Oliver was required to perform the conditions imposed during the lifetime of the testator. Performance was required before the vesting of the title. The devise was upon a condition precedent, and, unless there

was at least substantial performance of the conditions, no title to this eighty-acre tract ever vested in Oliver. *Burdis v. Burdis*, 70 Am. St. Rep. 825 (96 Va. 81), and note thereto; *Martin v. Ballou*, 13 Barb. (N. Y.) 122; *Mills v. Newberry*, 112 Ill. 123; note to *Nunnery v. Carter*, 78 Am. Dec. 231 (58 N. Car. 370); *Merrill v. Wisconsin Female College*, 74 Wis. 415.

Defendants contend that literal performance of the condition was never intended by the testator. In support of this contention they rely upon the fact that the testator never informed Oliver of the condition upon which the land was devised—and, in fact, it appears that none of the children had any knowledge of the contents of the will until after the death of their father—also, the fact that the testator, at the time of the making of the will, was possessed of ample property and had an income of about $1,200 to $1,500 annually, and that Oliver, at the time of the making of the will, was a single man, possessed of no property of any consequence. And it is urged that the testator had in mind, by the use of the words "keep, care for and support," such personal attention as Oliver had been accustomed to bestow upon his father at that time. Upon the other hand, we must consider that the testator was a man of more than ordinary intelligence, and had been admitted to the bar, and presumably had knowledge of the meaning that is usually attached to the words contained in the will; also, the fact that the will was redrafted, and that it was drawn by an able and experienced lawyer, and that it was drawn only 12 days after the making of a previous will, showing that the testator had used care and caution in drawing his will and was desirous of having it exactly according to his wishes. To construe the will as contended for by the defendants would be to deprive the words "keep" and "support" of any use or effect in the will. It would be practically changing the clause so as to read, "to care for," or "to take care of me." It is a cardinal principle in the interpretation of wills that effect should be given to each and every portion thereof, if

possible, and, if it can be so construed as to give effect to all the language of the testator, such interpretation should prevail. If any significance is to be attached to the fact that the testator never informed Oliver of the provisions of the will, and that he never made any demand or request of Oliver for actual keep or support, we think it tends to support the view that the testator did not desire fulfillment of the condition, but preferred to let the 80 acres in question go under the residuary clause of the will. We think it probable that, at the time he drew the will, being confined to his bed and being a man of intelligence and knowing the nature of the disease with which he was afflicted, he probably reasoned that he was likely to become a helpless invalid, unable to manage his property or direct his affairs, and possibly unable to keep and support himself. With that contingency in view, he may have made provisions as therein stated as a consideration for the care, keep and support, which he anticipated would be furnished by Oliver; but, recovering from his attack within a few days and finding that his health permitted his managing and directing his own affairs, he was content to support and keep himself and let the property go to all his children in equal shares. It is evident that during the two years after the making of the will he was fully aware of the conditions, and knew that Oliver was not literally fulfilling them, and that he never took any steps to change or alter the will, presumably because he was satisfied to have the conditions not fulfilled and the property go to all the children.

The defendants contend that there was substantial performance of the conditions, because Oliver cared for and attended to the personal wants of the father and furnished him such things in the way of support as the father requested. In that behalf it may be stated that, at the time the will was made, one of the testator's daughters and her husband were living with and keeping house for the testator; that testator was furnishing, or supplying, the necessaries for the table, the fuel, and his clothing; that

Oliver furnished no part thereof, unless it was some occasional article of no consequence; that Oliver and the hired man were paying board to his father, and continued to do so until Oliver was married; that after Oliver was married he and his wife kept house, and Oliver and his father shared the expenses in about equal proportions for maintaining the household, which consisted of the father, Oliver, his wife, and the hired man. It will be seen that, although the father was only one-fourth of the number of the household, he was paying one-half of the expenses. At no time did Oliver furnish any clothing, or raiment, for the father. He did on a few occasions purchase medicines for his father, and paid for the nurse during the last illness of the testator, which lasted 11 days. Under these circumstances, we think Oliver's attempts to prove performance of the conditions fall far short of showing a substantial performance, and wholly fail to comply with the requirements imposed by the father's will.

Defendants further contend that the testator had a right to, and did, waive performance. It is doubtless true that the testator had a right to waive a performance of the conditions, but the only way that the waiver can be shown is by the will itself. We are aware that, in some instances, waiver of the conditions precedent has been held to occur. *Clarke v. Berkeley,* 2 Vern. (Eng.) 719, was a case wherein the testator devised real estate in trust for the benefit of a daughter until her death or marriage, and in case she married with the consent of two of the trustees and her mother, then to convey unto her and her heirs, or to such person as she should appoint, but, if she died before marriage or married without such consent, then the trustees were to convey the lands to other uses. Subsequently to the making of the will the daughter, with her father's consent, married. After his death it was insisted that she could not take the property by the will, because the devise was upon a condition precedent that she should marry with the consent of the trustees and her mother, and that no such consent was had or could be had. It was

held that the marriage did not work a revocation of the devise, and that the conditions in the will that she should marry with the consent of the trustees and her mother were dispensed with by having the consent of the testator, which was more to be regarded than the consent of the trustees. In this case it is clear that the testator desired that his daughter should not contract an unfortunate marriage, and, anticipating that the marriage would not occur until after his death, he took steps to prevent an unfortunate marriage by requiring the consent of certain persons appointed by him. But, when he had the opportunity to, and did, exercise that supervision over the marriage of his daughter, he had accomplished all that could be accomplished through the agency of others. The object and the intention of his will had been complied with. Substantial compliance with the conditions had taken place previous to his death. But we cannot say, from anything that is in the will in the case at bar, that there was any intention or purpose of the testator to waive compliance with the conditions. As was well said in the case of *Bryan v. Bigelow*, 77 Conn. 604, 107 Am. St. Rep. 64: "The intent must in every case be drawn from the will, but never the will from the intent. 'So far as concerns the construction of a will, the question always is, not what the testator meant to say, but what is meant by what he did say.' "—citing *Weed v. Scofield*, 73 Conn. 670.

Defendants contend that Oliver's ignorance of the provisions of the will excuses nonperformance. It is admitted that the general rule is that ignorance of a condition precedent in a will does not excuse its nonperformance, but defendants contend that this has no application to an heir of a testator, who is devisee of an estate upon condition. This doctrine has sometimes been given effect to prevent an heir from being deprived of any part of his inheritance. In this case it will be observed that the testator had already provided for Oliver by an unconditional devise of 80 acres, and, in fact, the evidence discloses that the value of the property devised unconditionally to Oliver

was greater than that devised to any of the other children. We think the general weight of authority is to the effect that nonperformance of a condition precedent, or a condition that must be performed during the life of the testator, is not excused by ignorance of it. In the case of *Brennan v. Brennan,* 185 Mass. 560, the clause in the will construed was: "All the rest, residue and remainder of my property, both real, personal and mixed, I give, devise and bequeath to Francis J. Brennan to him and his heirs forever, provided that he shall take care of me and look after me while I live." The court held this to be a condition precedent, and that no estate vested in the devisee because he had not complied with the condition. The fact that he had no knowledge of the conditions until after the death of the testator was held not to change the rule. We reach the conclusion, therefore, that the 80 acres in controversy were devised upon a condition precedent which was never performed, and that no title ever vested in Oliver, and that the eighty-acre tract was therefore disposed of under the tenth, or residuary, clause of the will, by which it was bestowed in equal shares upon all the children of the testator.

Defendants further contend that the district court had no jurisdiction to hear and adjudicate the matters here in controversy, claiming that the action of partition will not lie by one out of possession against one in possession claiming title to the land. It is sufficient answer to say that neither the pleadings nor the evidence show that the defendants were in possession, and it is rather inferable that the possession of the premises was in the executors of the will. But whether or not they were in or out of possession, we think, makes no difference under the circumstances. Whatever right defendants might have had to have the right of title tried first was waived by the defendants asking for affirmative relief from the court, waiving a jury, and participating without objection in a trial of all the issues to the court. *Schimpf v. Rhodewald,* 62 Neb. 105; *Schick v. Whitcomb,* 68 Neb. 784.

The defendants next contend that the county court had original jurisdiction to hear and determine the questions at issue, and that the district court was without jurisdiction, except on appeal. In support of this contention they rely upon *Boales v. Ferguson*, 55 Neb. 565, *Reischick v. Rieger*, 68 Neb. 348, and *Youngson v. Bond*, 69 Neb. 356. We think a careful reading of these cases does not justify the inference drawn by the defendants. It is the rule, doubtless, that the county court has jurisdiction in an action by the executor to construe a will for the purpose of affording information to the executor for the administration of the estate, but the principal action here is to partition the land. The construction of the will is only incidental to the main relief sought. It is quite clear that the county court could not have jurisdiction in an action to partition the land, and, we think, it is likewise clear that it would not have jurisdiction of an action for the construction of a will between two or more heirs or devisees claiming title to the same tract of land. In *Youngson v. Bond, supra*, the commissioner writing the opinion quotes with approval from the case of *Branson v. Studabaker*, 133 Ind. 147, as follows: "As effective a practical test as can be found is supplied by the answer to the question: Is the effect of the judgment appealed from such as to divest one of the parties of title, or to invest one of them with title?" It cannot be gainsaid that the effect of the judgment construing the clause of the will in controversy is to determine that the defendants do not have absolute title to the land, but that all of the children of the testator owned the land in equal shares. We think it is clear that the county court did not have jurisdiction to construe the will as between the plaintiffs and the defendants for the purpose of determining the title to the land in controversy.

It follows that the judgment of the district court is right and should be affirmed, which we accordingly recommend.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

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

FILED NOVEMBER 21, 1907. No. 14,980.

1. **Schools and School Districts:** CHANGE OF SCHOOL SITE. Where the electors of a school district, in a motion to authorize a change in the schoolhouse site, designate the new location as the southeast corner of the northeast quarter of section 22, the failure to state the township and range in which the section is located does not render the location of the proposed site uncertain, when there is but one section numbered 22 in the school district.

2. ———: ———: Under sections 11036 and 11038, Ann. St., a school district may authorize the removal of the schoolhouse to a new site previous to the acquisition of the title to the proposed new site, and may thereafter, at a special meeting, authorize the acquisition of the title to the proposed site, but will have no right to remove the schoolhouse to the new site until the district has acquired title thereto.

3. ———: ———: PRESUMPTIONS. Where the electors of a school district by a motion authorize the acquisition of a new site for the schoolhouse, and in the description the site is located in the southeast corner of the northeast quarter of section 22, township 22, range 5, and it appears that the section described would be without the district, and that there is but one section 22 within the district, it will be conclusively presumed that the location referred to was on the section 22 within the school district.

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

Fred H. Free, for appellant.

O. A. Williams, contra.

GOOD, C.

The appellant instituted this action in the district court against School District No. 66 of Antelope county and its

officers to enjoin them from removing the schoolhouse in said district to another site therein, and, from a judgment of dismissal, appeals to this court.

At its regular annual meeting, held on June 26, 1905, the following motion was carried by more than a two-thirds vote: "Moved and carried to move the site of the schoolhouse to the southeast corner of the northeast quarter of section 22." It will be observed that no township or range is mentioned. It is conceded that the district is composed of the south half of sections 13, 14 and 15, all of sections 22, 23 and 24, and the north half of sections 25, 26 and 27, in township 27, range 5. It will be further observed that there is but one section 22 within the district. It is conceded that at the time of this annual meeting the school district had not acquired a site in section 22, and that the officers of the district were not at that meeting authorized to procure a site. The appellant contends that the designation of the location was too indefinite, because it did not fix the township and range, and that the district had no authority to move the schoolhouse to section 22, because it had procured no site in that section on which to place the schoolhouse. As there was but one section 22 in the school district, we think it cannot be consistently urged that the location was not sufficiently definite. It is not to be presumed that the district would contemplate locating the schoolhouse outside of its boundaries, and, as there was but one location in the district that would correspond with that designated in the motion, it is evident that the location intended was the southeast corner of the northeast quarter of section 22, of township 27, range 5 west. The fact that the district had not acquired a site would, under the rule laid down in *Ladd v. School District*, 70 Neb. 438, be an insuperable barrier to the right of removal, were it not for the subsequent occurrences.

This action was instituted two days after the annual meeting. Five days thereafter the officers of the defendant district received and accepted a warranty deed to one acre

of ground in the southeast corner of the northeast quarter of said section 22 from the then owner. The consideration recited in the deed was $1, but, in fact, no consideration was paid therefor, the owner conveying the one acre to the district as a gift. This action of the district in so acquiring title to the one acre in question was set up by the defendants in their answer. In May of 1906, and while the action was pending in the district court, a special meeting of the electors of said district was called, at which the following motion was carried: "Moved and seconded that the school board of this district, School District No. 66, be authorized and directed to purchase or procure by gift or otherwise title to one acre at the S. E. corner of the N. E. quarter of section 22, Tp. 22, R. 5, in Antelope county, and if the same cannot be obtained by consent of the owner, to proceed to condemn the same for school purposes, and that when the title shall be so obtained, to proceed and move the schoolhouse to said place and properly place and locate the same thereon." Within a few days after this meeting a new deed was procured from the owner to an acre of land in the southeast corner of the northeast quarter of section 22, township 27, range 5, and the consideration of $5 paid therefor. These facts were set up in a supplemental answer filed by leave of court.

The plaintiff contends that the district did not acquire any title by the first deed, because the voters of the district had not previously directed the purchase of the site, and that, under the holding in *Ladd v. School District, supra*, the action of the officers in accepting said deed did not operate to vest any title in the district. That case was decided upon section 11038, Ann. St. It is in the following language: "The said qualified voters shall also have power at any annual or special meeting, to direct the purchasing or leasing of any appropriate site, and the building, hiring, or purchasing of a schoolhouse, and the amount necessary to be expended the succeeding year, and to vote a tax on the property of the district for the payment of

the same." We are of the opinion that one of the objects of this section was to require the officers of a school district to first procure the assent of the voters before using the money of the district with which to purchase a schoolhouse site. It is doubtless true that, technically speaking, a conveyance by deed as a gift comes within the term purchase. We think the intention of the statute was to prevent the expenditure of the school district's funds, except upon the authority of the voters. But we do not think it was the intention of the legislature to prevent the acquisition of title to a schoolhouse site, to which two-thirds and more of the voters of the district had properly directed the change at their annual meeting, when the same could be acquired without the expenditure of any of the school district's funds. The voters had already directed the removal of the schoolhouse to the particular site, and had properly and lawfully indicated their wish to have the schoolhouse located at that particular place. We think it would be idle and foolish to hold that the officers of the district had not power to accept a donation that was for the benefit of the district, and to accept the site and title thereto, when the same was tendered free of cost to the district. Still, if it should be held that the officers of the district were without authority to accept the deed and title when they were tendered as a donation, the subsequent action taken in May, 1906, was sufficient to vest the title in the district.

It will be observed by reading the motion passed at the special meeting held in May, 1906, that the description locates the section in township 22, instead of in township 27. That would be 30 miles south of the point where it was desired to locate the schoolhouse, and not only outside of the district, but outside of Antelope county. In other words, it would be an impossible description. As was observed above, there was only one section 22 within the district, and it cannot be presumed that the voters had in mind a location outside of their district, or outside of their county. Nor can it be seriously urged that any

one would be misled as to the location intended. We think all of the description coming after the words "section 22" in the motion might be wholly disregarded as surplusage. It cannot be doubted that the giving of township 22, instead of township 27, was a clerical error, and should be disregarded. The action at the special meeting held in May, 1906, was sufficient to authorize the purchase of the site in question.

Appellant contends, however, that the action in May, 1906, was insufficient to authorize the removal of the schoolhouse to a new site, because such authority could only be given at the annual meeting and must be by a two-thirds vote, while the record shows that the motion only prevailed by a majority vote. We agree with the appellant upon both of these propositions.

Appellant further contends, as above stated, that the action of the school board at its annual meeting in 1905 to change the site of the schoolhouse was void, because a site had not been previously obtained. In this contention we cannot agree. The statute does not require that the site should be first procured before a change of the site is authorized. The holdings of this court do require the acquisition of a site prior to the actual removal. We think it would be illogical to hold that the district should first procure the site before authorizing the removal of the schoolhouse to it. The purchase of a site may be authorized upon a majority vote. Suppose that a majority vote authorized the purchase of a site, then it would require a two-thirds vote to authorize the change. We think it more logical to authorize the change by a two-thirds vote and thereafter to acquire the title to the proposed site by a majority vote.

In our view of the case, the action of the school district at the annual meeting in 1905 was sufficient to authorize the change in site, and that, as soon as the title was acquired to the proposed site, the removal of the schoolhouse thereto was authorized.

It follows that the judgment of the district court is right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

JOHN WEINANDT V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1907. No. 15,260.

1. **Intoxicating Liquors:** TRIAL: EVIDENCE. In a prosecution under section 20, ch. 50, Comp. St. 1905, for unlawfully keeping intoxicating liquors with the intent to sell the same without a license, it is prejudicial error to permit the introduction in evidence, over objection, of the search warrant under which the premises of the defendant were searched and the liquors seized. *Nelson v. State*, 53 Neb. 790, followed and approved.

2. ———: ———: ———. In a prosecution under said section, it is not error to admit evidence showing the keeping of other liquors in addition to those charged; nor is it error for the jury to taste of the liquors taken from the defendant's premises under the search warrant.

3. **Instructions** numbered 6, 7 and 8, examined, and disapproved.

ERROR to the district court for Cedar county: ANSON A. WELCH, JUDGE. *Reversed.*

C. B. Willey and *Millard & Sidner*, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

GOOD, C.

Plaintiff in error was prosecuted and convicted for the unlawful keeping of intoxicating liquors with intent to sell the same without license, in violation of section 20,

ch. 50, Comp. St. 1905, and brings the case to this court on error.

Plaintiff in error had formerly been a licensed saloonkeeper in the village of Randolph, in Cedar county, Nebraska. After the expiration of his license he continued in his place of business, selling certain liquors under the names of "Cream of Malt" and "Malt Extract." The information charged that "certain intoxicating liquors, to wit, Malt Extract, Cream of Malt, and Hop Soda, were unlawfully owned and kept * * * with the intention of selling and disposing of the same without license or permit, that said intoxicating liquors above described were intended to be and were then and there being by and under the direction of the said John Weinandt unlawfully kept and sold without any license or permit so to do." The evidence disclosed that the plaintiff in error was in the possession of a considerable quantity of bottled liquors that were labeled "Cream of Malt," "Extract of Malt," and "Western Brew Beer." The uncontradicted testimony discloses that the plaintiff in error was keeping for sale and was selling the liquors known as "Cream of Malt" and "Malt Extract." There was no evidence that he had sold any of the liquor denominated "Western Brew Beer." Plaintiff in error sought to justify his possession of this liquor by showing that he had not ordered it, but had ordered Cream of Malt, and by mistake two barrels of Western Brew Beer had been sent to him in place of Cream of Malt, and that, when he opened the barrels and ascertained that they did not contain Cream of Malt, he did not sell any, and closed up the barrels with the intention of returning the same, and that the barrels had been in his possession only a few days when his premises were searched by the officers and the liquors seized. Upon the trial, the evidence as to the intoxicating character of the Cream of Malt and Malt Extract was conflicting. The evidence of the state tended to show that all of the liquors were, in fact, beers of the lighter sort, and that they contained between 2 and 3 per cent. of alcohol. The evidence

on the part of the defendant tended to show that they were nonintoxicating malt liquors. The trial court received in evidence, over the objections of the defendant, the search warrant under which the liquors were seized, and the officer's return thereon. The following is a copy of the warrant and the return:

"State of Nebraska, Cedar County; To the Sheriff or any Constable of said County, Greeting: Whereas, before me, C. H. Whitney, county judge within and for said county of Cedar, complaint has been made in writing, signed and sworn to by Benjamin F. Smith, Jr., and filed according to law, that John Weinandt of said county within thirty days last past on lot twelve in block ten in the city of Randolph, in the county of Cedar, in said state of Nebraska, then and there unlawfully sold intoxicating liquors without license or druggists' permit, and that the said John Weinandt is keeping intoxicating liquors in said premises with intent to unlawfully sell the same, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the people of the state of Nebraska; these are therefore to command you to seize the intoxicating liquors found upon the premises above described and bring the same into court, and forthwith to take the said John Weinandt, if he be found in your county; or, if he shall have fled, that you pursue after the said John Weinandt into any other county within the state, and take and safely keep the said John Weinandt so that you bring his body forthwith before me, or some other magistrate having cognizance of the case of said offense so committed, to answer said complaint and be further dealt with according to law. Given under my hand and official seal, this 10th day of November, A. D. 1906. (Seal.) C. H. Whitney, County Judge."

"State of Nebraska, County of Cedar; ss. November 12, 1906, I made diligent search for the goods and chattels described in the within warrant, at the place mentioned therein, and have found the following: Four barrels of Cream of Malt, Malt Extract, and a few bottles labeled

'Beer.' At the same time I arrested the said John Weinandt, and now have said goods and chattels and also the body of the said John Weinandt before the court within named. J. F. Rosenberger, Sheriff."

The admission of this evidence is assigned as error. The state contends that the admission of this evidence was not prejudicially erroneous, and that a jury of intelligent men would not be misled by the reading to them of the charge set forth in the warrant, and would distinguish between the charge and the proof of the commission of the acts charged. Ordinarily this might be the case, but here we have the trial court admitting in evidence the warrant over the objections of the defendant, and thereby saying to the jury that it is entitled to the probative force of evidence, and that they are entitled to consider it as evidence upon the questions in issue. No reason is given, nor is any apparent, for offering the warrant in evidence. By this warrant the jury were informed that one Benjamin F. Smith, Jr., had made oath that the defendant had, within the last 30 days, unlawfully sold intoxicating liquors without a license, and was then keeping intoxicating liquors in his place of business with the intention to unlawfully sell them. The jury were permitted to consider that evidence, and there is no way of ascertaining the weight that was given it, nor to what extent it influenced the jury in determining that the liquors, which the defendant had sold and was keeping for sale, were intoxicating. This was a material, controverted question in the case, and, as we view it, this evidence was admitted without any justification or excuse. It was calculated to prejudice the rights of the defendant, and we cannot presume that it did not.

The same question was before this court in the case of *Nelson v. State,* 53 Neb. 790. The court there held that the admission of the warrant in evidence was prejudicially erroneous. The state seeks to distinguish that case from this, because it was stated in the opinion in that case that the warrant was issued in an independent proceeding.

But an examination of the case leads us to the belief that it was the warrant under which the liquors were seized, and in all respects similar to the case at bar. The state seeks to avoid the effect of this case on the ground that the sheriff, who made the return, was a witness and fully testified to the facts, and that they did not differ from the facts set forth in the return; while in the case of *Nelson v. State, supra,* it was stated that the officer, by whom the return was made, was examined and cross-examined as a witness in that case, and that his testimony had much less of positiveness than did his return. We do not think this is sufficient to distinguish the cases, nor to change the rule laid down. The principal vice was in the fact that it informed the jury that the complainant had sworn positively to the facts that were set forth in the complaint and copied into the warrant, and that this was competent evidence for them to consider upon the issues involved. This error alone is sufficient to justify a reversal of the judgment, but there are other errors assigned that are likely to occur on a retrial, which we will consider.

The defendant complains because evidence of the keeping of Western Brew Beer was admitted in evidence, and because samples of this liquor, together with samples of other liquors than those alleged in the information, were offered in evidence, and the jury were permitted to taste samples thereof. Where the evidence shows the liquors were all substantially the same kind, although being sold under different names, and that, as in this case, all the liquors which were being sold belonged to the class of beer, it was not error to admit evidence of the keeping of other liquors of the same kind, although they bore different names. We think it would have been the same if the information had charged the defendant with the keeping of beer. Notwithstanding the liquors bore other names, yet, if they were in fact beer, the evidence concerning them was rightly received. When the evidence discloses that the defendant was in possession of the identical liquors charged, with intent to sell them, the admission of evi-

dence showing that he kept other liquors than those charged is permissible. *Feddern v. State,* 79 Neb. 651. It has been frequently held not improper for the jury to examine the liquors and to taste thereof. *Schulenberg v. State,* 79 Neb. 65. While the court would have no authority to direct or compel the jury to taste or sample the liquors, it was not error to permit them to taste thereof if they so chose.

Complaint is made of the giving of instructions numbered 6, 7 and 8. We think each of these instructions was erroneously given. It is not necessary to set out the instructions in full. It is sufficient to say that the vice contained in each is that it did not limit the right to a conviction to the keeping of the liquors charged in the information, but informed the jury that the keeping of intoxicating liquors with the intention of disposing of the same without a license, without limiting the same to the liquors described in the information, was sufficient. The court by its instructions should have limited the jury to a determination of the questions as to whether or not the liquors described in the information were intoxicating, and as to whether or not the defendant had kept the same with the intent to sell them without a license. It is a well-recognized principle that proof of unlawful sales of whiskey will not sustain a charge of unlawful sale of beer, or the reverse. The section of the statute under which this action was prosecuted seems to require that the liquors be described as nearly as may be, and if the defendant is charged with the keeping of beer, or the keeping of other intoxicating liquor under other names, such as Cream of Malt or Malt Extract, which are in fact beer, the charge is not sustained by the proof of keeping other and different kinds of intoxicating liquors. The instructions complained of are all subject to this vice, and should not be given upon a retrial. The jury should be informed that their verdict must be based upon the keeping by the defendant with intent to sell the liquors described in the information.

For the reasons given, we recommend that the judgment

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

DUFFIE 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 a new trial.

REVERSED.

IDA E. MILLER, APPELLANT, V. JOHN M. BRADFORD, APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,978.

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

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

Starr & Reeder, for appellant.

W. S. Morlan, contra.

FAWCETT, C.

This is an appeal from a decree of the district court for Red Willow county, denying appellant's prayer for a reconveyance of certain lots in West McCook, and granting appellee's prayer for a decree quieting his title thereto. The only errors assigned by appellant are: "The judgment of the lower court is not sustained by the evidence. The deed from plaintiff to defendant was procured by fraud and was without any consideration whatever." The last two clauses being covered by the first, the only question for consideration is: Does the evidence sustain the findings and judgment of the court? The substance of plaintiff's contention is that she was the owner of a home con-

sisting of some deeded lots in West McCook; that defendant came to her and represented that he owned a section of land in Dundy county for which he could give a clear deed, and proposed to trade it to her for her McCook property; that she sent her husband with defendant to examine the Dundy county land; that defendant showed her husband a lot of good valley land which did not belong to him, and by such fraudulent conduct induced him to give his approval to the trade; that plaintiff and her husband did not know until after they had delivered their deed to defendant that defendant could not give them a deed to the Dundy county land, but could only give a relinquishment of the same; that immediately after receiving the relinquishment and discovering the true character of the paper, the husband demanded a return of the deed, which was refused; that, without plaintiff's knowledge, her husband filed defendant's relinquishment of the Dundy county land and entered the same in his own name; that plaintiff never received any consideration whatever for her McCook property; that her husband was illiterate and could not even read his own name; that they relied implicitly upon the representations made by defendant, and executed and delivered to him a deed to their McCook property; that the said representations of defendant were false and fraudulent, as defendant well knew, and were made for the purpose of cheating and defrauding plaintiff out of her home in McCook, of the value of about $1,000.

Defendant denies all allegations of fraud, and says that plaintiff and her husband knew all about the fact that he simply held the Dundy county land as a homestead entry under the Kinkaid act; that his Dundy county relinquishment was worth from $1,200 to $1,500; that the improvements on the land alone were worth from $300 to $350; that plaintiff's husband, prior to the execution of plaintiff's deed, was advised as to just what he would have to do with defendant's relinquishment in order to secure the land as a homestead; that the trade was made in good faith; that he had relinquished his homestead entry; that

plaintiff's husband had entered the lands, and that plaintiff and her husband took and still hold possession of the same.

After carefully reading every word of the evidence, we are unable to concur in appellant's view of it. To our minds it not only sustains the findings and judgment of the trial court, but so strongly negatives every contention of plaintiff, and sustains those of defendant, that a decree for plaintiff based thereon could not have been sustained.

Plaintiff contends that her husband was an illiterate man, who could not read or write. An examination of his signature to exhibit 9—the deed to the McCook property—which the witness Berry testifies he signed himself, shows that he not only can write, but that he writes an unusually good hand for a laboring man. In addition to this, his examination on both direct and cross-examination shows him to be a man of at least ordinary intelligence. Plaintiff and her husband were both upon the witness stand on the trial of the case, and the estimate placed upon their intelligence by the district court would be much better and more reliable than any opinion we might form from the reading of the record. Plaintiff's contention that neither she nor her husband knew that defendant did not own the Dundy county land, and could not make a deed thereto, is completely negatived by her own testimony and that of her husband. On page 2, while testifying as to her first interview with the defendant, she says: "I met him on the street, the first time I ever met him, he came up to me and said: 'I see you want to sell your house. Don't you want to trade it for a homestead?' " On page 22 plaintiff's husband in testifying says: "They was talking together. I didn't pay much attention to it, only the woman told me a man was up here and looked at the place, and he wants to give her a homestead for her place, and she wanted me to go up and look at it. I say: 'All right, I can go up and look at it.' " From this testimony of plaintiff and her husband, it will be seen that at the very beginning of negotiations defendant advised them that all he had to

trade was a homestead. On page 54, defendant testifies: "I told her I had a homestead filing in Dundy county, and that I would trade them my right for their house, and make a relinquishment, if they thought that would suit them. I asked if Mr. Miller had a homestead right, and she said he had. She said: 'A homestead is what Paul has been wanting for quite a while.' She said: 'He tried to get one when the new law came in, but could not get one.'" On page 55 he says: "She thought it would be just what he would want, and to go down and talk it over with him, and whatever he did would be all right with her." Then, in testifying as to the conversation with the husband, defendant says: "I told him I had a homestead I would like to trade for his house. I asked him if he had his homestead right yet, and he said he had, and I asked him if he wanted to file on a piece of land, and he said he would. That that is what he had been wanting to do for a year." Again, in testifying, on page 55, as to the conversation which he had with plaintiff and her husband together, defendant says: "I said: 'Do you understand the law? You have to live on it five years under this Kinkaid law before you can prove up and get a deed. It is not like the old law.' They said: 'Yes.' They understood that you had to live on it—that you couldn't commute under this law." The witness Green, apparently a perfectly disinterested witness, owned land adjoining the Dundy county land. When defendant and plaintiff's husband went to examine the land, they drove by Green's place, and invited Green to get in the buggy and ride over with them. Green corroborates defendant's testimony that defendant showed plaintiff's husband the right land. Green was an old acquaintance of plaintiff and her husband. After they had ridden over the land, Green and plaintiff's husband had a conversation, and, on page 45, Green says: "I said: 'Paul, you know that Bradford can't sell you this land. All he can sell you is the improvements.' And I said: 'He will relinquish.' And I said: 'You want to be there as soon as he relinquishes, because

anybody else has a right, and whoever comes along can file.' And he said: 'How much does it cost?' And I said: '$14.' We drove a short ways farther, and I asked him: 'Have you got your naturalization papers?' And he said: 'No, I left them at McCook.' I said: 'You will have to have them.' Then I repeated what I said before in regard to Bradford not being able to sell the land." The witness Hines, who examined the abstract for defendant when plaintiff's husband returned to Benkelman with the deed, testifies, on page 70: "I took the abstract and examined it, and I thought the title was straight except $53 taxes that were unsatisfied—unpaid—and Mr. Miller spoke up at that time and said: 'I have decided to trade our property for the relinquishment of your homestead, provided you pay the taxes.'" Mr. Hines prepared the relinquishment and took defendant's acknowledgment of it. Then defendant and Miller went to the office of Mr. Rickard, the county clerk, and requested him to fill out the necessary blanks for Miller to file upon the lands, so that they could send the filing to the government land office, with defendant's relinquishment, and thus prevent any other man from getting in ahead of him. The county clerk prepared the papers, and, on page 68, says: "I asked him if he was a native born citizen, and he said he was not. Then I asked him for his naturalization papers, or a copy of them. He said he didn't have them with him; that he would have to wait until he got back to McCook." On page 69 this question was asked Mr. Rickard, and this answer given: "Q. When in your presence at that time was there any talk had in regard to the homestead and how long he would have to live on it, or anything of that kind? A. He said that all he regretted about it was that he would have to live on it five years before he could get a deed to it." On page 81 Mr. Green, on being recalled, testifies to a conversation with plaintiff one evening in the latter part of July, which would be a month after the transaction complained of had taken place. He says: "She asked me how my wife liked it out there, and I told her it was pretty

lonesome for her, and she said: 'When I go up there I can visit her.'" Defendant also testifies, on page 61, that about a week after the making of the deal for the land plaintiff's husband came to him to buy a horse, and that at that interview nothing was said by Mr. Miller in regard to being dissatisfied with the trade. On page 42, plaintiff was recalled by the court, by whom she was interrogated, and testifies that after the trade the defendant lived in McCook; that the first time she ever spoke to defendant about the trade and made any complaint was, as near as she could remember, some time in August, when defendant brought a man up there to sell the place, when she offered to make a settlement with him, "and he wouldn't take it"; and that she never spoke to him about it after that. Defendant Bradford fixed the time of that interview as late as the month of October. But, even if plaintiff is right about the time, it shows that she lived in the same town with the defendant for almost two months after the making of the trade without ever making any complaint to him. She waited until defendant came to show the place to a prospective purchaser, and even then she does not say that she claimed that he had defrauded her, but simply says that she "offered to make a settlement with him, and he wouldn't take it," and that she never spoke to him about it after that. It is incredible that she would so tamely submit to such a fraud as she says was perpetrated upon her. She says she never has gone upon the land, but the evidence shows that her husband took possession of the land, cut the hay upon it, and has had possession of it, together with all of the improvements made by defendant, ever since the time of the trade. All of the testimony by defendant and his witnesses stands in the record without any attempt at contradiction. In the face of such a record, it is idle to claim that plaintiff executed her deed to defendant on the strength of representations by defendant that he could and would give her a deed to his lands. All of the parties fully understood just what they were doing, and the fact that plaintiff may have subsequently con-

cluded that she had made a bad bargain is not sufficient to entitle her to relief by a court of equity. While a court of equity will at all times lend its aid to the prevention of fraud, it will not permit parties to use it as the means of getting behind transactions entered into with their eyes open, simply because they would like to undo what they have done.

Aside from all this, the record does not disclose that plaintiff was overreached in her trade with defendant. She does not claim that her McCook property was worth more than $1,000, while the uncontradicted testimony of the defendant and the witnesses Green and Hines establishes the fact that the improvements upon the Dundy county land were worth in the neighborhood of $300, and that a relinquishment of the lands, including the improvements, was worth, at a fair estimate, at least $1,200. In addition to this, the testimony of Bradford and Hines shows that defendant was compelled to pay $53 back taxes upon the McCook property.

There is no merit in the contention that, because her husband entered the lands in his name, therefore she received no consideration for the McCook property. The property in McCook was the homestead of herself and husband, the title being in her. If she saw fit to exchange that for another homestead, the title to which must, under the homestead laws, be taken in the name of her husband, and her husband obtained that homestead, and the party with whom they were dealing parted with his right thereto, she cannot now be heard to say that she has received no consideration for the homestead with which she parted.

We deem further comment unnecessary. The findings and judgment of the trial court are clearly right, and we recommend that the judgment be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

FRANK BENDEKOVICH, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,916.

Carriers: NEGLIGENCE: QUESTION FOR JURY. In the circumstances of this case, the question of whether a passenger was guilty of negligence in going from the platform to the step of a moving street car with the intention of alighting therefrom is a question of fact for the jury, and not one of law for the court.

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

T. J. Mahoney and *T. J. Nolan,* for appellant.

John L. Webster and *W. J. Connell, contra.*

AMES, C.

This is an appeal from a judgment for the defendant in an action to recover damages for a personal injury. There is no conflict of evidence, and for the sake of convenience the following statement of facts is copied from the brief of the appellee: "The plaintiff at the time of the accident in question was 18 years of age. He is a native of Austria, and had been in this country for only two months. About 10 o'clock on the evening of December 7, 1903, he boarded one of the defendant's south bound trains at the corner of Sixteenth and Williams streets in the city of Omaha. The train consisted of two cars, a motor and a trailer. Plaintiff boarded the first or motor car, and stood on the east or left-hand side of the rear platform thereof until he reached J street in South Omaha. At that point the street car tracks run north and south on Twenty-Fourth street, and J street intersects Twenty-Fourth street. Plaintiff testified that shortly after he had boarded the train he paid his fare to the conductor, and told him that he wanted to get off at J street, and that the conductor nodded his head; that about four blocks north from J street he again

told the conductor, and received the same sign from him; and that the same thing occurred again about half a block before reaching J street; that there is a church on the northeast corner of Twenty-Fourth and J streets, and, when the car was right across from the church, he walked toward the west and stepped down upon the step of the car, taking hold with both hands of the handhold in front of him, the one attached to the rear of the body of the car. Plaintiff further testified that the car did not stop at J street, but went by fast; that he wanted to move back onto the platform of the car, but could not, but the reason why he could not is not given; that the car went fast all the time; that he got scared so badly he fell down—fell down on the street. The only other witness who testified in regard to the happening of the accident was Henry Kochelek. Mr. Kochelek testified that he was a passenger on the same train, and that he sat in the trailer car, on the west or right-hand side thereof, and within about two feet of the front end; that the conductor stood on the front platform of the trailer with his hand upon the brake; that he (witness) saw plaintiff standing on the rear platform of the first car; that as the car was pretty near hitting J street he saw plaintiff motion to the conductor and start to walk off, and he noticed 'the jar, or something.' This 'jar or something' occurred while the plaintiff was still upon the platform of the car. Kochelek stated that he didn't know what followed after plaintiff struck the step; that he couldn't say how plaintiff got down the step, because he paid no attention; that as plaintiff moved west on the platform the car was going a pretty good gait, kind of jarring. Mr. Kochelek did not see the plaintiff fall, his attention being first attracted to the accident by the conductor ringing the bell and looking out on the side. The car stopped on the north side of K street, but Kochelek got off before it stopped 'to see who was hurt—to see if he really was getting off while it was going that gait. I wanted to see who he was.' This witness further testified that, after the car crossed J street, it was running about

25 or 30 miles an hour. After plaintiff had rested his case, and after the arguments on defendant's motion for a peremptory instruction had been partly made, the plaintiff was given leave to withdraw his rest and to introduce further testimony. Witness Kochelek was recalled, and testified that the car started to go faster when it was pretty close to J street—the north side of it; but this witness was unable to further describe this change in speed. He could not tell how much of a change was made, nor how much faster the car was going. John Bendekovitch testified that the distance from the south side of J street to the point where the plaintiff was picked up after the accident was 250 feet. There was no evidence of any imperfection in the car or track, either as to construction or operation, nor that there was any unusual or extraordinary jarring or jerking of the car; neither that the plaintiff's fall to the street was caused by any jerking or jarring of the car or on account of any imperfection in either the car or the track. At the close of plaintiff's case, on motion of the defendant, the trial court instructed the jury to return a verdict for defendant."

Considerable discussion has been devoted by counsel to the inquiry: What was the proximate cause of the accident? but that question seems to us to conceal no mystery. Evidently the proximate cause was the concurrence of two circumstances, in the absence of either of which the accident would not have happened. If the car had stopped at J street, the plaintiff would have alighted without injury. If he had remained within the car or on the platform, he would have been carried onward in safety. There is no other circumstance to which the mishap can be attributed. The car does not appear to have been moving at an unaccustomed rate of speed, although the rate was high and was accelerated after crossing J street. That the speed was high, some 25 miles an hour, and that it would be so accelerated, the conductor, it will be assumed, must have known, and the latter fact it is not shown that the passenger did know, but, as already said, the rapidity of the mo-

tion would have caused no harm, if the passenger had not attempted to alight. That he desired to alight at the point designated and would probably put himself in readiness so to do, the conductor had been informed, and had, besides, opportunity to observe. That the latter was negligent of his duty toward the former seems to us to be free from doubt.

But was the negligence of such a character that a reasonably capable and careful man in the position of the conductor would have anticipated the accident as a probable consequence thereof? This raises the question whether the conduct of the passenger was such as no ordinarily intelligent and careful man would have shown under the same or similar circumstances, for it was upon such conduct that the conductor, although himself negligent, had a right to rely. It is not a case of intentionally and voluntarily standing upon a car step or running-board for the purpose of continuous riding, which several courts have held to be negligence *per se,* but it is an instance of going down upon the step or board in anticipation of almost immediately leaving the same by alighting upon the ground when the car shall have stopped, or nearly so. Now, this is an act that men of all grades of intelligence, experience and prudence are frequently and constantly committing. We suppose it is done thousands of times every day in all the considerable cities of the United States, so that its frequency must be regarded as a matter of common knowledge of which the courts take judicial notice, and to hold that such an act is at all times and in all circumstances negligence *per se,* or in law, would be to say that the universal custom of intelligent and prudent men is such, which, as it seems to us, would be to utter an absurdity. But an act which is prudent in some or in most circumstances may be negligent or criminal in others; and the question now calling for decision is: Who shall discriminate the circumstances, the court or the jury? Applying the inquiry concretely to the facts of this

case, considering the speed of the car and the character of the locality, and the fact that the passenger had repeatedly notified the conductor of the place at which he desired to get off, and the known duty of the latter to give a signal to stop, and the knowledge of the passenger, if he had knowledge of the subject, whether the signal had been given, is not the question of negligence one of fact for the jury, rather than one of law for the court? In our opinion, the answer should be in the affirmative. It does not appear to us that the case is different in principle from that of a multitude of others in which the jury is required to say whether, under all the circumstances of the case, the conduct of a party was that of a reasonably or ordinarily intelligent and prudent man. And, the negligence of the defendant having been established, the burden of proving contributory negligence is upon it, and the question is one of fact for the jury.

We are therefore of opinion that the judgment of the district court should be reversed and a new trial granted.

CALKINS, C., concurs.

FAWCETT, C., not sitting.

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

REVERSED.

JOHN REDELL, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,966.

1. Cities: CHIEF OF FIRE DEPARTMENT. Whether the chief of a municipal fire department is an officer within the meaning of the rule that an officer *de jure* is entitled to the emoluments of the office without reference to actual incumbency or services, or whether he is merely an employee to whom other principles are applicable, *quære.*

2. **Appellate Court:** JURISDICTION. The jurisdiction of an appellate court is dependent upon that of the tribunal from which the appeal is taken.

3. **Cities:** CLAIMS: ALLOWANCE. The charter of the city of Omaha (Comp. St. 1903, ch. 12*a*, sec. 901), which enacts that the mayor and council shall not allow or authorize to be paid a claim presented under certain circumstances or after the lapse of a certain time, is a limitation upon the power and jurisdiction of the body itself, and a claim so situated, and not falling within an exception of the statute, is extinguished, so far as the judicial powers of the mayor and council are concerned.

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

Weaver & Giller, for appellant.

H. E. Burnam and *I. J. Dunn, contra.*

AMES, C.

The plaintiff filed with the mayor and council of the city of Omaha a demand for compensation as chief of the fire department of that city during a time in which he claims to have been a *de jure* incumbent of that position, although it was in fact held by another who performed the service and received the salary pertinent thereto. The mayor and council rejected the claim, and an appeal to the district court resulted in a judgment of dismissal, from which an appeal is prosecuted in this court.

The plaintiff asserts his right to the salary as an incident to the *de jure* title, and the argument "upon the merits" in this court has been confined principally to a discussion of that proposition. But we doubt whether a chief of a fire department is an officer within the meaning of the rule invoked, or whether he is not more properly regarded as a municipal employee, to whom other principles are more applicable. This question has not, however, been discussed by counsel, and, in our view of the case, does not require present decision.

The city charter contains the following enactment: "No

bill for labor or material or account of whatsoever kind against the city, after it has been adversely reported on and rejected by the administration under which it has been incurred, and no bill not presented or claimed within eighteen (18) months after it was incurred and payable, shall be allowed or authorized to be paid by any mayor and council of a subsequent administration, except through the order of a court of competent jurisdiction. These provisions shall apply equally to any modification of the same account, in whatever form it may be presented." Comp. St. 1903, ch. 12*a*, sec. 901. It is not disputed that the plaintiff's claim is embraced by the prohibition and does not fall within the exception of the foregoing statute. It does not seem to us that there is room for argument. The legislature could not have chosen language more apt for the expression of an intent that a demand so situated shall be extinguished, so far as the judicial powers of the mayor and council are concerned. The enactment is not analogous to an ordinary statute of limitations, which the defendant may waive at his discretion. To hold that the city authorities, or their representatives, may do so would be, in practical effect, to repeal the statute. The limitation is of the power and jurisdiction of the auditing body itself, whose disobedience thereto would be a void act. It is axiomatic that a court in which an appeal may be prosecuted must derive its jurisdiction from the tribunal from which the appeal is taken. It would be absurd to say that the court may treat as erroneous and reverse an order made by the mayor and council in obedience to a peremptory statute. Precisely the same situation would have arisen if the mayor and council had simply ignored the claim, and a mandamus had been applied for to compel them to take action upon it. No action was required of them. They were as powerless to reject the claim as they were to allow it. The one order is equally as void or futile as the other would have been, and there is nothing from which an appeal can be taken. Their order of disallowance, for the reason given, was

purely ministerial and formal, and in no sense judicial. It will be soon enough to ascertain what is meant by the saving clause or exception when the question is presented in some court having jurisdiction and in a manner calling for its decision.

We are satisfied that the judgment of the district court is right, and recommend that it be affirmed.

CALKINS, C., concurs.

FAWCETT, C., not sitting.

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

AFFIRMED.

JEREMIAH H. COOLEY, APPELLANT, V. THOMAS D. RAFTER ET AL., APPELLEES.

FILED NOVEMBER 21, 1907. No. 14,991.

Appeal: CONFLICTING EVIDENCE: FINDINGS. When the evidence in the district court consists of oral testimony which is in sharp and irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined from the degree of competency of the witnesses, their opportunity for knowledge and the apparent clearness of their recollection, and the reasons therefor, the findings of the trial judge will be considered in determining the issues in this court.

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

M. H. Weiss, J. T. McCuistion and *Berge, Morning & Ledwith,* for appellant.

C. L. Richards and *T. C. Marshall, contra.*

AMES, C.

This is an action to foreclose a mechanic's lien for lumber and materials alleged to have been furnished by the

plaintiff, a retail dealer in such articles, to the defendant for the building of a house upon grounds of the latter. The amount claimed in the petition is $844.62, which is not disputed, but the answer alleges, in substance, that the lumber and materials were furnished pursuant to an oral contract by which the plaintiff undertook to provide the same and construct the defendant's house for a total cost or price of $850, upon which defendant had paid the sum of $354.24, leaving a remainder due plaintiff of $555.76, and no more, for which latter sum and costs of suit defendant offered to confess judgment. The reply is a general denial. There was a trial to a jury, resulting in a disagreement, and a second trial to the court without a jury, followed by a finding of the issues of fact in favor of the defendant and a judgment for the plaintiff for $495.76. The plaintiff appealed.

Counsel agree that the trial court committed no reversible error of law, and that the only subject of controversy is the correctness of the finding of the issue of fact whether the plaintiff agreed simply to furnish lumber and material for the building of the defendant's house, or whether he agreed to construct the house for a specified sum, furnishing the lumber and material necessary therefor. It is admitted, too, that the evidence upon this issue consists wholly of oral testimony offered before the trial judge, which is in sharp and irreconcilable conflict, and that the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined from the degree of competency of the witnesses, their opportunities for knowledge, the apparent clearness of their recollection, and the reasons therefor. We think the rules laid down by this court for its guidance in such cases in *Faulkner v. Simms*, 68 Neb. 299, as well as in subsequent cases decided under the present statute, are sound and indispensable to the due administration of justice. The trial judge, who knows the parties and who personally presided over the examination

of the witnesses and observed their demeanor, is far more competent, in most cases, to weigh their testimony and deduce correct conclusions therefrom than can this court be, having before it nothing more than an unresponsive written record. The findings of the trial court in such cases will be considered in determining the issues in this court. The whole evidence, however, will be examined, and the issues determined anew.

These findings are supported by the evidence, and we therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

JAMES M. HURN, APPELLANT, V. JOSEPHUS ALTER, APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,969.

Boundaries: EVIDENCE. In determining the boundaries of land, fixed monuments and known corners govern both courses and distances; and, where the existence of the original government corner is established at a certain point by sufficient evidence, its authenticity cannot be overcome by showing that the location is not at the distance from other monuments indicated by the field notes of the original survey.

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

W. S. Morlan and *C. M. Miller,* for appellant.

R. L. Keester and *Gomer Thomas, contra.*

CALKINS, C.

In 1871 section 10, town 1, range 18, in Harlan county, was surveyed and subdivided by the government surveyors.

In 1875 W. P. Carr, who had entered the southeast quarter, and Louis Moore, who had entered the northeast quarter, under the homestead laws, employed George C. Reed, then county surveyor, to ascertain and mark the boundaries of their respective tracts. At that time the original monuments of the government survey marking the quarter corners of the boundaries of section 10 were found. Between these quarter corners Mr. Reed established lines east and west and north and south, marking their intersection as the center of the section. Fields were cultivated, and later fences built according to the lines so established, which seem to have been recognized as the true interior boundaries of the four quarters by the proprietors thereof until 1901, when A. Hoffmayer, then county surveyor, was called to resurvey the section. He accepted monuments as marking the original government corners at the northwest, northeast and southeast corners of the section. Finding no monument at the southwest corner, he ran a line between a recognized government corner at the southwest corner of section 15 and the northwest corner of 10 as recognized by him, and, dividing the distance so found, established the southwest corner of 10. He found no quarter corners, but proceeded to establish them by measurements, dividing distances between the section corners so recognized and established by him. He established lines east and west and north and south from these quarter corners, thus marking the interior boundaries of the four quarters, and placed a monument at the intersection of the two lines, in the center, 165 links south and 62 links west of the center corner theretofore recognized and claimed to have been established by the Reed survey in 1875. The adoption of this survey as correct would result in moving the boundaries south and west from where they had been supposed to lie; and the plaintiff, owning a part of the northeast quarter, brought this action against the defendant, owning the northwest quarter, praying to quiet title in the plaintiff to the land lying between these two boundary lines. There was a trial to

the district judge, who found that the land in dispute was a part of the northwest quarter, and, from a judgment rendered upon this finding, the plaintiff appeals.

The rule that fixed monuments and known corners govern both courses and distances, is well established; and, where the existence of an original government corner is established at a certain point by sufficient evidence, its authenticity cannot be overcome by a showing that the location is not at the distance from other monuments, indicated by the field notes of the survey. The interior boundaries of the four quarters of a section are not marked upon the government survey, but they are ascertained by establishing a right line between the quarter corners on the east and west and the north and south of the section, the point of intersection of these lines marking the center of the section. The real question in determining the interior boundaries of a section is the location of the original quarter corners. If they can be established, the boundaries are to be determined from their location. If they are lost and cannot be determined, they may be ascertained by surveying from the nearest known points and dividing distances. In this case it is contended by the plaintiff that these original quarter corners are lost, and that the surveyor Hoffmayer properly established them by measuring from the nearest known corners and dividing distances. On the other hand, it is contended by the defendant that, while the government survey was comparatively new, and while each quarter corner was visible, the interior lines were surveyed by Mr. Reed in accordance with the original monuments at the quarter corners, and the center of the section established; that the then occupants of the land began the cultivation thereof according to these lines, and afterwards built fences thereon; and that in this manner the location of the original government quarter corners has been preserved and is established by the evidence. The witness Carr entered as a homestead the southeast quarter, and he, with one Moore who entered the northeast quarter, procured the Reed sur-

vey to be made. He identifies the location of the lines and corners down to a period subsequent to the building of the fences, and from that time to the bringing of the action the identity of their location is sufficiently established. If the witnesses were to be believed, and their memories to be trusted, there was sufficient evidence from which to find that these fences marked the original boundaries of these tracts according to the original government quarter corners. This was the finding of the trial judge, which is supported, as we think, by the preponderance of the evidence and should not be disturbed.

In view of the conclusion at which we have arrived, it is unnecessary to consider the question of adverse posesssion or acquiescence raised by defendant.

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

FAWCETT and AMES, CC., concur.

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

AFFIRMED.

ELMER E. SHAFFER, APPELLANT, V. HELEN W. MURRAY, APPELLEE.

FILED NOVEMBER 21, 1907. No. 14,970.

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

W. S. Morlan and *C. M. Miller,* for appellant.

R. L. Keester and *Gomer Thomas, contra.*

CALKINS, C.

This cause was tried with, and upon the same evidence as, *Hurn v. Alter, ante,* p. 183. The statement of facts and

opinion therein being applicable to this case, we recommend that the judgment of the district court herein be affirmed.

FAWCETT and AMES, CC., concur.

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

AFFIRMED.

LORENCE BAUER ET AL., APPELLEES, V. H. W. MITCHELL ET AL., APPELLANTS.

FILED NOVEMBER 21, 1907. No. 14,981.

Attachment: BOND: LIABILITY. Where an action is brought without the authority or sanction of the party in whose name it is prosecuted, and an attachment is procured to be issued thereon, such attachment is wrongfully obtained within the meaning of section 200 of the code.

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

E. D. Kilbourn, for appellants.

O. A. Williams, contra.

CALKINS, C.

On the fifth day of October, 1903, an action was begun in the district court for Antelope county in the name of the J. I. Case Threshing Machine Company against the plaintiffs herein upon certain notes not then due. An affidavit for an attachment, alleging that these plaintiffs were about to remove and sell their property with intent to defraud their creditors, was filed, and, after the execution and approval of a bond in the usual form, signed by the defendants herein as sureties, an order of attachment was issued under section 237 of the code. This order was

executed by a seizure of the plaintiffs' property. They afterwards moved to discharge the attachment upon the ground that the facts stated in the affidavit were insufficient and untrue, and that an excessive levy had been made. While this motion was pending, the J. I. Case Threshing Machine Company filed a motion to dismiss the action, on the ground that they never authorized the bringing of the suit. On the 15th day of January, 1904, the district court made an order that the attachment be vacated and discharged, and the property returned to the plaintiffs. On the same date the court granted the motion of the J. I. Case Threshing Machine Company to dismiss the action. Thereupon the plaintiffs brought this action upon the bond for attachment. A trial to a jury was had, resulting in a verdict for the plaintiffs, and, from a judgment rendered upon such verdict, the defendants appeal.

There was no evidence as to whether the charge in the affidavit for attachment that the plaintiffs were about to remove and sell their property with intent to defraud their creditors was true or untrue, and the defendants contend that, as under the rule adopted in *Storz v. Finklestein,* 48 Neb. 27, 50 Neb. 177, the mere dissolution of an attachment does not establish its wrongful issue, the plaintiffs were bound to disprove the fraudulent intent charged against them in the affidavit for attachment by other evidence than the order of dissolution, and that, having failed to do so, the evidence does not sustain the verdict. The fact that an attachment was wrongfully obtained may be established in other ways than by showing that the allegations of fraudulent intent were untrue. In this case the defendants in their answer allege that the action begun in the name of the J. I. Case Threshing Machine Company was brought without the authority or sanction of said company, and set forth the proceedings in which the said company appeared in court and procured a dismissal of said action upon the ground that it was brought without their authority. Where an action is brought without the authority or sanction of the party in whose name it is

prosecuted, and an attachment is procured to be issued therein, such attachment is wrongfully obtained. The rule in *Storz v. Finklestein, supra,* goes no further than to hold that, where an attachment is dissolved on account of defects in the form of the proceedings, or for omissions, irregularities or informalities which the officer may commit in the issuance of the process, such dissolution does not show that the same was wrongfully obtained; but the seizure of a person's property by means of an attachment issued in a suit brought without the knowledge, consent or sanction of the party in whose name it is prosecuted is not an irregularity or defect in the form of the proceeding. It is a substantive wrong of a flagrant character, and we think it within the condition of the bond. The defendants undertook to pay these plaintiffs all damages which they might sustain by reason of the attachment in question if the order was wrongfully obtained; and they themselves allege facts showing that it was wrongfully obtained.

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

FAWCETT and AMES, CC., concur.

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

AFFIRMED.

ANN W. BARNES ET AL., APPELLEES, V. ALONZO B. MINOR, ET AL., APPELLANTS.

FILED DECEMBER 5, 1907. No. 14,807.

1. **Drainage Districts: ORGANIZATION: JUDICIAL INQUIRY.** The power of the legislature over the subject of procedure, within limits not impairing the inherent powers or jurisdiction of the courts, is not restricted; and it is competent to require, by statute, a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation.

2. ———: ———. The act of 1905 (laws 1905, ch. 161), relative to "the organization and government of drainage districts; for the reclamation and protection of swamps, overflowed or submerged lands," does not contemplate the inclusion of a railroad company's right of way, depot grounds and appurtenances as a part of the district.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed in part.*

Roscoe Pound, J. W. Deweese and *Frank E. Bishop*, for appellants.

A. R. Keim, A. R. Scott, E. Ferneau, H. A. Lambert, E. B. Quackenbush and *Francis Martin, contra.*

BARNES, J.

This is a proceeding for the creation of a drainage district in Richardson county, and is, in so far as has been brought to our knowledge, in formal compliance with the provisions of an act of the legislature of 1905, entitled, in part, "An act for the organization and government of drainage districts; for the reclamation and protection of swamps, overflowed or submerged lands," * * * and providing a procedure therefor. Laws 1905, ch. 161. Section 1 of the act provides for the organization of an association by adopting articles of incorporation by the persons owning contiguous tracts of such lands as are mentioned in the title, and embraced within an area of not less than 160 acres. The articles are required to define the limits of the proposed drainage district and describe the several tracts of land included therein and owned by the persons joining in the execution of said articles, together with such tracts of land in said proposed district as are owned by persons not joining, and the names of such persons. The articles, when executed, are required to be filed in the office of the clerk of the district court for the county, together with a prayer for process against the nonconsenting landowners.

It is further provided by the act that, upon the service of such process on the nonconsenting landowners, they may file their objections, if any, in writing, and, upon a proper hearing, the district court, by its order duly entered of record, shall declare said drainage district a public corporation of this state; and the court may exclude such lands as will not be benefited, and declare the remainder a drainage district, as prayed for. It appears that the right of way, road bed and depot grounds of the Chicago, Burlington & Quincy Railway Company traverse a part of the proposed drainage district, and said company was described in the articles as a nonconsenting landowner; that after process was served upon it the company appeared and objected to being made one of the incorporators, and to the inclusion of its said right of way and depot grounds as a part of said drainage district. Upon the hearing, the district court overruled the company's objections, and made an order including its property within and making it a part of the district. From that order the company has appealed.

Its first contention is that the act is unconstitutional and void, because it attempts to confer upon the district court duties and powers not judicial in their character. In support of this proposition counsel cite *Dodge County v. Acom*, 61 Neb. 376, and *Tyson v. Washington County*, 78 Neb. 211. It must be observed that in those cases the legislature had conferred the power upon the county board to determine the question as to whether the proposed drainage improvement would be conducive to the public health and welfare, and it was held that this was an administrative function properly conferred upon the county board, and that the district court was without jurisdiction of that matter either original or upon appeal. The case at bar, however, presents such facts and conditions relating to the sufficiency of the procedure, and the character and quantity of the lands sought to be affected thereby, as may, and is likely, to be drawn in question and give rise to a judicial inquiry as to their existence.

So it was enacted that such inquiry shall be had as a preliminary step to the organization of the corporation and the existence of its corporate powers.

Manifestly, as it seems to us, the court in such a proceeding is called upon to exert no other than its ordinary judicial functions. The statute prescribes that, if certain steps have been taken and certain facts exist, a governmental corporation shall be deemed to have been created, not otherwise, and the court by the exercise of its usual powers and by the observance of judicial methods ascertains and determines that such steps have or have not been taken, or that such facts do or do not exist, and from these premises draws an inference or reaches a conclusion which it pronounces in a form of a judicial order or judgment in like manner and in like effect as in ordinary cases. The power of the legislature over the subject of procedure, within limits not impairing the inherent powers or jurisdiction of the courts, is not restricted, and it is competent to require, by statute, a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation. The powers conferred upon the court by the act in question are analogous to those which have been upheld by the decisions of this court in proceedings to determine questions of fact involving the rightful inclusion or exclusion of tracts of land in or from the corporate limits of cities and villages. *City of Wahoo v. Dickinson,* 23 Neb. 426; *Young v. Salt Lake City,* 24 Utah, 321; *Forsythe v. City of Hammond,* 142 Ind. 505, 30 L. R. A. 576. So, without determining any other question which may be subsequently raised touching the validity or constitutionality of the act, we are of opinion that the appellant's criticism is not well taken, and so far as this point is concerned the act is constitutional.

Appellant's second contention is that the court erred in declaring it to be an incorporator of the drainage district, and its roadbed, right of way and depot grounds a part of said district. The act in question does not, in

express terms, provide for making a railroad company or a county a member of the drainage district; and it would hardly seem probable that it was the intention of the legislature that a public road, controlled by the county, or the right of way, railroad track or depot grounds of a railroad company, should be a part of a drainage district within the meaning of said act. From the nature of *quasi* public corporations, such as counties, and public service corporations, like railroad companies, it would seem clear that neither of them could become a member of a drainage district. From the very nature of their organization, and the powers conferred upon them by law, they would be unable to exercise the duties and claim the privileges required of and given to private owners of land situated within such district; and this thought is strengthened by the provisions of section 19 of the act, which reads, in part, as follows: "That when ditch, drain or watercourse, located and established under this act, crosses or drains, either in whole or part, any public or corporate road, or any railroad, or benefits any or either of said roads, so that the roadbed or traveled track of any such road will be made better by the opening and construction of any such ditch, drain or watercourse, or the straightening of any watercourse, the board of supervisors shall apportion and set off to the county, if a county road, or to a company, if corporated, or a railroad, a portion of the costs and expenses, the same as to private individuals, and in proportion to the benefits conferred by said ditch, drain, or watercourse on said roads." Comp. St., ch. 89, art. IV, sec. 19. So it would seem that the law simply requires a railroad company, when its roadbed or right of way traverses the drainage district, to contribute to the cost or expense of the construction of the drainage improvement in proportion to the benefits thereby conferred upon it. Section 4 of the act provides for the filing of the articles of incorporation with the secretary of state, after the order of the district court is made declaring the dis-

trict to be a public corporation. Sections 5, 6, 7 and 8 provide for the election of a board of supervisors to govern the affairs of the corporation, and prescribe the powers and duties of such board; while section 13 provides, in substance, that after the drainage district shall have been organized, and the board of supervisors elected and qualified, they shall estimate and apportion the necessary expenses for the construction of the improvement, and to that end shall give notice of the time and place of hearing to all persons interested, or whose property will be affected thereby, who may appear before said board on the day set for hearing and file their objections to such estimate and assessment; that a hearing shall be granted, and after such hearing the board shall make a final order in the matter, fixing and declaring the several amounts which shall be paid by the said persons found by them to be benefited by the improvement. Section 17 provides for an appeal by any person aggrieved by the decision of the board to the district court. So we are of the opinion that the order of the district court, in so far as it adjudged the appellant's right of way, railroad track and depot grounds a part of said drainage district, was erroneous, and its determination on the question of benefits, if any such was had or made, was premature. It seems clear that neither a county nor a railroad company, under the circumstances shown to exist in the case at bar, is a necessary party to the proceeding in the district court to declare the drainage district a public corporation. It is also apparent that, when the supervisors come to assess the property of such a corporation for the cost of the improvement according to the benefits conferred, it is entitled to have notice of the proceeding and a hearing thereon, and it may appeal from the judgment or order of the board in making such assessment.

For the foregoing reasons, so much of the judgment of the district court as declares the appellant to be a member of the drainage district and its roadbed, right of way and depot grounds a part of said district is hereby reversed,

and in all other things said judgment or order of the district court is affirmed.

JUDGMENT ACCORDINGLY.

CALVIN HARRIS V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1907. No. 15,439.

1. **Rape:** EVIDENCE: SUFFICIENCY. Record examined, and found to contain sufficient evidence corroborating the testimony of the prosetrix to warrant the submission of the question of the defendant's guilt to the jury.

2. **Criminal Law:** INSTRUCTIONS. In a prosecution for rape, it is not error for the court to refuse an instruction as to the necessity for corroboration, where he has properly instructed the jury on that question on his own motion.

3. **Rape:** EVIDENCE: PREVIOUS CHASTITY. In a prosecution for rape upon a female child under 15 years of age, where the only competent evidence as to her age shows that she was less than 15 years old at the time of the commission of the act, the question of her previous chastity is immaterial, and it is not reversible error to refuse to submit that question to the jury.

4. **Information:** SUFFICIENCY. It is not commendable for the prosecuting attorney to use any word, abbreviation or letter in an information, designating the race or color of the defendant; but, where it appears that such designation cannot result in any prejudice to the substantial rights of the defendant, it is not a ground for quashing the information.

5. **Criminal Law:** COMPLAINT. A wife may sign and file a complaint against a husband in prosecutions for rape.

6. —— —: MISCONDUCT OF PROSECUTING ATTORNEY. Where the question as to the alleged misconduct of the county attorney in conducting the prosecution has been submitted to and decided by the trial court on conflicting evidence, such decision will not be disturbed unless it is unsupported by the testimony and is clearly wrong.

7. ———: EVIDENCE: REVIEW. General assignments of error for the admission or rejection of evidence will not be discussed unless specifically called to the attention of the court by brief or oral argument, where no manifest error appears.

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

Billingsley & Greene, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

BARNES, J.

The plaintiff in error, who was the defendant in the court below, and who will be so designated in this opinion, was convicted in the district court for Lancaster county of the crime of statutory rape, and brings the case here for review.

His first contention is that the evidence is not sufficient to sustain the verdict, because there was no testimony introduced by the state corroborating the story of the prosecutrix. We learn from the record that the prosecutrix was the stepdaughter of the defendant; that he married her mother on the third day of July, 1900, and since that time she has been a member of his family. She testified, in substance, that she was born on the 26th day of July, 1891; that in the first part of the month of May, 1906, the defendant came into her room at their home in Lancaster county, Nebraska, and insisted on having sexual intercourse with her; that she finally consented, and he thereupon accomplished his purpose; that she became pregnant therefrom, and was delivered of her child on the 20th day of February following. Without going into details, it may be said that if her evidence is to be believed it is sufficient to establish defendant's guilt beyond a reasonable doubt. It further appears that she was examined by a reputable physician about the first of January, 1907, who testified that she was then pregnant with an eight months fœtus; that she was a fully developed woman, and presented the appearance of having had a great deal of sexual intercourse. The evidence also shows that before the birth of her child, and before the defendant was ar-

rested, there was a conversation between the defendant, the prosecutrix and her mother in the office of the county attorney, in the presence of that officer and of two other persons; that in that conversation the mother taxed the defendant with being the author of the condition of the prosecutrix, which he denied, and, thereupon, the prosecutrix, becoming somewhat excited, charged him with being the author of her downfall, called his attention to a number of different times and places where he had had sexual intercourse with her, and the defendant remained silent and made no denial of her statement. It also appears that the defendant procured various kinds of medicines or nostrums, commonly used to cause menstruation or produce abortion in the early stages of pregnancy, and furnished them to the prosecutrix. This he did not deny, but explained the matter by saying that he procured them at the request of his wife. The prosecutrix testified that she knew nothing about that matter, and, as the wife was not permitted to testify, his explanation was left without denial. It further appears, however, that, when the defendant was confronted with the charge, he wanted to know if there was not some way in which it could be fixed up or settled. He stated, in the presence of the prosecuting attorney and two or three other persons, that he would give his property, all he had, and more too, if he could get it settled up. Again, the fact was plainly shown that the prosecutrix had never at any time been in the company of other men or boys; that her associations with the defendant were such as to afford ample opportunity for sexual intercourse between them; and so, taking all of the evidence together, it would seem that there was sufficient corroboration of the testimony of the prosecutrix to warrant the court in submitting the question of the defendant's guilt or innocence to the jury, and their finding on that question should not be disturbed by a court of review.

It is further contended that the court erred in refusing to give the third instruction requested by the defendant. This request related to the necessity for corroboration.

While it may be said for the instruction that it was substantially correct, yet, the court having instructed upon that question on his own motion, it was not error to refuse the defendant's request. The record shows that the instruction given by the court was in form and substance like the one given and approved in *Fager v. State*, 22 Neb. 332, *Hammond v. State*, 39 Neb. 252, and *Dunn v. State*, 58 Neb. 807. So it is clear that the defendant was deprived of none of his substantial rights by the court's refusal to give the instruction requested.

It is also claimed that the court failed to submit the question of the previous chastity of the prosecutrix to the jury, and it is contended that such failure is prejudicial error. The only competent evidence of the age of the prosecutrix which we find in the record shows that she was born on the 26th day of July, 1891; that the act of sexual intercourse complained of took place between her and the defendant in the early part of May, 1906. At that time the prosecutrix lacked more than two months of being 15 years old. This being the case, the question of her previous chastity was wholly immaterial. It may be further said that there is no evidence in the record from which a single unchaste act of hers, except with the defendant, can even be inferred. So there was no evidence to sustain a finding on that subject, and the court did not err in failing to instruct upon that point.

The defendant filed a motion to quash the information, because the letters "col." were placed therein after the defendant's name, and were also indorsed on the back thereof; and it is insisted that the court erred in overruling the motion. The argument is that it was the purpose and intent of the prosecution to designate the defendant as a colored man, or one of the African race, and thus discriminate against him and deny him the equal protection of the law. We think this contention is without merit. While it is not commendable for a prosecutor to designate the color of a defendant in a charge made against him, yet we fail to see wherein it would prejudice his

rights. Under the early common law, where the party indicted was of the degree of knight or some higher dignitary, it was required to set out in the indictment the name of the dignitary, and it was common to designate the defendant, not only by his name, but by his station in life, or by his profession, in order to meet the then requirements of certainty. But this has never been required or practiced in prosecutions in this country. It may be further said that the color of the defendant's skin and his physical characteristics would reveal the race to which he belonged; that the jury and the court would necessarily be apprised of the fact that he was a colored man without the designation complained of, and therefore such designation would not result in any prejudice to his substantial rights.

The defendant also filed a plea in abatement, in which it was charged that he had never had a preliminary examination, the foundation of that charge being the fact that the complaint before the magistrate was signed by his wife. It is insisted that, as the wife was not a competent witness and could not be permitted to testify against her husband, she therefore could not be permitted to file a complaint against him. The court sustained a demurrer to the plea, and the defendant alleges error. It was held in *Latimer v. State*, 55 Neb. 609, that a preliminary examination is a personal privilege, which may be waived. The same rule was also announced in *Coffield v. State*, 44 Neb. 417. It appears that the defendant in this case made no objection to the complaint filed before the justice, but waived his preliminary examination, and, if necessary, we might hold that he thereby waived his right to object to the complaint upon the trial of the cause. But, without deciding this question, we are inclined to think that the wife of a defendant can testify against him in a case of this character. It is true that the offense charged is against the prosecutrix, but it is also an offense against defendant's wife in the nature of adultery. In *Lord v. State*, 17 Neb. 526, this court held that the wife may

testify against the husband on a charge of adultery. It was also held in *Owens v. State,* 32 Neb. 167, that the wife is a competent witness against the husband on a charge of incest. If the wife is a competent witness in crimes of this nature, there would appear to be no reason for a contrary rule in a case of statutory rape. And so we are of opinion that the demurrer to the plea in abatement was properly sustained.

Defendant filed a motion in arrest of judgment, and now alleges error because the court overruled it. What we have said in disposing of the foregoing assignments renders it unnecessary to further discuss this question. The motion was properly overruled.

Complaint is also made of the misconduct of the prosecuting attorney. We find from an examination of the record that that matter was presented to the trial court by a motion for a new trial, and upon affidavits and other evidence was determined adversely to the defendant's contention. This being the case, the findings and judgment of the district court on that matter will not be disturbed, unless they are unsupported by the evidence and are clearly wrong. *Cunningham v. State,* 56 Neb. 691; *Clark v. State,* 79 Neb. 473.

The defendant concludes his brief with certain general assignments of error in the admission and exclusion of evidence. Our attention is not directed to any particular matter of that kind, and the assignments are too general to require consideration.

In conclusion, it is sufficient to say that a careful examination of the record fails to disclose any reversible error, and the judgment of the district court is therefore

AFFIRMED.

GEORGE YOUNGER V. STATE OF NEBRASKA.

FILED DECEMBER 5, 1907. No. 15,292.

1. Proof of reputation is properly confined to the reputation of the individual in the vicinity in which he lives or in which he had formerly resided.
2. Criminal Law: EVIDENCE. Where articles are offered in evidence which are pertinent to the issue, the court will not exclude them on account of the manner in which they were obtained.
3. ———: INSTRUCTIONS. It is not error to refuse an instruction removing certain evidence from the consideration of the jury at the close of the trial, where the evidence was received without objection at the time of its admission, and no motion then made to strike it out.
4. ———: EVIDENCE: HARMLESS ERROR. Where a defendant in a prosecution for rape calls out from the prosecutrix on cross-examination the description of her assailant that she gave at the time she made complaint, it is not prejudicial to him to allow the person to whom the complaint was made to testify that immediately after the assault the prosecutrix complained that she had been assaulted by a negro, and to give her description of him then made.
5. ———: INSTRUCTIONS. Where the testimony of the prosecutrix in a rape case as to the fact of the assault is fully corroborated, and her evidence as to the identity of her assailant is also sustained by evidence in corroboration, it is not prejudicial error for the court to omit to instruct as to the necessity of corroboration, when the only instruction requested by the defendant upon that point does not fully and correctly state the law.
6. Evidence examined, and *held* to sustain the verdict.

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

James L. Caldwell, for plaintiff in error.

W. T. Thompson, Attorney General and *Grant G. Martin, contra.*

LETTON, J.

Plaintiff in error was convicted in the district court for Lancaster county of rape with force and violence upon

one Myrtle Furlong, and prosecutes error to this court. A brief statement of the facts is necessary to the understanding of the questions presented. On the night of February 6, 1907, the prosecuting witness, a girl between 15 and 16 years of age, who worked in the office of the Nebraska Telephone Company near Thirteenth and O streets in the city of Lincoln, stopped work at 10 o'clock. A few minutes afterwards she left the office with two other young women, who accompanied her to a candy store, where they spent five or six minutes. From thence she walked to the corner of Fourteenth and O streets, expecting to take an Interurban street car to her home. The car had gone, and she started to walk. She went north upon the west side of Fourteenth street, and had gone between four and five blocks when she saw a man cross the street. He came up and walked beside her for a few steps, and after requesting her to have sexual intercourse with him, which she refused, he seized hold of her, choked her, forced a handkerchief into her mouth as a gag, and dragged her into an alley. He first threw her down on a manure pile near the street, and then dragged her to an empty sleigh about half way in the alley between Thirteenth and Fourteenth streets. He there violently and forcibly tore nearly all her clothing from her person, and committed a forcible and brutal assault. As soon as she was released, he ran away, running west from the scene of the assault. As soon as the prosecutrix could gather the remnants of her clothing about her, she went to the back door of the nearest house and asked admittance. There were three ladies in the house, whom she told she had been assaulted by a negro, and described his appearance and clothing as nearly as she could. The description she gave was communicated by telephone to the police station, and the defendant was arrested about midnight as answering the description given. He was positively identified by the prosecuting witness, both by his appearance and the sound of his voice, and also by another witness who said he saw him about 10 minutes

after 10 o'clock that night standing near the intersection of Fourteenth and R streets, near an electric light, a distance of about one and one-half blocks from the alley where the crime was committed, and on the same side of the street where the assailant stood when first seen by Miss Furlong. The defense was an alibi. The defendant's occupation is that of a porter or janitor, taking care of a bank and office at the corner of Eleventh and O streets, a distance of about six and one-half blocks from the alley where the crime was committed. He went upon the stand, and testified that about 10 o'clock that night he was in the bank; that he went from there to a cigar store close by to get a pail of water, and named a number of persons that he saw while he was in the cigar store, a little after 10 o'clock; that he drank in the basement with one Smith, and that he went again to the bank and was mopping the floor until about 20 minutes to 11 o'clock, when he went back to the basement and remained there until after 11 o'clock. Two of the persons whom he stated he saw a little after 10 o'clock in the cigar store testified they saw him there from about 15 minutes to 10 to 10 o'clock, and a witness whom he says he saw about 10:30 testifies that he saw the defendant about 15 minutes to 11 o'clock that night in the basement with the witness Smith. The defendant's testimony is, to some extent, corroborated by the witness "Red" Smith, who testifies, in substance, that about 10 o'clock he saw the defendant attending to his work at the bank; that the witness was in the basement of the building, and that 10 minutes after 10 the defendant had taken a pail of water into the bank from the cigar store, and then came out and went into the cellar where he was; that he heard him in the bank for 15 minutes after he left the cellar; that he saw him again that night at about a quarter of 11 in the basement, where they again drank together, and that it was about 20 minutes between the two times. He fixes the last time the defendant came out of the bank as "in the neighborhood of 10:30." On cross-examination, this witness says

that he did not see Younger between 10:15 and 10:40; that he, Smith, left the building after 10:15, and was gone in the neighborhood of 20 minutes; that he was drinking a good deal that night, and that in his references to time he is merely guessing. The day after the assault the prosecuting witness was taken to the police station, and she pointed out the defendant from a number of other colored men as being her assailant. The clothing which the defendant wore when arrested tallied with the description given by the prosecuting witness, and also by the witness Hamilton, who says he saw him at the street corner just a few minutes before the assault.

The first assignment of error is that the court wrongfully refused a continuance. The preliminary examination was held a few days after the assault. The information was filed on February 26. On March 2 the defendant filed a motion for continuance, alleging in substance, as grounds therefor, the existence of excitement and prejudice, want of counsel, lack of time to communicate with his friends, who live in Texas and Colorado, also lack of time to investigate the character of the prosecutrix, and to establish his own good character. This continuance was asked until the next term of court. This motion was presented to the court on that day, but was overruled. The court then set the trial for March 11, and appointed as counsel for the defendant the same attorney that appeared for him in the preliminary examination. On the 5th day of March another motion and affidavit for continuance over the term was filed, somewhat argumentative in form; the substance of it being that counsel, for a number of reasons, was unable to prepare the case for trial in the length of time allowed for that purpose. This motion was overruled, but the case was passed for trial until March 18. On March 18 a third application for a continuance was made, the affidavit of counsel in support thereof being to the effect that a witness in St. Joseph, Missouri, would testify as to the good reputation of the defendant for truth and veracity and

virtue and chastity; that counsel had been unable to investigate the reputation of the prosecuting witness in like matters for want of time; and that counsel had been sick during the preceding week and was not able to enter upon the trial of the cause. This motion was overruled and an exception taken. From a consideration of these affidavits, we think the court did not abuse its discretion in overruling the motions. As to the first and second, the court extended the time for preparation for trial. The dishevelled, bruised and bloody condition of the prosecutrix immediately after the assault formed such positive evidence of its commission that the same necessity did not exist for the investigation of her character and reputation as in most cases where it is claimed that such an assault had been committed. The testimony of the witness in St. Joseph, as set forth in the third affidavit, standing alone, would not be admissible, since it only alleges that the witness had known the defendant in St. Joseph, and that his reputation in such matters is good, without anything to show how long ago it was that the defendant was in St. Joseph, or that he had ever been a resident there. Proof of reputation is properly confined to the reputation of the individual in the vicinity in which he lives or in which he had resided. There are no facts alleged to bring the testimony offered within this requirement.

The second, third and fourth assignments of error are based upon the contention that the prosecutrix was not corroborated, and that no proof was offered that she "was not a daughter or sister of the defendant." As to the fact of the criminal assault, it is seldom we find a case in which the corroborative testimony is so clear and convincing. The condition of the clothing and body of the prosecutrix immediately after the assault, as testified to by the witnesses who were present at the house of Mrs. Chapman at the time she applied for aid, is conclusive on this point. It is urged that the witness was not corroborated as to the identity of the defendant, but the

testimony of the witness Hamilton is that he saw him close by a few minutes before the outrage. He described his clothing in the same manner as the complaining witness, and the defendant was found by the police officers a short time after the assault dressed in precisely the same manner as the assailant, with a long black overcoat, light trousers, a black derby hat, a dark muffler, and no collar. This evidence furnished all of the corroboration necessary, even if corroborative evidence of the identity of the assailant is necessary in a case of this nature where the assault is evident, more than in a case of a violent assault of another character, which is not our opinion, although some courts of respectable authority have so held. As to the lack of proof that the prosecutrix was not the daughter or sister of the defendant, the record shows that the defendant is a negro and the prosecutrix a white person. They were both witnesses, and testified before the jury, and the law does not require proof of that which is self-evident.

The fifth assignment is that the particulars of the complaint made by the prosecutrix were permitted to be given in evidence. Examination of the record, however, shows that the witness did not relate the particulars, but merely testified that Miss Furlong complained that she had been nearly killed by a negro, and that she gave a description of the person who assaulted her. This was only a few minutes after the assault, and while the witness was still sobbing and trembling from its effects. This was a spontaneous and unpremeditated statement, and admissible as a part of the *res gestæ* in corroboration of the prosecutrix. Moreover, the evidence shows that the description was identical with that given by the prosecutrix on the witness stand, and which was used by the police in looking for the guilty person. We have held that the fact of the complaint being made and the name of the assailant then given may be testified to in corroboration. *Welsh v. State,* 60 Neb. 101. See, also, *State v. Andrews,* 130 Ia. 609; *State v. Hutchinson,* 95 Ia. 566; *Bannen v. State,*

115 Wis. 317; *Hannon v. State*, 70 Wis. 448. Besides, the defendant had previously called out the same facts by asking the prosecutrix how she described her assailant to the ladies at Mrs. Chapman's.

Objection is made to the introduction of the defendant's shoes in evidence, upon the ground that they were taken from him by force and that it is compelling him to furnish testimony against himself. A like question has been before this court a number of times, and it has been held that, where matters are offered in evidence on the trial of the cause which are pertinent to the issue, they should be admitted, and the court will not take notice how they were obtained. *Geiger v. State*, 6 Neb. 515; *Russell v. State*, 66 Neb. 497. A full discussion of the admissibility in evidence of articles forcibly taken from the possession of the defendant in a criminal case is to be found in *Williams v. State*, 100 Ga. 511, 39 L. R. A. 269. The cases seem to be uniform in support of the admissibility of evidence thus obtained. 1 Bishop, Criminal Procedure (4th ed.), secs. 210-212.

It is complained that the witness was allowed to testify, over objection, to foot prints in the snow, and that the iron band on the heel of one of the shoes looked similar to the tracks in the snow. This question was not objected to at the time, and no motion was made to strike out the testimony.

A question which has given us some concern is whether or not the instruction requested by the defendant at the close of the trial relating to the shoes introduced in evidence was erroneously refused. This instruction, in substance, is that, before the shoes offered in evidence can be considered by the jury, they must find that there was a careful and correct measurement of the tracks at the time, and that the marks on the shoes must exactly fit the impression made in the snow; that the mere memory of the witnesses as to the shape of the impression made after so long a period is dangerous, and that they should disregard the evidence as to the shoes in arriving at their verdict.

We have already seen that it was not error to admit the shoes in evidence over the objection that they were forcibly taken away from the defendant without his consent. The only material evidence given as to the foot tracks was given by Mrs. Ledky, as follows: "A. At each place where I found the snow beaten down where they had scuffled there were the same tracks, a woman's track and a man's track, and in each place the man's track showed as if the heel of the shoe was flat, and it looked as if the heel on the right foot of the right shoe had been mended and a piece set in. Q. (Handing witness exhibit 3) I would ask you to examine this right shoe of exhibit 3, and state if that iron band upon the heel would look similar to the track that seemed to be in the snow. A. Yes; I suppose." The witness further testified that she did not compare the track and shoe afterwards, and never saw the shoe closely until the time of the trial. The opinion of the witness as to whether or not the iron band on the heel would look similar to the track that seemed to be in the snow, without any comparison having been made by her of the tracks and merely upon her recollection as to the appearance of the tracks several weeks before, was incompetent evidence, and afforded no aid to the jury in determining whether the shoes of the defendant were the identical shoes that made the tracks in the snow. The evidence was admitted without objection, and no motion was made to strike it out at the time, or to take it from the consideration of the jury. It was clearly improper, as being the opinion of the witness as to facts which the jury were the proper persons to decide; but a defendant cannot allow testimony to be introduced without objection or moving to strike it out, and wait until the conclusion of the trial and then ask to have an instruction directing the jury not to consider it. "It is incumbent on the defendant in a criminal case, as it is on a party in a civil case, if he would avail himself, on error or appeal, of any irregularities committed on the trial of the case, to make his objection and to save his exception

at the time when the irregularity was committed. Objections to evidence cannot, as a general rule, be made by a *motion to instruct* the jury to disregard the particular evidence." It has been well said: "To allow a party to permit, without objection, the admission of evidence, and for the first time make his objection in instructions, would be intolerable practice. If he had an opportunity to interpose an objection, he cannot take the chances that the testimony will be favorable to him, and, when it turns out otherwise, raise his objection; but must be held to have *waived* it." 1 Thompson, Trials, sec. 700. The shoes themselves would furnish no evidence unless testimony were offered as to the tracks, and the only testimony which could have any weight as affecting the issue was that given orally as to the shape of the heel prints. We think, therefore, the objection to the evidence, embodied in the instruction, came too late. Moreover, the evidence was of the supposititious and inconclusive character above set forth, and we doubt that the defendant was prejudiced by the refusal to instruct the jury to disregard it. The cases which are cited by counsel for defendant hardly go as far as the propositions laid down in his brief.

It is complained that the court did not instruct the jury upon the question of alibi. The record shows, however, the jury were instructed, in substance, that, if they had a reasonable doubt of the presence of the accused at the time and place of the alleged crime, then it was their duty to return a verdict of not guilty. This instruction presented the question of alibi as fully as was necessary.

Error is predicated on the refusal of the court to give instruction numbered 4 asked by the defendant. This, in substance, directed the jury that "there must be evidence corroborating that of the prosecutrix to authorize the jury in convicting the defendant. And, in this case, the evidence of the prosecutrix that the accused was the party who was present there at the time and place and who committed the offense must be corroborated in order to

justify a conviction for the offense charged." This instruction is not correct in law. Corroboration by direct evidence as to the particular fact constituting the crime is not essential. It is enough that the evidence of the prosecutrix be corroborated by facts and circumstances which support her evidence, and from which, together with her testimony as to the principal fact, the inference that the defendant is the guilty party may be reasonably drawn. No corroboration is necessary in such a case as this as to the identity of the defendant. There is no reason for requiring such corroboration that would not exist in the prosecution of any crime committed against the witness. The instruction presented was, for that reason, erroneous. The corroboration as to the particular act was overwhelming, so much so that it cannot be said that any conflict exists upon that point in the evidence. Under such circumstances, the mere failure to instruct the jury, in the absence of any proper request for such instruction, is not reversible error.

It is urged that the court erred in refusing defendant's motion for a new trial, not only upon the grounds of the errors assigned, but on the ground of facts set forth in the affidavit of the defendant's counsel with reference to the public prejudice and bias against the defendant, threats of lynching, changing of the testimony of the witnesses from that given at the preliminary hearing, and other like reasons. This affidavit was resisted by a counter affidavit, filed by the county attorney, denying specifically the facts stated therein, and upon the hearing the motion for a new trial was overruled. The evidence in regard to the allegations of bias and prejudice is contained in these two affidavits alone, and that of the county attorney is sufficient to justify the court in overruling the motion, if it believed the statements therein contained, rather than those in the affidavit of defendant's counsel.

Upon the whole case, taking into consideration the fact that the assault was committed at a point six and one-half blocks from the bank where the defendant was work-

ing, together with the fact that the crime must have been committed between about 15 minutes past 10 and 30 or 35 minutes past 10, and that there was ample time for the assailant to have reached the bank after the assault in order to be there by 10:45, together with the further fact that the assailant ran west after the assault (in the direction of the bank), and that, during the short period of time necessary to go from the bank to where the man was seen by Hamilton, commit the assault and return to the bank, he was not seen by any one except Smith, who speaks with no certainty as to the time, and as the time he fixes for the defendant's getting the water is contradicted, we think the verdict is supported by the evidence.

Many matters prejudicial to the defendant are stated in the brief to have occurred, which are not contained in the record. These, of course, we cannot consider, and upon the record as it stands before us the judgment of the district court is

AFFIRMED.

WALLACE W. BARNES V. WILLIAM E. SIM, APPELLANT; MAUD E. RENFRO, APPELLEE.*

FILED DECEMBER 5, 1907. No. 14,977.

Partnership: ASSIGNMENTS: CONSTRUCTION. Two assignments of a partnership agreement examined, and *held* not to include a personal promise of one of the partners to pay a sum of money due from one partner to the other.

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

H. A. Lambert and *J. D. Graves,* for appellant.

E. B. Quackenbush, contra.

DUFFIE, C.

In November, 1904, J. F. Renfro sold to Wallace W. Barnes a half interest in a drug business which Renfro

* Rehearing denied. See opinion, p. 213, *post.*

was then conducting in the village of Peru, Nemaha county. Partnership articles were also executed between the parties, by the terms of which Barnes became a partner in the business, was to conduct the same, and receive a salary of $60 a month, payable out of the funds of the partnership. The partnership articles also contained a stipulation providing for the payment by Barnes of $45 quarterly, beginning April 1, 1905, with interest at 6 per cent. per annum, until the full sum of $564.83, the consideration to be paid by him for his half interest in the business, was paid. No lien on the property sold was reserved by Renfro, who accepted Barnes' agreement to pay the amount. This partnership agreement Renfro assigned to his wife by indorsing thereon the following: "I hereby assign all my interest in the above property to Maud E. Renfro of Peru, Nebraska, this 5th day of October, 1905." June 2, 1906, Mrs. Renfro assigned her interest to the defendant Sim by an instrument reading as follows: "I hereby assign for a valuable consideration all my rights, title and interest in and to a certain contract entered into November 1, 1904, by and between J. F. Renfro and Wallace W. Barnes, and assigned by J. F. Renfro to Maud E. Renfro." Barnes was unwilling to accept Sim as a partner in the business, and on June 7, 1906, commenced this action making Sim and Maud E. Renfro parties defendant, alleging that Mrs. Renfro still claimed an interest in the partnership agreement entered into between him and J. F. Renfro; asking that an accounting be had between the parties plaintiff and defendant; that their respective interests be determined; that a receiver be appointed to wind up the business; that the business be sold by the receiver, and the proceeds be divided among the parties to the action according to their respective interests. Mrs. Renfro filed an answer, the material allegations of which are to the effect that, in her sale and assignment to Sim, the agreement of Barnes to pay the consideration for his purchase of one-half the stock was not included; that she was the owner of the debt owing by Barnes, and entitled to

collect the amount still due thereon. Sim claimed that the assignment to him carried the amount still due from Barnes on his purchase of a half interest in the business. The district court found "that said obligation of the said plaintiff Barnes for one-half the purchase price of the stock of drugs did not pass by the assignment of said contract, but remained and belonged to the defendant Renfro, and that she is entitled to the relief asked for in her cross-petition." A decree to that effect was entered, from which the defendant Sim has appealed.

It is evident the court found that the assignment from J. F. Renfro to Mrs. Renfro did not include the personal obligation of Barnes to pay the sum of $564.83, the purchase price of a half interest in the business; that such assignment only conveyed J. F. Renfro's interest in the property of the firm. This being so, Mrs. Renfro's assignment of her right, title and interest in the contract would convey to Sim a one-half interest in the partnership property only, and did not carry the personal obligation of Barnes for the payment of the consideration of his purchase of a half interest in the business.

We think that this is the proper construction of the two assignments above set out, and that the judgment appealed from should be affirmed. We so recommend.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

The following opinion on motion for rehearing was filed October 8, 1908. *Opinion modified. Rehearing denied:*

1. **Contract:** CONSTRUCTION. Contract of assignment examined, and *held*, under the evidence, to fall within the provisions of section 341 of the code, which provides that, "when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

2. **Syllabus** in *Barnes v. Sim*, *ante*, p. 211, modified.

GOOD, C.

A reargument of this case has been had upon the motion for rehearing. The former opinion may be found, *ante*, p. 211, where a statement of the issues and the facts may be found. The only question that is involved is: Did the assignment from Mrs. Renfro to Sim carry the personal obligation of Barnes? In the former opinion it was held that it did not, and the holding was based on the assumption that the assignments from Renfro to Mrs. Renfro and from her to Sim were insufficient to transfer the personal obligation of Barnes. From a careful examination of the record it does not appear that any one has ever asserted that the Barnes obligation was not transferred to Mrs. Renfro by the assignment of Mr. Renfro to her. All parties in interest have acted upon the assumption that Mrs. Renfro became the owner of this obligation by the assignment from her husband. For this reason, as well as for others hereinafter stated, we think the assignment should be treated by this court as sufficient to vest the title in Mrs. Renfro to the Barnes obligation.

From the record it appears that Mrs. Renfro's "interest in the business" was the subject of the negotiations between her and Sim, which culminated in her executing an assignment in the following language: "I hereby assign for a valuable consideration all my rights, title and interest in and to a certain contract entered into November 1, 1904, by and between J. F. Renfro and Wallace W. Barnes, and assigned by J. F. Renfro to Maud E. Renfro. (Signed.) Maud E. Renfro." Did this assignment operate as a transfer to Sim of the unpaid part of Barnes' personal obligation? This obligation was a written promise to pay certain sums at stated times. It was a debt evidenced by a written promise to pay. It was a mere chose in action. It is elementary that no particular form of words or instrument is necessary to effect an assignment of a chose in action. It is not necessary that the contract of the parties should fully appear in the writing by which the assignment

is made. The consideration, and even the intent of the parties, may be shown by extrinsic evidence. 1 Am. & Eng. Ency. Law (1st ed.), p. 835. As between the parties, Mrs. Renfro and Sim, we think the written instrument set out above was sufficient in form to transfer Mrs. Renfro's ownership of Barnes' debt. In so far as our former opinion may be construed as holding the form of the assignment insufficient, it should be modified.

The evidence clearly shows that Mr. Sim in his dealing with Mrs. Renfro was seeking to acquire her interest in the drug store. It does not appear that he had any particular reason or desire to buy the chose in action against Barnes. It also clearly discloses that Mrs. Renfro did not think or believe that she was selling anything more than her one-half interest in the partnership business of Barnes and Renfro. Her language, her conduct, her every act, clearly shows that she had no intent or purpose to sell or dispose of the personal obligation due from Barnes to her. We think it is further fairly inferable from the record that Mr. Sim knew and understood that Mrs. Renfro was not intending to sell or transfer the personal obligation of Barnes, but that he believed the assignment which she executed was sufficient to transfer this personal obligation to him. He claimed and asserted a right to the personal obligation, apparently because he believed the written assignment was sufficient to convey it to him, and not because there was any belief upon his part that Mrs. Renfro intended to sell or convey the personal obligation to him. Section 341 of the code provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." We think this case falls squarely within the provisions of this statute. Mrs. Renfro understood the assignment in the sense that it operated to convey only her one-half interest in the partnership business, and that it did not operate to transfer the personal obligation of Barnes. Mr. Sim knew, or had reason to suppose, that

she so understood it. It follows that, in completing the agreement with her under such circumstances he must be held to that interpretation of the contract which will give it the meaning and sense in which Mrs. Renfro understood it. The assignment did not convey to him the personal obligation of Barnes.

The appellant complains because no reformation of the contract of assignment was prayed for, but, in view of this section of the statute, we do not think that any reformation of the contract was necessary. The statute requires the court, under such circumstances, to so construe the contract as to give it the meaning in which Mrs. Renfro understood it, because Sim, the other party to the contract, had reason to suppose she so understood it.

We recommend that the motion for rehearing be overruled.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the former opinion in this case is modified, and the motion for rehearing is

OVERRULED.

CHARLES T. PAYNE, APPELLANT, V. PETER ANDERSON ET AL., APPELLEES.

FILED DECEMBER 5, 1907. NO. 14,996.

1. **Judgment: VALIDITY: CONSTRUCTIVE SERVICE.** A judgment or decree affecting the title to land owned by a resident of this state, the only notice given being by publication, is absolutely void where no appearance was made by or for such resident.

2. **Quieting Title: LIMITATIONS.** Where the lands of a resident of the state are sold under a decree entered against him on service by publication, no appearance in the action being made by or on behalf of such party, an action to quiet his title to the land may be brought at any time within ten years from the recording of the deed made on a sale under the decree.

3. ———: ———. Whether a cause of action would accrue to such party on recording the deed made to the purchaser at the sale so as to start the running of the statute, not being necessary to a decision of the case, is not discussed or determined.

4. ———: TAXATION: EQUITY. In an action to quiet title as against a sale for taxes made under a void decree of court, an offer to pay such sum as the court may find due the defendants on account of any lien for taxes paid is a sufficient offer to do equity and a sufficient tender of any taxes due the defendants.

5. **Taxation:** VOID DECREE: REDEMPTION. The limitation of two years within which a party may redeem from a sale for taxes, has no application to a sale made under a void decree foreclosing a tax lien.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

A. E. Howard, E. M. Slattery, James E. Philpott and *Berge, Morning & Ledwith,* for appellant.

A. W. Crites, contra.

DUFFIE, C.

May 27, 1905, the plaintiff filed his petition in the district court for Dawes county, Nebraska, asking that his title to the northwest quarter of section 34, township 29, of range 9 west of the sixth P. M., be quieted. The petition alleges that he became the owner in fee of said land by purchase from the owner, John Strang, in 1893, and that his deed therefor was recorded in the office of the register of deeds January 4, 1894; that at the date of his said purchase, and ever since, he was an actual resident of the city of Lincoln, Lancaster county, Nebraska, where he has continued to reside with his family, and that the defendants had actual knowledge and constructive notice of his said place of residence; that in December, 1899, the defendant, Peter Anderson, began an action in equity in the district court for Dawes county, making the plaintiff a defendant therein, and demanding the foreclosure of certain pretended tax liens on the real estate above de-

scribed; that, notwithstanding the knowledge and notice of the plaintiff's place of residence, the said Peter Anderson, plaintiff in said action, proceeded to obtain service upon the plaintiff by publication, but it is alleged that no proper or lawful affidavit of nonresidence of the plaintiff was ever filed in that action; that a decree of foreclosure was entered in said action, and the land thereafter sold by the sheriff of Dawes county; that Peter Anderson became the purchaser, and thereafter, and on August 13, 1900, a sheriff's deed to said Anderson was placed of record in the recorder's office of Dawes county, the deed bearing date July 17, 1900. It is further alleged that during the pendency of said action plaintiff had no notice or knowledge of the same, either actual or constructive; that he never made any appearance therein; that he was never served with process; that the court never obtained jurisdiction over him or his said property, and that the proceedings, including the decree, sale, and sheriff's deed, are absolutely void; that such proceedings and deed constitute a cloud upon plaintiff's title, which makes it impossible for him to sell his land or borrow money thereon. It is further stated that the defendant, Peter Anderson, conveyed the land to the defendant, Mary Anderson, and that the deed of conveyance was recorded October 19, 1904; that the consideration named in the deed is $1; that Mary Anderson is the mother of Peter Anderson, and that she took said conveyance with full knowledge and notice of all the foregoing facts; that no consideration was in fact paid for said deed, and that it still further clouds and impedes plaintiff's title. The relief prayed is that title to the land be forever settled and quieted in the plaintiff; that all proceedings had in the former case be set aside as void, and that the defendants be enjoined from asserting or claiming any right, title or interest in the premises; (2) that, if the court should find that the defendants, or either of them, are entitled to any claim or demand in, to or on said premises because of any tax liens, an accounting be had of the amount; that plaintiff be permitted

to pay the same upon terms to be fixed by the court; and for such other, further or different relief as may be just and equitable. The defendants filed separate demurrers to this petition, alleging, first, that the petition failed to state facts sufficient to constitute a cause of action in favor of the plaintiff; and, second, the petition failed to state facts sufficient to entitle the plaintiff to any relief against defendant. The court entered an order sustaining these demurrers, and, the plaintiff electing to stand upon his petition, judgment was entered against him dismissing the petition and taxing him with the costs. From this judgment the present appeal was taken.

The demurrer admits all material facts alleged in the petition. These material facts are the following: At the date of Anderson's action to foreclose a tax lien against the land, the plaintiff was the legal owner thereof and a necessary party defendant to said action; second, he was an actual resident of Lancaster county, Nebraska, residing with his family in the city of Lincoln, where actual personal service of summons could be had on him; third, Anderson had both actual and constructive notice of his said residence; fourth, notwithstanding these facts, he proceeded to obtain service of summons by publication, and perpetrated a fraud both upon the court and upon the defendant by taking judgment in the action, knowing that the service required by statute had not been had upon the plaintiff, defendant in said action; that he procured a sale of plaintiff's land under said judgment, became the purchaser thereof, and has since transferred it to his mother, without consideration and with knowledge on her part of the facts above stated.

In *Eayrs v. Nason*, 54 Neb. 143, it was held that a decree foreclosing a mortgage was absolutely void as against the owner of the fee—a resident of the state—where the only service was by publication. In that case, as in this, the action was to redeem from the illegal sale and deed, and it was said that, even though the record in which a judgment is pronounced shows upon its face that the

court had jurisdiction both of the subject matter of the suit and of the parties thereto, a party made liable by such judgment, who had never appeared in the action and who never had legal notice of its pendency, might, in a proper proceeding, either as a cause of action or as a defense, show that the recitals of the record that he was served with process of the court were false. It is true, as urged by the defendants, that the rule in some jurisdictions is that a judgment entered against a resident of the state on service by publication is valid where the plaintiff making the affidavit for such service was honestly mistaken as to defendant's nonresidence. Such is the case of *Davis v. Vinson Land Co.*, 76 Kan. 27. The court in its opinion refers to *German Nat. Bank v. Kautter*, 55 Neb. 103, which follows the rule in *Eayrs v. Nason, supra*, and approves the holding in that case under the facts disclosed in the record, while it disapproves the holding that an affidavit for publication on the ground of the nonresidence of the defendant, although made in good faith, did not confer jurisdiction on the court. We quote from the opinion: "In support of their contention the plaintiffs in error cite the case of *German Nat. Bank. v. Kautter*, 55 Neb. 103. In that case, however, the court found the action of the plaintiff in obtaining service and judgment to be fraudulent, while nothing of that nature exists here. The fraudulent conduct of the plaintiff in the case cited fully justified the decision made, and we fully concur in the conclusion reached by the court for that reason. In the discussion of the case, however, the court does not seem to have regarded the question of fraud in procuring service as important, but places its decision flatly upon the ground that a false affidavit cannot confer jurisdiction. * * * We think the opinion, when considered apart from the facts, too broad, and are not inclined to follow it." From the above extract it will be seen that even in Kansas, where the rule prevails that a judgment against a resident of the state on service by publication is good, provided the plaintiff acted honestly in filing an

affidavit alleging the nonresidence of the defendant, under the admitted facts in this case, where the affidavit for publication was made with a knowledge of its falsity, the judgment would be regarded as absolutely void. We are not disposed, however, to recede from the rule announced in *Hayes v. Nason, supra.* Every resident is entitled to personal notice before being divested of his property. Service by publication may be had only in case of nonresident defendants, and not then when personal service can be had within the state. The court can acquire jurisdiction of the person of a defendant only as provided by statute. A judgment against a defendant of whom the court has no jurisdiction must, on principle, be void. The courts holding otherwise place it upon the ground that the nonresidence of the defendant is a question of fact to be determined by the court before the entry of the judgment. The evidence to establish this fact, as stated in *Davis v. Vinson Land Co., supra,* is the affidavit for publication filed by the plaintiff or his agent or attorney. Why should the validity of the judgment depend upon whether the party making such affidavit was mistaken as to the defendant's residence, or knowingly misrepresented such place of residence? In either event, the affidavit is a false one, and the jurisdictional fact—the nonresidence of the defendant—cannot be supplied by the good faith of the party who asserts it. The published notice in such case is not notice to the defendant, and gives the court no jurisdiction over him or his property.

It is urged by the defendants that no facts are stated in the petition showing a defense to the foreclosure action, and that, whether the judgment be void or voidable, it cannot be set aside without such showing. It is established in this state that a court of equity will not lend its affirmative aid to a person seeking to avoid the enforcement of a void judgment, unless it be made to appear that he has a valid defense thereto. *Hall v. Hooper,* 47 Neb. 111, and cases cited at page 119. It may be doubted whether this rule obtains as to a judgment secured by

fraud practiced by the plaintiff; but, even if that be the rule applicable to the case at bar, the plaintiff is seeking something further than the vacation of the judgment; he is seeking to redeem his land, the title to which the defendants assert in themselves under a void decree. He is willing that the court shall award to the defendants any amount equitably due them, but he is not willing, nor do we know of any rule which will require him, to surrender his title to real estate sold under a void judgment fraudulently obtained by one of the defendants. Whether the plaintiff has a meritorious defense to the tax lien claimed by the defendants against his land is not the question in issue. The real question is: Shall his title be divested by virtue of a void decree obtained from the court by fraud practiced upon it by one of the defendants?

The defendants further urge that the plaintiff must now tender all taxes due upon the land. The petition asks for an accounting, and for leave to redeem by paying any amount for which the defendants may have a lien on the land on account of taxes paid thereon. That no tender of any specific sum was made, we do not regard as important. As said in *Jones v. Hartsock,* 42 Ia. 147: "There is not the same necessity for tender in actions in equity as at law." "A court of equity, having control over the whole subject, may so mould the decree as to costs, and the conditions under which relief will be granted, as to fully guard and protect the interests of all parties," although no formal tender is made before the bringing of a suit. See, also, *Binford v. Boardman,* 44 Ia. 53, and *Taylor v. Ormsby,* 66 Ia. 109.

It is further asserted that the action is barred by the statute of limitation; that the action does not fall under section 6 of the code limiting the time for the recovery of the title or possession of real estate, but that it falls under the provisions of section 16, which limits the time for commencing actions not provided in the preceding sections to four years. We do not think there can be any doubt that the action is one for the recovery of title to

real estate, and that the ten-year statute of limitation is the one applicable. If not an action to quiet title, it is one to remove a cloud from the title, and there are cases holding that an action to remove a cloud upon the titie to real estate is not subject to any limitation. Such an action by one in possession would, we think, be a continuing action of which a party might take advantage at any time that the cloud interfered with a sale of his property or with his attempt to raise money by way of a mortgage. So long as the owner's possession continued, a cloud could not interfere with his actual possession and enjoyment of the property or the profits to be derived therefrom. No title by adverse possession could be acquired as against the owner in possession, and any unfounded claim of title could not grow into a right, however long continued, in the absence of possession. It might, however, seriously interfere with the sale of the property or a pledge of the title in the way of security for a loan, and an action to remove the cloud would become necessary only when such interference with the free disposition of the title occurred. In *Wagner v. Law*, 3 Wash. 500, 28 Am. St. Rep. 56, an action brought by a judgment creditor to set aside fraudulent conveyances made by the judgment debtor, the court said: "Under the statute, an action for the recovery of the possession can be commenced within ten years. We think, therefore, that the action is not barred, though we do not now decide that an action to remove a cloud would be even subject to that limitation, or subject to any limitation at all; for, as ten years had not elapsed between the time the purchaser received her deeds to any of these lands and the time of the commencement of this action, it is not necessary to discuss the subject of limitations further." In this case, we are clear that the action is not barred by section 16 of the code, and, as it was commenced within ten years from the date of the sheriff's deed, it is not barred by section 6 of the code. Whether the statute would commence to run upon the making and recording of the sheriff's deed, it is not necessary to determine.

The special statute of two years within which a party may redeem from a tax sale is also urged by the defendants as applicable to this case. If the defendant had been legally served with process in the action, the two-year statute would apply, but, the decree foreclosing the tax lien claimed by Anderson being void, the two-year statute has no application.

The demurrers interposed by the defendants should have been overruled, and we recommend a reversal of the decree appealed from and remanding the cause to the district court for further proceedings not inconsistent with this opinion.

EPPERSON and GOOD, CC., concur.

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

REVERSED.

DELLA MARTIN, APPELLEE, V. FRATERNAL LIFE ASSOCIATION, APPELLANT.

FILED DECEMBER 5, 1907. No. 15,005.

1. **Courts: JURISDICTION: EVIDENCE.** An objection to the jurisdiction of the court over the person of the defendant, either on account of irregularity in the service of the summons or because the action was brought in the wrong county, must be supported by evidence when the record in the case does not show facts going to support the objection.

2. **Insurance: AGENT'S CONTRACT: CONSTRUCTION.** A solicitor for an insurance company was to receive 80 per cent. of the first 12 premiums paid by the parties whom she might procure to take policies in the company. *Held*, That her leaving the service of the company before all the 12 premiums were paid did not affect her right to the commission agreed on.

3. ———: ———: ———. That such solicitor was assisted in securing applicants for insurance by a field agent of the company is not, under the facts disclosed, a defense to her claim for commissions.

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

Harry S. Dungan and *James E. Leyda,* for appellant.

Francis Martin and *Edwin Falloon, contra.*

DUFFIE, C.

This action was brought by the plaintiff to recover commissions alleged to be due her on a written contract appointing her a deputy supreme senior of the defendant, with power to solicit members and organize local lodges of the association. By the terms of the contract she was to receive as compensation a sum equal to 80 per cent. of the first 12 assessments paid by the members whose applications were obtained by her or by such assistance as she might employ. The action was brought in Richardson county for services rendered there, and summons was served on Israel L. Beaulieu, an officer of the local lodge located at Falls City, in that county. The defendant appeared specially and filed objections to the jurisdiction of the court in the following words: "Now comes the defendant, by Harry S. Dungan, its attorney, and appearing for the sole and only purpose, objects to the jurisdiction of this court over the subject matter of the action and the person of this defendant." The court overruled this objection to the jurisdiction, and properly so, for the reason that no evidence, either oral or by way of affidavits, was offered in support thereof. The defendant thereupon filed answer, admitting the contract of employment set out in the plaintiff's petition, admitting that plaintiff wrote insurance for the defendant in the towns of Franklin and Bloomington for which she had been overpaid in the sum of $51.70, and denying that she secured any

other applications for insurance for the defendant company. It is further alleged that plaintiff left defendant's employment in July, 1904; that her contract of employment was then terminated, and that she was not entitled to receive any compensation thereafter. The answer further contained the following plea to the jurisdiction of the court: "This defendant further alleges that this action was improperly brought in the county of Richardson, for the reason that the contract sued upon was made in the county of Adams; that the head office of the Fraternal Life Association, defendant herein, is at Hastings, Adams county, Nebraska; that demand was made on the defendant for payment in Adams county, Nebraska, and payment there refused, and that the cause of action of the plaintiff, if any, arose in Adams county, and that said cause of action, or any part thereof, did not arise in Richardson county, Nebraska; therefore, this court has no jurisdiction to try the above cause." Accepting this plea as raising the question of venue and a claim of immunity from lawful service of summons in Richardson county, our attention has not been called to any evidence in the bill of exceptions, nor have we discovered any testimony given, in support of this plea. *Prima facie* the court had jurisdiction of the parties, and, until some evidence was introduced by the defendant tending to show its immunity from suit in Richardson county, the court could neither pass upon the question himself nor submit it to the jury as an issue in the case. The jury returned a verdict for the plaintiff in the sum of $425. The court, before pronouncing judgment, required the plaintiff to remit $20 from the amount of the verdict, and entered judgment for the remainder, and from this judgment the defendant has appealed.

Numerous errors are assigned, but the only ones argued are those relating to the jurisdiction of the court, the giving of certain instructions, and the amount of the judgment, which, it is claimed, is excessive. What we have already said disposes of the question of jurisdiction.

Relating to the instructions given, they were clearly warranted by the evidence, and contained, so far as we can discover, no erroneous principle of law.

One claim urged against the amount of the recovery seems to be based upon the theory that plaintiff was not entitled to 80 per cent. of any of the first 12 premiums paid on policies secured by her, unless paid before she left defendant's employ. We do not think the contract can be so construed. It was undoubtedly the intention of the parties that plaintiff should receive as compensation 80 per cent. of the first 12 premiums on policies secured by her efforts, regardless of the time of the termination of her services. A general field agent of the defendant spent several weeks in Falls City assisting the plaintiff in organizing a lodge at that place. There was some evidence in the record to the effect that plaintiff was to have the assistance of an agent of defendant company in organizing the first three lodges, and there is evidence of defendant's field agent himself and of statements made by him which was sufficient to warrant the jury in finding that any services rendered by him in organizing the lodge at Falls City was as her assistant and of which she was to have the benefit. This question was fairly submitted to the jury by the instructions of the court, and a finding in her favor cannot be said to be without evidence in its support.

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

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

MALCOM SAVINGS BANK, APPELLANT, V. D. J. CRONIN, APPELLEE.*

FILED DECEMBER 5, 1907. No. 15,011.

1. **Affidavits** taken and subscribed before a notary public, who is also an attorney in the case, cannot be used in support of an attachment issued therein against the objections of the defendant.
2. **Trial**: EVIDENCE: ADMISSIBILITY. The courts of this state are not bound by the rules of evidence adopted in another jurisdiction, but must be governed in the admission of evidence by the law prescribed by our own legislature.

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

R. R. Dickson, for appellant.

Arthur F. Mullen, contra.

DUFFIE, C.

The plaintiff commenced this action on a promissory note executed by the defendant to James Duffus, a resident of Poweshiek county, Iowa, September 30, 1905. The note is for $2,110, and represents the purchase price of certain registered cattle bought by Cronin from Duffus on the date the note was given. This note Duffus sold and transferred to the Malcom Savings Bank. The plaintiff, at the time of commencing the action, obtained an attachment against the property of the defendant, alleging as grounds therefor "that the defendant fraudulently contracted the debt for which suit has been brought, and that the defendant fraudulently incurred the obligation for which suit has been brought." Defendant filed a motion to dissolve the attachment, alleging, among other grounds, that the statement of facts in the affidavit therefor were untrue. This motion came on for hearing before the court November 17, 1906, and an order was then entered requiring plaintiff to file his affidavits in support of the attach-

* Rehearing denied. See opinion, p. 231, *post.*

ment by November 26, and giving the defendant until December 1, 1906; the plaintiff was allowed until December 10 to file counter affidavits, and on December 11, 1906, the motion was heard by the court upon affidavits filed by the parties, and the attachment dissolved. The plaintiff has appealed from the order dissolving the attachment, and the defendant has filed a cross-appeal complaining of the action of the court in receiving certain affidavits offered by the plaintiff in support of its attachment.

The cattle for which the note in suit was given were purchased by Cronin in Poweshiek county, Iowa, at a sale of fine stock had by Duffus. One A. P. Meigs was clerk at the sale. The affidavits of Duffus and Meigs were used in support of the attachment, and are to the effect that in order to obtain credit on his purchase, and to induce Duffus to accept this note, Cronin represented to them that he was the owner of 1,200 acres of land in Holt county, worth $20 an acre; that it was free and clear of all liens, except a mortgage of $5,000; that he was the owner of a large number of fine cattle, horses and other valuable property, which were free and clear of all liens; and that the $5,000 incumbrance upon his land was his only indebtedness. These were the principal affidavits offered in support of the attachment, and the only ones tending to show any false or fraudulent representations made by the defendant to obtain credit. These affidavits were taken in Iowa before H. E. Boyd, a notary public, who was also an attorney of record in this case. When these affidavits were offered in evidence, the defendant objected to their introduction, for the reason that they were executed before a notary public who appeared as counsel in the case, and he further moved to strike the affidavits from the file for the same reason. The court overruled both the objection and the motion to strike the affidavits from the file, to which ruling an exception was entered.

It was a rule of common law that affidavits taken before an attorney in the case could not be used in evidence, if

objected to. *Collins v. Stewart,* 16 Neb. 52. In 1887 our legislature made an attempt to change this rule of the common law by an amendment to section 118 of the code, the amendment being to the following effect: "And nothing herein shall be construed to prohibit an attorney at law, who is a notary public from swearing a client to any pleading or other paper or affidavit in any proceeding in any of the courts of this state." Laws 1887, ch. 93. The effect of this amendment was before the court in *Horkey v. Kendall,* 53 Neb. 522, and it was there held: "The amendment of 1887 to section 118 of the code, notwithstanding its general language, cannot be held to apply to affidavits, other than those verifying pleadings, without giving the amending act a construction which would render it violative of section 11, art. III, constitution." A careful reading of the opinion in this case satisfies us of its correctness, and that to give full effect to the amendment would be to further hold that it amended section 371 of the code, which is not mentioned or referred to in the amendatory act. Boyd, the notary who took the affidavits, was present at the trial, and his testimony was taken to the effect that the laws of Iowa, where the affidavits were taken and subscribed, do not prohibit an attorney from taking and certifying an affidavit to be used in the case. We do not see how the practice in Iowa can have any bearing upon the question. The rules of evidence to be enforced by our courts are those established by our own legislature, and not the legislature or rules of court adopted in another jurisdiction. *Sulpho-Saline Bath Co. v. Allen,* 66 Neb. 295. The court erred in receiving the affidavits objected to, and their statements cannot be considered by this court. These affidavits being out of the case, there is nothing in the record to sustain the attachment as against the showing made by the defendant.

We therefore recommend an affirmance of the order dissolving the attachment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order dissolving the attachment is

AFFIRMED.

The following opinion on motion for rehearing was filed April 23, 1908. *Rehearing denied:*

1. **Affidavits:** OBJECTIONS. Section 371 of the code, providing that an affidavit may be made before any person authorized to take depositions, cannot inferentially be construed as requiring that objections to affidavits as evidence shall be made in the manner provided by statute for the filing of objections to depositions.
2. **Appeal:** ESTOPPEL. A party cannot take advantage of the court's erroneous rulings which he invokes.
3. **Attachment:** MOTION TO DISSOLVE: BURDEN OF PROOF. Where the grounds relied on to support an attachment are positively denied by the oath of the defendant, the burden is upon the plaintiff to prove his grounds for attachment by a preponderance of evidence.

EPPERSON, C.

In its motion for rehearing the plaintiff urges that, because we held that the affidavits upon which plaintiff relied to support its attachment were incompetent because sworn to before its attorney, who was a notary public, we should have remanded the case for a rehearing upon its merits. Plaintiff insists that defendant's objections to the affidavits should have been interposed before trial in the manner provided by statute for the filing of objections to depositions. Section 371 of the code, providing that an affidavit may be made before any person authorized to take depositions, cannot inferentially be construed as requiring that objections to affidavits as evidence shall be made in the manner provided by statute for interposing objections to depositions.

Again, it is not made clear as to how the rule invoked by appellant would avail him. The trial court admitted the affidavits in evidence. He undoubtedly would have admitted them, had the objection been made in a different form. Plaintiff cannot take advantage of the erroneous rulings of the court which he invokes. A party litigant

must in the first instance be the judge of the competency of his evidence, and, upon objection being interposed by the adverse party, it is his privilege to submit to the objection made, and if he submits to the objection, or his evidence be held incompetent because of the form in which it is presented, the trial court should, in cases such as the one at bar, grant a continuance, if necessary, that the evidence may be presented in its proper form. Where a party refuses or fails to submit to his adversary's objection, but insists upon presenting the incompetent evidence, he does so at his peril. This court can consider none but the competent evidence presented by the record.

There is another reason for refusing a rehearing of this case. The facts appearing in the objectionable affidavits are competent as evidence, although not presented in acceptable form. For this reason, we have examined the affidavits to ascertain whether or not appellant has been prejudiced by its failure to properly present them. Plaintiff relies upon alleged misrepresentations of defendant as to his financial condition made when the debt was incurred. The affidavits refer to conversations in which it is claimed that defendant misrepresented his financial condition. No two of plaintiff's witnesses swear to the same conversation. Defendant denies each controlling fact sworn to by plaintiff's witnesses. It was one man's evidence against another's. If defendant's evidence is true, plaintiff is not entitled to an attachment. The rule is well established in this court that, where the allegations made in support of an attachment are denied by the oath of the defendant, the burden is upon the plaintiff to prove his alleged grounds for attachment by a preponderance of the evidence. *Geneva Nat. Bank v. Bailor*, 48 Neb. 866; *Dolan v. Armstrong*, 35 Neb. 339. The plaintiff did not successfully carry the burden of proof.

We recommend that the motion for a rehearing be overruled.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, plaintiff's motion for a rehearing is

OVERRULED.

IN RE ESTATE OF MARY J. MALL.

MARTHA CALDWELL ET AL., APPELLEES, V. CHARLES E. KERR, EXECUTOR, APPELLANT.

FILED DECEMBER 5, 1907. No. 14,993.

1. **Administrators, Debts of.** Where it is sought to charge a legal representative with debts owing by him to the deceased, the burden of proof is upon the party applying; but, when the contracting of such indebtedness is admitted or otherwise established, the burden is upon the legal representative to show that the same has been paid or accounted for.
2. **Evidence** examined, and the judgment of the district court modified.

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

C. L. Richards and *J. M. Stewart,* for appellant.

W. E. Goodhue, P. J. Carolus and *J. M. Wilson, contra.*

EPPERSON, C.

This proceeding was instituted in the county court of Thayer county by legatees named in the will of Mary J. Mall, objecting to the final report of C. E. Kerr, executor of her estate. The legatees alleged that the executor was indebted to testatrix for certain money borrowed by him during the lifetime of testatrix, and for which he had failed to account. The county court denied the relief sought, but upon appeal the district court ordered that the estate recover from the executor $3,816.15, with interest, and the latter brings the case to this court for review.

The only contention of appellant argued in the brief and properly raised before the trial court and in the as-

signment of error is that the judgment is not supported by the evidence and is contrary to law. The evidence shows that in July, 1900, appellant gave his personal note to testatrix for $2,716.15, due five years after date, and at other times two notes for $600 and $1,200, respectively. The $2,716.15 note was given to testatrix for one-half interest in a lumber yard which she received from her husband's estate, of which estate appellant was administrator. Appellant, in addition to the note, and as a part of her share of her husband's estate, paid to testatrix a certain sum of money, which he testified was more than $100 and less than $1,000. The trial court found that the executor is chargeable with the $2,716.15 note, the $600 note, and with the sum of $500. We find no evidence in the record to support the court's finding as to the $500 item. Apparently the trial court considered that such an amount from her husband's estate remained unpaid. If so, the finding is unwarranted, because that estate appears to have been fully settled, and there is no evidence that appellant, at that time, borrowed more than the $2,716.15. The executor included the $600 note in his inventory, claiming credit for certain indorsements, and showing a remainder due the estate of $160, for which he has accounted. There can be no doubt that the court's finding is erroneous to the extent at least of charging the full amount of the $600 note to the executor, and we are of opinion that the evidence will not justify us in surcharging any part of it.

As to the note for $2,716.15, the facts are different. For a proper understanding of the situation, a brief review of the evidence is necessary. Appellant married the only daughter of Mrs. Mall, the testatrix, and lived near her. The families were intimate. She appointed him executor. Kerr and his wife and their children were bequeathed $3,000 by Mrs. Mall, and by her will she required Kerr to give bond in the sum of $13,000 as executor. Appellant admits the giving of the note. This fact being admitted, the burden was on him to account for the note, or, in other

words, to prove its payment. The law seems to be that, upon an accounting, the affirmative of establishing more assets than are acknowledged by the inventory or account of a personal representative is with the party objecting, but, where the assets are shown or admitted, the burden is upon the personal representative to account for their proper disposition. 18 Cyc. 1180, 1181, note 42. See, also, *Wilbanks v. Crosno & Evans,* 112 Ill. App. 503; *In re Bayley,* 67 N. J. Eq. 566; *Adams v. Adams,* 113 Ga. 824.

Appellant contends that he successfully carried the burden of proving that he paid the note before the death of Mrs. Mall. He testified that he made several payments in cash from time to time to Mrs. Mall and indorsed the amounts on the note; that one large sum was paid in this way: Mrs. Mall had purchased residence property of a party owing appellant. The purchase price was paid by appellant giving credit to the vendor; but he does not remember either the date or the amount, nor does he produce his books or account for their absence. He is corroborated by other witnesses as to the fact that a payment was made to Mrs. Mall in this way upon some indebtedness owing by him. We also find that there was another $1,200 secured note which had been paid, and, in view of the fact that the $2,716.15 note was not then due, it is possible that the above payment was in satisfaction of the secured debt. He further states that the note was turned over to him when paid; that he did not keep it; that he is unable to produce it; that he took no receipt from Mrs. Mall, and that he kept no record of the payment. Incredible as it seems, appellant, a business man, would have us believe that he had these large dealings and a settlement with Mrs. Mall, who was somewhat advanced in years, without taking a receipt for the money he paid, or having a witness to the settlement, or making a memorandum of dates and amounts. Mrs. Mall lived in her own home, was economical, and kept boarders to assist in making a living. She had at least $2,000 other than the several amounts loaned to appellant. If Kerr paid her the

$2,716.15, the record is silent as to what disposition she made of it; and it seems incredible that a woman of her habits and station in life would dispose of such a sum without it being known. Again, Mrs. Mall executed her will six months prior to her death, and bequeathed $4,600 to relatives. It is difficult to understand how Mrs. Mall, a person of ordinary intelligence, would attempt to dispose of such a sum if she did not possess anything near that amount. Appellant was a very unsatisfactory witness, so much so that the trial court was compelled to reprimand him for making evasive answers. We are convinced that Kerr could have produced documentary evidence, memoranda of dates and amounts, which would have given credit to his testimony, were it true. And, further, in view of the fact that Kerr within an hour or two after Mrs. Mall's death showed considerable anxiety about getting control of her papers, and had an opportunity to destroy his own notes, and admitted about the time he was appointed executor that he had $1,000 with which to settle appellees' bequests of $1,600, we conclude that the learned trial court was right in finding that the executor had not paid this indebtedness.

We therefore recommend that the judgment of the district court be affirmed, if the appellees remit from the judgment all in excess of the sum of $2,716.15, with interest at 7 per cent. from March 29, 1904; otherwise, that it be reversed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, if the appellees within 30 days remit from the judgment all in excess of the sum of $2,716.15, with interest at 7 per cent. from March 29, 1904; otherwise, the cause is reversed and remanded.

JUDGMENT ACCORDINGLY.

SUSIE H. GILLILAN, ADMINISTRATRIX, APPELLEE, V. ADELIA P. FLETCHER ET AL., APPELLANTS.

FILED DECEMBER 5, 1907. No. 15,000.

1. Limitation of Actions. "Where, after the maturity of a note secured by a real estate mortgage, interest payments are made annually on such note, a right of action accrues on the mortgage at any time within ten years after the date of the last payment on said note." *Teegarden v. Burton*, 62 Neb. 639.
2. Evidence examined, and *held* sufficient to sustain the finding and judgment of the district court.

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

Francis M. W. Price and *A. E. Harvey*, for appellants.

Berge, Morning & Ledwith, contra.

EPPERSON, C.

This is an action to foreclose two real estate mortgages given by Asa Fletcher and wife to W. G. Houtz. A decree of foreclosure was entered as prayed. Since the decree Houtz died, and the action is prosecuted in the name of his administratrix.

The principal defense relied on by defendants is the statute of limitations. The notes and mortgages became due April 20, 1891. They were not paid when due, and this action was instituted January 4, 1906. Defendants concede that the interest was paid up to and including the year 1895. Plaintiff's witnesses testified that the last interest payment was in the summer of 1896. This was denied by defendant's witnesses. The trial court resolved this issue of fact in plaintiff's favor, and, after a careful review of the record, we conclude that his finding was correct. Plaintiff testified that the last payment was interest to April 20, 1896, and the indorsements on the notes so show. Plaintiff was corroborated by his son-in-

law, who testified that he received this payment of interest for plaintiff in the summer of 1896 from the mortgagor in person. Defendants seek to discredit this testimony by a letter from plaintiff to defendants, of date September 25, 1896, in which the former urged a settlement of the indebtedness, and said in part: "You know it is unfair that I cannot get even the interest on my money invested." The general trend of this letter, which is too lengthy to set out in full, is pessimistic, and the excerpt undoubtedly referred to other investments made by plaintiff which he mentioned in the letter. It does not impeach the plaintiff's evidence as to the fact of the payment of interest on the indebtedness to April 20, 1896. As the action was commenced within ten years thereafter, it was not barred. *Teegarden v. Burton*, 62 Neb. 639.

Each mortgage contained a clause that, upon failure to pay taxes, the principal sum became due and payable. The Fletchers defaulted in the payment of taxes in the year 1893 and the land was sold at tax sale. It is now contended that the mortgages matured upon this breach of the conditions and that an action to foreclose was barred ten years later. The mortgage matured and became due April 20, 1891. Default in the payment of subsequent taxes could in no way affect the plaintiff's right to foreclose or cut short the period of limitation, which, as above indicated, was tolled by payment of interest.

Other assignments argued do not require discussion, and we recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

LUCY A. COLBY, APPELLANT, V. MARY J. FOXWORTHY, APPELLEE.*

FILED DECEMBER 5, 1907. No. 15,330.

1. **Alteration of Instruments: BURDEN OF PROOF.** The burden is upon the party alleging the material alteration of an instrument to prove that it was altered by the holder thereof after the execution and delivery of the same.
2. **Evidence** examined, and *held* insufficient to prove that the instruments in controversy had been altered after their execution by defendant.

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

Flansburg & Williams, for appellant.

L. C. Burr, contra.

EPPERSON, C.

This is an action for the foreclosure of a mortgage, and for the fourth time appears in this court. See 64 Neb. 216, 72 Neb. 378, 78 Neb. 288. A history of the case is given in the opinion by Mr. Commissioner ALBERT in 78 Neb. 288. Since then a new trial has been had, resulting in a judgment for defendant. Plaintiff again appeals.

It is contended by defendant that the rules announced in the opinion in 72 Neb. 378, *supra,* became the law of the case, and terminate the issues now involved in her favor. But the issues there involved and disposed of are no longer in the case, and it will be impossible to apply the law there announced to the case in hand. The court then construed a certain amended petition, holding that it stated a cause of action, and that the alleged spoliation of the instrument sued on would not avoid the contract. No doubt the rules announced became the law of the case; but they ceased to operate on any issue in this case upon

* Rehearing denied. See opinion, p. 244, *post.*

the withdrawal of the amended petition before the last trial. In commenting upon the opinion filed in this case (72 Neb. 378), the learned commissioner said: "Three propositions are involved in this controversy, and but three are determined in our former opinion, and are now governed by the rule of 'the law of the case.' The first of these is that the alteration of the instrument by inserting the word 'gold' before dollars was a material alteration; the second is that the defendant is not estopped from pleading this defense by paying without objection the nine interest coupons attached to the note, which contained this condition; third, that the alteration was made without defendant's knowledge and after the execution of the note and mortgage." As to the first and second propositions, no doubt exists but that they were established as the law of the case. However, we find nothing in the first opinion concluding that the alleged alteration was made after the execution of the note and mortgage. It is true, the trial court had found that such was the case, and the finding was mentioned in the opinion as a fact, but the sufficiency of the evidence was never determined by this court; instead, the case was remanded for further proceedings. It cannot be said that it was established as the law of the case that the word "gold" was inserted in the bond and mortgage after its execution. It was not so considered in the third opinion, wherein it was determined that a judgment could not at that time be predicated upon the findings made on the first trial. The lower court saw fit to grant a new trial, and, having done so, the district judge was required to make his findings from the evidence there adduced. There are three rules established as the law of this case: (1) That, if the word "gold" was inserted by the mortgagee after the execution and delivery of the mortgage and bond, it was a material alteration; (2) that the defendant by the payment of the interest coupons from time to time was not estopped from alleging a material alteration; and (3) the findings of fact at the first trial cannot be adopted by the trial court. These eliminate all

issues existing prior to the last trial, and confine our inquiry here to the sufficiency of the evidence to sustain the judgment rendered.

The bond in controversy is a printed form with blanks for amount, date, etc. Before the word "dollars" a blank line was filled, so that it now reads: "I promise to pay the sum of eight hundred and no-100 gold dollars," etc. The words and figures "eight hundred and no-100" were filled in with pen and ink, and the word "gold" stamped in the blank with a rubber stamp. In like manner a blank in the mortgage was filled out. The defendant asks the court to regard the inserting of the word "gold" as an obvious alteration, and to cast upon the plaintiff the burden of proving that it was made before the execution of the contract. It may properly be called an obvious alteration; that is, it is obvious that the word "gold" was inserted. It was no part of the form upon which the contract was written, nor was it necessary to make a complete contract between the parties. But we cannot agree with the defendant as to the rule of evidence she invokes. It is unnecessary to review the conflicting authorities as to the burden of proof in such cases. This court held in *Dorsey v. Conrad*, 49 Neb. 443, "Where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered." It would seem from this that, unless the instrument itself indicated an alteration after its execution, and in the absence of extraneous evidence, the party seeking to enforce the instrument would prevail. It also follows that the party alleging a material alteration carries the burden of proving it. This, we think, is the better rule and in accord with the weight of authority. In *Hagan v. Merchants & Bankers Ins. Co.*, 81 Ia. 321, it is said: "If we are to presume from the fact of alteration that it was fraudulently made, then the burden is upon the plaintiff to rebut this presumption; but if no presumption arises,

or if the alteration is presumed to have been made before delivery, then the burden is upon the defendant. * * * If the instrument shows upon its face, as it is possible it may, that the alteration was fraudulent, then it proves more than the mere fact of alteration; but when the fact of alteration alone appears from it, and it is silent as to the time or authority by which it was made, there is no evidence upon which to base the presumption that it was fraudulently done." See, also, *Fudge v. Marquell*, 164 Ind. 447; *Wilson v. Hayes*, 40 Minn. 531, 4 L. R. A. 196; *National Bank v. Feeney*, 12 S. Dak. 156, 46 L. R. A. 732, 737. In *McClintock v. State Bank*, 52 Neb. 130, it was held, in a case wherein the note itself did not disclose the alteration, that the burden of proof is upon the party alleging the alteration. Such is the rule also where the presumption is that a change appearing upon the face of the instrument was made at or before its execution. 2 Cyc. 234, note 92, pp. 239, 240, note 18. No witnesses were called at the last trial, and the evidence there given consisted of depositions, the testimony given by witnesses at former trials, and written instruments, and, under the rule announced in *Faulkner v. Simms*, 68 Neb. 299, and *Roe v. Howard County*, 75 Neb. 448, we have examined the evidence and arrived at an opinion uninfluenced by the decision of the district court.

There is a conflict in the evidence. The defendant produced the testimony of Miss Dowden, who, when the loan was made, was employed as a clerk in the mortgagee's office. She also negotiated the loan for defendant. She testified positively that she read the bond and mortgage immediately before they were signed, and that the word gold was not therein. Defendant herself gave testimony on two occasions. First, in 1899, she testified in reference to the bond and mortgage: "Miss Dowden read them over to me. Of course, I did not read them over. * * * I didn't read them very carefully myself. I cast my eye over that to see the amount. * * * There was $800, and the word 'gold' was not there. * * * Q. You were

not looking in that mortgage to see that word 'gold'? A. No, sir; because, of course, my attention was limited, and I could not tell. All I was looking for was to see the number of dollars, of $800 gold dollars, and it was not there. Q. Where did this conversation in regard to gold occur? A. I think about the first time I went there." In 1906 the defendant gave her deposition, in which she said: "Q. At that time did you read over the note, coupons, and mortgage? A. Yes, sir; two different times. Q. State whether any agreement was made or attempted to be made with you to pay this loan in gold as testified to by John West? A. No, sir; there was not, and this young man is mistaken. Q. When was the word 'gold' stamped in the note, mortgage and coupons, if you know? A. Between the first day of September and the time when I got the money. It was not in there when I signed them, and when Miss Dowden and I read them over." Contrary to the defendant's testimony, we find the depositions of John West and E. C. Jones. The former was a clerk in the office of the mortgagee. He prepared the papers in controversy, and says: "Mrs. Foxworthy and Miss Dowden were in the office to sign up these papers. After some conversation between Mrs. Foxworthy and Miss Dowden, they left the office, Mrs. Foxworthy refusing to sign the papers at that time, as they were made payable in gold—the bond, mortgage and coupons—which was explained to her by both Miss Dowden and myself. There was no mortgages or loans made by the Lombard Investment Company at that time without the gold clause being inserted. They then left the office. Whether they returned again that same day or the next morning, I am not sure; but return they did, and Mrs. Foxworthy then signed the papers in our office. Before signing these papers, it was again made clear to her that they would be made payable in gold. * * * The word 'gold' was stamped in the body of the bond, coupons and mortgage, and the red-ink ruling in the body of the instrument was made before they were signed by Mrs. Foxworthy." E. C. Jones, cash-

ier of the mortgagee, in his deposition says that he examined the papers immediately after their execution, and that the word "gold" was there at that time, and he approved the papers and stamped them with his "O. K.," closed the loan, and paid defendant the money. The execution of the mortgage was also acknowledged before him as notary public. The mortgage itself shows that it was acknowledged on October 24, 1891, instead of September 1, as testified to by defendant. Miss Dowden's memory is shown to be defective, in that she remembered John West only as a schoolboy, and not as a fellow employee. It appears, and we are convinced, that he was an employee of the mortgagee, and was about 23 years of age when the papers in the controversy were executed, and that they were prepared for execution by him.

A preponderance of the evidence does not disclose that the alteration was made subsequently to the execution of the bond and mortgage. The plaintiff was entitled to a decree of foreclosure, and we recommend that the judgment be reversed and the cause remanded, with instructions to the lower court to make a computation of the amount due plaintiff and to enter a decree of foreclosure.

DUFFIE and GOOD, 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 enter a decree of foreclosure.

REVERSED.

The following opinion on motion for rehearing was filed April 10, 1908. *Rehearing denied:*

PER CURIAM.

This case is again before us on motion for a rehearing, which is asked for on the theory that we have overlooked and failed to consider certain evidence contained in the record, which it is claimed would have required us to affirm the judgment of the district court.

It is practically conceded in the briefs in support of the motion, and rightly, we think, that the only question left for determination is whether or not the word "gold" was stamped in the notes and mortgage sought to be foreclosed in this action before they were executed by the defendant. From the citations of authorities it seems quite evident that counsel have overlooked the fact that, under the statutes and the rules now in force for the trial of appeals in equity cases, we are not at all bound by the findings and judgment of the trial court, but must try such cases *de novo,* reach our own independent conclusions as to the weight, credibility and effect of the evidence, and render our judgment without reference to the conclusion reached by the district court, or the fact that the record contains some evidence to support it. *Grandin v. First Nat. Bank,* 70 Neb. 730; *Naudain v. Fullenwider,* 72 Neb. 221; *Michigan Trust Co. v. City of Red Cloud,* 69 Neb. 585; *Winston v. Armstrong,* 74 Neb. 604; *Omaha L. & B. Ass'n v. Hendee,* 77 Neb. 12; *Roe v. Howard County,* 75 Neb. 448, 5 L. R. A. (n. s.) 831; *Stocker v. Nemaha County,* 72 Neb. 255.

Before considering the evidence, it is necessary to dispose of the defendant's contention that the plaintiff should have no standing in this case because she has twice changed her theory as to when the word "gold" was stamped in the mortgage in question. It sufficiently appears that the mortgage was given to the Lombard Investment Company, and several months afterwards was sold to the plaintiff, who resides in New Hampshire. She personally knew nothing of the parties or the circumstances of the giving and making of the mortgage, and upon default of payment instituted foreclosure proceedings. Mrs. Foxworthy, the principal defendant, pleaded an alteration in the notes and mortgage subsequently to their execution by her. When the action was commenced, the Lombard Investment Company had failed, its managing officer in Lincoln was dead, and its employees were scattered. Upon the first trial in the court below, the only evidence upon the question of the alteration of the instruments was

furnished by the defendant. Not being able to meet this evidence, and having no means at hand at that time of showing that it was untrue, the plaintiff changed her theory of the case, and filed an amended petition, in which she admitted the alteration by the insertion of the word "gold" before the word "dollars," thereby making the notes and mortgage payable in gold. But she alleged that such alteration was not made by her, that it was an unauthorized act by some unknown person, and sought to recover upon that theory. Later on, however, John West, the son of the manager of the Lombard Investment Company at Lincoln, the person who prepared the notes and mortgage in controversy, was located, and the residence of Mr. Jones, the former cashier of that company, was ascertained, their evidence was procured, and it was thus made apparent to the plaintiff that the word "gold" was stamped into the notes and mortgage prior to their execution. Thereupon, she again changed her theory of the case, withdrew her amended petition, and elected to stand upon her original pleading.

Much fault is found because in our original opinion no special attention was given to the amended petition, which was offered in evidence, and by which the alteration of the notes and mortgage was admitted. We have not overlooked the admission, but did not mention it because we deem it quite immaterial. The plaintiff, when she filed her amended petition, had no personal knowledge of the controverted facts, and her admission was made by counsel and under circumstances which led her to believe that it was true, as claimed, that the instrument had been altered, as she then inferred, by some one other than herself, and without her knowledge. However, when she discovered a different state of affairs, she promptly withdrew the amended pleading, and the admission thus made should not be allowed to prejudice her substantial rights.

We have carefully read the evidence tending to show the alleged alteration, all of which is given by Mrs. Foxworthy and one Miss Dowden, both of whom have testified on two

different occasions in this case. On the first occasion, both of these witnesses testified that the notes and mortgage were signed on the 13th day of October, and the money was immediately turned over to Mrs. Foxworthy by the cashier, Mr. Jones. On that occasion they both said that Miss Dowden read over the notes and mortgage to Mrs. Foxworthy, who did not read them; that Mrs. Foxworthy only looked over Miss Dowden's shoulder to see that the amount written therein was $800; that beyond that she did not read or examine the papers. They also, by their evidence given at that time, conveyed the idea that Mr. Jones, the cashier, prepared the notes and mortgage. When they testified the second time, which was after the depositions of West and Jones had been taken, they both stated that the notes and mortgage were signed about the 1st of September, some six weeks previous to their date. On the second occasion they did not know who prepared the notes and mortgage, and they testified at that time that Miss Dowden and Mrs. Foxworthy both read over the papers carefully and reread several portions of them. For these and other reasons, which will be presently given, we are not impressed with the correctness of their statements.

Again, the evidence in this case shows that Mrs. Foxworthy paid nine of the coupon notes, in each of which the word "gold" was plainly stamped. Had she been the very careful, cautious business woman which her testimony taken the second time would lead one to infer she was, it would seem that, when she paid the coupons, she would have discovered the fact that they were payable in gold. There are other parts of Miss Dowden's testimony that seem somewhat peculiar. The evidence clearly shows that it was the custom, and had been for some time, for the Lombard Investment Company to make all of its loans payable in gold, and that the word "gold" was stamped before the word "dollars" in all of its notes and mortgages. It appears that Miss Dowden was soliciting agent for that company. Yet she stated that the word "gold"

was not in the notes and mortgage, and, if it had been, it would have startled her, and would have scared her so that she would not have allowed Mrs. Foxworthy to sign them. This testimony appears to us to be very inconsistent with the position she was holding. As above stated, she was the agent of the Lombard Investment Company, and, if she was in the habit of reading its notes and mortgages at all, she must have been familiar with the fact that they were all made payable in gold. So we are unable to see why she would have been alarmed if she had seen the word "gold" before the word "dollars" in the notes and mortgage in question. Neither do we see any reason for her statement that she would not have allowed Mrs. Foxworthy to sign them if made payable in gold. In her second deposition, after it had been discovered that John West was the man who drew the notes and mortgage, she testified that she had a recollection of him as a schoolboy, while it is conclusively shown by other evidence that he was a young man about 23 years of age at that time, and had been in the employment of the Lombard Investment Company in its Lincoln office for a long time prior thereto. Under such circumstances, the evidence of Miss Dowden and Mrs. Foxworthy as to the alleged alteration is far from convincing. Upon the other hand, Mr. West testified clearly, explicitly and positively that he prepared the notes and mortgage in question, and that the word "gold" was stamped into them prior to their execution. Mr. Jones, the cashier, also testified that it was his duty to examine all of the papers prior to the payment of any money upon them; that he took Mrs. Foxworthy's acknowledgment of the mortgage in question; that it was his custom, after he had examined notes and mortgages, to place thereon the letters "O. K. J," indicating that he had examined them and found them correct. This mark appears upon the mortgage and the principal and coupon notes; and from this Mr. Jones testified that he examined the papers at the time he took the acknowledgment of the defendant, and that he knew the word "gold" appeared

therein at that time. There is also evidence of other employees that it was the custom of the Lombard Investment Company to make all of its loans payable in gold. Upon this alone it appears to us that the clear weight of the evidence is in favor of the plaintiff, and we have no hesitancy in finding that the word "gold" was stamped in the notes and mortgage prior to their execution.

There are still some other facts which should be mentioned, and which we think are conclusive of the question. An examination of one of the coupons, which appears in the record, marked "Exhibit 4," under a microscope, discloses that the last part of the words "twenty-four and no-100," immediately preceding the words "gold dollars," overlaps the word "gold" which is in red ink, thus clearly showing that those words were written after the word "gold" was stamped in the instrument. It is not conceivable that Mrs. Foxworthy signed the notes before they were filled out, and, if they were filled out prior to her execution and signature, it is clear that at least one of the coupons had the word "gold" stamped in it at the time she signed it. This being so, it may be presumed that all were so stamped.

Again, an examination of the notes and mortgage shows that the written portions thereof are underscored with red ink, and that the spaces between the written and the printed parts of the mortgage are filled with red-ink lines. The words "800 and no-100" are written in the middle of a blank line, and the first and last parts of this line are filled with red-ink marks. At first Mrs. Foxworthy testified that the red-ink lines were not in the instrument when she signed it; but afterwards modified her testimony by saying that she did not know about it.

For the foregoing reasons, together with others suggested by the evidence, we are of the unanimous opinion that the defendants failed to show by a preponderance of the evidence any alteration in the notes and mortgage in question. We therefore conclude that our former opinion is right, and the motion for a rehearing is

OVERRULED.

ELLSWORTH JOHNSON, APPELLANT, V. AMERICAN SMELTING AND REFINING COMPANY, APPELLEE.*

FILED DECEMBER 5, 1907. No. 14,967.

1. **Pleading**: AMENDMENT: CONSTRUCTION. Original and amended petitions examined, and *held* that the amended petition did not state a different cause of action from that attempted to be set up in the original petition.

2. ———: ———: LIMITATIONS. A plaintiff has a right to file an amended petition setting up a good cause of action after the sustaining of a general demurrer to his original petition, notwithstanding the fact that the statute of limitations has run prior to the filing of the amended petition, provided the amended petition does not seek to recover upon a new and independent cause of action; and it is error to sustain a motion to strike such an amended petition from the files.

3. **Appeal**: AMENDED PETITION: MOTION TO STRIKE: REVIEW. When an amended petition has been stricken from the files upon the ground that it states a different cause of action from that set forth in the original petition and one that is barred by the statute of limitations, the plaintiff is entitled on appeal to review the ruling of the court in striking the amended petition from the files.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed with directions.*

John M. Macfarland and *Weaver & Giller*, for appellant.

Crofoot & Scott, contra.

GOOD, C.

On the 14th day of April, 1903, the plaintiff commenced this action in the district court for Douglas county against the defendant to recover damages for a personal injury, alleged to have been sustained on the first day of July, 1899. To the petition filed by the plaintiff the defendant interposed a general demurrer. On the 21st day of March, 1904, an amended petition was filed, and on the day fol-

* Rehearing allowed. See opinion, p. 255, *post.*

lowing the district court sustained the demurrer to the original petition, and granted leave to file an amended petition instanter. While it does not appear that the plaintiff consented to the sustaining of the demurrer, that inference may be drawn from the fact that he filed an amended petition on the day previous to the ruling of the court on the demurrer. Thereafter the defendant filed the following motion: "Comes now the defendant, and moves the court to strike from the files the amended petition in this cause filed, for the reason that the amended petition sets forth a new and different cause of action from that set forth in the original petition, and one that was barred by the statute of limitations at the time of the filing of said amended petition." This motion was sustained on the 21st day of November, 1904. On the 4th day of February, 1905, plaintiff filed a second amended petition, practically identical in form with the original petition, which petition was, on motion of the defendant, stricken from the files, upon the ground that it was not an amended petition, but a copy of the original petition, to which a demurrer had been theretofore sustained by the court. Thereupon the plaintiff filed a motion, requesting leave of court to withdraw his consent to the sustaining of the demurrer to his original petition, which leave was granted by the court. Under the date of April 28, 1906, appears the following journal entry: "And now on this day come the parties hereto by their attorneys, and this cause comes on to be heard upon a demurrer of the defendant to the original petition of the plaintiff herein, and is argued and submitted to the court; and, after due consideration and being fully advised in the premises, the court does sustain said demurrer, to which the defendant duly excepts, and is by the court granted ten days to amend his original petition." The plaintiff refused to plead further, and upon motion judgment of dismissal was entered. Plaintiff appeals, and assigns as error the order of the court in sustaining the motion to strike his first amended petition, the order of the court in sustaining the motion to

strike his second amended petition, the order of the court in sustaining the demurrer to the original petition, and the order of the court in rendering judgment of dismissal.

The first question for determination is as to whether or not the court erred in sustaining the motion to strike the first amended petition. In order to determine this question, it becomes necessary to examine both the original and the first amended petitions. In the original petition the plaintiff alleged the corporate capacity of the defendant; that it was engaged in operating a smelter in Omaha; that it had succeeded "to the rights, property and liabilities of the Omaha & Grant Smelting Company"; that the defendant is now the owner of said smelting property, and running a smelter; that on or about the first day of July, 1899, "the predecessor of the defendant herein owned and operated" the said smelter. Then plaintiff averred that "he was employed by the predecessor of the defendant, and was working for them as a common laborer on or about the 1st day of July, 1899, and that he was under the direction and control of John T. Wolfe, a foreman of said party, and a foreman of the defendant herein"; that while he was so employed for the predecessor of said defendant under said foreman, on or about the 1st day of July, 1899, "he was instructed by Wolfe to take out a broken jacket, and put on a new jacket, from a hot furnace," etc. Then follow the allegations of his injury and the extent thereof, closing with the following: "That said injury was the result of the carelessness of the defendant and their foreman, and was without any negligence on the part of the plaintiff." In the first amended petition it is charged that the defendant at the time of the injury owned and operated the smelter, and that the plaintiff was in its employment, and acts of primary negligence were charged to the defendant, which caused the injury complained of. There is no question raised as to the first amended petition stating a cause of action against the defendant. Appellee contends that the amended petition sets forth a different cause of action from the original

petition, and that the statute of limitations had run prior to the filing of the amended petition, and that it was therefore proper to strike the amended petition from the files. We do not concur in this view. The cause of action for which plaintiff sought a recovery was for the injury sustained by him while replacing a broken jacket upon a hot furnace on the 1st day of July, 1899, and that through the negligence of the foreman, Wolfe, he was injured and sustained damages. The same injury, happening at the same time, in the same place, and under the same circumstances, is the basis of his action in each instance. It was not a new cause of action that he set up in the amended petition. It is doubtless true that the cause of action was defectively pleaded in the original petition. The principal defect therein was that it failed to show that the defendant was responsible for the employment of the plaintiff, or that it was responsible for the action of the foreman, Wolfe. The petition was defective, in that it failed to connect the defendant with the negligence, which, it was alleged, produced the injury.

The rule is well settled that an amendment should not be permitted for the purpose of setting up a new cause of action; but this does not forbid the amplification of the original cause of action. Nor does it prevent an amendment whereby a cause of action would be stated, when none was stated in the first instance, if it appears that it is the same cause of action that was attempted to be set up in the first instance. The court will be liberal in allowing amendments when the cause of action is not totally different. Bliss, Code Pleading (2d ed.), sec. 429. "Where a proposed amendment consists of new matter relating to the subject of the action as set forth in the complaint, and is not a new and independent cause of action, the fact that the statute of limitations has attached to it pending the suit is a strong reason for allowing the amendment instead of refusing it." 1 Ency. Pl. & Pr. 518, and authorities there cited. "The courts are not entirely agreed as to the right of the plaintiff to substitute a differ-

ent form of action from that set forth in the petition. But the better rule seems to be that, so long as the subject of the action remains substantially the same, an amendment may be permitted." Maxwell, Code Pleading, 578, 579. In the case of *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, it is held: "A petition in which the cause of action is insufficiently or defectively stated may be amended by adding other allegations to remedy or cure the defects. The statute of limitations does not run against the amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action." In the case of *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Ia. 67, it was held proper to permit an amendment after the bar of the statute, setting forth additional and other grounds of negligence than those stated in the original petition; that, as long as it was the same injury for which recovery was sought, the identity of the cause was maintained, although different grounds were alleged as the producing cause of the injury. In *McKeighan v. Hopkins*, 19 Neb. 33, it was held proper to permit a petition to be amended so as to change the form of the action from one in ejectment to a petition to redeem, upon the ground that the object in both cases was to recover the land, and that the identity of the cause of action was maintained, though there was a change of form. And in that case it was held that the statute of limitations did not run, though the statutory period had elapsed prior to the amendment. The same doctrine is substantially set forth in *Merrill v. Wright*, 54 Neb. 517. We therefore conclude that the district court erred in striking the amended petition from the files.

Appellee contends that the order of the trial court in permitting plaintiff to withdraw his consent to the sustaining of the demurrer to the original petition did not have the effect of setting aside the order sustaining the demurrer, and that, as plaintiff took no exception to the ruling of the court in sustaining the demurrer, he has no standing in this court. If such were the rule, then, in

any case where plaintiff's petition was defective, and a demurrer thereto was properly sustained, and he should file an amended petition stating a good cause of action, which should be stricken from the files, even though erroneously, the plaintiff would be without a remedy. The object of pleadings is to arrange for the orderly trial and disposition of a case upon its merits, and amendments of pleadings are always allowed in the furtherance of justice. To our minds the rule contended for by the appellee would amount to a bit of legal jugglery, whereby the plaintiff would be deprived of a hearing upon the merits of his cause. *Wheeler v. Barker*, 51 Neb. 846, is a case somewhat similar to the case at bar. It was there held that, where the amended petition had been stricken from the files, after the sustaining of a demurrer to the original petition, plaintiff might, by proceedings in error, review the order of the trial court in striking the amended petition from the files. And it was further held that, if upon examination the amended petition was not substantially the same as the original petition, it was error to strike it from the files.

We think it therefore follows that the trial court erred in striking from the files the amended petition and in rendering judgment of dismissal, and that the judgment should be reversed and the cause remanded, with instructions to restore to the files the first amended petition.

DUFFIE 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, with instructions to restore to the files the first amended petition.

REVERSED.

The following opinion on rehearing was filed May 7, 1908. *Former opinion vacated and judgment of district court affirmed:*

1. **Pleading:** CAUSE OF ACTION. All facts which, taken together, are necessary to fix the responsibility for an injury complained of constitute a cause of action.

2. ———: AMENDED PETITION: NEW CAUSE OF ACTION. A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged.

3. ———: ———: ———. The original petition alleged a personal injury and consequent damages to plaintiff because of the negligence of a third party, and that defendant succeeded to the liabilities of such third person; the amended petition alleged that said injury was caused by defendant's negligence. *Held*, That the amended petition stated a new and different cause of action.

4. ———: CONCLUSIONS OF LAW. In testing the sufficiency of a pleading, mere conclusions of law will be disregarded.

5. **Judgment Vacated.** Our opinion herein, *ante*, p. 250, vacated.

EPPERSON, C.

After the opinion reported *ante*, p. 250, was filed herein, a rehearing was allowed. A history of the case may be found in the former opinion. In the original petition plaintiff pleaded an injury received by him through the negligence of a third party, the Omaha & Grant Smelting Company. He sought to charge defendant therewith by alleging that defendant succeeded to the rights, properties and liabilities of such third party. Following this allegation the plaintiff specifically set forth the nature of the negligent acts complained of on the part of the Omaha & Grant Smelting Company and on the part of their foreman, Wolfe. He alleges that said Wolfe is also the foreman of the defendant herein, but definitely sets forth that it was while the plaintiff was employed by defendant's predecessor that he received the injury complained of. After making these specific allegations, the plaintiff alleged "that said injury," meaning necessarily the injury inflicted through the carelessness of the Omaha & Grant Smelting Company, "was the result of the carelessness and negligence of defendant and their foreman." A de-

murrer was sustained to this petition, to which the plaintiff apparently consented. Whereupon he presented the amended petition, in which he alleged that the same injury was caused by the negligence of the defendant and its foreman. The question arises whether the amended petition, which was stricken from the files, stated a new and different cause of action, or was it a proper substitute for the original petition. The plaintiff attaches significance to the phrase appearing in the original petition, "that said injury was the result of the carelessness and negligence of the defendant and their foreman," claiming that it charges defendant with negligence, and which would permit of an amendment more specifically alleging such cause. It is true that a general averment that the defendant was negligent, without setting forth the negligent acts or omissions, is good as against demurrer. But was the allegation referred to a general allegation of neggence on the part of the defendant? A pleading must be taken in its entirety to ascertain the cause of action or defense relied on by the pleader, and, as the original petition specifically set forth the negligence of a third party as the cause of his injury, the phrase now relied on by the plaintiff may not be given the weight of a general allegation of negligence. The phrase is contradictory. "Said injury" means the injury previously described in the petition. That was the injury inflicted by the Omaha & Grant Smelting Company. It could not have been caused by the negligence of the defendant. The allegation was but an illogical inference of the pleader.

If recovery may be had under the original petition, it is because defendant succeeded to all the liabilities of the Omaha & Grant Smelting Company. More than four years after the alleged injury, the plaintiff filed his amended petition, charging the defendant with negligence. He set forth the same injury as that alleged in the original petition, except that he now alleges that it was inflicted by defendant instead of its predecessor. If this is

a new and different cause of action it is barred by the statute of limitations. In our former opinion we considered that the amended petition was a mere amplification of the original cause of action. We there said: "The cause of action for which plaintiff sought a recovery was for the injury sustained by him while replacing a broken jacket upon a hot furnace on the 1st day of July, 1899, and that through the negligence of the foreman, Wolfe, he was injured and sustained damages. The same injury, happening at the same time, in the same place, and under the same circumstances, is the basis of his action in each instance. It was not a new cause of action that he set up in the amended petition." Further consideration has convinced us that we were in error in holding that it was not a new cause of action that he set up in his amended petition. It is the same injury, but a different liability is alleged against the defendant. It now appears that the failure to observe the distinction resulted in the erroneous conclusion reached at the former hearing. The injury, it is true, is the subject of the action. Had no injury been suffered, there would have been no cause of action. The cause of action in any case embraces, not only the injury which the complaining party has received, but it includes more. All the facts which, taken together, are necessary to fix the responsibility are parts of the cause of action.

In *Buerstetta v. Tecumseh Nat. Bank,* 57 Neb. 504, it appears that the original petition filed therein alleged that the plaintiff had deposited with the third party, a bank, certain money represented by certificates of deposit, which remained unpaid. She sought to hold defendant by alleging that it succeeded to the business of the third party, and its liability to plaintiff. Later plaintiff filed an amended petition containing additional allegations charging defendant with fraud. It was held that the additional facts pleaded in the amended petition constituted a separate and distinct cause of action independent from that stated in the original petition, and that the statute of limitations against the cause of action pleaded in the

amendment ran until the filing of such amended petition. See, also, cases reviewed in that opinion. In *Box v. Chicago, R. I. & P. R. Co.*, 107 Ia. 660, it was held: "In an action to recover damages for negligence, 'the cause of action,' as used in pleading, is not the injury wrongfully inflicted through defendant's negligence, but is the fact or facts that justify the action, or show the right to maintain it." The original petition in that case charged defendant with negligence in using different systems of bumpers in the coupling of its cars. The amended petition, which was held by the court to have been improperly allowed, charged negligence to the defendant, in that the injury was caused by its having bumpers loose and out of repair. The conclusion of the court was that the amendment charged a different cause of action. It changed the nature of the action pleaded in the original petition, and should not have been allowed. In the opinion we find the following: "The cause of action is the fact or the facts that 'justify it, or show the right to maintain it.' Hence, when a material fact, necessary to a recovery, is omitted from a petition, we say it does not state a cause of action." In the opinion the court quoted from *Rodgers v. Mutual E. A. Ass'n*, 17 S. Car. 406, as follows: "What is a cause of action? We must keep in view the difference between the subject of action and the cause of action. The subject of action is what was formerly understood as the subject matter of the action. * * * The cause of action is the right claimed or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant, on the other, *and these appear by the facts of each separate case.*" In *Union P. R. Co. v. Wyler*, 158 U. S. 285, it was held that the amended petition, alleging that the plaintiff's fellow servant was negligent and caused the injury, was a departure from the original allegation of the negligence on the part of the defendant in the employment of an incompetent person who caused the injury. In *Van Patten v. Waugh*, 122 Ia. 302, 98 N. W. 119, it was held that an amendment, alleging that the claimant was surety upon

certain notes, which he originally declared upon as owner, and which by reason of his liability as surety he was required to pay, was a different cause of action, and could not be sustained. In the opinion in that case the court recognizes the rule that, where the gist of the action remains the same, the court has the right to permit the plaintiff to withdraw his original declaration and file an amended one. The court, speaking through Ladd, J., say: "The mere fact of indebtedness does not indicate the cause of action out of which it arises. Otherwise an amendment alleging tort might be said not to add a new cause in an action on contract. As long as the pleader adheres to the contract or injury originally declared on, he may change the form or amplify his allegations; but he cannot inject by amendment an entirely new cause of action, and by so doing avoid the bar of the statute of limitations, which has run against it." In *Phœnix Lumber Co. v. Houston Water Co.*, 59 S. W. (Tex. Civ. App.) 552, it is held: "A petition alleged an express contract between plaintiff and a water company of which defendant was the successor to protect plaintiff's premises from fire, a breach of such contract, and loss by reason of defendant's failure to furnish sufficient water pressure as agreed, by reason of which the fire loss occurred. After the expiration of limitations an amendment was filed, which abandoned all reference to the contract, and alleged the facts as tending to impose on defendant a duty by implication of law to exercise ordinary care to supply water to the premises available for fire protection, and alleged that by reason of defendant's negligent failure to supply water plaintiff was damaged, etc. *Held,* That, plaintiff's cause of action alleged in the petition and amendment being essentially different, the former alleging an obligation *ex contractu* and the latter a cause of action *ex delicto,* and no fact of negligence except that arising from defendant's breach of contract being relied on to support the same, the amendment was improper, and the action was barred." In *Woodward v. Northern P. R. Co.*, 111 N. W. (N. Dak.)

627, plaintiff alleged in his first petition that he was the owner of certain premises destroyed by fire through defendant's negligence. He attempted to amend by alleging that he was the assignee of the owner of premises destroyed, or, in other words, that he was the assignee of the chose in action. The court denied him the right to thus amend, for the reason that he attempts to set up a cause of action entirely distinct from that originally pleaded. In *Gilleland & Dillingham v. Louisville & N. R. Co.*, 119 Ga. 789, 47 S. E. 336, it was held: "A declaration sounding in tort, seeking to recover from the defendant as a common carrier for the breach of its duty to furnish a suitable car for the transportation of live stock, cannot be amended by setting up as the basis of recovery a special contract between the parties for the equipment of the car." In line with the decisions above quoted or referred to at some length are the following decisions: *Boston & M. R. Co. v. Hurd*, 108 Fed. 116; *Phelps v. Illinois C. R. Co.*, 94 Ill. 548; *Blake v. Minkner*, 136 Ind. 418; *Parsons Water Co. v. Hill*, 46 Kan. 145; *Meeks v. Southern P. R. Co.*, 61 Cal. 149; *Campbell v. Campbell*, 133 Cal. 33.

The rule controlling the amendment of pleadings is liberal, but from the great weight of authority and the better reasoning it will not be expanded to such an extent as to permit the bringing in of a new or independent cause of action. A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged. In *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Ia. 67, cited in our original opinion, an amendment was permitted after the bar of the statute, but such amendment was, as it appears in the opinion of the court, "nothing more than a more specific statement of the averment in the original petition." It appears therein that the amendment did not attempt to allege a reason for the defendant's liability to

the plaintiff, other than the reasons set forth in the original pleadings. It did not attempt to change the nature of the defendant's liability or to allege a different liability than that originally pleaded. In both the amended and original petitions primary negligence on the part of the defendant was charged. In *Norfolk Beet-Sugar Co. v. Hight,* 59 Neb. 100, the amendment permitted was a mere amplification of the original statement. "It charges no additional wrongful act, but merely states another fact to sustain the charge already made." In *McKeighan v. Hopkins,* 19 Neb. 33, the identity of the cause of action was preserved in the amendment allowed, although the prayer for relief was changed from one in ejectment to one to redeem. *Merrill v. Wright,* 54 Neb. 517, was an action wherein the plaintiff sought the foreclosure of tax liens upon property purchased at sales for taxes. The petition was defective, in that it failed to allege the levy and assessment of such taxes. By the amended petition plaintiff supplied these defects. The amendment pertained to the original cause of action, which was defectively stated in the original. There was no attempt to change the nature of the action, nor to allege a different liability than that defectively set forth in the original petition. Without further review of the authorities cited in our former opinion, it will be noticed that each of them is distinguishable from the case at bar, in that here the amended petition changed the nature of the action, in that it sought to recover because of an alleged liability of a different nature.

The sustaining of the demurrer to the original petition is assigned as error. After the second amended petition was striken from the files, the plaintiff withdrew his consent to the first order of the court sustaining a demurrer to the original petition, so that the case came for hearing again in the lower court upon that demurrer. As above stated, the allegation charging the defendant with liability is that it has succeeded to all the rights, properties and liabilities of the Omaha & Grant Smelting Company, which inflicted the injury complained of in the petition

now under consideration. This allegation also is but a conclusion of law. It is not alleged that the defendant entered into any contract whereby it assumed the liabilities of its predecessor, nor are any facts set out from which it could be inferred that the defendant had become subject to the liability alleged by the plaintiff. As a matter of law, a corporation which succeeds to the business of another is not liable in damages for the torts of the latter. That defendant "succeeded to the liabilities of the Omaha & Grant Smelting Company" is insufficient to hold it responsible to plaintiff. As argued by defendant: "Plaintiff might just as well have limited his petition to the simple allegation that the defendant was indebted to the plaintiff in the sum of $2,000, as to set forth certain acts of negligence on the part of the third party, and then merely allege the conclusion that the defendant had succeeded to the obligation thus incurred by such third party." In testing the sufficiency of a pleading, mere conclusions of law will be disregarded. *Woodward v. State*, 58 Neb. 598.

It follows that the court committed no error in striking the second amended petition, which was substantially the same as the original; nor in dismissing the case.

We recommend that our former opinion be vacated, and the judgment of the lower court affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the former opinion is vacated, and the judgment of the lower court affirmed.

JUDGMENT ACCORDINGLY.

PATRICK E. MCKILLIP, APPELLANT, V. R. N. HARVEY, APPELLEE.

FILED DECEMBER 5, 1907. No. 14,994.

1. **Appearance:** SPECIAL AND GENERAL. A defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally. *Cropsey v. Wiggenhorn*, 3 Neb. 108.

2. ———: ———. In an action at law against a nonresident defendant, if service is made upon the defendant in any manner not authorized by law, defendant may appear specially and move to quash the service, but, if he go further and pray for a dismissal of the case, it will be held to be a general appearance in the action, as it invokes the power of the court on a question other than that relating to jurisdiction. *Bucklin v. Strickler*, 32 Neb. 602.

APPEAL from the district court for Boone county: JAMES N. PAUL, JUDGE. *Reversed.*

H. C. Vail, for appellant.

H. Halderson, contra.

FAWCETT, C.

This case is before us on an appeal from a judgment of the district court for Boone county dismissing plaintiff's action, for the reason, as stated in the judgment of the court, "that it appears on the face of the pleadings filed herein by the plaintiff that, under the law, he has no cause of action." Plaintiff filed his petition, declaring upon a promissory note, the petition being in the usual form, and making all of the necessary allegations to entitle him to recover. An examination of the transcript, *dehors* the petition, discloses the fact that defendant was a nonresident of the state of Nebraska. Plaintiff filed his affidavit, and sued out a writ of attachment and procured the issuance of a writ of garnishment, making serv-

ice by publication. Answers were made by the garnishees. Subsequently thereto plaintiff, by leave of court, filed a supplemental petition, asking for equitable relief, on the theory that he had exhausted his legal remedy under his original petition. To this petition defendant filed a special appearance, and moved the court to quash the service of summons, for the reasons: First, that the time intervening between the filing of the petition and the affidavit for publication was so great as to raise a presumption that a change in the facts of the case had occurred during the interim; second, because the affidavit for service by publication did not state that the case was one of those mentioned in section 77 of the code, and did not state facts showing that any of the grounds for service by publication provided in said section existed; third, because the answers of the garnishees in the action then on file showed that the defendant had no property in this state at the time of the commencement of the action; and, fourth, because the notice of publication erroneously stated that two of the garnishees had answered that they had property of the defendant, while the answers of the said garnishees on file showed the contrary to be the fact. As said by SULLIVAN, J., in *Bankers Life Ins. Co. v. Robbins,* 59 Neb. 170: "The effort of the company evidently was to try the matter and obtain a judgment on the merits while standing just outside the threshold of the court. This it could not do. A party cannot be permitted to occupy so ambiguous a position. He cannot deny the authority of the court to take cognizance of an action or proceedings, and, at the same time, seek a judgment in his favor on the ground that his adversary's allegations are false or that his proofs are insufficient."

The court sustained the second reason above assigned and overruled the other three; gave plaintiff leave to file a new affidavit for service by publication, and continued the cause for service. Plaintiff thereupon filed a new affidavit and gave new notice. Defendant then appeared and filed a demurrer to that petition upon three grounds:

"First, this court has no jurisdiction of the person of the defendant; second, because two causes of action are improperly joined; third, because it does not state facts sufficient to constitute a cause of action." By agreement of the parties in open court, this demurrer was submitted to the court upon briefs filed by the respective parties. After the submission of the case upon demurrer, and without a ruling thereon, plaintiff asked and obtained leave of the court to withdraw his supplemental petition. Defendant then filed this motion: "Comes now the defendant in the above entitled cause of action, and moves the court to dismiss the same for the following reason: That it appears upon the face of the pleadings filed by the plaintiff herein that the defendant is a nonresident of the state of Nebraska, and that at the time of the commencement of this action he had no property or debts owing him in the state of Nebraska." Upon that motion the court entered this judgment: "This cause came on to be heard on the motion of the defendant herein filed to dismiss this action, for the reason that it appears on the face of the pleadings filed herein by the plaintiff that, under the law, he has no cause of action, which motion was argued and submitted to the court, and the court, on consideration thereof, being fully advised, sustains the said motion to dismiss, the plaintiff excepting." In this we think the district court erred. The motion filed by defendant was clearly a general appearance. The rule is well settled in this state that "a defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally." *Cropsey v. Wiggenhorn,* 3 Neb. 108, cited and adhered to in many later decisions by this court. In *Bucklin v. Strickler,* 32 Neb. 602, defendant's motion was "to dismiss this case for want of proper service." In the opinion the court say: "The motion is too broad. It is to dismiss the action. The most that could be done in any case, where the only objection is

that the service is defective, is to quash the summons. In such case the appearance must be limited to that purpose, otherwise it is general."

The only petition in the case at the time defendant's motion was filed was the original petition filed by plaintiff, declaring on his promissory note. This stated a good cause of action; hence, it was error on the part of the court to dismiss the action. The supplemental petition had been withdrawn, and could not be looked to in considering defendant's motion. But, even if it were to be considered, we would still be compelled to hold that defendant, both by his "special appearance" and by his general demurrer, appeared generally. *Bankers Life Ins. Co. v. Robbins, supra,* and *Gilbert v. Hall,* 115 Ind. 549, cited therein with approval. From either point of view, the court erred in dismissing the action.

We therefore recommend that the judgment of the district court be reversed, and plaintiff's action reinstated, and that the cause be remanded for further proceedings.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and plaintiff's action reinstated, and the cause remanded for further proceedings.

REVERSED.

SIMON KENNEDY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 5, 1907. No. 14,806.

1. Railroads: NEGLIGENCE: EVIDENCE. The mere killing of an animal by collision with a moving train upon the tracks of a railway company is not evidence of negligence, nor can negligence be established by inference and conjecture in contradiction to the testimony of a competent, unimpeached and disinterested eyewitness.

2. Evidence examined, and *held* insufficient to support a verdict. LETTON, J., dissents to this proposition.

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

Roscoe Pound, J. W. Deweese and *F. E. Bishop,* for appellant.

John Barry, contra.

AMES, C.

This is an action to recover damages for the alleged negligent killing of the plaintiff's cow upon the tracks of the defendant company. The plaintiff recovered, and the defendant appealed.

There is no important conflict in the evidence, but it is urged that conflicting inferences of fact are deducible therefrom, and that in such cases such inferences are to be drawn and the preponderance of them determined by the jury, and not by the court. The occurrence happened within the defendant's depot grounds or yards, which were not fenced nor required so to be by law. There were five or six cows of the plaintiff on the grounds at the time, all of which, it appears, had gone there a short time previously. The locomotive engineer is the only witness who testified to having seen the accident, or the animal, immediately before the former happened. He saw only that cow and one other, which, he says, were standing near each other on the defendant's right of way, and about 20 or 30 feet from the track, and that, when the train was about 150 feet away and moving at a speed of about 20 miles an hour, the animal that was killed suddenly left her companion, and bolted upon the track immediately in front of the engine. It is not claimed that the rate of speed was in itself excessive or needlessly dangerous, and the engineer testified to having kept an ordinary lookout along the track in front of him, and to have seen no other animals, and that he had no reason to anticipate the strange and

unprecedented conduct of the cow, and did not become aware of it until the instant of the collision. For that reason, he did not sound an alarm whistle, or make a sudden or what is called an emergency stoppage of the train or slacken its speed. Within what distance such a stop could have been made the record does not disclose, but it was testified that a "service" stop could have been effected in 300 feet. The cow was unquestionably a trespasser, and the rule of law is well settled and undoubted that, for the killing of or injury to an animal under such circumstances, a railway company is not liable, unless the casualty is due to the gross or wanton negligence of its servants or employees in omitting such precautions as a reasonably capable and prudent man would employ to avert danger or prevent an obviously impending catastrophe. *Young v. Hannibal & St. J. R. Co.*, 79 Mo. 336; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb. 76.

The gist of the action is negligence, which is not to be presumed, but must be proved, and, in this case, of negligence in an unforeseen and not to have been anticipated emergency. We think it quite clear that, if the story of the engineer is true, the obligation of the plaintiff with respect to the burden of proof has not been met, and that the evidence is insufficient to support the verdict. That story is not directly contradicted, but the plaintiff produced witnesses who saw five or six of his cows go upon the defendant's right of way and into the yards, and who testified that after the accident happened they had followed and traced the tracks of the animals from the place of their entry to that of the killing, and that the tracks showed that the animals, or some of them, had walked that distance upon the defendant's roadbed, and from this fact, and the further fact that the accident happened, as they ascertained by "stepping," some 400 feet nearer the place of entry than the engineer guessed that it did, counsel infer and argue that the jury were justified in inferring that the engineer testified falsely, or at least mistakenly, in saying that the animal killed was one of those that he

saw standing beside the track, and contend that it was one walking on the roadbed, toward the train from the point of entry, which they say was 600 feet, and the engineer guessed was "about" 1,000 feet, from the place of the collision; and from this inference they deduce the further inference that, if the engineer had kept a reasonably careful or vigilant outlook along the railway track ahead of his train, he would have seen the cow in time to have stopped his engine, or to have frightened her away, and so have averted the casualty. It seems to us that such a building of inference upon inference is too unsubstantial a structure for the support of a verdict, especially when the inferences are contradicted by the direct testimony of a competent and unimpeached and, so far as appears, disinterested eye-witness. To hold otherwise would, it appears to us, quite overthrow the rule announced by this court in *Burlington & M. R. R. Co. v. Wendt, supra,* that the mere killing of the animal is not evidence of negligence, and to permit a recovery to be had upon a theoretical conjecture, the product rather of imagination than of fact.

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

JACKSON and CALKINS, CC., concur.

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

REVERSED.

LETTON, J., concurring in the conclusion.

I do not take the view as to the evidence which is announced in the foregoing opinion. I think the question is properly for the jury, and that, if the jury believed the plaintiff's witnesses, and had been properly instructed as to the law, there was sufficient evidence to support the verdict. It is admitted the cow was trespassing upon the railroad track at a point where it was not the duty of the

railroad company to fence its tracks. In such a state of facts, the railroad company is only liable in case the killing is caused wantonly or by gross negligence on the part of its employees. *Burlington & M. R. R. Co. v. Wendt, supra.* The jury were told that the question to determine was whether the employees of the railroad company were guilty of negligence in the operation of the train. This instruction was complained of and is erroneous. Unless, under all the circumstances, the engineer was guilty of gross negligence, the plaintiff cannot recover. If the jury believed the engineer, no liability existed; if they believed the plaintiff's witnesses, the question for the jury was whether it was gross or wanton negligence on the part of the engineer, under all the circumstances, not to see the cattle on the track a sufficient time before reaching them so as to avoid the killing by the exercise of ordinary care. I therefore concur in the conclusion, but not in the opinion of Mr. Commissioner AMES.

HENRY J. ABRAHAMS, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED DECEMBER 5, 1907. No. 15,004.

1. **Cities: WARRANTS: VALIDITY.** A warrant issued by a city in consideration of a demand which is a valid obligation payable out of its general funds is not invalidated by a recital, not contemplated by the statute, that it shall be payable out of a special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but the failure to create which is due solely to the fault or negligence of the city.
2. **Limitation of Actions: ACKNOWLEDGMENT OF DEBT.** A warrant issued by the proper authorities of a city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness and promise to pay it, and arrests the running of the statute of limitations.

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

Harry E. Burnam, I. J. Dunn and *John A. Rine,* for appellant.

George W. Shields, contra.

AMES, C.

This is an appeal from a judgment against the city of Omaha. The facts are the same as, or precisely similar to, those considered in the two former decisions of this court in the two cases of *Rogers v. City of Omaha,* 75 Neb. 318, 76 Neb. 187. We have not been advised by counsel and do not understand that any principle is invoked that was not involved in and expressly or by necessary implication determined by these two decisions, which are not assailed as erroneous or asked to be in any respect overruled or modified. Under such circumstances, a statement of the facts in detail or an elaboration of the principles of law applicable to them does not seem to us to be called for.

The plaintiff is the assignee for value and the owner of three claims against the city. One of them accrued to Mrs. Sarah J. Haskell for the value of real property taken from her by the city in the exercise of the power of eminent domain under precisely the same circumstances, so far as we can see, as those in which the property of Mrs. Croft was taken in the case first cited. Warrants were issued in satisfaction in the same form, and payment thereof was delayed and finally refused for the same reasons and for about the same length of time in one case as in the other, and in both cases the negligence, ineptitude or irregularity of the city, not of the plaintiff, is relied upon as having set the statute of limitations in motion, and to have operated as a bar a short time before the action was begun. Another of these claims is for the contract price of sewers constructed in like circumstances as those in which the work of street grading was done by the plaintiff's assignor in the second of the cases above cited, in satisfaction of which warrants were issued in like form as in that case, and payment in like manner delayed and finally refused,

because of irregularities committed by the city authorities, in consequence of which their attempt to create a special fund for the purpose was unavailing. The third claim is for the contract price of making certain water service connections, for which the charter provides that the city may reimburse itself by withholding an equal amount accruing from it to the water company on account of water furnished for city uses. The city undertook to provide payment for this service by creating a special fund by special taxation upon adjacent property, which it is contended that it is without lawful authority to do, and the warrants recited that they should be payable out of such fund. The recital, we think, was, if the contention is sound, mere surplusage, not affecting the validity of the instrument as general obligations of the city. The work on this contract was completed on October 7, 1893, but the matter was not finally adjusted and the warrants issued until the 15th of December following. This action was begun November 23, 1898, so that the five years' interval began between the time of the completion of the work and the issuance of the warrant. We think the warrants executed and delivered by the competent city authority are a written acknowledgment of the claim and a promise to pay it which is obligatory upon the city and arrested the running of the statute of limitations, if the running of the latter had previously begun, which we do not decide. There is a similar series of dates respecting the other two claims. All the issuable facts and circumstances are set forth in the pleadings and established by the evidence, and it appears to us to be immaterial, so far as the statute of limitations is concerned, whether the action is regarded as founded upon the warrants or upon the contract in satisfaction of which they were given. In either view the statute is not available as a defense. In all these instances, however, the warrants were issued in consideration of demands which were valid obligations of the city, payable out of its general funds, and, in our opinion, the instruments were not

invalidated by a recital, not contemplated by statute, that they should be payable out of special funds, which in one instance the city was not authorized to create, and which in the other two instances there was a failure to create, due solely to the fault or negligence of the city.

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

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

WILLIAM HART, APPELLEE, V. CHARLES M. MURDOCK ET AL., APPELLANTS.

FILED DECEMBER 5, 1907. No. 14,893.

1. **Appeal: PRACTICE: BRIEFS.** Errors assigned by appellee in his printed brief filed after the date required by rule 35 will be considered when the appellant neither objects to the service and filing thereof, nor moves to strike it from the record as having been filed out of time.
2. **Tax Certificate: FORECLOSURE: DESCRIPTION.** Where, in a suit to foreclose a tax sale certificate, a clerical mistake appears to have been made in the description, such error will not defeat the action if sufficient remains in the description to identify the land upon the tax list.
3. **Taxation: VOID ASSESSMENT.** Where land owned by one person is assessed with land of another, so that neither owner can determine the amount for which his property is liable, the entire tax is void.
4. ———: **DESCRIPTION.** In a description of land by metes and bounds, a point of the compass named in a survey may be construed to mean a different or opposite direction, when it appears to have been written by clerical error, and is so inconsistent with the remaining parts of the description as to demonstrate that the different or opposite direction was intended.

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

E. O. Kretsinger, for appellants.

R. W. Sabin, contra.

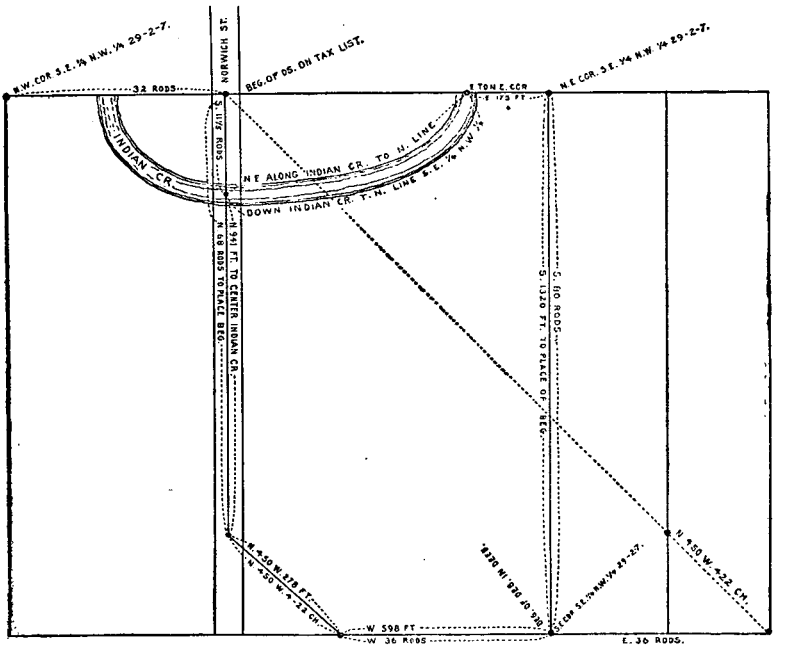
CALKINS, C.

In 1892 the defendants became owners of 21 acres of land situated in the southeast quarter of the northwest quarter of section 29, town 2, range 7, in Gage county. In the deed by which the defendants took title, the land was described by metes and bounds as follows: "Commencing at the southeast corner of the southeast quarter of the northwest quarter of section 29, in township 2 north, of range 7 east of the 6th P. M., thence west along the south line of said tract of land 598 feet, thence north 45° west 287 feet, thence north 941 feet to the center of Indian creek, thence down the center of the channel of Indian creek in a northeasterly direction to a point where the north line of the southeast quarter of the northwest quarter of said section 29 crosses said Indian creek, thence east along said north line 175 feet, more or less, to the northeast corner of the above described forty-acre tract of land, thence south along the east line of said land 1,320 feet to the place of beginning, containing 21 acres, more or less." The description of this land on the tax list for the years 1896 and 1897 was: "Com. 32 rds. e. of N W cor S E^4 N W^4, th E to pt on a line with the center of Norwich St. th S 11 1-5 Rds. to Indian creek, th N E along creek to N line S E^4 N W^4, th E to N E cor. S E^4 N W^4 th S 80 Rds., th W 36 Rds., th N 45° W^4 22.100 Chs., th N 68 Rds. to the place of beginning in S E^4 N W^4 29-2-7."

The accompanying diagram illustrates the two descriptions, the first being indicated on the interior, and the second on the exterior lines of the tract.

It will be observed that in the tax list description the distance from the northwest corner of the southeast quarter of the northwest quarter to the center of Norwich street is not given; but it appears from a plat introduced

in evidence by the defendant that the center of Norwich street is 32 rods east of the northwest corner of the southeast quarter of the northwest quarter, so that the starting point of this description is in the center of Norwich street, and, since the second call ends there, it may be ignored. With this explanation, the two descriptions, though starting from different points, describe the same land, the courses being the same, and the distances, when reduced to feet, corresponding, except in the last call of the tax



list description, which does not stop on Indian creek, but runs to the place of beginning, which is 11 1-5 rods further north. When allowance for this additional distance is made, the two courses are of practically the same length. In the tax list for 1898 the description was the same, except that the word east was substituted for the word west in the course next after the run of 80 rods south. This last description was repeated upon the tax books of 1899 and 1900. In 1901 the county caused a survey and plat of this

property to be made, in which it was described as lot 16; and by this description it was also known on the tax books for the years 1902 and 1903. The defendants failing to pay the taxes of 1898, the premises were on November 9, 1899, sold to the plaintiff's assignor, who subsequently paid the taxes for the years 1899 to 1903, both inclusive. In the tax certificate issued upon this sale, the description appears as in the tax list of 1898, except that the call for a course north 45° west 4.22 chains was given north 45° west 14.22 chains. This action was brought to foreclose the lien. The court below found the description insufficient, and that the plaintiff was not entitled to recover for the taxes of 1898, 1899 and 1900; but rendered a decree of foreclosure for the subsequent taxes paid after the property was described as lot No. 16. From this judgment the defendants appeal. The plaintiff, in his printed brief, complains of so much of the decision of the court as refused to give him judgment for the taxes of 1898, 1899 and 1900.

1. Upon the oral argument, the defendants objected to the consideration of the errors assigned in plaintiff's brief, on the ground that the plaintiff had not complied with the provisions of rule 35 of this court, which requires an appellee taking a cross-appeal to file his brief of errors within 30 days after service of notice of appeal upon him. It appears that the transcript in this case was filed September 21, 1906, the appellant's brief on May 1, 1907, and the plaintiff's brief on May 18, 1907. No objection as to time was made when these briefs were filed, and no motion was made to strike either brief because filed out of time, both parties proceeding to the argument without any formal objection by either. We think this was a waiver of the rule, and that the appellees are entitled to have the errors assigned in their brief considered. This was the rule under the former statute (*Meade P., H. & L. Co. v. Irwin*, 77 Neb. 391), and we do not think it has been changed by the statute of 1905.

2. We do not think the mistake of the treasurer in writ-

ing 14.22 chains for 4.22, as appears upon the tax list, invalidates the certificate. The plaintiff is not seeking to obtain title to the land by the statutory proceedings, but to foreclose the lien. In such cases, the court will look to the statute as the foundation of the lien, and will regard no defects or objection which goes only to the manner of assessing or levying such taxes. *Otoe County v. Mathews*, 18 Neb. 466. The statute fixes the lien, and the valuation by the assessor furnishes the data from which the amount of the taxes can be ascertained by a mere arithmetical calculation, when the levies shall have been made by the proper authorities. The description upon which the assessor acted was correct, and the defendants cannot be prejudiced by a clerical mistake in the certificate of sale, when a reference to the tax books upon which this certificate was issued corrects the error.

3. The important question in the case arises from the use of the word east in the next call after the run of 80 rods, or 1,320 feet south. If this course is literally followed, it is altogether upon another governmental subdivision than that named; and, after following the next call west 45° north 4.22 chains, we are still outside of the limits of said southeast quarter of said northwest quarter. The next call is 68 rods north to the place of beginning. The defendants claim that this line must be run due north the distance indicated, and, as this would not close the survey, that there is no land at all embraced in the description. On the other hand, the plaintiff insists that, where the last call of a survey requires a return to the place of beginning, such survey must be closed, though both the course and distance given be disregarded in so doing; and that, applying the rule to this case, the last line should run to the place of beginning, though the course must be northwest, instead of north, and though the distance is greater than indicated by the survey. If we should accept this solution, we would have bounded a triangular tract in the southwest quarter of the northeast quarter, and a tract comprising perhaps a third of defendants' land. If this

is done, it follows that a portion of defendants' land has been valued and assessed with that of another proprietor. Where land owned by one person is assessed with land of another so that neither owner can determine the amount for which his property is liable, the entire tax is void. *Spiech v Tierney,* 56 Neb. 514.

4. We do not think that either of the interpretations suggested furnishes the correct solution of the question involved. "In listing land it must be described with particularity sufficient to afford the owner the means of identification, and not to mislead him. Cooley, Taxation (3d ed.), 740. And the rule would seem to be that "the designation of the land will be sufficient if it afford the means of identification, and do not positively mislead the owner or be calculated to mislead him." Ib. 745. The reason of the rule is that "such a mistake or falsity defeats one of the obvious and just purposes of the statute—that of giving to the owner an opportunity of preventing the sale by paying the tax." Ib. 747. These rules are laid down for the construction of tax deeds, which, taking effect only as the execution of a statutory power, should be construed with strictness; and it might well be argued that in an action to foreclose a lien there should be an interpretation more favorable to the validity of the taxes; but that question we do not deem it necessary to decide. In this case the defendants' land had been borne on the tax list for the years 1896 and 1897 in the name of Pasco & Murdock as a 21-acre tract in the southeast quarter of the northwest quarter of section 29. In 1898, 1899 and 1900 the description was precisely the same, except the use of the word east for the word west in one of the calls. The evidence shows that no other 21-acre tract was assessed to these parties, nor in the said southeast quarter of the northwest quarter of said section 29; and it appears that, if the defendants' land was not covered by the description in question, it escaped taxation for these years. Is it reasonable to say that the error in the description was such as to have misled the defendant had he presented him-

self at the treasurer's office and sought to pay the taxes on his 21-acre tract? Had he made any such attempt, or an examination of the tax list, it must have been obvious to him, as it is to us, that the person who copied the description from the tax list of 1897 upon the assessor's books for 1898 inadvertently substituted the word east for the word west, and that it was a mere clerical error. But this is not all. A description in a deed must be construed like any other document. If some part is inconsistent with the other parts, that which is repugnant may be rejected altogether, if sufficient remain from which the intention of the parties can be ascertained. The word east in this description is inconsistent with, first, the location of the land in the southeast quarter of the northwest quarter of said section 29; second, with the number of acres specified; and, third, with the remaining calls of the survey. If we reverse the courses, a mode which a surveyor adopts in cases of doubt, and run the last call 68 rods south from the place of beginning, and thence south 45° east 4.22 chains, we are at a point just 36 rods west of the southeast corner of the southeast quarter of the northwest quarter of said section 29, which demonstrates that the course from this corner should have been west, and not east. For cases holding that a point of the compass named in a survey may be construed to mean a different or opposite direction when it appears to have been written by clerical error, or is inconsistent with the remaining parts of the description, see *Adm'r of Barnard v. Russell,* 19 Vt. 334; *Mizell v. Simmons,* 79 N. Car. 182; *Johnson v. Bowlware,* 149 Mo. 451, 51 S. W. 109; *Warden v. Harris,* 47 S. W. (Tex. Civ. App.) 834. We are therefore of the opinion that the description, taken together, plainly shows that the course from the southeast corner of the southeast quarter of the northwest quarter of said section 29 should be west, and not east; that the word east was written for the word west by mistake, and that it should be read west. The description, so construed, is sufficient. This conclusion disposes of the objections urged by the defendants.

We therefore recommend that so much of the decree as finds the plaintiff entitled to recover for the taxes of 1901, 1902 and 1903 be affirmed, the remainder thereof reversed, and the cause remanded for further proceedings in accordance with this opinion.

AMES, C., concurs.

FAWCETT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, so much of the decree of the district court as found the plaintiff entitled to recover for the taxes of 1901, 1902 and 1903 is affirmed, the remainder reversed, and the cause remanded for further proceedings in accordance with the above opinion.

JUDGMENT ACCORDINGLY.

MASON BROWN, APPELLEE, V. CHARLES H. GRAHAM, APPELLANT.

FILED DECEMBER 5, 1907. No. 14,968.

1. **Animals:** RUNNING AT LARGE. A dog is not running at large within the meaning of section 20, art. I, ch. 4, Comp. St. 1905, when he is within calling distance and sight of the owner's family and under their control.
2. **Evidence** examined, and found to support the instruction of the court that no person has a right to kill a dog for past and finished misconduct of the dog so killed.
3. **Animals:** STATUTE: CONSTRUCTION. Section 4 of the act of 1877 (Comp. St., ch. 4, art. I, sec. 20) was intended to give protection to sheep and those domestic animals which are ordinarily the prey of dogs; and not to give the owner of one of the participants in a dog fight the right to kill the other dog.
4. ———: INSTRUCTIONS. Where a jury is instructed that the burden of proof was upon the plaintiff to show that defendant wrongfully killed the plaintiff's dog, the word wrongful is presumed to be used in its legal, and not its ethical, sense.

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

H. A. Lambert and *E. Ferneau,* for appellant.

Stull & Hawxby, contra.

CALKINS, C.

The plaintiff and defendant were neighboring farmers, their residences being near together, and separated by a wire fence. Each owned a dog; and the two dogs were discovered fighting near the residences of the parties, and upon the defendant's side of the fence, by the defendant's hired man. While the latter was endeavoring to separate the dogs, and as the plaintiff's wife and children appeared upon the scene, the defendant came with a revolver and fired two or three shots at plaintiff's dog, some one or more of which proved fatal to the dog, and he died upon his master's premises, whither he had gone after the firing of the first shot. The plaintiff brought this action to recover damages for the loss of the dog. The case was tried to a jury, who found for the plaintiff in the sum of $25, and from a judgment rendered upon such verdict the defendant appeals.

1. The district judge, at the request of the defendant, charged the jury that under the law of this state it is the duty of the owner of any dog to place upon the neck of such dog a good and sufficient collar, with a metallic plate thereon, upon which shall be inscribed the name of such owner; and that, if the owner of any dog permits the same to run at large without said collar and plate, he cannot maintain an action for the killing of any such dog while so running at large. The jury were also instructed, at the request of the defendant, that a dog is running at large when he leaves the premises of his owner, no one having control of said dog being near said dog; and the court, on his own motion, instructed the jury that "a dog is to be considered running at large when he is away from

the premises of his master, roaming at his will, and out from under the control of his master or owner." At the request of the plaintiff, the court further instructed the jury that, "if you believe from the evidence that prior to the shooting the dog that was killed was on the defendant's land, that said dog was within calling distance and in sight of the plaintiff's family and under their control, then and in that event the dog was not running at large." Of these latter instructions the defendant complains. These instructions were predicated upon section 5 of the act of 1877 (Comp. St. ch. 4, art. I, sec. 20), which provides that it shall be lawful for any person to kill any dog running at large on whose neck there is no such collar. We think the instructions, taken together, correctly defined the words running at large, and gave the defendant as favorable an interpretation of this section as he was entitled to.

2. There was evidence tending to show that the plaintiff's dog ran away at the first shot, and that the defendant continued shooting at him after he had ceased fighting and had returned to his master's premises; and a jury would have been justified from the evidence in finding that the fatal shot was fired after the dog had left the defendant's premises. Under these circumstances, the judge instructed the jury that no person has a right to kill a dog for past and finished misconduct of the dog so killed. The statute gives no license to a person to destroy the dog of another, although the dog may have no collar with the owner's name inscribed thereon, when the dog is upon the owner's premises, or in close proximity to the home of the owner, and under the control or within the call of the owner's family. In other words, when a dog is within a short distance of the owner's family, who have control of the animal, and within calling distance of said family, then said dog is not at large, although he may be on the premises of another person. We think this instruction was applicable to the evidence, and correctly states the law.

3. The defendant asked the court to charge the jury that if, at the time the defendant shot the dog of the plaintiff, the said dog was doing damage to the dog of the defendant, then and in that case the defendant had a right to kill said dog, and is not liable therefor; and this instruction was by the court refused. The act of 1877 was entitled "An act to prevent sheep and other domestic animals from being killed by dogs." Laws 1877, p. 156. Section 1 of this act made the owners of dogs liable for all damages that might accrue to any person by reason of such dog or dogs killing, wounding, worrying or chasing any sheep or other domestic animal belonging to such other person. Section 2 of the same act provided that, if two or more dogs owned by different persons shall kill, wound, chase or worry any sheep or other domestic animal, such persons shall be jointly and severally liable for the damage done by such dog; while section 4 provides that any person shall have the right to kill any dog found doing any damage aforesaid to any sheep or domestic animal. The defendant contends that his dog was a domestic animal, and that the plaintiff's dog was within the meaning of this statute doing damage to his dog, and that he therefore had a right to kill him. We cannot agree to such an interpretation of the statute. The title of the law and the provisions of the statute all show that the intent of the legislature was to give protection to sheep and those domestic animals which are ordinarily the prey of dogs, and not to give the owner of one of the participants in a dog fight the right to kill the other dog. In construing statutes, the causes which led to the enactment of the law are to be considered, and, if one interpretation would lead to an absurdity and the other not, we must adopt the latter. There was therefore no error in refusing this instruction.

4. In one of the instructions given by the district judge the jury were told that a dog is personal property, and has a money value which the owner may recover from one who wrongfully kills the same; and in another that the burden of proof was upon the plaintiff to show that the

defendant wrongfully killed the plaintiff's dog. The defendant complains of the use of the word "wrongful" in this instruction, and argues that the killing might have been lawful and yet wrongful. The standard of wrong must be a legal standard, and nothing can be said to be wrong in law which is lawful. If the defendant apprehended that the jury might understand the word "wrongful" to include a moral or ethical wrong, he should have prepared and presented an instruction covering that point; otherwise it must be assumed that the jury understood the word in its ordinary legal sense.

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

AMES, C., concurs.

FAWCETT, C., not sitting.

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

AFFIRMED.

IRA C. MUNGER, APPELLEE, V. JOHN O. YEISER ET AL., APPELLANTS.

FILED DECEMBER 5, 1907. No. 14,982.

1. **Injunction**: REPEATED TRESPASSES. The destruction of a fence, and threatened repetition thereof, by a trespasser, as often as the fence may be replaced, entitles the owner to relief by injunction against the invader, even though the latter may not be insolvent. *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, followed.

2. ———: DEFENSES. In an action to enjoin a trespass, a defendant cannot defeat the plaintiff's action by showing an outstanding right in a third party to have one of the deeds in the plaintiff's chain of title declared a mortgage.

3. ———: PARTIES: SUBSTITUTION: EVIDENCE. Where, in an action brought to restrain a trespass upon real property, the same is sold during the action, and the vendee thereupon substituted as

plaintiff, such substitution does not modify the issues; and evidence taken before such transfer should be considered in the same manner as if there had been no change of parties.

4. Appeal: EVIDENCE. Where, after the introduction in evidence of an abstract of title under section 66, ch. 73, Comp. St. 1905, the original records referred to in such abstract are received and show the same facts, no error in the introduction of the abstract can be assigned.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

John O. Yeiser, for appellants.

Carl E. Herring, contra.

CALKINS, C.

The plaintiff claims to be the owner of lots 12 and 13, block 99, Dundee Place, Omaha, by authority of a sale to him made pursuant to a decree of the district court for Douglas county. After the conveyance to plaintiff by the sheriff's deed made in pursuance of such decree, and on the 20th day of April, 1903, the plaintiff conveyed the lots in question to one Chester W. Stem, who on the 14th day of May, 1904, reconveyed the same to the plaintiff. John Jeffries & Sons owned some adjoining lots, with which the lots in question had been inclosed, and, it appears, occupied by tenants of Jeffries' property; but Jeffries disclaimed any interest therein by reason of any adverse possession or otherwise. In September, 1903, defendants made an offer to Jeffries to purchase the property owned by the latter, Jeffries to give a warranty deed for the lots which he claimed to own, and a quitclaim deed to said lots 12 and 13, to convey the interest acquired by adverse possession. Just what response this offer elicited does not appear; but it is shown that, when Jeffries later conveyed his property to the defendants, nothing was said about any right in lots 12 and 13, and it nowhere appears that the defendants ever obtained any conveyance of any right in these lots from anyone claiming possession thereof.

When Stem acquired the title to lots 12 and 13, he removed the fence which had inclosed the same with the Jeffries property to the boundary line between the two tracts; and this fence the defendants demolished. It was replaced by Stem, and again razed by the defendants, who, it is charged, threatened to destroy it as often as it should be replaced. Stem brought this action to restrain the defendants from further trespass. When Stem conveyed to the plaintiff Munger, the latter was substituted as party plaintiff, and the case proceeded to trial. There was a finding and decree in favor of the plaintiff, from which the defendants appeal.

1. It is urged that an action at law afforded the plaintiff an adequate remedy, and that a suit for an injunction will not therefore lie. If a trespass to property is a single act and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere. The principle determining the jurisdiction embraces two classes of cases, and may be correctly formulated as follows: (1) If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable, that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money, then the wrong will be prevented or stopped by injunction. (2) "If the trespass is *continuous* in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act *if it stood alone,* then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions. In both cases the ultimate criterion is the inadequacy of the legal remedy." 4 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1357. This case clearly falls within the second class mentioned by Mr. Pomeroy. The rule has been applied by this court to facts precisely similar in the

case of *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, where it is held: "The destruction of a fence, and threatened repetition thereof by a trespasser as often as the fence should be replaced, entitles the owner to relief by injunction against the invader, even though the latter may not be insolvent."

2. It is claimed by the appellant that the plaintiff failed to establish title in himself. The plaintiff claims through the foreclosure of a mortgage executed by Anna J. Fitch, then owner of the premises, who afterwards conveyed to one Patterson. Patterson was made a party defendant, and was served with summons; but Mrs. Fitch does not seem to have been summoned, and did not appear. Patterson filed an answer, setting up that his deed was a mortgage, and asking that it be foreclosed. It is well settled that a mortgagor who has conveyed the fee is not a necessary party to a suit to foreclose. It is also well settled that, while a conveyance intended as a mortgage may be enforced as such between the parties and those having notice, even though no defeasance is contained therein, as to subsequent purchasers and incumbrancers without notice the instrument is to be taken for what it purports to be. In this case it is not contended that the plaintiff had any knowledge that the deed by Fitch to Patterson was intended as a mortgage, nor any notice of such claim, except that afforded by the filing of the answer by Patterson in the foreclosure suit. Whether a purchaser at a sale in pursuance of a decree in a foreclosure suit takes his deed with notice of the facts alleged in an answer and cross-petition filed in such suit by a defendant who appears upon the record as the owner of the fee it is not necessary to determine. The defendants show no transfer to themselves of any right in or claim to the premises from any of the persons whom they assert adversely occupied the same. They are naked trespassers without color of right. Against such the plaintiff's title is good, even though there be an outstanding right to redeem by a third party.

3. It appears that, while this action was being prosecuted in the name of Stem, the deposition of Jeffries was taken. At the beginning of the trial the defendants moved to suppress this deposition, on the ground that the same was taken before Munger was substituted as plaintiff, and that it was not properly certified. This motion was overruled, and this action of the trial court is assigned as error. The defendants do not point out in what particular the certificate is lacking, and we discover no defect therein. In support of the other ground we are cited to *Lange v. Braynard,* 104 Cal. 156, and *Edgell v. Smith,* 50 W. Va. 349. The former holds that a person made a party to the action by order of the court is not bound by a deposition taken before such order; and the latter that a deposition proving matter not in the original bill when taken cannot be read to support substantive matter in an amended bill afterwards filed. Neither of these cases is in point. Section 45 of the code provides that, in case of a transfer in interest like that here shown, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. In this case the parties chose the latter course; but it did not in any manner change the issues, nor was the defendant at all affected thereby. It is precisely the same as if the assignee Munger had chosen to prosecute the action to judgment in the name of Stem. It follows that the court rightly overruled the defendants' motion to suppress.

4. The only remaining assignment of error is that the court erred in receiving abstract of title of the land in question. The objections to the admission of the abstract at the time it was offered were, first, that it did not show the title to the lots in controversy in the plaintiff; second, that it did not show sufficient of the foreclosure proceedings; and, third, that it was incompetent, irrelevant and immaterial. Section 66, ch. 73, Comp. St. 1905, provides, in substance, that an abstract certified to, and

issued by a bonded abstracter, shall be received in all courts as *prima facie* evidence of the existence of the record of all deeds, mortgages and other instruments, conveyances or liens affecting the real estate mentioned in such abstract; and that such record is as described in such abstract of title. It is not suggested in what particular the abstract does not conform to the statute; but it is said that such abstract would not establish the facts necessary to prove title in an ejectment suit, and consequently would not suffice in this case. It is enough to say that concerning the only question in dispute, viz., the character of the proceedings in the foreclosure suit, the original records were introduced, and the plaintiff's case does not therefore depend upon the abstract.

We therefore conclude that the judgment of the district court should be in all things affirmed, and we so recommend.

FAWCETT and AMES, CC., concur.

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

AFFIRMED.

PHŒBE BLISS, APPELLEE, V. PERSE BECK ET AL., APPELLANTS.

FILED DECEMBER 5, 1907. No. 14,997.

1. **Continuance:** REVIEW. In the absence of any showing on the part of defendants that they were unprepared to meet, or were surprised by, the allegations in an amendment to the petition allowed at the close of the trial, the decision of the district court refusing a continuance on account of the granting of such amendment will not be reviewed.

2. **Witnesses:** CREDIBILITY: IMPEACHMENT. The fact that a witness was intoxicated at the time of the happening of the events about which he testifies is relevant, and may be shown without first asking the witness upon cross-examination whether he was intoxicated.

3. **Damages:** ACTION FOR INJURIES: EVIDENCE. In an action by a married woman for personal injuries, it is proper to show that she has been incapacitated by reason of her injuries from performing labor, for the purpose of showing the nature and extent of her injuries. *Pomerene Co. v. White*, 70 Neb. 171, followed.

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

E. F. Gray and *O. A. Williams*, for appellants.

M. F. Harrington and *C. H. Kelsey, contra.*

CALKINS, C.

The defendants Beck and Perrin were licensed liquor dealers, and the defendant the Metropolitan Mutual Bond & Surety Company was their surety upon the bond given by them to obtain their license. The charge was that on the 18th day of November, 1905, the defendants Beck and Perrin sold liquors to one Joseph Prevo, who became intoxicated, and, while in that condition, attempted to drive along the public highway upon which the plaintiff, with her husband, was traveling; that Prevo, by reason of his intoxication, lost control of the team which he was attempting to drive, and it collided with the vehicle in which the plaintiff was riding, causing the breaking of her leg, and other injuries. The plaintiff brought this action upon the bond given by the defendants to procure such license. There was a trial to a jury, and a verdict for the plaintiff in the sum of $2,000, and from a judgment upon this verdict the defendants appeal.

1. While the plaintiff's petition set forth the bond, and alleged that the defendants Beck and Perrin were engaged in the business of liquor dealing, it did not contain the allegation that the license was granted. At the beginning of the trial the defendants Beck and Perrin, for themselves, objected to the reception of any evidence, on the ground that the petition did not state facts sufficient to constitute a cause of action against them, which was over-

ruled. After both parties had rested, the plaintiff asked leave to reopen the case for the purpose of introducing evidence to show that the license was formally granted, and to amend her petition so as to allege the granting of the same. This was granted over the objection of the defendant, the surety company, which thereupon asked that the case be continued to give it opportunity to make its answer to the amended petition. The court refused the request for a continuance, but granted one hour to the defendant to prepare the answer. The defendant waived the hour, on the ground that the time was insufficient. The action of the court in reopening the case and permitting the amendment is assigned as error. Section 144 of the code provides that the court may, in furtherance of justice, and on such terms as may be proper, permit the amendment of any pleading by inserting other allegations material to the case. It has been held that this section confers upon the court an almost unlimited power of amendment (*Deck v. Smith*, 12 Neb. 389), and that prejudicial error cannot be predicated upon an order allowing a pleading to be amended when the amendment does not change the issues nor affect the quantum of proof as to any material fact. *Cate v. Hutchinson*, 58 Neb. 232. The whole matter of amendment is within the discretion of the trial court, and its action will only be reviewed where an abuse of discretion is apparent. In this case the complaint seems to be directed to the fact that the court refused a continuance. There was no showing on the part of the defendants that they were surprised by the new allegation, nor that they were not as well prepared to meet the same at that time as they could hope to be at any future date. In short, there was no showing of fact whatever; and, without such showing, it would be impossible for this court to say that there was any abuse of discretion either in allowing the amendment or refusing the continuance.

2. The defendants had made application for continuance to procure the testimony of one John Herrin, in which it was alleged that Herrin would, if present, testify

that he was with Prevo at the time of the accident, and that he, and not Prevo, was driving the team. The plaintiff offered to admit that Herrin, if present, would testify as stated, and upon that admission the continuance was refused. The plaintiff called witnesses to testify that Herrin was drunk shortly previous to the accident; and this testimony was admitted over the objection of the defendants as going to the credibility of the witness Herrin. Of this ruling the defendants complain, and argue that such evidence was not admissible without first asking the witness upon cross-examination as to his condition. It is a general rule of evidence that before the credit of a witness may be impeached by proof that he has made statements out of court contrary to what he has testified to at the trial he must be first asked the time, place and person involved in the supposed contradiction. It is said that common justice requires that he should have an opportunity to recall the facts and to explain the nature, circumstances and meaning of what he is alleged to have elsewhere said, and, if necessary, to correct the same. Neither the rule nor the reason for the same applies to a case where it is sought to show the physical condition of the witness to be such as to render him incapable of perceiving, understanding or remembering the facts to which he has testified. The apparent inconsistency of a verbal statement may frequently disappear when the circumstances under which it was made are explained; but the physical condition of a witness in respect to his perceptive powers is a fact, which can only be admitted or denied. This precise question has been before this court in *Willis v. State,* 43 Neb. 102, where it was expressly held that it was competent in a trial of a criminal case for the state to show in rebuttal that a witness who testified for the defendant was intoxicated at the time of the happening of the events about which such witness testified. There was therefore no error in the admission of this testimony.

3. The petition shows that the plaintiff is a married woman, living with her husband; and there is no allega-

tion that she has ever engaged in business on her separate account, nor of her intention so to do. It appears that before the accident she did the housework for her husband, herself and 7 children, and helped her husband in doing chores; that for five weeks after the accident she was unable to do any work, and since that time has been partially disabled from performing her ordinary duties. There was testimony introduced tending to show that her injuries are permanent. The defendant requested the following instruction: "If you should find in favor of the plaintiff, you are not to allow her anything for lost time, or depreciated earning capacity, because, there being no evidence that she engages in any business or work other than a wife's domestic duties, her husband only can recover for her loss of time or earning capacity." This the court refused, but gave the following: "No. 11. If the jury shall find for the plaintiff, then it will be their duty to allow her such amount of damages as will compensate her for the injuries sustained. The elements entering into damages and to be considered by the jury are as follows: (1) If the injuries sustained have impaired the plaintiff's ability to labor, then such sum as the jury find from the evidence will reasonably compensate her for such loss, if any; (2) if the plaintiff has endured pain and suffering and an impairment of her health by reason of said injuries, then the jury shall allow her such reasonable sum as will compensate her for any pain and suffering that she has endured and that in the future she will endure. There is no definite rule by which you can determine the exact amount thus to be allowed. The law in its wisdom puts no definite price on human pain and suffering, but leaves that entirely to the sound judgment and discretion of the jury. What amount the plaintiff shall recover for pain and suffering is exclusively a question for the jury; (3) if the jury find that as a result of the injuries the plaintiff has been and is permanently lame, then such sum as will reasonably compensate her for this inconvenience. No. 12. If you find in favor of the plaintiff, you are not to allow

her anything for lost time, because, there being no evidence that she engages in any other business or work other than a wife's domestic duties, her husband only can recover for her loss of time." It is contended by the appellant that the plaintiff is not entitled to recover for her depreciated earning capacity, and that the instruction No. 12, given by the court, permitted the jury to estimate that element of damage. In support of this contention the case of *City of Central City v. Engle*, 65 Neb. 885, is cited, and it is argued with much insistence that, under the rule adopted in that case, a married woman who has received permanent physical injuries wrongfully inflicted by another cannot in a suit against the wrongdoers recover for her diminished earning capacity, unless she had actually engaged in business on her own account, or intended so to do before the injury. In the above case the pecuniary damages for loss of wages were submitted to the jury as the measure of plaintiff's recovery, and for this action of the trial court the case was reversed. Under the well-settled rule that a case is not authority as to any point not necessary to be passed upon in order to decide the cause, the case under consideration goes no further than to determine that the direct pecuniary injury for loss of wages is in such cases to be recovered in an action by the husband, and not by the wife. In the case of *Pomerene Co. v. White*, 70 Neb. 171, this court had before it the question we are now considering. It was there urged that an instruction which informed the jury that it could take into consideration the probability of the injuries received by the plaintiff being permanent, and the extent, if any, to which the injuries had incapacitated her for labor, was in conflict with the *Engle* case; but the court there said: "In states in which married women are permitted to contract for themselves and in which they are permitted to engage in business or employment in their own behalf, it has been frequently held that, in an action for personal injuries, it is proper to prove that a married woman is incapacitated from labor as the result of her injuries, for the purpose of showing

the nature and extent of her disability. This rule seems founded on sound reason, because it is apparent that the mere fact that a married woman is not engaged in a separate business at the time she is injured should not deprive her of the right to recover for a disability that would ever afterwards bar her from engaging in an occupation on her own behalf." The language above quoted is applicable to this case, and meets with our approval. We therefore conclude that the instructions as given by the court correctly presented the law to the jury, and that there was no error in refusing the request of the defendant to give the instruction above referred to.

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

FAWCETT and AMES, CC., concur.

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

AFFIRMED.

WILLIAM J. CONNELL V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1907. No. 15,112.

1. **Contempt.** A prosecution for contempt of court is a criminal proceeding. The defendant is entitled to the benefit of any reasonable doubt as to his guilt.

2. ———: VENUE: TRIAL BY JURY. When the acts complained of are done in the presence of the court, the defendant is not entitled to a change of venue on account of alleged prejudice of the court, nor is he entitled to trial by jury. The fact that the prosecution for contempt is postponed until the end of the proceedings in which the contempt is alleged to have been committed will not change the character of the prosecution.

3. ———: INFORMATION: FINDINGS: EVIDENCE. When the prosecution for contempt is based upon language used by counsel in open court in the trial of a cause, and the words used are not in themselves necessarily contemptuous, and the court orders a

prosecution instituted by information filed by the county attorney, and a formal trial is had, there being no statement of the court in the record as to the conduct of counsel upon which the proceedings are based, general findings of the court will be considered as predicated on the evidence in the record, and unless supported by that evidence will not sustain a judgment of guilt.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

William J. Connell and *Hall & Stout,* for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin and *James P. English, contra.*

SEDGWICK, C. J.

This is in some respects the most extraordinary record that the writer has ever been called upon to examine. It contains over 500 sheets of closely typewritten matter and some 40 odd sheets of fine print. All of this record is supposed to be devoted to presenting, emphasizing and illustrating a continuous controversy between the court and the defendant, who is a member of the bar of Douglas county, in the trial of a misdemeanor case, entitled "State of Nebraska v. Samuel E. Howell," in which that defendant was indicted with some 40 others. This controversy extended not only through the trial of the case, but through the settlement of the bill of exceptions in that case, and throughout the trial of this case which is now presented to this court. The record clearly shows that the trial judge, which would, of course, be presumed without such showing, was animated throughout by a fine sense of justice, and was using every possible effort to maintain the dignity of the court and the honorable reputation of the bar of the state, and was conscious of the character of the disgraceful proceedings throughout, and yet was unable to preserve that order and decorum which is essential to the due administration of justice. The defendant is one of the able lawyers of the state, of long practice in all the

courts, and has held positions of great influence in the public service. Judging from this record, he is evidently fearless in the defense of the interests of his clients, and is willing, if it seems at the moment to be necessary, to make great sacrifices to promote their cause. These characteristics, of course, challenge the admiration of the courts, and yet it is equally manifest, we think, from this record that due consideration on the part of the defendant of the duties of counsel in the trial of causes and the proper exercise on his part of the ability of a strong lawyer to assist the court in the discharge of its arduous duties would have avoided all difficulty, and so it may be said that the record shows that the defendant is at fault. It is not necessary to go into this voluminous record in detail. That part of it which it will be necessary to quote in determining the legal questions presented will sufficiently illustrate the character of the proceedings. At the end of the trial of the principal case, the court directed the county attorney, who is also the attorney for the prosecution in the principal case, to file an information against this defendant, who was the leading counsel for the defendant in the principal case, charging the defendant with contempt of court in the process of that trial. In making this order the court directed the precise language used by the defendant, and apparently taken from the record, preserved of the former trial, which should be charged in the information against the defendant as the ground for the proceedings for contempt. There were six counts in the information filed by the county attorney, and the defendant was found guilty as to two of the respective charges. It will therefore be unnecessary to discuss the remaining accusations.

1. The first count in the information upon which the defendant was found guilty charged: "After the said court had heard the said William J. Connell in his argument of the law of said case, on behalf of the defendant therein, and after the said court had announced to the said William J. Connell that the said court did not care to hear

any further argument on the law of said case, the said William J. Connell, in answer to said announcement of said court, did then and there in a disorderly, contemptuous and insolent manner, and in a loud, boisterous, disrespectful and sarcastic tone of voice, with the intent on the part of said William J. Connell then and there and thereby to intimidate, humiliate, insult and lower the dignity of the said court in the presence of a large number of bystanders and visitors, then and there being present in said court, use the following language toward said court, to-wit: 'I don't want to say that I have lost faith in the court, but I will go to the extreme of saying that I do not think that any law that I could produce to your honor would be of much effect. I have got it (meaning the law) out of the Nebraska reports, and the supreme court is responsible for the law. I do not make the law. I merely find it and bring it into the court'—contrary to the form of the statute in such cases made and provided, and in contempt of said district court and its dignity and against the peace and dignity of the state of Nebraska." After the trial of the Howell prosecution an attempt was made to settle the bill of exceptions, and it appears from the record that a transcript of the evidence taken in that case was procured and was agreed upon between the counsel for the respective sides, but had not been allowed by the court and ordered to be made a part of the record. From this transcript extracts were presented and offered in evidence. Some objections were made to their being received. After some hesitancy they appear to have been received, and also appear to have been relied upon by both parties to this controversy as substantially showing the facts. In settling the bill of exceptions in this case, the judge has certified that the transcripts alluded to are not correct, and refers to the examination of the defendant, Connell, by the court as showing the incorrectness of these transcripts. This examination shows that the transcripts were not a part of the records of the court, and that the copy of the evidence of the former case from which the transcripts were

taken had never been allowed by the court as the bill of exceptions in that case. It is, however, admitted upon all hands that the supposed offensive language of the defendant was preceded by more or less controversy between the parties, and no attempt is made by any one to show what that controversy was, except as disclosed in the transcripts referred to. Neither has any one attempted seriously to show in what respects these transcripts are defective or incorrect, and as they are in evidence, and assumed by counsel on both sides to be substantially correct, we think they must for the purposes of this case be so considered. It appears then from the record that, while the prosecuting attorney was questioning a witness in the trial of the Howell case in regard to some record that had been received in evidence, a discussion took place which led to the supposed offensive language of this defendant. This discussion was as follows: "Q. Now, referring to the entry opposite C. B. Havens & Company under June 10, 1905, the figures 5 and two ciphers following, what does that mean, $5 or what? Objected to for the reason that the book itself is the best evidence. We object that it is immaterial and irrelevant. We further object that it does not tend to sustain the charge or does not tend to sustain any count in this indictment. We further object that it relates to a date and a time prior to the time when the existing law under which this prosecution went into force. Objection overruled and defendant excepts. Mr. Connell: That was a point I wanted to present, your honor, but if your honor has made up your mind not to hear any discussions or presentation here why I don't care to go into that. The court: You have argued so much law that I thoroughly disagree with that I have kind of lost faith in the law you present to the court, and if I thought there would be anything gained by this discussion I would be glad to hear it. Mr. Connell: I don't want to say I have lost faith in the court, but I will go to the extreme of saying that I do not think that any law that I could produce to your honor would be of much effect. The court: Per-

haps that is because you have argued bad law to the court for a long time, and the court, I suppose— Mr. Connell: I have got it out of the Nebraska reports, and the supreme court is responsible for the law. I do not make the law. I merely find it and bring it into court. Objections overruled. Defendant excepts."

It appears to be conceded in the findings of the trial judge that the language used by defendant would not necessarily in itself be contempt. The contempt was considered to consist in the manner of the defendant and the circumstances under which the language was used. The foregoing extract from the transcript illustrates two unfortunate conditions that existed during the whole trial. The trial judge was led into controversy and argument when nothing was required but prompt decision. He allowed himself frequently to be interrupted when attempting to explain the grounds of his ruling, and habitually allowed extensive argument after having indicated his opinion upon the point under discussion. The objection to the question propounded to the witness, it appears, was stated at large by counsel, and after the objection had been flatly overruled, and counsel had taken his exception to the ruling, counsel stated that the point was one that he wanted to present, but if the mind of the court was made up not to hear any presentation that he would not care to go into it. Ordinarily such a remark as this in open court would be regarded as more or less offensive. The implication plainly is that the point determined by the court was an important one; that it merited discussion, and the insinuation is that the court had made an important ruling without proper consideration of the matter, and that this indicated a condition of the mind of the court that made it undesirable to discuss the question. What we mean to say is that under some circumstances such a remark as this of counsel would be subject to such criticism as above, but the reply of the court would indicate that such discussions were anticipated and not rarely to be expected. The remark of the court that he had lost

faith in the law presented by counsel might be understood to call for some excuse or explanation on the part of counsel. The answer of counsel that "I do not think that any law that I could produce to your honor would be of much effect," taken literally, is merely a confirmation of the statement of the court. The difference in the two expressions consists in the inference to be drawn from each respectively. The one undoubtedly infers that counsel was in the habit of citing law to the court which was unreliable; while the other infers that the court was in the habit of disregarding the law when it was correctly cited by counsel. Such language on the part of either court or counsel can be accounted for only by the excitement which comes from the heat of unnecessary discussion and of a character to be carefully avoided. The court, instead of taking immediate measures to prevent such discussion in the future, continues it by a remark calculated to produce the reply which followed. The court intimates that counsel has attempted to deceive him by citing unreliable precedents, and counsel attempts to justify by stating the source of his authorities, a source which is regarded as legitimate, at least in the courts of this state. Thereupon the objection is again overruled, and another exception taken.

The charge of the other count of the information upon which the defendant was found guilty is as follows: "The defendant did then and there in the presence and hearing of said court, and in the presence and hearing of the presiding judge thereof, said court then and there being in session as aforesaid, and engaged in the trial of said case, unlawfully and wilfully behave toward said court in a disorderly, contemptuous and insolent manner, in that then and there and during said trial of said case, and in the presence and hearing of the jury impaneled in said case as aforesaid, and after the said court had passed upon the qualifications of a certain witness, called by the said defendant in said case to testify in said case, and had excluded said witness from testifying in said case, pursuant

to an order of the said court theretofore made at the opening of the trial of said case forbidding the witnesses in said case to be present in said court during the progress of the said trial of said case when other witnesses were testifying therein, the said William J. Connell did then and there in a disorderly, contemptuous and insolent manner, and in a loud, boisterous, disrespectful and sarcastic tone of voice, with the intent on the part of said William J. Connell then and there and thereby to intimidate, humiliate, insult and lower the dignity of the said court in the presence of said jury and in the presence of a large number of bystanders and visitors then and there being present in said court, use the following language toward said court, to wit: 'Now, your honor, I contend and insist that to exclude any witness called by the defense, simply because that witness has violated some order of the court, and the defendant himself is not a party to it, would be not only the rankest injustice, but would be error of the grossest character.'" We cannot find any other substantial proof of the exact language attributed to the defendant in this count of the information and the preceding controversy that led to its use, except that contained in the transcripts from the proposed bill of exceptions above referred to, and for the reasons already given, we think that we must take those transcripts as furnishing the evidence upon that point, and they show the following proceedings: "George E. Griffith, called as a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. Stout, of counsel for the defendant, and testified as follows: Q. You may state your name to the court and jury. A. George E. Griffith. Q. Where do you reside? A. 2823 Dewey avenue, Omaha. Q. How long have you lived in Omaha? A. Since the 16th of March, 1905. Q. What is your business? A. I am employed by the Union Fuel Company. Q. Where is the Union Fuel Company's place of business? A. 1614 Farnam street. Q. What is the nature of your business with the Union Fuel Company? A. I am employed in the capacity of bookkeeper

and solicitor. Q. In what way do you exercise that duty of yours as solicitor? Mr. Murdock: Has this man been in the court room? Immediate cross-examination by Mr. Murdock: Q. Have you been in the court room during the progress of this trial? A. I was in here for a short time one evening. Q. At the time of the taking of testimony? A. Yes; I was in here Thursday evening, I believe; no, it was Wednesday evening. Mr. Murdock: Object to the witness testifying. Mr. Stout: His instructions have been to stay out. Mr. Connell: That can make no difference. Mr. Connell: Were you aware that you would be a witness when you were in here that evening? The court: The court allowed Mr. Sunderland to testify because he was one of the defendants. Mr. Stout: If the witness is disqualified— Mr. Connell: My position is that he cannot be disqualified. The court: The court made the order, and told counsel that order would be enforced. Mr. Connell: I want to show by this witness that he was not present when your honor made that order; that he did not know anything about it; that he never expected to be a witness when he was called; and we wish to state, professionally, to the court, on my part and on behalf of my associate, Mr. Stout, we did not know that we would have to call him as a witness. I did not have the remotest idea that he would ever be a witness until well into yesterday; and, that being so, we ask and demand that his testimony be taken. Now, my understanding of the rule is this, your honor, that a party cannot be deprived of the right to use a witness simply because the witness violates some order of the court. If this witness has violated any order of the court, knowing that he was to be a witness, and has come into the court room, he would be liable for contempt of court; he would be punishable, himself, for contempt of court. But it cannot be, your honor. Suppose that Mr. Howell, in place of being on trial for an act in restraint of trade, was on trial for his life, and that this was the only witness by whom he could prove his innocence, and the witness has violated the order of the

court; is it possible that he must be denied his right to present that testimony, and go upon the executioner's platform, because the witness, the only witness who could testify in his own behalf, has wilfully, we will say, violated an order of the court? Now, your honor, I contend and insist that to exclude any witness, called by the defense, simply because that witness has violated some order of the court, and the defendant himself is not a party to it, would be not only the rankest injustice, but would be error of the grossest character. The court: Then we will have error of the grossest character. Now, I do not like that remark—grossest, rankest injustice. Now, Mr. Connell, you have been making free use of such remarks, and some time you are going to find out this court is not going to permit that any more. Mr. Connell: I do not believe, your honor; I do not know what your honor's ruling would be. I am merely submitting that proposition, and I thought the mere statement of the result of that rule would satisfy your honor that it would not be the proper thing. The court: The trouble is you have tried to blackguard the court all through this case by insinuations, and you are undertaking to carry things with a high hand, whether right or wrong. This is not a murder case, and the court has a right to make any reasonable rule, and it must not be violated. In this case the defendant is charged with a misdemeanor. The court would have no way of enforcing its order if any witness could come in here, if he sees fit, and violate the order of the court. Mr. Connell: He could be punished for contempt. The court: The court is not looking for contempt cases at all. The court is looking for the enforcement of its orders. The court allowed Mr. Sunderland to testify, even though he had been in the court room while testimony was being given, because he was one of the defendants in this case. Mr. Connell: We except to the ruling of the court."

From this it appears that, when defendant, as counsel in the case, stated his position to the court that the wit-

ness Griffith could not be disqualified, the court replied: "The court made the order, and told counsel that order would be enforced." This ought to have ended the controversy. This was a plain intimation that the court had considered and had determined that the order made at the commencement of the trial, excluding all witnesses from the court room, and directing that no witness should be examined who remained in the court room in violation of the order, applied to the witness Griffith; and, the court having come to this determination, there was no further necessity for debate; but it will be seen that Mr. Connell proceeded to argue the question at large. No one appears to have objected to this argument. The argument appears to be substantial, and on its face would appear to be in good faith, except for the fact that the point had already been determined. But the court listened to the argument. No attempt was made to prevent or restrict it, and at the close of the argument the court treated it as an attempt on the part of counsel to "blackguard the court." It must be considered that the language used by counsel was not as choice and delicate as might be desired. He tells the court in closing his argument that "to exclude any witness called by the defense (under the circumstances then existing) would be not only the rankest injustice, but would be error of the grossest character." The court apparently considered that the point had already been decided; and counsel himself concedes that there was reason at the time to suppose that the court would exclude the testimony, and he characterizes the proposed action of the court as "the rankest injustice, and error of the grossest character." We are not now considering the tone of voice, the gesticulations, or the manner of the defendant, other than as indicated by the language itself. Mr. Connell, as a witness in his own behalf, testified that he was applying, at least in his own mind and intention, his characterization of the nature of such a ruling to the illustration which he himself had proposed in his argument, and that he did not at the time have in mind charac-

terizing the proposed ruling of the court upon the question before it. His explanation at the time to the court, as disclosed by the record, tends to support him in this testimony, and might have been taken as purging him of any intentional contempt of court in making the offensive remark—"I do not know what your honor's ruling would be. I am merely submitting that proposition, and I thought the mere statement of the result of that rule would satisfy your honor that it would not be the proper thing." The reply of the court to this expression shows that under ordinary circumstances the explanation of counsel would have been regarded by the court as sufficient. It was only in the light of the general conduct of counsel during the course of that trial that the court regarded the language as offensive. Undoubtedly very much must be confided to the discretion of the trial court in the characterization of the language of counsel which might or might not be regarded as contemptuous, so much depends upon the circumstances surrounding the use of the language, and upon the manner of counsel in using it, and other matters, that the record cannot be made to show that a reviewing court must in ordinary cases rely upon the judgment and discretion of the trial court, which is based in a large degree upon his personal observations and knowledge. This subject will be considered further in connection with the allegations of the information that the defendant acted in a "disorderly, contemptuous and insolent manner." This is a criminal proceeding in its nature. The defendant is entitled to the benefit of any reasonable doubt as to his guilt. The language used by the defendant as charged in these two counts of the information, under the circumstances disclosed by the evidence, and in the light of the inducements and explanations contained in the record, would not of itself furnish sufficient proof that the defendant beyond reasonable doubt committed and intended to commit a wilful contempt against the authority and dignity of the court.

2. This is not a prosecution for a constructive contempt.

The acts complained of were done in the presence of the court itself. The fact that the court delayed the proceedings for contempt until after the principal case was finished would not change the character of the proceedings. It was the duty of the court to hear the matter himself, and the defendant's application for a change of venue was rightly overruled. These two propositions are elementary, and in the view that we take of the case they become unimportant, except as they bear upon the question which we come now to consider, and which we deem to be the most difficult and important question in the case. Did the defendant act in "a disorderly, contemptuous and insolent manner"? Did he speak to the court "in a loud, boisterous, disrespectful and sarcastic tone of voice"? Did he intend and attempt "to intimidate, humiliate, insult and lower the dignity of the court"? It appears to be conceded that the language used by the defendant might have been used with such manner and purpose as these questions indicate, or might have been used in the heat of the debate without malicious intent with the purpose as explained and insisted upon in the testimony of the defendant. The trial court saw the conduct of the defendant. He observed his manner, his tone of voice, and the circumstances under which he spoke. He was manifestly, as shown by the record, endeavoring to do his whole duty, and to conduct the trial in a seemly and appropriate manner. He has made a general finding in the case that the defendant "unlawfully and wilfully did behave toward said court in a disorderly, contemptuous and insolent manner, in that then and there and during the trial of said case, and in the presence and hearing of the jury impaneled in said case as aforesaid, and after said court had passed upon the qualification of a certain witness, called by the said defendant in said case to testify in said case, and had excluded said witness from testifying in said case, pursuant to the order of said court theretofore made at the opening of the trial of said case forbidding witnesses in said case to be present in said court during the

progress of said trial of said case when other witnesses were testifying therein, the said William J. Connell did then and there in a disorderly, contemptuous and insolent manner, and in a loud, boisterous, disrespectful and sarcastic tone of voice, with the intent on the part of said William J. Connell then and there and thereby to humiliate, intimidate, insult and lower the dignity of the said court in the presence of said jury and in the presence of a large number of bystanders and visitors then and there being present in said court, use the following language toward said court, to wit: 'Now, your honor, I contend and insist that to exclude any witness called by the defense, simply because that witness has violated some order of the court, and the defendant himself is not a party to it, would be not only the rankest injustice, but would be error of the grossest character.' That said language was used by the defendant wilfully, unlawfully, contumaciously, and in contempt of this court, and was an attempt of said defendant to obstruct the proceedings and hinder the due administration of justice in said case then pending and on trial before this court. The court therefore finds the defendant guilty as set forth in the first, second, third and fourth counts of the information."

It is contended that these findings are sufficient to support the conviction without regard to the evidence; that the language and actions of the defendant and the manner in which the language was used and the actions were done were necessarily within the personal knowledge of the judge, and that the specific charge of the manner of the defendant and specific finding and statement of the judge thereon required the rendering of the judgment that followed. We do not want to be understood as deciding that in ordinary cases something more is necessary than the statement of the facts upon the record and the findings of the court thereon to support a conviction of contempt committed in the presence of the court. In this case we think that the judgment is not supported by the record. Instead of relying upon the knowledge of

the court and inflicting summary punishment upon a contumacious attorney, the court directed the formality of a legal trial. It was stated from the bench that the matter was left in the hands of the county attorney, and the state called and examined numerous witnesses to prove, not only the fact of the use of the language alleged, but also definitely and specifically the manner and tone of the voice of the defendant and all of the surrounding circumstances and conditions, assuming the burden of proving in the ordinary way all of the matters alleged in the information. The findings of the court are borrowed literally from the information, and contain the most of the allegations of the information in the language and form in which the matters are charged. Outside of these formal findings there is no statement of the court in regard to the transactions that took place in the presence of the court. The findings are manifestly based upon the information and the evidence, and must be taken as reflecting the views of the court as to the facts established by the witnesses examined, and not from his own knowledge.

Among the witnesses examined for the state were the two bailiffs of the court, and the testimony of the witness Kirkendall, one of the bailiffs, fairly shows the evidence upon which the findings and conviction are based. This witness appears to be very observing and conscientious. He was questioned by the prosecution, and answered as follows: "Q. Was the language used by Mr. Connell, just quoted, spoken in a voice loud enough so that the people back in the court room would be able to hear it? A. I judge that any one in the court room could hear it. He did not say it in a very boisterous manner, but he said it so that any one in the court room might have heard it. I was sitting back there in my chair, and I heard it. Q. What was Mr. Connell's manner and demeanor, and what was the tone of his voice at the time he addressed the language quoted to the court? A. Well, I thought that he spoke in what I would consider a kind of natural tone

of voice for Mr. Connell. He talks very loud, but he spoke it in a kind of, that is, he finished it up, if I remember right, in a kind of half laughing manner, as though he had no confidence in bringing—" He was then interrupted, and, being told by the court to continue his answer, answered further as follows: "A. Well, he spoke it as though he thought it was useless to—he left the impression that he thought it would be useless to add any more law. He left the impression that he did not think it would carry any weight with it. That is the nearest I could give it. Q. What do you say, Mr. Kirkendall, as to whether the tone of voice used by Mr. Connell, when he employed that language, was respectful or disrespectful to the court? A. Well, now, that is hard for me to answer. If I was to use my own judgment, I would say that I did not suppose that Mr. Connell cared much for the court—respected the court a whole lot in that statement. Q. I will ask you to state whether the tone of his voice, when he used the language referred to, was sarcastic or otherwise? A. No; I don't know as it was. I thought it was a kind of natural tone of voice for Mr. Connell. Q. Have you stated, now, the manner in which his tone and conduct impressed you when he was using that language? A. I think I have." This related to the first and second counts in the information. As to the third and fourth counts in the information he was questioned, and answered as follows: "Q. Were you also present in the court room, Mr. Kirkendall, during the trial of the case of the State of Nebraska against Howell, when the defendant, William J. Connell, addressed the court, his honor, Judge Sutton, then presiding, in the following language: 'Now, your honor, I contend and insist that to exclude any witness called by the defense, simply because he has violated some order of the court, and the defendant himself is not a party to it, would be not only the rankest injustice, but would be error of the grossest character'? A. Yes, sir. Q. I will ask you to state what tone of voice Mr. Connell used when he employed the language quoted?

A. Well, in that statement, I think he used a kind of animated tone of voice. Q. Could you say as to whether it was boisterous or not? A. Well, it was very loud. Q. Was it unusually loud? A. Yes, sir. Q. What would you say as to whether or not the language used by Mr. Connell toward the court was used in an insolent manner or otherwise? A. Well, I don't know as to that. I was off that distance. I could hear it plainly. I could not see his face. Q. What would you say as to whether it was in a disrespectful or respectful tone of voice? A. Well, it sounded to me as challenging the judge on excluding the witness. Well, I don't know how you want me to answer that, unless I can answer it in my own way. Q. Read the question. A. I heard the question. Q. What would you say, Mr. Kirkendall, as to whether the tone of voice was respectful or disrespectful? A. Well, it sounded to me, of course, disrespectful, for the reason that it sounded as if he was issuing a challenge to the judge for excluding the witness from the chair on account of being in the room during the trial."

There appears to be two statements of this witness that tended perhaps in some degree to support the allegations of the information. When asked the leading question by the state's counsel in regard to the language of the defendant, "Was it unusually loud?" he answered, "Yes, sir," and he says that "it sounded to me, of course, disrespectful." But the reason for this latter conclusion is derived, as appears from his answer, entirely from the language itself, and not from the manner in which it was used. If the witness had understood that the question as to excluding the testimony of the witness, Griffith, was still undetermined, and that the court might yet conclude to allow the evidence, and was listening to the argument for the purpose of determining the propriety of so doing, this witness undoubtedly would not have considered the language used as disrespectful. We cannot add to this opinion, already too long, by quoting further from the evidence of the state's witnesses. There was none more

convincing than the evidence of the witness Kirkendall. The defendant testified as a witness in his own behalf. He plainly and unequivocally explained the language used, the circumstances under which it was used, and his purpose and intention in using it. If his evidence is to be believed, it completely purges him of contempt.

The evidence fails to show beyond a reasonable doubt that the defendant was guilty of a wilful purpose to obstruct the proceedings of the court, or to insult or humiliate the judge either by boisterous behavior, by loud or sarcastic language, or by offensive and insulting demeanor.

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

REVERSED.

FRED CLEMENTS V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1907. No. 15,208.

1. **Criminal Law**: REBUTTAL EVIDENCE: WITNESSES: INDORSEMENT ON INFORMATION. Where it becomes necessary to call persons to testify in rebuttal of testimony introduced on behalf of an accused in his defense, and the evidence sought to be introduced is obviously and purely rebuttal in its nature, it may be given by witnesses whose names are not indorsed on the information.

2. **Homicide**: EVIDENCE. Where a witness for a defendant on trial for the crime of murder exhibits a hat to the jury, and by his evidence conveys the impression that certain holes therein made were made by a shot or shots fired at the defendant and his family by the deceased, it is competent for the state to rebut this impression by proving that the holes in the hat are not shot holes, although the hat itself has not been formally offered in evidence.

3. **Criminal Law**: INSTRUCTIONS. It is not error for the court to refuse to give an instruction requested by the defendant which does not contain a full and correct statement of the law applicable to the facts of the case as shown by the evidence.

4. ———: ———. The introduction of evidence tending to impeach a witness does not require the court to instruct the jury to totally disregard his evidence, and it is proper to refuse such instruction.

5. ———: ———. It is not error for the court to refuse to instruct the jury that they should carefully scrutinize evidence of the prosecuting attorney because of the natural and unavoidable tendency of persons in his position to hear and remember only such matters as are favorable to the state.

6. ———: ———. An instruction that "a doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt; and the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors, if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered"—is not to be commended in all cases, but we cannot reverse a judgment of conviction solely for the giving of this instruction.

7. ———: ———. Error cannot be predicated upon a single clause or expression contained in an instruction, if the whole instruction, when read and considered together, correctly states the law applicable to the case.

8. ———: NEW TRIAL. Newly discovered evidence which is doubtful in its character, and is merely cumulative, is not a sufficient ground for a new trial.

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

B. S. Baker, James T. Begley and *F. G. Hamer,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

BARNES, J.

Fred Clements, who was the defendant in the district court, was charged with the killing of one Luke Goldie. He was convicted of the crime of murder in the second degree, and brings the case here for review.

We learn from the record that at the time of the killing, the defendant resided on the east side of Chicago street, which is an extension of Twenty-Seventh street of South

Omaha. The deceased resided on the west side of said street, about 50 feet south of the Clements residence, his lot being the second one south of the intersecting street, which is known as Grace street. Chicago street runs north and south. Grace street runs east and west. On the evening of the 3d day of August, 1906, the deceased returned to his home from South Omaha with a one-horse wagon loaded with bricks. If we are correct in our understanding of the evidence, the homes of the deceased and the defendant are located on a hill, or on the side of a hill. In driving up this hill with his load of bricks, the deceased stopped his horse to rest in front of the barn gate of the defendant. He then drove on to his own home. One Frank Gurness was assisting him, and on his arrival in his own yard the deceased heard his dog howling over at the defendant's place, and said to Gurness: "You unhitch the horse, and I will go and see about my dog." He then walked across the road to the defendant's fence. Several persons, among whom were two women, accompanied him. He found one of the Clements boys abusing his dog, and asked what he was doing. The defendant was near by with a gun in his hand, and his sons were also present. As soon as the deceased made the inquiry above quoted, the defendant gave the order to shoot, and immediately the firing began. The deceased, together with those who had accompanied him, rushed back toward his house, and, while running, he was struck in the leg by one of the bullets. About the time he arrived at the northeast corner of his home Gurness came from the horse and wagon, and assisted him into the house. He was also followed and assisted by his wife. Gurness took him through the kitchen into the front room, and about this time one Frank Gendra came from the Sofal house, which is located immediately south of the home of the deceased, entered the west door and passed through the kitchen into the front room. There he found Goldie and Gurness. The deceased showed him the wound in his leg; and, while Gendra was standing near the east window, the firing began a second time.

Several shots were fired, some of which passed through the window, breaking the glass and knocking it into Gendra's face. One of the shots struck the deceased in the side. He fell to the floor, and died the same night from the effect of this wound. The bullet which caused his death, and which was taken from his body, was shown to be from a 38-caliber rifle. The defendant was seen in the yard with his gun at or near the time the deceased received the fatal wound. The defense which seems to be most relied upon was an alibi.

The defendant's first contention is that the court erred in allowing one John McBride to testify against him, because the name of said McBride was not indorsed on the information. It appears that after the state had produced its evidence in chief and rested, the defendant, and other members of his family, testified in substance, that he and his son Henry had gotten into a buggy prior to the shooting, and driven out of the wagon gate, thence north about 450 feet to the county line road, thence west about 600 feet, thence south on Duncan street about 450 feet, thence east on Grace street to the wagon gate, from whence they started; that after they had reached a point about half way round the square above described, and while near the intersection of the county road and Duncan street, the shooting commenced at the Goldie and Clements' residences and continued for some time, but was all over before they returned to the vicinity of the Goldie residence. It was also claimed that the first shots fired were from the Goldie residence toward the Clements house, and were thereafter interchanged from each of the two residences. To rebut this evidence the state called several witnesses, among whom was John McBride, and after the usual preliminary questions the prosecuting attorney asked him the following question: "Did you see the defendant, Fred Clements, during the shooting which occurred near the Goldie premises on the evening of August 3d last?" No objection was interposed to this question, and the witness answered: "Yes, sir." Then followed the question:

"Where was he?" This was objected to by the defendant, and was not answered. The prosecutor then asked the witness: "Did you see all of the shooting that occurred there on the evening of August 3d?" This was objected to by the defendant as being "incompetent, irrelevant and immaterial, and not proper rebuttal; the witness' name not being indorsed on the information, and leading and suggestive and not calling for the fact." The objection was sustained. The prosecutor then asked the following: "Mr. McBride, at any time during the shooting in the vicinity of the Goldie and Clements premises on the night of August 3d last, was the defendant, Fred Clements, on the county line road, or on the road running north and south in the vicinity of Shellhardt's, or at any time during that shooting was he on the road leading north and south between Shellhardt's and Bradford's, or between Bradford's and the clump of trees testified to, immediately east of Bradford's?" This was objected to as being incompetent, irrelevant and immaterial, and not proper rebuttal, and for the further reason that the witness' name was not on the information, and was leading, suggestive, and not calling for the fact. The objection was overruled, and the witness answered: "He was not." He was next asked: "At any time during the shooting in the vicinity of the Goldie and Clements premises, on the night of August 3d last, was the defendant, Fred Clements, in a buggy, upon any portion of the road we have described to you in the previous question?" To this question the same objection was interposed, which was overruled, and the witness answered, "No, sir."

In *Kelly v. State*, 51 Neb. 572, it was said: "Where it becomes necessary to call persons to testify in rebuttal of testimony introduced on behalf of an accused in his defense, or if it is rendered necessary by a material issue raised for the first time in the case by the evidence for the defense, and the evidence sought to be introduced on rebuttal is obviously and purely rebuttal in its nature, it may be given by witnesses whose names were not indorsed

on the information"—citing *Goldsby v. United States*, 160 U. S. 70, 16 Sup. Ct. Rep. 216; *State v. Parish*, 22 Ia. 284; *State v. Ruthven*, 58 Ia. 121; *State v. Huckins*, 23 Neb. 309, and *Fager v. State*, 49 Neb. 439. The record discloses that the defendant introduced evidence tending to establish an alibi. By such evidence he located himself in a buggy, driving over the road described by the question of the prosecutor, during the time the shooting in question was going on. That it was the province and the duty of the prosecuting attorney, if he could do so, to show on rebuttal that the defendant was not in the place mentioned and described in his evidence, there can be no doubt, and that this was the purpose in calling McBride as a witness. It appears that the court carefully excluded the evidence offered as to the whereabouts of the defendant, and confined the testimony of the witness to the declaration that the defendant was not on the road, or in the buggy, the place described by himself and his witnesses, at the time of the shooting in question. That this was purely and strictly rebuttal evidence there can be no doubt. If it be said that the competency of the witness to testify to the fact stated by him was doubtful because of his lack of knowledge, or, in other words, because a sufficient foundation had not been laid, the answer must be that it was not objected to for that reason. The defendant did not seek to question the competency of the evidence, or the foundation for its introduction, but relied upon the fact alone that the name of the witness was not indorsed on the information. So we are of opinion that the reception of this evidence was not reversible error.

Defendant's next assignment is that the court erred in permitting the prosecuting attorney to examine the witness John Briggs concerning a certain hat and its condition, over defendant's objections. It appears that one Carl Clements, a son of the defendant, while on the witness stand, was shown a hat by the defendant's counsel, and was asked if he wore that hat at the time of the shooting in question. He answered that he did. His attention was

then called to certain holes in it and its condition and he testified that the holes were shot into the hat at the time said shooting took place. He thus conveyed the impression to the jury that Goldie, or some one at his place, had shot at the defendant and his family. It was therefore proper to rebut Carl's evidence by showing that the holes in the hat were not shot holes, and this was what was done by the evidence of the witness Briggs.

The defendant further alleges that the trial court erred in refusing to give the jury the following instruction: "If you find that the Clementses were on or in the public road in front of their premises, and, without blame on their part, were fired upon by Luke Goldie, the Clementses or any one of them were justified in firing upon said Goldie even though they knew the result of their shooting would be to kill said Goldie." This instruction is not a correct statement of the law, and is not applicable to the facts of this case. The undisputed evidence shows that the deceased received his fatal wound after he had sought what he supposed was a place of safety, and while in his own house. So, even if the evidence showed that he or some partisan of his fired upon the Clementses, the defendant would not be justified in following the deceased to his own premises and shooting him after he had taken refuge under his own roof. Again, we find no convincing evidence in the record which shows that any shot or shots were fired at the defendant or his sons from the Goldie premises, or that any member of the Goldie party had a firearm of any kind in his or her possession.

It is also contended that the court erred in refusing to give instructions Nos. 4 and 5 requested by the defendant. These requests were on the point above mentioned, and in line with the instruction last above quoted. So this contention requires no further consideration.

Defendant alleges that the court erred in refusing to direct the jury to entirely disregard the testimony of Frank Gurness; and that the court erred in refusing to instruct the jury to totally disregard the testimony of a

witness that had knowingly sworn falsely. An examination of the record discloses that the court, on his own motion, gave an instruction which embodied the principle contained in the foregoing requests, but made it general in its nature, so as not to direct the attention of the jury to any particular part of the evidence, or the testimony of any particular witness. The instruction given was proper, and obviated the necessity for the special requests above mentioned.

Defendant further insists that the court erred in refusing to instruct the jury as follows: "You are instructed that the prosecuting attorney, whose duty it is to prosecute, in case he testifies as a witness, it would be your duty to scrutinize his testimony with more care and caution than an ordinary witness, because of the natural and unavoidable tendency of persons in like position to hear and remember only such matters as are favorable to the state." It appears that the only testimony given by the prosecuting attorney was directed to the identification of certain photographs of the Goldie and Clements premises. Hence the instruction tendered could serve no useful purpose. It may be further said that the prosecuting attorney is not in that class of persons to whom such an instruction is applicable.

In a separate brief filed by one of the defendant's counsel the twenty-second paragraph of the instructions given by the court, on his own motion, is vigorously assailed. This is a copy of the instruction defining a reasonable doubt, given and approved in *Willis v. State*, 43 Neb. 102; *Barney v. State*, 49 Neb. 515; *Davis v. State*, 51 Neb. 301; *Carrall v. State*, 53 Neb. 431; *Bartley v. State*, 53 Neb. 310; *Leisenberg v. State*, 60 Neb. 628; *Savary v. State*, 62 Neb. 166; *Nightingale v. State*, 62 Neb. 371, and *Schwartz v. State*, 65 Neb. 196. It is true, however, that this instruction was criticised by Judge HOLCOMB in *Bothwell v. State*, 71 Neb. 747, and by Judge SEDGWICK in *Lillie v. State*, 72 Neb. 228, and was also criticised by the writer of this opinion in a more recent case; but we have consistently held

that we will not reverse a conviction for the giving of this instruction alone, and we see no reason to depart from that rule in this case. Counsel also select expressions from two other instructions, and contend that they have the effect of shifting the burden of proof to the defendant. We have examined these assignments, and find that the instructions from which these expressions are selected, when taken as a whole, correctly state the law, and they are not subject to counsels' criticism.

Finally, it is contended that the court erred in refusing to grant the defendant a new trial on the ground of newly discovered evidence. It was alleged by the defendant, and shown by affidavit, that after the conclusion of the trial he for the first time discovered that Charles Norris, his daughter Marie and one Seater would testify to matters in support of his alibi. We have carefully examined the record, and find that none of the witnesses mentioned were able to testify conclusively or positively to the fact that the defendant was in the buggy, upon Twenty-Seventh street, the county line road, Duncan street, or Grace street, at the time of the shooting at the Goldie premises. Not one of these witnesses was able to say that he recognized the defendant as one of the occupants of the buggy. It is true that it is alleged that one or two of these witnesses would testify that they thought, at the time, the defendant was one of the occupants of the vehicle, but it appears that their only reason for such thought was the fact that they thought they recognized the rig as one belonging to the defendant. Again, it will be observed that this evidence possessed very little, if any, probative force, and, at most, it could only be said to be cumulative. Such evidence has never been held sufficient to furnish ground for a new trial.

In conclusion it may be said the record in this case presents such a state of facts that it is difficult to see how the jury could have arrived at any other verdict than the one returned by them. We are convinced that the defend-

ant had a fair and impartial trial; in fact, he practically had his own way in presenting his theory of the defense. The record contains no reversible error, and therefore the judgment of the district court ought to be, and is,

AFFIRMED.

NATHAN CAMPBELL, APPELLANT, V. PETER J. YOUNGSON ET AL., APPELLEES.*

FILED DECEMBER 18, 1907. No. 14,847.

1. **Judgment:** COLLATERAL ATTACK. Generally, where the determination of a matter has been committed to a particular administrative or legislative board or officer, and no appeal is provided for from such decision, its order or determination is final, and will not be subject to collateral attack.

2. **Injunction:** DRAINS. In a proceeding to establish a drainage ditch, if the county board possesses jurisdiction and authority to act in the premises, injunction will not lie on account of mere irregularities in the exercise of the power conferred.

3. **Statutes:** CONSTRUCTION. The doctrine of strict construction of statutes in derogation of common right is not to be so unreasonably extended as to hamper the execution of public enterprises designed for the general welfare, but at the same time property rights of individuals are not to be interfered with unless the power to do so is plainly conferred by the law.

4. **Drainage Districts:** POWER TO CREATE. The drainage act of 1881 (laws 1881, ch. 51) confers the power upon county authorities to create drainage districts for the purpose of draining "marsh or swamp lands" alone, and does not confer power to change the channel or divert the flow of running streams or natural surface water drains for the purpose of relieving the lands of riparian proprietors lower down the stream from periodical overflows in seasons of freshet.

5. ———: ———. The term "marsh or swamp lands," as used in said act, has a wider significance than the terms "marshes" or "swamps." The power is conferred by this act to drain lands which are not, strictly speaking, "marshes" or "swamps," but which are "marsh or swamp lands," meaning thereby lands which are so situated as to be rendered difficult or incapable of

*Rehearing allowed. See opinion, 82 Neb. ——.

successful cultivation by reason of retaining in the soil or carrying on the surface an excessive quantity of water during certain portions of the year, even though at other times they may be as solid, dry and firm as lands in general.

6. Statutes: CONSTRUCTION. In considering an amendatory or substituted statute, it is proper to consider the provisions of the law which was repealed in connection with the law which takes its place, in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are annulled by the repealing statute.

7. ———: ———. In order to ascertain the proper meaning of a statute later as well as earlier legislation upon the same subject may be referred to. All existing acts should be considered, and a subsequent statute may often aid in the interpretation of a prior one.

8. Drains: POWERS OF COUNTY BOARDS. Under the facts set forth in the opinion, *held* that the county board of Kearney county is without jurisdiction to change the channel and divert the waters of the streams mentioned in the opinion from their natural flow for the purpose of preventing overflows, nor has it the authority to take part of the plaintiff's land against his will for the purpose of draining the lands embraced within the proposed drainage district.

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

H. M. Sinclair and *J. L. McPheeley,* for appellant.

L. C. Paulson and *C. P. Anderbery, contra.*

Robert E. Evans and *John V. Pearson, amici curiæ.*

LETTON, J.

The plaintiff, who is the owner of a certain tract of land in Kearney county, brought this action against the defendants, Peter J. Youngson and others, as constituting the board of supervisors of Kearney county. The petition, in substance, alleges that a petition was presented to the county board of supervisors under the provisions of the drainage act passed and approved February 28, 1881, asking that a drainage ditch be constructed over and across

plaintiff's land; that the board procured the same to be surveyed, and has ordered its construction across his land, and intends to pay the cost of construction by special assessment made against the lands claimed to be benefited. He alleges it will take more than four acres of his land, and will greatly injure the remainder of the tract, and that no provision has been made to compensate him. He further alleges that there are no marsh or swamp lands contiguous to the proposed ditch, but that its only purpose is to arrest the natural flow of surface water and divert the same from its natural channel and cast it upon and across his land; that the statute confers no jurisdiction upon the board to take lands for the purpose of diverting surface water and alleges a number of other reasons for the claim that the board is without jurisdiction. He asks a perpetual injunction to restrain the threatened action. The answer, in substance, pleads that the board had jurisdiction in the premises; that the land proposed to be drained is marsh or swamp land, and that the object of the ditch is to drain the same and render it fit for agricultural purposes, to benefit the public roads, and to promote the health and general welfare of the inhabitants of the district. A trial was had, and a decree rendered dissolving the injunction and dismissing the action, and from this judgment the plaintiff appeals.

Generally, where the determination of a matter has been referred to the consideration of a particular administrative board or officer, and no appeal is provided for from such decision, its order or determination is final, and will not be subject to collateral attack. In *Andrews v. Lillian Irrigation District,* 66 Neb. 461, it was held that the question whether land will be benefited by an irrigation system and the creation of the irrigation district is exclusively for the county board, and is conclusive in a collateral proceeding. In *Dodge County v. Acom,* 61 Neb. 376, and in *Tyson v. Washington County,* 78 Neb. 211, the same principle was stated and upheld with reference to the determination of the county board that the construction and establish-

ment of a drainage ditch would be conducive to public health, convenience or welfare, and as to whether or not the route thereof is practicable. In the latter case it is said: "We think that no authority can be found holding that the policy or expediency of constructing any such public work, the exercise of discretion as to which is vested in any administrative board or official, can, in the absence of statutory permission, be interfered with or tried by the courts." Under this principle, therefore, and under the facts presented in this case, the only question necessary to determine is whether the county board possessed jurisdiction to order the proposed improvement. If it possessed the requisite authority, injunction will not lie on account of mere irregularities in the exercise of the power. The determining factor in this case with reference to this question is whether or not the lands proposed to be benefited by the improvement and to be assessed to pay the cost of the same are within and of the class, or are of the nature with reference to which power is conferred upon the county authorities to act, or, in other words, whether the board had jurisdiction of the subject matter. In order to determine this, a brief description of the locality where it is proposed to construct the ditch is necessary. "Whiskey slough" is a stream of water which flows eastwardly through a somewhat shallow and tortuous channel about two rods wide and three or four feet deep close to the northern boundary of Kearney county. Its general course is parallel with that of the Platte river, at a distance from the south bank thereof varying from a few rods to nearly a mile, it being farthest from the river at a point near the south line of plaintiff's land. The territory through which it runs its entire course is the nearly level bottom of the river valley, which is here several miles wide and which has a nearly uniform slope or inclination to the eastward of about seven feet to the mile. The volume of water within its banks rises and falls substantially as does the water in the river, the subsoil between the two streams being of a very porous or sandy nature, so that its flow is

usually governed largely by that of the water in the larger stream. The land lying to the southward of the river valley consists of rolling hills, cut up by hollows and ravines, which form natural drainage channels and drain the surface water caused by heavy rains and melting snows toward the river, but which are intercepted at this locality by the bed of Whiskey slough. The plaintiff owns the southwest quarter of section 23 in Blaine township, and, according to the map introduced in evidence, the south line of this tract of land is crossed by Whiskey slough no fewer than seven times in its winding flow toward the east. Near the southwest quarter of this land a ravine or natural drainage channel, having its head or rise in the high ground some seven or eight miles to the southwest, intersects the channel of the slough. This natural waterway or drainage channel known as "Dry creek" drains a large expanse of territory, and in times of heavy rains carries down and discharges at the point where it enters the stream a large volume of surface water, thereby causing the slough, at such times, to overflow its banks and to inundate the almost level lands upon either side, extending from below the mouth of Dry creek to the lower course of the slough. Counsel for the defendants in his brief describes the condition which the proposed improvement is designed to remedy, as follows: "During wet seasons, and especially so during the last four or five years, heavy rains would fill up the two sloughs, Whiskey slough and Dry creek, and, where they join, the slow, sluggish, sinuous and tortuous nature of Whiskey slough fails to properly conduct the waters coming from the two sloughs to the river. By virtue of these conditions, the water would overflow the banks of Whiskey slough and onto the lands adjacent. Because of the failure of Whiskey slough to convey the additional water from Dry creek, its own banks would overflow for a great distance back of its junction with Dry creek, the water being backed up over its banks and on the surrounding country. The land on both sides of Whiskey slough, being of a level nature, the fall being

seven feet to the mile or one-fourth inch to the rod, instead of receiving much needed assistance from Whiskey slough in conducting its large amount of surplus rain water into the river, it receives added burdens from the overflow of Whiskey slough. During four consecutive seasons the crops were totally destroyed for a distance of ten or twelve miles east and west along Whiskey slough. This entire territory became a swampy, marshy tract, full of swales and low places, with Whiskey slough, instead of draining it, doing the reverse, feeding it more and more. In this condition, the ground becomes unfit for cultivation when too wet, and, if it ever dries up, again becomes unfit because of its hardened condition."

This is the situation of the lands in question as placed in the light most favorable to the defendants' contention. There is evidence on the plaintiff's side of the case, however, tending to prove that much of the trouble that has occurred in later years has been caused by the careless and unskilful manner in which a section line road has been constructed in the locality, by which the channel of Whiskey slough has been blocked and obstructed at different points so as to hinder the free flow of surface water therein and to create ponds where none existed before. One witness testifies as follows: "The condition of things is this: Sometimes there is a freshet. The Whiskey slough, if it rains, itself, would carry off its own water, but when there is a freshet most of the water comes down out of the sand hills, and that runs into Whiskey slough. They undertook to build a road, and, instead of putting crossings and bridges in where the creek crosses the road, they filled it up on the level, and when the water comes down through Whiskey slough it couldn't pass. * * * It could not have the natural course, and then they had a ditch two feet wide on one side and about a foot deep to carry the water out, and the other side of the road they scraped out there to help fill the road out. Now, as the road is, the water backs up, and if it was opened out and let the water through so that Whiskey slough

could have the natural course to carry off the water it would carry off all of the water." It will be seen that there is a decided conflict as to the actual condition of the lands in question.

The manner in which it is proposed to remedy the evils complained of is as follows: It is proposed to dig a ditch, beginning at a point in Dry Creek 120 rods south of Whiskey slough, sufficient in size and capacity to carry all of the waters of Dry creek and of the slough, and to extend this ditch northward across Whiskey slough and along the west side of plaintiff's land and other lands until it reaches another ravine draining into the Platte river. The object of this proposed construction is to change the channel and alter the course of Dry creek, and also of Whiskey slough, in such manner as to divert all of the waters of both streams from their natural channel so that, instead of discharging into the Platte river at the mouth of Whiskey slough, about nine miles from the point of diversion, they will discharge into the river at a point about one mile north of the intersection. The report of the commissioner who was appointed to view the proposed ditch is to the effect that no lands will be benefited thereby except such as lie to the eastward and at a lower level than the proposed ditch. It is apparent that the evil arises, not from the wet or swampy nature of the lands on Whiskey slough to the west of the mouth of Dry creek, as they are not benefited by the ditch, but from the sudden discharge of the waters of that creek into the channel of Whiskey slough at the point of intersection. As a matter of fact, the proposal is to create an artificial channel for and to divert thereinto the waters of the perennial stream, Whiskey slough, and the surface water at times flowing down the natural drainage channel known as "Dry creek."

Does the act contemplate or authorize the condemnation of private property for such purpose and the assessment of the cost thereof upon the land of the adjoining proprietors? It is an elementary principle that the right

to take the property of another *in invitum* must be clearly shown, and that a strict construction should be given statutes authorizing such a proceeding, such statutes being in derogation of common right. Black, Interpretation of Laws, p. 303. This doctrine is not to be unreasonably extended so as to hamper the execution of public enterprises designed for the general welfare, but, at the same time, property rights of individuals are not to be interfered with unless the power to do so is plainly conferred by the law. The act under which the authority is claimed was passed in 1881, and is entitled "An act to provide for draining marsh or swamp lands in the state of Nebraska, and to repeal an act entitled 'An act to drain marsh or swamp lands,' passed March 3, 1873, took effect June 1, 1873." Laws 1881, ch. 51. It is earnestly contended by the plaintiff that under the title of this act no authority can be conferred to drain lands other than those which are distinctively marshes or swamps and that the lands in the locality in question are not of that nature; hence that no jurisdiction is possessed by the county board to drain the same. From an examination of the testimony in this case it would appear that the lands which the commissioner reports would be benefited by the proposed ditch cannot be said to constitute a "swamp" or "marsh." We think, however, that it was not the intention of the legislature to confer power to drain "marshes" or "swamps" alone, but to drain "marsh or swamp lands," which is a term of wider significance, and which has been held by other courts to mean lands which, by reason of their wet or marshy nature, are incapable of successful cultivation. *San Francisco Sav. Union v. Irwin,* 28 Fed. 708. Land which, from its low and level character, may from excessive rainfalls retain at some seasons of the year sufficient water so that it is rendered incapable of cultivation may fall within the class of swamp lands, yet the same tract could hardly be said to form or be a "swamp." We find no difficulty therefore in holding that the power is conferred by this act to drain

lands which are not "swamps" or "marshes," but which are "swamp lands," meaning thereby lands which are so situated as to be rendered difficult or incapable of successful cultivation by reason of retaining in the soil or carrying on the surface an excessive quantity of water during certain portions of the year, even though at other times they may be as solid, dry and firm as lands in general.

The question presented is whether the statute authorizes the compulsory taking of lands against the will of the owner in order to provide for the prevention of overflows. In construing an amendatory or substituted statute, it is necessary to consider the provisions of the former law which was repealed in connection with the law which takes its place, in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are effectually annulled by the repealing statute. *Ex parte Crow Dog,* 109 U. S. 556, 3 Sup. Ct. Rep. 396; *Goodno v. City of Oshkosh,* 31 Wis. 127; *Viterbo v. Friedlander,* 120 U. S. 707, 7 Sup. Ct. Rep. 962, 972. Section 1 of the act of 1873 (Gen. St. 1873, ch. 80), which was repealed by the law under consideration, provides: "When a majority of the resident owners of any marsh, swamp, *watercourse,* or *overflowed* land within this state shall wish to have a ditch or drain laid out for the purpose of draining any marsh, swamp, or *overflowed* land, or for the purpose of straightening or enlarging any watercourse, they may make application, * * * the commissioners shall proceed to lay out such ditch or drain, or to deepen, widen, or in any form enlarge any watercourse for the purpose of draining the lands embraced in such petition, if in their judgment such ditch, drain, or enlargement is demanded by, or will conduce to the public health or welfare." Section 2 provides: "Whenever application shall be made to the county commissioners of any county by a majority of the resident owners of any swamp, marsh, *overflowed* lands, or *watercourse* * * *

for the purpose of having any ditch, drain, or watercourse laid out," etc. It will be observed that this act provides for application by the owners of overflowed lands or of a watercourse, as well as owners of swamp or marsh lands, and the powers conferred upon the commissioners by the body of the act extended to the straightening or enlargement of a watercourse apparently with reference to the draining of lands contiguous to streams of surplus waters thrown upon them by overflow, as well as lands of the character of marsh or swamp lands. The act of 1881, under consideration, which repealed this act, confers power upon the county board to cause to be located, constructed, straightened, widened, altered or deepened any ditch, drain, or watercourse when the same is necessary to drain any lots, lands, public or corporate, road or railroad, and will be conducive to the public health, convenience and welfare. Under this act the petition for the improvement need only be signed by one or more owners of lots or lands which will be benefited, instead of a majority of the resident owners as the former act requires. It omits entirely any provision for the construction of a ditch or drain for the purpose of draining overflowed lands. It cannot be said that this was done by inadvertence, or that the meaning and intention of the present act is the same as that which was repealed. The former provided specifically for the drainage of overflowed lands. The present omits all reference thereto. If it is said that this act covers all lands, then the act is broader than the title; but we think the words "marsh and swamp lands" in the title must be read into and control the general words in the body of the act, and that the qualifying words in the title are as effective as if contained in the act itself.

In order to ascertain the proper meaning of a statute, we may refer to later as well as earlier legislation upon the same subject. All existing acts should be considered in considering a given act, and a subsequent statute may often aid in the interpretation of a prior one. 26 Am. &

Eng. Ency. Law (2d ed.), 624, and cases cited in note two. An examination of the later course of legislation confirms us in our view that the act of 1881 does not confer power upon county boards to divert streams and change the course of natural drainage channels in order to prevent overflow. In 1905, and before the proceedings were begun, an act was passed and took effect, entitled "An act for the organization and government of drainage districts; for the reclamation and protection of swamp, *overflowed* or *submerged* lands," etc. (laws 1905, ch. 161); and, further, in 1907 another act was passed, entitled "An act to provide for drainage districts to drain wet land, and *land subject to overflow,* and any land which will be improved by drainage; to build dikes and levies; to construct, straighten, widen, deepen, or alter any ditch, drain or stream or watercourse; * * * to construct, enlarge, extend, improve or maintain any *system of control of surface water or running water,*" etc. Laws 1907, ch. 153. It is apparent from these enactments that the legislature was of the opinion that further legislation was necessary in order to confer power upon county authorities to prevent overflows by controlling the course of natural water ways so as to prevent the discharge of surface or overflow waters upon low or level lands, or to alter or straighten any stream or watercourse, or to construct or maintain any system of control of surface water or running water, and that by these later enactments it undertook to confer powers over a subject not already embraced in existing laws.

The plaintiff argues that the title of the act of 1881 is too restricted to cover all the subjects contained therein, but, irrespective of the question whether the titles of the respective acts of 1873 and 1881 are sufficiently broad to embrace all of the powers conferred within the bodies of the respective acts, a question which has been already passed upon by this court in the case of *Dodge County v. Acom,* and *Tyson v. Washington County, supra,* we are satisfied that the power to change the channel of Dry

creek and Whiskey slough, to divert the waters of these watercourses from their natural flow, and to change their place of outlet, as proposed, is not conferred by the act under consideration, nor is the power conferred thereby to drain lands which are not of the character of swamp or marsh lands as defined in this opinion.

The action of the county board in the premises was without jurisdiction, and the plaintiff is entitled to a perpetual injunction as prayed for in his petition.

JUDGMENT ACCORDINGLY.

STATE, EX REL. JAMES L. CALDWELL, APPELLANT, V. LINCOLN STREET RAILWAY COMPANY ET AL., APPELLEES.*

FILED DECEMBER 18, 1907. No. 15,063.

1. **Street Railways:** CHARTER. The charter of a street railway company organized for the purpose of constructing a system of lines in a city of this state, under act of February 15, 1877 (laws 1877, p. 135), must fix the termini of the road, and state the street or streets through which it is proposed to construct and operate the same.

2. ———: USE OF STREETS: SUBMISSION TO ELECTORS. The consent of a majority of the electors of the city to the use and occupation of the streets over which the proposed road is to be constructed must be obtained before construction is commenced; such consent to be given or withheld at an election called for that purpose.

3. ———: ———. The consent of the electors to the occupation of all the streets of a city by a street railway company, where no termini are mentioned in the notice of the election, carries with it no right to the use of any street which is not used for the construction of the road within a reasonable time thereafter. To hold that such blanket consent, where no termini or route is submitted to the electors, confers on the company the right to the use and occupation of any of the streets which it might at any time thereafter select as best suited to its interest would be awarding to a private corporation a power which the people, by their constitution, have withheld from the legislature of the

* Motion to modify opinion overruled. See opinion, p. 352, *post*.

state and from the municipal authorities where the streets are located.

4. **Quo Warranto**: PROCEEDINGS AGAINST CORPORATION. An information in the nature of a *quo warranto* filed against a corporation by its corporate name admits the existence of the corporation. If the charge be that the corporation is exercising powers not given by its charter, the action proceeds against the corporation to oust it from the use of the usurped power; but, where it is claimed that corporate powers are being usurped by a body which has no corporate existence, then the action must be against the individuals who are usurping corporate rights.

5. **Estoppel**: LACHES. The courts, in a proper case, will apply the doctrine of laches to a case in which the state is a party plaintiff. The state, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter.

6. **Judgment**: RES JUDICATA. The city of Lincoln brought an action against a street car company to oust it from the possession of certain streets in which its tracks were laid, alleging that its only right in the streets was derived from the purchase of the property and franchise of another company that had obtained the consent of the electors of the city to the use of its streets for railway purposes, that such consent was not transferable, and that the tracks of the company were an obstruction in the streets and constituted a public nuisance. On demurrer to this petition judgment went in favor of the defendant, which judgment is still in full force and effect. *Held*, That if it were conceded that the city represented the state in such action, and that the state was bound by the judgment to the same extent as the city, still the force of the judgment as a bar or estoppel in a subsequent action brought by the state could extend no further than to define the rights of the company in the streets then occupied by its tracks, that being the only question litigated, the right of the company to the use of other streets not being in issue.

APPEAL from the district court for Lancaster county. LINCOLN FROST, JUDGE. *Reversed with directions.*

F. M. Tyrrell, Charles O. Whedon and *J. M. Stewart*, for appellant.

Clark & Allen, contra.

DUFFIE, C.

Section 1, art. XI*b* of our present constitution, adopted in 1875, is as follows: "No corporation shall be created by special law, * * * but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time, or repealed." Section 2 of the same article is in the following words: "No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof." At the session of the legislature held in 1877 (laws 1877, p. 135) an act was passed relating to the formation of street railway companies. The act, so far as necessary to an understanding of this case, is as follows: Section 1. "Any number of persons may be associated and incorporated under the general laws of this state providing for the creation of corporations for the purpose of constructing and operating a street railroad within any of the cities of this state, upon procuring the consent of a majority of the electors of any such city as hereinafter provided." Section 2. "Every such corporation, previous to the commencement of any business except its own organization, must adopt articles of incorporation and have them recorded in the office of the county clerk of the county in which the city within which it is proposed to construct and operate such street railroad is situated, and must procure the consent of a majority of the electors of such city as herein provided." Section 3. "The articles of incorporation must fix the termini of such street railroad, and state the street or streets through which it is proposed to construct and operate the same." Section 4 provides for obtaining the consent of a majority of the electors of the city by submitting the question to the electors at an election to be held for that purpose, and requiring ten days' notice by publication, which notice shall

state the termini of such proposed street railroad, and the street or streets through which it is proposed to construct and operate the same. Section 5 provides for the holding of such election in the same manner and at the same places as the general city election, and that, if a majority of the votes cast shall be in favor of the construction and operation of such proposed street railroad, the council shall cause the city clerk to make out a certificate of the result, stating that the consent of a majority of the electors has been given to the construction and operation of such street railway, which certificate shall be delivered to the chief officer of the railroad company, who shall cause the same to be recorded in the office of the county clerk where the articles of association of such street railway company are recorded, and in the same book, and such certificate shall be *prima facie* evidence of the facts stated therein and thereupon such street railroad company *shall be authorized to proceed and construct and operate such street railroad, as described in its articles of association,* or any portion thereof, subject to such rules and regulations as may be established by ordinances of the city.

On March 9, 1885, articles of incorporation of the Lincoln Street Railway Company were filed and recorded in the office of the county clerk of Lancaster county, which articles provided for certain termini of the railway, and the streets through which it was proposed to construct the same. The streets mentioned in the articles are from First to Twenty-Seventh streets, both inclusive, running north and south through the city, and from A to W streets running east and west, and other streets, which, as we understand, included all the then established streets of the city. The articles also provided for termini of the company "at such other points within five miles of the corporate limits of the city of Lincoln as the company may see fit to build to." An election was thereafter held, the notice of which described the streets of the city through which it was proposed to construct the road as described in the articles of incorporation, but which omitted to give the termini of

the proposed road, and a certificate was duly issued to the street railway company certifying that a majority of the votes cast were in favor of the proposition. Some time in January, 1890, the Lincoln Electric Railway Company was incorporated and filed its articles in the office of the county clerk of Lancaster county. The third paragraph of these articles, after designating certain termini of the lines of the company within the corporate limits of the city, contains a clause providing for other termini "at such other points in the vicinity of Lincoln as it may be advisable to select for such termini lines," and in the same paragraph is a provision for constructing its tracks in all the streets of the city then established, running both east and west and north and south through the city. July 1, 1887, the Standard Street Railway Company was incorporated for the purpose of constructing a street railway in the city of Lincoln. The third article provides as follows: "The termini of the lines of such company are fixed at or near the several railway depots in the city of Lincoln, and at or near University Place, and at such other points in the city of Lincoln and vicinity for a radius of five miles outside the limits of said city of Lincoln as it may deem advisable to select." The streets through which it is proposed to construct its line of road are, as we understand, all the streets of the city then laid out or existing, running both north and south and east and west through the city. March 19, 1887, the Lincoln Rapid Transit Company was incorporated; the third paragraph of the articles providing for termini at the several railroad depots, at or near the intersection of Eleventh and P streets, at or near the intersection of Eleventh and N streets, at or near the intersection of Twelfth and N streets in said city, also in West Lincoln, and at the Nebraska Exposition Association grounds, at a point near the Wesleyan University place, Wyuka cemetery, the penitentiary, the hospital for the insane, and such other points in the vicinity of Lincoln as it may be deemed advisable to select

for termini of lines. Said article further provides for the construction of tracks, branches and connecting lines over and along First, Second, Third, up to and including Thirty-Third street, and other named streets running north and south, and the streets running east and west through the city, which description includes, as we understand, all the streets of the city then laid out or in existence. Elections were held to obtain the consent of the electors to the construction of railways by each of the above named companies, the notice of such election reciting, in substance, the provisions of the aforementioned articles of incorporation relating to the streets over which it was proposed to construct street railways by the several companies above mentioned, except that the termini of the proposed roads were omitted, and certificates issued to the chief officers of the several companies showing that the proposition had been adopted by a majority of all the votes cast at the election.

By chapter 38, laws 1889, street railways were authorized to unite their roads by consolidation, purchase, sale, or by subscription to or purchase of capital stock, and to mortgage their railways and property for the construction, equipment and extension of their roads. Under the provisions of this act the Lincoln Street Railway Company and the other companies above named executed articles of consolidation at different dates during the year 1891, and thereby became merged in a single corporation which retained the name of Lincoln Street Railway Company; and thereafter the lines constructed by each of the above named corporations were operated by the Lincoln Street Railway Company formed by the merger and consolidation of the above named separate companies. In July, 1891, the Lincoln Street Railway Company executed and delivered to the New York Security & Trust Company a trust deed on its property and franchises to secure the payment of bonds in the sum of $600,000 issued for the purpose of borrowing money to construct and equip its lines of street railway. About June, 1892, said railway company ex-

ecuted and delivered to the New York Guaranty & Indemnity Company a trust deed on its railway and franchises to secure bonds in the sum of $800,000 issued for the purposes aforesaid. Default being made in the payment of the interest accruing on these bonds, the mortgagees commenced an action of foreclosure in the United States circuit court, and in July, 1897, a decree was entered in favor of the mortgagees finding that each of said mortgages was a valid lien on the railway and franchises of the Lincoln Street Railway Company, and directing the property and franchises of the company to be sold and the proceeds applied on the sum found due. A sale under this decree was had in December, 1897, at which Moses L. Scudder and William Belcher, alleged to be acting as the agents of the Lincoln Traction Company, bid in the property in their own names, and the master conducting the sale, acting under the directions of the court, made and delivered to Scudder and Belcher a deed conveying to them the railway and franchises of the Lincoln Street Railway Company; and thereafter Scudder and Belcher made and delivered to the defendant Lincoln Traction Company a deed conveying to it the railway property and franchises of said company. Thereafter, and about January 10, 1898, the defendant took possession of the railway and has from that time to the present continuously operated the same.

The Lincoln Traction Company was organized on December 15, 1897. There is no provision in its articles for the construction of any street railway in the city of Lincoln or elsewhere, the evident purpose of the corporation being to purchase the property and franchises of the Lincoln Street Railway Company. This appears from the third paragraph of its articles, which defines the general nature of its business to be the acquisition by gift, grant, purchase, lease or otherwise, at public or private sale, and to own, enjoy, maintain, control and operate all or any part of the property or property rights, franchises, easements, lots, lands, etc., now or hereafter in the possession

or ownership of a certain corporation known as the "Lincoln Street Railway Company," and it is under these articles and the conveyance to it of the property and franchises of the Lincoln Street Railway Company by Scudder and Belcher that it now claims the right to occupy the streets in the city of Lincoln, and to operate thereon the several lines of street railway of which it is in possession, and to extend its lines in and over any of the streets of the city at its pleasure.

The relator, as county attorney of the county of Lancaster, brought this action to oust the defendant from its occupancy of any and all streets in the city of Lincoln. In the information filed he alleges that the Lincoln Street Railway Company, without right, and without lawful authority therefor, and without first obtaining the consent of a majority of the electors of said city of Lincoln, assumed to construct, in and upon certain streets of the city, street railway tracks; and, without authority therefor, assumed to lay down, in and upon certain public streets, ties and rails, and to run and operate street cars, without having obtained any right, authority or franchise therefor from said city or the electors thereof. The information then recites the particular lines of street railway constructed by the Lincoln Street Railway Company and which are now being operated by the defendant, the Lincoln Traction Company. It is further recited that the Lincoln Street Railway Company claims the right to construct and operate said lines of street railway under an ordinance passed by the mayor and council of the city in 1885 and a pretended consent of a majority of the electors obtained at an election held in April, 1885, but it is alleged that no legal notice of such election was given. It is further stated that the Lincoln Street Railway Company operated its lines for a few years and then abandoned the same, when the Lincoln Traction Company, without right or authority, assumed the right to operate street cars and a line of street railway upon and over the streets of Lincoln and practically along the routes theretofore oc-

cupied by the Lincoln Street Railway Company. Reference is then made to the articles of incorporation of the Lincoln Traction Company, and its right to own or operate a street railway company assailed upon the grounds above named, and also for the reason that its articles of incorporation do not name any termini of any street railway which it proposed to construct or operate, or any streets of the city of Lincoln which it proposes to occupy or over which it intends to operate its cars. It is further stated that the Lincoln Traction Company is constructing additional lines for which no consent has been obtained from the electors of the city, and that it never has filed any map or plat showing the route or location of any proposed line.

The answer of the defendant, the Lincoln Traction Company, recites the organization of the several street railway companies heretofore described and the consent of the electors of the city to the construction of lines of street railway by said several corporations. It further alleges the consolidation and merging of these several corporations into one corporation known as the "Lincoln Street Railway Company"; the issue of bonds as heretofore recited; the foreclosure of the mortgages given to secure the payment of said bonds; a sale of the property and franchise of the Street Railway Company to Scudder and Belcher, who, it is alleged, were acting for and on behalf of the Lincoln Traction Company in making the purchase at the master's sale; the conveyance by Scudder and Belcher of the property so bid in by them to the Lincoln Traction Company, after which, it is alleged, said company took possession of the railway and franchises of the Lincoln Street Railway Company, and has from that time to the present continuously operated the street railway purchased, and exercised and used the franchise obtained thereby. For a further defense it is alleged that the Lincoln Street Railway Company used the franchise granted by its charter openly and notoriously for more than 21 years prior to the filing of the amended information in

this case, and that any action challenging the grant of the franchise is barred by lapse of time, and that the law will presume a grant. It is further stated that after its organization the state in many ways recognized and acquiesced in the grant of the franchise claimed by the company under its articles; that it has assessed and collected taxes for each year from 1885 to 1897 on the property and franchise of the corporation; and that the city of Lincoln, acting under authority of the state, levied and collected taxes against the corporation finally merged and consolidated into the Lincoln Street Railway Company. Laches is also charged against the state in the conduct of the case, in that the trial of the action had been delayed for eight years after its commencement, and that in the meantime taxes had been levied and collected against its property and franchise, and that it had issued and sold bonds to the extent of $150,000 and expended large sums of money in the construction and equipment of its lines. It is also alleged that at the time the Lincoln Traction Company purchased the property and franchises of the Lincoln Street Railway Company an action was pending against the latter company in the district court for Lancaster county to enforce the payment of certain special taxes assessed against its property; that after the purchase the Lincoln Traction Company was made a party defendant to said action, and that the city, by a substituted petition filed therein, alleged that the defendant had acquired no franchise to construct and operate a street railway on any streets of the city of Lincoln; that it had acquired no right by its pretended purchase under the decree of the United States circuit court; and that it was wrongfully and unlawfully occupying the streets of the city and obstructing travel thereon; that the defendant answered to the merits in said action; that the issue raised was submitted to the court, which on March 12, 1902, gave judgment in favor of the defendant and against the city of Lincoln, and adjudged that the defendant had a valid franchise to operate a street railway in the streets of the city and was lawfully

occupying the streets under such franchise, and this judgment is pleaded in bar of this action. A subsequent action brought against the defendant by the city of Lincoln to oust it from its occupancy of the streets of the city, and in which judgment was given for the defendant, is also pleaded in bar of this action. The trial resulted in a judgment for the defendant, and the relator has brought this appeal.

The foregoing extended statement of facts and of the issues made by the pleadings seemed necessary to an understanding of our views of the rights of the respective parties. It will be noticed from the provisions of our constitution and the several statutes relating to street railways set forth in the above statement that two things are essential to the legal maintenance and operation of a street railway in any city of this state: First, a corporate organization whereby a franchise to operate a street railway is obtained; and, second, the consent of a majority of the electors of the city to the occupation of the streets with the necessary tracks and equipment for the operation of the road. The first requisite can be obtained only from the state by organization under the general incorporation law provided for those wishing such a franchise, the charter reciting, among other things, the termini of the proposed railway, and naming the route and street or streets through which it is proposed to construct and operate the same; and, second, the consent of the electors of the city to the use of the streets named, which consent must be given at an election held in the usual manner after ten days' notice. This consent of the electors, when legally given to a legal proposition submitted to them, constitutes, in our view, the grant of a right of way on and over the streets named in the articles of incorporation and in the notice for the election, and confers upon the railway company an easement in the street which is irrevocable after the company has, within a reasonable time, acted upon the permission given and constructed its lines of road.

It is insisted by the relator, and strenuously urged in

a brief filed by the city attorney, who was allowed to appear in the interests of the citizens of Lincoln, that the several propositions submitted on behalf of the several railway companies to occupy all the streets of the city with their tracks was not such a proposition as the constitution and statutes contemplate, and that the consent given was therefore void. Our views upon this question cannot be better expressed than in the words of Judge Lurton, found in *Mayor v. Africa*, 77 Fed. 501, where permission to enter upon the streets of the city had first to be obtained from the city council, and where the ordinance manifesting the consent of the council covered all or nearly all the streets of the city. The Judge said: "To say that the whole of the grant constitutes a route or system is absurd. The grant covers every street, and, if occupied, would result in a railroad upon the four sides of every city square. The city would be covered by a line of railroad having the system of a checkerboard, regardless of the public interest, and in defiance of the public necessity. No community would for a moment tolerate such an unnecessary and harmful obstruction of its streets, and no company could possibly contemplate such a multiplication of parallel lines, crossed at right angles at each cross street by another series of like parallel lines. The clear purpose of this ordinance was to enable the grantee to elect from time to time what streets it would occupy, and what new lines, or extensions of old ones, its interests as a private corporation would justify. To delegate this power to a street railroad company is wholly inadmissible, violates every principle of public policy, and has no sanction in law. The provisions of the statute which we have heretofore cited, providing that 'no one of the streets of said city shall be used by said company * * * until the consent of the city authorities has been first obtained and an ordinance shall have been passed prescribing the terms on which the same may be done,' is a clear implication that the city authorities shall know what streets the

proposed railroad is to occupy, and intelligently determine whether the public interests will thereby be subserved."

In the absence of a constitutional provision the control of the streets and public highways of the state is vested in the legislature, which may delegate to the municipal authorities therein the power of such control and regulation. This control is to be exercised in the public interest, and our people were so jealous of this right they made it a provision of the constitution that neither the legislature nor the municipal authorities should have authority to grant a right of way for street railways in any city or incorporated town. They reserve to the people of each municipality the authority to say upon what streets a street railway might be constructed, and this consent was to be given at an election in which the proposition was to be submitted. Of necessity this means that a specific grant is to be asked for, that a specific route must be designated, that a blanket grant to occupy any or all of the streets of the city was never intended or contemplated, for this would be granting to a private corporation the right to choose its own route, and to lay its track in any street of the city as its interest might dictate, thus vesting it with the very power which the people have denied to the legislature and the municipal authorities. It requires no argument to show that a blanket grant of this kind conferred upon a private corporation to exercise its own discretion in the choice of routes would be exercised in its own interest, regardless of the public welfare. The occupation of the public streets of the city by railway lines is a matter of public interest to be exercised for the public benefit, and is a matter that cannot be delegated to a private corporation to be used at its discretion, as advantage or injury to its own interest may require. The most that can be claimed from the permission obtained from the electors of the city of Lincoln by the several street railway companies is the right to enter upon such streets of the city, within a reasonable time after such permission was granted, as they thought best to occupy

with their lines of road. So far as these lines have been constructed we think the defendant may claim an easement over the streets occupied, but the blanket license under which the defendant claims the right to extend its lines or to go upon other streets must be denied.

As to the constructed lines, it would be manifestly unjust, not only to the defendant, but to the holders of its securities, to now oust it of rights and privileges which it and those through whom it takes title have been claiming and exercising for years with knowledge and acquiescence on the part of the state. The state, like individuals, may be estopped by its act, conduct, silence and acquiescence. *State v. Flint & P. M. R. Co.*, 89 Mich. 481. In *State v. School District*, 85 Minn. 230, it is said: "In cases where the right of a corporation to assert its corporate existence has been questioned because of some defect or irregularity in the proceedings for organization, it has frequently been held that the doctrine of estoppel is applicable, where there have been acts on the part of the state which in terms amount to a waiver. The conduct of a state may be such as to constitute a declaration that a forfeiture of corporate rights will not be insisted upon, and that the right to declare such forfeiture is waived. The authorities upon this are abundant." Cooley, in his work on Constitutional Limitations (5th ed.), 311, after stating the well-known rule that the corporate existence of a municipal corporation cannot be questioned by a private individual, and that the state only can raise that question by *quo warranto* or other direct proceedings, proceeds to say: "The state itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition." It is a significant fact that, even after commencing the action, the state for eight years made no effort to bring it to a trial and allowed it to slumber upon the docket. In this condition of affairs it seems unconscionable to ask us to deny the defendant the right to operate its constructed lines, and as a consequence compel it to sell its property for what it may

bring, or, if no sale can be effected, to make a scrap pile of its personal effects.

What we have said in relation to a blanket license to enter upon the streets of Lincoln arises from the fact that the charter of the companies mentioned did not attempt to fix termini covering all the streets of the city, and the electors had no notice of the termini of the different lines of road when the several elections were held. We are not attempting to determine the rights of a company under conditions different from what here appears. If the articles of incorporation of these several companies had fixed a terminus at the end of each street, and the notice of election had set forth such termini so that the voters understood that they were extending to the company the privilege of building along each street from one end to the other, it might be that a different rule would prevail. We are not now called on to pass upon the effect of such a franchise, and our decision rests wholly upon what appears in the record. We are induced to make these remarks because in *Mayor v. Africa, supra*, the court of appeals affirmed the right of the railway company to construct and operate its road upon the streets and between the termini which were specifically set forth in the ordinance passed by the city council. In the opinion it is said: "Without expressing any opinion upon the other objections urged by counsel for appellants, we are content to reverse the decree of the lower court upon the ground that the ordinance of 1876 was not a valid or effectual consent to the occupation of any street *other than those embraced by the route beginning at the intersection of Main and Gay streets and terminating at the junction of Broad and Jackson.* The termini and general course of that route are specifically described, and the requirement of the tenth section of the ordinance, that the track upon those streets shall be laid within a given time, is an effectual recognition of that line as a route specifically consented to by the municipality."

The state insists that the Lincoln Traction Company has no corporate capacity to own or operate a line of street

railway because its charter does not describe the termini of its lines or the streets in the city over which its road is to be operated, and, further, because its charter does not conform to the statute in providing for the construction as well as the operation of a street railway. We think the information filed by the state concludes it upon this question. Where it is sought to question the corporate existence of an alleged corporation—that is, where the franchise *to be* a corporation is intended to be drawn in question, the proceeding must be against the individuals who usurp such franchise. Where the information is filed against a defendant by its corporate name, charging a usurpation of corporate franchises, and process has issued and been served accordingly, and the defendant has appeared and pleaded in a corporate capacity, setting up its charter, it is not competent for the state to deny the corporate existence of the defendant. In *People v. Rensselaer & S. R. Co.*, 15 Wend. (N. Y.) 113, it was held that an information in the nature of a *quo warranto*, filed under the revised statutes of the state of New York against a corporation by a corporate name, admits the existence of the corporation or that it once had a legal existence. And in *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262, 286, it is said: "We are aware of no case in this country, in which a body, sued as a corporation, has been ousted of the franchise to be a corporation, on the ground that it never had a legal corporate existence." Where a corporation is exercising powers or privileges in excess of its charter, then it may be proceeded against as a corporation, and the court will oust it of the franchises which it is usurping in violation of its charter. But where, as here, it is claimed that it has no existence as a corporate body because not organized in accordance with our statute, the case must proceed against the individuals who are usurping corporate rights.

Relating to the claim of the defendant that its right to construct and operate a street railway in the city of Lincoln is *res judicata*, it may be conceded that this is the case

so far as its lines were completed and in operation when the decrees relied on were entered. There were two suits in the district court for Lancaster county in which it is claimed the question was raised by the city of Lincoln. One was an action to enjoin the Lincoln Traction Company from constructing or operating a street railway, on the ground that it was unlawfully and wrongfully occupying the streets of the city. The other was an action to enforce certain paving assessments levied against the property of the Lincoln Street Railway Company and constituent companies, in which the validity of the mortgages given by that company was attacked, as was also the title of the Lincoln Traction Company derived through a foreclosure of these mortgages. If we concede that the city represented the state in these actions, which is not at all clear still the judgments entered would operate as an estoppel only to the extent that the city, by its plea, questioned the right of the railway company to the use of its streets. As we understand the record, the question put in issue by the suit first mentioned was the right of the Lincoln Traction Company to occupy the streets of the city with the lines then in operation, and its right to extend these lines and to take possession of other streets was not in question and was not covered by the decree entered. The petition in that case does not charge that the Lincoln Traction Company claimed any right in any of the streets of the city not then occupied by its railway, and the only fact alleged in support of the claim that the company was a trespasser upon the streets occupied by its lines rests in an allegation that defendant's only right to occupy those streets arose from a transfer to it of the property and franchises of the Lincoln Street Railway Company, to whom it was then conceded the people had extended the right to construct a street railway, the claim of the city being that such license or privilege was personal to the Lincoln Street Railway Company, and that it could not be conveyed or transferred to another company. It is true that in the prayer for relief the court is asked to

enjoin the Lincoln Traction Company from occupying the streets of the city for the *construction,* operation or maintenance of any line of street railway; but nowhere in the charging part of the petition is it alleged that the Lincoln Traction Company is constructing, or claims the right to construct, additional lines of road from those then in operation; and the question of its right to occupy any street upon which a line was not then constructed was not made an issue in the case. The estoppel could not operate beyond the issue made and the question tried, and that question was whether the Lincoln Traction Company was obstructing the streets of the city and whether the lines then in operation were a nuisance because of a want of authority on the part of the Lincoln Traction Company to maintain and operate the same. We cannot discover that the right of the Lincoln Traction Company to extend its lines or to occupy additional streets was in question in the second case above referred to, and, as we now recognize the right of the company to own and operate its lines, so far as completed, a further discussion of these cases is not called for. The federal court, in the foreclosure proceedings above referred to, was not called upon, and did not in fact, pass upon the extent of the franchise of the Lincoln Street Railway Company, which was sold as a part of the mortgage security, nor was the question of the validity of its claim to occupy the streets of the city one which was then litigated. These questions are still pending for the decision of the courts, and we are not concluded thereon by any judgment heretofore entered.

Defendant further complains of the action of the trial court in allowing an amended petition to be filed raising the issue of the right of the Lincoln Traction Company to occupy any of the streets of the city. It is said that the original petition charged the company only with a failure to perform its duties and obligations as a corporation; that the suit was instituted and the case tried on the theory that a grant was made to the Lincoln Street Railway Company by reason of which it assumed certain obli-

gations to the public which it had failed to perform, and that the case was tried and determined upon that theory. It is earnestly insisted that this court, instead of passing upon the questions presented by the record, should confine its examination to a review of the case on the theory on which it is said it was tried and determined in the district court. It may be that the trial court, even under our liberal statute relating to the amendment of pleadings, was in error in allowing the amended information to be filed; but, however that may be, the question of the right of the defendant companies to occupy the streets of the city of Lincoln and to exercise their own discretion in selecting the route upon which they will construct additional lines of road is fairly raised by the pleadings, and this question has been thoroughly argued by the attorneys of the respective parties. In a case of such great public importance we do not think the state should be concluded by our strict adherence to the theory upon which the district court may have tried the case. No claim is made that the record does not contain all the material evidence which could be offered in support of the rights of the defendant company to own and operate the line of road in its possession or to further extend its lines. If it be conceded that the trial court did not proceed upon the same theory upon which the case has been presented to this court, we fail to see where a different case could be made for the defendants. In this condition of the case an affirmance of the decree would be a great injustice to the public, and remanding it for another trial could benefit neither of the parties.

There are other questions discussed in the briefs of counsel which we regard as unimportant in determining the rights of the parties. For the benefit of counsel we will say that they have all been considered, but their consideration has not in anywise changed our views as above set forth. Our conclusion is that the Lincoln Traction Company is the owner of the constructed lines of street railway of which it is now in possession, and that it has right and

authority to maintain and operate the same, that its purchase of the lines formerly owned by the Lincoln Street Railway Company does not invest it with right or power to extend its lines, or to take possession of streets, or parts of streets, not now occupied by its completed lines, and that such extensions cannot be made, except by proceeding as required by law to obtain an additional franchise for that purpose and the consent of the electors of the city to such extensions as it may desire to make and such new lines as it may propose to construct.

We recommend, therefore, that the cause be remanded to the district court, with directions to modify its decree in conformity with the views expressed in this opinion.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the cause is remanded to the district court, with directions to modify its decree in conformity with the views expressed above.

REVERSED

The following opinion on motion to modify former opinion was filed November 6, 1908. *Motion overruled:*

New Trial: PRACTICE IN SUPREME COURT. Rule 7 of this court allowing 40 days from the filing of the opinion or rendition of the judgment in the case within which to file a motion for rehearing supersedes the general rule as to judgments becoming final at the expiration of the term at which they are rendered. This applies only to judgments and opinions by the court in its appellate jurisdiction. In the exercise of its original jurisdiction the provisions of section 602 *et seq.* of the code apply.

PER CURIAM.

Since the filing of the opinion in this case on December 18, 1907, a number of motions have been filed. The questions raised thereby we think are of sufficient moment to require a written opinion in their determination.

The term at which the opinion was rendered adjourned *sine die* upon the 19th day of December, 1907. Upon the

27th day of January, 1908, and within the 40 days allowed by rule 7 of this court for the filing of a motion for rehearing, the Lincoln Traction Company, appellee, filed a motion praying for a modification of the opinion and judgment of the court. This motion was accompanied by a printed brief in support thereof. On June 4, 1908, a paper was filed by appellee purporting to dismiss and withdraw its motion to modify the opinion and judgment. On June 8, 1908, a motion to modify the opinion was filed by the relator and appellant, alleging that the opinion is indefinite and uncertain as to the extent and duration of the appellee's rights on the streets of the city, and asking that the opinion be modified so as to limit and define such rights, and that the cause be ordered reargued upon this question. On June 20, 1908, the appellee filed objections to the consideration of the appellant's motion to modify the opinion, on the grounds that the court had lost jurisdiction because the motion was not filed at the September, 1907, term in which judgment was rendered; that it was not filed within the 40 days allowed by rule 7 of this court for the filing of motions for rehearing; that the vacation or modification asked is within the prohibition of the fourteenth amendment to the constitution of the United States; and that, since the adjournment of the term at which the judgment was rendered, investments had been made in the stocks and bonds of the appellee on the faith that the judgment was final. Briefs were filed by the respective parties in support of their respective contentions.

All of these filings were made during the January, 1908, term of court, which adjourned while the motions were pending. At this, the September, 1908, term, the appellee filed a motion to strike the motion of relator and appellant to modify the opinion and judgment from the files for the foregoing reasons, and for the further reason that "the issue sought to be raised by the motion, to wit, the duration of the franchise of appellee is not within the pleadings, and the court has no power to adjudicate and determine

the same." We can scarcely credit that the appellee means to be taken seriously as to the first two reasons which it gives for its contention that we are without jurisdiction to consider the motion of the appellant to modify the opinion and judgment. From the first institution of this court it has been the practice to allow motions for rehearing to be filed within 40 days from the filing of the opinion or judgment in a case, without reference to whether or not the term had expired at which the opinion was handed down, except in cases brought under the original jurisdiction of this court, where, as we held in *State v. State Journal Company*, 77 Neb. 771, by virtue of the statute, the same rules apply with regard to opening judgments after the term has expired as in the district courts of the state. Counsel for appellee have themselves adopted this construction of the law, and acted upon it in this case, by filing a motion for the modification of the judgment, accompanied by a printed brief, after the term had expired at which the opinion was handed down. It is true that the practice of some appellate courts is to hold that judgments in appealed cases become final at the close of the term at which they are rendered, but this has never been the practice in this court. Such a ruling may often result in great injustice, since it is quite a frequent occurrence that a large number of opinions are handed down on or about the last day of the term, when it would be impossible to prepare or file motions for rehearing. This very case furnishes such an instance, since the opinion came down on the evening of the day before the final adjournment of the term. The provisions of rule 7 allowing 40 days to present a motion for rehearing suspends or supersedes the general rule as to judgments becoming final at the close of the term, and the provisions of the statute referred to are not applicable, except in cases brought under the original jurisdiction of the court. As said in Elliott, Appellate Procedure, sec. 551: "This conclusion rests upon the familiar principle that, where a motion or petition is filed which keeps the case open, the judgment is not a

final one." Until an order is entered disposing of the motion for rehearing or modification the case is not finally disposed of. We held in *Horton v. State,* 63 Neb. 34, that this court does not lose jurisdiction in appellate proceedings until after the mandate has been sent to the district court and action taken thereon, following *People v. Village of Nelliston,* 79 N. Y. 638, and we adhere to this view.

We are inclined to agree with the appellee's contention that the modification sought by the appellant is not within the issues raised by the pleadings. To quote from the appellee's brief: "The sole issue tendered by the pleadings is that the appellees have no franchise and are unlawfully occupying the streets. This is the gist of the action, and on this issue the judgment is conclusive. Obviously these pleadings do not tender the issue that the company is now lawfully occupying the street, but that at some time in the future, either an indefinite period, or a reasonable time, the right of occupancy will terminate." It was not the intention of the court to decide questions not within the issues presented by the pleadings. We are inclined to think that counsel for both appellant and appellee have read more in the opinion than was written by the court, and have extended its meaning by implication to an extent unwarranted by its language. The gist of the opinion, *ante,* p. 333, is contained in the concluding sentence, which is as follows: "Our conclusion is that the Lincoln Traction Company is the owner of the constructed lines of street railway of which it is now in possession, and that it has right and authority to maintain and operate the same; that its purchase of the lines formerly owned by the Lincoln Street Railway Company does not invest it with right or power to extend its lines, or to take possession of streets, or parts of streets, not now occupied by its completed lines, and that such extensions cannot be made, except by proceeding as required by law to obtain an additional franchise for that purpose and the consent of the electors of the city to such extensions as it desires to make and such new lines as it may propose to construct."

The action is *quo warranto,* and the questions whether or not, if the law so authorizes, the city may or may not by proper proceedings, recognizing and protecting or indemnifying the traction company for all its rights of property and equitable rights recognized by the opinion, seek to revoke the license by estoppel held by it, or as to the extent or duration of the equitable right of the railway company in the streets, are not within the issues in the case, were not considered by the court, and it would be manifestly improper, as contended by the appellee, for the court to express any opinion at this time upon these important questions. The state sought an ouster without regard to any equitable property rights of the appellee, and the court refused to allow such spoliation.

In this connection we think it well to say that there was no intention on the part of the court, by any language in the opinion, to depart from the principle announced in *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109, and *City of Lincoln v. Lincoln Street R. Co.,* 67 Neb. 469, and in *State v. Frost,* 78 Neb. 325, that, even if the ordinance submitting the questions to the voters had been valid and the consent of the electors had been obtained under the same, the street railway company would then have "derived no other or greater right than the privilege, license or permission to enter upon the streets for such purpose." Obviously no greater rights could be obtained by virtue of the laches of the city authorities than could have been had if the railway company was in possession of the streets under the provisions of a valid ordinance and the consent of the electors obtained thereunder.

The motion of the appellant to modify the opinion and judgment is

OVERRULED.

STATE, EX REL. JAMES L. CALDWELL, APPELLANT, V. CITIZENS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 18, 1907. No. 15,256.

1. **Street Railways:** USE OF STREETS. Where the electors of a city are invested with the power of extending to a street car company the right or privilege of entering on the streets of the city, an irregular exercise of such power will not, under all circumstances, be held void. Where the company, under the belief that it is authorized so to do under the vote of the electors, expends money in the construction of its line, considerations of public policy may require the court to protect it in the possession and use of its road so far as constructed and in operation, when its right to the use of the streets of the city is brought in question.

2. ———: ———: LICENSE: ASSIGNMENT. The right of a street car company to occupy the streets of a city with a line of street railway, granted by a vote of the electors, is, if nothing more, a license coupled with an interest, and such licénse is transferable.

3. **Cities:** SALE OF PROPERTY. A city of the class of the city of Lincoln may sell property acquired at a tax sale without first obtaining the approval of the electors of the city.

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

Flansburg & Williams and *J. M. Stewart,* for appellant.

Hall, Woods & Pound and *Hainer & Smith, contra.*

DUFFIE, C.

From the information filed by the state in this case the following facts appear: Three street railway companies, known as the "Capitol Heights Street Railway Company," the "Lincoln Rapid Transit Street Railway Company," and the "North Lincoln Street Railway Company," were duly organized under the laws of this state, and in the year 1887 ordinances were passed by the city council of the city of Lincoln calling elections for the purpose of

obtaining the consent of the electors of the city to the construction of lines of street railway in and over the streets of said city. So far as appears, neither the ordinances passed by the council nor the notices of the election gave any proposed termini of the lines proposed to be constructed or the route of any of said lines, but the ordinances and the notices described all the streets of the city as the streets upon which it was proposed to construct the several lines of street railway. At the several elections held, a majority vote was cast in favor of the proposition submitted, and certificates were duly issued to the said companies authorizing them to proceed and construct their several lines. The Capitol Heights Street Railway Company constructed and operated a line on Twelfth street from O street to N, from Twelfth to Eighteenth on N, from N to G on Eighteenth, on G from Eighteenth to Twenty-First, then north on Twenty-First to Randolph, and east on Randolph to Fortieth street. The North Lincoln Street Railway Company constructed and operated lines from Thirteenth and N streets, running north to T, west on T to Eleventh, north on Eleventh to Y, east on Y to Twelfth, and north on Twelfth to the city limits. The Capitol Heights Street Railway Company, some time in 1892, amended its articles, and the name of said corporation was changed to the Home Street Railway Company and was thereafter known by that name. After the building and construction of the above mentioned lines by the Lincoln Rapid Transit Railway Company and the North Lincoln Street Railway Company, the Home Street Railway Company, about the year 1892, purchased the physical property and right of way of said two companies, and by said purchase these roads became merged in the Home Street Railway Company of Lincoln, Nebraska. These lines continued to be operated by the Home Street Railway Company up to the year 1893, and during that time a large amount of general and special taxes were assessed against the property. In October, 1893, a suit was brought in the circuit court of the United States for the district of Nebraska by

the Fidelity Loan & Trust Company of Sioux City, Iowa, and a receiver was appointed to take charge of the property of the company, and afterwards the city of Lincoln, by leave of court, intervened in said action, and filed a cross-petition setting up its lien for taxes upon the property of the defendant company. Such proceedings were had in that case that in May, 1899, a decree was entered on the cross-bill filed by the city, in which it was found that franchises had been granted to the Lincoln Rapid Transit Street Railway Company, the North Lincoln Street Railway Company, and the Capitol Heights Street Railway Company, and that about July 1, 1893, the defendant the Home Street Railway Company, by purchase and conveyance, became the owner of all the properties, rights and franchises of said above named companies; that the taxes and special assessments were valid liens upon all the property, rights and franchises of said corporation; and it was ordered that said Home Street Railway Company pay or cause to be paid the sum of $46,015.68, the amount of said taxes with interest thereon, within 20 days, and in default of such payment the properties and rights of defendant the Home Street Railway Company be sold to satisfy the decree. September 6, 1899, the property was sold and bid in by the city of Lincoln for the purpose of protecting its lien. The sale was confirmed, and in 1906 a second sale was held, and the franchise of said Home Street Railway Company was sold and bid in by the defendant the Citizens Street Railway Company, which in the meantime, and at some date in 1906, had been organized for the purpose of constructing, maintaining and operating a street railway in the city of Lincoln, Nebraska. Previous to the sale last mentioned the Citizens Street Railway Company had purchased from the city of Lincoln the physical property purchased by the city under the decree of the circuit court of the United States, and it has since reconstructed the lines theretofore operated by the Home Street Railway Company, and now, as we understand, claims the right to extend its lines into any or all the streets of the city. After

the appointment of a receiver for the Home Street Railway Company in 1893 none of the lines of that company were operated, and one claim of the state is that, because such lines were not operated from 1893 until 1906 when the defendant company went into possession, the Home Street Railway Company had forfeited its franchise. A demurrer to this information was interposed by the defendant company and sustained by the district court. The state not desiring to amend its information, judgment was entered dismissing the case, and the state has taken an appeal to this court.

Many of the questions raised by the record have been discussed and disposed of in *State v. Lincoln Street R. Co.*, *ante*, p. 333. Under the holding in that case, it is evident that no valid consent to enter upon the streets of the city of Lincoln was ever obtained from the electors by the several companies which afterwards became merged in the Home Street Railway Company. Neither the ordinance calling an election nor notice of the election mentioned any termini of the lines or the route of the proposed roads. The consent given was what we have heretofore termed a "blanket consent," which is of no avail when questioned by proper authority. It cannot be questioned, however, that, under our constitution and the statute relating to the formation of street railway companies, the electors of the city of Lincoln had the power to confer on such companies the right to construct and operate a street railway within the corporate limits of the city. In the exercise of this power the termini of the road and the route to be taken between such termini should be set forth in the proposition voted on. When this is done, the line of road is fixed and definite, and the right to construct this line is vested in the company and is beyond recall, as everything necessary to a valid and complete exercise of the power has been done. While the statute must be followed in all esssential particulars in order that the consent of the electors to the occupation of the streets of the city by a railway company shall be valid and beyond recall, it does

not follow that an irregular exercise of the power possessed by the electors is absolutely void and wholly without force. The manner in which the question of the consent of the electors of the city was submitted was clearly irregular, and the affirmative vote cast thereon just as clearly conferred no power upon the railway companies to use the streets of the city beyond the time when that right should be questioned by some proper authority. But we are not prepared to say that, where the companies acted in good faith and expended their money in the construction of lines under a supposed right to occupy the streets, and this right was not questioned until the bringing of the present action, they or those claiming under them should be ousted from the possession of such streets as are now occupied by their lines, and their property rendered worthless. Under the circumstances of this case, we do not think it would be a wholesome public policy to hold that, because of the irregularity which occurred in granting the right which the people had power to confer, such irregularity renders all proceedings under the vote void and of no effect.

Regarding the claim of an abandonment of its franchise by nonuser, the authorities are clear that, to warrant a court in basing a decree upon that ground, the abandonment must be a clear, unequivocal and decisive act of the party showing a determination not to use or claim the benefit of its franchise. *Citizens Street R. Co. v. City of Memphis,* 53 Fed. 715.

It is also claimed by the state that the city of Lincoln did not acquire the franchise or consent of the electors held by the Home Street Railway Company by the foreclosure and sale in the federal court. We think the rule quite well established that a franchise to be a corporation is separate and distinct from a franchise as a corporation to maintain and operate a railway. The latter may be mortgaged without the former and passes to a purchaser at a foreclosure sale. *Morgan v. Louisiana,* 93 U. S. 217. The consent of the electors to the occupation of the streets of

the city, if a mere license, was a license coupled with an interest, and such licenses, it is well settled, are assignable. *Sawyer v. Wilson,* 61 Me. 529; *Wiseman v. Eastman,* 21 Wash. 163; *Heflin v. Bingham,* 56 Ala. 566.

It is further claimed that the city of Lincoln had no authority to sell and convey to the defendant the property of the Home Street Railway Company which it had purchased at foreclosure sale. This objection is fully met by the provisions of subdivision IV, sec. 9, art. I, ch. 13, Comp. St. 1905, defining the powers of a city of the class of the city of Lincoln. It reads as follows: "To sell and convey real or personal property owned by the city, and make such orders respecting the same as shall be deemed conducive to the interests of the city; but shall not have power to sell any real estate of the city, except such real estate as may be purchased upon sale for general or special taxes or assessments, unless authorized so to do by a vote of the majority of the electors of such city at a general or special election therefor."

Upon the record before us, we are of opinion that the Citizens Street Railway Company is entitled to the use of the streets now occupied by it for street railway purposes so far as its lines are completed and in operation, that it has no right to extend its lines without further authority from the electors of the city, that the decree of the district court should be reversed and the cause remanded, with directions to enter a decree in conformity with the views herein expressed.

EPPERSON and GOOD, 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 conformity with the views above expressed.

REVERSED.

AUGUST GEBHARDT V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1907. No. 15,149.

1. **Criminal Law:** REVIEW. A judgment in a misdemeanor case rendered upon conflicting evidence will not be reversed simply because the appellate court receives a different impression of the evidence than did the jury and trial court, but such judgment will be upheld unless we can say it is clearly wrong.

2. ———: ———. The case was submitted to the jury on Friday. The next day it was announced that there was a chance for an agreement. The judge then told the jury that he would soon leave and would not be back until Monday evening, and authorized them to separate only in the event they reached a verdict when the judge was absent, and to return a sealed verdict Monday evening. Three hours later, and before the adjournment of the court, the jury returned its verdict. *Held*, That the verdict should not be set aside.

3. **Instructions** examined, and *held* without error.

ERROR to the district court for Greeley county: JAMES R. HANNA, JUDGE. *Affirmed.*

G. W. Scott and *J. R. Swain*, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

EPPERSON, C.

Defendant, Gebhardt, was convicted of an assault and battery, and seeks a reversal upon three grounds: (1) The evidence is insufficient to sustain the verdict; (2) the court erred in making certain remarks to the jurors upon their return to the court room after deliberating several hours; (3) the court erred in giving an instruction upon its own motion. We shall consider the assigned errors in the order named.

1. John Adamie and his wife lived upon a farm in Greeley county. In July, 1905, water had formed a pond in the road near their residence, and Mrs. Adamie took

a spade and cleaned out a ditch along the road, thereby causing the water to flow upon defendant's land. While thus engaged, defendant drove along in a buggy, and, according to Mrs. Adamie's testimony, began to curse her and apply vile epithets. She came through the water toward defendant to a point where she could see her husband and call to him. While doing so, she passed close to the buggy and defendant struck her two or three times with his whip. After he struck her she struck at him with the spade which she held in her hand. Defendant drove on. Mrs. Adamie's testimony was flatly contradicted by defendant, who swore that she assaulted him with the spade, and that he used the whip to protect himself. The ten-year-old daughter of the prosecuting witness was present, and was called as a witness to corroborate her mother. She testified that defendant struck her mother first, and that her mother struck defendant's buggy with the spade after she had been assaulted. The little girl, however, corroborated defendant when she said that her mother jumped across the water and was going to hit him, and he hit her right across the neck. There was a sharp conflict in the testimony; and, while Mrs. Adamie's version of the affair was contradicted by several witnesses, we cannot say that the verdict entirely lacks evidence to support it. If Mrs. Adamie told the truth, and the jury found that she did, there was sufficient evidence to justify a verdict of guilty of assault and battery. A judgment in a misdemeanor case rendered upon conflicting evidence will not be reversed simply because the appellate court receives a different impression of the testimony than did the jury or trial court. Such judgment will not be reversed unless we can say it is clearly wrong. *Everson v. State,* 4 Neb. (Unof.) 109.

2. The case was submitted to the jury some time Friday. The next day the jury were brought into court, and were told by the judge that he would soon leave and would not be back until 7:30 P. M. Monday, and authorized them to separate in the event they reached a verdict when the

court was absent, directing that in that event to return the verdict sealed Monday evening. Before receiving these directions, the jury told the court that there was a chance of an agreement. Three hours later, and before the adjournment of the court, the jury returned their verdict. Under the court's instructions it is contended that the jury would have been required to remain together until Monday evening in charge of the bailiff had they not agreed. For this reason, defendant argues that the jury were coerced. No objection was made to the order of the court, and no exception taken to his ruling. However, we have examined the question for the reason that the coercing of a jury would be a flagrant injustice. The record shows that prior to the order of the court the jury announced that there was a chance for an agreement. Thereafter they continued their deliberations for three hours. With rare exceptions, Nebraska jurors heed their obligation, and do not permit the dread of difficult tasks to swerve them from the line of duty. On the face of this record it does not appear that the instruction complained of was objectionable or influenced the decision of the jury. A very similar case is *Erwin v. Hamilton,* 50 How. Pr. (N. Y.) 32, wherein the verdict was permitted to stand.

3. The court told the jury: "It is your duty as jurors to give this case a fair, intelligent and dispassionate consideration, and, if you find the defendant guilty, convict him; but, if under the evidence and the law as contained in these instructions you have a reasonable doubt of the defendant's guilt, you should not hesitate to find him not guilty." Defendant contends that the portion, "if you find the defendant guilty, convict him," allowed the jury to "enter the field of conjecture, or wander outside of the evidence." While we may not approve the form of the instruction, we cannot say that defendant was prejudiced thereby. Instructions should be read together, and, when the instruction complained of is read in connection with others given, we find that the jury were properly confined to the evidence.

An affirmance of the judgment is recommended.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

CHARLES A. CORLISS, APPELLEE, V. PLANO MANUFACTURING COMPANY, APPELLANT.

FILED DECEMBER 18, 1907. No. 14,848.

Exemptions: PLEADING. Under section 531*f* of the code, in an action by a wage-earner against a person assuming to be his creditor, who has by garnishment proceedings in a foreign jurisdiction obtained wages earned within 60 days previous to the garnishment, it is necessary to allege that the wage-earner was a resident of the state of Nebraska and entitled to the wages exempt at the time of the garnishment.

APPEAL from the district court for Antelope county: JOHN F. BOYD, JUDGE. *Reversed.*

George W. Cooper and *Mapes & Hazen,* for appellant.

E. D. Kilbourn, contra.

GOOD, C.

A full understanding of the points decided requires us to set out the plaintiff's petition in full: "Now comes the plaintiff, and for his cause of action against the defendant alleges: (1) That the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Illinois, and doing business in Nebraska. (2) That the plaintiff is a resident of Antelope county, Nebraska, and the head of a family, and an employee of the Northwestern Railway Company, a corporation engaged in interstate commerce. (3) That the defendant herein,

claiming to have some demand against the plaintiff, did on or about the 20th day of April, 1903, commence an action in the state of Iowa against the plaintiff and on the said pretended demand, and did, on or about the date of commencing the said suit, garnish and attach the wages due the plaintiff from the said railway company, for the purpose of evading the attachment and garnishment laws of Nebraska, and contrary to and in violation of chapter 25 of the laws of 1889 of Nebraska. (4) That the wages garnished and attached as aforesaid were exempt to plaintiff, and earned within 60 days prior to the commencement of said suit and garnishment. (5) That the amount of money garnished as aforesaid is the sum of $61.50; that the plaintiff's actual expenses and damages incurred on account of the said proceedings against him amount to the sum of $10, and an attorney's fee of $100, which is a reasonable attorney's fee in this case. (6) Plaintiff is not now, and never was, indebted to defendant in any sum whatever, and said suit was commenced for the purpose of extorting money from this plaintiff. (7) Plaintiff therefore prays judgment against the defendant for said several sums of money, amounting in all to the sum of $171.50, with interest on the sum of $61.50 from the date of said garnishment, and with costs of this suit." The statute under which this action is brought is in the following words: "That it be, and is hereby declared, unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employee of any corporation, firm, or individual, in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person or persons, firm, corporation, or institution, or to institute in this state or elsewhere, or prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk, or employee by any process seeking to seize, attach, or garnish the wages of such person or persons

earned within sixty days prior to the commencement of such proceeding, for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions." Code, sec. 531c. Prior to any evidence being introduced the defendant entered a demurrer *ore tenus* to the plaintiff's petition, alleging, as a ground, that it failed to state a cause of action. The demurrer was overruled, and, on a trial to the court, judgment was given for the plaintiff for the sum of $72.50 damages and $100 attorneys' fees and costs of suit. Defendant's motion for a new trial was overruled, and it has brought the record to this court on appeal.

A careful consideration of the statute discloses that it was the purpose of the legislature in enacting the statute to protect laborers, servants, clerks and employees in this state from having their earnings seized by creditors, or those assuming to be creditors, if earned within 60 days. The persons to be protected are the servants, clerks and employees *in this state*. The wages to be protected are the earnings for the past 60 days. An examination of the petition does not disclose that the plaintiff was a resident of the state at the time that his wages were seized under the garnishment proceedings. If he was not a resident of this state at the time, he was not entitled to his wages exempt under the laws of this state. For aught that appears in the petition, he may have been a nonresident of the state at the time of the garnishment proceedings and when the wages were seized, and may have been entirely without any right of exemption under the statutes of Nebraska. Under these circumstances, he has not shown by his petition that he was within the protection of the statute. The petition, not showing that the plaintiff was a resident of the state at the time the wages were garnished, is fatally defective. It therefore follows that the judgment of the district court is wrong and should be reversed.

For the reasons given, we recommend that the judgment of the district court be reversed and the cause remanded

for a new trial, with leave to the plaintiff to amend his petition if he so desires.

DUFFIE 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 a new trial, with leave to the plaintiff to amend his petition, if he so desires.

REVERSED.

WILLIAM A. LAMSON, APPELLEE, V. VILLAGE OF ELM CREEK ET AL., APPELLANTS.

FILED DECEMBER 18, 1907. No. 14,998.

Deed construed, and *held* to convey the land in dispute.

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

H. M. Sinclair and *J. M. Easterling*, for appellants.

N. P. McDonald, contra.

GOOD, C.

Appellee, Lamson, brought this action against the village of Elm Creek to quiet title to a tract of land lying in said village. Defendant answered and denied plaintiff's title. George Arendt intervened and claimed title in himself as devisee of Catherine Arendt, deceased. The district court found for plaintiff and entered a decree quieting his title. Defendant and intervener appeal. Lamson's title depends upon a deed executed by Catherine Arendt to one Potter, from whom, by mesne conveyances, Lamson claims title. The question is: Did the description in the deed from Mrs. Arendt to Potter cover the land in dispute?

In order to understand the situation, a statement of the facts, which are admitted, is necessary. Tyler street runs north and south through the village of Elm Creek. Block 1 of Arendt's Second addition lies west of Tyler street, but does not abut upon it. There is an alley running east and west through said block. East of the south half of said block 1, and between it and Tyler street, there is a strip of land 11 feet wide at the alley on the north, and 34 feet and 8 inches wide on the south. This is the strip of land in controversy. When Arendt's Second addition was platted, there was shown on the plat a street immediately east of block 1, which was designated as "Second street." It was never in fact used or traveled as it was platted, and was abandoned prior to the organization of Elm Creek into a village, and Tyler street, a little to the east of Second street, was opened. It was this change in the streets that left the strip that had formed a part of Second street, as platted, between said block 1 and Tyler street. The south half of block 1 had been subdivided into eight lots and one triangular tract. The eight lots were numbered from one to eight, commencing on the west, and were known as "Bond's subdivision," and the triangular tract formed the easternmost portion of the south half of said block. The triangular tract was 23 feet wide on the north, where it abutted on the alley, and narrowed to a point at the southeast corner of the block. This tract and the one in controversy lie adjacent to each other, and the two joined together form a tract 34 feet and 8 inches wide, extending from the south boundary of the block to the alley on the north.

The deed from Mrs. Arendt to Potter was made November 26, 1888. At that time Mrs. Arendt was the owner of the triangular tract in block 1 and the strip in dispute between it and Tyler street. Potter did not own any other real estate in the south half of the block. Prior to the date of the deed to Potter a sidewalk had been built adjacent to the south and east boundaries of the disputed strip. Lamson owned lot 8, and had a store thereon, and

after he acquired title to the land conveyed to Potter used a part of both the triangular strip and the strip in dispute for the storing of barbed wire and agricultural implements, and erected for rent on the north end of both strips a blacksmith's shop adjacent to the alley. The vilage moved its jail upon the disputed strip in 1897. It does not appear that it had permission from any one to do so, nor does it appear that any objection was made either by Mrs. Arendt or Lamson. Mrs. Arendt lived in Elm Creek until her demise in 1905. It does not appear that she asserted any claim of ownership to the disputed tract after her deed to Potter 17 years before her death. While Second street was abandoned and Tyler street opened as early as 1886, no formal action was taken by the village until 1897, when it passed an ordinance attempting to vacate Second street. It is not contended that this amounted to anything more than a formal ratification of what had actually taken place long previous.

This brings us to a consideration of the description in the deed from Mrs. Arendt to Potter. It is in the following language: "All that fraction of land lying east of lot eight (8) and south of the alley in Bond's subdivision in block one (1) of Arendt's Second addition to the town of Elm Creek, as platted and recorded in the clerk's office of Buffalo county, Nebraska, and extending east to the street now known as Tyler street." Appellants contend that this description does not cover the strip in controversy, and contend that the language used limits the land conveyed to that which is in block 1. They contend that the use of the word "fraction" at the beginning of the description shows an intention and purpose to convey only a fraction of the block, and therefore not to convey anything outside of the block. They also contend that the latter portion of the description, "and extending east to the street now known as Tyler street," shows an intention to convey the land to Second street, which was always commonly called Tyler street. While these arguments are plausible, we think that, under the circumstances, the lan-

guage will not bear the construction contended for by the appellants. It must be borne in mind that at the time of the conveyance to Potter Mrs. Arendt owned a tract of land 34 feet and 8 inches wide and 131 feet long. In the absence of strong reason for so doing, it does not seem probable that she would so divide this strip as to leave her remaining a wedge-shaped piece 11 feet wide at one end and 34 feet wide at the other. Nor can we conceive of any reason why Potter should desire to buy the triangular piece within block 1, which appellants contend he took by his deed. If appellants' contention is good, then Potter was buying a tract of land 23 feet wide on the alley, and narrowing to a point at the southeast corner of the block, without any outlet upon the street at all, and where he did not own any land adjacent to it in connection with which he could use such a strip. We think that a careful examination of the description shows that it was not the intention to limit the land described to that within the block, but that the language in the description, "in block one (1) of Arendt's Second addition to the town of Elm Creek, as platted and recorded in the clerk's office of Buffalo county, Nebraska," was used for the purpose of identifying the west and north boundaries of the tract conveyed. The west boundary was the east line of lot eight in said block. The north line was the alley in said block. Taking this view of the description, then the latter part of the description, "and extending east to the street now known as Tyler street," becomes plain and its purpose is apparent to convey the entire strip of land which is bounded on the west by the east line of lot eight, on the north by the alley in said block, and on the east by Tyler street. The fact that Mrs. Arendt resided in the village 17 years after her deed was executed to Potter and never asserted any claim of ownership to the disputed tract, in view of the fact that two buildings had been placed thereon and the tract was being used by Potter's grantees, would indicate very strongly that she did not claim any interest in the land, and that she understood that by her deed she had

conveyed the tract in dispute to Potter. It appears to us that no other construction could give any effect to the language in the latter portion of the description, to wit: "And extending east to the street now known as Tyler street." It seems clear and evident to us that this was the intention of the parties, and that the judgment of the district court is right.

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

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

WILLIAM E. MCJUNKIN, APPELLANT, V. PLACEK & FITL, APPELLEE.

FILED DECEMBER 18, 1907. No. 15,020.

Partnership, Action by: PLEADING. To authorize a copartnership to maintain an action in the partnership name, it is necessary for it to set forth in the pleadings in some manner that it was formed for the purpose of carrying on trade or business or for the purpose of holding property in this state.

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

Lafe Burnett and *J. H. Broady*, for appellant.

J. H. Grimm & Son, contra.

GOOD, C.

Placek & Fitl commenced this action in justice court to recover on an account. The defendant, by motion and objection, properly raised the question that plaintiff had not legal capacity to sue. His motion and objection were overruled and judgment was rendered for the plaintiff.

Defendant took the case on error to the district court, where the ruling of the justice court was sustained and the petition in error dismissed. Defendant appeals to this court.

The only question for consideration is: Did the record disclose that plaintiff had capacity to maintain the action? Plaintiff's bill of particulars was entitled as follows: "Placek & Fitl, a firm composed of Mike Placek and James Fitl, Plaintiffs, William McJunkin, Defendant." There is no allegation or reference in the bill of particulars as to the organization, business or character of the plaintiff. The action is prosecuted in the name of a copartnership. Under the common law this was not permissible. The rule of the common law has been abrogated in this state by section 24 of the code, which permits a partnership to sue and be sued in its partnership name. This court has held, in *Burlington & M. R. R. Co. v. Dick & Son,* 7 Neb. 242, that the statute, being in derogation of the common law, should be strictly construed. A strict construction of the statute requires the plaintiff, when it is a partnership, to set forth in the pleadings the facts which would show that it comes within the provisions of the statute. Under this section of the statute it is necessary that the pleadings should in some way disclose that the copartnership was formed for the purpose of carrying on trade or business or for the purpose of holding property in this state. The bill of particulars is silent in this respect. It fails to show that it was formed for the purpose of carrying on trade or business or for the purpose of holding property in this state. It therefore fails to disclose that the partnership is authorized to maintain the action. The construction of this statute has been before this court on a number of occasions, and the views herein expressed find support in the following cases: *Burlington & M. R. R. Co. v. Dick & Son, supra; Jansen & Co. v. Mundt,* 20 Neb. 320; *Weisz & Mall Co. v. Davey,* 28 Neb. 566. It follows that the judgments of the justice court and of the district court were both wrong and should be reversed.

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

DUFFIE 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.

HITCHCOCK COUNTY, APPELLANT, V. JOHN W. COLE ET AL., APPELLEES.

FILED DECEMBER 18, 1907. No. 14,919.

1. **Judicial Sale:** PURCHASER. The purchaser of real property at a judicial sale buys at his peril.
2. **Tax Sale:** REDEMPTION: RECOVERY BY PURCHASER. Under the facts stated, the purchaser should recover the purchase money paid by him from the redemptioner, and not from the plaintiff.

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

W. S. Morlan, for appellant.

J. W. Cole, contra.

JACKSON, C.

The county of Hitchcock had a decree foreclosing a lien for taxes on land in that county. Among the defendants in the action were John W. Cole and William Keeler. Service on William Keeler was had by publication. The decree was by default, and resulted in a sale of the land to Conrad Wagner for $451. The sale was confirmed, and after payment of the amount due the county and the costs there remained an excess, which appears to have been paid over to John W. Cole. Within two years from the

date of the sale the heirs of William Keeler applied to the court where the decree was entered to have the decree set aside and to be permitted to defend. It appears that William Keeler held a mortgage on the land involved, and that during his lifetime this mortgage was foreclosed and the land sold to Keeler, but that no sheriff's deed had issued. Upon the final hearing of this cause in the district court, the sale in the tax proceeding was vacated and the heirs of William Keeler were permitted to redeem upon payment to Wagner of the sum of $225, the amount of the tax lien and certain costs. Title to the premises was quieted in the heirs of Keeler, and by the same decree Conrad Wagner was given judgment against the county of Hitchcock for the sum of $226, which the court found to be the remainder due him as purchase money paid at the tax sale after the receipt of the redemption money. The county of Hitchcock appeals.

It is not seriously contended by the appellee, Wagner, that as a matter of law the county was liable to him for any part of the purchase money paid at the sale under the tax foreclosure proceedings. What he seems to contend is that, under the condition of the pleadings, the judgment ought not to be disturbed. After the decree had been vacated and an issue tendered by the heirs of William Keeler, Conrad Wagner pleaded both to the plaintiff's petition and to the answer and cross-petition of the heirs of Keeler. The plea contains an allegation that, acting under the advice of the plaintiff and its attorney and officers, he was led to believe, and did believe, that the plaintiff had a good, valid and subsisting judgment and decree against the lands by virtue of the decree, and that, relying upon said representations of the plaintiff and the files and records of the court, he proceeded in good faith to purchase the lands and paid the sum of $451. The prayer was that, in the event that the title was not quieted in him by virtue of the sale in the tax foreclosure proceedings, he have judgment both against the county and the heirs at law of William Keeler for the amount of purchase money,

with interest, and costs. The county did not plead to Wagner's answer, and it is insisted that Wagner's plea is sufficient to sustain the judgment. In that contention we do not concur. The purchaser at a judicial sale buys at his peril, and the plaintiff is not liable to such purchaser on account of defective title. Under the circumstances, Wagner should have been reimbursed for the full amount of the purchase money, but the order should have been against the persons seeking to redeem. *Wood v. Speck*, 78 Neb. 435.

There is no theory upon which the judgment of the district court can be sustained, and it is recommended that the judgment be reversed and the cause remanded.

AMES and CALKINS, 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.

NORTHWEST THRESHER COMPANY, APPELLANT, V. EDDYVILLE STATE BANK, APPELLEE.

FILED DECEMBER 18, 1907. No. 15,032.

1. **Appeal:** WAIVER. Points not presented in the supreme court will be deemed to be waived.

2. **Principal and Agent:** APPARENT AUTHORITY. "The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has." *Creighton v. Finlayson*, 46 Neb. 457.

3. ———: ———. "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb. 644.

4. ———: GENERAL AGENT: AUTHORITY. An agent who, by his contract of employment, is constituted a general collection agent,

and who, in the performance of his duties as such agent, agrees to place in the hands of a bank, for collection, notes received by him for his principal as part of the consideration for the sale by him to a third person of machinery belonging to his principal, has the power to bind his principal by a contract with said bank, authorizing the bank to make advancements for freight upon the machinery so sold and to retain the amount so advanced from the first moneys collected upon said notes and contracts.

5. **Appeal: VERDICT: EVIDENCE.** "Where there is sufficient evidence to sustain a verdict it will not be set aside, notwithstanding the supreme court might have found differently from the jury upon the testimony." *Fairfield v. Kern*, 48 Neb. 254.

6. **Evidence** examined, and *held* sufficient to sustain the verdict of the jury and judgment of the court.

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

Wilson & Brown, for appellant.

E. A. Cook, for appellee.

FAWCETT, C.

This was an action by appellant, a manufacturer of threshing machines, against appellee to recover a remainder of $170.11 claimed to be due upon certain notes which appellee had collected for appellant, and which appellant claimed appellee failed and refused to remit. Appellee admits having received the notes for collection, admits that it collected the sum of $270.91, and alleges that it remitted to appellant the sum of $100.80, and that it was entitled to retain the remainder of $170.11 as compensation for money advanced for the payment of freight upon a threshing machine which appellant had sold to one G. W. Smith under a contract entered into between appellee and appellant through appellant's agent, J. T. Clark. For reply appellant admits the sale of the machine to Smith, and the receipt of the notes of certain farmers, and "denies each and every allegation in said answer contained not herein specifically denied." These

are substantially the issues upon which the case was tried in the district court. There was a verdict in favor of appellee. Appellant's motion for a new trial was overruled, and judgment entered upon the verdict, and the case is now here for review.

Appellant assigns a large number of errors in its motion for new trial in the court below, and also in its assignment of errors in this court, but in its brief filed in this court only four of its assignments are discussed, and hence these only will be considered. Appellant's contentions here are, first, that no such contract was ever made by Clark; second, that if Clark made any such contract he was without authority so to do; third, that the contract between appellant and Smith, being in writing, could not be varied by parol; and, fourth, that the court erred in giving instruction No. 2, requested by appellee. We will consider these assignments in the order above named.

The evidence discloses that Clark, as agent for appellant, went to Eddyville for the purpose of trying to sell a threshing machine, having learned, in some manner not disclosed, that some one at that place desired to purchase a machine. On arriving at Eddyville he met Smith and entered into the contract with him, which appears in the record as defendant's exhibit 1. This contract required Smith to pay the freight charges on the machine. As part of the transaction between Clark and Smith in negotiating the sale of the machine, they together took a trip into the country and interviewed a large number of farmers for the purpose of ascertaining about how much threshing Smith would be able to secure during the first season. Defendant's exhibit 2 is a list of the farmers whom they induced to agree to employ Smith to do their threshing that year. These farmers first signed contracts. After Smith received the machine a large number of them gave their notes and evidently took up their contracts. The notes so taken were the ones which were finally sent to appellee for collection. The testimony of appellee's witnesses is to the effect that Clark and Smith went to ap-

pellee's bank and gave the officers of appellee the particulars of the deal, showed them the contracts which they had obtained from the farmers, and obtained from the officers of the bank their judgment as to the responsibility and integrity of the farmers who had signed those contracts; that Clark then asked if they thought Smith would have the money to pay the freight, and was told by appellee's officers that they were satisfied Smith would not have the money; that Clark then asked them if they would advance the freight for Smith; that they refused to do so, and that they then agreed with Clark that if he would give them the collection of the contracts, and of the notes that might be issued in lieu thereof, they would advance the freight and reimburse themselves by deducting the amount so paid from the first collections made upon the notes and contracts; that in accordance with this agreement, when the machine arrived, they paid the freight upon it, amounting to $170.11. The evidence for and against the making of the contract is decidedly conflicting. So far as the positive testimony of the witnesses is concerned, there is a decided preponderance in favor of appellee, but the circumstances disclosed by the correspondence between appellant and appellee tend strongly to corroborate appellant's contention. While an examination of the entire record leaves some doubt in our minds as to the making of the contract claimed by appellee, we are unable to say that the verdict of the jury was manifestly wrong, and, that question having been properly submitted to the jury, we do not feel that we can disturb its finding.

In support of its second assignment that Clark had no authority to make the contract, appellant contends that Clark's only authority was as a salesman; that he had no authority to make the contract with appellee, which appellee relies upon, and reference is made to the contract of employment between appellant and Clark appearing in the record as exhibit A, attached to the deposition of G. E. Wilson, general manager and secretary of appellant. We seriously doubt appellant's right to question the authority

of Clark under the general denial in its reply, but, as appellee does not discuss that question in its brief, we do not decide it. We are unable to agree with counsel for appellant in their contention that the contract of employment gave Clark authority to represent appellant as a salesman only. The contract contains this clause: "It is the intention that said employee is to be principally employed in sales expert and collection work, unless hereafter directed to perform other work by said employer." It will be seen from this that Clark not only had authority to represent appellant in the selling of the machinery, but that he was also fully authorized to act in the matter of collections. He therefore had full authority while at Eddyville to negotiate the terms of the sale of the machine with Smith, and also to negotiate with appellee for the collection of the notes and contracts which he was receiving as a part of the consideration for the sale of the machine to Smith. It is contended by appellant that the contract between Clark and Smith was nothing more than a proposal by Smith for the purchase of the machine, and that it did not become a binding contract until approved by the managing officers of appellant. While we have some doubt as to the correctness of this contention, we do not decide the point for the reason that, if, in arranging for the collection of the notes and contracts which he was obtaining from Smith, Clark agreed with appellee that appellee should advance the freight and reimburse itself by deducting the amount so paid from its first collections upon the notes, the fact that he failed to disclose the terms of that agreement to his principal would not release appellant from its liability under the contract as made. If Clark was acting within the scope of his real or apparent authority, appellee was not in any manner responsible for his failure to correctly and fully report his acts to his principal. Clark's contract with appellee was, in our judgment, clearly within the scope of his powers as the agent of appellant for the collection of those notes and contracts. He did not by this contract release Smith from

his obligation to pay appellant the amount of the freight. The liability of Smith for the freight on the machine remains and is fully secured by appellant's mortgage; and, the jury having found in favor of appellee on this point, it follows from what we have said that if the court properly submitted that question to the jury its finding cannot be disturbed.

Appellant's third contention that the contract between appellant and Smith, being in writing, cannot be varied by parol does not arise in this case. Appellee was in no sense a party to the contract with Smith. The contract between appellant and appellee did not purport to release Smith from his obligation to pay the freight nor in any manner change the terms of the contract between appellant and Smith. It was a separate and independent contract, entered into between appellee and Clark as the agent of appellant, and must stand or fall according to its own terms, independently of appellant's contract with Smith.

We come now to appellant's last assignment, that the court erred in giving instruction No. 2, requested by defendant. The instruction reads as follows: "Ostensible authority to act as agent may be conferred if the party (to) be charged as principal affirmatively or intentionally, or by lack of ordinary care, caused (causes) or allows third persons to trust and act upon such apparent agency; and in this case, if the jury believe from the evidence that said J. T. Clark had the apparent authority to contract for the payment by the defendant bank of the freight on the threshing outfit purchased by George W. Smith, then the plaintiff is bound by the acts of said J. T. Clark, and, if you believe that the defendant by a preponderance of the evidence has established the making of said contract to pay said freight and retain the same out of the collections made by it for plaintiff, then your verdict will be for the defendant." The only objection made to this instruction by appellant is as to the first clause. Counsel say: "It will be noted that the court uses the language,

'ostensible authority to act as agent may be conferred if the party (to) be charged as principal affirmatively or intentionally, or by lack of ordinary care, caused (causes) or allows third persons to trust and act upon such apparent agency.' This instruction is erroneous, for the reason that there is no evidence in the record that could possibly impute to the plaintiff any acts or omissions which would affirmatively or intentionally, or by lack of ordinary care, give third persons the right to believe that the agent, Clark, had authority to bind the principal for the purpose claimed by the bank herein. Nor is there any evidence that could be said to cause or allow third persons to trust and act upon such apparent agency." This is the only objection urged to this instruction; hence, none other need be considered. We are unable to agree with counsel in their contention. The evidence is that Clark was the agent of appellant, fully authorized to represent them "in sales expert and collection work." This being his actual authority, we think that in making the contract with appellee he was not only acting within the scope of his apparent authority, but that he was acting within the scope of his actual authority; hence, this contention of appellant must also fail.

While, as we have already stated, we have some doubt as to the actual making of the contract, a consideration of the whole record satisfies us that we cannot, without invading the province of the jury, give appellant any relief in this action. We therefore recommend that the judgment of the district court be affirmed.

AMES and CALKINS, CC., concur.

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

AFFIRMED.

JOHN T. CATHERS, APPELLEE, V. JOHN H. GLISSMAN, APPELLANT.

FILED DECEMBER 18, 1907. No. 15,052.

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

John O. Yeiser and *George A. Magney,* for appellant.

J. O. Detweiler, contra.

FAWCETT, C.

This case made its first appearance in this court on January 12, 1907, by the filing by appellant of a certified copy of the judgment below, together with a præcipe and assignment of errors. Nothing further was done in this court until September 7, 1907, when appellant filed in this court a motion to supply record, and delivered to the clerk with said motion a transcript of the proceedings in the district court, a bill of exceptions, and a copy of his brief. No notice of this motion was ever served upon appellee or his attorney, nor was said motion ever presented to the court. Nothing further was done by appellant until the morning of the day when the case was called for final argument and disposition, when appellant appeared and filed another motion suggesting a diminution of record, and asking leave to file certified copies of such record, omitted, as he alleges, by mistake, which certified copy he tendered with the motion. The case, in this state of the record, was submitted to this department. Attorneys for appellant and appellee both appeared, appellant claiming the right to supply the deficiencies in the record at this time, and appellee contending that the application should be denied, and that the judgment of the court below should be affirmed or the appeal dismissed.

On consideration of the matter, we are all of the opinion that appellee's contention should be sustained; that we

must consider the several applications of appellant to supply the record and to file the bill of exceptions as being made of this date. We do not think that such laches should be encouraged by the court. To permit appellant to do as he now desires would be encouraging a practice which would completely unsettle the procedure in this court, and would leave litigants to suffer from the gross lack of diligence of attorneys representing their opponents.

We therefore recommend that the motions of appellant for leave to supply record and his suggestions of diminution of record be overruled, and, no error appearing in the certified copy of the judgment filed January 12, 1907, that the judgment of the district court be affirmed.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the motions of appellant for leave to supply record and his suggestions of diminution of record are overruled, and the judgment of the district court is

AFFIRMED.

HENRY GUND, APPELLEE, V. ELIAS BALLARD ET AL., APPELLANTS.

FILED DECEMBER 18, 1907. No. 15,113.

1. **Appeal:** REMAND WITH DIRECTIONS. Where this court has determined the questions of fact and fixed the liabilities of the parties in a suit, and remanded the case to the district court, with specific directions to that court to enter its judgment in accordance with the findings and judgment of this court, as set out in its opinion, it is then too late to bring in new parties or to raise new or different issues.

2. **Banks:** INSOLVENCY: INDEBTEDNESS OF STOCKHOLDER: INTEREST. Where a stockholder in a bank which is in process of liquidation, who

is indebted to the bank, refuses to pay his indebtedness and litigates the question, thereby preventing the distribution of funds on hand, and the litigation is determined adversely to him, he should be charged with interest upon the amount of his indebtedness, as found by the court, down to the time of the entry of judgment, regardless of the fact of the existence of such funds.

3. ———: ———: LIABILITY OF TRUSTEES: INTEREST. Where the managing directors or trustees of a bank in process of liquidation have in their hands funds of the bank, and the distribution of such funds is prevented by litigation or otherwise, and the custom of responsible banks in the community where they reside is to pay interest upon such deposits, and said funds were in fact bearing interest at and prior to the time such trustees obtained the custody of the same, and said trustees withdraw the moneys from such banks and deposit them in a bank in which one of the trustees is a stockholder, without interest, such trustees will be held personally liable for the customary rate of interest paid by responsible banks in such community for deposits of like character.

4. ———: ———: TRUSTEES: COMPENSATION. The mere fact that managing directors or trustees of a bank in process of liquidation have not been active in interposing defenses to an action by one of their number against the bank upon an individual claim will not defeat their right to a reasonable compensation for services rendered and responsibility assumed in closing up and settling the other affairs of said bank.

5. ———: ———: STOCKHOLDERS: ATTORNEYS' FEES. Where certain stockholders of a bank in process of liquidation employ counsel to litigate for them their contention as to the distribution of a fund which is already in existence in the hands of the trustees or managing directors, and subject to distribution to the parties entitled thereto, as their respective rights may be determined by the court, they will not be entitled to recover their attorneys' fees out of such fund.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed in part with directions.*

Hall, Woods & Pound, for appellants.

Tibbets & Anderson, contra.

W. G. Hastings, pro se.

FAWCETT, C.

This case is here for the second time. The opinion on the former hearing was by HOLCOLMB, C. J., and is reported in 73 Neb. 547. The former opinion contains a complete statement of the issues and facts. The main controversy then and now is over a promissory note held by the Blue Valley Bank, signed by the plaintiff, Henry Gund, and intervener, George H. Hayes. Intervener Hayes was not a party to the suit at the time of the former hearing. On the former hearing the court fully and very carefully considered all of the facts in relation to the execution of the note referred to, and fixed the liability of the plaintiff, Gund, thereon as that of a principal debtor. In the opinion the chief justice says: "The plaintiff, when he undertook the payment of the obligation of Hayes Bros. in favor of the bank, at the time of the adjustment of the matters pending between him and the bank on the one part and the firm of Hayes Bros. on the other, and signed the note which the bank held against those parties, became, as we have seen, as between him and the bank, primarily liable thereon. The question presents itself as to the availability to him of the defense of usury in the determination of the amount legally due thereon. He having by this transaction become obligated to pay the debt, there can be no serious controversy, we apprehend, as to his undertaking to satisfy the note, being a new and different contract than the one then existing between the bank and Hayes Bros., and that the usurious character of the contract existing prior to such time in relation to such indebtedness was eliminated from the new contract, and, the old contract being terminated, the new was purged of the taint of usury theretofore existing. *Building & Loan Ass'n of Dakota v. Walker*, 59 Neb. 456; Webb, Usury, sec. 452; *Culver v. Wilbern Bros.*, 48 Ia. 26. * * * We are of the opinion that the law will not permit him, acting in the dual capacity in which he was, and in a sense the agent of his principal, the bank, to enter into a usurious contract with himself

and his principal, and thereby escape all liability for the payment of interest on the principal sum of the indebtedness for which he thus became obligated. It must be accepted, we think, as fundamentally correct that he could not be permitted to profit by his own wrongful action, nor by the action of the bank on the one part and himself on the other, to the prejudice of the stockholders, he holding, as he did, the fiduciary relations then existing between him and the corporation and those it represented. *Sternburg v. Callanan,* 14 Ia. 251; *Oliver v. Lansing & Ingham,* 48 Neb. 338. On the other hand, a court of equity will not enforce a usurious contract prohibited by law. A court of equity, it seems to us, should require him to do equity, and this demands of the plaintiff that, in order to discharge his liability to the bank, he must pay the principal indebtedness, together with the legal rate of interest accruing thereon during the time of the running of the debt. *Eiseman v. Gallagher,* 24 Neb. 79; *Frenzer v. Richards,* 60 Neb. 131." The above reasoning by the chief justice is eminently sound, and has our approval. The cause was remanded to the district court, "with directions to ascertain the amount justly due from the plaintiff, according to the views herein expressed, and to make such further and other orders in the premises as seem to be just and equitable, not inconsistent with this opinion, to the end that all of the rights of all parties to the litigation may be fully and finally adjudicated and determined."

In the opinion the court determined the question that, while the note referred to was tainted with usury, the relations of plaintiff Gund to the bank were such that he could not avail himself of the plea of usury, and thereby escape payment of lawful interest; that, while a court of equity will not enforce a usurious contract by compelling the payment of usury, it will require a party occupying the fiduciary relation to the payee which was occupied by plaintiff in this case to do equity by paying lawful interest; and that as plaintiff had full knowledge of the items which went to make up the consideration for the note

which he signed with Hayes, and had received from Hayes Bros. a large amount of property in consideration of his assuming the indebtedness represented by said note, according to its terms, the court would not go behind the execution of the note and inquire whether it contained any usury or not, but would take the note as fixing the amount of plaintiff's liability on that date, and would only consider the question of usury subsequently thereto. This left nothing for the district court to do when the case was remanded but to state the account between the plaintiff and defendant bank subsequent to the date of the note. This the district court has done, and so far as the court has correctly carried out its figures it has followed the directions of this court.

After the case was remanded, through the efforts of plaintiff's attorneys, Hayes was induced to intervene in the case, and an attempt was made by plaintiff to try again the question of usury which had been disposed of by the former decision of this court. We do not think that Hayes was a necessary or even proper party after the case had been remanded. His going into the case at that time could not in any manner affect the issues which had already been determined. If plaintiff desired him to be a party in the case, he should have made him a party in the first instance. He could not wait until after the issues had been fully determined by this court, and then, after the case was remanded with specific directions, bring him into the case for the purpose of trying again issues which had already been finally adjudicated, and which it is clear would have been adjudicated in precisely the same manner they were, even if Hayes had been a party on the first hearing. The fact that the district court permitted Hayes to intervene is immaterial, however, for the reason that his intervention was not permitted in any manner to influence the court in its findings and judgment.

An examination of paragraph 4 of the decree entered by the court shows a clerical error of $1,000. In that paragraph the court makes specific findings of the amount

due under the note, showing the amount due with interest at 7 per cent. to December 31, 1901, but in making the footing the total is stated as $5,335.50 when it should be $6,335.50. This error affecting a number of the other findings, as shown in several of the subsequent paragraphs of the court's decree, necessitates a recasting of the decree. The court charges plaintiff with interest to December 31, 1901, instead of to the date of the decree, and complaint is made of that fact by appellants, Lane and Sands, who contend that plaintiff should pay interest to the latter date. We think this contention should be sustained. The fact that the money was in the hands of the managing directors during all of the time subsequent to December 31, 1901, is not sufficient to relieve plaintiff from his liability to pay interest upon his indebtedness, for the reason that, while the money was in the hands of the managing directors, it was not available for the payment of plaintiff's note, but by the proceedings being prosecuted by plaintiff was withheld from distribution, thereby damaging the stockholders to the extent of the lawful interest thereon. We hold, therefore, that in the new decree the court should compute interest upon the net amount due from plaintiff to the bank on December 31, 1901, from that date to the date of the decree.

Complaint is made by plaintiff and cross-appellant, Hastings, that the court erred in paragraph 11 of its decree in charging them with interest at the rate of 2 per cent. per annum for not depositing the funds in bank at interest pending the litigation and after a supersedeas bond had been filed. We think the court was right. It appears from the evidence that the money had been on deposit in three banks, one of which was paying 3 per cent., and each of the others 2 per cent., but that plaintiff and cross-appellant, Hastings, after they obtained the custody of the funds, placed them in a bank of which plaintiff was a stockholder, without interest. We think the district court was fully warranted in holding that they were "negligent" in that particular. The bank had been paying

that rate of interest upon the money prior thereto, and a supersedeas bond had been filed, which would necessarily prevent a distribution of the money for a considerable period of time. We think it was clearly their duty to at least have used reasonable diligence to have deposited the funds in some responsible bank where they would have drawn the rate of interest customary on such deposits. The evidence does not disclose that they ever made any such attempt, but, on the contrary, they deposited the money in a bank in which plaintiff was personally interested, and without interest.

Complaint is made by appellants, Lane and Sands, of paragraph 10 of the court's decree, in which it allowed the trustees, Hastings and Gund, $500 and $250, respectively, for services in connection with the liquidation of the bank, the contention being made that they had not acted in good faith in relation to the attempt of plaintiff to escape payment of a large portion of the note in controversy. From the amount allowed by the court it is evident that no compensation was allowed to either of these trustees for any service performed or money expended on account of this litigation. While we perfectly agree with the contention of counsel for appellants, Lane and Sands, that the directors would not be entitled to any compensation of that character, we are not prepared to hold that the trustees would have to perform the large amount of work and bear the responsibility of closing up the affairs of the bank without just compensation therefor. No question is made that the amount allowed by the court is unreasonable, and its findings in that particular should be affirmed.

Complaint is also made by appellants, Lane and Sands, that the court erred in paragraph 14 of its decree in refusing to make them an allowance for attorneys' fees in this cause. At the oral argument we were inclined to think that in this the court had erred; but upon more mature deliberation and a careful examination of the record we have reached a different conclusion. The ap-

pearance of the attorneys for appellants, Lane and Sands, was for them only. They did not appear for them and all of the other stockholders, or for them and all stockholders similarly situated. What they did was to appear for those two parties alone and litigate their contention as to the distribution of a fund, which was already in existence, in the hands of the trustees and subject to distribution to the parties entitled thereto as their respective rights might be determined by the court. This was not sufficient to entitle appellants, Lane and Sands, to a payment of their attorneys' fees out of the general fund.

We therefore recommend that the cause be remanded to the district court, with directions to correct paragraph 4 of its findings by changing the total footing from $5,335.50 to $6,335.50, and to correct the other findings in accordance therewith, and to compute interest upon the net amount found due from plaintiff, Henry Gund, on December 31, 1901, to the date of the decree which it shall enter, at the rate of 7 per cent. per annum, and enter its decree therefor, and that in all other respects the decree of the district court be affirmed.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the cause is remanded to the district court, with directions to correct paragraph 4 of its findings by changing the total footing from $5,335.50 to $6,335.50, and to correct the other findings in accordance therewith, and to compute interest upon the net amount found due from plaintiff, Henry Gund, on December 31, 1901, to the date of the decree which it shall enter, at the rate of 7 per cent. per annum, and enter its decree therefor. In all other respects the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

ANDREW B. STARKEY ET AL., APPELLANTS, V. SAMUEL L. PALM, APPELLEE.

FILED DECEMBER 18, 1907. No. 14,975.

Intoxicating Liquors: LICENSE: PETITION: FREEHOLDER. The statutory qualification of a freeholder as a petitioner upon an application for a saloon license does not require evidence so conclusive as would be requisite to enable him to recover in ejectment against an adverse claimant, but it is sufficient if he has by record or documentary evidence, or both, and in good faith claims and believes himself to have a freehold estate in lands within the prescribed district within which he resides.

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

W. S. Morlan and *R. D. Druliner,* for appellants.

D. G. Hines and *Boyle & Eldred, contra.*

AMES, C.

This is an appeal from a judgment of the district court affirming an order of the trustees of the village of Benkelman granting a saloon license. The sole objection is that certain of the petitioners lacked the qualification of being freeholders. Concerning this qualification we are of the opinion that the statute does not require evidence so conclusive as would be requisite to enable the petitioner to recover in ejectment against an adverse claimant. So strict a rule would prolong the hearing of a remonstrance indefinitely, and entail an expenditure of time and money so great as practically to convert the statute into an absolute prohibitory law, which was evidently not the legislative intent that it should be. We think the statute is satisfied if the petitioner has by record or documentary evidence, or both, and in good faith has and claims a freehold estate in lands within the prescribed district within which he resides.

Two of the petitioners had purchased and acquired title

to a village lot some six months before signing the application. Something more than a month prior to that time they had entered into an executory contract for the sale of the same, conditioned upon the payment of the purchase price four months thereafter. Meantime they were to retain the title, and may still retain it for aught that we know. They, of course, were before the making of the contract, and afterwards continued to be, freeholders. Counsel suggests that such a transaction or a similar one might be made use of as a fraudulent device for the colorable qualification of petitioners. In such case the courts would, upon due proof, doubtless treat it accordingly, but there is no evidence that this is an instance of that kind. Another petitioner had purchased a lot subject to tax liens about a month before signing the petition. He gave no reason for making the purchase, but there is no evidence that it was colorable, that is, not a real purchase and acquisition of the title, and if it was such his motive is immaterial, but there is no evidence as to his motive. Another petitioner was the purported grantee in a deed executed some ten years previously, but not filed for record until about two months before signing. Her name seems to have been written in place of that of another as grantee, which latter had been erased. The erasure and substitution might have been innocent, and the court will not, without proof, presume it to have been fraudulent and criminal. As to several other deeds, it was shown that they were obtained shortly before signing, and recited nominal considerations only, and that some of them were acknowledged before a notary public who was also attorney for the applicant; and hence it is urged that the motive of the grantees was to qualify themselves as petitioners. This, however, is an inference or suspicion only, and not supported by proof. There is not shown any concert of action between the several grantees or grantors, nor any conspiracy between either and the applicant, nor is it shown that in any instance the title acquired was colorable only, and, as we have said, the law does not make the motive material, pro-

vided the character of the freehold is actual or *bona fide*, not pretended. Four of the petitioners were grantees by several deeds from one Hundley, who is alleged to have held the title as trustee of a partnership or corporation called the "Northwestern Cattle Company," but there is no competent proof of the assertion, and, if it be true, it does not appear whether the company authorized or ratified the transfer. The conveyances will not be presumed to have been breaches of trust. Counsel cites and relies on *Colglazier v. McClary & Martin*, 5 Neb. (Unof.) 332. We do not think that opinion is sufficient to warrant a reversal in this case. Under the statute as it now is the only question for the courts in this regard is whether the petitioners are in good faith and reality, as distinguished from colorable, freeholders.

The evidence does not convince us to the contrary, and we think that the judgment of the district court is right, and recommend that it be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

OTIS M. SMITH, APPELLEE, V. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED DECEMBER 18, 1907. No. 15,017.

1. **Telegraphs: NEGLIGENCE: EVIDENCE.** For a breach of its contract to transmit a message over its lines a telegraph company is liable for such damages as may reasonably be supposed to have been within the contemplation of both parties at the time the contract was made, and, such damages being dependent upon the knowledge of the parties at the time, proof thereof by evidence of facts and circumstances additional to such as are disclosed by the message itself is admissible.

2. **Appeal: INSTRUCTIONS: ASSIGNMENTS OF ERROR.** When a trial court

has instructed a jury generally upon the issues and law of a case, and there has been no request for different or additional instructions, an assignment of error in this court that "the court erred in failing to instruct the jury as to the law of the case" is too vague to call for consideration.

3. ———: EVIDENCE: ASSIGNMENTS OF ERROR. An assignment of error that "the court erred in the admission of incompetent evidence as to the measure of damages" is too vague to invoke the judgment of this court.

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

George H. Fearons, Francis A. Brogan and *France & France,* for apellant.

Gilbert Bros., contra.

AMES, C.

There seems to be no important dispute of fact in this case. The plaintiff was, and for some time had been, a grain dealer at the city of York, in this state; his business consisting principally in purchasing grain from farmers and shipping it to and selling it at distant markets in the east and south. These facts were well known to the defendant, the Western Union Telegraph Company, through its agent and operator at said city, who was and for some time had been accustomed to receive and transmit over the defendant's lines daily a large number of telegraph messages relating to the plaintiff's business, and between the latter and distant persons and firms with whom he transacted his business, and particularly between him and a commission house or firm named Ballard, Messmore & Company, located at the city of St. Louis, Missouri. The operator knew also that such messages were frequently written in cypher so as to be partly or wholly unintelligible to persons not familiar with or in possession of the "key" by which they were interpreted. On the 13th day of July the plaintiff received a cypher telegram from Ballard, Messmore & Company, which being interpreted

means that they would, upon his acceptance of their offer before 9:30 o'clock A. M. of the next day, pay him 93 cents a bushel for 10,000 bushels of a certain description of wheat, if actually delivered within a specified time. After having during the day of the receipt of the message supplied himself with the required grain, the plaintiff shortly before 8 o'clock on the following morning delivered to the operator for transmission a message in the following words: "York, Neb., 7-14-1905. Ballard, Messmore & Co., St. Louis, Mo. Accept detailed absolutely accursed, will run very near sample will all be accursed. O. M. Smith." This message, which was delivered to the operator in time for transmission and delivery on or before 9:30 o'clock on the same day, is interpreted as follows: "Accept 93 cents, 10,000 bushels No. 2 hard wheat. Will run very near sample. Will all be No. 2 hard wheat." It is not shown that the operator interpreted the message or was competent so to do, or that any one explained it to him, or that he knew or could have known its exact meaning or the subject to which it related, except by inference from his knowledge of the foregoing circumstances. He negligently delayed sending the message for several hours, and in the meantime the market price of wheat fell to the extent of 5½ cents a bushel, entailing a loss of that amount, or $550 in all, upon the plaintiff, to recover which as damages this action was brought. The answer, except that it admits the corporate character of the defendant and the receipt of the message for transmission, is a general denial. There is a reply, which, however, does not affect the issues as thus stated. There was a trial to a jury, and a verdict and judgment for the plaintiff, from which the defendant appealed.

The principal reliance of the defendant is upon the rule announced in *Hadley v. Baxendale,* 9 Exch. (Eng.) *341, which has been generally, if not universally, adopted in this country, both by the United States and state courts, and which is expressed in the following language: "Where two parties have made a contract, which one of them has

broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210; *French v. Ramge*, 2 Neb. 254. The rule, we think, is too well settled, both in this state and elsewhere, to permit of criticism or require discussion. Neither does there seem to be any doubt that in the absence of legislation it applies in its full extent and meaning to contracts, express or implied, for the transmission of messages over telegraph lines. *Western Union T. Co. v. Hall*, 124 U. S. 444; *Primrose v. Western Union T. Co.*, 154 U. S. 1; *Western Union T. Co. v. Coggin*, 68 Fed. 137; *Fergusson Bros. v. Anglo-American T. Co.*, 178 Pa. St. 377; *Candee v. Western Union T. Co.*, 34 Wis. 471. And the rule is held to apply with especial force in cases in which the message is in cypher, so as to be unintelligible to the company or its agents, and who are therefore presumably ignorant of its purport and purpose. *United States T. Co. v. Gildersleeve*, 29 Md. 232; *Western Union T. Co. v. Wilson*, 32 Fla. 527; *Cannon v. Western Union T. Co.*, 100 N. Car. 300. The purport of all these decisions, and of many others that might be cited, is that in an action against a telegraph company to recover damages for failure to transmit a message, unless the language of the message itself discloses that special loss or injury will probably result from such failure, or that fact is made known to the agents of the company by some other means, the measure of damages will not exceed the cost of transmission; otherwise, the requirement of the rule that only such damages are recoverable "as may reasonably be supposed to have been within the contemplation of both parties at the time they made the contract" will not be satisfied.

But it is equally well established by the authorities, or some of them, and deduced with logical necessity from principle and analogy, that knowledge of purport or purpose and of the nature of the loss or injury that will probably result from delay or error in transmission may be imparted to the company, so as to fix upon it a liability for substantial damages, as well by circumstances as by formal or explicit notice, or by the language of the message itself, and in the former case the fact, if it be one, that the message is wholly or partly cryptogram, is immaterial, except in so far as it may serve as an item of evidence for the proof or disproof of knowledge. 27 Am. & Eng. Ency. Law (2d ed.), 1063, and cases cited in note. This doctrine was fully adopted by this court in *Western Union T. Co. v. Church,* 3 Neb. (Unof.) 22, a case in some of its features not unlike this. The opinion, which cites and comments upon the authorities at considerable length, is reported as unofficial, but, inasmuch as the question was the sole vital point in the case and the decision was approved by the court as being "right," it cannot be regarded otherwise than as expressing the deliberate and unanimous judgment of the judges as well as that of the commissioners in this essential particular. Applying this rule to the case at bar, the above related facts, and some minor circumstances of like nature, but not recited, presented an issue of fact upon the question of knowledge appropriate for the determination of the jury, and constitute evidence sufficient to sustain their verdict in that respect. *Baldwin v. United States T. Co.,* 45 N. Y. 744.

There are two other assignments of error mentioned in the appellant's brief: "(2) The court erred in failing to instruct the jury as to the law of the case; (3) the court erred in admission of incompetent evidence as to the measure of damages." Both these assignments are too vague to invoke the judgment of this court. The trial judge did instruct generally upon the issues and law of the case. To several paragraphs of these instructions the defendant excepted, but no request for instructions was made on its

behalf, nor any objection that those given were not adequate to submit all the issues of fact to the jury under the court's view of the law applicable thereto. What specific instance or instances of admission of incompetent evidence occurred is not pointed out. The damages allowed appear to us to have been the probable and proximate result of the delay in the transmission of the message, and not excessive in amount.

We discover no error in the record, and recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

FIRST NATIONAL BANK, APPELLANT, V. BLAIR STATE BANK ET AL., APPELLEES.

FILED DECEMBER 18, 1907. No. 15,027.

Statute of Frauds: SALES: SUBSEQUENT PURCHASER. When a vendor of chattels by a contract voidable by the statute of frauds makes a subsequent valid sale or pledge and delivery of the same chattels to a third person, he thereby repudiates and avoids the former contract, and the subsequent purchaser may invoke the statute for his own protection.

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

Thomas Stapleton, James H. Van Dusen and *W. C. Lambert,* for appellant.

F. A. Brogan and *Herman Aye, contra.*

AMES, C.

In June, 1900, Mrs. L. F. Armstrong was the owner or in the possession of a cattle ranch and engaged in the live

stock business at Elm Creek in Buffalo county, in this state. On the 30th day of that month she executed two mortgages on parts of her herd, one which became the property of the First National Bank of Marengo, Iowa, and the other the property of the Blair State Bank of Blair, in this state. Her business seems to have been in the charge of her husband. At any rate, counsel for both parties to this suit treat him as her *alter ego* and impute his conduct to her unqualifiedly. On the morning of the 30th day of November, 1903, an officer and agent of the Marengo bank visited Elm Creek, and had there an interview with the husband with reference to the first mentioned indebtedness. At that time there were no cattle on the ranch answering to the description contained in the mortgage, but there were 40 odd head of cattle upon the premises and belonging to Mrs. Armstrong, which were described in the mortgage owned by the Blair bank, and 83 head belonging to her and not incumbered. It was agreed between Armstrong and the representative of the Marengo bank that the 83 head should be delivered to the latter, and be by him shipped to South Omaha and sold upon the market, and the proceeds of the sale applied toward the satisfaction of the indebtedness held by him. Elm Creek is situated on the line of the Union Pacific Railroad Company about 16 miles west of Kearney, but cars for the proposed shipment could not then be obtained at either place, and on the afternoon of the same day Delaney, the agent, returned east in quest of them. Nothing was paid in consideration of the agreement and none of the cattle were delivered to Delaney, and no written memorandum was made, but it was agreed that the cattle should remain in the custody of Mrs. Armstrong and be cared for by her husband, as had formerly been the custom, until they should be taken under the agreement. In the afternoon of the same day Armstrong visited Kearney. In the morning of that day the Blair bank had retained Robbins, an attorney at Kearney, and had instructed him in general

terms to look after their interests as the owner of the other mortgage and indebtedness belonging to it. Armstrong, upon his arrival in Kearney, met Robbins and told him in substance of the arrangement between the former and Delaney. The value of the cattle in the possession of the mortgagor and answering the description in the mortgage of the Blair bank was insufficient to satisfy the debt secured by that instrument, and Robbins asked Armstrong to make good the deficiency in part by delivering to him for his client the 83 head of the unincumbered cattle which were the subject of the agreement between Armstrong and Delaney. With this request Armstrong was reluctant to comply, mentioning as an obstacle to so doing that he did not intend to return at once to Elm Creek. To obviate this objection Robbins suggested that Armstrong write a note to his wife instructing her to deliver the animals, which he finally consented, or seemed to consent, to do, and he wrote and sealed a note, which he addressed to his wife and entrusted to Robbins for delivery. The contents of the note are not disclosed by the evidence, but Robbins gave it to an assistant named Swan, who on the next day, December 1, carried it to Elm Creek and delivered it to Mrs. Armstrong, and then, with the help of a hired man of the latter, drove the cattle from the pasture into a corral or feed lot, in which he fastened, fed and kept them for four or five days without objection from the Armstrongs, at the end of which time, and also without such objection, he shipped them to South Omaha, consigned to the Blair State Bank, where they were sold on the market, and the proceeds of the sale appropriated by that institution in part satisfaction of its demand. It does not appear that the Armstrongs or either of them have in any manner or at any time since the interview with Robbins been ignorant of, or have objected to, this transaction in any particular, but they appear to have silently acquiesced therein. This action was begun in May, 1904, and tried in April, 1906, upon an amended petition alleging a sale and delivery of the cattle to the

Marengo bank by L. F. Armstrong and a subsequent wrongful seizure and conversion of them by the Blair bank. The answer, besides a general denial, alleges ownership of the cattle in the defendant by reason of the transaction above set forth, and as a separate defense pleads the statute of frauds as against the alleged purchase by the plaintiff. There was a trial to a jury, and a directed verdict and judgment for the defendant, and the plaintiff appealed.

There is no contradiction in the evidence and no dispute of law, except as to the availability of the statute of frauds as a defense for the defendant bank. In other words, it is not disputed that the statute would have been a complete defense for Mrs. Armstrong to a similar action by the Marengo bank against her, or that in such an action she might have waived the statute, and that in that event the transaction between her husband and Delaney would properly have been adjudged sufficient to transfer the title to the Marengo bank, by which she would have been converted into a mere custodian of the cattle for it. Neither is it disputed that the protection of the statute extended, or would have extended, to any one who was by contract privy with her in title. This latter proposition seems also to have been set at rest by the previous decisions of this court. *Hansen v. Berthelsen,* 19 Neb. 433; *Dailey v. Kinsler,* 35 Neb. 835. The reason for this latter rule was, we think, concisely and correctly stated by the supreme court of Indiana in *Hunter v. Bales,* 24 Ind. 299, as follows: "The vendor makes his election to treat the prior verbal contract as void, whenever he makes a valid agreement of sale in the face of it; and that the intermediate purchaser, in such a case, is shielded by the statute, as well as the vendor." The principal, if not sole, ground of contention by counsel for the plaintiff, if we correctly understand him, is that Robbins' authority as agent and attorney for the defendant extended only to enforcing the mortgage of his client against the property described therein, and that the transaction by which he obtained possession of

the cattle in question, even if he had the consent thereto of the Armstrongs, which is denied, was in excess of his powers, and consequently ineffectual to transfer the title to the Blair bank. Granting such to have been the situation at the time he took possession of the animals, which we do not decide, that act was not one in its nature unlawful, but was one for the benefit and in furtherance of the interests of his client, which the latter was at liberty to, and which it in fact did, ratify and confirm before the plaintiff made any attempt to intervene or effectually to impeach it. As respects Armstrong, we have the uncontradicted testimony of Robbins that at the time of the interview in Kearney the former consented to turn over the cattle to him for the satisfaction of his client, and that in connection with such consent he wrote and addressed the note to his wife, in apparent compliance with which her employee assisted in making the transfer, to which she or her husband never made objection, though both had ample opportunity so to do before the cattle were shipped away. The evidence, to our minds, appears so conclusively in favor of the defendant in this respect that, in our opinion, a verdict in favor of the plaintiff could not be permitted to stand.

It is immaterial whether the transaction was a pledge or a sale, or whether it was consummated by the delivery to Swan or by subsequent ratification and acquiescence, or what was the scope of Robbins' powers as agent or attorney. In any event, the title passed before the plaintiff intervened, and the defendant was and is rightfully and lawfully in the possession of the cattle and of the proceeds of their sale. When a vendor of chattels by a contract of sale which is voidable by the statute of frauds makes a sale or pledge and delivery of them to a third person, he thereby repudiates and avoids the former contract, and the subsequent purchaser may invoke the statute for his own protection. *Hunter v. Bales, supra; Petty v. Petty*, 4 Mon. (Ky.) 215.

We do not consider that *Rickards v. Cunningham*, 10

Neb. 417, and *Cresswell v. McCaig*, 11 Neb. 222, cited by the plaintiff, are in point. In both of these cases the party seeking the protection of the statute was a creditor claiming adversely to both the vendor and the vendee. It is true that the defense of the statute of frauds is a personal one, but it is so in a sense somewhat different from that in which the term is used in some other instances, as, for example, the case of usury. It is free from the same degree or kind of moral obligation as that which affects the latter, and a third person, who by a voluntary and valid contract with the vendor succeeds to the title and possession of the latter, succeeds also to his right to protect that title against a previous void or voidable agreement.

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

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA V. ISAAC R. ALTER ET AL.

FILED DECEMBER 18, 1907. No. 15,369.

Pleading: SUFFICIENCY. When, in an action to quiet title, the petition sets forth the adverse title or interest in general terms, but without especial or particular description, the pleading is not for that reason obnoxious to a general demurrer, but the remedy of the defendant is a motion to require the petition to be made more definite and certain.

ORIGINAL action by the state to quiet title to certain lands occupied by the soldiers and sailors home at Grand Island. Defendants demurred. *Demurrer overruled. Decree for plaintiff.*

William T. Thompson, Attorney General, and *W. B. Rose*, for plaintiff.

R. R. Horth, contra.

AMES, C.

This is an action begun originally in this court for the purpose of procuring a decree quieting title in the state to a part of the site of the soldiers and sailors home at Grand Island as against certain persons who are grantors in deeds conveying the premises to the state for the purposes of such site. The cause was submitted upon a general demurrer to the petition without brief or oral argument on behalf of the defendants, so that we are left to conjecture what ground there may be, if any, for the former, which we are unable to do. The petition sets forth a deed executed jointly by the defendants, and reciting that "for and in consideration of the sum of one dollar and the location of the soldiers and sailors home as per an act of the legislature of the state of Nebraska entitled 'An act to establish and maintain a soldiers and sailors home,' in hand paid by the state of Nebraska" (the grantors) "do hereby grant, bargain, sell, convey and confirm unto the state of Nebraska" the premises in question. The instrument also contains the covenants against incumbrances and of title and quiet possession and enjoyment usually found in deeds of general warranty. The petition further alleges the due execution and delivery of the deed, and that it was filed for record on April 1, 1887, and that on the 30th day of March, in the same year, the state went into possession of the premises, and has remained in the possession of the same thence continuously until the commencement of this action, a period of more than ten years, during which time it has located, erected and maintained buildings thereon for the uses and purposes of a soldiers and sailors home, pursuant to said act, and continues so to maintain and use the same. But it is further alleged that the defendants falsely claim and pretend to have some right, title or interest in or to the premises adverse to the right, title or interest of the plaintiff, the nature of which is to the plaintiff unknown, but which is effectual as a cloud upon the plaintiff's title and against which it

is prayed that the plaintiff's title may be quieted by a decree of this court.

We think it unnecessary to discuss the general rules of law relative to the construction and effect of deeds of conveyance similar in form to that above described. The act of the legislature recited in the deed in question is, by the operation of a familiar rule of law, a part of the instrument itself, and that act provides that location of the institution at Grand Island shall be upon the condition that a site therefor shall be provided, which "shall be donated and conveyed to the state of Nebraska in fee simple." There is no expression known to the law that is more unequivocal or completely free from any sort or kind of ambiguity or doubt than the phrase "fee simple." It means an absolute title or estate in lands wholly unqualified by any reversion, reservation, condition, or limitation or possibility of any such thing, present or future, or precedent or subsequent, and it follows of necessity that, when a grant is made expressly pursuant to and in compliance with an act of the legislature requiring the creation of such a title or estate as a condition to its validity for any purpose, the grantor is estopped to allege anything in contravention of the legislative intent or in diminution of the estate described by the statute.

The attorney general has suggested that possibly the ground of the objection is that the petition does not set forth specifically or particularly a description of the adverse title or interest claimed by the defendants. We are not surprised that he confesses his own incompetency so to do, and strongly suspect that the defendants are afflicted with the same disability. It was formerly held that, in the absence of such a description, a petition to quiet title does not disclose a cause of action, because the court cannot determine from the face of the pleading that the defendant is asserting any claim sufficiently tangible to injure the plaintiff or cast a cloud upon his title. *McDonald v. Early*, 15 Neb. 63. If the petition is defective in this respect, the proper method of attack was by motion

to require it to be made more definite and certain, which has been waived by the filing of a general demurrer. *Fritz v. Grosnicklaus*, 20 Neb. 413. We think this latter decision must be regarded as overruling the former, in so far as the former holds that a petition omitting a description of the adverse claim or title is for that reason obnoxious to a general demurrer. A defendant in such a case has two sufficient means of protection; one is the motion mentioned, and the other, if he has made no claim at all and is therefore vexatiously sued, to file a disclaimer and be awarded his costs.

We recommend, therefore, that the demurrer be overruled.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the demurrer is overruled; and the parties electing to not plead further, judgment is entered for plaintiff as prayed.

JUDGMENT ACCORDINGLY.

CHARLES W. SANFORD ET AL., EXECUTORS, APPELLEES, V. FRANK A. LUNDQUIST ET AL., APPELLANTS.*

FILED DECEMBER 18, 1907. No. 14,921.

1. **Usury**: COMPOUND INTEREST. A contract to pay compound interest is not usurious, and will be enforced; but not in excess of the amount of simple interest computed at the maximum rate allowed by law.

2. ———: INTEREST ON INTEREST. Where the original obligation bears interest at the maximum rate allowed by law, there is no consideration for an agreement to pay interest upon interest computed for a time past and thus retrospective in its operation; but including such interest upon interest in a renewal note does not make the same usurious. It is enforceable for the amount thereof, less the interest upon interest included therein.

* Rehearing allowed. See opinion, p. 414, *post*.

3. Interest: PAROL AGREEMENT. Simple interest may, when it becomes due, be added to and made a part of the principal by including the same in a renewal note, or by a separate instrument given for that purpose, and thus be made to bear interest; but a mere oral promise to pay interest upon interest so accrued for an indefinite forbearance is not enforceable.

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

Simpson & Good and *Berge, Morning & Ledwith,* for appellants.

M. B. Reese and *H. A. Reese, contra.*

CALKINS, C.

This was an action to foreclose a mortgage, and the defense was usury. There were several causes of action stated in the petition upon different instruments; but, as the facts are similar, it will only be necessary to state in detail those from which arose the first cause of action. On the 16th day of March, 1885, the defendant obtained from the plaintiff a loan in the sum of $450, for which he executed his promissory note for that amount, payable in five years from date, with interest at 10 per cent. per annum. Forty-five dollars, the first year's interest, was deducted from the loan at the time it was made; and four notes for $45 each, maturing, respectively, on the 1st days of January, 1886, 1887, 1888 and 1889, were executed and delivered for the subsequent instalments of interest. These interest notes were drawn to bear interest after maturity. On March 14, 1900, three of the coupon notes had been paid; and the defendant on that date executed in renewal of the principal and interest unpaid his promissory note for the sum of $1,295.25, payable October 1, 1900, with interest at 10 per cent. per annum. The amount of this note was ascertained by compounding the interest unpaid on the original note annually. The mortgage sought to be foreclosed secured these notes. There was a trial upon the issues, and a finding by the judge of the

district court that, when interest became due upon each of the items making up the first and second causes of action, the plaintiff and defendant entered into an agreement that the plaintiff should carry such interest as separate loans, and should receive interest thereon at the rate of 10 per cent. per annum. From a decree upon this finding for the full amount the defendants appeal, contending, first, that the plaintiff was not entitled to include in the renewal notes any interest in a sum in excess of 10 per cent. simple interest upon the principal of the original note; and, second, that the renewal notes, having been taken for a sum in excess of the amount due on the original notes figured as simple interest, were usurious, and that the plaintiff is not, therefore, entitled to recover any interest on the renewal notes, being limited to the amount due on the original notes at the time the renewals were made.

1. A contract to compound interest on an obligation bearing less than the maximum rate is valid, if, when so computed, the interest does not exceed in amount simple interest computed at the maximum rate. *Richardson v. Campbell,* 34 Neb. 181. Such contract will not, however, be enforced beyond the limit of the highest rate allowed by law computed as simple interest. *Mathews v. Toogood,* 23 Neb. 536; *Rose v. Munford,* 36 Neb. 148. In neither case is the contract usurious, nor subject to the penalties of the statute against contracting for or receiving interest in excess of the amount limited by law. *Hager v. Blake,* 16 Neb. 12; *Rose v. Munford, supra; Lewis Investment Co. v. Boyd,* 48 Neb. 604. While the rule against allowing compound interest in excess of the highest legal rate computed as simple interest is not universal, it is general, and has been fully adopted in this state. It does not rest upon the ground that the agreement is usurious, but rather upon the ground that it is against public policy. These decisions do not declare the instruments subject to the penalties of usury. They simply refuse to enforce the stipulation for interest upon interest.

2. It being plain that the stipulation in the original obligation for compound interest did not make the contract usurious, it remains to consider the effect of including in the renewal notes compound interest. If a contract to pay compound interest before it has accrued is not usurious, it would seem that a contract to pay it after it is earned could hardly be subject to that vice. Some jurisdictions that refuse to enforce an agreement in advance to pay compound interest treat agreements made after it has accrued as valid. In these it is said that the borrower is under a moral obligation to pay interest on the interest which he failed to pay when it became due, and therefore, if he chooses to recognize this obligation and to pay such interest on interest or to give a new note of which it is a part of the consideration, that the transaction is not usurious, nor without sufficient consideration to support it. *Telford v. Garrels,* 132 Ill. 550; *Gilmore v. Bissell,* 124 Ill. 488. While we are satisfied that such inclusion of interest upon interest does not make a contract usurious, we cannot agree to the conclusion that there is a sufficient consideration for it. The rule against enforcing a contract by the debtor to pay compound interest in excess of the amount of simple interest computed at the maximum legal rate is founded upon the same reasons as are all usury laws. It is assumed that the debtor and creditor do not stand upon equal terms, and that it is necessary and proper to protect the former, as well from the consequences of his own imprudence and shiftlessness as from the oppression and rapacity of the latter. Whether the reasons for the rule are good, or the necessity for its adoption is real, we do not consider, for it is too firmly established to be changed, except by legislative enactment. Being the settled rule of law in this state, it should be so construed as to fulfil its reason and effectuate its purpose. It seems to us illogical to say that the debtor is under a moral obligation to perform a contract which the court has absolved him from on the ground that it savors of usury and is

against public policy. Every consideration that has led this court to adopt the rule in cases where the interest is contracted for in advance applies with equal or greater force where the agreement is made retrospectively. It was said by Mr. Chancellor Kent in *Van Benschooten v. Lawson,* 6 Johns. Ch. (N. Y.) *313, in speaking of such an agreement: "It is equally objectionable, as an agreement made at the time of the original contract or loan, that compound interest should begin and run upon the lawful interest the moment it falls due, whether payable yearly, half yearly, or quarterly; and such agreements are held to be oppressive. To exact from the debtor interest on the previous arrears of interest, without a previous special and particular agreement for that purpose, is inadmissible. It has no valid basis, nor any acknowledged legal consideration, on which it can rest, if the previous agreement, made at or after the time the interest became due, be wanting. It is the agreement, and not the law, nor the delay of payment, that will turn interest into principal. If the creditor was permitted to exact from the debtor a stipulation to pay interest on arrears of interest then due, it would lead to great and inevitable abuse. It would, perhaps, be less mischievous, because the parties would stand upon more equal terms, to allow of such a stipulation for compound interest, when the original contract is about to be made. The parties are, then, independent of each other; but, in the other case, the debtor is comparatively dependent, and probably distressed; and the creditor exacts the stipulation, under the evident advantage of power and superiority. The agreement, on the part of the defendant, to pay compound interest retrospectively, does not alter the case, for the maxim, *'volenti non fit injuria,'* does not apply in these cases." This case was followed in *Young v. Hill,* 67 N. Y. 162, 23 Am. Rep. 99, and the rule there announced is the one most consistent with the principles already adopted by this court for the enforcement of contracts for compound interest.

3. The plaintiff might have protected himself by insisting upon the payment of interest when due, taking renewal notes or separate obligations for the unpaid interest, for all the cases agree that a loan is not usurious because simple interest earned at the time of the renewal is included in the new principal (*Keiser v. Decker,* 29 Neb. 92), and it was doubtless in view of the application of this rule that the district judge made the finding that, when the interest payments became due upon each of the items making up the first and second causes of action, the plaintiff and defendant entered into an agreement that the plaintiff should carry said accrued interest as separate loans, and should receive thereon interest at the rate of 10 per cent. per annum. We have examined the record, and do not think the evidence sustains this finding. At the most, the alleged agreement amounted to nothing more than an oral promise of the defendant to pay interest upon interest for an indefinite forbearance. There was no time of extension agreed upon, nor any promise made by the plaintiff which would have prevented him from beginning an action at any time to recover the interest due.

We therefore conclude that the amount of the renewal notes in excess of the principal and simple interest computed thereon at the rate of 10 per cent. per annum was without consideration, but that they are valid obligations for the amount of principal and interest which the plaintiff was entitled to recover at the date of their execution, and that there is now due to the plaintiff that amount with 10 per cent. interest from the date of the renewal to the date of the decree.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a decree in accordance with this opinion.

JACKSON and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, this cause is reversed and remanded for further proceedings in accordance with the above opinion.

REVERSED.

The following opinion on rehearing was filed October 22, 1908. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Usury.** The demanding of interest in advance, even though the highest rate of interest allowed by law is being charged, is not usury in this state, as such a course is permitted by our statute. Comp. St. 1907, ch. 44, sec. 1.
2. **Parol Contract:** CONSIDERATION. An oral agreement for forbearance, and giving time for the payment of money then due, is a sufficient consideration to support an agreement on the part of the debtor to pay interest thereon.
3. **Interest, Compounding.** Where a principal note bears the maximum rate of interest allowed by statute, interest upon interest cannot be stipulated for at the time of the loan or contract, but if, after the interest is due, an agreement is made that it shall carry interest, such an agreement is valid and will be enforced.
4. ———. And in such a case, the fact that the principal note bears the maximum rate of interest allowed by law, and that such subsequent agreement to pay interest upon interest past due also stipulates for the payment of such maximum rate of interest, is immaterial.
5. **Evidence** examined, and *held* to sustain the findings of the district court.

FAWCETT, C.

Our former opinion, *ante,* p. 408, contains a very full and accurate statement of the issues involved in this case. Defendants base their claim for reversal on the following grounds: "(1) That the alleged agreements between the debtor and creditor, after the interest became due, are not established by the evidence, and, if they were, they did not warrant the inclusion of this compound interest in the renewals. (2) The mortgages are usurious, but, even if they are not, the compound interest is not collectible, since the original obligations already drew the highest rate of interest allowed by law."

It is insisted by the defendants that the evidence does not show that, when the interest payments became due from time to time, the parties agreed that the past due instalments of interest should be treated as principal and thereafter draw interest at the same rate as the principal note. The trial court found against defendants on this proposition, and we are unable to say that such finding is not supported by the evidence. On the trial, defendants called Mr. Charles W. Sanford, one of the plaintiffs, as their witness. Mr. Sanford testified that he was the son of Whitfield Sanford, the payee and mortgagee named in the notes and mortgages in controversy; that he attended to substantially all of the business of his father, Whitfield Sanford; that, when defendant Lundquist was notified from time to time of the maturity of the interest coupons, he "would come in—he would come up usually about that time to see me. If he could pay me, then, whatever he could pay was paid and indorsed upon the note. If he could not pay the interest, he would ask me if I could not carry it the same as the other, and promise to pay interest and treat it as a separate loan"; that the addition of the interest, and compounding it, was at defendant's request, "rather than to pay the interest that was due"; that no interest was ever charged on anything, or demanded on any part of the transaction in controversy, which was not due at the time it was charged, "due and past due"; that no agreement was ever made between the parties that defendants should pay any more than 10 per cent. on the amount due at the end of each year, and that no more than that sum was ever charged. Mr. Lundquist in some portions of his testimony denied these statements made by Mr. Sanford, but in other portions of his testimony corroborated him. He testified: "Q. When you would come and tell him you could not pay the interest, what would he say? A. He said he would extend it and make new notes. Q. And add the interest? A. Yes." Regardless of the fact that defendants, by placing Mr. Sanford upon the stand as their witness, vouched for his veracity,

and are bound by his testimony, he is corroborated by other facts and circumstances in the case. An attempt is made to show that Mr. Lundquist is a native of Sweden, and not well versed in the English language; but from his own testimony we gather that he moved to Saunders county in 1875, and has lived there ever since; that his son Frank, a man 29 years of age at the time of the trial in the district court, has always lived at home; that he is educated in English, in fact "has been all through the county school"; that defendant did not keep anything from him or any one in the family; that he talked about this business in the family. "Q. You did go on and talk, all of you, about it? A. Yes, sir. Q. You all knew about it? A. Yes, sir." He testified further that, when some of the mortgages in controversy were drawn, Mr. Sanford prepared them, and he took them home for the purpose of having his wife sign them, and the next day he and his wife went to Valparaiso and executed the mortgage, and that the son Frank, above referred to, went with them. It further appears from an examination of exhibit 20 that on April 2, 1903, Mr. Lundquist wrote a letter to Mr. Whitfield Sanford, in which he uses this language: "According to Charles' statement the mortgage is $9,552, but you should at least throw off the $552 for the big interest I have been paying, for I know of no one else who has been charging 10 per cent. on farm mortgages." This letter shows that at that time the old gentleman knew the amount which plaintiffs were demanding, yet no claim is made that he had been in any manner fraudulently or deceitfully dealt with, or that the amount claimed was not correct; nor is any claim made that he had ever paid any usury, or that he was entitled to deductions of any kind. He simply asked Mr. Sanford to "throw off" the $552, in consideration of the fact that he had been paying 10 per cent. interest. This testimony and these facts and circumstances, together with the fact that he deliberately and without any complaint or claim of injustice executed the notes and mortgages in controversy, so strongly cor-

roborate the testimony of Mr. Sanford that we cannot say that the district court erred in finding that, "when the annual interest payment became due upon each of the items making up the first and second causes of action, the defendant Frank A. Lundquist and Charles W. Sanford, as agent for Whitfield Sanford, entered into an agreement whereby the said Sanford should receive 10 per cent. interest annually in advance upon each of said interest payments then due, and at the request of said defendant such overdue interest payments were carried by Sanford for him as separate loans, and such compound interest was charged by the said Sanford annually by agreement with the said Frank A. Lundquist, and was included in the renewals set forth in the first and second causes of action; that the said Whitfield Sanford, in fact, carried said interest loans under said agreement until they were merged in the notes and mortgages set forth in plaintiff's first and second causes of action." We must therefore hold that, as to the questions of fact involved, the findings of the district court are sustained by the evidence.

Under the facts as thus found there is, we concede, some conflict in the authorities, but we think the overwhelming weight of authority sustains the conclusion of law reached by the trial court that the notes and mortgages in controversy were valid contracts which plaintiffs were entitled to have enforced. In *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) *13, and *Van Benschooten v. Lawson*, 6 Johns. Ch. (N. Y.) *313, that eminent jurist, Chancellor Kent, announced a contrary doctrine, but we think an examination of later decisions in all the states clearly indicates that, had it not been for the eminence of Chancellor Kent, his holding in those cases would have been entirely without subsequent support. Notwithstanding his eminence, the doctrine announced by him has been repudiated in substantially every court of last resort in the land. The application of the principle announced by Mr. Chancellor Kent sustains our former opinion in this case; but a care-

ful reconsideration of the question convinces us that the rule laid down by the learned chancellor goes too far, and that the better rule is the one now generally applied that interest upon interest cannot be stipulated for at the time of the loan or contract, but if, after the interest is due, an agreement is made that it shall carry interest, such an agreement is valid and should be enforced.

It is insisted that *Mathews v. Toogood,* 23 Neb. 536, sustains defendants' contention; but we do not so understand that case. All that that case decides is that an agreement in advance to pay interest upon interest coupons after they are due, where the principal note draws the maximum interest, will not be enforced. That is not this case. The rule announced in that case is in harmony with the holdings of many eminent courts, and is in entire harmony with our holding in this case. That an agreement to pay compound interest does not render the contract usurious is well settled in this as well as in other courts. *Weyrich v. Hobelman,* 14 Neb. 432; *Rose v. Munford,* 36 Neb. 148; *Steen v. Stretch,* 50 Neb. 572; *Otis v. Lindsey,* 10 Me. 315; *Hale v. Hale,* 1 Cold. (Tenn.) 233. In the last case, the court say: "There can be no plainer legal proposition stated, than that compound interest is not usury. In the language of the court, in *Kellogg v. Hickok,* 1 Wend. (N. Y.) 521, 'compound interest has nothing to do with the question of usury.'" In *Fobes & Adams v. Canfield,* 3 Ohio, 17, in a case similar to the one at bar, the court say: "A sum of money due for interest is as justly and fairly due as for any other consideration, and an agreement to pay interest upon it after it is due cannot be deemed usurious. * * * But if, when the interest is due and payable, and constitutes a then subsisting debt, the debtor ask to retain it, and pay interest upon the amount at the legal rate of interest, the agreement is not usurious. It is nothing more than an agreement to pay legal interest for the forbearance of enforcing the collection of a debt then actually due and demandable." In *Telford v. Garrels,* 132 Ill. 550, it is said: "Where a debtor has agreed to pay

annual interest, and upon a settlement with his creditor consents to allow interest on such annual interest not paid when due, the transaction will not be unlawful or usurious." In *McGovern v. Union Mutual Life Ins. Co.*, 109 Ill. 151, the court say: "When interest upon a note is past due, no reason is perceived which will prevent the holder from taking a new note from the debtor for principal and interest, and make this sum bear the legal rate of interest. Such a transaction is in all respects legitimate." In *Paulling v. Creigh's Adm'rs*, 54 Ala. 646, the court say: "As a mere incident, interest on interest is not allowed or recoverable. A promise to pay it is not, however, usurious or illegal, or without consideration, and the weight of authority is, perhaps, in favor of the validity of the promise to pay it, at law, whether made at or subsequent to the original contract. 1 Am. Lead. Cases, 650. The claim to such interest is usually regarded by all the authorities as founded in justice, and a note or other security given for it, after it has accrued, will be sustained and enforced. Ib. 561. Accounts may be legally settled on the basis of such interest, and an express promise to pay the balance is valid and binding. Ib. In the case of *Eslava v. Lepretre*, 21 Ala. 504, 530, it is said: 'When interest has once accrued due, it becomes a debt. There is no longer, therefore, any objection to an agreement *inter partes*, that it shall be considered principal, and thenceforth carry interest.'" In *Gilmore v. Bissell*, 124 Ill. 488, the court say: "The addition of this amount (the interest on the past due interest) to the debt, and the agreement to pay it, it is insisted, rendered the transaction usurious. We do not concur in this view. The mortgagors had agreed to pay the interest on the mortgage debt annually, and it was their duty to observe that agreement; but they had failed to pay as the interest each year become due. When the time, however, came to renew the debt, the mortgagors had the right, if they saw proper, to redeem their agreement and pay interest on the interest; and their agreement to pay that interest was not illegal, nor did it render the

transaction usurious. What was done was but the performance of a contract made by the parties, which they had the right to do. If authority was needed to sustain the view of the circuit and appellate courts, *Haworth v. Huling,* 87 Ill. 23, is conclusive of the question made." In *Haworth v. Huling,* referred to above, the court say: "The point made, that complainant was allowed compound interest, is not well taken. The principal debtor had agreed to pay annual interest, and on the settlement made July 11, 1865, there may have been interest allowed on annual interest maturing on the notes, and not paid when due, but that is not certain under the evidence. But, if there was, the transaction was not illegal. The mortgagor could pay interest on interest previously due on his indebtedness under his contract, if he chose." In *Gunn v. Head,* 21 Mo. 432, the court say: "The court was evidently mistaken in the notion that interest cannot bear interest. Parties cannot prospectively agree that interest may bear interest; but, after interest has accrued and is due, it may be agreed that such interest may bear interest." In Perley, Law of Interest (1893), p. 158, it is said: "If an agreement is made to convert interest already due and payable into principal, or if accounts between parties are settled by rests, and therefore in effect upon the principle of compound interest, it is allowed." In *Craig v. McCulloch,* 20 W. Va., 148, the court say: "When by the terms of an obligation interest is payable at stated periods, interest upon interest from the time it becomes due only gives the creditor the usual equivalent for the nonpayment of the interest at the time agreed upon; and an agreement to pay such interest simply secures to the creditor that remuneration which he could obtain by collecting such interest and loaning it to another party. In some states a recovery may be had of interest upon interest under such circumstances without a special contract to that effect. * * * With us this is not allowed. But it is definitely settled in Virginia and this state that an agreement to pay interest upon interest is valid if made after the inter-

est which is to bear interest has become due. * * * This rule of law is, we think, sound and reasonable. Money due for interest is as justly and fairly due as for any other consideration, and an agreement to pay interest upon it, made after it is due, cannot be regarded as unreasonable or inequitable. When the interest has become due it is a debt which the creditor has the right to collect, and an action lies to recover it, although the debt on which said interest accrued may not then be due. * * * If instead of paying it the debtor asks to retain it and pay interest on it as any other debt, there can be no reasonable objection to his being permitted to do so. It is nothing more than an agreement to pay interest for the forbearance of enforcing the collection of a debt then actually due and demandable. * * * The forbearance and giving time for the payment of money then due is a sufficient consideration to support the agreement. * * * The same reason which justifies the making of such an agreement for converting interest into principal once will justify the repetition of such agreements from time to time, as often as interest shall become due by the terms of the original contract out of which the interest arises, and the right to make such an agreement is not limited to converting interest into principal once upon the same debt." To the same effect as above are the holdings in Oregon, Iowa, Connecticut, Georgia, Illinois, Maine, Michigan, Virginia, West Virginia, Kentucky, Dakota, Massachusetts, Missouri, Alabama, Ohio, Pennsylvania, South Carolina, Tennessee, and the federal courts. In fact, our attention has not been called to any recent case holding to the contrary.

In addition to what has been said, we think section 1, ch. 44, Comp. St. 1907, settles this case adversely to the contention of defendants: "Any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest so agreed upon may be taken yearly, or for any shorter period, or in advance, if so expressly agreed." In

the case at bar, the principal note was clearly within the above provision of the statute. The interest upon interest in each instance was agreed to be paid by the defendants in consideration of the forbearance on the part of his creditor, and the forbearance on the part of the creditor was a good consideration for the agreement on the part of the debtor to pay the interest upon interest. Some point has been made by defendants that the agreements from time to time to pay interest were of no force and effect because they were not in writing. This contention is without merit for two reasons: First, an oral agreement to forbear collection of a debt then due will support an agreement on the part of the debtor to pay interest; second, in the case at bar the oral agreements were subsequently reduced to writing and signed and acknowledged by the defendants; so that, even if the rule contended for by defendants were sound, it could not apply in this case.

Another point is made that, even if the agreements were made as claimed, they were void, because the effect was to impose an additional burden on the homestead without the wife's consent. This contention is also without merit, for the reason that the notes and mortgages were signed by both husband and wife, and duly acknowledged by them under circumstances which show no restraint or coercion on the part of the plaintiffs. In fact, the record nowhere shows any attempt at fraud, coercion, or deception on plaintiffs' part.

The demanding of interest in advance, even though the highest rate allowed by law is being charged, is not usury in this state, as such a course is permitted by our statute. When money is due from A to B, and B, at the request of A, forbears enforcement of payment under an agreement that A will pay B interest during the period of such forbearance, it is clear that such forbearance on the part of B is a sufficient consideration for A's promise to pay interest. If such forbearance is a sufficient consideration for A's promise to pay interest, then, clearly, the contract is not against public policy or in any sense inequitable.

The finding of the district court is that the agreement between Lundquist and Sanford for the payment of interest upon interest was, in each instance made, not when the loan was originally made, but when the several payments of interest became due and payable. Being due and payable, Sanford had a perfect right to enforce payment of the interest as a liability on the part of Lundquist separate and apart from the principal debt. If Lundquist had paid this interest, Sanford could have loaned it elsewhere, or, if Lundquist had paid the interest one minute, there can be no doubt but that he could have borrowed it again the next minute from Sanford, and have given Sanford his notes therefor, bearing interest at 10 per cent. At the time the notes in suit were made Lundquist was owing Sanford certain sums of money representing the principal sum originally borrowed. He was also owing Sanford large sums of money for interest upon that principal sum, which it must be conceded were enforceable. The sum due for interest had been due for a considerable time; some of it for long enough that, unless it had been in some manner waived, Lundquist could probably have pleaded the statute of limitations in bar. Sanford had forborne enforcing payment of those instalments of interest relying upon Lundquist's oral agreement to pay 10 per cent. interest on such past due instalments of interest. It must be conceded that such oral agreement to pay interest for the forbearance of Sanford at least created a moral obligation to make the payment as agreed, and we have never understood that it is unlawful, or against public policy, for a party to reduce to writing and legally bind himself to make good a moral obligation previously incurred. We think the rule here adopted in harmony with the holdings of the many eminent courts above cited is more in the interest of the debtor than the rule announced by Chancellor Kent. To adopt the rule laid down by the learned chancellor would close the door of leniency and make the creditor insistent upon prompt payment of interest on the day of its maturity, regardless of the immediate necessities

of his debtor; for it is a rare case where a money lender will grant forbearance without recompense.

Our present holding that interest upon interest cannot be stipulated for at the time of the loan or contract is not intended to be applied to cases where such stipulation for compound interest will not result in making such interest when so compounded exceed the maximum rate. As to such cases our former holdings are adhered to.

We recommend that the former judgment of this court be vacated and set aside, and that the judgment of the district court be in all things affirmed.

ROOT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated and set aside, and the judgment of the district court is in all things affirmed.

JUDGMENT ACCORDINGLY.

REESE, J., not sitting.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND, APPELLANT.

FILED DECEMBER 18, 1907. No. 15,003.

1. **Waters: IRRIGATION DITCHES: EXEMPTIONS.** The proviso in section 1, art. III ch. 93*a*, Comp. St. 1905, that "where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall be exempt from the operation of this law," is for the benefit and protection of the owner of such land, as well as for the owners of such irrigation ditches.

2. ———: **IRRIGATION DISTRICTS: EXEMPTIONS.** In the organization of an irrigation district, the judgment of the county board as to those matters which are by the statute committed to its consideration, investigation and determination may not be collaterally

attacked; but the question whether land is under a ditch already constructed of sufficient capacity to water the same is not by the statute left to the adjudication of the county board. The proviso in section 1, art. III, ch. 93*a*, Comp. St. 1907, expressly exempts such lands from the operation of the law.

3. ———: ———: ———. The provisions of sections 46 to 53, inclusive, art. III, ch. 93*a*, Comp. St. 1907, are not applicable to a case where land is, at the time of the organization of the irrigation district, under a ditch already constructed of sufficient capacity to water the same, such land being expressly exempted from the operation of said law by the proviso in section 1 of said article III.

4. Taxation: TENDER: INTEREST. Where a taxpayer makes a sufficient tender of payment of his general taxes, and the treasurer refuses to receive the same because said taxpayer will not also pay an invalid special tax, interest should not be charged the taxpayer in a suit brought under the scavenger law.

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

Hainer & Smith, Hoagland & Hoagland, J. G. Beeler and *A. Muldoon,* for appellant.

L. E. Roach, contra.

CALKINS, C.

The city of North Platte is situated between the North and South Platte rivers, a short distance west of their confluence. For a distance of some 25 miles west of North Platte the two streams flow parallel at about three to five miles apart. In 1883 the North Platte Irrigation & Land Company began the construction of a ditch to water the land located east of their intake, which was on the North Platte river, about 21 miles west of North Platte, and on May 1, 1884, they had completed their main ditch for this distance. The ditch was constructed through the south half of section 25, township 14, range 31 west, a tract lying a short distance northwest of the city of North Platte, and on the 21st day of July, in 1888, the said corporation conveyed to M. W. Walsh, the

answering defendant herein, the said south half of this section. The grantors reserved from this conveyance a strip of land of the width necessary for the right of way of their canal, and for enlarging and repairing the same, and a right of way across said lands for lateral ditches when the same became necessary; but no right to use the water from the ditch was expressly granted by the deed. After the enactment of the irrigation statute of 1889 (laws 1889, ch. 68), the said company seems to have posted and filed the notice of appropriation required by that law. Upon the taking effect of the act of 1895 (laws 1895, ch. 69, Comp. St. 1895, ch. 93*a*, art. II), and on the 2d day of July, 1895, the company filed a claim with the secretary of the state board of irrigation for the appropriation of water to irrigate the lands in question amongst other lands, which was afterwards, and on the 6th day of September, 1898, allowed. In 1896 the Suburban Irrigation District was formed under the provisions of ch. 70, laws of 1895 (Comp. St. 1895, ch. 93*a*, art. III), and there was included in its boundaries the said south half of section 25, township 14, range 31. The order of the county board establishing such district was made on the 2d day of May, 1896, and, the district having issued bonds, a petition was afterwards filed in the district court for a judicial examination of the proceedings for the organization of said district under the provisions of sections 59 to 63, inclusive, of said chapter; and a decree was rendered approving said proceedings, and declaring them legal in all respects, on the 5th day of August, 1896. The directors of said Suburban Irrigation District proceeded to levy taxes upon the said land, which were certified to the county treasurer, so that there were charged against the same upon the tax list of the county treasurer for the years 1896 to 1904, inclusive, taxes amounting to about the sum of $1,700, in addition to the taxes levied against said land for general purposes. The defendant Walsh had tendered payment of the general state and county taxes, but the county treasurer had re-

fused to receive the same, unless he would also pay the taxes levied by the irrigation district. After the enactment of the statute of 1903 (Comp. St. 1903, ch. 77, art. IX), commonly known as the "scavenger law," these taxes being unpaid, this action was begun to enforce their collection. The defendant Walsh answered, alleging the tender of the state and county taxes; that his land was under the canal of the North Platte Irrigation & Land Company; and that said canal was constructed before the passage of the act of 1903, and was of sufficient capacity to irrigate said land. He also challenged the regularity of the proceedings organizing the Suburban Irrigation District. The irrigation district was thereupon made party, and issues framed between it and the defendant Walsh. Upon a trial of these issues, the court found that the Suburban Irrigation District was duly organized, that the taxes levied by it were a valid lien, and rendered judgment for the same and for the principal of the state and county taxes, without interest. From so much of the judgment as related to the irrigation taxes the defendant Walsh appeals, and the state has filed a cross-appeal from so much of said judgment as refused to give interest upon the state and county taxes.

1. Before the enactment of the district irrigation law, the irrigation of land had been developed to a considerable extent by means of canals constructed by private parties or corporations organized for that purpose; but up to that time there had been no authority to form irrigation districts and levy taxes upon the land embraced therein for the purpose of constructing and maintaining irrigating ditches. The purpose of the district irrigation law was obviously to provide the means of reclaiming arid land for which up to that time water had not been available. It would have been clearly unjust for the legislature to permit these districts to be organized to include land already reclaimed, except in cases where the purpose of forming the district was to purchase or take over an irrigation system already existing; and to prevent this

injustice there was inserted in the first section of the act the following: "Provided, that where ditches or canals have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall be exempt from the operation of this law except such district shall be formed to make purchase of such ditches, canals and franchises, and that this law shall not be construed to in any way affect the rights of ditches already constructed." Laws 1905, ch. 165. It is contended on behalf of the irrigation district that this provision is for the benefit, not of the landowner, but for the protection of the owners of ditches and canals in existence at the time of the organization of such district, and that the North Platte Irrigation & Land Company had waived the benefit of this protection. We cannot agree to this construction of the statute. It is that "such ditches and franchises *and the land subject to be watered thereby* shall be exempt from the operation of this law." Such a construction would eliminate the words quoted in italics, and no reason is given why they should be disregarded. On the other hand, the reason they were inserted is obvious. In an arid country the construction of a ditch enhances the value of the land lying thereunder and subject to be watered thereby; and to treat such land as being unprovided with irrigation, and impose upon it the expense of a second reclamation, is to deprive the owner of such increment in value. If irrigation is a benefit, and the only justification of the district irrigation law rests upon the assumption that it is, then this land was made more valuable by reason of its being subject to be watered by the ditch of the said North Platte Irrigation & Land Company. The defendant Walsh appears to have purchased his land from this irrigation company. It is shown by the evidence that the land is under its ditch; that it is practicable to irrigate the same therefrom, and that the company had sufficient water which it was will-

ing to furnish for that purpose at all times up to the time of the trial. Where land owned by an irrigation company is reclaimed from its arid state, it is usually sold for a higher price, and this increase of price is one of the inducements toward such reclamation, and we may safely presume that the defendant, or any person who purchased lands of this irrigation company, paid a higher price than would have been charged but for such reclamation. We are therefore satisfied that his land should not have been included in the boundaries of the Suburban Irrigation District in the first instance.

2. It is, however, contended that the county board had jurisdiction, and that its determination cannot be attacked in this proceeding. It must be conceded that, as to those matters which were by the statute committed to the consideration, investigation and determination of the county board, its judgment should not be collaterally attacked; but the question here is: Was it left to the county board to decide whether this land was under a ditch constructed prior to that time and of sufficient capacity to water the same? A similar question, arising under the same statute, has once been before this court. Sections 47 to 54, inclusive, of the same act provide for proceedings by means of which land may be excluded from an irrigation district; and section 49 contains the proviso that in no case shall any land be held in any district or taxed for irrigation purposes which cannot, from any natural cause, be irrigated thereby. This clause was construed in *Andrews v. Lillian Irrigation District*, 66 Neb. 461. In this case it was alleged that the plaintiffs were the owners of certain lands lying within the boundaries of the irrigation district, which were low, wet, swampy lands and totally unfit for irrigation, and which needed to be drained before they could be farmed. Observing that it is provided under section 2 that no lands shall be included in the district that would not in the opinion of the board be benefited by irrigation therefrom, the court declares that the question whether a particular

tract of land will be benefited by a proposed system of irrigation is exclusively for the county board, and that its conclusion cannot be attacked in a collateral proceeding. Considering the proviso in section 49 the court say: "As already shown, whether a particular tract of land will be benefited by a proposed system of irrigation is a question which the legislature has confided to the county board. Whether a particular tract of land from some natural cause cannot be irrigated is a question which goes to the jurisdiction of the county board over such tract and may be raised at any time in a proper case, because section 49, *supra,* expressly denies the jurisdiction of the county board to include such land in an irrigation district, or to tax it for irrigation purposes." The reasoning of this case applies to the question we are considering. If the provision that land which cannot, from any natural cause, be irrigated by a ditch excludes it from the jurisdiction of the county board, certainly the provision that land subject to be watered by a ditch constructed before the passage of the act and of sufficient capacity to water the same shall be exempt from the operation of the law would prevent the county board from passing upon and determining this question. If the section in question had said that, where ditches or canals have been constructed before the passage of the act of sufficient capacity to water the land thereunder, for which the water taken in such ditches is appropriated, such ditches and franchises and the land subject to be watered thereby shall not be held by any district or taxed for irrigation purposes, we would have had precisely the same question as was presented in *Andrews v. Lillian Irrigation District, supra.* The exclusion in section 1 is more radical and fundamental than that in section 49. It is that the lands described shall be exempt from the operation of the law; and it is only by the operation of the law that the county board can claim jurisdiction. Without this statute, from which this land is expressly made exempt, neither the county board which made the order, nor the district court which afterwards examined it,

had any jurisdiction whatever. Their jurisdiction arose by operation of this statute. The defendant's land was expressly and by the plain and unequivocal language of the statute exempted from its operation.

3. It is contended on behalf of the irrigation district that, if the lands of the defendant Walsh were wrongfully included in the district, he had a plain statutory remedy under sections 46 to 53, inclusive, of the act. We have already seen that under the rule in *Andrews v. Lillian Irrigation District, supra,* the express exclusion of authority negatives the jurisdiction of the county board. The claim made on behalf of the irrigation company is untenable for another reason. In the proceeding provided for in the sections above referred to there is no authority to inquire concerning, nor to determine, the fact whether the lands sought to be excluded were under another ditch of sufficient capacity to water the same before the enactment of the law. The only provision contained in these sections, as to what shall be cause for excluding the land, is that, if the directors deem it for the best interests of the district that the land mentioned in the petition, or some portion thereof, shall not be excluded, they shall deny the petition.

4. The conclusion at which we have arrived in reference to the validity of the taxes levied for irrigation purposes disposes of the appeal of the state from the decision of the district judge that the tender of the state and county taxes relieved the defendant Walsh from the liability to pay interest on the same. Whatever may be the rule where a taxpayer tenders his general taxes, but refuses to pay a special tax which is valid, it is perfectly clear that, where the special tax which he refuses to pay is invalid, and he tenders all the legal taxes, such tender should relieve him from the payment of interest.

We therefore recommend that the judgment of the district court be affirmed as to the state, county and general taxes, and reversed as to the taxes levied for irrigation purposes; and that the district court be directed to enter a decree that the latter are void and not a lien upon the land in question.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed as to the state, county and general taxes, and reversed as to the taxes levied for irrigation purposes; and the said court is directed to enter a decree that the latter are void and not a lien upon the land in question.

JUDGMENT ACCORDINGLY.

JOHN A. LUTHER V. STATE OF NEBRASKA. *

FILED DECEMBER 18, 1907. No. 15,188.

Intoxicating Liquors: KEEPING FOR SALE: QUESTION FOR JURY. The provisions of chapter 50, Comp. St. 1907, apply only to intoxicating liquors; and when a defendant charged with the offense of selling or keeping for sale without license "malt and intoxicating liquor, to wit, Malt Tonic," introduces evidence tending to show that the liquor actually sold and kept for sale by him was not intoxicating, he is entitled to have the question whether such liquor was in fact intoxicating submitted to the jury.

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

M. H. Weiss and *Berge, Morning & Ledwith,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

CALKINS, C.

This was a prosecution for the unlawful keeping and sale of liquors without license. The first count of the information charged the defendant with unlawfully keeping for sale, and the four following counts with unlawfully selling what was in each instance described as a certain "malt and intoxicating liquor, to wit, Malt Tonic." The

* Judgment of district court affirmed February 20, 1909.

trial resulted in a verdict of guilty upon all the counts, and the defendant, having been sentenced to pay a fine upon each, brings error from such judgment.

1. There was evidence tending to show that the liquor actually sold was not intoxicating; but the court in the instructions given on its own motion told the jury that the defendant was charged with selling malt liquors, omitting the word intoxicating in each instance. Under these circumstances the defendant requested the following instructions: "(1) The court instructs the jury that one of the material allegations of the complaint is that the defendant sold malt and intoxicating liquors, and that the state must prove said allegations beyond any reason of doubt before you would be justified in finding the defendant guilty of any one of the last four counts; that, unless you find from the evidence beyond any reason of doubt that the said Malt Tonic is intoxicating, you should acquit the defendant of said counts. (2) The court instructs the jury that in the first count the defendant is charged with keeping for sale certain malt and intoxicating liquors, to wit, Malt Tonic; that before you would be justified in finding the defendant guilty on said count it is incumbent upon the state to prove beyond any reasonable doubt that the said Malt Tonic is intoxicating; that, if the state fails to prove that said Malt Tonic is intoxicating, it is your duty to acquit the defendant on said count." This request was refused, and such refusal is assigned as error. There is therefore presented the single point, should the court have submitted to the jury the question whether the liquor shown to have been kept for sale or sold by defendant was intoxicating?

The learned counsel for the state contends that the statute forbids the sale or keeping for sale of malt liquors without license, regardless of whether they are or are not in fact intoxicating, though they admit that the intoxicating properties of the liquor might be considered for the purpose of ascertaining whether or not it was a malt

liquor. Section 11, ch. 50, Comp. St. 1907, upon which the charge of unlawfully selling is founded, provides that all persons who sell or give away upon any pretext "malt, spirituous or vinous liquors or any intoxicating drinks" without license shall be deemed guilty, etc. If this clause be read with the emphasis upon the word "any," it would appear that the legislature regarded malt, spirituous or vinous liquors as intoxicating, and intended by the words "or any intoxicating drinks" to include such intoxicating liquors as would not be embraced in the terms "malt, spirituous or vinous"; while by placing the emphasis on the word "intoxicating," it would appear that it was intended to describe malt, spirituous or vinous liquors as nonintoxicating, and to prohibit their sale, together with that of intoxicating drinks. The supposition that the legislature did not regard malt, spirituous or vinous liquors as intoxicating is incredible, and any interpretation founded upon such an assumption cannot be adopted. It is plain that the words "malt, spirituous or vinous liquors" were not used in opposition to, but synthetically with, the words "intoxicating drinks," and that this section should be construed as if it read "malt, spirituous or vinous liquors or any *other* intoxicating drinks." Section 20, under which the first count of the information in this case is framed, first makes it unlawful to keep for sale without license malt, spirituous or vinous liquors; then, dropping the term "malt, spirituous or vinous liquors," it provides that any person found in the possession of any intoxicating liquor with intent to dispose of the same without license shall be guilty of a misdemeanor; and, when it comes to prescribing the procedure, it provides for a complaint to be made that intoxicating liquor is kept for sale. This section cannot be enforced without construing the term "malt, spirituous or vinous liquors" as being used interchangeably with and meaning the same as "intoxicating liquors." It is hardly necessary to go further; but an examination of the other sections of the chapter in question shows that the words "malt, spirituous or vinous liquor," "liquors,"

"intoxicating liquors," and "intoxicating drinks" are used interchangeably throughout. There can therefore be no question that the malt liquor mentioned in the sections above quoted is an intoxicating malt liquor; and the defendant, having introduced evidence tending to show that the liquor kept and sold by him was not in fact intoxicating, had the right to have that question submitted to the decision of the jury. If it be urged that there are no non-intoxicating malt liquors, the defendant had the right to prove that the liquors kept and sold by him were nonintoxicating, for the purpose of showing that they were not malt liquors; and, having introduced testimony tending to support that theory, he had the right to have it submitted to the consideration of the jury.

This case does not involve the question whether it is sufficient in an information to charge the sale or keeping of malt liquors without the allegation that the same are intoxicating; and the cases cited to support the proposition that such an information would be sufficient are not in point. Neither is the question here presented whether the legislature might forbid the sale of harmless and non-intoxicating malt liquors, if such there be, for it has not yet attempted so to do, and it is not necessary for us to consider the cases cited for and against this proposition. In this state, legislative restriction of the sale of liquors has so far been directed to those which cause intoxication, and its attendant train of misery, vice and crime.

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

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.