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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1908.

VOLUME LXXXI.

HARRY C. LINDSAY,
OFFICIAL REPORTER.

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

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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CHARLES B. LETTON, ASSOCIATE JUSTICE.
MANOAH B. REESE, ASSOCIATE JUSTICE.

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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. LXXX.

BORG, CHARLES T.
BRUNT, J. A.
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WHITMORE, H.

In Memoriam.

FAYETTE I. FOSS.

At the session of the supreme court of the state of Nebraska, January 7, 1908, 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 THE COURT:

The committee of the bar, duly appointed by this court, desire to give utterance to their sorrow, and express the sensibility of loss, occasioned to them and the profession by the death of FAYETTE I. FOSS, and to pay a tribute to his abilities and labors at this bar.

Mr. Foss was admitted to the bar of this court on the motion of T. M. Marquette, Esq., on August 17, 1882; and while he held no official relation to it, yet during all that period, until his death, he argued before it a great number of interesting and important questions, more than two hundred cases in all, covering almost every department of the law. His intellectual vigor, alertness of mind, capacity for work, and power of persuasion and exposition marked his long and conspicuous career, while his briefs were of real value and usefulness, through not only research and preparation, but because of his faculty for lucid statement and cogent reasoning as well; while the simplicity and kindness of his nature secured for him many friends both on the bench and at the bar. Therefore be it

Resolved, That we bear testimony to and hold in honorable remembrance the professional attainments of our deceased brother, his fidelity to the law, his services to the profession and this court, and the singleness of purpose and devotion of spirit in which he discharged all the duties of his profession.

Resolved, That these resolutions be presented to the court, with the request that they be entered upon the records, and that the clerk

be directed to send to the widow and family of our deceased brother a copy hereof as a testimonial of our sympathy to them in the loss they have been called upon to sustain.

C. C. FLANSBURG.
J. H. GRIMM.
F. H. GAINES.
CHAS. H. SLOAN.
R. C. ORR.

C. C. FLANSBURG:

May it Please the Court: By this solemn pause in which the ordinary and orderly business of this court is stayed, as well as by the resolutions we have just heard, we are again reminded of the uncertainty of this mortal life, for the Grim Reaper has again invaded our ranks and stricken down another of its members.

Our dead comrade, in whose memory we speak today, was an active practitioner at this bar for more than a quarter of a century; and during nearly all that time I knew him intimately and well, for he was my friend. Having been opposing counsel to him in a number of difficult and interesting causes, I had the fullest opportunity to observe his methods and discover his powers; and I learned that he was no mean antagonist. In all probability his greatest strength was in his advocacy. His magnetic personality, his powers of persuasion, his copious diction, his logical reasoning, and, above all, his belief in the justness of the cause which he championed, raised his work above art, and it became with him the passion of his life. The unpopularity of a cause never deterred him from accepting its responsibilities; and, once in, he gave to it the full measure of a lawyer's ability to his client. The seeming hopelessness of a task only increased his efforts. And this one thing is to be chiefly remembered about our dead comrade: that, while he labored with an untiring zeal to win verdicts and secure judgments, yet in all his long and successful career not a single victory was ever clouded by the recollection of dishonorable means to attain it. But, although a strong advocate, he did not rely upon advocacy alone for results. He was a student, and tireless in the preparation of his cases, recognizing that all true and lasting victories are won in the office through preparation and research among the books. And the power which so often brought his case to a successful issue was the genius of hard labor, of unremitting toil. In the trial of a cause he was frank with the

court, fair to opposing counsel, and never sought in any way to mislead; so that during all the years of his practice at this bar no one was ever heard to charge him with unprofessional methods or conduct in the management of a cause.

While he was my friend for many years without a shade of differing, still I would not wish to speak unduly in his praise, but give expression only to my estimate of his worth, my testimonial of his legal qualifications. He was not perfect. He had his faults like others. And lonesome he would have been here without them. But for his faults we invoke that merciful charity which, soon or late, we must all crave for our own shortcomings, while we cherish with pride his successes and attainments in that most noble profession which he loved and followed.

CHARLES H. SLOAN:

May it Please the Court: Death, "which lays its icy hands e'en upon kings," has touched a prince of our craft, and he is dust.

It is a fitting procedure of this tribunal, when a distinguisned member of the bar is no more, to sit in solemn session, hearing not alone fulsome eulogy of his virtues and abilities, but rather to receive that estimate of his character and capacity which his life and labors impressed upon his fellows.

Choice words and carefully constructed sentences may not console mourning relatives, nor yet mold or modify final judgment of that Supreme Tribunal before whom he has been summoned to stand. But whatever any may believe in this liberal age as to final reward or punishment, all may agree that the eternal harmonies seem better served when we, as Abou Ben Adhem, love our fellow men, and in turn are loved and respected by them with whom personal contact gives opportunity to know. So, in this case, were the pleas of the Nebraska supreme court bar submitted to the Bench of Grace, there would be an entire harmony—all defense and justification—no criticism, no prosecution.

I knew our friend for a score of years, and knew him best as a trial lawyer. We lived in adjoining counties, in the same judicial district. His home county was Saline, which has given so many distinguished men to the state and so many able members to the bar of this court. I saw much of his practice in recent years, and it sometimes occurred that we were associated together or pitted against each other in important trials throughout our district, so that my im-

pressions are the impressions of association and contact, rather than those of hearsay, upon which mere reputation is established.

I would not disparage great jurists whose practice is largely before this and other courts of final resort. They are the forums where learning takes its kingly walk, faultless logic holds unhindered sway, and pure intellectuality stands for so much. The human element, so important below, has scant place here; while man's foibles, passions and prejudices receive little consideration.

The successful trial lawyer must be "myriad minded," ready tongued, have deep and varied sympathies, a student, yes, a master of that general indefinable term, "human nature," that he may illumine the path of the presiding judge, guide with circumspection a selfish client, inspire confidence and clearness in favorable witnesses, and confound or weaken those who oppose; wisely select, propitiate, enlighten, lead and convince the jury, often fraught with some knowledge, a little ignorance, a measure of conceit, and some diffidence; but above all to meet your skilled adversary across the table with studied system, shrewd dissembling, quickened wit, earnest enthusiasm and effective oratory, to the end that from this situation, delicate and complicated, fraught with numerous difficulties, composed of many heterogeneous elements, may result a favorable verdict—that highly prized deliverance from the Covenant Ark of our boasted liberties. Here it is that talent may be at par, but tact is always at a plunging premium. Here the advocate's resources are taxed to their utmost. Here, while professional courtesy may be in evidence, it is often subordinated to the play of humor and the scourge of wit. Here fierce feeling and high passion are not unknown. Here the personality of the advocate is often lost sight of in the fervid conviction of what appears to be his client's right. Here men become intellectual gladiators, forensic soldiers, with minds bent on victory, the primary cause of the quarrel seemingly pressed to the background; yet the history of our jurisprudence demonstrates that out of these conflicts has substantial right and justice been uniformly evolved, as from the clash of mind upon mind and personality upon personality is evolved the spark of truth which kindles into the flame of justice.

In this capacity I knew our departed friend; and in all the trial lawyer's art knew him as a past master. He was a formidable though a generous adversary to meet in that forum where errors are not always corrected, where precedents are not permanently established, or

final principles of law promulgated; but it is the forum to which the people look, and in which the human phases of legal controversy are so often controlling.

His death occurred in the middle autumn of the year that is gone. It was in the middle autumn of his life, yet till the end he maintained that erect carriage and fairness of face we knew so well. Like an oak felled in October, he had not lost that beauty which marked him through life. The beauty of the oak fell with it. The winter's blast was not to buffet its unadorned form. So our friend, retaining still that manly beauty and symmetry of form, was felled before the winter of life had dispersed the insignia of a glorious summer and a favoring autumn.

ROBERT C. ORR:

May it Please Your Honors: It is fit and proper that we pause amidst the busy scenes of life; that this court lay aside its ordinary labors for a little while to pay fitting tribute to memory of departed worth, to attest our tender regard for the memory of our departed friend and brother, and in some small degree to give expressions of the esteem in which we held him, and to bear willing testimony of our gratitude to his memory for the great part he took in properly shaping the jurisprudence of this young and growing state of ours.

For more than eighteen years it was my good fortune to be personally and intimately acquainted with Mr. Foss. Just nineteen years ago this month I met him for the first time in a professional way, in this very court. His conduct of an important case before the court on that occasion made a deep and lasting impression on my mind. His clear and lucid statements of the law applicable to the case, the forcible manner in which he marshaled his argument, the straightforward and earnest maner in which he applied the law to the facts, gave proof that he was a lawyer of no mean ability. A trait of his character was manifested then that I found in after years gave color to and governed his whole life. The rule for the application of the law for which he contended at that time could in no possible way inure to his advantage in the cause then claiming the attention of the court. His solicitude alone seemed to be that correct reasoning should be employed in reaching a legal conclusion, in order that proper precedents might be established in the early judicial history of this commonwealth, in order that property rights might be made secure and life and liberty be properly safeguarded. Few indeed are the important

legal questions that have come before this tribunal for the first time for legal interpretation, for which there was no precedent in this state, that his labors have not in a large degree contributed to aid this court in their correct solution.

In the very nature of the profession, the supreme bench in this state is largely dependent upon the bar for assistance in the laborious investigation imposed upon it by an unwise policy of the state in limiting the number of members of the court, thereby making it impossible for the court to perform the labor required of it in a manner satisfactory to itself.

Mr. Foss by nature was always earnest, serious and energetic, in every work he undertook. He was laborious and painstaking in a very marked degree. No matter whether his client's cause involved much or little of this world's goods, he felt that his client was entitled to his very best effort, and he spared neither labor nor painstaking preparation in order that his client might have all that he was entitled to under the law.

In his nature there was no such thing as envy or jealousy of a competitor in his profession; he firmly believed that, when "the path to fame became too narrow for two to walk abreast in it, it was time to abandon it altogether." He was a stranger to resentment or revenge, and often in the heat of argument he returned a kind answer to an unkind remark, when man's imperfect nature would usually have suggested a retort that would have wounded deeply his antagonist. He was the very embodiment of courtesy and kindness. No beginner in the legal profession, nor one unacquainted with the rules of practice in this state, ever sought his advice in vain.

I cannot but feel today that a very worthy citizen and an eminent lawyer has been taken from our midst; that a column of perfect symmetry and great strength and beauty has been broken; that in the midst of his ripe usefulness and in the full development of his cultivated mind, and at the very zenith of his intellectual power, he has been called from among us; that in the councils of the All-Wise it has seemed proper to cut short his usefulness here, it is not unreasonable to suppose, for a grander purpose elsewhere.

"The hand of the reaper
Takes the ears that are hoary,
But the voice of the weeper
Wails manhood in glory.

"The autumn winds rushing
Waft the leaves that are searest,
But our flower was in flushing,
When blighting was nearest."

Fully realizing our inability to comprehend the wisdom that pervades and constrains all existence, let us hope that that which seems a great and irreparable loss may be in some way for a great good. Let us hope that He who knelt in the garden of Gethsemane, who said, "Not my will, but thine be done," who sees all, and who knew all from the very foundation of the universe, has ordered all things well; and, while we "as mourners go about the street" lamenting his loss, let us fell grateful for the good that he has accomplished. Socrates, wisest of all uninspired teachers, taught that a man was a philosopher only as he had applied precepts to his conduct of life. Applying this rule to the life of our departed friend, who shall say that he lacked much of fulfilling in a high degree this requirement?

But I cannot think or realize that our friend is dead. Though his friendly counsel may be heard no more forever in these halls, yet surely his work will live and be an inspiration to others when all that is mortal of every one in this presence shall have returned to mother earth, and that immortal spark that distinguishes man from the brute shall have returned to Him who gave it.

The poet says, and says truly:

"There is no death; an angel form
Walks o'er the earth with solemn tread,
He bears our best beloved away,
And then we call them dead.

"Yet, ever near us, though unseen,
The dear immortal spirits tread,
For all this boundless universe
Is life; there is no death."

It is a custom, older than history, for friends to build monuments and mausoleums to mark the last resting place of the remains of their friends, to tell future generations of the life and death of their departed, but our departed friend has not left this labor of love to others. He himself, by his life work, has left a monument more enduring than bronze or adamant. Though time and storm may efface from the polished granite the chiseled inscription, the painter lose his art, and the sculptor his cunning; though the poet may forget his song, and the orator his eloquence; though thrones and empires may perish and decay, and the noblest work of man's hands crumble and fall, yet the record of such a life, spent in an honest endeavor to advance

human happiness, will stand on the tablets of time, made deeper and more enduring by the lapse of years. Second only to the love he bore his family, he loved his profession. All the energy of his being was devoted to its advancement. He believed that in thus doing he could confer a greater benefaction on future generations than in any other way. He never knew where love ended and duty began.

It was my privilege to sit in judgment on his last effort before an earthly court. Well do I remember with what earnestness, notwithstanding his failing powers, he labored for the interests of his client. Already the sign of the destroyer was marked upon his brow, still he faltered not. He passed from thence through the dark valley, from the shores of time to eternity, to appear at the bar of that great Judge, whose justice never fails, whose judgments are ever tempered with mercy, and whose law is blended with and overshadowed by everlasting equity.

By his life and early death let us be admonished how uncertain life is, and with what rapidity time is bearing us on from the things of this world. While we revere his memory, let us emulate all that was good and noble in his life; and, as we bid him a long farewell, let us join in the words of one of the wisest of our profession, who himself has gone before: "Let us all hope that when we shall stand at the bar of the Great and Final Judge, the Alpha and Omega of all law and justice, we shall have so contributed to the administration of justice here that we shall find mercy there."

BY THE COURT—HONORABLE SAMUEL H. SEDGWICK, C. J.:

Mr. Foss was one of the pioneer members of the bar of this state. He was vigilant and active in serving the interests of his clients. He never failed to render valuable assistance to the courts in the investigation of the legal questions involved in the cases in which he was interested.

It is suitable and proper that these proceedings be entered upon the records of the court; and it is so ordered.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1908.

HERMAN MUNDT, APPELLANT, V. JOHN M. SIMPKINS ET AL., APPELLEES.

FILED MARCH 5, 1908. No. 15,082.

1. Contracts: AFFIRMANCE. As a general rule a party who counterclaims for damages for breach of a contract will be held to have affirmed it, and cannot be heard to assert its nonexistence because of its recission.

2. Sales: RESCISSION. An exception to the rule above set out may exist where one expends money or material in the improvement of property before discovering the fraud by which he was induced to purchase it, or where the purchase is made on a warranty of its fitness for a prescribed use, and repairs are required to be made before the article can be tested and its fitness for the use ascertained. In such cases the purchaser may rescind the contract of sale and recover the reasonable cost of improving the property or of repairs made thereon.

3. ———: ———. A sale of personal property with a waranty of its fitness for a prescribed use may be treated as a sale upon condition subsequent at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded.

4. ———: ———. In order to work a rescission, it is not sufficient for the purchaser, who has taken delivery of the goods at the vendor's place of business, to give notice to the vendor that he holds the goods subject to his order, or that the goods are at a designated place subject to his disposal. The goods must be returned to the place where accepted, unless, upon an offer to return, such offer is refused by the vendor.

APPEAL from the district court for Greeley county: JAMES R. HANNA, JUDGE. *Reversed.*

Ray J. Abbott and *Landis & Schick,* for appellant.

J. R. Swain and *T. P. Lanigan, contra.*

DUFFIE, C.

In August, 1903, the defendants, Simpkins and McCune, purchased from Mundt, the plaintiff, a second-hand steam traction engine, belting, and water wagon, for the sum of $225, for which they executed their promissory notes. Plaintiff brought suit on these notes in the county court of Greeley county, and from a judgment entered in favor of the defendants he appealed to the district court, where judgment again went in favor of the defendants. He brings this appeal.

Plaintiff's petition was the ordinary one declaring upon negotiable paper. In their answer defendants allege that at the time they purchased the engine plaintiff represented it to be in good working condition and warranted it to be capable of performing the services for which they were purchasing it, to wit, running a 13 or 14 horse power separator, which separator, plaintiff informed them, he had seen, and knew the engine to be capable of operating; that he represented to them that originally the engine was a 12 horse power engine, but that he had procured the cylinder to be bored out, and that it was then equal to a 13 horse power engine, and guaranteed it to do the same work that a 12 horse power engine would do; that, relying upon these warranties, and not knowing to the contrary, they purchased the engine, and executed their notes to the plaintiff for the consideration agreed on. They further allege that at the time of making this purchase they were unskilled in the construction and working of steam engines, and so explained to the plaintiff, and relied solely upon the representations of the plaintiff regarding the condition, capacity and power of

the engine. They further allege that the engine as originally constructed was only 10 horse power; that it was badly out of repair and wholly unfit to do the work for which it was purchased; that the engine was purchased from the plaintiff at Utica, Nebraska; that it was tested at Greeley Center, Nebraska, where defendants commenced the work of threshing; that it was wholly inadequate to run their separator; that many parts of the engine had to be repaired; and that upon discovering the failure of the engine to meet the warranty given them they notified the plaintiff in writing that they would not keep or pay for it, that it was on the railroad right of way at Greeley Center, Nebraska, subject to his order, and that he might govern himself accordingly. A second count of the answer set up what is denominated a "counterclaim" for repairs to the engine, loss of time, payment of freight, etc., amounting to $100, for which the defendants pray judgment.

Upon what theory the defendants expected to wholly defeat the plaintiff's action by showing a rescission of the contract, and at the same time recover upon such contract by way of counterclaim, is not explained in their brief. The law is too well settled to need discussion that if a party elects to rescind a contract he cannot sue thereon to recover damages for its breach, and if he affirms the contract by suing for a breach he cannot thereafter rescind. An exception to the general rule exists in case where one expends money or material in the improvement of property before discovering the fraud by which he was induced to purchase it. In such case he may rescind the contract of sale, return the property, and recover for what he has necessarily expended, as the vendor gets the benefit of the improvements made upon the property when the same is returned to him. *Farris v. Ware*, 60 Me. 482. In the case we are considering the circumstances all tend to show that the parties understood that no test of the engine was contemplated until it was taken to Greeley Center, where the purchasers resided and were

to use it. For any improvements or repairs which were rendered necessary in order to transport it to Greeley Center, or to test it after arriving there, the defendants could recover had they rescinded the contract.

As the verdict of the jury was in favor of the defendants, it is evident that they found that the contract had been rescinded. This requires us to examine the answer filed and the evidence offered by the defendants in support thereof, to ascertain if the verdict can be upheld. In the first place it might be observed that there are no facts alleged in the answer showing a rescission. The facts relied upon to show rescission by the defendants are stated in the following language: "That immediately upon discovering the defects set out the defendants notified the plaintiff in writing, at Utica, Nebraska, of the same, and that said engine was not the same as represented to be by him; that it would not do the work guaranteed by him, and that it was worthless to the defendants; that they could not or would not keep it or pay for it; that it was on the railroad right of way at Greeley Center, Nebraska, subject to his order, and that he could govern himself accordingly." It is undoubtedly the better law that a sale of personal property with a warranty of quality, even without fraud on the part of the vendor, may be treated as a sale upon conditions subsequent, at the election of the purchaser, and in the event of a breach of warranty the property may be returned and the sale rescinded, since a breach of the warranty may be equally injurious to the buyer, whether the vendor acted in good faith or bad faith. *Milliken v. Skillings,* 89 Me. 180, 36 Atl. 77. The right of rescission is limited to cases where the seller can be put substantially in the position which he occupied before the contract, and this makes it the duty of the buyer, who would rescind for breach of warranty for quality, to restore the seller substantially to his former position, and requires him to return or tender back to the seller whatever of value to himself or to the other he has received under it. As stated in *Milliken v. Skil-*

lings, supra: "The word 'offer' is frequently used by courts and text writers as synonymous with 'tender,' and it may be properly so used with reference to articles capable of manual delivery and actually produced. But, with respect to heavy articles of merchandise situated at a distance from the place to which they must be transported if restored to the vendor, the phrase 'offer to return' is more commonly and aptly applied to express a willingness, or to make a proposal to rescind the contract and return the goods. It is not sufficient, however, for a buyer who has taken delivery of the goods at the vendor's place of business, merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. But, if he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless upon making the offer so to do he is relieved of the obligation, as stated, by a refusal to receive them if tendered."

The above quotation states with clearness and exactness the duty of a vendee who seeks to rescind on account of breach of warranty of quality, and, measured by this rule, the defendants' answer is fatally defective, and their evidence does not in the least tend to cure the defects found in the answer. The only evidence offered upon the question of rescission was that of the defendant Simpkins. He testified that after testing the engine at Greeley Center he wrote and addressed a letter to the plaintiff at Utica, informing him of the failure of the engine to do the work for which it was purchased, and that the engine was at Greeley Center, on the railroad right of way, subject to his order. This letter was not deposited in the post office, but was given to the party who had the contract of carrying the mail sacks to and from the railway station, with a request that he should mail it on the mail car of the departing train. The plaintiff denies having received the letter. There is no presumption that it ever reached him,

it not being shown that it was deposited in the United States mail; but, had the evidence shown the receipt of the letter by the plaintiff, still it contained no offer to return the engine at the defendants' expense, the inference from the language used being that the defendants expected and required the plaintiff to receive the engine at Greeley Center, many miles distant from his place of residence, where it was delivered to the defendants. The attempt to show a rescission signally failed, and that question, under the evidence and pleadings in the case, should not have been submitted to the jury.

We recommend a reversal of the judgment and remanding the cause for another 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 another trial.

REVERSED.

ALBERT HARTSUFF, APPELLEE, V. JOHN H. PARRATT, IMPLEADED WITH HENRY F. CADY, APPELLANT.

FILED MARCH 5, 1908. No. 15,096.

Mortgages: ASSUMPTION BY GRANTEE: FORECLOSURE: DEFICIENCY JUDGMENT. Several persons, joint owners of two lots in the city of Omaha incumbered by a mortgage, feared a loss of the property because of inability to pay interest due thereon. The property was worth $12,000, and they sold the same to the defendant for $10,000; the deed reciting that the conveyance was made subject to the mortgage, which the grantee assumed and agreed to pay. The negotiations for the sale were conducted by S. as agent for the defendant, and defendant took no part therein, and claims to have had no knowledge of the assumption clause in his deed until long after the same had been delivered to his agent and recorded, and until after he had sold the property. Shortly after the making of the deed defendant's agent called on the agent of the mortgagee and requested him to accept defendant's note for past due interest on the mortgage, saying that defendant had purchased the property and was to take care of the mortgage.

This proposition was rejected by mortgagee's agent, and shortly thereafter defendant himself called on the agent, and paid the interest. Within about six weeks after the purchase of the property defendant sold it to Mrs. H., and in his deed of conveyance a clause was inserted by the terms of which Mrs. H. assumed and agreed to pay the mortgage. Some time thereafter the mortgage was foreclosed, and on motion for a deficiency judgment against the defendant he resisted upon the ground that the assumption clause in his deed was inserted by mistake, that his agent in the purchase had no authority to so contract, and that no consideration existed for his agreement to assume and pay the mortgage. S., the agent, corroborated him in this claim. *Held*, That the action of the district court in entering judgment against the defendant for the deficiency was in accord with the circumstances shown and the evidence given on the hearing.

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

Montgomery & Hall, for appellant.

Hall & Stout and *A. C. Wakeley, contra.*

DUFFIE, C.

The Parratt brothers and sisters, of whom there were seven, were the joint owners of lots 1 and 2, in block 8, in McCormick's addition to the city of Omaha. The lots were incumbered by a mortgage for $6,000 held by the plaintiff, Albert Hartsuff. The Byron Reed Company, acting as agent for Hartsuff, was pressing for payment of interest due upon the mortgage, which the Parratts were unable to pay. In this condition of affairs, they sold the lots to Henry F. Cady, the appellant, and the deed recited that the conveyance was made subject to a mortgage for $6,000 and to all accrued interest thereon, which, with all taxes and assessments, the said Cady hereby assumes and agrees to pay. This deed bears date November 25, 1893. Cady conveyed the lots to Sarah M. Hendricks by deed bearing date January 2, 1894, and this deed recites that it is made subject to a $6,000 mortgage, which the grantee assumes and agrees to pay as part of the consideration. In

September, 1896, an action was commenced to foreclose this mortgage; Cady and Mrs. Hendricks both being made parties defendant. The petition alleged their agreement to assume and pay the mortgaged debt, and the petition asked, in addition to other relief, that if the mortgaged property did not sell for sufficient to pay the amount due upon the mortgage plaintiff might have judgment against Cady and Mrs. Hendricks for the deficiency. Cady, though personally served with summons, made default in the foreclosure proceedings, and in March, 1907, a decree of foreclosure was entered, in which the amount due on the note and mortgage was ascertained, and the court found, among other things, that the Parratts, the makers of the note and mortgage, had conveyed the premises to the defendant Cady subject to plaintiff's mortgage, which mortgage the said Cady at the same time assumed and agreed to pay. The premises were sold, and confirmation of the sale had in October, 1902, and in August, 1904, plaintiff filed a motion for a deficiency judgment against the various defendants, and a deficiency judgment was entered against Cady and Mrs. Hendricks, from which they took error to this court. The opinion on that appeal is found in 75 Neb. 706, and it was there held that Cady was not precluded by the terms of the decree from showing, if he could, that his agreement to assume and pay this mortgage was without consideration, and the case was reversed and remanded for further proceedings on issues properly joined as to whether the assumption of the mortgage in the deed to Cady was based upon any consideration. On this opinion being handed down the plaintiff filed an amended motion for a deficiency judgment against Cady, in which it is alleged that his agreement to pay the mortgage was a part of the purchase price of the lots conveyed to him. In an answer filed by Cady he alleges that he never agreed to assume and pay the mortgage, and that the clause in the deed to that effect was inserted by mistake and oversight, was without authority, and without any knowledge or consent

on his part. He further says that there was no consideration for such promise and agreement. On the trial judgment was entered for the deficiency in favor of the plaintiff and against the defendant Cady, and the case has been brought here on appeal.

There is evidence tending to show that the lots were fairly worth $12,000 at the time they were conveyed to Cady. The evidence further tends to show that the consideration agreed upon between the parties was $10,000, although the consideration named in Cady's deed is $11,000. William Parratt, who conducted the negotiations with Sholes, the agent, who acted for Cady in the transaction, testifies that they were liable to lose the lots; that the sale was made to relieve them of liability upon the mortgage. The sisters of William Parratt, who testified upon the trial, while having no knowledge of the actual terms of the agreement, testified that they would not have signed the deed to Cady in the absence of a clause therein by which he assumed and agreed to pay the mortgaged debt; and that by this conveyance they expected to be relieved of all responsibility in the matter. While this testimony does not go to the terms of the agreement actually made, it does show the reason for making the sale, and raises a strong presumption that the agreement finally made between William Parratt and Cady's agent was of such a nature as to effectuate the object which the grantors had in view in conveying the property. The Byron Reed Company was handling this mortgage as agent for the plaintiff. When Cady took his conveyance there was interest due and unpaid upon the mortgage. A. L. Reed, president of that company, testifies that in the month of November, 1903, Mr. Sholes came to see him on behalf of Mr. Cady with reference to this mortgage; that at the time he said: "I sold the Parratt property at the southwest corner of Twenty-Seventh and Farnam streets to H. F. Cady. Mr. Cady is to take care of the mortgage and interest on the property, being the debt that you represent. Would you be willing to accept

from Mr. Cady a ninety-day personal note in payment of the interest now due and delinquent?" I replied in substance that I was sorry, but that I could not do that. He said: "Mr. Cady is a responsible man, he will pay the amount, and he only asks the accommodation a short time." I replied: "I am not able to grant that." That is the substance of the conversation. He further stated that a short time thereafter Cady himself paid the interest. Within about six weeks after taking the conveyance Cady sold the property to Mrs. Hendricks, and in that deed attempted to relieve himself of responsibility for this mortgage by requiring Mrs. Hendricks to assume and to pay the same. All the circumstances tend strongly to show that the agreement was that, in consideration of the conveyance by Parratt to Cady, and as part of the consideration therefor, Cady assumed this mortgage and agreed to pay the same. It is hardly conceivable that such a clause would be inserted in a deed of conveyance unless inserted to carry out an agreement previously made.

We are satisfied that the district court was right in entering a judgment for the deficiency against Cady, 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.

UNITED STATES OF AMERICA, FOR THE USE OF FRANK A. JOHNSON, APPELLEE, V. BERNHARDT J. JOBST ET AL., APPELLANTS.

FILED MARCH 5, 1908. No. 15,109.

Master and Servant: CONTRACT OF EMPLOYMENT: ESTOPPEL. One G. A. Johnson made a contract with B. J. Jobst to do the work of painting, oiling and varnishing required on certain buildings which Jobst had contracted to erect for the federal government. G. A. Johnson employed the plaintiff, Frank A. Johnson, as a painter to work on the job, and during part of the time plaintiff was so employed he acted as foreman for G. A. Johnson, and kept and reported the time of the other employees, as well as his own, to the principle contractor, Jobst, who had agreed with the subcontractor to advance money to pay the painters at the rate of 40 cents an hour. Plaintiff reported his own time at 40 cents an hour, and Jobst advanced money to pay him at that rate. *Held*, That under the circumstances, and from the fact that plaintiff informed Jobst that he had not been paid in full when he quit the work, and the further fact that there was evidence tending to show that Jobst had himself paid the plaintiff on one or more occasions at the rate of $25 a week, plaintiff was not estopped to claim that his contract with G. A. Johnson was for wages at that rate.

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

Gurley, Crawford & Woodrough, for appellants.

Baldrige & De Bord, contra.

DUFFIE, C.

This action was brought under the act of congress of August 13, 1894 (28 U. S. St. at Large, p. 278, ch. 280), which gives a right of action upon a contractor's bond to laborers and material men who have supplied labor or material to contractors on federal buildings. The plaintiff in his petition claims that he worked as a painter upon a federal building for which J. B. Jobst was the con-

tractor and the National Surety Company was bondsman. His petition contains the following allegation: "The particular work performed by said Frank A. Johnson was in the painting of the said several buildings. A statement of the time and of the reasonable value and agreed price of the labor so furnished is shown by 'Exhibit D,' which is attached hereto and made a part of the petition." Exhibit D is as follows: "Statement of labor furnished by Frank A. Johnson in painting the buildings at Fort McKenzie, under the contract of Bernhardt J. Jobst, for the United States of America. October 2, 1903, to June 3, 1904, $658.35; paid on account of said labor, $196.05; balance due, $462.30." The pleadings and the evidence establish without controversy that Jobst was the principal contractor for the erection of several buildings for the United States government at Fort McKenzie, Wyoming; that one G. A. Johnson subcontracted the work of painting, oiling and varnishing the buildings, and that Frank A. Johnson was employed by said G. A. Johnson as a painter in the performance of this contract with Jobst. The plaintiff claims that he was to receive $25 a week for his services; the contention of the defendants, in which they are supported by G. A. Johnson, being that plaintiff was to receive 40 cents an hour for the time he was actually employed on the work, and his board bill to the extent of $5 a week, and that he had been paid in full for his services. The jury returned a verdict in favor of the plaintiff for the full amount of his claim; but the court, in passing on the motion for a new trial, required the plaintiff to remit the sum of $180.90, and upon such remittitur being made entered judgment in his favor for the sum of $361.75.

The real dispute between the parties, and on which there was a sharp conflict in the evidence, relates to the wages which the plaintiff was to receive, his claim being that his contract was for $25 a week, with board, and expenses from Omaha to Wyoming and return, the defendants asserting that his contract entitled him to 40

cents an hour for the time actually employed. As we have said, the evidence upon this question was conflicting, and the issue was for the jury alone, there being ample evidence to submit it to their consideration. The fact that we might have found differently had the question been one for the court to determine does not warrant us in disturbing the verdict of the jury, there being evidence upon which that verdict may be fairly sustained.

It appears that the plaintiff had received from Jobst a much larger sum than is credited to him in "Exhibit D," as above set forth, and one of the contentions of the defendants is that the court should have directed a verdict for them upon such showing. Under the circumstances shown by the evidence, we do not think this contention can be supported. It is undisputed that, shortly after plaintiff commenced work, G. A. Johnson, the subcontractor by whom he was employed, met with an accident which disabled him from overseeing the work. On November 24, 1903, he gave the plaintiff written authority to take full charge of the work, to hire and discharge men, to keep their time, and report the labor done by them to Mr. Jobst, the general contractor, and to receive from him the money to pay for the time of the men as reported, and to receive for his own board $5 a week. The plaintiff accordingly, during the disability of his employer, kept the time of the other employees engaged on the painting contract, and received from Mr. Jobst the money to pay such employees for their services, and in this way a much larger amount was received by him than the sum necessary to pay for his own labor or board; but the excess over and above what he reported on his own account was, he testified, paid out to the other employees in accordance with the written authority given him by G. A. Johnson. In this way, if, as appears, the jury accepted his story, the excess money received by him is fully accounted for. In reporting the time of those employed on the painting contract his own time was included at the price of 40 cents an hour, and it is

insisted that he is estopped as against Mr. Jobst from claiming a larger amount than that shown by his own report. Relating to this, he testified that it was by direction of G. A. Johnson, his employer, that he reported his time at the rate of 40 cents an hour. The circumstances shown by the evidence make this statement reasonable. One clause of the agreement between G. A. Johnson and Jobst is in the following language: "The party of the first part (Jobst) also agrees to pay for all labor at the rate of 40 cents an hour for all painters employed, this to be paid semimonthly on the order of the party of the second part (G. A. Johnson) to painters employed, and charged to party of the second part as per order; the party of the second part to draw pay for his labor only at the rate of 20 cents an hour for every hour's work, balance when final payment is made." It will be seen that when Jobst sublet the contract for painting he agreed to advance money for the payment of laborers employed by G. A. Johnson at the rate of 40 cents an hour, such payment to be made semimonthly. As Johnson could only call upon Jobst for money for his employees to the extent of 40 cents an hour for the time they were employed, it is quite reasonable to suppose that he would direct Johnson not to include in his time reports a greater amount for his own services, although the contract between them might be for a larger sum. There is evidence tending to show that Jobst himself on one occasion paid the plaintiff at the rate of $25 a week, and he himself testified that plaintiff on leaving Fort McKenzie informed him that he had not been paid in full. Under these circumstances, if he settled with G. A. Johnson on the theory that plaintiff had been fully paid for his work, he did so, knowing that plaintiff was claiming the contrary, and he stands in no position to assert an estoppel against him.

The verdict of the jury is supported by sufficient evidence, 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.

STATE OF NEBRASKA, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.*

FILED MARCH 5, 1908. No. 15,122.

1. **Commerce:** RAILROADS: REGULATION. While interstate commerce and the instrumentalities by which it is carried on is within the exclusive control of the federal congress, the domestic commerce of a state and the facilities by which it is conducted is within the control of the state, and the legislature of the state may make such reasonable rules and regulations governing its domestic commerce and the instrumentalities by which it is conducted as seem best fitted to advance the interest and convenience of its citizens, provided such regulation does not directly burden or interfere with the interstate commerce of the nation.
2. ———: INTERSTATE. Produce does not become a matter of interstate commerce until delivered to the carrier to be transported out of the state to the state of its destination, or has started on its ultimate transportation to that state.
3. **Constitutional Law.** Section 1, ch. 105, laws 1905, is not subject to the objection of being special or class legislation.
4. ———. This law referred to in the last preceding paragraph of this syllabus is not objectionable as allowing the taking or damaging of private property without just compensation, or as depriving the citizen of his property without due process of law.

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

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

C. A. Rawls, contra.

DUFFIE, C.

The legislature of 1905 passed an act which contains, among others, the following provisions:

* Pending on error in supreme court of United States.

"Section 1. Every railroad corporation shall give to all persons and associations reasonable and equal terms for the transportation of any merchandise or other property of every kind and description upon any railroad owned or operated by such corporation within this state, and for terminal handling, the use of the depot and other buildings and grounds of such corporation, and at any point where its railroad shall connect with any other railroad, reasonable and equal terms and facilities of interchange, and shall promptly forward merchandise consigned or directed to be sent over another road connecting with its road, according to the directions therein or accompanying the same; and every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip, and maintain a side-track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever: Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels.

"Section 6. Any railroad company, officer or agent thereof who wilfully violates or evades any of the pro-

visions of this act shall be liable to the party injured for all damages sustained by reason of such violation, and, in addition thereto, shall be liable for each offense to a penalty of five hundred dollars ($500), which may be recovered by the county attorney in an action brought in the name of the state of Nebraska in any county by an action in the district court where such railroad company or corporation is doing business."

This act is known as chapter 105 of the session laws of 1905. The facts leading up to this legislation are so well known that judicial notice thereof may be taken. Whether well-founded or not, the public at large had come to believe that a combination existed between the grain dealers and owners of elevators within this state to control the price of grain, and as a result that the producer was compelled to sell at a price much below the market value of his product. In this condition of affairs, the legislature enacted the statute above set out, and many of the farmers throughout the state organized companies for the purpose of erecting and maintaining elevators at the railway stations most convenient to their homes. In 1905 the Manley Cooperative Grain Association was organized, and in October of that year applied to the manager of the Missouri Pacific Railway Company for a lease to grounds on the right of way of the Missouri Pacific in Manley, Nebraska; the ground to be used as a building site for a grain elevator. On October 28 defendant's superintendent replied to this application as follows: "In reply to your favor of the 23d inst., beg to advise that we already have a sufficient number of elevators located on our right of way at Manley to take care of all the business originating at that station, and we cannot, therefore, grant your application." On November 8, 1905, the association again wrote the officers of the company, stating that it had control of a tract of land adjacent to the railroad right of way and near the south end of a side-track on the road. It was further stated

that the association proposed to construct an elevator on this land, having a capacity of at least 15,000 bushels, and when constructed it would expect the company to comply with the laws of Nebraska and to extend its side-track so that grain could be loaded from the elevator into cars on such extended side-track. The letter further stated that the association was made up of representative and substantial farmers residing in and about Manley, who during the last year had shipped about 50,000 bushels of grain over defendant company's road; that the members of the association had ample capital to construct and operate the elevator, and wished to do business with defendant company; that there was ample room on the right of way adjacent to defendant's side-track where, if permitted, they would construct their elevator, and obviate the necessity of building on their own land and causing the expense of extending the side-track; that, while they did not know what such expense might be, they were willing to bear an equitable share of the cost if the defendant company would either construct the same forthwith or contract to do so when it was needed. The letter concluded with an inquiry whether the company would consider any proposition looking toward the extension of its switch further south as above indicated and offering to give a bond to construct the elevator. In reply the superintendent of the company, under date of November 22, stated that there was no change in the position of the company. His letter concluded as follows: "We will not lease you a portion of our ground upon which to erect an elevator, nor will we give you trackage privilege to load from such a structure if erected on your individual property."

On January 12, 1906, the grain association notified the company, in writing, that it had about completed the construction of its elevator, which had a capacity of more than 15,000 bushels; that they had about 100,000 bushels of corn in sight for the elevator; that the building was so situated that the present side-track could be extended

in nearly a straight line, and if built in that direction and within four feet of the edge of the right of way would permit the switching of cars to be loaded for shipment. It was further stated that during the last season the association had shipped about 50,000 bushels of corn from the station at Manley and had been compelled to load it into cars on the side-track; that their elevator would permit the more economical and speedy handling of the grain; that they expected to continue in business at Manley for an indefinite time; that they were still willing to bear an equitable share of the expense in extending the siding, and now again demanded the extension of the side-track to the elevator so that the side-track would be laid within four feet of the outer line of the company's right of way. The defendant company still refused to comply with the demand of the grain association to extend its track. Thereafter this action was brought in the district court for Cass county to recover the penalty of $500 provided by statute for such refusal. On the trial judgment went in favor of the state, and defendant has appealed to this court.

The defenses urged against the maintenance of the action are, briefly stated, the following: First, That the subject matter of the action is within the exclusive jurisdiction of the United States and subject only to the control of congress; and, congress having acted in the passage of the act to regulate commerce, approved June 29, 1906, the state court is deprived of all jurisdiction of the subject matter of the action, the defendant road being an interstate road, and the claim being that the grain to be handled in the elevator in question was intended for interstate shipment. Second. That the statute under which the action is brought is invalid, because it is special and class legislation, and repugnant to section 15, art. III of the constitution of the state of Nebraska, which prohibits special legislation. Third. That the statute under which the action is brought provides for taking and damaging the property of appellant without just

compensation, and is therefore violative of section 21, art. I of the constitution of the state. Fourth. That the statute under which the action is brought seeks to deprive appellant of its property without due process of law and is repugnant to the fourteenth amendment to the constitution of the United States.

While each of the foregoing defenses are insisted on, defendant has chiefly devoted his argument to the one first mentioned, insisting that as the road of defendant company is an interstate road, chartered by the state of Missouri, and having a continuous line extending through six or seven states of the Union, its track and appurtenance is exclusively under federal control, and not subject to state regulation or the jurisdiction of the state courts. On the oral argument it was conceded by the attorneys representing the defendant that, so far as the domestic commerce of the state is concerned, it is subject to state control and regulation, and with this concession freely given it is hard to see why the sovereign state, which may control its own domestic commerce, shall not have a voice in determining the facilities by which that commerce is to be conducted. That purely internal commerce of a state is exclusively under state regulation has been many times determined by the supreme court of the United States. *Moore v. American Transportation Co.*, 24 How. (U. S.) 1; *Walker v. Western Transportation Co.*, 3 Wall. (U. S.) 152; *The Daniel Ball*, 10 Wall. (U. S.) 557. In the case last cited it is said: "The limitation of the power of congress over commerce to commerce among the several states, with foreign nations, and with the Indian tribes, necessarily excludes from federal control all that commerce which is carried on entirely within the limits of the state, and does not extend to or affect other states."

While defendant concedes that this is the rule, argument of counsel is partially based upon the theory that the grain which this elevator purposes to receive is intended for shipment to markets in other states, and,

further, that the act to regulate commerce, approved June 29, 1906, commonly known as the "Hepburn bill," places all interstate railroads, including switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the person or property designated therein, and all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property, and all instrumentalities and facilities of shipment or carriage, under charge and control of the interstate commerce commission. So far as the road is engaged in interstate commerce, it cannot be denied that every appurtenance of the road is within the control of the interstate commerce commission; but this does not in the least interfere with state control of the road and its appurtenances, so far as it is engaged in intrastate commerce. As said by the supreme court of Iowa in *McGuire v. Chicago, B. & Q. R. Co.*, 131 Ia. 340: "Subject alone to the condition that the regulation imposed does not operate upon interstate commerce or otherwise violate the provisions of the federal constitution, the power of the state to prescribe the terms on which foreign corporations may do business within its jurisdiction is unlimited. The fact that the corporation is engaged in interstate commerce does not exempt it from control by the state in respect to all business done therein not directly connected with traffic between the states. For instance, the local statutes pertaining to the duty to fence railway tracks, imposing liability for live stock killed by moving trains or for damages by fire set out by engines, regulating speed of trains within city or yard limits, abolishing the fellow-servant rule, requiring the redemption of unused tickets, and regulating contracts of employment, are no less applicable to foreign corporations engaged in interstate commerce than to domestic corporations doing only a local business."

Again, it might be said that the defendant company, by entering this state, subjected itself to all our laws relating to the control and management of railways. Sec-

tion 121, ch. 16, Comp. St. 1907, has been in force since 1864. It is as follows: "Every such railroad corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of passengers and freight, and shall take, transport, and discharge all passengers to and from such stations as the trains stop at, from or to all places and stations upon their said road, on the due payment of fare or freight bill." In *State v. Republican V. R. Co.*, 17 Neb. 647, a case in which this court issued a mandamus to compel the erection of a depot, basing its action on the rule of the common law requiring carriers to furnish adequate facilities to the public, it was said, referring to the section above quoted: "I do not think that this section furnishes authority for the interference of the courts to compel the establishment of a depot or station at any point on the line of respondent's road, but, on the contrary, it is quite apparent upon the face of the section that every duty thereby imposed is qualified by the words 'to and from such stations as the trains stop at,' and its application limited to established depots." On rehearing, granted on the application of the railway company, the court, while not intimating any doubt of the correctness of its former opinion, held that under our constitution and the several sections of our general railway act, and particularly of section 75 thereof, all railway companies in the state were required to furnish such "side-tracks, turnouts, offices, and depots as *shall be necessary*," so that by our former decisions railway companies in this state are required, both under the rule of the common law and by force of our statute, to furnish such side-track, depots, etc., as may be necessary for the use of the public. See 18 Neb. 512.

It may be that the elevator facilities furnished by the two elevators erected and doing business prior to the building of the elevator in question would under proper management accommodate the trade at that station, but

the condition of the market there, as shown by the evidence, did not afford the grain growers the fair market value of their product. The evidence is undisputed that the price of grain fixed by these elevators was from two to four cents below the fair market value of such grain, and we can conceive of no higher duty required of the defendant company than to furnish adequate facilities to the farming community that had expended its money in erecting an elevator for the storage and shipment of their own grain, in order to protect themselves against a condition which denied them the fair market price of their produce. If these facilities demanded the extension of the railroad switch at that station within reasonable limits, the power of the state to enforce its construction for the benefit of its citizens can no more be denied than the power possessed by the state to require the erection of a depot at a point where the interest and the convenience of the citizens demand it, even in the absence of the statute.

It is also urged that the grain received at the elevator in question was designed for shipment to a sister state, that it was an article of interstate commerce, and that application for facilities in the operation of the elevator should be addressed to the interstate commerce commission, and not to the courts of the state. The answer to this is that the record discloses that a great part of the grain received at this elevator was sold in Omaha; but, even if this were not the case, the authorities are uniform in holding that produce does not become a matter of interstate commerce until actually delivered to the carrier to be transported beyond the boundaries of the state. In *Coe v. Errol,* 116 U. S. 517, 525, the court deals with this question in the following words: "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for trans-

portation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state." In the case of *In re Greene,* 52 Fed. 104, 113, it is said: "When the (interstate) commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. * * * That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of congress." In concluding this branch of the discussion, we might say that we confess our inability to comprehend the force of the reasoning which concedes to the state the right to regulate and control its own commerce, acting at its pleasure in that regard, so long as it does not burden or impede interstate commerce, and which at the same time denies to it any voice in designating the instrumentalities by which that commerce is to be carried on and the facilities which the carrier shall afford the shipper.

We do not think the act under consideration is subject to the objection of special legislation urged against it by the defendant. In *Hunzinger v. State,* 39 Neb. 653, the

court said: "If the law is general in its terms, and restricted by its terms to no particular locality, and operates equally upon all of a group of objects, it is not a special law." In *Livingston Building & Loan Ass'n v. Drummond,* 49 Neb. 200, it was said: "It has been very often decided by this court that if a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation, or as being in the nature of special legislation." To the same effect are *State v. Berka,* 20 Neb. 375; *State v. Graham,* 16 Neb. 74; *McClay v. City of Lincoln,* 32 Neb. 412; *State v. Robinson,* 35 Neb. 401; *Van Horn v. State,* 46 Neb. 62.

The third and fourth objections raised by the defendant may be considered together. The building of a side-track upon the defendant's right of way is not a taking of its property. The switch or side-track will be owned by the company and under its control. It remains a part of the line of defendant's railroad, and a part of the public highways of the state. The grain company will have no exclusive use of this side-track. As said in *Chicago, B. & Q. R. Co. v. Giffen,* 70 Neb. 66: "The proprietor of an elevator, built upon the right of way of a railroad company by permission of the company, is a licensee upon the premises, and must operate his elevator, loading cars therefrom, subject to the right of the company to handle its trains and use the track for switching purposes in the ordinary and usual way of doing such work." While the elevator in the case at bar is built upon the grounds owned or controlled by a grain association adjacent to the defendant's right of way, this will not at all change the rule relating to the use of the side-track. The company may still use the track for its own purposes, and will be under no further obligation to the elevator company than to furnish cars for the transaction of its business, giving it equal facilities with other like companies

upon said switch or upon its right of way. The case is not similar to that of *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, where the supreme court of the United States reversed the holding of this court requiring the railway company to furnish a free site upon its right of way for the building and maintenance of a grain elevator. The opinion of this court was reversed upon the sole ground that it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its own grounds without being compensated therefor. In the opinion it is said: "Nor does it (the record) present any question as to the power of the legislature to compel the railroad company itself to erect and maintain an elevator for the use of the public; or to compel it to permit all persons equal facilities of access from their own lands to its tracks * * * for the purpose of shipping or receiving grain or other freight. * * * The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way."

That a railroad company may be compelled to construct a switch for the accommodation of the public is recognized in the provisions of the Hepburn law, as well as by the decisions of the supreme court of the United States. In the first section of the Hepburn act (U. S. St. at Large, vol. 34, p. 585, ch. 3591, June 29, 1906) it is provided as follows: "Any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side-track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same;

and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." If the federal congress may make such provision for the benefit of interstate shippers, we can see no reason why the legislature of the state may not protect the domestic shipper by similar legislation. We can see no difference in principle in compelling a company to build a switch connection with another road and constructing a switch or side-track upon its own right of way for the accommodation and convenience of a domestic shipper.

A statute of the state of Minnesota contains a provision similar to that found in the Hepburn law, requiring a switch connection between two roads for the transfer of traffic, and in the case of *Jacobson v. Wisconsin, M. & P. R. Co.,* 71 Minn. 519, the validity of the statute was questioned upon the grounds here urged against the statute under consideration. The supreme court of Minnesota held: "Where the putting in of a connecting switch at the crossing of two railroads to facilitate the transfer of cars from one road to the other will benefit both state and interstate traffic, *held,* there is concurrent jurisdiction in the state and federal authorities to order the putting in of such connection." And upon appeal to the supreme court of the United States (179 U. S. 287), that court affirmed the opinion of the state court, and held as follows: "The providing, at the place of intersection of the two railroads affected by this case, ample facilities for transferring cars used in the regular business of the respective lines, and to provide facilities for conducting the business, while it would afford facilities to interstate commerce, would not regulate such commerce, within the meaning of the constitution. * * * Whether a judgment enforcing trade connections between two railroad corporations is a violation of the constitutional rights of either or both depends upon the facts surrounding the cases in regard to which the judgment was given." In the body of the opinion it is said: "Railroads have from

the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. *Olcott v. Supervisors,* 16 Wall. (U. S.) 678; *Cherokee Nation v. Southern Kansas R. Co.,* 135 U. S. 641; *United States v. Joint-Traffic Ass'n,* 171 U. S. 505; *Lake Shore & M. S. R. Co. v. Ohio,* 173 U. S. 285. It is because they are such highways that the land upon which the rails are laid, and also that which may be necessary for the other purposes of the corporation, is said to be used for a public purpose. * * * The companies hold a public franchise, and governmental supervision is therefore valid. They are organized for the public interests and to subserve primarily the public good and convenience." In *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission,* 206 U. S. 1, 19, it is said: "The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be sucessfully questioned in view of the long line of authorities sustaining that doctrine."

The evidence taken upon the trial shows that the elevator in question, without any side-track facilities, and doing what is called a scoop-shovel business, shipped about 50,000 bushels of grain during the year prior to the trial of this action, and that with proper side-track facilities it will double, or more than double, its business. Not only is this the case, but the business of the railroad itself would be greatly facilitated by the building

of this side-track. Now the grain has to be hauled from the elevator to the cars in wagons, and but two cars a day can be loaded. With proper side-track facilities the same work can be done in from one to two hours—a saving of time and of expense to the shipper—thus clearing the railway track of cars that would otherwise necessarily incumber it for some days. The expense of extending the side-track, as shown by the defendant's own evidence, will not exceed $450, while the revenue derived from the shipment of grain will, as otherwise shown, amount to, or exceed, $3,000 per annum. Under the circumstances, we think that the demand for an extension of the side-track was reasonable, and that its construction will not cast an undue burden upon the defendant. By such extension the convenience of the shipper will be greatly facilitated, and the interest of the farming community advanced. At the same time the cars of the company will not be delayed in the loading and their use to other shippers denied during the time now necessarily employed in filling them for shipment. The extended switch will neither impede nor burden interstate shipments; but it will facilitate such as may be made from this elevator and from the station of Manley.

We recommend an affirmance of the judgment of the district court.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

CHARLES E. HOLTON ET AL., APPELLANTS, V. GEORGE I. SAMPSON ET AL., APPELLEES.

FILED MARCH 5, 1908. No. 15,349.

1. **Statutes:** REPEAL. Repeals by implication are not favored, and, when two statutes dealing with the same or similar subjects do not conflict one with the other, the later statute will not work a repeal of the earlier one.

2. ———: ———. Chapter 59, laws 1905, known as the "Juvenile Court Bill," *held* not to repeal chapter 36, laws 1897.

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

John C. Watson, O. G. Leidigh and *A. P. Moran,* for appellants.

D. W. Livingston, contra.

DUFFIE, C.

December 21, 1906, George I. Sampson filed a complaint in writing before W. W. Wilson, county judge of Otoe county, Nebraska, wherein it was charged that Charles E. Holton and Sarah S. Holton, the parents of two minor children, aged five and thirteen years, were not capable of giving said children proper care and attention, and were not suitable persons to have the care, custody and control of said children. This complaint was filed under the provisions of chapter 36, laws 1897, being "An act defining cruelty to children, prescribing punishment therefor, and for guardianship of children in certain cases." See Comp. St. 1903, ch. 34, secs. 41-46. The parents questioned the jurisdiction of the county court to entertain the complaint, or to make any order relating to the custody of the children, upon the ground that the statute had been repealed by chapter 59, laws 1905, more popularly known as the "Juvenile Court Bill." The county court overruled these objections, retained jurisdiction of

the case, and made an order committing the children to the custody of the Nebraska Children's Home Society, a legally incorporated humane society in this state. The case was taken on error to the district court, where the order of the county court was affirmed, and the case is brought here on appeal.

The sole question for our consideration is this: Does the Mockett juvenile court bill repeal the prior act defining cruelty to children, prescribing punishment therefor, and for guardianship of children in certain cases? The latter act does not in terms repeal the former. Section 19 of the juvenile court bill is in the following words: "All acts or parts of acts inconsistent with the provisions of this act, without being or more specifically designated, are hereby repealed. But nothing in this act shall be construed as in any manner conflicting with the compulsory education and child labor laws of this state." Laws 1905, ch. 59. If the Mockett act repeals the former, it is by implication alone, and the repeal of a statute by implication is not favored. In *Dawson County v. Clark,* 58 Neb. 756, it is said: "It is a cardinal rule of construction that an act whose provisions are general will not, unless unavoidable, be interpreted as to affect more particular and positive provisions of a prior act on the same subject." In *State v. Hay,* 45 Neb. 321, it is said: "A subsequent statute treating of a subject in general terms, and not expressly contradicting the more positive provisions of a prior special act, will not be construed as a repeal by implication of the latter, if any other reasonable construction can be adopted."

Again, the Mockett act contemplates that children may be taken from their parents and placed in institutions incorporated under the laws of this or other states in proceedings commenced and prosecuted under other provisions of our statutes. The first paragraph of section 1 of the act (laws 1905, ch. 59) is as follows: "This act shall apply only to children under the age of sixteen (16) years, and shall not apply to children who are now, or who shall

hereafter become, inmates of a state institution, or of any training school for boys or industrial school for girls, or some orphanage, society or institution incorporated under the laws of this or some other state, unless such children shall have been placed therein under and by virtue of the provisions of this act." Our attention has not been called to, nor do we now have in mind, any acts of the legislature authorizing the commitment of minors to an incorporated humane institution, except under the provisions of the juvenile court bill and the act which we now have under consideration, and which appellants claim has been repealed, and the act to prohibit the keeping, maintaining or harboring of girls under the age of 18 years, and boys under the age of 21 years, in houses of ill fame, and to authorize any officer of the law, or the officer or agent of the Nebraska Humane Society, and all other humane or charitable societies, to compel their removal from such houses, being chapter 37*a*, Comp. St. 1905. It cannot be claimed that chapter 37*a* was repealed by the Mockett act, as it includes a class of minors not included in the Mockett act, nor in the act for the prevention of cruelty to children, namely, males up to 21 years of age, and females up to the age of 18. There was no need, therefore, for the Mockett bill to provide that it should not apply to children committed to the care of any humane institution under the provisions of chapter 37*a*, and the legislature could have had in mind in making this exception only children who were committed to such institutions under the provisions of the act denouncing cruelty against children, under which this prosecution was brought. If this be true, then the legislature by its own language gave us to understand that the act under which proceedings in this case was instituted was not intended to be affected in any manner by the provisions of the Mockett bill.

Again, the act now under consideration makes the conviction of the parent for its violation sufficient cause for taking from him the children under his care and control, and committing them to the custody of a humane society,

a provision for which no substitute is found in the Mockett act, and which would become inoperative if we held the act repealed by implication.

For the reason that we discover no irreconcilable conflict in the provisions of the two acts, and for the further reason that the legislature, by the language used in the first section of the Mockett bill, clearly indicated that children might be committed to the care of humane institutions by proceedings under other acts in force when the Mockett bill was passed, we think the judgment appealed from should be affirmed, and so recommend.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

AMELIA RIEGER, APPELLEE, V. CARRIE SCHAIBLE ET AL., APPELLANTS.*

FILED MARCH 5, 1908. No. 15,049.

1. **Executors and Administrators:** ALLOWANCE TO WIDOW: APPEAL. An appeal lies from the judgment of the probate court granting or refusing an allowance to the widow out of the estate of her deceased husband.
2. **Dower:** BAR. Antenuptial contracts were void at common law, and did not constitute a bar to dower.
3. ———: ———. The provisions of the statute that a jointure is a bar of dower do not ordinarily deprive the intended wife of the power to bar her dower by any other form of antenuptial contract.
4. ———: ———. The first paragraph of the syllabus in *Fellers v. Fellers*, 54 Neb. 694, disapproved.
5. ———: ———. An antenuptial contract, in consideration of marriage and the release by each party of all interest in the property of the other, is based upon a sufficient consideration as to both parties, when each is the owner of property in which the other

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

would acquire an interest by reason of the marriage but for the antenuptial agreement, and is sufficient, when equitable and fair in its terms and entered into in good faith, to constitute an equitable bar to dower.

6. Antenuptial contracts between persons contemplating matrimony, determining the prospective rights of each in the property of both parties during and after marriage, are not against public policy and are enforceable.

7. **Executors and Administrators:** ANTENUPTIAL CONTRACTS: BAR TO WIDOW'S ALLOWANCE. An antenuptial contract made in good faith between parties, each of whom owned real and personal property not disproportionate in value, providing that in consideration of marriage each party thereto waived and released and forever quitclaimed and renounced all dower and other interest in and to the real estate and personal property which the other party had or should thereafter acquire; the expressed intention being that all the property of each should descend to his or her lawful heirs, released and divested of all claims of dower, curtesy, or other interest that the other contracting party might have as husband or wife, widower or widow, under the laws of the state of Nebraska, *held* sufficient to bar the widow's statutory allowance; the rights of children not being involved.

8. **Husband and Wife:** ANTENUPTIAL CONTRACT. Whether such antenuptial contract bars the widow's life estate in the homestead of her deceased husband is not here determined. If ineffectual for that purpose, the contract would not thereby be rendered void *in toto*.

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

Reavis & Reavis, for appellants.

Clarence Gillespie and *Edwin Falloon, contra.*

EPPERSON, C.

This appeal involves the validity of an antenuptial contract entered into December 11, 1897, by and between Henry Rieger, a widower, and Mrs. Amelia Lawler, a widow. The agreement was acknowledged, and its material portions follow:

"Whereas Henry Rieger and Amelia Lawler are about to enter into a contract of marriage, and whereas said

Henry Rieger is the owner of certain real estate and personal property, at this date, and Amelia Lawler is also the owner of certain real estate and personal property, at this date, and whereas said Henry Rieger and Amelia Lawler may at any time be desirous of disposing of said real estate and other property, divested of the curtesy, dower, or other claims of said Henry Rieger and Amelia Lawler either by deed or will: Now, therefore, in consideration of said Henry Rieger and said Amelia Lawler consummating and completing said contract of marriage, said Henry Rieger and Amelia Lawler hereby agree to waive and release, and do waive and release and forever quitclaim and renounce all dower and other interest in and to said real estate and personal property that said Henry Rieger and Amelia Lawler may now have or hereafter acquire by any means whatsoever. The intention being hereby to leave the absolute disposal of said real estate and other property now owned or hereafter acquired by either of them, unless taken in their joint names, so that at the death of said Henry Rieger and Amelia Lawler all of the property of said Henry Rieger and Amelia Lawler, real, personal, and mixed, shall descend to his and her lawful heirs released and divested of all claims of dower curtesy or other interest that said Henry Rieger and Amelia Lawler might have as widow or widower under the laws of the state of Nebraska. And in consideration of the consummation of said marriage said Henry Rieger and Amelia Lawler hereby releases, cancels, and waives all claims to all property of said Henry Rieger and Amelia Lawler to which they might be entitled as wife or widow, husband or widower. Any money transactions between the said parties may be represented by notes which, if not sooner paid, shall be a lien on their respective properties after death, and nothing in the above shall be construed to affect the right of either party to make a will disposing of their various properties contrary to this agreement, if either of them should so desire."

Each party was the owner of real and personal prop-

erty when the above contract was made, and each then had children living, the issue of a former marriage. The parties were married three months after the execution of the agreement, and lived together as husband and wife until the death of Henry Rieger on February 7, 1905. No children were born of their marriage. Henry Rieger left personal property worth $17,560.13, and six lots in Falls City, Nebraska, valued at $3,500, two of which were occupied by deceased and his wife as a homestead. During the settlement of his estate in the probate court his widow made application, in pursuance of the statute, for an allowance for her support and maintenance. The heirs objected on the ground that the antenuptial contract was a bar to the allowance claimed by Mrs. Rieger. The probate court adjudged the agreement void, and ordered payment of the allowance as prayed. The district court, on appeal, affirmed the order of the probate court, and the heirs bring the case here for review.

The widow (appellee) contends that the order allowing support from her husband's estate is not appealable, citing *Estate of James v. O'Neill,* 70 Neb. 132. This case does not support appellee's contention that an order allowing a widow an allowance is not subject to review. It was there held that an appeal would not lie from the district court to the supreme court in such matters; the proper remedy being a writ of error, which was not issued in that case. The *O'Neill* case did not declare the law to be that an order allowing the widow support from her husband's estate was not subject to review in any manner. We have not heretofore determined the question whether an order granting a widow an allowance is subject to review in the appellate courts. We are not now dealing with a mere temporary or interlocutory order. The court below granted the application of the widow, set aside the antenuptial contract, and allowed the full sum prayed for in her petition. This much of the estate of the deceased was distributed. We think such an order is a final order, and is appealable by virtue of section 42, ch. 20, Comp. St.

1907, which provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any person against whom any such order, judgment, or decree may be made or who may be affected thereby." The general rule seems to be that an appeal lies from the judgment of the probate court granting or refusing an allowance to the widow out of the estate of her deceased husband. 18 Cyc. 402, note 86; Dame, Probate and Administration, sec. 425. See, also, *Forwood v. Forwood,* 86 Ky. 114, 5 S. W. 361.

Appellee contends that the agreement is void and not a bar to dower, and, being void for this reason, is void *in toto,* and does not affect the widow's right to support during the settlement of the estate. If the agreement in judgment here does not bar dower, it follows, as we view it, that it does not intercept the widow's allowance, and we shall therefore examine the question whether the agreement is sufficient to bar dower of the appellee in the lands of her deceased husband. At common law the right of dower could not be waived or lost by an antenuptial agreement. *Gibson v. Gibson,* 15 Mass. *106, 8 Am. Dec. 94; *Hastings v. Dickinson,* 7 Mass. *153, 5 Am. Dec. 34; *Blackmon v. Blackmon,* 16 Ala. 633; *Gould v. Womack,* 2 Ala. 83; *Logan v. Phillips,* 18 Mo. 22. Two reasons were assigned by the courts to support the common law rule: (1) The settlement being executed before marriage, the demand of dower had no existence, and no right can be barred before it accrues. (2) No right or title to a freehold estate can be barred by a collateral satisfaction. 14 Cyc. 939.

The antenuptial agreement being insufficient at common law to bar dower, the next inquiry is as to its validity under the following provisions of our decedent statute (Comp. St. 1897, ch. 23), in force at the time the agreement herein was made:

"Section 12. A married woman residing within this state may bar her right of dower in any estate conveyed

by her husband, or by his guardian if he be a minor, by joining in a deed of conveyance, and acknowledging the same as prescribed by law, or by joining with her husband in a subsequent deed acknowledged in like manner.

"Section 13. A woman may also be barred of her dower in all the lands of her husband by a jointure settled on her, with her assent, before the marriage, provided such jointure consists of a freehold estate in lands for the life of the wife at least, to take effect, in possession or profit, immediately on the death of the husband.

"Section 14. Such assent shall be expressed, if the woman be of full age, by her becoming a party to the conveyance by which it is settled, and if she be under age, by her joining with her father or guardian in such conveyance.

"Section 15. Any pecuniary provision that shall be made for the benefit of an intended wife, and in lieu of dower, shall, if assented to as provided in the preceding section, bar her right of dower in all the lands of her husband.

"Section 16. If any such jointure or pecuniary provision be made before marriage, and without the assent of the intended wife, or if it be made after marriage, she shall make her election before the death of her husband, whether she will take such jointure or pecuniary provision, or be endowed of the lands of her husband; but she shall not be entitled to both.

"Section 17. If any lands be devised to a woman, or other provisions be made for her in the will of her husband, she shall make her election whether she will take the lands so devised or the provision so made, or whether she will be endowed of the lands of her husband; but she shall not be entitled to both, unless it plainly appears by the will to have been so intended by the testator.

"Section 18. When a widow shall be entitled to an election under either of the two preceding sections, she shall be deemed to have elected to take such jointure, devise, or other provision, unless within one year after

the death of her husband she shall commence proceedings for the assignment or recovery of her dower."

The agreement before us does not fall within the provisions of our statute. No jointure was settled upon the wife. She received no freehold estate in the lands of her intended husband by virtue of the antenuptial contract. The agreement was not intended to operate as a legal jointure, and, under the statute, she was not barred of her dower. If the statutory method of barring dower is exclusive, the antenuptial contract herein is void. *Fellers v. Fellers*, 54 Neb. 694. We are of opinion, however, that the true rule is that such agreements are regulated by statute, and are void unless executed in accordance with the written law, except in equity, or, as stated by this court in *Fellers v. Fellers*, "in the absence of any contravening equitable considerations." We think the law is that a provision in a statute that jointure is a bar to dower does not ordinarily deprive an intended wife of the power to bar her dower by any other form of antenuptial contract. *Barth v. Lines*, 118 Ill. 374, 59 Am. Rep. 374; *McGee v. McGee*, 91 Ill. 548; *Naill v. Maurer*, 25 Md. 532; *Logan v. Phillips*, 18 Mo. 22; *Gelzer v. Gelzer*, Bailey, Eq. (S. Car.) 387, 23 Am. Dec. 180; *Desnoyer v. Jordan*, 27 Minn. 295; *Stilley v. Folger*, 14 Ohio, 610; 14 Cyc. 940, note 20.

The supreme court of Illinois in *Barth v. Lines*, *supra*, held: "An antenuptial agreement entered into by parties of mature years, with a full understanding of its meaning, whereby each party released and waived his or her right of dower in the lands and estate of the other, and it was provided that each should retain his or her separate property, then had or afterwards acquired, free from any and all claims of the other growing out of the marriage relation: *Held*, That such agreement operated as a bar to the claim of dower by the wife in the husband's lands, resting upon the consideration of his release of his legal rights in her separate estate." Magruder, J., further said in the opinion in that case: "The provision of

our statute, that, when a conveyance is made to, or in trust for, an intended wife, for the purpose of creating a jointure in her favor with her assent, to be taken in lieu of dower, such jointure shall bar any claim for dower by her in the lands of her husband (Hurd, Rev. St. 1885, ch. 41, sec. 7) 'cannot be said to deprive her of the power to bar her right to dower by any other form of antenuptial contract. * * * This, however, is not the case of a settlement or jointure, but of a contract.'" In *Naill v. Maurer, supra,* it appears that a husband and wife agreed before marriage that neither would claim during their marriage or after the death of the other any interest whatever in the property or estate of the other. After the death of the husband the wife claimed dower, and the court held "that the legal operation of the contract is not affected by art. 93, sec. 289 of the code, that a simple statutory declaration, that a settlement of property by jointure or otherwise, on a woman by her husband, before marriage, shall bar her of dower in his lands. That this is not a case of a settlement or jointure, but of a contract between competent parties, executed in good faith, and upon a good consideration, by which the wife has expressly relinquished all right to claim any estate or interest in the property of her deceased husband." The court in the opinion in the case last cited said with reference to the jointure statute of that state: "That is a simple statutory declaration, that a settlement of property by jointure or otherwise, on a woman by her husband, before marriage, shall bar her of dower in his lands, but it goes no further, and cannot be said to deprive her of the power to bar her right to dower by any other form of antenuptial contract. It amounts to nothing more than a declaration of the effect of the settlement in that class of cases." The court in *McGee v. McGee, supra,* uses this language: "It is conceded the provision made in the antenuptial agreement does not create a jointure in favor of the wife, within the meaning of our statute on that subject. That provides that, when an

estate in lands shall be conveyed to an intended husband or wife, for the purpose of creating a jointure in favor of either of them, with his or her assent, to be taken in lieu of dower, such jointure shall bar any right or claim of dower by the party jointured in the lands of the other. None of the elements of a statutory jointure are to be found in the provision made for the intended wife by the antenuptial agreement; but may not that provision be in the nature of a jointure, and may it not for that reason bar the dower of the demandant? Although the cases on this subject are not entirely harmonious, the weight of authority seems to be that any reasonable provision which an adult person agrees to accept in lieu of dower will amount to an equitable jointure, and although it may be wanting in the requisites of a legal jointure, in equity it will bar dower." The court held in *Stilley v. Folger,* 14 Ohio, 610: "A reasonable antenuptial agreement will bar the wife of dower, though its terms be not such as to constitute a good legal jointure." We take the following excerpt from *Desnoyer v. Jordan, supra:* "But it has always been permitted to the parties in contemplation of marriage to fix those rights by agreement, equitable and fairly made between them, and to exclude the operation of the law in respect to fixing such rights; so that, so far as the agreement extends, it, and not the law, furnishes the measure of such rights. That such antenuptial agreements might be made was recognized in the statute in force when this agreement was made. Gen. St. 1866, ch. 69, secs. 1, 4; ch. 48, secs. 14-17. The latter of these statutes did not limit (as appellant argues) antenuptial contracts to barring dower alone. It only prescribed what sort of provision for the wife, in any such contract, should have the effect to bar dower; that it must be a jointure of a freehold estate in lands for her life, at least, to take effect in possession or profit immediately on the death of the husband, or a pecuniary provision for her benefit in lieu of dower, such jointure or pecuniary provision to be assented to by her before the marriage.

But it did not disable the parties to make an antenuptial contract which should, in any other respect, fix the rights of the parties in the property of each other." In 2 Scribner, Dower (2d ed.), pp. 409, 413, it is said: "With respect to the legal requisite, that the estate limited in jointure be such an estate of freehold as should continue during the wife's life, no such circumstance will be necessary in equity in order to make the jointure an absolute bar to dower, if the intended wife be of age and a party to the deed, because, as she is able to settle and dispose of all of her rights, she is competent to extinguish her title to dower upon any terms to which she may think proper to agree. * * * The cases are not entirely agreed upon the question as to whether an antenuptial contract which merely secures to the wife her separate property, and makes no provision for her out of the husband's estate, is a good equitable jointure; but in a majority of the cases it is held, that if it be a part of such agreement that the wife shall relinquish her dower, it will be good in equity." We therefore conclude that the statutes of this state, which are similar to those construed by the courts in the cases above cited, do not provide the exclusive method of barring dower, or deprive parties competent to contract of the right to enter into any other form of antenuptial agreement. Antenuptial contracts attempting to intercept dower being void at common law, and the method prescribed by our statute creating jointures being exclusive only in the absence of equitable considerations, we must therefore look to the general equitable principles controlling such cases to determine the validity of the agreement in the case before us.

In states where statutes creating jointures exist, it is generally held that an antenuptial contract, entered into in good faith by competent parties, and which is fair and equitable in its terms, will be upheld and enforced by the courts. Independently of jointure statutes, the parties may prescribe a rule by antenuptial agreement changing

the one prescribed by law. Such a contract "is not a *release* of any right; but it is doing what is done every day in other things, namely, providing a rule by agreement to be applied instead of the rule which the law would furnish in the absence of an agreement. Where this rule by agreement exists, dower, on common principles, ought to be held not to attach." 1 Bishop, Law of Married Women, sec. 418. "That, before the statute of uses, and, therefore, independently of the sections concerning jointure, if a husband and his wife had entered into an antenuptial agreement whereby she accepted any provision therein made by him in lieu of dower, this undertaking bound her in equity, and she could not have dower on his death. The same law prevailed after the statute was enacted; whence may be traced, in part, the doctrine of what is called equitable jointure, in distinction from jointure under the statute of uses and the rulings thereon by the common law tribunals." 1 Bishop, Law of Married Women, sec. 420. "It is but a step from such a case as this to another one of which there are several in the books, where the parties agree beforehand that, after marriage, each shall hold his or her antenuptial property to his or her separate use, and, on the death of one of them, neither shall have any marital claim on the estate of the other. This is, at least in a court of equity, generally esteemed to be a good bar to dower." 1 Bishop, Law of Married Women, sec. 423. "The principle governing these cases, it should be remembered, is, not that the antenuptial contract constitutes a release of dower—for a thing not existing cannot be released; but it is an undertaking not to claim dower—an introduction of a rule by agreement differing from the one which the law provides in the absence of an agreement. For the principle is well settled, that, though parties marrying must take the *status* of marriage as the law has established it, and cannot vary it by antenuptial contract, yet, within certain legal limits, and proceeding by legal rule, they may by such contract vary any or all of those property-rights which the *status* superinduces."

1 Bishop, Law of Married Women, sec. 427. "While marriage is a sufficient consideration, yet any other valuable consideration may support an antenuptial settlement. The mutuality of the stipulations in the contract may constitute a sufficient consideration to each of the parties for the rights relinquished by the other, as, for instance, a mutual relinquishment by each of all rights in the property of the other." 21 Cyc. 1248. See, also, 19 Am. & Eng. Ency. Law (2d ed.), 1233; Schouler, Domestic Relations (5th ed.), secs. 171, 173; 2 Story, Equity Jurisprudence (13th ed.), secs. 1367, 1368, 1370.

Turning to the adjudged cases, we find that the supreme court of Illinois in *Kroell v. Kroell*, 76 N. E. 63 (219 Ill. 105), held: "An antenuptial contract is supported as to consideration by the subsequent marriage of the parties and mutual covenants waiving and releasing the rights of each in the property of the other. Antenuptial agreements between persons contemplating matrimony, determining the rights of each in the property of the other and in their own property during and after marriage, are not against public policy, but are enforceable." Each of the parties to the agreement in *Kroell v. Kroell, supra,* was the owner of real estate when the antenuptial contract was executed. The agreement contained mutual covenants waiving and releasing the rights of each party in the property of the other. The court in the opinion said: "It can make no difference whether the interest of the husband in the property or estate of his deceased wife is of the same kind and amount as the interest of the wife in the estate of her deceased husband. Whatever interest either one acquired in the property or estate of the other was released by the contract. It is further contended that the contract does not rest upon a sufficient consideration, and that an intended marriage is not such a consideration. The parties were married, and marriage itself has always been regarded as a sufficient consideration to support a marriage settlement. * * * It was the only consideration in the antenuptial contract passed upon in the case

of *Dunlop v. Lamb,* 182 Ill. 319. But in this case there was another consideration, which was the mutual covenants of the parties to waive their rights in the property of each other and the release of such rights. Each party conveyed and quitclaimed to the other all interest to be acquired, by virtue of the marriage, in the property, real and personal, of the other, and the mutual covenants were a good consideration." See *Yarde v. Yarde,* 187 Ill. 636; *Worrell v. Forsyth,* 141 Ill. 22; *Spencer v. Boardman,* 118 Ill. 553; *Weaver v. Weaver,* 109 Ill. 225; *McMahill v. McMahill,* 105 Ill. 596, 44 Am. Rep. 819; *Jordan v. Clark,* 81 Ill. 465; *Phelps v. Phelps,* 72 Ill. 545.

The supreme court of Iowa in *Fisher v. Koontz,* 110 Ia. 498, held: "An antenuptial contract, providing that the wife shall acquire no interest in the husband's estate, is binding. Marriage is a sufficient consideration for an antenuptial contract whereby the wife relinquishes her marital rights in the husband's property"—citing in support of its conclusion *Peet v. Peet,* 81 Ia. 172; *Ditson v. Ditson,* 85 Ia. 276; *Jacobs v. Jacobs,* 42 Ia. 600. Antenuptial agreements are upheld in Kansas. In *Hafer v. Hafer,* 33 Kan. 449, it was decided: "The statutes of Kansas recognize the right of parties contemplating marriage to make settlements and contracts relating to and based upon the consideration of marriage, and an antenuptial contract providing a different rule than the one prescribed by law for settling their property rights, entered into by persons competent to contract, and which, considering the circumstances of the parties at the time of making the same, is reasonable and just in its provisions, should be upheld and enforced. * * * Marriage is a good and sufficient consideration to sustain an antenuptial contract." In the opinion in the Kansas case it was further said: "It was also held in the court below that the contract was without consideration. Clearly, this is not so. In addition to the reciprocal agreements therein, it has for its support the consideration of marriage, which is not only a valuable consideration, but has

been held to be 'the highest consideration known in law.'" See, further, *Brown v. Weld,* 5 Kan. App. 341. In *Forwood v. Forwood,* 5 S. W. 361 (86 Ky. 114), the rule is stated thus: "In the absence of fraud, a woman who is *sui juris* may, by antenuptial contract, relinquish her right of dower and distributive share in her intended husband's estate; and the marriage of the parties is a sufficient consideration to sustain such contract." *Sanders v. Miller,* 79 Ky. 517, 42 Am. Rep. 237. The court in *McNutt v. McNutt,* 2 L. R. A. 372, 116 Ind. 545 (a case quite similar to the one before us), reviews the authorities and states its conclusions as follows: "A contract in consideration of marriage, where each party releases all interest in the other's property, is upon a sufficient consideration as to both parties, at least where each is possessed of property before marriage. A valid antenuptial contract, founded on the consideration of marriage alone, may be executed by a woman who has an estate of her own." See, further, *Buffington v. Buffington,* 151 Ind. 200; *Kennedy v. Kennedy,* 150 Ind. 636; *State v. Osborn,* 143 Ind. 671; *Shaffer v. Shaffer,* 90 Ind. 472; *Bunnel v. Witherow,* 29 Ind. 123. It was held in *Naill v. Maurer,* 25 Md. 532, "that the agreement or contract cannot be avoided for want of consideration; that either the reciprocal stipulations of the contract or the proposed marriage would constitute a consideration, in every way sufficient to render the contract valid and binding." The court further said in *Naill v. Maurer, supra:* "The contract was made in contemplation of marriage, and, as clearly appears, was intended to bar or prevent the acquisition thereby of any right by either in the property of the other, in order that the marriage proposed might take place. The main object in view was the consummation of the marriage, and it was to that end that the contract was executed. It seemed almost impossible to view the contract as founded on any other consideration, although the reciprocal character of the stipulations might be held to constitute one sufficient to make the contract binding and

effective. But whether the marriage they proposed be expressly mentioned as a consideration or not, we think it must be regarded as such within the purview and meaning of the contract; and we accordingly hold that the contract cannot be avoided on that ground." In *McGee v. McGee*, 91 Ill. 548, Scott, J., said: "The contract, in our judgment, is a reasonable one. It is one that persons advanced in life could, with great propriety, make, and especially where the parties have previously been married, and where there may be children by both marriages, among whom controversies as to property may arise after the death of the parents. Such agreements are forbidden by no considerations of public policy, and there can be no reason why equity will not lend its aid to compel the surviving party to abide the contract. Our opinion is, the fair construction of the antenuptial agreement is that it intercepts dower of the widow, and may be set up as an effectual bar to her demand for dower in the lands of which her husband died seized." In *Stilley v. Folger*, 14 Ohio, 610, 649, it was said by the court: "*Antenuptial contracts* have long been regarded as within the policy of the law, both at Westminster and in the United States. They are in favor of marriage and tend to promote domestic happiness, by removing one of the frequent causes of family disputes, contentions about property and especially allowances to the wife. Indeed, we think it may be considered as well settled, at this day, that almost any *bona fide* and reasonable agreement, made before marriage, to secure the wife in the enjoyment either of her own separate property, or a portion of that of her husband, whether during the coverture or after his death, will be carried into execution in a court of chancery." In *Mintier v. Mintier*, 28 Ohio St. 307, is the following: "If the antenuptial agreement in this case was intended by the parties to operate as an equitable jointure, and as such to bar all claims of the wife to dower in the real estate of the husband; if the parties were of mature age, and capable of judging in respect to their

interests; if the agreement was fairly entered into in good faith, and without any fraud or imposition; if it was reasonable in its terms, and was in good faith acted upon and carried into effect by Robert Mintier during his life, no good reason is perceived why full effect should not be given to it, according to the intention of the parties." In *Jacobs v. Jacobs*, 42 Ia. 600, it was said: "It is claimed, however, that the contract is unreasonable and without sufficient consideration, and therefore ought not in a court of equity to be enforced. We cannot so regard it. The law looks upon marriage as a civil contract, and this marriage seems to have been purely a business transaction. So far as appears, the contract was freely and voluntarily entered into, without any fraud or imposition. One of the parties was a crippled widower, sixty-two years old, with eleven children, and real estate worth $12,000; the other, a widow with three children, forty acres of land and $700 or $800 in money. They were willing to marry, but each wanted the sole control of his or her own property, and to transmit it to his or her children. * * * We cannot say but that the advantages are about equal, and the contract is fair and reasonable. We know of no reason why it should not be enforced." In *Pierce v. Pierce*, 71 N. Y. 154, is the following: "Antenuptial contracts, whereby the future wife releases her claim to her right of dower, and to all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made and executed without fraud and imposition, they will be enforced by the courts." In *Johnston v. Spicer*, 107 N. Y. 185, it was said: "Antenuptial contracts, by which it is attempted to regulate and control the interest which each of the parties to the marriage shall take in the property of the other, during coverture or after death, like dower, are favored by the courts and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises."

A leading case is *Andrews v. Andrews*, 8 Conn. *79,

where the rule is stated as follows: "I can see no reason why such an agreement, deliberately made, and upon a sufficient consideration, should not be enforced in chancery. Such contracts, especially in late marriages, are not unusual. They are opposed to no rule of law, nor to any principle of sound policy. On the contrary, they are, in my judgment, highly beneficial and are eminently entitled to the aid of a court of chancery, where such aid is necessary to carry them into effect; and especially is this true, where the contract has been executed, in good faith, by one of the parties." See, further, *Staub's Appeal,* 66 Conn. 127; *Selleck v. Selleck,* 8 Conn. *86, note; *Webb v. Webb,* 29 Ala. 588; *Farrow v. Farrow,* 1 Del. Ch. 457; *Brooks v. Austin,* 95 N. Car. 474; *Neves v. Scott,* 9 How. (U. S.) 196; *Marshall v. Morris,* 16 Ga. 368; *Culberson v. Culberson,* 37 Ga. 296; *Wentworth v. Wentworth,* 69 Me. 247; *Busey v. McCurley,* 61 Md. 436; *Butman v. Porter,* 100 Mass. 337; *Freeland v. Freeland,* 128 Mass. 509; *Jenkins v. Holt,* 109 Mass. 261; *Miller v. Goodwin,* 8 Gray (Mass.), 542; *Vincent v. Spooner,* 2 Cush. (Mass.) 467; *Tarbell v. Tarbell,* 10 Allen (Mass.), 278; *Sullings v. Sullings,* 9 Allen (Mass.), 234; *Heald's Petition,* 22 N. H. 265; *Carpenter v. Carpenter,* 40 Hun (N. Y.), 263; *Shoch v. Shoch's Exr's,* 19 Pa. St. 252; *Ellmaker v. Ellmaker,* 4 Watts (Pa.), 89; *Law v. Smith,* 2 R. I. 244; *Cunningham v. Shannon,* 4 Rich. Eq. (S. Car.) 135; *Findley's Exr's v. Findley,* 11 Grat. (Va.) 434; *Charles v. Charles,* 8 Grat. (Va.) 486; *Faulkner v. Faulkner's Exr's,* 3 Leigh (Va.), 255; *Hinkle v. Hinkle,* 34 W. Va. 142; *West v. Walker,* 77 Wis. 557; *Hershy v. Latham,* 46 Ark. 542; *Peck v. Peck,* 12 R. I. 485, 34 Am. Rep. 702.

We think the rule deducible from the authorities under review is that in equity an antenuptial contract, in consideration of marriage and the release by each party of all interest in the property of the other, is based upon a sufficient consideration as to both parties, when each is the owner of an estate in which the other would acquire

an interest by reason of the marital relations but for the antenuptial agreement, and is sufficient, when equitable and fair in its terms and entered into in good faith, to constitute an equitable bar to dower. Such is the rule for which appellants contend.

We shall now examine the authorities which are claimed to be in conflict with the rule of the decisions above referred to. It is argued that *Fellers v. Fellers,* 54 Neb. 694, does not recognize the equitable rule relied upon by appellants; that this court is committed to the doctrine that the method prescribed by statute creating a jointure is exclusive; and that, the husband not having settled upon the wife any real estate, the agreement is void and unenforceable and does not bar dower. The decision in the *Fellers* case and the disposition made of the contract there construed was based solely upon the fact that the agreement was executory at the time of the marriage. As we view that case, no occasion existed for discussing the effect of contravening equitable considerations or for launching a rule with reference thereto; indeed, a rule to be deduced from the authorities, and the better reasoning, is that dower may be waived by a reasonable and *bona fide* antenuptial agreement, though not contemplated or provided for by the statute, and such contract will be enforced in the absence of contravening equitable considerations. It seems that the *Fellers* case was completely disposed of upon grounds not requiring a consideration of the statutory provisions relative to dower, and the discussion of "contravening equitable considerations" was *obiter dictum.* It is so considered, and the first paragraph of the syllabus is overruled. The antenuptial contract in the case before us does not depend upon a subsequent provision being made for the intended wife by will, and the covenant that either party was not to claim any interest in the property of the other may be enforced, if found to be within the equitable rule heretofore stated.

As we understand the cases of *In re Estate of Pulling,*

93 Mich. 274, and *Pulling v. Durfee,* 85 Mich. 34, the court did not declare the law in that state to be that jointure statutes similar to ours prescribed the exclusive method of barring dower, or that such provisions deprive an intended wife of the power to bar her dower in equity by any other form of antenuptial contract. In that case there were several written instruments besides the agreement relied upon, and in one of the written instruments the husband declared that he "intended to provide for her (his wife's) future consistently with his ability in a financial way." The heirs contended that the antenuptial contract was binding upon the widow and should be enforced, and the court said: "Were the agreements signed by the widow the sole evidence of what the understanding between the parties actually was, there might be some force in the contention." *In re Estate of Pulling,* 93 Mich. 274. The case of *Curry v. Curry,* 10 Hun (N. Y.), 366, has been repudiated by later decisions of the same court. *Young v. Hicks,* 27 Hun (N. Y.), 54; *Clark v. Clark,* 28 Hun (N. Y.), 509. In the last case cited it was said: "But we cannot concur in the observation of the learned judge in that case (*Curry v. Curry, supra*), that antenuptial contracts are against public policy. On the contrary, we think that the current of decisions respecting marriage settlements shows that, when such contracts are freely and fairly entered into, they are generally conducive to the welfare of the parties thereto and subserve the best purposes of the marriage relation."

The case of *Grogan v. Garrison,* 27 Ohio St. 50, as pointed out in *McNutt v. McNutt,* 116 Ind. 545, apparently confuses postnuptial and antenuptial contracts, and appears to be in conflict with a former decision (*Stilley v. Folger,* 14 Ohio, 610) and a later utterance of the same court (*Mintier v. Mintier,* 28 Ohio St. 307). It was held in *Mowser v. Mowser,* 87 Mo. 437: "A parol antenuptial agreement between husband and wife that, upon the death of either, the other should claim no interest in the estate of the deceased, is not admissible

against the widow in a suit by her for the allowance given her by Revised Statutes, section 107, where she has received nothing as a consideration for the alleged agreement." And further: "It is against public policy to allow a man by an agreement before marriage, which does not secure to the wife after his death a provision for her support during her life, to bar her right to dower." *Mowser v. Mowser, supra,* seems to be an authority against the rule for which appellants contend in the case at bar, and we consider the Missouri courts as committed to a different doctrine than the one announced in this opinion. See *Farris v. Coleman,* 103 Mo. 352, 15 S. W. 767; *Moran v. Stewart,* 173 Mo. 207, 73 S. W. 177; *King v. King,* 184 Mo. 99, 82 S. W. 101; *Coulter v. Lyda,* 102 Mo. App. 401, 76 S. W. 720, where *Mowser v. Mowser, supra,* is reaffirmed.

When we keep in view the distinction between antenuptial and postnuptial contracts, and that the law applicable to the latter, for obvious reasons, has no application to the former, we are of opinion that the authorities cited, except the Missouri cases above referred to, do not interfere with the operation of the rule in equity for which appellants contend, and we shall now proceed to apply that rule to the facts of the case under review.

Both parties were *sui juris,* and each was the owner of real and personal property when the antenuptial contract was executed, the amount and value of the property of each not being clearly disclosed by the evidence. The agreement was made in contemplation of marriage, and each released all claims of dower, curtsey, or other interest in the property of the other. We are therefore not dealing with a case where the intended wife had no property in which she could request or require the intended husband to release his rights arising by virtue of the marriage, and to which he would be entitled should he survive her, and the decision herein must be limited to such cases. An apt illustration was given in *McNutt v. McNutt, supra,* as follows: "Suppose the woman's free-

hold estate to be of great value, yielding an annual income of ten thousand dollars. Why should courts in such a case interfere and annul an antenuptial contract made and acted upon in good faith? Upon what imaginable ground of public policy could such an interference be justified? If she does own an estate in land, and if there is no fraud, and nothing unconscionable, she should be allowed to judge for herself whether the marriage is of itself a sufficient consideration, and courts should not, after the husband's death, substitute their judgment for hers. The truth is it is exceedingly difficult to imagine why, in any case where there is no fraud, courts should displace the judgment of contracting parties and substitute their own. No persons in the world can so well and so justly judge as the contracting parties themselves, and it is only in the strongest and clearest cases that courts should disregard their judgment, and never where there is neither positive wrong nor a fraud. The authorities sustain our conclusion." In view of the authorities cited and the reasons given, we think the antenuptial contract in the case at bar is sufficient in equity to bar dower. The provisions of the antenuptial agreement being sufficient to bar dower, as we have determined, it is quite difficult to see how it would not intercept the statutory right to an allowance; there being no children the issue of the marriage of the parties. As stated in *Staub's Appeal,* 66 Conn. 127: "If she can thus bind herself as to her principal rights, it is difficult to see why she may not also do so as to this minor and incidental right to an allowance." See, also, *Coulter v. Lyda, supra.*

The antenuptial agreement in the instant case does not, in express terms, waive the right to an allowance, but contains sweeping provisions whereby each party releases to the other all claims of dower, curtsey, "or other interest" in his or her estate. No particular form of words is required to create an antenuptial settlement, and a liberal construction of the instrument will be indulged in order to carry out the intention of the parties.

Carswell v. Schley, 56 Ga. 101; *Ardis v. Printup*, 39 Ga. 648; *Matney v. Linn*, 59 Kan. 613; *Mintier v. Mintier, supra; Tucker's Appeal*, 75 Pa. St. 354; *Gause v. Hale*, 37 N. Car. 241; *Buffington v. Buffington*, 151 Ind. 200; 21 Cyc. 1259. The rule seems to be that a widow may by appropriate and sweeping provisions of an antenuptial contract waive her right to an allowance, when the rights of minor children are not involved. 18 Cyc. 390; *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63; *Pavlicek v. Roessler*, 222 Ill. 83. In *Kroell v. Kroell, supra*, it was held: "A contract executed by a husband and wife, whereby each releases and conveys to the other all interest in the other's property, and renounces all claims in law or equity of curtesy, dower, homestead, survivorship, or otherwise, constitutes a release by the wife of her right to a widow's award after the death of the husband, and bars the same, provided there are no minor children of the husband living with the widow." 76 N. E. 63. The contract there construed is similar to the one before us, and the court said in the opinion: "The right to a widow's award, under the statute, depends upon marriage, the continuance of the marriage relation until death, and the survivorship of the wife. The contract included all rights acquired by either one of the parties to it who should outlive the other in the property or estate of the other, and clearly embraced the widow's award. The contract is sweeping in its terms, and includes every interest that the petitioner acquired in or to the property of her husband by virtue of the marriage and every interest which she would become entitled to upon his death in case she survived him." 219 Ill. 105. In *Staub's Appeal, supra*, it was decided that a married woman who had entered into an antenuptial contract could bar herself of the statutory right to an allowance. And in *Appeal of Cowles*, 49 Atl. 195 (74 Conn. 24), it was held: "Under an antenuptial agreement providing that 'the parties hereto * * * release * * * all rights of dower, curtesy, or survivorship, as well as all other rights, either

vested or inchoate, * * * which may be created or established by virtue of such marriage by the common law or any statute,' etc., the surviving widow is not entitled to an allowance from her deceased husband's estate pending settlement." In *Perkins v. Brinkley,* 133 N. Car. 86, the wife by antenuptial contract agreed that she would not claim for herself any right, title, or interest in any property owned by the said party of the first part (her intended husband). It was held that the contract barred her as widow from any statutory allowance. There is a clear distinction between the case at bar and those cases where the rights of minors are involved. The parties to an antenuptial agreement cannot prejudice the rights of minor children, the issue of the intended marriage. See authorities reviewed in *Kroell v. Kroell, supra.* With few exceptions the decisions holding that the widow was not barred by her antenuptial contract are cases where children were born of the marriage, or the contract was executory, and the wife or widow was held to have the right to repudiate the agreement. *Weaver v. Weaver,* 109 Ill. 225; *Zachmann v. Zachmann,* 201 Ill. 380. We are of opinion that the antenuptial contract relied upon by appellants is a bar to the statutory allowance claimed by appellee, unless for considerations presently to be stated it must be held that the agreement is unenforceable in equity.

It is argued that, if the antenuptial contract is valid, still it should not be enforced in a court of equity, for the reason that the utmost good faith is required between parties to such contracts, and, if the provisions secured to the wife be unreasonable or disproportionate to the means of the intended husband, it raises the presumption of designed concealment, and throws on him the burden of disproof. *Kline's Estate,* 64 Pa. St. 122. In *Pierce v. Pierce,* 71 N. Y. 154, it was held: "While an antenuptial contract, by which the future wife releases all claims against the estate of her husband upon his decease, will be sustained when fairly made, yet, from the confidential

relations between the parties, it will be regarded with the most rigid scrutiny; and where the circumstances establish that the woman has been deceived, or induced by false pretenses to enter into the contract, it will be held null and void. *It seems* that the presumption is against the validity of such a contract, and the burden of proof is cast upon the husband, or his representatives, to show perfect good faith; and strict proof will be required, particularly where the provision made for the wife is inequitable and unreasonably disproportionate to the means of the husband." The court said in the opinion: "The relationship of parties who are about to enter into the marriage state is one of mutual confidence, and far different from that of those who are dealing with each other at arm's length. This is especially the case on the part of the woman; and it is the duty of each to be frank and unreserved when about to enter into an antenuptial contract, by a full disclosure of all facts and circumstances which may in any way affect the agreement." The rule is stated in 21 Cyc. 1249, thus: An antenuptial agreement wherein the intended wife releases "all claims against the estate of the intended husband, although valid when fairly made, will be most rigidly scrutinized, and, if the circumstances show that she has been deceived, it will be set aside." *Murdock v. Murdock,* 219 Ill. 123; *Barker v. Barker,* 126 Ala. 503; *Graham v. Graham,* 143 N. Y. 573; *Fisher v. Koontz,* 110 Ia. 498.

Appellee in the case at bar introduced no evidence, and in what respect she was deceived or overreached is not pointed out by counsel. She lived on a farm in the same neighborhood with her intended husband. Negotiations leading up to the agreement seem to have been made by the parties themselves. The antenuptial contract was read over to her more than once, and its provisions fully explained to her. There is no suggestion of fraud or concealment in the evidence. The amount and value of her property at the time of the marriage is not disclosed, but that some of it was personal property does appear. Un-

doubtedly she thought the reservations of her property from the control of her intended husband, and the exclusion of his rights in the property she then owned, and her future accumulations should he survive her, were of more value to her and her children by former marriage than any interest she might leave in the property of her intended husband. At any rate, the interest she reserved in her own estate does not appear to be so disproportionate or unreasonable as to raise the presumption of designed concealment on the part of the husband. This marriage seems to have been in the nature of a business transaction. The parties were advanced in years. Each possessed a separate estate. They were willing to marry, but each, as disclosed by the agreement, desired the control of his or her own property, and wished to transmit it to his or her children by former marriage untrammeled by the interests the law might create in the survivor. The agreement, so far as appears by the record before us, was fairly made. Appellee was not deceived or overreached. The agreement was based upon a sufficient consideration, and was executed in good faith. Appellee understood its purport, and should be held to abide its terms. In this respect, however, and before passing from this branch of the case, it might be well to state that a court of equity, when called upon to consider an antenuptial contract, should examine and construe the instrument in the light of the circumstances surrounding that particular case, and enforce or annul the agreement according to the facts disclosed in the case before it. No arbitrary rule can be laid down which would apply to all antenuptial arrangements.

Appellee's final contention is that the antenuptial contract did not bar her right to homestead during her life, and for this reason the agreement was void *in toto*. It is unnecessary for us to determine in this action whether she is estopped by her agreement from claiming a life estate in the homestead, but, assuming that she is not, the question is whether the contract, being insufficient to

bar such claim, is void *in toto*. The contract does not specifically mention the homestead interest of the survivor. It does not contain any illegal considerations. Had no homestead existed at the death of the husband, the contract would certainly be valid, and reason dictates that the existence of a homestead should not require an avoidance of the contract in its operation upon the widow's right to dower and allowance.

The lower courts erred in decreeing that the antenuptial agreement in the case under review did not bar appellee's statutory allowance during the settlement of her husband's estate; and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings consistent herewith.

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 further proceedings consistent therewith.

REVERSED.

The following opinion on motion for rehearing was filed June 4, 1908. *Rehearing denied:*

DUFFIE, C.

The opinion of Mr. Commissioner EPPERSON is found *ante*, p. 33. In an interesting brief in support of the motion for a rehearing, the opinion of Mr. Commissioner EPPERSON is vigorously attacked. The most vital objection urged against the opinion, in our judgment, is the fact that it overrules the former holding of this court in *Fellers v. Fellers*, 54 Neb. 694, construing our statute relating to marriage settlements. We concede that an opinion establishing a rule of property should not be lightly set aside, but, when the opinion is not based upon reason, is contrary to public policy, and property rights will not be injuriously affected if overruled, the court

should not hesitate in refusing to follow it further. Because the legislature provided a way in which a woman might bar herself of dower in her husband's estate, by having property settled upon her prior to her marriage, Mr. Commissioner RYAN, in *Fellers v. Fellers, supra,* took the position that the only way in which she could effectuate the purpose was by following the method prescribed by the statute. His opinion entirely ignores the right of a woman of mature years to protect her own property or to exclude herself from dower in her husband's estate by contract entered into prior to her marriage. There is nothing in our statute from which it can be inferred that the right of contract was taken away from the parties, or that a contract made before marriage by which each of the parties should renounce all claim to the property of the other arising from the marriage relation might not be made and enforced by the court. As stated in the opinion of Mr. Commissioner EPPERSON, the prevailing opinion is now in favor of recognizing and enforcing such antenuptial contracts, when reasonable in their terms and made by parties with full knowledge of their conditions. Public policy would also seem to favor such contracts. As said in *Stilley v. Folger,* 14 Ohio, 610: "Antenuptial contracts have long been regarded as within the policy of the law both at Westminster and in the United States. They are in favor of marriage and tend to promote domestic happiness, by removing one of the frequent causes of family disputes, contentions about property, and especially allowances to the wife. Indeed, we think it may be considered as well settled, at this day, that almost any *bona fide* and reasonable agreement, made before marriage, to secure the wife in the enjoyment either of her own separate property or a portion of that of her husband, whether during the coverture or after his death, will be carried into execution in a court of chancery." On the main question involved we have no doubt that the motion should be overruled.

A question of minor importance involves the right of

a widow to an allowance during the settlement of the estate. It is urged with much force that this allowance is a provision made for the benefit of the widow and her family while the estate is in process of settlement, and that it is an absolute right of which she cannot be deprived. It is also urged that the order making the allowance is interlocutory, and not a final order from which an appeal will lie. If the contract, as we believe, is valid and enforceable, it should be given full effect, and the widow denied any interest in, or any part of, the husband's estate. By the terms of the contract she has no greater right to an allowance than she has to dower, and, if her dower interest may be barred by contract prior to marriage, on the same principle the allowance awarded the widow by statute would also be barred.

We are satisfied that the opinion establishes the better rule, that the enforcement of the rule will not affect any property rights, except in the future, and that it should be adhered to, and the motion overruled. We so recommend.

By the Court: For the reasons given in the foregoing opinion, the motion for a rehearing is

OVERRULED.

NORA JOHNSON, APPELLEE, V. GARRETT JOHNSON, APPELLANT.

FILED MARCH 5, 1908. No. 15,093.

1. **Action for Personal Injuries:** INSTRUCTIONS. "In an action for personal injuries it is error to give an instruction allowing the jury to assess damages for permanent injuries or lasting impairment of health, unless there is evidence showing, with reasonable certainty, that such permanent injuries or lasting impairment of health were in fact sustained by the plaintiff." *Goken v. Dallugge*, 72 Neb. 23.

2. **Evidence.** The maxim, *falsus in uno, falsus in omnibus*, does not

permit the jury to totally disregard the corroborated evidence of an impeached witness, but upon consideration thereof the jury may judge of its credibility and give thereto such weight as it is entitled to.

3. **Trial:** INSTRUCTIONS. The jury were instructed, in substance: If you believe that a certain witness (named in the instruction) is a person of bad reputation for truth and veracity in the neighborhood where he resides, then, as a matter of law, that fact tends to discredit his testimony, and as jurors you may entirely disregard it, except so far as he is corroborated by other credible testimony, or by facts and circumstances proved on the trial. *Held*, Proper.

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

John M. Stewart and *D. H. McClenahan*, for appellant.

Berge, Morning & Ledwith, contra.

EPPERSON, C.

Omitting the title, signature, and verification, we copy in full the petition filed in the district court, as follows: "For cause of action against the defendant, plaintiff says that on the 8th day of August, 1905, between the hours of 1 o'clock and 4 o'clock P. M., at her home near Panama, Lancaster county, Nebraska, the defendant Garrett Johnson, unlawfully, wilfully, and maliciously assaulted and beat plaintiff, with intent then and there to have unlawful intercourse with her against her will, and did bruise, wound and injure her, thereby causing her to become and remain sick and in bad health from thence hitherto, and to suffer great pain of mind and body, and as a result of said assault the plaintiff's health has been permanently impaired and injured, all to plaintiff's damage in the sum of ten thousand ($10,000) dollars. Wherefore plaintiff prays judgment against defendant in the sum of ten thousand ($10,000) dollars and costs of suit." The answer was a general denial. Upon the trial the plaintiff obtained a verdict and judgment for $2,000. Defendant appeals.

Instruction No. 5 given to the jury is as follows: "If, therefore, under this rule, you find and believe that the defendant, Garrett Johnson, on the 8th day of August, 1905, at the time and place by the plaintiff alleged, did unlawfully, wilfully, and maliciously assault the plaintiff, with intent then and there to have unlawful intercourse with her against her will, and did bruise, wound and injure her, causing her to become and remain sick and in bad health, and to suffer pain of mind and body, thereby causing the plaintiff's health to be permanently impaired and injured, then and in that event the plaintiff would be entitled to a verdict at your hands; and such verdict should be arrived at under the rule that the court gives you herein." Indorsed: "Given. E. P. H., Judge. Excepted to by defendant." This is objected to because it permits the jury to consider and recompense plaintiff for permanent injuries, when there is no evidence showing such damages. We have examined the evidence, and are convinced that all reference to a permanent injury should have been omitted from the instruction. In the absence of error, courts are reluctant to disturb a verdict for injuries inflicted by an assault, unless it appears that the jury were swayed by prejudice or passion, or were guided by an improper rule as to the measure of recovery.

There is no evidence in the case at bar from which the jury could reasonably have inferred that the injury was of a permanent character. Defendant owns and operates a meat market in the village of Panama. Plaintiff's husband is the defendant's brother, and was in his employ at the time of the alleged assault. Plaintiff testified that on August 8, 1905, while her husband was absent, defendant came to her home, about 80 rods from the village of Panama, and in the presence of her three year old child committed the assault alleged. It is unnecessary to repeat the details related by the plaintiff. She testified that by this assault she received bodily injuries, that her wrists and arms were black and blue; that her back was bruised, and since then she has been weak and nervous,

and not a bit well. She speaks of restless nights, which she attributes to the memory of the defendant's assault upon her; that at the time of the trial her health had improved, but she still suffered with her back and with nervousness. Two months prior to the trial in the lower court she and her husband moved to Panama and engaged in the hotel business. Since then she had a girl to assist her in the work. Prior to that time she did all her housework and the family washing and ironing, which had to be done; her husband helping her about the housework when she was unable to attend to it. Plaintiff's husband corroborated plaintiff as to the condition of her wrists and back, and testified that for two days after the assault she was confined to her bed, unable to walk, and was nervous; that he procured medicine for her from a local physician, whom he told that plaintiff had nervous headaches and nervous spells, and her back hurt her. He further testified that at the time of the trial, 15 months later, her health was better, but she was not as well as she was before the assault; that her trouble seemed to be in her back. Plaintiff and her husband were the only witnesses who testified regarding the injuries. It does not appear that a physician was called to see her, or that she ever consulted a physician relative to the matter. It is significant that after the assault, and during the two days she was helpless, none of her neighbors or friends visited her, or, if they did, it is remarkable that they were not called to testify as to her condition. On the day following the assault her husband, according to his own testimony, called on defendant and talked or quarreled with him over the assault; and in the same forenoon he told his father about it at the latter's place of business. Moreover, at noon on the same day, while his wife was at home, confined to her bed, unable to walk, the husband took dinner with his father, who lived in the village, and at least a quarter of a mile from plaintiff's home. Plaintiff herself testified that previous to the assault she had had "some pretty bad health." This may readily be believed,

when we take into consideration the following facts shown by the evidence: At the time of the trial, November 2, 1906, plaintiff was about 25 years of age, and had been married about 6 years. Her only living child was born in July, 1902. Some time prior thereto she had had a miscarriage, and about November 1, 1904, another. And when we take into consideration the fact that after the alleged assault, and in June, 1906, she had a miscarriage of a seven-months' child, we can readily see that there are potent reasons for believing that the nervousness and back trouble of which she and her husband testified might have been caused by reasons other than defendant's assault.

Evidence of bodily injury in this case is far from satisfactory, and the evidence of a permanent injury does not exist. The fear, humiliation, and mental anguish, experienced by a woman when assaulted by one with intent to hold sexual intercourse with her, is a damage for which she may recover; but, unless the evidence shows that abnormal conditions of a lasting character will probably result, no occasion arises by reason thereof to submit the question of permanent injury to the jury. The unhappy remembrance of such event alone does not amount to a permanent injury. It does not appear that any damages are reasonably certain to result from the alleged assault, except such as had accrued at the time of the trial. The judgments of the lower courts of this state have been repeatedly reversed because the question of recovery for permanent injuries was submitted to the jury when the evidence was insufficient to warrant a consideration thereof. A review of all the decisions is unnecessary. A case directly in point is *Goken v. Dallugge,* 72 Neb. 23, wherein it was held: "In an action for personal injuries it is error to give an instruction allowing the jury to assess damages for permanent injuries or lasting impairment of health, unless there is evidence showing, with reasonable certainty, that such permanent injuries or lasting impairment of health were in fact sustained by the plaintiff."

As this case must be remanded for another trial, there is one other question which should be considered now. Instruction No. 8 is in part as follows: "If you believe any witness has wilfully testified falsely to any material fact in this case in respect to which such witness could not be presumed liable to mistake, you may give no credit to any alleged fact depending upon the statement alone of any such witness. And you are further instructed that, if you believe from the evidence that the witness Charles Johnson is a person of bad reputation for truth and veracity in the neighborhood where he resides, then, as a matter of law, that fact tends to discredit his testimony, and as jurors you may entirely disregard it, except so far as he is corroborated by other credible testimony, or by facts and circumstances proved on the trial." The exception in reference to corroborative evidence and circumstances is objected to. It is argued that the rule given invades the province of the jury, by not allowing them to wholly disregard the testimony of an impeached witness, and forbids the jury from discrediting the testimony of the witness if corroborated. We do not so understand the instruction. It does not purport to tell the jury that they cannot judge of the credibility of the corroborated testimony of an impeached witness. It does not take from the jury their duty to weigh all the testimony and to give to it such credit as it is entitled to. The rule denies to the jury the privilege of totally disregarding the corroborated testimony of an impeached witness; that is, they have no right to overlook the fact that he testified relative to facts supported by the testimony of credible witnesses or corroborated by circumstances. But the duty still remains for the jury to determine the weight they shall give to his corroborated testimony. They may disbelieve him, but they must not totally disregard his testimony. They must consider it to the extent of determining what weight it is entitled to. The rule followed by the trial court has been followed generally by the district courts of this state, and

approved by this court in the following cases: *Dell v. Oppenheimer*, 9 Neb. 454; *Walker v. Haggerty*, 30 Neb. 120; *Watson v. Roode*, 30 Neb. 264; *Freiberg v. Treitschke*, 36 Neb. 880; *Denney v. Stout*, 59 Neb. 731. However, in *Atkins v. Gladwish*, 27 Neb. 841, an instruction omitting the qualification "unless corroborated" was approved. We do not understand that that case is contrary to the conclusion we have reached. "The reason of the case," the learned justice said, did not require the charge to be qualified by the additional words "unless corroborated." Indeed, were there no corroborative evidence or circumstances in the case, the omission of the qualifying clause would of course be unnecessary, if not prohibited. See, also, *Titterington v. State*, 75 Neb. 153; *Barber v. State*, 75 Neb. 543. There is a conflict in the decisions of this question among the courts of other states, a review of which is unnecessary. We see no reason for modifying the rule so frequently announced and so generally followed in this state.

As there must be a new trial of this case, it is unnecessary to review the defendant's remaining contentions that the evidence is insufficient to support the verdict, and that the same was the result of prejudice and passion.

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

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 to the district court for a new trial.

REVERSED.

STATE, EX REL. HUDSON J. WINNETT ET AL., RELATORS, V. UNION STOCK YARDS COMPANY OF OMAHA, RESPONDENT.

FILED MARCH 5, 1908. No. 15,516.

1. **Carriers: STOCK YARDS COMPANY A COMMON CARRIER.** A stock yards company has about 35 miles of railway track, including what is known as a "transfer track," constructed upon its own premises. Several private industries are conducted adjacent to the premises of the company. The transfer track connects with the track of several railway lines running to the city where the stock yards are located. The stock yards company is engaged in the carrying of freight in car-load lots. Cars billed to the stock yards, or to the industries adjacent thereto, are placed on the transfer track by the railway company over whose line the car is shipped, and from there are hauled by the stock yards company with its own engines to the pens or sheds in the yards or to the industries which are to receive the freight. Outgoing cars are hauled by the stock yards company to the transfer track, where they are received by the railway company. The railway companies for whom such service is rendered are charged $1 a car therefor. It does not deal with the general public, but only with the railway companies whose lines connect with the transfer line and with the industries located upon the margin of its premises, and with the consignees and consignors of live stock who receive shipments or load shipments in its yards. It transports freight in cars over its own tracks from one industry upon its lines to another. It is not engaged in the production of commodities. Its vocation is purely one of service to others, and, with the exception of feeding live stock in transit, the service rendered is the transportation of freight. *Held*, That such stock yards company is a common carrier within the meaning of the constitutional amendment adopted at the general election in 1906 and chapter 90 of the laws of 1907.

2. ———: STATUTE: CONSTRUCTION. Section 4, ch. 90, laws 1907, provides in part: "The term common carriers as used herein shall be taken to include all corporations, companies, individuals and association of individuals, their lessees, or receivers (appointed by any court whatsoever) that may now or hereafter own, operate, manage or control any railroad, interurban or street railway line, * * * or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies and any other carrier engaged in the transmission of messages or transportation of passengers or

freight for hire." *Held*, That the phrase "any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire" means only such companies as by their public profession hold themselves out to the world as engaged in the vocation of transmitting messages, or transporting passengers or freight for hire, and as willing to perform such services for any person who may have occasion to employ them.

3. ———: COMMON CARRIER: DEFINITION. Any person or corporation holding itself out to the public as offering its services to all persons similarly situated, and performing as its public vocation the services of transporting passengers, freight or intelligence, is a common carrier in the particular spheres of such employment.

ORIGINAL application for writ of mandamus to compel respondent to file with relators all freight schedules, classifications, rates, tariffs and charges used by respondent. *Writ allowed.*

William T. Thompson, Attorney General, for relators.

Frank T. Ransom and *Baxter & Van Dusen, contra.*

EPPERSON, C.

In their petition relators allege, among other things, that the respondent is a corporation and a common carrier; that it is the duty of respondent, pursuant to section 5, art. VIII, ch. 72, Comp. St. 1907, to file with relators within 30 days after the 27th day of March, 1907, all freight schedules, classifications, rates, tariffs and charges used by respondent and in effect January 1, 1907; and that respondent refuses so to do, though often requested by relators. Relators pray for a writ of mandamus requiring respondent forthwith to file such schedule with relators as the Nebraska State Railway Commission. Respondent answered, setting forth at length the nature of its business, admitted that it was a corporation, but denied that it was a common carrier.

The following facts are either admitted by the pleadings or established by the evidence: The respondent is a corporation duly organized and existing under and by virtue

of the laws of the state of Nebraska, and among other provisions of its articles of incorporation is the following: "The general nature of the business to be transacted by said corporation shall be the purchase and sale, the feeding and caring for, slaughtering, dressing, packing and holding for sale, selling and selling for others, of live stock, including cattle, hogs, sheep and horses, and shipping by refrigerator cars or otherwise of meats and product thereof, and doing generally the business of a stock yard, and whatever is incident or anywise related to or usually connected therewith. And in furtherance of the said business of the said company to guarantee the obligations of other corporations and of other parties and to apply its funds to the purchase and payment of stocks and bonds or either stocks or bonds of other corporations. It shall be competent for said corporation to construct, maintain and operate a railroad, with tracks of other railroad companies, which shall be operated for the purposes of its business as above set forth, as well also of carrying passengers and freight for the general public. The termini of said road shall be the city of Omaha in county of Douglas and a point on the south line of said county not farther west of the Missouri river than fifteen miles, and the amount of capital stock necessary to construct such road is ($300,000) three hundred thousand dollars." Respondent, however, has never been engaged in the packing business, or shipping any commodities of its own production, nor has it ever been engaged in passenger traffic. It owns a large tract of land in South Omaha upon which it has constructed buildings, sheds and pens for receiving and caring for live stock, and has upon its premises about 35 miles of railroad tracks. There are located on the margin of respondent's premises five slaughtering and packing houses owned by different corporations where live stock is slaughtered and the products packed for shipment. There are also located on its premises a lumber yard, a grain elevator, and a cooperage company's plant and other industries. Respondent has

railroad tracks upon its premises leading to said sheds and pens and to the said several industries located on its tracks, and these tracks connect with a transfer track, which connects with the tracks of several railroad companies engaged in interstate and state traffic. Cars loaded with live stock and other freight are transferred into respondent's premises, and to the pens, sheds and buildings thereon and to the several industries by means of said transfer track and the other tracks upon respondent's premises. Cars going into respondent's premises are placed by the railroad company desiring them carried in on the transfer track; this track being located on respondent's premises. And respondent there receives the cars, and takes them by means of its locomotives and engines to the point of destination in respondent's premises. Cars destined out of respondent's premises are carried by it over its tracks by means of its said locomotives to the transfer track, where the railroad company over whose lines they are to be carried receives them and hauls them away. Empty cars are delivered by the several railroad companies upon the transfer track, and these are hauled by the respondent in this manner either to the pens, sheds, buildings, or industries on respondent's premises, as directed by the company setting the cars on the transfer track. Respondent owns three flat cars used only upon its own premises for picking up refuse in and about the yards and for hauling cinders from the packing plants into respondent's premises. It owns eleven engines which it uses in its business. It has constructed no railroad tracks except those upon its own premises other than one track across the streets, authority for which was given by ordinance. Respondent has no station on its premises other than where live stock is unloaded and loaded into cars and at the industries mentioned above. At all these stations, and at the industries, the freight is received into cars owned by the railroad companies. Live stock received into or going out of the yards is unloaded and loaded by respondent, and freight received or shipped

from the industries is unloaded or loaded by the plants. Respondent has never exercised the power of eminent domain. Respondent, in the manner aforesaid, handles all cars requested by the common carriers to be handled by it where the tracks of the requesting common carrier reaches the transfer track, for which service respondent receives compensation from the railroad companies as provided in a circular of charges based upon a written contract between respondent and some of the railroad companies. The same charges are made other companies not signing the contract. Respondent has no tracks for unloading and loading freight from wagons into cars or from cars into wagons, or any place for the general public to receive or load freight for shipment. Where the owner of live stock in the yards desires to ship same out of the yards, respondent procures the necessary cars from the railroad company over whose lines the stock is to be shipped, loads them, and delivers the same to the railroad company upon the transfer track. The manner of receiving live stock destined to points in the yards is for the railroad company to deliver to respondent a waybill and to set cars upon the transfer track. This waybill shows the point of origin of the shipment and point of destination. Respondent takes the cars into its premises and unloads them to the consignee. Respondent collects all of the freight charges due to railroad companies on incoming live stock when not prepaid, and pays the same over weekly to the railroad companies, but collects no freight charges on outgoing freight nor on incoming dead freight. When requested, respondent transfers cars from one railroad company to another. The railroad companies are not authorized to issue any bill of lading for respondent for any shipment incoming or outgoing from its premises, nor does respondent issue any bills of lading on its own behalf, or on behalf of any railroad company connected with its tracks, nor does it fix rates for the connecting companies. Live stock consigned to points inside of the yards is generally consigned to a commission

agent to whom it is delivered by respondent. The live stock agent sells the shipment for the owner, and if the freight charges have not been prepaid the commission man pays the charges to respondent, who pays it over weekly to the railroad companies. Respondent does not receive any freight from the railroad companies except cars loaded with freight. The average daily receipts during the year are about 625 cars received in, which would make a movement of 1,250 cars in and out daily. There are 152 chutes on respondent's premises where live stock is loaded and unloaded. Respondent has never filed any plat of the route of the track that has been built on its premises nor of any intended to be built, and has never made a report to the secretary of state in conformity with section 1, art. XI of the constitution, nor as required by section 88, ch. 16, Comp. St. 1907. Respondent's property is assessed by the local assessor for taxation, and is not assessed by the state board of equalization. It might further be said that respondent also hauls cars from one industry to another in their interchange of business, and receives compensation therefor from the industry receiving the service. A fee is paid by the railroad companies for respondent's services in taking loaded cars to and from the industries and from the transfer tracks and stock yards, the amount being the same ($1 a car), and does not depend upon the distance hauled nor the amount of freight contained in the cars. From time to time the respondent changed its articles of incorporation, and on one occasion by a resolution, duly made and passed, the proper officers were directed to certify the adoption of an amendment according to the requirements of the general railroad laws of this state, thereby indicating its intention at that time to operate under our railroad laws. Respondent has never, however, taken advantage of its charter right to operate a railroad devoted to a general freight and passenger traffic, and its tracks have not been extended beyond the limits of its own property.

Summarizing this statement of facts we find the following, which we consider control this case: Respondent is authorized by its charter to construct and operate a railroad for the purpose of carrying freight for the general public. It has constructed railroad tracks connecting with the tracks of other carriers, and connecting also with a large number of industries whose plants are established upon the margin of respondent's property. It is engaged in the carrying of freight which the public consigns in car-load lots, or which the connecting carrier assembles in car-load lots, to the several industries upon its tracks, and to the commission men who receive consignments of live stock in the yards of the respondent. It carries like shipments for the shippers of live stock from its yards, and also from the industries located upon the margin of its land, and delivers the same to the several connecting carriers. It transports freight from one of the aforesaid industries to another. It is not engaged in the production of commodities. Its vocation is purely one of service to others. With the exception of feeding live stock in transit, the service rendered is the carrying of freight. For the service thus rendered it receives a compensation.

At the general election in 1906 there was adopted an amendment to our constitution which is as follows: "There shall be a State Railway Commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But in the absence of specific legislation, the com-

mission shall exercise the powers and perform the duties enumerated in this provision."

By an act of the legislature, appearing as chapter 90, laws 1907, the legislature prescribed the powers, duties and qualifications of the state railway commission. Section 4 is in part as follows: "The term common carriers as used herein shall be taken to include all corporations, companies, individuals and association of individuals, their lessees, or receivers (appointed by any court whatsoever) that may now or hereafter own, operate, manage or control any railroad, interurban or street railway line, operated either by steam or electricity or any other motive power, or part thereof, or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire."

The question presented for determination, stated generally, is this: Is the respondent a common carrier within the meaning of the constitutional amendment and the act of the legislature of 1907? Respondent contends that it is not a common carrier within the common law definition of that term, that the common carriers of the constitutional amendment are such carriers only as would be declared common carriers by the common law, and that the definition prescribed by the legislature is an unwarranted expansion of the meaning of the term. At the threshold of this case, therefore, we are met with the inquiry: Is the definition of "common carrier" in the act of the legislature an enlargement of the meaning of those words which will prohibit the application of the act to a class of agencies not strictly within the common law classification of common carriers?

There are but two carriers known in law—private carriers and common carriers. A private carrier undertakes to deliver particular goods at a particular place. He is not bound in law to undertake such transportation. When opportunity for such employment is presented, he may

reject it or avail himself of it as he sees fit. He enters into a contract applicable to and binding him only as to the particular undertaking. He does not hold himself out to the public as a carrier. Strictly speaking, at common law, so far as its vocation is concerned, a common carrier is one which holds itself out to the public as a carrier always open to employment for the transportation of persons or freight, and that it will carry for all persons indiscriminately. A common carrier undertakes to convey freight from one place to another, and it makes no difference whether the distance be long or short. It is not necessary to make of itself a common carrier that it should hold itself out as ready to transport freight from any place to any other place; but the transportation may be confined from one point upon the line it operates to another point upon its line, or upon the line of a connecting carrier. By the present general adoption and use of the term "common carrier" it is not necessarily limited to one which holds itself out to carry any and all kinds of freight, but it applies with equal force to any company whose vocation is of a public nature, although limited to the transportation of certain classes or kinds of freight, and it may be of service to a limited few who by their peculiar situation or business may have occasion to employ it. With the development of commerce and increased facilities for the transportation of passengers, freight, and intelligence the meaning of the words "common carrier" has correspondingly changed, not alone by technical and arbitrary legislative enactment, but by reasonable, necessary, and general adoption, so that now it means not only the stage coach and canal boat, but railway, street railway, and express companies—yes, telegraph and telephone companies. It appears that, in addition to operating the tracks within the boundaries of its own private property, the respondent receives from connecting railway companies, and delivers to the various packing plants and industries adjacent to its property, freight cars for the transportation of live stock and

merchandise. It accepts from connecting carriers loaded or empty cars, and delivers the same to the several industries, or to the consignee of live stock, or to the shipper of live stock from its yards, irrespective of persons, and for these purposes it must be considered as forming a component part of the system of railway transportation carried on by the connecting lines, and to this extent it is equally subject to the duties and obligations of a common carrier. We think there can be no doubt but that the respondent can be required to extend equal privileges to any person who may establish an industry for the production of commodities for shipment upon the margin of its grounds, that it could be compelled, if necessary, to furnish to any person who might desire to ship live stock under like conditions the same facilities that it now furnishes to its present patrons. We think there can be no doubt but that a railroad company, building its tracks to the transfer line of the respondent, could demand and receive the same facilities for the delivery of live stock to commission men at South Omaha and to the several industries adjacent to respondent's property as is now given to the present connecting railroads. As to such person the respondent must be considered a common carrier, even though it transacts only a small part of the business transacted by such common carriers as are doing a general business; or, in other words, it is a common carrier in the special line to which it has devoted its energies, although not a common carrier for all purposes.

Respondent does not produce commodities. Its business is strictly one of service to others. Its scope is one of magnitude, handling, as the evidence shows, 1,250 cars a day, or 456,250 during the year. Its vocation is the transportation of freight over its own lines. It holds itself out to the public as ready and willing to transport all freight for those who have occasion to employ it for the purpose for which it exists, and receives compensation therefor. The statute, we think, has reference to all

companies or persons who hold themselves out to the public as engaged in those things which characterize it as a common carrier. It has been said that a common carrier is one who holds itself "out as ready 'to carry at reasonable rates such commodities as are in his line of business for all persons who offer them, as early as his means will allow.'" *Faucher v. Wilson,* 68 N. H. 338, 39 L. R. A. 431, and cases cited. In the case at bar, respondent holds itself out as a carrier of certain classes of freight, namely: such as is tendered it in car-load lots. That is its line of business. It is a common carrier within the meaning of section 4, ch. 90, laws 1907, and the constitutional amendment.

In *Missouri P. R. Co. v. Wichita Wholesale Grocery Co.,* 55 Kan. 525, 40 Pac. 899, it was held: "A railroad company taking loaded cars from its connection with another railroad, and transferring them by means of a switch engine over a portion of its own track to a spur of its own, and receiving its compensation from the connecting road, acts as a common carrier, and is liable as such for the safety of the goods transported, no matter how short the distance from the place of receipt to that of delivery." In the opinion we find the following: "All railway corporations are by statute made common carriers, and required to transport persons and property, as such, for all persons alike. Gen. St. 1889, par. 1212. The distance over which freight is hauled, whether in car-load lots or in less quantities, whether in its own cars or those belonging to connecting carriers, can make no difference with the capacity in which the company acts. A railroad transporting a passenger or a car-load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train." See, also, *United States v. Union Stock Yards Co.,* 161 Fed. 919.

The bulk of respondent's business comes from the railroads running into South Omaha. These railroad companies are not producers of the goods, wares, merchandise

and live stock delivered to respondent for transportation or delivery. Such freight consists of commodities consigned by the public to the industries upon the respondent's tracks, or to commission men receiving live stock at the respondent's yards. Though the respondent receives such employment from the railroad companies and looks to them for its compensation, yet its service is to the public, to the same extent as were the services rendered by the connecting railroads in their transportation of the same freight. It holds itself out as ready and willing to transport such freight to the several industries and to the stock yards for all railroads entering South Omaha. Its employment is not limited to a certain few, but extends to all railroads. It is continually at work, daily transacting business of importance to the commercial world. It is the center of a vast transportation or commercial business, to complete which its duties as a carrier are constantly invoked. Respondent admits that it is subject to legislative control, and that its rates may be regulated by statute. We think that this is true, and that it is true because respondent is a common carrier. If it is not such, then it is a private carrier, and the legislature would have nothing whatever to say about its rates. The statute above quoted clearly defines a common carrier, and, under its provisions, any one engaged in the transportation of freight for hire is declared to be a common carrier. This, however, must be construed to mean any person whose public profession is the transportation of goods, and who is not at liberty to reject the carrying of such freight as he has held himself out to the world as willing to convey. With this construction of the statute we find that it is not an unwarranted enlargement of the common law meaning of "common carriers," as that meaning has grown to designate the improved agencies of commerce, according to its general adoption and use, nor has the legislative provision exceeded the authority of the constitution in declaring what shall be considered common carriers.

Respondent contends that it is but a switching company; that because its charges for services rendered are made as a switching fee, and not based upon the weight or value of the freight, or upon the distance hauled, it cannot be classed as a common carrier. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 616, 2 L. R. A. 289, is cited by respondent. It was there held: "Where a corporation, which is under no legal obligation to do so, voluntarily contracts to switch cars over its tracks, between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars, such corporati in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman. In respect to cars or traffic thus handled, such corporation can only be regarded as a switchman, or transfer company; and it is no more a common carrier of interstate commerce or traffic, within the provisions of the law, than a city transfer company, which checks a passenger's baggage at the hotel where it is received, and carries it, for an agreed compensation, to the station of the railway over which it is to be transported into another state." That case is clearly distinguishable from the one at bar. It there appears that the charter of the bridge company made the bridge "a public thoroughfare or highway, for the use of which by railroads or street cars, wagons, vehicles, animals and foot-passengers it was authorized to charge reasonable toll." It was said in the opinion: "The franchises and powers conferred upon petitioner of building, maintaining and operating its bridge and approaches, designated as its 'terminal facilities,' do not, in and of themselves, constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway, open to the use of others, common carriers and private parties, upon making compensation therefor in the shape of 'rea-

sonable tolls.' * * * The word, as used in its charter, is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services to be performed by itself. The distinction between such an incorporated bridge or highway, established and maintained for use by common carriers and others, upon paying compensation for such use in the way of 'tolls,' however graduated, and that of an incorporated common carrier engaged in transporting property for hire, is well defined. * * * The powers and franchises conferred upon petitioner find their legitimate scope and operation in the building, operating, and maintaining of its bridge and approaches thereto, for the public purposes it was intended to subserve—that of furnishing and forming a highway over which common carriers and others should have the right or privilege of transporting goods or passing, as they pass over a turnpike, a canal, or a ferry, upon paying reasonable tolls for the use of the structure or thoroughfare; and do not in any way constitute petitioner a common carrier of goods, authorized to equip its road, or to charge compensation for transporting goods on or over the same. Nor does petitioner, in the legal sense of the term, act or hold itself out to the public as a common carrier of property, in connection with the railroads on either side of the Ohio river. It has no freight cars. When it solicits or accepts freight upon its tracks on either side of the river for any railroad company, it is compelled to call upon the railroad for whom the freight is intended, or over whose line it is to go, to furnish the cars in which to load the same. Such cars the petitioner merely transfers over its bridge, and delivers to the railroad furnishing the same, charging for its service its regular bridge-toll, which is in no sense a charge for transporting the freight contained or carried in the car or cars. In some cases it makes an additional charge for switching cars which require to be transferred from one connection to another. Its object and purpose in thus constituting itself the soliciting agent for the railroad companies who are willing

to provide the cars for the freight it may secure is manifestly to obtain 'tolls' for use of its bridge."

In the case at bar, the business of respondent differs materially from the business of the bridge company in the case last cited in that, instead of maintaining a highway for the use of other carriers, respondent uses its tracks and engines for the transportation of freight and cars of its patrons. As to the transferring of cars, loaded or empty, to and from the packing houses and transfer tracks of respondent and the railway companies, and to and from its yards, respondent is something more than a switching company. It is true the transfer of the cars from one track to another is necessary; but such transferring of cars to and from respondent's tracks and those of the connecting lines does not differ from transfers made between connecting lines of other companies which are recognized by all as common carriers. Such business of respondent in the handling of loaded cars intended for one of the industries established upon its tracks requires it to convey the car from the termini of the connecting railways to the industry or place of destination. This does not differ from the last haul made of freight shipped over the lines of several connecting railways, except that with respondent the distance is shorter than is usual in cases of other carriers. The fact that charges are fixed at so much for each car transferred, and are not based upon weight, bulk, or distance hauled, we think is unimportant. The statute declares any company engaged in the transportation of freight for hire is a common carrier. The charge made by respondent is its hire, and it transports freight, notwithstanding the fact that it may not know the contents of the cars hauled, nevertheless it is the existence of a necessity for the transportation of freight which gives respondent occasion to exist.

In *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, *supra*, it is true that the physical act of switching cars

from one connecting line to another by the bridge company is similar to some of the work done by respondent herein, but such was only an incident to the principal business of the bridge company, which was not that of a common carrier.

It is contended by respondent that the railway commission has jurisdiction only over such railroads as are recognized as such by section 4, art. XI of the constitution. That section reads as follows: "Railways heretofore constructed, or that may hereafter be constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited." The constitution does not declare what a railroad is. It declares that railways are public highways for the use of all persons for the transportation of their persons or property. Respondent's railways cannot be said to be a highway for the transportation of persons; but this fact does not prevent the respondent's business from coming within the jurisdiction of the railway commission under the authority conferred upon it by the recent amendment to the constitution (Comp. St. 1907, sec. 421*a*) and chapter 90, laws 1907. In other words, a company doing a transportation business may be a common carrier, although its traffic is over tracks which may not constitute a public highway within the meaning of the constitution. Again, there is nothing in the constitution, as it originally stood, or in the 1906 amendment, nor in the act of the legislature, which limits the term "common carrier" to railroads. It is equally applicable to a stage coach, a ferry boat, a street railway, a telegraph or telephone company. If a person or a corporation holds itself out to the public as offering its

services to all persons similarly situated, and performs a service in the transportation of persons, freight or intelligence, it is a common carrier in the particular spheres of such employment. Thus considered, the respondent is brought within the constitutional and common law definition of "common carrier." This obviously includes all common carriers, whether railroad companies engaged in the transportation of both passengers and freight, or one only.

Respondent's transportation business is subject to the orders of the railway commission, and we recommend that the peremptory writ of mandamus of this court be issued, commanding respondent to forthwith file with the state railway commission all its freight schedules, classifications, rates, tariffs, and charges used by it and in effect June 1, 1907, pertaining to the transportation of freight.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that a peremptory writ of mandamus be issued, commanding respondent forthwith to file with the state railway commission all its freight schedules, classifications, rates, tariffs, and charges used by it and in effect June 1, 1907, pertaining to the transportation of freight.

WRIT ALLOWED.

GEORGE A. HOAGLAND, APPELLANT, V. MERRICK COUNTY ET AL., APPELLEES.

FILED MARCH 5, 1908. No. 15,104.

Taxation: ASSESSMENT. For the purpose of arriving at his net credits required to be listed for assessment and taxation, a taxpayer is not permitted to deduct from his gross credits an alleged item of indebtedness that exists merely as a convenience in bookkeeping, and of which he is both payer and payee. It is only a *bona fide* indebtedness to another that he may deduct.

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

Patterson & Patterson and *Warren Switzler,* for appellant.

Elmer E. Ross, contra.

GOOD, C.

George A. Hoagland appealed from an order of the board of equalization of Merrick County refusing to allow an item of alleged indebtedness as an offset against the items of credits in his assessment roll. In the district court a general demurrer was sustained to his petition, and his action dismissed. From this judgment he has appealed to this court.

In his petition the appellant alleged that he was engaged in the wholesale and retail lumber business in Omaha, and that he owned a branch lumber yard at Central City, in Merrick county, the business at that point being in charge of an agent. The agent, in listing for assessment for taxation appellant's property in Central City, included, as credits, notes and book accounts aggregating $4,243. It appears that it was the practice of the appellant in shipping lumber from his wholesale yard to his retail yard to charge the value thereof against the Central City yard. The items of lumber shipped would appear upon the books in Omaha as bills receivable, and upon the books at the branch yard at Central City as bills payable, and at the time of the assessment this item amounted to $6,872. He asked to have this set off as against the items of credits, on the theory that it was an indebtedness owing by him, and that only the net credits were assessable in Merrick county. The result, if his contention had been sustained, would have been to eliminate entirely the items of credits, as this debit item amounted to more than his credit items. The word credit, as appearing in section 10427, Ann. St., has been construed by

this court in *Lancaster County v. McDonald,* 73 Neb. 453, and there held to mean net credits, and that the indebtedness of the taxpayer may be deducted from the gross credits to find the true value of the credits for assessment. In *State v. Fleming,* 70 Neb. 523, it is held that the taxpayer making a return of his taxable property for assessment may deduct from the credits due him all just debts owing by him at the time of such return. The holding in *State v. Fleming* is reaffirmed in *Lancaster County v. McDonald.* Under the rule here announced it is clear that any just debts owing by Hoagland at the time the return in question was made, provided the same arose out of, or were connected with, the lumber yard at Central City, should have been set off against the items of credits. But from his own statement it does not appear that it was a debt owing by Hoagland. A *bona fide* debt is one that is owing to another—one that could be enforced in a court of justice. In this case Hoagland was the owner of the wholesale yard in Omaha and the owner of the retail yard at Central City. The item of indebtedness, therefore, would be from Hoagland, retailer, to Hoagland, wholesaler. But it is the same Hoagland in each case. The item of debt in this case is simply a fiction that existed only as a matter of convenience in bookkeeping. It was not a *bona fide* indebtedness, and he was not entitled to have it deducted from the items of credits.

It is alleged, and vigorously urged, that appellant is entiled to the offset for the reason that he had listed for taxation in Douglas county the item of $6,872, which he carried on his books in Omaha as a credit item, and that the effect of the ruling here will be double taxation. It is perfectly clear that Mr. Hoagland was not required to list in Douglas county as an item of credit that which was due to himself from himself. The item of credit in Douglas county, like the item of debit in Merrick county, was a fiction. That he erroneously listed for taxation a fictitious credit in Douglas county is no reason for permitting him to set off a fictitious debt against his real credits in

Merrick county. It appears that he has not resorted to the proper county to obtain relief. He should have applied for relief in Douglas county, and not in Merrick county.

Some contention is made in the brief that the items of credits were not taxable in Merrick county, because section 10428, Ann. St., requires the personal property to be listed and assessed in the county where the owner resides, except property having a local situs, like grain elevators, lumber yards, and any established business, which shall be listed and assessed at the place of such situs. It is contended that under this provision of the revenue law the situs of the items of credits was the residence of the taxpayer, and that, Hoagland's residence being in Douglas county, the credits were not taxable in Merrick county. It will be observed that in the exceptions are grain elevators, lumber yards, and any established business. It might be contended that the exceptions, lumber yards and any established business, would include not only all the tangible property connected with the lumber yard or with the established business, but that all book accounts and notes arising out of such business should be included and returned to the assessor at the situs of the lumber yard or of the established business. But we do not find it necessary to determine this question at this time, as the appellant voluntarily listed the items of credits, and the only complaint that he made before the board of equalization or in the district court was of the refusal to permit an offset of the fictitious debit item referred to. He has not, therefore, properly brought before this court for review the question as to whether the credit items referred to should have been listed for taxation in Merrick county.

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.

CHARLOTTE S. FLINT, ADMINISTRATRIX, APPELLEE, V. FRANK J. CHALOUPKA, SR., ET AL., APPELLEES; B. V. KOHOUT, TRUSTEE, APPELLANT.

FILED MARCH 5, 1908. No. 15,512.

1. **Intervention:** LACHES. Section 901 of the code does not authorize a party to intervene after trial has commenced in a pending suit, if prior to the commencement of the trial he had the opportunity to intervene and lost it by his laches. Said section applies only where no remedy is afforded by the code, and not where the code afforded a remedy which has been lost by laches.

2. **Bankruptcy:** FRAUDULENT CONVEYANCES: PLEADING. In an action by a trustee in bankruptcy to reach real estate alleged to have been fraudulently aliened by the bankrupt, it is necessary for the trustee to allege that the assets of the bankrupt estate in his hands are insufficient to discharge the liabilities of the bankrupt estate.

3. ———: ———: ———. Where a judgment creditor of a bankrupt has, in a creditors' suit, obtained a decree setting aside as fraudulent a conveyance of real estate made by the bankrupt to his son, and the trustee in bankruptcy files a petition to intervene and claim the surplus proceeds of the sale of the real estate after the satisfaction of the judgment creditor's claim, it is necessary for the trustee to allege facts showing that the transfer of the real estate was fraudulent as to the creditors whom he represents.

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

A. N. Dodson and *Flansburg & Williams,* for appellant.

J. H. Grimm & Son, Bartos & Bartos and *Hall, Woods & Pound, contra.*

GOOD, C.

After the mandate had issued from this court in the case of *Flint v. Chaloupka,* 78 Neb. 594, and before judgment had been entered thereon by the district court for Saline county, B. V. Kohout, as trustee in bankruptcy of Frank J. Chaloupka, Sr., made a written application to be permitted to intervene in that action and to be made a party to the decree and have the benefit thereof, and offered to pay to the plaintiff, Charlotte S. Flint, as administratrix, such attorney's fees, advances, costs and expenses as she might have incurred in the prosecution of said suit, and prayed that he might be substituted as plaintiff in the action, and that, failing to make such order, the court should permit said trustee, after the satisfaction of plaintiff's claim out of the lands adjudged to have been fraudulently aliened, to take the surplus. His application was denied, and a decree was rendered in accordance with the mandate from this court. From the order denying his application to intervene, he has appealed to this court.

The question for determination is as to the sufficiency of the application to entitle the appellant to intervene and be made a party to that action and have the benefit of the decree. In order to have a clear understanding of the situation, some pertinent facts will be stated. In September, 1896, Frank J. Chaloupka, Sr., conveyed certain real estate to his son, Frank J. Chaloupka, Jr. In May, 1897, Charlotte S. Flint, as administratrix, obtained a judgment against Frank J. Chaloupka, Sr., upon which execution was issued and returned *nulla bona.* In September, 1898, Mrs. Flint, as administratrix, brought a creditors' suit in the district court for Saline county to set aside the conveyance of the real estate aforesaid and to subject it to the payment of her judgment. In September, 1899, and while the said creditors' suit was still pending, Frank J. Chaloupka, Sr., was adjudged a bankrupt upon his voluntary petition, and appellant herein

was appointed trustee in bankruptcy. In October, 1899, a number of claims, including that of Charlotte S. Flint, as administratrix, were filed and allowed against the bankrupt estate. In September, 1901, said trustee in bankruptcy filed a petition in intervention in the district court for Saline county in said creditors' suit brought by Mrs. Flint, which was still pending and awaiting trial. In this petition he asked to be substituted for the plaintiff. A general demurrer was sustained to his petition. The trustee electing to stand upon his petition, judgment of dismissal was rendered. This ruling was afterwards affirmed in this court in *Kohout v. Chaloupka,* 69 Neb. 677. The creditors' suit was thereafter pressed to a final determination in the district court, resulting in a finding and decree adverse to the plaintiff with respect to the farm lands involved in the litigation. Upon appeal to this court, the judgment of the district court was reversed and the plaintiff awarded the relief prayed for. See *Flint v. Chaloupka, supra.* No further action was taken in the case by the trustee until after the mandate had been issued by this court. His first application to intervene was denied principally upon the ground that he did not allege that plaintiff had waived her security in filing and proving her claim before the referee in bankruptcy. In the present application he has remedied this defect. The first application was made before the commencement of the trial in the district court. The present application was made after the trial and after the judgment was ordered entered by this court.

Under section 50*a* of the code, any person who has or claims to have an interest in a matter in litigation may become a party to the action, either by joining the plaintiff in claiming what is sought by him, or by uniting with the defendant, or by demanding anything adverse to both plaintiff and defendant, either before or after issue has been joined in the action and before the trial commences. Under this section of the statute, it is apparent that appellant's present application to intervene comes too late.

But he seeks to avoid the force of this statute by claiming a right to intervene under section 901 of the code, which provides: "Rights of civil action given or secured by existing laws shall be prosecuted in the manner provided by this code, except as provided in the following section. If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." We think this section was clearly intended to apply to those cases only where no remedy is provided, or afforded, by the code, and that it is not intended to apply where an adequate remedy was afforded by the code, but which the party has lost by his own laches. Section 50*a* of the code, above referred to, afforded the trustee a complete remedy, and, as already shown, he made an ineffectual attempt to exercise the right there afforded. But his petition was defective, and a demurrer thereto was properly sustained. He did not ask leave to amend, or to file a good petition, but chose to stand upon the defective petition, and was properly dismissed out of court. Had he seen fit to file an amended petition setting up facts sufficient to entitle him to intervene, his rights would have been protected. He has no standing under section 901 and his application is, under section 50*a*, *supra*, too late to be of any avail.

There is another very potent reason why his application should have been denied. The petition of intervention does not allege that the trustee has not sufficient assets of the estate in his hands to pay the claims allowed and all other liabilities of the estate. In *Mueller v. Bruss*, 112 Wis. 406, it is held that it is necessary in such an action by a trustee to allege that he has not sufficient assets in his hands to satisfy the claims of the creditors, that the trustee has no rights superior to those of the creditors he represents, and, unless it is necessary for him to have the funds to discharge the liabilities of the bankrupt estate, he has no cause of action. The same rule is announced in

Seager v. Armstrong, 95 Minn. 414, *Roney v. Conable,* 125 Ia. 664, and *Deland v. Miller & Cheney Bank,* 119 Ia. 368. For aught that appears in the present application, the trustee in bankruptcy may have had sufficient property and funds in his hands with which to fully discharge every liability of the bankrupt estate which he represented. Counsel for appellant states in his brief that no property had come into the hands of the trustee, but this statement does not appear in the record. To entitle him to intervene, he must affirmatively state facts that would permit him to take the property to pay the claims of the creditors.

Appellant seeks to avoid the force of this rule upon the theory that he is not seeking to set aside a fraudulent conveyance of real estate, but is seeking to reach a fund that has arisen by reason of the decree entered in the creditors' suit, wherein the conveyance was held invalid. He proceeds upon the theory that the decree rendered divested Chaloupka, Jr., of all title and revested it in Chaloupka, Sr. We think this view is erroneous, because the conveyance from the father to the son was good as between them. The effect of the decree was to render that conveyance invalid only as to creditors who had been defrauded thereby. The effect of the decree was not to revest the elder Chaloupka with title to any of the land that was not necessary to satisfy the judgment of Mrs. Flint, and, if a surplus should exist after applying the proceeds of the sale to the satisfaction of Mrs. Flint's judgment and costs, such surplus would not belong to the grantor, but go to the grantee. Therefore, in order that the trustee might be entitled, under any circumstances, to reach this fund or the surplus, the creditors he represents must have had the right, if their claims were reduced to judgment, to set aside the conveyance. There are no facts set forth in appellant's petition which would show that the transfer would be fraudulent as to the creditors whom he represents. He has therefore failed to show that he had any right to any surplus that might exist.

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.

FRANKLIN H. RICE ET AL., APPELLANTS, V. ALEXANDER R. KELLY, APPELLEE.

FILED MARCH 5, 1908. No. 15,058.

1. **Adverse Possession:** TACKING. Where the owner of land, claiming adverse possession of a narrow strip adjoining same, conveys said land to a third party by a deed which does not describe the adjoining strip, simultaneously taking back a lease and remaining in possession of the whole until he afterwards secures a reconveyance of the land so conveyed by him, the question of whether or not the successive grantees could tack their possession to that of their grantors for the purpose of completing title by adverse possession does not arise.

2. ———: PRESUMPTIONS: EVIDENCE. While the calls of a deed limit the right as a presumption of fact of a party in possession of land outside of but adjacent to land within the calls of his deed to the calls of said deed, such presumption, like any other presumption of fact, yields to proof of actual facts which negative and overcome such presumption. It is the facts, when established, that govern.

3. ———: ———: ———. The rule sometimes announced that the adverse possession of land cannot be extended beyond the calls of the deed means that possession by construction cannot be extended beyond the calls of the written instrument by virtue thereof; but, if land be actually occupied beyond the calls of the deed, hostile to the true owner, the written instrument does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character.

4. **Quieting Title:** VENDOR AND PURCHASER. Where one who occupies land as owner in fee simple, also occupies a strip of land adjoining same, of which he has become owner by adverse possession

conveys said land by general description, without describing the adjoining strip, and at the same time and as a part of the same transaction delivers to his grantee possession of the whole tract, both grantor and grantee believing that such strip is included in the calls of said deed, the grantee thereby becomes the actual owner of the whole tract, and entitled to have his title quieted as against both his grantor and the owner of the fee of such strip.

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

O. A. Williams, for appellants.

Jackson & Kelsey, contra.

FAWCETT, C.

The plaintiffs were the owners of the northeast quarter of the northeast quarter, hereafter called the north forty; the southeast quarter of the northeast quarter, hereafter called the middle forty; and the northeast quarter of the southeast quarter, hereafter called the south forty; all in section 14, and together constituting a tract of land in dimensions approximately $\frac{1}{4}$ of a mile east and west, and $\frac{3}{4}$ of a mile north and south. The defendant owned the land adjoining this tract on the west. The plaintiff claimed that for about 18 years the west boundary of his said land had been marked by ridges of plowed ground, trees and fences, so as to indicate clearly to what limit possession had been exercised; and that he had for more than 10 years, under a claim of ownership, been in the open, exclusive and adverse possession of the land lying east of such boundary lines. He alleged that the defendant had procured the county surveyor to make a survey of the boundary line between this land and that of defendant, and that such surveyor had located such line about four rods east of the boundary so marked by ridges of plowed ground, trees and fences; and that defendant claimed the title and right of possession to the strip between the two lines, and threatened to take possession thereof. The

prayer of the plaintiff's petition was that the title to the disputed strip be quieted in him. The defendant answering denied the adverse possession, claimed the ownership of the tract in dispute, and alleged that the boundary line established by the county surveyor was the true boundary line according to the government survey. This was denied by the reply. There was a trial to the court and a finding for the defendant; and from a judgment rendered upon this finding, the plaintiff appeals.

1. The plaintiff Franklin H. Rice acquired title to the north forty in 1889. In 1893 he conveyed to one David Whittacher, from whom he leased the same, holding as the tenant of Whittacher until 1899, when Whittacher conveyed to plaintiff Rena M. Rice, wife of Franklin H. Rice; and she, during the pendency of this action and before judgment, conveyed the premises to her said husband. The evidence establishes the fact of adverse possession during the period of plaintiffs' ownership, but in the deed from plaintiffs to Whittacher, and from Whittacher to Rena M. Rice, the land was described as the northeast quarter of the northeast quarter of section 14, and the defendant contends that this excludes the disputed strip, which was not conveyed to Whittacher nor by him to the plaintiffs; and that therefore the possession of Whittacher cannot be tacked to the prior possession of the plaintiff, nor can the plaintiffs, upon receiving the conveyance from Whittacher, tack their later holding to the possession of Whittacher. When the plaintiff deeded to Whittacher, he took a lease from Whittacher, and remained in the actual possession of the premises, including the disputed strip, during the period of Whittacher's ownership. If the plaintiffs' deed to Whittacher did not convey the disputed strip, then the plaintiffs remained in the possession thereof during the Whittacher ownership, in their own right. If the plaintiffs' right in the disputed strip passed by authority of their deed to Whittacher, then by the same rule Whittacher's deed to the plaintiffs would pass back his right of pos-

session; so that the fact of the conveyance to Whittacher becomes immaterial, as in either view of the case it is the same as if this deed had never been made.

2. The plaintiffs claim title to the middle and south forties by a deed from J. N. Rice, who in 1885 entered the same under the timber culture laws, and planted the trees which mark the western boundary of the disputed strip along the middle forty and for a short distance upon the south forty; and who had possession of the same to the west line of the trees, claiming ownership thereof, until 1900, when he conveyed the middle and south forties to the plaintiff Franklin H. Rice, and delivered to him the possession of the whole, including the disputed strip. In this conveyance the land was described as the southeast of the northeast and the northeast of the southeast of section 14, and no mention made of the disputed strip. The question is therefore presented whether, when an owner of a governmental subdivision of land either rightfully or mistakenly encroaches upon the land of the adjoining proprietor and occupies the land included in his boundaries, adversely to the owner for more than 10 years, and then executes a deed to a purchaser which describes the governmental subdivision only, but surrenders the possession of the whole, the purchaser takes any right in that part acquired by adverse possession. While it is settled in this state that privity must be shown between adverse claimants of real estate before the possession of one can be tacked to the possession of the other for the purpose of completing title by adverse possession (*Zweibel v. Myers,* 69 Neb. 294; *Montague v. Maranda*, 71 Neb. 805; *Holdrege v. Livingston,* 79 Neb. 238), the precise question here presented has not been before this court. The defendant contends that the presumption is that the plaintiff entered under his deed, and the possession given him was only co-existent with his title; and that when plaintiffs' grantor quit possession of the disputed strip, the seizin of the true owner was restored, and an entry afterwards by the plaintiff upon such strip constitutes a new disseizin;

and cites *Graeven v. Dieves,* 68 Wis. 317, *Dhein v. Buescher,* 83 Wis. 316, in support of his argument. The cases above cited have been limited and very clearly explained in the later case of the *Illinois Steel Co. v. Budzisz,* 106 Wis. 499, where it is said: "If a person, not the true owner, but hostile to him, be in actual possession of a part of a larger tract of land, under a deed describing the whole, in law he is in actual possession of the whole for the purposes of the statute of limitations, though as to a part the possession be in fact only constructive. In that situation it is said, and it is the law, that the adverse possession cannot extend beyond the calls of the deed, meaning thereby that actual possession by construction cannot be extended beyond the calls of the written instrument by virtue thereof; but if land be actually occupied beyond the calls of the deed, hostile to the true owner, the written instrument does not preclude such occupancy from being adverse. The occupancy does not refer to the deed, but to the fact itself and its hostile character. There was such an occupancy in *Wollman v. Ruehle,* 104 Wis. 603, and the point was directly decided in *Bishop v. Bleyer,* 105 Wis. 330. The full legitimate effect was given in those cases to the rule that the possession under a deed cannot be extended beyond its calls. Full effect was also given to the presumption that a person so circumstanced only intends to claim what his deed calls for, and the further presumption that the land, as to which the occupant has no title, he holds consistent with the title of the true owner. The first presumption, however, was rebutted by clear proof that the occupant claimed that the disputed tract was in fact within the calls of his deed. The second was rebutted by clear proof that the possession was actual and hostile to the true owner. Such presumptions yield to proof, like any other presumption of fact, or facts otherwise established. It is the facts, when established, that govern."

A careful reading of that portion of the opinion following the quotation above given will show that the Wiscon-

sin court completely repudiates the view taken in *Gracven v. Dieves* and *Dhein v. Beuscher,* and makes it clear that what that court means to hold is that the calls of the deed limit the *presumptive* possession taken by the grantee under a deed, but that that presumption, like any other presumption of fact, can be overcome by competent proof; *i. e.,* when possession of a larger tract than that embraced within the calls of the deed is delivered by the grantor to the grantee, at the time of the delivery of the deed and possession thereunder and as a part of the same transaction, with an intent on the part of the grantor to deliver the possession of the whole tract, then the possession of the grantee will tack to the former possession of the grantor.

Under the rule so fully, forcibly and clearly stated by the supreme court of Wisconsin, it is clear that when plaintiff's father conveyed the two south forties to plaintiff, and in his deed described the property by congressional subdivisions, omitting therefrom the disputed strip, both plaintiff and his father believing at the time that the strip was within the calls of the deed, and plaintiff's father having placed plaintiff in possession of the whole, then the *presumption* that the strip to which plaintiff obtained no title was held by him consistent with the title of the true owner is completely overcome, and the adverse possession of the father having been hostile to that of the true owner tacked to and became the adverse possession of plaintiff.

Again, it is clear from the record in this case that plaintiff purchased from his father the entire tract of land claimed by him in his petition; namely, the two forty acres and the disputed strip adjoining. It is clear that they both thought that the strip was within the calls of the deed that was given. Plaintiff was placed in possession of the whole tract under that deed. The true intention of the parties being to convey the entire strip, he had a perfect right to demand of his father a corrected deed or to bring suit against him to quiet his title. Having purchased the land from his father, who had absolute title to

the entire tract at that time, he thereby became the true owner of the entire tract, and had a right to bring his suit to quiet title against every person asserting claim to any portion of it. In that suit he could join his father, who had failed to make a complete conveyance, with the defendant, who was asserting ownership and right of possession. If he failed to make the defendant a party to such suit, that would not defeat his right to a decree against his father; and, in like manner, if he failed to make his father a party to the suit, that would not defeat his right to relief against the defendant. The statute of limitations having run as against defendant, who was the original owner of the strip of land, plaintiff's father became the absolute owner. He and all others interested evidently understood that the strip was within the government subdivision. As between plaintiff and himself it is clear that such was the case. The land was transferred and received under that mutual understanding. Of course, it would have been different had the statute not run in favor of the occupant. But it had, and the occupant was the owner of the land. As it was so clearly understood and considered a part of the land actually conveyed *and delivered,* all rights of the owner under the statute went with the deed.

It follows, therefore, that the judgment of the district court should be reversed as to the entire disputed strip, and the plaintiff's title thereto quieted, and we so recommend.

ROOT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to enter a decree quieting plaintiff's title to all of the land in controversy.

REVERSED.

PETER GRAVERT, APPELLANT, V. JOHN GOOTHARD, APPELLEE.

FILED MARCH 5, 1908. No. 15,092.

1. **Bills and Notes.** The instrument sued on examined, and *held* to be an ordinary promissory note, with a pledge of the corn therein mentioned as security.
2. **Replevin: INSTRUCTIONS.** Instructions examined, and *held* to have properly submitted to the jury the real question involved in the suit.
3. ———: EVIDENCE. Evidence examined, and *held* to sustain the findings of the jury and judgment of the court.

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

Weaver & Giller, for appellant.

John M. Macfarland, contra.

FAWCETT, C.

Plaintiff instituted an action of replevin in justice court to recover from defendant a quantity of corn. The judgment of the justice went against plaintiff, whereupon he appealed to the district court, where judgment again went against him, and from that judgment this appeal is prosecuted.

The instrument upon which plaintiff claims the right to recover is as follows: "$50.00. Benson, Neb., Oct. 17, 1903. Sixty days after date I promise to pay to the order of Peter Gravert $50, payable at Benson, Neb., with interest at 3 per cent. per annum from date. This note being given on a contract for the purchase of 250 bushels of corn. It is expressly agreed that the title to and ownership of said property remains absolute in and shall not pass from Peter Gravert until this note and all others given for purchase money of said property are fully paid. It is further agreed that this note shall be due on demand if the maker attempts to move out of this county or dis-

pose of said property. We and each of us severally bind our separate property and estate for the payment of this debt. P. O. Address: Florence, Neb. (Signed) John Goothard."

On the trial of the case in the district court these two instructions were given: "(3) The basis of the action is on a note for $50 given by defendant to plaintiff, due 60 days after date. Plaintiff claims that the property in controversy was turned over to him in payment of a balance due on the note. The burden of proof is on the plaintiff to prove by a preponderance of the evidence that the corn was turned over to him in payment of a balance due on the note, and, if he has so done, then your verdict should be for the plaintiff. (4) The defendant claims that the note in controversy was fully paid, principal and interest, before the action was commenced. The burden of proof is on the defendant to prove by a preponderance of the evidence that he had paid the note before the action was commenced, and, if defendant has so proved, then your verdict should be for defendant."

Plaintiff objects to the two instructions above quoted for the reason "that the contract above set out in full herein is treated as a note for the payment of $50 rather than a contract for the purchase of 250 bushels of corn. Gravert let Goothard have $50, and in return Goothard by said contract agreed to return to Gravert 250 bushels of corn for the $50." Defendant's contention is that the instrument, upon which plaintiff relies, was nothing more than a promissory note, for the security of which the 250 bushels of corn were pledged; in other words, that the instrument is in effect a chattel mortgage note. We have read the entire record in this case, and, in our opinion, defendant's contention is well sustained thereby. It will be observed that the first part of the instrument is an ordinary promissory note, which recites that it was given on a contract for the purchase of 250 bushels of corn; but the testimony of plaintiff himself clearly negatives any idea that there was a purchase of the corn, and establishes

the fact that the corn was simply pledged as security. In his direct examination plaintiff, in speaking of an interview he had with defendant, says: "That has nothing to do with my 250 bushels of corn or $50." Again he says: "I had $50 coming or 250 bushels of corn." Again he says, in answer to the question: "Q. Did you have any agreement what this corn was to be taken at? What price? A. The agreement was I get $50 or 250 bushels of corn in 60 days after. Q. That is all the agreement you ever had with him? A. And then he signed the note for the security." This testimony, given by plaintiff himself, so fully corroborates the testimony of defendant that the transaction was an ordinary loan of $50 with the corn pledged simply as security that the claim of plaintiff in his brief that it was a contract for the purchase of 250 bushels of corn cannot be sustained. A reading of the instrument itself shows that such was not the fact. It says: "It is expressly agreed that the title to and ownership of said property remains absolute in and shall not pass from Peter Gravert until this note and all others given for purchase money of said property are fully paid. It is further agreed that this note shall be due on demand if the maker attempts to move out of this county or dispose of said property." If "the title to and ownership" were to remain in plaintiff until the note should be fully paid, then full payment of the note would, of course, restore to defendant the title and ownership. Again, the provision of the note that it should be due on demand if the maker attempted to move the corn out of the county or dispose of it indicates very clearly that plaintiff was seeking to protect himself against any attempt on the part of his debtor to dispose of the corn which he had pledged as security for the debt. We are unable to discover any point of view from which this instrument can be construed as anything more or less than an ordinary promissory note with a pledge of 250 bushels of corn as security therefor. If so, then, if defendant had fully paid the $50 with interest at the time the replevin suit was instituted, plaintiff's right to take any

of the corn specified in the instrument had been completely divested, and no action for the recovery of the same would lie. The evidence as to whether or not he had been paid the full amount due him under the note is conflicting; but there is ample testimony in the record to sustain defendant's contention that the note had been fully paid at the time the present suit was instituted. There is also ample testimony in the record to sustain the finding of the jury as to the value of the corn taken by plaintiff. The instructions of the court properly submitted the real question involved and we are unable to discover any theory upon which the verdict of the jury can be disturbed.

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

CALKINS and ROOT, CC., concur.

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

AFFIRMED.

MARY E. GANDY, APPELLANT, V. ESTATE OF WILLIAM C. BISSELL, APPELLEE.*

FILED MARCH 5, 1908. No. 15,331.

1. **Appeal:** VERDICT: EVIDENCE. Where the judge of a district court, who has had the advantage of seeing the witnesses and observing their demeanor while testifying, overrules a motion for a directed verdict, and there is sufficient competent evidence in the record, standing alone, to sustain the verdict returned by the jury, this court will not disturb such a verdict and reverse a judgment rendered thereon, even though the evidence in opposition to the verdict is such, as shown by the record, that a peremptory instruction might have been sustained.

2. **Executors and Administrators:** CLAIMS AGAINST ESTATE: EVIDENCE. Where a person, by deed, shortly before his death conveys all of his lands to a third party for a nominal consideration, which

* Rehearing denied. See opinion, p. 117, *post*.

deed is withheld from record until after the death of such person, and, after his death, an unsecured claim for a large amount is filed against his estate, and it appears from the testimony of the surviving wife of such deceased person that she, at least, joined in said deed on account of rumors which she and her deceased husband had heard in relation to said claim, such deed is proper evidence, and it is error to exclude it.

3. Appeal: ADMISSION OF EVIDENCE. Counsel should not be permitted, in the face of proper objections, to get before a jury improper evidence, and then escape the consequences of their action by consenting that it be stricken from the record.

4. ———: ———. In such case, if the evidence is of such a character, under the particular circumstances of the case, that it may have affected the verdict, the error cannot be disregarded. *Missouri P. R. Co. v. Fox*, 60 Neb. 531, and cases there cited, distinguished.

5. **Executors and Administrators:** CLAIMS AGAINST ESTATE: EVIDENCE. While, under particular circumstances which may arise on the trial in the district court of a claim against a decedent's estate which has been appealed to said court, it may be proper to permit evidence of the date when such claim was filed in the probate court and the last date for filing claims, it is not proper to submit to the jury copies of the proceedings in said court.

6. **Trial:** ARGUMENT OF COUNSEL. It is not reversible error for the district court to refuse to permit counsel, when addressing the jury, to discuss immaterial evidence.

7. **Notes:** DELIVERY. In a suit upon a promissory note, where the plaintiff has possession of the note, produces it upon the trial, and it is received in evidence, such facts make a *prima facie* case of due delivery of the note.

8. **Venue, Change of.** "When it shall be made to appear to a district court that a fair and impartial trial of a cause cannot be had in the county where brought, then such court has not only the discretion, but it is its duty, to send the cause to some adjoining county for trial." *Omaha S. R. Co. v. Todd*, 39 Neb. 818, followed.

9. ———: ———. And in such case the court is not limited to the adjoining county, but where the showing is equally or sufficiently strong as to an adjoining county the case should be sent to some county where the alleged prejudice does not exist.

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

S. P. Davidson, E. Falloon and *Samuel Rinaker,* for appellant.

Samuel H. Sedgwick, C. Gillespie, Francis Martin and *E. Ferneau, contra.*

FAWCETT, C.

The nature of this case is sufficiently stated in the former opinions of this court, as reported in 3 Neb. (Unof.) 47, 5 Neb. (Unof.) 184, and 72 Neb. 356. Following the reversal in 72 Neb. 356, the case was remanded to the district court, and was again tried to a jury, resulting in a verdict and judgment for the defendant. From that judgment plaintiff prosecutes her third appeal to this court. We do not deem it necessary to consider the evidence or questions of law considered and discussed in the former opinions, and will therefore confine this opinion to the new questions raised on the present appeal. A large number of errors are assigned by plaintiff in her assignment of errors, but, under the well-established rule in this court, we shall consider only those which are pointed out and discussed in appellant's brief.

Plaintiff's first complaint, and the one argued at greatest length, is that the verdict is not sustained by the evidence; that the evidence so strongly preponderates in favor of plaintiff that the verdict must have been given under the influence of passion or prejudice, in utter disregard of the evidence produced by plaintiff; and that the evidence is so overwhelmingly in favor of plaintiff that the district court should have directed a verdict in her favor. This contention was made on both of the former appeals, but in each instance this court held that the evidence offered in behalf of defendant was sufficient to require the submission of the case to the jury. On this branch of the case, counsel for defendant urge that there is no merit in plaintiff's contention that the court should have directed a verdict in her favor, but that, three suc-

cessive juries having passed upon the case and returned their verdicts in favor of defendant, the present judgment should be affirmed and this protracted litigation ended. If defendant's statement of this point were accurate it would be entitled to great weight, but we do not think the record will bear out the statement that three successive juries have passed upon the case, *as presented by the present record,* adversely to plaintiff. The record presented to this court was substantially the same on both of the former appeals, but upon the last trial of the case plaintiff introduced considerable new testimony by some six different witnesses. This testimony is now in the record for the first time; hence, but one jury has yet passed upon the testimony now before us. There is no claim that the defense was in any manner strengthened on the last trial of the case by the introduction of any new evidence. The case for the defendant, therefore, is substantially the same as on the former appeals. Plaintiff, however, on the last trial introduced all of the evidence which appeared in the records on the former appeals, and in addition thereto the following new testimony:

George Turner testifies that he had lived at Humboldt (the home of the Gandys and Mr. Bissell), for 19 years; that he is now filling his second term as councilman of the city of Humboldt; that he lived neighbor to Mr. Bissell (the deceased) in the years 1892, 1893, 1894; that in October or November, 1894, Mr. Bissell talked with him about securing a loan. The witness says: "One thing led on to another, and we kept on talking. I don't know as I asked him how much he owed, but some way, I asked him how much he wanted to borrow, and he said between $5,000 and $6,000. He said, 'I owe M. E. Gandy about that amount.' He said between $5,000 and $6,000." J. C. Worral testified that he at one time lived on the Bissell farm; that in the year 1892 he had a talk with Mr. Bissell about the purchase of one of his (Bissell's) quarter sections of land. He says: "I asked what it would take to buy it, and he said he would sell that quarter of land for

$6,500. We talked about selling it, and finally he said, 'I will throw off $50 for commission and make it $6,450,' and he says, 'I owe M. E. Gandy a note of $5,600 that you will have to pay if you buy the land.'" J. H. Shook, who has been road supervisor, postmaster, county commissioner, and member of the legislature, testifies that in 1893 "Bissell wanted to sell me his place. I inquired into it a little, and I was to pay him $900, and I could settle the balance with Dr. Gandy, or M. E. Gandy, that would be $5,600." F. W. Samuelson, the banker with whom it appears both Mr. Bissell and the Gandys did business, says that in 1895 Mr. Bissell came to him and wanted to know how he "would lend money on land—just making a farm loan," and, in answer to a question as to what Mr. Bissell said about the purpose for which he wanted the loan, testified: "Well, at that time I believe it was that I asked him what he wanted with such a large amount of money—such a large loan—and he said that he was owing Mrs. Gandy quite an amount of money." M. R. Wilson, ex-sheriff of Richardson county, testifies that in July, 1892, Mr. Bissell told him that he was owing the Gandys; that he (the witness) asked Mr. Bissell "if he wasn't afraid he would get into trouble with the Gandys. He said no, he didn't have no mortgage on him. They just had a note." He further testifies that in that conversation Mr. Bissell stated that he owed the Gandys $5,500 or $5,600 or between $5,000 and $6,000. Edward Moyer, who now lives in Kansas, testified that he lived in Humboldt from 1878 to 1888; that he and Mr. Bissell were both members of the same church, and took quite an interest in each other; that he and his wife would often go down and stay with the Bissells; that, during his conversations with Mr. Bissell, "he told me a good deal about his business and about his troubles"; that in 1892, while on a visit to Humboldt, he had a conversation with Mr. Bissell with reference to the latter's financial circumstances, and testifies that Mr. Bissell said to him: "I am in shape now that I think I am going to make out all right. I just had settled

it with Mrs. Gandy about that time or just then or a little before, I don't know how it was any more. He says, 'Now I have got it all in shape, in one note, all I owed Gandy, and if I can sell one quarter of that land I can get out.' He says, 'You better come up and buy that quarter of me.' I couldn't do that, of course, and he said, 'If I can sell that quarter I will get out all right.' Q. Did he in any way intimate to you the amount of the note which he said he gave? A. It was something between $5,000 and $6,000, as nearly as I can tell, it was nearly $6,000, I remember that, and he thought he could get out if he could sell that quarter." Mrs. Maggie Carsh Hyde, now a married woman living at St. Joseph, Missouri, testifies that she lived in Humboldt 23 years; that she used to go to school to Mr. Bissell, and that she lived with him a year before he died, and at his house "some while afterwards"; that she heard a conversation between Mr. Bissell and the Reverend Mr. Hawley; that she was present and heard the conversation when Mr. Bissell authorized Mr. Hawley to settle Dr. Gandy's doctor bill; that she was present and heard the conversation when Mr. Hawley subsequently told Mr. Bissell that he had made the settlement with Dr. Gandy. She says that when Mr. Hawley entered he said, "I settled the doctor bill"; that Mr. Bissell said, "You have?" that he replied, "Yes, I settled it up very pleasantly." She also testifies that on the evening of that same day she had a conversation with Mr. Bissell about the matter. She says: "Mr. Bissell talked to me as if I was one of the family. They talked their financial business, and the evening Mr. Hawley gave the receipt to Mr. Bissell he had his feet upon the stove, and was talking about this doctor bill, and he said, 'I am very glad the doctor bill is paid now.' I said, 'Then you have settled with Dr. Gandy.' He said, 'Yes, I am very glad. I owe M. E. Gandy a large amount, but that will be fixed so she can get all of her money if anything happens to me. I will see that she is not cheated out of anything.'"

It is on the strength of the foregoing new testimony,

coupled with what had formerly been offered, that counsel for plaintiff base their argument that the verdict is the result of passion and prejudice and of an utter disregard by the jury of the testimony of these witnesses. This testimony gives color to plaintiff's contention, and at least causes a grave suspicion in our minds as to whether the jury did not in fact try Dr. Gandy upon his alleged unsavory record, instead of trying the issues between Mrs. Gandy and the defendant. But, this case was tried before a judge, who has a well-earned reputation for integrity and a fearless discharge of his duty as he sees it. He had the advantage of seeing the witnesses upon the stand and noting their demeanor while testifying. He heard the testimony given, and, inasmuch as he, from his vantage ground, deemed the case, in the light of all of the evidence and facts and circumstances of the trial, one for the jury, we cannot say that he erred in not directing a verdict for plaintiff. We are therefore compelled to hold adversely to plaintiff on this branch of the case.

Plaintiff's second contention is that the court erred in excluding from the jury the copy of the deed from the deceased to William I. Phillips conveying the farm of deceased. The defendant had introduced the testimony of the witness Ida Carsh to the effect that Mr. and Mrs. Bissell had informed her that they had sold a farm in Illinois for $5,400, from the proceeds of which the two quarter sections of land in Nebraska had been purchased; that the difference had been used in paying moving expenses, buying a lot in town, building a house on the lot, and making a small loan of $300 to one Stearns. All this was evidently for the purpose of showing that the deceased had sufficient means of his own, and, hence, would not be under the necessity of borrowing from Mrs. Gandy the large sum of money represented by the note in controversy. There is the testimony, also, of Mrs. Bissell, widow of deceased, that her reason for making that deed (which was given for an express consideration of $1), was on account of the claim which she understood the Gandys were making. Dr.

Gandy's testimony is to the effect that this deed was executed shortly after he had the interview with Mr. Bissell, at which interview, according to Mrs. Bissell's testimony, he declared to Mr. Bissell that he did not have any large claim against him, but at which, according to his own testimony, he told Mr. Bissell that he had never said he had a large *mortgage* against him; that he had no mortgage at all, but had a *note* for a large amount. This deed, being executed so near the time when that conversation took place between Mr. Bissell and Dr. Gandy, was competent evidence to go to the jury. We think plaintiff might well argue the improbability of Mr. and Mrs. Bissell's making a deed to all of their property for a consideration of $1, if Dr. Gandy had assured them that he had no claim whatever against them; while on the other hand, if he had reminded them of the large note which he claimed his wife held against them, that might have been an inducement for them to make the deed under the circumstances shown by the record. However that may be, the fact that Mr. Bissell, shortly before his death, conveyed all of his property for an express consideration of $1, and that soon after his death this unsecured note of $5,600, with a large amount of accrued interest, was filed against his estate would, in our judgment, entitle plaintiff to show such transfer of the property, and have it go to the jury as a circumstance tending to show that the deceased realized that there was a large unsecured claim outstanding against him, and that the deed was made for the purpose of evading, if possible, the payment of that claim. We think, therefore, it was error on the part of the court to exclude the deed referred to; and, for the same reason, it was error to exclude the deed from Phillips to Enos W. Shaw, trustee. We think it was proper to introduce both of those deeds, as well as the indorsements showing the dates when they were recorded, it being a circumstance worthy of note that both of those deeds were withheld from the records until after Mr. Bissell's death.

The third contention of plaintiff is that the court erred in overruling their objections to that part of the cross-examination of Dr. Gandy relating to a certain judgment against him in the case of *Cummins v. Fries,* and in overruling plaintiff's motion to strike out all of that part of such cross-examination. The case of *Cummins v. Fries* was tried four or five years after the making of the note in controversy. No proper foundation had been laid for any such cross-examination. After getting all of the cross-examination before the jury, counsel for defendant consented that the court might sustain plaintiff's motion, and after such consent was given the court sustained the motion and excluded the testimony, stating to the jury: "Gentlemen, the testimony introduced in this record within the last half hour regarding a certain case in Pawnee county, in which case the plaintiff and Dr. Gandy and others had and made affidavits showing the estate of Bissell as surety that he had paid these obligations and this testimony has been stricken from the records, and all testimony bearing upon that subject and unless it was introduced further you will not consider the same, you will remember the testimony of the estate of Mr. Bissell having paid some money, unless there is other testimony on that point you will not regard it at all." The above is a literal quotation from the bill of exceptions. We greatly fear that it is not an accurate transcript of what the court said, but we must take the record as we find it. So taking it, we are compelled to hold that it did not sufficiently withdraw from the jury the improper cross-examination which had just been permitted. Moreover, even if the court had fully and completely charged the jury in that behalf, it would not have cured the error. Counsel should not be permitted, in the face of proper objections, to get before a jury improper testimony, and then escape the consequences of their action by consenting that it be stricken from the record. It is not as easy to extract poison as it is to inject it. Jurors are human. They are not experts in weighing evidence. They are not skilled in

the art of disregarding the incompetent and immaterial, and considering only that which is competent and material. As is said in *Erben v. Lorillard,* 19 N. Y. 299: "When illegal evidence properly excepted to has been received during a trial, it must be shown that the verdict was not affected by it or the judgment will be reversed. If the evidence may have affected the verdict, the error cannot be disregarded. The rights of parties can only be preserved by adhering to this rule. It would be vain to observe the rules prescribed by law to secure an impartial jury, if their minds are to be subjected to the influence of illegal evidence after they are impaneled. It does not follow that impressions thus obtained will have no effect, although the judge directs them to disregard the evidence."

Counsel for defendant rely upon *Missouri P. R. Co. v. Fox,* 60 Neb. 531, and the other three Nebraska cases cited on page 555 of the opinion in that case, which hold generally that "error in admitting improper evidence is cured by the court's withdrawal of such evidence from the jury." Like all general rules, this rule must yield to special circumstances. No general rule has ever yet been formulated by the mind of man which does not have its exceptions. The facts and circumstances in the four cases above noted are so radically different from those in the case at bar that those cases are readily distinguishable from this. In none of those cases was there anything out of the ordinary. No question of bias, prejudice or public sentiment against any of the parties or witnesses appears; hence, there was no reason in any of those cases to fear that the minds of the jury had been poisoned by such improper evidence. The case at bar presents an entirely different situation. Here, the main assault of defendant's counsel is upon Dr. Gandy, husband of the plaintiff. It is impossible to read their brief submitted in this case, and follow the record of their examination of witnesses, without reaching the conclusion that every effort was made, on the part of counsel for defendant, to create in the minds of the jury a belief that Dr. Gandy was the real party plaintiff—a

question not raised by the pleadings—and that he was the embodiment of everything that is dishonest and corrupt in his business transactions. So far as this could be done within the rules of practice, counsel had a perfect right to take that course, but, in such a case, counsel should not be permitted to introduce a line of improper evidence for the sole purpose of prejudicing the jury, and, when they had accomplished their purpose, consent that it be stricken out, and shield themselves behind a very proper rule announced by this court in cases of a radically different character. We do not think, therefore, that the rule announced in the cases above referred to can be invoked in this case. We have never known a case where we think the rule announced by the New York court of appeals should be observed with greater strictness than in the case at bar. Dr. Gandy for some reason, whether rightfully or wrongfully, has had a great deal of trouble in the community where he has resided, and in Pawnee county, where the case was tried. So far as it could be done within the rules of evidence, counsel were entitled to take advantage of that fact, as affecting his credibility; but in such a case the rules should not have been in the least relaxed. We think, therefore, that it was error to permit the cross-examination complained of, and that in striking it out by consent of counsel for defendant and in admonishing the jury as above set out the error was not cured.

Plaintiff's fourth contention is that the court erred in overruling plaintiff's objection to the introduction of defendant's exhibit "E," which consisted of a copy of the orders of the county court of Richardson county, approving the bond of the executor, fixing the time within which the creditors could file their claims, and giving the time for the publication of notice to creditors, and the original claim of plaintiff with the time when it was filed for allowance. It appears that plaintiff's claim was filed on either the last or the next to the last day allowed for filing claims against the Bissell estate; and counsel for defend-

ant argue that this was a circumstance which they had a right to show to the jury in support of their contention that plaintiff herself regarded her claim as a stale claim. In this we are inclined to think counsel for defendant were right; still we do not think that the entire transcript of the county court should have been given to the jury. It was sufficient for defendant's purpose to show the date of the filing of the claim.

Plaintiff's fifth contention is that the court erred in not allowing counsel for plaintiff to argue to the jury that it was in evidence that the National Christian Association is an organization to fight secret societies, and is the real beneficiary of the estate of William C. Bissell, and that the conveyance of Mr. Bissell hereinbefore referred to grew out of that fact. Dr. Gandy's attention was called to the testimony which had been given by the witness Hawley relating to the fact of Mr. Bissell's having deeded his property away. On his redirect examination, in answer to a question as to what Mr. Hawley had told him in the conversation referred to, Dr. Gandy testified that Mr. Hawley told him that Mr. Bissell had deeded his property away to a rich corporation in Chicago, the National Christian Association, for the purpose of fighting secret societies, and that if he (Gandy) did not settle with him he would never get a cent out of it. This testimony was admitted without objection, and on the strength of it Mr. Falloon, of counsel for plaintiff, in addressing the jury, sought to make the argument above indicated. Defendant's counsel objected to this line of argument, and their objection was sustained. We think the fact as to who was the real beneficiary of the Bissell estate, or the purpose to which Mr. Bissell's grantees might devote the property, or whether the statement attributed to Mr. Hawley was true or not were all immaterial. If so, then the refusal of the court to permit the proposed argument was not reversible error.

Plaintiff's sixth contention is that the court erred in

refusing certain instructions requested by plaintiff. In their assignment of errors they complain of the refusal of the court to give instruction No. 1, requested by plaintiff, but in their brief they for some reason abandon that contention. This brings us to the consideration of the other instructions requested by plaintiff. Without quoting it here, we do not think the court erred in refusing plaintiff's instruction No. 2, for the reason that that instruction entirely ignores the question of delivery of the note in controversy. Instructions Nos. 3 and 5, requested by plaintiff, we think are fully covered by instructions Nos. 6 and 8½, given by the court on its own motion.

Instruction No. 4, requested by plaintiff, is as follows: "The court instructs the jury that, if it appears from the evidence in this case that the note alleged in plaintiff's petition was signed by William C. Bissell in his lifetime as alleged in said petition, then the fact which appeared on the trial of this case, that said note was in the possession of the plaintiff and produced by her at this trial, of itself raises a legal presumption that said note was duly delivered to the plaintiff and lawfully in her possession, and that the conditions, if any, connected with the delivery of said note were fully complied with." In the opinion on the last hearing of this case in this court, reported in 72 Neb. 356, the court say: "The plaintiff had possession of the note, produced it upon the trial and it was received in evidence. This made a *prima facie* case of due delivery of the note. The defense undertook to prove that the note was, in fact, not delivered to Gandy until after the death of Mr. Bissell. This evidence on the part of the defense was not very satisfactory, and tended likewise to prove that Mr. Bissell had made himself liable upon some kind of bond at Mr. Gandy's request, and that when the note in suit was executed, it was, by agreement between the parties, left in the hands of a third party until such time as Mr. Gandy should cause Mr. Bissell to be released from liability upon his account, and that after Mr. Bissell's death the bond upon which Mr. Bissell was

liable for Mr. Gandy had been satisfied, and the note then delivered to Mr. Gandy by the holder thereof pursuant to the original agreement. This seems to be the only evidence offered to overcome the presumption of due delivery of the note, which arises from the fact of possession." The law, as thus stated by SEDGWICK, J., meets with our approval, and we think entitled plaintiff to have the instruction given.

Instruction No. 6, requested by plaintiff, is the one in which plaintiff asks for a directed verdict. This is fully covered by our discussion of plaintiff's first contention. Counsel for plaintiff in their brief do not refer to or discuss any of the instructions given by the court on its own motion. We therefore assume, without deciding, that they are free from error.

Plaintiff's seventh and last contention is that the court erred in sending the case to Pawnee county for trial on the change of venue granted from Richardson county. We have carefully examined the showing made by plaintiff for a change of venue from Richardson county, and also the showing made why the case should not be sent to Pawnee county. We fully recognize the rule that an application for a change of venue is addressed to the sound discretion of the court, but we must also recognize the rule that, when a proper showing is made, then the court not only has the discretion, but it is its duty, to send the case to some adjoining county for trial. We think the rule announced in *Omaha S. R. Co. v. Todd*, 39 Neb. 818, cited by counsel for defendant, is the correct rule. The first paragraph of the syllabus reads: "When it shall be made to appear to a district court that a fair and impartial trial of a cause cannot be had in the county where brought, then such court has not only the discretion, but it is its duty to send the case to some adjoining county for trial." In this case the court considered that the application for a change of venue made by plaintiff was sufficient to entitle her to the change; and properly sustained plaintiff's motion. Having reached that conclusion, we

think the court should have sent the case to some county entirely free from the same prejudice which existed against plaintiff in Richardson county. The showing made by plaintiff why the case should not be sent to Pawnee county was, in our judgment, much stronger than that made in support of its motion to have the case removed from Richardson county. If, therefore, the showing was sufficient to entitle plaintiff to a removal of the case from Richardson county, it certainly was sufficient to entitle her to have it sent to some county other than Pawnee. The counties of Richardson, Pawnee, Johnson, and Nemaha all embrace a territory in which Dr. Gandy is well known, and where his previous troubles seem to have been very generally discussed. If the case was to be sent from Richardson county, we see no good reason why it should not have been sent to some county in the same district not included in plaintiff's application for change of venue. Such a course would have been prudent, and, in our opinion, is the course which should have been pursued.

We have given this case very careful consideration with the view of affirming the judgment of the court below if possible, in order to end this expensive and long-continued litigation; but the more we have examined the record and studied the case, the more firmly we have become impressed with the conviction that plaintiff ought to be given a new trial in some county where both parties may be able to go before a jury upon an equal footing.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial in harmony with this opinion; and with instructions to change the venue to some county other than Richardson, Pawnee, Johnson or Nemaha.

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 for a new trial in harmony with said opinion; and with instructions to change the venue to some county other than Richardson, Pawnee, Johnson or Nemaha.

REVERSED.

LETTON, J., not sitting.

The following opinion on motion for rehearing was filed July 17, 1908. *Former judgment as modified adhered to. Rehearing denied:*

FAWCETT, C.

We are asked to set aside our opinion in this case, *ante*, p. 102, and grant a rehearing. One of the reasons assigned in the motion for rehearing is that we were wrong in holding that the district court erred in refusing to give instruction No. 4, requested by plaintiff. The instruction referred to reads as follows: "The court instructs the jury that, if it appears from the evidence in this case that the note alleged in plaintiff's petition was signed by William C. Bissell in his lifetime as alleged in said petition, then the fact which appeared on the trial of this case, that said note was in the possession of the plaintiff and produced by her at this trial, of itself raises a legal presumption that said note was duly delivered to the plaintiff and lawfully in her possession, and that the conditions, if any, connected with the delivery of said note were fully complied with." Our former holding with reference to this instruction was based upon a prior opinion in this case, reported in 72 Neb. 356. On a more careful consideration of the case we think that the criticism of our holding in reference to this instruction is sound. The instruction goes further than the rule announced in 72 Neb. 356. We think the use of the word "legal," as qualifying the word "presumption," might mislead the jury into believing that the presumption referred to was a conclusive presumption. While it is true that the possession of a note raises the presumption that it came lawfully into the

hands of the holder, such presumption is no more than a *prima facie* presumption of fact, subject to be overcome by other circumstances. As this element was not contained in the instruction tendered, it was properly refused. Our former opinion is, therefore, modified in accordance with the views above expressed, and the action of the trial court in refusing instruction No. 4, tendered by the plaintiff, is approved.

A number of other reasons are assigned why defendant thinks a rehearing should be granted. We have considered them all, and have carefully considered the able brief filed in support thereof, but we are not disposed to modify our former opinion further than as above indicated. We think the motion for rehearing should be overruled.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, our former judgment, as modified by said opinion, is adhered to, and the motion for rehearing is

OVERRULED.

LETTON, J. not sitting.

STATE, EX REL. JOSEPH E. COBBEY, RELATOR, V. GEORGE C. JUNKIN, SECRETARY OF STATE, RESPONDENT.

FILED MARCH 5, 1908. No. 15,549.

1. **Statutes:** CONSTRUCTION. House roll 57, adopted by the legislature of 1907, examined, and *held* to be free from doubt or ambiguity.
2. ———: ———. Its provisions are clearly within the scope of legislative power.
3. ———: ———. It confers no discretion upon the officers of the state as to the number of volumes of the statutes to be accepted thereunder.
4. **Mandamus:** EVIDENCE. Evidence examined, and *held* sufficient to entitle relator to a peremptory writ of mandamus.

ORIGINAL application for a writ of mandamus to compel respondent, as secretary of state, to receive 400 copies of Annotated Statutes of Nebraska, as required by law. *Writ allowed.*

J. E. Cobbey, pro se.

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

FAWCETT, C.

The legislature of 1907 passed, and the governor duly approved, the following act:

"HOUSE ROLL NO. 57.

"An act to purchase a supply of statutes for the use of the state, and making an appropriation therefor.

"*Be it enacted by the Legislature of the State of Nebraska:*

"Section 1. That the compiler of the Annotated Statutes of Nebraska is authorized to deliver to the secretary of state 400 copies of the Annotated Statutes of Nebraska for the use of the state. Said statutes to be brought down to date after adjournment of the Legislature and to equal in quality the Annotated Statutes of 1903.

"Section 2. For the purpose of carrying into effect the provisions of this act there is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of $3,600, payable on the delivery of the statutes to the secretary of state. The auditor is hereby directed to audit such bill and draw his warrant on the state treasurer for the amount thereof." Laws 1907, ch. 193.

Relator alleges that he was the author of the Annotated Statutes of 1903; that at the time of the passage of house roll 57 he was the only person in the state of Nebraska publishing, or authorized to publish, statutes known as the "Annotated Statutes of Nebraska"; that acting under the authority of this law, and accepting the same as a

contract, he prepared the statutes as therein provided, and tendered 400 copies of the same to the secretary of state, as provided for in the act, and demanded that he receive and receipt for the same, which the secretary of state, the respondent herein, refused to do. Whereupon, by leave of court, this action for mandamus was brought as an original action in this court.

Respondent admits the passage and approval of house roll No. 57, admits that relator tendered 400 copies of his annotated statutes, and that he, as secretary of state, refused to receive the same, admits that relator has a copyright of the statutes which he offered to deliver, which is entitled "Cobbey's Annotated Statutes of Nebraska," denies every allegation in relator's petition and in the alternative writ, except such as are specifically admitted, qualified or explained in his answer, alleges that at the time of the authorization, publication and copyrighting of the book referred to as "Cobbey's Annotated Statutes of Nebraska," and at the present time, there was and is an annotated compilation of the statutes of Nebraska other than the statutes of relator, which was known and recognized by the legislature of 1907 and the public generally as the "Annotated Statutes of Nebraska"; that the compiler of said last named statutes has prepared and printed an edition of said statutes that, as respondent believes, complies with all the requirements of the act of the legislature of 1907, and that said compiler, prior to the commencement of this action, was and now is ready, able and willing to comply with the terms of said act, and offered to deliver and now offers to deliver to respondent 400 copies, or any less number, of his annotated statutes, being brought down to date, and equal in quality to the annotated statutes of 1903, and that respondent verily believes that said statute complies with the said act of 1907; that the compiler of said statutes offers his statutes at the price of $2.50 a copy; that said statutes are in every respect equal in quality to the statutes of relator; that said statutes are preferred by a large number of the ex-

ecutive officers of the state, to whom the statutes when purchased would be distributed, and by whom they would be used; that by the terms of the act of 1907 respondent was authorized, within his official discretion, to purchase for the use of the state a supply of any annotated statutes for the state of Nebraska, not exceeding 400 in number, prepared in compliance with said act, or of two or more annotated statutes of Nebraska that come within the requirements of said act; that numerous state officers have already purchased and supplied themselves with the "Annotated Statutes of Nebraska" other than the "Cobbey's Annotated Statutes of Nebraska" at a cost to the state of $2.50 a volume, because they preferred said statutes; that respondent is informed and believes that there is no necessity for purchasing 400 volumes at this time for the use of the state, or for its use during the present biennium. Wherefore respondent submits whether he ought to purchase 400 copies of Cobbey's Annotated Statutes of Nebraska at a cost to the state of $3,600.

We deem it unnecessary to refer, to any great extent, to the evidence in this case, as the record discloses very little that is not already well known by every judge and lawyer in the state. The evidence shows that there are two statutes now in use, and which have been in use since 1903—one prepared by relator, known as "Cobbey's Annotated Statutes of Nebraska," the other prepared by Mr. H. H. Wheeler, known and designated as "Compiled Statutes of Nebraska." These two statutes are so generally known by all persons who have occasion to use the statutes of this state that we do not see how there is any possibility of one being mistaken for the other. Whenever a reference is found in any opinion, brief or other document to the "Annotated Statutes," it is known at once that such reference means the statutes prepared by relator; and, when any such reference is made to the "Compiled Statutes" of Nebraska, it is known at once that such reference means the statute prepared by Mr. Wheeler. In 1903 relator was authorized to prepare a statute which should

be annotated upon the same plan as the annotated code published by him in 1901, said statute to be published in two volumes, for which relator was to receive $9 a set of two volumes. Relator proceeded to prepare the statutes in accordance with said act of the legislature, and, after litigation which was decided by this court in *Marsh v. Stonebraker,* 71 Neb. 224, he was permitted to deliver the statutes so published, and collected his pay therefor. In 1905 the legislature recognized this two volume statute as the "Annotated Statutes," and authorized a supplement to be prepared on the same general plan, bringing "The Annotated Statutes" down to date, and relator contends that such recognition constituted a legislative sanction and interpretation of the use of the words "Annotated Statutes." However that may be, the supplement was prepared and is now in general use. During all of those times Mr. Wheeler was publishing the "Compiled Statutes" of Nebraska in the same manner as it is now being published. With these two statutes in general circulation, and the difference between them, both as to quality and price, well known, the legislature of 1907 passed house roll No. 57, in which they used the term "Annotated Statutes of Nebraska," instead of "Cobbey's Annotated Statutes of Nebraska." Because of the omission of the name of relator in connection with the name of his statutes, respondent claims that he is in doubt as to which statutes was meant. The conviction is forced upon us that this doubt is more imaginary than real. It is too unreasonable for serious consideration that the legislature, in passing house roll No. 57, and appropriating $3,600 for the purchase of 400 copies of a statute, had any thought of the "Compiled Statutes" published by Mr. Wheeler, consisting of a single volume, which could be purchased for $2.50 a volume. The reference to "Annotated Statutes," and the requirement that they should be equal in quality to the "Annotated Statutes of 1903," together with the designation of the number of copies as 400 and the fixing of the amount of the appropriation at $3,600, render it clear be-

yond a possibility of a doubt that the legislature had in mind the statutes of 1903 prepared by relator and the preparation by relator of the statutes contemplated by house roll 57. While some of the state officials may prefer the Compiled Statutes, as alleged by respondent, it is idle to claim that such statute is equal in quality to the Annotated Statutes prepared by relator. To one desiring only to examine the statutes without any reference to the annotations, it may be conceded that the Compiled Statutes, being in one volume, would be more convenient, but the purpose of the legislature was not simply to provide for a compilation of the statutes. It is evident that it had in mind, as an important consideration, the valuable annotations to the statutes prepared by relator. The fact that certain state officials may prefer the Compiled Statutes, or that respondent believes that there is no necessity for purchasing 400 volumes, or whether or not the legislature acted wisely in the passage of house roll No. 57 are all matters with which neither the court nor respondent has any concern.

In *State v. Wallichs*, 12 Neb. 234, we said: "According to our understanding of the provisions above quoted, the only rational conclusion to be drawn from them is that the legislature, exercising an undoubted inherent discretion, intended to supply the state with a definite number of copies, to be paid for at once upon delivery, and sufficient to meet not only the present, but also the future demands for a reasonable length of time. And the designation of this number was not left in doubt, to be determined by the uncertain discretion of the respondent, or any other state officer, but is expressed clearly enough, as we think, in the last of the above quotations. Whether this number were reasonable, or prodigal, under all the circumstances that should affect it, is not to be here considered. The legislature saw fit to designate the number 'required by the state,' and that designation is not subject to review. That is a matter with which neither the respondent nor this court has anything whatever to do. We are to ad-

minister the laws as enacted, in accordance with their evident design, leaving the responsibility with the legislature where it rightly belongs." In *Marsh v. Stonebraker, supra, State v. Wallichs, supra,* was quoted from and approved. In the opinion Mr. Commissioner DUFFIE, speaking for the court, said: "The objection that this statute is obnoxious to the provision of our constitution against the granting of any special or exclusive privilege is not, in our judgment, well taken. Mr. Cobbey is the only party having these books. If the state wishes to purchase, it must purchase from him. It is true that there is another statute published, and which the state could purchase from another party, but we know of no prohibition resting upon the legislature to determine, for itself, which of these statutes it will buy for the use of the state officers. * * * The state having, as we think, an undoubted right to make this purchase, it is not for the courts to interfere or to take any action in the matter."

What we said in those two cases will apply with equal force here. The legislature, acting clearly within its powers, passed house roll No. 57. Both the record and common knowledge on the part of all parties concerned conclusively establish the fact that the legislature intended an annotated statute to be prepared by relator. Relator has prepared a statute in accordance with the act. He has duly tendered same to respondent, and is now ready to deliver the full 400 volumes in accordance with the legislative enactment, and it is the duty of respondent to receive the statutes tendered. Respondent makes no point in his answer that he would have any difficulty whatever in determining to whom these statutes should be delivered after they are received by him. That point was suggested on the argument at the bar (respondent has not filed any brief), but we think it is without merit. The records in his office will doubtless advise him, if he does not already know, how such statutes have been distributed in the past. These distributions have been satisfactory heretofore, and we have no doubt they will be hereafter.

We recommend that a peremptory writ of mandamus issue as prayed in relator's petition.

CALKINS and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that a peremptory writ of mandamus issue as prayed in relator's petition.

WRIT ALLOWED.

HARRY E. NEILL, APPELLEE, V. CHARLES J. BURKE ET AL., APPELLEES; GIRARD TRUST COMPANY, TRUSTEE, APPELLANT.

FILED MARCH 5, 1908. No. 15,107.

1. **Limitation of Actions, Defense of:** MORTGAGE FORECLOSURE. Where, in a suit to foreclose his mortgage, a mortgagee asks for an account of, and offers to pay, the amount due to the holder of a tax sale certificate issued against the mortgaged property, who is also a party to the action, such tax purchaser may not plead the statute of limitations against such mortgage; he having no interest in the right of the mortgagee to enforce the same.
2. ———: ———. The defense of the statute of limitations is a personal privilege of the debtor, and can only be made by him or by persons standing in his place. When, therefore, in a suit to foreclose a mortgage, the allegation concerning a defendant is that he has or claims some interest in the premises subject to that of the mortgagee, and the character of his interest does not otherwise appear, he cannot present the defense of the statute of limitations by demurrer, nor without alleging facts showing that he has such an interest in the real estate described in the mortgage as entitles him to the benefit of that defense.

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

Bowersock & Hall, Dempster Scott and *W. S. Morlan*, for appellant.

J. W. Cole, contra.

CALKINS, C.

The plaintiff, Harry E. Neill, began an action in the district court to foreclose a tax sale certificate issued against a tract of land in Hitchcock county. Among others, he made one Thomas A. Neill defendant, but did not allege the nature of the interest had or claimed by him. In this action the Girard Trust Company was permitted to file a petition of intervention, in which it alleged the making by one Burke, the then owner, of a mortgage on the land in question on the 1st day of January, 1887, due in 5 years from that date, and that no part of the debt thereby secured had been paid. The intervener asked to have an account taken of the amount due the plaintiff on his tax certificate, and that it be permitted to pay the same and be subrogated to the plaintiff's rights in respect thereto. The makers of the mortgage were made party defendants, and the only statement contained in the petition of intervention as to the interest of the defendant Thomas A. Neill was the allegation that he claimed some interest or right in the premises, but that whatever interest he might have was subject to the right of the intervener. To this petition the plaintiff and the defendant Thomas A. Neill each interposed a general demurrer, urging in support thereof that the petition of intervention showed that the mortgage therein set forth had been barred by the statute of limitations before the filing of such petition, and that the same for that reason failed to state facts sufficient to constitute a cause of action. The district court sustained both demurrers, and, the intervener electing to stand upon its petition, judgment was rendered dismissing the same. The intervener brings this appeal to review such decision.

1. The defense of the statute of limitations is generally regarded as a personal privilege of the debtor, which cannot be interposed by a stranger, and which can only be made by him or by persons standing in his place, such as his grantees, mortgagees, executors, administrators, trustees, heirs or devisees. *Corbey v. Rogers,* 152 Ind. 169, and

cases there cited. This principle is recognized in *Baldwin v. Boyd*, 18 Neb. 444, and *Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622; the actual point decided in the latter case being that the creditors of a husband cannot question the validity of a conveyance made by him to his wife in payment of a preexisting debt, on the ground that such debt was at the time of the conveyance barred by the statute of limitations. In *Plummer, Perry & Co. v. Rohman*, 61 Neb. 61, this rule was again enunciated and similarly applied. It is, however, urged that a different rule was enunciated in *Hurley v. Cox*, 9 Neb. 230, and *Nares v. Bell*, 66 Neb. 606. In the former case the parties seeking to plead the statute of limitations claimed title by tax deeds which were alleged to be invalid; but the court held that they, having tax deeds therefor apparently regular on their face, had a right to defend their title. The case goes no further than to hold that, where the title of one who claims under a tax deed apparently regular is assailed in an action brought by a mortgagee of the same land, the holder of the tax title may plead the statute of limitations against the mortgagee. In *Nares v. Bell, supra*, the only point determined was that, where the debt is payable by instalments, a mortgage cannot be enforced for any instalment due and payable 10 years or more prior to the commencement of the action. It does not appear from the opinion in the case who interposed the plea of the statute of limations; but, if we assume that it was done by the second mortgagee, it will not strengthen the plaintiff's contention, for the second mortgagee, who claims under the debtor, is one of the exceptions to the rule. The plaintiff has no title in the land, nor is he interested therein, except to have payment of the amount of taxes represented by the certificate. This right is not contested by the intervener, who is only asking the privilege to pay the same. It makes no difference to the plaintiff whether the intervener's mortgage is valid or invalid. Parties must vindicate their own rights. One cannot complain for others of errors which, if they exist, in no

manner affect his own interest. Hawes, Law of Parties to Actions, sec. 8; *Albright v. Flowers*, 52 Miss. 246. The rule is fundamental that no person can maintain an action or defense concerning a subject matter in respect to which he has no interest, right or duty, either personal or fiduciary. *Baxter v. Baxter*, 43 N. J. Eq. 82. In the controversy before us the subject matter is the right of the intervener to enforce his mortgage. In that question the plaintiff had no interest, and his demurrer should therefore have been overruled.

2. The record nowhere discloses the nature of the interest, if any, of the defendant Thomas A. Neill, and it is therefore impossible to say whether or not he belongs to the class which may be permitted to plead the statute of limitations under the rule we have stated. In *Corbey v. Rogers, supra*, the facts were similar; the petition having charged that the defendant had or claimed some interest in the land, which interest, if any, was subject to the plaintiff's lien. The defendant pleaded the statute of limitations, but failed to set forth in his answer the character of the interest he claimed; and the court held that it was incumbent upon him to aver facts showing that he had such an interest in the real estate described in the mortgage as entitled him to the benefit of the statute of limitations. We think this is the correct rule, and that the demurrer of the defendant Thomas A. Neill should have also been overruled.

We therefore recommend that the judgment of the district court be reversed and this cause remanded for further proceedings in accordance with this opinion.

FAWCETT and ROOT, CC., concur.

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

REVERSED.

LEE GRIER V. STATE OF NEBRASKA.

FILED MARCH 5, 1908. No. 15,327.

1. **Indictment: CONSTRUCTION.** Where it is alleged that a defendant committed a certain single act upon a definite day and in a certain place, a later charge that defendant then and there did, or omitted to do, some other act with reference to the first one is equivalent to charging one transaction at the same time and place.
2. ———: ———. The rule that averments of time in an information are mere matters of form, and that the date need not be proved as laid, does not apply to a prosecution under sections 33 and 227, ch. 12*a*, Comp. St. 1907, against a clerk of the police court for failure to pay over within 30 days of collection all fines that come into his possession as such officer, where the offense is alleged to have been committed at a time when there was no obligation to account.

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

John O. Yeiser, for plaintiff in error.

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

ROOT, C.

An information containing seven counts was filed against appellant in the district court for Douglas county. We need consider only the first, which, omitting caption, is in the following language: "That on the 20th day of November, in the year of our Lord nineteen hundred five, Lee Grier, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being the duly appointed, qualified and acting clerk of the police court of the city of Omaha, and as such officer then and there authorized and empowered by law to collect and receive all fines, penalties and forfeitures for offenses against the ordinances of the said city of

Omaha and for misdemeanors against the laws of the state of Nebraska committed within the said city of Omaha, as such officer did on or about the said 20th day of November, 1905, in the county and state aforesaid, collect and receive the sum of twenty ($20) dollars in money of the value of twenty ($20) dollars, the same being a fine assessed by the magistrate of the said police court against one Jacob Yulto, and did then and there wilfully, unlawfully and feloniously fail, neglect and refuse to pay the same to the city treasurer of the said city of Omaha as required by law, after collecting and receiving the same as aforesaid, and the said Lee Grier did then and there fraudulently, unlawfully and feloniously convert the said sum of twenty ($20) dollars in money of the value of twenty ($20) dollars to his own use, the same being the property of the school district of the city of Omaha, in the county of Douglas and state of Nebraska." To this information the appellant demurred, for the reason that the charge did not "state facts sufficient to constitute a crime against any laws of the state of Nebraska." Preceding the demurrer appellant moved the court to quash the information for certain immaterial reasons. Each plea was denied, and appellant placed on trial.

The court instructed the jury with respect to the first count in the information as follows: "That defendant, Lee Grier, was on the 20th day of November, 1905, the the duly appointed, qualified and acting clerk of the police court of the city of Omaha, Nebraska; that on or about said date last named the magistrate of said police court, and while acting as such, did impose or assess a fine of $20 against one Jacob Yulto; that on or about said last named date said defendant, as clerk of said police court, did collect and receive into his possession said fine of $20 so assessed; that defendant wilfully, purposely and unlawfully did fail, for a period of more than 30 days after receiving the sum of said fine, to pay the same over to the city treasurer of the city of Omaha; that all these acts occurred within the county of Douglas and state of

Nebraska. Should you find from the evidence, beyond a reasonable doubt, that each and every one of the foregoing propositions are true, it will be your duty to convict said defendant in manner and form as he stands charged in the first count of said information. Otherwise, you will acquit said defendant of the charge made against him in said first count."

The court also instructed the jury, quoting from the statutes relating to metropolitan cities: "You are instructed that the charter of the city of Omaha, as the same is incorporated in and a part of the statutes of the state of Nebraska, in so far as they pertain to the offense herein charged, provides that; 'All fines, fees, and costs taxed and collected by a police magistrate shall be paid into the city treasury at the end of each week, accompanied by a full and accurate statement of all such as well as those taxed and uncollected. * * * Provided, that when a clerk for the police magistrate is provided for by ordinance, such clerk shall make collections, payments and reports herein required with like liability as the police magistrate.' It further provides that: 'All fines, penalties and forfeitures collected for offenses against the ordinances of the city, or for misdemeanors against the laws of the state committed within the city, shall, unless otherwise provided by law, be paid by the person receiving the same to the city treasurer, and any person receiving such fines, penalties and forfeitures, who shall fail to pay the same over as above provided, within 30 days after the receipt of the same by him, * * * shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not to exceed a certain stated amount and imprisonment not to exceed a certain stated period in the county jail."

In this court the assignments of error are not as clear as they might be, and the brief of appellant has the commendable feature of brevity. The case was prosecuted, not as one for embezzlement, but for an alleged violation of the quoted statute. To our minds the information does

not charge an offense under the statute. The court should not have instructed the jurors that the information charged that the defendant had wilfully, purposely and unlawfully failed, *for a period of more than 30 days after receiving the sum of said fine,* to pay over the same to the city treasurer of the city of Omaha. Thereby the court injected into the information the material and essential fact, not therein alleged, that appellant had failed for more than 30 days after making the collection to pay the same over to the city treasurer. The charge is that defendant collected the fine on or about the 20th day of November, 1905, and did then and there fail, neglect and refuse to pay the same, etc. However indefinite the time may be as to the alleged collection, that date, whatever it may have been, is the antecedent for the charge that appellant failed, neglected and refused to pay over the money. Appellant was not in default under this statute until 30 days after making the collection, unless the mayor should have made demand for the payment, and this is not charged or claimed. Section 412 of the criminal code only excuses the omission of an allegation of time from an indictment "where time is not of the essence of the offense." The time of failure to pay over was material with regard to the date the fine was collected, and the fact that the failure continued for 30 days was absolutely essential to constitute the statutory offense. The rule has been settled for ages that in charging an offense against the criminal law, where a time is definitely charged, and thereafter it is alleged in the indictment that the defendant "then and there" did, or refused to do, something, the later act is charged as existing coexistent with the earlier date. *Palmer v. People,* 138 Ill. 356, 32 Am. St. Rep. 146. A case in point is *Dreyer v. People,* 176 Ill. 590, where the indictment alleged that Dreyer on the 21st day of December, 1896, unlawfully and feloniously failed and refused to pay to his successor in office certain funds in his hands as treasurer of the West Chicago park commissioners. Mr. Justice Cartwright, writing

the opinion of the court, says: There is no direct allegation that at the time of the demand or the failure to pay Fred M. Blount had become treasurer, as successor to defendant, so as to entitle him to the fund. The indictment must show that the demand and failure to pay were when the defendant was no longer treasurer and had no right to retain the fund." In the instant case there is an entire lack of allegation, direct or by implication, that the failure and refusal of the defendant to turn over the money collected by him as clerk of the police court continued 30 days or more after the receipt of the money, and, hence, he should not have been placed on trial for that offense, nor should the court have instructed the jury that the information in substance charged material allegations entirely missing from the record. *Moline v. State*, 67 Neb. 164. The statement that the defendant then and there failed to pay "according to law" will not aid the state. The first allegation goes back to the time of collection, and the words "according to law" are mere legal conclusions of the pleader.

For errors referred to, the judgment of the lower court is vacated and the cause remanded for further proceedings according to law.

FAWCETT and CALKINS, CC., concur.

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

REVERSED.

STATE OF NEBRASKA V. OLIN M. ROUTZAHN ET AL.

FILED MARCH 19, 1908. No. 15,079.

1. **Criminal Law: ACCOMPLICE.** The keeper of a house of prostitution who enters into a corrupt criminal agreement with a public officer to pay, and does pay, to him certain sums of money at stipulated times, as a consideration for the privilege of carrying

on her unlawful business and selling liquor without a license, is an accomplice in crime within the meaning of the law, and on the trial of the officer for that offense it is not error to so instruct the jury.

2. ———: EVIDENCE. On the trial of such officer charged with having entered into a conspiracy to obtain money from a keeper of a house of prostitution as a consideration for allowing her to carry on her unlawful occupation, and with having for several months received from her the sum of $50 each month for that purpose, proof of payments of other sums of money to the defendant at or about the same dates, under like agreements by other persons engaged in the same unlawful occupation, may be received for the purpose of corroborating the principal witness upon the material facts of the transaction as alleged in the information.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *State's exceptions sustained in part.*

F. M. Tyrrell and *C. E. Matson,* for plaintiff in error.

A. S. Tibbets and *Stewart & Munger, contra.*

BARNES, C. J.

Olin M. Routzahn and William A. Bentley were tried in the district court for Lancaster county on an information describing them as the chief of police and the city detective (officers of the city of Lincoln, respectively), and charging them with the crime of blackmail by forming a conspiracy to levy and collect certain sums of money from one Dolly Palmer, the keeper of a house of prostitution in that city, by means of threats of prosecution, coupled with an agreement for protection from arrests, the privilege of conducting her unlawful business, and selling beer to frequenters of her said house. It was also alleged in the information that the said conspiracy, and the agreement in pursuance thereof, was carried out by securing, collecting and obtaining from the prosecutrix the sum of $50 a month from and including the month of September, 1904, to and including the month of April, 1905. The trial resulted in an acquittal, and the state has

brought the case here under the provisions of section 515 of the criminal code to settle certain questions of law arising upon the trial which were decided adversely to the views of the prosecuting attorney.

1. The state's first contention is that the district court erred in instructing the jury as follows: "While it is a rule of law that a person accused of crime may be convicted upon the testimony of an accomplice or accomplices, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination, in the light of the other evidence in the case, and the jury ought not to convict upon such testimony alone, unless after a careful examination of such testimony they are satisfied beyond a reasonable doubt of its truth, and that they can safely rely upon it. The jury are instructed that in this case Dolly Palmer would be an accomplice in the commission of the crime she alleges to have occurred." The prosecution maintains that in cases of blackmail and extortion the victim is not an accomplice, therefore Dolly Palmer was not an accomplice of the defendants in the transactions complained of. In order to determine this question, we must resort to the evidence introduced by the state to establish the charge contained in the information. Without quoting the evidence in full, it is sufficient to say that the prosecuting witness testified in substance: "That in the month of September, 1904, and a few days before the fair, they (meaning the defendants) came down and asked me if I would be willing to pay them $50 to have the privilege of running an open house and selling beer during the fair. I said, 'Yes, sir.' I did not pay them any money till the week following after the state fair. The conversation took place in my room, and there was nobody present but Mr. Routzahn and Mr. Bentley and myself. They both talked it over with me. I told them, if the rest of the landladies were willing to pay, why I would be willing. They gave me the impression that the rest of the landladies were willing to pay the same as I did. I didn't pay them the $50 then, at

that time, because they told me I would not have to pay until after the fair. Well, after the fair they came down together, and they took my money. I paid the money, but I cannot recall the conversation. The amount I paid was $50, and I paid it to Mr. Routzahn, and Mr. Bentley was present at the time. On the first of the next month they came down. I saw them in my room. Mr. Routzahn and Mr. Bentley and myself were the only persons present. I knew what they came for, and I paid them $50." It appears that this sort of proceeding occurred on the first of each month until the defendants went out of office, which was about the first of May, 1905. It is doubtful if the evidence of the state was sufficient to establish the charge of blackmail or extortion, a point which is not decided; but it would seem clear that this evidence, if true, was sufficient to convict the defendants of the crime of bribery. If the prosecuting witness was to be believed, then the defendants solicited from her the payment of certain sums of money for an agreement on their part to refrain from performing their plain duty in the premises, which was by all lawful means to prevent her from running a house of prostitution and illegally selling beer. That they were willing to accept and receive a money consideration therefor, and that she was willing to pay and did pay them $50 on or about the first of each month for the time set forth in the information, seems clear. This, without doubt, constituted bribery on her part and the acceptance of a bribe by the defendant officers, and would make the prosecuting witness an accomplice in the crime, which her evidence tended to prove. Therefore the instruction complained of was proper, and the state's first exception is overruled.

2. It appears that on the trial the state offered to prove, by keepers of some four or five other houses of prostitution, that the defendants made agreements with each of them similar to the one testified to by the prosecuting witness, and received payments of like sums of money from them for the same purposes. A part of the

evidence thus offered was received; but no evidence of the payment of money to the defendants by persons other than the prosecutrix was allowed to go to the jury. The state excepted, and now contends that the court erred in excluding the evidence of such payments, while the defendants contend that this proof was properly rejected because it was evidence of other crimes independent of, and not at all connected with, the one for which they were being tried. While the general rule is that on the trial of one charged with a criminal offense proof of his commission of other crimes is not admissible, yet to this rule there are certain well-known exceptions; and the question now is: Does the proof offered fall within such exceptions? In *Cowan v. State,* 22 Neb. 519, *Berghoff v. State,* 25 Neb. 213, and *Morgan v. State,* 56 Neb. 696, evidence of the commission of like crimes by the defendants was held admissible for the purpose of showing guilty knowledge. In *State v. Sparks,* 79 Neb. 504, and in *Clark v. State,* 79 Neb. 473, which were cases where the defendants' guilt of the crime charged depended upon the intent, purpose or design with which the alleged criminal acts were done, evidence of the commission of other like crimes by the defendants at about the same time was held admissible for the purpose of showing guilty knowledge and intent. In *Guthrie v. State,* 16 Neb. 667, this question came before us the first time. In that case Roger C. Guthrie, the city marshal of the city of Omaha, was convicted on a charge of having received money from Charles Branch and other gamblers of that city, as a consideration for allowing them to carry on their business, and refraining from prosecuting them. It was urged that it was error for the trial court to permit the introduction of evidence tending to show the payment to the defendant of other sums of money at other times and by other persons than Branch. It was said in the opinion: "It (evidence of other payments by other gamblers at other times) was properly admitted as part of the transaction in which the $300 was paid by Branch to plaintiff in error. The fact of the carrying out

of this system was proper evidence for the purpose of corroborating the testimony of Branch, and showing the purpose, understanding and intent with which the money was received as alleged in the indictment, and for the purpose of showing the system under which these several transactions were had." In *State v. Ames*, 90 Minn. 183, the defendant (who was the mayor of the city of Minneapolis), was charged under the criminal statutes of Minnesota with levying blackmail or tribute from the women of the town. It appeared that one Cohen represented the mayor in collecting the various sums from the various women. The state was permitted to prove over the objection and exception of the defendant payments of money to Cohen by the other women referred to, and to relate conversations had with him in reference thereto. It was held that the evidence was admissible, and the court in discussing the question said: "But, reduced to its narrowest compass, the true rule is that evidence of the commission of other crimes is admissible when it tends corroboratively or directly to establish the defendant's guilt of the crime charged in the indictment on trial, or some essential ingredient of such offense, * * * or is a part of a common scheme or plan embracing two or more crimes so related to each other that the proof of one tends to establish the other." Commenting on the evidence the court further said: "It established beyond question a scheme concocted by the defendant to put the abandoned women of Minneapolis under tribute to him in return for his official protection, and each and every payment was a part of the one scheme. It was practically one transaction—each act, each payment, an essential part of the whole plan of corruption—and the evidence was competent."

In the case at bar the defendants, two public officers, whose duty it was to enforce the law, were charged with conspiring together and adopting a general plan or scheme of holding up the prosecuting witness, a supposed violator of the law, and obtaining from her by blackmail, or, as the testimony tended to show, by bribery, certain sums of

money as the price of her immunity from punishment, and that they actually entered upon and carried out that plan. In such cases the defendants of necessity operate secretly and privately. There is usually but one other witness to each transaction, and that is the victim, the supposed criminal from whom the money is extorted, or upon whom the blackmail is practiced, and who, in case of bribery, as above stated, is an accomplice. In pursuance of his general scheme, the defendant goes from one to another of the same class of supposed wrongdoers, and by the same threats, agreements and promises of immunity obtains money from them as a consideration for allowing them to violate the law. This appears to have been the plan adopted by the defendants in this case; and this was done not only once, but for a considerable time at regular intervals. It follows that the proof offered would be corroborative of the testimony of the prosecuting witness, and for that purpose it was admissible.

We are therefore of opinion that the evidence offered falls within the exception to the general rule above stated, that the district court erred in excluding it, and the state's second exception is sustained.

JUDGMENT ACCORDINGLY.

STATE, EX REL. UNION PACIFIC RAILROAD COMPANY, RELATOR, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, RESPONDENTS.

FILED MARCH 19, 1908. No. 15,275.

1. **Taxation:** ASSESSMENT: COLLATERAL ATTACK. The state board of equalization and assessment, in valuing and assessing property for taxation, acts in a *quasi* judicial capacity, and its action is not subject to collateral attack, except on grounds of fraud or other wrongful conduct equivalent thereto, or for the exercise of power not conferred upon it by law.

2. ———: ———: REVIEW. The action of such board is in its nature a final order, which may be reviewed in the district court by a petition in error.

3. ———: ———. SPECIAL FINDINGS: EXCEPTIONS: REVIEW. At the time fixed by the board of equalization and assessment for valuing and assessing railroads, and while that matter is being considered, a railroad company may present requests for special findings, which should be considered by the board, may object to the rulings made thereon, and take exceptions to such rulings. But, if it desires to have such interlocutory matters and rulings reviewed, it must preserve the same by a bill of exceptions, settled and allowed as provided by statute.

4. **Mandamus**: TAXATION: BOARD OF EQUALIZATION. A writ of mandamus will not lie to compel the board to make a record of objections and requests for rulings which are not required by law to be spread upon the record of its proceedings. Such matters should, if desired, be preserved and made a matter of record by a proper bill of exceptions.

ORIGINAL application for a writ of mandamus to compel respondents, as the state board of equalization and assessment, to convene and make and record special findings in the valuation and assessment of relator's property for taxation, and to allow relator's exceptions thereto. *Writ denied.*

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

W. T. Thompson, Attorney General, contra.

BARNES, C. J.

This is an application to the court, invoking its original jurisdiction, for a writ of mandamus directed to the respondents, as the state board of equalization and assessment, commanding them to convene as such board, and make special findings of facts in response to requests in writing submitted to them on May 31, 1907, and certain verbal requests made on June 1 of said year, to spread the same on the record of their proceedings in valuing and assessing the relator's railroad property for taxation, and to allow and record the relator's exceptions thereto. The

respondents have answered the affidavit and application, the evidence has been taken, and the case has been submitted on briefs and oral arguments.

It appears that the relator returned a sworn statement or schedule of its property on the 31st day of March, 1907, to the state board of equalization and assessment in accordance with the provisions of section 87, ch. 77, art. I, Comp. St. 1907, and has complied with all of the requirements of the board and of the revenue law in that behalf; that on the 6th day of May, 1907, the respondents held a meeting as a board of equalization and assessment, and proceeded to consider the question of the valuation of the relator's property; that other meetings for that purpose were held by them from time to time until May 31, 1907, when the officers and attorneys of the relator were present and presented their views as to the proper valuation to be placed upon its property; that on the said 31st day of May, and before any order had been made by the respondents valuing and assessing said property, the relator presented a written request to the board for special findings, in substance, as follows: First. To show to what extent and at what value the board considered the capital stock and bonds of the Union Pacific system (Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon Railroad & Navigation Company), and at what value such stocks and bonds were considered as applicable to the railroad mileage of the relator in Nebraska. Second. To state what deductions or subtractions were made from the entire capitalization of said system on account of its holdings of securities representing properties outside and distinct from the railroad mileage of the Union Pacific system; also, what deductions were made, if any, from such capital stock on account of the land assets and water-right properties belonging to said system; also, what deductions were made from such capital stock on account of right of way, grades, railroad tracks and buildings, and other railroad property on new lines belonging to the relator, subject to assessment by

the board and by local assessors in the state of Nebraska. Third. To show in the records of the board to what extent and in what amount the gross earnings and net earnings of the Union Pacific Railroad Company were considered in fixing its taxable valuation in Nebraska. Fourth. To show in the records to what extent and at what value the tangible property of the Union Pacific Railroad Company was considered in fixing the taxable value of its property in this state, and what deductions were made from said value on account of machine and repair shops, headquarters, storehouses and other property held for use in the operation of the relator's railroad in this state locally assessed. Fifth. To show in the records what per cent. of allowance was made in fixing the taxable value of the Union Pacific Railroad Company's property in this state, for the fact that lands, town lots, personal property, and all other property in this state, except railroad, is valued for taxation at much less than its real, true or market value; that the records of the board be made to show specifically and numerically the facts, methods and rulings indicated. And thereupon the respondents adjourned their board meeting to the day following, without taking any action on said requests. On the 1st day of June, 1907, the relator again appeared before the board, and was notified by the respondents that they would ignore said requests, and would refuse to take any action whatsoever thereon. The relator then requested the board to enter the fact of its refusal to act on said requests on its own records, which was refused, and the relator's request for exceptions to such refusal was also denied. Immediately thereafter the respondents passed a resolution valuing and assessing the relator's railroad within this state for taxation.

The relator contends that it was the plain duty of the board to make and enter of record the special findings requested, and to allow and record exceptions thereto; while the respondents, by their answer and brief, insist that the foregoing facts are not sufficient to constitute a

cause of action, or entitle the relator to any relief; that there is no legal obligation resting upon the respondents to perform the acts sought to be enforced by this proceeding; that the requests in question are impossible of answer, are wholly immaterial and of no utility or value to the relator. An examination of the authorities discloses that some of our former decisions are of considerable assistance in solving these questions. In the case of *State v. Savage*, 65 Neb. 714, it was said: "In assessing property for taxation purposes the board is clothed with *quasi* judicial powers as to the valuation of such property, and when it has once acted on sufficient information, and expressed an honest judgment as to such value, its judgment cannot be controlled by the writ of mandamus." As bearing on this question, see, also, *Hacker v. Howe*, 72 Neb. 385, where it is said: "The state board, in the equalization of assessments as between different counties, acts in *quasi* judicial capacity, and the action taken is not subject to collateral attack except upon grounds of fraud or other wrongful conduct equivalent thereto, or for the exercise of power not conferred upon it by law." We also find that we have uniformly held that the action of a taxing board is in its nature a final order, which cannot be attacked collaterally, and can only be reviewed on error or appeal. *McGee v. State*, 32 Neb. 149; *State v. Merrell*, 43 Neb. 575; *Chapel v. Franklin County*, 58 Neb. 544; *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30.

It is insisted by the respondents, however, that neither appeal nor error will lie from the final action of the board in valuing and assessing railroad property for taxation. We can readily agree with the first part of this contention, for appeal is purely a statutory remedy, and where no provision therefor is made by law the right to pursue that remedy does not exist; but when we come to consider the question of the relator's right to prosecute error to a court of competent jurisdiction an entirely different rule prevails. By section 580 of the code it is provided: "A judgment rendered, or final order made, by a probate court,

justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court." It is further provided by sec. 581 of the code: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." In *Sioux City & P. R. Co. v. Washington County, supra,* it was held that an appeal from a decision made by the board of county commissioners sitting as a board of equalization of taxes does not lie to the district court. This because there was no statute in existence at that time providing for an appeal from such an order. It was said in that case: "The decision of the county board of equalization in fixing the assessed valuation of property and making the levy for taxes is a final order, and as such may be reviewed in the district court upon petition in error." Evidently the intention and purpose of the relator in presenting its requests to the respondents, and asking for exceptions to their rulings thereon, was to lay a foundation for a review of the proceedings of the board in the proper court by a petition in error. It is a rule of long standing in this jurisdiction that to make such a proceeding effective the suitor must challenge the rulings of the court or tribunal, and have his exceptions to such rulings made a matter of record. This may be done if the matters presented are such as should be recorded. But where they are not properly a part of the record they must be preserved, if at all, by a bill of exceptions, as provided by section 311 of the code.

This brings us to the determination of the question whether the court, by mandamus, will require the respondents to perform the particular acts requested and demanded of them by the relator. The state board of equal-

ization and assessment has original and exclusive jurisdiction of the matter of the valuation and assessment of railroads in this state, and is given a wide discretion in the exercise of its powers and duties in that behalf. The section of the revenue law above mentioned contains a statement in detail of the several items of property which, together with their value, must be furnished, under oath, to that tribunal by each railroad company doing business in this state; and section 89, ch. 77, art. I, Comp. St. 1907, provides: "The returns of railroad companies or corporations shall not be held to be conclusive as to the value of said property, but the state board of equalization and assessment shall, from all the information which it is able to obtain, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. The valuation of each mile to be determined by dividing the whole value by the number of miles of the main track of each road or line." So it is apparent that the respondents, in valuing and assessing the relator's railroad, were entitled to take into consideration all of the items of property, matters and things reported in the schedule furnished them by the relator, together with all other reliable information which they were able to obtain relating to the nature, kind and value of the relator's railroad. A full discussion of the powers and duties of the respondents, together with the matters and things which should be taken into consideration by them in assessing railroad property, will be found in *State v. Savage, supra,* to which we can add nothing; and it is sufficient for the purposes of this opinion to say that, in determining the value of the relator's railroad, it was the duty of the board to consider all the factors having the elements of property which enter into and form a part of the total property and assets of the corporation in this state. Whether such property be tangible or intangible, or a valuable privilege or a contract right which enhances

the corporation estate, or adds to its income or earning capacity, it should be considered and taken into account by the assessing board in fixing the value of the property to be assessed. So it would seem that the board could readily state, in a general way, the matters and things taken into consideration in valuing and assessing the respondents' property for taxation.

Coming now to the special request that the respondents state the particular value of the stocks and bonds of the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, and the Oregon Railroad & Navigation Company, considered as applicable to the railroad mileage of the relator in Nebraska, we are inclined to think that there is much merit in the claim of the respondents that it is impracticable and perhaps impossible for them to make a finding fixing, with mathematical precision, the value of the aforesaid properties as considered by them in arriving at their final conclusion. It is a matter of common knowledge that usually in estimating values the judgment of a court, assessing board or other tribunal composed of several individual members is arrived at by the sacrifice to some extent of individual opinion. It is quite likely that no two members of the board could agree upon the same value of any of the particular items of the relator's property, and yet by calculation, compromise and sacrifice of individual opinion they might all finally agree upon the total value of such property for taxation. And so the board should not be required to state the particular value of the several items of property included or excluded in their consideration leading up to the final order of valuation and assessment. The same may be said as to like demands found in the relator's second, third, fourth and fifth requests. Such matters should not be made a part of their record, and we are satisfied should not be made a part of the records of the assessment unless they are preserved and made so by a bill of exceptions settled and allowed by the presiding officer of the board. There is no provision of the statutes

requiring the respondent board to keep a record of its interlocutory rulings or the reasons therefor during the progress of a hearing upon the valuation of the property of railroad corporations for the purpose of taxation. While the orderly transaction of its business may prompt the board to keep such a record of its rulings upon such matters for its own convenience, yet it is not an essential requirement for the proper performance of its duties. There is no doubt that all the steps required by the statute in making an assessment should be preserved as a matter of record, in order to evidence and perpetuate the fact that the board has acted within its jurisdiction; but, as above stated, such record need not contain its rulings upon interlocutory questions, and when it records the matters necessary to confer upon it the power to act, its general proceedings, and the final result of its deliberations fixing the value of properties, it has performed all that the law contemplates in that behalf.

We have already set out and considered the requests made by the relator on the 31st day of May. It is shown that on June 1 the same requests were renewed, and that the relator asked that the refusal to act thereon be made a matter of record, which was refused. We are of opinion that the same considerations apply to these proceedings as to those of May 31. If the relator desired to make its requests and the rulings thereon a matter of record, it should have preserved them by a bill of exceptions. They are not a proper, necessary or essential part of the record of the proceedings, and hence a writ of mandamus will not issue to compel the board to make them so. It may be well to say that, in valuing and assessing railroad property for taxation, the rights of the taxpayer as well as those of the state should be carefully preserved, and all proper objections should be ruled upon, and exceptions thereto should be allowed. As clearly pointed out in *State v. Savage*, *supra*, the field of review of the action of the taxing board is only a narrow one at best, and this

renders it the more essential that due regard be paid to the rights of the taxpayer during its proceedings.

For the foregoing reasons, the writ of mandamus prayed for is refused.

WRIT DENIED.

REESE, J., not sitting.

JOHN G. HAMBLIN V. STATE OF NEBRASKA.

FILED MARCH 19, 1908. No. 15,241.

1. **Criminal Law:** DEFENSE OF INSANITY: INSTRUCTIONS. In the trial of a person charged with the crime of murder in the first degree, the defense of insanity having been presented by the evidence, *held* not to be reversible error for the court to instruct the jury, among other things, that when the defendant has introduced evidence as to his mental condition sufficient to raise a doubt as to his sanity, which the law presumes, then it was incumbent upon the state to overcome such doubt, and to establish by evidence, beyond a reasonable doubt, that the defendant was sane at the time of the commission of the acts charged, as the instruction, when considered with others, did not place the burden of proving his insanity upon the accused.

2. ———: ———: ———. In a case where such facts claimed by the defense rendered the instruction applicable to them, it was not error for the court to instruct the jury that, if the accused was, at the time of the alleged criminal act, laboring under an aberration of mind to such a degree that he was unconscious of his acts, so much so that his intellectual powers were obliterated to that extent that he had no will, no purpose, no consciousness of right or wrong, he should be acquitted; the claim and testimony of the accused being that he was unconscious of his act, and had no recollection of the occurrence.

3. ———: ———. Instruction number 17, being a copy of instruction number 10 set out in *Carleton v. State*, 43 Neb. 373, 410, is approved, when considered in connection with the other instructions given.

4. **Homicide:** DEFENSES. Where a mortal wound is unlawfully inflicted by one person upon another under such circumstances that, if death had immediately ensued, it would have been a felonious

homicide, the fact that other causes, such as errors or accidents in the treatment of the victim, may have contributed to or hastened death, will not relieve the accused from the criminality of his act; the real cause of the death being the felonious assault.

5. **Criminal Law:** HYPOTHETICAL QUESTIONS. In propounding hypothetical questions to expert witnesses, it is allowable for each party to the controversy to submit such questions upon the theory of the case contended for by the side propounding them. A question is not improper simply because it includes only a part of the facts testified to. If facts are testified to which are not believed to be true, or which are believed to be immaterial to the issue, there is no rule of law requiring that they be included in the question.

6. ———: MISCONDUCT OF ATTORNEY: REVIEW. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury, and it is desired to raise a question on that point for decision in the supreme court, it is necessary that objection be made to the trial court at the time, and an adverse ruling had thereon, and an exception thereto, and that the same be made a part of the record by a proper bill of exceptions.

7. ———: IMPEACHMENT OF VERDICT. Affidavits of jurors may not be received for the purpose of impeaching a verdict rendered by them, where the facts stated by the affidavits are such as inhere in the verdict, such as that the jury misunderstood or did not rightly comprehend the instructions of the court.

8. ———: INSTRUCTIONS. Where other instructions to the trial jury fully covered the law upon every feature of the case, including the law of insanity, reasonable doubt, etc., and an instruction is given covering the physical facts in the case, and stating that, if they are established beyond a reasonable doubt, the defendant would be guilty of murder or manslaughter "according to the evidence as explained in these instructions proves the one or the other," *held* not erroneous as withdrawing other questions and defenses from the jury.

9. ———: ———: SANITY OF ACCUSED: REVIEW. The question of the sanity of the accused having depended upon conflicting evidence submitted to the jury, under proper instructions, the verdict of the jury must be taken as decisive of the question, so far as the reversal of the judgment is concerned.

10. ———: ———. While not always calling for a reversal of a judgment, the incorporation of sayings of law writers, not containing statements of legal principles, into instructions, cannot be approved.

11. ———: NEW TRIAL. "It is a general rule, applicable in capital as well as in other cases, that a new trial will not be granted on the ground of newly discovered evidence where such evidence would be cumulative merely." *St. Louis v. State*, 8 Neb. 405.

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

Leo Cleary, B. H. Paine and *W. H. Thompson,* for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin, A. C. Mayer and *W. A. Prince, contra.*

REESE, J.

On the 17th day of January, 1907, an information was filed in the district court for Hall county, accusing plaintiff in error of murder in the first degree by shooting Rachael Engle on the 3d day of August, 1906; the allegations of the information being that the deceased lived until the 14th day of January, 1907, when she died from the effects of the gun-shot wound. Upon a plea of not guilty being entered, a trial was had, which resulted in a verdict of guilty of murder in the first degree and the imposition of the death penalty. A motion for a new trial was filed, which was overruled, and the sentence fixed by the jury was pronounced. The case is brought to this court for review by proceedings in error.

In so far as the physical facts of the alleged tragedy are concerned, there does not appear much, if any, dispute or conflict. For the purposes of this investigation, it may be stated that plaintiff in error on the 3d day of August, 1906, was an unmarried man of about 33 years of age, and Rachael Engle was a girl, or young woman, of between 15 and 16 years of age, in good health and rather a robust constitution, of medium size and unmarried. She resided with her mother and stepfather, Mrs. and Mr. Kent, whose home was in Grand Island. Plaintiff in error was a

laborer, employed by Mr. Kent, and made his home with the family, with whom he had boarded for some 11 months, though not all of that time employed by Mr. Kent. At the time of the alleged assault a street carnival was being carried on in that city. After supper on the evening in question the family, consisting of Mr. and Mrs. Kent, their daughter, Rachael Engle, their son, George Engle, Charles Smith, Stephen Williams and plaintiff in error, together with Mr. and Mrs. Greenfield and their daughter, Miss Dunham, who were visiting the Kents for the evening, decided to go upon the streets and witness the carnival. The younger people, consisting of Miss Engle, Miss Dunham, Mr. Engle, Mr. Smith, Mr. Williams and plaintiff in error, started to walk, while the Kents and Greenfields rode in a spring wagon or carriage. The young people pursued their course toward the central portion of the city. Smith, George and Rachael Engle, and Miss Dunham, becoming somewhat separated from plaintiff in error and Williams, were enjoying themselves by indulging in the innocent frolics of the evening, while plaintiff in error and Williams walked rather to themselves. As they crossed the railroad tracks on their way they passed a car standing near the sidewalk, when plaintiff in error stepped behind the car and struck a match, presumably for the purpose of lighting his cigar. At or about that time Smith and Rachael Engle passed by, when plaintiff in error shot Miss Engle, the ball entering the back in the region of the eighth or ninth dorsal vertebra, penetrating the spinal column, severing the spinal cord, and becoming buried and lodged in the anterior portion of the bone. This wound produced immediate, total and permanent paralysis of the whole of that portion of the body below it, and Miss Engle fell helpless to the ground. Plaintiff in error fired another shot with no effect, except that the powder struck the face of Smith, who was standing by where Miss Engle fell. Whether this shot was fired at Smith or not is a matter of conjecture, but it was evidently not fired at Miss Engle. Plaintiff in error started to run

away. Smith, at or about the same instant, cursing him, calling him a bad name, and saying he would kill him, pursued him for a short distance, when he (Smith) returned to Miss Engle. This occurred at about the hour of half past 8, or a little before dark. Miss Engle was taken to a hospital, the wound examined, and she was made as comfortable as possible for the night. The surgeons, not being able to definitely locate the ball without making an incision, applied the X-ray, by which the location of the ball was determined, and an effort was made to extract it by enlarging the wound and chipping off and removing the fractured bones. It was discovered that the ball had passed through the spinal cord, completely severing it, and had become embedded in the bones of the inner portion of the spinal column. As the ball could do no further harm, it was permitted to remain. The wound healed up, and, except as to the paralysis of the lower parts of the body, gave but little trouble. The vital organs performed their functions naturally, food was taken and digested, but the intestines and bladder being rendered inactive, it was necessary that evacuations should be produced by artificial means. The bladder was relieved by the insertion of a glass catheter two or three times each day. After the healing of the wound in the back the victim suffered little, if any, pain. About the beginning of December, 1906, while an attendant was using the catheter, it was, by accident, broken in two, and the severed end, about 2½ inches long, remained in the bladder. This was allowed to remain for some time, probably eight or ten days, when it was removed by an operation which consisted of making an incision through the wall of the body and in the bladder. At that time bed sores had appeared upon the body; some of them having become gangrenous and the flesh sloughing off; others showing the discoloration caused by ecchymosis. The wound made in removing the broken catheter never healed, and soon thereafter the victim began to fail rapidly, and died on the date above named, to wit, January 14, 1907.

Upon the trial two lines of defense were developed: One that plaintiff in error was insane at the time of firing the shot; and the other that the victim died, not from the effects of the wound caused by the ball, but that the cause of her death was the accident in breaking the catheter and allowing it to remain in the body until inflammation and gangrene were developed to such an extent as to cause the death. In other words, that a new and independent cause, itself producing the death, intervened. Other questions were presented upon the trial and in the motion for a new trial and they are here upon the record; but to a great extent the case hinges upon these two.

As to the former, there was evidence to the effect that plaintiff in error was an epileptic; that he had suffered sunstroke on a number of occasions; that he had suffered excruciating pains in his head during the most of his adult life; that he was frequently unconscious of his acts; that when suffering from his paroxysms his memory was obliterated, and he testified that he had no knowledge or recollection of firing the shot which inflicted the wound on Miss Engle. It was also claimed that there was no motive shown for the act, the parties being on friendly terms, and that there was no attachment between them, or jealousy on his part; they never having associated together except as members of the same household. A number of credible witnesses, both expert and nonexpert, testified that in their opinion he was not able to distinguish the difference between right and wrong, nor was he able to judge of the particular act at the time of firing the shot. Evidence was also introduced by the state by which it was sought to establish his sanity. This consisted of the testimony of witnesses who had associated with him, and also of experts.

Complaint is made of certain instructions given by the court to the jury upon this feature of the case, among which are instructions numbered 22 and 26, which are as follows: Instruction number twenty-two: "You are instructed that when the defendant has introduced evidence

as to his mental condition sufficient to raise in your minds a doubt as to the sanity of the defendant at the time of the commission of the alleged offense, which the law presumes, then it is incumbent upon the state to overcome, by evidence, such doubt, and to establish, by evidence, beyond a reasonable doubt, that the defendant was sane at the time of the commission of the acts charged." Instruction number twenty-six: "You are instructed that in criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence, a conviction can be had only when the jury are satisfied from a consideration of all the evidence of the defendant's guilt beyond a reasonable doubt. This rule applies not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed by the accused to justify or excuse the act charged." The criticism upon the instruction numbered 22 is that by it the jury are told, in effect, that the presumption is that plaintiff in error was sane at the time of the commission of the act, but that, if *he* "has introduced evidence as to his mental condition sufficient" to raise in the minds of the jury a reasonable doubt of his sanity at the time of the commission of the act, he should be acquitted—stated differently, that the jury would necessarily infer from the language used that the burden was upon the defendant, in the first instance, to rebut the presumption of sanity sufficient to raise a doubt thereof in the minds of the jury, and that then the burden would change or shift to the state to prove beyond a reasonable doubt the sanity of the accused. This criticism is, in a sense at least, a just one, but we cannot say, in the light of *Knights v. State,* 58 Neb. 225, and *Furst v. State,* 31 Neb. 403, that the instruction was radically wrong and misstated the law. If the language of the instruction could have made a wrong impression upon the minds of the jury by what might be claimed as an unfortunate expression, that impression would be removed by the twenty-sixth instruction, which informed them that

the burden of proof never shifts, but as to all defenses which the evidence tends to establish rests with the state throughout. As these instructions must be construed together, we are unable to find error to the prejudice of plaintiff in error. This must dispose of the contention that these instructions were contradictory, inconsistent, or irreconcilable.

Instruction numbered 20 is complained of, which is as follows: "You are instructed that the defendant in this case interposes the defense of insanity, or an aberration of the mind claimed to arise from overheating or sunstroke or epilepsy. Such a defense is a legal and proper one, one recognized by the law, and the evidence relating thereto should be viewed by the jury and weighed the same as any other evidence should be which tends to establish any other defense known to and recognized by the law. If the accused in this case was at the time of the act charged laboring under an aberration of the mind to such a degree that he was unconscious of his acts, so much so that his intellectual powers were obliterated to that extent that he had no will, no purpose, no consciousness of right or wrong in respect to the particular act charged, then a great wrong would be done him to find him guilty of the offense charged; on the other hand, if he had will, purpose, intelligence, consciousness of right and wrong in respect to the particular act charged, and such is established by the evidence, as well as his guilt of the offense charged, then you would be doing an injustice to society and to law to permit him to escape punishment for his wrongful acts so committed." The criticism of this instruction is of the words: "If the accused in this case was at the time of the act charged laboring under an aberration of the mind to such a degree that he was unconscious of his acts, so much so that his intellectual powers were obliterated to that extent that he had no will, no purpose, no consciousness of right or wrong in respect to the particular act charged, then a great wrong would be done him to find him guilty of the offense charged; on

the other hand, if he had will, purpose, intelligence, consciousness of right and wrong in respect to the particular act charged, and such is established by the evidence, as well as his guilt of the offense charged, then you would be doing an injustice to society and to law to permit him to escape punishment for his wrongful acts so committed." It is contended that under this instruction, in order to acquit the defendant, it would be necessary for the jury to find that the accused was laboring under a mental aberration to such an extent that he was unconscious of his acts, *and* that his intellectual powers were obliterated to that extent that he had no will, *and* no purpose, *and* no consciousness of right or wrong. There is no doubt but that the part of the instruction referred to, if considered in the abstract, would be open to the criticism made, and would be erroneous in a case where general insanity was claimed. However, we cannot see that the instruction was wrong when we consider the evidence. It must be remembered that plaintiff in error in his testimony denied all knowledge or recollection of what occurred at the time of the shooting. If his testimony is true, and for this purpose we must assume that it is, his mind was a total and absolute blank, at least so far as memory was concerned, at the time of the tragedy. He had neither consciousness, nor will, nor purpose, nor appreciation of the distinction between right and wrong. This part of the instruction was doubtless given with reference to that testimony, and we cannot say that it should not have been given. The closing portion of this instruction, containing the admonition that, if plaintiff in error possessed the mental faculties spoken of, the jury "would be doing an injustice to society and to law to permit him to escape punishment for his wrongful acts so committed," was unnecessary, and added no principle of law to that which had gone before, and it is not to be presumed that the jury stood in need of this cautionary expression. While we are unable to see that plaintiff in error was prejudiced thereby, yet such sentences in instructions should not be indulged in.

Complaint is made of the giving of the seventeenth instruction, which we here copy: "The jury are instructed that, while the law requires, in order to constitute murder in the first degree, that the killing shall be done purposely and of deliberate and premeditated malice, still it does not require that the premeditation and deliberation, or the wilful intent and purpose, shall exist for any length of time before the crime is committed. It is sufficient if there was such design and determination to kill distinctly formed in the mind at any moment before or at the time the blow is struck or the fatal shot is fired; and in this case, if the jury believe from the evidence beyond a reasonable doubt that the defendant feloniously, purposely, and of his deliberate and premeditated malice, shot and killed Rachael Engle in manner and form as charged in the information, and that before or at the time the said shot was fired the defendant had formed in his mind a wilful, malicious, deliberate and premeditated design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, then the jury should find the defendant guilty of murder in the first degree. To constitute murder in the first degree there must have been an unlawful killing of a person, done purposely and with deliberate and premeditated malice. If the person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the time of forming the purpose and the time of its execution. It is not the length of time intervening between the time of the formation of the purpose and the time of the actual killing which constitutes the distinctive difference between murder in the first degree and in the second degree. An unlawful killing done purposely and with deliberate and premeditated malice constitutes the crime of murder in the first degree, while murder in the second degree consists in an

unlawful killing done purposely and maliciously, but without deliberation and premeditation. To constitute murder in the first degree, it matters not how short the time may be between the time of the formation of the purpose to kill and its execution, if the party has turned it over in his mind, that is, weighed and deliberated upon it." This instruction is copied from an instruction given in the case of *Carleton v. State*, 43 Neb. 373, 412. The language used was criticised by us, and it was said that "this language, if it stood alone, might be ambiguous and objectionable, as possibly implying that it would be murder in the first degree if the intent were formed simultaneously with the infliction of the wound; but by the latter portion of the instruction it clearly appears that the intent must have been formed, and that there must have been deliberation and premeditation before the act was performed, and also that there must have been a turning over in the mind, a 'weighing and deliberation.' And by the twelfth instruction it was stated, 'If an intention to kill exists, it is wilful; if this intention be accomplished by such circumstances as evidence a mind fully conscious of its purpose and design, it is deliberate. Premeditate means to think of in advance; to determine upon beforehand. It means that there was a design to kill before the act of killing took place.'" This twelfth instruction was not given in terms in this case. Why it was omitted we need not inquire. While we are not convinced that it was necessary, yet, if the substance of it were given in any other instruction, the evil, if any existed, would be cured. The last paragraph of this instruction is copied substantially from an instruction given in *Reed v. State*, 75 Neb. 509, and which was approved. In instruction numbered 15 the court instructed the jury: "'Deliberation' means the act of deliberating or weighing and considering the reasons for or against a choice or measure. In the sense in which the word is here used an act is done deliberately or with deliberation when it is done in cool blood, and not under the influence of vio-

lent passion, suddenly aroused by some real or supposed grievance. A person who does an act, not in the heat of sudden passion, but after having coolly weighed or considered the mode and means of its accomplishment, does it deliberately." Instruction numbered 16 is as follows: "Upon the question of 'intent' you are instructed that the law presumes a man to intend the reasonable, probable and natural consequences of any act, by him voluntarily and intentionally done, and this presumption will always prevail unless, from a consideration of all the evidence bearing upon this point, the jury entertain a reasonable doubt whether such intent did exist." The court also gave the legal definition of malice in the fourteenth instruction, but there is no separate instruction defining or giving the meaning of the word "premeditation." However, this seems to be fully covered by the instruction above quoted, as well as incidentally in other instructions.

Instruction numbered 23 is sharply criticised by counsel for plaintiff in error. It here follows: "You are instructed that the rule that death must result within a year and a day is one of limitation only, and does not change the burden of proof; but the state must prove beyond a reasonable doubt that the deceased died of the wound inflicted by the defendant, but this general rule requires explanation in its application to certain conditions disclosed by evidence in this case; that a person who has inflicted a mortal or dangerous wound with a deadly weapon upon the person of another cannot escape punishment by proving that other causes may have cooperated in hastening or producing the fatal result." It is contended that the latter portion, beginning with the words, "but this general rule requires explanation," etc., should not have been given; that there is no "explanation" which sheds any light upon the rule, but that the so-called "explanation" is harmful, for the reason that it contains the statement, without any reference to the "general rule," that a "person who has inflicted a mortal

or dangerous wound with a deadly weapon upon the person of another cannot escape punishment by proving that other causes may have co-operated in hastening or producing death." It is difficult for us to see just why that portion of the instruction should have been given in the connection in which it occurs. It is probably a correct statement of the law upon that particular subject, but what light can be thrown by it upon the preceding portion of the instruction is not clear. However, we do not see that any prejudice to the rights of plaintiff in error resulted from the language used. While it is true that, if death from a wound unlawfully inflicted does not follow within a year and a day, the presumption is that the death was from another cause, yet, as the victim died within less than six months after receiving the injury, any discussion of what might have happened but for the unfortunate accident of breaking the catheter must necessarily be purely speculative, and not a necessary inquiry in this case.

It is also contended that the real, immediate cause of the death of Rachael Engle was the breaking and lodging of a portion of the catheter within the bladder and allowing it to remain there for so great a length of time, followed by the operation for its removal, and that the jury should have so found under the evidence. This question was passed upon by the jury under instructions, and by their verdict they found against plaintiff in error. There was sufficient evidence to show that the gunshot wound was a mortal one, and that there was no escape from death therefrom, but that the exact time which the patient would live could not be stated. The lower portion of the body being paralyzed, a steady and continuous degeneration would follow, owing to the failure of nerve force and circulation, and recovery was impossible. At the time of the accident portions of the body had already sloughed off, and ecchymosis was visible in many places. This being true, the fact that the accident, and probably subsequent unskilful treatment, may have contributed to

and even hastened death would not relieve the accused from the criminality of his act, if it were criminal. This rule seems to be quite well settled. The rule is also well settled that, if a new and independent cause of death intervenes and of itself takes the life of one mortally wounded, it will be considered the cause of the death, and the person inflicting the first wound could not be held accountable for the murder, however subject he might be to a prosecution for the felonious assault. But, as in a case of this kind, when the wound inflicted was mortal or dangerous and directly contributed to the death, the first wrongdoer will not be absolved from accountability for his act. Wharton, Homicide (3d ed.), sec. 35 *et seq.;* 2 Bishop, Criminal Law (7th ed.), sec. 638; *Denman v. State,* 15 Neb. 138; *Territory v. Yee Dan,* 7 N. M. 439; *State v. Edgerton,* 100 Ia. 63; *Downing v. State,* 114 Ga. 30; *Clark v. Commonwealth,* 90 Va. 360; *Daughdrill v. State,* 113 Ala. 7; *Sharp v. State,* 51 Ark. 147; *State v. Wood,* 112 Ia. 411.

During the course of the trial hypothetical questions were propounded to the expert witnesses by both the prosecution and defense. Those propounded by the prosecution were much shorter and omitted many elements contained in those submitted by the defense, some of which were included in the evidence. Objections were made to those submitted by the prosecution upon the ground that they failed to include all the facts shown by the testimony. The objection was overruled, to which plaintiff in error excepted, and now assigns the ruling as error. The questions were quite lengthy, and it could serve no good purpose to reproduce them here. It must be sufficient to say that, as we understand the rule, it is allowable for each party to a controversy to submit hypothetical questions upon the theory of the case contended for by the side propounding the question. If any facts are testified to which are not believed to be true, or which are believed to be immaterial to the issue, we know of no

rule which would require them to be incorporated in the question. Of course, the omission of any facts appearing in the case would be at the peril of the side propounding the question and subject to the consideration of the jury, and, if the questions were manifestly unfair, a jury of even ordinary intelligence would know of the omission and might reject the answer of the witness. In Rogers, Expert Testimony (2d ed.), sec. 27, it is said: "Counsel, in framing the hypothetical question, may base it upon the hypothesis of the truth of all the evidence, or on an hypothesis especially framed on certain facts assumed to be proved for the purpose of the inquiry. The question is not improper simply because it includes only a part of the facts in evidence. And if framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he should state the facts as they actually exist. 'The claim is,' says Chief Justice Folger, 'that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice.'" See, also, *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 471; *Schulz v. Modisett*, 2 Neb. (Unof.) 138. Then, again, had plaintiff in error desired to do so, he could have taken the opinion of witnesses for the prosecution on a question propounded by himself, or even submitted the one propounded to his own experts, and, receiving a favorable answer, thus showing his insanity by witnesses on behalf of the state.

A reversal of the judgment is asked for on account of the misconduct of one of the attorneys for the state in the

use of improper language in making the closing argument. The subject appears to have been first presented for a ruling by the trial court in an affidavit in support of the motion for a new trial. It is true that the affidavit sets out the language complained of, and that objection was made at the time, but there is no record anywhere of an adverse ruling and exception, both of which were necessary in order to secure a review of the subject. In discussing a similar question in *Cropscy v. Averill,* 8 Neb. 151, 160, the rule of procedure was stated by Judge LAKE, and has been considered as the proper one ever since, so far as we know. It is said: "To have raised a question on this point for this court to decide there needed to be an adverse ruling of the court below, and an exception thereto, and these should have been made a part of the record by a proper bill of exceptions." While this rule precludes us from reversing the judgment upon this ground, we have examined the affidavit of the attorneys for plaintiff in error, and the counter affidavit of the attorney against whom the charge was made, and are unable to see that the rules of proper and legitimate discussion were violated.

It is claimed that the jury were guilty of misconduct while deliberating upon the verdict. The affidavits of four jurors were produced and submitted to the trial court upon the hearing of the motion for a new trial. Of these, three testified that, when the subject of the insanity of plaintiff in error was called up for consideration, objection was made to any deliberation upon that subject as that whole matter had been withdrawn from the jury by the instructions of the court, and that the jury so decided and that subject was not considered, debated nor determined by the jury. No counter affidavits were filed. The first question to be considered in connection with this subject is to what extent may the affidavits of jurors be received for the purpose of impeaching their verdict? The rule of law upon this subject appears to be well settled, both in this and other states of the Union, and there

seems to be an entire unanimity of holdings. In 2 Thompson, Trials, section 2618, it is said: "Upon the grounds of public policy, courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, or to show a mistake in it; or that they misunderstand the charge of the court; or that they otherwise mistook the law, or the result of their finding." See, also, *Harris v. State,* 24 Neb. 803; *Coil v. State,* 62 Neb. 15; *Savary v. State,* 62 Neb. 166. If the instructions correctly stated the law, the fact that the jury failed to understand or misinterpreted them cannot be shown by their affidavits. The affidavits are to the effect that the jury understood and believed that by instruction numbered 24, the whole question of the sanity of plaintiff in error was withdrawn from their consideration, and that the accused, under the facts proved, was guilty of murder or manslaughter, according to the evidence, and that they must so find. The giving of the instruction was duly excepted to, and is here assigned for error. If it was correctly given, the verdict cannot be impeached upon the ground that it was not correctly understood. If incorrect, the error would be in giving the instruction. It is here copied: "And you are further instructed that, if you are satisfied beyond a reasonable doubt that the defendant inflicted on the deceased a dangerous wound with a deadly weapon, and that said wound produced a condition in said deceased that required the use of a catheter, and that in its use it was broken, a part remaining in the bladder of the deceased which required a surgical operation to remove it, and that the piece of catheter, while in the bladder, and the operation to remove it, together with the condition of the deceased as produced by the wound inflicted by the defendant, caused gangrene and fever to ensue, and that the deceased died from the wound inflicted by the defendant, combined with the conditions produced by the broken catheter and the operation to remove it, then the defend-

ant is guilty of murder or manslaughter according to the evidence as explained in these instructions proves the one or the other. The law does not permit a person who has used a deadly weapon and with it inflicted a dangerous wound upon another to apportion his own wrongful act and divide the responsibility of it by speculating upon the question of the extent to which other causes may have co-operated in, or contributed to, the death of the person injured." If there is any real vice in this instruction, it is that, by its language, the jury may have concluded, as they seem to have done, that the question of the mental condition of plaintiff in error was eliminated from the case, and that, if they found beyond a reasonable doubt that he inflicted the wound, and that the condition of the deceased, as produced by the wound, caused the gangrene to follow the breaking of the catheter and the operation to remove it, then plaintiff in error "is guilty of murder or manslaughter according to the evidence as explained in these instructions proves the one or the other." If this instruction stood alone, we would have no hesitation in saying that it should not have been given in the form in which it occurs. The closing words of the first paragraph that the defendant is guilty of "the one or the other," meaning murder or manslaughter, would also be open to criticism. But this is followed by instruction No. 25, which is as follows: "You are further instructed that, if you are in doubt whether the wound was mortal, or a dangerous wound, or whether it caused or contributed to the death, or whether the deceased might not have died from the effects of the broken catheter in the bladder and the operation to remove it alone, then the defendant will be entitled to an acquittal." Reading the two instructions together, it cannot be said that the effect was to instruct the jury that they must find the defendant guilty of murder or manslaughter, "the one or the other." Under the rule, all instructions given must be construed together, and, since there is no conflict or inconsistency in the charge taken as a whole, and all may be harmonized, we

do not see that instruction No. 24 could by any reasonable interpretation mislead the jury and produce the conviction upon their minds that the question of the sanity of plaintiff in error was not to be considered. The closing paragraph of the instructions is, we think, justly criticised, yet it is not fatally erroneous. It is not every correct statement of the law found in law books or argumentative legal discussions that is or would be considered desirable in an instruction to a trial jury. The sayings of law writers, no matter how "fitly spoken," should not, as a general rule, be made use of as embellishments when juries are being instructed. The instruction under consideration was complete as a legal proposition without this additional paragraph. True, it probably did no harm and resulted in no prejudice to plaintiff in error, yet its use as a necessary part of the instruction is not apparent.

It is contended that the verdict of the jury is not supported by sufficient evidence. We assume that this contention does not question the fact of the alleged shooting of the deceased at the time, place, and under the circumstances charged in the information and detailed by the witnesses, nor the fact of her subsequent death, nor can the fact that the gunshot wound contributed to her death be seriously questioned. For the purpose of this inquiry, we will assume that the foregoing are not to be here considered. Considerable of evidence was submitted tending to prove the insanity of plaintiff in error at the time of the shooting of Miss Engle. In support of this contention of insanity, it is insisted that there was an absolute absence of malice, unless the mere fact of the shooting demonstrated its presence; that there was nothing shown in the evidence tending to prove the existence of any motive for the act; that there was no evidence of attachment, envy or jealousy; that plaintiff in error, being a member of the Kent family for so long a time, had never shown any preference for the deceased, nor that she had ever shown any dislike for him; that during a great portion of his life he had been subject to attacks of epilepsy, and had

on a number of occasions been subjected to sunstroke when laboring in warm weather, and which had resulted in long continued prostrations; that he had all his later life been subject to attacks of intense pains in his head; that his epileptic attacks had produced temporary unconsciousness; that he was unconscious of what he did at the time of the shooting, and was irresponsible for his act. The testimony tending to present this defense cannot be here set out without extending this opinion to an unreasonable length, and without any compensating benefits. Expert witnesses, prominent in the medical profession in this state, in answer to counsel's hypothetical question, and after slight personal examination of plaintiff in error, testified that in their opinion he was not sane at the time of the tragedy. There was enough testimony of the character above suggested which, uncontradicted, would have been sufficient to justify a verdict of acquittal. But testimony was produced by the state maintaining the opposite, and, this conflict being submitted to the jury, it was for them to decide, and with their decision we must be content, in so far as a reversal of the judgment is concerned.

A number of affidavits of persons who had known plaintiff in error during his earlier life were filed in support of the motion for a new trial, and in which many facts were stated which would tend to support the defense of insanity, but those statements of fact were cumulative upon those presented to the jury upon the trial. While much, and probably all, of what is stated in those affidavits would have been competent and admissible upon the trial, yet they could furnish no good reason why a new trial should be granted, as a new trial will not be granted on the ground of newly discovered cumulative evidence. *Brooks v. Dutcher*, 22 Neb. 644; *Bell v. City of York*, 31 Neb. 842; *St. Louis v. State*, 8 Neb. 405.

We have given the whole record in this case as careful an examination as possible, in view of its great importance, and are persuaded that the killing of Rachael Engle

was of a most unusual character. There seems to have been no reason for the act. It is insisted by the state that it was prompted by a spirit of wanton, jealous rage, induced by seeing Smith in her company, and that it was a most heartless, cruel, cold-blooded and deliberate murder of an innocent, inoffensive girl, against whom there was no possible cause for ill will or hatred. Viewed from the standpoint of his complete sanity and legal accountability at the time of the shooting, this would seem to be true. She had never given him any offense, had never mistreated him in any way. His conduct in the home of the Kents had at all times been that of a gentleman, and he had never at any time sought to bestow his attentions upon her. Neither had sought nor avoided the association of the other. The conduct of both seems to have been exemplary in all respects. A solution of the motive which prompted the act is, to the mind of the writer, an impossibility. Plaintiff in error appears to have been most unfortunate and a great sufferer during the greater part of his life. We are fully persuaded that he should never be given his liberty, for he would be a menace to those with whom he should associate. The evidence tends strongly to convince us that, owing to his physical and mental condition, there may be grave doubts as to his responsibility for his acts at the time of the tragedy, and yet he is neither an idiot, an imbecile, nor a maniac. We can find no justification for taking his life, nor should he ever be discharged from confinement.

Under the provisions of section 509*a* of the criminal code, the judgment of the district court will be modified to the extent that the sentence will be changed from the infliction of the penalty of death to that of imprisonment in the state penitentiary at hard labor during his natural life, but without solitary confinement, and as thus modified the judgment will be, and is, affirmed.

AFFIRMED: SENTENCE REDUCED.

EASTERN BANKING COMPANY, APPELLANT, V. JOHN H. LOVEJOY ET AL., APPELLEES.

FILED MARCH 19, 1908. No. 15,091.

Quieting Title: LIMITATION OF ACTIONS. One Brandenbury preempted government land, made final proof before the clerk of the district court November 5, 1885, but such proof and the money to pay for the land was not filed in the local land office until January 5, 1886, when a final receipt was issued and delivered to him. At the time of filing his proof Brandenbury filed an affidavit, of date December 16, 1885, that he had not alienated the land. This affidavit was probably overlooked by the officers of the general land office, as they notified the local office in August, 1889, to require Brandenbury to furnish proof of nonalienation between the date of making final proof and the date of his final receipt. It is claimed that Brandenbury never received the notice issued by the local office, and in January, 1890, Brandenbury's entry was canceled by the general land office. September 13, 1894, George C. Lovejoy entered the land as a homestead, made final proof, and received his final receipts October 25, 1889, and a patent for the land March 26, 1900. He died in September, 1900, and his father and only heir at law took and held possession. On February 11, 1905, the plaintiff, claiming title to the land through foreclosure of a mortgage made by Brandenbury after receiving his final receipt, brought an action to quiet its title. *Held*, That, if Brandenbury, after receiving his final receipt, held title to the land, he and his mortgagee were in position to maintain an action for possession or to quiet title at any time since September, 1894, when Lovejoy entered the same as a homestead, and the action is barred by limitation; that, if his final receipt did not vest him with title to the land, the land department had jurisdiction to cancel his entry, and relief should have been asked from that department after Lovejoy's entry on the land.

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

R. A. Moore, for appellant.

C. L. Gutterson and *Sullivan & Squires, contra.*

DUFFIE, C.

The plaintiff brought this action to quiet his title to 160 acres of land in Custer county. In April, 1884, James H.

Brandenbury entered upon this land as a preemption. After living on the land something over a year he determined to commute his entry, and made application to make final proof of his occupancy and improvements thereon, and notice was given that such proof would be made before the clerk of the district court for Custer county, at Broken Bow, on November 7, 1885. On that date he made his final proof before the clerk, but such proof and the money to enter the land was not forwarded immediately and was not received at the United States land office in Grand Island until January 5, 1886, on which date a final receipt, showing entry and payment of said land by Brandenbury, was issued by the officers of the Grand Island land office. January 13, 1886, Brandenbury and his wife executed a mortgage on the land, which mortgage was afterwards foreclosed, and the sheriff's deed issued to A. S. Richards on November 23, 1889. This deed, issued on the foreclosure proceedings, was recorded in Custer county in February, 1890, and thereafter the grantee in said sheriff's deed conveyed the land, and by one or more mesne conveyances the plaintiff herein now claims title to the land. In August, 1889, the general land office at Washington notified the local office at Grand Island to require Brandenbury to furnish proof that he had not alienated the land in question between the time he made proof before the clerk of the district court for Custer county and the date of his final certificate. September 23, 1889, the officers of the local office at Grand Island reported to the general land office that notice had been given to Brandenbury to furnish such proof on August 15, 1889. It will be observed that the local officers reported they notified Brandenbury on August 15, some 15 days prior to the direction received from the general land office to have such notice served, a fact upon which stress is placed as showing that Brandenbury never had notice. October 22, 1899, Brandenbury's entry was held for cancelation by the general land office for failure to

furnish proof of nonalienation, and January 17, 1890, the local land office reported to the general land office that notice had been given Brandenbury that his entry of the land was held for cancelation. January 30, 1890, the general land office canceled Brandenbury's entry. March 24, 1891, the land was entered as a homestead by Frank Lovejoy. September 13, 1894, Frank Lovejoy relinquished his homestead entry, and on the same date George C. Lovejoy entered the land as a homestead. October 28, 1899, George C. Lovejoy made final proof before the land office at Broken Bow, and a final homestead certificate was issued to him, and thereafter, and on March 26, 1900, he received a patent for said land from the general government. September 6, 1900, George C. Lovejoy died, and John H. Lovejoy, his father and only heir at law, took possession of the land, and now holds possession, claiming to to be the fee owner thereof.

This action was brought by the plaintiff on the 11th of February, 1905, and one of the defenses urged against the suit is adverse possession by the defendant and those through whom he claims title for more than ten years prior to the commencement of this action. It is insisted by the plaintiff that when Brandenbury, the original preemptor, made final proof, paid for the land, and received his final certificate, he was vested with title which could not be annulled without notice to him, and that no notice was ever given him of the action of the general land office requiring him to furnish proof of nonalienation of the land between the date of his final proof and the date when such proof and the money to enter the land was received at the local office in Grand Island and his final certificate issued. Such proof, under the rules of the department, might be, by affidavit, made by the entryman himself, and it is further insisted, and the record seems to bear out the contention, that such affidavit was furnished at the time proof was filed, it being sworn to December 16, 1885, and filed in the Grand Island office January 5, 1886. However

this may be, there are two propositions involved in this case which, in our judgment, are fatal to the plaintiff's claim. If it be true, as plaintiff insists, that Brandenbury was invested with complete title to the land when he paid his money and received his final receipt, then he and the plaintiff, who claims through him, stood in position to maintain an action of ejectment or a suit to quiet its title when the defendant and those through whom he claims first entered into possession. If, as insisted, Brandenbury was entitled to a patent from the time of making proof and payment for the land, then on the authority of *Dolen v. Black,* 48 Neb. 688, the statute of limitation commenced to run as early as 1894, when George C. Lovejoy, the son of the defendant, entered possession of the land claiming it as his homestead. In the case cited it is said: "The statute of limitations will begin to run against the title of a party purchasing lands from the United States from the date of his compliance with all the requisites to entitle him to a patent therefor in favor of one who holds adverse possession of the real estate." In the late case of *Iowa Railroad Land Co. v. Blumer,* 206 U. S. 482, it is said: "Although one who in good faith enters and occupies lands within the place limits of a railway grant *in præsenti* may not obtain any adverse title against the government, if, as in this case, his possession is open, notorious, continuous and adverse, it may, if the railway company fails to assert its rights, ripen into full title as against the latter, notwithstanding the entry in the land office was canceled without notice as having been improperly made and allowed," On the other hand, if Brandenbury's title was not complete at the date of his final certificate, and the general land office still retained jurisdiction to cancel his entry, such cancelation has been made, and, no appeal having been taken therefrom, his right to the land has been extinguished.

The rules of the general land office provide for giving notice to parties interested in land entries by registered

letter. A registered letter addressed to Brandenbury, at Sargent, notifying him of the action of the general land office, was returned uncalled for. The disposition of the public lands of the United States is vested in the officers of the general land office, and they may make such reasonable rules relating to the administration of the laws of the United States regulating the disposition of the public lands as they see fit, and the courts have no authority to interfere. Before an alienee of a grantor of public lands is entitled to notice of proceedings against his grantor, he must give notice to the local land office of his interest in the land. In *In re Hill,* 5 Land Dec. Dep. Int. 276, the secretary of the interior held: "In the case under consideration, there was nothing in the record to show that Hill had mortgaged the tract in question; and it was no part of the duty of the United States officers to search the records in the proper territorial office to ascertain whether any transfer of said land had been made or lien placed thereon by him, in order to send notice of the rejection of the final proof to such transferee or lienor." In *In re American Investment Co.,* 5 Land Dec. Dep. Int. 603, the practice of permitting notice of transfer to be given the local office was approved, and in that case the secretary said: "If the entry is held for cancelation, notice should always be given to an assignee or mortgagee, if the fact of such interest is known, who will then be allowed to intervene to sustain the validity of the entry by disclosing under oath the nature of their interest and making proof thereof as required by rule 102." In *In re Waterhouse,* 9 Land Dec. Dep. Int. 131, it is said: "If parties fail to notify the local officers of the acquisition of an interest in entered lands, after proof, and before patent, they can blame no one but themselves if notice is not given to them of proceedings involving said lands; it being out of all reason to require those officers to examine the records of the county offices to ascertain if any assignment of or incumbrance upon said land has been

therein recorded, before notice shall be issued for contest or hearing."

We conclude, therefore, that, if Brandenbury was entitled to a patent upon receiving his final certificate, he and his mortgagee were in position to bring an action to assert their title as against the adverse claim of Lovejoy, the homesteader, and that the homesteader has acquired title by adverse possession. If, on the other hand, Brandenbury's title was inchoate and still within the jurisdiction of the general land office to deal with, he should have applied to that office for relief and for reinstatement of his entry when Lovejoy took possession of the land as a homestead.

We recommend an affirmance of the decree of the district court.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons above given, the decree of the district court is

AFFIRMED.

STATE, EX REL. FARMERS ELEVATOR COMPANY, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.*

FILED MARCH 19, 1908. No. 15,128.

1. **Constitutional Law**: DUE PROCESS OF LAW. Section 1, ch. 105, laws 1905, is not subject to the objection of being special legislation, or of allowing the taking of private property without just compensation, or of depriving the citizen of his property without due process of law. *State v. Missouri P. R. Co.*, *ante*, p. 15.

2. **Railroads**: COURTS: JURISDICTION. In consideration of the franchises that they receive from the state, railroad companies agree to perform certain duties toward the public, and the power of determining those duties and enforcing their performance is vested in the courts of the state.

* Pending on error in supreme court of United States.

3. ———: STATE CONTROL. To deny to the state the power to require the erection of depots, the construction of side-tracks, and such other facilities as the public necessities require, would enable railway companies to create a monopoly in handling the products of the country adjacent to their lines, and to turn it over to whomever they chose.

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

J. W. Orr, B. P. Waggener and *Reavis & Reavis,* for appellant.

R. C. James and *C. Gillespie, contra.*

DUFFIE, C.

The petition in this case recites that the relator, the Farmers Elevator Company of Strausville, Nebraska, is a corporation organized under the laws of this state, and engaged in operating a grain elevator on land adjacent to defendant's right of way at the station of Strausville, Richardson county; that the elevator has a capacity of 15,000 bushels, and was completed prior to April 1, 1905. It is further alleged that the defendant company has refused to construct a side-track to said elevator, by reason of which the plaintiff has been unable to load grain directly from its elevator into the cars of the defendant to its great damage; that application had been made for a site for the elevator on the defendant's right of way at Strausville, and the application refused, and that thereafter a written request was made on the defendant company to extend its side-track to the elevator, which was also refused; that defendant had for a time prior to April 1, 1905, maintained a side-track to another elevator at Strausville, and that plaintiff is not afforded equal facilities with other patrons of the road. A writ of mandamus was asked requiring the defendant to construct a side-track to the plaintiff's elevator and to equip and maintain the same. The answer of the defendant was substantially

the same as the answer filed in *State v. Missouri P. R. Co., ante,* p. 15. The district court ordered a mandamus to issue as prayed in the petition, and defendant has appealed.

In *State v. Missouri P. R. Co., supra,* we have considered and passed on most of the questions presented by the record in this case. In that case the state recovered the penalty prescribed in chapter 105, laws 1905, for failure of the railroad company to construct a side-track to an elevator erected by the Manley Cooperative Grain Association on land adjacent to the right of way of the railroad company. In our former opinion, we did not discuss at length the claim made by the defendant that the requirement of the statute that a site should be furnished by the railroad company on its right of way for the building of an elevator of the prescribed capacity, or a side-track extended to the location of an elevator built adjacent to the right of way of the railroad company in case it refused to furnish a site on its right of way where side-track facilities existed, was a taking of the property of the company without due process of law, in violation of the federal constitution and the constitution of this state. Since the opinion in *State v. Missouri P. R. Co.* was filed, we have had time to further consider the question made by this objection, and further reflection has served to confirm us in the opinion that the statute is not open to the objection urged by the defendant. It is not contended that a railroad company is not obliged to furnish facilities for the receipt and delivery of passengers and freight offered for carriage. In *State v. Republican V. R. Co.*, 17 Neb. 647, we held that it was a duty imposed on the railroad company by the common law to maintain depots and warehouses for the receipt and delivery of passengers and freight, and, on a rehearing of the same case, we held that the constitution and statutes of this state imposed on railroad companies that duty, which might be enforced by the court in case of neglect of the company to furnish the public with adequate facilties. See 18 Neb. 512. In this

view of the law, and the duty of the railroad company to furnish facilities to shippers over its line, there can be no doubt that it would, in the absence of any provision made for receiving grain intended for shipment, be compelled to erect and maintain suitable and adequate facilities for that purpose. While not speaking directly to the point, the supreme court of the United States in *Missouri P. R. Co. v. Nebraska,* 164 U. S. 403, strongly intimates that a railroad company may be compelled to maintain elevators or warehouses for the receipt of grain offered by patrons of the road, and equal facilities to all persons of access from their own lands to its tracks, and the use of the tracks for the purpose of shipping or receiving grain or other freight.

It cannot be denied that the state may require a railroad company to renew its ties and tracks when the safety of the public demands it. It may also require the company to construct expensive viaducts and keep them in repair. *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549, affirmed by the supreme court of the United States, 170 U. S. 57. Our general railroad law provides: "Such corporations shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate, and enjoy a a railroad with single or double tracks, with such side-tracks, turnouts, offices, and depots as shall be necessary, between the places of the termini of said road." Comp. St. 1907, ch. 16, sec. 75. In *State v. Republican V. R. Co.,* 18 Neb. 512, we held that this provision of the statute required the railroad company to furnish all necessary depots, and this holding must on principle extend to necessary side-tracks demanded for public use. Even in the absence of this statute, under which the defendant constructed and is operating its road, it would seem that the state has power to order such side-tracks as the convenience and necessity of its citizens demand. It is true that there are one or more elevators at the station of Strausville, but the farmers in that vicinity do not seem willing

to deal with the parties operating them, and have invested their money in the erection of another one of the requisite capacity, and this expenditure is evidence of a satisfactory character of some reason existing for another elevator at that place.

What would be the result of a denial of the power of the state to require the construction of side-tracks under the circumstances of this case? It would require the farmers to deal with the elevators doing business prior to the building of the one for which the side-track is demanded. In other words, the railroad company could create a monopoly of the grain business, and turn it over to whomever it saw fit. It could compel the producers adjacent to every station on its line to deal with the parties having elevator and side-track facilities for handling their produce. To make the railroad company the sole and ultimate judge of the place or building from which it will receive its freight, or to dictate to the public the party to whom the produce of the country shall be delivered or sold, would give such corporations power to control the market of the country and to grant a monopoly in favor of any party whom it might choose, and to promote or retard at pleasure the growth, prosperity and welfare of cities and towns. In consideration of the franchise that they receive from the state, railroad companies agree to perform certain duties toward the public, and the power of determining those duties and enforcing their performance is vested in the courts of the state. The evidence shows that the elevator in question handles about 10,500 bushels of grain each month under the adverse circumstances under which the proprietors are compelled to work. It fairly appears that this business will be greatly increased when adequate facilities are afforded it in handling and shipping grain, and that the business will be a continuing one. As said by the supreme court of Massachusetts in *Commonwealth v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555: "If the directors of a railroad were to find it for the interest of the stockholders to refuse to

carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations or do any way business for that reason, though the road passed for a long distance through a populous part of the state, this would be a case manifestly requiring and authorizing legislative interference. * * * And on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors so as to make the duty to provide the accommodation absolute. * * * The objection that it takes the property of the company and appropriates it to the benefit of others is not valid. The depot which they are required to build is to be their own, like all the other depots, and their compensation for all their outlays is in their freights and fares." The above remarks apply with equal force to the construction or extension of side-tracks required for the public convenience or necessity. We can see no valid objection to the enforcement of this statute, and, this case being a proper one, its provisions should be enforced.

We recommend an affirmance of the judgment of the district court.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

SARAH YOUNG, APPELLEE, V. R. L. BEVERIDGE ET AL., APPELLANTS.

FILED MARCH 19, 1908. No. 15,047.

1. **Intoxicating Liquors:** ACTION: MEASURE OF DAMAGES. In an action by a widow, brought for herself and as next friend for her minor child, the measure of damages is the present value of the sum the deceased would probably have contributed to the support of his wife during the period of their joint expectancy of life and the amount he probably would have contributed to the support of the minor child during her dependency, the same being less than the deceased's expectancy.

2. APPEAL: INSTRUCTIONS. Where an instruction is defective only because it states the rule in general instead of specific terms, a new trial will not be granted on account thereof, unless it clearly appears that prejudice resulted.

3. **Evidence:** RES GESTÆ. A statement by defendant, or his servant, that he had served a certain mild drink to deceased is inadmissible as a part of the *res gestæ*, in an action in damages for the wrongful killing of deceased by the sale to him of intoxicating liquors.

4. ———: ADMISSIBILITY. A statement of a witness as to the probable effect of a drink of liquor consumed by a dealer's patron is inadmissible in evidence for the purpose of proving the nature of the liquor, but its admission is not error if it was a part of a conversation properly admissible in evidence.

5. ———: NONEXPERT EVIDENCE. The ability of a person to perform manual labor is not a matter so exclusively within the domain of medical science that witnesses who were acquainted with him and had opportunity to observe his ability cannot testify with reference thereto.

6. **Intoxicating Liquors:** ACTION FOR DAMAGES: DEFENSES. In an action to recover damages growing out of a sale of intoxicating liquors by the servant of defendant, a licensed liquor-dealer, the fact that defendant had previously directed his servant not to sell intoxicants to the person injured is no defense.

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

L. S. Hastings and *W. S. McCoy,* for appellants.

Matt Miller, contra.

EPPERSON, C.

This action is brought by Sarah Young for herself and as next friend for her daughter Maysie Young against the defendant Beveridge, a liquor-dealer, and his bondsmen to recover for the alleged wrongful killing of plaintiff's husband. On the night of February 21, 1906, plaintiff's husband, it is alleged, drank whiskey, sold or given to him by the defendant in the latter's saloon, from the effects of which the former died soon thereafter. The trial in the district court resulted in a verdict and judgment for $1,500 for plaintiff, and defendants appealed.

Upon the trial evidence was introduced to show the age of the minor child to be 15 years at the time of her father's death, also evidence to show the probable expectancy of the life of the deceased; but no evidence was offered to show the age of plaintiff or her expectancy of life. The rule for the measure of damages was submitted to the jury by instruction No. 5, which is as follows: "The jury are instructed that, if you find for the plaintiff, it will be your duty to find from the evidence such damages as the plaintiff and the minor child have suffered in a pecuniary way by the death of the said Leander H. Young. * * * The extent of such loss is to be considered and measured by the kind, character and value of the support furnished by the deceased to the plaintiff and her minor child while living, in case you find that such deceased did during his lifetime furnish support and maintenance to the plaintiff and such minor child; and, as to the value of the loss of such means of support to said minor child, that would depend upon her age and ability to support herself, bearing in mind that you can only assess damages, if any, to the extent of the actual value of the loss of the means of support to said mother and minor child occasioned by the death of said Leander H. Young. Should you find for the plaintiff, in estimating the damages for loss of support, you must take into consideration the situation of the deceased, his estate, if any, the physical condition and health

of the deceased, his means of earning money and a livelihood, his habits of industry or otherwise, his occupation and the annual value or product of the same, his age, and what he would have earned had he lived, and what he would have contributed to the support of the plaintiff and her minor child, and also his reasonable expectation of life, * * * and, taking all things into consideration, and considering all the evidence on the subject, give such damages as would reasonably compensate the mother and her minor child for the loss of means of support they have sustained, if any, in the death of the said Leander H. Young, not exceeding the sum of $5,000, the amount claimed in the petition." This instruction was objected to for the reason that the plaintiff's right of recovery was not thereby limited to the joint expectancy of her life and that of her husband, and, further, that it did not limit the right of the child to recover for loss of support during minority. In such cases, the measure of recovery to which the widow is entitled is the present value of the husband's support during their joint expectancy of life; and minor children can recover only for loss of support during their minority, except in cases of dependent adult children. *Rouse v. Detroit Electric R. Co.*, 128 Mich. 149; *Carpenter, Adm'r, v. Buffalo, N. Y. & P. R. Co.*, 38 Hun (N. Y.), 116; *Fordyce v. McCants*, 51 Ark. 509, 14 Am. St. Rep. 69. But the instruction assailed expressly directs that the only recovery which may be had is for the damage in a pecuniary way which the plaintiff and her minor child have sustained by the loss of the means of support caused by the death of their husband and father. The language used states the rule in a general way, and was sufficient to permit the jury to take into consideration the minority of the child and the probable expectancy of plaintiff's life, as they might determine the same from her general appearance, she herself being a witness upon the trial. It should have been stated more definitely by express language, positively directing the jury that they must take into consideration the plaintiff's and deceased's joint expectancy

of life, and that the minor child was entitled to recover only for the loss of her support during minority. The instruction, however, was not a misdirection, but was a general statement of the correct rule, when a more specific statement would have been better. It is substantially the same as each of the instructions considered in *Sellars v. Foster,* 27 Neb. 118, and *Houston v. Gran,* 38 Neb. 687. In those cases, however, the limitation of the wife's recovery on account of her own expectancy of life being possibly less than that of her husband was not considered. In *Gran v. Houston,* 45 Neb. 813, it was held that, if such an instruction was erroneous, it was without prejudice, and that, had the defendant desired a more extended or explicit statement upon any portion of the subject therein embraced, it should have been prepared and presented to the court with a request that it be read. Failure to do so precludes error. In the case at bar, failure to give the rule in more specific language does not seem to have been prejudicial to the defendants. The evidence shows that the deceased had been a healthy man, capable of doing the work of a common laborer, and that for two years prior to his death he earned about $400 a year; substantially all of which he handed to his wife to be expended for the support of the family. His expectancy of life according to the Carlisle Table, which was introduced in evidence, was 16.2 years. The child was entitled to support for three years and the plaintiff during her lifetime, unless it exceeded her husband's expectancy. It is apparent that she was entitled to recover substantial damages. Although no evidence was introduced to show the age of plaintiff, or the condition of her health, yet the jury were not precluded from considering her appearance in this regard in determining the probable duration of her life. *City of South Omaha v. Sutliffe,* 72 Neb. 746. Had the deceased survived, he would within a few years have contributed to the support of his family an amount equal to the judgment; and there is nothing in this record indicating that the plaintiff would not probably survive this short period of

time. The verdict is not excessive. It was justified by the case made, and the instruction was not prejudicial.

Upon cross-examination of one of plaintiff's witnesses in reference to one sale of liquor to the deceased on the night of his death, defendant attempted to prove that his bartender, immediately after he served the drink, said to the witness: "I fooled him that time. I gave him a glass of ginger ale." It is contended that this was a part of the *res gestæ*. The statement referred only to one drink taken by deceased. The bartender could not have known at that time of Young's approaching death. It cannot be taken as the spontaneous explanation of the cause of death, or the nature of the liquor consumed.

One of plaintiff's witnesses testified, over objection, that he said to defendant's bartender at the time the latter sold or gave drinks to deceased: "That is enough to kill him." This expressed opinion of the witness standing alone was improper evidence. But it was only a part of a conversation between witness and the bartender, in which the latter said in reference to the liquor drank by deceased that it would not hurt him; that he had given him (at some previous time) a "bolacek" of alcohol, and he lived through it all right, and if he could stand that he could stand all that he drank then, and that he didn't give a damn if deceased died before morning. A "bolacek" is, it seems, a glass larger than those ordinarily used in serving strong drinks. This conversation, we think, was competent evidence for the purpose of showing that intoxicating liquor rather than ginger ale, as sworn to by the bartender, was served to the deceased only a few hours before his death. The expressed opinion of the witness was therefore properly admitted as a part of the conversation. Later the testimony relative to the balance of the conversation was stricken out. This we think was error against the plaintiff. If any of the conversation was stricken, of course all should have been, but defendants' motion did not include this part of the testimony.

Plaintiff was permitted, over objection, to prove by a

nonexpert witness that the deceased was, in the opinion of the witness, able to perform a full day's labor. The witness had worked with the deceased more or less for two years preceding his death. Defendants contend that the evidence was incompetent, because it was but the conclusion of the witness. As we understand the rule, the actual condition of a person's health must be proved by expert witnesses, but that the apparent physical condition of any person, where that fact is an issue, may be established by other witnesses who have had occasion to observe such condition. 17 Cyc. 87, 88. The evidence shows that the deceased had never been seriously ill, and that he had never had occasion to consult a physician. It would be impossible, therefore, to prove his physical condition by expert testimony. And, again, whether the deceased was able to do the work of a common laborer is not a matter so exclusively within the domain of medical science that witnesses who were acquainted with him and had worked with him frequently for a considerable length of time immediately preceding his death could not testify in reference thereto.

Complaint is made because the court refused to permit defendants to prove that the defendant Beveridge had instructed his bartender not to furnish the deceased any intoxicating liquors, or to allow him about the defendant's saloon. The evidence shows that the defendant was not himself present at the time of the alleged sale of liquors. In support of this contention, the defendants cite several criminal cases holding that, to justify a conviction of the master for an illegal sale by a servant, under the penal sections of the liquor law, it must appear that the sale was authorized by the master. But the difference between criminal and civil liability in this regard is apparent. In a criminal case an intent to violate the law must exist before there is any liability, while in a civil case the fact of the sale, and not the intention of the dealer, governs. This question, we think, has been set at rest in *Houston v. Gran,* 38 Neb. 687, and

in *Gran v. Houston,* 45 Neb. 813, wherein it is held: "The fact that a saloon-keeper, prior to the sales complained of in a civil damage case, had instructed his servants not to sell liquor to the deceased, is inadmissible in evidence as not tending to prove that such sales were not in fact made."

There are other assignments which we have considered, but which are unnecessary to review, as we find no error therein, and a discussion of them would be without value.

We have found no prejudicial error in the record, and we recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

JOHN R. SMITH, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED MARCH 19, 1908. No. 15,106.

1. **Waters: RAILROADS: EMBANKMENTS.** It is the duty of a railroad company to so construct its bridges across natural watercourses, and its roadbeds or embankments through the bottom lands of such streams, as to allow the passage of such flood waters as may reasonably be expected to occur occasionally; but it is not required to provide for the passage of the waters of extraordinary floods, such as are often designated as the act of God.

2. **Appeal: VERDICT.** Of two reasonable inferences deducible from the evidence this court cannot say that the one chosen by the jury is wrong.

3. **Jury: CHALLENGE OF JUROR.** The opinion of a juror as to the liability of the defendant for damages in other cases is not of itself a cause for challenge.

4. **Appeal: EVIDENCE: HARMLESS ERROR.** In an action for damages caused by alleged negligence in the construction of a railroad

bridge, the general rule is that it is error to admit, over objection, evidence that a change had been made in said bridge by the defendant since the time of the alleged damage, as it improperly tends to impute to the defendant an acknowledgment of its negligence in the construction thereof. But, where evidence of such fact has been previously introduced without objection, and the fact of the change otherwise proved, the admission of the incompetent evidence objected to is without prejudice.

5. **Damages:** DESTRUCTION OF CROPS. Where growing crops are totally destroyed by negligence, the measure of recovery is the fair market value thereof at the time of their destruction.

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

James E. Kelby, Francis Martin, Frank E. Bishop and *Fred M. Deweese,* for appellant.

Reavis & Reavis, contra.

EPPERSON, C.

The plaintiff is the owner of a tract of land situate on the south bank of the Nemaha river. The course of the river for the distance which we need to consider may be stated as follows: From the northeast corner of the plaintiff's land the river flows in a northeasterly direction for about half a mile, thence south for a distance of nearly one mile, thence in a northeasterly course to and beyond a bridge of the defendant railroad company across the river, known as bridge 67. This bridge is about two miles east of the plaintiff's land. The defendant's railroad approaches the Nemaha river from the northwest, coming to a point near the north bank of the river where it turns south, half a mile east of the plaintiff's land, thence east paralleling the general course of the river west of the bridge. For a distance of about one mile west of the bridge the railroad company had heretofore constructed a roadbed or embankment, leaving the same without culverts or openings for the escape of flood waters. Plaintiff alleges, in his petition, in substance and in part,

that the defendant's embankment or grade in its present condition catches all the flood waters, and flows the same to the south side of the river and back upon the lands of plaintiff; the opening under said bridge being insufficient to permit the proper escape of such flood waters, in consequence of which the plaintiff suffered the loss of certain crops during each of the years 1902, 1903 and 1904. Upon the trial of the case the court gave instruction No. 7, which is as follows: "You are instructed that, if you believe from the preponderance of the testimony in this case that the defendant railroad company raised its roadbed previous to the year 1902 high enough to arrest the flood water in the river in times of freshets between Pearsons Point and the bridge number 67 on east thereof, and that said water was thrown to the south side of said river, and that the bridge across the Nemaha river, being bridge number 67 as referred to in the testimony, and the openings or culverts, if any, in the embankment were not of sufficient size to permit the proper escape of said flood waters, and that by reason thereof the water was backed upon the land of plaintiff and held there until the growing crops of the plaintiff on his land were destroyed, then you are instructed that the defendant would be guilty of negligence, and you should find accordingly." It is contended that the instruction is erroneous because it condemns the construction as negligence, as a matter of law, simply because the grade and bridge interfered with the flood waters. In connection with instruction No. 7 we also consider instruction No. 8, which is as follows: "You are further instructed that, although you may believe from the evidence that defendant's crops were injured by flood waters, yet, before you can find for the plaintiff, you must be satisfied from a preponderance of the testimony that said overflow and damage to said crops was the direct and natural consequence of the negligence of the defendant in the proper construction of its roadway and bridges." Under these instructions, the right of the plaintiff's recovery is dependent entirely upon the

damage done by the defendant in its wrongful construction of its railroad embankment and its bridge over the channel of the river. It is the contention of the defendant that it would be at fault only if at the time it constructed its grade it failed to use reasonable care in constructing its road in view of the flow of the waters of the river and the valley; and that, with this measure of care fulfilled, then in subsequent years of heavy rainfall and disastrous floods the company could not justly be held to be guilty of negligence should the grade interfere with the flood waters. Such objection, we think, was contemplated and obviated by the trial court, who further, by instruction No. 9, expressly told the jury that the defendant in this case would not be liable for damage occasioned by the overflow of lands caused by extraordinary floods or freshets, such as the defendant company could not reasonably have anticipated and provided for in the construction of its said bridge, although such damage may to some extent have been occasioned by such embankment and bridge over the river.

Complaint is made of instructions 5 and 6. In No. 5 the court instructed the jury as follows: "It was the duty of the defendant in planning and constructing said embankment and bridge to use and employ the engineering knowledge and skill at the time of such construction ordinarily practiced in the construction of such work, and to see to the practical application of such knowledge and skill to the work of constructing said bridge and embankment, among other things, so as to allow the passage of water, such as is known to pass in said river annually, or which may be reasonably expected to occur occasionally, without regard to such great or sudden overflows as are often designated as the acts of God." By instruction No. 6 the jury were told that, if they found from the evidence that defendant thus constructed such bridge, then it would not be guilty of negligence, and would not be liable in this action; but, on the other hand, if it failed to exercise and employ such reasonable and proper skill

and care in the construction of said embankment and bridge, and that the overflow of plaintiff's land was the direct and natural result of such failure, and that the plaintiff suffered damage in consequence thereof, then the defendant would be guilty of negligence. It would perhaps have been as well had the court omitted the first part of instruction No. 5 relating to the employment of engineering knowledge and skill, and given an instruction directly in reference to the manner in which the embankment and bridge should be constructed with reference to the passage of such flood water as might reasonably have been expected. But the instructions were not unfavorable to the defendant. They properly stated the law, and are applicable to this case. *McClenehan v. Omaha & R. V. R. Co.*, 25 Neb. 523.

There is no doubt but that the rainfall during the seasons in which plaintiff's crops were destroyed was heavy; and defendant contends that the damage was caused by excessive rainfalls, and was not due to the improper construction of its railroad embankment and bridge. The evidence, we think, would have been sufficient to have sustained this contention; and, had the verdict been for defendant, it would not have been set aside. On the other hand, the evidence is sufficient to justify a finding that the natural course of the flood waters of the Nemaha river at this place was in a northeasterly direction; that they were retarded and held back upon the plaintiff's land by the defendant's embankment for a time long enough to have destroyed his crops. In weighing the evidence the jury have chosen one of two reasonable inferences, and we cannot say that it is wrong.

During the impaneling of the jury, defendant challenged for cause two jurors. One upon his *voir dire* stated: "Q. You have seen the effects of the rainy weather down there, and the floods from the river, I suppose. Do you have any opinion with reference as to who is to blame in any way for the retention of the floods? A. Any place? Q. This place would necessarily be on the bottom land.

A. Yes, sir." We find nothing in this to indicate that this juror had formed or expressed an opinion, or was in any way disqualified from trying the case. It will be noted that the response made by the juror to the interrogatory first quoted was itself a question; and it does not appear that the response following the second question quoted was intended as an answer to the first. The record does not disclose any further examination of this juror as to his knowledge of the case, or his opinion as to who should prevail. The examination of the other juror challenged, upon his *voir dire,* was in part as follows: "Q. Have you any opinion about the question of the liability of the railroads in this case, or any other case similar to it? A. Well, yes; to a certain extent. Q. It would take some evidence to remove that opinion, would it? A. Yes, sir. By Mr. Deweese: We challenge for cause. By Mr. Reavis: Q. The question was asked you whether you have an opinion in this case, or some other case—similar case; have you any opinion as to whether or not the railroad company is at fault or in any way to blame or responsible for the backing of water on this land in this case? A. Not in this case. Q. You don't know anything about this case? A. No, sir. Q. Do you know where the land is situated? A. No, sir. Q. You have no opinion as to the merits of this case? A. No, sir. Q. You have no opinion as to whether the railroad company is to blame, or whether anybody is to blame? A. No, sir; I have not." The opinion of the juror as to the liability of the defendant in damages for crops destroyed in some other part of the valley did not necessarily incapacitate him for the trial of this case. His examination does not disclose that he had any opinion as to defendant's liability to plaintiff. The overruling of the defendant's challenges of these jurors was not error.

One witness called by plaintiff was permitted to testify that since the destruction of plaintiff's crops the defendant company changed their bridge by extending it, thereby increasing its capacity for carrying away the flood waters.

This evidence was incompetent, and may have been introduced for the purpose of indicating an acknowledgment of carelessness on the part of the defendant company in its former construction of the bridge. But, in view of the other evidence in this case, we cannot see wherein it has been prejudicial to the defendant, for we find that plaintiff himself testified to the same fact without objection, both on direct and cross-examination, and one of defendant's witnesses also testified to this fact on cross-examination without objection. This proof being produced, the admission of the incompetent testimony objected to was without prejudice.

As to the measure of damages, the evidence showed that at the time each crop was destroyed it had about matured and was a fair average crop, and, further, that it was totally destroyed. The witnesses testified as to the fair market value of the same. The court instructed the jury in this regard that, if they found for the plaintiff, they would find the fair value of the crops of the plaintiff which were destroyed by the negligence of the defendant, and thus arrive at the aggregate amount the plaintiff was entitled to. Where crops are partially destroyed the rule as to the measure of damages is "the difference in the fair market value of the crop just before the land was flooded * * * and immediately thereafter." *Chicago, B. & Q. R. Co. v. Mitchell*, 74 Neb. 563. However, where the crops are totally destroyed, it is not required that the rule be stated in the language used in the *Mitchell* case, but an instruction directing the jury to find the value of the crop at the time of its destruction is necessary. The evidence being given with reference to the fair market value of the crops, the omission of the word "market" from the instruction was not fatal.

We find no prejudicial error in the record, 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.

JOSEPH TIERNEY ET AL., APPELLANTS, V. JOHN TIERNEY, APPELLEE.

FILED MARCH 19, 1908. No. 15,117.

Insane Persons: GUARDIANSHIP: APPEAL. The heirs apparent or presumptive, or those dependent upon an alleged incompetent person for support, may appeal from an order of the county court dismissing their petition for the appointment of a guardian for such incompetent.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Reversed.*

Brome & Burnett, for appellants.

A. R. Oleson, contra.

EPPERSON, C.

The appellants filed their petition in the county court of Cuming county, alleging that their father, the appellee, was the owner of real estate valued at $10,000, and that he, by reason of extreme old age and impaired health, was mentally incompetent to have the charge and management of his property, and incapable of taking care of himself. Upon the trial thereof the county court found against the appellants, and dismissed the action. An appeal was taken to the district court, and from an order dismissing such appeal the case is brought here.

It is contended by the appellee that no appeal will lie from an order dismissing the application for the appointment of a guardian of an alleged incompetent person. Section 5384, Ann. St. 1903, provides that the relations or

friends of any insane person, or of any person who, by reason of extreme old age or any other cause, is mentally incompetent to have the charge and management of his property, may file a petition with the county court for the appointment of a guardian. Section 5385 provides for a hearing upon the application, and requires the county court to appoint a guardian for such incompetent person, if it appears that such person is incapable of taking care of himself or managing his property. Original jurisdiction in guardianship matters is conferred by statute upon the county court as a part of its probate jurisdiction. Section 4823, Ann. St. 1903, provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any person against whom any such order, judgment, or decree may be made, or who may be affected thereby." The question presented by this appeal is: Do the children of an incompetent person have an interest in the proceedings which gives them the right to prosecute an appeal to the district court from the order of the county court dismissing a petition for the appointment of a guardian for an alleged incompetent person?

It has been held by other courts that such an appeal will not lie, because the petitioner has no interest in the proceeding which will entitle him to prosecute his petition further than the court of original jurisdiction. See *Studebaker v. Markley,* 7 Ind. App. 368; *State v. Branyan,* 30 Ind. App. 502, and, also, to the same effect is *Nimblet v. Chaffee,* 24 Vt. 628. In *Studebaker v. Markley, supra,* it is said: "The petitioner who institutes the proceeding is not a real party in interest. It is a matter of no special concern to him that any person be adjudged of unsound mind; whilst to the court, and to the public, it may be a matter of great solicitude. It is not the function of the petitioner to take upon himself the management of the proceeding. His position is analogous to that of a friend of the court. * * * After the proceeding is instituted, his duty is done, and that of the court begins. * * *

The appellants can neither gain nor lose by any judgment that might be rendered by this court, so far as the subject matter of the controversy is concerned. * * * There is no occasion for an appeal. The rights of all can be secured by a second proceeding. The interest of the accused and the interest of the public require, and we think the evident purpose of the statute is, that such a judgment is a finality from which no appeal will lie to any court." This reasoning we think may logically apply to an attempted appeal by a stranger, or by any relative of the alleged incompetent person who is not an heir apparent or presumptive, or upon whom no legal obligation rests to care for the incompetent. We cannot adopt the reasoning quoted to the extent of applying it to proceedings instituted by the next of kin, or by relatives who are dependent upon such alleged incompetent person for support. In the event that the county court misapprehends the law or the evidence, and an appeal from an order dismissing the petition is denied, then the wife or dependent children of a property owner may be required to sit silently by and see the only source of their income lost to them forever by reason of the incompetency of their husband and father; and heirs apparent likewise might have no remedy to prevent the squandering of their prospective inheritance. Section 5440, Ann. St. 1903, expressly provides that, upon an application by a guardian of an incompetent person to pay debts, notice shall be served upon the next of kin and heirs apparent or presumptive of the ward, who shall, for the purpose of such proceeding at least, by the express provision of the statute, be considered as interested in the estate, and may appear and answer the petition of the guardian. See, also, *Myers v. McGavock,* 39 Neb. 843. Section 5440, *supra,* and the other sections of the statute cited above cannot be said to be *in pari materia;* but we may properly look to the statutes pertaining to the control of the property of an incompetent person for the purpose of ascertaining the policy of the law, and in determining who are to be considered real parties in interest. The

legislature has expressly declared the next of kin and the heirs apparent or presumptive to have an interest in the estate of an incompetent person. It is very apparent that the next of kin have as great an interest in the property and estate of an incompetent person before he has been declared such as they have thereafter. While the interest of heirs apparent is not vested, yet their right to protect the same is a present and existing one. The children of an incompetent person have an interest other than that of heirs apparent; for, in the event of the wasting of his property, the duty of supporting him would rest upon them, and for this reason, if for no other, they are interested in the proceeding.

And, again, not only are property interests involved, but the personal welfare of the incompetent person himself is a matter of as great concern. One who, on account of extreme old age or by reason of mental incapacity, is unable to properly take care of himself is entitled to the care and protection of his next of kin, and they are entitled to demand of the courts a warrant of authority, so that they may legally exercise the necessary control to restrain the unfortunate from pursuing a course, not only destructive of his financial interests, but also disastrous to his health and comfort. The next of kin or dependent relatives are primarily interested as such in the comfort and general welfare of the incompetent, and if they appear only in his behalf it would seem that they would have the right to appeal in such representative capacity. Moreover, the mere fact that the alleged incompetent person resists the application does not take away the right or the duty of his next of kin to appear for him; for, indeed, if he was in fact insane, his resistance of the application would furnish no reason whatever for the dismissal thereof.

It is true that upon a change of conditions further application might be made to the county court, and the same matter, with additional evidence, tried again before that tribunal. But the matter is of such importance that we do not consider that the interested next of kin should be re-

quired to adopt as conclusive the judgment of the county court, but, like all other litigants having matters of importance in issue, are entitled to an appeal to a higher court; nor can we presume in an action of this nature that the judgment of the county court was right. The petitioners could not reasonably be expected to again make application to the same court who had once refused them, unless they could obtain stronger evidence of incompetency than that presented at the first hearing. An insane person might squander his property and destroy his health by repeated insane actions of the same nature. It can readily be seen that, unless an appeal is allowed, such insane person might waste his entire estate, and his dependent ones would have no redress, because evidence of the same character would probably not appear to the county court in a second instance any more forcible than it did upon the first trial.

We are not entirely without precedent for the conclusion we have reached. It was held in *In re Olson,* 10 S. Dak. 648, that such an appeal would lie, and there, as here, the children of the alleged incompetent person were the appellants, and in the opinion we find the following: "If their father was incapable of caring for himself and his property, who could be more vitally interested than his children in having his estate preserved by a suitable guardian? They are certainly interested in the estate affected by the order appealed from. As to them, it was clearly an appealable order." We held in *Prante v. Lompe,* 77 Neb. 377, that in a proceeding for the appointment of a guardian for an alleged incompetent person his next of kin were proper parties, and they could appear in court and oppose the petition for the appointment of a guardian. In that case the county court refused the application of the next of kin to set aside an order appointing a guardian. It appears that an appeal may be taken from an order appointing a guardian by any person aggrieved. "But the interest of such person must be a substantial one, not that of love or affection of a relative, unless he is a presumptive

heir of the party *non compos.*" Woerner, Law of American Guardianship, 526. It is the policy of our law that the heirs apparent or presumptive and those dependent upon an incompetent person have an interest in him and in his property, and that they are proper parties to any proceedings affecting him or his property. The very interests which make them proper or necessary parties also give them the right to appeal from an adverse order.

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

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 further proceedings.

REVERSED.

HUGH A. ALLEN, APPELLANT, V. HOLT COUNTY ET AL., APPELLEES.

FILED MARCH 19, 1908. No. 14,840.

1. **Homestead:** ABANDONMENT: EVIDENCE. Where the owner of a homestead has removed to another home, which he has purchased, it will ordinarily be presumed that such removal from the old home was an abandonment of the homestead right therein; but such presumption does not obtain where the owner of the homestead has been elected to fill a state office, and removes with his family to a new home purchased in the capital city for the sole purpose of performing his official duties, while such owner retains the continuing intention to return to the old home at the expiration of his official term. Such owner would be entitled to a reasonable time after the expiration of his term of office to return and occupy his homestead, and, if he is then forcibly prevented from returning, the homestead right would continue for a time reasonably sufficient for such return after the removal of the preventing cause.
2. ———: SALE ON EXECUTION: VALIDITY. The sale of a homestead under an ordinary execution during the temporary absence of the owner is void.

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

R. R. Dickson, for appellant.

W. T. Thompson, Attorney General, E. H. Whelan and *Arthur Mullen, contra.*

GOOD, C.

The appellant, Hugh A. Allen, brought this action in the district court for Holt county against the county of Holt and the state of Nebraska to quiet his title to a tract of land adjacent to the village of Atkinson, Nebraska, to cancel a sheriff's deed conveying the premises in controversy to Holt county, and to have certain judgments declared not liens upon the premises. The plaintiff claimed ownership by virtue of a deed from Joseph S. Bartley and wife, executed on the 27th day of January, 1904. The defendant Holt county answered, claiming title to the premises by virtue of a sheriff's deed, executed on the 11th day of February, 1898, and asked to have its title quieted as against the plaintiff. The state of Nebraska admitted certain formal allegations in the petition, and denied plaintiff's title. Upon a trial of the issues joined the district court found against the plaintiff, dismissing his action, and found in favor of the defendant Holt county, and entered a decree quieting and confirming its title to the lands. From this judgment of the district court the plaintiff has appealed.

The facts disclosed by the record, as far as they are material to the determination of the questions herein involved, are as follows: Joseph S. Bartley on the 10th day of December, 1885, became the owner in fee of the premises in controversy, and resided thereon with his family. The land in controversy constituted his homestead, and the evidence shows that at no time has the property been worth more than $2,000. In November, 1892, Bartley was elected

state treasurer, and in January following removed with his family to the city of Lincoln to enter upon his duties as such officer. He left a considerable portion of his household goods in his residence upon the land in controversy, and left upon the premises most of his agricultural implements and tools. He did not rent the property, but left it in the care of certain of his relatives. Shortly after his removal to Lincoln he purchased property there, the title thereto being taken in the name of his wife, in which he and his family resided during his term of office, and thereafter until he was taken into custody upon a criminal charge. Bartley's second term as state treasurer ended in January, 1897, and on the 27th day of February following he was arrested and incarcerated in jail in Douglas county. In June of the same year he was tried, convicted, and sentenced to a term of 20 years in the state penitentiary. Pending a review of his trial in the supreme court he remained in the Douglas county jail, and after the judgment was affirmed he was confined in the penitentiary until he was pardoned in the year 1902, and he has ever since resided in the Lincoln home. During the time that Bartley was state treasurer he claimed his home at Atkinson, frequently returned there, and voted there at each general election, and has never voted elsewhere. He did not rent the premises in controversy, and never sold or removed his household goods and agricultural implements and tools that he left thereon. He purchased the property in Lincoln with a view of its occupancy during the term of his office, and with the intention and expectation of selling the same at the end thereof, and it was also his expectation and intention to return at the end of his term of office to his homestead in Holt county.

In December, 1894, Holt county recovered a judgment for $5,863 and costs in the district court for that county against Barrett Scott, as principal, and Joseph S. Bartley and others, as sureties, and on the 4th day of January, 1898, caused execution to be issued on said judgment and levied upon the premises in controversy. On February 23,

1898, the premises were sold under said execution to Holt county for $625. In May following the sale was confirmed and deed issued, which was recorded in November, 1900. In the interim between the obtaining of the said judgment and the sale of the premises under the execution levied thereon Holt county obtained another judgment in the district court for that county against Bartley, and the state of Nebraska filed in the district court for that county a transcript of a judgment in its favor against Bartley obtained in Douglas county.

The first question for determination is: Was the land in controversy the homestead of Joseph S. Bartley at the time of the sale thereof under the execution? And did the county of Holt acquire title to the lands by virtue of the sheriff's deed? That the land in controversy constituted the homestead of Bartley up to the time of his removal to Lincoln to assume his official duties as state treasurer is not questioned; but it is contended by the appellees that by virtue of Bartley's removal from the home in Holt county to the city of Lincoln and the purchase of a new home there, in which he installed his family, he had abandoned his old homestead. Ordinarily, where the owner of a homestead removes therefrom with his family and to another home, of which he is the owner, it will be presumed that he has abandoned the first home and thereby the homestead right in it. But this, like other presumptions, may be rebutted by evidence to the contrary, and the real question to determine is whether or not in leaving the home in Holt county to go to Lincoln there was an intention to abandon, or, after having removed therefrom, an intention was formed to remain away from it. If Bartley's intention, when he removed from Holt county to Lincoln, was not to return, then, of course, he abandoned the homestead; or if, after his removal to Lincoln, he formed the intention while there to remain in Lincoln, or of not returning to Holt county, then there would be an abandonment of the homestead. But, from the record, it is apparent that his only purpose in removing to Lincoln was to perform his

official duties. It was but natural that he should take his family with him, and the question of purchasing a home in Lincoln or of renting one was a question of expediency. It might be that it was difficult to find a suitable house for rent, or one that he could rent for a term of years. There are many reasons that will suggest themselves why one residing in Lincoln, filling a state office, might deem it desirable to purchase residence property to live in during one's official career. It is a matter of common knowledge that many of our United States senators and other government officials purchase and own homes in the city of Washington, and yet maintain their residences in their respective states; and no one would contend, under these circumstances, that our senators and other federal officers had lost their residences in their respective states because they had purchased and owned homes in Washington. We think that the same rule applies to state officers, and that it cannot be said that they have abandoned their respective residences in their home counties because they have purchased residences in the capital city and have installed their families there during their terms of office. So that, while the fact of a purchase of a residence, under ordinary circumstances, and the removal from the old home to the new one, would constitute an abandonment, such presumption cannot be said to obtain under the circumstances as they appear in this case. The facts that Bartley left a considerable portion of his household goods in his house in Holt county, that he left his agricultural implements on the land, that he did not rent the premises, but left them in the care of relatives residing in the same town, and that he returned to Atkinson each year to cast his vote, that he never engaged in any other business in Lincoln, and had no business there except his official duties, are such as to negative the idea that he intended to abandon his homestead. After his second term of office had closed, and before he had adjusted his accounts as state treasurer, he was arrested, and from that time forth until after the sale of the property to Holt county upon execution he was

not in a position to return to his home in Holt county. The property was levied upon and sold while Bartley was in jail in Douglas county. Under the circumstances, we think there was not sufficient time elapsed after the expiration of his term of office and previous to his arrest and incarceration in prison to evidence an intention not to return to Holt county. There was no act of his shown in the record inconsistent with an intention to return to Holt county until after the execution sale, while, on the other hand, the evidence clearly discloses that it was his purpose and intention to return, and that he had not abandoned that intention prior to the sale of the property under the execution. We think the evidence conclusively establishes that, up to this time, Bartley had not abandoned his homestead, and that the property was his homestead at the time of the sale to Holt county under the execution.

Appellees contend that, even if the property was the homestead at the time, he has waived the homestead right. It is true that this court has held that the homestead right is a personal privilege and may be waived. But the cases in which that has been held were those wherein the homestead quality of the property was an issue in the case, or wherein the homestead claimant had the opportunity of asserting and establishing his homestead right in the action. See *Brownell & Co. v. Stoddard,* 42 Neb. 177; *Curtis v. Osborne & Co.,* 63 Neb. 837; *Gilbert v. Provident L. & T. Co.,* 1 Neb. (Unof.) 282. In the action whereby Holt county obtained a judgment against Scott and Bartley the homestead character of Bartley's property was not and could not have been put in issue. The only opportunity, therefore, that Bartley could have had to interpose the homestead character of his property was by way of objections to the confirmation of the sale. But this court has held that the homestead character of the property cannot be properly determined upon objections to the confirmation of the sale, and that, even if such objections were made, they are not binding upon the homestead claimant, who may thereafter bring an action to cancel the sheriff's

deed on the ground that the sale was void. *Best v. Grist,* 1 Neb. (Unof.) 812; *Baumann v. Franse,* 37 Neb. 807. Under the holdings of this court in these cases, the sale of the premises in controversy under the execution was absolutely void. No right or title by virtue thereof was vested in Holt county.

There still remains for consideration the question as to whether the realty in controversy was the homestead of Bartley at the time of the sale to the appellant on the 27th day of January, 1904, and whether the conveyance from Bartley and wife to appellant vested a good title in the grantee divested of the judgment liens of Holt county and the state of Nebraska. Bartley was pardoned and released from the state penitentiary in the early part of the year 1902, and has ever since continued to reside in the home in Lincoln, and has never made any attempt to remove to the Holt county homestead. Two years had elapsed from the time of his release before the sale of the property to the appellant. The only reason or excuse offered for his continued absence was that Bartley was interested in litigation, which rendered necessary his presence in Lincoln, where he might have easy and free access to the books and records of the treasurer's office. The evidence upon this question appears to be a mere conclusion. There are no facts shown in the record which would indicate that it was necessary for Bartley to remain in Lincoln or to be near the treasurer's office, and it does not appear that, in fact, he ever visited the treasurer's office or examined the books and records thereof. The record does disclose that there were two actions pending in the district court for Douglas county in which Bartley was interested; but there is nothing to disclose that they required his attendance in Lincoln or required his absence from his Holt county residence. We think a fair inference to be drawn from the record is that Bartley, before the sale of the property to Allen, abandoned his intention to return to Holt county. We are inclined to the view that he was entitled to a reasonable time after his pardon and release from the peni-

tentiary to return and reoccupy his former homestead; but that two years is more than a reasonable time. We therefore conclude that, prior to the time of the sale to Allen, Bartley abandoned his homestead in Holt county, so that the property at the time of the sale did not possess the homestead character. It necessarily follows that the land was subject to judgment liens at the time of the conveyance to the appellant, and that appellant took Bartley's title to the real estate burdened with the liens of all the valid judgments of record against Bartley in Holt county. It appears that more than five years had elapsed after the rendition of the judgment in favor of the state of Nebraska, and without any execution having been issued thereon previous to the conveyance to the appellant. This judgment had, therefore, ceased to be a lien upon the property. The appellant was entitled to have the sheriff's deed to Holt county canceled, and to have his title quieted as against the state of Nebraska; but he was not entitled to have his title quieted as to the judgment liens of Holt county.

We therefore recommend that the judgment of the district court be reversed and the cause be remanded, with directions to enter a decree in conformity 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, with directions to enter a decree in conformity with this opinion.

REVERSED.

REESE, J., not sitting.

HEYE J. MENSEN, APPELLANT, V. EVA L. KELLEY ET AL., APPELLEES.

FILED MARCH 19, 1908. No. 15,103.

1. **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." *Cooley v. Rafter*, 80 Neb. 181, reaffirmed and followed.
2. **Adverse Possession:** EVIDENCE. Evidence examined, and *held* sufficient to sustain the findings and judgment of the district court on the question of adverse possession.

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

Fred A. Nye, for appellant.

John H. Linderman, contra.

FAWCETT, C.

This suit is entitled "Heye J. Mensen v. Eva L. Kelley, Frederick Gruneberg and Caroline Gruneberg"; but as defendant Eva L. Kelley was dismissed from the suit in the court below, and the real controversy is between plaintiff Heye J. Mensen and defendant Frederick Gruneberg, we will consider the case as if they were the sole parties to the suit. The controversy in this case is over a strip of land about 198 feet wide on the east end and about 192 feet wide on the west end, on the south side or line of lots 7 and 8, section 4, township 8, range 19, Dawson county. Plaintiff brought suit in the district court to quiet his title to said strip. Defendant interposed two defenses: (1) That plaintiff had no title or right to the disputed tract; (2)

adverse possession for the statutory period of ten years. The district court found in favor of defendant on both of these defenses, and entered judgment dismissing plaintiff's suit. From that judgment, this appeal is prosecuted.

The same points are relied upon in this court, and both questions are argued at length in brief of counsel on each side. As the judgment of the district court must be affirmed on the second point, viz., the defense of adverse possession, we deem it unnecessary to consider any of the other questions presented and discussed. The evidence in the record before us is decidedly conflicting. This case well illustrates the advantage which the opportunity of seeing the witnesses upon the stand and hearing their testimony gives the trial court over an appellate court. While a careful reading of the testimony in the record before us creates some doubt in our minds as to the correctness of the conclusion reached by the trial judge, we must give heed to the advantage which he had over us, as above indicated. As said in *Faulkner v. Simms*, 68 Neb. 299: "In passing on findings of fact upon appeal, the reviewing court should go over all the evidence and reach its own conclusion thereon, giving such weight to the determination of the trial court as to credibility of witnesses and its finding on conflicting evidence as, under all the circumstances of the case, the nature of the evidence before the trial court, and that court's special opportunities, if any, for reaching a correct solution, such finding may be entitled to." Defendant testified that he broke all of the land in controversy in 1893, and that during each year thereafter, down to and including the year 1903, he, either personally or through his tenants, cultivated the entire tract; that there were some two or three years during that period of time when, on account of drought or flood, there was a failure of crop, but in each of those years the crop was planted. His wife corroborates him, and, to a certain extent, he is also corroborated by the witness August Schmidt. Mr. Schmidt's cross-examination, to a great extent, broke the force of his testimony as to specific years,

but on recross-examination he sums it up thus: "Q. You saw it every year? A. Yes. Q. You know it was farmed each year? A. Yes; it was farmed each year, but there wasn't a crop on it every year." This testimony was contradicted by plaintiff and his witnesses; but we cannot say that this contradictory testimony was sufficient to overcome the testimony above referred to. We would not be warranted in holding that the district court erred in discrediting plaintiff's witnesses and giving full credit to the witnesses of defendant.

Plaintiff insists that the evidence shows that at most defendant used only a portion of the strip of land in controversy, and, hence, he could in any event recover only such portion as he had actually used continuously during the statutory period, and further that, defendant having claimed that this disputed tract was a part of lot 9, owned by him, he held the title during all of the time, not adversely to the true owner, but under the belief that it was a part of his own lot. The former of these two contentions is disposed of by the testimony above referred to, and the holding of the court that defendant had occupied the whole tract during the statutory period. The latter of the two contentions has been disposed of adversely to plaintiff in *Baty v. Elrod*, 66 Neb. 735, where we say: "In this state, possession may be adverse, though the claimant occupies under a mistaken belief that the land is actually part of another tract, and that the true boundary is different than it really is." Conceding that defendant may not at all times during the entire ten years have actually plowed or cut hay from every particular acre of the tract in controversy, this alone would not defeat his claim of possession of the whole tract. In *Baty v. Elrod, supra,* we sustained an instruction of the court which told the jury that "the possession must have been such as was consistent with the nature of the property and is indicative of an honest claim of ownership thereof." In *Twohig v. Leamar*, 48 Neb. 247, 252, we said: "The law does not require that possession shall be evidenced

by a complete inclosure, nor by persons remaining continuously upon the land and constantly, from day to day, performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be, in its nature, adapted." If the testimony of defendant's witnesses is true, as the district court has found, then defendant had possession of the entire disputed tract, within the meaning of the law. The mere fact that some portions of it may not have been plowed or otherwise utilized because of the fact that it was too marshy for such use would not limit his possession. The fact that defendant used all of the available land within the tract in such a manner as to indicate his claim of ownership, even to the extent of ordering plaintiff off of the land when he undertook to take possession of it in 1899, as shown by the record—an order which plaintiff complied with up to the time of commencement of this suit—is certainly sufficient to establish an occupancy of the entire tract.

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

AMES, C., concurs.

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

AFFIRMED.

A. R. OLESON, APPELLANT, V. CUMING COUNTY ET AL., APPELLEES.

FILED MARCH 19, 1908. No. 15,116.

1. Taxation: ASSESSMENT. "The word credits as used in section 28, art. I, ch. 77, Comp. St. 1903, means net credits. The indebtedness of the taxpayer may be deducted from gross credits to find the true value of credits for assessment." *Lancaster County v. McDonald*, 73 Neb. 453.

2. ———: ———. A note and mortgage taken in exchange for property is not "money loaned and invested" within the meaning of the statute, but is a "credit" from which the holder may deduct the just debts by him owing at the time of making his tax return.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Reversed with directions.*

A. R. Oleson, pro se.

M. McLaughlin, contra.

FAWCETT, C.

The only question in this case is the construction of the word "credits" as used in the revenue law. Appellant sold a farm in Stanton county, and took back from the purchaser a mortgage for $3,500 for a portion of the purchase price of the farm. Subsequently appellant bought another farm, and gave his grantor a $3,500 mortgage for a portion of the purchase price of that farm; and the only question here is: Had appellant a right, when listing his property for taxation, to offset his indebtedness under the note and mortgage which he had given for the purchase of the latter farm against the note and mortgage which he had received upon a sale of the former? The assessor refused to allow such offset. The board of equalization sustained the assessor. The district court sustained the board of equalization, and the case is now here for review.

We think the district court erred. As we view it, the question involved here is no longer an open question in this state. The attorney general, in his published opinions, 1902, 1903, p. 211, holds that the word "credits," as used in section 28, art. I, ch. 77, Comp. St. 1903, means net, and not gross, credits. In *State v. Fleming*, 70 Neb. 529, in the first paragraph of the syllabus by DUFFIE, C., it is said: "In making a return of his taxable property under the provisions of chapter 73, laws 1903, the tax-

payer may deduct from the credits due him all just debts by him owing at the time of such return." In the third paragraph of the syllabus in *Lancaster County v. McDonald*, 73 Neb. 453, we held: "The word credits as used in section 28, art. I, ch. 77, Comp. St. 1903, means net credits. The indebtedness of the taxpayer may be deducted from gross credits to find the true value of the credits for assessment." The opinions in those two cases fully support the syllabus above quoted. Counsel for appellees contend that *Lancaster County v. McDonald* sustains his contention, because of the fact that in that case we held that the demurrer to the petition should have been sustained; but the facts in the case at bar bring it within the exception noted in that case. In that case we held that the demurrer to the petition should have been sustained, because there was no allegation in the petition and nothing to show the origin and character of the notes and mortgages against which the plaintiff was claiming the right to offset his indebtedness; and we said, "If they represented moneys loaned or invested, within the meaning of section 28, they are not credits within the meaning of that section, and being specifically named for taxation, they are not subject to reduction on account of general indebtedness." The reverse of that must be taken as true, namely, that, if the petition had alleged that those notes and mortgages did not represent moneys loaned or invested, but simply represented the unpaid portion of the consideration for a sale of property, either real or personal, they would be credits within the meaning of that section, and would be subject to reduction on account of general indebtedness. If, as argued by appellees, the balance of purchase money on a sale of land, or the amount of a note and mortgage taken "in exchange for a pair of horses" constitutes "moneys loaned and invested," then there never could be such a thing as a "credit" within the meaning of section 28, as no one could ever become a creditor of another without giving something of a money value in exchange for the credit he obtained. Under such

a construction, it would make no difference whether such credit were represented by an open account, a simple promissory note, or a note secured by mortgage. The only exception made by the statute, under the construction which we have already given it in the cases above cited, is in the case of "moneys" or "moneys loaned or invested." It was not the purpose of the legislature in passing the act in question to tax any citizen upon fictitious wealth or property. If appellees' contention were sustained, that would be the result in this case. To illustrate: A owns a farm worth $3,500. What is the amount of A's wealth? Clearly it is $3,500, and upon that he should be taxed. He sells the farm to B for $3,500 without receiving any cash, but takes a note secured by a mortgage for the consideration. What is A then worth? He is still worth $3,500, represented now by a $3,500 note and mortgage, instead of the land which he formerly owned. He is still subject to taxation for $3,500. He buys another farm from C for $3,500. C is not willing to take the $3,500 note and mortgage which A holds against B, so A gives C his own note and mortgage for $3,500 in payment of the farm he has purchased. What is A then worth? Appellees would say, $7,000, viz., a $3,500 farm and a $3,500 mortgage. This sudden rise in wealth from $3,500 to $7,000 is created, as by a magician's wand, the moment A accepts the deed to the land which he has purchased. By a process of legerdemain he is now required to pay taxes on $3,500 worth of land and on a $3,500 mortgage, when, as a matter of fact, his actual wealth has not been increased a dollar. This is pure fiction. It was never the intention of the legislature that the state should obtain its revenue in any such fictitious manner, and a court will never sustain such a course, if there is any reasonable theory upon which it may refuse to do so. As we have said in the opinions above cited, the term "credits" in the statute does not mean gross credits. It means net credits. The simple fact that a note, taken in exchange for a sale of property, either real or personal, is secured by a mortgage does not

change its character as a credit. In other words, a note and mortgage taken in exchange for property is not "money loaned and invested," within the meaning of the statute, but is a "credit" from which the holder may deduct the just debts by him owing at the time of making his tax return.

We recommend that the judgment of the district court be reversed and the cause remanded, with directions to enter a decree in favor of appellant as prayed in his petition.

CALKINS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded, with directions to enter a decree in favor of appellant as prayed in his petition.

REVERSED.

HARRY N. VERTREES, APPELLANT, V. GAGE COUNTY, APPELLEE.

FILED MARCH 19, 1908. No. 15,212.

1. Contributory negligence is an affirmative defense, the burden of proving which is upon the party pleading it, and must be established, if at all, by a preponderance of the evidence pertinent to that issue contained in the whole record.
2. Contributory Negligence: QUESTION FOR JURY. When the testimony of the plaintiff himself discloses facts from which contributory negligence might be inferred, unless it is of such nature as to amount practically to a confession, or so conclusively establishes his contributory negligence that reasonable men might not honestly draw different inferences therefrom, it is for the jury to say whether it is explained or extenuated by other facts and circumstances, established by the evidence, in such manner as to exculpate the plaintiff or to show that his conduct was not in fact contributory to the injury. He is entitled to have his conduct, as related by himself, considered in the light of all the evidence and of all the facts and circumstances disclosed on the trial.

3. ———: INSTRUCTIONS. Contributory negligence which will defeat a recovery in a personal injury case must be such negligence as contributed directly to the injury complained of; and an instruction which tells the jury "that the plaintiff is required to prove his case by a preponderance of the evidence without disclosing any negligence on his part," without adding the qualification that such negligence contributed directly to the injury complained of, is reversible error.

4. Appeal: INSTRUCTIONS: EVIDENCE. The doctrine that a case will not be reversed for errors in the instructions, where the verdict of the jury is the only verdict that could properly have been returned under the evidence disclosed by the whole record, is only applicable when the evidence is so clearly one way that reasonable men might not honestly draw different inferences therefrom.

5. Evidence examined, and *held* sufficient to require the submission of the case to the jury.

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

E. O. Krctsinger, for appellant.

M. W. Terry, F. O. McGirr and *Hazlett & Jack, contra.*

FAWCETT, C.

This is an action to recover damages for personal injuries suffered by the plaintiff while assisting in an attempt to move a threshing machine engine over a county bridge, and immediately occasioned by the falling of the bridge. The answer is a general denial qualified by a plea of contributory negligence. That the bridge was old and rotten and in a generally unsafe condition and had been so for several years, and that its condition had been for a long time well known to the county authorities and to the public generally, is proved by overwhelming evidence, and is admitted by counsel for the defendant, so that practically the only issue litigated on the trial was that of contributory negligence, concerning which the evidence is conflicting. The verdict and judgment were in favor of defendant, and plaintiff appealed. The court, at the re-

quest of defendant, gave the following instruction: "The court instructs the jury that the plaintiff is required to prove his case by a preponderance of the evidence without disclosing any negligence on his part, and if you believe from the evidence of the plaintiff himself that the circumstances known and apparent to him, and immediately preceding and connected with the injury, as disclosed by plaintiff's testimony, were such that a reasonably prudent and cautious man under like circumstances in the exercise of reasonable prudence and caution would have known, understood and discovered the danger of going upon the bridge where he was injured, then the plaintiff cannot recover." The court was clearly in error in instructing the jury "that the plaintiff is required to prove his case by a preponderance of the evidence without disclosing any negligence on his part," without at least adding thereto the words, "which contributed to the injury complained of." In fact many decisions state the rule much stronger, and, as we believe, more justly, that the contributory negligence must be such as *contributed directly* to the injury complained of. This part of the instruction left the jury at liberty to find against the plaintiff, if on that occasion he had been guilty of any negligence of any kind whatever, whether the same contributed to the accident or not. This is not the law.

The instruction also tells the jury: "And if you believe from the evidence of the plaintiff himself that the circumstances known and apparent to him, and immediately preceding and connected with the injury, as disclosed by plaintiff's testimony, were such that a reasonably prudent and cautious man under like circumstances in the exercise of reasonable prudence and caution would have known, understood and discovered the danger of going upon the bridge where he was injured, then the plaintiff cannot recover." This part of the instruction was erroneous for three reasons: (1) The effect of it was to tell the jury that plaintiff was bound to establish by a preponderance of the evidence that he was not guilty of con-

tributory negligence. (2) The court had no right to limit the jury to the plaintiff's own testimony. The plaintiff is not required to stand or fall by his own testimony. He is entitled to the benefit of all of the evidence in the case. He might give testimony himself which would tend to show contributory negligence sufficient to warrant a jury in finding him guilty of contributory negligence; yet, if the other evidence in the case fully explained his apparent contributory negligence, he would be entitled to the benefit of that evidence, and the court is without power to deprive him of it, as was done by this instruction. (3) This part of the instruction is not warranted by "plaintiff's testimony," as there is nothing whatever in "plaintiff's testimony" which shows that he knew of the dangerous character of the bridge, or which would charge him with a suspicion of its dangerous character. He states positively that he did not know it was dangerous. His testimony discloses that he knew only the week before of a load passing over the bridge which must have weighed over 7,000 pounds. The separator of the threshing machine outfit, to which the engine belonged, had passed over it only a short time prior to their attempt to take the engine across. He was a young fellow there, helping with the engine. The owner of the engine himself, a man of mature years and experience, was present on the bridge with plaintiff and the engine at the time of the accident, apparently without any fear of danger either to himself or his engine; and, when this old gentleman was willing to go upon the bridge with his engine, we do not think that a young man, not much more than a boy, could be chargeable with contributory negligence in going upon the bridge with him. But, however that may be, there is nothing in plaintiff's testimony to warrant the court in charging the jury that if they believed "from the evidence *of the plaintiff himself* that the circumstances known and apparent to him, and immediately preceding and connected with the injury, *as disclosed by plaintiff's testimony*, were such that a reasonably prudent and cautious man under like circum-

stances in the exercise of reasonable prudence and caution would have known, understood and discovered the danger of going upon the bridge where he was injured, then the plaintiff cannot recover." There was testimony from other witnesses from which the jury would have been warranted in drawing such conclusion—that is, in drawing the conclusion that plaintiff knew of the dangerous character of the bridge—but there is nothing "in plaintiff's testimony" to charge him with any such knowledge, and, hence, it was error on the part of the court to give the instruction. The effect of this instruction was to eliminate all of the evidence given upon the trial, except that of plaintiff alone. In that view of the case, there was absolutely nothing upon the question of contributory negligence to go to the jury. If the case had stood upon plaintiff's testimony alone, the court would have been compelled to direct a verdict in favor of plaintiff on that branch of the case.

We think the rule is correctly announced in the second paragraph of the syllabus in *City of Beatrice v. Reid*, 41 Neb. 214, as follows: "If one attempts to pass over a place of danger, the law requires him to exercise caution commensurate with the obvious peril; but this means that the law only requires of the party to exercise ordinary care, the danger and his knowledge thereof considered." As was pointed out by this court in *Rapp v. Sarpy County*, 71 Neb. 382, contributory negligence is an affirmative defense, the burden of proving which is upon the party pleading it, and must be established, if at all, by a preponderance of the evidence pertinent to that issue contained in the whole record. When there is evidence of such negligence in the testimony of the plaintiff himself, unless it is of such nature as to amount practically to a confession, or is unqualified by his own evidence or otherwise, it is for the jury to say whether it is explained or extenuated by other facts and circumstances established by the evidence, in such manner as to exculpate the plaintiff or to show that his conduct was not in fact contribu-

tory to the injury. As above stated, there is ample testimony in the record, outside of plaintiff's testimony, to sustain the verdict of the jury, but this instruction eliminated all of that, and, being complete within itself, it was not cured by any subsequent instructions which the court gave.

Counsel for defendant insist that "the verdict of the jury was right, and was really the only verdict that could have been rendered under the overwhelming evidence of contributory negligence on the part of plaintiff." We have examined the record with great care to see whether the judgment of the district court might not be affirmed on this theory; but we cannot so hold. Plaintiff testifies unqualifiedly that he did not know the dangerous condition of the bridge; that his attention had never been called to it; that he had no thought of any such thing that morning, or he would not have been on the bridge with that engine. He denies most emphatically the testimony of some of the other witnesses as to statements made by himself, at some of which interviews defendant's own witnesses admit plaintiff's father and mother were present; and the father and mother corroborate him in his denial. The testimony of the witness Wade that on the evening before the accident he told old man Folden, the owner of the engine, in the presence of the plaintiff and his father and two brothers, and a number of other men, that the bridge was not safe, that it was hardly safe for a "wagon team" to cross, and that, "if you cross that bridge, you will not thresh tomorrow," is met by the testimony of at least three witnesses that the plaintiff was not present at that interview at all, and had not been there at the latest since noon of that day. The testimony of Mr. Colby shows that at least one, if not two, of the other witnesses testifying for defendant to the effect that plaintiff heard statements made as to the dangerous condition of the bridge at and prior to the accident had made entirely different statements to him. The testimony of the county judge, who at the time of the accident was deputy county attorney, shows that

he went to see plaintiff the next day after the accident for the purpose of getting evidence for the county. At that time plaintiff was in a critical condition, his head bound up, his nose in splints, stitches in his lips, and in a condition where the doctor had advised that he should not be permitted to talk to any one. The testimony of the judge is squarely contradicted by both the plaintiff and his parents. The judge says he remained there for half an hour engaged in that conversation. Plaintiff and his parents both testify that he was not present to exceed three to five minutes, during which time the mother was standing beside plaintiff, bathing his head, which fact is admitted by the judge. In the light of such testimony we cannot say that the verdict returned by the jury was the only one which could properly have been returned.

For the errors above indicated, we recommend that the judgment be reversed and the cause remanded.

CALKINS, C., concurs.

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

REVERSED.

FRANK MURPHY ET AL., APPELLANTS, V. WILLOW SPRINGS BREWING COMPANY ET AL., APPELLEES.

FILED MARCH 19, 1908. No. 14,949.

1. **Intoxicating Liquors:** ACTION: PARTIES. Where damages are sustained by an individual in consequence of the liquor traffic, under the provisions of sections 15-18, ch. 50, Comp. St. 1907, the action is properly brought by the party or parties entitled to such damages.
2. ———: ———: WAGES OF MINOR. The wages which a son would have earned during his minority would have belonged to his father, and he therefore suffers a direct pecuniary loss by death of his son.

3. ———: ———: DAMAGES. There is no ground for restricting the right of recovery in actions brought under the law governing the sale of intoxicating liquors where death results within narrower limits than actions brought under Lord Campbell's act; and, while loss of means of support is a pecuniary injury, it is not the only damage for which a recovery may be had in such actions.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed with directions.*

Smyth & Smith, for appellants.

I. J. Dunn and *Gurley & Woodrough, contra.*

CALKINS, C.

This case was argued and submitted with the case of *Murphy, Adm'r, v. Willow Springs Brewing Co.,* p. 223, *post.* The petition sets forth the same facts as the petition in the latter case with the exception of the appointment of the administrator; the injury which resulted in the death of James A. Murphy being stated in substantially the same language in each case. To this petition a general demurrer was interposed, which was sustained by the court; and, from the judgment dismissing the action, the plaintiffs appeal.

1. From the conclusion arrived at in the case of *Murphy, Adm'r, v. Willow Springs Brewing Co.,* p. 223, *post,* it necessarily follows that, if a right of action existed in favor of the next of kin of the deceased for the injuries resulting in his death, they are the proper parties to bring the action.

2. The defendants contend that no facts were pleaded to show that any legal duty to furnish support to the plaintiffs rested upon the deceased, and that, therefore, the plaintiffs could not maintain the action. The language of the statute is that "the person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic." Paraphrased to meet the

facts in this case, it plainly says that the defendants shall pay all damages which the plaintiffs may suffer in consequence of the injuries which caused the death of their son. The wages which the son would have earned during his minority belonged to his father; and in the death of his son he has suffered a direct pecuniary loss. *Fitzgerald v. Donoher,* 48 Neb. 852.

3. There is no room for distinction in the character or extent of damages recoverable under Lord Campbell's act and under the Slocumb liquor law. At least there is no ground for restricting the recovery in actions brought under the latter act within narrower limits than those which depend upon the former. The provisions of the former are that in every case where the death of a person shall be caused by wrongful act, neglect or default such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, then the person who would have been liable if death had not ensued shall be liable nothwithstanding the fact of such death; while the latter provides that the person licensed shall pay all damages that may be caused by the traffic in intoxicating liquors. The defendants claim that the gravamen of the action under the liquor law is loss of support, and that the plaintiffs must be shown to have been legally dependent upon the deceased. In support of this theory they cite *McClay v. Worrall,* 18 Neb. 44; *Chmelir v. Sawyer,* 42 Neb. 362; *Gran v. Houston,* 45 Neb. 813. In *McClay v. Worrall* the court goes no further than to hold that the action lies where the legal duty to support exists. *Chmelir v. Sawyer* was an action by a wife for the loss of support, and a judgment in her favor was sustained; but there is nothing in the opinion from which a doctrine that no action can lie, except for support by a dependent, can be deduced. *Gran v. Houston, supra,* was an action by a married woman for loss of support, and it was held that within the words "all damages" is included loss of means of support; but there is no suggestion excluding other elements of damage. Loss of means of support is pecuniary

injury; but it by no means follows that it is the only pecuniary injury for which a recovery may be had in such actions. We may not assume that a parent has no pecuniary interest in the life of a child, because he was not at the time of the death of such child dependent upon him. In each child there exists a potential assurance of support when the infirmities of age shall render the parent dependent. It is therefore held that a parent may recover for a wrongful act causing the death of a minor child where there is a general allegation of pecuniary damage. *Tucker v. Draper,* 62 Neb. 66. It is not necessary to determine whether the petition in this case is sufficient to cover the elements of damages beyond the mere legal right of his father to his earnings during minority. This case must be remanded; and, in view of the conclusion reached in the case of *Murphy, Adm'r, v. Willow Springs Brewing Co.,* p. 223, *post,* the plaintiff, Frank Murphy, should, if he desires, be allowed to amend his petition to more specifically cover his pecuniary loss beyond the right of services during minority.

We therefore recommend that the judgment be 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, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance therewith.

REVERSED.

FRANK MURPHY, ADMINISTRATOR, APPELLANT, V. WILLOW SPRINGS BREWING COMPANY ET AL., APPELLEES.

FILED MARCH 19, 1908. No. 14,950.

1. **Death:** PARTIES TO ACTIONS. Where the right to maintain an action for injuries resulting in death depends upon the provisions of Lord Campbell's act (Comp. St. 1905, ch. 21), such action must be brought in the name of the administrator.
2. **Intoxicating Liquors:** ACTION: PARTIES. Damages sustained by an individual in consequence of the liquor traffic are, under the provisions of section 15, ch. 50, Comp. St. 1907, recoverable notwithstanding that death follows the injury; and this without the aid of Lord Campbell's act. Such action is properly brought by the party or parties entitled to such damages, and is not maintainable by the personal representative of the deceased. *Roose v. Perkins*, 9 Neb. 304; *Gran v. Houston*, 45 Neb. 813; *Fitzgerald v. Donoher*, 48 Neb. 852, followed.
3. **Courts:** PROCEDURE. Where a rule relating to a matter of form and procedure, and not affecting a substantive right, has been adopted in former decisions of this court, and appears to be salutary in its operation, it should be followed.

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

Smyth & Smith, for appellant.

I. J. Dunn and *Gurley & Woodrough, contra.*

CALKINS, C.

This was an action by the plaintiff as administrator of his deceased son, James A. Murphy, against the defendant, a licensed liquor dealer of the city of Omaha, and its bondsmen. It was alleged in the petition that on the 22d day of July, 1905, James A. Murphy, a boy of 18 years of age, went to the brewery of the defendant, who there unlawfully and wrongfully sold him large quantities of beer, from which he became intoxicated; and that while so intoxicated, and while rendered incapable of taking care of

himself by such intoxication, he went upon a near-by railroad track, and was killed by a passing train. The petition further alleged that the said James A. Murphy at the time of his death had an earning capacity of $55 a month; that he left him surviving as his sole and only heirs at law his father, the plaintiff, and Ellen Murphy, his mother; and that prior to his death he had contributed his earnings to the support of his father and mother. There was also the formal allegation of the granting of the license, the giving of the bond, and the appointment of the administrator. The defendants joined issue upon this petition; and after a jury was impaneled, and when the first witness was called to the stand, the defendants objected to the introduction of any testimony on the ground that the petition did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants; and, this objection being sustained, the court directed a verdict for the defendants. A judgment was entered thereon, from which the plaintiff brings this appeal.

1. The sole question argued in this case is the right of the administrator to bring this action. The plaintiff contends that, since at common law no action would lie for injuries or wrongs resulting in death, and since the act, commonly known as the "Slocumb Law" (Comp. St., ch. 50), does not in terms purport to change the rule of the common law in this respect, and a recovery is only possible when aided by the statute giving damages in case of death, commonly known as "Lord Campbell's Act" (Comp. St., ch. 21), the action must be brought according to the provisions of the latter act in the name of the personal representative of the deceased. It must be admitted that no question is better settled than the rule at common law that no civil action would lie for causing the death of a human being; and, although the master of a servant or any one lawfully entitled to command the services of another might bring an action against the wrongdoer who deprived him of those services, he could only recover for the time intermediate the injury and the death. Cooley,

Torts (2d ed.), p. 307; *Wilson v. Bumstead,* 12 Neb. 1; *Insurance Co. v. Brame,* 95 U. S. 754. In the latter case it is said: "The authorities are so numerous and so uniform on the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." This came to be regarded as a grave defect in the common law; and the British parliament undertook to remedy it in the year 1846 by an act familiarly known as "Lord Campbell's Act," which has formed the model for much of the legislation in this country on the same subject, and has been substantially embodied in our own act of 1873, which is now included in chapter 21 of the Compiled Statutes. This statute provides that actions brought for injuries causing death must be in the name of the personal representative of such deceased person, for the benefit, however, of the widow and next of kin; and it follows that, if the right of action set forth in the plaintiff's petition depends upon this act, it was properly brought in the name of the administrator.

2. The plaintiff's right of action is founded upon the law first enacted as sections 340-343, inclusive, of the criminal code of 1866, which is still retained in sections 15-18, inclusive, of chapter 50 of the Compiled Statutes of 1907. The only important change made since its first enactment is in the last named section and in a matter immaterial in this case. Section 15 provides that the person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic. He shall support all paupers, widows and orphans, and the expenses of civil and criminal prosecutions growing out of or justly attributable to his traffic in intoxicating drinks; said damages and expenses to be recovered in any court of competent jurisdiction by any civil action on the

bond named and required in section 6 of the act. It is contended on the part of the defendant that this statute operates as a change of the common law, and that a recovery may be had by the party damaged for the injury notwithstanding the fact that death resulted therefrom, and without reference to the provisions of Lord Campbell's act. There is no specific provision in the act that recovery may be had for an injury thereunder which results in death; but stress is laid upon the fact that the statute provides that the person so licensed shall pay "all damages." It is said by Judge Cooley in the discussion of statutes which provide a remedy where the common law gives none that in these cases such statutes have been left for explanation to the rules of the common law; that the rights they give can only be understood in the light of common law principles. Cooley, Torts (2d ed.), p. 14. This we conceive to be the correct rule of interpretation; and, since at the time of the enactment of this statute the common law did not give damages in civil actions for injuries causing death, it cannot have been the intention of the legislature, by using the words "all damages," to mean damages which were not then recognized by the common law as such. But we are not free to determine this question solely upon principle, nor by the application of the well-known rules of the common law in the interpretation of statutes. It has been in force since territorial days, and has often been construed by our courts. The first case to which our attention has been called is that of *Roose v. Perkins,* 9 Neb. 304. In that case a widow brought action for injuries sustained by herself and children by the death of her husband caused by liquors sold to him by the defendant, whereby the means of support of herself and children were destroyed. The objection was made that the action should have been brought in the name of the legal representative of the deceased; but the court held that the action was brought for the loss of means of support, and the death of the husband was a mere incident which affected the measure of damages, and that, therefore, the

objection was not well taken. In *Gran v. Houston*, 45 Neb. 813, the question was again raised, and it was held that it was undoubtedly the intention of the lawmakers in enacting the law of 1881 to pass a statute upon the subject involved complete in itself; and that the words "all damages" showed an intent to give a remedy where the means of support are permanently destroyed by death. It was also said that, under the rule requiring the court in construing a statute to consider its policy and the mischief to be remedied, this enactment should be interpreted to give damages for the injury notwithstanding the fact that death resulted therefrom. In *Fitzgerald v. Donoher*, 48 Neb. 852, which was an action brought by a mother to recover damages for the death of her son, the question was again raised. It was there held that the right of recovery under Lord Campbell's act would arise alone from the party's standing in such relationship to the deceased as to be entitled to his estate or a share of it by virtue of heirship; while in an action under the Slocumb law (Comp. St. 1907, ch. 50, sec. 15), "the plaintiff seeks to recover that to which she was entitled, the services of her son, a minor, not as his heir or as a part of his estate, but because of her parental right to his services." From an examination of these cases it appears that this court has adopted the rule that in actions brought under the liquor law, where death follows the injury, the proper party plaintiff is the person entitled to the damages, and not the personal representative of the deceased.

3. The rule so adopted does not affect a substantive right, but relates merely to a matter of form and procedure. It appears to have been salutary in operation, tends to simplify the application of the remedy, and should therefore be followed.

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 district court is

AFFIRMED.

VERGIL R. CASS ET AL., APPELLANTS, V. JOSEPH NITSCH ET AL., APPELLEES.

FILED MARCH 19, 1908. No. 15,089.

1. **Taxation**: FORECLOSURE OF TAX LIEN: JUDGMENT: COLLATERAL ATTACK. Under the revenue law in force in 1901, a petition by a county to foreclose a tax lien, which fails to allege an antecedent sale for taxes by the county treasurer, does not state a cause of action, but the judgment rendered thereon is not void, and the charge in the petition collaterally attacking the same that the party claiming under such judgment knew there had not been an antecedent sale does not make such case an exception to the rule.

2. **Judgment, Vacating**: SHOWING. Where the affidavit required by section 82 of the code is in the form of a petition verified by the attorney of a nonresident defendant who deposes that he believes the facts stated in the petition are true, it is insufficient, especially where it fails to show that the attorney had personal knowledge of the fact that the defendant did not have notice of the pendency of the action in time to appear and defend.

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

Starr & Reeder, for appellants.

M. F. Harrington and *C. A. Ready, contra.*

CALKINS, C.

The plaintiff Vergil R. Cass in 1901 was the owner of a tract of land in Hayes county against which certain state, county and school district taxes had been levied for the years from 1894 to 1900, inclusive. There had been no administrative sale for these taxes, but the county com-

menced and prosecuted action to foreclose the lien thereof. Constructive service was had upon the plaintiff Cass, but he had no actual notice of the pendency of the action in time to appear and defend, and the same was prosecuted to final decree and the land sold to the defendant Joseph Nitsch, to whom it was conveyed by the sheriff after confirmation of such sale by the district court. In 1904 the said Vergil R. Cass and one Jesse C. McNish filed their petition in the district court, setting forth the foregoing facts, alleging that the plaintiffs were the owners of said land, and praying that an account be taken of the amount due for taxes against the same, and the rents and profits thereof received by the defendant Nitsch; that such rents and profits be set off against the amount due for taxes, penalties and costs; and that the deed so made by the sheriff to the said defendant Nitsch be declared void, and the title to said premises quieted in the plaintiffs. To this petition the defendants demurred, and, the demurrer being sustained, judgment was rendered for the defendant, from which plaintiffs prosecute this appeal.

1. It is held that collection of a land tax by judicial sale without an antecedent sale by the county treasurer is contrary to the provisions of the revenue law in force at the time of the commencement of the suit so brought by the county of Hayes, and it is clear that the petition in that case did not state facts sufficient to constitute a cause of action. *Logan County v. Carnahan,* 66 Neb. 685, 693. It is, however, well settled and upon sound principles that such a judgment is not void nor subject to collateral attack. *Logan County v. Carnahan,* 66 Neb. 693; *County of Logan v. McKinley-Lanning L. & T. Co.,* 70 Neb. 399; *Russell v. McCarthy,* 70 Neb. 514. The plaintiff seeks to except this case from the operation of the rule last above stated by alleging that the purchaser knew that the action was brought without any previous administrative sale; but this can make no difference. In every case where the petition fails to state a cause of action it must so appear upon the record, and it could, therefore, be said that the

purchaser at a sale under a decree rendered upon such a petition took deed with notice of such fact; but he also takes it with the knowledge that the sufficiency of the petition is not a test of jurisdiction, and that the decision of the district court that the petition does state such cause of action, however erroneous such judgment may be, becomes final, and can only be questioned upon appeal or error.

2. The plaintiffs contend that their petition should be considered as an application under section 82 of the code, and that they should be let in to defend the action under the provisions of that statute. The petition is not in form of such an application, nor does the prayer thereof indicate that the plaintiffs at the time of the commencement of their action intended to proceed under that section. Without determining how far a party who has an election of remedies is bound to pursue and be judged by the rules of law regulating the one he has chosen at the commencement of his suit, we turn to the inquiry whether the plaintiffs by the filing of their petition have, in substance, if not in form, fulfilled the conditions imposed by section 82. This section provides that a party seeking to open such a judgment must, among other things, make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense. No such affidavit was filed, unless the petition may be considered as such or equivalent thereto. The petition is verified by the affidavit of one of the plaintiffs' attorneys, who deposes that all the plaintiffs are absent from the county of Hayes, and are nonresidents thereof; "that he has read the foregoing petition, and believes the statements, facts and allegations therein contained are true." This is no more than an affidavit that the plaintiffs' attorney believes that during the pendency of the action the plaintiffs had no actual notice thereof in time to appear in court and make their defense. In order for a petition to be regarded as an affidavit, it must be sworn to positively. The fact that the party had no actual notice of

the pendency of the action in time to appear and defend the same is usually one of which he alone is cognizant, and such fact will ordinarily best appear from the affidavit of the party himself. Where the affidavit is made by another person, it must set forth the facts showing that the person making the affidavit had the means of knowing, and did know, that the party making the application had no such notice. Nothing short of this would, in the language of the statute, "make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof." We therefore think that the petition, regarded as an affidavit under section 82 of the code, is insufficient, and that the demurrer of the defendants was properly sustained.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

ADELAIDE L. HARRINGTON ET AL., APPELLANTS, V. HAYES COUNTY ET AL., APPELLEES.

FILED MARCH 19, 1908. No. 15,090.

1. **Judges:** DISQUALIFICATION: JUDGMENT: COLLATERAL ATTACK. A district judge is disqualified from making an order confirming a judicial sale in an action which he commenced and prosecuted to judgment as attorney for the plaintiff, and, where the fact of such disqualification appears upon the record, the order of confirmation made by the judge so disqualified is void, and may be collaterally attacked.
2. **Judicial Sales:** CONFIRMATION. An order confirming a judicial sale is a judicial, and not a ministerial, act.
3. **Judgment:** SUIT TO VACATE: PLEADING. In an action to set aside a

sheriff's deed upon the ground that the order confirming the sale which it was executed to carry out was made by the judge disqualified to act, an allegation that the plaintiffs are the owners in fee simple of the land in question is a sufficient plea of ownership, when the petition is attacked by a general demurrer.

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

Starr & Reeder, for appellants.

M. F. Harrington and *C. A. Ready, contra.*

CALKINS, C.

On the 2d day of January, 1902, the county of Hayes, by its then attorney, commenced an action against the defendant Harrington, a nonresident of the state, to foreclose its lien for taxes upon a tract of land then owned by her. Service was had by publication, and on the 31st day of March, 1902, a decree was rendered as prayed, upon which an order of sale was afterwards issued, and the sheriff, at a sale held on the 4th day of August, 1902, struck off the premises to the defendant Mansfield upon his bid of $100. On the 4th day of March, 1904, the purchaser paid the amount of his bid. At this time the county attorney had become judge of the district court, and, being then holding a term of said court in said county of Hayes, made an order confirming the said sale, in pursuance of which order the sheriff on the 2d day of July, 1904, made and executed a deed conveying said premises to the defendant Mansfield.

This action is brought by Adelaide L. Harrington and Jesse C. McNish against the county of Hayes and the purchaser Mansfield, and they allege, in addition to the facts above stated, that the plaintiff Harrington was, during the proceedings above mentioned, and that she and the plaintiff McNish were, at the commencement of this action, the owners in fee of the premises in question; that the plaintiffs had no actual notice of the pendency of said

action in time to appear and defend the same, and that they had on the 20th day of December, 1904, tendered and offered to pay to the defendant Mansfield the amount of taxes chargeable against said land, with interest, penalties and costs. It appeared that the action of foreclosure was brought without an antecedent sale by the county treasurer, and that the plaintiff Harrington would have had good defense to said action. To the plaintiffs' petition the defendants filed a general demurrer, which was sustained, and judgment rendered for the defendants, which this appeal is brought to review.

1. We have therefore to consider whether a judgment rendered by a disqualified judge is void, or simply erroneous. At common law the latter rule prevails. Freeman, Judgments (4th ed.), sec. 145. In many of the states statutes have been enacted prohibiting judges from acting in certain specified cases, and where the statute in direct and positive terms forbids a judge to act in such cases the prohibition goes to the jurisdiction, and the judgment is void. Freeman, Judgments (4th ed.), sec. 146, and note to *Moses v. Julian,* 45 N. H. 52, 84 Am. Dec. 114, 126. Such seems to be the rule uniformly adopted where the prohibition is direct and positive, and there is no provision for a waiver by the parties of objections to the judge upon that ground. Our own statute in force at the time of the confirmation of the sale in this case provided: "A judge or justice is disqualified from acting as such, except by mutual consent of parties, in any case wherein he is a party, or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, * * * or where he has been attorney for either party in the action or proceeding, and such mutual consent must be in writing and made a part of the record." Comp. St. 1905, ch. 19, sec. 37. In at least two other states statutes containing similar provisions have been enacted. The statute of Tennessee (code, sec. 4098) provides: "No judge of any court, chancellor or justice shall sit in any cause or proceedings

in which he is interested, or has been of counsel, or where he is related to either party by consanguinity or affinity, within the sixth degree, computing by the civil law, except by consent of the parties entered of record." The supreme court of Tennessee, in construing its statute, held that there must be a waiver of the judicial incompetency as required by the statute, or the judgment will be void. *Pierce v. Bowers* 8 Bax. (Tenn.) 353; *Reams v. Kearns,* 5 Cold. (Tenn.) 217; *Hilton v. Miller & Co.,* 5 Lea (Tenn.) 395. On the other hand, it is said by the supreme court of Alabama, in construing a similar statute, that if the provisions for consent had not been introduced there could not have been any question about the construction, but that the consent giving authority seems to imply a personal privilege, and the court accordingly decides that the disabilities mentioned in the statute do not render the proceedings void, though no consent appears upon the record. *Hines v. Hussy,* 45 Ala. 496. And this rule has since been followed in that state, whose courts seem to have been influenced by the gravity of the consequences to follow from annulling judgments of courts having apparent jurisdiction to render them. The importance of these considerations cannot be denied. There should be confidence in the judgments of courts, and the titles resting upon judicial proceedings should not be lightly set aside for matters not appearing upon the record, and which the intending purchaser at a judicial sale could not have discovered by a diligent examination of the proceedings. However, the question whether a judgment rendered in a court of general jurisdiction by a judge apparently qualified should, upon the considerations above referred to, be held void when collaterally attacked upon the ground that the judge was disqualified by reason of facts not shown upon the record is not presented in this case, and need not be decided. Here the disqualification complained of appears by the inspection of the record. It is there shown that the person who, as county attorney, brought and prosecuted the action to judgment, and the

person who, as district judge, confirmed the sale, had the same name. Identity of names is *prima facie* evidence of identity of persons, and the disqualification of the judge to act was apparent from the inspection of the record of the proceedings. In such a case, the reason for the rule adopted by the Alabama court does not apply, and the rule should not, therefore, govern the disposition of this case. We have no doubt that where the disqualification of the judge affirmatively appears upon the record, and there is no waiver of such disqualification, as required by statute, the acts of such disqualified judge are void, and it follows in this case that the order of confirmation and proceedings subsequent thereto are invalid and of no effect.

2. It is asserted that an order confirming a sale upon foreclosure does not involve the exercise of any judicial discretion, and it was therefore one which a judge who had been attorney for one of the parties might properly make. Section 498 of the code provides that the court may make the order of confirmation if, after having carefully examined the proceedings of the foreclosure, it is satisfied that the sale has in all respects been made in conformity to the provisions of law. This law, it is held, cures the irregularities in the proceedings, and that could not be said of a mere ministerial act. In fact, the crux of the defendants' contention is that this order should be accorded the respect given to judicial determinations, and it is highly inconsistent for them to at the same time argue that for the purpose of determining whether the judge was disqualified we should regard the confirmation of the sale as a mere ministerial act. We are not impressed with the view that, if the proceedings were regular so that there was but one thing for the judge to do, the act becomes merely formal. That argument, logically carried out, would apply to all decisions and all judgments; for, when the facts and the law are ascertained, the judge has no discretion—he must pronounce the decision that the law commands. The principles applicable to some cases are so

obvious and generally understood that the judge reaches his conclusion easily and pronounces his decisions with the utmost confidence. Other cases are so complicated that it is a task of infinite difficulty to unravel the tangled skein of legal principle and follow each thread from its source to its proper application. When this is done, however, the judge has no more discretion in the latter than in the former case. He must pronounce the judgment of the law. The disqualification of the statute is not a disqualification to decide erroneously. It is a disqualification to decide at all.

3. It is contended that the petition is defective in not showing that the plaintiffs have such title to the land in question as to enable them to prosecute this action. The petition contains the allegation, "the plaintiffs Adelaide L. Harrington and Jesse C. McNish are the owners in fee simple" of the land in question, and in another part it pleads that the plaintiff Harrington was at the time of the beginning of said foreclosure proceeding, and at the time of the confirmation of such sale, the "owner in fee." The claim was made by the plaintiffs that their petition might be regarded as an application to open up the judgment under the provision of section 82 of the code, giving such relief to defendants served constructively. The defendants contended that to entitle the plaintiffs to such relief the plaintiff Harrington, who was the sole owner of the land at the time of the foreclosure proceedings, must still remain such sole owner. We presume, therefore, that this argument was directed to the petition as an application to open up the judgment under section 82, and that, since we have not so considered the petition, it has no application. In any event, we are satisfied that in an action by two parties to cancel a cloud upon the title of real estate the allegation that the plaintiffs are the owners in fee simple of the land in question is a sufficient allegation of ownership, when the petition is attacked by a general demurrer.

We therefore recommend that the judgment of the dis-

trict court be reversed and the cause remanded for further proceedings in accordance with this opinion.

FAWCETT and ROOT, CC., concur.

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

REVERSED.

CHRISTINA HENRY, APPELLEE, V. OMAHA PACKING COMPANY, APPELLANT.

FILED MARCH 19, 1908. No. 15,114.

1. **Trial:** NEGLIGENCE: QUESTION FOR JURY. When different minds may honestly draw different conclusions as to whether admitted facts prove or disprove negligence, the question is for the jury.
2. **Principal and Agent:** NOTICE TO AGENT. While, during the existence of the relation of principal and agent, the agent receives notice in his private capacity of facts not then concerning his principal, but afterwards acts for the principal in a matter in which such facts are material, the notice so received by the agent should be imputed to the principal.
3. **Instruction** examined, and *held* justified by the evidence.
4. **Damages:** INSTRUCTIONS. In an instruction to a jury that the plaintiff is entitled to recover such damages "as she may have received" by reason of the injuries complained of, the use of the word "may" does not introduce an element of conjecture and uncertainty, and such an instruction is not erroneous upon that ground.
5. **Appeal:** INSTRUCTIONS. A party cannot predicate error in the giving of an instruction upon the ground that the same is not sufficiently explicit and particular, unless he has first called the attention of the court to such defect, and the court has refused to correct the same.

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

T. J. Mahoney and *J. A. C. Kennedy,* for appellant.

Benjamin S. Baker and *E. C. Wolcott, contra.*

CALKINS, C.

The defendant is a corporation engaged in the packing business at South Omaha, and the plaintiff was on the 10th day of November, 1904, employed by the defendant in its packing house. While so employed the plaintiff became sick. It appears that it had been the custom of the defendant for some years to convey to their homes such employees as became sick or injured while at work, and on this occasion the foreman under whom the plaintiff was working directed the barn boss to get a carriage ready to take her home, and the barn boss thereupon hitched to one of defendant's buggies a mare belonging to Mr. Urquhart, the defendant's general manager, and the defendant's receiving clerk undertook to drive the plaintiff home in the conveyance so provided. After proceeding a short distance the mare became frightened and unmanageable, and the plaintiff was thrown from the buggy to the pavement and injured. To recover the damages caused by such injury, she brought this action, charging the defendant with negligence in using to convey her to her home a horse vicious and unsafe, and known by it to be such. There was a verdict for the plaintiff, and from a judgment rendered thereon the defendant appeals.

1. The first contention of the defendant is that there was not sufficient evidence to warrant a finding that the previous record and history of the mare was such that a person of ordinary prudence ought not to have used her under the circumstances shown. It appeared that she had belonged to a Mr. Olney, who was called as a witness concerning his experience with the mare, and testified as follows: "I started out from the stock yards to go home, and took a man with me that was quite a heavy man, and we had driven probably a quarter of a mile when the hind

wheel on the right side broke. The axle broke right off the spindle. That frightened the mare, and she commenced to run, and I did my best to control her, but couldn't do it. She ran through a viaduct, and as soon as we got through there the other wheel on the same side broke—the front wheel—and with the top up we were in a perilous condition; so I pulled on one rein as hard as I could in an attempt to throw her, which I did, and of course that saved us." Being asked what speed she was going, witness answered that she was going as fast as she could go on a road. The evidence discloses that the witness Olney never drove the mare any more, but sold her to Mr. Urquhart through a man named Walwork, who acted for Mr. Urquhart in the transaction. The mare afterwards became unmanageable while being driven by Mrs. Urquhart, concerning which Mr. Robertson, a witness, testified that he, with his son, was riding on Center street, and met Mrs. Urquhart going in the other direction; that he was on the left side of the road, and anticipated the boy would follow him there too, but instead of that the boy crossed over to pass her on the right side; that the horse thereupon turned right square around, and ran about a hundred yards, and fell about six feet from where the witness was; and that he ran up and caught the horse's head until the ladies were released; they having fallen over the dashboard and upon the horse. The evidence of the two witnesses referred to tended to show that the mare was subject to be frightened at the happening of unusual occurrences, and when so frightened became unmanageable. Whether it is prudent to use such a horse to drive a sick woman upon a busy street is a question that would be likely to receive different answers from different individuals. A timid, cautious driver would hesitate to use such an animal, while a bold and skilful horseman might regard the danger involved as beneath his notice. When different minds may honestly draw different conclusions as to whether admitted facts prove or disprove negligence, the question is for the jury. *City of Lincoln v. Gillilan,* 18 Neb. 114. The question

whether the use of a horse with the record and history of this mare for the purpose and under the circumstances shown constitutes negligence was for the jury, and not for the court.

2. The evidence discloses that Mr. Urquhart was the general manager of the defendant's packing house plant and business at South Omaha, and that the mare in question was his private property, and had been used by him for a time to drive in the morning from his home in Omaha to the defendant's place of business and to return at night; the mare being kept in the defendant's barn during the day. It also appears that this use of the mare did not continue up to the date of plaintiffs' accident; that for some time previous thereto the mare had been left in the barn, and had been used in the defendant's business by defendant's employees in the same manner as if she belonged to the defendant. There is no evidence that Mr. Urquhart ever gave any specific directions about the mare or her use, but, he being the general manager of the defendant in charge of all its employees, as well as the owner of the horse, it is fair to presume that the use of the mare in the business of the defendant was by his authority. This being the case, we think that the ownership of the mare was immaterial. If defendant's liability exists at all, it must grow out of the fact that it used an unsafe horse, and it matters not who owned the horse. This becomes important when we consider whether the notice to Mr. Urquhart of the mare's faults was notice to the defendant. It is insisted that notice to Mr. Urquhart was not notice to the defendant; that he acquired notice in his personal and private transactions and capacity which, at the time of being so received, was a matter of no concern to his principal, to whom such knowledge could not therefore be imputed. In its brief the defendant says: "The rule respecting notice to an agent being notice to the principal is based on the theory that what the agent knows it is his duty to communicate to his principal, and he will be presumed to have performed that duty. As a corollary it

follows that, where no such duty exists, no such presumption can be indulged. If an agent receives notice in and through the discharge of his duties as agent, the courts hold such notice to bind the principal. *Again, where an agent receives notice in his private capacity, but afterwards acts for the principal in a matter in which the notice is material, the notice to the agent ought to be held notice to the principal.*" The last clause of the quotation from defendant's brief, which we have italicised, is precisely applicable to this case. When Mr. Urquhart received notice of the mare's infirmities through the accident to his wife, it was in his private capacity, and of no concern to his principal. Had he then left the employ of the defendant, after which the defendant had acquired title to the mare, no notice would have been imputed to the defendant from the knowledge of its former agent acquired in his personal capacity. But, when Mr. Urquhart put the mare in the defendant's barn and permitted her to be used in defendant's business, he was acting for his principal in a matter in which the notice was material, and the notice to him ought, in the language of defendant's brief, to be held notice to the defendant.

3. Instruction numbered 4, given by the court on its own motion, was as follows: "Knowledge or notice to the general manager of the defendant company of the use of the mare for the defendant company, and of her vicious and dangerous propensities, provided you find from a preponderance of the evidence she had such vicious and dangerous propensities, or knowledge or notice to an employee of the vicious and dangerous propensities of said mare over which he had supervision and control at and prior to the accident, would be notice to the defendant company, and it is not necessary that such knowledge or notice be established by direct evidence, if you find from a preponderance of the evidence that such general manager or employee had such knowledge or notice." The defendant contends that there is no evidence

to show that any employee having charge of the mare had notice of any vicious disposition on her part, and that so much of the instruction as tells the jury that notice to such employee would be notice to the defendant is erroneous. The barn boss, Homan, and his helper, McCorley, were called as witnesses for the plaintiff, and were examined as to their knowledge concerning the character of the mare. Mr. Homan, after testifying to having said he did not "think it was a lady's horse to drive," admitted that such remark was made in a conversation with Mr. Urquhart in which the latter had told him of some trouble that his wife had with the mare. Mr. McCorley, being asked if he had heard of the mare running away prior to the accident of the plaintiff, said: "I heard it in this ear, and let it go out the other. I didn't pay any attention to it." He afterwards stated that he heard it from a stranger who had been drinking, and, being examined by defendant's attorney, stated that it was after the accident of plaintiff. Considering that these witnesses, though called by the plaintiff, were evidently hostile to her, and made the slight admissions above quoted with reluctance, we cannot say there was no evidence to justify the giving of the instruction complained of.

4. The defendant complains of the use of the word "may" in the following taken from one of the instructions given by the court on its own motion: "If the plaintiff has established these facts by a preponderance of the evidence, then the plaintiff would be entitled to recover such damages as she may have received by reason of the injuries complained of, not exceeding the sum of $2,000." A charge which allows damages for the pain and suffering which plaintiff *may* endure hereafter is erroneous, as allowing the jury to go into the field of mere probability. *Nixon v. Omaha & C. B. Street R. Co.*, 79 Neb. 550. Used concerning a past transaction, the word is not capable of such a construction. To speak of such suffering as one may endure in the future is to introduce into the estimate an element of conjecture and uncertainty which is not

at all involved in speaking of the damages one may have sustained in the past. The amount of the latter cannot, under any construction of the language used, exceed the damage which has actually been sustained. The trial judge, not being permitted to assume that the plaintiff had suffered any damage, used the word "may" to express the possibility of the existence of such damages, which were limited by the amount that she had already experienced, and therefore no element of probability was included. We think the rule laid down in *Nixon v. Omaha & C. B. Street R. Co.*, has no application to the case at bar, and there was no error in the use of the word "may" in the instruction complained of.

5. Finally, the defendant complains of the seventh instruction given by the court on its own motion, on the ground that, after instructing the jury that, if it finds for plaintiff, to award her the amount of the pecuniary loss she has sustained by being unable to work, it adds that "she is also entitled to recover on account of bodily pain and suffering," without limiting the latter to such bodily pain and suffering as is caused by the injury. The defendant argues that this instruction authorizes the jury to give damages for pain and suffering without reference to whether the same were established by the evidence or caused by the injury. The instruction is in the matters complained of too general. It is right as far as it goes, but not sufficiently explicit. It falls into that class of instructions where the charge does not necessarily mislead the jury, but where, from want of particularity, there is danger that it may do so. In such cases "there is no ground of error, unless the appropriate complementary instruction was requested and refused." 2 Thompson, Trials, sec. 2346; *Republican V. R. Co. v. Fellers*, 16 Neb. 169; *Sioux City R. Co. v. Brown*, 13 Neb. 317. This case furnishes an illustration of the reason for the rule. The attention of the court and counsel was directed to the question whether the evidence tended to show the dangerous character of the horse, or whether notice of

her vicious disposition could be imputed to the plaintiff. A large number of instructions were prepared and presented by the defendant upon these points, but no suggestion was made to the court upon the element of damages, nor was the deficiency of instruction numbered 7 in any way pointed out. It is the duty of counsel "to give attention to the charge of the judge, and if, in their opinion, it omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate supplemental instructions; and where they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in appellate court." 2 Thompson, Trials, sec. 2341.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

FRED YEOMAN V. STATE OF NEBRASKA.*

FILED MARCH 19, 1908. No. 15,452.

1. **Criminal Law:** INSTRUCTIONS. When his attention is called to that point, it is the duty of a trial judge, in a criminal case, to instruct the jury concerning the presumption of innocence to which the defendant is entitled, and he is not excused from so doing because an instruction presented by the defendant is improper in form. In such case he should modify the instruction by eliminating the objectionable portion thereof, or prepare and submit to the jury a proper instruction on his own motion.

2. ———: ———. If, in a criminal case, the trial judge gives the jury an instruction which is technically correct, but couched in

* Rehearing allowed. See opinion, p. 252, *post.*

terms which in the opinion of counsel for the defendant are liable to be misunderstood or misapplied by the jury, it is the duty of such counsel to call the attention of the court to the supposed defect and present a suitable instruction. In default of his so doing the defendant cannot complain of the defect.

3. ———: INFORMATION: SEVERAL COUNTS: SENTENCE. Where the different counts in an information charge the same offense, in case of a conviction on each count the rule is to render a single sentence upon all the counts for the one entire offense.

4. Intoxicating Liquors: INFORMATION: EVIDENCE: VARIANCE. In an information charging the unlawful sale of intoxicating liquors, a count alleging a joint sale to two persons named is not sustained by evidence showing separate sales to each of them.

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

J. L. McPheely, for plaintiff in error.

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

CALKINS, C.

The defendant was charged in an information containing 15 counts. The first 13 counts were for selling intoxicating liquor without license to divers persons on divers dates. The fourteenth and fifteenth counts were for having such liquor in his possession for the purpose of unlawfully selling the same, the fourteenth on the date of December 22, 1906, and the fifteenth on the date of May 3, 1906. The jury found the defendant guilty upon counts 3, 4, 8, 9, 14 and 15, and not guilty as to the other counts contained in said information. The court sentenced the defendant to pay a fine of $500 each on the fourth and fourteenth counts, and suspended sentence on the conviction had upon counts 3, 8, 9 and 15. From this judgment the defendant prosecutes error.

1. The defendant prepared and presented to the court an instruction in the following form: "At the commencement of this trial the defendant is presumed to be inno-

cent, and that presumption of innocence is just as strong as any other fact which may be proved in the case. And this presumption of innocence should be considered by you in your deliberations until overcome by evidence so strong and conclusive as to convince you, beyond a reasonable doubt, of the guilt of the defendant." This instruction the court refused to give; and the jury was not otherwise instructed by it on the presumption of innocence. A defendant charged with a criminal offense is presumed to be innocent, and this legal presumption of innocence should be considered and weighed by the jury as a fact until overcome by evidence sufficient to convince it of his guilt beyond a reasonable doubt. *Garrison v. People*, 6 Neb. 274; *Long v. State*, 23 Neb. 33; *Bartley v. State*, 53 Neb. 310; *McVey v. State*, 57 Neb. 471. For a discussion of this principle, and of the distinction as to the presumption of innocence, the burden of proof, and reasonable doubt, see Lawson, Law of Presumptive Evidence, p. 505 *et seq.*; *Coffin v. United States*, 156 U. S. 432. Had a proper instruction embodying this rule been presented to the court, its refusal to give the same would have constituted reversible error; but the instruction presented by the defendant invaded the province of the jury by informing them that this presumption "is just as strong as any other fact which may be presented in the case." It is exclusively for the jury to say what weight shall be accorded to this presumption of innocence. An instruction which tells it that this presumption is as strong as any other fact is clearly improper, and the instruction offered by the defendant should not have been given in the form in which it was presented.

It has been held by this court that no conviction in a criminal case will be reversed for mere nondirection, where no instructions were requested by the accused. *Gettinger v. State*, 13 Neb. 308. And where the defendant desires instruction upon matters not embodied in the charge made by the court on its own motion, or desires matters contained in such charge to be more specifically

stated, it is his duty to prepare and present the same. In default of his so doing, the failure of the court to direct the jury or to make its own instructions more specific in the matters complained of will not be error. *Hill v. State*, 42 Neb. 503; *Housh v. State*, 43 Neb. 163; *Barr v. State*, 45 Neb. 458; *Edwards v. State*, 69 Neb. 386; *McConnell v. State*, 77 Neb. 773. The language used in some of the foregoing cases declares that it is the duty of the defendant in such cases to prepare and present proper instructions, but in none of the cases above cited was an instruction improper in form presented by the defendant, and the precise question here presented was not before the court, nor has it been presented in any case to which our attention has been directed. The law of the presumption of innocence, like that of reasonable doubt and the burden of proof, is applicable alike to all criminal cases; and the question presents itself whether upon these principles of universal application the judge should not, when his attention is called thereto, instruct the jury, even though the defendant has embodied matter in the instruction by which he challenges the attention of the court, which should be eliminated therefrom before it is given to the jury. The concrete question is whether in this case, when the instruction was presented, the trial judge should not have stricken out the objectionable part, and submitted to the jury the instruction thus corrected, or, having his attention called to the same, have prepared an instruction in his own language covering the point. In civil cases it has been held that to entitle an instruction to be given it must be wholly correct in point of law. 2 Thompson, Trials, sec. 2349. But it is also the rule of law that, unless there is a statute requiring the judge in all cases to give or refuse instructions in the terms in which they are presented to him, it is his right and duty, if they do not conform to his view of the law, to modify them so that they shall state the law correctly as he understands it, and to give them to the jury as thus modified. 2 Thompson, Trials, sec. 2350.

In determining whether the rule that mere nondirection by the trial court is insufficient ground for reversal, unless the defendant has prepared and presented instructions upon the point in question, should be applied to a case where the defendant prepares and presents an instruction which sufficiently calls the attention of the court to the point to be covered thereby, but which should be modified before given, we should look to the reason for the rule. It is said to rest upon the foundation that the facts of the case come to the mind of the judge as matters of first impression, and that it will often be extremely difficult for him, in the short time allowed for a trial before a jury and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand, to come to the court with a fair understanding of the facts which will probably be proved, and with a full knowledge of the law applicable to those facts. It is therefore their duty to give attention to the charge of the judge, and, if in their opinion it omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate suppletory instructions. And, where they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in an appellate court. 2 Thompson, Trials, sec. 2341. It is equally as clear that the reasons for the rule apply to all those questions which are peculiar to a particular case, as that they do not apply to those questions which are common to every case. Concerning the former it is well said that the facts must come to the judge as matters of first impression, and that counsel are presumed to come to the court with a fair understanding of the facts and a full knowledge of the law applicable thereto. In the latter, such a presumption would be unfounded, and usually untrue. Concerning the general principles applicable to

every criminal case, the judge should, and he usually does, come to the trial better equipped than counsel. We therefore conclude that the rule in question, though highly salutary in the cases to which it has been applied, does not embrace the case we are now considering; that it is the duty of the trial judge in a criminal case, when his attention is directed to the law on the presumption of innocence, to charge the jury thereon; and he is not excused from so doing by the fact that in the instruction presented by the defendant he asks more than he is entitled to. In such case, the trial judge should modify the instruction by eliminating the objectionable portion thereof, or should prepare and submit to the jury a proper instruction on his own motion. His failure to do so is reversible error.

2. One of the instructions given by the court upon its own motion was as follows: "The court instructs the jury that in criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence, a conviction can be had only when the jury are satisfied from a consideration of all the evidence of the defendant's guilt beyond a reasonable doubt. That rule applies not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed by the accused to justify or excuse the act charged." It is contended that this instruction shifted the burden of proof from the state to the defendant as to any distinct, substantive defense which might be interposed by the accused to justify or excuse the act charged. A casual reading of the instruction might leave the impression that it was to be so construed; but a more critical study shows that it is not susceptible of that construction. Our attention is called to the circumstance that this instruction is taken almost word for word from paragraphs numbered 1 and 2 of the syllabus in *Gravely v. State,* 38 Neb. 871, and it is argued by the state that it therefore has the approval of the court. It does not follow that a

syllabus approved by the court as such is necessarily approved by the court as an instruction to a jury. It is desirable that the language used in an instruction should be adapted to the understanding of the body to which it is directed, and it should be as clear as possible. It is not to be expected that a judge, however learned and able he may be, will always use language that is incapable of being misunderstood. If he submits an instruction which is technically correct, but couched in terms which in the opinion of counsel for the defendant are liable to be misunderstood or misapplied by the jury, it is the duty of such counsel to call the attention of the court to the supposed defect and present a suitable instruction covering that branch of the case; and, failing so to do, the defendant cannot afterwards complain of the defect. This is within the rule discussed in the first paragraph of this opinion.

3. The third count of the information charged the defendant with selling to A. M. Simpson on May 3, 1906, without having procured a license therefor, two glasses of whiskey; and the fourth count charged the defendant with having on the same day sold to the same person a half pint of whiskey. The testimony of Mr. Simpson shows that he went to defendant's place of business on May 3, 1906, and purchased two glasses of whiskey, which he drank, and a half pint of whiskey, which he carried away in a bottle, for the whole of which he paid at one and the same time 45 cents. There can be no question but that this was a single transaction, and it cannot be split into two distinct offenses. The attorney for the state takes the position that it is not necessary to consider this question, since the judge sentenced the defendant upon one of these counts only, suspending sentence as to the other. The effect of a suspension of sentence upon one count, when the defendant is convicted upon several, was not discussed, and will not be considered. It is enough to say, for the guidance of the court in a future trial, that, where the same offense is charged in different counts,

there should be but one sentence. *In re Walsh,* 37 Neb. 454.

4. The eighth count of the information charged the defendant with the unlawful sale of intoxicating liquor to W. S. Robbins and Gilbert Phillips. The evidence tending to sustain this charge shows that the two parties together went to the defendant's drug store, where Phillips ordered two drinks of whiskey, of which he drank one and Robbins the other, Phillips paying for both. After this Robbins ordered two drinks, of which he drank one and Phillips the other. Robbins also ordered a half pint of whiskey, for which he paid, together with the two drinks which he had ordered. It is contended that this does not show a joint sale to the two parties, but a separate sale to each of them, and we must confess that the contention seems to us well grounded. Tested by any of the rules of law relating to the joinder of parties or of actions, each of these was a separate transaction. Suppose, instead of being a cash transaction, the liquor had been purchased on credit, and the parties had left when the first transaction was completed, could the vendor have maintained a joint action against the two parties? Or, suppose that Phillips had paid for the drinks ordered by him, and Robbins had made his purchase on credit, is it not plain that the only action the vendor could bring would be against Robbins? The proof fails to show a joint sale to these parties, and the jury should have been so instructed.

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

FAWCETT and ROOT, 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.

The following opinion on rehearing was filed October 8, 1908. *Former opinion as modified adhered to:*

1. **Criminal Law**: ILLEGAL SALE OF LIQUORS: PRESUMPTION OF INNOCENCE. A defendant, when on trial charged with the crime of selling intoxicating liquor without a license, is presumed to be innocent until such a time as the evidence establishes his guilt beyond a reasonable doubt, and he is entitled to have the jury so instructed.

2. ———: ———: ———. A person charged with the keeping of intoxicating liquors for the purpose of unlawfully selling or disposing of the same, where such liquor is found in his possession, is not entitled to the presumption of innocence which usually surrounds the defendant in a criminal prosecution, because the statute makes such possession presumptive evidence of a violation of ch. 32, Ann. St. 1907, regulating the license and sale of intoxicating liquors in this state.

3. ———: REVIEW. The supreme court may reverse a judgment of the district court, in a criminal case, in part and affirm it in part, where the legal part is severable from that which is illegal.

4. **Judgment Modified**. Former judgment herein modified and adhered to.

BARNES, C. J.

By our former opinion in this case, *ante*, p. 244, the judgment of the district court was reversed for a failure to instruct the jury as to the presumption of innocence which ordinarily surrounds the accused in a criminal prosecution.

It is contended by the state that the failure to instruct the jury on that point was error without prejudice, because two of the fifteen counts contained in the information charged the defendant with the crime of unlawfully keeping or having in his possession certain intoxicating liquors for the purpose of unlawfully selling or disposing of the same. It is further contended by the attorney general, on whose application the rehearing was granted, that in any event the judgment of the district court should be affirmed in so far as it relates to the fourteenth count

of the information, because as to that count the ordinary presumption of innocence is supplanted by that provision of the statute which declares that the possession of such liquors shall be presumptive evidence of a violation of the chapter regulating the license and sale of malt, spirituous and vinous liquors in this state. We may say at the outset that we deem the state's first contention unsound; for as to all of the charges of selling intoxicating liquors without a license the defendant was presumed to be innocent, and this presumption was sufficient to acquit him until the evidence established his guilt beyond a reasonable doubt. Therefore we are still of opinion that the district court erred in refusing to instruct the jury on that point as requested by the defendant. Moreover, we approve of all that was said in our former opinion on that subject, and adhere to so much thereof as reverses the judgment of the district court on the charges for selling intoxicating liquors without a license.

As to those counts which charge the defendant with keeping and having such liquors in his possession with the intent and for the purpose of unlawfully selling and disposing of them, we are satisfied that a different rule should prevail. The statute clearly provides that, when such liquors are found in the defendant's possession, the presumption of innocence to which he would ordinarily be entitled must give way, and he is presumed to have violated the chapter regulating the license and sale of intoxicating liquors, unless he can satisfactorily explain such possession. Therefore as to those counts he was not entitled to the instruction requested. We may also say, in passing, that the failure of the court to instruct the jury as to the statutory presumption in such cases was error of which the prosecution alone could complain. So far as we are able to ascertain, the record is without error as to the fourteenth and fifteenth counts of the information upon which the defendant was convicted.

This brings us to the question of our power to reverse the judgment of the district court in part and affirm it

in part. It is with some hesitation that we have reached the conclusion that this may be done. In 12 Cyc. 937, it is said: "The appellate court may reverse a judgment of a lower court as to part and affirm as to part, where the legal part is severable from that which is illegal." This rule, we find, is supported by the decisions of the courts of last resort in many of the states, and it also appeals to sound reason. Now, in the case at bar, each count of the information charges the defendant with a distinct and separate crime; the verdict specifically responds to each of said counts, and a several, separate and distinct judgment appears to have been pronounced upon each of the separate findings of the jury as expressed in their verdict. Therefore a reversal of the judgment of the trial court on the several charges of selling intoxicating liquors without a license should have no effect upon the sentence based on the fourteenth count of the information, which charges the defendant with keeping and having intoxicating liquors in his possession for the purpose of unlawfully disposing of them, and on which the jury found him guilty. We are therefore of opinion that as to that count the judgment of the district court should be affirmed, and to this extent our former judgment should be modified.

For the foregoing reasons, the judgment of the district court based on the fourteenth count of the information, requiring the defendant to pay a fine of $500, is affirmed, and our former opinion, as thus modified, is adhered to.

JUDGMENT ACCORDINGLY.

PLATTE COUNTY BANK; JOHANNA REGAN, ASSIGNEE, APPELLEE, v. MICHAEL J. CLARK ET AL., APPELLANTS.

FILED MARCH 19, 1908. No. 15,087.

1. Appeal: MOTION FOR NEW TRIAL: REVIEW. Where special findings are in irreconcilable conflict with a general verdict, the party relying upon that verdict may, during the term, and within three days of the return of those findings, move the court to vacate the special findings, and for judgment on the general verdict, and, upon the overruling of his motion and the entry of a judgment on the special findings, may, within three days, and during the term, move the court to vacate the last recited order, and thereby entitle himself to a review in this court of all the questions presented to the trial court in his motion to set aside the special findings, and this independent of whether or not the last motion was filed within three days of the return of the verdict.

2. Judgment: REVIVOR: PLEA OF PAYMENT. In a proceeding to revive a dormant judgment, where the judgment debtor pleads payment, a presumption of payment arises, and the burden is upon the judgment creditor to rebut that inference.

3. ———: ———: ———. Unless some witness having knowledge of the fact testifies to the nonpayment of the dormant judgment, then it is incumbent on the judgment creditor to rebut that presumption by proof of some fact or circumstance, the legitimate tendency of which is to make it more probable than otherwise that payment has not in fact been made.

4. Evidence in this case examined, and *held* not to repel the presumption that the judgment has been paid.

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

A. M. Post and *M. Whitmoyer,* for appellants.

H. W. Pennock and *C. J. Garlow, contra.*

ROOT, C.

This was a statutory proceeding to revive in appellee's name a judgment recovered by the Platte County Bank in the county court of Platte county in 1888 against ap-

pellants herein, and later transcripted to the district court. Appellee's title is based on an alleged assignment of the judgment by the bank to H. H. Bulkley, an assignment by Bulkley to Michael Regan, appellee's late husband, and an assignment of the judgment to her by the county court of Douglas county in the settlement of her husband's estate. Michael Regan resided in Platte county in 1887, when he changed his residence to Douglas county, where he died intestate in 1896. Appellants, in resisting the revivor proceedings, severally denied that the judgment had been assigned to, or was owned by, Michael Regan; denied that appellee ever acquired title to said judgment; alleged appellee was not the real party in interest; that there was a defect of parties defendant; and alleged that the judgment had been fully paid and satisfied. The issues were submitted to a jury, to which were given two special interrogatories as well as general verdicts. One interrogatory was whether, from the evidence, the jury found that the judgment at the time of the trial was unpaid; and the other whether Mrs. Regan was the owner thereof. To each question the jury returned an affirmative answer, and also a general verdict in favor of appellants. The day the verdict was returned appellants filed a motion to set aside the special findings and for judgment on the general verdict, and appellee on the same day moved the court to set aside the general verdict and for judgment on the special findings. Eighteen days thereafter the court overruled appellants' and sustained appellee's motion, and rendered an absolute order of revivor of the judgment. Two days thereafter appellants filed a general motion for a new trial, which was overruled.

1. Counsel for appellee insist this court cannot consider the assignments of error because, it is said, a motion for a new trial was not filed by appellants within three days of the rendition of the verdict, as required by section 316 of the code. We cannot agree with counsel. Appellants requested the court to vacate the special find-

ings, and in that motion assigned every ground essential for a review in this court of the district court's alleged errors in so far as they relate to those findings. It is immaterial whether this application was indorsed as a motion for a new trial, or to set aside the special findings. It presented to the trial court appellants' claim that the evidence did not sustain the findings; and that the findings were contrary to law and the instructions of the court. *Goode v. Lewis,* 118 Mo. 357. Appellants were not required to include in their motion a request for the vacation of the general verdict in their favor. Upon the trial court's vacation of the general verdict, the appellants were prejudiced, not by the verdict, but by the *decision* of the trial court that the general verdict should not stand. Thereupon appellants, within two days of the decision, filed a general motion for a new trial, which searched the record and brought within its scope every erroneous act of the court from the inception of the proceedings down to and including the final revivor of the judgment. The Nebraska cases cited by appellee in nowise militate against the practice pursued by the appellants. They proceed in conformity with the language of the code that the motion for a new trial must be filed within three days after the verdict or *decision* was rendered. This appellants did, and they are properly here with the entire record for our inspection.

2. Appellants assert that appellee is not the owner of the judgment. It seems that Michael Regan, appellee's husband, on October 2, 1890, received a written assignment of the judgment signed by H. H. Bulkley; an assignment from Stevenson to Bulkley of a judgment, entitled "Stevenson against the appellants," was introduced in evidence, and, if that were the only evidence of Bulkley's right to assign to Regan, we might hold with appellants on this point. However, Bulkley's testimony was taken by deposition, and therein he swears positively that he was cashier of the bank in 1890; that the bank

assigned the judgment to him to hold as trustee for the corporation; and that he, in his capacity as trustee, sold and assigned the judgment to Regan, who paid the bank therefor. The witness was not cross-examined, and we hold the evidence sufficient to sustain a finding that Regan owned the judgment at the time of his death. Upon appellee's discharge as administratrix of the estate of her deceased husband, the county court of Douglas county found: "That the personal property in said estate should be assigned over to Johanna Regan, widow of said deceased, as her assignment of personal property under the statute." In the judgment following the finding, the court assigned to the appellee "the personal property set out in said final account, the same to be by her held for her own sole and individual use and benefit, and as her own private property." It was admitted by counsel in the trial of the case that the litigated judgment was not referred to in the account of the administratrix. However, it seems to have been conceded by the actions of the sole heir, Hanora Regan, that the judgment belonged to her mother. Miss Regan appeared and testified for the appellee in this case, and the evident construction given the decree of the county court by the sole persons interested therein will be respected by us, as it was by the trial court.

3. The court properly instructed the jury that the burden was on the appellee to establish the fact that the judgment had not been paid and satisfied. A careful reading of the record convinces us that the evidence does not sustain the finding that the judgment is unpaid. Eighteen years intervened between the recovery of the judgment and the commencement of the proceedings to revive. Presumptively the judgment was paid and satisfied. *Garrison v. Aultman & Co.*, 20 Neb. 311. The judgment was the property, first, of the Platte County Bank, a corporation. Later Bulkley became assignee thereof, and he in turn assigned it to Michael Regan October 2, 1890. Regan departed this life in December,

1896, and by operation of law the title vested in his daughter, Hanora, and his wife, appellee, subject to the right of the county court to assign it to the widow under section 176, ch. 23, Comp. St. 1897. In December, 1897, the widow became possessed in her own right of the judgment. Manifestly no one of the various owners of this judgment would be in a position to know and to testify that during its history it had not been paid or satisfied. Bulkley, assistant cashier of the Platte County Bank from 1886 to 1890, and cashier from 1890 to 1893, testifies that he does not remember that anything was paid on the judgment prior to the assignment to Michael Regan in October, 1890. On that date Michael Regan released the lien of the judgment so far as it related to a specific tract of land, but what, if any, consideration he received therefor, or at whose request it was done, the record is silent. This act may be taken as an indication of payment, or that Regan was thereby asserting dominion over the judgment, and that it had not been paid. Hanora Regan testifies she attended to most of her father's correspondence, and in a general way was familiar with his business, and that, so far as she has knowledge, the judgment was not paid; that she attended to the business of the estate while her mother was administratrix, and that the judgment was not paid during the administration thereof. It is conceded that execution was never issued on the judgment. There is an entire lack of testimony to show any such relation between the several owners of the judgment or any of them on the one hand, and the judgment debtors on the other, as would tend to retard collection by process of the court; nor is there any evidence to show that the judgment creditors are, or ever were, insolvent. There is not a hint to explain the lethargy of the bank, of Bulkley, and of Regan during the past 18 years. None of the books of the bank were produced to show the state of account with Clark and others, nor any sufficient explanation to account for their absence. Hanora Regan, who says to the best of her knowl-

edge the judgment was not paid her father, does not claim to have had any knowledge of the existence of this judgment during her father's lifetime, and upon the administration of that parent's estate the judgment was not listed or considered. Her testimony is of but little, if any, greater value than the negative testimony of any stranger to the transaction. Not an admission, express or implied on the part of the appellants, that the debt is unpaid is shown; not an excuse or reason given for this long delay in attempting to collect the judgment. In the meantime the original judgment creditor has gone out of business, one of the mesne assignees has removed from the state, one is dead, and the present owner does not testify because of her mental condition. Finally, one of the judgment debtors has become incompetent. There being no individual, or collection of persons, having actual knowledge of the fact, to appear and testify that the debt has not been paid, it seems to us the presumption of payment can only be rebutted by proof of some intervening fact transpiring within a reasonable time, such as a payment of part of the claim, an admission on the part of those to be charged that the debt is unpaid, proof that the debtors have been insolvent and unable to pay, or by proof of some other fact or circumstance, the legitimate tendency of which is to make it more probable than otherwise that the judgment has not in fact been paid. *Tilghman v. Fisher,* 9 Watts (Pa.), 441; *Grantham v. Canaan,* 38 N. H. 268; *Beekman v. Hamlin,* 23 Or. 313; *Gregory v. Commonwealth,* 121 Pa. St. 611. We do not consider that the legitimate tendency of the evidence presented is sufficient to overcome the presumption of payment.

For the reasons stated, we think the trial court erred in overruling appellants' motions and in sustaining the motion of appellee, and we recommend that the judgment of the district court be reversed and a new trial granted.

CALKINS, C., concurs.

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.

P. A. THOMPSON, APPELLEE, V. FRED FOKEN ET AL., APPELLANTS.

FILED MARCH 19, 1908. No. 15,118.

1. **Homestead, Conveyance of.** A homestead in Nebraska cannot be aliened or incumbered except by a written instrument executed and acknowledged by both husband and wife, and that execution must be the conscious, voluntary act of each spouse.
2. **Specific Performance: HOMESTEAD: EVIDENCE.** Evidence in this case examined, and found to be insufficient to establish the execution of a contract by the wife or to support the decree of the district court.

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

Bernard McNeny, for appellants.

L. H. Blackledge and *A. D. Ranney, contra.*

ROOT, C.

Action for specific performance of an alleged contract for the sale and conveyance of defendants' homestead. Decree for plaintiff, and defendants appeal.

It seems that defendants are husband and wife, and have resided for 13 years upon the quarter section of land in controversy. The record does not disclose whether the legal title was in the husband or wife, although the wife testified the land was hers, and the husband said "the farm belongs not to me." Defendants owned no other land, and its homestead character is clearly established. The husband is a cripple, and desired to sell

the land and move to town, while the wife objected to parting with the home. Defendants are Germans, although they speak the English language. November 18, 1905, Fred Foken, the husband, met John C. Rose, who is in the employ of one Simpson, and told Rose, he, Foken, wanted to sell his farm. Whereupon Rose made out a memorandum in a little vest pocket-book, and the writing was signed by Foken, and is as follows: "Nov. 18th, 1905. I, Fred Foken, list my farm for sale, the N. E. ¼ sec. 3, Town 3, Range 10, Webster Co., Neb., for sale for $4,100, and will pay $150 commission if sold by R. A. Simpson. (Signed) Fred Foken. R. A. Simpson, by John C. Rose, Agent." Rose made a deal with plaintiff, and on the 20th of November appeared at the Foken farm with a written contract, wherein Foken and wife purported to agree to sell the farm to plaintiff for $3,950, and Thompson to purchase at said price; $50 to be paid down, $150 December 1, 1905; $800 March 1, 1906, and remainder to be paid March 1, 1911. As a result of the conference the writing was signed by Fred Foken, and the wife's name was first attached to the contract by Rose, and later signed thereto by the husband. Rose, who is a notary public, affixed an acknowledgment to the contract. The details of the transaction at the farm are not agreed to by those present. It seems to be admitted that defendants said they would not sell for $3,950, and that the husband insisted he must receive $4,000. Rose gave his personal note for $50 to make up the deficit. Rose says the defendants were satisfied, and that the wife specially directed her husband to sign her name to the contract after he himself had signed it. Both defendants most emphatically deny this statement, and say the wife absolutely refused to sign the contract. She says: "Q. Did they ask you to sign this contract? A. Yes, sir. Q. You didn't see it? A. No. Q. Did they ask you to sell the land? A. No. Q. What did they say to you? A. Nothing, but sign him. Q. They said for you to sign him? A. He asked me to sign him. Q. Who said that?

A. John Rose. Q. What did you tell him? A. I wouldn't do it. Q. You told him you wouldn't do it? A. Yes, sir." The husband said: "Q. Did you talk with your wife about selling it? A. Yes; but then she would not allow me. Q. Did you tell Rose that she would not allow you? A. Yes; I told Rose to talk with her, the place belongs not to me. I couldn't sell him. He got to ask her, and he would not do it and drove off. Q. What did your wife say to Rose about your signing her name to the agreement to sell the place? A. 'You can write so much as you want, but never I sign it,' and she went out the door. Q. Why did you sign her name if you knew she did not want you to? A. 'John,' he says to me, 'you write her name,' and he wrote her name first, and then he strike them." Rose says that the only difference between himself and the defendants was over the $50, for which he gave his note, and further: "Q. And you say Mr. Foken signed her name to the contract? A. Yes, sir. Q. And he signed at her request? A. Yes, sir; he signed at her request. Q. State what her language was. A. Well, she says, after he had signed both contracts, she stood right close to him, at the stove, and I asked her to sign. She says to him, calling him by name, she said, 'You sign my name to both contracts;' and he said, 'You had better sign yourself'; and she said, 'No; sign both of them; it will be all right.' Q. Did she say, 'Sign by mark'? A. No, sir. Q. You started to sign her name? A. Yes, sir; I started to, but I marked it out. Q. And then Mr. Foken signed it? A. Yes; Mr. Foken signed her name." George Harral, an insurance adjuster, accompanied Rose, and was called in to witness the contract, and he says that, when Mr. Rose asked Mrs. Foken to sign the contract, she said: "Why, Mr. Foken can sign it"— and motioned for her husband to sign, which he did. He says he does not understand the German language, and all the talk was in German except a few words, but he remembers the wife said in the English language: "You sign the contract." The contract, plaintiff's check for $50 and the Rose note were

taken by the wife to Blue Hill and placed in a bank for plaintiff within two days, and defendants have not received or used any of the consideration for the contract. Plaintiff has made timely tender in cash, note and mortgage of the deferred payments. A tenant testified Mrs. Foken told him not to nail boards on the barn as they would lose them, and "everything that wasn't nailed wouldn't go with the place." There is not a scintilla of evidence to show that the contracts were read over to the defendants. Rose said he told them he had sold their farm for $3,950 or $4,000, and $50, or $4,100 and $150 commission. He did not tell them that $2,850 of the purchase price would not be paid for a number of years and would bear but 6 per cent. interest; in fact, he appeared to be devoting his entire energies to securing defendants' names to the writing. The evidence establishes that $4,000 was the fair value of the land in November, 1905.

Section 4, ch. 36, Comp. St. 1905, entitled "Homesteads," is as follows: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Section 681*a* of the code directs us to review the record and determine appeals in equity, and reach an independent conclusion as to what finding or findings are required under the pleadings and evidence, without reference to the conclusion reached in the district court. "Specific performance is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court." *Clarke v. Koenig*, 36 Neb. 572. The contract must be unambiguous. An unconscionable price, any circumstances of overreaching, misrepresentation, or suppression of the truth, will justify a court in refusing specific performance. *Friend v. Lamb*, 152 Pa. St. 529, 34 Am. St. Rep. 672. In the instant case the testimony is not so conclusive that the contract was executed and acknowledged by the wife as that in our judgment it should be enforced by a decree for

specific performance. In fact, we cannot say the preponderance of evidence is in favor of plaintiff on this issue. It is conceded the wife did not herself sign the contract. It is admitted the husband signed her name thereto. Rose says Mrs. Foken told her husband to sign for her. Both husband and wife deny this fact. Harral, who seems to be disinterested, does not say the wife told the husband to sign her name, but that he could sign "it"; whether the contract or her name is not plain. Harral could not understand the language spoken by the parties, except as they temporarily lapsed into the use of English, and it seems incredible that the wife should have spoken in that interview in Harral's presence only those four words in English that would tend to support Rose in his claim. Rose, it will be observed, first signed Mrs. Foken's name to the contract. He says he thought he heard her say "you" sign it, and started to do so, when it occurred to him the signature would not be legal. Fred Foken's statement that he signed his wife's name to the duplicate contracts at the request of Rose seems reasonable, and supported by a preponderance of the evidence. The words, "wife's name signed by husband at her request in the presence of above witnesses," are written on the margin of the contract that was filed for record, but they do not appear on the duplicate left at the Foken home, so they were clearly an afterthought. Whether added before or after the instrument was recorded the record does not disclose. The act of the husband in signing his wife's name to the contract at the request of John Rose would not bind any one, and it may be doubtful whether it would bind her homestead if signed in her presence and upon her verbal request. We do not overlook *McMurtry v. Brown,* 6 Neb. 368, cited by plaintiff. In that case we find a statement in the syllabus and opinion to the effect that, if a deed is signed by an agent in the principal's presence in the name and upon the request of the principal, it is the deed of the principal. The real question in that case was whether a wife might give a written

power of attorney to her husband so as to empower him thereby to execute mortgages and deeds in her name binding upon her and her estate, and that question was answered in the affirmative. The report does not disclose that a single one of the various instruments referred to in that case were signed by the husband in the wife's name with none other than verbal authority for the act; nor was the question of homestead involved in any of the transactions. It is held by respectable courts, and in opinions logically reasoned, that a conveyance of a homestead signed by the husband for himself and by the husband for his wife, acting under a power of attorney for her, is void, both as to husband and wife, as not being that necessary evidence of the active consent of each mind to the disestablishment of the home. *Keeline v. Clark*, 132 Ia. 360; *Wallace v. Travelers Ins. Co.*, 54 Kan. 442; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316; *Gagliardo v. Dumont*, 54 Cal. 496.

The homestead is a favorite of the law. It is intended as a home, not only for the husband and wife, but their children as well. It is the policy of the courts to frown upon all attempts to secure title thereto, except the vendee brings himself clearly within the letter of the law. *Bird v. Logan*, 35 Kan. 228; *Warden v. Reser*, 38 Kan. 86. This we do not believe plaintiff has done.

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

FAWCETT 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 is dismissed.

REVERSED AND DISMISSED.

A. L. PATRICK, APPELLEE, V. NORFOLK LUMBER COMPANY ET AL., APPELLANTS.

FILED MARCH 19, 1908. No. 15,124.

1. **Pleading:** NAME OF PLAINTIFF. In an action on account, the plaintiff should sue in his Christian name.
2. ———: OBJECTIONS TO EVIDENCE. In an action on account, defendant cannot, by objecting to the introduction of evidence, take advantage of the fact that plaintiff has not set out in the petition tiff should sue in his Christian name.
3. **Sales:** WARRANTY. If posts are sold by a particular description, such description is part of the contract of sale, and does not constitute an implied warranty of quality.
4. ———: WAIVER. E. purchased from P. a car-load of lime, plaster and cement, and paid therefor about six weeks after its receipt. Thereafter E. ordered a car-load of cedar posts from P., giving in his order the numbers and dimensions of the posts desired. A car loaded with posts varying somewhat in size and number from the order was delivered by P. to E., who received the same without objections, and sold the greater part thereof, making no complaint to P. that the posts did not comply with the specifications in the order. About 50 days after the receipt of the posts E. claimed to P. there was a deficiency in number and dimensions of the posts, and, after P. placed his account against E. in the hands of an attorney for collection, E. also made claim that the lime purchased was inferior in quality. *Held*, E. had waived the right to object to the quality of the lime, or that the posts in the car were deficient in dimensions or not equal in number of the invoice thereof.
5. **Trial:** DIRECTING VERDICT. Evidence examined, and *held* to justify the court in directing a verdict for plaintiff.

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

Isaac Powers and *Barnhart & Koenigstein,* for appellants.

Mapes & Hazen, contra.

ROOT, C.

Action on account for a balance due on a car-load of posts sold by plaintiff to defendants, and for 40 sacks which contained plaster sold and delivered defendants by

plaintiff. The petition is brief and indefinite in statement. Concerning the posts, the statement is made in the pleading "that on the 22d day of August, 1904, the plaintiff, at the instance and request of the defendants, sold and delivered to the defendants a car of posts, and at the price at which said posts were sold to the defendants said car of posts amounted to the sum of $266.20." A credit of $125.28 is allowed for freight paid by defendants on the car. It is further alleged that plaintiff sold and delivered to defendants a car of lime and plaster, and defendants agreed to return the sacks wherein the plaster had been shipped, but had failed to send back 40 thereof. Defendants Emery & Emery are sued individually and joined with the Norfolk Lumber Company, a firm of which they are the sole members. To this petition the Emerys filed a general denial. The lumber company denied all allegations in the petition not by it expressly admitted; admitted it received from plaintiff a car of lime and a car of posts, but alleged that the lime was not of the kind or quality which plaintiff was to furnish defendant; that said defendant paid for the lime before it had the opportunity to examine and test it, and when tested the lime was found to be inferior in quality, air slacked, and almost worthless; that by reason thereof said defendant was unable to sell or dispose of much of said lime, and that the lime was not worth as much by $45 as was the lime plaintiff was to furnish defendant; that the posts shipped by plaintiff to defendant were not of the kind, quantity and quality which it bought of plaintiff, and that said posts were not worth as much by $50.78 as the kind and quantity so agreed to be furnished to the defendant; alleged it had returned all the sacks received from plaintiff, and admitted itself indebted to plaintiff in the sum of $50. Plaintiff in reply generally denied any inferiority of the posts and lime sold by him to defendant lumber company; alleged that said defendant had ample opportunity to examine and test the lime, and paid for the same without protest, and is estopped to claim damages

therefor; denied that the posts were inferior in kind or quality to those sold defendant, or that they were short in quantity as alleged; alleged that the posts were received in Norfolk October 10, were unloaded, counted and retained by defendants without complaint till November 19, and that defendants thereby accepted the posts, and are estopped from claiming damages therefor. In response to plaintiff's request at the close of the evidence, the court directed the jury to find a verdict for Patrick. Defendants claim three errors: (1) That the court erred in not compelling plaintiff to amend his petition by setting out his Christian name in full; (2) in taking the case from the jury, in that there was evidence of a warranty on the part of plaintiff of the goods sold defendants, and (3) that there was included in the verdict $4 for sacks claimed in the petition not to have been returned to plaintiff by defendants, but actually sent back to him, as shown in the bill of exceptions.

1. Plaintiff should have commenced his action in his proper name, and without pleading to that effect it can hardly be said that A. L. Patrick is that complete name, although it is possible. *Scarborough v. Maybrick,* 47 Neb. 794. However, the defect is a technical one, and to avail defendants must have been properly presented to the trial court. This was not done. Defendants, upon the introduction of evidence, objected thereto on the ground that plaintiff did not have legal capacity to sue. It was held 24 years ago by this court in *Smelt v. Knapp,* 16 Neb. 53, that "an objection to the name in which a plaintiff brings suit cannot be raised by an objection to the jurisdiction of the court. It should be done, if at all, by plea in abatement." In *Davis v. Jennings,* 78 Neb. 462, we again held that objection to a misnomer must be raised by a pleading in the nature of a plea in abatement, and suggested that a motion would serve all purposes. Defendants, not having filed a motion suggesting the misnomer and requesting the court to compel plaintiff to set out in the petition his full name, waived the objection.

2. The petition and the lumber company's answer are alike indefinite, and it is questionable whether the allegations contained in the answer can be said to amount to a charge that plaintiff impliedly warranted the lime or the posts. The parties introduced evidence without much regard to the allegations in their respective pleadings, so it becomes necessary to examine the evidence to ascertain the issues tried. So far as the lime is concerned, the car containing cement, lime and plaster was shipped from Omaha September 15, and received four or five days later. It was paid for without objections on the 31st of October. August 6, 1904, defendants gave plaintiff a written order for a car-load of posts. The order calls for seven different sizes of posts, the exact number of all but those 6½ feet in length, No. 1 splits, is given. The last-named size was to be in number sufficient to fill out the car-load, and, of necessity, might vary according to the size of the car furnished by the railway. The order was for a car-load of posts, and was not severable as to the different classes enumerated in the order. *Pacific Timber Co. v. Iowa W. M. & P. Co.*, 135 Ia. 308. Plaintiff resides in Omaha, where he transacts his business, but he sent the order to a man in Tennessee to be filled, who loaded a car with red cedar posts and shipped them to defendants at Norfolk, where the car was received, as shown by the bill of lading, October 10. Defendant Emery says he thinks the car arrived as late as October 14 or 15, but the waybill is in all probability correct on this point. The posts were unloaded, and Emery says he noticed they did not grade according to his order, whereupon he repiled them, sorting the various sizes each by itself and counted them; that it was then found that, instead of 1,200 posts, as called for in the invoice, there were but 1,096 posts, and they were not of the sizes called for in the order, nor entirely as indicated in the invoice. Plaintiff's suit is for the number and dimensions of posts enumerated in the invoice, which is identified by the shipper Dies. According to the plaintiff, the car-load of posts shipped as

per Dies' testimony would be of the value of $266.20 delivered in Norfolk, and, deducting the freight, $125.28, would leave a balance of $140.92. Defendant Emery insists the deficiency in size and number of the posts would bring the value of the car-load down to $210.42, and, deducting the freight, would leave but $82.14 due plaintiff thereon. Dies says he attended to the loading of the car, and knows it was sealed, and contained the posts in number and size as indicated by his books, a copy whereof he attaches to his deposition. October 31, 1904, defendants remitted to plaintiff for the car of lime, cement and plaster, and in the letter referred to the posts: "We have the R. C. Pts. and will make report and send freight bill in a day or two with remittance." This was 3 weeks after the arrival of the posts in Norfolk, if we take the statement in the bill of lading as correct, and 16 to 17 days thereafter, if we take defendant Emery's testimony as establishing the day the posts arrived there, and after he had transported them to the lumber yard, sorted them over, ascertained the grade and number of the posts, and, of necessity, knew they were neither up to the specifications in his order, nor to those set forth in the invoice. A letter was sent plaintiff by defendant Emery under date of October 20, containing an itemized statement of the number and dimensions of the posts contained in the car from Tennessee, showing a balance due plaintiff of only the $85.14, after payment of the freight bill, and with the statement: "Please send us credit for difference. Would be pleased to have you come and inspect this shipment Norfolk." Mr. Emery says this letter was mailed not later than the day after its date. Plaintiff says he received it November 19, and exhibits the envelope with the Omaha post-office stamp of November 19, which he says inclosed the letter. He replied thereto November 22, refusing to go to Norfolk, and claimed the demand was not made within a reasonable time, nor so as to permit him to verify the claim of shortage, and insisting that defendant must pay as per the invoice. The record is con-

vincing that defendant Emery dated his letter back from November 18 or 19 to October 20, and the rights of the parties with respect to the posts should be settled on the basis that the posts were received October 10, and were retained without objection for 50 days or thereabouts, although any deficiencies in dimensions and numbers of the posts were apparent, and, as a matter of fact, ascertained and known by defendants within a few days after the receipt of the material.

Defendants insist there was a warranty and evidence of a breach thereof sufficient to entitle them to go to the jury. The record is barren of proof of an express warranty. The fact that the order was for a car-load of posts of certain dimensions, and that plaintiff undertook to fill that order, did not create a warranty by plaintiff that the posts would be in number and dimensions to correspond with the direction. But it was a condition precedent to defendants' obligation to receive and pay for the posts that their size and number equalled their order. As said by Mr. Justice O'Brien in *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 137, and quoted with approval by Mr. Justice Bartlett in *Waeber v. Talbot,* 167 N. Y. 48, 82 Am. St. Rep. 712: Words of description "are not considered as a warranty at all, but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obligated to receive and pay for a thing different from that for which he contracted. * * * The tendency of the recent decisions in this court is to treat such words as part of the contract of sale descriptive of the article sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty." We do not say defendants were under any obligation to accept the car-load of posts, and, as the deficiency in the number and size of the posts was not patent without unloading

the car, they doubtless had the right, in the absence of an invoice demonstrating the car-load was not up to their order, to take the posts from the car and count and inspect them, and, upon learning the deviation from the order, had the right to refuse to accept the posts, and in that event should promptly notify plaintiff, or they could waive the difference between what they had bought and the timber sent them. And if without notice or complaint to plaintiff they took the course they did of hauling the posts to their yard, and selling part of them to the trade, for a period of some 50 days, they are without standing in court. *Wacber v. Talbot,* 167 N. Y. 48. In *Roman v. Bressler,* 32 Neb. 240, we held the buyer could not receive corn upon an executory contract, and, after shipment to a distant market, defeat recovery of the contract price on the ground that the grain was of inferior quality. See, also, *Havens & Co. v. Grand Island L. & F. Co.,* 41 Neb. 153; *Hazen v. Wilhelmie,* 68 Neb. 79; *Locke v. Williamson,* 40 Wis. 377; *Northern Supply Co. v. Wangard,* 117 Wis. 624.

In *Buick Motor Co. v. Reid Mfg. Co.,* 150 Mich. 118, 113 N. W. 591, it was held in the sale of machinery there was an implied warranty that the goods were merchantable and reasonably fit for the use intended; and that court further say that the purchaser of goods under an implied warranty has a reasonable time after receipt in which to inspect them, and, on finding defects, he must refuse to accept, or he will be estopped from setting up discoverable defects.

As to the lime, defendant Emery claims he did not know when he paid therefor, that it was air slacked, dead, and of little value, and that he had a right after discovering that defect to recoup his damages. The difficulty in defendant's case is that there is not a particle of proof that the lime did not air slack while in their possession, nor scintilla of evidence to show the lime was at all deficient when it came into their possession. Moreover, the answer says: "It was not worth as much as defendant

agreed to pay and did pay the plaintiff for the quality of lime plaintiff was to furnish defendant by at least $45." In this regard the case parallels *Kessler & Co. v. Zacharias,* 145 Mich. 698, wherein Chief Justice Carpenter said: "It is also contended that error was committed by the trial court in refusing to permit defendant to show that the whiskey purchased by him was not worth what he promised to pay for it. This ruling was also correct. No authority need be cited for the proposition that one is not released from an obligation to pay for property merely because he agreed to pay too much for it." However, the transaction concerning the lime is within the scope of the authorities cited relative to the car-load of posts. The court will take judicial notice of the action of air upon lime. It is also apparent that an examination of the lime at the time of its receipt would have given defendants information that it was unsuitable for use, if that was its condition at that time. Not only was the lime paid for without objection, six weeks after its receipt, but it is undisputed that complaint was not made concerning this material till plaintiff placed his bill for the posts in the hands of Norfolk attorneys for collection.

3. It is claimed that the court should not have directed recovery for the 40 empty sacks referred to in the petition. The direction to the jury was not to find the amount of plaintiff's claim, but merely to find for the plaintiff. Upon the trial of the case plaintiff's attorneys withdrew that item from the jury, and said they would not contend therefor. The amount of the verdict is some cents less than the balance due for the posts, with interest, in accord with the terms of the invoice, so defendants are not bound by a judgment which includes the $4 for non-return of the sacks.

Upon the entire record, we are satisfied the court did not err in directing a verdict. 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.

JOSEPH GUTSCHOW, APPELLANT, V. WASHINGTON COUNTY, APPELLEE.

FILED APRIL 10, 1908. No. 15,476.

Drains: CONSTRUCTION: DAMAGES. One whose land is traversed by a drainage ditch constructed under the provisions of sections 5500-5527, Ann. St. 1907, is entitled to recover the value of the land actually taken therefor, together with special damages, if any, to the remainder of his land caused by the construction of the improvement; but he cannot recover in such proceeding the damages he may have theretofore sustained by reason of the neglect of the county board to keep a previously established ditch free from silt and debris and in a suitable condition to serve the purpose for which it was constructed.

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

H. C. Brome and *E. C. Jackson,* for appellant.

Frank Dolezal, E. B. Carrigan and *W. C. Walton, contra.*

BARNES, C. J.

This is an appeal from a judgment of the district court for Washington county in an action on a claim for damages alleged to have been sustained by the plaintiff in the construction of a drainage ditch in that county. This is the second appearance of the case in this court; plaintiff, who is the appellant, having prosecuted error from a former judgment, which was reversed because of an erroneous instruction as to the measure of damages in such cases. *Gutschow v. Washington County,* 74 Neb. 794. Upon a retrial of the case in the district court a

verdict was returned in favor of the plaintiff for $140, and he prosecutes this appeal.

It is practically conceded by counsel for both parties that the only question presented for our determination is the measure of plaintiff's damages. The facts upon which the principal assignment of error is based are not at all in dispute. It appears that Fish creek was a natural watercourse passing through plaintiff's land and emptying into the Missouri river some three or four miles below his premises. In 1883 the counties of Burt and Washington constructed a drainage ditch from a point in Burt county to an outlet in Washington county, called the "Fish Creek" ditch. No portion of the original ditch was constructed upon the plaintiff's land. It intersected Fish creek north of his northern boundary, and used that creek from the point of its intersection to the Missouri river, which served as an outlet for the water flowing through the ditch. The improvement as thus constructed drained a large tract of wet land situated in said counties, and for a time served the purpose for which it was constructed. For a number of years thereafter the county of Washington made some efforts to keep the ditch free from obstructions; but in time it began to fill up with silt and debris brought down by the flood waters of wet seasons, and a fair preponderance of the evidence shows that not only the ditch, but Fish creek itself, was completely filled up in places, and that part of it where it passed through plaintiff's land had been in that condition for several years prior to March, 1903. At that time, on the petition of interested landowners, the county of Washington entered upon a scheme to cause the part of the ditch situated in that county to be straightened, widened, altered and deepened, and to that end employed an engineer whose plan was ultimately adopted and put in force. The improvement thus determined upon practically followed the old bed of Fish creek from the place where the original ditch had intersected it to a point on the east line of plaintiff's land, from where it was carried to the

east across lands belonging to other people, and again intersected the creek about one mile south of plaintiff's line. The right of the county to determine that the original ditch and outlet were insufficient to accomplish the successful drainage of the territory contemplated was vindicated by this court in the case of *Morris v. Washington County,* 72 Neb. 174.

At the time of the location and construction of the new ditch, as above stated, the bed of Fish creek had become obstructed and filled up, and no longer afforded a channel through which the waters could escape, so that the water coming down from the west and from a stream called North creek, which had originally emptied into the channel of Fish creek, spread out over plaintiff's lands and rendered a considerable quantity of it useless for agricultural purposes, and this condition had existed for several years. When the new ditch was constructed, plaintiff was assessed for special benefits, and 3½ acres of his land were actually taken for the construction of the improvement. His claims, first, for the value of the land so taken; and, second, for special damages to the remainder of his farm which he alleges he has sustained by reason of the improvement. The judgment of the district court upon the last trial awarded him $140 for the land actually taken, and nothing whatever for special damages. At the trial plaintiff introduced evidence tending to establish his contention that the original Fish creek ditch and the channel of that creek and its outlet had become filled with silt and other debris, so that the free passage of water through that outlet, including the waters of both Fish creek and North creek, was thereby obstructed, and the water was caused to spread out upon and greatly depreciate the value of his land; that this was due to the failure of the county to maintain the original ditch and its outlet in substantially the same condition they were at the time of its construction. Having attempted to establish these facts by the introduction of the evidence above mentioned, plaintiff then offered to prove, as a

basis of his claim, the fair market value of his land at the time the new ditch was located, on the assumption that Fish creek was maintained as a natural watercourse, and not filled up with silt and other debris, contending that the difference between such value and its value after the new ditch was constructed was the proper amount of his damages. The court excluded the evidence so far as it was sought to prove the value of the plaintiff's land on the assumption that Fish creek was maintained as a natural watercourse, and in the same condition that it was when the old or original ditch was constructed; and the exclusion of this evidence is the principal error discussed by the briefs and arguments of counsel.

The rule as to the measure of damages in drainage cases arising under the provisions of sections 5500-5527, Ann. St. 1907, was settled on the former hearing of this case. *Gutschow v. Washington County, supra.* It was there held that the plaintiff was entitled to recover the difference between the value of his land at the time the proceedings to construct the improvement were commenced and its value after the same was constructed and in operation, undiminished by any deduction for special benefits. It appears that such was the rule applied by the district court on the last trial of this cause. However, the plaintiff now contends that, because the county failed and neglected to keep the original Fish creek ditch and the channel and outlet of that creek open, and had for many years allowed them to fill up with silt and debris, and remain in that condition to his damage, he should be allowed to recover such damages in this action. This contention cannot be sustained for several reasons, as we shall presently see.

The drainage act, under which the ditch in question was constructed, provides in substance that the lands of the petitioners and others whose lands are specially benefited by the improvement shall be taxed to pay the costs thereof, including damages to landowners by reason of its construction; and it appears that the county is only

chargeable with the expense of its maintenance. To that end it is provided by section 5525, Ann. St. 1907, that the county board may create a ditch fund to be expended for that purpose. This, however, affords no reason why the persons petitioning for, and others having land benefited by, the enterprise should be burdened with claims for damages sustained by reason of the neglect of the county board to keep another ditch or waterway in proper condition to serve the purpose for which it was constructed. Especially is this so when, as in the case at bar, the new ditch serves in a considerable measure to mitigate the evil caused by such neglect. Again, the trial court seems to have taken the position that, even if it was the duty of the county board to keep the old ditch and Fish creek and its outlet cleaned out, and that the failure to do so gave the plaintiff a right either to enforce that duty or maintain an action for damages against the county board because of such neglect, still such right was an independent one, which was not an outgrowth of the new improvement, and could not be maintained or enforced in this action. We are of opinion that the holding of the district court was right on this point; and this view is not in conflict with the provision of the constitution (art. I, sec. 21) that "the property of no person shall be taken or damaged for public use without just compensation therefor."

It appears that the plaintiff was allowed the sum of $140 for that part of his land actually taken for the construction of the new ditch. This seems from the evidence to have been a fair and just amount, and disposes of that element of his damages. While it incidentally appears that about seven acres of the plaintiff's land were cut off by the new ditch from the main body thereof, and may have been rendered inaccessible thereby, still that fact was treated as of no particular significance. No claim for damages was made therefor in the trial court, and no such claim is urged here. As above stated, the jury awarded nothing to the plaintiff for special damages to

that part of his land not taken for the construction of the ditch, and under the circumstances disclosed by the evidence this was undoubtedly correct. Any scheme that would divert a portion of the water from plaintiff's land would to that extent be beneficial, and if we are to measure his damages by comparing the condition of his land immediately before the construction of the new ditch with its condition immediately afterwards, without taking into account his right to have the obstructions removed from the channel of Fish creek and the natural watercourse restored, it is apparent that the plaintiff has no substantial claim for special damages. It seems clear from the evidence that by the construction of the improvement in question plaintiff sustained no such damages, but on the contrary his lands were benefited to a considerable extent thereby.

For the foregoing reasons, we are of opinion that the judgment of the district court is right, and it is therefore

AFFIRMED.

STATE OF NEBRASKA V. WILLIAM W. LEEKINS.

FILED APRIL 10, 1908. No. 15,580.

1. **Information**: DUPLICITY: FORGERY. Forging and fraudulently uttering and publishing the same instrument, if done by the same person, constitutes but one crime, which may be charged in a single count of an information.

2. **Criminal Law**: LIMITATIONS. An information setting forth forgery, and the uttering and publishing of the forged instrument by the same person, in separate counts, charges but a single offense, commonly called "forgery," which falls within the exception contained in section 256 of the criminal code.

3. ———: ———. In such a case, although it appears that the transaction occurred more than three years before the commencement of the prosecution, the so-called second count of the information, which sets forth the fact of uttering and publishing the forged instrument, is not vulnerable to a general demurrer as being barred by the statute of limitations.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *State's exceptions sustained.*

H. A. Lambert, for plaintiff in error.

E. Ferneau, contra.

BARNES, C. J.

At the October, 1907, term of the district court for Nemaha county an information was filed against one William W. Leekins, hereafter called the defendant, containing four counts. The first count charged him with having forged an order for the sale and purchase of certain nursery stock of the value of $150 on the first day of September, 1903, and by the second count he was charged with having, on the same day and at the same time, uttered the forged order by delivering the same to the Titus Nursery Company, thereby obtaining from said company the sum of $30 in money. The third count charged the defendant with forging another order for the sale and purchase of nursery stock of the value of $130 on the 21st of August, 1903, and by the fourth count he was charged with having uttered said order, on the same day and at the same time, by delivering the same to said nursery company, and obtaining from said company thereby the sum of $26 in money. Each of the several counts were sufficient in form and substance, but it appeared on the face of the information that it was filed more than three years after the time when the offenses were alleged to have been committed. For that reason, a demurrer was interposed by the defendant to the second and fourth counts, which was sustained, and the state prosecutes error.

It is the state's contention that uttering a forged instrument is not a crime distinct and separate from that of forgery, and is within the exception contained in section 256 of the criminal code, which reads in part as

follows: "No person or persons shall be prosecuted for any felony (treason, murder, arson and forgery excepted), unless the indictment for the same shall be found by a grand jury, within three years next after the offense shall have been done or committed." The briefs of the parties contain a more or less exhaustive discussion of this matter, but as we read the record that question, so far as it applies to this case, has been fully settled and determined in *In re Walsh,* 37 Neb. 454. That case was an application for a writ of habeas corpus by one Fred Walsh. It appeared that at the May term, 1892, of the district court for Douglas county an information was filed against the petitioner which contained two counts, the first of which charged that the petitioner on the 12th day of April, 1892, in the county of Douglas, unlawfully and feloniously did falsely make, forge and counterfeit a certain bank check calling for the sum of $45.60, with intent to defraud. A copy of the instrument was set out in the information. The second count charged the petitioner with feloniously uttering and publishing, as true and genuine, the said false, forged and counterfeit bank check described and set out in the first count, he at the time knowing the same to be false, forged and counterfeited. The petitioner was arraigned, pleaded guilty, was sentenced by the court upon the first count to confinement in the penitentiary at hard labor for the period of one year from and after the 9th day of May, 1892, and upon the second count a like imprisonment was imposed for the term of one year from May 9, 1893. After the expiration of his first sentence he presented his petition to this court for a discharge on habeas corpus on the ground that the second sentence was illegal and void. The writ was allowed, and, among other things, it was said in the opinion: "There is another reason why the imprisonment of the petitioner was illegal. The information, although it contains two counts, charges but a single offense, yet the accused has been sentenced to two separate terms of imprisonment, one term for falsely making a

bank check, and another term for fraudulently uttering the same instrument. From the information itself it appears that the check described in the second count as having been fraudulently uttered by the petitioner was the same instrument as that described in the first count as having been forged by him. Both acts were parts of the same transaction, and constituted but one crime, and the court had no power to impose separate sentences upon each count." Indeed, it has been often held that where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase of the same offense, they may be coupled in one count. In this case the forging of each of the orders described in the information, with intent to defraud, constituted a distinct offense, and the uttering and publishing of such order by another than the one forging it, with knowledge that the same had been forged and counterfeited and with intent to defraud, would also constitute a distinct and separate offense. For each offense, unconnected with the other and committed by different persons, an information would lie. Yet, both having been perpetrated by the same person, at the same time, they constitute but one offense, for which one count describing the whole transaction would have been sufficient. The mere fact that the transaction was described in two counts in the information cannot avail to charge the defendant with two separate crimes. This rule seems to be supported by *Johnston v. Commonwealth,* 85 Pa. St. 54; *In re Snow,* 120 U. S. 274; *Woodford v. State,* 1 Ohio St. 427; *Hinkle v. Commonwealth,* 4 Dana (Ky.), 519; *Commonwealth v. Eaton,* 15 Pick. (Mass.) 273; *Devere v. State,* 5 Ohio C. C. 509; *State v. Egglesht,* 41 Ia. 574. In *Devere v. State, supra,* the prisoner was indicted in two counts, one charging her with the forgery of a promissory note, and the other with uttering and publishing the same instrument. A verdict of guilty was rendered on both counts, and she was sentenced by the court to confinement in the penitentiary for five years under the

first count, and a like term under the second count; the last term to commence at the expiration of the first. She prosecuted error to the circuit court, where it was held, under a statute relating to forgery almost like our own, that the false making and the fraudulent uttering of the same instrument by the same person constitute a single offense, and subject the guilty party to but one penalty. It is settled beyond question that a demurrer will not lie to a part or a paragraph of an information charging a single offense. The first and second counts of the information in the case at bar charge but one offense, to wit, the crime of forgery, which is within the exception contained in the statute of limitations. Therefore, the district court erred in sustaining the demurrer to the so-called second count; and the same rule applies to the fourth count of the information.

This view of the case dispenses with the necessity of deciding whether the charge of uttering and publishing a forged instrument by one other than the person forging it falls within the exception contained in section 256 of the criminal code, and we decline, at this time, to determine that question.

For the foregoing reasons the state's exceptions are

SUSTAINED.

FORREST ELLIS V. STATE OF NEBRASKA.

FILED APRIL 10, 1908. No. 15,434.

1. **Grand Jury: IMPANELING.** Since the enactment of section 584, criminal code, no grand jury can be lawfully organized, unless its selection and impaneling has been previously ordered by a judge of the district court for the county in which said grand jury is to act.
2. ———: ———. Such order must be in writing and filed with the clerk of the district court on or before the day fixed by law for the drawing of jurors for the term of court at which the grand jury is to appear.
3. ———. *Jones v. State*, 18 Neb. 401, and *State v. Lauer*, 41 Neb. 226, followed.

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

William V. Allen, M. D. Tyler and *Mapes & Hazen,* for plaintiff in error.

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

LETTON, J.

The plaintiff in error was indicted for assault with intent to commit great bodily injury. To the indictment he filed a plea in abatement, challenging the authority of the grand jury which presented the indictment. A demurer to this plea was sustained, exception was taken, a trial upon the charge had, and the plaintiff in error found guilty of a simple assault, from which conviction he has prosecuted error to this court.

It appears from the plea in abatement that no grand jury had been ordered to be summoned for the April, 1906, term of the district court for Madison county; that during the session of the April term an order was made by the court, reciting: "It appearing to the court that a grand jury is required, and there having been no grand jury drawn for service at said term, and there being no grand jury in attendance and it being necessary that a grand jury be called, it is ordered that the sheriff of said county summon from the body of the county without delay 16 good and lawful men," etc. The sheriff, in obedience to the order, summoned 16 persons, who served as grand jurors, and who presented the indictment under which the plaintiff in error was tried and convicted. An amended plea in abatement was also filed, challenging the indictment on account of certain proceedings had before the grand jury, but, in view of the conclusion which we have reached as to the first point presented, it is unnecessary to consider the question raised by such amended plea.

The question for determination is whether the grand jury which found the indictment was legally drawn and summoned. Prior to 1885 all prosecutions for crime in the district courts of this state were begun by an indictment presented by the grand jury. By the provisions of sections 658 to 663, inclusive, of the code, the grand jury was required to be selected from the body of the county by the same officers and in the same manner as the petit jury, and the manner of filling vacancies in either panel, or of summoning a new panel in the event of a failure from any cause of the panel of either grand or petit jury, was provided for by section 664 of the code, or by section 405 of the criminal code. These sections, taken together, provide a complete and orderly method of procedure for the securing of both a grand and petit jury for each term of the district court, and providing for any contingency with regard to vacancies or failures in the panel which might arise in the course of events. But in 1885 the system of prosecution by information was adopted, and the investigation of crimes and the presentation of indictments therefor by a grand jury was made the exception, and not the rule. An act was passed entitled "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges," which is found as chapter LIV, Comp. St. By section 7 of this act (criminal code, sec. 584) it was provided: "Grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within this state, as provided by law, unless the judge thereof shall so direct by writing, under his hand, and filed with the clerk of said court." And sections 660, 661 and 662 of the code were amended to correspond. In *Jones v. State,* 18 Neb. 401, the effect of this legislation was considered with reference to proceedings taken by the district court under the provisions of section 405 of the criminal code, providing for the calling of a grand jury from the bystanders after the regular grand jury had been discharged, and the court, Judge

MAXWELL writing the opinion, held that the former statutes regarding the summoning of grand juries were repealed by implication, and that the power of the district court to summon a grand jury under section 405 was taken away. In *State v. Lauer,* 41 Neb. 226, the facts were that during the session of the September, 1892, term of the district court for Lancaster county, for which no grand jury had been ordered or summoned, an order was made in writing by that court, by Judges Hall and Tuttle, directing that a grand jury be called at a later day in the term. The grand jury appeared and returned an indictment against Lauer, who filed a plea in abatement on the ground that the order of the district court directing the summoning of the grand jury was void for want of authority, and that the grand jury's proceedings were null and void. A demurrer by the county attorney to this plea was overruled by Judge Strode of the district court, and the state excepted and brought the case here for review. This court held that so long as section 584 of the criminal code remains in force no grand jury can be lawfully selected and impaneled, unless first ordered by the judge of the district court for the county in which such grand jury is to act; that the order must be in writing and filed with the clerk of the district court more than 20 days before the first day of the term, and that the county board must select the persons from whom the grand jury is to be drawn. The judgment of the district court sustaining the plea in abatement was affirmed. The proceedings in the *Lauer* case were in a county of 70,000 inhabitants; but there is no difference in the application of the principle involved between such a county and all others in the state, since the only difference between the law as to the selection of juries in such a county and one of the usual class is merely as to minor details in the proceedings. The reports of these two cases do not disclose whether section 664 was called to the attention of the court, but the proceedings in the *Lauer* case seem to have been taken

under the provisions of that section, and the circumstances were almost identical with those in this case. Prior to the legislation of 1885, if a grand jury was discharged during a term of court, then, under the provisions of section 405 of the criminal code, or, if for any other reason there was no panel in attendance, then by section 664 of the code, *the court* might order the sheriff to summon another panel. It will be observed that the power resided in the *court,* and not in the *judge.* By the law of 1885 the imperative statement is made that "grand juries shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within this state, as provided by law, unless the *judge* thereof shall so direct by writing, under his hand, and filed with the clerk of said court." As construed in the *Jones* and *Lauer* cases, this section must be read in connection with the provisions of section 658, *et seq.,* and the order must be made in writing and filed by the judge on or before the day fixed by law for the drawing of jurors for the term of court at which the grand jury is to appear. We adhere to the law as laid down in these cases.

We think the interests of justice are more likely to be subserved by drawing a grand jury by lot from a list of names prepared by the county commissioners, and as nearly as may be proportionate from each precinct in the county, than by the selection by one man of the whole panel. We do not wish to be understood as holding that vacancies in the panel may not be filled under the provisions of section 664. The law as to this has not been changed. We have also held repeatedly that the provisions of this section with reference to the manner of summoning petit juries are still in force. *Barney v. State,* 49 Neb. 515; *Carrall v. State,* 53 Neb. 431; *Welsh v. State,* 60 Neb. 101; *Dinsmore v. State,* 61 Neb. 418; *Lamb v. State,* 69 Neb. 212. The legislation of 1885 did not affect the selection of petit jurors, nor did it interfere with the filling of the panel of either grand jury or petit juries, under the provisions of section 664.

Following the *Jones* and *Lauer cases,* we are of the opinion that the district court was without authority to summon a grand jury in the manner in which the jury which found the indictment in this case was summoned, and that the plea in abatement should have been sustained.

For these reasons, the judgment of the district court is reversed and the cause remanded.

REVERSED.

JAMES ALLAN, APPELLEE, V. MILTON J. KENNARD ET AL., APPELLANTS.

FILED APRIL 10, 1908. No. 15,560.

1. **Constitutional Law:** SPECIAL LEGISLATION. If a law is general and uniform throughout the state, acting alike upon all persons and localities of a class, it is not open to the objection that it is local or special legislation.

2. **Statutes:** CLASSIFICATION: SPECIAL LEGISLATION. The power of classification rests with the legislature, and this power cannot be interefered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to avoid and violate the provisions of the constitution prohibiting local and special legislation.

3. ———: ———. A real and substantial difference which affords a proper basis for classification exists between ordinary counties and those which contain within their boundaries a city of the metropolitan class.

4. ———: REPEAL BY IMPLICATION. An act which treats of one department of county government, the creation of a county office, and the duties and functions to be performed by the incumbent of such office, is complete in itself, repeals by implication all acts and parts of acts repugnant thereto, and is not required to contain all the sections of former acts which it may amend or to specifically repeal the same.

5. ———: INDUCEMENT TO PASSAGE. Chapter 37, laws 1907, providing that the county comptroller in counties having within their boundaries cities of the metropolitan class shall be *ex officio* city comptroller, examined, and *held* not to have formed the induce-

ment for the enactment of chapter 36, laws 1907, creating the office of county comptroller in such counties.

6. ———: VALIDITY. *Held*, Further, that chapters 33, 36 and 38, laws 1907, are cognate acts, carrying out the legislative purpose to create the office of county comptroller in counties of the class referred to, and providing facilities for carrying out the duties of such office, and that said acts are not properly subject to the objections made to their validity.

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

Carl E. Herring, James P. English, A. G. Ellick and *B. F. Thomas,* for appellants.

John P. Breen and *W. H. Herdman, contra.*

LETTON, J.

The petition in this case in substance alleges that the plaintiff is a resident taxpayer of Douglas county; that the defendant Solomon is the county comptroller elect, and that the other defendants are the county commissioners of that county; that Douglas county has within its boundaries a city of the metropolitan class, and is the only county in this state having such a city within its boundaries; that by chapter 36, laws 1907, the legislature attempted to create the office of county comptroller in any county including within its boundaries a city of the metropolitan class, and provided for the election of such officer; that the defendant Solomon was declared duly elected to that office and a certificate of election issued to him; that the board of county commissioners have set apart certain rooms in the county courthouse for the office of county comptroller, ordered the expenditure of large sums of money in furnishing the same, and have authorized the employment of a large number of clerks, accountants and stenographers. It further alleges that the law is unconstitutional as being special legislation and based upon an arbitrary classification;

that it is amendatory of other existing laws, and does not contain the section or sections so amended, and does not repeal the section or sections so amended, and that the title of the act is not broad enough to permit the amendments. It is further alleged that chapter 36, laws 1907, is a companion act to chapter 37; that the legislative purposes and intent can only be given effect through the operation of both of said chapters; that chapter 37 is unconstitutional as being an amendatory act not complying with the provisions of the constitution with reference to amendments, and because its title is not sufficiently broad. The petition further alleges that chapters 33, 36, 37 and 38 are cognate acts, and are parts of the legislative scheme and plan covered by chapters 36 and 37; that they were prepared by the same author and member of the legislature, and that they cannot be put in force without giving effect to chapter 33; that chapter 33 is an amendatory act, but that the same is void as failing to comply with the constitutional requirements as to amendatory acts. The petition further alleges that, unless restrained, the defendants will pay out nearly $15,000 a year for the salaries of the comptroller and necessary assistance, and prays for an injunction to restrain the defendants from putting the law into operation, and for general equitable relief.

A demurrer was filed to the petition, which was overruled. The defendants elected to stand upon the demurrer. The district court found: "That chapter 36, laws 1907, being an act creating the office of county comptroller, is an act complete in itself, conforming to the constitutional requirements; that chapter 37, laws 1907, being an act making the county comptroller *ex officio* city comptroller, is amendatory in character and void; that from an inspection of the two chapters it is apparent that the provisions inherent in chapter 37 formed an inducement for the passage of chapter 36, and that chapter 36 is, therefore, void," and rendered judgment accordingly, perpetually restraining the defendants as

prayed in the petition. The case is now before this court upon appeal from this judgment.

A summary statement of the purport of the several chapters of the laws of 1907, the validity of which is controverted, is necessary to understand the questions presented. Chapter 33 consists of four sections amending sections 33, 37 and 74, ch. 18, Comp. St. 1905, and repealing the original sections; the only change made in the former law being to provide that certain duties now devolving upon the county clerk shall, in counties having a county comptroller, be performed by that officer. Chapter 36 creates the office of county comptroller in any county having within its boundaries a city of the metropolitan class, provides for his term of office and salary, specifies his duties in detail, and provides that all duties delegated to the county comptroller, which are now performed or exercised by other county officials, are taken away from such official and made the special duty of the comptroller. Chapter 37 provides that the county comptroller shall be *ex officio* city comptroller after the expiration of the term of the present incumbent of the office of city comptroller. It provides for the giving of a bond as city comptroller, and for the payment of $7,000 each year by the city to the county as compensation for services rendered by the county comptroller as *ex officio* city comptroller. Chapter 38 requires the county board to provide suitable rooms, vaults, books, blanks, stationery, clerks and office furniture for the use of the county comptroller.

The first point relied upon by the plaintiff in asserting the invalidity of the legislation is that an act creating a county office and limiting such office to counties which may now or hereafter contain a city of the metropolitan class is an arbitrary classification of counties, and, therefore, void as being within the inhibition of the constitution against local or special legislation "regulating county and township officers," "providing for the election of officers in townships, incorporated towns or

cities," or "granting to any corporation any special or exclusive privileges, immunities, or franchises, whatever." It is settled law in this state, as well as in most others having like constitutional restrictions, that where a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, it is not open to the objection that it is local or special legislation (*State v. Graham,* 16 Neb. 74; *State v. Berka,* 20 Neb. 375; *Van Horn v. State,* 46 Neb. 62; *Livingston L. & B. Ass'n v. Drummond,* 49 Neb. 200), and it is unnecessary to do more than state the principle in this connection. See, also, *State v. Frank,* 61 Neb. 679. An interesting discussion of this subject is to be found in the opinion of Bishop, J., in the case of *Eckerson v. City of Des Moines,* 115 N. W. (Ia.) 177. It is also true that the legislature may classify the subjects, persons or objects as to which it legislates. But such classification should rest upon some difference in situation or circumstances between the thing or person placed in one class and that placed in another. The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by an artificial and baseless classification attempted to evade and violate the provisions of the constitution prohibiting special and local legislation. Unless, therefore, it has been made clearly apparent that there can be no real distinction made between counties having within their boundaries cities of the metropolitan class and other counties, the presumption of constitutionality which attaches to each act of the legislature must prevail. It is pointed out in the brief of the plaintiff that the usual method of classification of counties or cities is by means of population. Such a classification must necessarily be more or less arbitrary. But such classifications have uniformly been upheld by the courts, even though to a certain extent arbitrary in their nature. Plaintiff, while conceding that a classification by population is entirely proper and allowable, contends that a

classification based upon the presence within the boundaries of a county of a city of the metropolitan class is invalid, for the reason that there is no substantial difference in condition between a county having a population of over 100,000 urban inhabitants concentrated within the limits of a metropolitan city and one with an equal population living in a more diffused condition. Common experience, however, and the well-known facts with reference to the conditions which usually flow from the collection within a limited area of a congested population, convince us to the contrary. There is usually an actual and substantial difference, especially with regard to vice and crime, sickness and destitution, as well as aggregated wealth and luxury, between 100,000 people distributed over the many square miles and extended boundaries which are usually embraced within the boundaries of a county and the same population when confined within the limits of a municipal corporation of comparatively small extent. Every reason which may be urged to support a classification by population may be urged upon better grounds for the support of the classification attacked in this case. We are of the opinion that there is a real and substantial difference which affords a proper basis for classification between ordinary counties and those which contain within their boundaries a city of the metropolitan class, and that the act in question is not local or special legislation.

It is next insisted that chapters 33, 36, 37 and 38 are cognate acts, embracing one legislative scheme or purpose, each necessary to the complete attainment of the scheme, each an inducement to the passage of the other, and, hence, that, if any one of the said acts is void, the others fall with it. We think this contention is to a certain extent well founded, and that, if chapter 36, creating the office of county comptroller, should fail, chapters 33 and 38, having no independent force when considered separate and apart from chapter 36, must fall with it; but we think a different condition is presented with refer-

ence to chapter 37—the act making the county comptroller *ex officio* city comptroller—when considered with chapter 36. There is nothing within the four corners of the act creating the office of county comptroller which seems in anywise to rest or be based upon any of the provisions of chapter 37. Chapter 36 seems to be complete in itself, creating a new office upon sufficient reasons and prescribing the functions and duties and compensation of the incumbent of the office thus created. It was stated upon the argument, and conceded by the plaintiff's counsel, that the annual disbursements of the county of Douglas in all its departments of county government amount to more than $1,000,000, and that, in order to preserve an accurate record and an efficient control over the disbursements in the various funds, the county board has designated an officer as county auditor, and has installed him with a force of clerks for the purpose of keeping an efficient check on the finances of the county. While, by the statute, these duties devolve upon the county clerk, it seems that experience has shown that in Douglas county the duties which strictly and properly appertain to that office are sufficient to employ the entire time of that officer, after being relieved of the duties which are by chapter 36 imposed upon the county comptroller. We are of the opinion, therefore, that chapter 36, with its cognate acts—chapters 33 and 38—evidence a legislative plan or intention to create the office of county comptroller and provide the methods and instrumentalities with which its duties may be carried on, and are not in contravention of the constitutional inhibition against local or special legislation.

In this connection it may be well to notice the contention that chapter 33 is invalid because the amendments made thereby are not germane to the original sections. The original sections deal with the powers and duties of the county clerk with reference to the drawing of county warrants, the filing of claims against the county and notice of the disallowance thereof, and the filing of ac-

counts acted upon by the county board. The act in which these sections are found is entitled "An act concerning counties and county officers." The act contains all the general provisions with reference to county government, the creation of county officers and the duties of such officers. We are unable to see why the amendments to the sections of this act made by chapter 33 are not germane. They treat of the same subject matter as the original sections amended, which is the proper disposition to be made of the various matters connected with the financial affairs of the county, and the officer whose duty it is to act in relation thereto.

It is next contended that chapter 36 is void, for the reason that it is amendatory of many sections existing in other statutes, and does not contain or repeal the sections so amended. This contention is the same as that made in *Van Horn v. State,* 46 Neb. 62, but the answer in this case is the same as in that, that the act is one complete in itself, covering the whole subject to which it relates, and the fact that such act moves, changes or disturbs the effect of other statutes does not render it in conflict with the constitution. *State v. Whittemore,* 12 Neb. 252. This doctrine is so well established in this state as to require no further discussion. But it is said that the subject of the act being county government, it is not complete unless it embraces the entire scheme, and, therefore, if any of its provisions are in conflict with existing statutes, it is open to the charge that it is amendatory of such statutes. The act is not concerned with county government in general, but is concerned only with the accounting and financial department of the county government. It is designed to embrace a complete scheme of accounting for all the various funds and receipts and disbursements of the county, and to provide an officer with proper assistance and facilities to fully carry out the duties imposed. It is complete within itself so far as concerns the subject with which it treats. The subject of county government is a broad one, and many officers are

required to carry on its various departments, and an act which purports to deal with the creation of a county office and the duties and functions to be performed by such officer is complete in itself, and repeals by implication all acts and parts of acts repugnant thereto. The purpose of the constitutional provisions is to prevent surreptitious legislation. It cannot be said that an act which, while complete in itself, treats of a subject which is considered in numerous sections of other acts is within the evil which the constitutional provision was intended to prevent. We have upheld acts which were upon their face much more liable to this objection than the one under consideration. *Zimmerman v. Trude*, 80 Neb. 503. See, also, *State v. Cornell*, 50 Neb. 526, in which there is a full discussion of this subject, with the former decisions of this court collected. See, also, *Affholder v. State*, 51 Neb. 91, in which an act entitled "An act to provide cheaper text-books, and for district ownership of the same" was upheld as against the objection that, because it modified or amended certain sections of the general school law without containing or repealing these sections, it was void. But the act was held to be a complete act in itself, although it only treated of one of the numerous subjects embraced in the general school law.

It is next urged that chapter 37, creating the county comptroller *ex officio* city comptroller, is void, it being amendatory of various sections of the Omaha charter act, and that, as it does not contain the sections amended and repeal the same, it is within the constitutional inhibition. Since, by its terms, this act does not become effective until the expiration of the term of office of the present incumbent of the office of city comptroller, and since another legislature will meet before any action can be taken by any of the defendants with reference to the office of city comptroller, it is unnecessary at this time, in view of the considerations to be mentioned hereafter, to pass upon the constitutionality of chapter 37 standing alone. It may be that the act is defective. This point is

not decided, however, and if the present act is not proof against attack, and if it is thought advisable by the legislature to consolidate the offices, an act as to which no question can be raised may yet be passed. The only point which is necessary to be considered at this time with reference to this act is whether or not it formed the inducement to the passage of chapter 36; for, unless it did so, it is entirely unnecessary for its provisions to be considered at this time.

The plaintiff asserts that from the internal evidence presented by the various acts themselves, and from common knowledge of the movements for consolidation of city and county offices in Douglas county, it is evident that this act was the moving cause and inducement for the passage of chapter 36. The argument is that, while the acts are general in form, they were enacted with reference to the present conditions and needs of Douglas county and the city of Omaha; that the bills were introduced by a member from Douglas county; that it is, to quote the brief, "a fact, common to the knowledge of all men that for years there has been a constant growing demand in Omaha and Douglas county for a merger and consolidation of city and county offices in the sense that similar duties pertaining to the city and county affairs should be performed by one and the same officers"; that such consolidation has been had with reference to the office of city and county treasurer, and that the result has been satisfactory, and there is a demand for further consolidation. Again, it is said that Douglas county has had a county auditor or comptroller with several assistants for years, and that the city of Omaha also has a comptroller; that the people know this, and there is a demand that one comptroller be provided for both county and city. It is said further that the court must take judicial notice of these facts and of this public demand; that chapter 36 fixes the salary of the county comptroller at $3,500 a year, while chapter 37 provides that the city shall pay to the county $7,000 annually for the service of

such comptroller; and it is asked: Is it not plain that the legislature, in fixing the salary of the comptroller at the sum named, had in mind the performance by the comptroller of the functions and the duties of the city comptroller? We think this argument is a potent one to show the need of the enactment of chapter 36, providing a county comptroller for Douglas county, since it appears that the necessity for such an officer has existed for years, and has been met in a manner the legality of which may be questioned. It would seem further that there is sufficient work to be performed and sufficient responsibility to be assumed by the county comptroller of Douglas county, without reference to whether or not the additional duty of city comptroller *ex officio* may or may not be imposed upon him, to fully justify and warrant the payment of a salary of $3,500 a year for the service to be rendered. The fact that at an early period in the history of this state, and during a time of privation following a prolonged drouth and a devastation by grasshoppers, the constitution makers fixed the salary of our state officers and district judges at amounts barely sufficient in these days to meet living expenses is no reason why an officer clothed with such duties and responsibilities as the county comptroller should not now be paid a reasonable salary, and does not furnish any proof that $3,500 a year is more than the services of a man competent in all respects to fill the position are reasonably worth. If the duties of city comptroller are added to those already imposed upon him, the annual payment of $7,000 provided for by chapter 37 is intended to pay for the additional assistance in the form of clerks and accountants and the other expenses which will necessarily be incurred by his performing the functions of city comptroller, and not to add to his compensation or to give a profit to the county.

We are not sufficiently advised as to whether or not the consolidation of the office of city treasurer and county treasurer in Douglas county has been productive of such

a pressing local demand for further consolidation as to have given rise to the introduction and passage of these measures; and it may be doubted whether the court may properly be permitted to wander into such a devious domain, in order to find a reason for declaring an act of the legislature providing methods of county government unconstitutional, the more especially since this is a general law which may apply hereafter to other counties in this state. It is probable that the learned trial judge, being a resident of Douglas county and of the city of Omaha, is more conversant with the local demand than this court, and has taken judicial notice thereof. It would seem from the copy of his opinion printed in plaintiffs' brief that his decision was based somewhat upon this elusive quantity, but this court scarcely feels justified in basing its construction of the constitutionality of these acts upon such local and temporary grounds.

In conclusion, we are of the opinion that there is no such connection shown between the provisions of chapter 37 and 36 as to make it clearly apparent that the passage of chapter 37 formed the inducement for the passage of chapter 36. We are further of the opinion that chapter 36 with its cognate acts, chapters 33 and 38, form a complete and independent plan of legislation for the creation of the office of county comptroller in counties of the class named therein, irrespective of whether chapter 37 was ever passed, and that the validity or invalidity of chapter 37 has, and can have, no bearing upon the validity of chapter 36.

The judgment of the district court is therefore reversed, the injunction dissolved, and the cause dismissed.

REVERSED.

ROY MAYNARD V. STATE OF NEBRASKA.

FILED APRIL 10, 1908. No. 15,487.

1. **Criminal Law: TRIAL: EXCLUDING WITNESSES.** In a trial of a criminal case where the accused is charged with a felony, it is the duty of the court in the exercise of its discretion, upon request, to exclude from the courtroom all witnesses for the state not being examined; but in the absence of a showing of abuse of discretion, or a prejudice to the accused on trial, a judgment of conviction will not, for that reason alone, be reversed.

2. ———: WITNESSES: EXAMINATION BY COURT. While it is the right of a trial judge in the exercise of a sound discretion to interrogate witnesses on a trial of a criminal case when essential to the administration of justice, yet the practice of so doing should be discouraged. Should the discretion be abused, or prejudice to the accused be shown by the record to have resulted, a new trial should be granted. But a judgment of conviction will not be set aside for that reason in the absence of a showing of such abuse or prejudice.

3. ———: INSTRUCTIONS: PREJUDICE. Where, in the trial of an accused charged with the commission of a felony, there were a large number of instructions given to the trial jury, all of which are assigned for error as, when taken as a whole, they show a prejudice or bias on the part of the court against the accused, this court will examine the whole charge for the purpose of ascertaining if such prejudice or bias be shown. In the present case the instructions are not thought to be objectionable on that ground.

4. ———: ———: MALICE. On the trial of an accused charged with the crime of murder in the first degree, the court gave the jury the following instruction: "Malice, within the meaning of the law, includes not only anger, hatred, ill will, and a desire for revenge, but every other unlawful and unjustifiable motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent on mischief, indicates malice within the meaning of the law. And the existence of malice is inferred from acts committed or words spoken." *Held*, Not erroneous.

5. ———: ———: GREAT BODILY HARM. An instruction defining "great bodily harm" as being "a battery of greater magnitude than a common assault and battery," *held* not erroneous by rea-

son of the use of the term "common assault and battery," without further definition of "assault and battery"; the meaning of the term "assault and battery" being known in common speech by people of ordinary intelligence, it is presumed the jury understood it.

6. ———: ———: SELF-DEFENSE. In an instruction on the law of self-defense, otherwise unobjectionable, it is *held* not erroneous for the court in stating the law to say: "Where a man in the lawful pursuit of his business is attacked, and where from the nature of the attack he honestly believes that there is a design to take his life or to do him great bodily injury," etc.—the objection being that it left the jury to infer that the accused was not in the lawful pursuit of his business when he entered the place of business of the deceased for the purpose of procuring property which he claimed belonged to him, notwithstanding the court had refused an instruction that he had the right to go there for that purpose.

7. ———: WITNESSES: EXAMINATION: WAIVER OF ERROR. The evidence showed that the deceased and the accused met at an attorney's office for the purpose of adjusting a money demand which the accused made upon the deceased; that in the conversation there was much ill feeling shown; the accused having been assaulted and beat by the deceased a number of times during that day. The deceased renewed an accusation that the accused had stolen money from the place of business where he had been employed, refused to pay anything, ordered the accused to cease his demands, and left the room. Immediately thereafter the accused made the remark, "I'll fix him," and departed. On cross-examination the witness was asked if deceased had not in that conversation made threats to the accused of personal violence whenever he should meet him. Objection to the questions was made by the attorney for the state upon the ground, among others, that the proof of the facts sought to be elicited was a part of the defense. The objections were sustained. *Held*, Error. But, as the attorney announced that he would make the witness his own for the purpose of making the proof, and did, at a subsequent stage of the trial, call the witness on the part of the defendant and inquired into the details of the conversation, but refrained from in any form repeating the questions ruled out on cross-examination, it is *held* that the error was waived.

8. **Homicide:** INSTRUCTIONS: INTOXICATION. It was shown by the evidence that the deceased was killed by the accused between the hours of 4 and 5 o'clock in the afternoon; that the accused drank intoxicating liquors freely during the day and up to a short time before he killed the deceased; but there was no proof

that at the time of the tragedy the accused was so far intoxicated as to render him irresponsible for his acts. The court instructed the jury that voluntary intoxication would not relieve a person committing a crime from the penalties of the law; but that, if there was evidence that the accused was intoxicated at the time it was alleged that he committed the crime, it should be considered by the jury for the purpose of determining whether he was capable of forming a wilful, deliberate and premeditated purpose to take life. If he was so far intoxicated as to be incapable of forming such purpose, and the jury entertained a reasonable doubt upon that subject, he could only be found guilty of murder in the second degree, if guilty of murder. This was in accordance with an instruction asked for by the defense. But the court added that, if the jury found that the accused took intoxicants "to steady his nerves for the commission of the crime," his intoxication would not excuse him. *Held*, That, though there was no occasion for the instruction, the error in giving the addition was not prejudicial, and therefore harmless.

9. **Criminal Law**: TRIAL: OPENING STATEMENT. Section 478 of the criminal code provides that after the jury is impaneled, and after the attorney for the prosecution has made a statement of the case and the evidence by which he expects to sustain the charge, "the defendant or his counsel must then state his defense, and may briefly state his evidence he expects to offer in support of it." Under the provisions of this section, neither party may discuss the law of the case, nor instruct or admonish the jurors as to their duties as such jurors; it being the province of the court alone to instruct the jury. It is not error for the court to confine counsel to the statement of the case and the evidence they expect to produce.

10. **Homicide**: DEFENSES. It was disclosed by the evidence adduced upon the trial that during the earlier part of the day on which deceased was killed he committed a number of assaults upon the accused, beating and cuffing him, but that no assault had been made immediately prior to the time when deceased was killed, and on that occasion deceased ejected the accused from his place of business by pushing him out through the door and inflicting a slight assault. Although these facts might be considered in mitigation, they, as matter of law, afforded no defense to the charge of murder, the essential elements of that crime having been found by the jury to exist at the time deceased was killed.

ERROR to the district court for Box Butte county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Hamer & Hamer, for plaintiff in error.

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

REESE, J.

An information was filed in the district court for Box Butte county, charging plaintiff in error (hereinafter referred to as plaintiff) with the crime of murder in the first degree committed on the 29th day of January, 1907, by shooting Leroy W. Barnes. There is not much conflict in the testimony of the witnesses as to the material facts surrounding the tragedy. The deceased, Barnes, was in charge of a lunch counter near the railroad depot at the city of Alliance. Plaintiff was employed by the proprietor as night man in charge. His hours were from 7 o'clock in the evening until 7 o'clock the next morning. He had worked six nights. On the morning of the 29th of January, 1907, the deceased came to the lunch room, and appeared to be checking up the cash register. Plaintiff remained in the lunch room until about half past 7 o'clock, when he left and went to a nearby saloon. He remained there for some time, when the deceased came in, seized hold of him, administering an opprobrious epithet, accusing him of being a thief, and demanding the return of the money which he claimed plaintiff had stolen. Plaintiff had about $10, which deceased sought to take from him, but in which he was not successful. Plaintiff denied the appropriation of any money, and vigorously persisted in his denial. He was of the age of 22 years, and the weight of about 122 pounds. The deceased was much his superior in age, size and strength. Instead of causing the arrest and prosecution of plaintiff for the alleged embezzlement, he seems to have determined to extort the money by threats, abuse, assaults and personal violence. On a number of occasions during the day he is shown to have followed plaintiff from place to place, and

assaulted and beat him rather unmercifully. Plaintiff was drinking heavily, which, in addition to his diminutive size and strength, rendered him unable to resist the attacks of the deceased. He, on some occasions, would escape, but to be followed and punished by beatings and cuffings. He was discharged by the deceased early in the day, but did not receive payment for the six nights' labor. Deceased refused to pay him, claiming that he had paid for clothing—aprons and jackets—worn in the lunch room, and other expenditures made on behalf of plaintiff. Plaintiff consulted two local attorneys upon the matter of making the collection of his wages, and one had telephoned deceased to call at his office for the purpose of seeing if the matter could not be amicably adjusted. The deceased had answered the call, and the parties met in the attorney's office, but no adjustment could be made, as the deceased presented his claim for the fees of the employment agency at Denver through which plaintiff was employed, and the cost of the aprons and jackets for which the deceased had paid, but which, upon being paid for, belonged to the employees for whom they were purchased. The deceased claimed that those two items and money advanced amounted to more than the wages due, and refused to pay anything, informed plaintiff that he "did not owe him anything, and would not pay him anything, and then said: 'Now, Roy, I don't care to have any more trouble with you about this' "—and went away. Plaintiff stood by a window for a time, and then, applying to the deceased an epithet which deceased seems to have frequently applied to him, said: "I'll fix him," and left the office. He sought another local attorney for assistance in recovering what he claimed to be due him, but met with no better encouragement than in the first instance, probably on account of the smallness of his claim, which was $4.80, and which was not sufficient to fully balance the demands of the deceased. Plaintiff seems to have been drinking excessively during the whole of the day.

After his failure to secure assistance in his effort to collect he went to a hardware store and purchased a pistol and cartridges. This purchase was made in the afternoon, probably about 2 o'clock; and in his testimony plaintiff states that the purchase was made in order to enable him to defend himself against further attacks of the deceased. About half past 4 in the afternoon he went to the lunch room, opened the door, stepped inside, closing the door behind him. He remained standing quietly for a short time, when the deceased, seeing him, walked rapidly toward him, and said: "You get out of here, and stay out. I don't want you around at all." Plaintiff replied: "I have got an apron and jacket here, and want them." Deceased responded: "You haven't anything of the kind; get out"—took hold of him, opened the door and pushed him out, closing the door, as some of the witnesses say, when plaintiff immediately turned and fired, killing the deceased. There were four persons present and witnessed the encounter. They were all sworn on behalf of the prosecution. While they agreed as to many of the principle facts, yet in details there was some conflict. Some say that, when the deceased put plaintiff out of the house, he closed the door, which plaintiff immediately opened, and fired three shots; while others say the door was not closed, but as plaintiff was being forced into the opening he fired the shots in rapid succession. Plaintiff became a witness in his own behalf, and his version of the affair agrees with that of some of the state's witnesses, except as to the language used by the deceased, and the further fact that deceased both kicked and struck him as he crowded him to the open door, and that when so kicked and struck he, in self-defense, drew the pistol and fired. Plaintiff then left the lunch room, went to a nearby saloon, procured more liquor and drank it, saying he had killed the deceased, and soon thereafter surrendered himself to the officer of the law. The verdict of the jury found plaintiff guilty of murder in the first degree, and fixed the sentence at imprisonment for life. Plaintiff prose-

cutes error to this court, alleging errors committed during the trial, including instructions given to the jury and instructions prayed for by him and refused, as well as the contention that the verdict for murder in the first degree is not sustained by the evidence.

At the commencement of the trial plaintiff, by his counsel, requested the exclusion from the court room of the witnesses for the state not upon the stand, which request was refused, and to which exception was taken. There is no reason shown by the record why this request was refused. We are unable to find anything throwing light upon the action of the court, either of reasons for refusing the request or why it should have been granted. Aside from what was developed later in the trial, and of which the court presumably had no knowledge at the time of the ruling upon the request, we are not advised of any abuse of discretion on the part of the court. That such a request, in cases of the importance of this one, should be granted cannot be questioned. As said in the syllabus in *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 138: "The practice of causing unexamined witnesses, except those called as experts, to be sequestered, so that they may not hear the testimony of the witness being examined, is a good one, as it tends to elicit the truth and promote the ends of justice." However, the ruling of the trial court refusing such a request does not call for a reversal of the judgment where an abuse of discretion is not apparent.

On the trial plaintiff became a witness in his own behalf, and during his cross-examination by the attorney for the state he was asked the following questions, to which he made answers as here shown: "Q. He (referring to deceased) pushed you out of the door, did he? A. Part way out, yes, sir. Q. Was your face toward the street? A. It was. Q. And did you turn around then and come back into the restaurant? A. I did, just as soon as he hit me. Q. What did he do after he pushed you out? A. He just stepped back a couple of steps when

he seen me jerk my gun. Q. How far did he step back? A. A couple of feet. Q. You saw him step back? A. Yes, sir. Q. And did you shoot at him as he stepped back? A. He was stepping backward, his face was toward me. Q. He was standing with his face toward you? A. Yes, sir; at the time I shot. Q. And you shot him through the neck, this way? A. I couldn't say where the bullet went in. Q. Was he stepping back at the time you shot him? A. Yes, sir. Q. What was the distance between you at the time you shot him? A. I should judge four or five feet. Q. Then both times you shot him his face was directly toward you, was it? A. I think so, I couldn't say positive. Q. Now, what time did you work, in the day time or at night? A. I worked at night." The court here took plaintiff in hand and questioned him. "Q. Did you step in the door as he was backing off? A. One foot was in the door. He didn't get me all the way out. Just as he hit me on the ear my head flew to one side, like this, I can represent it to you. (Witness stands up.) I was facing like this, and he walked up face to me, and grabbed hold of me, whirled me around, like that, and gave me a kick on the hip, and then he hit me right back of the ear. Just as I whirled out of the door I jerked my gun and shot. Q. Which way was he going? A. He was stepping back, like this, just as he shoved me out he stepped back. Q. About how far had he got back when you shot? A. About three or four feet, I should judge. Q. And still going backward? A. Yes, sir."

This action of the court was excepted to, and is sharply criticised as an abuse of discretion and "a distinct effort on the part of the judge to lead the witness to say that at the time he fired upon deceased the deceased was retreating from him. This was done with a view of demonstrating to the jury that the defendant was then in no immediate danger of the deceased," and that this action "on the part of the trial judge must have very much prejudiced defendant's case." The question here presented was before this court in another form in *Fager v.*

State, 22 Neb. 332, and the subject was discussed at some length. In that case questions were propounded by the court to a witness for the state, the prosecuting witness, in a prosecution for an assault upon her. In this case the questions are propounded to the accused. In that case the rule agreed to by all the members of the court seems to be that, unless in case of urgent necessity, the presiding judge should refrain from interfering in any way with the progress of the trial; while Judge MAXWELL held to the further view that the law required the court to abstain from propounding any questions to witnesses or in any way interfering with the management of the trial of criminal cases. However, unless it is made to appear that the action of the court has in some way been to the prejudice of the party on trial, the judgment should not, on that ground and for that reason alone, be reversed. While this is true, we all agree that the practice is wrong and, as a general thing, should not be indulged in. It will be observed that the course pursued by the judge in the matter of the examination of plaintiff was practically a repetition of that pursued by the prosecuting attorney. On material points, the questions by the court and answers of plaintiff made little, if any, change in the result of the testimony. It is not a question of the motives or purposes of the trial judge in asking the questions, but what was the effect of the court's action. If not prejudicial, no harm resulted to plaintiff. While we cannot approve the action of the court, we cannot see that the rights of plaintiff were jeopardized thereby, and, therefore, cannot reverse the judgment on that ground.

While all the instructions to the jury are assigned for error, but few of them are criticised in the brief and argument of counsel for plaintiff. It is claimed that, taking the instructions as a whole, they show upon their face that the court sought to and did impress upon the minds of the jurors a general trend against plaintiff, and thereby gave the jury to understand that the presiding judge believed he was guilty of murder in the first degree,

and that that fact caused the jury to return the verdict finding him guilty of the higher crime. With this contention in view, we have carefully considered all the instructions, but are unable to see that this criticism is supported. They are too long to be here set out, and we must be content with this general statement.

Counsel for plaintiff requested the giving of three instructions. These requests were all refused, and to the refusals exceptions were severally taken. It is not necessary to notice this feature of the case further than to say that the substance of all was included in those given by the court on its own motion, which was sufficient.

The definition of malice given in the twelfth instruction is objected to. The part of the instruction referred to is as follows: "And 'malice,' within the meaning of the law, includes not only anger, hatred, ill will, and a desire for revenge, but every other unlawful and unjustifiable motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent on mischief, indicates malice within the meaning of the law. And the existence of malice is inferred from acts committed or words spoken." This definition has been substantially approved in this state in the cases of *Housh v. State*, 43 Neb. 163, and *Carr v. State*, 23 Neb. 749. The court seems to have substituted the word "fully" for "fatally," but this cannot be said to have been prejudicial. See Good and Corcoran, Nebraska Instructions to Juries, p. 309, *et seq.*

Specific objections to some of the instructions are made which we should notice. By the thirteenth instruction given, and which will not be copied in full on account of its length, the jury were informed that, when a person in the lawful pursuit of his business is violently assaulted by one whom he honestly believes intends to take his life or inflict great bodily harm, the person so assaulted may kill to save his own life or protect himself from such assault. The instruction continues: "The term 'great bodily harm' cannot be accurately defined, but it means a battery

of greater magnitude than a common assault and battery. And if you find from the evidence in this case that the deceased assaulted the defendant at the time he ejected him from the eating house referred to in the evidence, and that the deceased in making the assault, if you find that he did make an assault, intended to simply inflict upon the defendant what is known as a common assault and battery, and the defendant believed and understood it as such, then he would have no right to intentionally take the life of the deceased. A person is only justified in taking the life of his assailant when he honestly believes that he is about to lose his own life, or that his assailant is about to inflict upon him great bodily harm. But if the person making the assault intended it only as a common assault and battery, and the person assaulted believed that the person making the assault was going to inflict upon him great bodily injury, or was about to take his life, then if under such circumstances the person who is being assaulted takes the life of his assailant, prompted by the sole motive of self-preservation, the law will excuse him. But he must not use any greater force to repel force than what seems to him to be reasonably necessary under the circumstances. And, if after he has secured himself from danger he takes the life of his assailant in the spirit of revenge, he cannot claim exemption from punishment on the ground of self-defense." The criticism upon this part of the instruction is as to the use of the words "a common assault and battery." It is said that "in common language there is no such thing as 'a common assault and battery.' Neither is there such a thing in legal terms. No one may know by that language what it means." This criticism may, in a strict sense, be well founded, and yet there be no prejudicial error in the instruction. No doubt it would have been better had there been some definition of what is known in law as an assault and battery, and the word "common" discarded, but it is thought that it does not require a higher degree of information and intelligence than the jury may be presumed to have possessed to

comprehend the meaning of the words as they were used in the instruction and are similarly used in common speech. The jury evidently understood what was meant. Again, had counsel for plaintiff desired a more elaborate instruction on that point, he should have submitted a proper request. Failing to do so, the objection must be considered as waived. But it is contended that, as testified by plaintiff, the deceased kicked and struck him as he pushed him out of the door. Judging by the testimony of other witnesses as to the occurrences during the day, the statement is probably true, and yet the deceased had ceased assaulting plaintiff and was moving away when the fatal shots were fired, thus demonstrating that no serious injury was to be apprehended at that time. These facts were doubtless in the mind of the court when the language of the instruction, now criticised, was used, to wit: "And, if after he has secured himself from danger he takes the life of his assailant in the spirit of revenge, he cannot claim exemption from punishment on the ground of self-defense." Considering all the evidence upon this feature of the case, we think the quoted language was properly used in the instruction.

The nineteenth instruction was excepted to, and is now assigned for error. It is as follows: "The jury are instructed that the defense of necessary self-defense is interposed in this case. This defense is legal and proper in a criminal case. This defense is interposed by law, and you are required to consider it in view of the testimony in this case. And it will be your duty to consider it fairly and honestly upon its merits. And the rule of law on the subject of necessary self-defense is this: Where a man in the lawful pursuit of his business is attacked, and where from the nature of the attack he honestly believes that there is a design to take his life or to do him great bodily injury, then the killing of his assailant under such circumstances would be excusable or justifiable, although it should afterwards appear that no great bodily injury was intended, and no real danger of losing his life or receiving

great bodily injury existed. And the jury are instructed that, if you find from the evidence that at the time the defendant is alleged to have killed the deceased the circumstances surrounding the defendant were such as in sound reason would justify or induce in the defendant's mind an honest belief that he was in danger of receiving from the deceased great bodily harm, or that the defendant was about to lose his life, and that the defendant in doing what he then did was acting from instinct of self-preservation, then he is not guilty." Two objections are urged to this instruction. The first is to the language, "where a man in the lawful pursuit of his business is attacked," etc., and the second is to the use of the words "sound reason," near the close. We are unable to see any prejudice to plaintiff in the language used. Plaintiff's attorney requested the court to instruct the jury that "defendant had a right to enter the building where the shooting occurred," etc., and the instruction was refused; and it is now claimed that the instruction given left the question of his right to enter the eating house in doubt, and that the jury should have been informed that he had the lawful right to enter the building. There is no doubt but that he had a right. But it is equally clear that the deceased terminated his right to be there by telling him to depart. This order was not immediately obeyed, and deceased had the right to use such force as was necessary to eject plaintiff, but not to kick or strike him, if he did so. However, we do not think the instruction is open to the criticism that plaintiff had not rightfully entered the house. His entry was not unlawful. It is true he had been forbidden the premises, but, notwithstanding that fact, he still had the right to enter for the purpose of procuring or demanding the possession of what he claimed as his property. But, when ordered to depart, he, failing to do so, became a trespasser, and deceased had the right to eject him. We think the instruction is not open to the construction contended for. To the use of the words "sound reason" we can see no objection. The

phrase is equivalent to "good reason," which would not be objectionable. *Coil v. State,* 62 Neb. 15.

During the afternoon of the day of the tragedy plaintiff consulted the county attorney upon the subject of the collection of the wages claimed to be due him for his labor. The attorney telephoned the deceased, who came to his office, met the plaintiff, and the subject was gone over between the deceased and the plaintiff. It appears that in the conversation deceased accused plaintiff of stealing money from him while in his employ, and positively refused payment of the demand made by plaintiff. This charge of theft or embezzlement was strenuously denied at all times, and plaintiff asked deceased why he did not cause his arrest. The evidence is not entirely satisfactory as to what further was said at that time, but it is pretty clear that deceased was quite abusive and insulting. He went away, leaving plaintiff in the attorney's office. Plaintiff stepped to a near-by window, and stood there for a while, when he applied the opprobrious epithet in common use with some, and said, "I'll fix him," and soon after left the office. On cross-examination the witness testified that there was no violence there between the parties; that as soon as deceased had declared he would not pay the demand, and had told plaintiff he did not care to have any more trouble about the matter, he walked out. Witness was asked if deceased called plaintiff any names, and the answer was: "I don't think they either called the other any names in the presence of the other." The threat was made after deceased had left the office, probably soon thereafter, but just how long is not clearly stated. Counsel for the defense asked the witness on cross-examination if he was present during the whole of the interview, and the answer was that he had been present all the time. The following is shown by the record: "Q. Did you hear Mr. Barnes say anything about beating him, either that he had or that he would? Counsel for state objects as improper cross-examination, incompetent, irrelevant and immaterial, and part of their defense, if

anything. Sustained. Exception. By Judge Hamer (defendant's attorney): I will make you our witness. By Mr. Mitchell (counsel for state): Well, wait until we get through with our case. By Judge Hamer: Q. During this conversation did Barnes say he would beat hell out of him every time he met him, or anything equivalent to that? Counsel for state objects as incompetent, irrelevant and immaterial, and improper cross-examination, and part of their defense, if anything. Sustained. Exception. Q. Now, Mr. Burton, you say at the time he was up there, that is, one of these times, that he threatened to kill him, or something like that? A. No, sir. He said: 'I will fix him.' Q. He said, 'I will fix him'? A. Yes, sir. Q. Now, was that in connection with the fact that Barnes said he would beat hell out of him every time he met him? Counsel for state objects as incompetent, irrelevant and immaterial, and not proper cross-examination, and no such testimony being in evidence. Sustained. Exception. Q. Did you hear Roy Maynard make these threats immediately after Mr. Barnes had said what he would do, whatever it may have been? Counsel for state objects as incompetent, irrelevant and immaterial, improper cross-examination, and presuming something to be in evidence which is not in evidence, and part of their defense. Objection sustained. Exception. Q. Were these threats, which you say Maynard made, in the presence of Mr. Barnes, or immediately after Barnes had left? A. Immediately after Mr. Barnes had gone out. Q. Now, did Mr. Barnes immediately before he went out, in your presence and hearing, tell, and in the presence of this defendant state, what he would do? You need not say what it was, but whether he told you. Counsel for state objects as incompetent, irrelevant, and immaterial, improper cross-examination, and presuming something to be in evidence which is not. Sustained. Exception."

Just what were the mental processes of the attorney in making these objections, or of the court in sustaining them, we cannot inquire. The threat, if it should be so

termed, was made immediately after the departure of the deceased. The length of time must have been very short indeed, as the witness at another stage of the trial testified that the deceased had just stepped out of the office, and the witness then thought that he was still in the hall adjoining the office at the time the alleged threat was made. This brought the remark so near a part of the conversation as to, in effect, make it a part of it, and we are wholly unable to conceive any just or legal reason for the making or sustaining the objections. Whether or not the ruling of the court was prejudicial to the defendant on trial in its final results is not now under consideration. That the objection should have been overruled must be clear to any legal mind, as the answer might have given color to the meaning of the remark made by plaintiff. As is above shown, counsel for plaintiff appears to have submitted to the ruling and decided to call the witness on the part of the defense, or, as he stated: "I will make you our witness." After the state had rested this witness was called on the part of the defense, and he was interrogated upon the subject of the interview in his office, much of his former testimony, including the alleged threat by plaintiff, being repeated, but no questions were asked him as to any threats having been made by the deceased, nor was any reference made to the subject contained in the questions to which the objections had been sustained. The conclusion must be that counsel for the defense had discovered that there was no reason for further investigation into that subject, and the error, if any, was waived.

The tragedy occurred late in the afternoon, and the evidence shows that plaintiff drank intoxicating liquors frequently during the day. The defense requested the court to give the following instruction: "Evidence has been introduced tending to show that the defendant on the day of the killing had been drinking intoxicating liquors to excess, and that he was intoxicated. The intoxication of the accused can only be considered for the purpose of determining whether he is guilty of murder in the first

degree. If he was so far intoxicated as to be unable to deliberate upon the consequences of his act and to premeditate an intent to kill, he is not guilty of murder in the first degree." This was refused, and the court gave the following on its own motion: "The jury are instructed that voluntary intoxication is no excuse for the commission of crime, and will not relieve a person committing a crime from the penalties of the law. Still, in a case of this kind, if there is evidence introduced that the defendant was intoxicated at the time it is alleged he committed the crime, it should be considered by the jury for the purpose of determining whether the accused at the time of the alleged killing was capable of forming a wilful, deliberate and premeditated purpose to take life. And if in this case, although you believe from the evidence beyond a reasonable doubt that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evidence that at the time he inflicted the fatal injuries he was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditatedly to do the killing, or if you entertain a reasonable doubt as to these things, then such killing would only be murder in the second degree. If, however, the defendant took intoxicants to steady his nerves for the commission of the crime with which he stands charged, then his intoxication would neither excuse the crime nor reduce it from murder in the first degree to the second degree." As this instruction covers all that is contained in the instruction refused we need not notice that instruction further. However, the closing sentence of the instruction given is severely criticised by counsel for plaintiff as submitting a question upon which there was no evidence, and it is insisted that it was prejudicial for that reason. While it is true that it was shown that plaintiff drank heavily during the day, yet we can see no urgent necessity for giving any instruction upon the subject named. There can be no doubt but at the particular time of the tragedy plaintiff was in the

possession of his faculties, and well understood just what he did and why he did it. Whether he anticipated an attack by the deceased or not he evidently was not in such condition from existing intoxication as to dethrone his reason or excuse the commission by him of an unlawful act. However, the instruction was asked and given, in substance, and no complaint can be or is urged on that ground. Since the question was submitted, it was not prejudicially erroneous for the court to add that, if plaintiff drank intoxicants for the purpose named, his intoxication would not excuse him nor reduce the degree of the crime. We grant that there was no necessity for the precaution, but cannot see that it could prejudice plaintiff.

After the return of the verdict a motion for a new trial was filed, in support of which certain affidavits were submitted. The point of contention presented by the affidavits has reference to the opening statement made, or attempted to be made, by the attorney for the defense after the jury was impaneled and before the introduction of evidence. The affidavit made on this behalf is very lengthy, and cannot be here even summarized. Section 478 of the criminal code provides that, after the jury has been impaneled and sworn, "the counsel for the state must state the case of the prosecution, and may briefly state the evidence by which he expects to sustain it. The defendant or his counsel must then state his defense, and may briefly state his evidence he expects to offer in support of it." The affidavits show that when the attorney came to state the case of the defense he gave considerable attention to what may be termed an instruction or admonition to the jury as to their duties, and to the law which would govern the case as the trial progressed. Objection was made to this, and the objection was sustained. Counsel then engaged in a contest with the court as to his rights, and demanded that the reporter might take down what he might say, and that he be permitted to go on. This the court refused, and informed counsel that

if he did not desire to state his defense he would have to desist, when the attorney proceeded with a proper statement of the defense which would be offered. In this ruling the court was clearly correct. The statute is free from ambiguity, and the rights of counsel are defined with all necessary precision. The defense may be stated, together with a brief statement of the evidence by which it will be supported. All the instructions and admonitions upon questions of law are for the court.

It is contended that the verdict of murder in the first degree is not supported by the evidence. The natural impulse, entertained by all right-minded people, is to give every one what has of late been termed a "square deal." This sentiment, no doubt, prompts counsel for plaintiff to insist that this measure of justice has not been meted out to his client. It cannot be denied but that plaintiff was to quite an extent inhumanly treated during the forenoon of the day upon which the tragedy occurred. He was followed from point to point and place to place, and repeatedly assaulted by deceased who was a much larger, stronger and more mature man. Many citizens and sojourners in the city of Alliance observed the beatings and cuffings administered by the deceased, but no one interfered. The officers of the law were, no doubt, aware of the many assaults committed upon plaintiff, but no arrest of deceased followed. Had this duty been performed, we can well imagine that the tragedy would have been averted and the deceased's life would have been spared. If the plaintiff had embezzled the money of deceased the courts were open for the prosecution of the offender, but there was no authority for assaulting him, knocking him down, and cuffing him upon the streets and in public places. The failure of the officers of the law to discharge a plain duty, no doubt, unintentionally contributed to the terrible conditions which followed. Plaintiff was a young man, a stranger, and without friends. After his interview with deceased at the county attorney's office, which was about 2 o'clock in the afternoon, he went to a hardware store and

purchased a revolver and a number of cartridges, which, he says, were purchased for his defense. The purchase of the weapon was of itself no crime. What his real intentions may have been can only be surmised. According to the testimony of Mr. Burton, the county attorney, plaintiff was indebted to deceased in the sum of $2.45, over and above the amount of his wages. The statement of the account was that, including the amount paid by deceased for the jacket and apron, and money advanced, plaintiff was indebted to deceased $7.25, and deceased was indebted to plaintiff the amount of his wages, $4.80. Plaintiff thought he was entitled to the jacket and apron, or so claimed. So believing, he had the right to go to the eating house and make demand for them. Upon his demand being refused and the order given him to depart, he had no right to remain longer, and deceased had the right to eject him, using such force only as was necessary. According to the apparent preponderance of the evidence, and which the jury doubtless believed, no unnecessary assault was made upon him at that time. He was pushed out at the door, and, as he went out, he shot deceased, who was then moving from him. Judging by the location of the wounds inflicted, he shot to kill. Leaving out of consideration what had occurred during the day, the jury were justified in deciding that the killing was murder. By strict legal rules the occurrences of the day cannot be considered, however galling they may have been. The state does not permit the law of retaliation. Whatever might have been our own views of the case as to the degree of the offense, had we been one of the triers of fact, the question was for the jury, and with their verdict we must be content.

It follows that the judgment of the district court must be, and is,

AFFIRMED.

CLARK & LEONARD INVESTMENT COMPANY, APPELLEE, V. CHARLES W. RICH ET AL., APPELLANTS.

FILED APRIL 10, 1908. No. 15,099.

1. **Judgment:** ENTRY NUNC PRO TUNC. Judgment *nunc pro tunc* may be entered in two classes of cases: First, those cases in which the suitors have done all in their power to place the cause in condition to be decided by the court, but in which, owing to the delay of the court, no final judgment had been entered until the death of one of the parties or some other occurrence would prejudice a party in not having the judgment entered as of the date when the case was submitted to the court. The second class embraces those cases in which judgment, though pronounced by the court, has from accident or mistake of the officers of the court never been entered in the court records. In such cases the court will order the judgment actually rendered entered *nunc pro tunc* on the production of satisfactory evidence that the judgment was rendered as alleged.
2. ———: ———: Such entry will not, however, be allowed to the prejudice of a third party who has become the owner of the property which will be affected by the order, and such party may appear and resist the entry of a judgment *nunc pro tunc* which will prejudice his interest.

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

Foss & Brown, for appellants.

S. L. Geisthardt and *Boyle & Eldred, contra.*

DUFFIE, C.

April 16, 1906, the plaintiff filed in the office of the clerk of the district court for Hitchcock county, Nebraska, a motion of which the following is a copy: "Comes now the plaintiff, the Clark & Leonard Investment Company, and moves the court to order the present clerk of this court to enter of record as of November 18, 1893, the decree pronounced in this cause on said date, in words,

letters and figures set forth in a draft of said decree on file in this cause, and a true copy whereof is annexed to the affidavit of L. H. Blackledge filed herewith, for the reason that the clerk in office at the time said decree was pronounced has failed and neglected to enter the same upon the journal of this court." April 17, 1906, the court made an order to show cause, if any, on or before April 19, why plaintiff's motion shall not be granted, and the decree asked by the plaintiff entered upon the journal of the court *nunc pro tunc*. The order to show cause was served upon W. Z. Taylor, who was in possession of the land described in the proposed decree. April 19, 1906, Taylor filed objections to the plaintiff's motion and to the granting thereof, which sets forth the following facts: In May, 1890, Chas. W. Rich was the owner of the northeast quarter of section 7, township 4, of range 32, in Hitchcock county, Nebraska, and made a mortgage thereon to the plaintiff for $500, and a second mortgage for $50 securing interest upon the principal sum. The $500 mortgage the plaintiff sold to one Cal Thompson, and on September 14, 1893, it brought foreclosure proceedings upon the second mortgage, in which action a decree was pronounced November 18, 1893, but which was never entered of record; the decree as pronounced giving the plaintiff herein a lien for the amount of its mortgage, subject to the lien of the mortgage held by Thompson. That the clerk failed to enter any decree of record or to index the same. November 7, 1893, the mortgaged premises were sold for taxes to the Western Land Company, and in February, 1899, said company foreclosed its tax lien, making Cal Thompson and the plaintiff herein parties defendant. Thompson filed a cross-petition asking foreclosure of his mortgage, the plaintiff herein entered its voluntary appearance in said cause, but failed to ask for any relief. A decree was duly rendered in said tax foreclosure case February 27, 1899, awarding the Western Land Company a first lien for the amount of taxes paid on the land, and Cal Thompson a second lien for $852 due upon his

mortgage. In March, 1899, Taylor purchased from Thompson and the Western Land Company, the decree entered in their favor in the tax foreclosure case, and at a later date purchased from Rich the fee title to the land in question, and, not being aware of the pendency of the foreclosure proceeding of the Clark & Leonard Investment Company against Rich, he canceled of record the judgment and decree by him purchased from Thompson and the Western Land Company in order that his title to the land might stand clear upon the record. That, being owner of the land against which it is sought to have the decree entered, as well also of the decree given in favor of Cal Thompson and of the Western Land Company in the tax foreclosure proceeding, he objects to the granting of the plaintiff's motion, and the entry of the decree *nunc pro tunc,* which would cast a cloud upon his title. He further asked to intervene in the action, and tendered an answer setting out the facts set forth in his objections above referred to.

On motion of the plaintiff the court struck Taylor's objections and answer from the file, and at a later date, as we judge from the final journal entry of the case, Taylor was allowed to refile his objections and answer, and the court entered the following final order in the case: "And now on this 23d day of October, 1906, this cause came on for hearing on the motion of the plaintiff for a *nunc pro tunc* entry of the decree rendered in said cause November 18, 1893, the answer and objections of Wiliam Z. Taylor thereto, the motion of the plaintiff to strike said answer and objections, and at request of William Z. Taylor he is allowed to refile answer and objections, and said cause being finally submitted to the court upon the foregoing papers and petition of intervention of William Z. Taylor this date filed, on consideration whereof it is ordered by the court that the answer and objections of William Z. Taylor to the *nunc pro tunc* entry of said decree be overruled, to which said William Z. Taylor excepts, and it is further ordered by the court that the motion of the

plaintiff for the *nunc pro tunc* entry of said decree be sustained, to which W. Z. Taylor excepts. It is therefore considered and ordered by the court that the clerk of said court enter of record on the journal of said court the decree rendered herein on the 18th day of November, 1893, *nunc pro tunc,* and that said entry be made in words, letters and figures as set forth in the draft of decree filed in said cause on the 13th day of December, 1894, to which W. Z. Taylor excepts."

There are two classes of cases in which it has been held proper to enter judgments and decrees *nunc pro tunc.* First, those cases in which the suitors have done all in their power to place the cause in a condition to be decided by the court, but in which, owing to the delay of the court, no final judgment has been entered. The second class embraces those cases in which judgment, though pronounced by the court, has from accident or mistake of the officers of the court never been entered on the court records. Where the case has been fully tried, and the court takes it under advisement, during which one of the parties dies, a judgment will be entered *nunc pro tunc* as of the date of the case being submitted to the court, in order that no prejudice shall result on account of the death of the party, and the same rule obtains where a party is prevented from entering up a judgment on a verdict in his favor on account of a motion for a new trial, during the pendency of which the party dies. 1 Freeman, Judgments (4th ed.), sec. 58. *Den v. Tomlin,* 3 Har. (N. J.) 14, 35 Am. Dec. 525. A court which has ordered a judgment, which the clerk has failed or neglected to enter in the record, has power after the term at which it was rendered has passed to order the judgment so rendered to be entered *nunc pro tunc,* provided there be satisfactory evidence that the judgment was rendered as alleged, and of the nature and extent of the relief granted by it. 1 Freeman, Judgments (4th ed.), sec. 61. It is the universal rule, so far as our examination extends, that the entry of a judgment *nunc pro tunc* will not be allowed to injuri-

ously affect the rights of innocent third parties. Such entry will be allowed to subserve the interest of the parties only so far as it will not conflict with the rights of others. 1 Freeman, Judgments (4th ed.), sec. 66; 1 Black, Judgments (2d ed.), sec. 137; *Ninde v. Clark,* 62 Mich. 124, 4 Am. St. Rep. 828, and notes. In *McClannahan v. Smith,* 76 Mo. 428, the following is held: "It is well settled that a judgment *nunc pro tunc* cannot be made to operate to the prejudice of the rights of third parties acquired in good faith between the time of the rendition of the original judgment and the entry of the judgment *nunc pro tunc.*" In *Koch v. Atlantic & P. R. Co.,* 77 Mo. 354, the court said: "It is settled that such entries cannot be made to the prejudice of third parties."

In the case we are considering the plaintiff insists that Taylor, not being a party to the case originally, had no further interest in the proceeding than to see that the decree finally entered was in form and substance the decree pronounced by the court in November, 1893, and that the effect of the judgment when rendered is a matter for consideration hereafter. The court apparently proceeded upon that theory, the recital in the final order made being that he acted upon the papers before him, showing conclusively that no inquiry into the rights of Taylor as a purchaser of the property affected by the *nunc pro tunc* decree was made. In *Koch v. Atlantic & P. R. Co., supra,* it is said: "Where it appears, however, as in the present case, that a stranger to the original judgment is sought to be affected by the *nunc pro tunc* entry, in order to bind such party, it must also appear that he had notice of the judgment really rendered by the court at the time his rights were acquired or his liability was fixed thereunder, or that he had notice of the application to have such judgment entered, and an opportunity to appeal." This court held the same view, judging from the language used in *Hyde v. Michelson,* 52 Neb. 680. In the third subdivision of the opinion it is said: "It appears, from the evidence introduced on the hearing of the motion for the

nunc pro tunc entry of the judgment, that since the final decree was rendered in the case the Lothrops have conveyed the real estate in controversy to a man named Gustin; and the argument is here made that it was error for the court to make the *nunc pro tunc* order, since it affected the rights of third parties to the property affected thereby. The answer to this contention is that Gustin is not a party to this suit, nor a party to his application for the *nunc pro tunc* order. He has not intervened either in the action or in the proceeding and asked for the protection of the court. The Lothrops cannot prevent the court from having spread upon its records the judgment actually rendered in the suit to which they were defendants by insisting upon any rights which Gustin may have acquired to the property. In other words, Gustin is not before the court, and his rights, if he have any, are not adjudicated in this proceeding." In the case at bar Taylor was before the court. He was brought in by an order served on him, the plaintiff says, for the purpose of allowing him to object to the form and contents of the *nunc pro tunc* decree, but not to set up any rights which he had acquired in ignorance of the decree, and which would be prejudiced by its entry. So far as the present record discloses, the court took this view of the case, and refused to examine the objections made by Taylor, or to consider his rights in the land covered by the decree. In this we think the court erred. If Taylor, in good faith, acquired rights in land affected by the decree which the court entered, and if, as stated in his objections and answer, he released and satisfied judgments entered against the land which were liens superior to the lien of the plaintiff, his interest should be protected; and, while the plaintiff is probably entitled to have its decree entered and enforced so far as it can be against Rich, the mortgagor, such entry should be made without prejudice to the rights of Taylor, provided he establishes his good faith and want of knowledge of the decree rendered by the district court in 1893, when he made his purchase.

We recommend a reversal of the order of the district court, and remanding the cause for inquiry into the rights of the intervener Taylor.

EPPERSON 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 further proceedings not inconsistent with this opinion.

REVERSED.

AGNES URICK, APPELLEE, V. WESTERN TRAVELERS ACCIDENT ASSOCIATION, APPELLANT.

FILED APRIL 10, 1908. No. 15,086.

1. **Mutual Accident Insurance:** CHANGE OF BENEFICIARY. Section 6638, Ann. St. 1903, relative to mutual accident insurance companies, providing that any member shall have the right at any time with the consent of such corporation to designate a new and different beneficiary, *held* to require the consent of such corporation, notwithstanding the by-laws of the company provide that a beneficiary may be changed upon the written application of the member to the secretary.

2. ———: ———. A member of a mutual accident insurance association wrote a letter to the association requesting the substitution of a different beneficiary. In reply thereto the association wrote to him, requesting him to fill out the blank on the policy intended for use in designating a change of beneficiaries. Thereafter the assured made no move in the matter. *Held* insufficient to bring about a change of beneficiaries.

3. ———: REDUCTION OF BENEFITS. The declaration of the officers of a mutual insurance company fixing the amount of benefits less than that provided by the contract and by-laws cannot become a part of the contract, unless it was made known to the assured when he became a member, or was legally adopted thereafter.

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

Brome & Burnett, for appellant.

Jacob Fawcett and *McIndoe & Thurman, contra.*

EPPERSON, C.

November 14, 1903, defendant, a mutual insurance company, issued to Ray P. Brock the following contract or policy of insurance: "No. 12,792. $5,000. The Western Travelers Accident Association, Omaha, Neb. This certifies that Ray P. Brock is, while in good standing, a member of the Western Travelers Accident Association, and is entitled to all its benefits under the provisions on the back of this certificate, and named in the constitution and by-laws, and subject to the warranties contained in the application for membership. In witness whereof, we have hereunto affixed our official signatures and impressed the corporate seal of the association this 17th day of Nov., A. D. 1903. (Signed) A. L. Sheetz, Secretary. (Corporate seal.) (Signed) E. S. Streeter, President." The provisions upon the back of said contract, which are relevant to the present inquiry, are the following: "Payments will be paid under this certificate for all injuries received through external, violent, and accidental means, and resulting in death, loss of both hands, both feet, or both eyes—$5,000. * * * Membership certificate. The Western Travelers Accident Association, Omaha, Neb. For traveling men. No. 12,792. Issued to Ray P. Brock, Columbus, Kan. Beneficiary, Agnes Brock, wife."

Said Brock, while a member in good standing of the defendant company, and on August 17, 1904, received accidental injuries from which he died the next day. Plaintiff, who was the wife of assured, and was named as beneficiary in the application for membership and in the indorsement made upon the contract, sued for and recovered judgment for the full amount named in said contract of insurance. Defendant admits a liability of $1,000 only under the contract, and further denies the

plaintiff's right to recover any sum, alleging that the son of assured and plaintiff had been substituted as beneficiary. The defendant company operates under the provisions of section 6631 *et seq.*, Ann. St. 1903. Section 6638 provides: "The beneficiary under said certificate shall be the member insured, a husband, wife, relative, dependent, or legatee of such insured member, nor shall any such certificate issued be assigned or willed to any person of a class other than herein designated. Any member of any corporation, association or society operating under this act shall have the right at any time with the consent of such corporation, association, or society to designate a new and different beneficiary without requiring the consent of such beneficiary." The by-laws, adopted by the defendant company, contain the following provision: "The beneficiary under any certificate may be changed upon application of member, in writing, to the secretary." No change was ever made in the certificate of insurance; but on July 25, 1904, the assured addressed a letter to the defendant herein which is as follows: "Gentlemen: Kindly change the beneficiary in my accident policy from Agnes Brock, my wife, to Sam S. Brock, my son, and send policy or notice of change to Eagleville, Mo., care E. E. Moore. Yours truly, (Signed) Ray P. Brock, Columbus, Kansas." Upon receipt of the above letter, and on July 27, 1904, the defendant company, acting through an employee, wrote to the assured as follows: "Mr. Ray P. Brock, Eagleville, Mo., care E. E. Moore. Dear Sir: Your letter of the 25th inst., requesting a change in the beneficiary under your certificate of membership, is received. In reply we would request that you fill up the blank on the back of your certificate provided for this change, and forward to us, when we will indorse the change, and return to you. Yours truly, Western Trav. Accident Ass'n, A. E. T., Cashier." The above correspondence is all the evidence pertaining to the alleged change of the beneficiary. The certificate was found among Brock's papers after his death. Upon the con-

clusion of the trial the defendant requested the court to direct the jury to return a verdict in its favor. This request was refused, and the court's ruling thereon is the first assignment of error presented for our determination.

In the construction of contracts of insurance made by mutual insurance companies it is a well-established rule that the statutes under which the company is organized, its constitution and by-laws, and the application for membership are to be considered as a part of the contract. It is apparent from the reading of the statute above quoted that the change of the beneficiaries is not left entirely with the assured, but the insurance company is concerned in the changing of the beneficiaries, and that it must consent before the change becomes a part of the contract for insurance. It was apparently the intention of the legislature that the assured should have the power in the first instance to name, and thereafter the right to change, the beneficiary of his contract to any one included within the several classes prescribed by the statute, and undoubtedly the insurance company would have no right to refuse to grant a request unequivocally made in accordance with the statute and the rules of the company, so long as such rules are not contrary to or inconsistent with the statute, which in all instances must prevail. Upon reading the statute and the by-laws of the defendant company the conclusion is irresistible that to effectually substitute one beneficiary for another an application must be made therefor by the member in writing, and, if approved by the company, they should consent thereto, and thereby complete a change of the contract by the substitution of a different beneficiary. The association, regardless of the provisions of its by-laws quoted, would have the right to refuse its consent to the substitution of a beneficiary not dependent upon or related to the assured. It would have the right to require the application for change to be sufficiently authenticated that the genuineness thereof should appear reasonably certain. That its consent should be obtained is a reasonable provision, and

necessary for its own protection, for, otherwise, it would probably be subjected to numerous suits by adversary claimants. It is true that a beneficiary has no vested interest in a mutual policy of insurance and is not a party to the contract, and cannot legally prevent a substitution of another. But neither has the substituted beneficiary a vested interest, and a contemplated beneficiary has not even a contingent interest until substituted or named in some contract made by the insurer and the assured. Brock's letter to the company was an application for the substitution of his son instead of his wife as beneficiary. There is no evidence that the defendant ever consented thereto. Its answer to his letter must be taken as a refusal to consent to the change until he should comply with the suggestion there made.

In *Counsman v. Modern Woodmen of America,* 69 Neb. 710, the court had before it an attempted change of the beneficiaries under an insurance policy. The contract in that case, as it was found to exist, provided that "no change in the beneficiary shall be of effect until the delivery of the new certificate, and until then the old certificate shall be held in force." There an application for a change was made in the manner provided, but it was not approved until after the death of the assured. As will be observed from the reading of the opinion in that case, two beneficiaries were named in the certificate. The assured desired to change both. Under the contract or rules of the company one of the changes was prohibited. For that reason the insurance company refused to make any change whatever. The litigation was, in fact, between the parties not affected by the attempted illegal change, but who were interested in the other fund. In the opinion it is said: "The learned trial court seems to have regarded the matter of beneficiary as wholly within the disposal of the assured. We cannot so regard it. It is a matter of agreement between the assured and the association." In *Freund v. Freund,* 75 N. E. 925 (218 Ill. 189), it was held: "A New York statute (laws 1892, p.

2015, ch. 690, sec. 211) requiring the consent of the insurance company to a change of beneficiary by insured becomes a part of a New York policy issued while such statute is in force, and is controlling on the subject covered thereby, although the policy is silent concerning the same." The statute of New York under which the insurance company was organized provided that "membership in any such corporation, association or society shall give to any member thereof the right, at any time, with the consent of such corporation, association or society, to make a change in his payee or payees, or beneficiary or beneficiaries, without requiring the consent of such payee or beneficiaries." The similarity of this statute with our own is apparent. The contract there involved contained a provision that the assured may, at any time, change the beneficiary by written notice to the company, accompanied by the policy, such change to take effect on the indorsement of the same on the policy by the company. The assured presented the policy to the agents of the company in Chicago, with the written request for the substitution of another beneficiary. This was forwarded by the Chicago agents to the home office of the company, but before the policy with the application for a change had been forwarded by the agents the assured died, without the consent of the company to the change having been procured. In the opinion it is said: "First. It is said by counsel for the appellee that there is nothing in the insurance policy, issued to Josef Freund, which required the consent of the company to the change of the beneficiary. It is true that in the policy itself, which is the contract between the company and the assured, there are no express words requiring the consent of the company; but the statute of the state of New York provides, in substance, that the assured shall have 'the right, at any time, with the consent of such corporation, association or society, to make a change in his payee or payees, or beneficiary or beneficiaries, without requiring the consent of such payee or beneficiaries.' This provision of

the New York statute * * * became a part of the contract, embodied in the policy by implication, with the same effect as if it had been embodied in the policy itself. *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 417; *Christian v. Connecticut Mutual Life Ins. Co.*, 143 Mo. 460; *Ritchey v. Home Ins. Co.*, 104 Mo. App. 146. All stipulations of the policy must yield to the statute. *Havens v. Germania Fire Ins. Co., supra.* Inasmuch, therefore, as the provision of the New York statute thus quoted is by implication a part of the policy or contract, this policy is to be regarded as one which requires the consent of the company to the change, the same as though the provision of the statute was written into the policy itself." In *Hall v. Northwestern Endowment & Legacy Ass'n,* 47 Minn. 85, the court had before it a matter which in principle is similar to the case at bar. There the by-laws of the insurance company provided that certificates of membership shall not be transferred, except such transfer shall be allowed by the secretary and noted upon the books of the association. The assured sent his certificate to the company, with a letter, in which, among other things unnecessary to copy, he said: "Inclosed find one of my certificates for change to Nettie Hall, $500; Otto Hall, $500; Temple Lodge, A. F. & A. M., $500." Upon receipt of the communication the secretary of the company returned the certificate to Hall, with a letter calling his attention to the fact that the indorsement providing for change of beneficiaries upon the back of the contract had not been dated nor witnessed, and saying that as soon as it was signed and returned he would attend to it. The assured received this communication and a return of the certificate, but moved no further in the matter. In the opinion it is said: "It is a just inference of fact that he intended to designate the change which he desired to have made by a new certificate to be issued. At least he knew, when the secretary returned the certificate for his proper execution of the indorsed revocation and reappointment, that the other party to the

contract did not claim the substitution of beneficiaries to have been yet effected. He was then advised that if he desired to have the change made he should subscribe the declaration indorsed on the certificate, and return it to the secretary. This he did not do, but retained it without further action. The evidence suggests no reason why he did not comply with the simple direction of the defendant's secretary, if he still desired to carry out his previously expressed purpose. The trial court was justified in inferring that the assured either concluded not to perfect the substitution, or, at least, that he remained undecided whether or not he would do so. In either case, the contract remained in form unchanged, and the substitution was not effectually made."

Brock made no reply to the company's letter requesting a return of the certificate for the purpose of effectually substituting his son as beneficiary. He remained silent. He had the policy in his possession or control. A reasonable inference deducible from this conduct is that he had changed his intentions, and was willing to permit the contract to stand as originally made. Upon the receipt of the defendant's letter he could not reasonably have believed that the consent of the company had been procured, or that he had done all that was required of him to bring about a change. The changing of a contract is a matter of as great importance as the making thereof. The insurer had an interest therein. It is necessary that there should be a meeting of the minds, that both parties thereto should agree before an important change in a contract can be accomplished. That the company itself considered that the change of beneficiaries had not been made is further evidenced by letters written to the plaintiff herein and to her attorneys subsequent to the death of Brock and prior to the institution of this action, in which they were negotiating a settlement, and in which it remained absolutely silent as to the alleged change of beneficiaries. In such correspondence they acknowledged a liability to the plaintiff herein; indeed, they sent to her

a draft for $1,000, which they maintained was the full amount of their liability under the contract. Their silence in this regard at a time when they should speak, although, perhaps not estopping it from denying that a substitution of beneficiaries had been made, indicates clearly that the company itself at the time it wrote these letters considered that it had never consented to the change. Their present contention in this regard was manifest for the first time upon the institution of this suit one year after Brock's death. In *Fisher v. Donovan,* 57 Neb. 361, it was held: "A member holding a certificate in a fraternal beneficiary society may at his option change the beneficiary therein, so long as he complies with the laws of such society, and keeps within its limitations, and those of the statute under which it is organized."

Relative to the changing of beneficiaries under an insurance contract there are decisions holding that when the assured has done all that he is required to do, and all that is in his power, or when, through ignorance or mistake, he fails to do all that he could have done to substitute a new beneficiary, equity will declare the change complete. We find no fault with these decisions. However, they do not state the general rule, but exceptions thereto. The evidence in this case will not permit the application of any exception to the general rule. To support her contention the plaintiff cites *Hirschl v. Clark,* 81 Ia. 200. The benefits under the contract there construed were payable to the wife of the assured, "subject to such future disposal of the benefits as he might thereafter direct." There was no provision in the by-laws or constitution of the insurance company containing any provision whatever relative to the change of beneficiaries. That case we hardly think is in point, as the contract left the disposal of the benefits entirely to the assured. The consent of the association was not required.

At the time the contract in controversy was made Brock was a traveling salesman. Subsequent thereto he also engaged in the occupation of a railway news-agent, which

consumed a part of his time. He was so employed at the time he received the fatal injury. Upon the trial of the case defendant offered to prove that the executive board of the defendant, pursuant to authority of their by-laws, during the year 1901 adopted a classification of the occupations considered more hazardous than that stated in the original application for membership, and fixed the benefits to which members should be entitled by reason of such increased hazard; that the classification so made and the resolutions adopting same provided that a railway news-agent was entitled to receive benefits in the event of death by accident in the sum of $1,000 only. Upon objection, this evidence was rejected. It is the defendant's contention that the classification of risks made by the executive board became a part of the contract. The contract sued on provided for the payment of $5,000 upon the accidental death of the assured. By the terms of the contract and the assured's application for membership we must consider as a part thereof, not only the acts of the legislature, but the by-laws of the defendant company; and, turning to the by-laws in force when Brock became a member and at the time of his death, we find a provision that, upon the accidental death of any member in good standing, his beneficiary shall receive $5,000. No exception limiting the amount of recovery to less than $5,000 is made. But defendant relies upon another section of the by-laws, which is as follows: "If any member of the association shall, after becoming such, change his occupation to one which the executive board may consider as more hazardous than that stated in his original application for membership, he shall be entitled to such benefits only as may be fixed by the executive board for such increased hazard of his occupation." It may be doubted that this by-law confers upon the executive board the authority attempted. This we do not decide, but, instead, for the purposes of this case, consider that the executive board had authority to adopt a reasonable classification of more hazardous risks, and thereby fix the

amount of recovery less than that provided by the certificate. But it is apparent that the classification made by the executive board, to become effectual as a part of the insurance contract, must be made known to the member, that he may be given an opportunity to accept or reject the contract. The classification adopted by the executive board was not one of the by-laws. It was never made known to Brock that the executive board considered the occupation of a railway news-agent more hazardous than that of a traveling salesman. The record of the proceedings of the executive board had been lost for three years prior to the trial of this case, which was begun November 8, 1906. The record was lost about the time of Brock's application for membership, which was dated November 4, and accepted by defendant November 14, 1903. The defendant further offered to prove that there was no other record kept of the proceedings of said board. The secretary of the defendant testified that he had a book which contains the classification as adopted by the executive board, and identified the same, which was offered in evidence by the defendant, but which, upon objection, was rejected. There is absolutely no evidence in the record, and none offered, that the deceased ever knew of the action of the executive board, nor that the classification of hazardous risks was ever known to him, nor that the book containing such classification offered in evidence was in existence at the time Brock became a member, nor that the classification was published as a part of the advertising matter of the defendant, nor was the same referred to or expressly made a part of the contract. It is not competent for an insurance company to make a secret classification of risks or other rule prejudicial to the rights of the assured. The evidence offered would not have proved that the classification of risks by the executive board ever became a part of the contract. The declaration of the officers of a mutual insurance company fixing the amount of benefits less than that provided by the contract

and by the by-laws is not a part of the contract, unless it was made known to the assured at the time he became a member.

Defendant now contends that there was error in the admission of the letters, above referred to, by the defendant to the plaintiff and her attorneys. We do not, however, consider this assignment of error, for the reason that the bill of exceptions shows their admission in evidence without objection.

The court properly excluded the evidence offered, and we recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

BENJAMIN F. PITMAN, APPELLEE, V. CARL HEUMEIER ET AL., APPELLANTS.

FILED APRIL 10, 1908. No. 15,033.

1. **Process: SERVICE: RETURN: JURISDICTION.** The court acquires jurisdiction over a defendant upon the proper service of summons regularly issued; and it is immaterial that the officer serving the summons does not make and file his return until after the answer day.

2. **Courts: CONTINUANCE: JURISDICTION.** Where the county judge fails to attend at the commencement of any regular term of the county court, all cases pending in the court and triable at such term are, by operation of law, continued to the succeeding term, and the court retains jurisdiction to try such cases at the succeeding term.

3. **Judgment: VALIDITY.** A judgment rendered by a county court on default, and in the absence of both parties, in a civil action not cognizable before a justice of the peace, at a time that it is regularly reached for trial, although irregular, is not void; and, if no seasonable application is made to set it aside for such irregularity, it may be enforced.

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

J. E. Porter and *A. L. Schnurr,* for appellants.

Allen G. Fisher, contra.

GOOD, C.

This appeal arises out of a proceeding originally instituted in the county court to revive a dormant judgment. Objections to the revivor were filed, setting up facts, which, it was urged, made void the original judgment sought to be revived. Upon a hearing the county court sustained the objections and dismissed the revivor proceedings. The plaintiff took the case on error to the district court, where the petition in error was sustained, the judgment of the county court reversed, and the original judgment ordered revived. From this judgment of the district court, the defendants have appealed to this court.

The facts, as disclosed by the record, and necessary to an understanding of the controversy here, are as follows: On September 5, 1899, Benjamin F. Pitman, the appellee herein, filed his petition in the county court against Carl Heumeier and Cordelia Heumeier, praying for judgment for more than $600 on promissory notes set out in the petition. On the same day summons was issued, requiring the defendants to answer on the 6th day of October, 1899. The summons was made returnable on the same day. On the answer day the defendants appeared at the courthouse and found the county judge's office locked. It appears that he was then absent from the county and remained away until the 30th day of October. The defendants, on answer day, were unable to inspect the petition, and did not then, nor thereafter, make any further attempts to do so, nor make any attempts to apear or defend in the action. Whether or not they had any valid defense does not

appear from the record in this case. On the 30th day of October the summons was returned and filed. On the 6th day of November the court made a trial calendar and set this case for hearing at 1 o'clock P. M., November 11, 1899. On that day, and after waiting for more than an hour, neither of the parties appearing, and the notes upon which the suit was based being on file, the county judge, without any application from the plaintiff, took up the case, investigated the evidence on file, and rendered judgment in favor of the plaintiff for the amount due upon the notes. In January, 1906, the judgment having become dormant, plaintiff made an application to revive it. The defendants filed objections to the revivor, and set up the foregoing facts, with the result above stated.

Appellants first contend that the county court was without jurisdiction to render the original judgment, because the summons was not returned and filed within its lifetime. This court has held in the case of *Graves v. Macfarland,* 58 Neb. 802, that, so long as the summons is served within its lifetime, the court acquires jurisdiction, although the return was not made at the time stated in the writ. Appellants urge that this case is not applicable, because the rule there announced was in a case where the return was made before answer day. We are unable to see the distinction. It was there held that the court acquired jurisdiction by reason of the service of summons, and, if it acquired jurisdiction by service of summons, it certainly was not divested of jurisdiction by reason of the failure of the sheriff to make and file his return. The object of the issuance and service of summons is to officially notify the defendant of the commencement of the action and of the time and place he is required to answer. The making and filing of a return would appear to be wholly immaterial to the defendant. By the proper service of summons upon the defendant he is fully apprised of the commencement of the action and of the time and place where he is required to answer. The law requiring the sheriff to make return is evidently for the purpose of furnishing proper evidence

that the defendant has been given the notice required by law. This evidence might be supplied by other means than the return upon the summons. The jurisdiction of the court does not depend upon any particular kind of evidence as to the service of summons, but is acquired by the service of summons.

Appellants next urge that the county court had no jurisdiction to set the case down for trial or to enter default at the November term, and that, in the absence of any appearance by the defendants at the October term and the failure of the plaintiff to prosecute or take a default at that term, the court lost jurisdiction with the expiration of the October term. The summons was served more than ten days prior to the commencement of the October term, and had the county judge been present the cause was properly triable at that term, but, owing to the absence of the county judge, the case could not be heard at that term. Section 4811, Ann. St.1907, provides: "When for any cause the probate judge fails to attend at the commencement of any regular term, or at the time when any cause is assigned for trial, or at the time to which any cause may be continued, the parties shall not be obliged to wait more than one hour, and if he does not attend within the hour, the parties in attendance shall be required to attend at 9 o'clock A. M. of the following day, and if such judge shall not attend at that time, the cause shall stand continued until the first day of the next regular term. This section shall apply only to causes not cognizable before justices of the peace." Under this section of the statute, the failure of the county judge to attend at the opening of the October term operated to continue all cases then pending and triable over to the November term. The court did not thereby lose jurisdiction to proceed at the succeeding term. Under section 4799, Ann. St. 1907, it is the duty of the county judge, on the first day of each term, or as soon thereafter as may be, to prepare a calendar of the causes standing for trial at such term and set the causes for trial upon convenient days during such term.

Pursuant to this statutory duty the county judge, on the 6th day of November, made a trial calendar and assigned this case for trial on the 11th day of November, 1899, at 1 o'clock P. M. Up to this point, every action of the county judge in this case appears to have been regular and above criticism, but appellants urge that the court had no authority, in the absence of both parties and without any application on the part of the plaintiff, to dispose of the case and render judgment on the 11th day of November. The cause stood for trial at that time, the defendants were in default for want of answer or any other pleading or appearance, and there can be no doubt that the plaintiff was entitled, upon application, to have default entered and have judgment rendered upon the pleadings as they then stood. It will not be contended that it is commendable practice for the county judge, in the absence of both parties, to take up a case and render a judgment, and the action of the court in this respect was irregular, and, had seasonable application been made to open up and set aside this judgment, we have no doubt that it would have been error to refuse it. But no such application was made, and the judgment rendered and entered was one which the plaintiff was entitled to have entered upon request. The court had jurisdiction of the parties and the cause; and, while the rule is laid down in 1 Black, Judgments (2d ed.), sec. 108, that an application for judgment is probably always necessary in case of default, yet, where a judgment was entered to which the judgment creditor was clearly entitled upon the pleadings, it will not be disturbed for the failure to give notice of the application for the judgment, but such a judgment would be irregular and voidable, and liable to be set aside upon seasonable application to the court. It is held in *Grant v. Clarke,* 58 Neb. 72, that, because the defendant made default in the district court, all the averments of the petition were properly taken as true, except as to the amount of the recovery, and the proof upon that point was supplied by the notes sued on. In *Slater v. Skirving,* 51 Neb. 108, it is held that it is not

necessary for the plaintiff to prove his case when the defendant is in default. It was not necessary, therefore, in the instant case to introduce any evidence, and the only criticism, or irregularity, is that the court rendered judgment without any application on the part of the plaintiff therefor. While such conduct is not commendable, it would not have the effect to vitiate the judgment rendered. It was a mere irregularity. We, therefore, conclude that the judgment rendered was valid and binding upon the defendants, and that the plaintiff was entitled to a judgment of revivor.

It follows that 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, the judgment of the district court is

AFFIRMED.

PORTSMOUTH SAVINGS BANK, APPELLEE, V. HETTIE L. YEISER ET AL., APPELLANTS.

FILED APRIL 10, 1908. No. 15,129.

1. **Land Contract: FORECLOSURE: PLEADING: ADMISSIONS.** In a suit by a vendor to foreclose upon a contract for the sale of real estate, if the vendee seeks the enforcement of the contract and pleads a tender of a sum to pay the remainder of the purchase price, he thereby admits that the vendor is entitled to a decree of foreclosure for the amount tendered.
2. **Tender.** In order to make a tender effective and to relieve the defendant from further interest and costs, he must, when sued, not only plead the tender, but bring the amount into court so that it may be available for the use of the plaintiff.
3. **Judgment: INTEREST.** Under section 6727, Ann. St. 1903, a judgment or decree should draw 7 per cent. interest from the date of its rendition, when founded upon a contract which provides for interest at a less rate.

4. Land Contract: SUIT FOR CONVEYANCE: DAMAGES. A vendee in a contract to convey real estate free and clear of incumbrance is entitled to nominal damages only, in an action where he seeks to compel the conveyance and to recover damages on account of limitations and restrictions in the vendor's title, if the limitations and restrictions do not affect the market value of the property.

5. ———: FORECLOSURE: DECREE. On entering a decree of foreclosure for a balance due in an action by a vendor to foreclose a contract for the sale of real estate, provision should be made requiring the vendor to make a conveyance upon the payment of the decree.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Judgment modified.*

Guy R. C. Read and *John O. Yeiser,* for appellants.

William Baird & Sons, contra.

GOOD, C.

This is an action brought by the Portsmouth Savings Bank to foreclose a vendor's lien arising out of a contract for the sale of real estate. The case has been in this court on a former occasion, the opinion being reported in *Yeiser v. Portsmouth Savings Bank,* 75 Neb. 690, where a general statement of the facts may be found. After the cause was remanded to the district court the plaintiff filed an amended petition, omitting any attempt to have the contract performed, and asking for a foreclosure upon the contract as made. The defendants answered, setting up certain limitations and restrictions and conditions in plaintiff's title, and alleging its inability to convey title free and clear of incumbrances occasioned by the limitations and conditions in the plaintiff's title, alleged certain payments upon the contract of purchase and a tender previous to the bringing of the action of $1,245.37, which was in excess of the amount due the plaintiff on the purchase price, and alleged that they had kept the tender good, and were ready, able and willing to pay the amount of said tender upon the delivery of a deed conveying title in fee simple clear of all incumbrances, alleged and asked

for damages on account of the defects in the title, and prayed that the plaintiff be ordered and directed to make a deed to the defendant Hettie L. Yeiser. The plaintiff replied, admitting the limitations in its title at the time of making the contract, and that said restrictions were limited to a period of 15 years, which term had long since expired. It denied that the limitations and conditions in the plaintiff's title constituted an incumbrance or cloud upon the title to the premises, and denied all the other allegations of the answer. Upon a trial of the issues the plaintiff had decree of foreclosure as prayed. No provision was made in the decree requiring the plaintiff to execute and deliver to the defendant a deed to the premises upon the payment of the amount of the decree into court. Defendants have appealed.

The restrictions and limitations mentioned in plaintiff's title were the same as contained in all the deeds of the original owners of Dundee Place, and restricted the use of the lots for a period of 15 years to residence purposes, that no buildings should be erected closer than 25 feet to the front of the lot line, that no residence should be erected that should cost less than $2,500, exclusive of other buildings, and that the sale or barter of intoxicants upon the premises should be prohibited. The right was given to the owner of any lot in Dundee Place to enforce the provisions and conditions of the deed. The deed containing these restrictions was made in October, 1889. The contract in this action was made in 1899, and provided for the sale of the lots in question for the sum of $1,800, $50 in cash, the remainder payable $25 monthly, with an option to the vendee of making greater payments at any time, thus making it optional with the vendee to pay the full amount at any time. All payments had been promptly made up to August, 1901. At the date when the September, 1901, payment became due, Yeiser, who was then the owner of the contract by assignment, tendered $1,245.37, a sum slightly in excess of the amount then due, and demanded a deed to the premises. At that

time the 15-year limitation had not expired, and plaintiff declined to make a deed, except subject to the limitations and conditions mentioned. This was not satisfactory to Yeiser, and the money was not paid. No further payments were made, and thereafter this action was instituted.

Appellants first insist that the plaintiff was not entitled to a decree, because at the time that it brought the action it was not able to comply with its contract, and, therefore, the decree was contrary to law. To our minds this contention is not well founded. Appellants are demanding a conveyance of the real estate. They are and have been in possession of the premises ever since the assignment of the contract, and have made less than one-half of the payments thereon, exclusive of any interest. They have also asked for damages on account of the limitations and restrictions that existed in the title. Where suit is brought by a vendor to foreclose upon a contract for the sale of real estate, and the vendee seeks the enforcement of the contract and makes a tender of a sum to pay the remainder of the purchase price, he thereby admits that the vendor is entitled to a decree of foreclosure for the amount of the tender. *Murray v. Cunningham,* 10 Neb. 167; *Phœnix Ins. Co. v. Readinger,* 28 Neb. 587; Am. & Eng. Ency. Law (1st ed.), 942.

Appellants next contend that the decree is excessive in that it should not have been for a sum in excess of the amount tendered. The law is unquestioned that, if the full amount due was tendered and the tender kept good, the appellee would not thereafter have been entitled to any interest, and would have been entitled to a decree for that amount and no more. 25 Am. & Eng. Ency. Law (1st ed.), 926. The rule is also quite general that, in order to make a tender effective and continue it in force, the defendant, when sued, must not only plead the tender, but must bring the amount into court so that it may be available for the use of the plaintiff. 25 Am. & Eng. Ency. Law (1st ed.), 932; *Clark v. Neumann,* 56 Neb. 374. This

the appellants failed to do, and, because of the failure in this respect, whatever of benefit they might have obtained by reason of the tender was lost to them. They have conceded by pleading a tender that the amount tendered was due at the time it was made, and by failure to keep the tender good the appellee was entitled to the full amount with interest.

Appellants next contend that the decree is contrary to law in that it provides that it shall draw interest at the rate of 7 per cent. per annum, though the contract of sale provides for the payment of only 5 per cent. upon deferred payments. Section 6727, Ann. St. 1903, substantially provides that judgments and decrees shall draw interest at the rate of 7 per cent. per annum, except where the judgment or decree is based upon a contract calling for a greater rate of interest. This section has been construed in *Havemeyer v. Paul,* 45 Neb. 373, and *Connecticut M. L. Ins. Co. v. Westerhoff,* 58 Neb. 379, wherein it was held that a decree based upon a written contract calling for a less rate than 7 per cent. should draw 7 per cent. from the date of its rendition. The decree of the district court in this respect was, therefore, proper.

Appellants next contend that the court erred in not allowing damages to them on account of the restrictions and limitations that existed in plaintiff's title to the premises. It will be observed that the limitations and restrictions were for the period of 15 years, and that this period had expired previous to the entry of the decree, although they did exist at the time of the tender. The evidence does not disclose that appellants suffered any injury, or that the property was of any less value because of the limitations and restrictions in plaintiff's title. The evidence shows that there was a dwelling-house upon the property, that it was used for residence purposes, and that it was not suitable or available for any other purpose. The evidence does not disclose that the property would have been of more value without the restrictions than with them. Under these circumstances, the appel-

lants were entitled to only nominal damages, and this the court awarded them in the sum of 5 cents.

Appellants complain that the decree did not require the appellee to make and deliver a deed upon the payment of the amount found due by the court. In this respect we think the appellants' contention is well founded. Appellee was entitled to the amount found due by the district court, but was entitled to that amount only upon the delivery of a deed conveying the premises in question, and the decree should have provided for the delivery of a deed to the clerk of the court for the benefit of the appellants. In all other respects the decree of the district court is right and should be affirmed. But on account of a failure to provide for a delivery of a deed to the appellants we recommend that the judgment of the district court be modified so as to provide that within 20 days from the entry of the decree the appellee shall execute and deliver to the clerk of the district court for Douglas county a good and sufficient deed, with the usual covenants of warranty, conveying the premises in fee simple, free and clear of incumbrance, to the appellant Hettie L. Yeiser, to be delivered to the appellant only upon the payment of the amount found due, together with interest and costs, and that, if the appellants shall fail within 20 days to pay the amount of the decree, the premises be sold to satisfy the decree and costs.

DUFFIE, C., concurs.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is modified, and a decree is entered in this court in conformity with the recommendation in said opinion; the costs of this court to be taxed to the plaintiff.

JUDGMENT ACCORDINGLY.

CHARLES W. THATCHER, APPELLANT, v. JOHN C. DEUSER ET AL., APPELLEES.

FILED APRIL 10, 1908. No. 15,147.

Nuisance: ANIMALS: BREEDING. The business of standing stallions and jacks for breeding purposes in a livery barn in a village is not a nuisance, if the breeding business is carried on concealed from the view of the public, and in such a manner as not to be shocking to the sense of decency to those residing or having business in the immediate vicinity.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

George A. Adams, for appellant.

Hall, Woods & Pound, contra.

GOOD, C.

Appellant, who is the owner of a hotel in the village of Raymond, brought this action against the appellees, who own and maintain a livery, feed and breeding stable near the premises of the appellant in said village, to enjoin them from keeping and standing stallions and jacks and breeding them to mares in and about their said barn. The appellees answered, admitting the keeping and maintenance of their barn for the purposes alleged, but averred that the same was kept in an orderly manner, that the breeding of said jacks and stallions was carried on in a quiet and orderly manner within the barn and without the sight of the public, and denied that the maintenance of said barn for said purposes constituted a nuisance. Upon a trial of the issues thus joined, the district court found for the defendants, and dismissed plaintiff's petition for want of equity. Plaintiff has appealed.

The evidence discloses that appellees have for a great

many years kept and operated the livery barn in question, and have kept a number of stallions and jacks therein for breeding purposes. The evidence shows that these animals were never bred, except within the barn, and that the doors were always closed, and the public excluded therefrom. The record also shows that appellant's hotel is immediately across the street from the livery barn. The particular acts complained of were the braying of the jacks and the noise made by the stallions when they were about to be used for breeding purposes, and that the stallions were led from one part of the barn through a lot and into another portion of the barn, within sight of the appellant's hotel, and that mares after being bred were immediately taken out upon the street and hitched within plain sight and view of the hotel and of its occupants and guests, and that the appearance and condition of the stallions as they were being conducted to the mares, and the mares when brought upon the street immediately after the breeding, and the neighing and squealing just preceding the breeding were shocking to the sense of decency. There is some evidence tending to sustain all these contentions. Upon the other hand, the evidence is almost overwhelming that the stallions were never conducted into the stable for breeding purposes within the sight of the hotel, and the only opportunity therefor was a possible glimpse of the horses as they were being conducted past a gate, and that when the first complaint was made this gate was boarded up so that all view of the horses was excluded. It also shows that every precaution was taken to minimize the noise, and that the noise made was not of an indecent or objectionable character, was not shocking to the sense of decency, or even annoying to those who lived in the same block. The evidence also discloses that the proprietors of the barn undertook to and substantially did enforce a rule that mares should not be taken out and hitched upon the street after being bred, and that they were usually kept in the barn for an hour or more after being bred. In addition to this

the evidence discloses that the present owner of the hotel bought the same after having lived in the village of Raymond for a number of years, knowing at the time that the barn was there and the purpose for which it was used, and that he ran the hotel adjacent to the barn and never found any fault therewith until another controversy arose, in which the appellant was several times arrested for running a pool-hall, that the appellees were members of the village board, and one of them a justice of the peace, and were instrumental in having the appellant prosecuted for the violation of a village ordinance. The evidence discloses that the appellant harbored resentment and ill will toward the appellees, and made threats that he would get even with them, and shortly thereafter instituted this action.

Upon a consideration of all the evidence, it seems apparent that the prosecution was inspired by resentment and malice, rather than by a desire to obtain just redress for a wrong suffered. It is conceded that, if the things complained of by the appellant existed, he would be entitled to relief, but upon a consideration of all the evidence, which we have carefully read, we feel impelled to say that appellant has failed utterly upon every contested issue of fact, and is entitled to no relief, unless it can be said that the keeping of a breeding stable within a village is a nuisance *per se*. We do not know of any court that has so held, nor do we conceive of any reason upon which such a holding could be made. The keeping of stallions and jacks for breeding purposes is a legitimate, proper and necessary business. They are usually kept at livery barns in villages, as being the most convenient places for carrying on the business. That such business may be carried on in such a manner as not to constitute a nuisance is beyond question; and, if it is so conducted as not to offend or shock the sense of decency and not to annoy those in the immediate vicinity, it cannot be enjoined as a nuisance. The stable involved in this controversy appears to have been so conducted.

It follows that the finding and decree 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.

GEORGE P. BEMIS, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED APRIL 10, 1908. No. 14,961.

1. Cities: INJURIES: EVIDENCE: ADMISSIBILITY. In an action for personal injuries against a city by one who claims to have been injured by reason of the overturning, during a wind-storm, of a billboard which defendant city had permitted to be erected and maintained close to, or upon, the sidewalk space, it is not error to admit testimony tending to show that at the time of the injury the board was not securely braced, and that such condition had existed for some 12 months prior thereto.

2. ———: ———: NOTICE. Section 22, ch. 12*a*, Comp. St. 1901, does not require an injured person to include within his written notice to the city a statement of the nature and extent of both the accident and injury, but reference to either, with full particulars as to the nature and extent thereof, satisfies the statute on that point.

3. ———: ———: QUESTION FOR JURY. Evidence examined, and *held* sufficient to warrant the submission to the jury of the issue as to whether or not the wind-storm that overturned the billboard was an act of God.

4. ———: ———: EVIDENCE. Evidence examined, and *held* sufficient to sustain the verdict of the jury.

5. Jury: QUALIFICATIONS. It is the duty of the trial court to decide as to the fact of qualification of a juror challenged for cause from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The trial court in determining the fact of qualification is not confined to the answers of the juror alone, but may consider

his appearance and general demeanor while undergoing the examination.

6. ———: ———. In such a case the ruling of the trial court in deciding a challenge for cause will not be disturbed unless an abuse of discretion is shown.

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

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

W. J. Connell and *Walter P. Thomas, contra.*

FAWCETT, C.

Plaintiff recovered judgment in the district court for Douglas county for injuries caused by the overthrow, during a wind-storm, of a billboard, which he claimed defendant had suffered to be placed and maintained close to, or upon, part of the sidewalk space on the north side of Farnam street, between Eighteenth and Nineteenth streets, in the city of Omaha.

Defendant, in its brief, alleges four grounds of error: That the court erred in not sustaining appellant's challenge of the juror Liddell; that the verdict of the jury is not sustained by sufficient evidence; that no sufficient notice was given to the city as required by section 22, ch. 12*a*, Comp. St. 1901; and that the court erred in admitting evidence as to the condition of the billboard at a period long prior to the accident complained of. We will consider these points in reverse order.

1. That court did not err in admitting testimony to the effect that, at various times, reaching back as far as a year and down to within a few days next preceding the accident, a brace provided for the support of the billboard was loose and detached from the anchor post. This testimony was met by testimony offered by defendant that the billboard had been inspected within a month of the acci-

dent, and all of the braces found intact and fastened to the anchor post. The weight of this conflicting testimony was exclusively for the jury. Testimony tending to show the inspection and condition of the board would not render inadmissible and incompetent the chain of testimony which, if believed by the jurors, indicated a long-continued, or at least a frequently occurring, dangerous condition of the board. *Maus v. City of Springfield,* 101 Mo. 613, 20 Am. St. 634; *Hanousek v. City of Marshalltown,* 130 Ia. 550.

2. The statute under which the city of Omaha is incorporated provides: "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 proved to have been given to the mayor or city clerk within twenty (20) days after the occurrence of such accident or injury." Comp. St. 1901, ch. 12*a*, sec. 22. The notice, shown to have been given within 20 days of the accident, is as follows: "Notice is hereby given that on Friday, the 25th day of April, 1902, about the hour of 6:30 o'clock P. M.,I sustained a serious and permanent personal injury as the result of the negligence of the city of Omaha in allowing and permitting to be maintained near the sidewalk on the north side of Farnam street, between Eighteenth and Nineteenth streets, in the city of Omaha, large billboards or wooden signs, and in failing and neglecting to cause the said billboards or signs to be removed or abated as a nuisance; the same being at such time and for a long time prior thereto a nuisance, and in a dangerous condition, and standing in danger and proximity to said sidewalk. You are further notified that at the time and place mentioned, the said place being more particularly described as follows: About 100 feet west of the west line of Eighteenth street, on the north side of Farnam street, in the said city of Omaha, while walking

along the sidewalk provided for pedestrians on said north side of Farnam street, and while immediately opposite one of the said large billboards or signs, the same, without notice or warning, was blown down upon said sidewalk at the place where I was walking, and fell upon me, crushing me to the stone walk, thereby seriously injuring me, breaking both bones of my left leg between the knee and the ankle, and greatly lacerating my leg at the said place, the bones of my leg being splintered and badly broken, by reason of the force of said billboard or sign striking me in the manner it did, causing what is known and usually termed a 'compound comminuted fracture,' which said injury is serious and permanent, and has caused a great shock to my nervous and physical system. You are hereby notified that notice of the time, place, and manner of said accident, and extent of said injury, is given in pursuance of provision of law in that behalf, and that I will look to and hold the city of Omaha liable for the damages that I have sustained as a result of said personal injury. (Signed) Geo. P. Bemis."

Courts generally agree that statutes like the foregoing should be liberally construed, and we so held in *City of Lincoln v. O'Brien,* 56 Neb. 761. The statute is explicit that "the time when and the place where" the accident or injury happened shall be given. Those particulars were furnished in the notice. There must also be actual notice in writing of the accident or injury complained of, with a statement of the nature and extent thereof. It will be observed that this requirement is in the disjunctive—"the accident *or* injury." The accident and the injury are distinct and separate. The one precedes and is the cause of the other. The injury results from the accident. A statement of the nature and extent of the accident would not of necessity include a description of the injury. In like manner, a statement of the nature and extent of the injury might be given without reference to the accident which produced it. The court cannot increase the plaintiff's burden by construction, and we must hold that a statement

of the extent and nature of either the accident or the injury, and of the time when and place where it occurred, satisfies the statute. The nature and extent of the injury were plainly detailed in the notice above set out, and we think the statutory requirement was reasonably complied with. *Wright v. City of Omaha*, 78 Neb. 124; *Forbes v. City of Omaha*, 79 Neb. 6.

It is evident that the construction which we have given the section of the statute above quoted cannot be considered an inspiration on our part, for the same view seems to have occurred to others as early as 1905, when the legislature was called upon to, and did, amend the section under consideration by substituting the conjunction "and" for the disjunctive "or," and by adding other requirements which defendant is contending for here. This section now appears as 206, ch. 12*a*, Comp. St., and reads thus: "No city, governed by this act, 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, *describing fully the accident and nature and extent of the injury* complained of, *and describing the defects causing the injury, and stating* the time when *and with particularity the place where the accident occurred,* shall be proved to have been *filed with the city clerk* within *ten* days after the occurrence of the accident or injury." The words which we have italicized indicate very clearly that some one interested in saving the rights of metropolitan cities had discovered the weakness in the statute in force prior thereto, and secured the amendment above set out.

3. Is the verdict sustained by the evidence? In this connection defendant strenuously insists that the evidence conclusively establishes the fact that "the character of the storm that blew down the billboard was extraordinary and unprecedented. It was extraordinary with reference to the variation in velocity, in the variation in direction, in duration, and in the sudden shifting of the wind during high velocity." The government record wind

sheet of the storm was introduced in evidence and explained by the officers of the weather bureau. It appears from this record that between 5 o'clock P. M. and 7:10 o'clock P. M. of April 25, 1902, the wind in Omaha attained a velocity of from 29 to 62 miles an hour; that the highest velocity prior to the accident was 60 miles an hour, and that at the time of the overturning of the board it was blowing at not to exceed 50 miles an hour. The wind shifted frequently, coming at different times from as many points of the compass, and was very destructive in its effect. One firm had 2,357 lineal feet of billboard prostrated by the wind, whereas, in previous years, not to exceed 100 lineal feet had ever been blown down during any one storm. In some instances shingles were stripped from roofs, gable ends of houses, roofs of porches, and tin roofs of buildings were blown off, windows were blown in, sections of sidewalk were overturned, in one instance causing the death of a boy, and telephone wires were broken. Witnesses from various walks of life testified that the storm was the worst and most destructive that had occurred in Omaha during their residence in that city. On the other hand, it was shown by plaintiff from records of the weather bureau that within the 27 years next preceding 1902 the wind on five different occasions, viz., in 1901, 1896, 1889, 1880 and 1875, had attained the velocity of 60 miles an hour in Omaha. In 1900 the wind passed over the city at the rate of 59 miles an hour; in 1901 at the rate of 54 miles an hour; in 1899, 1897, 1892, 1891, 1890, 1880 and 1873, at the rate of 50 miles an hour; and from 1871 down to 1901, on various occasions, it recorded a velocity of from 40 to 48 miles an hour. During one storm the railway bridge across the Missouri river was blown down. On other occasions buildings were unroofed, plate glass windows blown in, and general destruction wrought. Residents of Omaha, testifying for plaintiff, said that the storm of April 25, 1902, was not worse than had occurred in that city every few years, and that in preceding years the winds had been as high and variable

as the one that overturned the billboard in this case. We cannot say, therefore, as a matter of law, that, in considering the evidence in this case, reasonable men might not differ as to whether or not the wind-storm of April 25, 1902, was of such a character that "the defendant city, in the exercise of ordinary care, would not be bound to anticipate and guard against." The last preceding clause is taken from an instruction of the court, given upon the request of defendant. *Omaha Street R. Co. v. Craig,* 39 Neb. 601; *Chicago, B. & Q. R. Co. v. Pollard,* 53 Neb. 730. The instructions adopted defendant's theory in nearly every instance, even to placing the burden on plaintiff of proving that his case was not within the exceptions of an "act of God." We cannot say that the evidence does not sustain the verdict.

4. Did the court err in overruling defendant's challenge of the juror Liddell? We think not. In the course of his examination the juror expressed the thought that he might have some sympathy for the plaintiff; but we think his examination fairly shows that this was nothing more than a fear that he *might* possibly have some sympathy for plaintiff. Among others, these questions and answers appear in the record. "By Mr. Connell: Q. Have you any knowledge of the facts of this case, except as you have heard them stated here in court? A. No; that is all. Q. Have you any bias or prejudice for any reason for or against either of the parties to this case, or anybody connected with it? A. Well, I might have a leaning one way; I might possibly have in it. Q. Have you any bias or prejudice for or against either of the parties? A. No, sir; I have not. No, sir; I have not. No, sir; just put myself in their position, that would be all. Q. But you would be able to try the case in accordance with the evidence and the law as the court would give it to you? A. I would, to the best of my ability. Q. If accepted as a juror you would do that? A. Do the best I could. Q. You believe yourself that you could do that and that you would do that, do you not? A. Well, I would try to. Q. You have no prejudice,

so far as either party is concerned? A. No, sir; I know none of the parties at all. Q. Admitting that you have sympathy, and I presume everybody would have sympathy for Mayor Bemis, taking into account his condition, what is the fact as to whether or not, notwithstanding any sympathy for him that you might have, by reason of his injuries, could not you fairly try and determine the case in accordance with the facts and the evidence? A. I think I could; I believe I could. By Mr. Breen: Q. Suppose the evidence on any given point of fact in this case was equally balanced, for instance, one man swearing one way and another the other way, directly the contrary on any given point, would not this sympathy and leaning toward the mayor that you have tend to resolve any doubt on such a point in his favor? A. I believe it would." The above question, it will be observed, was not a proper question, as it failed to include the statement of the rule requiring plaintiff to prove his case by a preponderance of the evidence. "Mr. Connell: Q. Do I understand that you do not think you would be able to decide a controversy in the evidence uninfluenced by sympathy? Would that sympathy for his injuries control you? A. No; it would not, unless, as Mr. Breen said, they were equally balanced; and in that case he would get the benefit of it. Q. Right there—you would give him the benefit of that condition? If the court would tell you in an instruction that it devolved upon the plaintiff to prove his case, and to prove negligence on the defendant by a preponderance of the testimony—if the court would instruct you that it would require a preponderance of the testimony on the side of the plaintiff to recover, then would you resolve the doubt where the parties stood even, or would you follow the instructions of the court? A. Well, if it would require a preponderance, I suppose I would have to go by the instructions of the court. Q. Would you not do so? A. I believe I would, under the circumstances. Q. And, if the judge would instruct you that the law is that the case of the plaintiff must be established by a preponderance of

the testimony, then you would follow that instruction? A. I would try to. Q. And you believe you could and would do it? A. I would do the best I could. Q. I say, you believe that you could and that you would? A. As near as I understood the instructions I would."

Counsel for defendant place great reliance upon *Curry v. State,* 4 Neb. 545, and other early cases in this court. We had occasion to consider those cases again at a later date, and in *Basye v. State,* 45 Neb. 261, cited with approval in *Dinsmore v. State,* 61 Neb. 418, 433, *Curry v. State, supra; Miller v. State,* 29 Neb. 437, and the other early cases are discussed and distinguished. In *Dinsmore v. State, supra,* we held: "The ruling of a trial court in deciding a challenge for cause will not be disturbed, unless an abuse of discretion is shown." On page 433 we said: "The evidence as a whole shows that any impression or opinion these jurors had was wholly hypothetical, which brings the case within the principles announced in *Basye v. State,* 45 Neb. 261, where all objections urged by defendant are discussed and resolved against him, and the earlier opinions of this court cited by defendant are discussed and distinguished." In *Coil v. State,* 62 Neb. 15, we again state: "The ruling of a trial court in deciding a challenge for cause will not be disturbed unless an abuse of discretion is shown." In *Keeler v. State,* 73 Neb. 441, we said: "If the *voir dire* examination of a juror, considered as a whole, does not show incompetency, a challenge upon that ground is properly overruled, although during his examination statements be made which, if unexplained, might be ground for challenge." The opinion is by SEDGWICK, J., and fully supports the syllabus. In *Basye v. State, supra,* NORVAL, C. J., on page 278, states the rule very clearly: "Although it is competent and proper to put to a juror questions to elicit from him whether he could lay aside any opinion formed, and decide the case upon the evidence produced on the trial, yet it is the duty and province of the court, and not of the juror, to pass upon and determine the question of capability and whether or

not his opinion disqualifies him to act as a juror. * * * Manifestly, it is the duty of the trial court to decide as to the fact of qualification of the person challenged from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The trial court in determining the fact of qualification is not confined to the answers of the juror alone, but may consider his appearance and general demeanor while undergoing the examination." The rule, sustained by the overwhelming weight of authority, is clearly announced by the supreme court of Iowa in the recent case of *Croft v. Chicago, R. I. & P. R. Co.,* 134 Ia. 411, as follows: "The court is not restricted to the mere form of words in which the answers of the venireman are couched. His manner and appearance may be taken into consideration. Here, too, much must be left to the discretion of the trial court, and, as in other matters resting in discretion, its action will not be disturbed except a clear case of abuse is made to appear." This announcement of the rule is fully sustained in the following cases outside of this state: *Reynolds v. United States,* 98 U. S. 145, 156 (a case very similar in its facts); *Smith v. State,* 24 Ind. App. 688; *Commonwealth v. Roddy,* 184 Pa. St. 274; *Commonwealth v. Eagan,* 190 Pa. St. 10; *Kumli v. Southern P. Co.,* 21 Or. 505; *State v. Brown,* 130 Ia. 57; *Wilburn v. Territory,* 10 N. M. 402, 62 Pac. 968; *Jarvis v. State,* 138 Ala. 17, citing *Reynolds v. United States, supra; Schwarz v. Lee Gon,* 46 Or. 219; *Leigh v. Territory,* 85 Pac. (Ariz.) 948; *State v. Simas,* 25 Nev. 432; *Dolan v. United States,* 116 Fed. 578; *People v. McGonegal,* 136 N. Y. 62; *Ruschenberg v. Southern Electric R. Co.,* 161 Mo. 70; *Brady v. Territory,* 7 Ariz. 12; *State v. Ekanger,* 8 N. Dak. 559, quoting from *State v. Church,* 6 S. Dak. 89; *Baker v. State,* 88 Wis. 140; *Hardin v. State,* 66 Ark. 53, citing *Reynolds v. United States, supra; State v. Summers,* 36 S. Car. 479; *Trenor v. Central P. R. Co.,* 50 Cal. 230; *Williams v. Supreme Court of Honor,* 221 Ill. 152; *Gam-*

mons v. State, 85 Miss. 103; Thompson and Merriam, Juries, sec. 252; 1 Thompson, Trials, sec. 88.

Applying the law, as clearly announced by this and the other courts above cited, we hold that the trial court, in determining the fact of qualification of the juror Liddell, was not confined to his answers alone, but could consider his appearance and general demeanor while undergoing examination, and if, from his answers and a consideration of his appearance and general demeanor, the court was convinced, as it evidently was, that he was a fair and impartial juror, it was not an abuse of discretion to overrule the challenge. The answers of the juror fall far short of showing that he had any "unconditional and fixed" sympathy for Mr. Bemis, whom he did not know personally. He expressly stated that he had no prejudice, so far as either party is concerned, so that, at most, all that can be inferred from his examination is that he had a vague "hypothetical or conditional" feeling of sympathy for plaintiff, nothing more than any fair-minded citizen would have for anyone in plaintiff's unfortunate condition. The entire examination of the juror shows him to have been a very fair and frank man, just the kind of a man who would make a good juror. His answer, "Well, if it would require a preponderance, I suppose I would have to go by the instructions of the court," and again, "As near as I understood the instructions I would," were sufficient, when taken together with the court's observation of the juror while giving this testimony, to bring the question as to whether or not he should be excused within the discretion of the court. The court, after hearing all the answers and observing his demeanor, exercised its discretion in favor of his retention as a juror, and we cannot say that in so doing there was any abuse of discretion.

The case appears to have been tried with great care on the part of the court, and with signal ability on the part of counsel on both sides. No claim is made that the amount allowed by the jury is excessive, nor is the conduct of any

juror assailed. The judgment is just, and should be affirmed.

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

AFFIRMED.

IN RE ESTATE OF WILLIAM H. NELSON.
MINNIE E. NELSON, APPELLEE, V. COLUMBUS H. NELSON, EXECUTOR, APPELLANT.

FILED APRIL 10, 1908. No. 15,143.

1. Fraud: PLEADING. "Questions of fraud are generally questions of fact, and must be raised, if at all, by suitable pleadings alleging such fraud." *Hamilton v. Ross*, 23 Neb. 630.
2. Judgment: PLEADING. "The sufficiency of the petition is not a test of jurisdiction; although it may be defective in substance it will support a judgment if the court has authority to grant the relief demanded and the facts upon which the demand is based are intelligibly set forth." *Dryden v. Parrotte*, 61 Neb. 339.
3. ———: COLLATERAL ATTACK. "A judicial order or judgment cannot be attacked in a collateral proceeding unless affected by some jurisdictional infirmity." *Dryden v. Parrotte*, 61 Neb. 339.

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

Halleck F. Rose and *Allen G. Fisher*, for appellant.

D. B. Jenckes and *Arthur F. Mullen, contra.*

FAWCETT, C.

For convenience we will designate the claimant, Minnie E. Nelson, as plaintiff, and the Estate of William H. Nelson, deceased, as defendant. On June 7, 1906, plaintiff filed in the county court of Dawes county, the following claim: "In the County Court of Dawes County, Nebraska. In the Matter of the Estate of William H. Nelson, De-

ceased. Now comes Minnie E. Nelson, and avers that she is the widow of William H. Nelson, deceased, late of Dawes county, and is entitled to an allowance for her maintenance and support out of said estate; that said William H. Nelson departed this life on the 7th day of July, 1906 (this is a typographical error, as it is conceded that Mr. Nelson died on July 7, 1905); that she is reasonably entitled to an allowance of $40 a month from the time of his death up to the present time, and will be until the said estate is finally closed up, for her support and maintenance; that there is justly due for her support and maintenance from said estate the sum of $350, and she asks that this court make an order directing the payment of said sum to her for her support and maintenance." (Signed and verified.) A hearing was had before the county court, and plaintiff's claim was disallowed. She thereupon prosecuted an appeal to the district court for Dawes county, where, under the direction of the court, issues were made up for the trial of the cause. The petition filed by plaintiff is, in substance, a copy of her claim in the county court. Defendant answered, setting up various grounds of defense, to which answer plaintiff for reply filed a general denial. After the trial had been entered upon in the district court and some evidence received, the defendant, by leave of court, filed an amended answer, in which, among other things, he alleged that on February 10, 1904, the said William H. Nelson, in the district court for Dawes county, Nebraska, obtained a decree granting him an absolute divorce from the plaintiff herein; that plaintiff appeared in said divorce suit in person and by counsel, and filed her answer; that prior to the entry of the decree the parties to said divorce suit, out of court, settled all of their property rights in a contract which was confirmed by the court in said decree; that said William H. Nelson paid to plaintiff, in accordance with their said contract, the sum of $1,250 in cash, and sundry other large bills, which plaintiff had contracted in the name of said William H. Nelson; that said judgment or decree of

divorce was never appealed from by plaintiff, and thereby became absolute; that plaintiff at all times thereafter to the time of filing her claim in the county court treated said divorce as absolute, and never thereafter lived or had anything whatever to do with said William H. Nelson; that on August 11, 1904, Mr. Nelson married one Gertrude Helwig, who continued to live with the said William H. Nelson from the date of said marriage to the time of the death of said Nelson; and that said Gertrude, and not the plaintiff, is the widow of said William H. Nelson, deceased. After the filing of said amended answer plaintiff obtained leave to withdraw her reply, and filed a motion to strike certain portions of the amended answer, which motion was overruled, whereupon plaintiff, by leave of court, again filed her general denial as a reply to said amended answer. Upon the issues thus joined the case proceeded to trial. The district court found in favor of plaintiff, and entered a decree containing a large number of findings which we do not deem it necessary to set out, and gave judgment in favor of the plaintiff and against Columbus H. Nelson, as executor of the estate of William H. Nelson, deceased, in the sum of $350, with interest from June 7, 1906, and costs of suit. From that decree this appeal is prosecuted.

In their brief filed here counsel for plaintiff say: "The real questions presented by the record in this case are two: First: was Minnie E. Nelson the lawful wife of William H. Nelson at the time of his death? Second: If Minnie E. Nelson was the lawful wife of William H. Nelson at the time of his death, has she been estopped from claiming her rights as his widow?" As the first of these two questions must be answered in the negative, it will be unnecessary to consider the second. The only theory upon which plaintiff can be permitted to recover in this action is that the decree of divorce above referred to was void for want of jurisdiction on the part of the court to enter it. If it was void, it was subject to collateral attack; if not void, then, however irregularly the court may have proceeded in that suit, the judgment cannot be assailed collat-

erally, and plaintiff's action here must fail. Plaintiff's contention is that the decree of divorce was void for two reasons: (1) That the petition in the divorce case did not state facts sufficient to constitute a cause of action for cruelty; and (2) that the decree was obtained by fraud and collusion. The first of these contentions must fail for the reason that it is well settled in this state, as well as elsewhere, that the sufficiency of the petition is not a test of jurisdiction. The second contention must fail for the reason that there is no plea of fraud in this case. Defendant, in the amended answer, set up the divorce as a bar to plaintiff's right to recover. Plaintiff's reply was simply a general denial. We do not think this was sufficient to raise either the question of jurisdiction or fraud. Clearly, it could not raise the latter. The record shows that plaintiff appeared in the divorce suit, filed her answer, and ratified the decree entered by accepting the provision made for her therein. She subsequently acquiesced in that decree, and permitted her former husband to marry another woman on the strength of it. She never performed, or attempted to perform, any marital duties after the entry of the decree, and never asserted any claim that she was the wife of Nelson until after his death, when she thought she saw a chance to obtain another slice of his estate. To permit her to come into court at this time and disgrace the memory of her former husband and fasten the crime of bigamy upon an innocent woman, in order to entitle her to obtain a moiety of this estate, would be a travesty upon justice; and, even if there were not ample authority to sustain us, we would not hesitate to hold, as a case of first impression, that plaintiff is estopped.

That fraud is an affirmative defense which must be pleaded, see *Hamilton v. Ross,* 23 Neb. 630, and the numerous authorities cited in 1 Page's Digest, pp. 929-931.

That the irregularity of the divorce proceedings cannot be shown under the pleadings in this case, see 2 Black, Judgments (2d ed.), sec. 875; *Bennett v. Morley,* 10 Ohio,

100; 2 Black, Judgments (2d ed.), sec. 971, note 75, and cases there cited.

That the petition is not a test of jurisdiction, see *Trumble v. Williams,* 18 Neb. 144; *Taylor v. Coots,* 32 Neb. 30; *Logan County v. Carnahan,* 66 Neb. 693; *Head v. Daniels,* 38 Kan. 1; *Entreken v. Howard, Admr's,* 16 Kan. 553; *Rowe v. Palmer,* 29 Kan. 337; *Moore v. Perry,* 13 Tex. Civ. App. 204, 35 S. W. 838; 1 Black, Judgments (2d ed.), sec. 259; *Rush v. Moore,* 48 S. W. (Tenn. Ch. App.) 91; *McFarlane v. Cornelius,* 43 Or. 513; *Dryden v. Parrotte,* 61 Neb. 339; *Howell v. Ross,* 69 Neb. 1; *In re James,* 99 Cal. 374.

That a domestic judgment, regular upon its face, cannot be collaterally attacked, see 1 Black, Judgments (2d ed.), secs. 270, 271, 278; *Cizek v. Cizek,* 69 Neb. 797, 800; *Banking House of A. Castetter v. Dukes,* 70 Neb. 648; *Aldrich v. Steen,* 71 Neb. 57; *Sodini v. Sodini,* 94 Minn. 301; *Fraaman v. Fraaman,* 64 Neb. 472.

There is no theory upon which plaintiff's action can be maintained. We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to dismiss plaintiff's appeal from the county court at plaintiff's cost.

CALKINS and ROOT, CC., concur in the result.

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 dismiss plaintiff's appeal from the county court at plaintiff's cost.

REVERSED.

CATHERINE ROUSE, APPELLANT, V. HENRY WITTE ET AL., APPELLEES.

FILED APRIL 10, 1908. No. 15,021.

1. **Deeds: VALIDITY.** A deed executed and acknowledged, but without an attesting witness, is valid between the parties.

2. **Acknowledgment: IMPEACHMENT.** Evidence examined, and found insufficient to impeach the certificate of acknowledgment of a justice of the peace attached to a deed of real property.

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

J. H. Broady and *Lafe Burnett,* for appellant.

Charles A. Robbins, contra.

CALKINS, C.

Prior to April 28, 1869, Joseph Rouse was the owner of a quarter section of land in Saline county, and on said day he executed a deed conveying said premises to one John Frederick Witte, the defendant's father and grantor. The plaintiff Catherine Rouse was the wife of Joseph at the time of the execution of said deed, which purports to be signed by her mark and acknowledged by her. In 1903 Joseph Rouse died leaving him surviving the said Catherine Rouse, his widow, who afterwards brought this action to recover her dower in the said lands, claiming that she had never in fact joined in the execution of the deed to Witte. There was a trial to the judge of the district court, and a finding and judgment for the defendants, from which the plaintiff appeals.

1. The original deed from Rouse to Witte is in the record. The scrivener used a printed blank prepared for use in the state of Missouri. Two forms of acknowledgment were printed on this blank, one for the acknowledgment of a single person, and the other for the acknowledgment of a husband and wife, containing a certificate that

the latter, being made acquainted with the contents of the deed on examination apart from her husband, acknowledged that she relinquished her dower in said premises, conveyed freely and without compulsion or undue influence of her husband. Both certificates were filled out, the first containing the name of Joseph Rouse, and the second the name of Joseph Rouse and his wife Catherine, and both were certified by the justice. The instrument purports to be signed with the autographic signature of Joseph Rouse, while the name of Catherine Rouse is written in what appears to be the handwriting of the justice of the peace, with a cross between the Christian and surname and the word "her" over and the word "mark" under the cross. The name of the justice of the peace appears on the copy before us as an attesting witness, and three fifty-cent internal revenue stamps are attached, canceled April 28, 1869. This instrument was twice recorded—on May 10, 1869, and again on March 15, 1880. Neither the internal revenue stamp nor the signature of the justice as a witness appeared upon the record made May 10, 1869, but this record in other respects is the same as the one made in 1880, in which the deed before us is accurately copied. It is contended that the omission from the record made in 1869 of the name of the attesting witness tends to show that the signature of the attesting witness was not attached until about the time of the record made in 1880. The presumption that the first recording was correctly done might obtain, if it were not for the fact that the internal revenue stamps upon the deed were omitted. The difficulty of securing these stamps in 1880, long after the law requiring their use had been repealed, renders it extremely improbable that these stamps were affixed at a later date, and the fact that the register in recording the deed omitted these stamps greatly weakens the presumption that the deed was in all particulars correctly copied as it then existed. But we regard the question whether the attesting wit-

ness affixed his signature before or after the first recording as immaterial. A deed is good between the parties without an attesting witness. *Pearson v. Davis,* 41 Neb. 608. If the plaintiff signed and acknowledged the deed she is bound thereby, whether there was an attesting witness or not, and if she neither signed nor acknowledged it she is not bound thereby, even if the magistrate signed his name as witness at the time of the execution thereof.

2. Section 3, ch. 73, Comp. St. 1907, provides that the acknowledgment must be made or proved, if in this state, before a judge or clerk of any court or some justice of the peace or notary public therein. Section 13 of the same chapter provides that "every deed acknowledged * * * and certified by any of the officers above named, * * * may be read in evidence without further proof." but that such certificate shall not be conclusive but may be rebutted by any party affected thereby. There also exists in favor of this deed the presumption accorded to documents over 30 years old, which is stated to be that, where any document purporting or proved to be 30 years old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested, and the attestation or execution need not be proved, even if the attesting witness is alive and in court. Stephens, Digest of Evidence, art. 88; 1 Greenleaf, Evidence (16th ed.), sec. 575*b*. The question therefore presented is whether the evidence produced on the part of the plaintiff is sufficient to overcome these legal presumptions. It is generally held that the evidence to impeach the certificate of an acknowledgment must be clear and convincing, and that as a general rule the unsupported testimony of the party purporting to have made the acknowledgment is insufficient to over-

come the officer's certificate. *Perceau v. Frederick,* 17 Neb. 117; *Phillips v. Bishop,* 35 Neb. 487; *Council Bluffs Savings Bank v. Smith,* 59 Neb. 90. On her direct examination the testimony of the plaintiff was as follows: "Q. Now, Mrs. Rouse, did you ever sign away your right of dower or your interest in that land? A. No, sir. On rebuttal she was recalled and testified as follows: Q. Look at this instrument and see if you ever saw that (showing witness deed). A. No, sir; not that I know of. Q. This is a deed. Look at that signature here made by mark. Did you ever make that? A. No, sir. Q. Is that th way you sign your name? A. No, sir; 'a' in place of 'e'. Q. You don't sign your name so? A. Not with an 'a'. Q. How do you spell your name. A. 'C-a-t-h-e-r-i-n-e.' Q. 'C-a-t-h-e-r-i-n-e'? A. Yes, sir; I see this is signed with an 'a'. Q. Did you ever sign this instrument in that way—did you make that mark? A. No, sir; I did not." This is all the testimony of the plaintiff upon the question of her signature to the deed. She testifies that she and her husband moved away from this property in about 1869, but she does not tell what she remembers of the sale by her husband, whether she was present when her husband signed the deed or knew of its being executed by him. She does not tell whether she was acquainted with the justice of the peace who certifies that she acknowledged the execution of the deed or whether she ever had any conversation with him on the subject, and utterly fails to deny the essential fact of his certificate that she acknowledged the execution of the deed. If it were true that she went with her husband and saw him execute the deed, and saw the justice write her name upon it and touched the pen while he make the mark, according to the usual custom where a person signs by mark, and acknowledged to the justice that it was her voluntary act and deed, she might still testify as she did and satisfy her conscience, for she denies none of the above acts. True, she says that she didn't make the mark, but she, being illiterate, might not have understood that,

in contemplation of law, she made her mark by touching the pen held and directed by another. Assuming her veracity, her denial is inconclusive and unsatisfactory.

It is, however, argued that she is corroborated by circumstances. As we have already seen, the deed as recorded in 1869 did not appear to be witnessed or stamped, and the signature of the attesting witness and the internal revenue stamps attached to such deed first appeared in the second record, made in 1880. The evidence tends to show that about this time the defendants endeavored to get a new deed from the plaintiff and her husband, which the latter signed, but which the plaintiff refused to execute. Being pressed upon her examination as to what reason the defendants gave for wanting a new deed, she finally admitted that it was because the old deed was not witnessed. It is argued by the plaintiff that this act of the defendants was an admission which tends to corroborate the plaintiff's testimony. If it were material whether the deed was witnessed in the first instance, such a statement would have been relevant as tending to show that the deed was not so witnessed, but it is not an admission and does not tend to show that the plaintiff did not in fact sign and acknowledge the deed. The defendants were neither of them the original grantee, and it is not shown that they had any personal knowledge of the original transaction, and the fact that they attempted to get a new deed when they discovered an apparent defect in the record title does not amount to an admission on their part nor tend to show that the deed was not in fact signed and acknowledged. There is some testimony that the plaintiff was able to write, and this is urged as rendering it improbable that she should have signed by a mark. The testimony that she could write comes from herself and the members of her family, and does not purport to show that she did so with any degree of ease or facility. She admits that for the last few years she has signed her pension vouchers with a mark. No specimen of her writing was produced except her

signature to the petition and the verification thereof, the original of which is in the record. This signature appears to have been painfully achieved with great difficulty. It certainly does not appear that she writes with sufficient facility to render it improbable that she would, in executing a deed, have signed with a mark. The district judge had the opportunity to see and hear the witnesses testify in person, and he found against the plaintiff. An independent examination of the record leads us to the same conclusion, and we are satisfied that his decision was correct.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

FREDERICK N. GODDARD, APPELLEE, V. HENRY T. CLARKE ET AL., APPELLANTS.

FILED APRIL 10, 1908. No. 15,131.

1. **Receivers: APPOINTMENT: DISPOSITION OF FUNDS.** Where the separate mortgages of different owners are sought to be foreclosed in the same action, the court may make an order appointing a receiver of one or more of the mortgagees according to their respective rights, and such order, when made, governs the disposition of funds collected thereunder until it is modified or set aside.

2. ———: ———: ———. Where an order is made appointing a receiver to collect the rents of mortgaged property for the benefit of a junior mortgagee, a senior mortgagee, party to the suit, who does not object to such order, may not, after sale for a price insufficient to pay the amount due upon its mortgage, have such order modified so as to secure the benefit of the rents collected thereunder, especially when its application fails to show that it would have been entitled to a receiver for its own benefit at any time before sale.

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

W. D. McHugh, for appellants.

Francis A. Brogan and *H. W. Pennock, contra.*

CALKINS, C.

The plaintiff began a suit to foreclose a mortgage on part of two city lots, making the Creighton University, which held a prior mortgage on these two lots and 12 others, a party defendant. The university filed an answer in which it sought to foreclose its mortgage, making one Bellamy, who held a junior mortgage on the remaining part of the lots mortgaged to plaintiff, a party defendant. The district court found the mortgage to the university void, and from this decree an appeal was prosecuted to this court, where the same was reversed, and the mortgage to the university held a valid first lien. *Goddard v. Clarke,* 1 Neb. (Unof.) 769. The cause being remanded, a decree was rendered by the district court finding the mortgage to the university a valid first lien, to which the mortgages of the plaintiff and Bellamy were subject. By virtue of such decree the premises were sold, and bid in by the university at a price some $1,700 less than the amount due it on its decree. After the first decree, and pending the appeal, the plaintiff and Bellamy each filed a motion for the appointment of a receiver to collect the rents of the property covered by their respective mortgages; and upon these applications the court made an order appointing such receiver and directing him to apply the proceeds of that portion of the property covered by the plaintiff's mortgage to the plaintiff's claim, and the proceeds of that part of the property covered by the defendant Bellamy's mortgage to the Bellamy claim. No modification of this order was sought until after the sale of the property, when, there being some $1,200 in the

hands of the receiver which had been collected by him under such order, Creighton University applied to the court for an order requiring the receiver to pay such money to it to apply upon the unsatisfied portion of its decree. Before the disposition of this application the university filed a motion for an order modifying the original order appointing the receiver by striking therefrom the provision for the payment to Goddard and Bellamy of the moneys collected thereunder. These applications were denied, and the moneys so collected were by the district court ordered to be paid to the plaintiff Goddard and the defendant Bellamy, and from this order the university appeals.

1. Where the separate mortgages of different owners are sought to be foreclosed in the same action, it may happen that some of the parties may be entitled to the remedy of the appointment of a receiver to collect the rents of the mortgaged property, while as to others no ground for such relief exists. This may depend upon the terms of their several instruments and the stipulations therein contained as to rents, or upon their position as to priority, the property frequently being ample to pay the senior, and insufficient to discharge the senior and junior mortgages. Again, the application for a receiver is attended with some risk and some burdens which all the parties similarly situated may not desire to incur or assume. In still other cases the rights and wishes of the parties may be the same. It follows that in some cases it may be proper to appoint a receiver to collect rents for the benefit of some mortgagees, and not for others; while in other cases the appointment should be made for the benefit of all according to their respective interests. This doctrine has frequently been recognized in the administration of the remedy. High, Receivers, sec. 688; 23 Am. & Eng. Ency. Law (2d ed.), 1031; 27 Cyc. 1632; *Washington Life Ins. Co. v. Fleischauer,* 10 Hun (N. Y.), 117; *Hennessey v. Sweeney,* 57 N. Y. Supp. 901; *Cross v. Will County Nat. Bank,* 177 Ill. 33; *Nesbit v. Wood,* 56 S. W. (Ky.) 714.

We think it established upon principle and authority that a court may in a foreclosure case appoint a receiver for the benefit of one or more of the mortgagees claiming liens upon the premises; and it necessarily follows that, the court having made such an order, the same becomes the law of the case and governs the disposition of funds collected under it until it is modified or set aside.

2. The general rule is that a junior mortgagee who obtains a receiver of the rents and profits in aid of a bill to foreclose his mortgage is entitled to the rents and profits at the hands of such receiver up to the time of appointing a receiver upon a bill by a prior mortgagee not a party to the original suit. High, Receivers, sec. 688. And the prior mortgagee is only entitled to have of the receiver such rents and profits as accrue after the appointment in aid of such prior mortgage, although one and the same person is appointed in both cases. The rule is based upon the consideration that until the elder mortgagee sees fit to assert his right to the rents and income a junior incumbrancer has a right to do so; and the first mortgagee, not being a party to the former suit and having no lien on the rents and profits, and no right to recover the back rents, can only assert his right thereto as against the receiver from the date of the appointment in his own suit. High, Receivers, sec. 688. A consideration of the reasons for these rules will simplify their application to cases where the different mortgagees are parties to the same action. If the senior mortgagee would be entitled to the appointment of a receiver to collect rents and profits at any stage of the action, his right following his lien would be superior to that of a junior mortgagee; and if asserted either in an application made upon his own initiative or in opposition to an application made by a junior mortgagee it should be recognized. But, if the necessary facts to entitle the senior mortgagee to a receiver do not exist, or if they do exist and such senior mortgagee omits to assert them and a receiver is appointed for the benefit of a junior mortgagee, such order should stand until the senior mortgagee

asserts his right, or at least until it is shown that the order was improvidently granted in the first place. In the instant case there is nothing to show that the university would have been entitled to a receiver on its own application at the time the order was made. It does appear that at the sale the property did not realize a sum sufficient to satisfy its claim; but for how long prior to such sale such deficiency in value existed is not attempted to be shown. In this case the appointment of a receiver and the sequestration of the rents seem to have been entirely due to the efforts of the plaintiff and the defendant Bellamy, and they should not be deprived of the fruits of their superior diligence in the absence of any showing that the senior mortgagee had or attempted to assert any rights to these rents until after the sale.

It follows that the judgment of the district court should be affirmed, and we so recommend.

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

ELMER G. STARR, RECEIVER, APPELLEE, V. BANKERS UNION OF THE WORLD ET AL., APPELLANTS.

FILED APRIL 10, 1908. No. 15,155.

1. **Beneficial Associations: POWERS.** A fraternal beneficiary association organized under the laws of the state has no authority to purchase the business and assume the risk of another association of like character.

2. ———: CONVERSION: DEFENSES. Where a fraternal beneficiary association obtains possession of the funds of another association of like character, it cannot defend an action for conversion on the ground that the acts by which it secured the funds were not within its corporate capacity.

3. Trover: LIABILITY OF AGENT. One who aids and assists in the wrongful taking of chattels is liable for the conversion thereof, though he acted as agent for another.

4. Receivers: APPOINTMENT: EVIDENCE. The recital of jurisdictional facts in an order appointing a receiver is *prima facie* evidence of the existence of such facts.

5. Beneficial Associations: RECEIVERS: JURISDICTION. Where all the property, books and records of a fraternal beneficiary association organized under the laws of another state are brought into this state, and the business of the association is attempted to be here carried on by persons assuming to act as the officers or agents thereof, the courts of this state have power to appoint a receiver to administer the property of such association.

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

Weaver & Giller, Robert Ryan and *John W. Burdette,* for appellants.

Crane & Boucher, contra.

CALKINS, C.

The Order of the Iron Chain was a fraternal beneficiary society organized under the laws of the state of Minnesota in 1898, and having its home office at Winnebago, in that state, until November 11, 1901. At that date it had cash on hand, $5,466.01 in the benefit fund, $2,348.68 in the reserve fund, and $2.80 in the extension fund. Under the rules governing the order the benefit fund was devoted to the payment of death claims, and the reserve fund was to be used to supplement the benefit fund when the regular benefit assessments exceeded the number of 12 in any one year, while the extension fund was to be used in extending the organization. During 1901, and prior to November 11, there had been 12 regular benefit assessments, and in addition thereto there were valid outstanding death claims amounting to about $20,000. On November 4, 1901, the defendant the Bankers Union of the World, which was a fraternal beneficiary society organized under the laws of

Nebraska, by its directors, authorized the defendant Spinney, its president, "to confer with the directors of the Order of the Iron Chain and make such arrangements as he should deem necessary and proper to effect a consolidation of the said Order of the Iron Chain with the Bankers Union of the World." November 11, 1901, the defendant Spinney, at Winnebago, Minnesota, entered into a written contract with the directors of the Order of the Iron Chain, which stipulated that the management, property, assets and money of the Order of the Iron Chain should be set over to the Bankers Union of the World; that the latter should use the sums of money set over in a manner conformable to the regulations and by-laws of the former, and pay the mortuary claims then pending and thereafter accruing against that order in accordance with the terms of its certificates, constitution and by-laws. In pursuance of this contract the funds, books, records and other property of the Order of the Iron Chain were turned over to the defendants and brought to Omaha, where the money was placed in the treasury of the Bankers Union of the World and the books and records kept in its office. The head clerk of the Order of the Iron Chain was brought to Omaha and placed in charge of these books and papers. The defendant Spinney assumed the title of supreme chancellor of the Order of the Iron Chain, and proceeded to send out notices of assessment to members of that order, from which a very small sum seems to have been collected. There is no evidence as to what was done with the moneys received from the Order of the Iron Chain, and, so far as the record shows, it still remains in the hands of the defendants. In January, 1904, upon the application of James H. Womack, a beneficiary whose claim against the Order of the Iron Chain had been approved prior to November 11, 1901, the plaintiff was by the district court of Douglas county appointed receiver of the Order of the Iron Chain, with directions to commence such actions as might be necessary against any persons for the recovery of any property or effects of the order which might seem to have

been converted by them or found to be in their possession. The plaintiff, having qualified as such receiver, brought this action in the district court for Douglas county against the defendants the Bankers Union of the World and Edmond C. Spinney, charging the conversion by them of the funds as aforesaid received by them from the Order of the Iron Chain. The defendants answered, asserting the validity of the contract, and denying the jurisdiction of the court to appoint the plaintiff receiver, and upon the issues so formed there was a trial had to the court, who found for the plaintiff, and rendered a judgment against the defendants for the full amount claimed. From this judgment the defendants appeal.

1. That the defendant the Bankers Union of the World had no authority to purchase the business or assume the risks of the Order of the Iron Chain is settled by the decision of this court in *State v. Bankers Union of the World,* 71 Neb. 622. The fact that the statute law of Minnesota undertakes to regulate the consolidation of such societies may be taken as a recognition of the powers of societies organized under the laws of that state to make such an agreement, but it cannot be held to confer such a power upon the Nebraska society. The Nebraska society not having the legal capacity, the obligation it attempted to assume in the contract in question was void as well in Minnesota as Nebraska.

2. Any distinct act of dominion wrongfully exerted over one's property in denial of his right is a conversion. 2 Cooley, Torts (3d ed.), 524; *Hill v. Campbell Commission Co.,* 54 Neb. 59; *Stough v. Stefani,* 19 Neb. 468. While the defendant society is not liable on its contract to assume the risks and liabilities of the Order of the Iron Chain, it cannot defend an action for the conversion of the funds of that order on the ground that the acts by which it secured the funds thereof are not within its corporate power. Cook, Corporations (5th ed.), sec. 15*b; National Bank v. Graham,* 100 U. S. 699; *Mendel v. Boyd,* 3 Neb. (Unof.) 473.

3. The question whether the defendant society would have been liable had it never had the money is not here involved, for it is admitted that it was received by it and placed in its treasury. That the defendant Spinney, through whose agency it actually procured possession of these funds, is also liable therefor cannot be doubted. Where several parties unite in an act which constitutes a wrong to another under circumstances which fairly charge them with intending the consequences which follow, it is a very just and reasonable rule of the law which compels each to assume and bear the responsibility of misconduct of all. 1 Cooley, Torts (3d ed.), 153. Hence, it is held that one who aids and assists in a wrongful taking of chattels is liable for the conversion, though he acted as agent for a third person. *McCormick v. Stevenson,* 13 Neb. 70; *Stevenson v. Valentine,* 27 Neb. 338; *Cook v. Monroe,* 45 Neb. 349; *Hill v. Campbell Commission Co.,* 54 Neb. 59; *Osborne Co. v. Plano Mfg. Co.* 51 Neb. 502.

4. It is argued with much insistence that the order of the district court for Douglas county appointing the plaintiff as receiver of the Order of the Iron Chain was void for want of notice required by the statute to be given in such cases, and that the plaintiff has not, therefore, the legal right to sue. The petition alleges that on the 7th day of January, 1904, in the action of James H. Womack against the Order of the Iron Chain, he was duly appointed receiver of its property, etc., and authorized to bring any action for the collection of any property of, or debts due to, such Order of the Iron Chain. There was a further allegation that the Order of the Iron Chain was organized under the laws of the state of Minnesota; that its home office was in the city of Winnebago, in said state, prior to the 11th day of November, 1901, since which time its home office and all its property had been in the city of Omaha; that the defendant Spinney had since said date been the supreme chancellor of said order. These allegations were met in the answer by statements that the district court was without jurisdiction, and that the only

notice served in said case was upon the defendant Spinney as supreme chancellor; that said Spinney was never supreme chancellor of said order and never acted as such. The new matter in this answer was controverted by reply, and the plaintiff introduced in evidence the order appointing him as receiver and the bond showing his proper qualification. The order contains a finding that due and legal notice of the application for the appointment of a receiver was given to the defendant according to law. There was no further proof as to the giving of notice of the application for the receiver. The recital of jurisdictional facts in the order appointing a receiver is *prima facie* evidence of the existence of such facts. *Edee v. Strunk,* 35 Neb. 307; *Hagerman v. Thomas,* 1 Neb. (Unof.) 497. There being no evidence to rebut this presumption, it must prevail.

5. The defendants contend that the courts of this state cannot administer the affairs of a foreign corporation, and that the district court for Douglas county had, therefore, no jurisdiction of the subject of the action. Where the general administration of the assets of an insolvent corporation is proceeding in the state of its creation, there are good reasons, founded on the principles of judicial comity, why the courts of another state should not appoint receivers of such of its assets as may be found in its jurisdiction; but the impounding of assets of the debtor by means of a receiver being in the nature of a proceeding *in rem,* it is believed that no principle can be suggested which disables a court of equity from taking that course with the assets of a non-resident debtor, corporate or unincorporate. 5 Thompson, Corporations, sec. 6861. The power to appoint a receiver of the assets of a foreign corporation is constantly exercised. 5 Thompson, Corporations, sec. 6861; 3 Cook, Corporations (5th ed.), sec. 865. That a court should not appoint a receiver to administer the internal affairs of a foreign corporation is a very general rule, the reason for which is that the court cannot obtain control of all the property, books, records and

members of the corporation so as to do full justice between all the parties interested, but the operation of this rule ceases when the reason for it no longer exists, and whatever might be the objection to appointing a receiver for the property of a foreign corporation found in this state where such property is only part of its assets, and where the books and records and officers of such corporation are beyond the process of the court, they do not apply in this case. Here all the assets, books and records were brought into this jurisdiction. Here the defendants assumed to exercise the power and authority of the foreign corporation. No assets, no books, no person assuming to act as its officer remained in the state of its creation. Clearly the courts of this state, in which all that remained of the Order of the Iron Chain had been brought by these defendants, would be better able to take jurisdiction of an action by its beneficiaries and members than would the courts from the state from which it was abducted. 6 Thompson, Corporations, secs. 8010, 8011. There nothing remained for the jurisdiction of that state to act upon, no funds, no records, and no officers, but those who had abdicated their authority and ceased to act for the order. None of the ordinary reasons why the courts of this state should not take jurisdiction of these assets remained, but whether the suit in which the receiver was appointed is considered as one to subject the assets of the foreign corporation found in this state to the payment of its debts, or whether it be considered as a suit to administer and wind up the affairs of such corporation, every reason exists why the courts of this state should take jurisdiction.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

EDWIN F. MCCLURE, APPELLEE, V. CITY OF BROKEN BOW, APPELLANT.

FILED APRIL 10, 1908. No. 15,110.

1. **Limitation of Actions:** OBSTRUCTION OF WATERCOURSE. Where defendant fills with earth the channel of a creek and fails to provide a sufficient outlet for the flood waters that would naturally find passage down said watercourse, so that at widely separated dates the flood waters are backed up and cast against and over plaintiff's lots and into his mill, plaintiff's cause of action will accrue at the date of the injury to his property, and not at the time of defendant's negligent acts.

2. **Waters:** OBSTRUCTION OF WATERCOURSE: DAMAGES. In such case, the measure of plaintiff's recovery is the difference in the fair market value of his property immediately before and immediately after the injury.

3. ———: ———: ACTION: INSTRUCTIONS. Upon the trial of said case, plaintiff's witnesses, if qualified, may testify to the cost of restoring said property to its condition before the injury, but it is error to instruct the jury that it may allow such cost in addition to general damages, or to instruct, in effect, that the possibility of future overflows and further injury are factors to be considered in making up a verdict for plaintiff.

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

J. H. Broady and *N. T. Gadd,* for appellant.

Sullivan & Squires and *L. P. Main, contra.*

ROOT, C.

Action against defendant for injuries to plaintiff's mill and lots because of the alleged negligent filling of a natural watercourse and failure to provide in lieu thereof a sufficient outlet for flood waters. Plaintiff prevailed, and defendant appealed.

Defendant is a municipal corporation. By virtue of subdivision XV, sec. 69, art. 1, ch. 14, Comp. St. 1907, it had authority "to establish, alter and change the channel

of watercourses, and to wall them and to cover them over; to establish, make and regulate wells, cisterns, windmills, aqueducts, and reservoirs of water, and to provide for filling the same." Muddy creek flows through the city of Broken Bow, and drains a considerable water-shed. The natural channel of said creek was about 10 feet deep and 60 feet wide. The city council changed and straightened the course of said stream, placed 3 or 4 courses of tiling in the channel, and filled the bed of the creek with earth. The evidence demonstrates that, while the tiling remained in the creek bed, flood waters would wash the earth away from the tiling and thereby escape down the open channel. Plaintiff purchased his mill property in 1897. In 1901 the city removed the tiling from the new channel, and placed therein an iron conduit 5 feet in diameter and about 100 feet in length, slightly altered its direction as compared with that of the tiling, and filled the channel of the watercourse with earth. In August, 1903, all of the flood waters of Muddy creek could not pass through the iron pipe, and, in consequence, the surplus water backed up, overflowed the valley, and was directed toward and against plaintiff's mill, undermining its walls, filling the basement, and damaging the machinery and building. A like disastrous flood occurred in 1905.

The court on its own motion instructed the jurors: "The court instructs the jury that, if from the evidence in the case you find for the plaintiff, the measure of his damages will be ascertained by first ascertaining the fair and reasonable cost and expense, if any, of restoring the property of plaintiff to the same condition it was before the water flooded the same, and to this sum, if any you find, you will add the difference, if any, in value of the property when restored after the last flood proved to have caused damage with the channel running as it did before the defendant fixed the same, if you find it did fix the same, and as it now runs, but in no event can you allow dam-

ages in a sum greater than the value of the plaintiff's property." The instruction is not as definite as those ordinarily given by the learned judge, but, when read in connection with the testimony admitted, amounts to an instruction that the jury first allow plaintiff the cost of restoring his property to its condition immediately before the flood, and then add to that sum the difference between the value of the property immediately before and immediately after the change of the channel of Muddy creek.

The witness Renau qualified as to the value of the property, and was asked: "Q. Do you know what was the total value of the mill property including the real estate, building and machinery, assuming that to have been $1,500 prior to the time that the iron pipe was placed across the avenue and prior to the time the flood occurred? A. Yes, sir. Q. What was the value? A. Four thousand dollars. Q. Now, what was the value of the property, assuming that the damage by the flood had been repaired so that the building was in as good condition as it was prior to the flood, after the flood of 1905; do you know? A. Yes, sir. Q. Now, what was the value subsequent to the floods of 1903 and 1905? Q. Now, leaving out of consideration the improvements he has put in, and taking into consideration the permanent damage, what was it worth, without the improvements he has put in, and including in your estimation the way the pipe is? A. It would make a difference of $1,000 in the property with the pipe running against the corner of it." Additional testimony of the same character was admitted. The pipe did not touch plaintiff's property nor interfere with access thereto. Only twice in four years has water damaged the mill, and such floods may not occur again within a generation. The case was presented to the jury upon the theory that changing the channel of Muddy creek and substituting the iron pipe for the tiling in 1901 depreciated the value of plaintiff's property, and that said damage could be recovered in 1906, in addition to the cost of repairing the mill. The city pleaded the statute of limi-

tations, and objected to the introduction of the quoted testimony. If the acts of defendant in 1901 gave plaintiff cause for action, his suit was barred by the statute of limitations before the commencement of this suit. *Chicago, B. & Q. R. Co. v. O'Connor,* 42 Neb. 90; *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239. If, as seems more probable, plaintiff's cause of action accrued at the time his property was injured, then the measure of his recovery would be the difference between the fair market value of his property immediately before and immediately after the injury. *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237; *Fremont, E. & M. V. R. Co. v. Harlin,* 50 Neb. 698. We know of no principle of law that will permit the property owner to recover the difference between the value of his property before and after injury, and in addition thereto the cost of repairing it. The cost of repairs would be included in the general damage, and might be testified to, so that the jurors would be satisfied that the witnesses who testified to the amount of damage had some subsantial basis for their estimate.

For the error of the court in giving said instruction, it is recommended that the judgment of the district court be reversed and that a new trial be granted.

FAWCETT 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.