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IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1910.

VOLUME LXXXVI.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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By HARRY C. LINDSAY, REPORTER OF THE SUPREME COURT,
For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

JUSTICES.

MANOAH B. REESE, CHIEF JUSTICE.
JOHN B. BARNES, ASSOCIATE JUSTICE.
CHARLES B. LETTON, ASSOCIATE JUSTICE.
JESSE L. ROOT, ASSOCIATE JUSTICE.
WILLIAM B. ROSE, ASSOCIATE JUSTICE.
JACOB FAWCETT, ASSOCIATE JUSTICE.
SAMUEL H. SEDGWICK, ASSOCIATE JUSTICE.

OFFICERS.

WILLIAM T. THOMPSON ..... Attorney General
GRANT G. MARTIN ..... Deputy Attorney General
HARRY C. LINDSAY ..... Reporter and Clerk
HENRY P. STODDART ..... Deputy Reporter
VICTOR SEYMOUR ..... Deputy Clerk

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, Garden, Keith, Kimball, Lincoln, Logan, McPherson, Morrill, Perkins and Scott's Bluff.	Hanson M. Grimes...	North Platte.
Fourteenth...	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock and Red Willow.	Robert C. Orr.....	McCook.
Fifteenth	Box Butte, Boyd, 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. LXXXV.

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WARD, PETER F.
WEST, RALPH M.
WHITNEY, CHARLES L.

In Memoriam.

LORENZO CROUNSE.

At the session of the supreme court of the state of Nebraska, June 7, 1909, there being present Honorable MANOAH B. REESE, chief justice, Honorable JOHN B. BARNES, Honorable CHARLES B. LETTON, Honorable JAMES R. DEAN, Honorable JACOB FAWCETT, Honorable JESSE L. ROOT, and Honorable WILLIAM B. ROSE, associate justices, the following proceedings were had:

MAY IT PLEASE THE COURT:

The committee appointed by your Honors to prepare and report such memorial and resolutions as might be deemed appropriate touching the recent death of the Honorable LORENZO CROUNSE respectfully submit the following:

In the last hour of May 13 of the present year, LORENZO CROUNSE, a former judge of this court, died at the mature age of 75 years, at his abode in the city of Omaha, after an illness of several weeks' duration. His life had been fortunate and greatly honored, and its fitting close was tranquil and serene.

Born in Sharon, in the state of New York, on January 27, 1834, he received such education as the common schools and a local seminary permitted. Choosing the practice of law for his vocation, and pursuing his legal studies for the requisite term, he was admitted to the bar in his native state in the year 1857, and began a local practice which continued until 1861.

This was interrupted by his response to the call of patriotic duty and service in the civil war as a captain of volunteers. In this new field of action he displayed the loyalty and bravery which characterized the citizen-soldiery of that time; and, being severely wounded in one of the many conflicts in which he took part, he received his honorable discharge, and returned to the duties of civil life.

Resuming his practice, he came, in 1864, to the territory of Nebraska, locating at Rulo, in Richardson county. There, with little

delay, he began a public career, not only marked by uniform excellence, but exceptional in its variety and range, extending to all the departments of government—legislative, judicial and executive.

He was elected as one of the representatives of Richardson county to the last territorial legislature, and had an influential part in framing the proposed constitution, submitted to the electors for adoption or rejection, and under which the state government was inaugurated.

At the election of 1866, held for that purpose, and for the tentative election of state and judicial officers, he was chosen as one of the associate justices of the supreme court. Thus, at the early age of thirty-two years, without great experience, or previous opportunity for wide study of the law, so helpful in the judicial office, he assumed the grave duties and responsibilities of a trial judge in the district courts, and a member of the supreme court of Nebraska. Assigned by the legislature to the Third judicial district, comprising all that part of the state lying north of the Platte river, excepting Douglas and Sarpy counties, he presided alone in its courts for the six years of his incumbency. The state was in its infancy; judicial procedure under the code was largely unsettled; and no published reports for Nebraska furnished a guide for judges or attorneys—mostly young men with little experience, and limited libraries—yet the judge proved to be equipped for the work devolving upon him, under such conditions, with a clear judicial mind, a high sense of justice, and the needful aptitude for readily applying established legal rules to proved facts. He was a patient listener, an industrious and painstaking judge, courteous and affable to all, especially to the younger members of the bar, and his administration was wholly acceptable to those concerned.

The ability, research and industry with which he performed his duties in this appellate tribunal, under the pressure of scant time saved from *nisi prius* labor, is evidenced by his opinions, commencing with the first case in the first volume of the state reports and continuing to the end of his term. He gave to those labors the vigor of young manhood, and was remarkable for ascertaining the essential facts of the case in hand, and applying to it the correct principles of law, evincing a strong desire to thoroughly understand the merits of the controversy, and decide it, under such principles, according to the very right, making up, in large measure, by patient assiduity, the lack of previous experience.

His labors in the laying of the foundation, deep and strong, of the

admirable judicial system of Nebraska, which we today enjoy, entitle him to the fullest meed of praise and gratitude that we can bestow, and his uniform kindness and courtesy as a jurist furnish a worthy example for imitation.

Withdrawing from the bench at the end of his term, he next served the state as a representative in congress for four years, and was later appointed collector of internal revenue for Nebraska, and assistant secretary of the treasury, giving to service in the federal government the same care and fidelity as to all official service in the state.

Elected governor of Nebraska in 1892, he performed the duties of chief executive officer with distinction, for one term, declining a re-election; and, in 1900, he was chosen state senator, for one term, from Washington county, remaining thereafter in private life to the time of his death.

Reviewing the official career of the deceased jurist, and his unblemished character as a citizen, it is

Resolved, That the members of this court, in common with the people, and the bar of this state, deeply regret the death of the Honorable LORENZO CROUNSE, one of the judges of this court chosen at the first election therefor, and the first judge of the Third judicial district of the state.

Resolved, That we recognize in the character and ability of the deceased, as disclosed by his labors in this court, and upon the district bench, as representative in congress, as governor of this state, and in other offices of trust and responsibility held by him during his long and busy life, a man of signal judicial and executive ability, and whose work contributed, in a large degree, to mould the character and destiny of our commonwealth.

Resolved, That, in his unsullied public and private character, and his irreproachable domestic life, he honored the state of his adoption, left to his family the heritage of a blameless life, and to the young men of our state, and elsewhere, an example to follow, and an inspiration to worthy efforts in the world's work.

Resolved, That this honorable court is requested, if it shall approve the memorial and resolutions submitted, to order them entered in its records, and that copies thereof be sent to such relatives of the deceased as may be found advisable.

BYRON G. BURBANK.
GEO. B. LAKE.
ELEAZER WAKELEY.
O. A. ABBOTT.
R. A. BATTY.

ELEAZER WAKELEY:

May It Please Your Honors: The memorial and resolutions which I have subscribed as a member of the committee express, as well, my personal sentiments of regard and esteem for the deceased jurist in whose memory we are assembled. They speak, quite fully, of his characteristics, and the leading events in his career, and I may properly be brief in what I add in this more informal way.

I became acquainted with Judge CROUNSE early in the year 1868, on resuming a residence in Nebraska to pursue my profession in a field somewhat familiar from former association.

The territory had developed into a state, and the machinery of state government had been in movement for about one year. But Nebraska was still a new region. It had been but thirteen years since the pioneer settlement began. Population had been spreading slowly to the westward from the Missouri river, and rural conditions were improving. But, save the Union Pacific, newly built along the Platte valley, no railroad had penetrated to the interior of the state. Where, now, with scarcely an exception, every county-seat can be reached by cars, the trial judge made his way, as best he might, to lonely places where judicial duty called him. Hotels, or places of entertainment, were of the crudest sort. Rude, unfinished structures, for the most part, served as improvised court houses; and the dignity and decorum befitting the place where justice is administered were hard to preserve.

To three judges was allotted the labor of holding courts, under such conditions, in an area now divided into fifteen judicial districts, to which a total of twenty-eight judges are assigned, and of exercising, in addition, the appellate jurisdiction now devolved upon the seven judges of this honorable court. Judge CROUNSE had been assigned to the northern district, comprising, of itself, an area adequate to a strong and populous state. He had established his home in the attractive little town of Fort Calhoun, some fifteen miles north of Omaha, on the border of which he secured an extensive farm, and there, for many years, he mingled with the discharge of official duties the pursuit of a practical agriculturist. What is said in the memorial as to how those duties were performed I need not repeat or amplify. But, I may say generally, that the judges, who, in the early years of Nebraska's statehood, struggled with, and effectively bore the burdens laid upon them as trial judges, and members of this court of last resort, furnishing precedents, by their decisions, and establishing rules

of law of permanent value to their successors, and to the bar, deserve well of the profession, and of the later judiciary of this state. It was an era of inadequate and niggardly compensation for duty well performed, not worthy of a prosperous state; and those who performed that duty should not be forgotten.

And, your Honors, as we look over the reports of those earlier years and note the names of the jurists who prescribed the law from that seat now so worthily filled, and of the attorneys contending here for the triumph of their clients' causes with a zeal unknown in their own affairs, we are impressively warned of time's silent, unhalting work. With sometimes a lingering exception, we see them here no more. Of the first judges of this court there is but a single survivor. As a member of the committee, Judge LAKE has been privileged to join in the tribute to his former associate, while his own excellent service on the district bench and in this tribunal is recalled, and appreciated by the judiciary and the bar of these later years. And what is true of judges and lawyers is true of the resolute pioneers in all the vocations of frontier life, on the farm, in the shop, in the business place, who wrought, in union, to make Nebraska what it is today. They have answered to the roll-call of destiny, and passed on.

As a legislator, Judge CROUNSE did not attempt to become a great figure in national politics. He sought to be helpful and attentive to the interests of his constituents, and to represent faithfully and rightly their views of political and financial policy. In vote and influence he was a safe and conservative lawmaker; and, by impulse, he was found on the side of the weaker, rather than the stronger, if there was conflict between them.

The duties required of a governor, as prescribed by our constitution, aside from his concurrence in legislative enactments, are not of a nature to attract wide attention. That Governor CROUNSE discharged even the onerous and detailed duties devolved upon the chief executive scrupulously, industriously, and exactingly in the interest of the state was never questioned; and a re-election undobutedly awaited him, at the call of his party, had he not firmly declined it. An important event in his administration, illustrative of his purpose to protect the interests of the state, regardless of personal or political considerations, was the prosecution of the suit to recover two hundred and thirty-six thousand dollars of the state's money lost by the failure of the Capital National Bank. The state treasurer who had deposited it, and most of the sureties on his official bond—men of wealth, high

financial standing, and of large influence—were of the same political party as Governor CROUNSE, and had been his strong supporters; yet, at the earliest time possible, he procured a legislative appropriation for prosecuting proceedings to recover the money, placing the conduct of the suit unreservedly in charge of an attorney of opposite politics, that there might be no misgiving as to possible personal or political influence or favoritism, weakening the prosecution. And, to the end of his administration he aided and required the most vigorous efforts possible to enforce the claim of the state. That the effort finally failed, after his term was ended, was not due, in the slightest degree, to indifference, want of interest, or of effort on his part.

In considering the uniform public praise accorded to Judge CROUNSE through his whole official career, we must regard the standard by which official integrity and official fidelity are measured. And, in this land, the standard of official integrity is a high standard. The level of fidelity to public trust is a high level. Let the pessimist say what he will, there is no government anywhere, despotic or liberal, in which the standard of civic duty is higher, or in which there is less of venality, of peculation, or of fraud and dishonesty than under the free governments, national and state, in our favored land.

The calcium light of an exacting people is ever focused upon their public agents, searching out malfeasance and shortcoming with relentless scrutiny. An alert and unsparing press is ever eager to blazon to the world the slightest deviation from official rectitude. Partisan rancor penetrates to the obscurest points of attack, and heralds them to the electorate for political effect.

That LORENZO CROUNSE, judged by these standards, in an official life covering thirty-three years from its beginning in early manhood to its close in the sober years of later life, in high and varied positions of public trust, kept, unbroken, the confidence of political friends, while escaping the criticism and securing the esteem of political opponents, is high praise. But it is just praise; and those who knew him well, and knew the modest estimate which he placed on his own abilities and merits, know that he would have sought no other. To a sensitive man, over-praise, or undeserved praise, should be as offensive as unwarranted criticism.

His public work done, he sought the retirement coveted by most men who, in youth, and through mature manhood, have fought the obstacles to success, and won the prizes of life best worth the winning. Unpretentious, unostentatious, he lived in the quiet simplicity

which befits an American citizen. I may mention one incident disclosing his philosophy as to the later years of life. Meeting him on the sidewalk, one morning, a year or two ago, I said to him, with the familiarity customary between us, "How are you passing the time, in these days, Governor?" His answer was, "I am hunting the easy side of life." The remark impressed me. It did not mean that he was seeking ignoble and unearned ease. It meant, only, that, having done conscientiously, unshrinkingly, and to the best of his ability, the work which had come to him to be done; and caring not, in the evening of life, for the things which would not bring him added comfort, and which it is not permitted to man to take out of this world, he was content to pursue, during his remaining years, the truer, and higher, and nobler aims for which life is given. And who shall say that he was not right?

As to this period of his life, let me take from an editorial comment in the Evening World-Herald some language better than I could command:

"He had fought the long, hard fight of life. From the days of his youth his had been a figure almost constantly in the forefront of the fray. He had been teacher, soldier, pioneer, farmer, lawyer. He had served his country not alone in the field of battle, but in high places of legislative, executive, and judicial responsibility. Ripe in years, rich in experience, sound in judgment and understanding, with a name unsullied, and a fame secure, he spent these closing years as a student and philosopher. His alert and vigorous mind was in its prime. Sternly trained in observation and analysis, it was open to impressions from a multitude of sources. His knowledge of men and events was never keener and truer than during these last years in Omaha; his interest in human affairs never more intense. Age had mellowed him rather than hardened. With broadened vision he looked out, in unruffled tranquility, upon the world, present, past and future. He was one of those who, having given much, were able to receive much; and he opened his mind and his heart to the riches the world stands ready to bestow on all who are ready to accept them. The beauties of nature, the delights of literature and philosophy, music, the theater, the pleasures of travel, the world's work, his family, his friends, all contributed to his joy of life."

Such, your Honors, were the closing years of his favored and successful life. He died, as men wish to die, in his own abode, with those of his own blood beside him; and, at sunset of an unclouded day, on a green hillside overlooking his rural home, friends and kindred parted from him.

His legal work is finished; but the records of this court will remain to attest that the work was well and fitly done.

ROBERT A. BATTY:

It was not my privilege to be intimately acquainted with Judge CROUNSE. I had only such an acquaintance as a lawyer gets with a judge on this bench. I met him many times as governor, legislator, congressman and judge. He was always a pleasant gentleman to meet. Kind, considerate, entertaining, and instructive; always ready to listen and advise.

Judge CROUNSE was one of the early settlers; was a judge in this court when the first volume of the Nebraska reports was issued; wrote the first opinion printed in that volume; so that he commenced his career as a public man thus early in the history of this commonwealth, and continued to be one of its constructive statesmen and distinguished citizens to the day of his death. He was one of the men who laid the foundation, and helped to build this state up to what it is today. Great countries and great states must, of necessity, reflect the character of the men who build them. Their broad constitutions, liberal laws and judicial constructions are but the highest ideals of men, and, in view of the active part that Judge CROUNSE, all his life, took in the public affairs of his state as executive, legislator, and judge, his character and ideals must of necessity have been more interwoven in the warp and woof of this commonwealth than any other single individual who has lived within her borders; and if we had no other means by which we could measure his wisdom and his greatness, we might point with pride to the present status in the sisterhood of states of the great state of Nebraska. She is but the reflection of the character of the sturdy manhood of her early settlers. Whoever writes the history of a great state with a eulogy of its great achievements writes but the biographies of its distinguished citizens. The history of Nebraska could not be written without giving large space to the life and public services of Judge CROUNSE. He was permitted to live the full measure of an industrious, useful and happy life; to look back to his early hopes and to see that they had been more than realized. His life has been a successful one in all things that youthful hopes and early ambition could desire; happy in an estimable family; successful in the accumulation of a reasonable share of this world's goods; a standing that was among the foremost in his profession; distinguished among his fellow citizens by being often called upon to occupy the places of highest honor.

And if, in the future, some loving and ambitious father should desire to inculcate high ideals in the mind of his youthful son and set before his eyes an example worthy to be followed, he need but point to the career of Judge CROUNSE.

T. L. NORVAL:

May It Please the Court: More than one of those who have been members of this high tribunal, by the touch of death, have been silenced forever. GANTT, MASON, MAXWELL and COBB, in turn, have obeyed the final summons, and crossed the mystic river. And now the silent messenger has beckoned the spirit of LORENZO CROUNSE to the world beyond, whose death we today so keenly feel and sadly mourn. Surely, in the apt words so beautifully set to notes, "We are going down the valley, one by one."

Our acquaintance with Judge CROUNSE dates back more than thirty-six years, and which soon ripened into a lasting friendship. We were ever an ardent admirer of his abilities and sterling traits of character. We were in the state convention of 1872 which gave him his first nomination of representative to congress, and on that and other occasions in our feeble way aided him in his laudable political ambitions, which we never have had cause to regret.

His ability, purity of character and superior leadership were recognized by all. Political preferments came his way, sometimes unsought. His public career was more varied than usually comes to man. He was an influential and leading member of our territorial and state legislatures. For four years he faithfully represented this young and growing state in the lower house of congress. He was collector of internal revenues, assistant secretary of the treasury of the United States, one of the judges of this court, and governor of the state he loved so well; all of these he filled with marked ability. He was a capable, faithful and conscientious public servant.

Judge CROUNSE was, indeed, the man of the hour. In 1892 the tidal wave of populistism had reached our state; and in November of that year a governor, with a full set of executive state officers, was to be chosen. Leading and influential members of the political party to which Judge CROUNSE belonged, and which had so frequently honored him, and he it, were casting about for a strong available man to head the ticket, which resulted in his being drafted to make the race for governor, leading his party to victory at the polls. It is doubtful whether any other man could have done this. He gave the state an

able, clean, economical and business-like administration, demonstrating that, though drafted into the service as he was, he could give to the position his best efforts no less than he gave his country when he volunteered his services in defense of the flag in the dark hours of the rebellion.

For six years Judge CROUNSE was a member of this court. He, Chief Justice MASON and Judge LAKE comprised the supreme court of this state as first organized. They were all strong and able lawyers. They laid the foundation of our present jurisprudence. They builded well. Their decisions have stood the test for nearly forty years, and few of them, indeed, have been overruled. Judge CROUNSE did his full share of the work. His opinions are models, many of them displaying deep research, legal learning and marked ability. They are clear cut, and constitute a lasting monument to the memory of their author.

Many of his opinions were upon important questions, one of which, we may be pardoned for mentioning, is *Brittle v. People*, 2 Neb. 198. While this case directly involved, and decided, the right of a colored man to sit on a jury, it further determined that Nebraska had been admitted into the Union not alone upon the constitution adopted by her voters, which limited the right of suffrage to white males, but as well upon the fundamental conditions imposed by congress and assented to by the legislature, that in this state "there shall be no denial of the elective franchise, or any other right to any person (excepting Indians not taxed), by reason of race or color." The majority opinion in that case prepared by Judge CROUNSE is a masterly discussion of the questions involved.

Another important opinion written by Judge CROUNSE was in the celebrated *Tennant's Case*, 3 Neb. 409, in which our venerable brother Judge Wakeley was the leading counsel for relator. It was there determined that a proclamation by the executive calling for a convention of the legislature in special session was revoked by the promulgation of a subsequent one for that purpose.

The earthly career of Judge CROUNSE is closed. His life was as an open book with spotless pages. The monument which, by its purity of life and character, he builded for himself is far more beautiful and enduring than any sculptor can fashion out of marble or granite. The record of his honorable and blameless career as a citizen, soldier, public official, lawmaker, executive and jurist will remain as his richest legacy through all the countless centuries.

GEORGE H. HASTINGS:

It is a melancholy pleasure for me to add my tribute in support of the resolutions just offered to the memory of that pioneer, soldier, lawyer, judge, statesman, governor, and distinguished citizen, LORENZO CROUNSE. It was my privilege to know him intimately and well, especially during his service, as judge of this court, and as a governor of this state. From 1864, when he came to this state in the full flush and ardor of young manhood, to 1909, when he laid down his burdens with the consciousness of a life-work well done, and the love and approval of his fellow-citizens, is a whole lifetime, and of Judge CROUNSE it can truthfully be said that the entire forty-five years were spent in unceasing efforts to assist his people to better conditions through a better administration of the law, and through a safe, conservative, economical, but at the same time vigorous and progressive administration of the affairs of state. Judge CROUNSE found this state a wilderness, the stage and the freighter, with his patient oxen, the only means of transportation; he found it with a population of scarce 30,000; he left it with a contented and prosperous people numbering 1,250,000. He found it the domain of the Indian, the buffalo, and the prairie-dog; he left it a garden of fruitful fields, a land of splendid cities, and beautiful, contented homes. Who wrought the magic spell that by its mystic touch produced this mighty change? Among the foremost of the potent forces that laid deep and enduring the foundation of this commonwealth, nursed it through infancy, and guided it to sturdy, vigorous, prosperous fulfillment of the most daring dream of the enthusiast, stood LORENZO CROUNSE. Endowed by nature with a strong physical personality, a clear, analytical, vigorous mind, schooled to meet the varying conditions with a keen, clear, quick grasp of the entire proposition, with an education that fitted him to adorn any position of honor and responsibility to which he might be called, his was among the master minds and strong arms who did this work so well. Among his leading characteristics was his unswerving and uncompromising honesty. The first question he asked himself when a proposition was presented to him was, "Is it right? Is it just? Is it honest? Ought it to be?" These being answered in the affirmative, his aid and his ardent support could always be depended upon. On the other hand, he instinctively shunned and denounced everything that was dishonest or dishonorable. The soul of honor and probity himself, he despised and abhorred everything that was tinctured with deceit or falsity. His strong, vigorous, well-trained, and well-balanced

mind correctly and cogently reasoned from cause to effect; he could instantly grasp the proposition presented in its entirety, with all its bearings and side lights of surrounding conditions, and arrive at a correct solution. As a trial judge and as a judge of this court, his profound knowledge of the law, his learning, his sound judgment, his varied experience, his unbounded love of justice and right, eminently qualified him for those exalted positions in the nation and in the state which he so creditably filled. As a lawyer and as a judge he cared less for the technical than for the real. Even-handed justice between man and man, a close adherence to the law which he loved, and the approval of his own conscience, was his constant, faithful, persistent endeavor. It was indeed most fortunate for this state that such a man as Judge CROUNSE should be within her borders and that he should be placed upon this bench at the early period of our history when we were in a formative condition, the period during which he served the state in that capacity. The precedents he established and assisted in establishing in this court must continue as precedents, so long as this court continues. Early in his career, long before he was called to the bench, he had closely allied himself with the people; he had won their love and their confidence to a remarkable degree. That alliance continued to the day of his death; their love and their confidence he never betrayed. He bears to the grave with him that love and that confidence that he had earned during the forty-five years of his service. It was his close adherence to the people and his loyalty to their cause and his ever present desire to serve the best interests of his constituents during his service in congress that prevented his election as United States senator. His compensation which more than repaid him was the consciousness of a duty well performed, a faithful service rendered to the people. His name has been so indelibly carved upon our history, and the record of his many services so closely interwoven with it, that Judge CROUNSE needs no other monument to commemorate his splendid services rendered the state and the nation. He lived at that fortunate period in our history when our nation most needed just such men, and in this state when the state needed most just such potent, guiding hands as were those of Judge CROUNSE. His was a well-rounded, useful life of duty well done.

SAMUEL P. DAVIDSON:

May It Please the Court: It has been said that "It is while standing by the open graves of our friends that we receive our purest and

holiest inspirations." All our contentions are hushed before the power of Him who says to the storm of human passions, as He said of old to the waves of Galilee, "Peace, be still." We are admonished that there is an impartial tribunal before which all must stand, and "We're hurrying toward it fast."

No consideration can purchase a moment's respite when the summons comes, whether it be sounded at the doors of the stately mansion of the rich, or at the cot of the lowly poor. It has been said on an occasion similar to this: "The statesman falls with plans of future glory yet unaccomplished; the poet expires in the midst of his song, and the magic of his muse lingers on his dying lips; the sculptor drops his chisel before he has taught the marble to breathe; the painter drops his pencil while the figures on his canvas are yet unfinished; the sword slips from the grasp of the warrior before the battle is won; and the orator is silenced while the words of wisdom are yet dropping in sweetest accents from his lips."

It is well for us all to stop frequently and ponder well the solemn notes of warning that are so often sounding in our ears. But it is preeminently fitting and proper that, in this high tribunal, all connected with it should do so. It seems to me that of all places in the world, here, where exact and unbending justice is the theme and aim of all our contentions, and of the deliberations of the court, these contentions and deliberations should cease occasionally, as we stand face to face with the realities and solemnities that should, and which actually do, almost overwhelm us on occasions like the present.

It is well that these contentions and deliberations should be purified and ennobled by the contemplation of these realities and solemnities. It is peculiarly proper that this great court should cease its exacting deliberations, and that our contentions should be hushed for a time, while we contemplate the virtues and honor the memory of such a man as LORENZO CROUNSE. It was always a peculiar satisfaction and source of pride to me that I was privileged to know that Judge CROUNSE was my personal friend. By my acquaintance with him, I was enabled to know something of the nobility of his character. There was a strength and independent manliness about him that inspired confidence in the man. In his rising young manhood he responded to his country's call, and on the march and on the battlefield did his country noble service. After the war was over, in the strength and vigor of his early manhood, he came to Nebraska and cast in his lot with those stalwart pioneers who laid the foundations of this great common-

wealth. Nobly he did his part in laying the foundations and in building up this great state. He became one of the three first judges of this court, and had the distinction of having written the first opinion published and contained in the first Nebraska reports. After his service on the bench he was chosen by the people to be a member of congress, and was among the strongest, if not the very strongest man ever sent to that great legislative body by this state. He was afterwards called by the president to serve his country as assistant secretary of the treasury of the United States. After retiring from that distinguished position, as you know, he was called by the people to become governor of the state. And still later he was called out of his greatly desired retirement to ably serve his state as a state senator.

And in every position he was called to fill, his service was marked by fidelity and distinction and very great ability. Strength and independent manliness were among the distinguishing characteristics of the man. He could not countenance mere pretense and sham. Partiality and insincerity in the official conduct of any public officer was abhorrent to him. I cannot refrain from referring to a personal experience I had with him while he was governor of this state. It became my professional duty to apply to him for a requisition upon the governor of one of our sister western states for the return to this state of a man charged with the commission of a serious crime. Being convinced that my application should be granted, the requisition was promptly issued. And, armed with it, an officer was dispatched to the sister state to present it and carry out its requirements. But to my surprise, for reasons that were unfounded and unjust, and, as I still think, unworthy of the great office of governor of a great state, the governor to whom that requisition was presented refused to honor it, and declined to issue his warrant for the return of the alleged criminal. I at once consulted Governor CROUNSE and informed him of the refusal to honor his requisition, and of the reasons given for such refusal. His indignation was aroused, and he said to me, "You sit down and dictate a letter to that governor, and in as vigorous language as you think ought to be used, urge him to reconsider his decision, and I will sign it." I did so, and I thought I used reasonably expressive English in the letter I dictated. But when the letter was shown to Governor CROUNSE, he said to me, "You have used language entirely too diplomatic for this case." He then dictated a letter in which he used language which in the most forceful manner expressed his indignation at the refusal to honor his requisition; and in which,

in the most vigorous and trenchant style, he grandly affirmed that the great office of governor ought never to be used to shield a criminal, but should always be employed in the righteous and vigorous enforcement of the law.

Judge CROUNSE was the very personification of integrity, honesty and self-reliant capacity in official station; and an example of manly dignity and uprightness in the peaceful walks of private life, well worthy of imitation. Of his two able associates when he sat as a member of this great court, one remains to enjoy the fruits, the beneficent results, that flow from our jurisprudence, whose foundations he so ably aided in laying; and we, who as young practitioners at this bar, when he presided in this court, loved to honor him for his splendid record as a judge, today wish him every joy and blessing during his remaining years, which he has so nobly earned.

But Judge CROUNSE, the strong, manly man, and splendid citizen, is gone. The world recognizes a grand intellect and marvels at its power. Judge CROUNSE despised the popularity that is run after. He challenged the fame that awaits efficient, faithful service and noble deeds. The future, and not the present, can do full justice to a great jurist and a great man. The softening touch of time, blotting from memory every human frailty, will preserve for honor and for example the high endowments and vast attainments of a master mind. The commonwealth of Nebraska, in the future, will take care of the memory of such a man as Judge CROUNSE. Of him it may more justly be said, than was once said of another, that:

> "His life was gentle, and the elements
> So mixed in him that Nature might stand up
> And say to all the world, 'This was a man.'"

HONORABLE MANOAH B. REESE, C. J.:

It was my good fortune to become acquainted with Judge CROUNSE soon after my arrival in this state in 1871. From the year 1874 our acquaintance was of such a nature as to enable me to form, what I consider to be, a just estimate of his character and worth. From that time until his death I esteemed him as one of my personal friends, and had full assurance that he considered me as one of his. Our relations enable me to judge, rightfully, I think, of the bed-rock worth, character and integrity of the man as a judge, a congressman and governor. In all his official career there was never even a suggestion or insinuation derogatory to his character. As a judge, both upon the district bench and as a member of this court, he realized his re-

sponsibilities and obligations, and fearlessly, conscientiously and intelligently met and performed all duties imposed according to his best light and judgment, without any reference or thought as to what others might think or say, or whether his course would add to or detract from his standing in the estimation of the people or of special interests which might be affected by his action. He had for his guide the application of the law as he found it and the administration of justice. By his labors in the early days of the state government he assisted in laying the foundation of our jurisprudence, and the sequel has shown that he built well of the material at his command. His course as governor of the state in its later and more developed condition is within the memory of all. In his whole official career he knew of no motive but duty. He carried no enmity for his political opponents, nor friendship for those who believed in him, which affected his official action. In official integrity and probity of character his life stands today as an inspiration to every young man in the state and to every person who may have the labor and cares of official responsibility placed upon him. To him and his works the state is largely indebted. We cherish the memory and will never forget the life and service of LORENZO CROUNSE. While the duty is a sad one, yet it affords us a pleasure to order that the resolutions presented by the committee be spread upon the records of the court and published in the reports as a standing memorial to the life and character of our deceased friend and fellow citizen; and it is so ordered.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1910.

HEISLER PUMPING ENGINE COMPANY, APPELLANT, V. JAMES E. BAUM ET AL., APPELLEES.

FILED FEBRUARY 10, 1910. No. 15,907.

1. **Parol Evidence.** "Where the controversy is between a party to a written contract and one who is neither a party nor a privy to it, the rule excluding parol evidence tending to vary, modify or contradict the writing does not apply." *First Nat. Bank v. Tolerton & Stetson Co.*, 5 Neb. (Unof.) 43.

2. **Appeal: HARMLESS ERROR: STRIKING EVIDENCE: DIRECTING VERDICT.** Where the trial court erred in striking out the testimony of plaintiff's principal witness after plaintiff rested its case, and then instructed the jury to return a verdict in favor of defendants, the order striking out the testimony was error without prejudice if the instruction to return the verdict would have been proper had the testimony been retained.

3. **Trial: DIRECTING VERDICT: SALES: EVIDENCE.** It was alleged in the petition that plaintiff sold an engine to the B. B. Co. for a certain price; that the engine had not been paid for; that after the sale defendants, for value, assumed and agreed to pay the debt, and which they failed to do. There was no evidence tendered upon the trial that plaintiff had sold the engine to the B. B. Co., or that it had or held a claim for the price against such company, considering all the evidence offered. *Held*, That an instruction to the trial jury to return a verdict in favor of defendants was proper.

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

Richard S. Horton and *Gerald M. Drew,* for appellant.

Baldrige & De Bord, contra.

REESE, C. J.

It was alleged in the petition in this case that both plaintiff and defendant Baum Building & Realty Company are corporations duly organized; that on the first day of February, 1902, plaintiff sold to the W. R. Bennett Building Company, another corporation, an engine of the value and price of $1,375; that on the 13th day of April, 1903, plaintiff procured a judgment against said building company for the sum of $1,455.20, which is unpaid and is still in force; that, for a valuable consideration moving to defendants, they assumed and agreed to pay the said claim of plaintiff against the building company, together with interest thereon, and for which demand had been made and payment refused; that said sum of $1,455.20 is due, and for which judgment is demanded. The answer is a general denial. The cause was tried to a jury, and upon the conclusion of plaintiff's evidence defendants moved the court for an order striking out all the testimony of the principal witness for plaintiff, assigning the following grounds: "The defendants now move to strike out all of the testimony of the witness Bennett in relation to the defendants or either of them having assumed or agreed to pay the debts of the Bennett Building Company, or the W. R. Bennett Building Company, for the reason that the testimony of the witness Bennett shows that the alleged statement of Mr. Baum, one of the defendants, in regard to this matter was made at the time of the agreement marked exhibit 1, and is shown by the evidence to be a part thereof, and for the reason that the verbal statements, or verbal understandings of the parties at the time said agreement was written or entered, cannot now be used for the purpose of altering and modifying or in any sense amending the written

agreement marked exhibit 1, and for the further reason that the said exhibit 1 shows on its face, and the evidence of Mr. Bennett further shows, that it is the agreement between the parties under which the Bennett Building Company stock and property was transferred, and exhibit 1 shows on its face that it is a complete agreement between the parties in relation to said matters, and for the further reason that the testimony of Mr. Bennett tends to modify, alter or amend said written agreement marked exhibit 1; and therefore said testimony is incompetent, and I move to strike the same from the record in so far as it relates to the varying or modifying of said contract." This motion was sustained. Defendants then moved for an instruction to the jury to return a verdict in their favor. The motion for the instruction, which was sustained, was as follows: "I now move the court to instruct the jury to render a verdict for the defendants in this case, for the reason that the evidence does not tend in any way to sustain the allegations of plaintiff's petition, and for the further reason that the evidence does not tend to show that the defendants, or any of them, assumed or agreed to pay the debt of the plaintiff referred to in the petition." Plaintiff also moved the court for an instruction for a verdict in its favor, but which the court overruled. In accordance with the instruction the jury returned a verdict in favor of defendants. Plaintiff excepted to the action of the court on these motions. A motion for a new trial was filed, which was overruled, and judgment was rendered on the verdict. Plaintiff appeals.

As above appears, the motion to strike out the testimony of plaintiff's principal witness was based upon the ground that there was a written contract between the W. R. Bennett Building Company and defendants by which the whole of the transaction was set out, except the fact of the assumption by defendants of certain debts owing by said company. It was held by the trial court that the written contract between the parties to it was binding and conclusive, and that no testimony could properly be

submitted to the jury which would tend to vary or contradict its terms. In this the court overlooked the fact that plaintiff was not a party to that agreement, and was, therefore, not within the rule applied. In *Rosewater v. Hoffman*, 24 Neb. 222, we said: "The rule is well settled that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument, but this rule is applied only in suits between the parties to it. As between them, the contract must stand as written. But it should not be permitted to affect the rights of third parties, for, as can be plainly seen, great injustice might result from the application of the rule as to them." This rule is also stated in *First Nat. Bank v. Tolerton & Stetson Co.*, 5 Neb. (Unof.) 43, and is practically conceded to be the established rule of this state, as well as the general rule. It is therefore apparent that the court erred in sustaining the motion to strike out the testimony of the witness.

The question remains as to whether the court, after plaintiff rested, erred in then instructing the jury to return the verdict for defendants. If the instruction was not erroneous, had the evidence not been stricken out, it is clear that the order first made could not be held to have been prejudicial to plaintiff. The averments of the petition are that plaintiff sold the engine referred to to the W. R. Bennett Building Company; that defendants, for a valuable consideration, agreed and promised to pay the debt thereby created, and that they had failed to do so. The answer being a general denial, it devolved upon plaintiff to prove the sale, as in a suit by a vendor against a vendee; that the purchase price had not been paid; and that defendants assumed and agreed, for a valuable consideration, to pay the debt. The evidence, we think, tends to show the agreement on the part of the defendants to pay for the engine; but it is nowhere shown that plaintiff ever sold the property to the W. R. Bennett Building Company, or that that company was indebted to plaintiff therefor. Had the court overruled defendants' motion

to strike out the evidence, still the instruction to return the verdict in defendants' favor would have been proper upon the conclusion of plaintiff's evidence.

The judgment referred to in the petition was introduced in evidence, but the pleadings upon which it was based were not, and it is nowhere shown upon what cause of action it was founded, and it cannot be considered as supplying the defect.

Such being the condition of the evidence, the judgment will have to be affirmed, which is done.

AFFIRMED.

TRIMBLE & BLACKMAN, APPELLANTS, V. M. V. COREY & SON, APPELLEES.

FILED FEBRUARY 10, 1910. No. 15,893.

Appeal: FINAL ORDER. An order setting aside a judgment or decree, fixing the time for filing pleadings and setting the cause down for a new trial, under section 602 of the code, is not a final order from which appeal will lie before the trial and final judgment therein.

APPEAL from the district court for Clay county: ROBERT C. ORR, JUDGE. *Appeal dismissed.*

Thomas H. Matters, for appellants.

John C. Stevens, contra.

BARNES, J.

This is an appeal from an order of the district court for Clay county setting aside a default judgment of that court and granting a new trial in an action pending therein.

The application for the new trial was made by petition, under the provisions of sections 602 and 603 of the code,

at a regular term of the district court immediately following a special term at which the default judgment was rendered. This is a second appeal from such an order. On the first appeal the commissioner who wrote the opinion overlooked our former decisions and treated the order as appealable. In the great press of business the opinion was inadvertently adopted by the court, the order granting a new trial was reversed because there was no evidence in the record which would sustain it, and the cause was thereupon remanded for further proceedings. *Trimble & Blackman v. Corey & Son,* 78 Neb. 639. It appears that thereafter there was a hearing on the petition in the district court, and, upon the evidence submitted, the order of which complaint is now made was entered therein. There has been no new trial, and the action is still pending for trial on its merits before the district court.

The question as to whether an appeal may be prosecuted from such an order before trial and final judgment on the merits was before us in *Rose v. Dempster Mill Mfg. Co.,* 69 Neb. 27, and it was there held: "An order setting aside a judgment or decree, fixing the time for filing pleadings and setting the cause down for a new trial, under section 602 of the code, is not a final order from which appeal or error will lie before the trial and a final judgment." In the opinion in that case we find the following expression: "In the case of *Morse & Co. v. Engle,* 26 Neb. 247, it was held that such an application to open up a decree was not a new action but a proceeding in the original one. A final order or judgment in such a proceeding, to be appealable, must at once put an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues. Tried by this test the order in question is not a final one, but merely vacates the decree or deficiency judgment and allows the defendant to file an answer and make its defense. It leaves the original action to recover a deficiency judgment undetermined in the trial court." See, also, *Cockle Separator Mfg. Co. v. Clark,* 23 Neb. 702; *Merle &*

Heaney Mfg. Co. v. Wallace, 48 Neb. 886. The rule thus announced has since been followed in all cases, except on the former appeal in this case, where the matter inadvertently escaped our attention. It follows that the plaintiffs' appeal herein is premature. In order to review the judgment of the district court in making the order complained of, the plaintiffs must await a final trial and judgment in this case, for, as has been well said, it may not be necessary for plaintiffs to appeal. If, upon the final trial in the district court, they should again recover a judgment, they would have no reason to complain of such order.

For the foregoing reasons, the appeal herein is

DISMISSED.

SEDGWICK, J., dissents.

JOHN H. TRENERRY, APPELLANT, V. CITY OF SOUTH OMAHA, APPELLEE.

FILED FEBRUARY 10, 1910. No. 15,909.

1. Appeal: ASSIGNMENT OF ERRORS. In an action at law brought to this court on appeal from a judgment of the district court, the assignment of error that the judgment should have been for the plaintiff instead of the defendant is too general to require consideration.
2. ———: ———. Where, however, the record contains a further assignment that the court erred in overruling the motion for a new trial, we will consider the record in order to ascertain whether or not the judgment complained of is warranted by the pleadings.
3. ———: EVIDENCE. In such a case, where there is evidence which will support the judgment, it will not be reversed, unless it is clearly wrong.

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

D. C. Patterson, for appellant.

W. C. Lambert and *S. L. Winters, contra.*

BARNES, J.

Action against the city of South Omaha on five warrants of $100 each purporting to have been issued by the city and assigned by the payee thereof to the plaintiff. The trial resulted in a judgment for the defendant, and the plaintiff has appealed.

The petition alleges, in substance, the corporate capacity of the defendant city, and that by its ordinances duly and legally adopted the city directed the removal of garbage and refuse, and in pursuance of said ordinance entered into a contract with one W. H. Rawley for that purpose; that the contractor proceeded to, and did, remove the garbage within the limits of South Omaha in pursuance of said ordinance and his contract; that defendant, in part payment thereof, on the 30th day of September, 1895, directed its clerk to issue warrants, among which are the ones in question, in favor of said Rawley, which were duly issued and signed by the city clerk and the mayor of the defendant city on the 1st day of October, 1895; that they were delivered to Rawley, who, for a valuable consideration, sold and assigned them to the plaintiff; that they were duly presented to, and registered for payment by, the treasurer of the defendant city on the 18th day of November, 1895. Then followed, in the body of the petition, a copy of each one of the warrants sued on. Plaintiff further alleged that the defendant city had failed and neglected to provide a proper and legal fund against which the warrants in question might be drawn; that its officers failed and grossly neglected to collect any taxes or revenue from which they could be paid, although more than four years had elapsed in which the city might have collected funds for that pur-

pose. It was further alleged that the plaintiff was the present owner and holder of said warrants, and concluded with a prayer for judgment for $500 and interest thereon from the 18th day of November, 1895, at the rate of seven per cent. per annum and costs of suit. The answer properly put in issue all of the allegations of the petition, and further contains certain affirmative matter alleging want of authority on the part of defendant city to issue the warrants and to levy and collect any taxes for the purpose of paying them. It also contained a plea of the statute of limitations. Reply was a general denial.

To maintain the issues on his part plaintiff introduced the following evidence: First, an admission of the defendant "that there is not now, and never has been, any money in the fund upon which the warrants, marked exhibits one to five, inclusive, are drawn; that said warrants have not been paid; that the plaintiff is the owner thereof, and that the signatures of all persons appearing upon the face and back of said warrants are the genuine signatures of the persons they purport to be; that Ed Johnston was mayor and Joseph J. Maly was city clerk of the city of South Omaha on October 1, 1895; that Thomas Hoctor was city treasurer of the city of South Omaha on November 18 and 19, 1895; that the warrants were presented for payment, registered for payment upon the dates shown upon the back of the warrants, and payment refused for want of funds. The defendant does not admit that Ed Johnston or Joseph J. Maly signed said warrants in their official capacity. The defendant does not admit, as a matter of law, that Joseph J. Maly, as clerk, and Ed Johnston, as mayor, signed, or could sign, the warrants as officers, or that Thomas Hoctor, who was then treasurer, indorsed the warrants or registered the same, or could indorse or register the same as such officer, as a matter of law." The defendant thereupon offered in evidence the warrants, one to five, inclusive, together with all of the indorsements on the back of the same. They were objected to for the reason that they

were incompetent, irrelevant and immaterial, and for the further reason that they showed upon their face that they were barred by the statute of limitations prior to the commencement of the action, and that any claim evidenced thereby was also barred by said statute. The court received the evidence subject to the foregoing objections, and plaintiff thereupon rested his case.

The defendant, to maintain the issues on its part, introduced in evidence ordinance numbered 98 of the city of South Omaha, which purports to be a special ordinance to provide a fund against which it is claimed the warrants in question were drawn. Defendant also introduced general ordinance numbered 618, which expressly provides that the garbage master or contractor of the defendant city shall collect certain fixed fees and charges from the person in said city from whose premises garbage was removed, and by which it is declared that the fees mentioned therein shall be full payment therefor. Defendant also introduced plaintiff's admission that between the 1st day of November, 1895, and November 1, 1901, no appropriation or estimate was made by the city council, and that no tax was levied to pay the warrants in controversy, or the claim on which they purport to have been based. Defendant further introduced in evidence the annual appropriation bill, and the city ordinance of defendant city levying taxes for the year 1895, which was the year in which the warrants were issued, and thereupon rested its case. No further evidence was offered on either side, and thereupon the trial court found generally for the defendant city and dismissed the plaintiff's cause of action.

The plaintiff now contends that the court erred in rendering judgment for the defendant, and this is the only question presented by the record. While this assignment is too general to merit our consideration, yet we find that the plaintiff further contends that the court erred in overruling his motion for a new trial, and for that reason we have examined the record and bill of excep-

tions, and will determine that question. From the foregoing statement of the evidence it will be observed that the plaintiff failed to show by any competent testimony that Rawley, who was the payee named in the warrants sued on, performed any services for or ever had any contract with the defendant city for the removal of garbage therefrom. Again, the evidence discloses that no appropriation was made by the city for the purpose of paying for the removal of garbage; that no estimate was ever made by the mayor and city council of the defendant city for that purpose; that no fund has ever been created, and no taxes have ever been levied, for the purpose of paying the warrants in question, and the plaintiff has failed to show that it ever was the duty of the defendant to create such a fund.

It follows that the judgment of the district court was the only one which could be sustained by the evidence, and it is therefore

AFFIRMED.

LAFE BURNETT V. STATE OF NEBRASKA.

FILED FEBRUARY 10, 1910. No. 16,255.

1. **Criminal Law**: ADMISSIONS: INSTRUCTIONS. Mere inculpatory statements made by a defendant should not be considered or treated by the trial court, in a criminal prosecution against him, as confessions or admissions of the crime charged; and it is error for the court in instructing the jury to treat them as such.

2. ———: ———: ACCOMPLICE. Confessions or admissions of guilt made by one of two persons charged with a criminal offense are admissible against him; but they are not ordinarily admissible as against his alleged accomplice unless they are made in his presence or are assented to by him.

3. ———: INSTRUCTIONS: REASONABLE DOUBT. Instruction attempting to define a reasonable doubt, set forth in the opinion, and its use condemned.

ERROR to the district court for Phelps county. HARRY S. DUNGAN, JUDGE. *Reversed.*

W. G. Hastings, R. D. Stearns, S. A. Dravo and *J. I. Rhea*, for plaintiff in error.

William T. Thompson, Attorney General, George W. Ayres, F. A. Anderson and *Morlan, Ritchie & Wolff, contra.*

BARNES, J.

The state prosecuted one Lafe Burnett, hereafter called the defendant, in the district court for Phelps county on the charge of adultery, alleged to have been committed by him with one Anna Wilson, a married woman, the wife of Augustus Wilson. The trial resulted in a verdict of guilty, and the defendant was sentenced to be confined for a term of six months in the county jail of Phelps county. To reverse that judgment the defendant has brought the case here by petition in error. The record contains a great many assignments, but three of which will receive our consideration.

At the trial the state was permitted to prove, over the objections of the defendant, that at the time he was arrested defendant said: "I suppose I am under arrest." That in a subsequent conversation with the officer the defendant said: "She is a mighty good looking woman, isn't she?" That the officer replied "Yes"; and the defendant then said: "Mighty good form, too." This evidence was not introduced to contradict any statements made by the defendant, but as substantive evidence for the prosecution, and was treated by the state and by the trial court as an admission of guilt. Another witness for the state was also permitted to testify that at the time and place where the defendant was arrested he said to Mrs. Wilson: "Nobody would hurt her, but it meant the penitentiary for him." This was also objected to by the

defendant, and was introduced by the state and treated by the court as an admission of the defendant's guilt. Touching this evidence, and upon the request of the state, the court gave the following instruction: "The court instructs the jury, if from the evidence you believe, beyond a reasonable doubt, that the defendant made the admissions testified to in this case, although, at the time of making the same he was held in custody, yet, if he voluntarily and without inducement of any kind made such admissions, the jury should treat and consider such admissions precisely as they would any other evidence or testimony." The defendant excepted, and now assigns error for the giving of said instruction. We think the vice of this instruction is in treating the alleged statements of the defendant as admissions or confessions of his guilt. At most, they were mere inculpatory statements, and do not amount to a confession of the commission of the crime charged against him. These statements were all susceptible to explanation, and when considered in the light of the conditions, and the circumstances under which they were made, if made at all, they may or may not have been inculpatory. 2 Wigmore, Evidence, sec. 1050, distinguishes admissions from confessions, as follows: "A confession is one species of admission, namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge. * * * The peculiarity of confessions in evidence is that they are subjected to an additional limitation when offered in criminal cases—the limitation that they must have been made without any inducement calculated to destroy their trustworthiness." In section 1051 of that work the writer says: "An admission is logically useful against the party in the same way as a prior inconsistent statement against a witness, * * * and its admissibility rests upon that ground." In section 1052 we find the following: "Admissions are statements, *i. e.*, assertions in words, and it is their inconsistency with

the party's other assertions that discredit the latter. Hence, *conduct cannot of itself be* treated as *an admission.* Yet the various sorts of conduct, which indicate a guilty consciousness and are undoubtedly receivable in evidence, are sometimes spoken of as admissions. The truth is that they are just what they seem to be, namely, acts, not assertions, and that their use in evidence is strictly a circumstantial one by way of inference from the conduct to the mental state beneath it, and from that to some ulterior fact." The inculpatory statements above quoted, if they amount to evidence against the defendant at all, fall within the acts or statements last above described, and it was reversible error for the court to state to the jury that they were either confessions or admissions. At most, the instruction should have told the jury that defendant's statements, viewed in the light of the circumstances under which they were made, if made at all, might be considered by them in connection with all of the other evidence in the case to aid them in determining the question of defendant's guilt or innocence of the crime charged against him.

Again, the record shows that the state was permitted to prove, over defendant's objection, that, after he was arrested and was taken away by the officer, Mrs. Wilson, his alleged paramour, said: "This is a great idea. It is the first time we ever did anything of this kind, and have to be caught." Another witness for the state was permitted to testify that she said, in the absence of the defendant: "You need not laugh, there isn't a one of you but what would have done the same thing if you had had a chance," or words to that effect. These statements made in the absence of the defendant by his alleged paramour, who was not under indictment, who was not a codefendant, and against whom no prosecution has ever been instituted, were treated by the state and by the court as admissions of his guilt. They were received as evidence in chief, and not for the purpose of contradicting the statements made by Mrs. Wilson denying the commission

of the alleged crime. That the introduction of this evidence was reversible error seems clear. In 12 Cyc. 440, we find the following: "While confessions or admissions of guilt made by one of several persons who are jointly indicted and tried for an offense are admissible against him, they are not admissible against his codefendants unless made in their presence and assented to by them." We find the text above quoted to be supported by citations from nearly all the states. Among them is *Dutcher v. State,* 16 Neb. 30. In that case there were several defendants, and it was there held that the admissions or statements of Orlando Dutcher, who was one of them, not made in the presence of or assented to by the others, should not be considered as evidence against them.

Complaint is also made by the defendant of instruction No. 1 A, given at the request of the state, in which the court attempted to define a reasonable doubt. The instruction reads as follows: "The court instructs the jury: A reasonable doubt, as used in these instructions, to justify an acquittal must be a reasonable one arising from a candid and impartial investigation of all of the evidence in the case. A doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and the juror is not allowed to create sources of materials of doubt by resorting to trivial or fanciful suspicions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors if, free from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. That by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt reasonably arising from all the evidence or want of evidence in this case. The proof is deemed to be beyond a reasonable doubt

when the evidence is sufficient to impress the reason and understanding of ordinarily prudent men with a conviction on which they would act in the most important concerns and affairs of life." We have frequently condemned a like instruction, but we doubt if one has ever been presented to this court before which contains so many objectionable features as this one. We think one illustration will be sufficient. It will be observed that the jury were informed: "That by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having some *reason* for its basis." In *Childs v. State*, 34 Neb. 236, we held an instruction containing a like expression erroneous, and a cause for a reversal of the judgment. Other expressions contained in the instruction complained of have been held erroneous by other courts, but it seems unnecessary for us to consider them. We are satisfied that the objectionable features of this instruction, together with the errors heretofore mentioned, entitle the defendant to a new trial.

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

REVERSED.

LETTON, J., dissenting.

I think the instruction as to admissions was not erroneous under all the evidence in the case.

SEDGWICK, J., not having heard the argument, took no part in the decision.

WESTERN UNION TELEGRAPH COMPANY v. STATE OF NEBRASKA.

FILED FEBRUARY 10, 1910. No. 16,369.

1. Telegraphs and Telephones: RATES: CRIMINAL PROSECUTIONS. Proceedings for violation of the provisions of subdivision *c*, sec. 15, ch. 90, laws 1907, must be by criminal prosecutions, and not by civil actions.
2. ———: REGULATION: STATUTES: CONSTRUCTION. The chapter above mentioned, in so far as its provisions relate to the prevention of abuses, extortions and unjust discriminations, is applicable to common carriers of news and intelligence, such as telegraph and telephone companies, as well as to common carriers of goods and passengers.
3. Constitutional Law: TITLES TO ACTS. The title to that chapter is broad enough to embrace its provisions defining telegraph companies to be common carriers, prohibiting them from practicing abuses, extortions and unjust discriminations, and providing penalties therefor.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

George H. Fearons, Henry D. Estabrook and *Francis A. Brogan,* for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

BARNES, J.

The Western Union Telegraph Company, hereafter called the defendant, was prosecuted under the provisions of subdivision *c,* sec. 15, ch. 90, laws 1907, being subdivision *c,* sec. 15, art. VIII, ch. 72, Comp. St. 1909, commonly known as the "State Railway Commission Law", for a violation of the provisions of that chapter. The trial resulted in a conviction, and from a judgment imposing a fine the defendant has prosecuted error.

The record discloses that a complaint was filed in the county court of Lancaster county charging the defendant with violating two sections of the act above mentioned. The first count of the complaint charged a violation of subdivision *c*, sec. 15 of the act, in that the defendant company, having on file in the office of the state railway commission a schedule of rates and charges, changed rule 3 thereof, and increased its rate for sending messages within the state of Nebraska, without first making application to the state railway commission for permission to make such change. The second count charged a violation of section 9 of the act, in failing to file the report required of common carriers by the terms of that section. The defendant company objected to the jurisdiction of the county court to entertain the complaint, upon the ground that the proceeding to recover the penalties prescribed in the act should be by a civil suit, and not by criminal prosecution. The objection was overruled, the defendant waived a preliminary examination and was bound over to the district court. The information in that court contained the same counts in the same order as they appeared in the complaint. The defendant demurred separately to each count upon the ground that the court had no jurisdiction to proceed by information in a criminal prosecution for the collection of penalties, and also because each count did not state facts sufficient to constitute a public offense. The court sustained the demurrer to the second count, but held that the proceedings for the enforcement of the penalty incurred by a violation of subdivision *c*, sec. 15, were properly brought as a criminal prosecution, and that the first count stated an offense. A trial to a jury resulted in a verdict of guilty under the first count. The court overruled defendant's motion in arrest of judgment, also its motion for a new trial, and adjudged that it pay a fine and costs, and this is the judgment of which it complains. It seems to be conceded that the change of rule 3 described in the first count of the information increases the rate or cost of sending messages

in this state; that such change was made without application to, or the consent of, the railway commission, and this brings us to the consideration of the errors complained of by the defendant.

It is first contended that the court erred in holding that the proceeding was properly instituted by criminal prosecution. In support of this contention defendant cites *Mitchell v. State,* 12 Neb. 538; *State v. Sinnott,* 15 Neb. 472; *State v. Standard Oil Co.,* 61 Neb. 28; *State v. Missouri P. R. Co.,* 64 Neb. 679. We are of opinion that these authorities do not support defendant's contention. In *State v. Sinnott* and *State v. Missouri P. R. Co., supra,* the court held that criminal prosecutions were properly brought. *State v. Standard Oil Co., supra,* was a case where the statute specifically provided for an action by injunction, and, of course, it was there held that the proper procedure was by civil action. In *Mitchell v. State, supra,* it appears that the amount of forefeiture sought to be recovered was fixed by the statute at a definite sum, while in the instant case the statutory provision is that any one convicted of the offense, of which the defendant has been found guilty, "shall be fined in any sum not exceeding ten thousand dollars."

It is argued, however, that where the statute declares the doing of an act to be unlawful, and prescribes a penalty therefor, the intention of the legislature as to whether the penalty is to be enforced by a civil or criminal action is to be ascertained by the terms used and the procedure provided. That this proposition is sound cannot be questioned, but it would seem that the legislature intended that violations of the act should be punished by criminal prosecutions for the following reasons. That part of the act which includes the matter of procedure reads as follows: "When the railway commission has reason to believe that any railway company, or common carrier, or any officer, agent or employee thereof, subject to the provisions of this act, has been guilty of any misdemeanor, or misdemeanors, as herein defined, said commission shall

immediately cause actions to be commenced and prosecuted against such railway companies, common carriers, agents, officers or employees, as the case may be, which may be brought in the county of the state through or into which the line of the railway company or common carrier sued may extend, and in the case of a misdemeanor on the part of any officer, agent or employee as herein defined shall be brought in the county where the misdemeanor was committed; said actions commenced shall be prosecuted in the name of the state, and no such action shall be dismissed without trial unless said commission and the attorney general consent thereto. Such action shall have precedence to all other business, except criminal cases, cases of similar nature, and such other actions as are herein provided for. (a) All of the penalties herein provided, unless otherwise provided for, shall be recovered and suits thereon shall be brought in the name of the state in the proper court having jurisdiction thereof in any county in this state to or through which said railway company or common carrier may be operating a road, by the attorney general, or under his direction. (b) In all suits arising under this chapter the rules of evidence shall be the same as in ordinary civil actions, except as otherwise provided herein. (c) It is hereby declared to be unlawful for any railway company or common carrier to change any rate, schedule or classification until application has been made to the railway commission and permission had for that purpose. Any railway company or common carrier violating this provision shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding ten thousand dollars." Comp. St. 1909, ch. 72, art. VIII, sec. 15.

From the foregoing it appears that no form of procedure is specifically prescribed by the terms of the act. It will be further observed that the actions mentioned in the statute are to be brought in the name of the state, and in case of a misdemeanor on the part of any officer, agent or employee the action must be brought in the county

where the misdemeanor was committed. Other parts of the act provide that any officer, agent or employee violating certain provisions thereof shall be deemed guilty of a misdemeanor, and it is expressly provided that upon conviction such officer may be fined or imprisoned. It is also declared that any railway company or common carrier violating the provisions of the act shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding ten thousand dollars. There does not seem to be anything in the foregoing provisions inconsistent with the maintenance of a criminal prosecution, and it seems clear that the legislature had in mind, when it passed the act in question, that the penalty provided for therein should be fixed and be enforced by such a prosecution; otherwise the words, when *convicted* shall be fined in any sum not exceeding ten thousand dollars, would be meaningless. The word "convicted", as used in this act, must be understood to mean a determination of guilt in a criminal prosecution. *Faunce v. People,* 51 Ill. 311.

Again, there seems to be another and very cogent reason why a civil action to recover the penalties for violations of the act cannot be maintained. Section 92 of the code provides that the petition in a civil action must contain: "*First.* The name of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant. *Second.* A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. *Third.* A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and if interest thereon be claimed the time from which interest is to be computed shall also be stated." In view of these provisions it is difficult for us to see how a petition could be framed to recover a penalty, the amount of which is not fixed or determined. Here the amount of the fine which the court shall impose in case of a conviction could not be known

or ascertained in advance of the termination of a criminal prosecution, and it would therefore be impossible to allege the amount for which the state should demand judgment against the person, agent, corporation or company violating the provisions of the act. It will be presumed that the legislature had this in mind, and therefore refrained from making any provision to enforce the act by civil action. The statute having made no provision for such an action, it follows that, unless a criminal prosecution can be maintained, the legislature has passed a law which provides a penalty for its violation, and yet has left the matter in such a chaotic condition that there is no means of enforcing it. We are not at liberty to presume that the lawmakers intended to create such a situation.

It is also argued that a criminal prosecution cannot be maintained because of the following language contained in the act: "Such actions shall have precedence to all other business, except criminal cases, cases of similar nature, and such other actions as are herein provided for." Comp. St. 1909, ch. 72, art. VIII, sec. 15. It is evident that the sole purpose of this provision was to expedite suits to enforce the provisions of the act; but it was not intended that such suits should take precedence over other criminal cases, and the language above quoted will be so construed.

It is further urged that the provision that "'suits thereon shall be brought in the name of the state in the proper court having jurisdiction thereof in any county in this state to or through which said railway company or common carrier may be operating a road' indicates a purpose to prosecute by civil action, and is inconsistent with a criminal proceeding, and that to adopt any other view we must assume that either the legislature intended to violate the constitutional rights of the employees of the offending common carrier by compelling them to be taken, perhaps, to a remote corner of the state for a trial for an offense alleged to have been committed in the

county of their domicile, or that the legislature intended that the fine and penalties were to be collected by civil action." We do not so understand the effect of this language. It must be read and construed with all of the other provisions of the act, and we find it expressly stated in that section of the statute first above quoted that the action, if against an employee, shall be brought in the county where the offense was committed. This is a complete answer to the objection above stated, for the employee is thereby permitted to make his defense in the county of his domicile.

The constitutionality of the provision that the corporation or company may be prosecuted in any county through which or into which its line or business extends is not involved in this proceeding, and that question will not be decided until it is properly before the court.

So we are of opinion that the statute contains nothing which would prohibit its enforcement by criminal prosecutions, and that it was the intention of the legislature that such prosecutions should be resorted to for violations of its provisions. To support this opinion we are not without authority. In *State v. Missouri P. R. Co.*, 64 Neb. 679, we held: "When the legislative thought is cast in the mould of the criminal law, it will be presumed, nothing appearing to the contrary, that the remedies contemplated were those generally used in courts exercising criminal jurisdiction." In *State v. Marshall*, 64 N. H. 549, it was said: "In the absence of any special provision as to the mode of procedure, the use of the word 'fine' determines the form of the remedy." To the same effect is *State v. Horgan*, 55 Minn. 183. The district court did not err in entertaining the criminal prosecution herein.

As a second ground for a reversal of the judgment complained of, it is claimed that "the provisions of subdivision *c*, sec. 15, rightly construed in connection with other portions of the act, have no application to the business of telegraph companies." This contention is supported by a well-written and instructive brief, and was urged

with much legal acumen at the hearing. It seems to us, however, that counsel have lost sight of the evident intention and purpose of the legislature in passing the act in question. By the constitution of 1875 telegraph companies were placed in the same class with railroad companies and other common carriers. Section 7, art. XI of that instrument, provides: "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this state and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." The people, by amendment of the constitution, having created a tribunal with jurisdiction to carry out the foregoing provision, it became at once the duty of the legislature to define the powers and duties of that tribunal and provide the manner of procedure to enforce its orders. In the performance of that duty the act in question was passed with the evident intention to include telegraph companies, as well as railroad and express companies, within its provisions; and it was enacted that telegraph companies should file with the state railway commission the schedule of their rates and charges then in force, and that such rates should not be changed without the consent of that tribunal, in order to prevent abuses, unjust discriminations and extortions, and we are of opinion that the act is sufficient for the accomplishment of that purpose. Indeed, the statute in express terms declares that telegraph companies are common carriers and are included in its provisions, and the commission is thereby required to regulate and control such companies to the full extent permitted by the constitution. It would seem that the defendant was originally of that opinion, because it filed its tariff book with the railway commission on the 11th day of September, 1907, which was shortly after the act went into effect, and again on the 3d day of October, 1907, filed another and revised tariff book with that tribunal. While this is not of itself conclusive, and may

not be binding upon the defendant, yet this may be considered as tending to show, to some extent at least, the view of the matter originally entertained by the defendant. We are therefore of opinion that the terms of the act in question apply to telegraph companies, and defendant's contention on this point should not be sustained.

Finally, it is contended that the part of section 4 of the act which defines common carriers to include telegraph companies is not within the title of the act, and is therefore unconstitutional and void. It was admitted by the defendant upon the argument that the bill does not cover a double subject, and it is conceded in defendant's brief that there are general terms contained in the title which would be broad enough to include regulations concerning telegraph companies if they were not restricted by other portions of the title. In other words, that the legislature, in attempting to make an elaborate title, has in effect restricted the scope of the act to railway companies and common carriers engaged in the business of transporting freight and passengers only. As above stated, we are convinced that, in drafting the act, it was the intention of the legislature to include telegraph companies in its provisions, to prevent abuses, discriminations and extortions, and to that end required such companies to file a schedule of their rates with the state railway commission, and prohibited a change or increase of such rates without the consent of that tribunal. It is true that the main and more specific portions of the act refer to railway companies as common carriers of goods and passengers. But those provisions, which in their very nature could alone apply to telegraph companies, are not thereby excluded. The title to the act reads as follows: "An act, creating and defining the powers, duties and qualifications of the state railway commission and the secretary thereof and fixing their compensation; defining railway companies and common carriers, regulating the same, and providing the method of fixing, establishing, publishing rates, charges

and classifications for the transportation of passengers, freights and cars, including joint through rates and joint traffic arrangements, over and upon the various lines of said railway companies and common carriers in this state; to provide for a system of annual reports by common carriers; the method of making, establishing and enforcing the general orders of said commission; defining unjust discriminations; to provide penalties for the violations of the provisions of this act, and to repeal all acts or parts of acts in conflict herewith, and to declare that an emergency exists." Laws 1907, ch. 90. This title is comprehensive enough to include all common carriers, whether of freight or passengers, or of news and intelligence. By the use of the conjunction the legislature made it clear that the provisions of the act are intended to apply not only to railroad companies, which are at the common law carriers of passengers and freight, but also to all other kinds or classes of common carriers doing business within this state. By this title the legislature gave notice that it proposed to define common carriers, and by section 4, as found in the body of the act, telegraph companies are so defined. That the legislature had power to include such companies within the definition of common carriers, and provide for the prevention of abuses, unjust discriminations and extortions, there can be no doubt. Indeed, from the very nature of telegraph companies they are common carriers, and it was so held by this court in *Pacific Telegraph Co. v. Underwood,* 37 Neb. 315. In many of the states it is held that the power to make all needful regulations is embraced in the common law, and in any event there is no question but telegraph companies are common carriers when they are so designated by legislative enactment. Jones, Telegraph and Telephone Companies, sec. 30, says: "It is a pleasure to note the fact that most of the states have, or are enacting, statutes which declare them common carriers. * * * They are agents of the government and have the power of exercising the right of eminent domain, without which they

could not invade the private property of an individual without his consent. With all these privileges granted by the government, and the almost perfect control over the art of telegraphy by the late and modern improvements, it is but fair and just that they be placed under almost if not the same restrictions as that which the common law imposes on common carriers." Having the power to define and regulate telegraph companies as well as other common carriers, the legislature gave notice by the title to the act that it proposed to exercise that power, and, after having given notice, it so defined them, and proceeded to carry out its purpose. That this was a substantial compliance with section 11, art. III of the constitution, there is no doubt. We are therefore of opinion that the law in question is not vulnerable as to the constitutional objection above stated.

Having thus disposed of defendant's assignments, and finding no error in the record, the judgment of the district court is

AFFIRMED.

RALPH C. VORCE, APPELLEE, V. INDEPENDENT TELEPHONE COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 10, 1910. No. 15,811.

1. Negligence: QUESTION FOR JURY. Where different minds may reasonably draw different inferences as to whether certain facts establish negligence or contributory negligence, the question of negligence must be left to the jury.
2. Appeal: INSTRUCTIONS: REVIEW. Where a requested instruction is refused by the trial court, but the court embodies the same idea in an instruction given upon its own motion, the party requesting such instruction having suggested it to the court will not be heard to complain that it is erroneous.

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

Benjamin S. Baker, for appellants.

Smyth, Smith & Schall, contra.

LETTON, J.

This is an action to recover damages for personal injuries. The defendant corporations in May, 1907, were constructing a telephone system in the city of Omaha. In the prosecution of the work they laid a tile conduit across Tenth street in the city. In laying the conduit it became necessary to remove the paving, which consisted of stone blocks, and to excavate a ditch about two feet wide and to such a depth that the concrete covering of the tile conduit was about 3½ feet below the surface of the paving. After the conduit was placed the defendants filled the ditch with dirt, and it is because of the alleged negligent filling of the ditch and failure to firmly tamp the same that the plaintiff bases his right of recovery. On the afternoon of May 27 the plaintiff was driving a loaded two-horse dray or express wagon at a slow trot along Tenth street on his way to the railroad station. He alleges that a portion only of the dirt and stone removed had been replaced in the trench, and that the same was left loose, unpacked and not tamped down and was about even with the surface of the street; that he was driving along the street, without any notice or knowledge that the dirt would not sustain the weight of the wagon, and that when the front wheels came to the ditch the wagon gave a sudden drop, and he was by reason of the jar thrown forcibly to the ground under the wheels, breaking his left arm and inflicting permanent injuries.

The answer alleges that the trench was filled and tamped in a thorough and workmanlike manner to the surface of the street; that the work was open and visible to all passers-by; that the plaintiff had knowledge of the condition of the street and ditch, and that whatever injury occurred to him was due to his own carelessness and negli-

gence. On these issues the case was submitted, and the jury found for the plaintiff, assessing his damages at $1,500. Defendants have appealed.

The first assignment of error discussed is that the verdict is not sustained by sufficient evidence. In this connection it is said that the evidence of appellee, standing alone, was that the dirt was filled to the surface of the street and was loose and untamped; that all the other witnesses say that the ditch was open and obvious; that the plaintiff's case depends upon the alleged carelessness and negligence in filling the ditch with loose dirt, and that the contrary of this allegation has been overwhelmingly established by the testimony. A consideration of this assignment requires a summary view of the evidence. The testimony on the part of the plaintiff is that the wagon he was driving had a high seat in front, upon which he sat; that the seat was at a height of between 8 and 9 feet above the surface of the pavement; that as he approached the locality of the accident he could see where the paving had been removed and the dirt filled in, and that it looked to him as though it was level and safe. There was a pile of dirt and stones in line with the ditch near the sidewalk, where a manhole was being constructed. This was inclosed by barriers, and there was a space of 7 or 8 feet between the barricade and the west rail of the street car track. The plaintiff drove along in this space. When the wagon reached the ditch, the wheel dropped in between the paving stones, and the jar caused him to fall. He says he could see the ditch at a distance of 30 to 40 feet, but we understand this to mean that he could see that the paving had been removed and a ditch dug, not that he could or did see any depression. There had been temporary barricades placed at this point while the ditch was being dug, but they had been removed a day or two before the accident. A number of other witnesses testify as to the condition of the ditch. The evidence on the part of the defense is that, when it was filled, the dirt was tamped and rounded up to a height of from 3 to 4

inches above the surface of the street; that there was a heavy rain after it was filled, and that some of the dirt adhered to the wheels of wagons passing over it and was deposited on the paving on either side by the jar when the wheels struck the paving stones. Defendants' foreman testifies that, on measuring immediately after the accident, the dirt was from 3 to 4½ inches below the level of the surface of the paving. The witnesses, other than the plaintiff, all seem to agree that there was a depression at this point, but the testimony also shows that it was not so deep but that wagons had been continually passing and repassing at this place. One of defendants' witnesses says that he saw many wagons drive across that day. Another, employed as a messenger boy, testifies that he ran over this place about 25 times a day; that when it was first filled in it was level with the street, but as the wagons went back and forth it was cut; that he could have ridden through it if he had wanted to be bumped; that, in order to save his wheel, he would pull his front wheel up and jump over it, and that if he had not done so the front wheel would go down about an inch or an inch and a half. Other testimony places the depression from 3 to 4½ inches in some places between the rail and the sidewalk. Some parts of the testimony we cannot clearly understand, since counsel directed the attention of witnesses and his questions to a sheet of paper, by bending which he sought to illustrate the condition of the depression. Unfortunately these curves are not in the record. Under the terms of the ordinance authorizing the laying of conduits, the defendants were required to obtain a permit from the proper city officers, and it was provided that they should "in all cases restore any and all openings made by them under this ordinance in such streets, avenues, alleys, boulevards, or public grounds, to good condition." We think that the evidence clearly discloses negligence on the part of the defendants in not filling the ditch in such a manner as to make it safe for public travel, or if, as seems probable under the evidence, it was originally so

placed, in not keeping it filled and in a safe and proper condition for travel. If the paving stones had been replaced, or if the barrier had been left standing, in all probability no accident would have happened.

The principal question in the case is whether or not the evidence that the plaintiff was guilty of contributory negligence is so clear that a verdict cannot be sustained. As to this, we are satisfied that the question was properly for the jury. We have the testimony of several witnesses who saw the depression from the level of the sidewalk, but the plaintiff is the only witness who testified to its appearance from a height of 10 or more feet above the street level, from which point he must have viewed it. The evidence also shows that a good deal of traffic had been passing at this point, and the street was muddy there. Under these circumstances it was for the jury to say whether, taking all the evidence into consideration, the plaintiff was guilty of contributory negligence in attempting to drive along the street at this point in the manner he was doing when injured.

Defendants next insist that the court erred in refusing to give instruction No. 4, requested by them, to the effect that, "if you find the ditch was open and the plaintiff saw the open conduit or ditch and deliberately drove into it, he took the chance of the consequences of his act." We think the court did not err in refusing this instruction. There is no evidence that the plaintiff "saw the open conduit or ditch and deliberately drove into it." Defendants' evidence shows that there was more or less mud and dirt at this point. The plaintiff says that it appeared level with the surface of the street from the position and height at which he saw it, and denies that he saw an open ditch. Moreover, the court by instruction No. 9 covered this point, and told the jury that, if they found "that the plaintiff knew, or by the exercise of reasonable care ought to have known, that he could not drive over the street at the place where the accident is claimed to have occurred, without danger to himself, then he could

not recover in this action." It is said in this connection that this instruction is not a fair statement, because the plaintiff testified that, had the ditch been open, he would have known it to be dangerous and would not have driven into it, but the instruction leaves the question of whether the plaintiff knew or ought to have known the dangerous condition of the ditch to be determined by the jury. The critical question was whether from the appearance of the ditch the plaintiff knew or ought to have known that to attempt to drive over it was dangerous, and, if they so found, they were instructed to find for the defendants.

Complaint is made as to instruction No. 8, which tells the jury: "Should you find that the defendants did not use ordinary care in guarding and protecting the ditch, and in tamping the dirt therein, the plaintiff could not recover, if by the exercise of ordinary care and caution he could have avoided the accident." We cannot see how this is prejudicial to the defendants. Under the evidence, as we view it, the sole question is: Was the plaintiff guilty of contributory negligence? And, while the question of whether the ditch was guarded and protected or not was not an issue in the case, still we cannot see how the jury were misled by this instruction or the defendants in anywise prejudiced. Besides, this instruction is in this particular a copy of one that the defendants requested the court to give; and, having suggested that they desired such an instruction, they cannot now complain because the court adopted their suggestion.

Defendants complain of the refusal of the court to give instruction No. 2, which undertook to state the allegations of negligence set forth in the petition. The court, however, by instructions Nos. 1 and 4, given upon its own motion, fully and correctly instructed the jury as to the allegations of negligence in the petition, and that the burden of proof was upon the plaintiff to show by a preponderance of the evidence that defendants were negligent in the particulars alleged. We think there was no necessity for a repetition, and that the trial court very

properly refused to restate what had already been made clear. Too many words often darken counsel. Upon the whole case, we think the main questions were for the jury to determine, and that we would not be justified in setting aside the verdict.

The judgment of the district court is

AFFIRMED.

WILLIAM L. CRABTREE, ADMINISTRATOR, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 10, 1910. No. 15,878.

1. **Negligence**: QUESTION FOR JURY. Where different minds may reasonably draw different inferences as to whether certain facts establish negligence or contributory negligence, the question of negligence must be left to the jury.

2. **Death**: ACTION: DAMAGES: EVIDENCE. A parent may recover for pecuniary loss which it is reasonably probable he may sustain by reason of the death by wrongful act of his minor child, and in ascertaining the amount of such pecuniary loss it is not erroneous to receive evidence of the circumstances of the father and of the age and condition of his family. *Chicago, R. I. & P. R. Co. v. Hambel*, 2 Neb. (Unof.) 607, and *Chicago, St. P., M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566, distinguished.

3. **Trial**: INSTRUCTIONS. An instruction, by which the jury was sought to be directed that the evidence of certain witnesses was entitled to greater weight than that of others concerning a disputed fact, invades the province of the jury, is erroneous, and was properly refused.

4. **Appeal**: MOTION FOR JUDGMENT: REVIEW. Where only a portion of the facts involved in the determination of issues of negligence and contributory negligence was specially found by a jury, and a judgment is moved for upon such special findings upon the ground that they are inconsistent with the general verdict, the court is entitled to consider all the other facts established by the evidence, and if, taking the special findings in connection with

the other facts proved, they are consistent with the general verdict, such verdict will not be disturbed.

5. Special findings examined, and *held* not inconsistent with the general verdict, in view of the proof made under the issues.

6. Railroads: INJURY AT CROSSING: CONTRIBUTORY NEGLIGENCE. The duty of a traveler upon a public highway approaching a railroad crossing is to exercise ordinary care. If he goes upon a railroad crossing without first looking and listening for the approach of a train, without a reasonable excuse therefor, and such failure to look and listen contributes to his injury, he cannot recover.

7. ———: ———: ORDINARY CARE: QUESTION FOR JURY. If the view of an approaching train is obstructed by cars near the crossing, if the traveler's attention is distracted by moving trains upon other tracks, or by other sounds or sights, it is a question for the jury as to whether or not the traveler has exercised ordinary care.

8. ———: ———: ———. Where a bright, intelligent girl nine years of age was killed at a railroad crossing over a public street, the jury were entitled to consider the age of the child in determining whether or not she used ordinary care under the circumstances, and a special finding that she was old enough to know the dangers of the crossing is not inconsistent with a verdict based upon the thought that she used such care as might ordinarily be expected from such a child. What might be the exercise of ordinary care in a child of nine years of age, measured by its experience and reasoning powers, might constitute gross negligence on the part of a person of mature judgment.

9. Remarks of Counsel set forth in the opinion, *held* not prejudicial to defendant.

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

B. P. Waggener, George G. Orr and *James W. Orr,* for appellant.

S. I. Gordon, Charles E. Smith and *W. W. Slabaugh, contra.*

LETTON, J.

This action was brought by William L. Crabtree, administrator of the estate of Bessie M. Stevens, deceased, to recover damages suffered by the next of kin by reason

of the killing of plaintiff's intestate. The accident occurred on April 11, 1905, between 4 and 5 o'clock P. M., at a point where the railroad tracks of defendant cross Ohio street in the city of Omaha. The railroad runs nearly north and south, and it is intersected at right angles by Ohio street. The railroad tracks are situated in the Missouri river bottoms a short distance east of a steep hill or bluff which forms the side of the valley. From the point where Ohio street reaches the escarpment there are three flights of steps terminating at a point about 45 feet west of the first railroad track. There are about 25 or 30 dwellings on the north side, and 35 buildings on the south side of Ohio street east of the tracks, and about 200 people live in the immediate neighborhood. There is no other street across the tracks leading to the city nearer than three or four blocks to the north or five or six blocks to the south of Ohio street, so that people working in the city and school children use the path in the street leading from the east of the tracks to the foot of the steps as a main thoroughfare, although the street is not capable of use by vehicles on account of the steepness of the bluff. Directly east, contiguous and parallel to the tracks of the defendant railroad were tracks of the Chicago, St. Paul, Minneapolis & Omaha Railway. The roundhouses of both railroads were some distance north of Ohio street, and the passenger stations of both were at a considerable distance south, so that it was necessary for engines going from the roundhouse to the station to cross this street. At this point the defendant had four tracks. The two farthest west were known as "elevator tracks," there being an elevator between them about 125 feet north of Ohio street. The next track east was the main-line track, and it was upon or close to this track that the accident happened. At the time of the accident some freight cars were standing on the second track from the west, at a distance of about ten feet north of the street. There were also cars standing on the same track south of the street, at a distance of about 12 or 15 feet.

The plaintiff's intestate, Bessie M. Stevens, was a bright, intelligent little girl of about nine years of age. Her father lived on the north side of Ohio street a short distance east of the railway tracks. On the afternoon of the accident she had been sent by her mother to a grocery store west of the stairs for some groceries, and was returning carrying them in a basket. When she reached the foot of the stairs she met another little girl. She stopped and talked with her a few moments, then started eastward across the tracks. The girl who met her, Eleanor Anderson, who was then about 11 years of age, testifies that a few moments after Bessie had started east she looked around, and just as she looked saw her struck and knocked down by an engine which was running backward on the roundhouse track, at the rate of 12 or 14 miles an hour, and with no bell or whistle sounding. She testifies that from where Bessie and she were standing it was impossible to see the engine on account of the box cars on the elevated track, and that at the time Bessie was struck a train with passenger coaches on the Chicago, St. Paul, Minneapolis & Omaha Railway (hereafter referred to as the Omaha road) was running across Ohio street, and was just south of the street, and that, when struck, Bessie was looking in the direction of that train. This account of the accident is corroborated by a number of other witnesses, whose evidence it would serve no useful purpose to detail at length. It is also shown that a person standing in the middle of the main-line track looking to the north could have an unobstructed view for nearly half a mile, and would have been able to see at such a distance moving engines or cars upon either the main-line or roundhouse tracks. The little girl was struck on the left side of her head by the beam on the rear end of the tank of the engine, which, as the engine was running backward, was in front. It is 45 feet from the foot of the steps to the first track, 15 feet from that to the second, 9 feet from the second to the third, and 11 feet from the third to the fourth.

On the part of the defendant it is shown that the engine was a large freight engine with a high tank, which was being operated from the roundhouse to the passenger station by two employees, the hostler and hostler's helper. The hostler testifies that he was in charge of the engine; that his position was upon the east side; that he could see the rail upon his side of the track immediately behind the tank, and could see the other rail a car length away at an angle; that the tank was high and square, and he could not see over it; that the first thing that attracted his attention as they went south was that his helper called to him; that from his gestures and call he supposed something was the matter, and at once threw the throttle back and whistled twice. The engine stopped at a distance of 90 feet south of Ohio street. The witness says he was going about 6 or 7 miles an hour, and that he could not have stopped the engine any quicker. The helper testifies that after the engine was about half way down from the next street north he saw the little girl come out from behind the elevator on Ohio street; that she was standing in the middle of the main-line track; that when she stopped on the main-line track they were about four engine-lengths away, and that when they got about an engine-length away, and when he was ringing the bell, he saw her move, and called to the hostler, who shut off the engine and applied the air brake; that the little girl was looking southwest when she started toward the engine, and that she approached the track with her back partly toward it. He also says that the engine was moving about 6 or 7 miles an hour. He testifies that the engine whistled about 4 or 5 feet from her, and just before she was struck; that he yelled at her just after the whistle was blown. He also says that he remembers a train being on the Omaha track southeast of there. Another witness for defendant was a switchman in the employ of the Omaha road, who testifies that at the time of the accident he was standing southeast of the crossing, throwing the switches on that road to allow a train to back down from

the roundhouse to the station. He testifies that he saw the little girl come down from the steps and walk toward the tracks; that he saw the engine coming, and that he called to her and beckoned with his hand to call her attention; that she was looking southeast at the time she stepped upon the track, and that his calling out and the gestures which he made induced the Omaha train to stop as it approached. He says that the Missouri Pacific engine was running at from 6 to 8 miles an hour, and that the bell was ringing. As to this point, his cross-examination seems to weaken his testimony. He could not say whether he heard any whistle.

The jury returned a general verdict for the plaintiff in the sum of $1,900. They also returned six special findings, which the defendant claims are inconsistent with the general verdict, and which we will consider later.

1. The first point discussed in defendant's brief is that the court erred in overruling a motion to direct the jury to return a verdict for the defendant for the reason that the plaintiff had failed to make out or prove any cause of action. It is argued that, by the undisputed evidence, the deceased was guilty of contributory negligence to such extent as to bar a recovery; that she was a bright girl who knew the dangers incident to crossing the railroad tracks and was familiar with the locality; that it was her duty to look and listen, and that she carelessly walked immediately in the way of a backing engine after it was too late to stop it. It is also said that the defendant was not guilty of any negligence; that according to defendant's witnesses the bell was kept constantly ringing, and that the fireman, seeing her standing in a place of safety, had a right to presume she would avoid the danger. This motion was made at the close of plaintiff's evidence, and renewed at the close of all the evidence. When first made, the motion was properly overruled. The evidence of plaintiff's witnesses, if believed, clearly disclosed negligence on the part of the defendant in backing an engine at a rate of from 12 to 14 miles an hour over a street

crossing in constant use by foot-passengers, without giving warning by bell, whistle, or otherwise, and at a point where the view of the track on which it was running was obstructed by freight cars standing near the crossing. The testimony at that time was sufficient also to carry the case to the jury for determination as to whether the deceased was guilty of contributory negligence. It was shown that it was only a few steps from where the view was obstructed to the place where she was struck, and that immediately in front of her a train was moving upon the tracks of the Omaha road, which apparently drowned the noise of the backing engine and distracted her attention. Under these circumstances, we think the question of whether or not the plaintiff was guilty of contributory negligence was one upon which reasonable men might well differ, and must therefore be for the jury to determine. The matter was in nowise altered after the defendant's witnesses had testified. The truthfulness of their accounts as to the rate of speed, the giving of signals, and the actions of the little girl was, as compared with that of plaintiff's witnesses, a matter for the jury to determine, and not for the trial court, and we think the court properly overruled the motion.

2. It is next argued that the court erred in permitting the plaintiff to prove, over the objections of the defendant, the financial condition of plaintiff's father, and the fact that he had a family consisting of a wife and children, citing the cases of *Chicago, R. I. & P. R. Co. v. Hambel,* 2 Neb. (Unof.) 607, *Chicago, St. P., M. & O. R. Co. v. Lagerkrans,* 65 Neb. 566, and *Chicago, R. I. & P. R. Co. v. Holmes,* 68 Neb. 826. The doctrine of these cases, we think, is inapplicable here. In the *Hambel* case the railway company sought to show that the value of the estate of the deceased was $50,000. The offer was rejected by the trial court for the reason that it afforded no information as to the pecuniary loss which would result from the death. The *Lagerkrans* case was an action in behalf of a widow who had married again. The *Holmes* case was an

action in behalf of the widow. In each of these cases the next of kin had a direct legal interest in the earnings of the deceased. He was under a legal obligation to support them, which at the time of his death he was discharging. It is clear that in such cases the value of the estate left by him would be of no aid in determining what the pecuniary loss occasioned by his death would be, since it affords no criterion as to his earning capacity and the amount he was contributing to their support. This, however, is a different case. The pecuniary loss which the father might reasonably be expected to suffer after the time when the deceased would have attained her majority by reason of her death would be in the nature of things liable to be affected in a large degree by the circumstances of himself and family. The ordinary experience of mankind as to social and family relations is such as to convince us that a child, who after majority is under no strict legal obligation to contribute pecuniary aid to her parents, would be much less liable to do so if the family were small or were able to support themselves, or the financial circumstances of the parent were such as to render such assistance unnecessary, than if they were indigent and poverty stricken. It stands to reason that a poor man with a large family of small children to support would ordinarily be more apt to suffer pecuniary loss by the death of a child, who was able to contribute to the support of the family, than one who required no such assistance. We are not unaware that some cases have held that the probability of such aid being afforded after the child attains majority is so remote and speculative as not to furnish any reasonable basis for estimation by a jury. *Cooper v. Lake Shore & M. S. R. Co.*, 66 Mich. 261. But such is not the rule in this state.

In *Johnson v. Missouri P. R. Co.*, 18 Neb. 690, this court said in an opinion by REESE, J.: "But, it is said that the word 'pecuniary' as used in our statute is not construed in a strict sense. The damages are largely prospective, and their determination committed to the discretion of

juries upon very meagre and uncertain data. A parent may recover for loss of expected services of children not only during minority, but afterwards, on evidence justifying a reasonable expectation of pecuniary benefit therefrom. Neither is it essential that this expectation of pecuniary benefit should be based on a legal or moral obligation on the part of the deceased to confer it, but it may be proved by any circumstances which render it probable that such benefit would, in fact, be realized. And as a right of action is given whenever the injured person, had he lived, could have maintained an action, at least nominal damages may be recovered. 3 Sutherland, Damages (1st ed.), pp. 182, 183; *City of Chicago v. Scholten*, 75 Ill. 468; *Johnston v. Cleveland & T. R. Co.*, 7 Ohio St. 336; *Pennsylvania R. Co. v. Keller*, 67 Pa. St. 300; *McIntyre v. New York C. R. Co.*, 37 N. Y. 287; *North P. R. Co. v. Kirk*, 90 Pa. St. 15; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 90; *Grotenkemper v. Harris*, 25 Ohio St. 510." This has been the rule in this state ever since. *Missouri P. R. Co. v. Baier*, 37 Neb. 235; *Tucker v. Draper*, 62 Neb. 66; *Draper v. Tucker*, 69 Neb. 434; *Post v. Olmstead*, 47 Neb. 893. In the latter case the evidence shows that the father was a poor man with four children younger than the deceased, and it is said: "The pecuniary damage to a next of kin is always more or less a matter of estimate, if not of conjecture." This holding is not inconsistent with that in *South Omaha Water-Works Co. v. Vocasek*, 62 Neb. 710, that "the establishment of the poverty of plaintiff, or the dependence upon him of the mother and other children, as a direct ground for the jury's action upon the matter of damages, is wholly inadmissible." In that case it was held proper to establish the existence of the mother and other children, "not as a direct ground for the jury's action, but as showing what deceased was doing and liable to do to make his life pecuniarily valuable to the plaintiff. The evidence is admissible, not as establishing directly a greater right to consideration from the

jury, but as showing what consideration plaintiff was actually receiving, and likely to receive in the future, from this son." See, also, *Bright v. Barnett & Record Co.*, 88 Wis. 299, 26 L. R. A. 524, and cases cited. We think the distinction is clear between cases of this class and of the class of the *Hambel* case, and that no error was made in the reception of this testimony.

3. It is next contended that the court erred in refusing to give to the jury instruction No. 8, requested by the defendant. This instruction informed the jury that the testimony of a witness who testified that he did not hear the engine whistle or the bell ring is not entitled to the same weight as one who testified positively that the bell was ringing or the whistle sounded, and that such negative testimony is entitled to but little weight. This court has repeatedly held that instructions which direct the jury as to the weight to be given to testimony of one witness or set of witnesses as distinct from another infringe upon the province of the jury and are erroneous. *Wilson v. Gamble*, 50 Neb. 426. The writer is not much in sympathy with this view of the law, but it is too firmly established in this state to warrant a change by mere judicial act.

4. The next complaint is in regard to the giving of instruction 13. This complaint we think is more technical than sound. The petition alleged that it was the duty of the persons running engines over the track, when approaching the crossing, to keep a lookout for persons at the crossing, and to sound the whistle or ring the bell at a sufficient distance to warn any person approaching, and also that it was the duty of the company to keep and maintain a watchman at the crossing to warn persons of the approach of switch engines. It is also alleged that the engine, "without warning of any kind", ran over the crossing and caused the death of the child. The jury were instructed that if they found those in control of the engine "did not exercise a lookout ordinarily consistent with their duties in the practical operation of the train, or

that the defendant was negligent in failing to provide a watchman at the crossing, or was negligent in the rate of speed of said engine, and that such failure or either of such failures was the proximate cause of the injury of the deceased, * * * then you should find for plaintiff." The fault found is that there is no charge of negligence in the petition based upon the defendant's failure to maintain a watchman or of its employees to keep a vigilant lookout. While perhaps not entirely specific and definite, we think that the language of the petition that the defendant failed to give "warning of any kind" at the crossing, taken in connection with the allegation of the necessity for a watchman, negatives the idea that a watchman had been stationed there, and the further allegation, that if defendant's employees had kept a lookout they could have prevented the accident, negatives the thought of a vigilant lookout being kept. No motion was made to make the language more specific, and in any event we cannot see how any prejudice could have occurred to the defendant from the giving of this instruction.

5. It is contended that the district court erred in not sustaining defendant's motion for judgment on the special findings of the jury *non obstante veredicto*. It is insisted that the general verdict is inconsistent with the special findings, and that, since the special findings control, the court should have rendered judgment in its favor on the facts found. The jury found, in substance, that Bessie M. Stevens at the time of the accident was of sufficient age, intelligence and experience to know and realize the danger usually attendant upon crossing railroad tracks; that when she stepped upon the main-line track and before attempting to cross the track next east, if she had looked to the north, there was nothing which would prevent her seeing and knowing of the approach of the engine in time to have averted the accident; that she knew that engines and cars frequently moved along the tracks in both directions across Ohio street; that she did not look to the north before attempting to cross over the roundhouse track; and

that, if she had done so, she could have seen the engine. These special findings may all be taken as true and yet be consistent with the general verdict. The evidence which the jury accepted shows that her view of the tracks was obstructed until the main-line track was reached; that the engine was backing swiftly and silently, and that immediately before the child was struck a moving train was passing over the crossing in front of her; that a switchman a short distance to the southeast was shouting to her and endeavoring to attract her attention, and that she was looking in that direction. Under these circumstances, and with these facts added to the facts found by the special verdict, there is no inconsistency. *Kafka v. Union Stock Yards Co.*, 78 Neb. 140. The rule in this state is not that there is an absolute obligation upon a person crossing a railway track to stop, look and listen before attempting to cross, but, as laid down in *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627, the duty of the traveler upon a public highway approaching a railroad crossing is to exercise ordinary care. If he goes "upon a railroad crossing without first listening and looking for the approach of a train, *without a reasonable excuse therefor*, * * * and if such failure to look and listen contributes to the party's injury, he cannot recover." The qualifying words, *"without a reasonable excuse therefor"*, are of great significance in this connection. If, as in this case, the view of approaching trains is obstructed by freight cars standing near the crossing, if the traveler's attention is distracted by moving trains upon other tracks, or by other sounds or sights, if no warning signals are given or lookouts stationed, it is a question for the jury as to whether or not the traveler exercised ordinary care. *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730; *Union P. R. Co. v. Connolly*, 77 Neb. 254; *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790; *Nilson v. Chicago, B. & Q. R. Co.*, 84 Neb. 595; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Cherry v. Louisiana & A. R. Co.*, 121 La. 471, 46 So.

596, 17 L. R. A. (n. s.) 505, and note. It may further be said that, while the jury found specially that deceased was of sufficient age, intelligence and experience to know and realize the danger usually attendant upon crossing railroad tracks, this does not amount to a finding that she was possessed of sufficient judgment and discretion so that she would be held to the same accountability as a person of mature years. What might be the exercise of ordinary care in a child nine years old, measured by its experience and reasoning powers, might constitute gross negligence on the part of a person of mature judgment. The jury were entitled to consider the age of the child in determining whether or not she used ordinary care under the circumstances, and the finding that she was old enough to know the dangers of the crossing is not inconsistent with a verdict based upon the thought that she used such care as might ordinarily be expected from an infant of such tender years.

It is next contended that the verdict is excessive. The jury found specially that the father might reasonably have expected to receive from the deceased after she arrived at her majority, had she lived, the sum of $1,900. As has been said, it is exceedingly difficult to estimate with any degree of precision the amount of damages which would accrue to the next of kin by the killing of a minor child. The matter, by the very nature of things, must be left largely to the discretion and good judgment of the jury, taking into consideration all the surrounding circumstances tending to throw any light upon the amount which the father might reasonably be expected to receive from the deceased. If the sum awarded as damages is not clearly excessive and unreasonable, a reviewing court will not interfere with the verdict. We are of the opinion that the amount of recovery in this case would not justify the court in setting aside the verdict for that reason alone, or even in requiring a remittitur.

6. Misconduct on the part of the counsel for the plaintiff is complained of, in this, that at the close of the argu-

ment he said: "All we ask of you is that you be careful and not allow the special findings to conflict with your general findings." We cannot see that the defendant was harmed by this remark. While, as defendant contends, the full duty of the jury with respect to the special findings was to answer the questions as they believed the facts to be, and we think it would have been better if counsel had refrained from making this remark, yet, at the same time, we cannot see how the defendant could be prejudiced by it. The special findings were all answered in accordance with its views; it seeks to base a judgment upon them, and, even if we accept the defendant's theory that they are inconsistent with the general verdict, the jury not only paid no attention to the remark, but acted in direct opposition to the request.

Upon the whole record, we find no prejudicial error, and the judgment of the district court must be

AFFIRMED.

JAMES NELSON, ADMINISTRATOR, ET AL., APPELLANTS, V. FRANK P. WICKHAM ET AL., APPELLEES.

FILED FEBRUARY 10, 1910. No. 15,886.

1. **Deeds: PRESUMPTIONS: MENTAL CAPACITY: UNDUE INFLUENCE.** In a case where a father, 75 years of age, who owned a farm of 120 acres on which he lived with his son, made a conveyance of the farm to his son, without any pecuniary consideration, during his last illness and about three weeks before his death, and by which conveyance his other child was excluded from any participation in his property, the presumptions are against the validity of the conveyance. A court of equity will scrutinize the transaction very closely, and unless from all the evidence in the case the court is satisfied that the grantor was mentally competent to make the deed, and that no undue influence had been exerted, the conveyance will not be upheld.

2. ———: CANCELATION: EVIDENCE: REVIEW. Where some time prior to the execution of such a conveyance it is shown that the

grantor had made a will conveying 80 acres of his farm to his son and 40 acres to his daughter, who was a married women of about 35 years of age, and that by reason of his prolonged sickness additional care and trouble was imposed upon the son and additional expense incurred, which under the provisions of the will the son would be compelled to pay, and it is further shown that the mind of the deceased was entirely unimpaired at the time of the conveyance and for several weeks afterwards, that he informed the scrivener that he was making the conveyance for the care and trouble that his son had been put to, and that he afterwards called for the will and destroyed it, this court, trying the case *de novo*, will not set aside a finding of the trial court that the conveyance was made voluntarily and without undue influence, and was valid.

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

E. O. Kretsinger, for appellants.

Hazlett & Jack, contra.

LETTON, J.

This is an action in equity brought for the purpose of procuring the cancelation and setting aside of a deed of conveyance made by one Horace M. Wickham shortly before his death to his son, Frank P. Wickham. The action was begun by Clarissa M. Nelson, one of the children of the deceased, but during its pendency she died. Revivor was had in the name of James Nelson, as her administrator, and as father and next friend of Horace Nelson, their only child.

Horace M. Wickham, the deceased, lived in Gage county. The petition alleges in substance that Horace M. Wickham died on the 5th day of September, 1906, leaving surviving him a son, Frank P. Wickham, and a daughter, Clarissa M. Nelson. At the time of his death he owned 120 acres of land in Gage county, upon which he resided; that on the 11th of August, 1906, Frank P. Wickham and Mattie Wickham, his wife, the defendants, procured Hor-

ace M. Wickham to convey this land to him; that at the time the deceased was nearly 75 years of age, and was suffering from abscesses, Bright's disease, blood poisoning, and mental decay, and was of unsound mind to such an extent as to be wholly incapable of transacting business; that he was unable to sign his name at the time, and was so mentally and physically incompetent that he was unable to make a delivery of the deed; that no consideration was paid for the deed, but that it was procured with the intention of cheating and defrauding Clarissa M. Nelson out of her share of her father's property. The prayer is to set aside the deed and to quiet the title to half of the land in Horace Nelson.

The answer substantially is to the effect that Frank P. Wickham is 35 years of age; that he has always from the time he has been able to work, with the exception of 18 months when his father was absent from Gage county, remained upon his father's farm and worked continuously without salary or compensation, except his clothing and maintenance; that about the year 1900 the deceased ceased doing manual labor, and to induce the defendant to remain with him and care for him during his life he promised and agreed that, if Frank P. Wickham would assume all indebtedness contracted by Horace M. Wickham, pay all his bills and expenses thereafter, and release him from any claim for labor and services due and owing by him to the said Frank P. Wickham, and for his faithful conduct theretofore, he would convey, transfer and turn over all of his property free of rent to these defendants to farm and manage as their own. Defendants say that they faithfully complied with these stipulations and agreements, and that while Horace M. Wickham was of sound mind and memory he executed and delivered the deed in controversy in satisfaction of the aforesaid agreement and promise. They deny that the deed was obtained fraudulently; that the deceased was of unsound mind; that he did not know and understand what he was doing; and deny that he was possessed of any personal property at the

time of his death. They also allege that they have paid medical and funeral expenses and other debts since the death of the deceased, in accordance with the agreement.

The district court found generally for the defendants; and found further that the deceased was mentally competent to make the deed; that no undue influence was exerted; that he made and executed the same voluntarily, understanding fully the purpose thereof, and without being influenced by any one, and rendered judgment of dismissal, from which judgment plaintiffs have appealed.

The evidence shows that the deceased had lived with his son Frank upon the home farm since the year 1900, when he returned from an absence of 18 months in Merrick county. In the early summer of 1906 he had in some way injured his right hand by a scratch or bruise, and blood poisoning resulted. On June 25 he called at the office of Dr. Roe, a practicing physician in Beatrice, for the purpose of having the doctor examine his hand and arm. The doctor at once took him to a sanitarium in that city, and attended him there from that time until he was removed home to the farm. The arm became much inflamed and swollen, open sores developed, and he was unable to use his right hand or arm. The arm was kept bandaged, and his fingers were swollen and stiff. After a week or two Bright's disease set in, and his feet and lower limbs became swollen. He seemed to improve, and in the latter part of July he was removed home, but soon began to fail again. On August 10 Dr. Roe received a telephone message from Frank P. Wickham, saying that his father wanted to make a deed, and asking him to bring a lawyer or notary with him when he came. The doctor asked him whom he should bring, and he said he did not care. The next day he took Mr. Beaver, who was an insurance agent and notary public, to the farm with him. Beaver testifies that when they reached the farm he went into the room where the deceased was lying on the bed; that Mrs. Wickham said, "Here is Mr. Beaver and Dr. Roe";

that deceased said, "How do you do", and nodded his head, and that he asked the deceased what he wanted of him and that Mr. Wickham said that he wanted to make a deed of his farm to Frank. Beaver inquired whether he had the old deed to the farm. The deceased said that he had, and Mrs. Wickham procured the old deed from a drawer in the kitchen, and gave it to him, and that he copied the description from the old deed, writing it on the kitchen table. After the deed was written he returned to the room where Mr. Wickham was, read the deed to him, and asked him if he would make his mark. That he said he would; that Dr. Roe and Frank then raised him up in the bed, and he took hold of the pen with his left hand while the mark was made, Beaver holding the pen. He then acknowledged the deed. He said that he wanted to make the deed to Frank because of what he owed him for the trouble and expense he had been to for him. Frank was there part of the time, but, so far as the testimony shows, he took no part in the proceedings except to help raise his father in order to hold the pen, and said nothing to his father with reference to making the deed. This testimony is corroborated by Dr. Roe.

A large number of witnesses were examined with reference to the deceased's mental condition, and there is absolutely no evidence of any weight or value whatever to show that in any respect the intellect of the deceased was in anywise impaired at the time of the execution of the deed, or, in fact, at any time, except immediately before his death, which occurred on September 5, and the weakness at that time appeared to be due more to actual physical disability than to a direct affection of the brain. The testimony further shows that his daughter, Clarissa M. Nelson, was a patient in the sanitarium for a portion of the time that her father was there; that her bed had been in the same room or ward for a short time, and had been removed to another room at his request, and that the old gentleman had complained of being worried by her. He also told his stepdaughter of Clarissa speaking

to him about the disposition of his personal property. On the evening of the day that the deed had been executed, the deceased took a will, which had some time previously been prepared, and handed the same to his stepdaughter, Mrs. Connolly, who lived in Nuckolls county, but who was visiting the home for about a week at this time. He asked her to read the will to him, which she did. By the terms of this instrument 80 acres of the farm were left to Frank, subject to the debts, and 40 acres to Clarissa. After reading it she returned the will to him, when he tore it in two, and at his request she burned it. There is other evidence in the record tending to show that the disposition of the property made by the will was known to the family before this. Under section 329 of the code, defendants were not permitted to testify as to the transaction, so we are compelled to look to surrounding circumstances only to test the validity of the conveyance. The deceased was a man of intelligence, had been a member of the county board of Gage county, and for many years upon the school board.

The plaintiff contends that the circumstances show conclusively that the deed was the result of undue influence exerted upon the failing mind and will of the deceased, was without consideration, was never delivered, and is presumptively void. The principles of equity jurisdiction with relation to such transactions are plain and well settled, and have often been announced by this court. In *Bennett v. Bennett,* 65 Neb. 432, we said: "A court of equity will scrutinize jealously a transaction as to which there is ground for holding that influence has been acquired over a person of weak mind, and has been abused. *Smith v. Kay,* 7 H. L. Cas. (Eng.) *750, *759. The circumstances under which a conveyance was made, the condition of the grantor at the time, and the injustice to him and his heirs if it is upheld, may be such as to cast upon the grantee the burden of showing that it is untainted with undue influence, imposition, or fraud, but is the intelligent and deliberate act of the grantor." In *Gibson v.*

Hammang, 63 Neb. 349, in rebutting the contention of the appellant that the relation of parent and child is so far one of trust and confidence that, in any case where one obtains a conveyance from the other, the burden is upon the grantee to establish that the transaction was fair and honest, it was said by POUND, C.: "While the relation predisposes to trust and confidence, yet some circumstances of reliance or dependence of one upon the other or habitual trust ought to appear in addition. No presumption of fraud or undue influence arises from the mere existence of the relation. *Samson v. Samson,* 67 Ia. 253; 27 Am. & Eng. Ency. Law (1st ed.) 488. Where the parent is old and feeble and dependent upon the child, or where the child has been given the control and management of the parent's affairs, or has been largely consulted therein, or where they have long lived together, the fiduciary relation may be clear enough." And again: "In other words, though the relation of parent and child may not necessarily and of itself alone cast a burden of proof upon the one receiving a gift or conveyance from the other, so as to bring the rule of law as to burden of proof in cases of relations of trust and confidence into play, it is so far liable to abuse that a strong presumption of fact may arise, from circumstances of a particular transfer, which will require close scrutiny of the transaction, and cast a burden upon the grantee. It is a familiar doctrine that a court of equity scans with great jealousy a transaction where there are any grounds for holding that influence has been acquired and abused, or that confidence has been reposed and betrayed. *Smith v. Kay,* 7 H. L. Cas. (Eng.) *750, *759." We consider as settled, therefore, the contention of plaintiff's counsel that the transaction in this case should be closely scrutinized, and that the burden is upon the defendants to overcome the sinister presumptions arising under such circumstances.

We are unable to find any evidence in the record to sustain the allegations of the petition that the deceased was of unsound mind to such an extent as to be incapable of

transacting business at the time of the execution of the deed. Taking all the circumstances of the case together, and bearing in mind that a court of equity will closely scrutinize such a transaction, we are convinced that the change in conditions subsequent to the time that the will was made, the added care and trouble which the sickness of the deceased imposed upon his son and his wife, and the additional expense which would all fall upon Frank if the disposition of his property made by the will was not changed, operated to induce the deceased to make the conveyance. *West v. West,* 84 Neb. 169. His daughter was apparently provided for. She was a married woman of about 35 years of age at this time, living with her husband in a distant county. It is true she had a little son who had been named after the deceased, but no provision had been made for the grandson in the will, and there was nothing to indicate that he was in his grandfather's mind at the time of the execution of either deed or will.

The plaintiff contends that there is no proof of the delivery of the deed. It is true that the notary does not state what was done with the deed after the grantor made his mark and acknowledged it, except to say that it was witnessed by himself and Dr. Roe. It is an established principle that the possession of a deed by the grantee is ordinarily *prima facie* evidence of delivery, and that the burden of proof is upon him who disputes this presumption. *Wilson v. Wilson,* 85 Neb. 167; *Roberts v. Swearingen,* 8 Neb. 363; *Brittain v. Work,* 13 Neb. 347. The deed was recorded about 2 o'clock in the afternoon of the same day. While there is no evidence as to this fact, it was probably taken to Beatrice by the notary. The fact, however, that in the evening the deceased called for his will and destroyed it is a circumstance tending to show that he had previously made another disposition of his property, and, when taken in connection with the circumstances attending the making and signing of the deed, indicates that he was of the opinion that the changed disposition had been made effective. We think the circum-

stances taken in connection with the presumption arising from possession of the deed were sufficient to establish delivery.

The case is very near the border line, but the failure to show any mental weakness carries great weight. The trial judge had the witnesses before him, and the case seems to have been carefully tried, and with painstaking discrimination as to the exclusion of incompetent evidence on the part of the defendants. After according plaintiff all the presumptions which the law affords, we are convinced that the conclusion of the trial court should be sustained.

The judgment of the district court therefore is

AFFIRMED.

JAMES S. REED, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 10, 1910. No. 15,906.

1. **Waters**: RAILROAD EMBANKMENT: DAMAGES. Where damages were paid to a riparian owner for the diversion of a stream from his land, such damages do not cover future injuries by reason of the defective construction of a railroad embankment in such a manner as to retain flood waters which otherwise would have escaped through a natural channel.

2. ———: INJURY TO CROPS: ACCRUAL OF ACTION. Where an injury to crops is caused by the negligent construction of a railroad embankment, which arrested and held upon the land the flood waters of a natural stream, the cause of action accrues at the date of the injury, and not at the date of the negligent construction of the improvement. *Chicago, B. & Q. R. Co. v. Mitchell*, 74 Neb. 563.

3. **Evidence** examined and *held* to sustain the verdict.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

J. E. Kelby, Frank E. Bishop and *Fred M. Deweese*, for appellant.

Gomer Thomas and *John Everson, contra.*

LETTON, J.

The plaintiff is a resident of Harlan county, owning land which lies in the valley of Sappa creek, which is a small stream running easterly and emptying into the Republican river. The railroad track of the defendant company runs about 20 rods south of the south line of plaintiff's land, crossing the creek about a quarter of a mile west of the west line of plaintiff's land, and also a few rods east of the plaintiff's east line. From the point where the railroad crossed it to the west of the plaintiff's land the creek originally flowed in a northeasterly direction into and through his premises, thence curved again to the southeast to a point south and east of his land, where it was again intersected by the railroad. A solid embankment was constructed across the stream at both points of crossing, except that at the east crossing two iron drainage pipes, each 24 inches in diameter, were placed in the embankment to drain the old bed of the stream north of the railroad, and dispose of the natural drainage of the lands lying north and west, which was discharged into the old bed by several long ravines. The railroad company dug a new channel for the stream from the point where the embankment dammed it on the west to where it crossed the channel again on the east, so that the stream when it struck the embankment was diverted at right angles across the chord of the arc formed by its old channel and the railroad, and ran in the ditch dug along the south side of the railroad. In 1886-1887, at the time the railroad was built, the change in the stream was made with the consent of John Reed, a brother of the plaintiff, who then owned the land, and he was paid $150 damages for this diversion of the stream from its natural

course. In 1903 the plaintiff, with knowledge of these facts, purchased the land. On July 1, 1905, there was an excessive fall of rain in this vicinity, between five and six inches falling during the latter part of the night and early in the morning of July 1, 1905. The flood waters, which before the construction of the railroad had overflowed the channel of the creek and flowed down what is known as the "first bottom", following the windings of the stream, being impeded by the railroad embankment, and the new channel not being of capacity to carry them off rapidly, accumulated until they rose to a height sufficient to flow over the railroad, which was washed out, and the waters rushed into the old channel. The flood waters were again dammed by the embankment to the east of plaintiff's land where the two drain pipes were placed. The water again accumulated until it rose to the top of the embankment, when it again broke through at or near the old channel. The plaintiff's land was flooded to a height of from six to ten feet, ruining his crops, destroying his hay and corn in crib, injuring the furniture in his house, and drowning his domestic animals, damages for which he seeks to recover in this action.

The petition alleges that the defendant negligently and carelessly failed to build or maintain a bridge or other means for the water to escape at the place to the east of plaintiff's farm, where the railroad crossed the channel, but negligently built an embankment there, and that during wet periods of the year a large amount of water flowed into the old channel, but could not escape therefrom, and would overflow and stand upon plaintiff's land, and that the defendant negligently failed to maintain a sufficient dam or embankment at the point where it sought to divert the stream from the natural channel to the artificial channel, and that by reason of this negligence the water on the 1st of July, 1905, flowed over the artificial embankment into the old channel, and on account of no proper means of escape being provided they caused the damage complained of.

The defendant alleged that the railroad was built in 1887 as now constructed; that the then owner was paid all damages by reason of such construction; that the present condition existed at the time plaintiff secured any rights in the land, as he well knew; that whatever damages resulted from the construction of the railroad and the change in the channel of the creek occurred in 1887, and that the cause of action, if any, accrued at that time. It is also alleged that the flood was of such unusual and unprecedented and excessive character as never had been known in that vicinity before; that the valley lands, regardless of the nearness of the railroads, were flooded to a great height for many days; that the railroad was overflowed and washed away in many places by the flood, which was of such a character as to constitute "an act of God", which the railroad company could not have anticipated and prevented. Plaintiff recovered judgment, from which defendant appeals.

We will consider the errors assigned in the order of their presentation in defendant's brief.

1. It is contended that the evidence establishes the defense that the flood was so unprecedented and unusual that the defendant could not reasonably be required to anticipate its occurrence, and was of such a character as to come within the class of happenings technically known as the "act of God." A number of witnesses testified it was the highest flood they had ever seen in the valley, either before or since; that hay, dead animals and other articles were carried away by it. Some of defendant's own witnesses, however, say that the waters in 1887 rose to within a few inches of the top of the grade, and one witness for the defendant testifies on cross-examination: "Q. Now, as to the height of the water, it has been up to about the ties before? A. Within a few inches of the ties; yes, sir. Q. A number of times? A. Well, about three times that I know of before that, it has been up pretty high there." Another witness testifies that they "had a few floods after that was just as bad." Taking all the

testimony with respect to the volume of this flood, we think the jury were warranted in finding that the washing out of the railroad embankment by the flood waters flowing down the course of the old channel, and the consequent flooding of the plaintiff's land by the retention of such waters where the lower channel was dammed, might reasonably have been expected from what had occurred previously in that locality. We think the evidence sustains the finding of the jury upon this point.

2. It is next argued that the construction was agreed to by the landowner, and damages paid. The testimony clearly shows that the damages were paid to John Reed for the right to change the stream and divert the flow from his land. This transaction, so far as the evidence shows, had nothing whatever to do with the manner of construction of the railroad, except in so far as it diverted the stream, which, as riparian owner, Reed was entitled to have flow as it had always flowed.

3. It is next contended that the right to overflow the lowlands on the north side of the railroad track had been obtained by prescription. It is said that the water had accumulated in the old channel from the drainage of surrounding lands and damaged the crops growing on the low land, and that, since this condition had existed ever since the building of the railroad, a prescriptive right of flowage had been obtained. The damages claimed are for injuries to the crops, furniture, live stock, etc., and not for injuries to the land itself. We have held in *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237, *Chicago, B. & Q. R. Co. v. Mitchell,* 74 Neb. 563, and *Chicago, R. I. & P. R. Co. v. Andreesen,* 62 Neb. 456, that such damages do not fall within the rule contended for: "Where an injury to the crops and lands of one is caused by the negligent construction of a railroad embankment, which arrested and held upon said lands the flood waters of a natural stream, such party's cause of action accrues at the date of the injury, and not at the date of the negligent construction of the improvement." There is also evidence in the record

to show that claims for damages had been made, and that in 1902 or 1903 defendant paid the plaintiff's grantor $50 as damages for crops destroyed by water.

The defendant complains of instruction No. 8, which, in effect, tells the jury that the defense of an "act of God" is an affirmative defense, and the burden of proof is upon the defense to establish it, and criticises severely the statement that, if you "find that such injury was not occasioned by an act of negligence on the part of the defendant, * * * then your verdict should be for the defendant." The objection to the form of this instruction, as well as to No. 9 and of others treating on this subject, we think it is unnecessary to consider because the evidence warrants the conclusion that the jury found that the flood was not of such an unprecedented character as to constitute an "act of God", and that defendant by the exercise of reasonable care might have prevented the backing up of the water upon plaintiff's land, at least to a greater height than other lands where the flow was unobstructed. We think it clear from the evidence that, even if the railroad embankment had not been constructed, the volume of the freshet would have covered much of the lower portion of plaintiff's land. The evidence shows that the stream was out of its banks and covered the "first bottom" of the creek for several miles above. But it also shows that the "first bottom" above the railroad embankment was from a quarter to more than a half mile wide; that the point where the new channel was cut was close to the high bank of the "second bottom" on the south; and that the space between the railroad embankment and this bank was only from about 100 to 200 feet wide, so that the volume of flood waters which had spread over the entire "first bottom" were concentrated at this point; and that, as soon as the railroad embankment was washed out so as to furnish an outlet, the waters above rapidly fell. While the waters would probably have covered most of the "first bottom" on plaintiff's land if no railroad grade had been erected, we are satisfied that they would not have

reached the height to which they rose by several feet if it had not been there, or if free passageway had been afforded. We think it clear that all the damage that plaintiff suffered did not result from the construction of the embankment, and that in common with others he would have suffered by the flood in any event. The defendant, however, made no issue upon this point either by the pleadings or the evidence, and, having relied solely upon the defenses before mentioned, we cannot apportion damages in this proceeding.

It is urged that the amount of the verdict is not supported by the testimony; that there is no evidence to sustain the verdict with regard to the claim for potatoes, alfalfa hay, chickens, garden, and household goods, and that, since the jury were left at liberty to estimate these damages without testimony, there is prejudicial error. The record shows that, as to a number of items, the proof of value offered by plaintiff was erroneously excluded upon objections by defendant's counsel, but there is ample competent proof of damage to an amount greater than the sum fixed by the verdict, even excluding the 50 acres of corn, the fruit trees, garden, and a number of other items which were damaged or destroyed, but as to which the evidence of value was excluded. From a careful consideration of the record, we are inclined to think the jury guarded the defendant from paying any damages other than those suffered by the plaintiff in excess of what he probably would have suffered but for the embankment, and that the amount of recovery is not unjust. On the whole record, we find no error prejudicial to defendant upon the theory it adopted in the trial of the case, and which has been presented here.

The judgment of the district court is

AFFIRMED.

GLEN L. METZGER ET AL., APPELLEES, V. ROYAL NEIGHBORS OF AMERICA, APPELLANT.

FILED FEBRUARY 10, 1910. No. 15,852.

1. **Insurance**: ACTION: EVIDENCE. "A fraternal insurance company cannot have the benefit of its by-laws and amendments thereto, in defending against a death claim, unless certified copies of such by-laws and amendments have been filed with the auditor of public accounts." *Hart v. Knights of the Maccabees of the World*, 83 Neb. 423.

2. **Witnesses**: PRIVILEGED COMMUNICATIONS. In an action prosecuted by children of a deceased mother upon a certificate of insurance on her life executed for their benefit, the surviving husband will not be permitted over their objections to testify to privileged communications made to him by her during marriage unless the privilege is waived.

3. **Error** committed in excluding evidence is cured by the subsequent admission thereof.

4. **Trial**: EXCLUSION OF EVIDENCE. Testimony, apparently irrelevant at the time it is offered, may be lawfully excluded if the party seeking its admission does not state to the court that evidence which he expects to introduce will make the proffered testimony relevant.

5. **Appeal**: EVIDENCE: OFFER OF PROOF. If objections are sustained to questions propounded to a witness on his direct examination, an offer should be made to prove a relevant fact responsive to the question, or the ruling will not ordinarily be reviewed in this court.

6. ———: ———. In an action at law submitted to a jury, if a logical reason exists for rejecting part of a witness' testimony, and with that part excluded the evidence will sustain the verdict, the judgment will not be disturbed on appeal on the ground that it is not supported by the evidence.

7. ———: INSTRUCTIONS. If the instructions taken altogether are more favorable to the losing party than the record warrants, a verdict will not be set aside because in minor details some of them may with propriety be criticised.

8. **New Trial**: NEWLY DISCOVERED EVIDENCE. "Before the defendant is entitled to a new trial on the ground of newly discovered evidence, it must appear that due diligence was exercised to pro-

cure such evidence upon the original trial, and that it is through no fault or neglect of the party making the application that such evidence was not then produced." *Grand Lodge, A. O. U. W., v. Bartes*, 69 Neb. 636.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John D. Dennison, Jr., C. M. Miller and *Perry & Lambe*, for appellant.

John Everson and *J. G. Thompson, contra.*

ROOT, J.

This is an action against a fraternal insurance company upon its certificate payable to the assured's infant children. Plaintiffs prevailed, and defendant appeals. Upon a former submission the appeal was dismissed because of the condition of the record. 85 Neb. 477. The defect has been supplied, and the cause comes on now for decision upon the merits.

1. The defense is that the assured, in violation of the terms of said certificate while pregnant, wilfully and unlawfully caused a physician to commit an abortion upon her person. Certain conditions in the application for insurance, in the certificate and in defendant's by-laws are pleaded to demonstrate that upon the facts defendant is not liable. These allegations are denied in the reply. In 1901, in the application made by the assured for admission into the order, she agreed to conform in all respects to the laws, rules and usages of the society then in force or thereafter adopted. Defendant's by-laws in 1901 contained no conditions for forfeiture other than those set forth in the certificate. By paragraph five of the certificate it is provided, among other things: "If the member holding this certificate * * * shall die by such member's own hands, when sane or insane, or if death shall occur in consequence of a duel, or of any violation or at-

tempted violation of the laws of any state or territory of the United States, * * * then this certificate shall be null and void and of no effect and all moneys which have been paid, and all rights and benefits which may have accrued on account of this certificate, shall be absolutely forfeited, and this certificate shall become null and void." Subsequently, in 1903 and 1905, defendant's by-laws were amended, and, as thus changed, provided that, "if the death of a member results from criminal or self-inflicted abortion or miscarriage, the benefit certificate of such member shall be absolutely null and void, and all liability of the society thereon shall by reason thereof be extinguished." Plaintiffs' counsel stipulated that the by-laws had been amended, and that certified copies thereof "shall be admitted in evidence without objection except materiality or relevancy." The 1901 by-laws and the by-laws as amended in 1903 and in 1905 were introduced in evidence, but there is no proof that they were filed in the office of the auditor of public accounts, and hence they are immaterial for the purposes of this case. *Hart v. Knights of the Maccabees of the World,* 83 Neb. 423. It was suggested at the bar that the aforesaid stipulation waived proof of the filing of the amended by-laws, but the argument is not sound. By stipulating, plaintiffs' counsel only relieved defendant of the burden of proving the adoption of the by-laws and amendments thereto.

2. Defendant has not alleged nor attempted to prove a state of facts essential to bring its defense within the provisions of section 6 of the criminal code, but by averment of alleged facts and by direct reference to section 39 of said code the defense is based upon a violation of section 39, *supra,* which is as follows: "Any physician or other person who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have

been advised by two physicians to be necessary for that purpose, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

The trial court instructed the jury, in effect, that, if the assured procured an unlawful abortion to be performed upon herself and death resulted therefrom, their verdict should be for defendant. Instruction numbered 4 is as follows: "You are instructed by the court that for the unlawful act of the assured to work a forfeiture it is not necessary that the act should be the direct cause nor the precise consequence which actually followed could have been foreseen. It is enough if the act is unlawful in itself and the consequences flowing from it are such as might have been expected to happen, for in such case the ultimate result is traced back to the original proximate cause. Therefore, if you find that the deceased, Mary A. Metzger, had reason to know that the unlawful act of submitting to an attempted abortion endangered her life, you will find for the defendant. If you find from the evidence that the act of Mary A. Metzger in submitting to an attempted abortion was unlawful, and that death might reasonably have been expected to result therefrom, then the causative connection between the unlawful act and the death is established, and it will be your duty to find in favor of the defendant." The jury were further instructed that, if the assured came to her death as the result of criminal or self-inflicted abortion or miscarriage, or of any violation or attempted violation of the laws of the state or territory of the United States, the certificate in suit would be null and void. Section 39 of the criminal code was set forth at length in the instructions, and the jury informed that, if the assured voluntarily submitted to a criminal operation and death resulted therefrom, they should find for defendant. Finally, they were instructed that, if the assured died as the result of an operation performed by Dr. Conklin in his attempt to relieve her from an ailment from which she was suffering, not the result of any cause

pleaded in defendant's answer, they should find for plaintiffs.

Defendant called the assured's surviving husband, and propounded to him many questions calling for information communicated to him by his wife. Objections to these questions were sustained. Section 332 of the code is as follows: "Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal, in testimony, any such communication made while the marriage subsisted." By section 334 of the code the interested spouse may waive said privilege. We think the court committed no error in this regard. The husband's testimony was not for the benefit of his late wife's estate, nor did the witness or plaintiffs waive the statutory privilege. *Stanley v. Montgomery,* 102 Ind. 102.

Defendant complains because the court ruled that the husband need not testify to the fact that he gave Dr. Trostler a promissory note about the time of the alleged abortion. This was not a privileged communication, but the fact was established by the doctor's testimony. We think no error would have been committed in permitting the witness to testify concerning the purpose for which said note was given. Before asking the question, defendant had not connected that purpose with any criminal conduct on the part of Dr. Trostler or of the deceased, nor did its counsel suggest the missing link would be supplied, and, under the circumstances, we think the court acted within its discretion in sustaining these objections. The witness testified to the condition of his wife's health about the time she was in Dr. Trostler's care, and said that he did not know for certain and could not state, except from statements made by her, the purpose of the physician's visit, nor inform the jury what the doctor did to his wife. So, whether the court ruled wisely or otherwise concerning many questions propounded to the hus-

band, defendant's counsel finally secured from the witness statements which, if true, indicated that he could not assist the defense without divulging privileged communications made to him by his wife, and that privilege was insisted upon. The woman's pregnancy is established by the testimony of at least one other witness, and is not contradicted.

3. Dr. Conklin succeeded Dr. Trostler as the assured's physician, and testified for the defendant to the effect that before treating his patient he required Mr. and Mrs. Metzger to sign a written statement wherein they exonerated him from all blame because of results flowing from an attempted abortion committed by Dr. Trostler. This document the witness stated was lost, but he produced an alleged copy, which was excluded by the court. The witness, however, testified to the contents of the original paper, so the fact was before the jury.

4. Since defendant's counsel did not offer to prove any fact after objections to certain questions on direct examination of its witnesses were sustained, we will not review errors assigned upon such rulings. Witnesses were allowed to answer relevant questions which had been held improper at other stages of the trial, and in some instances were refused permission to testify a second time concerning subjects discussed in answers theretofore given by them, so that apparent errors argued upon an examination of the entire bill of exceptions are found not to be real. An attempt was made to prove that Mr. Gomer Thomas while county attorney of Harlan county had control of a written dying declaration made by Mrs. Metzger, but the record discloses the witness was not acquainted with the handwriting or the signature of the assured, nor was there any competent foundation laid to establish that said document contained the statements referred to.

5. It is insisted that the verdict is not sustained by the evidence. It will be borne in mind that, in the state of the record, it devolved upon defendant to prove that the assured came to her death as a result of a violation or

attempted violation of the law, and that it pleaded the assured came to her death as a result of a violation of section 39 of the criminal code. It appears from the evidence: That on the 23d day of September, 1906, Mrs. Metzger consulted Dr. Trostler, and was probably treated by him until about the 9th of October. The evidence is meager concerning her physical condition, but it may fairly be inferred she was in ill health and probably pregnant. From October 9 until November 13 the woman was not, so far as the evidence indicates, under the care of or treated by a physician, but on the last named date Dr. Conklin was employed to attend the woman, and called to his assistance Dr. Gardner. An examination disclosed an inflamed condition of her generative organs, and an unsuccessful attempt was made to relieve the patient by the use of various remedies and instruments and by an operation. Dr. Bartlett was then called in consultation, and on the 18th Dr. Elam, an expert in gynecological surgery, with the assistance of Drs. Conklin and Bartlett, attempted to operate upon the woman, but she died before the preliminary incision was completed. Dr. Conklin testifies that Mrs. Metzger told him that Dr. Trostler had attempted an abortion upon her, and there is evidence to corroborate his statement that by some means an abortion had been attempted prior to his connection with the case. It is not impossible to logically infer from Dr. Bartlett's testimony that the woman died as a result of Dr. Conklin's operation. The jurors may have rejected Dr. Conklin's testimony concerning the woman's declarations, and, if they did so, the verdict is not without some support in the evidence. It is possible that the woman's condition prior to November 13 was brought about by some unforseen and innocent cause. On the other hand, she may have attempted upon her own responsibility to operate upon herself. It may be doubted whether an abortion brought about or attempted by the woman would amount to a violation of section 39 of the criminal code. *Hatfield v. Gano,* 15 Ia. 177; *Commonwealth v. Wood,* 11 Gray

(Mass.) 85; Bishop, Statutory Crimes (3d ed.) secs. 749, 760. In any event, the burden was on defendant to establish to the satisfaction of the jury the facts upon which it predicated a forfeiture of the certificate in suit, and we do not feel justified in disturbing the verdict upon this point. The instructions are criticised, but, taken altogether, they are much more favorable to defendant than the evidence justified, and it has no just cause for complaint upon this point.

6. Defendant's showing of diligence was not sufficient to justify the court granting a new trial because of newly discovered evidence. This subject is largely within the discretion of the trial court, and ordinarily its ruling upon the point is conclusive. *Grand Lodge, A. O. U. W., v. Bartes,* 69 Neb. 636.

The judgment of the district court therefore is

AFFIRMED.

LOUISA M. HILLIGAS, APPELLEE, V. DAVID C. KUNS, APPELLANT.

FILED FEBRUARY 10, 1910. No. 15,902.

1. **Vendor and Purchaser: BONA FIDE PURCHASER: ACTION FOR DAMAGES.** K., being the owner of a tract of unimproved and unoccupied land, sold and conveyed it to J., who sold and conveyed it to H., but neither deed was recorded. Subsequently K., for a substantial consideration and with knowledge that the purchaser desired to destroy the title K. had theretofore conveyed, sold and conveyed the land to R., who sold and conveyed it to D. These deeds were duly recorded. *Held,* That if either R. or D. was a *bona fide* purchaser of said real estate, H. could maintain an action for damages against K., and could recover the value of her interest in said land at the time her title thereto was destroyed.

2. ———: **ACTION FOR DAMAGES.** On the trial of the case defendant offered to prove that subsequent to said transactions D. paid H. $25 for a deed for said land. *Held,* That defendant was entitled

to make said proof in mitigation of plaintiff's damages, but that under the circumstances of this case the fact did not disable her from prosecuting her suit.

3. Errors without prejudice to a litigant will not work a reversal of a judgment otherwise supported by the evidence and the law.

APPEAL from the district court for York county: HARVEY D. TRAVIS, JUDGE. *Affirmed on condition.*

France & France, L. O. Pfeiffer and *Morning & Ledwith,* for appellant.

Power & Meeker and *William E. Shuman, contra.*

ROOT, J.

This is an action for damages. Plaintiff prevailed, and defendant appeals.

The facts underlying this case are that in 1899, defendant owned a half section of unimproved, unoccupied land in Deuel county of but little value. In that year he sold and conveyed the land by warranty deed to a Mr. Jones, and Jones sold and conveyed it to plaintiff, who resided in Lincoln county. The deeds were not recorded, and the land remained unoccupied, except as strangers to the title pastured cattle thereon. In 1906 the treasurer of Deuel county, Mr. Roudebush, noticed that taxes levied upon the land for many preceding years were unpaid, and, after ascertaining the name of the record owner and his residence, wrote to defendant. Subsequently Roudebush conferred with Kuns, purchased the land in September of 1906 for $600 subject to the taxes, and received a quit-claim deed from Kuns, which Roudebush at once recorded. Subsequently Roudebush sold the land and conveyed it by special warranty deed to Mr. Delatour for $900 subject to said taxes. Plaintiff alleges that Roudebush and Delatour were *bona fide* purchasers without notice or knowledge of her title, and that they bought the real estate relying upon the records of Deuel county, all of which defendant well knew; that by reason of the premises she has been deprived of her title to her damage, etc. De-

fendant admits in his answer that he owned the land in 1899 and conveyed it to Jones; that Jones conveyed it to plaintiff, and thereafter defendant executed and delivered to Roudebush a quitclaim deed therefor. As a separate defense, he alleges that about April 2, 1907, plaintiff sold and conveyed the land by warranty deed and parted with her interest therein, and is estopped from asserting that she was not the owner thereof subsequent to the date of the deed from defendant to Roudebush. A demurrer to the second defense was sustained.

1. Defendant's counsel argue that plaintiff's alleged cause of action is alien to the law and will not support a judgment in her favor. We do not agree with them. Defendant is charged with knowledge that a subsequent deed first recorded takes precedence over an elder deed subsequently recorded, provided the later grantee is a *bona fide* purchaser within the meaning of the law. He is also conclusively presumed to know that any grantee of the subsequent grantee, if a *bona fide* purchaser, will prevail over the holder of a title based upon an earlier unrecorded deed. Kuns received a substantial consideration for his second conveyance, and testifies that he was told by Roudebush that Roudebush held a tax title which he expected to perfect by defendant's conveyance. Kuns knew that he was placing an instrument in Roudebush's hands which might be used directly or indirectly as a means to destroy the title Kuns had theretofore conveyed. This is not a case where a deed has been innocently made for a nominal consideration for the benefit or supposed benefit of those holding under the grantor by a former conveyance, nor an instance where the grantor had not theretofore conveyed, or, having conveyed, had or believed he had the right to rescind.

The legislature has taken notice of the possibilities existing under just such a state of facts as this record presents, and has enacted by section 127 of the criminal code: "If any person or persons shall knowingly sell or convey any tract of land without having title to the same, either

in law or equity, by descent, devise, or evidence, by a written contract or deed of conveyance, with intent to defraud the purchaser, or other person, every person so offending shall be imprisoned in the penitentiary not more than seven years nor less than one year." In our opinion a common law writ can be framed to support a cause of action in plaintiff's favor, and certainly the code is not inferior to the earlier procedure in suggesting forms and methods to be employed in meting out justice between men. At common law the suit would be an action on the case. This action is said to be in the nature of a bill in equity and founded upon the mere justice and conscience of plaintiff's right to recover. It is a remedy for an injury to the absolute rights of persons not committed with force, actual or implied. *Adams v. Paige,* 24 Mass. 542; *Doremus v. Hennessy,* 62 Ill. App. 391; 6 Cyc. 684; 2 Moore, Civil Treatise (4th ed.) sec. 560 *et seq.* The facts in the cited cases are not identical with those in the instant one, but the principles apply. If the pleaded acts were wrongful, the mere fact that no such other case can be found in the books will not deprive a court of jurisdiction. *Hunt v. Dowman,* 3 Cro. (James, Eng.) 478; *Winsmore v. Greenbank,* Willes (Eng.) 577. We are, however, not entirely wanting in precedent. *Corbin v. Sullivan,* 47 Ind. 356. In that case the common grantor was not made a party, but second grantees, who took a deed with knowledge that their immediate grantor had parted with his title before conveying to them, were held responsible for their sale to a *bona fide* purchaser, whereby the title evidenced by the first and unrecorded deed was destroyed.

Counsel for defendant cite *Ring v. Ogden,* 45 Wis. 303, and assert that it sustains their argument that the court erred in instructing the jury that, if either Roudebush or Delatour was an innocent purchaser, plaintiff ought to recover, and that the intent with which defendant executed the deed to Roudebush is immaterial. The Wisconsin court hold the mere giving of a second conveyance is not necessarily wrongful, and therefore, to maintain an

action like the instant one, a plaintiff must plead and prove an intent on the part of the defendant to defraud. It may be that cases will arise wherein the intent with which a second conveyance is made will be material, but the defendant herein is in no position to urge that plaintiff's petition is defective in that particular. The facts are all stated, and would not be strengthened by charging bad faith, because no other deduction can be reasonably drawn therefrom. Defendant knew, or ought to have known, that the deed he was making, confessedly to a person claiming or seeking a title hostile to the title Kuns had theretofore conveyed, was sought and would be used for the purpose of destroying the earlier title. Years since we discarded the theory that in actions for deceit the intent with which representations are made is a controlling factor, but have said that a party will be held to the reasonable consequences of his acts. *Johnson v. Gulick,* 46 Neb. 817.

Marshall v. Robert, 22 Minn. 49, is also cited by defendant. The Minnesota court, upon the first appeal of that case in 18 Minn. 405, held that a grantee in a quitclaim deed takes only such title as his grantor actually possessed. Upon the second appeal the defendant was held not liable for any damage flowing from the deed executed by his grantee. In *Schott v. Dosh,* 49 Neb. 187, in an exhaustive opinion prepared by Mr. Commissioner IRVINE, the preceding decisions of this court touching the status of a purchaser of real estate whose title is evidenced by a quitclaim deed are reviewed, and we held the mere fact that a conveyance is a quitclaim will not deprive the grantee therein of the benefits of the recording act, nor of the principle of law protecting *bona fide* purchasers. See, also, *Bannard v. Duncan,* 79 Neb. 189. We are not satisfied with the reasoning of the learned judge who wrote the opinion in *Marshall v. Robert, supra,* nor will we adopt the suggestions of learned counsel for defendant upon this phase of the case. A tortfeasor is answerable for all the consequences that in the natural

course of events flow from his unlawful acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrongdoer, or were the natural consequences of his original act. *Philpot v. Taylor,* 75 Ill. 309.

Conceding that Roudebush was told by defendant that he had theretofore conveyed the land and that Roudebush was not and could not for that reason be an innocent purchaser, still Kuns knew that by executing the quitclaim deed he might place Roudebush in position to record the deed, convey the land to an innocent purchaser, and thereby destroy the earlier title. It is tasking human credulity to assert that Kuns did not expect or ought not to have anticipated the precise course of action pursued by his grantee, and we think that, under the facts in this case, defendant must be held if either Roudebush or Delatour was a *bona fide* purchaser of the land.

2. The instructions are criticised because the trial court did not inform the jury that an essential element of a *bona fide* purchase is that the consideration therefor was actually paid. If there was any contradiction in the evidence upon this point, we might consider the assignment, but there is none. Defendant testifies that he was paid $600 for his deed, and the testimony of Roudebush and Delatour that the consideration for the subsequent conveyance was paid is not denied. The error therefore is without prejudice to defendant.

3. Defendant insists he should have been permitted to prove that before the commencement of this action, and subsequent to the execution of the deed to Roudebush, plaintiff sold and conveyed the land. The facts, according to the offer to prove, are that after Delatour purchased from Roudebush he was told that Mrs. Hilligas had an unrecorded deed for the land, and to prevent a possible cloud upon his title he paid her $25 for a conveyance, which, at his direction, she made for his benefit to a business associate and personal friend. We do not

think she thereby disabled herself from maintaining this action. Her right of action, if any, sounds in tort, and would not pass by her subsequent deed for the land, nor can we understand upon what ground an estoppel by deed can thereby be predicated against her. While the facts did not constitute a complete defense to the action, they, in our judgment, should have been received in mitigation of damages. Even though she could not successfully assert her title against Delatour, it sufficed to yield her $25. If Delatour had paid her the value of her land, she would not have been damnified by the conduct of defendant. The error will not, however, work a reversal of the case if plaintiff will remit that sum with interest from the 2d day of April, 1907.

To the argument that plaintiff cannot recover more than Jones paid Kuns for the land, it may be repeated that this action sounds in tort, and plaintiff, if entitled to recover, should receive compensation for the injury inflicted by defendant's wrongful act. The measure of her recovery therefore is the value of the land at the time she lost title thereto, less the taxes thereon and whatever she received from Delatour.

All of the numerous assignments of error have been examined, but none other than those heretofore noticed are thought of sufficient importance to warrant a detailed discussion, nor do they in combination justify a reversal of the judgment of the district court.

The judgment of the district court is therefore affirmed, upon condition that plaintiff shall within 30 days of the filing of this opinion remit from her judgment the sum of $25, with 7 per cent. interest thereon from April 2, 1907. If she fails to make said remittitur, the judgment of the district court will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

IN RE ESTATE OF FRANK HENTGES.

KATHERINE MCDANIEL ET AL., APPELLANTS, V. PETER HANSEN, EXECUTOR, APPELLEE.

FILED FEBRUARY 10, 1910. No. 15,911.

Executors and Administrators: ACCOUNTING: ATTORNEY'S FEES. An executor should ordinarily be credited in his final account with the estate for reasonable attorney fees paid by him in proceedings to probate the will of his testator.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

J. H. Barry, for appellants.

J. J. Sullivan and *A. H. Briggs, contra.*

ROOT, J.

This is an appeal prosecuted by certain legatees of Frank Hentges, deceased, from an order of the district court allowing the executor credit for attorney fees.

There is but little substantial conflict in the evidence, and, in so far as the witnesses disagree, we should solve the doubts in favor of the judgment. It appears that the testator departed this life possessed of property worth about $4,000, and survived by eight children and one grandchild. In April, 1906, an instrument purporting to be his last will and testament was presented for probate to the county judge of Platte county by Mrs. Gorgen, his daughter and a legatee. In that document the testator bequeathed to Mrs. Gorgen two-ninths of his estate, and the remainder was divided in equal shares among the grandchild and six children. Five of these children contested the probate of said will because of the alleged mental incapacity of their father, and prevailed in the county court, but on appeal to the district court a jury found in favor of the proponent. The executors named in

the will, five days subsequent to the day Mrs. Gorgen petitioned for the probate thereof, filed a written declination to accept said office, but thereafter Mr. Hansen, one of the executors, withdrew his declination, subsequently qualified and acted as executor. In his final report the executor charged the estate for money paid by him to attorneys for services rendered in probating the will. The contestants objected to the charges as unlawful. In argument they insist that the executor had no interest in probating the will and that Mrs. Gorgen, the proponent, should pay these fees. Judge Briggs appeared in the county court and in the district court for the proponent, and testified that he did so at the request of the executor and the proponent. Judge Sullivan first appeared in the district court, and testifies that he was employed by the executor. The executor was called by the contestants, and testified that he had nothing to do with employing counsel until after he was appointed executor. If he used the word appointed to designate the date he qualified as executor, he flatly contradicts his counsel. If he referred to the execution of the will, the date he was nominated or appointed by the testator, there is no contradiction. In the absence of explanation and in view of the finding of the district court, we shall adopt the latter construction. Both attorneys rendered the ordinary professional services incident to the administration of an estate subsequent to the probate of the will. The county judge disallowed part of the executor's charge for attorney fees, but the district court on appeal found the fees were reasonable and a proper expense of administering the estate.

Counsel for appellants in a persuasive brief and forcible argument at the bar asserts that the executor should only be allowed credit for money necessarily expended by him in payment of attorney fees for services rendered subsequent to his qualification as executor. The precise point involved herein has not been determined by this court. Sections 5002, 5003, 5004 and 5005, Ann. St. 1909, are as follows:

"Section 5002. Every person named as executor in any will shall, within thirty days after the death of the testator, or within thirty days after he has knowledge that he is named executor, if he obtains such knowledge after the death of the testator, present such will to the probate court, which has jurisdiction of the case, unless the will shall have been otherwise deposited with the judge of probate, and shall, within the period above mentioned, signify to the court his acceptance of the trust, or make known in writing to such court his refusal to accept it.

"Section 5003. Every person who shall neglect to perform any of the duties required in the last two preceding sections, without reasonable cause, shall be guilty of a misdemeanor, and shall be liable to each and every person interested in such will, for the damages which each person may sustain thereby.

"Section 5004. If any person having the custody of any will after the death of the testator shall, without reasonable cause, neglect to deliver the same to the probate court having jurisdiction of it, after he shall have been duly notified by such court for that purpose, he may be committed to the jail of the county by warrant issued by such court, and there be kept in close confinement until he shall deliver the will as above directed.

"Section 5005. When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, and shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of such court, in such newspaper printed in this state as the judge shall direct, three weeks successively, previous to the time appointed, and no will shall be proved until notice shall be given as herein provided."

By section 5017 all of the estate of a testator is made liable for the expense of administration as well as for the satisfaction of his debts and the support of his family.

Section 5148 provides that an executor or administrator shall be allowed all necessary expenses in the care, settlement and management of the estate.

In *Clark v. Turner,* 50 Neb. 290, Mr. Commissioner IRVINE argues that the statute commands an executor, after knowledge that he has been nominated as executor of a will and that the testator had departed this life, to present the will for probate or renounce the trust. Whether the executor, if he does not resign, is charged with an imperative duty of propounding his testator's will is not involved in this case, and was not necessarily presented in *Clark v. Turner, supra.* Independently of such a construction of the statute, we are of opinion that the executor has the power to request probate of his testator's will, and in some instances it may be his duty to do so. 3 Redfield, Law of Wills (3d ed.) p. 8; *Henderson v. Simmons,* 33 Ala. 291; *Phillips' Ex'r v. Phillips' Adm'r,* 81 Ky. 328; *Meeker v. Meeker,* 74 Ia. 352; *Lassiter v. Travis,* 98 Tenn. 330. If a legatee petitions for the probate of his testator's will, the executor may ordinarily discharge his duty by awaiting the outcome of that application provided he has complied with the statute, *supra,* but he may lawfully combine with the legatee for the purpose of advancing the expressed will of the deceased. In the last named event, his reasonable counsel fees incurred in establishing the will are expenses of administration to be paid from the assets of the estate, unless he acted in bad faith. *Phillips' Ex'r v. Phillips' Adm'r, Meeker v. Meeker* and *Lassiter v. Travis, supra; Succession of Heffner,* 49 La. Ann. 407; *Hazard v. Engs,* 14 R. I. 5.

Appellants' counsel contends that we are committed to a contrary doctrine, but we do not agree with him. In *Mathis v. Pitman,* 32 Neb. 191, a defeated contestant of a will recovered his costs and attorney fees. In *Seebrock v. Fedawa,* 33 Neb. 413, an heir of the deceased was reimbursed from the assets of the estate for counsel fees and costs incurred in an unsuccessful contest of her father's will. The equities seemed strong in favor of the contest-

ants in the cited cases and their good faith in waging the contest was undoubted. In *McClary v. Stull*, 44 Neb. 175, attorneys for discomfited contestants of a will requested that their fees should be paid from the assets of the estate. It appeared from the record that their fees were contingent, and we held they had no just claim against the estate for compensation. In *Clark v. Turner, supra,* counsel for a vanquished proponent of an alleged lost will moved the district court in proceedings there pending on appeal for the probate of said will for counsel fees. The prayer was denied because the district court had no authority in that proceeding to direct payment of the assets of the estate for a purpose which, if legitimate, constituted an expense of administration.

In *Wallace v. Sheldon,* 56 Neb. 55, costs and attorney fees had been taxed in favor of defeated contestants of a will, and we held the order erroneous. *Mathis v. Pitman* and *Seebrock v. Fedawa, supra,* were disapproved. It will be noticed that the learned commissioner writing the opinion of the court in *Wallace v. Sheldon* expressly disclaims committing us to a rule that under no circumstances may costs or attorney fees be allowed an unsuccessful contestant in proceedings to probate a proposed will. In *Atkinson & Doty v. May's Estate,* 57 Neb. 137, attorneys employed by a legatee to secure the probate of an alleged will failed in their mission. Subsequently they filed a claim for fees against the estate, and were defeated in the lower courts. We affirmed the judgment. In *St. James Orphan Asylum v. McDonald,* 76 Neb. 630, following *Atkinson & Doty v. May's Estate, supra,* we held that ordinarily the estate of a decedent would not be held liable for attorney fees for services rendered at the request of a legatee. The facts in that case disclosed that the equities were in favor of the defeated contestant. *In re Donges' Estate,* 103 Wis. 497, is cited with approval by Judge BARNES in his opinion in *St. James Orphan Asylum v. McDonald.* In the Wisconsin case Mr. Justice Dodge correctly reasons that taxable costs must be taxed ac-

cording to statute, and that contending legatees ought not to be reimbursed from the assets of the estate for counsel fees paid by them; but the learned jurist states that what he has said does not refer to the allowance of counsel fees reasonably incurred by an executor in the good faith performance of his duties. Judge BARNES carefully discriminates between counsel fees paid by an executor and like fees expended by a legatee. *In re Estate of Wilson,* 83 Neb. 252, an attorney had been appointed administrator of an estate. Subsequently interested parties sought to probate an alleged lost will wherein he was named as executor. The heirs contested this application. The administrator was a witness in the suit and attended court during the trial. The will was not established, and he was not permitted to collect an attorney fee for the time he devoted to that case. He had not been employed by either side to the controversy, and while it was pending was acting as an officer of the court. In *Smullin v. Wharton,* 83 Neb. 346, counsel fees were allowed by agreement of parties.

In the instant case attorneys are not pursuing the estate for compensation, nor is a legatee under the will demanding reimbusement for money paid counsel, but the executor has paid for legal services rendered, as he asserts, in the administration of the estate. No charge of bad faith is made, but his power to create the liability is challenged. In giving the executor credit for counsel fees, the county court must have found that the employment was necessary, although he concluded too much had been paid for the services rendered. The effect of the judgment of the district court on appeal is that the necessity existed and the charges were reasonable. It may be that the executor would have exercised better judgment had he permitted the contending heirs to litigate the validity of the will, but he was not compelled to do so, nor does the record suggest bad faith on his part in casting the weight of his influence and authority into the balance in favor of the proponent. The estate is not great, and the fees, while not excessive,

form no inconsiderable part of the cost of administration, but the contestants, by attempting to defeat the will of their father, are responsible for that expense.

A consideration of the record and the arguments of counsel impel us to affirm the judgment of the district court.

AFFIRMED.

GEORGE R. GREER, APPELLANT, V. HUGO OTTO GROSSE, APPELLEE.

FILED FEBRUARY 10, 1910. No. 15,913.

Appeal: AFFIRMANCE. In an action at law, this court will not ordinarily reverse a judgment of the district court, supported by the pleadings, if the record does not exhibit a copy of a motion for a new trial.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Gomer Thomas and *John Everson,* for appellant.

C. M. Miller, contra.

ROOT, J.

This is an action in ejectment with respect to a tract of land containing about 18 acres. The description of the land involved presumably may be made certain by reference to a plat described in the petition as exhibit "A", but no plat or copy of a plat can be found in the transcript. March 30, at the close of plaintiff's evidence, the jury, in response to a peremptory instruction, returned a verdict for defendant. There is a statement in the transcript that plaintiff's motion for a new trial was overruled April 11. Nowhere in the record is there a motion for a new trial or a copy of such a document. The clerk of the court

certifies that the transcript "is a full, true, and complete transcript of the record and proceedings."

Unless the motion were filed within three days of the rendition of the verdict and during the term, the overruling thereof presents no question for review in this court. Defendant's answer is a general denial, so that the judgment is supported by the pleadings. Error will not be presumed, but must affirmatively appear. In the state of the record, the judgment should be affirmed. *Lichty v. Clark,* 10 Neb. 472; *Hake v. Woolner,* 55 Neb. 471. Notwithstanding the premises, we have examined the evidence, and find nothing therein to suggest that the court erred in giving its peremptory instruction.

The judgment of the district court therefore is

AFFIRMED.

ALFRED C. WHITE ET AL., APPELLANTS, V. WILLIAM J. LIPPINCOTT ET AL., APPELLEES.

FILED FEBRUARY 10, 1910. No. 15,792.

Highways: LOCATION: BONA FIDE PURCHASER. A purchaser of land affected by a highway established pursuant to the terms of a valid agreement executed by all persons pecuniarily interested cannot take advantage of an error in the county clerk's record entry describing the location, where such purchaser, before he bought the land, had knowledge of the actual location of the highway, or of facts from which such knowledge will be imputed.

APPEAL from the district court for Webster county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Bernard McNeny, for appellants.

E. U. Overman, contra.

ROSE, J.

This is a suit for an injunction to prevent William J. Lippincott, a road overseer, from grading a highway on

plaintiff's land. There was a general finding in favor of defendant, and from a dismissal of the suit plaintiff appealed.

Some of the facts alleged in the petition are, in substance, as follows: October 3, 1906, a highway 40 feet wide on a line directly east and west was by the county commissioners duly established across an eighty-acre tract of land described as the north half of the northeast quarter of section 29, township 1, range 10 west, in Webster county, the center of the highway being 151 feet south of the section line on the northern boundary of the tract. When the county commissioners made the order establishing the road, the eighty-acre tract intersected by it was owned by Richard J. Skeen. Relying upon the record showing the center of the highway was 151 feet south of the section line, plaintiff purchased in good faith from Skeen February 7, 1907, all that portion of the northwest quarter of the northeast quarter of section 29 south of such highway. Subsequently defendant entered upon plaintiff's land for the purpose of grading a highway south of the one mentioned, where none had been established. There was a prayer for an injunction to prevent this alleged trespass. The proceedings of the county commissioners are set out in the answer of defendant and show that a petition for the opening of a road across Skeen's eighty-acre tract was filed February 6, 1906. They further show: The section line on the northern boundary was abandoned as a roadway to avoid a creek. A route varying from a direct line east and west was surveyed a short distance south of the section line and a surveyor's plat showing the course was filed with the county clerk. According to the plat the point farthest south was in a draw or pocket opening toward the north into the channel of the creek. From this point the distance to the section line is marked on the plat as "151 feet." This route was adopted by the county commissioners June 21, 1906, and from an allowance for damages Skeen appealed to the district court. August 25, 1906, Skeen, the petitioners for

the road and the county commissioners entered into an agreement containing, among other things, the following: "The course of said road as the same crosses said eighty-acre tract shall be and hereby is changed from that described in the order of said board of June 21, 1906, as follows: Said road shall be located straight across said eighty-acre tract from west to east at a distance of 151 feet from the north line of said eighty; said distance being the farthest point south marked in the survey of said line of road, as reported in said proceedings. It is to be a forty-foot road; the said distance of 151 feet is the center line thereof. In constructing and opening said road for travel the said Webster county by its proper authorities shall cause a bridge to be built where the said line of road as herein provided for crosses a draw or pocket on said land near the eastern boundary of said tract, in a substantial manner and of sufficient height and width that stock may freely pass in under the same, and so that the said Skeen as owner of the land on both sides of the road may run his fences up to said bridge and thus provide a passage way under the road for stock from one side to the other. * * * Said Skeen shall be paid the sum of $200 heretofore allowed him by said county as damages on account of the location of said road, and the petitioners whose names are signed hereto agree to pay the said Skeen the sum of $100 additional thereto, all of said moneys to be paid before any work is done on said road and within twenty days from the date of this agreement."

An order containing the following provisions was entered on the county records October 3, 1906: "That in the location and opening of said road the course thereof be and it is changed where the same crosses the north half of the northeast quarter of section 29, township 1, range 10, in Webster county, so that the same shall be and is established in a straight line over and across said tract from west to east, the center thereof to be 151 feet distant south from the north line of said tract and the width of

said road to be 40 feet; and that at the point where said road crosses a draw or pocket near the eastern boundary of said tract, a bridge be constructed by the county in a substantial manner, of sufficient height and width that stock may freely pass under the same; and that the proper officers be and they are instructed in the recording, platting and opening of said road to conform to the change hereby made, the former course proposed and reported for said road across said tract being annulled and set aside." In this order, the one on which plaintiff relies, the description of the route varies from the description in the agreement on which the order is based. Skeen accepted the damages fixed by the agreement and dismissed his appeal from the former action of the county board. The entry of October 3, 1906, was corrected March 17, 1908, after notice to plaintiff and Skeen, by an order containing the following language: "It is therefore adjudged by this board that said above and last description is incorrect and incomplete, untrue and not in conformity to the facts and that the same was placed in said commissioners' record without the knowledge or consent of the board of county commissioners, then in session, but was procured or placed in said record by L. H. Blackledge, attorney for Richard J. Skeen, without authority of said board and by mistake or oversight on his part, and that said record should be so changed as to speak the truth and conform to the fact, and the same is hereby changed and annulled in all things wherein it does not entirely conform to and ratify said original agreement; that said defective description, to wit, *'in a straight line over and across said tract from west to east, the center thereof to be 151 feet distant south from the north line of said tract'*, is hereby annulled and set aside and the correct description as given in full in the original agreement, to wit, *'straight across said eighty-acre tract from west to east at a distance of 151 feet from the north line of said eighty; said distance being the farthest point south marked in the survey of said line of road as reported in said proceedings'*, is hereby

adopted and inserted in said commissioners' record instead and in place of the description hereby annulled and set aside." The answer denies that plaintiff was an innocent purchaser. Skeen intervened as plaintiff, and Webster county and a number of petitioners for the road intervened as defendants, but the conclusion reached makes further reference to interveners unnecessary.

Plaintiff insists that the county commissioners had no power to change their order of October 3, 1906, so as to make it effective against him after he made his purchase; that he was an innocent purchaser; and that the decree dismissing his suit is not sustained by the evidence. The case may properly be determined by answering the question: Was plaintiff an innocent purchaser? It seems clear from the proceedings of the county commissioners and the proofs in relation thereto that the parties to the agreement understood the term, "at a distance of 151 feet from the north line of said eighty", was a part of the description of the point farthest south on the route, there being evidence that the actual distance was 200 or 201 feet. Otherwise, the clause, "said distance being the farthest point south marked in the survey of said line of road, as reported in said proceedings", would perform no office whatever in the agreement or record. Before plaintiff purchased the land there was a bridge across the draw or pocket. Three witnesses testified there was a stake at the point farthest south on the survey, and there is proof that this stake was the center of the road agreed upon by all parties to the contract. There is testimony that the stake was at the point farthest south when the bridge was constructed there. There is also testimony tending to show: When the highway was established October 3, 1906, plaintiff was road overseer of the district in which the road in question was located. He was a listener during the proceedings October 3, 1906, when the order upon which he relies to show the location of the highway was made. He had heard about the agreement. When he was road overseer before he made his purchase,

but after the order of October 3, 1906, had been made, he hauled lumber for the bridge and left it at the draw, or point farthest south, as indicated by the survey, a distance of 200 or 201 feet from the north line of the eighty-acre tract. The bridge contractor testified: "I had to make him haul one or two loads to locate the place there." Plaintiff knew the bridge was about 15 rods east of the tract purchased. The moving of the bridge farther north would have defeated two purposes of the agreement. It would have required the building of a bridge and the grading of a road in the channel of the creek, and would have left the draw or pocket without a bridge. Prior to his purchase he examined the record entry of the order before it was corrected. That record imparted notice to him that the road would cross the draw or pocket, because it contained the order "that at the point where said road crosses a draw or pocket near the eastern boundary of said tract, a bridge be constructed." The record also gave him notice that the road ran directly east and west. He knew the location of the bridge, having hauled lumber there when he was road overseer. A little attention to direction in connection with his actual knowledge of physical conditions would have shown where a line running west over the bridge would cross the eighty-acre tract containing the land purchased by him. There is sufficient evidence of his knowledge of the actual location of the road, or of facts from which such knowledge will be imputed, to justify the trial court's finding that he was not an innocent purchaser. This conclusion requires an affirmance of the judgment of the district court.

AFFIRMED.

STATE, EX REL. WILLIAM V. BANTA, APPELLEE, V. GEORGE R. GREER ET AL., APPELLANTS.

FILED FEBRUARY 10, 1910. No. 15,914.

Quo Warranto: VILLAGE TRUSTEES: PARTIES. After the corporate existence of a village has been legally terminated by a vote of the electors, persons subsequently assuming to act as village trustees may be ousted in a proceeding in the nature of *quo warranto;* and, when the county attorney has given his consent, an action for that purpose may be instituted and maintained by an elector whose property is being assessed by defendants for village purposes.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John Everson and *Gomer Thomas,* for appellants.

C. M. Miller and *J. M. Mohney, contra.*

ROSE, J.

Defendants were assuming to act as trustees of the village of East Oxford, and this is an action in the nature of *quo warranto* to oust them as such on the ground that the corporate existence of the village had been terminated by a vote of the electors at an election held November 6, 1906. The district court granted a writ of ouster April 11, 1908, and defendants have appealed to this court.

The first point argued by defendants as a ground of reversal is that the information does not state a cause of action, because it shows on its face that relator, William V. Banta, is a private individual having no right or authority to institute or maintain the suit. Defendants state their position as follows: "William V. Banta is a taxpayer and a resident of the village of East Oxford, Nebraska. The village had caused to be levied upon his property taxes to the amount of $2.35 for village purposes. This is the only interest he has in the suit. He does not

claim either of the offices held by the respondents, or any one of them. He has no more interest in the results of this suit than any other resident of the village. The purpose of the suit is to oust all of the village officers, because, as the relator says, the village has no legal existence. Can an individual in his private capacity and without the consent of the state, by its proper officers, test the legal existence of a municipal corporation? If he can, the complaint may state a cause of action, but if not, it does not, and the judgment entered by the trial court must be reversed and the action dismissed."

If the allegations of the information are true, the incorporation of the village of East Oxford was abolished by the votes of a majority of the electors who voted on that question. The power to terminate such an incorporation by ballot is granted to the electors by statute, and when it has been legally exercised by a majority vote the municipal existence of the village ceases, "after the first day of January next ensuing," and thereafter the village must be governed by the county commissioners. Comp. St. 1905, ch. 14, art. I, secs. 55*c*-55*g*. It not only appears on the face of the petition that the village government has been abolished, but that defendants are usurping and exercising the powers of trustees. The usual remedy for preventing such a usurpation and averting its consequences is a writ of ouster. May a citizen who is a taxpayer and elector invoke such a remedy? May he ask the court to oust usurpers who are attempting to run a village government having no existence, and who are levying against his property taxes having no authorization in law?

The code declares: "An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized

by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law." Code, sec. 704. Under this section persons who assume to act as officers of a village having no legal existence may be ousted. *State v. Uridil,* 37 Neb. 371. Such proceedings are not limited to cases prosecuted by the attorney general in the supreme court. Informations may be filed by the county attorney of the proper county. Code, sec. 705. In the present case the information recites that the proceeding was commenced with the consent of the county attorney of Harlan county, and that fact was indorsed by him on the information. In *State v. Clark,* 75 Neb. 620, it was held that the owner of land illegally included within the corporate limits of a village could maintain an action in the nature of *quo warranto* to determine the validity of the order of incorporation. By such means he could protect his rural property from illegal control and from taxation for municipal purposes. In the present case the information shows that defendants subjected relator and his property to the burdens of a village government having no legal existence, when the village with its incidental burdens was under the lawful control of the county commissioners. Substantial reasons for the rule stated are just as inherent in the case at bar. In addition, the electors themselves terminated the corporate existence of the village, and relator was entitled to the fruits of the election. Under the facts pleaded he was properly allowed to invoke the appropriate remedy of *quo warranto,* since he was duly authorized by the county attorney to do so.

It is also argued by defendants that the incorporation was not abolished, for the reason that "valid, unpaid indebtedness existed against the village when the alleged ballot to dissolve it was taken." This argument is founded on the following proviso to the statutory provision authorizing the county clerk to submit to the voters the proposition to abolish the incorporation: "Provided,

that no village shall abolish incorporation until all liabilities are liquidated." Comp. St. 1905, ch. 14, art. I, sec. 55*d*. This proviso clearly relates to abolishment by ballot. The only unpaid claims proved were two judgments for costs rendered November 16, 1906, ten days after village government had been abolished at the election. Both judgments were paid before the writ of ouster was allowed. This point is therefore without merit.

Other questions raised have been considered, without finding reversible error in the record. The judgment is therefore

AFFIRMED.

WILLIAM SMITH ET AL., APPELLEES, V. ALBERT F. GARBE, APPELLANT.

FILED FEBRUARY 10, 1910. No. 15,783.

1. **Easements.** Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it will be held to be an easement appurtenant to the land, and not an easement in gross.
2. ———: APPURTENANT PASS BY CONVEYANCE. An easement appurtenant to land will pass by a conveyance, although the words "with the appurtenances" are not used.
3. **Case Followed.** *Culver v. Garbe*, 27 Neb. 312, reaffirmed and *held* to be decisive of the rights of the parties in this case.

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

Charles O. Whedon and *H. P. Wilson*, for appellant.

Charles H. Sloan, Frank W. Sloan and *J. J. Burke, contra.*

FAWCETT, J.

A number of questions have been discussed in this case which we do not deem it necessary to consider. Various assignments of error on the part of the trial court in the admission of evidence cannot be considered for two reasons: First, no motion for new trial was filed in the court below; second, even if there had been such a motion, this is an equity case and was tried to the court without the aid of a jury. In such cases the rule is well settled in this state that errors of the court in admitting testimony will not be considered. This court will presume that the trial court only considered the competent and material evidence received.

The main question involved in the case is the right of defendant to maintain a certain ditch and two dams which the undisputed evidence shows were dug and constructed within the dead water zone of the plaintiffs' milldam. The rights of the parties with regard to this question we think were fully settled by this court in *Culver v. Garbe*, 27 Neb. 312. All of the rights of the parties to this suit were derived from the parties in that case, and depend upon the same lease, and the same stipulation and decree in proceedings in *ad quod damnum* considered, construed and decided in the said case, to which we refer for a statement of the main contention of the parties and for a copy of the lease, and stipulation and proceedings in *ad quod damnum* hereinbefore alluded to. In that case plaintiffs sought to enjoin defendant therein from digging the ditch and constructing the two dams referred to. The Culvers also claimed the right to cut the grass upon the lands described in the lease, which were not actually submerged. The district court found in favor of the defendant, and decreed that defendant was entitled to cut the grass upon the lands in controversy, not submerged, and to dig the ditch and construct the dams referred to, and enjoined plaintiffs from in any manner interfering with defendant in digging and con-

structing said ditch and dams, and from going upon the land to cut grass. On appeal by plaintiffs to this court, the judgment of the district court, so far as the use of the farm or pasture land was concerned, was affirmed. As to the ditch and dams referred to we held: "A careful examination of the evidence and plat of the river at the point where it is proposed to construct the ditch and dams, satisfies us that the proposed improvement cannot be made without endangering plaintiffs' property. This being true, the law will afford relief and protection. The decree of the district court must therefore be modified so as to protect the rights of plaintiffs to the exclusive use of the river and the water therein in defendant's land, and defendant will be enjoined from constructing the dams and ditch referred to. As thus modified, the decree will be affirmed. Judgment accordingly."

It seems that when the mandate of this court was sent down in that case it was never entered of record in the district court, and it is now contended by defendant that the judgment of the district court thereby remained in full force and effect and is *res adjudicata,* and that plaintiffs, upon the trial of this case, could not offer in evidence the said mandate. This contention is without merit. The judgment of this court did not reverse the judgment of the court below and remand the cause for further proceedings. The judgment entered here became final and binding upon the parties regardless of whether the mandate was ever entered of record in the district court or not. This being true, then it clearly appears that by the judgment of this court it was finally decided that defendant had no right to and should not dig the ditch and construct the dams in controversy. In the syllabus we held that "appellant had a vested right in the stream and water within the land covered by the lease, and that appellee had no right or authority to interfere therewith, and would be enjoined from changing the course of the stream, constructing the dam, or diminishing the appellant's reservoir or supply of water." Contention is made that the

lease and stipulation referred to only gave plaintiffs the right of flowage of the land in controversy. This contention cannot be sustained. The language of the lease is: "To have and to hold the same to her and her heirs, executors, and administrators and assigns, for the purpose of running, maintaining, and operating a mill and for mill purposes, the said Jerusha A. Ellis and personal representatives and assigns to have all the rights, privileges, and use and benefit of said land as described in this lease for the purpose aforesaid, as though she were the owner thereof in fee simple. Except that said lessee nor his heirs or personal representatives or assigns are not to cut the timber, if any there be growing on said land so leased, but said lessors or their assigns are to have the right to this timber growing on said land, and provided further the said lessors and their assigns shall forever have free access to the southwest side of said river and dam for farming and stock purposes. This lease is an absolute lease for all the lands described in said lease for the period of time therein named and for all purposes save the exceptions expressly named. The rights of said Jerusha A. Ellis and her assigns under this lease are as to all of said leased lands the same as if said lands had been condemned on proceedings in *ad quod damnum*. And the said Jerusha A. Ellis and her representatives and assigns are to pay all taxes hereafter assessed or levied upon the lands described in this lease." The duration of the lease was to be "for so long and for such a period of time as the said Jerusha A. Ellis, her heirs, executors, administrators, or assigns shall keep up and maintain a mill on or near the present site on section one", etc. It is clear that this gave more than the right of flowage. It gave to Mrs. Ellis and her representatives and assigns the right to use said land "for the purpose of running, maintaining, and operating a mill and for mill purposes." This would include not only the right of flowage, but also the right to use the land (94 10-100 acres) in any manner necessary for the proper protection and operation of the

mill and for mill purposes, including the right to extend her dam, if need be, onto the lands so leased to her. In the face of the judgment of this court, defendant, or those under whom he claims, proceeded to dig the ditch and construct the dams in controversy, and in addition thereto place other obstructions upon the lands so leased to plaintiff's grantors, and refuses to permit plaintiffs to go upon the leased lands for the purpose of removing such obstructions and filling the ditch and removing the dams referred to. This suit was brought to enjoin such interference. The district court found for the plaintiffs, and entered a decree giving them the right to the free use of the lands obtained under the aforesaid lease, and to take all necessary steps to protect their mill and dam, reservoir and water supply, and enjoining defendant "from interfering with or preventing the plaintiffs, their legal representatives, heirs and assigns from going upon said lands so described in the said grant from Frederick Garbe and wife to Jerusha A. Ellis and assigns, for the purpose of caring for, protecting, repairing and maintaining the said milldam, waste gate, race and reservoir, and removing obstructions therefrom or protecting and strengthening the banks thereof, and doing any and all of the things reasonably necessary for the protection and maintenance of said appurtenances to said mill for the proper and successful operation thereof for mill purposes, and said defendant is hereby ordered to remove any dams or other obstructions he has placed in said stream or mill-pond, and to fill up the ditch by him constructed, within —— days from the entry of this decree, and, upon his failure so to do, the said defendant is enjoined from interfering with or hindering the plaintiffs in the removal of said obstructions and the filling of said ditch." Some other minor points are covered which we do not deem it necessary to set out. We think the decree is fully sustained both by the evidence introduced in this case, and by the former judgment of this court.

Defendant contends that the lease to Mrs. Ellis was an

easement "in gross", and not "appurtenant." There are two reasons why defendant's contention must fail: (1) The lease itself recites: "To have and to hold the same to her and her heirs, executors, administrators and assigns"; (2) it is beyond dispute that the grant of the land described in the lease to Mrs. Ellis was for the purpose of enabling her, her heirs and assigns to use the said lands "for the purpose of running, maintaining, and operating a mill and for mill purposes." It was known both to the grantor and grantee under that grant that the lands therein described were to be used as a necessary appurtenance to the land and mill to which it was contiguous. In such a case an easement in gross will never be presumed. In *Winston v. Johnson,* 42 Minn. 398, it is held: "A grant *in gross* is never presumed when it can fairly be construed as appurtenant to some other estate." In *Lidgerding v. Zignego,* 77 Minn. 421, the same rule is again announced. In *Cadwalader v. Bailey,* 17 R. I. 495, it is said: "Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. * * * If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross, the rule for the construction of such grants being more favorable to the former than to the latter class." In *Johnson v. Sherman County I., W.-P. & I. Co.,* 63 Neb. 510, we held: "Where a mill is erected and a water-power obtained by the aid and co-operation of adjoining landowners, any right of flowage over their premises of water for the mill arranged for and contemplated by the owners, as subscribers towards its construction, becomes appurtenant to the mill."

It is further contended by defendant that even if the grant to Mrs. Ellis, under the lease referred to, created

an easement appurtenant to the land, it did not pass to plaintiffs, for the reason that in the chain of title from Mrs. Ellis down to plaintiffs several of the deeds conveyed the mill property by a description of the land only, without mention of "appurtenances" or "hereditaments." The record shows that Mrs. Ellis and her husband conveyed to J. H. Welch and R. Price by description of their land, "together with all and singular the hereditaments and appurtenances." Price conveyed his half to Smith without mention of appurtenances or hereditaments. Smith conveyed to Jasper Culver without mention of appurtenances or hereditaments. Welch conveyed his half, which he obtained from Mrs. Ellis, to Helen M. Culver, wife of Jasper, without mention of appurtenances or hereditaments. With the title thus standing in them, the Culvers brought the suit against Frederick Garbe and wife, the grantors in the lease in controversy, decided in 27 Neb. 312, hereinbefore referred to, in which suit the rights of the Culvers under a title so obtained were established. Subsequently the Culvers conveyed the lands "with all the appurtenances." The parties to whom they conveyed, conveyed to their grantees without mention of appurtenances; and so the conveyances proceeded until title was obtained by plaintiffs in this action, some of the deeds mentioning appurtenances, and others making no mention thereof. We think it is immaterial whether the deeds contained the words "with the appurtenances and hereditaments" or not. In *Morrison v. King,* 62 Ill. 30, it is held: "Incorporeal hereditaments appendant or appurtenant to land will pass by a conveyance of the land as an incident thereto. Thus, if a house or store be conveyed, every thing passes which belongs to and is in use for it, as an incident or appurtenant, without the use of the word *'appurtenances',* by mere operation of law." In the opinion the court say: "The foundation of the doctrine of easement in this and similar classes of cases is a disposition and arrangement of the premises as to the uses of the

different parts, by him having the unity of seizin, and then a severance. It being a general principle in relation to grants that every grant of a thing naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for, it would seem to follow that each portion of the severed premises should pass subject to all the burdens and advantages imposed or conferred by the proper owner." The same court in *Shelby v. Chicago & E. I. R. Co.*, 143 Ill. 385, 400, say: "An easement appurtenant to land will pass by a conveyance, although the words 'with the appurtenances' are not used. Those words will not enlarge the scope of the deed. Whatever is actually appurtenant to the land granted passes without those words." In the opinion they say: "What we have said thus far is upon the theory that the right to have the dams maintained did not pass to the railroad company by the deed, but we are inclined to the opinion that said right constituted an easement appurtenant to the land, and as such passed by the conveyance. It is true the words, 'with the appurtenances', or equivalent words, were not employed in the deed, but those words, if used, would not have enlarged the scope of the deed, for what is actually appurtenant to the land granted passes without such words, it being the general rule that whatever is in use for the land as an incident or appurtenance passes by a conveyance of the land." Again in *Jarvis v. Seele Milling Co.*, 173 Ill. 192, they say: "The question here is not, as assumed by appellant, whether the mill can be operated without the mill-pond, but whether the use of the mill-pond passed as a necessary appurtenant of the mill property. The deed or grant of conveyance need not contain the word 'appurtenance', or similar expression, in order that appurtenances will pass thereby." In *Huttemeier v. Albro*, 18 N. Y. 48, the court say: "It is also a fair conclusion, in the absence of evidence excluding that idea, that the grantors designed to convey, with the lots, a way which had been long used as appurtenant to them. * * * It is a general rule that,

upon a conveyance of land, whatever is in use for it, as an incident or appurtenance, passes with it. The law gives such a construction to the conveyance, in view of what is thus used for the land as an incident or appurtenance, that the latter is included in it." In *United States v. Appleton*, 1 Sumn. (U. S.) 492, the court, speaking through Mr. Justice Story, say: "It has been very correctly stated at the bar that in the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties. In truth, every grant of a thing naturally and necessarily imports a grant of it, as it actually exists, unless the contrary is provided for."

Under the authorities above cited it seems very clear that the rule is just the opposite of that contended for by defendant; that is to say, the inference is that a grant of land carries with it the appurtenances, "unless the contrary is provided for", and not that the appurtenances do not follow the land unless the deed so recites. If, as stated by Mr. Justice Story, we take into consideration "the circumstances attendant upon the transaction", at each time the land was sold and deed made, and "the particular situation of the parties", and "the state of the thing granted, for the purpose of ascertaining the intention of the parties", there can be no escape from the conclusion that in the case at bar it was the intention of the parties in each instance to convey the land, together with the rights appurtenant thereto obtained under the lease in question.

Upon any theory of the case, the judgment of the district court is right, and it is therefore

AFFIRMED.

REESE, C. J., not sitting.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND (NAIMAN), APPELLANT.

FILED FEBRUARY 10, 1910. No. 15,899.

1. **Taxation: SALE: CONFIRMATION.** On a hearing of an application for confirmation of a sale for taxes, where it is made to appear by an uncontradicted affidavit, offered by the owner of the land sold and received by the court, that all taxes lawfully assessed against said land had been paid prior thereto, it is error to confirm such sale.

2. ———: ———: ———. And where it further appears by such affidavit that the lands so sold were assessed, taxed and sold as town lots, when in fact no survey, plat, or division of said land into town lots had been made or authorized by the owner thereof, such land is not subject to taxation as town lots, and a sale thereof by such designation is void.

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

M. H. Weiss, for appellant.

John T. McCuistion, contra.

FAWCETT, J.

This is an appeal from an order of the district court for Thayer county confirming a sale for taxes under the scavenger law of lots 13 to 16, inclusive, in block 13, lots 7 to 15, inclusive, in block 18, and lots 4 to 12, inclusive, in block 19, all in the original town of Gilead. The record, which is quite incomplete, and in many respects unsatisfactory, shows that one Nelson Gaston purchased the property in controversy at a tax sale under and by virtue of the decree of the district court in the state tax suit of the year 1905. The sale was confirmed over the objections of the appellant, John Naiman, April 4, 1908. The bill of exceptions, which was duly served and settled by the court, shows that upon the hearing of objections to confirmation plaintiff introduced the affidavit and notice

of the purchaser, Gaston, the final notice served by the sheriff, and the certificate of publication by the publisher, and nothing more. Defendant Naiman introduced his formal objections to the confirmation, supported by a full and complete affidavit giving in detail what is claimed to be the facts in relation to the property included within the alleged sale and described in the certificates held by Gaston, and nothing more. No objection was made to the above affidavit, nor was there any attempt at contradiction of the statements contained therein. We therefore accept the facts stated in the affidavit as established, and as sufficient to overcome all presumptions of regularity in the original petition. From the affidavit it appears that on March 3, 1887, defendant Naiman was the owner of all of the N. E. $\frac{1}{4}$ of section 15, township 2, range 1; that on said date he conveyed to one F. J. Hendershot, trustee, the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, "for townsite purposes" (for the sake of brevity we will separate the lands so conveyed to Hendershot into two tracts, and designate them as tracts 1 and 2; tract 1 being the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and tract 2 being the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$); that on October 1, 1887, the said Hendershot, trustee, dedicated to the public for townsite purposes a portion of tract 1, and no more; that on May 22, 1890, the said Hendershot reconveyed to defendant Naiman all of tract 2; that none of tract 2 was ever dedicated to the public, or surveyed and platted as town property; that defendant Naiman had paid all taxes upon tract 2 as a governmental subdivision, and that no taxes were delinquent or due thereon; that none of said tract was subject to taxation or sale, for the reason that the lots appearing upon said tax roll are not part of tract No. 1, upon which the same are platted or shown by the certificate or the plat filed by said Hendershot, "but, in truth and in fact, said lots mentioned in said pretended sale certificate are located without right or authority or without survey or plat made in accordance with law, and arbitrarily appear to be lo-

cated according to a plat filed with the county clerk, and under which the assessment and sale were made, to wit, upon the N. ½ of the S. W. ¼ of the N. E. ¼ of section 15-2-1 (tract 2), and that the description of the lots or pretended lots, and which arbitrarily cover this defendant's land, in truth and in fact, do not exist, and that all taxes due thereon have been paid."

In the light of the above undisputed testimony, it would seem clear that the court erred in entering the order of confirmation complained of. In consideration of the public nature of the question involved, and the unsatisfactory condition of the record, together with the further fact that we have not had the benefit of either brief or oral argument in plaintiffs' behalf, no specific directions are given to the district court, but its judgment is reversed and the cause remanded for further proceedings according to law.

REVERSED.

CURTIS-BAUM COMPANY, APPELLEE, V. SAMUEL LANG, APPELLANT.

FILED FEBRUARY 26, 1910. No. 15,524.

Rehearing. Upon rehearing the former decision, reported in 83 Neb. 728, and the judgment rendered thereon are adhered to.

REHEARING of case reported in 83 Neb. 728. *Judgment of reversal adhered to.*

PER CURIAM.

The opinion by Commissioner CALKINS reversing the judgment of the district court was filed March 5, 1909, and is reported in 83 Neb. 728. A motion for rehearing was granted, but later it was discovered by counsel that the bill of exceptions had not been filed in the office of the clerk of the district court when leave was asked and

given for the withdrawal of the record for such filing. This caused the case to lose its place upon the docket, and it was not reargued and submitted until the present sitting, February 7, 1910.

The arguments presented by counsel for appellee have been exhaustive, but we are not persuaded that the commissioner's opinion is subject to the criticisms made, but that his holdings are correct, and it could serve no good purpose to repeat what he has said.

The former opinion and the order thereon reversing the judgment of the district court are adhered to.

JUDGMENT ACCORDINGLY.

EMIL HORNSTEIN, APPELLEE, V. GIOVANNO BATTISTA CIFUNO ET AL., APPELLANTS.

FILED FEBRUARY 26, 1910. No. 15,923.

1. **Notes: INTEREST.** A promissory note in the following form: "One year after date we promise to pay to the order of Liberato Varriano four hundred no-100 dollars at Omaha, Nebraska. Value received with interest at the rate of —— per cent. per annum from —— until paid"—draws interest at the legal rate of seven per cent. per annum from its date.

2. **Pleading: ADMISSIONS.** The averments of the answer, set out in part in the opinion, *held* to constitute an admission of plaintiff's ownership of the note and mortgage upon which the action is based.

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

John M. Macfarland, for appellant.

T. W. Blackburn, contra.

REESE, C. J.

This action was instituted in the district court for Douglas county for the foreclosure of a real estate mort-

gage on the south one-half of lot 24, in McCandlish Place, in the city of Omaha. A decree was entered in favor of plaintiff for the full amount of the note, the payment of which was secured by the mortgage, together with interest at seven per cent. per annum from its date. The note was in the following form: "$400. Omaha, Neb., Jan. 4, 1907. One year after date we promise to pay to the order of Liberato Varriano four hundred no-100 dollars at Omaha, Nebraska. Value received with interest at the rate of —— per cent. per annum from —— until paid. Giovanno Battista Cifuno. Marie Giuseppa Cifuno. Indorsement: Liberato Varriano, Emil Hornstein." At the time of the maturity of the note the makers, defendants, tendered the sum of $400.25, claiming that at the time the note was given there was an oral agreement between plaintiff's assignor, the payee of the note, that no interest was to be charged, and the sole question presented is as to when the interest began to run. If at maturity, the tender was sufficient, and plaintiff could only recover a sum equal to the face of the note. If the note drew interest at the legal rate of 7 per cent. per annum from its date, the decree is correct. As is shown by the copy of the note above set out, the blanks for the statement of the rate of interest and the date from which the interest would run were not filled in at the time of the execution of the note, and the legal effect would be the same as if there had been nothing written or printed after the word "interest", and the reading of the note would be to pay "interest until paid." This would cause the debt to draw interest at the legal rate of 7 per cent. per annum from the date of the note. *Salazar v. Taylor,* 18 Colo. 538; *Jewett v. McGillicuddy,* 55 Neb. 588; *Campbell Printing Press & M. Co. v. Jones,* 79 Ala. 475; *Bogan v. Calhoun,* 19 La. Ann. 472; *Dewey v. Bowman,* 8 Cal. 145; 2 Parsons, Notes and Bills (2d ed.) p. 392; Eaton and Gilbert, Commercial Paper, sec. 47*c;* Ogden, Negotiable Instruments, sec. 48; 2 Daniel, Negotiable Instruments (5th ed.) secs. 1385, 1458; Perley, Law of Interest, p. 8; 8 Cyc. 313; 22 Cyc. 1538. It would

also follow that proof of an oral modification of the written contract could not be received as against plaintiff who is an innocent purchaser of the note. In this we think the trial court did not err.

There is a contention that the answer denied plaintiff's ownership of the note, and that therefore the burden was on him to prove the indorsement and transfer; but it appears from the answer that plaintiff's ownership is admitted. It is alleged that the tender of the $400 was made to one Mancuso on the 4th day of January, 1908, who was in possession of the note, and on the 14th day of January of the same month the said Mancuso "for himself and plaintiff herein, for whom he was acting as agent at that time, refused to cancel the mortgage and receive the $400", etc. This must be held as an admission of plaintiff's ownership.

We find no error in the decree of the district court, and it therefore is

AFFIRMED.

JOHN MASOURIDES V. STATE OF NEBRASKA.

FILED FEBRUARY 26, 1910. No. 16,425.

1. **Criminal Law: WITNESSES: REFRESHING RECOLLECTION.** A party who calls a witness, and is in part taken by surprise by his unexpected and unfavorable testimony, may, for the purpose of refreshing his recollection, interrogate him as to a written statement previously made by him which is inconsistent with part of his testimony, and thereby seek the correction thereof, and may, for that purpose, submit the statement to the witness for inspection. The denial of the witness of the correctness of a part of such statement will not render the whole of the writing admissible in evidence.

2. ———: **EVIDENCE: ADMISSIBILITY.** Where a statement of substantially all of the facts of the killing of a human being, and for which a party is on trial for murder, is prepared by the county attorney and signed by a witness of the tragedy, and upon the trial the testimony of the witness contradicts a part of such statement and denies its correctness, it is reversible error to permit the whole of such statement to be read to the jury.

3. ———: WITNESSES: IMPEACHMENT. Ordinarily a party may not impeach his own witness by showing that he has made statements previous to the trial contradictory of his testimony. This, however, will not prevent proof of the truth by other evidence or witnesses.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

Sullivan & Rait and *J. M. Macfarland,* for plaintiff in error.

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

REESE, C. J.

An information was filed in the district court charging plaintiff in error with the crime of murder in the first degree in the killing of Edward Lowry, a police officer of the city of South Omaha, on the 19th day of February, 1909. A trial was had, beginning on the 24th day of May of the same year, which resulted in a verdict finding the accused guilty of murder in the first degree, and fixing the penalty at death. A motion for a new trial was filed and overruled, and sentence of death was pronounced against him. He brings the case to this court by proceedings in error. A number of alleged errors are presented, but, as another trial must be had in which the same causes for complaint will probably not arise, they, with the exception of the one error hereinafter discussed, will not be noticed. It was contended upon the trial, and is here insisted upon, that the evidence submitted to the jury is not sufficient to sustain the verdict, but it is not deemed necessary, or even proper, that we express any opinion upon that subject.

As leading up to the question to be considered, certain conceded facts may, with propriety, be stated. Plaintiff in error is of foreign birth and nationality, having at the time of the tragedy been in this country but about two

years, and was wholly unacquainted with the English language, not being able to either speak or understand any part of the speech of this country. A countryman and friend of his had what is spoken of as a candy kitchen in South Omaha, which was frequently visited by plaintiff in error. The wife of his friend was not of his nationality and could not speak his language. He expressed a desire to learn to speak English, and sought the aid of some one who could teach him. He was referred to a girl, or young lady, by the name of Lillian Breese, of the age of about 17 years, who was working in the candy kitchen, and through the aid of an interpreter it was arranged that she, for a compensation named, should give him, and perhaps others, lessons in the language. Miss Breese, whose reputation appears to have been good, was living in a room in one of the nearby flats with her little brother of between six and seven years of age, and it was arranged that the lessons should be given at her room. At the time to which we refer she had given him two lessons. On the evening of the 19th day of February, 1909, after the completion of her labors at the candy kitchen, she with her little brother were starting for her room when plaintiff proposed accompanying her, which he did, and the three went to her home. Soon after their arrival the deceased called at the house, and inquired of the landlady if the girl and little boy were in their room. On being informed that they were, he expressed a desire to enter, and was shown to the room. The landlady knocked on the door and Miss Breese opened it. The deceased entered at once, and directed Miss Breese and plaintiff in error to accompany him to the police station. They started with him, leaving the little boy with the landlady. On the way to the station the tragedy occurred, by which the officer was shot and killed, and plaintiff in error received two gunshot wounds, one in the breast, and the other in the leg. Miss Breese, becoming frightened, stepped into a nearby hallway as soon as the first shots were fired. There is no suggestion of any element of guilt or wrong doing on the

part of Miss Breese or of the plaintiff in error up to the time of the invasion of her room by the officer, nor on her part at any time in connection with the tragedy. It does not appear whether she was ever permitted to return to the little brother or her room, or not, but it is shown that during the whole of the time from that night until the day of the trial she was kept in confinement in the jail. Just why this was made necessary, or even rightful, is not made clear. She was examined as a witness before the coroner's jury, and, probably, at the preliminary examination. On the next day after the tragedy, and without the presence or knowledge of plaintiff in error or any one in his behalf, the county attorney visited her and procured from her a statement of the principal facts of the tragedy. This statement was written by the county attorney and read over to her, and to which she signed her name. It does not appear that the written statement was ever made public or that any others knew of its existence. It corresponded substantially with her testimony given at the trial. In the statement, in describing the affair, occurs the following: "I then heard some one, I think it was the Greek, say 'stop', and then I heard one or two shots. After I heard these two shots I saw the officer take his gun from his clothes, I thought from his pocket, and then I ran into a hallway a few feet away." In her testimony upon the trial she said that after she heard the two shots she "noticed the officer take his hand from his side, and then I ran." The following is a part of what follows in the bill of exceptions: "Q. Take his hand from his side, where? A. Well, his hand from his side. Q. From his pocket? A. Yes, sir; like taking his hand from his pocket. Q. Yes; and when he took his hand from his pocket, what, if anything, did you see in his hand? A. I didn't see nothing. Q. Didn't you see a gun. A. No, sir. Q. In the officer's hand? A. No, sir. Q. You testified at the coroner's inquest about this shooting, didn't you, just a few days—(interrupted)? A. Yes, sir. Q. Didn't you state at the coroner's inquest, when

the officer took his hand from his pocket you then, for the first time, saw his gun?" This was objected to as "incompetent, irrelevant and immaterial; no foundation laid, and an attempt to impeach his own witness." Whereupon the county attorney made the following statement in the presence of the jury: "If your honor please, we are entitled to this question from this witness. Your honor can realize the situation the state is in with this witness who is, in the nature of things, a hostile witness to the state. Now, then, if the state can develop the fact that, since the testimony of this witness taken immediately after the occurrence, there has been marked departure from that testimony and her testimony here on the stand, why, we ought to be entitled to show that. It wouldn't be fair, in other words, for the state to be betrayed into putting a witness on the stand, and have her change her testimony afterwards." Defendant's counsel responded as follows: "The defendant wants the record to show his objection to the question and also his exception to the statements of the county attorney made in the presence of the jury, in reference to what it appears since the former examination, since the preliminary examination or the examination at the coroner's inquest." The court: "The objection is overruled", to which exception was taken. "A. No, sir; I did not." Her attention was then called to the written statement which she made, written by the county attorney, which she testified she signed, that it was read to her, and was correct, and was asked: "Q. And is that the statement, Miss Lillie (counsel handing witness a paper)? A. Yes, sir. I never said that the officer took his gun, I said he took his hand from his pocket like he was taking his gun from his pocket. I didn't say he took his gun from his pocket, I said like he was taking his gun. Q. Like he was taking his gun? A. Like he was taking his gun. Q. What do you mean by this in the statement, 'After I heard these two shots I saw the officer take his gun from his clothes, I thought from his pocket, and then I ran into a little hallway a few feet

away'?" Plaintiff in error's counsel: "The defendant objects to this as incompetent, immaterial, hearsay, and irrelevant; an attempt to impeach his own witness with reference to an instrument that is not admissible in evidence or binding this defendant in any way." The objection was overruled, and exception taken. "A. I never made that statement. Q. Do you want to change that statement now? A. Why, I will say just like I said before. Q. What do you say now? A. I said that I seen the officer take his hand from his side like he was taking his gun from his pocket. Q. What do you say as to whether you saw a gun or not? A. I never seen no gun."

On the re-examination of the witness by the county attorney the following is shown to have occurred: "Q. Calling your attention to the statement you have identified as having been made by you immediately following this shooting, to the language, 'Just before I heard the first two shots I was not far from the Greek, and immediately before these shots were fired I saw him (referring to the Greek) turn toward the north and partially face the officer. It was after that, and when the officer came up closer, I saw the officer take out his gun.' How do you explain that language in the statement?" Plaintiff in error's counsel: "Objected to as incompetent, irrelevant and immaterial; no foundation laid, and not the best evidence; an attempt to impeach his own witness, and hearsay." County attorney: "I offer as part of the examination of this witness the statement that has been identified, and I pursue this examination upon what is apparent from the examination of this witness, that she is hostile to the state, and has come upon the stand here as a state's witness, and, according to our theory, has given testimony in variance with her statements to the county officials and statements made at the coroner's inquest." Plaintiff in error's counsel: "The defendant objects to the question as incompetent, immaterial, irrelevant; no foundation laid; not the best evidence; an attempt to impeach his own witness, and cross-examination of his own wit-

ness." The objection was overruled, to which ruling of the court defendant excepted. Plaintiff in error's counsel: "The defendant objects to the statement of the county attorney, in the presence of the jury, at this time, as incompetent, immaterial, irrelevant; no foundation laid; not the best evidence; an attempt to impeach his own witness, and cross-examination of his own witness." The objection was overruled. Defendant excepted to the ruling of the court.

While other portions of the examination of this witness show similar proceedings by the court and counsel, it is not deemed necessary to make further quotations in order to present the question involved. The whole of the written statement was offered in evidence by the state, and over the objections and exceptions of plaintiff in error's counsel was read to the jury. This, we think, was clearly wrong and highly prejudicial to plaintiff in error. It is to be observed that upon a careful reading of the testimony of the witness we are persuaded that she was not hostile to the state, but that her examination exhibited a candid and honest desire to tell the truth as she understood it. The statement in the writing, if incorrect, would naturally fail to attract the attention of one not familiar with detailed expressions and writings, and might be passed unnoticed, and the correction upon the witness stand would leave no just ground for the aspersions cast upon her in the presence of the jury. As we have seen, she had been incarcerated in the jail during the whole time from the date of the tragedy until called upon the witness stand. Enough appears to show that she had been under close surveillance during the whole time. Over the objection of the county attorney, she was, after the second effort of plaintiff in error's counsel, permitted to state that she had never conversed with them, and, in fact, had never seen either one of them until called upon as a witness upon the trial. She had never before been called upon to pass through such an experience; had never been in court as a witness; was to some extent, at least, unfamiliar

with the forms of expression in legal papers, or, perhaps, not quick to detect slight errors in details of statement in such documents. The written instrument which she signed consisted of three and a half of legal-cap pages. She was then in the jail, the next day after the tragedy, which occurred at about 11 o'clock of the night before, and one may well imagine the state of her mind, although practically unacquainted with either of the parties to the unfortunate affair. It is evident from the whole record before us that the effect of the introduction of the written statement in evidence could not be otherwise than to impeach, or at least impair, the testimony of the witness in the estimation of the jury, or give the statement the force and effect of substantive evidence, neither of which should have been permitted. It is elementary that, if a party is surprised by the statements of his own witness upon the stand, he is not bound by such statement, but may show the fact to have been otherwise than as stated, by other competent testimony; not so much for the purpose of contradicting, and to that extent impeaching, his own witness, but to show the truth. *Blackwell v. Wright*, 27 Neb. 269; *Nathan v. Sands*, 52 Neb. 660. By the examination of the witness, the detailed statement by her as to the signing of the paper, its presentation to and inspection by her, the reading of the portion in dispute to her in the presence and hearing of the jury, when all considered, presented the *discrepancy* as fully and completely as it was or could have been possible to do. All that the county attorney sought to do, and all he had the right to do in the way of showing such discrepancy in the statements had been accomplished, and the introduction of the statement itself could add nothing to the proof of the fact. It did not and could not show which of the two was correct. The jury were fully advised of her testimony before them and of the statement upon that point in the writing. The state could, in reason or law, ask nothing more. There can be no doubt but that it was competent to refresh the memory of the witness by calling

her attention to the written statement, assuming the variance to be of such materiality as to justify it, and thus attract her attention to the specific facts and by that means obtain her best recollection, and it could properly be read to her for that purpose, but to allow the whole instrument to be read to the jury and commented upon, as was allowable if admitted, could have no other effect than that of substantive evidence, hearsay though it might be, and thus destroy a constitutional right of the accused on trial. In *Hickory v. United States,* 151 U. S. 303, it was held that "proof of the contradictory statements of one's own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law." This question was before the supreme court of Ohio in *Hurley v. State,* 46 Ohio St. 320, and in an exhaustive opinion by Judge Williams many cases are cited in support of the rule that, where one is surprised by the testimony of his own witness, he is not bound by it, but may show the truth by other witnesses, proving the facts by them, but not by proving the former statements of the witness contradictory of his testimony. That opinion is reproduced in 4 L. R. A. 161, and is annotated by the editor, and to which we refer without further citation. A moment's reflection must show the fallacy of the contention of the state and ruling of the court upon this question. The necessary effect of the course pursued must have been either to discredit and, to that extent, destroy the credibility of the state's own witness, or to substitute for her evidence the former statement alleged to have been made by her. The secondary effect was to get before the jury her evidence upon the witness stand, and the whole of the written statement covering substantially the same facts, and thus bolster up and support her testimony by introducing her former statement in support thereof. All of which is in conflict with the plainest and most fundamental rules of evidence.

It is the contention of plaintiff in error that he was intending to depart from the city of South Omaha for Kansas City within a short time after the hour when he was arrested; that he was uncertain as to his return, and was taking his property, including the pistol and knife, with him, having them upon his person for that purpose; that he could not understand the English language, but had been informed that the carrying of concealed weapons was a violation of law; that his efforts to reach his pocket were prompted by a purpose to throw the pistol into a secluded place near the edge of the sidewalk where he could afterwards procure it; that he had no intent or purpose of assaulting or taking the life of the officer; and that he did not shoot until after receiving the wounds from the two shots fired by the officer, and which wounds were serious and from which he had not recovered at the time of the trial.

The judgment of the district court is reversed and the cause is remanded for further proceedings in accordance with law.

REVERSED.

CHARLES BOOTON ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 26, 1910. NO. 16,257.

1. Criminal Law: VENUE. "The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient." *Weinecke v. State*, 34 Neb. 14.

2. Evidence examined, its substance set forth in the opinion, and *held* sufficient to sustain the verdict.

3. Criminal Law: WITNESSES: IMPEACHMENT. The fact that the name of a witness is indorsed on the information in a criminal prosecution, he not having been examined by the state, and no demand having been made upon the prosecution to place him upon the witness stand, and the defendant having called such witness and

interrogated him in his own behalf, does not prevent the state from impeaching him.

4. Instructions complained of examined and found to be without error.

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

John M. Macfarland, for plaintiffs in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

BARNES, J.

Charles Booton and Roy Raymond, hereafter called the defendants, were jointly tried in the district court for Douglas county on an information charging them with the crime of robbery from the person of one Harry Miller. They were convicted and sentenced to imprisonment in the state penitentiary for the term of ten years. To reverse that judgment they have prosecuted error to this court.

1. Their first contention is that the evidence is not sufficient to sustain the verdict. The reasons assigned are: (*a*) That the venue was not proved; (*b*) that the evidence produced by the state was insufficient to identify them as the persons who committed the robbery; and (*c*) that the evidence for the prosecution was wholly insufficient to overcome their testimony tending to establish an alibi. These questions will be disposed of in the order above stated. The record shows that during the trial in the district court for Douglas county one James Stary was called as a witness for the state and testified in part as follows: "Q. On the night of December 24 did you see these two defendants? A. I did not see them until they held me up; that is the only time. Q. Where was that? A. Thirteenth street viaduct, about five minutes of 11 or 11 o'clock; somewhere around there. Q. In this city, county and state? A. Yes, sir." It further appears from the testimony that after the defendants had

robbed Stary they proceeded down the street; that he turned around and watched them, and saw them hold up and rob Harry Miller, the prosecuting witness in this case, only a block away. It thus appears that the crime was committed in the city of Omaha, county of Douglas, and state of Nebraska. "The venue of an offense may be proven like any other fact in a criminal case. It need not be established by direct testimony, nor in the words of the information, but if from the facts in evidence the only rational conclusion which can be drawn is that the crime was committed in the county alleged, the proof is sufficient." *Weinecke v. State*, 34 Neb. 14.

On the question of identification, the record discloses that the defendant Booton was positively identified by James Stary as being one of the parties who robbed him. He also described the other man, whose features he did not claim to have observed, as being similar in build to the defendant Raymond. While this witness identified Booton, he described the second man, who assaulted him, as being similar in build to Raymond, and the latter is positively identified by the witness Miller. As above stated, Stary was the first victim. Defendant Booton was identified by him as the man who held the gun on him and compelled him to hold up his hands, and who took his watch while the other man went through his clothes and robbed him. Stary also testified that when they had taken his watch and money they told him to go on; that at that instant they saw Miller coming alone, and one of them said: "Here comes a man, and we will hold him up, too"—or words to that effect. He further testified that he started on, but turned and watched the defendants, and saw them assault and rob the prosecuting witness, Miller. Miller recognized the defendant Raymond as the one who held the revolver while the defendant Booton took his money. There was thus a complete and sufficient identification of each of the defendants. It also appears that when Miller and Stary were taken to the jail where the defendants were confined after their arrest, one of

them recognized both of the defendants as the persons who had committed the robbery. It follows that the evidence upon this point was amply sufficient to sustain the verdict.

On the question of an alibi, the record discloses that the defendants admitted that they were in Omaha during the fore part of the night in question. They testified, however, that they boarded a street car and went to Council Bluffs, and walked from the car line to an assignation house called the "Riverside Hotel", or the "Metcalf Road House"; that they arrived there about 10 o'clock, but neither of them fixes the time positively. They also produced as a witness one Jim Booton, a brother of the defendant Charles Booton, who testified that he was barkeeper at the road house, and that he saw the defendants there about 10 o'clock. One May Noble, who was the keeper of the place above described, also testified that she saw the defendants at her place some time during the evening, and fixes the time at about 10 o'clock. One John Nelson, however, was called as a witness by the defendants, and he fixes the time when he saw them there at about 12 o'clock. The defendants further stated that a couple of women, who were inmates of a house of prostitution in Omaha, called Jim Booton by telephone to meet them at the street car line, and one of the defendants, at Jim Booton's request, met them and escorted them to the road house. They fixed the time of this transaction at about 12 o'clock. The state, however, produced the telephone operator, who took the call of the two women, as a witness, and she testified that the time the call was made was 1:20 o'clock on the morning after the offense was committed. She also produced the record of the call, which, under the rules of the telephone company, she was required to make at the time when the call was received, and thus verified her statement. So it appears that the defendants could have been in Omaha and have committed the crime charged against them at 11 o'clock on the evening of December 24, and still have had plenty

of time to go to the road house and be seen there by the witnesses who testified for them. The testimony as to time was so indefinite that this alone would warrant the jury in finding that the alibi was not proved. Again, the witnesses by which it was sought to establish that defense were of such a character that the jury with propriety might have disregarded their evidence. A careful examination of the bill of exceptions satisfies us that the evidence was sufficient on this point to sustain the verdict of the jury.

2. It is next contended that the court erred in permitting the prosecution to impeach the witness May Noble. It appears that this witness was not called by the state, but was produced by the defendants themselves, so it cannot be said that the rule that a party will not be allowed to impeach his own witness is applicable in this case. No demand was made by the defendants for the prosecution to put May Noble upon the witness stand, although her name was indorsed on the information. Upon the other hand, they chose to call her as their own witness. This being so, we know of no rule of law which would prevent the state from impeaching her, and the authorities cited upon this point do not support the defendants' contention.

3. It is claimed that the court erred in giving the third paragraph of his instructions to the jury. This was an instruction defining a reasonable doubt, and the complaint is that it is argumentative. We have examined the instruction, and find that it is one that has been often approved by this court, and is not subject to the criticism directed against it. Some other points are discussed in defendants' brief, but they are without merit.

From a careful examination of the whole record, we are satisfied that the defendants had a fair and impartial trial, and, finding no reversible error therein, the judgment of the district court is

AFFIRMED.

GILBERT L. COOPER, APPELLEE, V. FERNANDO KENNEDY, APPELLANT.

FILED FEBRUARY 26, 1910. No. 15,916.

Vendor and Purchaser: RESERVATION OF CROPS: PAROL EVIDENCE. Growing crops are personal property which pass by deed as appurtenant to the realty, but they may be severed therefrom by reservation evidenced either by parol agreement or by instrument in writing. The vendor may show by parol evidence that such crops were reserved from the sale of the land.

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

Cordeal & McCarl, for appellant.

Morlan, Ritchie & Wolff, contra.

LETTON, J.

On the 22d of July, 1907, the plaintiff sold his farm to defendant by warranty deed, at the same time by parol agreement he reserved the possession of the land until the 1st of March, 1908, and also reserved all the growing crops upon the land. Afterwards he harvested a portion of the crops without objection by the defendant. It is admitted in the answer that in the latter part of August the defendant entered into a field of corn on the premises, gathered a portion of the crop, and that on August 27 while the plaintiff was gathering corn the defendant went to the field, forbade the plaintiff from further gathering corn therein, and commanded the plaintiff to leave the premises, and now asserts that he is the owner of the corn. On the same day the plaintiff filed his petition alleging these facts, and further alleging that the defendant threatens to enter upon the land, to take the corn and deprive the plaintiff of same, and that the defendant is insolvent and cannot be compelled to respond in damages. No trespass is shown other than as above admitted, nor are there

any threats in evidence. In this state of the record the writer is of opinion that no facts have been shown sufficient to authorize the issuance of the extraordinary writ of injunction, but a majority of the court are of a contrary opinion, and it will therefore be necessary to consider the principal question in the case, which is whether parol proof may be made of a reservation of growing crops where no such reservation is made in the deed of conveyance. The authorities are irreconcilable on this question. A number of states hold that growing crops, being *fructus industriales*, are personal property and do not necessarily pass with the conveyance of the land; that there is a distinction between such planted crops and such products of the soil as growing timber or grass, which are known as *fructus naturales*, and which pass with the soil, unless separated and reserved by instrument in writing.

In this state, however, the question as to whether such crops will pass by deed was discussed in the case of *In re Estate of Andersen*, 83 Neb. 8, and it was held: "Until a crop is severed from the land upon which it is grown, it is such part of the real estate as will pass by a deed of conveyance or by a devise of the land, unless reservation thereof is made in the deed, or there is evidence contained in the will of the testator that the devisee of the land should not be entitled to the crop." The question whether the reservation must be made in a deed was not involved in the case, so that this portion of the holding is obiter. The syllabus of the case is as follows: "Unless reserved, crops standing upon the ground, matured or not, pass to the grantee named in a deed of conveyance, or to a party to whom the land is devised."

In an early Indiana case, *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449, it was held that the crop passed with the deed, notwithstanding a previous written agreement expressly reserving the same, for the reason that the prior preliminary contract could not affect the terms of the deed into which the contract was finally merged. To the same effect is *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438,

as respects a parol reservation. *McIlvaine v. Harris,* 20 Mo. 457, 64 Am. Dec. 196; *Gibbons v. Dillingham,* 10 Ark. 9, 50 Am. Dec. 233; *Chapman v. Veach,* 32 Kan. 167; *Garanflo v. Cooley,* 33 Kan. 137; *Kammrath v. Kidd,* 89 Minn. 380; *Smith v. Price,* 39 Ill. 28, 89 Am. Dec. 284; *Firebaugh v. Divan,* 207 Ill. 287. The later Indiana cases have adopted the contrary rule. *Stoddard v. Johnson,* 75 Ind. 20; *Hisey v. Troutman,* 84 Ind. 115.

In *Aldrich v. Bank of Ohiowa,* 64 Neb. 276, it was held that growing crops do not pass to the purchaser of the land at judicial sale, so as to defeat the rights of one holding a chattel mortgage on them, following *Foss v. Marr,* 40 Neb. 559; *Monday v. O'Neil,* 44 Neb. 724. The decision in these cases is based upon *Cassilly v. Rhodes,* 12 Ohio, 88, and *Houts v. Showalter,* 10 Ohio St. 124, and the reasoning of the Ohio cases is based upon the premise that such crops are in law regarded as personalty. The language of the opinion might justify the thought that it was the idea of its writer that a deed would not carry growing crops where no mention is made of them by the parties either in the conveyance or by extraneous writing or parol contract; but this point was not involved, and we find no difficulty in holding as the Ohio court did in the case of *Baker v. Jordan,* 3 Ohio St. 438: "In the absence of any proof that any other valid disposition of them attended or had preceded the deed, that instrument would certainly convey them." The whole subject is well considered in that case. While the Ohio statute as to emblements passing to the executor is mentioned, it is not made the basis of the decision. The following excerpt concisely expresses the view of the court: "A deed purports to convey the realty. But what is the realty? Growing corn may be a part of it, for some purposes, but it is generally to be considered as personalty. If the parties to a deed, either by words or their behavior, signify their understanding that as between them it is personalty, the law will so regard it, and will respect their intention in the construction of the deed. When the evidence of such understand-

ing is produced, it is not to contradict the deed, for with that it is perfectly consistent; but it is to show that what in some instances would go with the lands as part of the realty was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect."

The Pennsylvania rule is that growing crops, *fructus industriales,* are personal property, but pass by conveyance with and as appurtenant to the realty, unless severed therefrom by reservation or exception; that the vendor may show such reservation by parol evidence, but that a reservation of the natural products of the earth, *fructus naturales,* must be in writing. *Backenstoss v. Stahler's Administrators,* 33 Pa. St. 251, 75 Am. Dec. 592. This is substantially the view taken in the following cases: *Flynt v. Conrad,* 61 N. Car. 190, 93 Am. Dec. 588; *Bond v. Coke,* 71 N. Car. 97; *Walton v. Jordan,* 65 N. Car. 170; *Glass v. Blazer Bros.,* 91 Mo. App. 564; *Cannon v. Matthews,* 75 Ark. 336. In New Jersey, in equity, a parol reservation of crops was allowed and enforced, but this was as a reformation of a deed. *Hendrickson v. Ivins,* 1 N. J. Eq. 562.

From a consideration of these cases and of the previous decisions of this court, we are satisfied to declare that, though growing crops are personal property, they pass by deed as appurtenant to the realty, but they may be severed therefrom by reservation either by parol agreement or by instrument in writing, and that the vendor may show by parol evidence that such crops were reserved from the sale of the land. Such crops may be sold upon execution as personal chattels, or they may be conveyed by a verbal contract. In the absence of a reservation, such crops pass by the deed; but a reservation is a collateral contract which may exist at the same time as a contract to convey the real estate. Of course, in case of a dispute, written evidence of such a contract would be of a much more satisfactory nature; but in this case, where the undisputed evidence shows that the vendor remained in pos-

session of the land and crops and harvested the small grain upon the same without objection or interference by the defendant, that defendant admitted the plaintiff's right to the crop to others, and that it was only after he had become dissatisfied in some respects that he claimed the right to the crops, there is no room for doubt or controversy as to the rights of the parties.

Adopting this rule, the plaintiff is entitled to retain the crops, and the judgment of the district court is

AFFIRMED.

MATHEWS PIANO COMPANY, APPELLANT, V. H. E. MARKLE ET AL., APPELLEES.

FILED FEBRUARY 26, 1910. No. 15,920.

1. **Conditional Sales: BONA FIDE PURCHASER.** If the vendor in a conditional sale contract fails or neglects to avail himself of the provision of section 6045, Ann. St. 1907, relating to the filing of such contracts in the office of the clerk of the county, and relies only upon the good faith or credit of the vendee, he cannot interfere with a conveyance of the property to a purchaser in good faith without notice.

2. ———: **ELECTION OF REMEDIES: WAIVER.** Where personal property is sold and delivered upon condition that the title shall remain in the vendor until the payment of the purchase price, and the latter elects to bring suit for the recovery of the debt, the adoption of this course is a waiver of the condition, and the sale becomes absolute.

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

S. D. Killen, for appellant.

A. H. Kidd, contra.

LETTON, J.

This is a replevin action brought by the Mathews Piano Company against H. E. Markle as defendant to recover

possession of a piano. Before the trial John H. Penner intervened and answered, alleging that he was the owner of the property. Markle made no appearance. The case was tried to the court without a jury, and judgment was rendered for the intervener Penner. From this judgment the plaintiff appeals.

The evidence shows that in the latter part of December, 1903, H. E. Markle was conducting a hotel in the city of Beatrice; that about this time Markle borrowed $5,500 from Penner. Penner had guaranteed the payment of the rent of the hotel by Markle. On December 21, 1904, Markle and his wife executed a bill of sale to Penner of all the furniture in the hotel, including the piano, as shown by an inventory attached to the bill of sale. At that time the piano was in Markle's possession. Two days afterwards Markle executed and delivered to plaintiff's agent a promissory note containing a conditional sale contract, whereby it was provided that the title of the piano did not pass from the vendor until the payment of the debt or note, but a copy of this instrument was never filed with the county clerk under the provisions of section 6045, Ann. St. 1909. Markle failing to pay Penner the amount secured by the bill of sale, he took possession of all the furniture some time in the year 1905 to apply on the debt, under an agreement by which he was to credit Markle with the amount he received upon a sale of the property. On the 11th of July, 1906, the plaintiff sued Markle and obtained judgment against him upon the note referred to. Execution was issued thereon and returned unsatisfied. The evidence conflicts as to Penner's testimony in the county court with reference to whether he owned the piano or merely had a lien upon it, but it is sufficient to sustain the conclusion of the trial court that Penner took the piano from Markle upon a valuable consideration without notice of the conditional contract, and that the title thereby passed to him.

Complainant's first point is that Penner is not entitled to recover in this action for the reason that the plaintiff

was in possession of the piano when his answer was filed, and that he filed no affidavit in the case as to the ownership of the property. This was unnecessary. The intervener occupied the position of a defendant in resisting the claim of ownership of the plaintiff. He was merely defending his title and right of possession of the piano, and the fact that it had been taken from his possession under the writ did not make it necessary for him to file an affidavit. The case cited is not applicable.

It is also argued that the bill of sale was made two days before Markle purchased the piano and before Markle had title. The evidence warrants the conclusion that the sale had been made and the piano delivered to Markle before the conditional contract was executed. Even if it were the case that at the time the bill of sale was executed the purchase of the piano had not been completed, though it was in Markle's possession, a purchase after the execution of the bill of sale and its subsequent transfer and delivery to Penner with the other property listed in the inventory, without notice of plaintiff's claim, to apply as part payment on the debt from Markle to Penner operated to convey the title to Penner. Section 6045, *supra,* was made for the protection of vendors such as the plaintiff, and if they fail or neglect to avail themselves of its provisions, relying only on the good faith or credit of the vendee, they cannot interfere with a conveyance of the property to a purchaser in good faith without notice. But, in any event, we think that action being brought and judgment taken for the balance due upon the note operated as a waiver of the conditional sale and passed the entire ownership to the vendee. Where personal property is sold and delivered upon condition that the title shall remain in the vendor until the payment of the purchase price, and the latter elects to bring suit for the recovery of the debt, the adoption of this course is a waiver of the condition and the sale becomes absolute. *Fredrickson v. Schmittroth,* 77 Neb. 722; 6 Am. & Eng. Ency. Law (2d ed.) 480; *Alden v. Dyer & Bro.,* 92 Minn. 134; *Rich-*

ards v. Schreiber, Conchar & Westphal Co., 98 Ia. 422; *Van Winkle v. Crowell*, 146 U. S. 42.

The judgment of the district court must be

AFFIRMED.

SWAN ANDERSON, APPELLEE, V. PETER CARLSON, APPELLANT.

FILED FEBRUARY 26, 1910. No. 15,881.

1. **Forcible Entry and Detainer:** APPEAL: PLEADING. "In actions for the forcible entry and detention or forcible detention of real property, on appeal to the district court it is not necessary that new pleadings be filed." *McCue v. Lee*, 16 Neb. 575.
2. ———: PARTIES. An action for forcible entry and detainer may be maintained by one who has been deprived of the possession of real property by an unlawful and forcible entry thereon, made by a person having the present right of possession.
3. **Instructions** not applicable to the testimony in, or the law of, a case should not be given. Instructions requested by a litigant and applicable to a case may be lawfuly refused, if the trial judge embodies the principles therein stated in instructions given the jury on his own motion.

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

Wilbur F. Bryant, Peter H. Peterson and *M. F. Harrington*, for appellant.

R. J. Millard, contra.

ROOT, J.

This is an action for a forcible entry upon and the unlawful detention of a tract of land. Plaintiff prevailed, and defendant appeals. On a former hearing we dismissed the appeal because the transcript did not show that a final judgment had been entered in the district court. The missing journal entry has been supplied, and the case now comes on for a hearing on the merits.

It appears that plaintiff leased the land in controversy from the owner for one year, commencing March 1, 1906. Defendant rented the land from said owner for five years, commencing March 1, 1907. Plaintiff refused to yield possession, and defendant, in company with several assistants, over plaintiff's objections, took forcible possession of the premises March 1, 1907, and thereafter, by threats and the display of a shotgun, excluded plaintiff therefrom.

1. Defendant argues that the parties are cotenants, but the facts do not sustain the contention. In January, 1907, defendant stored a quantity of grain in a granary on the farm, but this fact was submitted to the jury in an appropriate instruction, and the verdict amounts to a finding that the grain was thus stored without plaintiff's consent.

2. Defendant complains because the district court overruled a motion to compel the parties to file pleadings. The cause was first tried in the county court, and subsequently appealed to the district court. The remedy is given by statute, and plaintiff may file his written complaint with a justice of the peace or a county judge exercising the jurisdiction of a justice of the peace. Code, sec. 1023. The defendant is not compelled to file a written plea; but, if he desires to contest the action, his oral plea of not guilty is entered and the issues are thereby made up. The defeated litigant may appeal to the district court, but the statute makes no mention of pleadings in the appellate court. In *McCue v. Lee,* 16 Neb. 575, it was held that new pleadings need not be filed in the district court. The statute construed in that case was later held to be void for constitutional reasons relating to the title of the bill containing the act, but the reasoning is sound, and applies to the present statute.

3. The court did not err in refusing to give defendant's instruction numbered 1. The court was justified in taking the position that plaintiff did not sell defendant any permanent improvements. The court did not err in refusing to instruct the jury that a tenant unlawfully holding over

and a person forcibly entering the leased premises are equally criminal, and that the law will refuse to aid either party. To so construe the law would amount to a repeal of the statute. *Tarpenning v. King*, 60 Neb. 213. Instructions 3 and 4 requested by defendant are foreign to the issues in the instant case, and were properly refused.

Complaint is made because instruction numbered 5 was not marked "given" or "refused," and was not delivered to the jury. Assuming that this instruction was not given, the fact does not constitute reversible error. The instruction, in substance, states that instructions prepared by counsel and given by the court are entitled to as much weight as instructions prepared and given by the court. But one instruction requested by defendant was given the jury, and the principle therein announced is stated in instructions numbered 4 and 5 given by the court on its own motion, so that defendant could not have been prejudiced because the jury were not permitted to read defendant's instruction numbered 5.

4. It is insisted that the verdict is contrary to instruction numbered 6 given by the court at defendant's request, and that the verdict is not supported by the evidence. The instruction, in effect, informed the jury that, if defendant with plaintiff's permission entered upon and occupied part of the demised premises, they should find for defendant. The testimony is conflicting as to whether or not the grain stored in the granary by defendant was placed there with plaintiff's consent. Anderson insists he never gave his consent thereto, but intimated to defendant that, if the grain was thus stored, plaintiff would use it. Plaintiff stands in an unfavorable light. His lease expired February 28, 1907, yet he refused to yield possession of the premises to his successor, the defendant, unless paid $100, but these facts did not justify Carlson in forcibly dispossessing Anderson. The law is well settled that the rightful owner of real estate entitled to the possession thereof cannot take the law into his own hands and recover that possession by violence from one in actual and peace-

able possession of the premises. *Myers v. Koenig,* 5 Neb. 419; *Tarpenning v. King,* 60 Neb. 213. See, also, *Reeder v. Purdy,* 41 Ill. 279. We think the court would not have erred had it permitted defendant to further cross-examine plaintiff, but it is just as evident that no reversible error was committed in sustaining the objections referred to in defendant's brief. The trial court is vested with considerable discretion in such matters of practice; and, unless that discretion is abused, its rulings will not work a reversal of a case.

Upon a consideration of the entire record, we are satisfied that the judgment of the district court is right, and it is

AFFIRMED.

CHARLES T. SCHNEIDER, APPELLANT, V. ORAN F. PLUM ET AL., APPELLEES.

FILED FEBRUARY 26, 1910. No. 15,925.

Municipal Corporations: SIDEWALKS: VOID ASSESSMENT: INJUNCTION. In litigation concerning a special assessment levied upon village lots to pay for a sidewalk constructed in a street adjacent to such real estate, if it appears that the village board in levying the assessment did not take into account the benefits and damages resulting from the construction of the sidewalk, but levied the total cost thereof without regard to such benefits or damages, the tax is void, and its collection may be enjoined.

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

H. C. Vail, for appellant.

J. A. Price, contra.

ROOT, J.

This is an action to enjoin the trustees and clerk of the village of Petersberg and the county treasurer of Boone

county from collecting a special assessment levied upon plaintiff's lots in said village to defray the cost of constructing a concrete sidewalk adjacent to said property. Defendants prevailed, and plaintiff appeals.

1. The facts are practically undisputed. Petersberg is a municipal corporation containing less than 800 inhabitants. Plaintiff is, and during the times hereinafter mentioned was, the owner of lots 4 and 5 in block 12 in said village. About 1895 a board sidewalk was constructed contiguous to said lots, and in 1907 it was somewhat out of repair. In April, 1907, the village trustees enacted an ordinance requiring lot owners in said village, when requested by a resolution of the trustees, to construct, reconstruct or repair sidewalks adjacent to their respective lots. The form of the resolution to be adopted in such cases is set forth in the ordinance. Upon the adoption of such a resolution, the village marshal is directed to deliver a copy to the owner of the lot or lots affected, or to leave it at such owner's usual place of residence. If the sidewalk is not constructed or repaired, as the case may be, within 30 days after such service, the village is authorized to make the improvement, and levy an assessment against the property to defray the expense incurred. On the 5th day of June, 1907, a resolution was duly passed commanding plaintiff to construct a sidewalk along said lots, and on the 12th of that month a copy of the resolution, neither signed nor certified to by the clerk, was delivered to plaintiff's wife upon the premises in question. Plaintiff was away from home at the time, but the notice was delivered to him about the 20th or 23d of the month Plaintiff failed to construct the sidewalk, and the village authorities proceeded under the ordinance to make the improvement. Thereafter the trustees notified plaintiff they would meet at a definite time for the purpose of levying an assessment upon his lots to pay the expense of constructing said sidewalk. At the time fixed in the notice the village board passed the following resolution: "Be it resolved by the chairman and village board of the village

of Petersberg that lots 4 and 5 of block 12 of the original town of Petersberg be valued at $1,400 for the purpose of assessment, and that there be levied against said lots a special tax amounting to $80, said amount being a total expense in building the cement sidewalk along the south side of Rae street and along said lots; further that the village clerk be instructed to file a certified copy of this resolution, together with a certified copy of the notice served upon the occupants of said lots of this special meeting, with the county clerk of Boone county, Nebraska." Copies were duly filed. Plaintiff argues that the copy of the resolution delivered to his wife at their home did not give the trustees jurisdiction over his property. The statute under which the assessment was made does not require notice to be given the lot owner before a sidewalk may be constructed. Ann. St. 1909, secs. 8916-8919. Notwithstanding the statute, village trustees have authority to prescribe by ordinance the jurisdictional steps to be taken by them in such cases. *Ives v. Irey,* 51 Neb. 136. Having exercised that power, the trustees would be bound by the ordinance. *State v. Cosgrave,* 85 Neb. 187. The ordinance does not require that the copy of the resolution to be delivered to the lot owner shall be signed by the clerk or attested by that officer, nor certified nor sworn to by the marshal. The copy describes plaintiff's lots with sufficient certainty, and, among other things, recites: "Be it resolved by the board of village trustees of Petersberg, Nebraska," etc. Plaintiff could not have been, and was not, misled, and we think the trustees acquired jurisdiction to make the improvement, and by a proper procedure to assess a tax upon plaintiff's lots for the net benefits thereby accruing to them.

2. It is contended that the trustees did not ascertain the benefits and damages, if any, resulting to the property from the construction of the sidewalk, and exceeded their power by arbitrarily assessing the cost of the improvement to plaintiff's lots. There is merit in this contention. The vital principle underlying special assessments is that

the value of the property taxed has been increased in a sum at least equal to the assessment levied. To levy a tax without a corresponding increase in value is to take private property for public use. *Hanscom v. City of Omaha*, 11 Neb. 37; *Cain v. City of Omaha*, 42 Neb. 120; Const., art. IX, sec. 6. The legislature, recognizing its limitations and the rights of the citizen, provided with reference to special assessments by village authorities: "Such assessment shall be made by the council or board of trustees at a special meeting, by a resolution fixing the valuation of such lot assessed, taking into account the benefits derived or injuries sustained in consequence of such contemplated improvements, and the amount charged against the same, which with the vote thereon by yeas and nays shall be spread at length upon the minutes," etc. Ann. St. 1909, sec. 8919. The burden is on plaintiff to prove that the trustees were without authority to levy the assessment under consideration, and the proof upon this issue is the record of the village board. That record is before us, and demonstrates that the statute was ignored. The trustees did not find that the lots were or were not benefited by the construction of the sidewalk, but they arbitrarily assessed upon the real estate the total cost of said improvement. The market value of lots may or may not, according to the circumstances of a particular case, be increased by the construction of a sidewalk adjacent thereto, and the cost of the improvement does not necessarily measure that increase. The trustees were not vested with power to ascertain and then assess the *cost* of the sidewalk, but the benefits accruing to plaintiff's lots by reason of the improvement, not to exceed its cost. We do not intimate that the trustees' record must be faultless, but it must at least show that those officials acted within their jurisdiction and substantially complied with the law. It follows that the assessment under consideration is void. *Smith v. City of Omaha*, 49 Neb. 883; *Hutchinson v. City of Omaha*, 52 Neb. 345; *Harmon v. City of Omaha*, 53 Neb. 164; *Henderson v. City of South Omaha*,

60 Neb. 125; *John v. Connell*, 64 Neb. 233, 71 Neb. 10; *Trephagen v. City of South Omaha*, 69 Neb. 577.

Defendants cite *Barker v. City of Omaha*, 16 Neb. 269, and *Darst v. Griffin*, 31 Neb. 668. In *Barker v. City of Omaha, supra*, no constitutional limitations were suggested by counsel. At the time the assessment considered in the *Barker* case was made, the Omaha charter limited special assessments to 5 per cent. of the value of the lot or tract of land benefited. Gen. St. 1873, ch. 8, sec. 53. The plaintiff in the *Barker* case asserted that the assessment exceeded 5 per cent. of the value of his property, and urged he had not been notified of the meeting of the taxing board. Upon the trial of the case, no proof was made that plaintiff had not been notified or did not have knowledge of said meeting, but he introduced evidence to prove the levy was excessive. The principle of law urged in the case at bar was not considered in the *Barker* case. In *Darst v. Griffin, supra*, the power of the legislature to vest county commissioners with authority to construct ditches for the drainage of lands and to assess a special tax upon real estate for benefits accruing by reason of such improvement was challenged. The statute was upheld. The plaintiff in that case also urged that, if the statute was valid, certain irregularities in the procedure leading up to the levy of the assessment rendered the tax void. The irregularities were found not to be jurisdictional and the plaintiff was refused relief. The application in each of the cited cases of the principle that he who asks equity must do equity should be considered with reference to the fact that the assessing board was held to have had jurisdiction to levy some part of the tax assessed. *Redick v. City of Omaha*, 35 Neb. 125, is another case where the equitable principle was applied. In that case the assessment was according to the foot-front rule, but the taxing board had found that the property thus assessed had been benefited to the amount of the levy, and the assessment was held valid in an action to enjoin its collection. That these cases do not control the

instant one is evident from the failure of this court to mention them in *Smith v. City of Omaha, Hutchinson v. City of Omaha, Harmon v. City of Omaha, Henderson v. City of South Omaha, John v. Connell* and *Trephagen v. City of South Omaha, supra.* In *Hutchinson v. City of Omaha, supra,* we held the levying of a special assessment was not a judicial act, and that the district courts should not, where the assessing authority had acted without jurisdiction in cases of special assessments, attempt to make that levy by directing the plaintiff to pay any part of the void charge as a condition precedent to relief. See, also, *Harmon v. City of Omaha, supra.*

Other reasons are advanced by plaintiff to sustain his contention that said assessment is void. They have all been considered, and have been found insufficient to justify us in extending this opinion by a specific mention of each argument. While we agree with plaintiff that the village board did not have power to make the assessment levied upon plaintiff's lots, we do not think the trustees are without power to eventually levy and collect the amount of the net benefits, if any, accruing to said lots by reason of the construction of the sidewalk in question. Neither the statute nor the village ordinance fixes any limitation of time subsequent to the completion of a sidewalk within which the trustees may levy special assessments for benefits bestowed. The trustees may, therefore, by retracing their steps and giving proper notice, sit as a board of equalization and assess whatever net benefits accrued to plaintiff's lots by reason of the construction of the sidewalk in question.

The judgment of the district court, therefore, is reversed and the cause remanded, with directions to enter a judgment restraining the collection of the tax in dispute, without prejudice to a subsequent levy, for the net benefits accruing to plaintiff's lots by the construction of the sidewalk under consideration, but not to exceed the cost of such construction.

REVERSED.

IRA W. OLIVE, APPELLANT, V. SCHOOL DISTRICT ET AL., APPELLEES.

FILED FEBRUARY 26, 1910. No. 16,481.

Schools and School Districts: ELECTIONS: BONDS. Women entitled to vote at school elections may lawfully vote for or against school district bonds.

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

W. D. Oldham, for appellant.

H. D. Rhea, E. A. Cook and *Warrington & Stewart, contra.*

ROOT, J.

This action involves the validity of certain school district bonds. Defendants prevailed, and plaintiff appeals.

It is conceded by the litigants that the record presents but one controlling fact for our determination, and that is whether women may under any circumstances lawfully vote to authorize a school district to issue bonds. If, as plaintiff contends, the constitution disqualifies women from voting at such an election, the judgment of the district court should be reversed, otherwise it should be affirmed. In 1858 the territorial legislature provided by suitable legislation for school districts in the various townships in organized counties. Voters resident in the respective school districts qualified to vote at the territorial and county elections were authorized to vote at school district meetings. The districts were not authorized to issue bonds. In 1869 the state legislature passed an act "to establish a system of public instruction for the state of Nebraska." 2 Complete Session Laws, p. 448 *et seq.* Section 23 of the act provides: "Every inhabitant of the age of twenty-one years residing in the district, and liable to pay a school district tax therein, shall be enti-

tled to a vote at any district meeting." Section 30 of the act provided that school districts might borrow not to exceed $5,000 to pay for school sites and the construction of schoolhouses, if authorized by a majority of the qualified voters of the district present at an annual meeting or at a special meeting called for the purpose of voting upon such a proposition. The constitution of 1866 provides that every male person of the age of 21 years or upwards, resident of the state, county and precinct for the time provided by law, and a white citizen of the United States, and every white male person of like age and residence, but of foreign birth, who had declared his intention to become a naturalized citizen of the United States, should be an elector. It will be noticed that the legislature did not refer to the persons entitled to vote at school meetings as electors, but as inhabitants of the district, so that women were recognized as competent to participate in school elections as early as 1869. In *State v. School District,* 13 Neb. 78, it was held that the statute of 1869, *supra,* authorized school districts to not only borrow money, but issue bonds as evidence of the debt thereby incurred. *State v. School District,* 13 Neb. 82; *Orchard v. School District,* 14 Neb. 378.

Section 1, art. VII of the 1875 constitution, provides: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: *First,* citizens of the United States. *Second,* persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States, on the subject of naturalization, at least thirty days prior to an election." Section 5, art. IX, further provides: "County authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of

the county." Counsel for plaintiff argues that the constitutional qualifications of electors may not be enlarged or curtailed by legislation; that no person lacking any of these qualifications has the right, or can be given authority by the legislature, to vote for any office created by the constitution, or upon any proposition contemplated by that instrument; that since the county authorities are directed by statutory law to annually levy taxes in the respective school districts within the county to satisfy interest accruing on unpaid school district bonds, to accumulate a fund by such taxation to eventually pay such debts, and no bonded indebtedness may be created without a vote of the qualified electors in the district, such an election is within the scope of these constitutional provisions. The fact that the county authorities, and not the school district officers or the electors in the district, are directed to levy taxes to satisfy bonded debts has no significance in this case. The method provided by law is one of convenience only, and was not enacted to satisfy any constitutional limitation. Section 6, art. VIII of the constitution, directs the legislature to "provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." Section 4, art. VIII of the constitution, provides that certain gifts, grants and devises, the interest arising on certain funds, rents from unsold school lands, "and such other means as the legislature may provide, shall be exclusively applied to the support and maintenance of common schools in each school district in the state."

In *State v. Walsh,* 31 Neb. 469, we held that the word "means" as used in section 4, art. VIII, *supra,* refers to money arising from annual taxation for school purposes. In *Affholder v. State,* 51 Neb. 91, we held that the constitution vested the legislature with power to provide the funds, and discretion in applying the revenue, necessary to furnish free instruction to the children of the state. There is no provision in the constitution that the legislature or the agencies created by statute for the purpose

of carrying out the mandate of the people shall not provide means for educating the children of school age in the respective school districts, unless the voters resident therein shall have authorized the levy of taxes or the creation of a debt for that purpose. The legislature has, however, with commendable wisdom provided that in rural school districts the electors shall levy local taxes for school purposes, and that a bonded debt shall not be created in any school district unless the qualified voters therein shall have first given their consent thereto at an election.

In 1879 the legislature enacted a general law concerning school district bonds. Laws 1879, p. 170 *et seq.* (Ann. St. 1909, sec. 11318 *et seq.*). Section 11319 directs that no bonds shall be issued until the proposition shall have been submitted to the qualified electors of the district, and two-thirds of such voters present and voting on the question shall have declared by their votes in favor of such bonds, nor shall a bond election be called unless one-third of the qualified electors in the district petition therefor. Chapter 78, laws 1881, is a comprehensive act "to establish a system of public instruction for the state of Nebraska." Section 4, subd. II thereof, provides: "Every voter and every woman who has resided in the district forty days and is over twenty-one years of age and who owns real property in the district shall be entitled to vote at any district meeting. Every voter and every woman who has resided in the district forty days and is over twenty-one years of age and who owns personal property assessed in his or her name at the last assessment shall be entitled to vote at any district meeting. Every voter and every woman who has resided in the district forty days and is over twenty-one years of age and who has children of school age residing in the district shall be entitled to vote at any district meeting." Subsequent amendments to the school law upon this subject do not change the qualifications of such voters. The amendment of 1899 provides that the qualified voters, as aforesaid,

shall be entitled to vote "at any district meeting or school election." Laws 1899, ch. 59, sec. 1 (Ann. St. 1909, sec. 11533). The act of 1879, *supra,* has not been modified in any manner material for an understanding of the instant case. In construing the act of 1881, *supra,* in *State v. Cones,* 15 Neb. 444, it was held that a woman possessing the statutory qualifications might lawfully vote at school district meetings, and hold the office of school trustee. Counsel argues that Judge MAXWELL'S opinion, by inference, repels the thought that female electors may vote to authorize the creation of a bonded debt. Judge MAXWELL does say "the statute merely permits women possessing the necessary qualifications to have a voice in the choice of school officers, selection of teachers, and general management of schools", but the point of law presented in the instant case was not involved in the cited one, and Judge MAXWELL'S argument does not relate to nor control the subject in controversy here.

The legislature from time to time has enacted statutes for the creation and management of school districts within the various cities of the state, and from the necessities of the case has vested the boards of education with authority to levy a school tax of 20 mills on the dollar valuation on all property in such districts. School levies have been made time and again in excess of 15 mills without first submitting the question to the voters of the district, and yet, if plaintiff's construction of the constitution is to be accepted, the excess over 15 mills of those levies is void. The entire course of legislation is repugnant to the construction plaintiff contends should be given the constitution. To hold as he desires would hamper the administration of the schools of the state, and emasculate article VIII of the fundamental law. The argument does not appeal to us as sound.

The judgment of the district court is right, and is

AFFIRMED.

FAWCETT, J., dissenting.

The majority opinion quotes from chapter 78, laws 1881, which provides that every voter and every woman who has resided in the district 40 days and is over 21 years of age and who owns real property in the district, or who owned personal property in his or her name at the last assessment, or who has children of school age residing in the district, shall be entitled to vote at any district meeting. Reference is also made to the amendment of 1899, which provides that such persons shall be entitled to vote "at any district meeting or school election." The opinion also states that the act of the legislature of 1879 directs "that no bonds shall be issued until the proposition shall have been submitted to the qualified electors of the district, and two-thirds of such voters present and voting on the question shall have declared by their votes in favor of such bonds, nor shall a bond election be called unless one-third of the qualified electors in the district petition therefor." The opinion also states that the act of 1879 "has not been modified in any manner material for an understanding of the instant case." In this latter statement I fully concur. At the January, 1884, term of this court, in *State v. Cones*, 15 Neb. 444, MAXWELL, J., in construing the act of 1881, *supra*, said: "The statute merely permits women possessing the necessary qualifications to have a voice in the choice of school officers, selection of teachers, and general management of schools. And, being entitled to vote, they are also entitled to act as trustees. We have no doubt, therefore, that the act allowing women possessing the qualifications prescribed in the act to vote at school meetings is constitutional and valid." In that construction of the law by the learned judge I fully concur. In speaking of the law as it then stood, the majority opinion states: "Subsequent amendments to the school law upon this subject do not change the qualifications of such voters." In this statement I concur. The opinion further says: "The amendment of 1899 provides that the

qualified voters, as aforesaid, shall be entitled to vote 'at any district meeting or school election' "; and because of the addition of the words "or school election" the majority hold that women possessing the qualifications above set out are entitled to vote at a bond election. In other words, the opinion holds that an election for the issuing of bonds is a school election within the meaning of the law. In this I am unable to concur. To my mind there is a decided distinction between permitting women to vote on certain questions and declaring them to be electors. In the act of 1879, which authorizes an election for the issuance of bonds, the legislature has, to my mind, carefully guarded against all doubt on the subject by providing that no bonds shall be issued until the proposition shall have been submitted "to the *qualified electors* of the district"; and, further, that no such bond election shall be called "unless one-third of the *qualified electors* in the district petition therefor." I think the legislature was carefully drawing the distinction between electors and other persons who might vote on school matters at a district meeting. Section 1, art. VII, const. 1875, declares who shall be an elector, as follows: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: *First*, citizens of the United States. *Second,* persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States, on the subject of naturalization, at least thirty days prior to an election." Sec. 3, ch. 26, Comp. St. 1909, reaffirms section 1, art. VII of the constitution. The question as to who shall be an elector having been thus definitely settled by both the constitution and the statute above cited, and the legislature having expressly limited the right to vote at an election for the issuance of bonds to qualified electors of the district, I do not think it is within the province of the court to extend that right by construc-

tion so as to permit persons who are not qualified electors under the constitution to vote upon so important a question; nor do I think it can be successfully claimed that a bond election or an election for the issuance of bonds is a school election within the meaning of the law. The law of 1881 granted women the right to vote at any district meeting. The amendment of 1899 gives them the right to vote at any district meeting or school election. I think the purpose of the legislature was to relieve the question of any doubt as to the right of women to vote for the election of school officers. The law of 1881 giving them the right to vote at a district meeting clearly entitled them to vote on the question of selection of teachers and matters pertaining to the general management of schools; but it left the matter in some doubt as to whether they were entitled to vote at a school election for the election of directors. The amendment of 1899 solved that doubt by providing that they might vote not only at district meetings, but also at school elections. I think this was what the legislature had in mind, but do not think that the thought ever entered the mind of any member of the legislature that by that amendment they were practically making women of the class designated electors. The word "elector" has a clear and distinct meaning. It had been defined in the constitution and by the legislature; and, if it had been the purpose of the legislature to make women electors, it would have been a very easy matter to have so stated in express terms. I therefore hold that the rights possessed by women today are the same as declared by MAXWELL, J., in *State v. Cones, supra,* viz.: "To have a voice in the choice of school officers, selection of teachers, and general management of schools. And, being entitled to vote, they are also entitled to act as trustees;" but that they have no other or greater rights.

A. A. COOPER WAGON & BUGGY COMPANY, APPELLANT, V. FRED B. TORBERT, APPELLEE.

FILED FEBRUARY 26, 1910. No. 15,926.

Principal and Agent: AUTHORITY OF AGENT: RELEASE OF GUARANTOR. In a suit by a manufacturer of farm implements to recover from a retail agent the balance due on purchasers' notes guaranteed by him, the foundation for proof that he had been released from liability on the guaranty by an agreement with plaintiff's traveling representative to procure chattel security for purchasers' notes, *held* sufficient as to such representative's authority, where defendant, without objection or contradiction, testified he had transacted business with him as plaintiff's agent and his acts had been approved by plaintiff; had bought goods from him and turned over to him for plaintiff money and notes in settlement; had purchased goods from him which plaintiff had delivered; had made settlements with him and plaintiff had accepted the benefits thereof; and had performed his agreement by procuring chattel security, which the record shows to have been accepted by plaintiff.

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

N. D. Burch, for appellant.

A. H. Tingle, D. A. Harrington and *Jeannette Taylor, contra.*

ROSE, J.

Plaintiff is an Iowa corporation engaged in manufacturing and selling wagons, buggies and farm implements, and defendant was its agent at Dorsey, Nebraska. Under the contract of agency defendant was required to keep a stock of goods on hand and to make sales at retail. He was authorized to accept, in settlement for vehicles sold, farmers' notes payable to plaintiff, and was required to deliver the proceeds in notes or cash to plaintiff, and to make monthly reports of sales and of goods on hand. The contract also contained a provision requiring defendant

to guarantee payment of all notes delivered to plaintiff. The petition contains two counts. On the first, plaintiff seeks to recover on an open book account, running from June 11, 1901, to November 27, 1904, a balance of $260. On the second, judgment is demanded for a balance of $589.26 on unpaid notes guaranteed by defendant. As to the first count, defendant denies the indebtedness *in toto*, alleges the account was settled, and that plaintiff owes him $315.54. As a defense to the second count, defendant alleges he is not indebted to plaintiff in any sum whatever on account of the guaranty pleaded. He also pleads, among other things, a release from liability on the guaranty by performance of a subsequent agreement entered into with plaintiff, through its agent P. J. Donoher, to take from purchasers and turn over to plaintiff chattel security for notes. Upon a trial to a jury a verdict was rendered in favor of defendant for $10.70, and from a judgment thereon plaintiff has appealed.

To defeat the first cause of action, defendant testified to a settlement with plaintiff, through its agent F. M. Barron; and the first reason urged for a reversal is that there is no proof of Barron's authority to act in that capacity. If this position is well taken, defendant nevertheless testified positively, without objection, that his books of account showed a balance in his favor. He also testified that he was not indebted to plaintiff in any sum. An examination of the record shows that as to the first cause of action the evidence is sufficient to sustain the verdict in favor of defendant.

In establishing his defense to the second cause of action, defendant testified to facts tending to show he had entered into and performed an agreement for his release as guarantor, that he made the agreement with plaintiff, through its agent P. J. Donoher, and that he was released by taking and turning over to plaintiff chattel security instead of the guaranteed farmers' notes authorized by the original contract. Plaintiff next argues there is no foundation for this proof because there is no evidence

that Donoher had authority to act for plaintiff in making such an agreement. The following is a summary of the testimony of defendant on this subject: He was acquainted with Donoher, who was plaintiff's traveling representative. Defendant had transacted business with him as plaintiff's agent, and plaintiff had approved his acts; had bought goods from him and turned over to him for plaintiff money and notes in settlement; had purchased goods from him, which plaintiff had delivered; and had made settlements with him, and plaintiff accepted the benefits thereof. Defendant also detailed a number of transactions with Donoher in which he acted for plaintiff. This testimony was admitted in evidence, without objection, and is uncontradicted. In addition, the record shows defendant procured chattel security pursuant to the terms of the new agreement, and that plaintiff accepted the fruits of performance on his part. In absence of objections or contradictory evidence, the testimony, as a foundation for proof of plaintiff's release, will be held sufficient on appeal.

The evidence being sufficient to sustain the verdict, and no other assignment of error being argued, the judgment will be

AFFIRMED.

GILBERT E. HAASE, APPELLEE, V. BUFFALO COUNTY, APPELLANT.

FILED FEBRUARY 26, 1910. No. 15,933.

Counties: LIABILITY: TREASURER'S BOND. The expense of a county treasurer's official bond, when legally executed by a qualified bonding company as surety and approved and accepted by the county board, is a binding obligation of the county. Comp. St. 1909, ch. 10, secs. 9, 9*a*, 9*b*.

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

J. M. Easterling, for appellant.

H. M. Sinclair and *W. D. Oldham, contra.*

ROSE, J.

This is a suit by Gilbert E. Haase, county treasurer of Buffalo county, plaintiff, to recover from Buffalo county, defendant, a premium of $370 on an official surety bond for the term of office beginning in 1908. There is no dispute about the facts. Plaintiff was elected, took the oath of office, and gave bond in the sum of $100,000 with the Lion Bonding Company of Omaha as surety. The surety was duly authorized by law to execute the bond, and it was accepted and approved by the county board. Plaintiff paid the premium of $370, a lawful and reasonable charge, and filed with the county board a claim therefor, which was first rejected and afterward allowed to the extent of $185. From this order plaintiff appealed to the district court, where a judgment was rendered in his favor for $370, and defendant appealed to this court.

The only question presented is whether, under the facts stated, the county is liable, the statutory provisions applicable being as follows: "All official bonds of county, precinct, and other local officers, shall be executed by the principal named in such bonds, and by at least two sufficient sureties who shall be freeholders of the county in which such bonds are given; or any official bond of a county, precinct or local officer, may be executed by the officer as principal and by a guaranty, surety, fidelity or bonding company as surety, or by two or more of such companies; but only such companies as are legally authorized to transact business in this state shall be eligible to suretyship on the bond of a county, precinct or other local officer." Comp. St. 1909, ch. 10, sec. 9.

"That when a county treasurer, in giving the bond required by him by law shall furnish a bond executed by a surety company, authorized by the laws of this state to

execute such bond, and such bond shall be approved by the county board, then in each and every case the county may pay the premium for such bond, not in any instance to exceed one-half of one per cent. per annum of the penalty in the bond so executed and approved." Comp. St. 1909, ch. 10, sec. 9*a*.

"Upon the execution and approval of any such bond the county board shall direct the county clerk to draw a warrant upon the county treasurer in payment of such premium against the general fund of the county, such warrant to be signed by the chairman of the county board, countersigned by the county clerk and sealed with the county seal." Comp. St. 1909, ch. 10, sec. 9*b*.

The county attorney takes the position that the county may pay all or any part of the premium or reject its payment *in toto,* and argues that the statutes are permissive, and not mandatory. If this interpretation is adopted, it is perfectly obvious that the statutes will operate diversely in different counties, according to the varying convictions or motives of the officers comprising county boards. Uniformity of operation under similar circumstances is the evident intention of the legislature. Counties and compensation of officers are classified to that end. This purpose in a measure would be defeated by the adoption of defendant's construction.

By the section first quoted provision is made for the giving of a personal bond. Where this course is pursued by the county treasurer and the county board, both avoid the expense of a surety bond. Where the bond is executed by a surety company, however, these provisions govern: "The county may pay the premium for such bond", and "upon the execution and approval of any such bond the county board shall direct the county clerk to draw a warrant upon the county treasurer in payment of such premium." In giving effect to these expressions, it should be observed that when the county board approved and accepted the surety bond executed by the Lion Bonding Company, individual obligations or rights of plaintiff

arose. If the county did not become liable for the payment of the premium, that burden rested on plaintiff individually. When the surety bond was approved and accepted, the funds of the county were protected by a modern, statutory method created for the public welfare. When the county board approved and accepted the surety bond, its discretion as to incurring the resulting expense terminated. Afterward the county could not arbitrarily refuse to pay the premium. This is believed to be the logical result of a correct interpretation of the statutes. The word "may" in the sentence, "The county *may* pay the premium," and the word "shall" in the sentence, "The county board *shall* direct the county clerk to draw a warrant," in their relation to all the legislation on this subject, when applied to the facts of this case, are mandatory. *People v. Commissioners of Buffalo County,* 4 Neb. 150; *Doane v. City of Omaha,* 58 Neb. 815.

The district court having taken this view of the law, the judgment below will be

AFFIRMED.

MINNIE LANHAM, APPELLEE, V. CHARLES J. BOWLBY ET AL., APPELLANTS.

FILED FEBRUARY 26, 1910. No. 15,863.

1. **Appeal:** STIPULATION. Where a petition is filed in the district court by which plaintiff in possession seeks a decree quieting title to real estate, and defendant answers denying the right of plaintiff to such possession and demanding judgment in his favor therefor, and decree is entered denying relief to either party, from which the defendant alone appeals, but pending the appeal the parties stipulate that "the court shall consider all questions for and against either party as though both parties had taken an appeal and enter decree accordingly", this court will treat the whole case as before it the same "as though both parties had taken an appeal."

2. **Adverse Possession:** ACTS CONSTITUTING. Where the purchaser of

real estate under a verbal contract of sale is put in possession by the vendor under an oral agreement for the payment of the purchase price thereafter, the possession of the vendee will not become adverse until payment in full of the agreed consideration. But in such a case where a dispute arises between the parties as to whether or not such consideration has been paid in full, and the vendee in person or by his agent or attorney notifies the vendor that he claims full payment of such consideration has been made, and demands of the vendor a deed for said real estate, such acts will constitute such an assertion of ownership by the vendee that his possession thereafter will be adverse; and, if such possession is permitted to continue for the full statutory period of ten years thereafter, it will vest in the vendee an absolute title to such real estate.

3. ———: EVIDENCE. And in a suit thereafter by the vendee to quiet his title, where the testimony of the vendor and vendee is conflicting, but it appears from the evidence that the vendor never at any time after such assertion of ownership and demand for a deed by the vendee made any demand upon the vendee for payment of any balance claimed to be due, nor in any manner questioned the title or right of possession of vendee, and it further appears from the evidence that the vendee and his heirs have during all of said time been in possession of and exercised absolute dominion over said real estate, such facts and circumstances will be held to furnish sufficient corroboration of the testimony of vendee to entitle him to a decree quieting his title to such land.

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

W. G. Hastings and *M. H. Fleming,* for appellants.

Thomas H. Matters, contra.

FAWCETT, J.

This is the second time this case has been before us. For our former opinion, see 79 Neb. 39. At that hearing a judgment in favor of plaintiff was reversed on the ground that it was not sustained by sufficient evidence. On the second hearing plaintiff and defendants each asked affirmative relief. The court denied relief to either party, and dismissed both the petition and cross-petition. Defendants appealed, and plaintiff presents a cross-appeal.

After the filing of the appeal by defendants, a stipulation was filed signed by the attorneys for each party, as follows: "It is hereby stipulated by and between all parties hereto that either party to this suit has the right to use the bill of exceptions and transcript upon the questions presented in the record, and the court shall consider all questions for or against either party as though both parties had taken an appeal and enter decree accordingly." It is contended by defendants that plaintiff has taken no appeal, and that the only thing to be considered is their own appeal from the judgment of the district court dismissing their cross-petition, while plaintiff insists that the stipulation above set out gives the court full jurisdiction to examine into and decide the whole case "for or against either party as though both parties had taken an appeal", and that this court shall "enter decree accordingly." Upon full consultation we are all agreed that under the provision of section 675 of the code, which provides that "the filing of such transcript shall confer jurisdiction in such case upon the supreme court", jurisdiction was obtained, and the case being in equity, and the parties entitled to a trial *de novo,* the stipulation must be held to require the whole case to be examined the same as though plaintiff had prosecuted a separate and distinct cross-appeal. The writer being so instructed, that course will be followed, notwithstanding any irregularity in the proceedings.

The petition alleges substantially: That in January, 1880, defendant Charles J. Bowlby, being the owner in fee simple of the southeast quarter of the northeast quarter of section 33, township 8, range 4 east of the Sixth principal meridian, in Saline county, Nebraska, sold the same by verbal contract to John Lanham for the sum of $1,100, payable as follows: "Said sum of $1,100 to be credited upon the books of John Lanham and paid for in building material, rent, and other materials to be furnished for the said Charles J. Bowlby by the said John Lanham, and the said Charles J. Bowlby agreed to con-

vey said premises to John Lanham by deed of general warranty upon the payment of the purchase price as aforesaid"; that defendant Bowlby thereupon delivered possession of said premises to said John Lanham under said contract, and that said John Lanham "continued in open, notorious, visible, continuous, exclusive, adverse and actual possession of the same from that time until his death"; that said Lanham performed said contract on his part by crediting the purchase price as agreed, and by furnishing rent and materials as agreed in the sum of $1,313.61; that said John Lanham duly performed all the conditions of said contract, and, when said performance upon his part was completed, he requested the defendant Bowlby to convey said premises according to the terms of said contract, but defendant refused and continues to refuse to execute and deliver said conveyance; that on or about March 3, 1900, the said John Lanham died, leaving plaintiff and certain other heirs at law; that all claims against the estate of John Lanham were fully paid and his estate finally settled; that all of the other heirs at law have since the settlement of said estate conveyed their interest in said lands and premises to plaintiff; that at the time of the purchase of said property by John Lanham defendant Mary Bowlby claimed to have a contingent right of dower in said premises by reason of her marriage to defendant Charles J. Bowlby, for which reason she is made a party defendant; that plaintiff has often requested said Charles J. Bowlby to convey said premises to her, but that said defendants Bowlby have each failed and refused and still refuse to execute and deliver to plaintiff a deed to said premises; that plaintiff is now in the actual possession of said premises, and has been in the open, notorious, visible, continuous, exclusive, adverse and actual possession thereof since the death of the said John Lanham; that defendant Charles J. Bowlby claims to have some title adverse to plaintiff's title to said described premises by virtue of a certain deed now on record in said Saline county, but that said Bowlby

has no right, title or interest in said premises; that said deed was so recorded in the office of the clerk of said Saline county; that said deed is valid on its face, and constitutes a cloud upon the title of plaintiff and injures the market value thereof; that defendant Charles J. Bowlby will not institute an action at law to determine the legal title to said premises, and that plaintiff is without remedy at law. The prayer of the petition is for a decree; that her title be quieted; that defendants be decreed to execute and deliver to plaintiff a good and sufficient deed, and, failing so to do, that the decree of the court be entered canceling all of the right, title and interest of said defendants; that the cloud caused by the said record of said deed be removed, and that same be declared to be no cloud upon the title of plaintiff, and that defendants be perpetually enjoined from instituting any suit at law or in equity against plaintiff for possession of the premises, or from setting up any claim or claiming any estate therein adverse to plaintiff, and for such other and further relief in the premises as equity and good conscience may require.

The answer alleges substantially as follows: Admits the relation of defendants as husband and wife and the relationship of the other parties as alleged by plaintiff; admits the death of John Lanham, and that the records show the title to the lands in controversy, to wit, the southeast quarter of the northeast quarter of section 33, township 8, range 4 east, in Saline county, Nebraska, in the defendant Charles J. Bowlby; denies generally all the allegations of the petition not expressly admitted; specifically denies that the said John Lanham or either of his heirs or successors or the plaintiff ever had possession of said real estate adverse to defendants; avers that said John Lanham in his lifetime "as tenant at sufferance of the said Charles J. Bowlby" went upon the land and removed ice therefrom "under the expectation that he would buy said real estate of the said Charles J. Bowlby; that he never bought it; that, on the contrary, he entirely

failed to do so"; that from the time he so went on to said real estate to cut ice until the time of his death, about the year 1900, he recognized and admitted that the said Charles J. Bowlby was the owner of said land, "and that he was there doing whatever he did there and, among other things, wrongfully removed timber therefrom under the said Charles J. Bowlby as the owner thereof, and not otherwise"; that plaintiff is now in possession of said premises wrongfully and without any right of title or right of possession; that defendant Charles J. Bowlby is, and for over 29 years has been, the owner of said real estate in fee simple, and is entitled to the possession thereof; "wherefore defendants pray judgment that plaintiff have no cause of action; that the defendant Charles J. Bowlby is the owner of said real estate, and entitled to the possession thereof, and that the title thereto be quieted in him, and the possession thereof be restored to him, and that defendants recover their costs, and for such other and further relief as equity and good conscience may require."

For reply, after admitting the allegations in the first paragraph of defendants' answer, and denying generally all other allegations in the answer except such as are admitted by the reply, plaintiff alleges substantially that John Lanham during his lifetime went onto and removed ice from the lands, and removed timber therefrom during his lifetime; that in the year 1880 or thereabout the said John Lanham purchased from defendant Charles J. Bowlby the land in controversy at an agreed price of $1,100, which amount was to be credited on the books of John Lanham and paid for in rent, building and other material furnished to and for the said Charles J. Bowlby by the said John Lanham (setting out the same statement referred to in the petition); that during the year 1888 plaintiff had under the terms of the said contract completely paid the purchase price of said premises, and was entitled to a conveyance thereof; that at the time of the completion of the payment of the purchase price in

the year 1888 the said John Lanham was in actual possession of said premises under and by virtue of said contract of purchase; that from and after the said year of 1888 the said possession of the said John Lanham commenced and continued to be absolute, open, notorious, adverse, continuous, exclusive and actual, he claiming title thereto as the absolute owner thereof, and that such ownership and possession continued from said date until the present time in the said John Lanham, his heirs, and this plaintiff, and that plaintiff is now so in possession.

By reason of the death of John Lanham, the evidence in this case is not of as satisfactory a character as we could wish, but there having been two trials of the case in the district court, at which each side was represented by able and experienced counsel, there is every probability that all the evidence was produced upon the last trial which can ever be furnished by either party. Indeed, this condition was admitted to exist by counsel in their oral arguments at the bar. To allow the decree of the district court therefore to stand would be to leave the parties suspended in mid-air, as it were, and permit the title and the true ownersip of the land in controversy to remain in an unsettled condition for all time. This should not be done unless the evidence is so entirely unsatisfactory that no reasonably just conclusion as to the rights of the parties can be drawn therefrom. We agree with the statement made by Mr. Commissioner EPPERSON at the former hearing that the evidence clearly establishes that plaintiff's ancestor took possession of the property in controversy under a verbal agreement with the defendant, and that he and his heirs have been in continuous occupancy thereof from 1880 until the present. We think the evidence also fully establishes the fact that that "verbal agreement" was a verbal sale of the lands in controversy by defendant Bowlby to plaintiff's ancestor, and that under such verbal sale the said John Lanham, with the full permission of defendant Bowlby, entered upon such possession. From that time until the time of the trial John

Lanham and plaintiff have at all times had the possession and exercised absolute dominion over the lands involved. Mr. Lanham built an icehouse, induced the railroad company to build a track to it, constructed a bridge of some kind, rented a portion of the lands to one Boeckel, who built a slaughterhouse thereon, and, what is still more significant, cut large quantities of timber growing upon the lands and converted it into cordwood. Plaintiff testifies that her father cut timber almost every winter, that he employed at times probably as high as 20 men cutting wood, and at times probably as high as 50 or 100 men cutting ice. Defendant Bowlby himself testified that at one time in passing by the land in the cars he "noticed a lot of wood ricked up there, four feet wide. Q. How much did you see there? A. I could only give an estimate, but there might have been 50 cord and might have been 100, I never was there to measure it. It was long ricks of it. Q. How many ricks did you see? A. Well, I never measured them, so I don't know, but I should say from 50 to 100 ricks or cords. Q. How much is that wood worth? A. I suppose about $4 a cord, from $4 to $5 a cord. Q. That was in about '95 you think? A. Well, along there. It might have been earlier and might have been later, but I think it is probably earlier. It has been a good while ago." Notwithstanding the fact that Mr. Bowlby saw that Mr. Lanham had cut and piled up from $250 to $500 worth of cordwood, he never, so far as the record discloses, made any demand for any portion of the wood, or of the money derived from the sale thereof, nor did he ever complain to Mr. Lanham that he had no right to cut the wood upon the land. In fact, the record is entirely barren of proof that defendant Bowlby ever in any manner during all those years questioned Mr. Lanham's right to the absolute dominion over and control of the lands in controversy. We think this evidence completely destroys defendants' contention that Mr. Lanham was simply "a tenant at sufferance", and entirely overcomes his plea that he never had sold the land to Lanham.

It also furnishes strong corroboration of plaintiff's contention that the land had been fully paid for by her father during his lifetime, for it seems incredible that defendants would permit Mr. Lanham to convert valuable timber into cordwood and retain the full proceeds thereof, if Lanham was at that time indebted to him for any part of the purchase price of the land. We adhere to our former holding that "one who enters into the occupancy of real estate under contract cannot afterwards obtain title thereto by adverse possession, without showing that his occupancy had assumed an adverse character and continued as such during the statutory period." It was by reason of the fact that the evidence at that time was not sufficient to show that the possession obtained by Mr. Lanham, as above set out, had assumed an adverse character, and thereafter continued for the statutory period, that we reversed the judgment of the district court on the former hearing. At the last trial plaintiff introduced as a witness her brother-in-law, Guy L. Abbott, Esq. Mr. Abbott testified that after his marriage to the daughter of John Lanham he assisted Mr. Lanham a good deal in the management of his business until 1892, when he left Nebraska and removed to Sheridan, Illinois. Mr. Abbott was at the time, and still is, a practicing attorney. He testifies that, while so acting for John Lanham in 1888 or 1889, he called upon defendant Bowlby at defendant's office which was then in a building in Crete owned by Mr. Lanham; that he then told Mr. Bowlby "that the land was paid for and we were entitled to the deed, * * * and told him it was all paid for. * * * Of course I can't remember the exact conversation or anything of that kind, but that was the purport of it, that the payments had all been made and I wanted the deed to the land for him. Q. For Lanham? A. For Lanham." On cross-examination he was asked: "Q. Didn't you in that conversation present some kind of an accounting, something like $300 you claimed Lanham had against Bowlby, and you wanted Bowlby to let that go on the purchase price?

A. That was a part of the conversation; yes. Q. Didn't you tell him that the balance you would pay or see paid? A. I probably said to him that if there was any balance that we would pay it, but I didn't consider that there was any balance. Q. Didn't you admit there that that would be all the payment, that account, and the balance would have to be paid in some other way? A. No, sir, neither in words nor effect did I admit that that was all of it. Q. Instead of demanding a deed to Lanham, didn't you ask for a deed to your wife in that conversation? A. No, sir; I asked for the deed to Lanham. Q. Didn't you tell him that Lanham was involved, and you would rather have the deed to your wife in that conversation? A. No, sir. Q. Didn't you tell him something to that effect? A. No; I told him in effect that I wanted the deed to Lanham because the land had been paid for and he wanted a deed." All of this answer after the word "No" was stricken out on motion of defendant.

Mr. Bowlby in his own behalf testified that about 1889 or 1890 Mr. Abbott came to his office with a bill for brick. "My remembrance is it was about $300. He stated that he wanted to make some arrangements for the land, and he asked if I would make a deed to himself or his wife. I think his wife. My remembrance is it was his wife; and they would fix the balance in some way, he didn't say how, but just they would fix the balance. Q. The balance of what? A. Due on the land. Q. Balance over what? A. Over the bill that was presented to me at that time. Q. Wanted you to allow that bill, then, did he? A. Yes; I suppose so, that was the inference, and I declined to do so. Q. Did he state anything about how much the balance was? A. No, sir; didn't say anything about it, never talked on that subject. I asked for the balance, the amount, the bill was before me, and I thought I had kept it, but I never have been able to find it. It was a bill for bricks I had obtained from them, I presume in 1886, '87, or maybe 1889, at different times. Q. State if he gave any reason why he wanted the deed made

in his wife's name or his name? A. No; he didn't say to me at that time why it was that he wanted it. Q. What did you say? A. The reason I wouldn't do it? Q. (540) Yes; what did you tell him? A. I told him if Mr. Lanham had any interest in that land that I didn't feel like it was safe for me to make a deed to other parties, that at that time Mr. Lanham was involved and had creditors and judgments against him, and all that, and that I wouldn't make a deed to anybody else for the land at that time. I didn't think I was safe in doing it." He then denies that Abbott said anything about its being paid for. "He never said to me it was paid for. Q. Now, had the land been paid for, or any part of it? A. It had not according to the agreement or by the agreement."

This testimony by Mr. Bowlby is quite significant. His answer to question 540 shows that he had in mind the fact that a deed should be made to somebody, but the reason which he says he gave Mr. Abbott for not making the deed to Abbott's wife was that he did not feel it would be safe to make a deed to her for the reason "that at that time Mr. Lanham was involved and had creditors and judgments against him", and that he did not think he would be safe in making a deed to anybody else. There is not a particle of testimony in the record to show that what he claims he then said about Mr. Lanham was true, viz., that Mr. Lanham "was involved and had creditors and judgments against him." On the contrary, the record shows that Mr. Lanham at the time of his death, which, according to Mr. Bowlby's testimony, occurred only a year later, was entirely solvent, his estate, outside of the land in controversy, paying all of his obligations. Then, again, it will be observed he does not give a direct answer to the question "Now, had the land been paid for, or any part of it?" His answer is: "It had not according to the agreement or by the agreement." He does not say that it had not been paid for in other ways. He does not attempt to testify that, after Mr. Abbott was there asking for a deed, he ever went to Mr. Lanham prior to his death,

or to the plaintiff thereafter, and demanded any payments, or that they deliver up possession of the land, or asserted any right, title or claim of any kind to the lands in controversy, notwithstanding the fact that during all that time he lived within three-quarters of a mile of the land in controversy. According to Mr. Abbott's testimony, this demand for the deed was made in 1888 or 1889. According to Mr. Bowlby, Mr. Abbott's visit was in 1889 or 1890. Giving defendant the benefit of the later date—1890—and it still appears that from that time until this suit was commenced, a period of more than ten years, he permitted Mr. Lanham and plaintiff to continue in the undisputed possession and control of the lands in controversy without a word of objection. Moreover—a very significant fact—he never filed any claim against the solvent estate of John Lanham for any balance due him. These facts and circumstances furnish strong, and indeed almost irresistible, corroboration of the claim of plaintiff that the land had been fully paid for, and of the testimony of Mr. Abbott that that claim was asserted and deed demanded at the time testified to by him. We think, therefore, that the evidence is now sufficient to establish plaintiff's claim that the statute of limitations began to run against the defendants in 1889 or 1890, and that it had run for more than the statutory period of ten years at the commencement of this suit. No demand for any moneys due or for the possession of the land having been made by defendants for more than ten years prior to the suit, and subsequent to assertion of payment and demand for a deed by John Lanham, plaintiff became invested with an absolute title to the land in controversy. Not only that, but, if defendant Bowlby were now to bring suit for any balance which may have been due in 1889, he could, so far as the record before us shows, be successfully met with a plea of the statute of limitations. We do not think the evidence sustains any of the contentions made by defendant in his cross-petition, but that it is sufficient to sustain the allegations in plaintiff's petition.

The judgment of the district court is therefore reversed and the case remanded to that court, with directions to enter a decree quieting plaintiff's title in and to the lands in controversy.

REVERSED.

JOHN W. COLE, APPELLANT, V. VILLAGE OF CULBERTSON ET AL., APPELLEES.

FILED FEBRUARY 26, 1910. No. 15,915.

1. **Villages:** POOL-HALLS, REGULATION OF. *State v. McMonies*, 75 Neb. 443, has been superseded by section 8887, Ann. St. 1907.
2. ———: ———: DELEGATED POWERS. The legislature has full power to grant authority to villages to license, regulate, or prohibit billiard-halls, pool-halls or bowling-alleys within the limits of such village.
3. ———: ORDINANCES: VALIDITY. "The motive governing a legislative body in passing a statute or ordinance is not a proper subject for investigation by the courts." *McCarter v. City of Lexington*, 80 Neb. 714.

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

John W. Cole and *Morlan, Ritchie & Wolff*, for appellant.

Boyle & Eldred, contra.

FAWCETT, J.

The petition alleges substantially that the defendant village of Culbertson is a municipal corporation under the laws of the state of Nebraska, and that the other defendants are the duly elected, qualified and acting trustees of said village; that at the time of filing his petition plaintiff was, and for many years prior thereto had been, a resident, elector, property owner, and taxpayer of said village; that in the fall of 1907 he purchased a brick build-

ing of the value of $2,500, and at an expense of $300 equipped one of the rooms in said building as a billiard and pool-hall, and thereupon opened said room for the purpose of having therein a billiard and pool-hall; that said billiard and pool-hall have been paying plaintiff a large revenue and income of at least $50 a month; that in running said billiard and pool-hall plaintiff has complied with the laws of the state of Nebraska, and at all times conducted said billiard and pool-hall in an orderly, quiet and legitimate manner; that defendants, well knowing the expense that plaintiff had been to in the premises, on the 3d day of February, 1908, passed an ordinance prohibiting the operation, keeping and controlling of a billiard or pool-hall in said building for hire; that said ordinance was passed by defendants for the sole purpose of depriving plaintiff of his property and property rights in his said pool and billiard-hall and apparatus thereto belonging; that said billiard and pool-tables and fixtures have no value except for the purpose of being used as such; that the ownership of the billiard and pool-tables and the ownership, running and management of the billiard and pool-hall is now, and for many years past has been, recognized by the laws of this state, and the decisions of the court of last resort of this state, to be "a legitimate and lawful business, except that minors shall not be permitted to play or be and remain upon the premises"; that plaintiff invested his money in good faith in his pool and billiard-tables, and established a pool and billiard-hall in said village in reliance thereon; that said ordinance is unconstitutional because it contravenes section 1, art. XIV of the constitution of the United States, and also contravenes section 3, art. I of the constitution of the state of Nebraska, in so far as said ordinance seeks to prohibit plaintiff and deprive him of the use of his said billiard and pool-hall and the tables and fixtures thereunto belonging, and because its intent and purpose is to deprive plaintiff of a vested legal right without due proc-

ess of law; that, notwithstanding the premises, defendant trustees are threatening, under color of authority derived from said ordinance, to close up and prohibit plaintiff from operating his said billiard and pool-hall, and are threatening to and will, unless restrained by order of the court, prohibit and suppress plaintiff's said business, and will destroy plaintiff's property and business and the value thereof, and are threatening to and will arrest plaintiff and his employees and harass and annoy them, under color of authority derived from said ordinance, and will institute many criminal and other suits against plaintiff and those operating and conducting said pool-hall, and wholly destroy the value of his said property, and deprive him of the income therefrom to plaintiff's irreparable injury, loss and damage, and that plaintiff has no adequate remedy at law. The prayer is for an injunction restraining the defendant village and its trustees from in any manner seeking to enforce said ordinance or in any manner instituting any proceedings to enforce the same, or from in any manner interfering with the plaintiff or his employees in conducting or operating said pool and billiard-hall, or from commencing any criminal prosecutions under said ordinance against plaintiff or any person or persons conducting said business as employees of plaintiff, or in any manner interfering with plaintiff or his employees in conducting, maintaining or operating said pool-hall. A copy of the ordinance is attached to the petition, as follows:

"Ordinance No. 73.

"An ordinance to prohibit the keeping, conducting and operation of billiard-halls, pool-halls and bowling-alleys within the limits of the village of Culbertson, and to provide a penalty for the violation thereof, and to repeal all ordinances and parts of ordinances in conflict herewith.

"Be it ordained by the chairman and board of trustees of the village of Culbertson, Nebraska.

"Section 1. No person shall hereafter open, keep, manage, operate or conduct either for himself or as agent,

clerk, or servant of another any billiard-hall, pool-hall, or bowling-alley, or any room or place in which shall be used any billiard-table, pool-table or bowling-alley for profit, or hire or gain, within the limits of the village of Culbertson.

"Section 2. No person shall hereafter open, keep, manage, operate or conduct either in person or by agent, clerk or servant, any billiard-hall, pool-hall or bowling-alley, or any room or place in which shall be used any billiard-table, pool-table or bowling-alley for profit, hire or gain, within the limits of the village of Culbertson, Nebraska.

"Section 3. Any person who shall violate the provisions of sections one and two of this ordinance shall, upon conviction thereof, be fined in any sum not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00) and shall stand committed to the jail until such fine and costs of prosecution are paid.

"Section 4. That all ordinances and parts of ordinances in conflict with this ordinance be and they are hereby repealed.

"Section 5. This ordinance shall take effect and be in force from and after its passage, approval and publication."

The ordinance was passed and approved on the 3d day of February, 1908. No irregularity in the passage of the ordinance is claimed. The defendant village and the defendant trustees separately demurred generally to the petition. The demurrers were sustained, and plaintiff's suit dismissed. Plaintiff appeals.

Plaintiff's main reliance is upon *State v. McMonies*, 75 Neb. 443. As the law then stood, plaintiff's contention would have to be sustained; but since the decision in that case, and probably as a result of such decision, the legislature has delegated to the boards of trustees of villages the power which we then said they did not possess, viz., the right to prohibit billiard and pool-halls. Section 8887, Ann. St. 1907, provides: "Such board of trustees

shall have power to pass by-laws and ordinances to prevent and remove nuisances; to prevent, restrain, and suppress bawdy houses, gambling houses, and other disorderly houses; and to license, regulate, or prohibit billiard-halls, pool-halls, or bowling-alleys within the limits of such village." The constitutional power of the legislature to grant such authority to villages of the defendant class is too clear to require discussion or a citation of authorities. Defendants having exercised the power thus granted by the legislature, by the passage of the ordinance in question, its right to proceed under such ordinance cannot be questioned.

The allegation in plaintiff's petition that the sole purpose of defendants in passing the ordinance was to deprive plaintiff of vested rights cannot be considered, for two reasons: (1) In the light of the statute cited, plaintiff had no vested right to conduct a billiard and pool-hall for hire. (2) In *McCarter v. City of Lexington*, 80 Neb. 714, we said: "The fact, if such be the case, as alleged by the plaintiff in his petition, that the city council was induced to pass the ordinance of May 26, 1906, to injure the plaintiff in his business, and to aid a rival in such business, is a matter with which we have no concern, and which we cannot investigate. The motives inducing action by a legislative body is not a proper subject of inquiry by the courts."

It is further contended that this ordinance is discriminating in that it prohibits the keeping of a billiard or pool-hall or the maintaining of tables for hire, while it does not attempt to prohibit keeping them for private or free use. This argument is met and aptly disposed of adversely to plaintiff's contention by the supreme court of Kansas in *City of Burlingame v. Thompson*, 74 Kan. 393.

As the judgment of the district court must be affirmed for the reasons above stated, it is unnecessary to consider the question of plaintiff's right to the relief demanded by injunction.

The judgment of the district court is

AFFIRMED.

JAMES W. JOHNSTON, APPELLANT, V. NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT COMPANY, APPELLEE.

FILED FEBRUARY 26, 1910. No. 16,032.

1. Appeal: FILING TRANSCRIPT: COMPUTATION OF TIME. The computation of time for filing a transcript in this court on appeal from the district court, under section 675 of the code, is controlled by the provisions of section 895 of the code.
2. ———: ———: ———. The rule stated in the third paragraph of the syllabus in *McGinn v. State*, 46 Neb. 427, reaffirmed, and *held* applicable to section 895 of the code.
3. ———: ———: ———. Section 895 of the code *held* to apply to the computation of time, whether the time to be taken into account be days, months or years; and where an act is to be done, or is permitted to be done, within a specified time, and the last day is Sunday, it shall be excluded and the act may be done on the following day.
4. ———: REVERSAL: SECOND TRIAL: DIRECTING VERDICT. On a former appeal from a judgment in favor of plaintiff, the case was reversed on the ground that the evidence was insufficient to establish actionable negligence on the part of the defendant. On a second trial no new or additional evidence on that branch of the case was offered by plaintiff. The trial court directed a verdict for the defendant. *Held* no error. *Anderson v. Union Stock Yards Co.*, 84 Neb. 305, followed.

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

T. W. Blackburn and *Richard S. Horton*, for appellant.

Greene, Breckenridge & Matters, contra.

FAWCETT, J.

This is the third time this case has been before us for consideration, the two former hearings being reported in 78 Neb. 24, and 78 Neb. 27. The opinions of Mr. Com-

missioner AMES on those two hearings contain a full statement of the facts, and they will not be restated here. On the last trial the court directed a verdict for the defendant, and entered judgment thereon. Plaintiff appeals.

We are met at the threshold of the case on the present hearing with an objection by defendant to the jurisdiction of this court on the ground that the transcript was not filed within the six months required by statute. The motion for new trial was overruled and judgment entered in the court below June 20, 1908. The six months' time allowed for filing the transcript in this court would therefore expire December 20, 1908. It was not filed until December 21, or one day after the statutory time. December 20 was Sunday, and plaintiff contends that this entitled him to file his transcript on the day following. The question presented by this objection therefore is the construction of section 895 of the code, which reads as follows: "The time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded." As the record before us calls for an affirmance on the merits, we were strongly tempted to follow the line of least resistance and affirm the judgment, without deciding the objection to jurisdiction; but, as the point is squarely raised in defendant's brief and has been argued by counsel on both sides at the bar, and is likely to arise again at any time, we concluded to make a thorough investigation of the point and definitely decide it, so that the matter may be set at rest in this jurisdiction. Section 675 of the code provides: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code of this state, shall be by filing in the supreme court a transcript certified by the clerk of the district court, containing the judgment, decree or final order sought to be reversed, vacated or modified, within six months from the

rendition of such judgment or decree or the making of such final order or within six months from the overruling of a motion for a new trial in said cause; the filing of such transcript shall confer jurisdiction in such cause upon the supreme court." We have frequently held that an appeal must be prosecuted within the time limited by this section of the code in order to confer jurisdiction upon this court. *Glore v. Hare,* 4 Neb. 131; *Chapman & Scott v. Allen,* 33 Neb. 129; *Fitzgerald v. Brandt,* 36 Neb. 683; *Omaha Loan & Trust Co. v. Ayer,* 38 Neb. 891; *Renard v. Thomas,* 50 Neb. 398.

Patrick v. Faulke, 45 Mo. 312, cited and relied upon by defendant, squarely sustains defendant's contention. The Missouri statute is identical with ours. In construing it, the court say: "The word 'excluded', as used in the statute, is somewhat ambiguous when practically applied; but, as the general rule is, when construing statutes, to give it a restrictive operation, and, as such is the recognized principle in commercial law, I am of the opinion that the legislature used it in this sense. The language of the statute would seem to import and imply this construction. In the computation, the first day is to be excluded and the last day included; but, if the last day fall on Sunday, it, too shall be excluded, showing that the act, then, must be performed on the previous Saturday."

We are unable to understand how the court could reach such a conclusion as to the meaning of the word "excluded" in the statute quoted. If Sunday is excluded, it is removed; taken away; stricken from the calendar. That day being gone, another day must elapse before the time within which the act required to be performed is complete. We are not alone in our inability to understand the reasoning of the learned judge who wrote that opinion. In *Miner v. Tilley,* 54 Mo. App. 627, and *Evans & Hollinger v. Chicago & A. R. Co.,* 76 Mo. App. 468, *Patrick v. Faulke* is so ably and thoroughly criticised and discredited as to leave nothing further to be said. In the latter case the court cites an Alabama case, the only other

case we have found squarely in line with *Patrick v. Faulke,* and say: "There is one case (*Allen v. Elliott,* 67 Ala. 432) which has given expression to the same view taken in *Patrick v. Faulke, supra.* The Alabama statute is the same as ours. The court refers for authority to Bouvier's dictionary, 'Sunday.' But singularly enough the rule is there stated exactly to the contrary. It is evident that the learned judges in writing the opinions in those cases (*Patrick v. Faulke* and *Allen v. Elliott*) excluded Sunday from the *time* allowed in which to do the act, instead of excluding it from the *count of the time.* By such inadvertence their statement of the rule is in the face of the statute. The statute reads that Sunday shall be excluded, not from the time, but from the computation of the time." There, we think, the court of appeals gives the true construction of the statute under consideration, viz., that excluding Sunday does not extend the time, but merely excludes it from the count of the time.

Robinson, Adm'r, v. Foster, 12 Ia. 186, is cited in the note in 49 L. R. A. 204. But an examination of the case shows that it is not in point here. The statute under consideration there provided that "the defendant, if served otherwise than by publication, shall be held to answer at the next term after service, provided, (1) he be served within the county where suit is brought in such time as to leave at least ten days between the day of service and the first day of the next term." It will be seen that under that statute there was nothing which could be done on the last day. There was nothing calling for any action on that day. The act to be performed was required to be performed prior thereto and long enough prior so that there should be ten days *between* the time of the performance of the act and the first day of the ensuing term of court. There is nothing in the act, there required to be performed, which brings it within the meaning of the wording of our statute. The supreme court of Iowa later, in *Conklin v. City of Marshalltown,* 66 Ia. 122, relieves the situation in that state of all doubt by this

holding: "Plaintiff filed his petition on the twenty-ninth of November, and the next term of court commenced on the tenth of December. *Held,* That the ninth of December being Sunday, the petition was filed 10 days before the term." (23 N. W. 294.)

Merritt v. Gate City Nat. Bank, 100 Ga. 147, 38 L. R. A. 749, is another case where there was nothing that would or could be done on the last day. *Vailes v. Brown,* 16 Colo. 462, 14 L. R. A. 120, was a contested election case. An examination of the opinion shows that the decision in that case is predicated upon a prior opinion of the court which holds that the proceedings upon an election contest before the county judge, under the statute, "are special and summary in their nature. * * * The act is not only special in character, but it furnishes a complete system of procedure within itself"; and it is for that reason the court holds that the general statute as to computation of time does not apply. *Shefer v. Magone,* 47 Fed. 872, refuses to exclude Sunday when it is the last day, but the opinion shows that the reason for that holding is that there was no statute providing that Sunday should be excluded. *Haley v. Young,* 134 Mass. 364, has been several times cited as an authority on this question. But that court also recognizes that, where there is a statute, the rule is different. They quote with approval from *Cooley v. Cook,* 125 Mass. 406, as follows: "Whenever the time limited by statute for a particular purpose is such as must necessarily include one or more Sundays, Sundays are to be included in the computation, even if the last day of the time limited happens to fall on Sunday, unless they are expressly excluded, or the intention of the legislature to exclude them appears manifest." To the same effect is *Dorsey v. Pike,* 46 Hun (N. Y.) 112. In *Gibbon v. Freel,* 65 How. Pr. (N. Y.) 273, the court of appeals of New York considered section 788 of the code (similar to ours), and held: "When the statute requires service of process to be made out of the state or by publication within thirty days, and the thirtieth day occurs upon Sunday, a service

made or publication commenced on the thirty-first day is a compliance with the statute."

Williams v. Lane, 87 Wis. 152, is cited in the note in 49 L. R. A. 204, as an authority on this point. The fifth paragraph of the syllabus reads: "Where the year within which an action must be commenced ends on Sunday, the action cannot be commenced on the next day." In the opinion Pinney, J., says: "We are of the opinion that the action, as to these plaintiffs, was not brought in time, and that by the great weight of authority, where the time for doing an act is one or more years, and the last day falls on Sunday, it cannot be lawfully performed on the next day. In such case the act should be performed on the preceding day"—citing *Haley v. Young,* 134 Mass. 364, and two or three other cases, none of which bear out the distinction attempted to be drawn by the learned judge between an act to be done within one or more years and one to be performed within a given number of days. We think the writer of that opinion got his idea from the statutes of Wisconsin (Wis. St. 1898, sec. 4971), and not from the cited cases. The statute upon which the opinion is predicated is very different from the one we are considering. It reads: "The time within which an act is to be done as provided in any statute, when expressed in days, shall be computed by excluding the first day and including the last, except that if the last day be Sunday it shall be excluded; and when any such time is expressed in hours the whole of Sunday, from midnight to midnight, shall be excluded." The very decided difference between that statute and the one at bar is so apparent that discussion is unnecessary.

Johnson v. Meyers, 54 Fed. 417, also attempts to distinguish between a limitation by month or year and one by days. The opinion by Sanborn, J., quotes section 5013, U. S. Rev. St., title "Bankruptcy", as follows: "In all cases in which any particular number of days is prescribed by this title, or shall be mentioned in any rule or order of court or general order which shall at any time be made

under this title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first, and inclusive of the last, day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the president of the United States as a day of public fast or thanksgiving, or on the 4th of July, in which cases the time shall be reckoned exclusive of that day, also." In the opinion the learned judge says: "Where the time limited for the performance of an act is less than seven days, where the unit of its measurement is the day, and there is reason to suppose that juridical days were intended by a statute or act of congress, there is reasonable ground for the holding that Sundays and legal holidays falling within such time shall be excluded. * * * But where the time limited is such that one or more Sundays must fall within it, and there is no statute or act excluding any of them, it is certainly not the province of the court to extend the time fixed by including the last, the first, or any intermediate Sunday or holiday. * * * Moreover, where the unit of measurement of the time limited is not the day, but is the month or year, there is still less reason to hold that any day that falls within the month or year can be excluded by the court."

As opposed to the construction by Sanborn, J., of section 5013, under consideration, we have the construction of the same section of United States Revised Statutes by Mr. Chief Justice Gray, in *Cooley v. Cook,* 125 Mass. 406. The syllabus reads: "Under the U. S. Rev. St., sec. 5013, the four months next preceding the commencement of proceedings in bankruptcy, an attachment made within which is dissolved by section 5044, are to be reckoned exclusive of the first day, and, if the last day falls on Sunday, exclusive of that also." In the opinion the learned chief justice says: "In the case at bar, computing the four months according to the rule so established, whether we reckon forwards from the day of the attachment, or backwards from the day of the commencement of the proceed-

ings in bankruptcy, the last day of the four months falls on a Sunday, and the question is whether, for that reason, another day is to be included in the computation. * * * (Citing cases.) The determination of the question before us therefore depends upon the true construction of the last clause of the U. S. Rev. St., sec. 5013. This section, after defining the meaning of various words used in the title 'Bankruptcy' in these statutes, provides as follows: (Setting out the same section quoted by Sanborn, J., in *Johnson v. Meyers, supra.*) The bankrupt act, in several places, measures time by days; sections 4981, 4982, 5021, 5024, 5032, 5036, 5056, 5102; in a greater number of places by months; sections 5014, 5023, 5044, 5054, 5092, 5093, 5101, 5110, 5128, 5129, 5132; in a few instances by years; sections 5057, 5120, 5132; and in one section by each of the three; * * * section 5108. It can hardly be presumed that congress, in laying down general rules of definition and interpretation, especially as to the computation of time, intended them to be inapplicable to the majority of instances in which periods of time are mentioned in the bankrupt act. The more reasonable conclusion is that the intention was to establish a general rule of interpretation, by which all periods of time prescribed in that act might be computed. The cases in the federal courts support this view." We think the reasoning of Mr. Chief Justice Gray is unanswerable and completely overcomes the distinction between the computation by days, or by months or years, attempted to be made in *Johnson v. Meyers* and *Williams v. Lane, supra.*

In addition to the authorities opposed to defendant's contention, which we have already considered in connection with the cases in support thereof, we call attention to the following: *Carothers v. Wheeler,* 1 Or. 194; *Gage v. Davis,* 129 Ill. 236; *Hicks v. Nelson,* 45 Kan. 51; *Muir v. Galloway,* 61 Cal. 498; *City of Spokane Falls v. Browne,* 3 Wash. 84; *Edmundson v. Wragg,* 104 Pa. St. 500; *West v. West,* 20 R. I. 464; *Spencer v. Haug,* 45 Minn. 231. In *Spencer v. Haug,* the first paragraph of the syllabus an-

nounces the rule exactly as we have announced it in *McGinn v. State,* 46 Neb. 427, viz.: "Gen. St. ch. 66, sec. 82, relating to the computation of time, was intended to establish a uniform rule, applicable to the construction of statutes as well as to matters of practice." The question involved in that case was the ten-year lien of a judgment; that is to say, the time when the right to proceed for the enforcement of the judgment expired. The court, on pp. 232, 233, discuss the matter at length. We will not prolong this opinion by quoting therefrom except to call attention to the concluding remarks of the court with reference to the statute for computation of time, which is identical with our own. On that point the court say: "Inasmuch as the certainty of a rule is of more importance than the reason of it, we think the legislature intended by section 68 to put an end to all this confusion and uncertainty by adopting a uniform rule for the computation of time, alike applicable to matters of mere practice and to the construction of statutes." In *McGinn v. State,* 46 Neb. 427, we had under consideration section 895 of the code, and held: "The provision of section 895 of the code of civil procedure, for the exclusion of the first day in computing the time within which an act is to be done, was intended to establish a uniform rule, applicable alike to the construction of statutes and to matters of practice." That holding was made in response to the contention frequently made that the section of the code under consideration referred only to matters of practice, and not to the construction of statutes. By our holding in that case, all doubt on this subject was removed, and the section under consideration must now be considered as applicable alike to the construction of statutes and to matters of practice.

Notes on the matters above discussed may be found in 14 L. R. A. 120, and 49 L. R. A. 204. Defendant has called our attention to *Cary-Lombard Lumber Co. v. Fullenwider,* 150 Ill. 629. We have examined the case, but do not consider it in point, as the question of Sunday is in

no manner involved therein. After a full and careful consideration of the question, as indicated by the above overlengthy opinion, we hold, in line with the supreme court of Minnesota, that section 895 of the code, was intended by the legislature to put an end to all confusion and uncertainty by adopting a uniform rule for the computation of time, alike applicable to matters of mere practice and to the construction of statutes, and that it applies to the computation of time, whether the time to be taken into account is days, months, or years, and that where an act is to be done, or is permitted to be done, within a specified time, and the last day is Sunday, it shall be excluded, and the act may be done on the following day. It follows, therefore, that the appeal in the case at bar was in time.

We have gone into the matter thus fully for the reason that the question is an important one, one that is liable to arise at any time. In fact, another case in the same condition as the one at bar, although the point is not raised by counsel, is now under consideration by this court. We have analyzed, discussed and cited the cases in detail, in order that the bar may understand that the point has been thoroughly and carefully considered by the court and further discussion of the subject foreclosed.

A consideration of the case on the merits leaves us no alternative but to affirm the judgment of the court below. When the case was before us the first time, we held that the evidence was insufficient to establish the negligence of the defendant. On rehearing that holding was not retracted, but was in effect reannounced. On the last trial of the case, no additional evidence was offered upon that point. The injured boy did not testify at the former trial, and the declaration in the second opinion that he was as a matter of law guilty of contributory negligence was made in view of that fact. Ordinarily, as said in the first opinion, the question of the intelligence of an injured child is a question for the jury.

Our former holding as to the lack of evidence of defendant's negligence should be treated as the law of the

case. *New Omaha T.-H. E. L. Co. v. Rombold,* 73 Neb. 259; *Hargadine v. Omaha B. & T. R. Co,* 76 Neb. 729. The judgment of the district court must therefore be affirmed, regardless of the question of contributory negligence.

AFFIRMED.

IN RE ESTATE OF WILLIAM W. WILSON.

GEORGE E. HIBNER, ADMINISTRATOR, APPELLEE, V. JAY SAUM ET AL. APPELLANTS.

FILED FEBRUARY 26, 1910. No. 16,390.

Executors and Administrators: COMPENSATION. Evidence examined and referred to in the opinion *held* sufficient to sustain the judgment of the district court.

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

Robert Ryan and *R. S. Mockett,* for appellants.

Tibbets & Anderson, contra.

FAWCETT, J.

This is an appeal by the heirs of William W. Wilson, deceased, from the judgment of the district court for Lancaster county in favor of appellee George E. Hibner for his services as administrator of said estate. The case is before us for the second time. For our former opinion see *In re Estate of Wilson,* 83 Neb. 252.

No formal assignment of errors has been filed in this court, nor does the brief of appellants contain any such assignment and discussion of error on the part of the court in finding the amount due appellee as to really warrant a consideration of that question. It is suggested in the brief that but one lawyer, other than Mr. Hibner himself, was sworn as to the value of appellee's serv-

ices, and that he fixed the value at from $2,400 to "$2,600." While this is true, it is an inaccurate statement of the situation. This case originated in the county court. That court, in fixing the amount of appellee's compensation, allowed him "in full for his services as special and general administrator for the care and labor incident to the caring for said estate, and for all time and labor in regard to any questions and actions that arose in said estate, including any unusual and extraordinary services rendered said estate, the sum of $2,000; this being in full for all services of the said administrator of every nature and kind whatsoever in the matter of said estate." It will be seen from this that the claim of appellee is not only for his extra and unusual services, but also for his regular services, both as special and general administrator.

On the trial in the district court the testimony of the witness above referred to fixed the value of appellant's services at from $2,400 to $2,800 (not $2,600 as stated by appellees). The answer of the witness was given in response to a question covering nearly two pages of the record, in which were recited the services rendered by the administrator, who is a lawyer, outside of the regular and usual duties performed by an administrator, and the witness in answering the question expressly limited his testimony thereto in the following language: "In answering the question I would confine myself to what I would regard as the value of legal services if rendered by a lawyer outside of the administrator himself, and take into account the magnitude of the estate, and the questions that naturally come up, and the responsibility which is naturally assumed, and I would say, under the modified question, not less than 3 to 3½ per cent. of the value of the estate. Q. (By Mr. Ryan) That is the entire value of the estate—do you mean the entire value of the estate, the real property and all, or what he collected? A. I put it the entire value of the estate. Q. And what would you place it in figures? A.

Well, I do not think you mentioned the value of the estate. Q. $80,000. A. Then I would say from $2,400 to $2,800." The witness having fixed the value of the extra services performed by the administrator at from $2,400 to $2,800, and the court having before it the proceedings in the county court, and having knowledge of the fact that a large estate had been administered by appellee, the services covering a period of a number of years, was well qualified to fix the value of appellee's services for his regular duties as administrator. This the court did, and combined both in the following finding: "And the court, on due consideration, being fully advised in the premises, finds generally in favor of the appellant George E. Hibner, and that there should be allowed him for all services rendered as general and special administrator the sum of $3,500." No evidence was offered by the heirs on the question of the value of the administrator's services, and we therefore accept the findings of the district court on that question.

The main point discussed in the brief of appellants, and the one upon which they chiefly rely, is that "there was developed on the trial of this case so gross a violation of his duties by the administrator that he should not be allowed anything—not even the compensation provided by statute." The record discloses that Mr. Wilson left an estate consisting of real and personal property of the value of about $80,000. He left no wife or children surviving. He died intestate, his estate descending to a number of collateral heirs, most of whom were of full age. At the time of the funeral of Mr. Wilson, a man by the name of Evans appeared upon the scene, and asserted that he was an illegitimate son of the deceased, and it would appear from the evidence that he had threatened to institute proceedings to establish his right of inheritance to the entire estate. It does not appear that he was in possession of any proofs such as would enable him to establish that claim, but, regardless

of that fact, the heirs who were of full age were desirous of avoiding the scandal which would result from such a contest, and were willing to pay Evans something to avoid any such undesirable attempt on his part. Appellee made a trip to Richland, Iowa, to see Evans, and made an agreement with him that he, Evans, would pay appellee 25 per cent. of whatever sum was obtained from the heirs in settlement of his pretended claim. Appellee then took the matter up with the heirs who were of full age, and made an agreement with them that they would each pay their proportion of $4,500 to obtain a settlement with Evans. It seems that the heirs were all poor people, and were unable to advance the money to make this settlement. Thereupon appellee agreed to advance to each one, from his or her respective distributive share of the estate, their proportions of this $4,500. In accordance with this arrangement appellee took from each of the adult heirs a receipt for his or her proportion of said sum, charging them with the amounts as a portion of their distributive shares of the estate, and taking credit himself on his account as administrator. Appellee did not advise any of the heirs who contributed portions of this amount of the fact that he was to receive a fourth of said sum. He justifies his conduct by contending that as to that matter he was not acting in his capacity as administrator; that it was a matter with which the estate had no concern; that it did not tend to either increase or diminish the estate; that he did not submit the matter to the court for the reason that it was a matter with which the court had no concern. In other words, that it was purely a personal matter between himself and the adult heirs and Evans. It is contended by appellants that this was misconduct on his part which amounted to a gross violation of his duties as an administrator, and for that reason he should not be allowed anything for his services. While we cannot commend the conduct of appellee in that transaction, we are unable to concur in the contention of appellants. We

think the action of appellants in paying the amount of money stated, for the purpose of avoiding a scandal and disgracing the memory of the deceased, from whom they were receiving a handsome estate, was commendable, and if appellee had fully advised them of his interest in the transaction, his part therein would have been equally commendable. A careful consideration of the whole transaction, however, has convinced us that we cannot give appellants any relief in this case. A suggestion has been made that we might, perhaps, require appellee to remit from the judgment his 25 per cent. of the $4,500, but that cannot be done in this case for the reason that the minor heirs of Mr. Wilson did not contribute any portion of the money, and if we were now to order a remittitur from appellee's judgment, the heirs who contributed no portion of the fund would receive money to which they are not entitled, at the expense of the adult heirs who contributed the entire amount. It would seem, therefore, that if the adult heirs are entitled to a return of the fund which they contributed to settle with Evans, the right thereto would have to be asserted in an independent action, and cannot be determined here.

Upon a consideration of the whole case, we feel constrained to affirm the judgment of the district court, which is done.

AFFIRMED.

SEDGWICK, J., not having heard the arguments, took no part in the decision.

REESE, C. J., dissenting.

I cannot agree to the opinion in this case. This is an appeal from the final settlement of the administrator. I think appellee should be required to refund to those who contributed the portion of the $4,500, which he retained from the settlement with Evans. It will not do to refuse relief in such cases, and it can as well be given here as in an independent suit. In his settlement with Evans he

represented the estate as administrator. This was a species of agency. Can he profit by the secret arrangement he made by which he compromised the Evans claim? He could have settled with Evans for $3,375, but instead of doing so he settled for $4,500, and retains $1,125 to his own use, and represents to the heirs that he actually paid $4,500. I cannot approve such a transaction, and he should not be allowed that sum in his final settlement.

ROSE, J., concurs in this dissent.

MELISSA WAXHAM, APPELLEE, V. ROBERT O. FINK, APPELLANT.

FILED FEBRUARY 26, 1910. No. 15,931.

1. Appeal: ASSIGNMENT OF ERRORS. The purpose of the act of 1907 (laws 1907, ch. 162) was to further simplify the practice in taking appeals to this court in civil actions at law. No assignment of errors in this court is necessary except in the printed brief; and ordinarily the court will not reverse the judgment of the district court for errors not so assigned. Plain errors not so assigned, especially if they involve jurisdictional questions, may, under some circumstances, be considered. Each error complained of must be assigned separately and *"particularly."*

2. ———: ———. The assignment in this court that "the court erred in overruling the motion for a new trial", and similar technical assignments, are no longer required. If the particular ruling of the trial court which is complained of is separately assigned in the brief and plainly and definitely stated, the statute is complied with. This court, however, will not ordinarily discuss in the opinion assignments that are not argued in the brief and supported by authorities.

3. ———: ———. When at the close of the evidence the defendant moves the court to instruct the jury to find a verdict in his favor, and the motion is overruled and an exception duly taken, the assignment in the brief that "the court erred in overruling the motion of the defendant made at the close of the evidence that the jury be directed to return a verdict for defendant" is sufficient.

4. ———: MOTION FOR NEW TRIAL. The practice in the district court

is unaffected by this statute. The motion for new trial must give the trial court an opportunity to correct all errors complained of. No alleged error can be considered in this court as ground for reversal unless so brought to the attention of the trial court.

5. **New Trial:** REFUSAL TO DIRECT VERDICT: ASSIGNMENT OF ERRORS. The assignment of error in the motion for new trial that "the verdict is not sustained by sufficient evidence" or "the verdict is contrary to law" is sufficient to challenge the attention of the trial court to its ruling in refusing to direct a verdict for defendant, since there should be an instruction to find for defendant if the evidence is not sufficient to sustain a verdict for plaintiff, and the same question is raised by either suggestion.

6. **Appeal:** ASSIGNMENT OF ERRORS. It is not necessary that the assignment in this court should be in precisely the same language used in the motion for new trial in the district court. If the ruling is identified and plainly defined, it is sufficient.

7. **Trial:** MOTION TO DIRECT VERDICT. The suggestion in a motion to instruct the jury to find a verdict for defendant that "the facts proven are not sufficient to entitle the plaintiff as matter of law to recover" is equivalent to assigning that the evidence is insufficient to justify a verdict for plaintiff.

8. **Master and Servant:** FELLOW SERVANTS. If two servants of the same employer are associated together in the same service, and neither is in any manner under the control or direction of the other, they are fellow servants, and one of them cannot recover damages from the employer, caused solely by the negligence of his fellow servant.

9. ———: ———. A woman of mature age was employed as housekeeper and in general charge of the housework, and was injured by an accident caused by the negligence of the son of her employer, a boy of 14 years, who was also performing ordinary household service in the absence of his father, but pursuant to the general directions of his father to perform such service. *Held*, That the woman and the boy were fellow servants, and that she could not recover from her employer damages so sustained.

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

H. C. Brome and *Clinton Brome*, for appellant.

W. F. Wappich and *Joel W. West, contra.*

SEDGWICK, J.

The plaintiff began this action in the district court for Douglas county to recover damages which she alleges she suffered because of the negligence of the defendant. The plaintiff was employed as a domestic by the defendant. The defendant's family consisted of himself and his son, about 14 years of age, and the plaintiff had general care of the house and performed the ordinary duties of a housekeeper. At the time of the accident which caused the plaintiff's damage, the defendant was away from home, and the boy, in getting some coal from the cellar for the evening, left the small trapdoor in the floor open, through which the plaintiff fell, causing her injuries. There was a verdict for the plaintiff, and the defendant appeals. The brief of the defendant in this court is devoted entirely to the proposition that the plaintiff and the boy were, in the absence of defendant, fellow servants, and that the defendant is not liable for the carelessness of the boy. This proposition is not discussed at all in the brief of the plaintiff. The argument on behalf of plaintiff is addressed entirely to reasons for supposing that the main question insisted upon by defendant cannot be considered by this court, and several reasons are urged for that conclusion.

The question presented by the plaintiff is wholly one of practice, and becomes of more than usual importance because of the change in the method of obtaining a review in this court of judgments and final orders of the district courts in civil actions at law. The act of 1905 (laws 1905, ch. 174) was intended to provide a complete procedure in such cases. It was a radical departure from the procedure then provided, and under that act this court held that "it was the intention of the legislature to simplify the practice in bringing cases to this court", and the former rule, which had been universally enforced, that "an assignment of error directed against a group of instructions is insufficient, and will be considered no fur-

ther than to ascertain that any one of such instructions was properly given", was abrogated. *First Nat. Bank v. Adams,* 82 Neb. 801.

It will be observed further that under the act of 1905 this court adopted the rule that upon docketing the appeal a printed or type-written brief of the errors relied upon must be filed in this court with the transcript. But the legislature at its next session amended the statute, repealing nine several sections of the compiled statutes then in force, and enacting five sections in their stead. Laws 1907, ch. 162. The title of the new act is: "To provide for appeals to the supreme court in all cases except criminal cases", etc. The manifest purpose of the act is to further simplify the practice, and the result, we are satisfied, is to do away with many of the technical rules which had been supplied by the court. The fourth section of the act amends section 675*c* of the code. That section was: "The supreme court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or other assignment of errors shall be required. The supreme court may, however, at its option, consider a plain error not specified in appellant's brief." The section was re-enacted, and to the clause, "but no petition in error or other assignment of errors shall be required", were added the words, "beyond or in addition to the foregoing requirements." We must give force to this amendment, and we can discover no other meaning than that only one brief, and that the printed brief which had always been required, was to be filed in the case, and the assignments of error in that brief were sufficient if they "set out particularly each error asserted and intended to be urged." *Each* error of the trial court relied upon must be assigned in the brief and must be set out with *particularity.* The party complaining of the judgment

will not be supposed to have any reason to ask for a reversal except the errors committed by the trial court which he specifies in his brief and so defines that this court may know from his brief the particular ruling of which he complains. If this is done, nothing further is required to obtain a review of the rulings so specified.

The brief of appellant in this case contained but one assignment of error. It is in these words: "The court erred in overruling the motion of the defendant made at the close of the evidence that the jury be directed to return a verdict for defendant." Under the statutes now in force and the rules of this court framed in compliance with the amendments above discussed, this assignment presents the only question for us to review. Under the former practice it was held, perhaps not necessarily, that the petition in error in this court must contain the assignment that "the court erred in overruling the motion for a new trial." The rule so established appears to be inconsistent with the simplified practice introduced by the recent legislation above referred to. At the close of the evidence the defendant asked the court to direct a verdict in his favor. This the court refused to do, and the defendant excepted to the ruling. This is the specific error of the district court which is "asserted and intended to be urged for reversal", and it is "set out particularly" in the brief filed in this court. This is an exact compliance with the statute as to the assignment of errors in this court.

The amendments of the statutes under consideration have nothing to do with the practice in the district courts, and of course the well-settled rules of those courts are in no way affected thereby. The motion for new trial filed in the district court is unaffected by these amendments. It must give the trial court an opportunity to correct all errors complained of, and no alleged error can be considered as ground for reversal that is not so brought to the attention of the trial court.

It is contended by the plaintiff that the defendant's

motion for new trial was insufficient to challenge the attention of the trial court to the error now relied upon. The motion for new trial contained the following assignments: "First. The verdict is not sustained by sufficient evidence. Second. The verdict is contrary to law. Third. Errors of law occurring at the trial duly excepted to." Then follow seven assignments, each assigning error in giving a specified instruction. Bearing in mind that the defendant's contention is that the whole evidence shows that the plaintiff and the son of defendant are fellow servants, and that upon this evidence the law is that the plaintiff cannot recover, it would seem that either the first or second assignment in the motion for new trial must bring the real matter in controversy to the attention of the court. *Houston v. City of Omaha*, 44 Neb. 63. If "the verdict is not sustained by sufficient evidence", the court erred in not sustaining the defendant's motion to so instruct the jury.

In *Albright v. Peters*, 58 Neb. 534, the court said: "At the close of plaintiff's testimony the defendants asked the court below to instruct the jury to return a verdict in their favor, which request was denied, and the ruling is assigned as error. The decision cannot be considered at this time for the reason the attention of the trial court was not called thereto in the motion for a new trial." The opinion does not set out the assignments in the motion for a new trial, but it appears that one of them was that "the verdict is contrary to the evidence." This assignment would be substantially equivalent to the one considered in this case: "The verdict is not sustained by sufficient evidence." The opinion in the case referred to discusses the evidence, and concludes that it was sufficient to support the verdict. When the evidence was all in before the jury, the question of its sufficiency to support a verdict would be directly raised by a motion to instruct for the defendant; and so in the motion for a new trial, either assignment, that the verdict was not supported by sufficient evidence, or that

the court erred in not instructing for the defendant, would raise precisely the same question and bring precisely the same matter to the attention of the trial court. The matter is not discussed at large in the opinion referred to, and the distinction, if in fact there is any distinction, is too technical to furnish a precedent.

In the motion to instruct for defendant, which was made at the close of the evidence, the reason given for the motion is "that the facts proven are not sufficient to entitle the plaintiff as a matter of law to recover." The plaintiff now contends that this is defective, in that it is not equivalent to assigning that the evidence is insufficient; but we are not able to see the distinction. The sufficiency of the evidence is to be tested by what it proves, and if it does not establish sufficient facts to justify a verdict, then the evidence is insufficient.

We think that we are called upon by this record to determine whether this evidence was sufficient to support a verdict in favor of the plaintiff, and this depends wholly upon whether the plaintiff and the son of defendant were fellow servants. Upon this question the plaintiff has given us no assistance in the brief. The plaintiff alleged and contended upon the trial that it was no part of her duties to bring the coal from the cellar or to direct or superintend the son, and that the defendant undertook to do it himself or to procure his son to perform this service. These contentions were denied by defendant, but it appears that the jury have decided this contention in favor of the plaintiff. From her testimony it appears that the trapdoor through which she fell is located in the pantry, a small room about 4 feet by 6 feet inside, as she said, opening directly from the kitchen, which was also not large, and in which she had finished her evening's work but a few minutes before the accident occurred. The sitting room also opened from the kitchen, and she says that the coal for the base-burner for the sitting room was kept in the cellar. There was an outside entrance to the cellar which was ordinarily used. The trapdoor in ques-

tion was only used, according to the plaintiff's testimony, in very cold and stormy weather. The boy testified that at the time of the accident the plaintiff was at work in the kitchen, and that she requested him to get some coal for the evening; that he procured one hod full, which was not sufficient to fill the base-burner, and he left the trapdoor in the pantry open while he went to the base-burner, intending to immediately return for some more coal, and that just as he was returning to the pantry the accident occurred.

The verdict having been in plaintiff's favor, we will consider her testimony upon this point for the purpose of the present discussion. She testified that both the kitchen and pantry were dark, the gas having been turned off, and another light, which they sometimes used there, having been removed from the kitchen to the sitting room, and that under these circumstances she went into the pantry, not knowing that the boy had left the trapdoor open, and so fell and received her injuries. If the boy and the plaintiff were both the employees of the defendant and associated together in the same service, and neither was in any manner under control or direction of the other, they must be considered as fellow servants, and each in law must be presumed to take such risk as might follow from the negligence of the other in performing the duties incident to such service. There is nothing in the record to show that it was intended or supposed by any one that the son, being a boy only 14 years of age, should control or direct the plaintiff in performing her duties. It would be more reasonable to suppose that he would be subject to plaintiff's suggestions as to his conduct. No authorities have been cited by plaintiff nor any argument advanced for concluding that under such circumstances the "fellow servant" rule so well established should not be applied. In *Debus v. Armour & Co.*, 84 Neb. 224, the case is made to turn upon the question as to whether the plaintiff was the fellow servant of the employee whose negligence caused the injury,

and under the circumstances in that case it was held that they were not fellow servants. In *Anthony v. Leeret*, 105 N. Y. 591, under somewhat, though not entirely, similar circumstances, the fellow servant rule was applied. In another case, under somewhat similar circumstances, the court of appeals of Kentucky held the defendant liable. *Vandyke v. Memphis, N. O. & C. P. Co.*, 71 S. W. (Ky.) 441.

The defendant was a tenant of the house in which they lived. The plaintiff was familiar with the house and knew the condition and use of the trapdoor in question. She does not explain why she was performing her services in the pantry in the dark, nor does she satisfactorily explain why the bringing up of the coal and the use of the trapdoor upon that occasion and its condition at the time should be unobserved by her. If the question of her contributory negligence may be said to be settled in her favor by the verdict of the jury, and if her injuries were caused solely by the negligence of this young boy, it must be held, under the law so well established in this state, that he was a fellow servant and that the defendant is not liable for his negligence in this action.

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

REVERSED.

FAWCETT, J., concurring.

I concur in the judgment of reversal, but not upon the ground stated in the majority opinion. The doctrine of "fellow servant" has been made to "work overtime" during late years by the courts of the country. So much so that even congress has taken notice and given some relief along that line. While I concede that under some circumstances a minor son will be held to be a servant of his father, it is in my judgment extending the rule beyond the bounds of reason and common experience to hold that a 14 year old son is, in his father's home, a fel-

low servant of the kitchen girl or housekeeper. Such a theory is to my mind not only unsound, but repulsive.

I think the judgment of the court below should be reversed on the ground of assumption of risk. Plaintiff is a mature woman. She knew all about the trapdoor leading into the cellar, and the use often made of it. She understood fully the construction and dangers of the place where she was required to work. She made no complaint to defendant, nor did she ask for any change of conditions, but continued in her employment. She thereby assumed the risk of her employment and environment. The majority opinion is in error in stating that the brief of defendant is devoted "entirely" to the fellow servant proposition. In his brief appellant says: "Appellee knew, or was in a position to know, the risk of suffering injury through the carelessness of the son of appellant. It was her privilege to refuse to perform duties which would cause her to run the risk of suffering injuries through the carelessness of appellant's son. By failing to do so, then she must be held to have assumed the risk attendant upon those duties." In that statement I concur.

REESE, C. J., concurs in the first paragraph of the above.

PHIN E. BLUE V. STATE OF NEBRASKA.

FILED FEBRUARY 26, 1910. No. 16,407.

1. **Criminal Law**: INSTRUCTIONS: REASONABLE DOUBT. To instruct a jury upon the trial of a criminal case that "a reasonable doubt is such a doubt as you are able to give a reason for" is erroneous, and under some circumstances might be so prejudicial as to require a reversal of the judgment of conviction.

2. **Adultery**: EVIDENCE: CORROBORATION. Without determining whether in all cases in a prosecution for adultery the unsupported evidence of one of the parties will justify the conviction of the other party

when fully and circumstantially contradicted by the defendant and another apparently credible witness, under the circumstances shown in the record in this case, it is *held* that the wholly unsupported evidence of the complaining witness will not justify the conviction of the defendant.

3. ———: ———: ———. A fact or circumstance relied upon to corroborate the testimony of a witness must have evidence to support it other than that of the witness whose testimony it is supposed to corroborate. A witness cannot by his unassisted testimony corroborate his own evidence.

ERROR to the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Reversed.*

Adams & Adams, for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

SEDGWICK, J.

The defendant was tried in the district court for Kearney county upon an indictment of the grand jury, under section 208 of the criminal code. The substance of the offense was charged in the indictment in the following words: "From the 15th day of December, A. D. 1907, to the 1st day of September, A. D. 1908, did unlawfully keep one Libbie Peterson, a woman other than his wife, and did wantonly cohabit with the said Libbie Peterson." The jury rendered a verdict against the defendant, who was sentenced accordingly, and he has brought the case here for review. He insists that the evidence is not sufficient to justify his conviction, and that there were several errors upon the trial which call for a reversal of the judgment against him.

1. The first question discussed in the briefs is that the court erred in giving instruction No. 7. In this instruction and instruction No. 6 the court attempted to define at large what is meant by reasonable doubt. It seems to be conceded that instruction No. 6 is substantially a correct definition, but in instruction No. 7 the court told

the jury: "A reasonable doubt is such a doubt as you are able to give a reason for." There is some discussion in the brief as to whether the sixth instruction did remedy the vice, if any, of the seventh, but it seems that there is no real ground for this discussion. The jury is told plainly that they must be able to give a reason for any doubt that they had as to defendant's guilt, or otherwise such doubt would not be reasonable, and the question is whether this is such an error as requires a reversal of the judgment. Several of the former decisions of this court are cited as determining this question, but they do not seem to be precisely in point. In *Cowan v. State,* 22 Neb. 519, the trial court in defining a reasonable doubt told the jury "it is a doubt for having which the jury can give a reasón, based upon the testimony", and this instruction was held to be erroneous, calculated to mislead the jury and require a reversal of the judgment. In *Carr v. State,* 23 Neb. 749, an instruction was given in the following language: "It is a doubt having a reason for its basis derived from the testimony, and a doubt for the having of which the jurors can give a reason derived from the testimony." In this latter case the matter is discussed more at large, and the instruction is held to be erroneous and to require a reversal. Several decisions of other courts are cited and quoted from, and among them a decision from the supreme court of Indiana, in which it is said: "It is not the law that in order to justify an acquittal the doubt must arise out of the evidence given, and be such as to cause a prudent man to hesitate. The doubt may arise from the want of evidence." *Brown v. State,* 105 Ind. 385. In the later case of *Childs v. State,* 34 Neb. 236, the instruction complained of told the jury that a reasonable doubt was a doubt "arising out of the evidence", and such a doubt as "you are able to find a reason in the evidence for." The instruction was held erroneous under the authority of the two cases above cited, but without discussion of the reason of the holding.

These cases then all hold that it is erroneous to tell the jury that a reasonable doubt which would require an acquittal must arise from the evidence, but the precise question presented in this case has not heretofore been determined in this court. The question is: Is it prejudicial error requiring a reversal of the judgment to tell the jury that they must be able to give a reason for any doubt which they entertain of defendant's guilt or such doubt will not be a reasonable one? If a juror, who has doubt of the defendant's guilt, is required by his fellow jurors to give a reason for such doubt, he would feel bound by this instruction to do so or to abandon his convictions. A better rule would require reasons for finding the defendant guilty. To whom must the juror stand ready to give his reasons? Is he to be called upon by the court to formulate a substantial reason for voting for acquittal, or will he be required to give his reasons to the public generally, after the trial is over. There can, of course, be no doubt that such an instruction is erroneous, and we think that it would, at least in some cases, be prejudicial to the defendant. Under the evidence in this case there was great danger of prejudice from such an instruction. The expression "reasonable doubt" is difficult of definition. Many attempts at definition have been criticised by the courts in the reported cases. The definition introduced by Judge Gary in the famous anarchists' case has been very generally disapproved, and this court has often condemned it. On the other hand, the language of Mr. Chief Justice Shaw in the famous trial of Professor Webster was quoted with unqualified approval by the present chief justice of this court in the case above cited, *Carr v. State,* 23 Neb. 749. In this connection we quote from an opinion of the supreme court of California: "It will perhaps accomplish no useful purpose to suggest generally to *nisi prius* judges that, in giving their instructions to juries in criminal cases, they should restrict themselves, upon the doctrine of reasonable doubt, to the use, literally, of the language employed

by Chief Justice Shaw in his great exposition of that doctrine in the *Webster* case, *supra,* and to not undertake to amplify the subject in language of their own. We say that it will perhaps be useless to thus caution trial judges, because the supreme court has so often, in the plainest kind of language, warned such judges of the danger of going beyond the language used in the *Webster* case in explanation of this doctrine, that it would seem that such warnings would be constantly in the minds of those presiding over the trials of criminal cases, so that they would content themselves with the clear and simple language of Chief Justice Shaw, however strong the temptation may be to make the experiment of determining how far they can wade out into deep water without disappearing beneath the surfce. The 'reasonable doubt', as defined by Chief Justice Shaw, is good enough for all the courts of last resort of the country, and, it would seem, ought to be good enough for those judges the records of whose cases must finally be reviewed with a view of determining whether an accused has been tried according to the established forms of law." *People v. Del Cerro,* 9 Cal. App. 764, 100 Pac. 887.

The courts of the various states do not appear to be in entire harmony upon the question presented by this instruction. The instruction is generally criticised, but some of the courts have refused to regard the instruction as so prejudicial as to necessarily require a reversal. The supreme court of Minnesota had under consideration a similar instruction in *State v. Sauer,* 38 Minn. 438. The instruction contains these words: "This does not mean beyond any doubt, but beyond a doubt *for which you can give a reason.*" The court said that this definition "is not without some authority to support it", and citing *Commonwealth v. Harman,* 4 Pa. St. 269, and after remarking, "we are not prepared to say that it contains any error prejudicial," the court proceeded to criticise the instruction quite severely. In *Commonwealth v. Har-*

man, supra, the instruction is reported as given upon the trial. It is not the opinion of a reviewing court. It contains many things not in harmony with the practice under our criminal code. It does not contain the language here complained of. We would not have considered it as authority for allowing an instruction such as that now under consideration if it had not apparently been so regarded by the Minnesota court.

The supreme court of Iowa, having under consideration an instruction which contains these words, "a reasonable doubt is such a doubt as the jury are able to give a reason for," held that the instruction was erroneous and prejudicial, requiring reversal. *State v. Cohen,* 108 Ia. 208. The opinion is by Judge Ladd, who gives convincing reasons for his conclusions, and cites several authorities, among them our own cases, above cited.

Other courts have held that to instruct the jurors that they must be able to give a reason for their doubts as to the defendant's guilt is erroneous and so prejudicial as of itself to require a reversal. *Siberry v. State,* 133 Ind. 677; *Abbott v. Territory,* 20 Okla. 119. We have noticed no decisions in which such an instruction is approved, but there are very many in which it is severely criticised, although not held to be so prejudicial as under all circumstances to require a reversal. *Morgan v. State,* 48 Ohio St. 371; *State v. Morey,* 25 Or. 241; *People v. Del Cerro,* 9 Cal. App. 764, 100 Pac. 887; *Wallace v. State,* 41 Fla. 547, 26 So. 715. In *State v. Morey, supra,* the court reviewed the authorities somewhat at length, and among them referred to our own decisions. The discussion is an interesting one.

2. The princple ground upon which the defendant asks for a reversal is that the evidence is insufficient to support the conviction. There is no direct testimony tending to support the verdict other than the evidence of the complaining witness. Her own evidence shows her to be both incompetent and reckless. She could not state her birthday, and, when asked what was her father's name,

she answered: "I call him George." The most important parts of her testimony are composed of monosyllables given in answer to leading questions, and in much of her testimony she is shown to have contradicted herself, and to a large extent while she was under oath in other proceedings. The story that she tells is an unreasonable one and an unnatural one. The evidence is not of such a nature as to make it desirable to quote it at large, and we do not feel that there is any necessity for so doing. That the complaining witness resided with the defendant and his wife for several weeks is conceded. Mr. and Mrs. Blue had been married for about nine years. They had no children, and were living upon a farm, although not engaged in farming. Mr. Blue and his cousin were occupied in corn-shelling, and their business took them to different parts of the county, so that Mr. Blue was frequently away from home, and Mrs. Blue objected to remaining alone during his absence. She was told by a neighbor that she could get the complaining witness to stay with her, and she went for that purpose to the home of the complaining witness, some six or seven miles distant, and took her home with her. Without stating the repulsive details of complainant's story of what took place while she was living with these parties, it is sufficient to say that Mrs. Blue was, by the complainant's own evidence, in a position to observe any improper conduct between these parties, and, if guilt there was, Mrs. Blue was equally guilty with the other parties. Both Mr. and Mrs. Blue were upon the witness stand, and were fully examined and thoroughly cross-examined. Their testimony is reasonable and consistent, and fully and emphatically contradicts the testimony of complaining witness in regard to all matters tending to show the guilt of the defendant. When the complaining witness appeared to be indisposed, Mrs. Blue took her to a physician. He prescribed some medicine, and told Mrs. Blue that if the patient was not improved in ten days to return. She did so, and this physician then told her to go

to another physician, Dr. Smith. Thereupon, Mr. and Mrs. Blue took the complaining witness to Dr. Smith, and upon examination in the presence of Mrs. Blue, Dr. Smith first informed them of the patient's condition. Dr. Smith was upon the witness stand, and his testimony is straightforward and candid, and in no way tends to throw any suspicion upon Mr. Blue. The doctor testified that the complaining witness then stated to him that her father was the cause of her trouble, and that he advised Mr. Blue "to take her home and take care of her or to take her somewhere else." Mr. Blue, who was not present at the examination, asked the doctor afterwards what the girl said, and, when the doctor told him what she had said as to who was the cause of her trouble, Mr. Blue said that it was all right. On his cross-examination, the doctor said that it seemed to him that he stated to Mr. Blue something about taking the girl and taking care of her "and sending her to some home." If the doctor believed her statements as to her father's conduct toward her, he did not, of course, advise sending her to her father, and it seems reasonable, as Mr. and Mrs. Blue testified, that it was upon his advice that the girl was taken to a home in Omaha, where she was cared for. The fact that Mr. Blue believed and approved of the statement that the girl's father was the cause of her trouble and the fact that he immediately after the interview with the doctor took the girl to the Omaha home are relied upon as tending to show guilty knowledge on the part of Mr. Blue, but these facts appear to be equally consistent with innocence upon his part. Under the circumstances disclosed in this record, the conviction could not be sustained, based as it was upon the testimony of complaining witness, unless that testimony was substantially corroborated by some well-established fact. We find nothing in the record that tends to corroborate her testimony.

3. The court instructed the jury: "If you find from the evidence that Phin E. Blue gave or caused to be given to Libbie Peterson turpentine with the purpose of pro-

ducing an abortion, such conduct on his part would be corroborative of the testimony of the prosecutrix, Libbie Peterson, as to the sexual intercourse between them." The complaining witness testified that Mr. and Mrs. Blue gave her turpentine and sugar to drink, and caused her to take it as a medicine. Both Mr. and Mrs. Blue unequivocally deny this, and the circumstances that are conceded or proved tend rather to corroborate Mr. and Mrs. Blue than the complaining witness. After Mrs. Blue had first taken her to a physician, she was given such medicine as the physician had prescribed, and the testimony of the complaining witness herself indicates that this was the medicine that she now characterizes as turpentine and sugar. Moreover, the complaining witness testified that Mr. Blue told her the name of the party, a near neighbor, from whom he obtained the turpentine. Mr. Blue denies this, and the neighbor was not produced as a witness to corroborate the complainant's testimony. It is manifestly erroneous and prejudicial to single out a circumstance testified to by the complainant alone and inform the jury that they might believe the complainant upon that point, and, if so, consider it as corroborating her evidence in general. The witness could not corroborate herself in such manner.

For these reasons, the judgment of the district court cannot be sustained, and the cause is reversed and remanded.

REVERSED.

REESE, C. J., not sitting.

LETTON, J.

I concur in the reversal for the reason that I believe the ninth instruction as to procuring an abortion is not based upon any evidence in the case, and was prejudicially erroneous, and I also agree with the opinion in regard to instruction No. 7.

I cannot agree with that part of the opinion which discusses the evidence. I believe that, while the evidence

is not very strong, it is sufficient to uphold a verdict, if believed by the jury.

ROOT, J., I concur in the above.

ROSE, J., dissenting.

My view of the evidence is radically different from that expressed in the opinion of the majority. The complaining witness testified in direct and positive language that defendant committed the offense with which he is charged. Some of the facts are not open to controversy. Defendant was a married man. The complaining witness was unmarried and was under 18 years of age. She had been debauched. She gave birth to a child September 19, 1908. Most of the time from December 22, 1907, until the child was born, she lived in defendant's home. There was opportunity for commission of the offense. In addition to these facts, she gave nauseating details which prove defendant's guilt, unless she testified falsely. Whether she told the truth or not was a question for the jury. I dissent from the conclusion that her story is either untrue or unbelievable in the face of the verdict of the jury.

I am also pronounced in my conviction that the corroboration of her testimony by that of other witnesses is sufficient, if any is required. By the testimony of either defendant or his wife, or both, these facts appear in the record: Complaining witness went into defendant's home December 22, 1907, as a companion for his wife, without stipulated compensation, and had only one dress at the time. A few days after Christmas he gave the girl a ring, and in April following defendant's wife gave her a dress, which was described as a "Christmas present." During the time she lived at defendant's home she received clothing worth $8 or $10. These facts are shown independently of the testimony of complaining witness.

A practicing physician at Shelton testified that defendant and his wife brought the girl to his office April 23, 1908, that he examined her, and told them she had

been pregnant four or five months. In testifying the physician also said that, when defendant went out of the office, he said: "They were trying to lay it onto him." The import of this expression is that defendant in some way previously knew the girl's condition, or had been or was about to be accused of responsibility therefor. He nevertheless took her to his home and kept her there, where she was no longer needed as his wife's companion; his father and mother in the meantime having joined defendant's family. This proof does not rest on the testimony of the complaining witness. Defendant admitted on cross-examination that the complaining witness from April 24, 1908, until August 30, 1908, slept in the same room where he and his wife slept, though in a separate bed. During that time at least her condition was known to defendant. This is not her proof. By defendant's own testimony it is shown that he went to Omaha August 30, 1908, with no companion, except the complaining witness, took her car-riding there, kept her over night in a hotel, though in a room separate from that occupied by him, and the next day took her to the Salvation Army Rescue and Maternity Home, where he arranged for her accouchement, left her there, and returned to see her the following day. The matron of the home was sworn as a witness, and said defendant paid the girl's lying-in expenses to the extent of $25. She also stated: "I asked him if he would be willing to take the child, and he said that it would be quite a burden on him, but, if necessary, he supposed that he could do it *and would do it.*"

There is proof tending to show that defendant prior to that time had part in procuring from the complaining witness a statement showing that the paternity of the unborn child was traceable to the girl's father. The matron testified defendant said he would take the child, if necessary. What necessity would induce him to accept in advance the burden of keeping a child of incestuous coition and shocking depravity? I am unwilling to say that the matron testified falsely, or that her statement

had no proper, evidential bearing on the truth of complainant's testimony that defendant was guilty of the offense with which he was charged. For anything appearing in the record, the matron, when she gave her testimony, may have been influenced alone by a desire to tell the truth. This part of the story was not told by the complaining witness. To my mind the finding that there is nothing in the record that tends to corroborate her testimony disregards both the record and the rules of evidence. If corroboration is necessary, and if the circumstances narrated do not corroborate the direct evidence of defendant's guilt, it may as well be understood that punishment for adultery is practically at an end. Offenders of this kind do not invite neighbors to be witnesses of their unlawful conduct or commit the offenses in the presence of others.

According to my understanding of the proofs and the law, there is abundant corroboration of the testimony of the complaining witness, without reference to the turpentine episode. In this view of the record, the instruction that the giving of the turpentine was corroborating testimony was not a prejudicial error, I solemnly protest against the condemnation of the state's evidence, and dissent from the conclusion of my associates.

EQUITABLE LAND COMPANY, APPELLANT, V. BERNARD H. WILLIS ET AL., APPELLEES.

FILED MARCH 10, 1910. No. 15,919.

Tax Sale: VALIDITY: REDEMPTION. Real property was sold at administrative sale for the taxes of the years 1892 to 1900, inclusive. In a suit to redeem it was shown that the land was not assessed for the years 1898 and 1899, being entirely omitted from the assessment rolls for those years. There was no assessment made or ordered to be made by the county board, nor by the county clerk. The land was entered upon the treasurer's tax list by interlinea-

tion, but neither the treasurer nor the county clerk knew, or could explain, how, by whom, or by what authority such entries were made. *Held*, That the sale of the land for taxes, including the two years, was without authority of law, and the land was subject to redemption by the owner of the legal title.

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

Hoagland & Hoagland, for appellant.

J. G. Beeler, contra.

REESE, C. J.

This action was instituted in the district court for Lincoln county, the purpose of which was to redeem from a certain tax sale for the delinquent taxes of the years 1892 to 1900, inclusive, and to quiet the title to the south half of the northwest quarter and the west half of the southwest quarter of section 26, in township 16 north, of range 29 west, in Lincoln county. Plaintiff alleges, and has proved, a chain of title from the United States. Defendant relies upon the validity of a sale of the property for the taxes for the years above named, and shows a chain of title from the purchaser at such sale. A trial was had to the district court for Lincoln county, which resulted in a finding in favor of defendants and decree dismissing the petition. Plaintiff appeals.

Plaintiff has assigned and contends for a number of reasons why the tax deed issued by the county treasurer of Lincoln county on the 25th day of January, 1904, should be held invalid, but, as we view the case, it will be necessary to notice but one. As we have seen, the sale was for the delinquent taxes for the years 1892 to 1900, inclusive. The proofs show that the land was not assessed for either of the years 1898 or 1899, although it was included in the sale for the assumed taxes for those years. The returns of the assessor for the years named do not contain any reference to the lands, and they are wholly

omitted from the assessment roll. There is no record of any action by the county board in any capacity assessing or directing the assessment of the property, nor is there any showing that the county clerk took any action thereon. The numbers of the land, with the taxes extended, appear upon the county treasurer's tax list, but it is interlined in a handwriting shown not to be that of either the county clerk who made the tax list, nor in the handwriting of any one who had authority to place it there. The clerk and treasurer were both examined as witnesses upon that subject, and neither one could furnish any explanation as to how, by whom, or by what authority the entries were made. In the absence of evidence showing the irregularities or failure to comply with the law, the issuance of a treasurer's deed upon sale for taxes raises the presumption that all prior proceedings were regular and valid; that is, "that the property had been listed and assessed", and "that the taxes were levied according to law." Comp. St. 1901, ch. 77, art. I, sec. 130. The same provision is to be found in section 220 of the same chapter and article in the compilation of 1909, and the presumption is recognized in *Bryant v. Estabrook*, 16 Neb. 217; *Darr v. Berquist*, 63 Neb. 713; *Wales v. Warren*, 66 Neb. 455. This presumption is, however, only *prima facie*, and the failure to comply with the requirements of the law may be shown notwithstanding the presumption. In *Ure v. Reichenberg*, 63 Neb. 899, in discussing this question, we said: "If such defense (of irregularity) is interposed, the certificates and receipts of proper officers for subsequent taxes paid are sufficient *prima facie* evidence to support the plaintiff's claim, as the mortgage and receipts for subsequent taxes paid would be sufficient in an action of foreclosure thereon; but in either case such evidence is not conclusive. When the defendant has introduced evidence overcoming this presumption, the plaintiff must furnish other evidence. * * * The certificates and receipts are sufficient for that purpose if no other evidence is offered." It follows that the taxes for the years 1898

and 1899 were never legally assessed nor levied, and should not have been included in the sale, and for that reason the sale was invalid. *Gage v. Pumpelly,* 115 U. S. 454. Plaintiff has the right to redeem, and, upon such redemption being made, by the payment of all legal taxes, interest, penalties and costs thereon by reason of the taxes and the proceedings to collect them, to have its title quieted.

The decree of the district court is reversed and the cause is remanded to that court, with direction to enter a decree in accordance with this opinion.

REVERSED.

FANNIE SVANDA, APPELLANT, V. FRANK SVANDA, SR., ET AL., APPELLEES.

FILED MARCH 10, 1910. No. 15,937.

1. **Deeds:** DELIVERY: ACCEPTANCE. A deed conveying real estate was duly executed and delivered to the scrivener by whom it was written, with instructions to forward it to the register of deeds for record, the grantee being present and assenting thereto. *Held,* That this consituted a delivery to and acceptance of the deed by the grantee, and the title was thereby vested in the grantee.

2. **Specific Performance:** EVIDENCE. Plaintiff alleged that before the date of the execution of a deed to real estate she was an unmarried woman; that defendants, the father and mother of an unmarried man, agreed and promised her, in consideration that she would marry their son, they would give and convey to them jointly a designated 160-acre tract of land; that, relying upon their promise, she was married to the son. In a suit for specific performance of the contract, it was shown that subsequent to the marriage a conveyance of a tract consisting of 120 acres of said land was made to plaintiff and her husband, the deed being delivered to a third party to be placed upon record, such delivery being agreed to and accepted by the grantees without objection. *Held,* That by those acts the title to the land conveyed vested in the grantees jointly upon such delivery, and that plaintiff could not maintain a subsequent action for the specific performance of the contract to convey the 160 acres.

3. ———: RELIEF. In such case, where it was shown that the grantor, without the consent of plaintiff, obtained the return of the deed to him and destroyed it, the court should refuse to enforce specific performance, but should by proper decree confirm and quiet the title of plaintiff in the land conveyed, the prayer of the petition being for general relief.

4. ———: PLEADING: HOMESTEAD. In such case, where the answer alleged that a portion of the land claimed by plaintiff constituted the homestead of defendants, and no reply was filed denying such allegation, the decree of the district court denying any relief will be reversed, with direction to allow the pleadings to be reformed, if desired, and ascertain whether the land conveyed by the husband alone included any part of the homestead, and, if so, such part, not exceeding $2,000 in value, be excluded from the decree.

5. **Vendor and Purchaser**: DEEDS: DESTRUCTION. The destruction by the grantor of a deed conveying real estate, after delivery and without the consent of the grantee, will not divest the grantee of title, the possession of the deed having been obtained by the grantor without the consent of such grantee.

APPEAL from the district court for Richardson county: LEANDER M. PEMBERTON, JUDGE. *Reversed with directions.*

Reavis & Reavis and *I. E. Smith,* for appellant.

Roscoe Anderson, Edwin Falloon and *S. P. Davidson, contra.*

REESE, C. J.

This action was commenced in the district court for Richardson county for the specific performance of a contract for the conveyance of real estate described in the petition as the east half of the northeast quarter of section 20 and the west half of the northwest quarter of section 21, all in township 2 north, of range 13 east of the sixth P. M., in Richardson county. It is averred in the petition, in substance, that on the 3d day of March, 1907, she was an unmarried woman of the age of 17 years, and was in the employ of defendants, Frank Svanda, Sr., and Aloisia Svanda, his wife, and that their unmarried son, Frank Svanda, Jr., was living with his parents as a member of

the family; that the parents of Frank, Jr., on divers times suggested to plaintiff that she become the wife of the young man, and proposed to her, as an inducement to such marriage, that they would convey to the young couple jointly a certain tract of land consisting of 160 acres, the conveyance to be executed as soon after the marriage as it could be conveniently done; that under this arrangement the plaintiff and the said Frank Svanda, Jr., who is made defendant herein, were married, said marriage and the conveyance of the land having been previously agreed to by the parents of both parties; that soon after their marriage the defendants, Frank Svanda, Sr., Frank Svanda, Jr., and plaintiff, went to the city of Humboldt, and a deed of conveyance was executed by Frank Svanda, Sr., to plaintiff and her husband, but which was not accepted by them as not in accordance with the agreement; that at a later date the same parties went to the city of Humboldt, and another deed was prepared and executed by the said Frank Svanda, Sr., and delivered to plaintiff and her husband; that said deed did not comply with the former agreement, but that plaintiff was ignorant of the legal effect of some of its provisions and the deed was accepted by them, and was by the said Frank Svanda, Sr., delivered to the notary by whom it was written, and before whom it was acknowledged, to be by him sent to the register of deeds of Richardson county for record; that upon their return to the home of the defendants the said Frank Svanda, Sr., becoming angry at plaintiff because she declined to submit to his advances, telephoned to some one in Humboldt to see the notary and direct him not to send the deed to Falls City for record, but to return the same to him. It is alleged that the execution of the two deeds was such a recognition of the contract to convey, and, with the marrige, such part performance thereof, as to remove all defense or excuse for the failure of performance; that soon after the execution and delivery of said deed her husband, under the influence of his parents, abandoned her, and has refused to make provision for

her, and the defendants, Frank Svanda, Sr., and his wife, Aloisia Svanda, have refused to make said conveyance as agreed, and that from the beginning their aim and design was to practice a fraud upon her, and that they never intended to comply with their said contract, but that they desired said marriage in order to secure the services of plaintiff as a "common drudge to do the work of their household." It is alleged that she has fully performed her part of the said contract, and insists that defendants comply with theirs. The prayer is for specific performance of the contract conveying to plaintiff an undivided half of the land in question, or if the court is of the opinion, by reason of subsequent conveyances having been made by defendants of said property, that specific performance cannot be decreed, that an accounting be had of the value of the land, and that a decree be entered in her favor for a sum of money equal to one-half the value of the land promised and agreed to be conveyed, and for general relief. A copy of the deed last executed, and which it is alleged was delivered to her and her husband, is attached to the petition as an exhibit. The petition is of unusual length, but it is believed the foregoing contains the essential averments sufficient to an understanding of the questions presented.

The defendants filed their joint answer, admitting their relationship to each other; that Frank Svanda, Sr., is the owner of the real estate in question, and deny all other averments in the petition. They specifically deny the promise or agreement to convey the land described in the petition, or any portion thereof, to plaintiff and her husband; allege that they had no knowledge of the contemplated marriage until after it had been consummated, and that "there was no contract of any sort entered into or considered and discussed between Frank Svanda, Sr., and Aloisia Svanda and this plaintiff and Frank Svanda, Jr., by which said Frank Svanda, Sr., and Aloisia Svanda were to convey said lands, or any portion thereof, to plaintiff and Frank Svanda, Jr., until about two weeks after

said marriage had been consummated between plaintiff and Frank Svanda, Jr." It is alleged that the lands mentioned in plaintiff's petition are and were at the time the alleged contract was made the home and homestead of said Frank Svanda, Sr., and Aloisia Svanda, the same being occupied as such by them; that while they never agreed to convey any of said land to plaintiff and Frank Svanda, Jr., in contemplation of said marriage, or to induce them to intermarry, still Frank Svanda, Sr., in order to comply with the urgent request of plaintiff, offered to convey to her and Frank Svanda, Jr., a portion of the lands, subject to a life tenancy therein of himself and wife, but that his wife, Aloisia Svanda, refused to join in said conveyance; and deny that the offer to make such conveyance was in the attempted consummation of any antenuptial agreement. No reply was filed. The trial resulted in a finding and decree dismissing plaintiff's petition. Plaintiff appeals.

From reading the petition, answer and bill of exceptions, we receive the impression that the cause was tried upon the contention of plaintiff that an antenuptial contract was made whereby the defendants Frank Svanda, Sr., and wife agreed to convey to their son and his wife the 160 acres of land designated, in consideration of their marriage, and that when the marriage was consummated they became dissatisfied with the contract, and exerted an influence over the son and induced him to abandon his wife and join them in defeating her rights, and, by his aid, avoiding the contract. As alleged in the petition and shown by the evidence, the defendants, after the marriage of plaintiff to their son, transferred their real estate, including the land in question, to the different members of the family, and which it was alleged was for the purpose of defrauding plaintiff. But, upon the suggestion of counsel in the argument, that this part of the case would require no attention here, that part of the pleadings has been omitted from our statement of the issues. Much of the attention of the trial court, as well as of counsel, was

devoted to the question of whether the marriage, even if plaintiff's contention that an antenuptial contract was made, was such a part performance as to take the contract out of the statute of frauds. However, we are persuaded that that question is not involved in the case, and it will not be considered.

The evidence shows beyond controversy that, after the marriage of plaintiff to the junior Svanda, they and the senior Svanda went to Humboldt, and a deed of some kind was prepared by which certain real estate, or some interest therein, was conveyed to the young people, but, the deed not being satisfactory, it was not delivered, nor accepted, and was destroyed. No copy of that deed appears in the record, nor are its contents given. At a later date the same parties again went to Humboldt, and applied to another notary, and another deed was prepared by him which was accepted by all parties as being correct, and the deed was, by mutual consent, entrusted to the notary to be sent to Falls City for record. The parties returned to their home. After their arrival at their home defendant, Frank Svanda, Sr., telephoned to a friend in Humboldt to go to the notary, get the deed, and return it to him. This order was without the consent of the grantees. The party called upon the notary as requested, but the deed had already been mailed and was then in the post office. In accordance with the request, the notary went to the post office, procured the deed, and some days later returned it to the grantor, who, without the knowledge or consent of plaintiff, destroyed it. The notary, however, had prepared and retained a copy of the deed, and this copy was attached to the petition, fully identified and verified, and introduced in evidence, showing the acknowledgment, witnessing, etc. It is in all respects a legally executed instrument. The copy attached to the petition describes the land conveyed as the east half of the northeast quarter of section 20 and the west half of the west half of the northwest quarter of section 21, all in township 2 north, range 13, while the copy in the bill

of exceptions gives the description as the east half of the northeast quarter of section number 20 and the west half of the west half of the northwest quarter of section number 13 (21), same township and range. We assume that the discrepancy is a clerical error of the copyist, and will notice it no further. There can be no doubt but that the conduct of the parties at the time of the execution of the deed of conveyance was intended for, and was, a delivery of the deed, and that the title was thereby vested in the grantees. *McGuire v. Clark,* 85 Neb. 102; *Rogers v. Heads Iron Foundry,* 51 Neb. 39; *Brown v. Westerfield,* 47 Neb. 399; *Jamison v. Jamison,* 4 Del. Ch. 311; *Bates v. Winters,* 138 Wis. 673. This being true, the title was not affected by the subsequent procurement of the deed and its destruction by the grantor without the knowledge and consent of the grantee. *Brown v. Westerfield, supra.* See 16 Am. Dig. (Cent. ed.) "Deeds", col. 167, sec. 135.

The evidence shows that the surrender of the deed was with the consent of Frank Svanda, Jr., but not of plaintiff. The deed having been executed, and accepted by plaintiff, must be held as a completion and close of the transaction, and she is entitled to a decree confirming the transfer unless it be shown that some part of the land is included in the homestead of the defendants, the senior Svandas. It is well settled that, when a court of equity acquires jurisdiction of a cause and of the parties thereto, it will retain the cause for all purposes and determine all matters put in issue. See cases cited in 1 Page, Nebraska Digest, 791.

The decree of the district court is reversed and the cause remanded, with leave to the parties to reform the pleadings should they desire to do so, and the district court is directed to hear evidence as to the homestead quality of the land. If any portion of the property conveyed is found to be included in the homestead, the deed will be held to be ineffectual as to that part, not exceeding $2,000 in value.

REVERSED.

JOHN CLARENCE V. STATE OF NEBRASKA.

FILED MARCH 10, 1910. No. 16,310.

1. **Criminal Law**: EVIDENCE: ADMISSIBILITY. Upon a trial of an accused under a charge of murder, certain witnesses testified that they were in a corncrib shoveling corn into a sheller, and that at the time of the tragedy they were standing upon corn in the crib not yet removed, and, looking through an opening between the boards constituting the wall of the crib, witnessed the affair which resulted in the death of the deceased, their testimony being favorable to the defendant and his theory of self-defense. At the time of the shooting of the deceased there was a team and wagon and the corn sheller near the crib, which were thereafter removed, and the boards, between which the witnesses testified they saw the transaction, were knocked or taken off. Over four months thereafter the state procured persons to go to the place in question, who, over the objection of the accused, testified that they caused a team and wagon to be placed where they were informed the team and wagon had stood, and they procured boards to be placed where the boards were said to have formerly been, and that by standing on the floor of the granary they could not see the spot where it was said the tragedy occurred. The admission of the testimony, without proof that the conditions as existing at the time of the affray had been restored, *held* erroneous.

2. **Homicide**: INSTRUCTIONS: SELF-DEFENSE. "When, in a trial for murder, the defendant produces evidence tending to justify the killing on the ground of self-defense, an instruction which limits the right of self-defense to one in the lawful pursuit of his business is erroneous." *Hans v. State*, 72 Neb. 288.

3. ———: ———. In an instruction given to the jury upon a trial of one charged with the crime of murder, the law of murder in the first and second degrees and manslaughter was fully explained. Upon the request of the state, the court later instructed the jury that "a malicious killing, although done upon a sudden quarrel and in the heat of passion, is, at least, murder in the second degree." *Held*, That, in view of the instructions already given and of the use of the words "at least", the instruction was prejudicial error.

4. **Criminal Law**: INSTRUCTIONS: PROVINCE OF JURY. The jury are the sole judges of what is shown by the testimony of the witnesses. An instruction which informs the jury that certain facts are shown by a witness, naming him, and quoting his testimony, is erroneous as usurping the function of the jury. It is for them to

say whether the testimony of the witness establishes the fact detailed.

5. ———: ———: MATERIALITY OF EVIDENCE. It is error to submit the question of the materiality of evidence to the jury before whom the case is being tried.

ERROR to the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Reversed.*

Byron Clark, W. A. Robertson and *John C. Watson,* for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

REESE, C. J.

An information was filed in the district court for Cass county charging plaintiff in error with the crime of murder in the first degree in killing John P. Thacker, in said county on the 15th day of January, 1909, by shooting him with a pistol, or revolver, then held by plaintiff in error. A jury trial was had, beginning June 2, 1909, which resulted in a verdict finding plaintiff in error guilty of murder in the second degree. A motion for a new trial was filed, which was overruled, and plaintiff in error was sentenced to imprisonment in the state penitentiary for the term of 14 years, and that he pay the costs of prosecution. The cause is removed to this court by proceedings in error for review. The bill of exceptions is very voluminous and the testimony of the witnesses quite conflicting. In view of the fact that there will probably be another trial, it is not deemed proper that we should review the facts, except so far as it may be necessary to present the questions to be here passed upon.

It is shown by the evidence that plaintiff in error was a young man of about the age of 29 years at the time of the tragedy, five feet six inches in height, weight 160 pounds, and is, and has been for a number of years, so crippled in his left leg as to render it practically useless,

requiring him to use a cane in order to enable him to walk. The deceased was a man of about middle age, weighing from 220 to 240 pounds, of full vigor and strength, and of, at least, resolute disposition. The relations between plaintiff in error and deceased were friendly. On the day of the tragedy a number of people, including plaintiff in error and the deceased, were at the farm of a Mr. Darrough, shelling corn from the crib, and hauling it away. There were four persons in the crib, or granary, shoveling corn into the sheller. One person was in a wagon nearby. A difficulty arose between one of the shovelers and the person in the wagon. Their relation to each other was that of uncle and nephew. Feeling ran high between them, and, while no assault was committed, their language and actions were quite demonstrative. At that time plaintiff in error was standing at a water tank nearby watering a span of mules. The deceased then appeared upon the scene, apparently rather unexpectedly, and called, in language not necessary to be repeated here, suggesting to the man in the wagon that he administer punishment to the young man with whom he was quarreling, and started in their direction. At that moment plaintiff in error, who was leaning upon his cane and holding his mules, called to the deceased, in language more forcible than polite, to keep out of the difficulty between the uncle and nephew. Deceased then started toward plaintiff in error, and the tragedy soon thereafter followed. Up to this point there is little, if any, conflict in the testimony. From that time on the testimony is somewhat conflicting. At some period in the difficulty which followed, deceased picked up a board or club and struck plaintiff in error on the head two or more blows. Plaintiff in error raised his cane, a heavy hickory stick which he had carried and used for a number of years, and by the use of which he was enabled to walk, either in defense or counter attack, when deceased took it from him and struck him a heavy blow with it. By some means the cane was dropped, and deceased seized plaintiff in error around the body from

behind and somewhat to the left side, when they fell to the ground, deceased falling on top of plaintiff in error. At some period in the encounter the deceased was shot three times by plaintiff in error, the wounds thereby inflicted causing his death some five days thereafter. During the time of the difficulty, three of the shovelers in the crib looked out through the cracks or openings between the boards forming the side of the crib, and some of them testified to having seen the whole, or practically all, of the contest between deceased and plaintiff in error. Their version of the affair, upon the witness-stand, was largely, if not entirely, in favor of the theory of the defense, and to the effect that plaintiff in error acted upon the defensive, and would probably be excused, or possibly justified, in protecting himself with his pistol. There seems to be no doubt of his inability to do so of his own strength. Soon after the tragedy photographs were taken of the corncrib and surroundings, some teams, wagons and sheller being placed as at the time of the difficulty.

The trouble occurred on the 15th day of January, 1909. The trial was commenced on the 2d day of June following. Upon the trial the state disputed the testimony of the witnesses who claimed to have seen and heard the difficulty from their position in the crib, and, the better to enable them to do so, as was supposed, caused persons to go to the crib in question, either immediately before or during the trial, and inspect the place for the purpose of ascertaining whether persons so situated could have observed what was done. The teams, wagons and sheller had all been removed, as well as the boards which formed the cracks through which it was claimed the witnesses had looked. A team and wagon was placed where it was *said* a team and wagon had stood, and boards were nailed on the studding where it was said some of the boards had been before being removed. We are unable to find any proof in the bill of exceptions by any one present at the time of the tragedy that the original condition was in any way restored. The witnesses who made the inspection

testified that, in looking out at the place where the board was nailed up by them, or in their presence, and the team and wagon being placed where they were supposed to have stood, no one could have seen the parties involved at the place where they were said to have had the altercation and contest. So far as we are able to discover, this evidence was wholly incompetent for want of sufficient foundation, was inadmissible, and highly prejudicial. The vice of this evidence also affirmatively appears. It was shown that there was corn in the crib at the time of the tragedy, and that the witnesses stood upon the corn and were thus elevated so that they could see, but at the later time, referred to by the impeaching witnesses, the corn had all been removed and there was none in the crib.

As a part of the ninth instruction given by the court to the jury, the court said: "The jury are instructed that the rule of law on the subject of self-defense is this: Where a man, in the lawful pursuit of his business, is attacked, and when, from the nature of the attack, there is reasonable ground to believe there is a design to take his life, or to do him great bodily harm, and the party attacked does so believe, then the killing of his assailant under such circumstances will be excusable or justifiable homicide, although it should afterward appear that no injury was intended and no reasonable danger existed." We do not copy the whole of the instruction on account of its length. It must be enough to say that, in the main, with the exception of the portion quoted, the law of self-defense is correctly stated. But, as must appear to any one reading it, the whole is in effect made to depend upon whether the accused was "in the lawful pursuit of his business." This portion of the instruction is condemned in *Hans v. State*, 72 Neb. 288. In the syllabus it is said: "When, in a trial for murder, the defendant produces evidence tending to justify the killing on the ground of self-defense, an instruction which limits the right of self-defense to one in the lawful pursuit of his business is erroneous." There can be no doubt but that, considering

the physical condition of the two parties and the testimony of practically all the witnesses, there was at least some evidence "tending to justify the killing on the ground of self-defense."

Objection is made to the eighth instruction, given upon the request of the state. It is as follows: "The jury are instructed that a malicious killing, although done upon a sudden quarrel and in the heat of passion, is, at least, murder in the second degree." Were the words "at least" eliminated, the instruction might not be objectionable, although the statement of abstract principles of law in an instruction is not to be encouraged, but rather condemned. It requires but little reflection for one to see that the instruction as formed might be to the prejudice of a person on trial. The use of the words "at least" would naturally suggest to the mind of a juror that it might also be something greater. If so, the crime of murder in the first degree would be suggested, for that is the next step upward in the grade of the crime. In the seventh and eighth instructions given by the court upon its own motion the law of manslaughter is fully explained, and a return to the subject in the language of the instruction above quoted was not necessary or in any way demanded. Under the circumstances we cannot approve of the instruction.

An error was committed in giving the twenty-second instruction, given upon the court's own motion. It is as follows: "You are instructed that the testimony of George Cole shows that the defendant stated to him 'that if Thacker came into the field where he was and threatened to kill him, he would kill him (meaning Thacker, the deceased)', also that he stated 'that if Thacker had done that way with him he wouldn't only have drawn a gun but he would have used it.' You are instructed that the foregoing language of the defendant does not constitute a threat, but is admitted as showing the condition of mind of the defendant which he entertained toward Thacker at that time, and is to be weighed by you in determining

whether or not the shooting of Thacker by the defendant was malicious. You are the sole judges of the weight of this testimony and whether or not it has any bearing upon the case." As to what the testimony of the witness "*shows*" was for the determination of the jury alone. By the language of the instruction the consideration of the weight of Cole's testimony was entirely withdrawn from the jury, and they were thereby required to take the testimony of the witness as true. It was within the province of the jury to ignore his evidence *in toto,* if for any sufficient reason they believed he testified to an untruth. It is true that at the close of the instruction the jury were informed that they were the sole judges of the weight of the testimony, but, as they had been instructed as to what was *shown* by it, the natural inference would be that they must accept the fact as established, and decide for themselves as to "whether or not it has any bearing upon the case", which was for the court, and not the jury. It is for the court to decide if proffered testimony may have any bearing upon the case, and for the jury to decide whether or not it is to be believed, or, stated otherwise, how much weight or credence is to be given to what the witness has said. An instruction telling the jury what effect must be given to the evidence of a witness is erroneous. *Coon v. McClure,* 53 Neb. 622; *Murphey v. Virgin,* 47 Neb. 692; 1 Sackett (Brickwood), Instructions to Juries (3d ed.) sec. 182. Other questions are presented by the assignment of errors and briefs, but as they may not arise upon another trial they will not be noticed here.

It is strenuously objected that the evidence is not sufficient to support the verdict. As we have hereinbefore stated, it is not deemed necessary to discuss this question as another trial may not present the same facts and circumstances.

For the errors referred to, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

RALPH O. URBAN, APPELLEE, V. EDWIN F. BRAILEY ET AL., APPELLANTS.

FILED MARCH 10, 1910. No. 16,441.

1. **Appeal:** SUBMISSION: AFFIRMANCE. Where a petition for a writ of habeas corpus was filed in the district court charging A with illegally imprisoning the plaintiff, and he made return that he held the plaintiff by virtue of a warrant held by B, and an amended petition was filed, praying for the writ directed to B, and they "being in court with the body of" plaintiff "and having answered as to their right to hold and imprison" him, and a judgment is rendered against them ordering the discharge of the plaintiff, from which they appeal by giving separate notices and filing separate precipes, but docketing the cause and submitting it as one case, it will be treated as one, and the affirmance of the judgment will be upon the merits as to both appellants.

2. ———: RECORD: CONCLUSIVENESS. The journal record of the district court recited that an amended petition was filed against B, and that both A and B answered as to their right to hold the custody of the plaintiff, and were both in court with the body of the plaintiff. *Held*, That the record will be accepted as correctly stating the facts, even though the transcript contains no copy of the amended petition or answer.

OPINION on motion for rehearing of case reported in 85 Neb. 796. *Rehearing denied.*

REESE, C. J.

The opinion, affirming the judgment of the district court, in this case is reported in 85 Neb. 796. A motion for a rehearing was filed by Crocker, and which, upon a full consideration of the record, was overruled. He now files another motion asking a reconsideration of the former one, and of Crocker's connection with the case. The principal contention is that Crocker had filed a separate appeal in this court and was entitled to have it disposed of as such. It is true that he gave a separate notice of appeal in the district court and filed a separate precipe in this court. But one transcript was filed and but one set of briefs was presented, and it was, incorrectly perhaps,

supposed that the appeals were to be treated as one. Laboring under this impression, the opinion was written and attention not so strictly given to the details of the case as would otherwise have been. In the opinion, near the close, we said: "Crocker made no appearance in the case." This was a mistake, owing to the fact that no pleadings, other than the original petition against Brailey alone, and his return, were set out or contained in the transcript. But upon a more minute inspection of the certified transcript of the record of the district court we find that, while there was no order appearing as entered making Crocker a party to the suit, this entry was made:

"Now on this 18th day of August, 1909, this cause coming on to be heard before me, A. L. Sutton, judge of the district court in and for Douglas county, Nebraska, upon the petition of Ralph O. Urban, praying for a writ of habeas corpus, directed to Edwin F. Brailey, sheriff of Douglas county, Nebraska, and upon the amended petition praying for a writ of habeas corpus, directed to William Crocker, special agent of the state of Colorado, and Edwin F. Brailey, and William Crocker being in court with the body of Ralph O. Urban, and having answered as to their right to hold and imprison said Ralph O. Urban, and testimony being adduced by the parties hereto, and after argument of counsel the court, being fully advised in the premises, finds: * * * IV. That Ralph O. Urban is illegally, wrongfully and unlawfully deprived of his liberty by Edwin F. Brailey and William Crocker. V. That Ralph O. Urban should be discharged from the custody of Edwin F. Brailey and William Crocker."

It is a well-known rule of law that the records of the district court import absolute verity, and by this record we must be governed. The district court thereby obtained jurisdiction over Crocker as well as over Brailey. The fact that the amended petition and answer are not copied in the transcript constitutes no proof, in the face of such a record, that they were not filed. This, in connection with the recital in the record that both Brailey and Crocker

were in court with the body of Urban attending the trial with counsel, leaves no ground for the contention that Crocker was not a party to the proceeding, and that, for that reason, the judgment should be reversed as to him. Neither does it furnish any basis for the contention that the filing of a separate notice of appeal in the district court and a separate precipe in this court necessarily so divided the case as to require a separate and several judgment as to each in the final decision here. While it is true that in writing the opinion we fell into the error here noted, it is equally true that the judgment of affirmance was as effectual as to Crocker as to Brailey, and the decision was equally final as to Crocker upon the merits of the case. The district court had jurisdiction over both, and its judgment was regular and valid as to both, and has here been affirmed as to both.

The motion is therefore

OVERRULED.

PAPILLION TIMES PRINTING COMPANY, APPELLEE, V. SARPY COUNTY, APPELLANT.

FILED MARCH 10, 1910. No. 15,832.

1. **Pleading:** DEMURRER: WAIVER OF ERROR. Where a demurrer is sustained to a paragraph of an answer, and the defendant obtains leave, and thereafter files an amended or substituted answer in which another and different defense is set forth in the place of the one to which the demurrer was sustained, and afterwards defendant files a second amended answer in which no reference is made to either of said defenses, and thereupon goes to trial on the issue tendered by his second amended answer, and on such trial offers no testimony tending to establish the defense set forth in the paragraph of his original answer to which the demurrer was sustained, he waives the error, if any, in the ruling on the demurrer to his said original answer.
2. **Rehearing Denied.** Motion for rehearing overruled.

OPINION on motion for rehearing of case reported in 85 Neb. 397. *Rehearing denied.*

BARNES, J.

Our former opinion in this case will be found in 85 Neb. 397, where the facts are correctly stated. The appellant has filed a motion for a rehearing and argument has been had thereon. It is conceded that the general rule as to the effect of filing an amended pleading announced in our opinion is correct, but appellant strenuously contends that this case comes within what may be considered an exception to that rule.

In support of this contention, our attention is first directed to the case of *Hagely v. Hagely*, 68 Cal. 348. That was an action in ejectment, and the defendant pleaded two separate and distinct defenses, one of which was a special plea of the statute of limitations in a single paragraph of the answer. A demurrer was interposed as to that defense, which was sustained. Defendant thereupon filed an amended answer, in which she again interposed a plea or pleas of the statute of limitations. It was contended by her counsel that the defense to which the demurrer was sustained was again set out in the amended answer. We think this contention was well founded. It was said by the court, however: "Where separate defenses are set up in answer, and a demurrer is sustained to one or more of such defenses, and the defendant subsequently files an amended answer, it will amount to a waiver of error as to such defenses as are pleaded anew in such amended answer, but not as to defenses to which the demurrer was sustained, and which are not again pleaded in the amended pleading. In other words, it is not the new pleading which operates as a waiver, but the pleading anew of the same defense." This statement as contained in the opinion is unsupported by reasoning or authority, and it appears from an examination of the whole case that the plea of the statute of limitations as contained in the several sections of the California code of civil procedure was the point upon which the decision turned. That this case is not con-

sidered by the supreme court of California as contrary to the general rule, see *Ganccart v. Henry,* 98 Cal. 281.

Our attention is next directed to the case of *Whalen v. Muma,* 94 Ill. App. 488. That was an action upon a promissory note. In addition to the plea of *non assumpsit* in the usual form with an affidavit of merits, appellant filed two special pleas which were demurred to generally. The superior court sustained the demurrers to each of the special pleas, and granted leave to file additional pleas. In pursuance of such leave, an additional plea was filed. It will thus be seen at the outset that the defendant did not file an amended answer, but under the common law practice, which obtains in that state, he simply filed an additional plea as a part of his original answer. Reviewing this situation, the appellate court held that nothing appeared to indicate that appellant acquiesced in the decision sustaining the demurrer to his special pleas, or that he waived the error of which he complained, or did anything that could be so construed. The supreme court of Illinois, however, is committed to the rule announced by our former opinion, for in the case of *Dunlap v. Chicago, M. & St. P. R. Co.,* 151 Ill. 409, 421, it was held that the defendant acquiesced in the decision overruling his pleas by having obtained leave to plead over, and by having filed three new pleas, and that this amounted to a waiver of error, if any, in the decision overruling his former plea.

Appellant also cites *McIlroy v. Buckner,* 35 Ark. 555, and it appears that it was there held: "The filing of an amended and substituted answer after demurrer sustained to a former one will not be considered as a waiver of the defendant's objections to overruling the former, unless such intention appear or be inferred from the record. If the new defense be distinct from the former, and there is nothing to indicate his intention to abandon it, he may still rely upon it in the supreme court." That decision, however, turned wholly upon the point as to whether or not the defendant had abandoned, and thereby

waived, the defense pleaded in his former answer. That the general rule prevails in that state, see *Walker v. Wills,* 5 Pike (Ark.) 166.

Our attention is next directed to *Washburn v. Roberts,* 72 Ind. 213. That that case is not in point is apparent, for it is there said: "A party, by amending one paragraph of a pleading, does not waive the exception reserved to a ruling upon a demurrer to another paragraph of the same pleading."

Appellant also cites *Folsom v. Winch,* 19 N. W. 305 (63 Ia. 477). It was there said: "Where an answer containing a general denial, special defenses, and a counter-claim is demurred to, and the demurrer sustained, and the answer struck out, an amendment to the first paragraph of the answer, without reference to the counter-claim, does not amount to a pleading over, and the demurrer is not waived." It will thus be seen that the defendant in that case did not file an amended answer, but merely filed an amendment to the first paragraph of the answer, and therefore that decision is not in conflict with our opinion in this case.

The record fails to disclose any intention on the part of the appellant in this case to rely upon the defense set forth in the fifth paragraph of the original answer. By obtaining leave to file, and by filing, an amended answer, in which no reference is made to the fifth paragraph of the original answer, or the defense attempted to be pleaded thereby, by filing a second amended answer without any reference thereto, by going to trial upon the issue which appellant thus elected to make, and by failing to offer any testimony in support of that defense, the appellant must be held to have waived the error, if any, in sustaining the demurrer thereto. We are of opinion that his conduct amounted to a complete abandonment of the fifth defense set up in his original answer.

In *Brown v. Brown,* 71 Neb. 200, it was held that an erroneous ruling overruling a demurrer is error without prejudice, where the pleading assailed is afterwards

amended, and the cause submitted and determined on the amended pleading. In *Worrall Grain Co. v. Johnson*, 83 Neb. 349, we said: "Where a party answers over after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling." That there may be exceptions to this rule, and that a pleader can easily bring himself within such exceptions by indicating his intention to do so in any suitable manner, is not to be denied. But we are of opinion that the case at bar presents no exception to the general rule.

Finally, it is contended that the question on which this case was decided was not presented or argued in the brief of either appellee or appellant, and that for this reason a rehearing should be granted. We think that the appellant is mistaken upon this point. We find in appellee's original brief the following: "After this demurrer was sustained, the county attorney abandoned this answer and filed another answer which is a practical admission of the cause of action as set forth by the appellee in its petition. It is from the judgment rendered on this answer that this appeal is taken. The former answers having been abandoned, we understand the rule to be that, having declined to rely upon any of these answers and by answering over, the exceptions are waived."

For the foregoing reasons, the motion for a rehearing is

OVERRULED.

ROOT, J., dissenting.

I am unable to concur in the majority opinion overruling defendant's application for a rehearing. I do not say plaintiff's demurrers to defendant's answers should not have been sustained, and shall not discuss that proposition, but I do insist the rule of practice announced is not in harmony with the spirit of our code, and is not sustained by authority. A demurrer to a separate affirm-

ative defense in an answer admits, for the purposes of the case, the truth of all facts well pleaded therein, and the court in passing upon that pleading will consider the separate defense as though it were the only answer in the case. *Fisk v. Reser*, 19 Colo. 88. If the demurrer is sustained, the defendant in effect is informed that the time of the court will not be taken up in hearing evidence upon the issues joined by the petition and that part of the answer. The defendant may then plead over or stand upon his answer. If no other defense is stated and the defendant refuses to further plead, the plaintiff is entitled to a judgment on his petition. If other defenses are pleaded, the trial will proceed upon the issues thereby joined, and, if the plaintiff prevails, defendant may have a review in the appellate court of the ruling on the demurrer as well as upon his other defenses. The defendant may waive the error in sustaining a demurrer to his answer. He may do so by amending his answer so as to state all of the facts contained in the original defense and such other allegations as will cure the objections raised by the demurrer. He may do so by pleading another defense repugnant to, and inconsistent with, the one to which a demurrer was sustained. But, if he merely amends his answer by setting up other defenses not inconsistent with the one to which a demurrer has been sustained, he should be permitted, if defeated in the lower court, to present to the appellate court the ruling of the trial court whereby he has been prevented from proving facts which he contends will defeat plaintiff's claim. In other words, if the ruling of the trial court compelled defendant to so frame his answer that he could not prove the facts pleaded in the defense to which the demurrer was sustained, and those facts constitute a defense to the action, the judgment of the district court should be reversed, notwithstanding an amended answer has been filed stating another and distinct defense not repugnant to the one contained in the answer held bad on demurrer. *Knox County Bank v. Lloyd's Adm'rs*, 18

Ohio St. 353. *McIlroy v. Buckner,* 35 Ark. 555, is also directly in point. The distinction made between the instant case and *Washburn v. Roberts,* 72 Ind. 213, and *Folsom v. Winch,* 63 Ia. 477, is technical, and not convincing.

In considering the principle contended for by the plaintiff in the case at bar, Mr. Justice Beck in *Ingham v. Dudley, Adm'r,* 60 Ia. 16, 24, said: "Counsel in support of their position rely upon the general rule that a party whose pleading is held bad upon demurrer waives the error of such a ruling by pleading over. * * * A little reflection will make it plain that the rule is not applicable to the case under consideration. It reaches a case where a party, by pleading over, supplies omissions or cures defects in his pleading pointed out by the demurrer. * * * A defendant may plead as many defenses as he may have. * * * He may add to his answer by way of an amendment new defenses at such times and in such manner as may be permitted by the court. If a defense pleaded be held insufficient upon demurrer, the defendant may, with leave of the court, set up another, and by doing so he will not be regarded as waiving the error in the ruling sustaining the demurrer." It seems to me that the logic of the Arkansas, Ohio and Iowa courts is unanswerable and controls the case at bar.

The cases cited in the majority opinion are not in point. In *Ganceart v. Henry,* 98 Cal. 281, a demurrer to a complaint had been sustained. Subsequently an amended and amplified complaint was filed stating with greater particularity the cause of action set forth in the original complaint. The appellate court properly held the error in sustaining defendant's demurrer, if any had been committed, was waived by plaintiff filing the amended complaint. In *Dunlap v. Chicago, M. & St. P. R. Co.,* 151 Ill. 409, plaintiff demurred to pleas numbered one and two filed by defendant to the petition, and the

demurrer was sustained. No exception was taken to the ruling, but defendant pleaded over, and it was held he thereby waived any error committed by the circuit court in sustaining the demurrer. The judgment of the appellate court reversing the circuit court is not based upon the point herein discussed, nor does it appear that in pleading over all essential facts contained in the first and second pleas were not set out in the third, fourth and fifth pleas subsequently filed. In *Brown v. Brown*, 71 Neb. 200, and in *Worrall Grain Co. v. Johnson*, 83 Neb. 349, a demurrer to the petition had been overruled, and it was held in each case that by subsequently answering the defendant waived any error in the ruling upon his demurrer.

It is logical and reasonable to hold that a defendant waives error by pleading over to a petition, because the demurrant is not deprived of any defense he may have to the action. If the defendant amends a defense to which a demurrer has been sustained, he still preserves his defense, and, if after such a demurrer has been sustained he files an answer repugnant to the original one, he may well be held to have abandoned the first defense. But to solemnly adjudge the filing of a separate and consistent defense in an amended answer, without reference to that other defense which the court has held bad on demurrer, is a waiver of the first defense is, it seems to me, a long step backward and a sacrifice of substance to form.

The former judgment of the court should be vacated, and the case determined on its merits.

SEDGWICK and LETTON, JJ., concur in this dissent.

BENJAMIN S. BAKER, ADMINISTRATOR, APPELLEE, V. RACINE-SATTLEY COMPANY, APPELLANT.

FILED MARCH 10, 1910. No. 15,959.

1. Trial: MOTION TO DIRECT VERDICT: WAIVER OF ERROR. If a defendant desires to submit his case to the jury on the evidence of the plaintiff, and asks the court to instruct the jury to return a verdict in his favor, he should make his motion to that effect without reservation. If he does not, the court may refuse to entertain it. If the defendant on the overruling of his motion offers testimony in support of his defense, this will amount to a waiver of the error, if it be such.

2. Appeal: PLEADING: REVIEW. Where upon the trial both parties to the action have treated the case as though the affirmative defenses contained in the answer were denied by a reply, or have treated the reply as sufficient in form and substance to put such affirmative defenses in issue, such conduct will amount to a waiver of the insufficiency of the pleading, and that question cannot be raised for the first time in the court of review.

3. Negligence: EVIDENCE: QUESTIONS FOR JURY. Evidence examined, its substance stated in the opinion, and *held* sufficient to require the trial court to submit the questions of negligence and contributory negligence to the jury.

4. Trial: ADMISSION OF EVIDENCE: INSTRUCTIONS. Admission of immaterial and incompetent evidence may be cured by an instruction to the jury to disregard it, where it is of such a nature as not to prejudice the substantial rights of the complaining party.

5. ———: WITNESSES: CREDIBILITY: QUESTIONS FOR JURY. Ordinarily the credibility of a witness is a question for the determination of the jury, and it is within their province to credit the whole of his testimony or any part of it which appears to them to be convincing, and reject so much of it as in their judgment is unworthy of credit.

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

Rich, O'Neill & Gilbert, for appellant.

Benjamin S. Baker, contra.

BARNES, J.

Action in the district court for Douglas county by the administrator of the estate of Walter J. Williamson, deceased, against the Racine-Sattley Company, a corporation, for damages on account of the alleged negligence of the defendant company in causing the death of his intestate. Plaintiff had a verdict and judgment, and the defendant has appealed.

It appears that at the close of the plaintiff's evidence in chief counsel moved the court to direct the jury to return a verdict for the defendant, for the reason that the uncontradicted evidence disclosed such contributory negligence on the part of the plaintiff's intestate as should, as a matter of law, prevent a recovery on the part of the plaintiff. The motion was overruled, and this ruling is assigned as reversible error. In disposing of this assignment it is sufficient to say that by declining to stand upon its motion, and by the production of evidence in support of the defenses set forth in its answer, defendant waived the right to complain of the adverse ruling above mentioned. In *Union P. R. Co. v. Mertes,* 35 Neb. 204, it was held that, if a party desires to submit his case to the jury on the evidence of the plaintiff, and asks an instruction that the jury find for the defendant, he should make his motion to that effect without reservation. If he does not, the court may refuse to entertain it. If the defendant on the overruling of such motion offers testimony, this is a waiver of the error, if it be such. This rule is so well settled that no additional authority need be cited to support it, and this contention must therefore be resolved against the defendant.

It is contended by the defendant, for the first time in this court, that having pleaded contributory negligence in its answer, and the plaintiff having replied thereto by way of negative pregnant, there was no denial of contributory negligence on the part of plaintiff, and therefore he was not entitled to recover. Of this contention it is

sufficient to say that the record discloses that the case was tried in the court below on the theory that an issue as to contributory negligence was tendered by the pleadings. Appellant in its motion for a new trial nowhere called the court's attention to the reply, and in fact treated it as a denial of the allegation of contributory negligence. Neither do the assignments of error filed in this court direct our attention to the condition of the pleadings. In *Krbel v. Krbel,* 84 Neb. 160, it was said: "Where both parties to an action treated the case as though affirmative defenses in the answer were denied by a reply and tried the case upon that theory, this court on appeal will treat the case as though such reply had been filed." The case of *Chicago, St. P., M. & O. R Co. v. Lundstrom,* 16 Neb. 254, was one where the plaintiff in error took no exceptions to the reply before trial, either by motion or otherwise, nor did it claim upon the trial that the new matter contained in its answer was admitted for want of reply, and it was there held that defendant could not avail itself of that point by raising it for the first time in this court. To the same effect are *Sheibley v. Fales,* 81 Neb. 795, and *Stanser v. Cathers,* 82 Neb. 136. We are therefore of opinion that the district court did not err in overruling defendant's motion for a directed verdict.

It is further contended that the court erred in overruling its motion to direct a verdict in its favor at the close of all of the evidence, and that the evidence is not sufficient to sustain a verdict for the plaintiff. The record discloses that on and prior to the 17th day of May, 1907, the defendant corporation owned and occupied a large wholesale implement building in the city of Omaha abutting on the Tenth street viaduct; that the general entrance to the building was from the said viaduct to the third floor thereof; that some distance from the front entrance there was an elevator, used both for freight and passenger service, extending from the top floor to what is known as the first or ground floor of the building; that

various kinds of agricultural implements were stored upon the first floor in such a way that there was an alley extending from the elevator shaft on that floor about 16 feet to the north, and thence for a long distance to the rear of the building, where was located the office of the business manager; that the condition of the windows on the first floor, and the manner in which the agricultural implements were stored, rendered that floor dark to a certain extent, and especially was the light dim and uncertain about the elevator shaft; that the building was lighted with electric lights, which then, and for some time previous thereto, were and had been out of repair so that there was no light at or near the elevator shaft, although the elevator was equipped for such lights; that the elevator was also equipped with what is known as "automatic gates," which were operated by the rise and fall of the elevator itself in such a manner that, when the cage approached either of the floors in its passage up and down the shaft, the automatic gate, which bars the entrance to the shaft on that floor, would be raised to such a height that, when the elevator stopped at the proper place for use upon that particular floor, the gate would stand up in the entrance of the shaft some six or seven feet, and afford free entrance to and exit from the cage of the elevator; that at that time, and for some time previous thereto, the automatic gate on the first floor of the elevator was out of repair, and was tied or fastened up at the place or point where it would be found if it was in good working order when the elevator cage was at that floor at the point proper to receive or discharge passengers; that the plaintiff's intestate was unacquainted with the condition in the building, and knew nothing of the facts in relation to the construction or repair of the elevator, except in a general way he had been told that the elevator lights were out of repair. In the forenoon of the day above mentioned deceased, who was an expert electrician, was sent by the Omaha Electric Company, in whose service he was then engaged, to defendant's build-

ing in response to a letter which had been sent by the defendant's general manager to his employer to send some one to repair the lights, and especially the one attached to the beam of the elevator above described; that the deceased entered the building from the viaduct upon the third floor; that he there met one of the defendant's employees who conducted him to the elevator, and thence to the first floor of defendant's building, and directed him to the office of the manager. When the deceased met the manager, he informed him that he was there in response to the letter above mentioned, and the manager replied that he was glad to see him. The employee who conducted the deceased to the office of the manager testified that the next time he saw the deceased he was lying in the pit, at the bottom of the elevator shaft, some 12 feet below the first floor of the building, in a dying condition. That the defendant was guilty of negligence in permitting its elevator and the gate thereof on the first floor to be and remain in such a condition as to deceive one who might desire to make use of it, and in permitting the unlighted condition of that floor of the building, and of the elevator shaft itself, seems clear beyond question.

It appears from the testimony of a witness of the name of Wallace, who was produced by the defendant, that he was the employee who took charge of Williamson to conduct him to the place where he was to work, when he left the office of the general manager; that they walked down the alley from the manager's office to the point where it intersected with the passageway to the elevator; they then turned toward the elevator shaft, and, when they approached it, Wallace said, "I will ring for the elevator"; that the deceased replied, "The elevator is right here now", and stepped into the shaft and fell to the bottom of the pit. On cross-examination Wallace testified as follows: "Q. Mr. Wallace, taking your version of what you said to young Williamson from the time that you said, 'I will call the elevator', until the time that the young man said, 'The elevator is here now',

and stepped in, was there any perceptible space of time? A. Just a few seconds. Q. Was there any perceptible —did not the two men run right in together? A. Well, very near. Q. So, then, from the time that you said, 'I will call the elevator' and he said 'The elevator is here now', and stepped in, there was neither time for you to do or say a thing to prevent it? A. No, sir. Q. You did not raise your hand, or say, hold, or stop, because there was not time? A. There was not time. Q. Did not you say to him, then, I will call the elevator, and walk immediately there; and when you said, I will call the elevator, he immediately responded, the elevator is here, and he stepped in? A. Yes, sir. Q. What was the condition in front of this elevator as to being light or dark at this time? A. Well, it was fairly light. It was not dark, and it was not light, it was dim. Q. It was an uncertain dim light? A. It was dim. Q. You knew at the time that the young man stepped into the elevator shaft that the bar or gate was stationary, that is, tied up there, did you not? A. Yes, sir. Q. You never said anything to him about the gate being tied up, did you? A. No, sir. Q. You did not say anything to him about the elevator was not protected with a bar or gate, or anything, did you? A. No, sir. Q. You say you did not? A. No. Q. You were familiar with the fact that there were no lights in the elevator, there were no lights in the shaft below, and no light in front, were you not? A. Yes, sir."

Under this state of the evidence, we are satisfied that the question of contributory negligence was one for the jury, and that they were justified in resolving that question in favor of the plaintiff and against the defendant, for it clearly appears that by reason of the dim and uncertain light, and the open unguarded elevator shaft with the automatic gate in such a position as to invite entrance thereto, together with the fact that Wallace did not say or do anything to overcome the natural, and to be expected, belief in the mind of Williamson that the elevator was at hand, justified him in stepping into the

shaft, and such action on his part did not constitute contributory negligence. We are therefore of opinion that the trial court did not err in overruling defendant's motion for a directed verdict.

Defendant assigns error for the reception of certain evidence produced by the plaintiff upon the trial. It appears that the father of the deceased was permitted to testify to a conversation which took place between himself and the defendant's witness, Wallace, when they met at the plaintiff's office some time after the accident in question. If this was error, which question we do not determine, it was cured by the instruction given by the trial court to the jury by which they were told that this evidence should be entirely disregarded. While it is true that in some cases error in the reception of incompetent evidence cannot be cured by an instruction to the jury to disregard it, yet in the case at bar there was nothing in the nature of the evidence complained of which could prejudice the substantial rights of the defendant, and which an instruction, like the one above mentioned, would not cure.

Finally, it is contended that, because the plaintiff was permitted to contradict some of the statements of the witness Wallace in the way of impeachment, the testimony of that witness must either be accepted as a whole, or, if any portion of it be rejected by the jury, they must entirely disregard the whole of it; that, if the testimony of Wallace be disregarded, then the evidence is not sufficient to sustain the verdict. This contention cannot be sustained. The credibility of the witness was a question for the jury, and it was within their province to credit the whole of his testimony or any part of it which seemed to them to be convincing, and reject so much of it as in their judgment was not entitled to credit.

A careful examination of the record satisfies us that it contains no reversible error, and the judgment of the district court is therefore.

AFFIRMED.

JESS KINNAN V. STATE OF NEBRASKA.

FILED MARCH 10, 1910. No. 16,151.

1. **Sodomy:** INDICTMENT: SUFFICIENCY. The act charged in the indictment does not constitute the infamous crime against nature prohibited by section 205*a* of the criminal code.

2. **Evidence:** SUFFICIENCY: QUÆRE. Sufficiency of the evidence to identify the defendant as the person who performed the acts complained of, questioned.

3. **Criminal Law:** EVIDENCE: REVIEW. The admission of evidence of the finding of footprints in the corn field where it is alleged the unlawful act occurred, not shown to have been made by any shoes ever worn by the defendant, and not connected with him in any way except that they led in the direction of his home, *held* reversible error.

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

N. D. Jackson, C. H. Kelsey, William V. Allen and *William L. Dowling,* for plaintiff in error.

William T. Thompson, Attorney General, George W. Ayres and *M. F. Harrington, contra.*

BARNES, J.

Jess Kinnan, hereafter called the defendant, was tried in the district court for Antelope county upon the charge of committing the infamous crime against nature, defined in section 205*a* of the criminal code by penetration *per os.* He was convicted, was sentenced to the penitentiary for a term of ten years, and has brought the case here for review.

Before going to trial, defendant, by motion and demurrer, challenged the sufficiency of the information on the ground that the facts set forth therein did not constitute a violation of the section of the criminal code above cited, and now strenuously renews that contention. The identical question here presented has been deter-

mined by the supreme judicial tribunals of many of our sister states. In *People v. Boyle,* 116 Cal. 658, under a similar statute, the defendant was convicted of a felony, which was technically designated in the information as an assault with intent to commit "the infamous crime against nature." The supreme court of that state held that the facts of the case, which were the same as in the case at bar, did not make out the offense of which the defendant had been convicted. By the statutes of Texas, "the abominable and detestable crime against nature" is made a felony, and the supreme court of that state has many times decided that such facts as shown in this case do not constitute that crime. *Mitchell v. State,* 49 Tex. 535, 95 S. W. 500; *Prindle v. State,* 31 Tex. Cr. Rep. 551, 37 Am. St. Rep. 833; *Lewis v. State,* 36 Tex. 37, 35 S. W. 372; *Harvey v. State,* 55 Tex. 199, 115 S. W. 1193. In *Commonwealth v. Poindexter,* 118 S. W. (Ky.) 943, the supreme court of Kentucky considered this question, and in a very able opinion reached the same conclusion. This view of the question was adopted by the supreme court of Ohio in *Davis v. Brown,* 27 Ohio St. 326, and thereafter the legislature of that state enacted a statute to cover such a case. In *Estes v. Carter,* 10 Ia. 400, a like construction of a similar statute was adopted, and thereupon the legislature passed an act to supply the defect in the criminal law. Iowa code, Supp. 1907, sec. 4937*a*. The supreme court of Indiana in *Ausman v. Veal,* 10 Ind. 355, 71 Am. Dec. 331, adopted this rule, and such has always been the understanding of the text-writers. See 2 Bishop, New Criminal Law, sec. 1193; 25 Am. & Eng. Ency. Law (2d ed.) 1145; 3 Russell, Crimes, 250; 2 McClain, Criminal Law, sec. 1153, and 1 Wharton, Criminal Law (10th ed.) sec. 579. As opposed to this overwhelming weight of authority counsel for the state have directed our attention to *Means v. State,* 125 Wis. 650, and *Honselman v. People,* 168 Ill. 172. In the Wisconsin case the supreme court held that an act similar to the one in question in this case was a violation of section 4591 of

the statutes of that state, but this statute specifically includes the act charged here, hence the case is no authority on the point.

From the foregoing it clearly appears that the ruling in that case is of no assistance to us in the case at bar. Counsel, however, ask us to adopt the extraordinary language of the Wisconsin court that "there is sufficient authority to sustain a conviction in such a case, and, if there were none, we would feel no hesitancy in placing an authority upon the books." We cannot approve of this language. There is no doubt but that the Wisconsin case was correctly decided, and it was unnecessary for the court to use the language above quoted. It is not within the powers of the judicial branch of the government to place rules upon the books, or enact laws to define or punish crime. Those matters are wholly within the province of the legislature, and we are satisfied that the Wisconsin court did not intend its language to be understood as it is now interpreted by counsel for the state. In the Illinois case it appears that the legislature of that state, as a part of its criminal code (section 279), enacted the following: "Every person convicted of the crime of murder, rape, kidnapping, wilful and corrupt perjury or subornation of perjury, arson, burglary, robbery, sodomy, *or other crime against nature,* incest, larceny, forgery, counterfeiting, or bigamy, shall be deemed infamous", etc. So it seems clear that the decision of the Illinois supreme court turned upon the particular definition of crimes given by the statutes of that state.

Our statute fails to define the manner in which the infamous crime against nature may be committed, and it is therefore apparent that, when the legislature passed the section of our criminal code here in question, it had in mind the usual or common law definition of that crime, and as the acts charged in the information do not fall within that definition they must be held insufficient to constitute the infamous crime within the meaning of that section. Again, we have frequently held, and it is now set-

tled beyond question, that there are no common law crimes in this state, and we only resort to common law definitions where general terms are used to designate crime. Section 251 of our criminal code in express terms provides: "This code and every other law upon the subject of crime which may be enacted shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects, and no person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit." In *Bailey v. State,* 57 Neb. 706, it was said: "To sustain a criminal conviction it is not enough for the state to show that the prisoner indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law." In view of the section last above quoted, and of the construction placed thereon by this court, we are constrained to hold with the great weight of authority that the acts charged in the information in this case, although they amount to an unlawful assault, do not constitute a violation of the provisions of section 205*a* of our criminal code. It is to be regretted that acts so infamous and disgusting have not been declared to be a felony by the legislature of this state, and we trust that the lawmakers will speedily remedy this defect.

Defendant also contends that the evidence is insufficient to sustain the verdict because of the failure of the state to identify him as the person who committed the act in question. Without deciding this question, we deem it proper to say that the record contains no positive evidence connecting him with the commission of the offense. The prosecuting witness was not sure that he was the man who assaulted her. She said that the man had a cloth over his face, and that he was shaped or built like the defendant, and she thought it was the defendant.

It is further contended that the trial court erred in

the admission of the evidence of witness Stucker as to the footprints found by him in the corn field where it is claimed the transaction occurred. We think this evidence should have been excluded. No testimony was produced showing or tending to show that the footprints were made by the defendant. It is not shown that they corresponded in any way with the shoes worn by him, and the only fact shown which tended to connect him with them in any manner was that they led in the direction of his home. We think this evidence was erroneous and prejudicial to the defendant's rights, and is within the rule announced in *Heidelbaugh v. State*, 79 Neb. 499.

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

REVERSED.

GEORGE A. MILES, APPELLEE, V. HOLT COUNTY, APPELLANT.

FILED MARCH 10, 1910. No. 15,876.

1. **Taxation:** PUBLICATION OF NOTICE: COMPENSATION. A county board, under the provisions of section 7, ch. 75, laws 1903 (Ann. St. 1903, sec. 10650) known as the "Scavenger act", designated a newspaper in which the necessary notices should be published. The county treasurer, assuming that the designation was not adequate, delivered the notice for publication to the plaintiff, who was the owner and publisher of another newspaper, and who knew of the former designation. The notices were published in plaintiff's newspaper. Under the proceedings the county collected a large amount of taxes from delinquent taxpayers, and a sum of money as costs in excess of plaintiff's claim. Plaintiff filed his claim for the statutory fee for publishing legal notices, which was disallowed by the county board. *Held*, That having accepted the services without protest, and having received enough money from taxpayers to pay for the publication, defendant must pay the reasonable value of the services.

2. ———: ———: ———. In such a case the principle applied is that of reimbursement, and the plaintiff can only recover the actual cost of the services rendered and material furnished without the allowance of profits, and not exceeding the legal rate. *Clark v. Lancaster County*, 69 Neb. 717.

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

E. H. Whelan and *R. R. Dickson,* for appellant.

J. A. Donohoe and *M. F. Harrington, contra.*

LETTON, J.

In January, 1905, the county board of Holt county took action under the provisions of chapter 75, laws 1903 (Ann. St. 1903, secs. 10644-10691) commonly known as the "Scavenger act", to enforce the collection of delinquent taxes against real estate in that county. The act provides for the publication of a notice of the filing of the petition in the statutory action in the district court, and for a description of the lands or lots affected to be published as a part of the notice. The act also provides (section 10650): "The county commissioners of each county shall designate the newspaper in which said notice, and in which all notices of tax sales made by the county treasurer hereinafter provided for, shall be published, provided, the county treasurer shall designate such newspaper where the county commissioners fail to do so." The county treasurer, pursuant to the direction of the county board, prepared the petition required by the statute and the notice of the filing thereof. On the 21st of April, 1905, the county board designated the newspaper in which the notice should be published, the record showing: "On motion the printing of the scavenger delinquent tax list was awarded to the O'Neill Frontier." The county treasurer, assuming that the county board did not "designate the newspaper", as the statute required, on the 2d day of July, 1905, designated the Holt County Independent as the newspaper in which the notice should be published, and gave the copy for the notice to the plaintiff, who is publisher of that paper, for the purpose of publication. The notice was so lengthy

and contained so many descriptions that it was necessary to have the typesetting done in a larger place than O'Neill, in order to have the notice published within the statutory time. The plaintiff received the notice about 2 o'clock in the morning of July 2, and took it to Sioux City to be put in type. Prior to this time the Independent had published in its account of the proceedings of the county board the resolution by which the Frontier was designated as the paper to publish the notice. Before giving the notice to the plaintiff the county treasurer consulted the county attorney, Arthur F. Mullen, and was advised by him that the designation by the county board as shown by the record of proceedings was not a legal designation, and that it was his duty to designate the newspaper in which the notice should be published.

On the 3d day of July an action in mandamus was brought by the owner and publisher of the Frontier against the county treasurer to compel him to deliver the notice to him for publication. This writ was denied by the district court. On appeal to this court it was held, ALBERT, C., writing the opinion, that, while the relator was entitled to the publication of the notice under the facts shown, yet the district court was justified in denying the writ, because when the case was heard the time was too short for the Frontier to prepare and publish the list within the time required by law. *State v. Cronin*, 75 Neb. 738. It may be regarded as settled by this decision that, the county board having acted in the matter of designating the newspaper to publish the notice, the county treasurer, while authorized to prepare the notice and deliver it to the printer, had no right to divert its publication from the newspaper in which the county board had decided that it should be published.

The notice was published in the Independent, as was also, some time later, the notice of sale of the land and lots foreclosed upon by tax decree. No further action was taken by the county board respecting the publication of notice. Three extra copies of each

number of the paper were furnished, as the statute provides, to the county clerk, the auditor of state, and the county treasurer, and proof of publication was duly filed. After the decree was rendered many taxpayers paid the amount of the decree, including a docket fee of $1 upon each description. A large number of tracts upon which the taxes were not paid were sold to private bidders at the sale under the decree, and a large number of said tracts were bought in by the county board as trustee, under the provisions of the law. The record shows that the county board attended the sale for taxes day by day until the bulk of the lands had been disposed of; that the county collected large amounts of money as taxes, and that the county treasurer collected $4,263 docket fees, on the tax suit. All this money was turned into the general fund of the county. In *State v. Fink,* 73 Neb. 360, where it appeared that a notice of this nature had been irregularly published, it was held that the publication, under the liberal provisions of the statute, was sufficient to confer jurisdiction upon the district court to render the decree. So that the county received equal benefit from the publication in the newspaper of the plaintiff to that it would have had if the publication had been made in the Frontier.

If the evidence of the plaintiff is believed, there was no collusion between him and the county treasurer, nor was the giving of the notice to him for publication the result of deliberate, wrongful action on the part of that officer, and this seems to be the finding of the trial court. The action of the treasurer was very severely stigmatized by Commissioner ALBERT in *State v. Cronin, supra,* "as a wanton disregard of duty and a reckless attempt to thwart the purpose of the governing body of the county." It is now insisted that the evidence in this case, that his action was taken under the advice of the county attorney, was not before the court in that action, but, even so, we are inclined, in view of the evidence before us, to be

somewhat skeptical as to there being any substantial doubt upon his part concerning the sufficient designation of the Frontier by the county board.

The question presented is whether or not one who furnishes material and performs services for a county under a void contract, from the result of which service the county has secured a financial gain, can be permitted to recover the reasonable value thereof, and, if so, what is the rule by which to ascertain such reasonable value.

The defendant contends that this is an action upon contract, but we doubt whether the language of the petition is susceptible of this construction. It pleads substantially that the county determined to enforce all delinquent tax liens under the "scavenger act", and directed proper action to be taken thereunder; that under said direction the county treasurer prepared and filed the petition in the district court; that he caused a notice in statutory form to be published in the Holt County Independent, and that the county treasurer designated the Holt County Independent as the newspaper in which the said notice should be published; that the treasurer made this designation, and that plaintiff received the notice, and published the same in good faith; that the defendant and the county board of said county acquiesced in the publication of the notice during the four weeks that it was published, received and used copies of the same, acted under the decree, and ratified the publication by the plaintiff; "that the reasonable, just and true charge for publishing said notice for said four weeks in said newspaper was the sum of $2,669.50"; that by reason of the publication of said notice and the approval thereof, and the ratification thereof, and by reason of each and every one of the said acts, there became due to the plaintiff, and is due him for publishing said notice, the sum of $2,669.50. The second count in the petition is for the publication of the tax sale notice after decree, and is couched in like terms to the first count, except as to the time of publication and the amount due. Both counts

allege the purchase of several hundred parcels of real estate by the defendant at the sale made under the notice and decree, and the realization of a large amount of money by reason of the same.

This can hardly be said to be an action upon contract. We think it rather to be an action for the reasonable value of the services performed. But the defendant contends that the plaintiff cannot recover in this case as upon an implied contract, because the treasurer had no authority to make the contract, and that, if the treasurer was not authorized to make the contract, then no liability can attach against the county upon any ground of implied contract; that all persons dealing with officers or agents of counties are bound to ascertain the limits of their authority or power as fixed by the statute or the organic law, and are chargeable with the knowledge of such limits, and that no estoppel can be created by the acts of such agent or officers in excess of their statutory powers, citing *Hall v. County of Ramsey,* 30 Minn. 68; *Hampton v. Commissioners,* 4 Idaho, 646, 43 Pac. 324; *Bartholomew v. Lehigh County,* 148 Pa. St. 82; *Endion Improvement Co. v. Evening Telegram Co.,* 104 Wis. 432, and other cases.

The plaintiff on his part maintains that a distinction may be drawn between the principle of the cases above referred to and the instant case. He concedes that, where a public official has no authority under any conditions to request the performance of a service, such as the printing of an election notice or the proceedings of the board of supervisors, from which the public corporation gets no financial return or property, then the county or municipality may escape liability. But he contends that there is another class of cases which establish the principle that, where the county or municipality engages in a business undertaking of some kind, where there is no valid contract or where the public officer who makes the contract is authorized under certain circumstances to do so, but not under others, or where there is irregularity in

making the contract, but where the county or municipality received the money, service or property of another in a business way, and for its financial advantage, and to its profit uses the money or property or services of another, then in either of such instances the county or municipality must pay. It is also argued that, when a legal notice is given to a printer for publication, and nothing is said as to compensation, there is an implied contract to pay the legal rate, and counsel cites a number of cases to the effect that, where a fee is fixed by statute for the printing of a notice, the printer is entitled to it, even though it is sought by contract to limit his compensation.

We will first examine the cases cited by the county to support its contention that it is not liable for the publication of the notice. In *Hall v. County of Ramsey*, 30 Minn. 68, the action was for damages for breach of an alleged contract for publication by plaintiff of the delinquent tax list. We infer from the opinion that no publication had been made. The court held that under the statute the county commissioners were not authorized to make the contract for the breach of which the plaintiff sought to recover, and sustained a demurrer to the petition. Evidently this is not a parallel case. In *Hampton v. Commissioners*, 4 Idaho, 646, a county board made a void contract for the employment of the plaintiff as county attorney. The plaintiff's claim was for $4,142 for legal service performed in one year for a county with a voting population of 780. The claim was for more than the combined salary of the attorney general and of the district attorney, who was the proper legal officer of the county. The court held that the plaintiff could not recover upon an implied contract for services, for the reason that there was no authority vested in the board to make the contract, but said, also: "The doctrine that if a municipality obtain the money or property without authority of law, it is her duty to make restitution or compensation, not from any contract entered into by her on the subject, but from the general obligation to do

justice which binds all persons, whether natural or artificial, does not apply here." In *Bartholomew v. Lehigh County*, 148 Pa. St. 82, a sheriff, after having procured the publication of an election notice in four newspapers under a statute which provided the publication should be in "not more than four" newspapers, procured another newspaper to print the notice. After the county had paid the four newspapers first authorized as certified by the sheriff, the fifth presented a claim, which was refused. The court held that the sheriff could not bind the county for the cost of the publication in more than four newspapers, and that, if the sheriff exceeded his authority, "it is a question between the plaintiff and that officer, and one in which the county of Lehigh has no concern." It will be seen that in this case the county derived no substantial benefit from the publication, the requisite legal notices having already been published and paid for. In *Endion Improvement Co. v. Evening Telegram Co.*, 104 Wis. 432, a county clerk had given to plaintiff for publication the usual election notice, and also, under a misapprehension of the law, the entire banking law, as a question to be voted upon. The court held that the publication of the banking law "was absolutely without authority of law, and not binding upon the county. * * * The clerk had no right to make any such contract, and no duty rested upon him to act as he did. * * * He stood as the mere agent of the county, with no power or authority to cause or contract for any publication except such as the law prescribed." It is clear that no liability would attach to the county in such a case. The county received no benefit from the publication of the banking law, and the clerk had no more right to publish it than he had to publish a circus poster and charge it to the county.

In the case at bar the notice was a legal notice in all respects, and one from the publication of which the county received a substantial benefit, which clearly distinguishes it from the above cases, except, perhaps,

Hampton v. Commissioners, supra, in which the language of the court seems to indicate it thought the whole transaction a fraud upon the people of the county. In this case the publication of the notice was not beyond the power of the county, but was strictly within its authority. The treasurer was the officer vested with the duty of the preparation of the notice, and, under some circumstances, the selection of the publisher. *World Publishing Co. v. Douglas County,* 79 Neb. 849. If the notice had been published by the properly designated newspaper, as well as by the plaintiff, it is clear there could be no recovery here, for in such case the county would receive no benefit from this publication, and the case would be the same as *Bartholomew v. Lehigh County, supra,* and the other cases cited by defendant; but the labor and material of plaintiff was productive of actual gain.

We are not very strongly impressed with the contention of plaintiff that the county authorities ratified the unauthorized act of the treasurer. Under the circumstances, the statutory time for publication having arrived, the county authorities were placed in the position of being compelled either to allow the publication of the notice, which was essential to the proceedings, to go on, or to lose a year's time in the collection of delinquent taxes under the scavenger act. They were compelled by force of circumstances to receive the benefit of the publication or to jeopardize the interests of the county. At the same time we have come to the conclusion that the benefits of the unauthorized act of the treasurer in giving the notice to the wrong paper have been accepted and acted upon to such an extent as to make it unjust and inequitable for the county to refuse to pay for the services. It has for many years been the rule of this court that a public corporation or quasi-corporation, as against persons who have dealt with it in good faith and parted with value for its benefit, cannot set up mere irregularities in the exercise of power conferred in order to defeat recovery for the reasonable value of the services rendered

or property furnished. 2 Dillon, Municipal Corporations (3d ed.) sec 936.

In *Grand Island Gas Co. v. West,* 28 Neb. 852, where a city entered into an illegal contract with a gas company, and a taxpayer brought an action to restrain the enforcement of the contract, and to restrain the gas company from prosecuting any suit at law or in equity to recover compensation for light furnished, it was held that the contract was illegal, and the taxpayer could maintain an action to cancel the same, but that the city would be required to pay the reasonable value of the light furnished prior to the bringing of the suit. This was followed by *Lincoln Land Co. v. Village of Grant,* 57 Neb. 70, in which case the rule is laid down: "Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received. In such an action it is unnecessary to establish a ratification of the contract." In the opinion the case of *Tullock v. Webster County,* 46 Neb. 211, cited by defendant, was distinguished. In the latter case it was held that, as there was no power to make the contract, there could be no authority to ratify it, but in the *Lincoln Land Company* case, as in the case at bar, the power to contract for the service existed, but the manner of exercising the power as prescribed in the statute was not followed. The doctrine of this case was again considered in *Rogers v. City of Omaha,* 76 Neb. 187, *Cathers v. Moores,* 78 Neb. 17, and *Nebraska Bitulithic Co. v. City of Omaha,* 84 Neb. 375.

Second Congregational Church v. City of Omaha, 35 Neb. 103, was a case where an appeal had been taken by a landowner from the assessment of damages made by certain appraisers in proceedings taken by the city to change the grade of the street. The city attempted to defend against the claim for damages by setting up defects in the proceedings. The court said: "To us it

appears unjust, inequitable, and contrary to every principle of right to permit the city, after it has damaged property by changing the grade of the street upon which it abuts, to urge defects in its proceedings to defeat an appeal taken by the landowner to recover a fair compensation for the damages sustained. To do so would be to allow the city to take advantage of its own wrong after it had accomplished that which it undertook to do, the change of the street grade. Such a rule courts should not sanction."

The same doctrine has been declared by the supreme court of the United States in *Hitchcock v. Galveston*, 96 U. S. 341, and is also approved in *City of East St. Louis v. East St. Louis Gas Light & Coke Co.*, 98 Ill. 415, 38 Am. Rep. 97; *Argenti v. City of San Francisco*, 16 Cal. 255; *Lines v. Village of Otego*, 91 N. Y. Supp. 785; *City of Valparaiso v. Valparaiso City Water Co.*, 30 Ind. App. 316; *Butler v. Board of Commissioners*, 15 Kan. 178; *Coit v. City of Grand Rapids*, 115 Mich. 493; *County of Jackson v. Hall*, 53 Ill. 440; *Crump v. Board of Supervisors*, 52 Miss. 107; *State Board of Agriculture v. Citizens Street R. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Louisiana v. Wood*, 102 U. S. 294; *Salt Lake City v. Hollister*, 118 U. S. 263; *Board of Commissioners v. Skinner*, 8 Colo. App. 272; *Central Bitulithic Paving Co. v. City of Mt. Clemens*, 143 Mich. 259; *Kramrath v. City of Albany*, 127 N. Y. 575; *Town of New Athens v. Thomas*, 82 Ill. 259; *Leonard v. Long Island City*, 20 N. Y. Supp. 26.

We are of opinion that this case falls within the doctrine of the cases cited. The publication of the notice was within the power of the county, and its preparation and delivery to the proper newspaper within the legal power and duty of the treasurer. The designation of the newspaper might or might not be within his authority, depending upon whether the county board had failed to act. He acted unlawfully in designating plaintiff's newspaper and in delivering the notice to him for publication, but, plaintiff having rendered the services, and the county

having received the benefit of the same, and having received a sufficient amount of money in payment for the publication of the notice from taxpayers to pay the reasonable value of the services rendered, it cannot now take the benefit of the plaintiff's labor and material and escape all liability upon the plea of lack of authority upon the part of the treasurer. To allow it to deprive the plaintiff of his property in the manner sought, and under the circumstances shown, would be to countenance action on the part of a county which would be considered grossly reprehensible upon the part of an individual. We cannot permit such spoliation.

The question remains: How shall the reasonable value of the services be ascertained? Is the statutory fee for printing legal notices to be taken as the value where no contract has been made? This is the measure applied by the district court, and, if it is the true measure, the judgment must be affirmed. No evidence was offered as to value. Plaintiff's counsel seems to rely with great confidence upon the case of *Bee Publishing Co. v. Douglas County,* 78 Neb. 244. The facts in the two cases, however, are totally dissimilar so far as the controlling features are concerned. The controversy as to the right of the Bee Publishing Company to publish the proceedings first came before this court in *State v. Fink,* 73 Neb. 360, which was a mandamus suit brought to compel the county treasurer of Douglas county to deliver the notice to the World Publishing Company for the reason that on the 2d day of July, 1904, the Omaha Evening World Herald had been designated by the board of county commissioners. The opinion shows that in the month of June, after the petition had been filed, and at a time when the county board had taken no action, the county treasurer delivered the notice for publication to the Omaha Bee. When the case reached this court, the notice had been published, and, the time having gone by in which a new publication could be of any avail, the writ was refused. On the evidence then presented, the commission and court were of

the impression that the designation made by the county board was made within a reasonable time, and that the designation by the treasurer was premature, but this point was not decided, the opinion saying: "The most that the relator can contend for is that the 'Bee' was not designated in the manner prescribed by the act. Whether this was so or not, the issues in this case do not call upon us to decide." The case cited and relied upon by counsel was a later controversy between the Bee Publishing Company and Douglas county over the amount claimed to be due for the publication of the same notice. The World Publishing Company intervened, contending that the county was not liable, for the reason that the Bee was not legally designated for the publication of the notice. This raised a direct issue as to the legality of the designation. Upon a consideration of the evidence then submitted, both the district court and this court held that the designation of the Bee by the county treasurer was legal and proper, and that the publication was in all respects valid. This being so, the plaintiff's contention, that the holding in that case that the printer was entitled to the statutory fee governs this case, cannot be sustained. In that case the designation was legal. In this case it was illegal. In that case the recovery is based upon the contract. In this case it is based upon the doctrine that one shall not take and keep another's property inequitably, even though no legal right to recover exists. While the action is legal in form, the doctrine upon which this and other courts have allowed recovery in such cases is essentially equitable in its nature. Under strict legal principles no recovery could be had upon the contract, but it would be manifestly unfair that one party should have the benefit of the labor and property of the other without recompense. Such a result is opposed to natural justice, and the courts will not allow it. Generally they will not allow profits which might have been obtained if the contract had been legal and valid, and if recovery were had according to its terms, but will confine the re-

covery to such sum as will reasonably compensate the party whose services or property have been devoted to the advantage of the other. If recovery could be had to the same extent under an illegal as under a legal contract, the temptation to public officers to pay no regard to statutes might often prove too strong for them to overcome in order to benefit their friends. The principle which applies is that of reimbursement. Where a county or municipal corporation has received money in payment for an invalid issue of bonds, they have usually been compelled to refund the money paid them, with interest, regardless of whether the bonds were sold at a premium or discount. The reasonable value which the plaintiff is entitled to recover in this case would seem to be the actual cost of rendering the services and furnishing the material necessary, including all expenses incurred, but excluding profits.

The plaintiff contends that, the county having received a docket fee of $1 in each case from the taxpayer, this money in equity belongs to him to the extent of the statutory fee for printing legal notices. But this cannot be so, because the dollar fee is paid into the general fund of the county, and no specific part of it is appropriated by the statute to any specific purpose. In the scavenger act no sum is fixed as compensation for printing the notices. In *Bee Publishing Co. v. Douglas County, supra,* it was held that, no fee being fixed, the statutory fee for ordinary legal notices was the proper fee to be paid the printer when the publication was legally authorized. We are of opinion that, where there is no contract, the statutory fees cannot *ipso facto* be taken as the measure of damages. In *Clark v. Lancaster County,* 69 Neb. 717, which was an action by a taxpayer to prevent one Sheeley from building certain bridges and to prevent the collection of payment for the same, it appeared that the contract was invalid and the action of the county board under it was unlawful. The district court allowed Sheeley a decree for the amount of his labor and material

furnished. It was complained in this court that the amount so found was not large enough. This court found it sufficient, and declined to allow more than Mr. Sheeley's outlay in money and property, refusing to allow profits. We are satisfied to follow this precedent. This being so, the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED.

BARNES, J., took no part in the consideration or decision in this case.

ROSE, J., dissenting.

I recognize in the opinion of the majority a lofty purpose to administer justice, but I am not fully convinced that plaintiff should recover the reasonable value of his services. In my judgment the finding that the publishing contract is void, and that in consequence plaintiff cannot recover the compensation allowed by law for performance of a valid contract, should result in a dismissal of the case. The power to designate the newspaper for the purpose of publishing notice was conferred by statute upon the county commissioners. That power was legally exercised, and plaintiff's newspaper was not selected. This is shown irrefutably by the majority opinion and by a former decision. *State v. Cronin,* 75 Neb. 738. The county treasurer has no power whatever to select the newspaper, except "where the county commissioners fail to do so." Those officers having made the designation according to law, the county treasurer was absolutely without statutory authority to designate plaintiff's newspaper. The county treasurer's power is derived alone from legislation, and, having none from that source, he could not by any act on his part or by the aid of any other person invest himself with such power. If, in designating plaintiff's newspaper, he acted conscientiously, with a disinterested zeal for the public welfare, and with-

out a thought of personal interest or of favoritism, the question of power remained exactly the same, since it could come alone from the lawmakers. The opinion of the county attorney, however honestly expressed, did not take the place of legislation or change the law. Plaintiff in attempting to make a contract to publish the notice was, like the county treasurer, required to know that the legal designation formerly made was already a matter of public record. Plaintiff in dealing with a county officer was also required to know the law, and neither the treasurer nor the county attorney as such was his legal adviser. If the finding of the district court that plaintiff acted in good faith is true as a matter of fact, it cannot supply legislative power, give vitality to a void act, legalize a claim arising in violation of law, or conceal knowledge imparted by a public record. County officers cannot ratify their own unlawful acts either directly or indirectly. To hold otherwise would permit them to defy the laws by which they are governed. In this case plaintiff was a party to the wrongdoing in defeating the order of the county board and in evading the act of the legislature. When he was bound to know from the public records and statutes that another newspaper had been lawfully designated, he joined the county treasurer in a void agreement which had the effect of annulling a valid order of the county board and of circumventing the law under which he assumed to act. How county business shall be transacted depends on the statutes. These statutes are general and many of them apply to all the counties. They declare the public policy of the state in the management of county affairs. Plaintiff departed from this policy in publishing the notice. He assumed to act for the county in transacting public business. He usurped the functions of a duly appointed representative of the county who was authorized to publish the notice. He united with the county treasurer in making a void contract in violation of law. Compensation under such circumstances is not allowed by statute. The county has

no statutory authority to make an allowance for his services. The county treasurer cannot find in the statutes the power to disburse public funds for such a purpose. No statute makes the county liable to plaintiff for any sum whatever. He has come into court to reap the benefits of his wrongdoing. He should be left in the same situation as other plaintiffs who make and seek to enforce contracts which violate public policy. The courts should leave him where they find him. County officers and those who deal with the county in transacting public business should keep in the straight and narrow path pointed out by statute. There is peril in allowing compensation for public services performed in any other course.

Under the doctrine announced in the opinion of the majority, plaintiff is permitted to recover the reasonable value of his services. What service did plaintiff perform for the county? By publication he notified tax-debtors that the county had filed a petition to enforce the collection of the delinquent taxes. The services were official and were performed on behalf of the public. The official duty of notifying tax-debtors that they have been sued is an ordinary function of the sheriff. For reasons well understood that duty was imposed by statute upon the publisher of a newspaper designated by the county commissioners. The character of the services required was not changed by the transfer of authority from the sheriff to the publisher of a newspaper. When such services are performed by a publisher, the composition, ink, paper and distribution of newspapers are mere incidents of official duty, and correspond in legal effect to the copy of a writ which has been served upon a defendant by the sheriff. Within the meaning of the statute a publisher, when legally designated by the county commissioners, is an officer. The services performed by him are official services. These propositions are sanctioned by precedent. The supreme court of Iowa held: "To authorize recovery against a county for official printing, the publisher must

show both title to the appointment as official printer and performance of the service. Under this rule, a publisher cannot have compensation for public printing pending a contest of his right to the position which is finally decided against him, even though the county board acquiesce in the service and his successful competitor has been denied the right of recovery therefor." *Smith v. Van Buren County,* 125 Ia. 454.

Plaintiff's claim is one for compensation for official services. His relation to the county was that of a *de facto* officer. As such he cannot recover. "None but the officer *de jure* can successfully claim compensation for official services." *Commonwealth v. Slifer,* 25 Pa. St. 23; *Smith v. Van Buren County,* 125 Ia. 454. The law is that an officer cannot recover on a *quantum meruit* for services performed, unless a board or other tribunal is authorized by statute to fix compensation. "A public officer must perform every service required of him by law, and he must look to the statute for his compensation. If it provides none, then the services are gratuitous." County commissioners are without power to allow as compensation for official services any sum other than that fixed by statute. *Logan County v. Doan,* 34 Neb. 104; *State v. Meserve,* 58 Neb. 451; *State v. Silver,* 9 Neb. 85; *State v. Wallichs,* 15 Neb. 457; *State v. Wallichs,* 14 Neb. 439; *Bayha v. Webster County,* 18 Neb. 131; *State v. Benton,* 31 Neb. 44; *State v. Roderick,* 25 Neb. 629. An officer cannot bind himself by an agreement to accept for his services a less sum than the statute allows. *Gallaher v. City of Lincoln,* 63 Neb. 339.

Under the judgment pronounced it becomes the duty of the district court to ascertain and decree the reasonable value of plaintiff's services, without reference to statutory compensation. This is equivalent to a decision that the county commissioners, before this suit was brought, had power to ascertain and direct the county treasurer to pay the reasonable value of plaintiff's services. This power is not found in any enactment of the legislature. It fol-

lows that county boards have a power in addition to that conferred by statute, and may administer the rule in equity announced in the syllabus, as occasion may arise. I take a different view of the law. I am convinced that neither the district court nor the county commissioners have the authority ascribed to them, and that the doctrine announced in *Clark v. Lancaster County*, 69 Neb. 717, is not applicable to the present case. Plaintiff should not be permitted to recover to any extent. Entertaining the views expressed, I am compelled to dissent from the opinion of the majority.

FARMERS LOAN & TRUST COMPANY, APPELLEE, V. JOHN JOSEPH ET AL., APPELLANTS.

FILED MARCH 10, 1910. No. 15,905.

1. **Appearance.** When, in a case in which the court has jurisdiction of the subject matter, a defendant voluntarily appears to resist an order in the case, and thereafter answers to the merits and asks for affirmative relief, he thereby makes a general appearance in the action.

2. **Appeal in Equity: MOTION FOR NEW TRIAL.** In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed and overruled in the district court.

3. **Tax Certificates: OWNERSHIP: EVIDENCE.** Proof of indorsement of a tax sale certificate by an original purchaser and possession by an indorsee are *prima facie* evidence of ownership of it.

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

Charles O. Whedon, for appellants.

J. A. Donohoe and *M. F. Harrington, contra.*

LETTON, J.

In September, 1895, a petition in an action to foreclose certain tax certificates was filed in the district court for Holt county. The land itself was made defendant, as were also the owners of the land, John Joseph and William Grafe, who at the time were residents of Saunders county in this state. The record before us is defective, confused, and incomplete, and, so far as it shows, no summons was ever issued or served. On December 7, 1895, a voluntary dismissal was filed by the plaintiff. No order of dismissal appears. The record does not show any appearance of the defendants by answer or otherwise at that time. About four years afterwards, on December 27, 1899, a motion to reinstate the case was filed by the plaintiff, giving as a reason that the cause was dismissed by mistake and that the defendants had never paid the tax lien. A defective notice of this motion was personally served upon the defendants, and the record shows that on February 7, 1900, certain objections to the reinstatement of the case were filed by them. These objections set forth the facts as to the filing of the petition and the dismissal, alleged "that more than four years have elapsed since plaintiff dismissed its cause of action, and that the first legal notice to reinstate its cause, has been brought to defendants' notice this 7th day of February, 1900," with several other reasons not necessary to consider. The journal entry shows that on the 7th day of February a special appearance of defendants was sustained, and that "defendants thereupon entered voluntary appearances for the purpose of resisting the motion to reinstate. The matter was submitted to the court, and the court finds that this action was wrongfully and improperly dismissed and was dismissed without any authority." The court further ordered that the dismissal be set aside and the action reinstated, to which the defendants excepted, and on the same day requested and were granted 40 days in

which to file an amended answer. On June 12, 1901, an answer was filed setting up a number of defenses to the merits, alleging that the plaintiff was not the real party in interest, that the statute of limitations had run, and asking the court "to find, order, and decree that the plaintiff do not have any right, title, or claim" in the premises by reason of the alleged taxes. The case evidently lay quiescent in the district court until the 3d of April, 1908, when it was heard upon the pleadings and evidence, and the court found generally for the plaintiff, fixing the amount due for taxes, foreclosing the tax lien, and ordering a sale, from which judgment the defendants have appealed. The principal complaints made are that the court was without jurisdiction to reinstate the case, that there is no competent proof of the assignment of the tax certificates, and that the plaintiff is not the real party in interest.

1. As to the reinstatement of the case, it was clearly irregular, and we think that no valid judgment could have been rendered without service of summons if the defendants had not voluntarily submitted themselves to the jurisdiction of the court. The court had jurisdiction of the subject matter, but it had no jurisdiction of the person of defendants until they appeared and litigated the question of reinstatement, and upon the court finding against them upon this point they voluntarily answered to the merits, and asked for affirmative relief. By so doing they waived their objections to the jurisdiction. *State v. Smith,* 57 Neb. 41; *Cleghorn v. Waterman,* 16 Neb. 226.

2. In the tax certificates upon which the action is based the original purchaser was W. G. Palmanteer, and upon the back of each of them appears an assignment to the plaintiff signed by Palmanteer. His signature and that of the county treasurer were identified at the trial, and the papers were offered and received in evidence as exhibits A, B, C and D, over the objection that the testimony offered was incompetent, irrelevant and immaterial,

It is insisted that the reception in evidence of the exhibits did not include the assignment, and it is argued that under the authority of *Levy v. Cunningham,* 56 Neb. 348, this ruling of the trial court was erroneous. No motion for a new trial was made calling the attention of the district court to the alleged error. The cause is before us for trial *de novo* upon the question whether the judgment of the district court is right under the pleadings and evidence, and alleged errors occurring at the trial cannot be considered in the absence of a motion for a new trial. In *Leavitt v. Bartholomew,* 1 Neb. (Unof.) 756, it is said: "Proof of indorsement of a tax sale certificate by original purchaser and possession by indorsee are *prima facie* evidence of ownership of it." We think the evidence sustains the findings of the trial court in this regard.

3. As to the contention that the plaintiff is not the real party in interest; this is based upon an affidavit which appears in the transcript, but which forms no part of the bill of exceptions, and, hence, cannot be considered. Without this there is no evidence to support this complaint.

We find no merit in the defendants' contentions. The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. WILLIAM C. BULLARD ET AL., APPELLANTS, V. EDWARD M. SEARLE, JR., ET AL., APPELLEES.

FILED MARCH 10, 1910. No. 16,044.

1. Statutes: CONSTRUCTION. An act of the legislature requiring all corporations, with the exception of those belonging to certain classes, to file articles of incorporation with the secretary of state and an act establishing a standard of fees for such services are *in pari materia,* and should be construed together.

2. ———: ———. Ordinarily an exception in a statute will be held to apply to the clause or sentence immediately preceding it, but

this rule is not unbending, and if a consideration of all statutes bearing upon the subject indicates a different legislative intent, this will prevail over a construction based upon the rules of syntax.

3. Corporations: FILING ARTICLES OF INCORPORATION. The exception of building and loan associations, etc., in section 126, ch. 16, Comp. St. 1907, examined, and *held* to apply to the clause of said section requiring every corporation to file its articles of incorporation in the office of the secretary of state. *Held further*, that such exception does not excuse domestic corporations from filing such articles "with the county clerk in the county in which their headquarters are located."

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

Alfred G. Ellick, for appellants.

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

LETTON, J.

The relators herein ask for a writ of mandamus to compel the state banking board to issue to the Prudential Savings & Loan Association, of Omaha, Nebraska, a certificate of approval of the articles of incorporation and of the constitution and by-laws of such association. They allege that they have incorporated said association in conformity with the laws of the state, that the articles of incorporation, constitution and by-laws have been filed with the state banking board and the auditor of public accounts, and that a certificate has been filed with the secretary of state complying with the statute, but that the respondents refuse to issue to the association a certificate of approval and authorization to transact business. It is alleged that the state banking board examined and approved their articles of incorporation and constitution and by-laws as conforming to the laws of the state, and as containing a just and equitable plan for the management of the association's business, but refused to issue a certifi-

cate of approval until the association should file the articles of incorporation with the secretary of state and pay as his fee therefor the sum of $500. These allegations are in the main admitted by the respondents. The cause was heard upon the pleadings by the district court for Lancaster county, which denied the writ because the association had failed to file its articles of incorporation with the secretary of state. Relators have appealed to this court.

The question is purely one of statutory construction. Its determination depends upon the effect to be given to the amendment made in 1897 of section 126, ch. 16, Comp. St. 1895, and to subsequent laws relating to the subject. Prior to the amendment of 1897 the law relating to the filing of articles of incorporation was found in ch. 16, Comp. St. 1895, as follows: "Section 126. Every corporation, previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation, * * * and have them recorded in the office of the county clerk of the county or counties in which the business is to be transacted, in a book kept for that purpose.

"Section 127. Corporations for the construction of works of internal improvement must also file in the office of the secretary of the state a copy of their articles of association, and the same shall be recorded in a book kept for that purpose.

"Section 132. Any corporation formed without legislative enactment may commence business as soon as its articles of incorporation are filed by the county clerks of the counties, as required by this subdivision, and shall be valid if a copy of its articles be filed in the office of the secretary of state, and the notice required be published within four months from the time of filing such articles in the clerk's office."

Under these provisions a corporation was authorized to commence business as soon as its articles of incorporation were filed in the office of the county clerk. In *Live-*

sey v. Omaha Hotel Co., 5 Neb. 50, 73, it was said, speaking of these sections: "The latter section modifies the former by what may be considered as an explanatory clause, providing that the corporation 'may commence business as soon as the articles of incorporation are filed in the county clerk's office', instead of waiting until they are recorded, and by making the validity of the corporation depend on filing a copy of the articles with the secretary of state, and upon publication of the notice required."

In 1897 section 126 was amended to read as follows: "Section 126. Every corporation, previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation, and have them filed in the office of the secretary of state and recorded in a book kept for that purpose, and domestic corporations must also file with the county clerk in the county where their headquarters are located, except mutual insurance companies, building and loan companies, loan and investment companies and banking institutions, which shall be filed with the state auditor and state banking board. All mutual insurance companies, building and loan companies and loan and investment companies required by law to file articles with the state auditor, shall file a certificate with the secretary of state, stating the date of filing with the auditor, name and place of business and names of stockholders. Banking organizations incorporated under the laws of this state, that have been approved by the state banking board and that have filed articles of incorporation with said board, shall file a certificate in the office of the secretary of state, stating the date of filing articles with said board, name and place of business and names of stockholders; Provided, that this act shall not apply to mutual fraternal benefit societies or associations"—and sections 126 and 127, as they then existed, were repealed. Section 3, art. II, ch. 83, Comp. St. 1895, relating to fees for the filing of articles of association in the office of

the secretary of state, was as follows: "For receiving and filing articles of association, corporations, or consolidations, bonds, oath of office, each, one dollar. For recording the same, for each one hundred words, ten cents." In 1897 this provision was amended to read as follows: "For filing articles of association, incorporation, or consolidation, domestic or foreign, ten dollars, and if the capital stock authorized by such articles exceeds the sum of one hundred thousand dollars, an additional filing charge of ten cents for each one thousand dollars of stock authorized in excess of one hundred thousand dollars; and he shall also charge for recording such articles, ten cents for each one hundred words contained therein." A fee of $2 was also provided for receiving and filing a certificate of the state auditor or of the state banking board. The changes in the law relative to the place of filing articles of incorporation and in the law relating to the fees to be paid to the secretary of state for filing articles of incorporation and certificates of the state auditor and banking board took place at the same session of the legislature, are in *pari materia,* and must be construed together. They evidence an intention to deal with the whole subject of the place where such articles should be filed, and the fees to be paid for filing them, and fix a fee for the filing of the new certificate required.

It is the contention of the respondents that under section 126, as amended, domestic building and loan associations are required to have their articles of incorporation filed and recorded in the office of the secretary of state, that, in addition to this, the articles must be filed with the state auditor and with the state banking board; and that they are also required to file with the secretary of state the certificate described in this section. The relators construe this statute to mean that such associations are only required to file their articles and other required papers with the county clerk, with the state auditor, and with the state banking board, and that the only

thing which they are required to file with the secretary of state is a certificate stating the date of filing of its articles with the auditor, the name and place of business, and the names of its stockholders. Among the recognized canons of statutory construction are that, in construing amended laws, the old law, the mischief and the remedy must be considered, and, further, that when a general law is in force upon a certain subject, all subsequent laws bearing upon the same subject matter must be considered with the general law as if the two separate acts formed part and parcel of the same amendment, and that acts relating to a special subject modify general laws relating thereto. *Meyer-Cord Co. v. Hill,* 84 Neb. 89; *State v. Omaha Elevator Co.,* 75 Neb. 637. From all enactments upon the same general subject of the organization of corporations generally, and of those belonging to certain excepted classes, we must gather the intent of the legislature, and so construe an ambiguous statute as most certainly to carry out that intent.

In respondents' brief it is argued that the clause in section 126 excepting "mutual insurance companies, building and loan companies, loan and investment companies and banking institutions", etc., limits the clause beginning with the words "domestic corporations." This contention is based upon the principle that exceptions and provisos should be construed with reference to the immediately preceding parts of the clause to which they are attached, unless a contrary intention is evinced by the language of the statute. But this rule is subject to the exception that it must not defeat the intent of the act, and is qualified by the other rules of statutory construction before stated. Ordinarily an exception in a statute will be held to apply to the clause or sentence immediately preceding it, but this rule is not unbending, and if a consideration of all statutes bearing upon the subject indicates a different legislative intent, this will prevail over a construction based upon the rules of syntax. If adopted in respect to section 126, this construc-

tion would excuse domestic mutual insurance companies, building and loan companies, loan and investment companies and banking institutions from filing their articles with the county clerk of the county in which their headquarters are located, and this, we think, could not have been the legislative intention. The purpose of the legislature seems to have been to place full information with regard to the excepted organizations in public offices readily accessible to any one in the county where the business is carried on, and also to make it convenient of access to the banking board, and other interested persons in the capital of the state, and to add to the revenues of the state by increasing the filing fees required of all other corporations.

Respondents also argue that this has been the interpretation of the statute ever since an opinion was given by the attorney general in 1902. There is no proof of this allegation in the answer, and we think it is not so public a matter that we may take judicial notice of it. In cases of doubt, it is very probable that the attorney general would very properly incline to that construction most favorable to the state. It is also probable that until the filing of this case the magnitude of the capital stock of associations previously filed has not been so great as to require the payment of heavy fees, and, hence, has not warranted the institution of litigation to determine the meaning of the law. However this may be, we think that long continuing contemporaneous construction has not been shown sufficient to justify the court in overriding what we believe to be the meaning of the statute.

What was the legislative intent when the change was made in 1897 and in 1899, when the present building and loan law was adopted? The amendment of 1897 relieved the excepted associations of no existing burden, but merely reserved to them privileges which they then possessed, and imposed upon other corporations additional requirements and conditions before they could legally incorporate. When the amendment of 1897 was adopted,

it was the duty of an insurance company to file certain statements in the office of the auditor of state, together with the articles of association and the names of the stockholders, before receiving a certificate authorizing it to do business. Banking institutions were also required to make an annual report to the auditor of their condition, resources and liabilities. In 1895 the state banking board was created, and given power to issue charters to, and to have general supervision over and control of, any and all corporations, partnerships and individuals transacting a banking business.

In 1899, two years after these amendments, the present law relating to building and loan associations was passed. This is a complete measure, treating of the organization, management and powers of all such associations, both foreign and domestic, and providing for the terms upon which they may be permitted to do business, within the state. Laws 1899, ch. 17. The title to this act, among other things, provides: "An act to provide for the organization, government, regulation, examination, reporting, and reorganizing or winding up of the business of associations now or hereafter incorporated under the laws of this state, and which shall be organized within this state for the purpose of raising money to be loaned among its members; * * * and for the examination of their articles of incorporation, constitution and by-laws, and all amendments thereto, by the auditor of public accounts, state treasurer and attorney general, composing the state banking board, and their certificate of approval, if approved under this act." Section 2 gives the state banking board power "to issue certificates of approval and authorization to, and shall have general supervision over, and control of, any and all associations" so organized. "Section 15. A copy of the articles of incorporation, constitution and by-laws of every such association shall be filed in the office of the state banking board, which board, or any two of the members thereof, shall examine the same carefully, and if they find that

said articles of incorporation, constitution and by-laws conform with the requirements of this act and contain a just and equitable plan for the management of the association's business, they, or any two of them, shall issue to such association a certificate of their approval of such articles of incorporation, constitution and by-laws; but if they, or any two of them, find the provisions of such articles of incorporation, constitution and by-laws to be unjust or inequitable or oppressive to any class of shareholders, they shall withhold their approval." This section further provides for like approval as to amendments. Section 22 requires existing associations to comply with the provisions of the act by filing a certified copy of its articles of incorporation, constitution and by-laws with the state banking board, unless such copy shall have been filed with the auditor of public accounts prior to the time the act took effect. Sections 24*a*, *b*, *c*, *d*, require similar filing with the state banking board as to a foreign association of its charter, or articles, and constitution and by-laws, the laws of the foreign state, and a sworn statement as to its financial condition, whereupon, if approved, the banking board may grant annually certificates giving such foreign association leave to transact business for the current year.

Construing section 126, as amended in 1897, with these provisions of the building and loan act of 1899, we think it was the intention of the legislature to place the entire control of such associations in the hands of the state banking board. As a measure of precaution, it also required their articles of incorporation to be filed with the state auditor, as well as with the state banking board, presumably for the reason that the state auditor is a constitutional officer, the tenure of whose office does not depend upon a mere legislative act, while the banking board, being the creature of statute, might at any session of the legislature be abolished. The information furnished by the filing of the articles of incorporation, the constitution and the by-laws of the association is neces-

sary to the state banking board in its control of the business of such associations, and, hence, the law requires that they must be filed with that board, and also with a constitutional officer of a fixed tenure of office. Publicity is given; for a person seeking information at the office of the secretary of state, as he naturally would do under the provisions of the former acts, would find a certificate on file showing that these documents had been filed with the state auditor, the date of filing the same, and the names of the stockholders. The act of 1899 relating to the organization of insurance companies is further evidence of this intention, though afterwards declared invalid. We can see no reason in requiring the articles to be filed with the secretary of state, another copy to be filed with the state auditor, and still another copy to be filed with the state banking board, and, in addition to these filings, to require a certificate to be filed with the secretary of state showing the filing of the articles with the auditor; and, unless such an intention of the law is plain, it ought not to be imputed to the legislature. Surveying the whole field of legislation in this regard, we are satisfied that the respondents are not justified in refusing to issue a certificate upon the sole ground that the relators have not paid to the secretary of state the sum of $500 as a filing fee, and filed in his office the articles of incorporation.

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

REVERSED.

ROSE, J., not sitting.

STATE, EX REL. ELLA MAY NELSON, APPELLEE, V. LINCOLN MEDICAL COLLEGE ET AL., APPELLANTS.

FILED MARCH 10, 1910. No. 16,048.

Judgment: PETITION TO VACATE: SUFFICIENCY. In a proceeding brought under section 602 of the code to open up a judgment on account of fraud after the expiration of two years from its rendition, if the petition fails to set forth that the facts were not discovered within two years thereafter, and fails to show any reason why the two years should be extended, it is not error for the district court to refuse to take jurisdiction, and on motion strike the petition from the files.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Tibbets & Anderson, for appellants.

Charles O. Whedon and *James A. Brown, contra.*

LETTON, J.

This is an appeal from an order of the district court striking from the files a petition of respondents to set aside the judgment formerly rendered in this case, and to be permitted to file additional and supplemental returns to the writ of mandamus heretofore issued, for the alleged reason that the relator perpetrated a fraud in the trial of the case by giving false and perjured testimony in a material matter; that the false testimony was knowingly and fraudulently given and produced for the purpose of substantiating a material issue in the case. The allegations of fraud and perjury are set out fully and specifically in the petition, and, though objected to by the respondents, are sufficiently specific to warrant the district court to take proofs, and if satisfied of their truth and materiality to set aside the judgment. The most serious question is with regard to whether the application was made in time under the provisions of sec-

tion 609 of the code. This section provides: "Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions 4, 5 and 7 of section 602 must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or person of unsound mind, and then within two years after removal of such disability."

This proceeding is brought under subdivision 4 of section 602, and consequently must be commenced within two years. The judgment sought to set aside was rendered June 27, 1906. The present application was filed November 27, 1908, and consequently beyond the time limit fixed by the statute, unless some reason for not filing it within the two years appears in the petition. The allegations with respect to this in the petition are as follows: "These respondents, and each of them, further allege that they had no knowledge of such fraud and forgery, and no knowledge that the said Ella May Nelson had testified falsely, and no knowledge that said diploma was a forgery until a long time after the judgment was rendered in this case in this court, and after an appeal and submission of the case to the supreme court of the state of Nebraska, and that, upon learning of said facts, these respondents, and each of them, made application to the supreme court of the state of Nebraska for permission to reopen said case in said court and take additional testimony; that said application was denied, for the reason that the supreme court had no jurisdiction to grant such application, but that the proper forum for such application was in the district court of Lancaster county, Nebraska." There is nothing in the facts alleged to show that full knowledge did not come to the respondents within the two years, and, the statutory period having elapsed, it was incumbent on the petitioners to allege some facts excusing the failure to comply with the statute. While we are not bound to do so, we have taken pains to examine the records in this court as to the time of appeal and submission of the case. The transcript on

appeals was filed in this court December 26, 1906, and the case submitted December 3, 1907. There remained 18 months after the appeal was taken, and 6 months and 24 days after the submission of the case, until the expiration of the two-year period within which the petition might have been filed. It was held in *Van Antwerp v. Lathrop,* 70 Neb. 747, in which case a similar petition was filed two years and six months after the rendition of judgment, that, "where such a petition fails to set forth that the facts were not discovered within two years of the trial, and fails to show any reason for extending the two years allowed by statute for setting aside judgments for fraud, equity is powerless to relieve." The rule would certainly not be more liberal in a purely statutory proceeding. The petition failing to show a case in which the district court had power to act, the order striking it from the files was justified.

The judgment of the district court is therefore

AFFIRMED.

FRANK H. PARSONS, APPELLEE, V. PRUDENTIAL REAL ESTATE COMPANY ET AL., APPELLANTS.

FILED MARCH 10, 1910. No. 16,542.

1. **Tax Sales:** RIGHT OF REDEMPTION. The right of redemption from a tax sale under the scavenger act is a property right belonging to those having an interest in the real estate, and not to a mere trespasser.

2. ———: CONFIRMATION: NOTICE. An actual occupant of real estate, either claiming an interest therein in privity with the owner, or claiming title or a right of possession adversely to the owner, has such an interest in the property as that notice to him is essential before a valid confirmation of such sale can be had; but a mere trespasser claiming no title or interest in the property, and having no duty to pay the taxes, is not an actual occupant upon whom personal service of notice must be had in order to vest the court with jurisdiction to confirm the sale.

3. ———: REDEMPTION. The owner of land sold under a tax decree in such proceedings under the scavenger act (laws 1903, ch. 75) is not entitled to redeem from the sale at any time within two years from final confirmation. In such case the two-year period runs from the sale by the county treasurer under the decree.

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

D. C. Patterson, for appellants.

Charles Battelle, contra.

LETTON, J.

This action was brought by the owner of certain real estate in Douglas county for the purpose of setting aside a tax deed issued under the provisions of the scavenger law. The real estate was included in the default decrees rendered in the 1904 tax suit. On the 10th of February, 1905, it was sold by the county treasurer to D. C. Patterson, trustee, who has since paid the 1904 and 1905 city, state and county taxes thereon. No "final notice" as described in section 33, ch. 75, laws 1903 (Ann. St. 1903, sec. 10676) was issued for personal service on the owners or occupants. On the 17th of October, 1906, an affidavit was filed for the service of final notice by publication upon "the unknown owners, and upon Frank H. Parsons." It alleged that Parsons was a nonresident of the state, and was interested in the real estate, and further alleged that reasonable diligence had been made to ascertain the names of the owners, but that the same could not be ascertained. A "final notice" in conformity with the statute, directed "to Frank H. Parsons, owner, and the unknown owners, and to the occupants of the real estate described below," and describing the property, was duly published. On the 16th day of February, 1907, the sale was confirmed by the district court, under the notice, and a treasurer's deed was executed on April 10, 1907. This deed was recorded. Afterwards a conveyance

was made to the Prudential Real Estate Company, which now claims to be the owner of the property. In his petition the plaintiff asks to be allowed to redeem from the sale, and offers to pay the amount bid at the tax sale, with interest and costs, and subsequent taxes with interest.

The plaintiff bases his right to redeem upon two propositions: First, that in the fall and summer of 1906 one Wesley Parker was in the actual occupancy of the real estate, and that, no final notice being served upon him as required by statute, the confirmation proceedings were void; second, that even if the confirmation proceedings were valid, he is entitled to redeem at any time within two years after the confirmation of the sale. Section 33, ch. 75, laws 1903 (Ann. St. 1903, sec. 10676), provides: "It shall be the duty of the holder of every tax certificate (other than the state, county or city) to cause a notice, which shall be termed 'final notice' to be served upon the owner, as well as every person in actual occupancy of the lands or lots purchased, not less than three months nor more than six months from the expiration of the period of redemption." This section further prescribes the duties of the purchaser with respect to the issuance of final notice, the contents of the notice, and the manner of service, both in the county within which suit was brought, and other counties of the state. Section 34 (sec. 10677) provides: "Where the owner of any real estate is a nonresident of the state or cannot, with reasonable diligence, be found therein, or in cases where the name, or names, of such owner, or owners, cannot be ascertained by the exercise of reasonable diligence, it shall be sufficient for the owner or holder of any certificate of tax sale to cause service of final notice to be made upon the person actually occupying such real estate, in the manner above provided, and to cause a notice substantially like the sheriff's final notice, signed by such owner, his agent, or attorney, to be published once a week

for three consecutive weeks in some newspaper of general circulation in the county where the land is located, or if no newspaper be published in the county, then in some newspaper published in the judicial district." This section further provides for the filing of an affidavit prior to the publication, in order to authorize the same. The plaintiff insists that the testimony establishes "actual occupancy" by Wesley Parker at the time notice was required. Parker's testimony, which is all there is on this point, is vague and indefinite. It shows that Parker in 1906, without leave or license from the owner, entered upon this lot, and cultivated it in connection with certain other lots in the same block, which he had leased; that he planted potatoes and corn thereon, and that all of the corn on the stalks was not removed before January, 1907. He did not live on the lot, was a mere trespasser, paid no rent, but took possession and cropped the ground that year. Section 3, art. IX of the constitution, provides: "The right of redemption from all sales of real estate, for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof; *provided,* that occupants shall in all cases be served with personal notice before the time of redemption expires." The statute merely carries out this constitutional provision.

The question for determination is, therefore, whether a mere trespasser, not residing upon the land, but temporarily cultivating the same, is an "actual occupant" to whom notice must be given. The terms "occupant" or "actual occupant" are not always susceptible of precise definition. Their meaning may vary according to the context. The idea which the lawmakers intended to convey must be gathered from a consideration of the purpose of the constitutional provisions, and of the statutes in which the terms are used, as well as from the ordinary definitions given by lexicographers. Ordinarily the oc-

cupant or actual occupant of land is one in the actual possession of the premises. "Occupant" is defined in the Century dictionary as: "One who occupies; an inhabitant; especially, one in actual possession, as a tenant, who has actual possession, in distinction from the landlord, who has legal or constructive possession." The Standard definition is: "One who occupies; especially, a tenant in possession of property, as distinguished from the actual owner." Quoting from *Cutting v. Patterson,* 82 Minn. 375, " 'Actual occupancy' is defined as an open, visible occupancy, as distinguished from the constructive possession which follows the legal title. 'Actual possession' has practically the same meaning. It means possession in fact, effected by actual entry upon the premises and actual occupancy. * * * Black, Law Dict. 29, 30. The same definitions are found in 2 Bouvier, Law Dict. 254, 349."

The statutes of New York provide that, whenever any land sold for taxes should be at the time of the conveyance "in the actual occupancy of any person," written notice should be served of the time of redemption. In *Smith v. Sanger,* 3 Barb. (N. Y.) 360, it was held that it was not necessary that the occupation should be by the owner, or by a person having an interest in the land, to require service upon the occupant, and that the statute calls for the service of notice wherever there is an occupancy by any person, whether he is interested in the land or not. This holding was based upon the provisions of the laws of that state under which a mere occupant of land was subject to assessment and taxation for the real estate occupied, and which also provided that "the occupant or any other person" might redeem the land from tax sale. In that state, therefore, the broad definition of an occupant as one in possession seems to apply. But the provisions of the Nebraska statute are very different from those of New York. The right of redemption under section 27 of the act (laws 1903, ch. 75) is limited. It provides: "Any person, or corporation, *having an interest*

in any real estate against which a decree has been entered shall have the right to redeem from such decree by paying to the county treasurer. * * * Any redemption shall inure to the benefit of any person having the legal or equitable title to the property redeemed." The right of redemption under our law is a property right belonging to those having an interest in the real estate, and not to a mere trespasser. A reasonable interpretation of our law would seem to be that any occupant of real estate *claiming an interest therein,* either through some conveyance, license, lease, contract, or any other act in privity with the owner, or any occupant claiming title or a right of possession adversely to the owner, would have such an interest in the property as that notice to him would be essential before a valid confirmation could be had, but that a mere trespasser, claiming no title or interest in the property either in privity with, or adverse to, the actual owner, whose possession was a mere entry for cropping purposes, as Parker had, and having no duty to pay the taxes, is not an actual occupant upon whom personal service of notice must be had in order to vest the court with jurisdiction to confirm the sale. The later cases in New York support this view. *People v. Campbell,* 143 N. Y. 335; *People v. Turner,* 145 N. Y. 451. To the same effect are *Cutting v. Patterson,* 82 Minn. 375, *Drake v. Ogden,* 128 Ill. 603, and *Whities v. Farsons,* 73 Ia. 137. We are of opinion that the evidence does not establish that Parker was an actual occupant upon whom it was essential to jurisdiction that a final notice be personally served, and that the confirmation was authorized.

It is next contended that, even if the sale was valid, it was not complete until confirmation, and that the owner of the property is entitled to two years after the confirmation and completion of the sale within which to redeem. The plaintiff relies upon the case of *Smith v. Carnahan,* 83 Neb. 667, in which it was held that the two-year right of redemption granted by the constitution ap-

plied to judicial sales for unpaid taxes, as well as to administrative sales. He also cites *Logan County v. Carnahan,* 66 Neb. 685; *Selby v. Pueppka,* 73 Neb. 179; *Wood v. Speck,* 78 Neb. 435, *and Barker v. Hume,* 84 Neb. 235. In none of these cases were the proceedings brought under the statute under consideration. No administrative sale by the county treasurer had been made, and the action in each of these cases was for the foreclosure of a tax lien. The proceedings had were substantially the same as in the foreclosure of mortgages. No sale took place until that made by the sheriff under the decree, and no period of redemption from the sale was conferred by the statute under which the suit was brought. Under such circumstances it was held that the provisions of the constitution, giving the owner two years to redeem from tax sales, were mandatory and self-executing, and that, since the only sale had was the judicial sale, the redemption period did not expire until two years after the completed sale. But the statute under which the sale of this real estate was had presents entirely different provisions and conditions. It provides for a sale by the treasurer under the decree, but it also protects and enforces the two-year redemption period before the confirmation, and thus specifically provides a manner of operation for the constitutional guaranty which was lacking in the cases relied upon, and which in such cases required the intervention of the court to be made effective. While in the *Carnahan* case it was properly said that the sale was a judicial sale, and that it was the completed sale from which the owner had a right to redeem, the "judicial sale" spoken of was of a different character, and the rights of the landowner thereunder were based upon a different proceeding from the sale under consideration. The reasons for the rule of that case do not appear in these proceedings, and the rule is not applicable to such a sale. In the one case no statute provided for the right of redemption, in the other the matter has been fully provided for. To hold as the plain-

tiff desires would practically nullify or render ineffective the beneficent operations of the scavenger act by postponing the final completion of a title under such act for four years from the time of sale. This could not have been the intention of the legislature, and we do not feel warranted in thus emasculating the purpose of the act. So far as appears from this record, the proceedings under the sale and confirmation were regular in all respects, and the right of redemption expired on the 10th day of February, 1907.

This being so, the judgment of the district court must be

REVERSED.

REESE, C. J., dissenting.

I cannot agree to the conclusion of my associates as to the disposition of this case. Section 3, art. IX of the constitution, provides that "occupants (of real estate sold for taxes) shall in all cases be served with personal notice before the time of redemption expires." This section of the constitution is followed up by section 214, ch. 77, art. I, Comp. St. 1909, which requires that the notice under consideration shall "be served on every person in actual possession or occupancy of such land or lot", and, until that is done, "no purchaser at any sale for taxes or his assignee, shall be entitled to a deed for the land or lot so purchased." Section 33, ch. 75, laws 1903, cited and quoted in the majority opinion, is equally positive in requiring the final notice to be served upon "every person in the actual occupancy of the lands or lots." To my mind there can be no kind of doubt but that Parker was an "occupant" of the lot in question. He was cultivating it, raising annual crops thereon. He actually occupied it. He was in possession of it. A stranger could not have legally divested him of that possession or interfered with his occupancy. As to all the world, except the owner, his possession was unassailable. Now, is it for the holder of the tax certificate, or the purchaser at

tax sale, to inquire into the right of such an occupant, or why he is there, and, if not in privity with the owner, that his possession and occupancy, such as it may be, if actual, shall or may be ignored? I do not so read the constitution nor the statutes.

JOSEPH J. YOUNG, ADMINISTRATOR, APPELLEE, V. MARION G. ROHRBOUGH ET AL.; COMMERCIAL BUILDING COMPANY, APPELLANT.

FILED MARCH 10, 1910. No. 15,690.

Trial: VERDICT. Where all of the defendants are by the court's instructions placed in the same relation with respect to plaintiff, a verdict in favor of two defendants and against another, based upon conflicting evidence which is the same as to all of the defendants, will not be permitted to stand.

REHEARING of case reported in 84 Neb. 448. *Former judgment vacated and judgment of district court reversed.*

ROOT, J.

An oral argument has been made by counsel for both parties on defendant's application for a rehearing. Being more fully advised, we conclude that our judgment should be for the defendant Commercial Building Company. The statement of facts in our first opinion is correct, but will be repeated.

The building in question was constructed by the Rohrbough brothers, Marion G. and George A. The evidence tends to prove that the first and second stories of the structure were constructed for college and office purposes, the third story was designed for lodge and public assembly rooms, and the fourth story for a gymnasium. After the building was completed the Rohrboughs rented

the third story to a Mr. Baright "to be used for lodge, society, church and other gatherings except public dances, also for office purposes." The room where Mrs. Young was injured was constructed for lodge purposes, and was sublet by Baright to a Ben Hur lodge, of which she was a member. Subsequently the Rohrboughs conveyed the lots and building to the defendant Commercial Building Company, a corporation. We infer, although the evidence is not clear upon that point, that after the last named lease was executed the Commercial Building Company rented the attic, or fourth story, to the Y. M. C. A. The Rohrboughs and C. C. Shimer own all of the stock of the defendant corporation, and constitute its board of directors, but the evidence does not show that any one other than the Rohrboughs attended to the business of the corporation. The room under consideration is in the southwest corner of the building. The fourth floor and the roof of the structure are supported by a series of trusses running east and west. In constructing the east partition of said lodge room, a truss was built north and south in the line of the partition to sustain part of the third floor. One end of the truss was anchored in the south wall of the building, and the north end was supported by a stirrup attached to the lower cord of one of the east and west trusses sustaining the fourth floor and the roof. Studding were placed within, and flush with, the frame of the north and south truss, and laths were fastened across the studding and the truss, so that there was no chance for the plastering to clinch at the points where the laths crossed the surface of the truss.

Plaintiff alleges the building was negligently constructed in many particulars with reference to the plan adopted, the material used, the construction and support of the trusses, and the manner in which the east wall of said room was lathed and plastered. Plaintiff further charges that the fourth story of said building was not constructed, and should not have been used, for a gymnasium; that, when the patrons of the gym-

nasium exercised therein, the building vibrated so as to loosen and eventually dislodge the plastering upon the walls of said room; that the defendants, with knowledge of the facts, negligently permitted the building to be used as aforesaid, and as a proximate result a quantity of plastering was detached from the east wall of said room and precipitated upon Mrs. Young to her fatal injury.

The court by its sixth instruction informed the jury that if the defendants Rohrbough negligently constructed the building in question, as charged by plaintiff, so that it was dangerous to life or limb of those who might reasonably be expected to occupy it, and such negligence was the proximate cause of Mrs. Young's death, the jury should find against the Rohrboughs, notwithstanding they had transferred the property before the woman was injured; that the Rohrboughs in this particular should be charged with such knowledge as they had or should have acquired "by the exercise of such care and prudence in the construction of the building and the uses to which it was put as an ordinary, prudent person would have gained under like circumstances and conditions." In the eighth instruction the jury were further told that if the Rohrboughs as directors of the building company knew, or by the exercise of ordinary prudence ought to have known, the building was in a dangerous and defective condition for the purposes to which it was devoted, and Mrs. Young was injured as a proximate cause of the negligence charged in the petition, they were liable. The court also stated in this instruction: "The said defendants would be charged with such knowledge as they actually had, or should have gained by the exercise of such care and prudence in the maintenance of the building, and the uses to which it was put, as an ordinary, prudent person would have gained under like circumstances and conditions." Upon these instructions the jury found for the Rohrboughs, judgment was rendered in their favor, and no appeal has been prosecuted

therefrom. The law of the case respecting the corporation's liability is stated in the court's seventh instruction as follows: "With respect to the liability, if any, of the Commercial Building Company, you are instructed that if you believe from the preponderance of the evidence that said building company knew of the defective construction of the building with respect to the matters complained of in the petition, or that by the exercise of such care as an ordinary, prudent person would have exercised under the same circumstances, would have known of such defective construction, and knowingly maintained the same, and if you further believe that said building, with respect to the matters complained of, was a menace to life or limb of persons rightfully upon the premises, and if you further find that the plaintiff has established the essential elements necessary to make a case as set out in instruction No. 5, then you should find against the defendant, the Commercial Building Company. * * * Upon the question of the knowledge of the said building company, you are instructed that said building company would be bound by such knowledge as was possessed by its directors or managers, or either of them."

The evidence tends to prove that the use of the gymnasium caused the ceiling of the lodge room and the building itself to shake and vibrate, and that complaint was made to Marion G. Rohrbough that the noise created by the use of the gymnasium was obnoxious to the members of the lodge and interfered with the transaction of their business, but there is not a scintilla of evidence that anything was said to the directors of the corporation, or any agent thereof, about the vibrations or the effect of the gymnastic exercises upon the building, or that any agent or representative of the corporation had knowledge of those facts. The directors deny emphatically they had any notice or information that the plastering upon the east wall of the lodge room was in any manner defective. The verdict upon the instructions submitted

amounts to a finding that the Rohrboughs were not negligent in constructing the building, did not as directors devote it to an improper use, and in the exercise of ordinary care could not have ascertained that the building was defective or dangerous to persons rightfully within the structure. Upon the same evidence the jury has said the corporation defendant is liable, although under the instructions that liability must be established by the knowledge those directors had, or in the exercise of reasonable prudence ought to have acquired, concerning the alleged dangerous conditions either inhering in the building by reason of its construction, or created by the alleged improper use to which it was devoted, its construction being considered.

We adhere to the statement made in our former opinion that the Rohrboughs, in constructing the building, did not act as agents of the defendant corporation, and that it will not be heard to complain because the court may have held the defendants Rohrbough to a stricter account than the law will justify. We think, however, we did not give sufficient weight to the verdict in favor of the Rohrboughs, in the light of the issues presented by the instructions. By the seventh instruction the jury were informed the corporation would be bound by such knowledge as its directors or managers, or either of them, possessed, and by the eighth instruction they were told the Rohrboughs should be charged, in case of negligence, with such knowledge as they had, or as an ordinarily prudent person would have acquired under the circumstances of this case. Notwithstanding the jury have found all of those facts in favor of the Rohrboughs, by that same verdict they say, for the purposes of the corporation, that the Rohrboughs did construct an unsafe building, or they as directors did devote it to an improper use, or by the exercise of reasonable prudence they could have anticipated and prevented the injury to Mrs. Young. Upon mature reflection we think the case of *Gerner v. Yates,* 61 Neb. 100, is in point. It is true that in the

cited case the liability of all of the defendants was joint, and that as a matter of law the liability of all of the defendants in the instant case, if any exists, is not necessarily joint; but it is also true that, upon the instructions given the jury, the liability of the corporation and the liability of its directors, the Rohrboughs, was placed upon the same state of facts. The verdict in the one case as in the other is inconsistent with itself, and finds, in effect, that the allegations of the petition are both true and false. It ought not to be, and will not be, accepted to sustain a judgment against the corporation defendant.

It is argued that the corporation may be held by reason of the knowledge possessed by the director Shimer, because he was a member of the firm of contractors that constructed the building, and may have acquired, and probably did gain, knowledge of the alleged defective condition of the building, and that knowledge should be imputed to the corporation defendant. The jury, however, say the building was not improperly constructed, so Shimer could not have knowledge of a condition that did not exist. Concerning the alleged improper use to which the building was devoted, the court informed the jury that, if the Rohrboughs in reason could have ascertained any of the facts concerning which plaintiff complains, these directors should be held, and the jury by their verdict say no reasonably prudent man could have ascertained those facts. There is not a scintilla of evidence that Shimer had anything to do with renting the building, or any part thereof; that he was ever informed or knew that the east wall of the room in question was defective, or that the use of the fourth floor for a gymnasium caused any part of the building to vibrate. We do not think, under the instructions of the court, the possibility that Shimer may have known some facts essential to charge the corporation can be accepted to sustain the verdict.

It is also suggested that the corporation is liable for its directors' negligent failure to act, whereas they can only

be held for acts of misfeasance, and the general verdict against the corporation can be sustained upon the theory that the jury found that defendant was liable for its agent's negligent failure to act. We do not take issue with plaintiff's statement of the law relative to a corporation's liability and its agent's non-liability for the latter's failure to act. The principle, however, cannot be successfully invoked in the instant case by plaintiff, because it was ignored by the district court, and the jury were required, as a condition precedent to finding the corporation liable, to find facts making it their duty to also find against the Rohrboughs. What has been said concerning the effect of the verdict returned relates solely to the trial at which it was rendered, and not to the force that shall be given it in future trials of this case.

For the reasons above stated, our former judgment of affirmance is set aside, the judgment of the district court reversed as to the defendant Commercial Building Company, and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

REESE, C. J., dissents for the reasons stated in the original opinion.

WILLIAM H. HILMER, APPELLEE, V. WESTERN TRAVELERS ACCIDENT ASSOCIATION, APPELLANT.

FILED MARCH 10, 1910. No. 15,819.

1. **Pleading:** DEFENSES. "A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false." *Home Fire Ins. Co. v. Decker*, 55 Neb. 346.

2. **Insurance:** NOTICE OF ACCIDENT. Where a person is accidentally injured so as to render him unconscious and thereafter cloud his mind so that he cannot, within the time limited in an accident insurance policy, intelligently give notice to the insurer of

such accident, he will be excused from giving the notice while so disabled.

3. ———: ———. And if, while the policy holder is thus incapacitated, a third person gives the insurer notice at its office of the accident and the insurer acts thereon, it will be held to have received notice of the accident.

4. Contracts: CONSTRUCTION: FORFEITURES. Where an insurance contract is susceptible of two constructions, one of which will work a forfeiture, and the other will not, that construction should be adopted which will prevent the forfeiture.

5. Evidence: MENTAL CONDITION: OPINION OF NONEXPERT. If the mental condition of a litigant becomes a material subject of inquiry, it is competent to receive the opinion of a nonexpert witness, concerning that condition, where it appears that the witness has for years been intimately acquainted with the litigant, and the opinion is formed upon facts within the personal knowledge of the witness and sworn to by him before the jury.

6. ———: PHYSICAL CONDITION: OPINION OF PHYSICIAN. A physician may give his opinion concerning the cause of a person's physical condition, where that opinion is based upon a hypothetical question fairly describing such condition and reflecting the testimony before the jury upon that point.

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

H. C. Brome, Clinton Brome and *R. G. Young,* for appellant.

Benjamin S. Baker, J. W. Eller and *Simeon Bloom, contra.*

ROOT, J.

This is an action upon an accident insurance policy. Plaintiff prevailed, and defendant appeals.

Defendant is a mutual accident insurance company transacting business under the provisions of chapter 53, laws 1903 (Ann. St. 1909, sec. 6661 *et seq.*) The certificate in suit was issued April 17, 1903. Subsequently plaintiff fell and was severely injured. Defendant does not argue that plaintiff's fall was not accidental, or that the evidence does not support the amount recovered.

1. Defendant argues that plaintiff did not plead or prove a compliance with the conditions precedent in his policy or a waiver of those conditions. The certificate in suit and defendant's by-laws should be considered together. The former provides: "This certifies that William H. Hilmer 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. * * * Provisions referred to: Payments will be paid under this certificate for injuries received through external, violent, and accidental means, and resulting in * * * permanent total disability, $2,500; temporary total disability, $25 per week, for a period not to exceed 52 weeks; which said payments are more fully set out and provided for in the constitution and by-laws of the association which, with the application for membership and this certificate, forms the contract between the member and the association under which, and by the terms, conditions, and limitations of which only will payments be made to the member or his beneficiary." The certificate is indorsed: "No claim under this certificate will be paid unless notice of the injury with respect to which claim is to be made, is received at the office of the association within fifteen days from the date of such injury."

Plaintiff's application is not in the record, but no suggestion is made that it modifies the evidence before us. Defendant's constitution and by-laws are contained in one instrument. Only such parts of the document as are considered material will be reproduced in this opinion. Article VI provides: "No claim against the association will be valid unless notice of the injury with respect to which claim is to be made is received at the office of the association within FIFTEEN DAYS from the date of such injury." Article VIII is entitled "Benefits." Section 1 thereof is as follows: "Whenever any member of this asso

ciation, in good standing, shall through external, violent and accidental means, receive bodily injuries which shall independently of all other causes wholly disable him from the transaction of every part of the duties pertaining to his usual occupation, he shall be paid the sum of twenty-five ($25) dollars per week, during the continuance of said total disability, not exceeding fifty-two (52) consecutive weeks, provided: That no claim under this section shall be valid unless written notice of said accident shall have been received at the office of the association within fifteen (15) days from the happening thereof, nor unless the said injured member shall within thirty (30) days after the said total disability ceases, furnish the executive board with affirmative proofs in writing, of the duration of the disability, and of the nature, cause and effect of the injury sustained, and such other proofs as may be required by the executive board." Section 2 refers solely to an accident resulting in death, and provides: "No death claim provided for in this section will be paid unless proofs of such death be filed in the office of the association by the claimant within thirty days from the date of the death of said member, nor unless it is shown in such proofs by the positive and unequivocal statement of the attending physician that the death was caused in the manner provided in this section. No claim under this section shall be valid unless written notice of the accident which caused the death shall have been received at the office of the association within fifteen days from the date of said accident."

Section 3 states: "Whenever any member of this association, while in good standing, shall through external, violent and accidental means, receive bodily injuries which shall independently of all other causes result in the loss of both feet, or both hands, * * * the said member shall receive as indemnity the proceeds of one assessment of two ($2) dollars on each member in good standing at the date of the accident, not exceeding five thousand ($5,000) dollars. * * * If said accident shall inde-

pendently of all other causes, in the judgment of the medical examiner and the executive board, result in the total disability and render the member unable to perform any duties or follow any occupation for a period of two years or over, then said member shall receive as indemnity one-half of the proceeds of one assessment of $2 on each member of the association in good standing at the date of the accident, not to exceed $2,500. Provided: That no claim mentioned in this section will be valid unless notice in writing of the accident is received in the office of the association within fifteen days from the date of same and affirmative proofs in writing of said claim, as required by the executive board, are received within thirty (30) days after loss occurs. The association shall not be liable for weekly indemnity on account of an accidental injury by reason of which claim is made under this section." Section 5 is as follows: "All claims under certificate of membership shall be due and payable ninety days after proofs of loss in writing are filed in the office of the association and no legal proceedings for recovery under any certificate of membership shall be brought within ninety days after the receipt of proof of loss at the office of the association, nor at all unless begun within ninety days from the time that right of action accrues as above stated." Section 7 provides: "Proofs of claim, mentioned in sections one, three, and five of this article, shall consist of the affidavit of the claimant and his attending physician, which affidavits shall state the cause of the loss of limb or limbs, or eye or eyes, or disability, the duration of disability if the claim is made under section one, and such other facts as may be required by the association. If claim is made under section two of this article proofs shall consist of the affidavit of the beneficiary of the deceased member and the attending physician, and such proofs shall state the cause of death, giving dates of the accident and particulars thereof, and also the date of

death, and such other information as may be required by the association."

Plaintiff pleaded that on October 16, 1903, as a result of an accident, which is detailed with particularity, he was wholly and continuously disabled from the transaction of every part of the duties pertaining to his usual occupation for 52 consecutive weeks, "and that same disability has continuously so disabled him, as aforesaid, ever since; and plaintiff further avers that said injuries so received through external, violent and accidental means resulted in permanent total disability." He further charges that the injury rendered him unconscious of his surroundings and he remained in that condition for more than 15 days; that while plaintiff was unconscious his friends notified defendant at its office of his injury.

Defendant admits it issued the certificate in suit; denies that plaintiff was unconscious, and denies that plaintiff or his friends at any time prior to the commencement of the action notified defendant of plaintiff's injury, "and shows to the court that at the time said beneficiary certificate was issued, and at all times thereafter, it was provided by the constitution and by-laws of defendant that no claims for benefits under such certificate should be valid unless written notice of the accident should be given within 15 days from the happening thereof, and within 30 days from the date of such accident make and give to defendant affirmative proofs in writing showing the duration of the disability, and the nature, cause and effect of the injury sustained, and including the affidavit of the claimant and his attending physician", etc. It is charged that no such notice was given or proofs of loss furnished, and by the terms of the policy an action could not be maintained thereon until 90 days after proof of loss was furnished, nor at any time unless begun within one year after plaintiff's right of action accrued, and that no right to maintain the suit existed at the time the action was commenced or at any other time.

In his amended reply plaintiff admits that defendant's

constitution and by-laws require written notice of an accident to a member within 15 days after the occurrence thereof, but relies upon his condition as an excuse for prompt performance. He denies that he was required to furnish proof of loss within 30 days of the accident. He admits that the constitution and by-laws provide that an action shall not be commenced until 90 days after proof of loss had been furnished, but alleges said section is qualified by other parts of said document and does not apply to the certificate in suit; denies that the constitution limits his right to commence an action to one year after proof of the accident has been furnished. Plaintiff admits that he did not "at any time prior to the commencement of this action make and give proofs in writing consisting of an affidavit made by himself showing the duration of disability, and nature, cause and effect of the injury, and the affidavit of his physician stating the cause of the disability and its duration." Plaintiff alleges that defendant's executive board did not require him to furnish any proof, but rejected his claim, and that he has performed all acts required in the contract to be performed by him.

Defendant insists the pleadings demonstrate that this suit cannot be maintained because conditions precedent to plaintiff's right to recover have not been complied with. Plaintiff asserts that defendant having denied all liability has waived the right to insist upon notice of the accident or proof of loss, and cites *Omaha Fire Ins. Co. v. Dierks & White,* 43 Neb. 473, and *Western Travelers Accident Ass'n v. Tomson,* 72 Neb. 674. In the *Dierks* case an insurance company answered, denying that its policy was in force at the time plaintiff claims he had suffered loss. The company also urged a defense based upon an agreement in the policy. Manifestly it was not just to permit the company to insist that the policy was void for one purpose and valid for another. It appeared that Dierks & White, the assured, notified the insurance company's local agents that the fire occurred, and they

notified the company and it acted on the notice. We held that notice had been given. Speaking for the court upon this subject, Judge RAGAN says: "But what we do decide is that when an insurance company is sued for a loss on a policy issued by it, and places its defense to such suit on the ground that by reason of some act of the assured the policy *was not in force at the date of the loss,* then in such action all issues made by the pleadings as to whether the insured gave notice of the loss, and whether he furnished the insurance company proofs of loss, become immaterial." In the *Tomson* case, *supra,* we held that, if an insurance company has actual knowledge of a loss within the time limit stipulated in its policy for the giving of formal notice thereof, the assured is not compelled to give the formal notice.

Section 100 of the code gives a defendant the right to plead in his answer as many grounds of defense or counterclaim as he may have, but inconsistent defenses will not be tolerated. Defenses are inconsistent whenever proof of one defense necessarily disproves another. *Blodgett v. McMurtry,* 39 Neb. 210. An answer in an action upon a policy of insurance is no exception to the general rule. *Home Fire Ins. Co. v. Decker,* 55 Neb. 346. But, if a person before suit refuses to satisfy a demand for particular reasons stated by him to the plaintiff, he will not be permitted after litigation has commenced to change his ground and defend upon entirely different considerations. *Ballou v. Sherwood,* 32 Neb. 666; *Frenzer v. Dufrene,* 58 Neb. 432; *State v. Board of County Commissioners,* 60 Neb. 566; *First State Bank v. Stephen Bros.,* 74 Neb. 616; *Powers v. Bohuslav,* 84 Neb. 179.

In the case at bar defendant's secretary, on March 30, answered a communication from plaintiff's counsel, and stated: "The office did not report to me that any notice of any accident was ever received by the association, neither have any proofs of claim been filed. We know nothing of the merits of Mr. Hilmer's claim. Of course will rely upon his failure to give notice and make proper

proofs." February 6, 1906, the secretary again wrote counsel for plaintiff: "I wish to restate what I stated to you orally with reference to the position of the association in this matter. At this time we neither admit nor deny liability, the claim not having been submitted to the executive board who have the only authority in our association to pass upon any matters in connection with claims. The executive board will consider this matter in due time, and in the meantime we waive none of the conditions of the contract, as above stated neither admit nor deny liability." It therefore seems clear to us that defendant did not waive its right to notice of the accident and proofs of loss in accordance with the terms of the contract between the litigants. The evidence is undisputed that on November 2, 1903, 17 days after the accident, Emil Hansen, a member of defendant association and a friend of plaintiff, called at defendant's office and delivered the assured's traveling card to defendant's secretary, and told him, among other things, that Hilmer "was hurt in his own house" and unconscious. The secretary indorsed the card: "Emil Hansen reported orally claim Wm. H. Hilmer, Wayne, Apoplexy. Bruised face. Fell in own home. Hilmer told Hansen himself. Dr. Blair. Happened about Oct. 24." The evidence shows that defendant acted upon this information, and communicated with and received information concerning plaintiff's condition from his attending physician.

Upon a consideration of the facts above stated, we think the evidence shows notice to defendant within the terms of the policy. *Woodmen Accident Ass'n v. Pratt*, 62 Neb. 673; *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 674. If the contract required plaintiff to furnish defendant an affidavit sworn to by himself giving the details of the accident as a condition precedent to a valid claim against it, such proof of loss is material, and if not given, and such default was not waived, but properly pleaded, it might be a defense to the action. A careful consideration of defendant's constitution and by-laws fails to sat-

isfy us that such a condition exists. The contract contemplates payment of indemnity for injuries caused by an accident as follows:

(1) Section 1 of article VIII refers to weekly sick benefits for not to exceed one year, provided the injured member furnishes the executive board with written proofs of the accident within 30 days after his disability ceases.

(2) Section 2 of said article relates to accidents resulting in death, and the beneficiary is required to furnish the company written proofs within 30 days of such death.

(3) Section 3 of said article contemplates an accident causing the destruction of an eye, foot, hand or limb of the assured, or disabling him so that he cannot perform any duty or follow any occupation for a period of two years or over. The condition is: "No claim mentioned in this section will be valid unless notice in writing of the accident is received in the office of the association within fifteen days from the date of same and affirmative proofs in writing of said claim, as required by the executive board, are received within thirty (30) days after loss occurs." This section plainly means that proof need not be furnished unless required by the executive board, and it is conceded no such demand was made. We do not think that section 5 of said article refers to the instant case. The attempt to limit the right to maintain an action to 90 days after the right accrues is in violation of the statute, and void. Ann. St. 1909, sec. 6677. The remaining provisions in section 5 are general, and must yield to the special statement in section 3 that proof shall be furnished "as required by the executive board." *Mutual Life Ins. Co. v. Hill,* 193 U. S. 551. The quoted words must have some significance. They were deliberately inserted by defendant in its constitution for some purpose, and, if not construed as we interpret them, are senseless and impotent. Forfeitures are not favored, nor will the courts construe a contract for insurance so as to defeat the policy holder except to carry out the obvious intention of the parties. *Phenix Ins. Co. v. Holcombe,*

57 Neb. 622; *Woodmen Accident Ass'n v. Pratt,* 62 Neb. 673. If a contract is susceptible of two constructions, one of which will work a forfeiture, and the other will not, that construction should be adopted which will prevent a forfeiture and preserve the rights of the parties. *Hamann v. Nebraska Underwriters Ins. Co.,* 82 Neb. 429. Section 7 of article VIII describes the nature of evidence to be submitted as proof of loss, but necessarily, if proof is not required, the section does not apply. We are satisfied that the district court did not err in not directing a verdict because proofs of loss were not furnished defendant before this action was commenced. For the reasons above stated, the court did not err in giving instruction numbered 2.

2. Charles Meier, plaintiff's son-in-law, testified that he had known plaintiff since 1881—intimately much of that time. He testified at length concerning plaintiff's actions subsequent to the accident. After stating the facts in answer to numerous questions, he was asked whether, basing his opinion upon the facts testified to by him, he considered plaintiff capable of transacting ordinary business. Defendant objected, but the witness was permitted to answer. The testimony tends strongly to prove that plaintiff was seriously injured, mentally as well as physically, as a result of the fall, and Meier's testimony was relevant on the issue of plaintiff's disability. No error was committed in receiving this testimony. *Schlencker v. State,* 9 Neb. 241. The same conclusion is reached concerning the testimony of Mrs. Meier, plaintiff's daughter.

A hypothetical question fairly reflecting the facts testified to by witnesses was propounded to Dr. Rosewater, and he was requested to give his opinion of the cause of plaintiff's physical condition immediately after the fall. Defendant's objections were overruled, and the witness stated the symptoms indicated that plaintiff's unconscious condition was caused by concussion followed by hemorrhage, and later stated that the fall was not caused

by a rupture of a blood-vessel in the brain, but that the rupture was caused by the fall. The preliminary questions established the witness' qualifications as an expert, and the testimony was competent and relevant. *Matteson v. New York C. R. Co.*, 35 N. Y. 487.

Upon consideration of the entire record, we find the judgment of the district court is right, and it is

AFFIRMED.

FAWCETT, J., dissents.

SEDGWICK, J., dissenting.

I did not hear the argument in this case, and so am excused from taking part in the decision, but I think it my duty to protest against the seeming recognition of the decision in *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473. In that case the defendant answered that the plaintiff had violated the conditions of his policy by giving a chattel mortgage on the property without the consent or knowledge of the company, and that the plaintiff had not given notice of the loss, and it was decided that these two defenses were inconsistent and could not be pleaded together and relied upon by the company.

When the insured demands payment for his loss, the defendant may of course waive the notice of the loss. So, too, the defendant, when payment is demanded, may waive the formal proofs of the manner of loss, the cause of the fire, and the character and value of the property destroyed. If the defendant, when payment is demanded, flatly denies all liability, refuses to consider the matter, and does not ask for formal proofs, most courts hold that by such conduct the defendant waives both notice and formal proofs. This is not because it is inconsistent to say: "You have forfeited your policy, and you gave no notice of the fire, and did not make the formal proofs." These statements are not inconsistent; they may all be true. Indeed, the fact that no notice of the fire was given, and also the fact that no proofs of loss were made, add to the probability that

the parties both considered the policy forfeited. If the insurance company, at the time that proofs of loss should be made, or perhaps at any time before suit, had insisted that the policy was forfeited and refused to further consider the claim, such conduct would no doubt be held to waive both notice and proof of loss. This is what is decided in the many cases cited and reviewed in the *Dierks* case. In none of them was the question of pleading involved. They are not authority for the proposition that after a policy has been forfeited, and no notice of the fire has been given, and no proof of loss has been made, the insured may begin an action in which he sets out a policy which by its terms requires notice to be given and proofs of loss to be made, and the defendant, under a statute which allows it to set up as many defenses as it has, cannot allege that the policy was forfeited without admitting that notice was given and that proof of loss was made.

The decision in the *Dierks* case is bad. It has been several times virtually overruled by this court, but without being mentioned. It ought not now to be followed or countenanced, but should be overruled.

F. J. AYRES, APPELLEE, v. I. J. WEST, SHERIFF, APPELLANT.

FILED MARCH 10, 1910. No. 15,869.

1. **Action: JOINDER: CAUSES OF ACTION.** A cause of action against the maker of a promissory note and a cause of action against a third person who has guaranteed that the bill shall be paid are not identical, nor do the contracts create a joint liability.

2. **Process: SUMMONS TO ANOTHER COUNTY.** If an action for a money judgment is brought upon those contracts in the county where the maker of the note resides and summons is served upon him in that county, the court is without authority to issue an alias summons to a foreign county for the guarantor.

3. **Judgment: COLLUSIVE JOINDER OF DEFENDANTS: INJUNCTION.** Where persons, severally and not jointly liable on separate contracts,

have been collusively joined as defendants for the sole purpose of bringing suit for a money judgment against a defendant in a county wherein he does not reside, a summons sent to, and served upon him in, the county of his residence is void, and if the record discloses those facts, collection of the judgment may be enjoined.

APPEAL from the district court for Butler county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Norval Brothers, J. J. Thomas and *Edwin Vail*, for appellant.

R. C. Roper and *Skiles & Harris, contra.*

ROOT, J.

This action is prosecuted against the sheriff of Butler county to enjoin him from selling plaintiff's real estate on execution. Plaintiff prevailed, and defendant appeals.

Walter Jackson, prior to 1889, executed two promissory notes maturing July 1, 1889, payable to William Deering & Company, or order. A contract of guarantee signed by plaintiff appears on the back of each note as follows: "For value received I hereby guarantee that the indebtedness mentioned in the within note, with interest at the rate agreed upon, will be paid by the maker thereof at maturity, and hereby consent that the time of payment thereof may be extended, or new note or security for the same debt taken, and this guarantee shall extend and apply thereto, hereby waiving protest, demand, and notice of nonpayment and necessity of suit against any party to this note, or any note taken in its place." Ayres is credited with the payment of 50 cents June 13, 1894.

June 2, 1898, Deering & Company commenced an action in the county court of Hall county against Jackson and Ayres. In its petition plaintiff charged that the defendants made and delivered the notes. Copies of the bills and of the guarantee are attached to the petition and made a part thereof. A summons was issued to the sheriff

of Hall county and served on Jackson. The sheriff in his return to the writ states: "F. J. Ayres not served on account of not being found in Hall county." In June, 1898, Ayres was, and has continued to be, a resident of Butler county. June 21, 1898, a summons was issued to the sheriff of Butler county for Ayres, and served on him in that county. Ayres did not appear in the action, his default was entered on answer day, and judgment was rendered for the full amount of Deering & Company's claim. Prior to the entry of said default and judgment, Jackson had demurred to the petition because of a misjoinder of causes of action. The demurrer was submitted the day judgment was entered against Ayres, and thereafter sustained. Subsequently an amended petition was filed wherein Jackson was given credit for $25 not mentioned in the original petition. To this pleading Jackson demurred, his demurrer was overruled, and he answered. The transcript does not contain a copy of this pleading, but a statement is made that Jackson pleaded the statute of limitations. Deering & Company's attorney filed a stipulation to the effect that Jackson had withdrawn his demurrer, that he was a proper party to the action, and that other facts existed which demonstrate the statute of limitations had barred a recovery against Jackson. The court made findings in conformity with the stipulation, but did not render judgment thereon.

1. Plaintiff contends that his joinder with Jackson in said suit was fraudulent and collusive; that the petition disclosed a several liability of the defendants on distinct and separate contracts; and that the court never acquired jurisdiction to render a judgment in that action against any one other than Jackson. Defendant asserts that the pleadings in the county court presented questions of fact and law which the judge necessarily determined when he issued a summons to Butler county, and that the judgment at most is erroneous, but not void. Defendant further urges that Ayres, by failing to present timely objections to the court's jurisdiction, waived his privilege

to be sued in the county of his residence. It is also suggested that under the authority of *Pollard v. Huff,* 44 Neb. 892, Ayres is an indorser and jointly liable with Jackson for the payment of said notes. Sections 51 to 59, both inclusive, of the code, under title IV, specify the venue for various actions and for the prosecution of suits against corporations. Section 60 provides: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned." Section 65 directs: "Where the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county, against any one or more of the defendants, at the plaintiff's request."

The law is well settled that, in an action for a money judgment, a summons cannot be lawfully sent to a county other than the one wherein the litigation is pending, unless there is a joint demand against the nonresident defendant and the party summoned in the county where the suit is commenced. *Barry v. Wachosky,* 57 Neb. 534; *Seiver v. Union P. R. Co.,* 68 Neb. 91; *Stull Bros. v. Powell,* 70 Neb. 152. Copies of the notes were attached to and made part of the petition. Ayres' name does not appear as a maker or payee of either note, but his signature was written across the back of the instruments beneath technical words apt to charge him as guarantor, but not as maker or indorser. In *Mowery v. Mast & Co.,* 9 Neb. 445, we held that the contract of the payee who indorses a note and the agreement of a mere guarantor that the bill should be paid are so distinct that a joint action cannot be maintained thereon. *Weitz v. Wolfe,* 28 Neb. 500, approves *Mowery v. Mast & Co., supra.* In *Heard v. Dubuque County Bank,* 8 Neb. 10, a distinction is made between a guarantee of payment indorsed by the payee upon a negotiable instrument and a like contract executed by a person not a party to the bill. It is suggested that the payee must have intended to transmit title by signing his name across the back of the note, and for

that reason he would be considered an indorser as well as a guarantor. Our subsequent decisions are in accord with *Heard v. Dubuque County Bank, supra. State Nat. Bank v. Haylen,* 14 Neb. 480; *Helmer v. Commercial Bank,* 28 Neb. 474; *Buck v. Davenport Savings Bank,* 29 Neb. 407. In *Pollard v. Huff,* 44 Neb. 892, cited by defendant, a payee of a note guaranteed its payment, and the case is within the rule announced in *Heard v. Dubuque County Bank, supra.* The other guarantors were held, under the peculiar facts of the case, to be sureties and indorsers of the note. Judge POST cites *Weitz v. Wolfe, supra,* wherein *Mowrey v. Mast & Co., supra,* is approved, and does not attempt to discredit or modify the preceding decisions of this court.

Ayres and Jackson were not by virtue of their contracts subject to a joint suit by Deering & Company. These contracts were referred to, and, in exact language by exhibits to the petition, made part of that pleading. *Bank of Stockham v. Alter,* 61 Neb. 359. In the light of the reported decisions of this court, counsel for Deering & Company must have known that Jackson and Ayres were not jointly liable to his client. The fact that he took a several judgment against the nonresident defendant upon return day indicates that he in truth was not contending for a joint liability. The judgment, it will be observed, is not upon the notes, but "upon the cause of action set forth in plaintiff's petition." Now, the only cause of action set forth in the petition against Ayres is upon his contract of guarantee, so that plaintiff was prosecuting two distinct and several causes of action against as many defendants, and the court purported to enter a separate several judgment against the nonresident defendant upon the cause of action not pleaded as a liability of the resident defendant. Manifestly the county judge did not have power to render a valid judgment against Ayres in the circumstances of this case. Deering & Company is in no better plight than it would be if it had commenced a separate suit against Ayres and caused

summons to be issued to and served on that defendant in Butler county. In such a case the county court would not have acquired jurisdiction. *Walker v. Stevens,* 52 Neb. 653. The action of Deering & Company and of Jackson suggests that the former did not hope to recover judgment against Jackson, that Jackson's interest in the suit was not from any standpoint adverse to the plaintiff therein, and that the joinder of defendants in the county court was fraudulent and collusive. In *Strowbridge v. Miller,* 4 Neb. (Unof.) 449, we held that a collusive joinder of defendants for the sole purpose of bringing suit against a nonresident of the county where the action is brought will not vest the court with authority to send its summons to the other county, and a judgment rendered upon default in such a case is void. The opinion has not been officially reported, but is in line with the principle announced in *Dunn v. Haines,* 17 Neb. 560; *Cobbey v. Wright,* 23 Neb. 250; *Miller v. Meeker,* 54 Neb. 452; *Barry v. Wachosky,* 57 Neb. 534; *Seiver v. Union P. R. Co.,* 68 Neb. 91. See, also, *Graham v. Ringo,* 67 Mo. 324; *Union Stoneware Co. v. Lang,* 103 Minn. 466; *Stevenson v. Murphy,* 106 Minn. 243; *Marshall v. Saline River Land & Mineral Co.,* 75 Kan. 445. The finding of the district court that William Deering & Company procured the judgment in Hall county by fraud is to our minds supported by the evidence, although that finding is not necessary to sustain the decree rendered herein.

2. It is argued that, conceding the judgment to be void, a court of equity will not enjoin its execution. The county judge's record disclosed his lack of jurisdiction, and Ayres may enjoin collection of the judgment, especially so since it clouds his title to real estate. *Predohl v. O'Sullivan,* 59 Neb. 311; *Fogg v. Ellis,* 61 Neb. 829; *Chicago, B. & Q. R. Co. v. Hitchcock County,* 60 Neb. 722.

We have not made specific mention of all points discussed in the well-written briefs filed on behalf of defendant, but they have been considered, and it is not

thought necessary to further extend this opinion by reference thereto.

The judgment of the district court is

AFFIRMED.

PAUL SCHMINKE COMPANY, APPELLANT, V. WINFIELD S. HOLDEN, APPELLEE.

FILED MARCH 10, 1910. No. 15,939.

Appeal: INSTRUCTIONS: REVIEW. An instruction submitting a defense not raised by the pleadings, supported by the evidence or suggested in defendant's requests to charge the jury, is prejudicially erroneous where the evidence will support a verdict for the plaintiff and a verdict is returned for the defendant.

APPEAL from the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Reversed.*

D. W. Livingston, George H. Heinke and *Pitzer & Hayward,* for appellant.

W. F. Moran, contra.

ROOT, J.

This action is prosecuted by a judgment creditor of Ed. Holden against Winfield S. Holden for the latter's alleged untruthful disclosure in garnishment proceedings before judgment in a suit against Ed. Holden. Defendant prevailed, and plaintiff appeals.

The evidence discloses that on and prior to October 10, 1906, defendant owned a grain elevator in Burr and considerable land in the neighborhood of said village. In 1903 he entered into a contract with two of his sons, Ed. Holden and E. L. Holden, whereby they agreed to handle, free of expense to him, such grain as he might store in his elevator, and they were given the right to use the machinery in, and one-half of, said building. Subse-

quently E. L. Holden withdrew from, but Ed. Holden continued to perform, the contract. In July and August, 1906, defendant delivered at his elevator about 4,000 bushels of corn, 1,500 bushels of wheat, 3,500 bushels of oats, and 400 bushels of rye. During the night of October 10, 1906, Ed. Holden absconded. October 11 defendant took exclusive possession of his elevator, and thereafter sold all grain contained therein. The evidence is conflicting concerning other material facts. No attack is made upon plaintiff's judgment against Ed. Holden or said garnishment proceedings, and they will be treated as valid.

1. The instructions are criticised at length, but will not be considered in detail, because it is believed upon the facts disclosed there was reversible error in modifying plaintiff's instruction numbered 23, and, as thus modified, giving it to the jury. The defendant testifies he paid 11 individuals an aggregate of about $3,400 for grain which he says they claimed to have stored in the elevator. The evidence shows that on October 5, 1906, Mr. Steinkuhler delivered 900 bushels of corn at the elevator to Ed. Holden. On the 18th of October he was paid $294 therefor by defendant. Steinkuhler testifies he sold the corn to Ed. Holden, but informed defendant that the witness wanted pay therefor; that defendant said he would treat the witness as he had "the rest of them," give him 34 cents a bushel for the corn, the market price, and Ed. would pay the remaining 4 cents of the contract price when he returned. Mr. Farmer delivered 986 bushels of corn at the Holden elevator October 10, 1906. Farmer testifies he sold and delivered the corn to Ed. Holden, but was not paid by him; that, after Ed. Holden left Burr, the defendant talked with the witness over the telephone and requested him to come to town, and thereafter said "he had settled with the rest of them and he wanted to settle with me for the corn"; that defendant wanted to buy the corn, but the witness said it had been sold to Ed., whereupon defendant said he would give 34 cents a bushel for the grain, and when Ed. came back he could pay the

remainder of the contract price, and the witness accepted the money, $335.

Defendant's version of his transactions with Steinkuhler and Farmer is that they denied having sold their corn to Ed. Holden, but contended it was merely stored in the elevator and he purchased it from them, and he is corroborated by the testimony of his son. The district judge instructed the jury that, if defendant purchased corn stored in the elevator by third persons, he would not be liable to plaintiff for any of that grain, and, if Ed. Holden absconded without paying for the grain delivered to him, his vendors would have the right to rescind and declare void such sales, retake the grain theretofore sold and delivered by them and resell it. There was no evidence tending to prove that Ed. Holden misrepresented any fact to secure possession of any grain in the elevator, that he did not intend when he purchased the grain to pay therefor, or that it was not unconditionally delivered. No witness testifies to a rescission of any contract with Ed. Holden. Upon the evidence it is doubtful whether the principle of rescission should have been submitted to the jury. *Kingsley v. McGrew*, 48 Neb. 812; *Kramer & Son v. Messner & Co.*, 101 Ia. 88. Plaintiff, however, in its request numbered 23, suggested the submission of that principle, and it will not be heard now to complain that the court instructed on that subject. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482. The court modified plaintiff's said request so as to include: "And that said contract was rescinded either by the acts of Ed Holden or by his agent, if you find he did have any person acting for him after he left Burr, Neb." There is no evidence in the record that any person acting as agent for Ed. Holden rescinded any of his contracts, and the submission of that issue was prejudicial to plaintiff. According to the evidence, $630 worth of corn was delivered to Ed. Holden between October 5 and October 10, and none of it was shipped by him. There was no evidence to show that any

of defendant's corn was intermingled with this grain, and, if $500 be deducted from its value to cover Ed. Holden's exemptions, the jury, if they rejected defendant's theory of his transactions with Steinkuhler and Farmer, could find that a substantial balance of the proceeds of Ed. Holden's property was in defendant's possession at the time he was garnished.

2. Plaintiff contends that the issue of Ed. Holden's exemptions should not have been submitted to the jury, but the court did not err in this particular. The jury were permitted to allow $500 as exempt property, if they found from the evidence that Ed. Holden was a married man, the head of a family, and did not possess an interest in real estate subject to exemption as a homestead, and, if he absconded leaving his wife the head of a family, she would be entitled to that exemption. It is true defendant, as garnishee, denied having any of his son's property except a pony in his possession, but the evidence is conflicting, and defendant is justified in insisting upon his construction of the evidence. Should the jury find that any part of the grain in dispute belonged to the son, and not the father, it would still be defendant's duty to preserve his son's exemptions. *Mace v. Heath,* 34 Neb. 54, 790. And if Ed. Holden absconded leaving his wife to care for their infant children, she may demand and receive that exemption. *Frazier v. Syas,* 10 Neb. 115; *State v. Wilson,* 31 Neb. 462. We have not overlooked the fact that Mrs. Holden has not filed a schedule of her personal property or that of her husband, nor an affidavit as contemplated by the code, but she has appeared and testified to the facts.

Complaint is also made because the court gave as an instruction section 530 of the code. The evidence does not tend to prove that any of the grain in dispute was specifically exempt, and the instruction should not have been given, although we might not reverse the case if this were the sole error in the record.

Reference is made in the instructions to the right of an owner to recover his aliquot share of grain mixed with

other like property. We think defendant's counsel is correct in that part of his written argument which reads: "There is no evidence in the record to establish the contention of appellant that the grain of appellee was mixed with other grain", and, such being the fact, the instruction on this point should not have been given. It is quite probable that upon a disclosure of the facts the law relating to the confusion of goods may apply. Some features of the law on this subject have been settled in Nebraska. *Grimes v. Cannell,* 23 Neb. 187; *First Nat. Bank v. Scott,* 36 Neb. 607. On the entire record we are constrained to find there is error prejudicial to plaintiff.

The judgment of the district court therefore is reversed and the cause remanded for further proceedings.

REVERSED.

EVERETT B. HANKINS, ADMINISTRATOR, APPELLANT, V. HERMAN M. REIMERS, APPELLEE.

FILED MARCH 10, 1910. No. 15,952.

1. **Master and Servant: INJURY: PLEADING.** Allegations in a petition that a master unlawfully, wrongfully and negligently directed his infant servant to dig a cave in the side of a hill under circumstances particularly alleged, making it dangerous to life and limb to work in said excavation, in effect charges that the master had knowledge or in reason ought to have known of the danger surrounding such work.

2. ———: ———: **LIABILITY.** If the employment of an infant under the age of 16 years, contrary to the provisions of the statute, is the proximate cause of an injury to the child, his master is liable therefor.

3. **Negligence: INSTRUCTIONS.** The word "accident" is ordinarily used to define that which happens unexpectedly, or without design, regardless of the fault of any individual; but it is erroneous to instruct the jury in an action for negligence to find for the defendant if the injuries referred to in the petition were caused by an accident, unless they are further instructed that, to so acquit, they must find that defendant's fault or negligence was not a proximate cause of the injury.

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

Wilcox & Halligan, for appellant.

Hoagland & Hoagland and *J. G. Beeler, contra.*

ROOT, J.

This action is prosecuted against a master for damages flowing from the death of his infant servant, alleged to have been caused by the master's negligence. Defendant prevailed, and plaintiff appeals.

1. Defendant contends the petition is fatally defective because the pleader did not state therein that defendant knew the work his servant was performing, at the time of his death, was dangerous. Plaintiff states in his petition that the deceased was under 16 years of age at the time of his death; was ignorant of the dangers incident to said work, and incapable, because of his immaturity, of appreciating them; that defendant, the master, "unlawfully, wrongfully and negligently" directed said servant to work in a cave under circumstances detailed at length which plaintiff charges made the cave a place dangerous to life and limb to work in. While a direct allegation that the master knew said work was dangerous would be more satisfactory, we think the pleader, in effect, does charge that knowledge, and, in conformity with the spirit of the code, we shall so hold for the purposes of this appeal. *Chicago, B. & Q. R. Co. v. Kellogg,* 55 Neb. 748.

2. Plaintiff argues that the district court ignored section 5490, Ann. St. 1909, which provides: "No child under the age of sixteen years shall be employed in any work which by reason of the nature of the work, or place of performance, is dangerous to life or limb or in which its health may be injured or its morals may be depraved. Any parent, guardian, or other person, who having under

his control any child, causes or permits said child to work or be employed in violation of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined", etc. There is an allegation in the petition that the deceased, at the time of the accident, was under the age of 16 years, and the work he was directed by his master to do was dangerous to life and limb, but we find nothing in plaintiff's request for instructions to indicate he asserted a right by reason of a violation of said statute. The court gave all of the instructions requested by plaintiff, and they were prepared on the theory that the case is controlled by the general law of master and servant independently of said statute. Plaintiff, having induced the court to adopt one theory, ought not to complain because a different doctrine was not followed. *Dawson v. Williams,* 37 Neb. 1; *American Fire Ins. Co. v. Landfare,* 56 Neb. 482. Both parties have discussed section 5490, *supra,* and, as the case must be reversed, we think it proper for their guidance to consider the point. The statute is part of the child labor law. Laws 1907, ch. 66, sec. 13. Section 1 of that act prohibits the employment of children under the age of 14 years in certain vocations or places, and section 2 thereof forbids the employment of children between 14 and 16 years of age in those vocations or places except on certain conditions. Section 10 of the act limits the hours in any one day wherein children under the age of 16 may labor in certain employments. It is competent for the legislature in the exercise of the police power to fix an age below which children may not lawfully be employed in dangerous occupations. *Lenahan v. Pittston Coal Mining Co.,* 218 Pa. St. 311; *Stehle v. Jaeger Automatic Machine Co.,* 220 Pa. St. 617. The legislature may either designate such employments by name or it may prohibit child labor in dangerous work. In the latter event it is a question of fact, in each case to be ascertained from a consideration of the evidence, if not admitted in the answer, whether the work is dangerous. Proof that the child was injured

would not in itself establish that the work was dangerous within the meaning of the law. To bring a case within the statute, we think the work must have been inherently dangerous to life or limb as a matter of common knowledge, or dangerous to life or limb because of the manner in which the master directed its performance, or because he negligently failed to properly instruct his servant or to superintend such work. If an infant is injured as the proximate result of engaging at his master's request in a vocation which the legislature has forbidden an infant of that age to follow, the master is liable. *Lenahan v. Pittston Coal Mining Co., supra; Platte v. Southern Photo Material Co.,* 4 Ga. App. 159, 60 S. E. 1068; *Starnes v. Albion Mfg. Co.,* 147 N. Car. 556, 61 S. E. 525; *Leathers v. Blackwell Durham Tobacco Co.,* 144 N. Car. 330.

3. The court, at defendant's request, instructed the jury: "The court instructs the jury that an accident is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone and without human agency; or it is an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both. It may be an event from an unknown cause, or an unknown event from a known cause; a chance or casualty. If from the evidence in this case you believe that the death of Canna O. Spencer was the result of an accident, then the defendant would not be liable, and the plaintiff in such case cannot recover in this action."

A person guilty of negligence ordinarily does not anticipate the consequences of his acts or intend that any one shall be injured by what he has done or omitted to do. Men are injured in countless ways where it can be readily understood after, and it ought to have been known before, the event, that the exercise of ordinary care would have prevented the injury, and the responsible person is held liable, even though he did not design or expect the results that followed his default. *Nave v. Flack,* 90 Ind.

205, 46 Am. Rep. 205. The court should have qualified the instruction by stating that, if defendant's negligence was not a proximate cause of the injury, he would not be liable. *City of Chicago v. Sheehan,* 113 Ill. 658; *Kellar v. Shippee,* 45 Ill. App. 377; *Nelson v. Richardson,* 108 Ill. App. 121. Given without qualifications, the instruction is erroneous. Defendant argues that an identical instruction was commended in *Ellick v. Wilson,* 58 Neb. 584. In that case the defendant in error had recovered a judgment against the plaintiff in error for his negligent acts. Plaintiff in error insisted that the injuries were caused by an accident. The definition of an accident and its application to the facts in that case were favorable to defendant, and followed a request made by him for an instruction upon that point. The instructions were not set out in the opinion, and their approval should be considered with reference to the particular case, and the fact that the defendant and not the plaintiff in the district court made complaint with respect thereto.

4. Defendant's witnesses were permitted, over plaintiff's objections, to give their opinion as to whether it was safe to dig caves in the banks of cañons in the neighborhood of defendant's farm and safe to excavate the cave where the boy was killed. The witnesses were not confined to a description of the soil in the walls of the cañon, nor the results following the excavation of the caves therein, but expressed their opinions as to whether or not it was dangerous to dig such caverns. There was nothing complicated or peculiar in the facts from which the witnesses drew their conclusions, and the jurors were as well qualified to make correct deductions, after being informed concerning the facts, as were the witnesses. We think the witnesses should have stated the facts, and the jury would determine whether the work was dangerous or otherwise. *Virginia Iron, Coal & Coke Co. v. Tomlinson's Adm'r,* 104 Va. 249. These witnesses stated that it was dangerous to dig a cave in the manner attempted by the deceased, and their testimony was not prejudicial to plain-

tiff except on the issue of the deceased's contributory negligence.

Defendant insists that the evidence will not support a verdict in favor of plaintiff, but we are not justified in holding, as matter of law, that a jury could not lawfully find defendant guilty of negligence.

For the reasons stated, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

EDWARD GURSKE, APPELLANT, V. CHARLES W. BRITT, APPELLEE.

FILED MARCH 10, 1910. No. 15,917.

1. **Justice of the Peace: JUDGMENT BY DEFAULT: JURISDICTION.** Where a summons returnable June 8, 1903, at 9 o'clock A. M., was issued by a justice of the peace and served on defendant June 5, 1903, the justice, in absence of an appearance by defendant, had jurisdiction to enter a judgment against him by default June 8, 1903, at 10 o'clock A. M. *White v. German Ins. Co.*, 15 Neb. 660.
2. **Judgment: VACATION: EQUITABLE RELIEF.** In a suit in equity to cancel a judgment on the ground that it was rendered against the defendant in a suit before a justice of the peace who deprived him of his defense by stating that he could go where he pleased, that it would be foolish to employ counsel, and that plaintiff therein had no case, denial of equitable relief *held* proper, where it was shown that such defendant deliberately permitted a default after having stated to the justice and the constable that he had no property and did not care whether plaintiff took judgment or not.
3. ———: ———: **INSANITY: EVIDENCE.** A judgment against defendant in an action at law will not be set aside in a suit in equity on the ground that he was *non compos mentis*, where the evidence fails to disclose that fact.

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

John M. Macfarland, for appellant.

Charles W. Britt and *M. O. Cunningham, contra.*

ROSE, J.

This is a suit in equity to cancel a judgment in favor of Charles W. Britt for attorney's fees amounting to $180 and against Edward Gurske, his client. The judgment was rendered in Douglas county, June 8, 1903, by William Alstadt, a justice of the peace. The district court after a trial dismissed plaintiff's petition to cancel the judgment, and he appeals to this court.

Under issues properly raised by the pleadings plaintiff urges three reasons for canceling the judgment in controversy. They are as follows: (1) The justice of the peace had no jurisdiction. (2) By fraud the justice of the peace prevented plaintiff herein from making the defense of full payment of Britt's claim. (3) Plaintiff herein was *non compos mentis* when the judgment was rendered.

1. Want of jurisdiction as a ground of relief is based on the assertion that, the summons was not served on plaintiff herein three days before the time set for his appearance, within the meaning of section 911 of the code, which declares: "The summons must be returnable not more than twelve days from its date, and must, unless accompanied with an order to arrest, be served at least three days before the time of appearance." June 5, 1903, the justice issued a summons returnable June 8, 1903, at 9 o'clock A. M., and there was personal service on Gurske June 5, 1903. The record of the justice recites that the case was called June 8, 1903, at 10 o'clock A. M.; that Gurske did not appear at the hour named in the summons nor for an hour thereafter, but made default; that Britt was sworn and examined, and that judgment in his favor followed. It is argued by plaintiff that he only had one full day and fractions of two days to make his appearance, and that, since the law does not recognize fractions of days, he was deprived of three days' notice. To sustain this position plaintiff cites *Dale v. Doddridge,* 9 Neb. 138. The notice in that case was dated and served September

4, 1878. It required a tenant to remove from the premises occupied by him *within three days after its service*, and the court held he was entitled to comply within three days *after* September 4, or any time during the fifth, sixth and seventh. The opinion was written by Chief Justice MAXWELL. That it does not control a case like the present one is shown by a later opinion in which the same jurist announced the following rule: "In cases where a justice of the peace has cognizance, a summons served three days including the day of service, before the time set for trial, is sufficient to give the justice jurisdiction." *White v. German Ins. Co.*, 15 Neb. 660. This rule was followed in *Messick v. Wigent*, 37 Neb. 692. The justice of the peace, therefore, had jurisdiction.

2. The substance of plaintiff's testimony in support of the averment that he was prevented by fraud of the justice of the peace from making the defense of payment is as follows: About 9:30 A. M., June 8, 1903, the return day of the summons, plaintiff had a conversation with the justice in the latter's office. He told the justice he did not owe Britt a cent. The justice told him there was nothing to the case, or that there was no case, that he could go wherever he pleased, that it was foolish to employ a lawyer, and that it was no use to spend money for that purpose. Plaintiff afterward went home and paid no more attention to the case. He relied on the statement of the justice, and except for it would have employed counsel and made a defense. This is the sum of the testimony of plaintiff on the issue as to fraud. There is no evidence that he stated under oath he did not owe Britt a cent, or that his presence at the hour mentioned was for the purpose of making a defense. The justice had jurisdiction. In the performance of his official duties, when he was bound by his oath of office, Britt was sworn and examined, and judgment was entered against Gurske for $180. The judgment is record evidence that plaintiff had a case. It contradicts officially what purports to be an unofficial statement of the justice that Britt

had no case. Proof that the justice without a hearing prejudged the case in favor of Gurske and so stated to him is at variance with the presumption that the officer performed his duty. In addition, the constable who served the summons testified that when he handed it to Gurske the latter said he did not own anything, that he had turned all his property over to somebody else, and he "did not care whether they took a judgment or not." The justice was also examined as a witness and testified to having had a conversation with Gurske about the case. When asked to state what the conversation was, the justice answered: "He told me that he settled, and that he did not owe him a cent; he paid him; and he did say: 'I don't care if he gets a judgment. I got nothing and he couldn't take anything from me.'" The proof justifies a finding that Gurske deliberately permitted a default. This finding is in harmony with a recital in the justice's record that Gurske made default. Under such proofs, relief in equity on the ground of fraud was properly denied.

3. Plaintiff's averment that he was *non compos mentis* when judgment was rendered against him is refuted by his own testimony. He stated under oath that except for the statement of the justice he would have consulted an attorney, would have appeared with an attorney, and would have defended. This indicates mental capacity to protect himself by making a defense. Besides, the testimony of the justice and constable contains convincing proof that plaintiff's mind was normal when the judgment was rendered.

No substantial reason for canceling the judgment of the justice of the peace having been urged, the dismissal of plaintiff's petition in equity will be

AFFIRMED.

GEORGE H. ROGERS, APPELLANT, V. MARTIN F. TRUMBLE ET AL., APPELLEES.

FILED MARCH 10, 1910. No. 15,921.

1. **Specific Performance**: LEASE: DEMAND: FINDINGS. Where a written lease of farm land contains a covenant that the lessee "shall secure the performance of the terms and conditions of this lease on his part by giving to the first party on demand a chattel mortgage upon all or any part of the crops growing or gathered on said premises during the said term", and said lessee, after an instalment of rent has become due and is unpaid, executes to a third party a chattel mortgage upon said crops together with other chattels, and in an action by the lessor for specific performance of the contract of lease the district court finds that "demand was duly made" by the lessor for said mortgage, *held*, that such finding by the trial court is tantamount to a finding that the lessor made such demand in due time and proper manner, and prior to the execution of said mortgage to said third party.
2. ———: ———: CHATTEL MORTGAGE: FRAUD. And in such case the execution of such mortgage to said third party constitutes a fraud on the part of such lessee against which a court of equity will grant relief at the suit of the lessor.
3. ———: ———: CROSS-PETITION: EXEMPTIONS. And in such a case where such third party is made a party defendant in said suit, and files a cross-petition for the foreclosure of his mortgage lien, the lessee will not be permitted to assert his exemptions as the head of a family, as to such other chattels, and defeat the lessor's collection of his rent by requiring the said crops to be first sold and the proceeds applied to the payment of said third party's mortgage before said third party can subject such other chattels to the payment of his said mortgage.
4. **Marshaling Assets.** In such a case the securities will be marshaled and the exempt chattels first exhausted in payment of said third party's mortgage, and the deficiency, if any, resulting therefrom, only, will be a first lien in favor of such third party upon said crops; and the residue of a sale thereof will be applied to the payment of the lessor's claim for rent.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed with directions.*

Morning & Ledwith, for appellant.

George A. Adams, contra.

FAWCETT, J.

Plaintiff, being the owner of a farm in Lancaster county, leased the same to defendant Trumble for one year beginning March 1, 1907, for an annual rental of $420, payable $210 August 1, 1907, and $210 January 1, 1908. The lease was in writing and contained among other things the following stipulation: "And it is further covenanted and agreed by and between the parties hereto that the party of the second part shall secure the performance of the terms and conditions of this lease on his part by giving to the first party on demand a chattel mortgage upon all or any part of the crops growing or gathered on said premises during the said term." Plaintiff alleges that on or about August 1, 1907, he demanded of Trumble a chattel mortgage upon the crops then growing upon the farm, but that Trumble evaded the execution of the mortgage by leading plaintiff to believe that his, Trumble's, mother would sign notes with him as security; that in this manner plaintiff was put off from time to time; that on September 27, 1907, Trumble executed a chattel mortgage to defendant Bell to secure the sum of $425.80, the mortgage covering defendant Trumble's farm implements and live stock, and also the "growing crops of corn and wheat raised on said premises during the crop season of 1907." On January 14, 1908, plaintiff commenced this action against both Trumble and Bell for the purpose of having the agreement for a chattel mortgage on the growing crops, contained in the lease, specifically performed, and to have the lien of Bell postponed to plaintiff's lien, or, failing in that, to require Bell to marshal his securities and sell the chattels included in his mortgage upon which Rogers had no claim before resorting to the crops. Defendant Trumble answered claiming that the chattels included in Bell's mortgage, other than the crops, were exempt to him as the head of a family, and that therefore plaintiff was not entitled to require Bell to marshal his securities and sell such exempt articles before resorting to

the crops. Defendant Bell answered denying the allegations of plaintiff's petition, and also filed a cross-petition asserting his lien as a first lien upon all of the chattels, including the crops, and praying a foreclosure of the same. On the trial a decree was entered giving Bell a first lien upon all the chattels included in his mortgage, and giving plaintiff a second lien on the corn for the amount of the rent and interest. The decree denied plaintiff's prayer that Bell be required to resort to the other chattels included in his mortgage before resorting to the crops, and ordered that the corn should be sold first, and the proceeds applied to the payment of the liens in their order before resort be had by Bell to the other chattels. Plaintiff appeals.

The first and second subdivisions of plaintiff's brief are not very strongly insisted upon. We therefore pass them without comment, and will consider only the third subdivision, which is devoted to the question of the marshaling of securities. The evidence shows that the first instalment of the rent due August 1, 1907, was not paid; that there was talk between plaintiff and defendant Trumble that Trumble would secure the signature of his mother to two notes for the two semiannual payments of the rent in lieu of a mortgage. The month of August having about elapsed without the payment of the instalment of rent due on the first of that month, and Trumble not having delivered to plaintiff the notes signed by his mother, plaintiff, on August 31, wrote Trumble as follows: "Lincoln, Neb., Aug. 31st, 1907. Mr. M. F. Trumble, Havelock, Neb. Dear Sir: I wrote you several weeks ago to come in and pay the $210 of rent which was due Aug. 1st, 1907. Please give this your immediate attention, for I cannot have it stand as it is. If not convenient to pay immediately, bring in those notes indorsed by your mother, and explain matters. Otherwise it must be paid at once. Very truly yours, G. H. Rogers." Trumble received this letter, but denies having received the prior letter therein referred to. Plaintiff testified that, in re-

sponse to that letter, Trumble called at plaintiff's home, and that at that interview plaintiff demanded of Trumble that he execute the mortgage provided for in the lease; that this conversation was in the early part of September. Defendant Trumble denies this, except that he called at plaintiff's residence in response to the letter, but "plaintiff was not at home." On September 27, defendant Trumble executed to defendant Bell the chattel mortgage referred to in the above statement, covering not only his farm implements and live stock, but also the growing crops on plaintiff's land upon which he had stipulated in the lease to give plaintiff a mortgage on demand. In the decree the district court made the following finding: "The court further finds that by a provision of said written lease the said defendant, Martin F. Trumble, agreed that he would on demand execute to the plaintiff a chattel mortgage upon the growing, ungathered crop during said term, and finds that demand was duly made for such mortgage and execution thereof by the plaintiff, but the defendant, Martin F. Trumble, declined and refused to comply with the said provision of said lease." We think this finding of the trial court, which is acquiesced in by both defendants, must be held to be conclusive upon the point that plaintiff had demanded a mortgage upon the growing crops in accordance with the terms of the lease and that defendant Trumble had refused to comply with such demand, prior to the execution of the chattel mortgage by Trumble to Bell. This being true, the act of Trumble in including the growing crops in the mortgage subsequently given to defendant Bell was a fraud upon plaintiff's rights. The finding of the court that the demand was "duly" made for such mortgage does not refer to form alone, but to substance as well. In *Brownell v. Town of Greenwich,* 4 L. R. A. 685 (114 N. Y. 518) the New York court of appeals in the syllabus say: "The expression 'duly adjudged', as used in the statement for the submission of this controversy, means adjudged according to the statute governing the subject, and implies the ex-

istence of every fact essential to perfect regularity of procedure and to confer jurisdiction of the subject matter and of the parties." In the opinion it is said: "It does not relate to form merely, but includes form and substance both." In 3 Words and Phrases, 2259, it is said: "'Duly' means: In a due, fit, or becoming manner; properly or regularly. * * * In due time or proper manner; in accordance with what is right, required, or suitable; fittingly, becomingly, regularly." The Century dictionary defines the word "duly" as "in a due manner; when or as due; agreeably to obligation or propriety; exactly; fitly; properly." When the court found, therefore, that plaintiff had *duly* demanded the execution of said mortgage, it was tantamount to finding that plaintiff had made the demand in due time and proper manner. When plaintiff demanded the mortgage, it was the duty of defendant Trumble, under his agreement in the lease, to execute it and thus give to his landlord his promised security. Instead of doing so, in violation of his duty in that regard, he subsequently executed the chattel mortgage to defendant Bell for a sum largely in excess of the growing crop, all of which, except the sum of $60, was for a long past due prior indebtedness. The circumstances of the transaction raise a suspicion as to the *bona fides* of the entire transaction of September 27, and strongly indicate that defendant Bell made the small cash advancement as an inducement to Trumble to give him a chattel mortgage not only upon the property which Trumble had a right to mortgage, but also upon the growing crops which in equity and good conscience should first respond to the payment of plaintiff's demand for rent. Whether this be true or not, it is clear that, under the findings of the court, plaintiff, at the time of the execution of the chattel mortgage from Trumble to Bell, had an interest in the growing crops which he could at that time have enforced in a suit for specific performance. For Trumble to violate his contract obligations with plaintiff and encumber the growing crops together with other chattels by his

mortgage to Bell, and then pay neither party, and, when both seek to enforce their demands, interpose his exemptions as the head of a family and require Bell to exhaust the growing crop before resorting to the exempt chattels, thereby entirely defeating plaintiff's collection of the money justly due him, would be a gross wrong on his part which a court of equity will not aid him in perpetrating. As said by the supreme court of Mississippi in *Hodges v. Hickey,* 67 Miss. 715, 726: "The rules by which courts of equity adjust the rights of parties in cases like this are variant, and seem to depend on the peculiar circumstances of each case, the principle being that justice shall be done according to the view taken of the relative positions and rights of the parties." Again, on page 728, the court say: "Holding a part of the land as such trustee, she has, for purposes of her own, encumbered the whole, and by the decree she has secured has exonerated that part which she owned and had a right to encumber by onerating that with which, as against the complainant, she had no right to deal, and has therefore secured a benefit from her own wrong, at the expense of complainant. If we look at the land as the debtor to Patty, it becomes clear that, as between the two tracts, the exempt and non-exempt, the first is, in the view of a court of equity, the principal debtor, and the other a mere surety." Paraphrasing that statement by the Mississippi court, we think it should be said in this case that, if we look at the chattels as the debtor to Bell, it becomes clear that, as between the two classes of chattels, the exempt and non-exempt, the first is, in the view of a court of equity, the principal debtor, and the other a mere surety. We think the court erred in refusing to marshal the securities as requested by plaintiff.

If our statute would warrant us in so doing we would give plaintiff's equities priority over the Bell mortgage, but in this state a landlord has no statutory lien for rent. The lease in evidence did not, *ipso facto,* give plain-

tiff a lien. It only gave him the right to demand a mortgage lien. The fact that plaintiff had duly demanded such lien was not of itself sufficient, under the evidence, to charge defendant Bell with constructive notice of his equity thereby acquired; and as this court is committed to the doctrine that one who takes a chattel mortgage to secure a debt actually and justly owing to him, whether preexisting or not, without actual or constructive notice of prior equities against the mortgaged property, is a mortgagee in good faith (*State Bank v. Kelley Co.*, 49 Neb. 212), we reluctantly hold that defendant Bell's mortgage is a first lien upon the chattels in controversy.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a decree ordering that the chattels described in the mortgage of defendant Bell, other than the corn and other crops, be first sold and the proceeds applied, first, to the payment of the costs of this suit, including the costs in this court; second, to the payment of his mortgage; and if the proceeds of such sale be insufficient to pay the mortgage in full, that the corn or other crops be sold and the proceeds thereof applied to the payment of the unpaid balance of said mortgage; third, that the surplus, if any, from the sale of said corn or other crops be next applied to the payment of the amount due plaintiff for rent, and if any surplus still remains, after such application, it be paid to defendant Trumble.

REVERSED.

EDGAR H. HOTCHKISS, TRUSTEE, APPELLANT, V. MOSES H. KECK ET AL., APPELLEES.

FILED MARCH 10, 1910. No. 15,696.

1. **Village Trustees: TERM OF OFFICE.** One who is elected and serves a term as trustee of a village is entitled to hold over after his term expires until his successor is elected and qualified.

2. ———: ELECTION: DUTY OF BOARD OF CANVASSERS. It is the duty of the board of canvassers of the election returns to determine whether a candidate for the office of trustee of a village was elected, and, if so, to issue their certificate to that effect. If they refuse the certificate, the candidate has no *prima facie* right to the office.

3. **Officers**: USURPATION OF OFFICE: INJUNCTION. If one without any *prima facie* right to an office attempts to take possession of the office and discharge the duties thereof, a court of equity, at the suit of the incumbent of the office, will restrain him from so doing.

REHEARING of case reported in 84 Neb. 545. *Former judgment vacated and judgment of district court reversed.*

SEDGWICK, J.

A rehearing was granted in this case, and the cause has been submitted anew upon the record and argument of counsel.

An election was held in the spring of 1908 in the village of Valparaiso, in Saunders county, at which three members of the board of trustees of the village were to be elected, two members to succeed the plaintiff in this case and one J. P. Moor, whose respective terms of office expired at that time, and one member to fill a vacancy caused by the resignation of one Scott, whose term for which he was elected would expire in the spring of 1909. More than six months before the election of 1908 Mr. Scott had resigned, and no appointment had been made to fill the vacancy. Each of two parties had nominated three candidates to be voted for at the said election of 1908, and the names of these six candidates were placed upon the ballot without any designation as to the terms for which they were respectively to be elected. When the village board met to canvass the result of the election, not being able to determine for which term any one of the candidates was elected, they counted and declared the number of votes that each candidate had received and refused to issue any certificate of election. After this count of the village board the defendants Pokorny and

Tucker, who were two of the said six candidates, claimed that they were entitled to hold the office, and, with the consent of the other two members of the board whose terms of office had not expired, they assumed to meet with the members and act as members of the board. The plaintiff, claiming that no one had been elected and qualified to succeed him as a result of the election, was attempting to hold the office under section 5756, Ann. St. 1909. The defendants refused to recognize him as a member of the board, and he brought this action in the district court for Saunders county against the said Pokorny and Tucker and the two members of the board whose terms of office had not expired, to enjoin the defendants from interfering with the plaintiff in the discharge of his duties as trustee of said village. There was a general demurrer to the plaintiff's petition, which was sustained by the district court, and the plaintiff declined to plead further. His action was dismissed, and he brought the action here by appeal.

Section 62, art. I, ch. 14, Comp. St. 1909, provides: "Certificates of election for all officers of cities and villages shall be made out under the corporate seal by the city council or board of trustees, at their first meeting after any election of such officers." The plaintiff insists that the defendants Pokorny and Tucker had no color of right to the office without the certificate of election duly issued as the statute provides, and that they were merely intruders, interfering with the rights and duties of the plaintiff as an incumbent of the office.

The defendants insist that, as the petition does not show the number of votes received at the election by each of the candidates, it must be considered that these defendants Pokorny and Tucker received the largest number of votes, and that, although the canvassing board refused to declare them elected and issue them certificates of election, the fact of their receiving the largest number of votes furnishes such color of right to the office that with the consent of the remaining members of the board they

might take possession of the office to the exclusion of the plaintiff, and, they being in possession of the office and *de facto* officers, the plaintiff cannot contest their right by summary proceedings of injunction.

Of course, an action of injunction is not the proper remedy to try title to public office. The many authorities cited by defendants in their brief establish that proposition, if indeed there was ever any doubt in regard to it. The law is just as clear that, where one is an incumbent holding the office under a *prima facie* legal right and performing the duties thereof, a court of equity will restrain an intruder from interfering with the proper exercise of those duties. That the plaintiff held this office for a term of two years ending in 1908 is conceded, and under the statute above cited there can be no doubt of his right to hold over until a successor is elected and qualified. It is, of course, equally clear that the defendants, one of whom was a candidate for election as a successor of the plaintiff, are not invested with the power or jurisdiction to determine for themselves whether they were duly elected. The law provides a tribunal to determine this question, and their determination is final until set aside by a court of competent jurisdiction. Under the statute cited above it was the duty of the board of trustees to determine whether the respondents, who were candidates at that election, had been duly elected, and, if they had been, to issue their certificates to that effect, which would give the officers so elected *prima facie* right to the office. There is no doubt that if the proper officers wilfully refused to canvass the votes and certify the result, and the right of the candidates elected was clear, the officers could be compelled by mandamus to canvass the returns and issue the certificate of election. The canvassing board refused to declare the defendants Pokorny and Tucker elected or to issue a certificate of election, and therefore on the face of the proceedings they were not entitled to the office, and the plaintiff was entitled to hold the office until it should be regularly established that

his successor had been elected and qualified. Not having any right to the office upon the face of the proceedings, it is equally clear that the defendants Pokorny and Tucker could not introduce themselves into the office so as to become officers *de facto* while the plaintiff was holding the office and against his protest, and the members of the board who countenanced and assisted them in so doing were acting equally in violation of the law and of the plaintiff's rights. In such case there is no doubt that a court of equity should intervene to protect the plaintiff in the exercise of his right to the office.

The term of office in controversy will expire in a few weeks. The right of the plaintiff depends upon the simple propositions that he was entitled to hold over, and that the defendants Pokorny and Tucker had no certificates of election. If the defendants could have controverted these simple propositions of fact, they should, in an action of this kind, have done so, and after such protracted and expensive litigation they should now be required to stand upon the record they have made.

Our former judgment is set aside, and the judgment of the district court reversed and the cause remanded, with instructions to make the injunction perpetual as prayed in the plaintiff's petition.

JUDGMENT ACCORDINGLY.

BEE BUILDING COMPANY, APPELLEE, V. WEBER GAS & GASOLINE ENGINE COMPANY; ATLAS OIL COMPANY, APPELLANT.

FILED MARCH 10, 1910. No. 15,941.

1. **Pleading:** DEFENSES. The defense that a written instrument was executed and delivered under a mistake of fact must be pleaded specially; it cannot be proved under a general denial of the allegation of the execution and delivery of the writing.

2. Trial: INSTRUCTIONS. If a material fact is alleged in the pleadings, and proved without contradiction by the evidence, it is the duty of the court to so instruct the jury.

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

Hugh A. Myers, for appellant.

W. J. Connell and *Walter P. Thomas, contra.*

SEDGWICK, J.

In March, 1908, Mr. W. A. Eddy was the representative of the Atlas Oil Company in Omaha, and one Smith represented the Weber Gas & Gasoline Engine Company at that place. On the 28th of March of that year Mr. Eddy and Mr. Smith executed a contract of lease with the plaintiff, whereby the plaintiff leased a certain building in Omaha for the term of one year for the agreed rental of $100 a month. This lease was signed by Mr. Smith as "Mgr. Weber Gas & Gasoline Engine Co.", and was signed by Mr. Eddy individually. It also recites that the Weber Gas & Gasoline Engine Company and W. A. Eddy are the lessees. The building was occupied and used by the Weber Gas & Gasoline Engine Company and the Atlas Oil Company, and other parties. Eight hundred dollars of the rent was paid, and this action was brought by the plaintiff to recover the remaining $400 of the year's rent, with interest thereon. Both of the above named companies were made defendants, as was also Weston A. Eddy, who signed the lease, as before stated. There was no service on the Weber company, and at the close of the evidence the plaintiff dismissed the action as to Mr. Eddy. The petition alleges that the plaintiff and the Weber Gas & Gasoline Engine Company and W. A. Eddy entered into a contract of lease, whereby the Weber company and "the said W. A. Eddy, as appears on the face of said lease, did rent and lease" the building, etc. It sets out the terms of the lease and the payments, as above stated, and contains the allegation that "with reference to the

name of said W. A. Eddy, as appearing in said lease, and with reference to the said signature of W. A. Eddy, the said plaintiff alleges that said lease was intended to be made to and taken by, and in fact was made to and taken by the said Atlas Oil Company, a corporation which was represented by the said W. A. Eddy, in said Omaha, as its general agent and manager, and the signature of W. A. Eddy to said lease was intended to be, and was in fact, his signature in his representative capacity of agent and manager of the said Atlas Oil Company", and then alleges that two days after the making of the lease the Atlas Oil Company, by its secretary and manager, A. E. Roblee, at the general office of said Atlas Oil Company, ratified and approved the making of the lease for and on behalf of the said Atlas Oil Company, and notified the plaintiff in writing that the said lease was assumed by said Atlas Oil Company, and that Mr. Eddy was the western representative of said company and had notified them that he had entered into a lease "for said building, which was then occupied by said company." The answer alleges that the lease with the plaintiff was entered into with the Weber company and Mr. Eddy, and that Mr. Eddy "did rent and lease from said plaintiff" the building described in the petition. The terms of the lease are stated as in the petition. It denied specifically that, "with reference to the name of W. A. Eddy appearing in said lease and with reference to said signature of W. A. Eddy, said lease was in any way intended to be made to, and was taken by the said Atlas Oil Company", and that the lease was taken by W. A. Eddy in his individual capacity, and that the Atlas Oil Company thereafter became a subtenant of Mr. Eddy. The allegations of the petition that the Atlas Oil Company ratified and assumed the lease are answered only by a general denial. The answer admits that the Atlas Oil Company occupied the building with the Weber company for the full period, but denies that it occupied said building under said lease, and alleges that it occupied and used the building only as a subtenant

of Mr. Eddy. The answer then contains the allegation that the full sum of $1,200 was paid to the plaintiff on account of the said lease "by the said W. A. Eddy and the Weber Gas & Gasoline Engine Company", and denies specifically that there is anything due to the plaintiff. It also alleges that Mr. Eddy gave his personal note for the sum of $400 to the plaintiff, which was the balance due upon the lease, and received therefor a receipt in full, and pleads Mr. Eddy's discharge in bankruptcy as a complete defense. It appeared to be necessary to thus fully set out the condition of the pleadings in order to present the precise points in controversy between the parties.

1. Upon the trial of the case the plaintiff introduced in evidence a letter, purporting to come from the Atlas Oil Company, which is as follows: "The Atlas Oil Company, Miners' Lard and Lubricating. Office, 1050 Rose Bldg. Works, Junction C. & P. & N. Y. P. & P. R. R.'s. A. E. Roblee, Secy. & Manager. Cleveland, O., Mar. 30, 1904. Mr. C. C. Rosewater, Prop. Omaha Bee, Omaha, Neb. Dear Sir: Our western representative, Mr. W. A. Eddy, has advised us that he has entered into a lease with you for the building now occupied by us at 916 Farnam St., Omaha, Neb., and that you wished to have a statement from us as to whether such lease had our approval. We beg to advise you that Mr. Eddy is our authorized representative, and that the lease which he has made is in the name of the company, and is assumed by us. We have a contract with Mr. Eddy, as our representative, which will not expire until Jan. 1st, 1905. Yours truly, The Atlas Oil Company, per A. E. Roblee, Secy. Dict. to S." Thereupon, on behalf of the Atlas Oil Company, it was offered to prove that upon the execution of the lease, at the request of Mr. Rosewater, who was the agent of the plaintiff in the transaction, Mr. Eddy wrote the following letter to the Atlas Oil Company: "The Atlas Oil Co. Miners' Lard and Lubricating. W. A. Eddy, General Western Sales Agent. 1308-10-12 Izard street. Phone, Douglas

2702. Omaha, Neb., March 28, 1904. Mr. A. E. Roblee, Cleveland, Ohio. Dear Sir: I have today made a lease with Mr. C. C. Rosewater, of the Omaha Bee, for the building we are now in. Mr. Smith, manager of the Weber Gas & Gasoline Engine Co., has gone in jointly with me on the lease. We are going to have in a power elevator. The building costs us $100 per month, Mr. Smith paying one-half and myself the other half. However, we will have three extra floors, and presume we will have no difficulty in getting a tenant for them. One is occupied already, but we think we have a party to lease the rest, or at least have two parties in view. What Mr. Rosewater will want is a statement from you that you consider me all right, such a lease, stating that you have a contract with me, that will not terminate until January 1, 1905. Yours respectfully, The Atlas Oil Company, per W. A. Eddy, Western Sales Agent." The introduction of this letter was objected to as irrelevant under the issues, and incompetent. Some technical objections as to the introduction of the letter were also made, which, under our view of the case, it is not necessary to consider. The object of this evidence appears to be, and is in the briefs declared to be, to show that the ratification and assumption of the lease on the part of the Atlas Oil Company by its letter of March 30 was made under a mistake of fact and without actual knowledge of the character of the contract that Mr. Eddy had entered into, and so was not binding upon the company. It will be observed that this letter speaks of Mr. Smith and his relation with the contract in precisely the same terms that it speaks of Mr. Eddy and his relation therewith, and it is considered by all parties that Mr. Smith entered into the contract of lease solely as agent of the company which he represented and on behalf of that company. It is not contended that Mr. Rosewater dictated the terms of Mr. Eddy's letter to his company or knew in what terms it had been written, and if Mr. Eddy led his company to believe that he had entered into the lease as agent of his company and on

behalf of the company, and, acting under that belief, the company assumed the lease, it may well be doubted whether such a letter from Mr. Eddy to his company would prove or tend to prove a state of facts that would relieve his company from the liability which it definitely assumed by its letter of the 30th of March. However that may be, while there is no doubt that it would have been competent for the defendant to have pleaded and proved that its assumption of the lease was made under a mistake of fact, it is equally clear that such proof would not be competent under general denial. Ratification by the principal of an unauthorized act of his agent will not be binding upon the principal, unless made with knowledge of the facts. When, however, as in this case, the ratification is in writing, and not only ratifies the act of agent, but expressly assumes the contract made by him, and it appears without contradiction that the principal has received the benefits of the contract, it devolves upon the principal to show that such ratification and assumption of the contract was made under a mistake of fact or was procured by fraud. The defense sought to be proved by the evidence offered is inconsistent with the defense pleaded. If the company never did ratify and assume the lease it is impossible that it should have done so under mistake of fact, and there can be no doubt that this evidence was properly excluded.

2. The court instructed the jury: "For the purposes of this case you are instructed that you are to consider as established that by reason of the use of plaintiff's premises by defendant, the Atlas Oil Company, that the Atlas Oil Company became indebted to the plaintiff in the sum of $400 as rent money. The theory of the defense of the Atlas Oil Company that is submitted to you is that Mr. Eddy assumed said debt of $400 and paid the same to the plaintiff by his promissory note for said amount, and that thereby the obligation of the Atlas Oil Company to pay said sum ceased." This instruction is seriously complained of in the brief. It was indeed quite

decisive, and must have been of great importance in its influence upon the verdict of the jury. It is the duty of the court, however, to define accurately the issue of fact submitted to the jury, and to remove from their consideration all questions that are settled by the pleading or that are immaterial to the issue to be presented. There was much evidence given as to the relation of Mr. Eddy to the lease when it was made, and as to whether he acted in making it solely for himself, or in his representative capacity for the defendant. This evidence was in some respects conflicting; but that issue seems to have been wholly eliminated from the case by the parties before the case was submitted to the jury. As already shown, the petition stated the fact that the lease appeared upon its face to be the contract of Mr. Eddy, and not of the company that he represented, and then presented the issue that the company had afterwards ratified and assumed the contract. The writing which the plaintiff introduced established this fact, and the evidence furnished was wholly uncontradicted. The attempted defense that the company ratified and assumed the contract under a mistake of fact was properly excluded as not having been presented in the answer. The principal, therefore, and not the agent, incurred the liability, and the first part of the instruction was correct.

The last part of the instruction presented to the jury the remaining issue that was in fact controverted by the parties. It was alleged in the answer that Mr. Eddy had paid the debt, and he testified that in payment of the balance due upon the lease he gave to the company his promissory note and that the company received it in payment of the same. He also introduced in evidence the plaintiff's receipts which upon their face showed that the rent had been paid in full. The company's agent denied that Mr. Eddy ever gave a promissory note to the company. He testified that there was a writing given by Mr. Eddy by which he promised to pay the company the balance of the rent. That writing was produced and was received in

evidence. He also testified that the receipt which covered the $400 now claimed was given at the request of Mr. Eddy to enable his company to maintain an action at law which had been or was about to be begun against the Weber company. Taking all the evidence that was offered upon this branch of the case into consideration, the most that can be said in favor of Mr. Eddy's contention upon this point is that the evidence was somewhat conflicting as to whether Mr. Eddy had in fact given a promissory note, and whether the writing which he did give was given in settlement of the balance of the rent and was so received by the plaintiff. This instruction fairly presented this issue to the jury.

3. When the letter of March 30 from the company was presented in evidence it was objected to by the defendant. The foundation for the introduction of the letter in evidence was not very satisfactory. The signature thereto was not shown to be that of the company's secretary, nor was it shown that the letter was received in the regular course of mail in answer to a former letter of inquiry. The plaintiff's agent, however, swore specifically that "it was a communication from the Atlas Oil Company", one of the defendants in this case, and was received from him about or soon after this date, and that it was the original letter. While the objection to this evidence contained the statement that it was "irrelevant, incompetent and immaterial", the whole objection taken together indicates that it was predicated wholly upon the supposition that the writing was not sufficiently connected with or identified by the contract of lease to make it relevant to the issue presented, and the brief of defendant discusses it wholly in that light. We do not think therefore that the irregularity in its introduction, if any, ought now to be considered important. No other matters are suggested and discussed in the brief, and we have found no errors requiring a reversal of the judgment.

The judgment of the district court is therefore

AFFIRMED.

HARM DIRKSEN V. STATE OF NEBRASKA.

FILED MARCH 28, 1910. No. 16,490.

Proceedings in Error: LIMITATIONS. "The supreme court has no jurisdiction to review the proceedings and final judgment of the district court in a criminal case, unless proceedings in error are instituted therein within six months after the rendition of such judgment." *Kock v. State*, 73 Neb. 354.

ERROR to the district court for Boyd county: WILLIAM H. WESTOVER, JUDGE. *Dismissed.*

W. T. Wills, for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayres, contra.*

PER CURIAM.

March 4, 1909, a verdict was returned in the district court for Boyd county finding the plaintiff in error guilty of rape. March 8, 1909, his motion for a new trial was overruled and he was sentenced to imprisonment at hard labor for six years in the state penitentiary. December 6, 1909, he filed in the office of the clerk of this court a certified transcript of said judgment of conviction, and the proceedings leading up thereto, his bill of exceptions of the evidence adduced on his trial and a petition in error. We are without jurisdiction to consider the petition for the reason that the transcript was not filed in this court within six months of the date of the plaintiff in error's conviction, and it is evident that no action of any officer of the district court or this court prevented him from securing that transcript. In fact the transcript was duly certified by the clerk of the district court on the 10th day of March, 1909. *Kock v. State*, 73 Neb. 354.

The proceedings in error, therefore, are

DISMISSED.

AUGUST SPIER, APPELLANT, V. CHARLES A. SCHAPPEL, ADMINISTRATOR, ET AL., APPELLEES.

FILED MARCH 28, 1910. No. 15,945.

Specific Performance: EVIDENCE: REVIEW. In an action for the specific performance of a contract for the sale of real estate, it was shown that the contract between the owner of the land and plaintiff (his brother) was made December 31, 1902, and that the owner died July 10, 1907, no tender of the unpaid portion of the purchase price, nor demand for a conveyance, having been made during the lifetime of the owner; that, during the time, plaintiff rented the land of the owner, paying rent therefor, the owner retaining dominion and possession during said time; and there was satisfactory proof that the contract was upon a condition, and upon the failure of the condition the contract was abandoned. *Held*, That the decree of the district court refusing specific performance in a suit by the purchaser against the heir of the deceased, who is the mother of both, is sustained.

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

Story & Story, for appellant.

Dort & Dort, contra.

REESE, C. J.

This is an action for the specific performance of a contract for the sale of the east half of the southeast quarter of section 34 and the southwest quarter of the southwest quarter of section 35, all in township 3 north, of range 10 east, in Pawnee county, Nebraska. The suit is founded upon a written memorandum of contract which is as follows: "$900. Dec. 31, 1902. Received of August Spier, the sum of nine hundred dollars, the same being part payment on purchase of land, the E. ½ of S. E. ¼ of sec. 34; and the S. W. ¼ of S. W. ¼, sec. 35-3-10, Pawnee Co., Neb., purchase at price of $6,000. Herman Spier." Plaintiff and Herman Spier were brothers.

Herman died July 10, 1907, unmarried. Their father had died, probably prior to the date of the contract, at any rate he was deceased at the time of Herman's death, and Sophia Spier, the mother of Herman and plaintiff, inherited the land. Defendant Schappel is the administrator of Herman's estate and is made a party to the suit. The petition was filed and the suit commenced on the 16th of January, 1908. The trial resulted in a finding and decree in favor of defendants, and plaintiff appeals to this court.

There appears to be no question as to the execution and delivery of the contract above set out and that at that time Herman was the owner of the land in controversy. The trial court so found. The court also found specially that "at the time of the death of said Herman Spier, plaintiff had not received the conveyance of said real estate; and further finds that he is not entitled to receive such conveyance because he has never made tender of the amount of the purchase price, and because of his laches in delay of more than five years in bringing this action." It is not thought that the specific performance was refused because of the lapse of time alone, but that, under the circumstances, plaintiff had slept upon his rights during the time intervening between the making of the contract and the death of Herman. There was evidence at the trial that the sale had been abandoned as having been made to depend upon the condition that Herman could purchase another tract of land which he failed to procure, and that, for that reason, the contract was allowed to terminate. It was shown that Herman Spier had retained the possession of the land until his death; that during that time plaintiff had rented portions of it for different years, paying the customary rent therefor; that he had not had the $5,100 with which to pay the purchase price, nor had he ever made any tender thereof to Herman or demanded a deed, nor had he made a tender of the money to defendants, nor was the money tendered on the trial. The most that can be said in favor

of plaintiff as to the time of payment would be that the $5,100 should be paid within a reasonable time after the purchase, as it was to all intents and purposes a cash sale. As actions for the specific performance of a sale of real estate are not in all cases subject to absolute rules, but are to be enforced or not within the sound discretion of the court, we are not inclined to disturb the findings and decree of the district court. This applies with the greater force since it is shown by the evidence that at the time of the date of the contract the land was worth $6,000, and at the time of the commencement of the suit it had increased in value to $8,400, without any tender of the price or demand for a deed during the life of Herman.

In addition to the prayer in the petition for specific performance, there was a prayer for "such other and further relief as justice and equity may require." The district court found that the $900 had been paid by plaintiff at the time of the signing of the contract, and that plaintiff was entitled to a return of the money with interest, amounting to $1,140.28, and rendered judgment against defendants therefor. This part of the decree is not objected to, and, as it is within the issues and has direct reference to the transaction upon which the suit is founded, and restores plaintiff what he has paid out, under the well-known rule that where a court of equity has obtained jurisdiction of a cause and of the parties it will retain such jurisdiction and do equity and justice between the litigants, it strikes the conscience as an equitable adjustment of the rights of the parties and is approved. *Johnson v. Carter*, 120 N. W. (Ia.) 320.

The decree of the district court is

AFFIRMED.

LETTON, J., not sitting.

LINCOLN TENT AND AWNING COMPANY, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED MARCH 28, 1910. No. 15,960.

1. **Carriers:** BILL OF LADING: PAROL MODIFICATION. As a general rule a bill of lading issued by a common carrier to a shipper containing a receipt for property received for shipment constitutes the contract between the carrier and shipper. However, the rights thereby conferred are not absolute or inalienable, and such contract may, like any other written contract, be changed or modified by subsequent parol agreement between the shipper and carrier.

2. ———: AUTHORITY OF AGENT: EVIDENCE. Evidence examined and discussed in the opinion *held* sufficient proof of the identity of defendant's agents, and of their authority to bind defendant by the shipping agreement in controversy.

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

B. P. Waggener, J. W. Orr and *A. R. Talbot,* for appellant.

Morning & Ledwith, contra.

REESE, C. J.

Plaintiff alleged in its petition, among other things, that on the 11th day of August, 1905, it delivered a shipment of tents and tent fixtures, fully described, to defendant for shipment from Lincoln, Nebraska, to Guthrie, Oklahoma, and that defendant promised and agreed to and with plaintiff to deliver the shipment to the place of consignment not later than the 15th day of the same month; that plaintiff informed defendant's agent that said tents and tent fixtures were leased to the consignee for use at Guthrie, Oklahoma, during a session of the Oklahoma Epworth Assembly which was to be in session from August 16 to 24, and informed said agent that unless said goods were delivered to the consignee on or before the

15th it would be useless to ship them, and defendant agreed to make such delivery at the time specified, and, relying upon said promise, plaintiff delivered the shipment to defendant with the information that the freight was to be paid by the consignee, both to and from Guthrie; that the property was to be shipped from Lincoln station on the train leaving said station at 4:40 o'clock P. M. of the said 11th day of August, and was delivered to defendant a sufficient length of time before the departure of said train; that defendant negligently failed to transmit the property on said train, but held the same until the same hour of the next day, the 12th; that, upon plaintiff being apprised of such failure, it notified defendant that, unless there was still sufficient time to transport and deliver the property to the consignee by the date specified, it would be useless to send out the shipment, when defendant again assured plaintiff that there was sufficient time to make and complete the shipment within the time limited, and verbally agreed to do so; that, had defendant transported the property with reasonable diligence and without unnecessary delay, its said agreement could and would have been fulfilled; that the consignment was unreasonably delayed, both on the 11th day of the month and thereafter, so that it did not reach Guthrie until the 21st day of said month, which was too late for use by the consignee, who for that reason refused to receive the tents and tent fixtures, and they were by order of defendant reshipped to plaintiff at Lincoln, and plaintiff was required and obliged to pay, and did pay, the freight charges both ways, amounting to $71.84, and also lost the rental of said tents and tent fixtures, which was of the value of $71.50, and that by defendant's failure plaintiff had been damaged in the total of said two items amounting to the sum of $143.34, for which, with interest, it asked judgment. Defendant answered with both general and specific denials, and alleging that it made no such contract as set out in the petition; that the shipment was received in the regular course of business, without any special or

oral contract to deliver the property shipped at its destination at any particular or specified time; and that the only contract made was embodied in the bill of lading. It was further alleged that no agent at Lincoln was authorized or empowered to make such an agreement as alleged in the petition, and if any such agreement was made by any agent it was wholly without the authority or power of such agent to bind defendant thereto; that at the time of the delivery of the consignment to defendant on the 11th the plaintiff knew that the train by which it would have to be transported left the Lincoln station at the hour of 4:40 o'clock P. M., and that defendant would not receive freight for shipment thereon after the hour of 4 o'clock P. M., and that the goods were not delivered to defendant until 4:50 P. M., and could not be shipped on said train; that it received said shipment in the usual course of business, and carried the same to Kansas City over its road, and there delivered it in good order to the Atchison, Topeka & Santa Fe Railroad Company, its connecting carrier, to be transported to the consignee at Guthrie, and by so doing it fully complied with the terms of its contract. A copy of the bill of lading is attached to the answer and is in the usual form. Plaintiff replied to the answer by general denial, and also a specific denial that the bill of lading attached to defendant's answer was the contract under which plaintiff's goods were shipped; alleged that a similar paper was delivered to the teamster who delivered plaintiff's property to defendant, but that it did not embody the terms of the agreement, was not signed by plaintiff, nor its provisions called to plaintiff's attention or made known to it at the time it was delivered to the teamster or at any time thereafter; that the shipment was made under the verbal assurance and agreement made by defendant that the goods should and would be forwarded and delivered at their destination as alleged in the petition. It is further alleged that by the assurance of defendant that the goods, if shipped on the 12th of August (the next day after the delivery to defendant),

would be delivered at Guthrie on or before the 15th, plaintiff was induced to permit the shipment to be made on the 12th, the defendant well knowing that plaintiff would not allow such shipment to be made but for said assurance of defendant. The cause was tried to a jury, who returned a verdict in favor of plaintiff for the sum of $156.75, and upon which judgment was rendered. A motion for a new trial was filed and overruled. Defendant appeals.

It is contended by defendant: First, "the bill of lading issued by the railway company to appellee constitutes a written contract covering the movement of this freight, and, being in writing, controls as to the rights of the parties"; second, "there is no competent proof in the record that any special contract was made, fixing a specified time at which the shipment was to be delivered to consignee at Guthrie, Oklahoma"; third, "there is no competent proof in the record showing that parties with whom plaintiff undertook to negotiate for special contract were authorized or empowered to make any such contract as agents for the appellant"; and, fourth, "the positive proof and testimony in the record shows that there was no special contract for the delivery of said goods, and hence the verdict is contrary to the evidence and not sustained either by the law or the evidence in the case."

1. The claim that a bill of lading, issued by a common carrier, is, and contains, the contract between the shipper and the carrier may, for the purposes of this case, be admitted as correct, as a general rule, but, even if true, it does not necessarily follow that the rule should be applied here. As claimed by plaintiff and testified to, the tents and fixtures were delivered to defendant upon its agreement to deliver the consignment at Guthrie by the 15th of the month; that upon the delivery of the property to defendant on the 11th it issued the bill of lading to the drayman, and not to plaintiff, and that instrument did not come into the possession of plaintiff, nor did plaintiff know of its contents until long after the return of the

property to Lincoln over another line of railroad, with the freight charges and the charges of defendant for the freight to Guthrie from Lincoln charged against plaintiff; that the consignment was not sent out by defendant on the 11th, and on the 12th plaintiff's manager called upon defendant's agent in charge of its city office and informed him of the failure to ship, with the statement, in substance, that there would be no use of sending the tents unless they could be delivered at Guthrie on or before the 15th; that the agent with whom this conversation was had then called up the agent at the station, and had a consultation with him over the telephone, only a part of which could be heard by plaintiff's manager, but enough to apprise him that the subject of delivery by the time named was under consideration, after which the agent at the city office assured him that there was sufficient time to make the delivery, and upon that assurance the tents and fixtures were allowed to remain at defendant's station and be forwarded that afternoon. Should it be conceded that the bill of lading issued on the 11th and delivered to the drayman was a delivery to plaintiff who was charged with knowledge of its contents at the time it was received by the drayman, yet we know of no rule which would prohibit that contract from being changed or modified by the subsequent agreement and undertaking made by defendant on the 12th. *Morrissey v. Schindler,* 18 Neb. 672; *Delaney v. Linder,* 22 Neb. 274; *Steidl v. Minneapolis & St. L. R. Co.,* 94 Minn 233.

2. It is believed that the second contention of defendant is sufficiently referred to in the foregoing. The evidence offered, while conflicting, was competent. Its weight was for the jury. In addition, it might be said that there was evidence offered and admitted showing that defendant was informed of the purpose for which the shipment was made, to what use the tents were to be applied, and at what time they were to be delivered in order that they might be utilized.

3. As to the third contention, we cannot agree with

counsel for defendant. It was conceded upon the argument, and must be accepted as the law, that the proper agent at a shipping point has authority to enter into contracts of the character alleged. All the business of the great railroad companies, and of corporations generally, must of necessity be transacted by agents: The corporation, of itself, without the intervention of an agent can make or enter into no contract. Agents are placed at each shipping point for this very purpose. Contracts made by them within the reasonable scope of their employment and business are binding. They are located at the stations, or in the city offices in the larger cities, for the purpose of managing the transportation from the points where the stations and offices are located. No one else is supposed to be in control. Patrons are not expected, nor does the law require them, to ascertain by inquiry and investigation whether the person found in charge of the business of the station is there wrongfully or without authority. The agent at the station was called by telephone on the 11th, and some one answered the call. On the 12th plaintiff's president and manager called at the city office and found a person in charge and with whom he conferred upon the subject of making the shipment on that date. The party at the city office called up the agent at the station, and the subject was gone over between them and the agreement was made with plaintiff's manager. This was sufficient, and plaintiff's manager had the assurance that he was dealing with the person having the requisite authority.

4. The fourth point of contention cannot be sustained. Should we hold that the conversation had with the party at defendant's station on the 11th, when taken in connection with the bill of lading issued on that day, was not enough to establish the contract, we would be yet met by what occurred on the 12th, before the shipment was sent out, which must be held sufficient and made with agents having authority.

It is further contended that "the verdict is contrary

to the evidence, and is not sustained by competent proof and is against the law and the evidence in the case." It must be conceded that in some particulars the evidence is not as precise and clear as might be desired, yet the facts detailed were sufficient for submission to the jury and the evidence was sufficient to sustain the verdict.

Objection was made to the admission of the testimony of witnesses detailing conversations had with persons over the telephone who claimed to represent defendant, and with the person at the city office (in person and "face to face"), "concerning the routing of the shipment in question and as to the time of making delivery at Guthrie, Oklahoma." Upon objection being made to the admission of this evidence, the court admitted it "on the promise of the plaintiff that he will show that the information and conversation had with this person (through the telephone) was known by the regular shipping agent afterward, and before shipment came to the knowledge of the shipping agent of the Missouri Pacific Railway Company." The latter part of this ruling is not readily comprehended by the writer hereof. We are inclined to think the reporter may have misunderstood the language of the presiding judge. The ruling must have been to admit the testimony of the witness upon "the promise of the plaintiff that it will show that the conversation had with this person was known by the regular shipping agent afterward and before shipment." If this is what was meant there was no lack of proof upon that point, subsequently submitted. The court must have so understood that the conditions were complied with, else the motion for a new trial would have been sustained. As we have hereinbefore seen, the contract made at the city office, to say nothing about what occurred on the 11th by the use of the telephone, was sufficient.

We find no error in the record calling for a reversal of the judgment. It is therefore

AFFIRMED.

JOHN DONNELLY V. STATE OF NEBRASKA.

FILED MARCH 28, 1910. No. 16,475.

1. **Intoxicating Liquors:** ILLEGAL SALES: EVIDENCE. Where one is indicted for selling intoxicating liquors without a license, and evidence is introduced to show that he was the proprieter of a restaurant; that he engaged in sale of what was termed "soft drinks"; that he mixed such drinks with whiskey and sold the mixture himself; that his place of business was resorted to and patronized by drunken people; that his employee also sold intoxicants; that he was at the restaurant substantially all the time and must have known what was being done there; that his servant openly sold the liquors across the bar for which the indictment against the proprietor was returned, it is *held* that these facts, if found to be true by the jury beyond a reasonable doubt, are sufficient to sustain a conviction of the proprietor for the sale.
2. **Indictment and Information:** INDORSEMENT: NAMES OF WITNESSES. The law of this state does not require that the names of witnesses examined before the grand jury, and who are to be called upon the trial of the cause, shall be indorsed upon an indictment, as in the case of informations.

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

F. J. Mack and *W. M. Cain,* for plaintiff in error.

William T. Thompson, Attorney General, and *George W. Ayers, contra.*

REESE, C. J.

Plaintiff in error was indicted by the grand jury and prosecuted in the district court for Boone county for the crime of selling intoxicating liquors without first having procured a license therefor. The indictment contained two counts. The first count charged a sale to David Primrose on the 23d day of February, 1909, and the second count with selling to George Bourn on the same day. A trial was had, and the jury returned a verdict finding

the accused guilty as charged in the second count, and not guilty as charged in the first. A motion for a new trial was filed and overruled, and plaintiff in error was sentenced to pay a fine of $200. He prosecutes error to this court.

1. The first contention presented by plaintiff in error is that the district court erred in permitting certain witnesses to testify on behalf of the state whose names were not indorsed upon the indictment. In this the court did not err. *Ballard v. State,* 19 Neb. 609.

2. It is next contended that the verdict is contrary to law and is not supported by sufficient evidence. The second count of the indictment charges a sale to George Bourn on the 23d day of February, 1909, within the county, etc. George Bourn testified that on or about that date he purchased a mixture of malt and whiskey at the place of business of plaintiff in error from his clerk or employee, Waddell. Waddell was not a witness, and the testimony of Bourn was not contradicted. This was sufficient as to the purchase and sale. But it was claimed and testified to by plaintiff in error that Waddell's duties were to wait upon customers in the restaurant owned by plaintiff, and that he never authorized, directed, nor permitted said Waddell to sell intoxicating liquors in the restaurant, nor consented to such sale. There was evidence introduced showing that plaintiff in error had sold intoxicating liquors to customers in his restaurant; that he had a soda fountain and other appliances for furnishing drinks denominated by him as "soft drinks"; that men were seen in his place of business who were intoxicated; and that plaintiff in error was present in the restaurant a great portion of the time and must have known what was being done there in addition to the sales made by himself. There can be no doubt but that plaintiff in error knew that intoxicants were furnished at his restaurant. We think the same rule must be applied here as in the case of *In re Berger,* 84 Neb. 128, except that it must operate more strongly against plaintiff in error than

was applied there. The jury must have found that the sale by Waddell was with the tacit, if not the expressed, consent of plaintiff in error, and there was sufficient evidence to sustain their finding. The fact that plaintiff in error had no license could make no difference, as he would be equally liable for the acts of his employee in the one case as the other.

Finding no prejudicial error in the record, the judgment of the district court must be affirmed, which is done.

AFFIRMED.

GAGE COUNTY, APPELLANT, V. W. W. WRIGHT ET AL., APPELLEES.

FILED MARCH 28, 1910. No. 15,955.

1. **Counties: OFFICERS: ASSISTANTS: COMPENSATION.** By the provisions of chapter 35, laws 1901, county boards of counties having more than 25,000 and less than 60,000 inhabitants were given the power to authorize the county treasurer to employ three assistants or clerks, and retain out of the fees of his office, if they should reach that amount, the sum of $2,400 a year for the payment of their salaries.

2. ———: ———: ———: ———. In January, 1905, the county board of Gage county, that being a county having more than 25,000 and less than 60,000 inhabitants, authorized the county treasurer to employ three clerks or assistants to enable him to properly conduct the affairs of his office, with combined salaries amounting to $2,400. The legislature of that year, by an amendment to the act of 1901, provided that county boards of such counties shall furnish the treasurer with one deputy or chief clerk with a salary of $1,400; one clerk whose salary shall be $1,000, and one clerk whose salary shall be $600 per annum. The treasurer retained the clerks theretofore authorized by the board, and paid them for the remainder of the year the increased compensation provided by the amendment. *Held*, That the county cannot recover of the treasurer or upon his bond the amount of such increased compensation.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

F. O. McGirr and *Menzo W. Terry,* for appellant.

Sackett & Brewster, contra.

BARNES, J.

This appeal and *Gage County v. Wright,* p. 436, *post,* which we have just decided, are companion cases, and differ in law and fact upon one proposition only. This action was brought to recover from the defendants the sum of $2,200, money alleged to have been unlawfully retained by defendant Wright as treasurer of Gage county for the payment of clerk hire. The county had judgment in the district court for $261.75, and, being dissatisfied with the amount of the recovery, has brought the case here by appeal.

It appears that defendant Wright was the treasurer of Gage county for a second term of two years, ending on the 4th day of January, 1906; that for the first year of his said term the county board duly allowed him to employ one deputy or chief clerk, with compensation at the sum of $1,200 per annum; one clerk at a salary of $1,000 per annum, and one additional clerk at a salary of $200, making a total of $2,400. This it appears was the amount retained by the treasurer and actually paid out by him for necessary deputy or clerk hire. It also appears that in his annual settlement with the county board his action in that behalf was approved and ratified. As was held in *Gage County v. Wright, supra,* this was authorized by the county and by the statute, and none of this money can be recovered by the plaintiff. It further appears that in January, 1905, the county board of Gage county allowed the treasurer to employ three clerks, one at $1,200 a year, one at $1,000 a year, and another for four months at $50 a month. The defendant treasurer employed the two clerks first named at the salaries above stated for the first quarter of the year, and paid them their salaries amounting to $300 and $250, respectively. The legislature of 1905 amended the law at that session by inserting some

more definite provisions. Among the others so inserted is a provision that "in counties having over 25,000 and less than 60,000 inhabitants the county treasurer shall receive the sum of three thousand ($3,000) dollars per annum, and shall be furnished by the county board with the following clerks or assistants: One deputy or chief clerk whose salary shall be fourteen hundred ($1,400) dollars; one clerk whose salary shall be one thousand ($1,000) dollars, and one clerk whose salary shall be six hundred ($600) dollars per annum." Laws 1905, ch. 72, sec. 1. By the amendment the amount to be expended for clerks to the county treasurers in counties of this class was increased to $3,000. Upon the taking effect of this amendment the treasurer continued the employment of the clerks above mentioned, and for the remaining three quarters of that year retained out of the fees of his office and paid to the deputy a sum which added to what was paid him for the first quarter amounted to $1,400. This it seems was $50 more than he was entitled to. He also paid the other clerk $1,000 for the year, which was the amount of compensation to which that clerk was entitled. In the last three quarters of the year the defendant also employed two other clerks, to one of whom he paid $425, and to the other $175. The first of these clerks was authorized by the county board, while the other was not. Under the law the defendant might have paid to the first clerk $450, but it appears that he only paid him $425, so, as found by the district court, the defendant owed nothing to the county on account of said clerk. The district court also found that the other clerk, not having been authorized by the county board, was not entitled to anything out of the county funds, and that the defendant treasurer exceeded his authority in paying him the $175. The district court also found that the treasurer acted in good faith in hiring the clerk to whom he paid $175, and that such employment was necessary in order to properly prepare the delinquent tax list for a scavenger foreclosure suit, but that, the law having made no provision for the

payment of such extra clerk, the treasurer was not entitled to retain the $175 paid for his work. It therefore appears that there was due the county at the close of the treasurer's second term of office $225, which, with the interest due thereon at the time of the trial, amounted to $261.75, which was the exact sum for which the plaintiff had judgment.

It is contended by the plaintiff that the amendment of 1905 fixing the salaries of clerks for the county treasurer at a definite sum did not authorize the defendant Wright to pay his clerks for the last three quarters of that year the increased salaries provided by law, and this is the only difference between the instant case and *Gage County v. Wright, supra.*

It is argued that, the county board not having authorized the employment of clerks after the amendment above quoted went into effect at the salaries named therein, the treasurer was without authority to pay the increased compensation. This view does not meet with our approval. The county board had, by proper resolution, authorized the treasurer to employ three clerks for that year, and that order, not having been rescinded, was sufficient authority for him to continue them in the service after the adoption of the amendment which, when it took effect, fixed their compensation for the remainder of the current year.

It is contended, however, that the amendment is in conflict with that portion of the statute which provides that "neither of the officers above named shall have any deputy or assistants unless the county board shall, upon application, have found the same necessary; and the county board shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive (Comp. St. 1905, ch. 28, sec. 42)"; and it is insisted that the amendment must give way to this proviso. We are not required to determine that question in disposing of this case, for it clearly appears that the board at the proper time, and

by suitable resolution, prescribed the number of clerks which the treasurer could employ for the last year of his incumbency. It also appears that such clerks were necessary to enable him to transact the business of his office; that they were actually paid the compensation allowed them by law, and the amount retained by the treasurer for his own salary and the salaries of his clerks was less than the fees earned by his office for that year. Without deciding the question above stated, it may be said that one of the first rules for the construction of statutes is that the court will give effect to all parts of the statute if practicable. If the language of the second proviso is to be taken literally, it would seem that there is a substantial conflict between that part of the act and the amendment above quoted. We think, however, that a more reasonable construction of the second proviso is that it was intended to apply to the smaller counties of the state, and not to counties having more than 25,000 and less than 60,000 inhabitants. If we say that by the act of 1901, ch. 35, the counties are divided into classes with reference to the work of the county treasurer, and that in those having over 25,000 and under 60,000 inhabitants the treasurer is allowed assistants whose combined salaries are fixed at $3,000, and in all counties having 25,000 or less the rule of the second proviso obtains, this will give effect to all of the provisions of the statute and render the act consistent with itself. We think that this sufficiently disposes of the plaintiff's contentions.

For the foregoing reasons, we are of opinion that the judgment of the district court was right, and it is therefore

AFFIRMED.

JOHN O. YEISER, APPELLANT, V. BALTHAS JETTER ET AL., APPELLEES.

FILED MARCH 28, 1910. No. 15,964.

Assignments: PLEADING: SUFFICIENCY. Petition examined, its substance stated in the opinion, and *held* sufficient to resist a general demurrer.

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

John O. Yeiser, pro se.

John T. Cathers and *A. S. Ritchie, contra.*

BARNES, J.

Plaintiff brought this action to recover a money judgment for the rent of certain premises situated in the city of Omaha owned by P. R. E. E. Linton, A. F. Linton and A. F. Linton, trustee. Before the plaintiff filed his petition in the district court one John T. Cathers came into the case by way of intervention. We are unable to ascertain from the record when or how Cathers became an intervening defendant, and therefore we assume that the action was commenced in the county court and was brought to the district court by appeal. The other defendants, who were the lessees of the premises, and from whom the rent in question is alleged to be due, are Balthas Jetter and the Jetter Brewing Company. The allegations of the petition are substantially as follows: That Balthas Jetter and the Jetter Brewing Company leased the east one-third of lot 4, in block 134, in the city of Omaha, Douglas county, Nebraska, of P. R. E. E. Linton and A. F. Linton; that on the 31st day of March, 1897, P. R. E. E. Linton conveyed the premises to A. F. Linton as trustee; that defendants Jetter and the Jetter Brewing Company continued to lease and occupied the premises from month to month at an agreed rental of $45 a month, and are still

occupying said premises under said lease; that the defendants Jetter and the Jetter Brewing Company have paid no rent since December 1, 1902; that in the month of May, 1902, the Lintons and their minor children had a large amount of litigation pending in Nebraska, and at that time retained the plaintiff to act as their attorney in conducting such litigation, and agreed to and with the plaintiff that as his compensation for his services he should collect and receive the rent due and to become due for the use of said premises, and thereafter made and delivered to him a written assignment therefor in the words and figures following: "For valuable consideration we hereby assign all our right, title and interest in and to any rents due or to become due in any real estate in Nebraska, owned severally or jointly or in a trust capacity, to John O. Yeiser. This agreement to be valid only so long as he continues to act as the attorney of the undersigned and subject to revocation at any time without notice. Subject to revocation." That such relationship of attorney and clients still exists, and that he has ever since continued to act as attorney for the said Lintons; that his said clients made a second written assignment of the rents aforesaid to plaintiff as follows: "Pittsburgh, Pa., Aug. 29, 1904. For value received we assign all money due to us for rents from the Linton estate, Omaha, Nebraska, up to date, to John O. Yeiser, our attorney at law. A. F. Linton, A. F. Linton, Trustee, P. R. E. E. Linton." That his right to collect and receive the aforesaid rents has never been and is not now disputed or questioned by his said clients; that they are indebted to him in a sum largely in excess of the amount due as rents from the defendants Jetter and the Jetter Brewing Company; that there is now due and owing to him from the above named defendants the sum of $855 on account of the rents aforesaid from December 1, 1902, until July 11, 1904, no part of which has been paid, and that he has frequently demanded payment thereof. The

petition concludes with a prayer for a judgment against the defendants for $855, with interest and costs of suit. To this petition the intervener Cather demurred, for the reason that "the petition of the plaintiff does not state a cause of action against the defendant and the intervener." The district court for Douglas county sustained the demurrer and dismissed the plaintiff's action, who, to reverse that judgment, has brought the case here by appeal.

It is contended by the intervening defendant Cathers, who argues that he is entitled to the rent due from his codefendants, that the petition does not state facts sufficient to constitute a cause of action. In support of this contention he claims to have a judgment against the Lintons, and that the assignments set forth in the petition are void as to him, because he is a creditor of the assignors. While this may be so, still, there is nothing contained in the petition from which that fact can be inferred, and therefore that defense, if it exists at all, must be raised by way of answer.

It is further contended that the assignment in question is within the statute of frauds, and is therefore void because it relates to real estate or is an interest in land. We think this contention is beside the mark. The assignment created no interest in the leased premises. It gave the plaintiff no power to terminate the lease. He could not even declare a forfeiture for non-payment of rent, nor could he lease the real estate to another. It gave him no right to the possession of, or control over, the leased property, and the only thing he could do was to demand and receive the money which otherwise the defendants Jetter and the Jetter Brewing Company would pay to his assignors. It seems clear that the defendant's objections are in the nature of defenses to the plaintiff's cause of action, which cannot be determined upon a general demurrer to the petition. To be available they must be pleaded by way of answer.

We are of opinion that the petition is sufficient to resist

a general demurrer, and therefore the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

DRAINAGE DISTRICT NO. 1, RICHARDSON COUNTY, APPELLEE, V. RICHARDSON COUNTY, APPELLANT.

FILED MARCH 28, 1910. No. 16,372.

1. **Drainage Districts.** A drainage district organized under the provisions of article IV, ch. 89, Comp. St. 1909, is a public and not a private corporation. *Neal v. Vansickle*, 72 Neb. 105.

2. ———: ASSESSMENTS: CONSTITUTIONAL LAW. The provisions of section 19, art. IV, ch. 89, Comp. St. 1909, authorizing the assessment by a drainage district of benefits accruing to a highway within the district from the drainage improvement, are not in conflict with section 2, art. IX of the constitution, exempting property of the state and county from taxation, nor are such provisions in conflict with section 6, art. IX of the constitution, vesting the corporate authorities of cities, towns and villages with power to make local improvements by special taxation or assessments against the property benefited.

3. ———: ———: ———: TRIAL BY JURY. The provision of section 6 of the bill of rights (const., art. I), which declares that "the right of trial by jury shall remain inviolate", has no application to judicial proceedings concerning the amount or legality of special assessments for benefits to highways within a drainage district.

4. **Constitutional Law:** TITLES TO ACTS. The title of article IV, ch. 89, Comp. St. 1909, is sufficiently comprehensive to include the assessment of public highways for benefits accruing from a public drainage improvement.

5. ———: CONFLICT OF GOVERNMENTAL POWERS. The provisions of the article and chapter above mentioned are not in conflict with section 1, art. II of the constitution, dividing the powers of the state government into three separate departments.

6. **Drainage Districts:** HIGHWAYS: ASSESSMENTS. Under the provisions of section 19, art. IV, ch. 89, Comp. St. 1909, the board of supervisors of a drainage district has the power, and it is made the duty of that body, to charge assessments for benefits accruing

to the highways within the drainage district to the county, and not to the townships, where the county is under township organization.

7. ———: JUDGMENT: EVIDENCE. The evidence contained in the bill of exceptions examined, and found sufficient to sustain the order of the board of supervisors of the drainage district in fixing the amount of benefits, and to require an affirmance of the judgment of the district court confirming such order.

APPEAL from the district court for Richardson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Amos E. Gantt and *Clarence Gillespie,* for appellant.

Kelligar & Ferneau, A. R. Keim, A. R. Scott and *E. Falloon, contra.*

BARNES, J.

A majority of the owners of about 30,000 acres of swamp, overflowed or submerged lands situated in Richardson county formed a drainage district for the purpose of draining such lands under the provisions of article IV, ch. 89, Comp. St. 1909 (Ann. St. 1909, secs. 5561-5597), and after its organization the district, in carrying out the purpose for which it was formed, apportioned the benefits, assessed the cost of the improvement, and required the county of Richardson to pay the sum of $18,600 as its share thereof on account of special benefits accruing to the 53 miles of public roads or highways situated and maintained within its boundaries. From a hearing before the board of drainage supervisors the county appealed to the district court, where a trial resulted in a judgment confirming and approving the order above mentioned, and from that judgment Richardson county has brought the case here by appeal.

The record presents many important and interesting questions, which will be stated and determined in the order in which they have been discussed by counsel.

1. Appellant's first contention is that the drainage district is not a public, but is a private, corporation engaged

in the promotion of a private enterprise for the betterment of private property, and therefore the county cannot be required to contribute to the cost of the construction of its drainage system. That question was decided by this court in the case of *Neal v. Vansickle,* 72 Neb. 105. It was there said: "That the districts contemplated by the act are intended to be of a purely public and administrative character, is evident as well from the title as from the body of the law itself. Its officers are chosen by popular election and their powers, duties, compensation and terms of service are prescribed by the statute. The sources of its income are predetermined as are also the uses to which it may be applied, and the county treasurer is made the custodian of its funds, and his disbursement of them regulated as in case of other public moneys. In our opinion, it is too late in the day to contend that the irrigation of arid lands, the straightening and improvement of watercourses, the building of levees and the drainage of swamp and overflowed lands for the improvement of the health and comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every of them subjects of general and public concern, the promotion and regulation of which are among the most important of governmental powers, duties and functions." Supporting this doctrine are many authorities, among which are *Mound City Land & Stock Co. v. Miller,* 170 Mo. 240, 60 L. R. A. 190; *Morrison v. Morey,* 146 Mo. 543, 48 S. W. 629; *Tide-water Co. v. Coster,* 18 N. J. Eq. 518, 90 Am. Dec. 634, and other well-considered cases. We see no reason at this time to depart from that opinion, and therefore this contention must be considered foreclosed so far as this court is concerned.

2. Appellant attacks the power of the drainage district to assess and collect from any political subdivision of the state any sum of money for benefits accruing to a highway from the improvement in question, and contends that such power cannot be granted by the legislature. In support of this contention appellant cites section 2, art. IX

of the constitution, exempting the property of the state, counties and municipal corporations from taxation. The theory of that provision is that all such property belongs to the state, and it would be an idle proceeding for the state to collect a tax levied and assessed upon its own property. It has long been settled in this state that this section has reference only to taxes assessed by general valuation for general purposes, and has no reference to special taxation of property benefited by the creation of local improvements. *City of Beatrice v. Brethren Church*, 41 Neb. 358.

The argument of appellant's counsel, however, is that the county is the sole owner and proprietor of the highways assessed, and therefore it should not be required to assess and collect taxes upon its own property. We think this idea is a mistaken one. In *Krueger v. Jenkins*, 59 Neb. 641, it was said: "A county does not hold the legal title to county roads within its borders; it has no powers of disposition over them. * * * In performing the duties with which it is charged in connection with them, it acts as an agent of the state, and in the interests of the general public." We can see no reason why the county acting for the general public should not be required to pay for the benefits accruing to the public roads. It is charged with the duty of constructing and maintaining such roads in a suitable condition for public travel, and, if the improvement contemplated by the drainage district materially aids in the performance of that duty, there would seem to be no good reason why the county should not pay for the benefits thus conferred upon it.

Our attention is also invited to section 6, art. IX of the constitution, by which it is provided that the legislature may authorize the corporate authorities of cities, towns and villages to make local improvements and pay for the same by special assessment of the property benefited. As early as 1879, in construing this section, we said: "The constitution of a state not being a grant, but a restriction upon the power of the legislature, therefore a provision

in the constitution, that 'the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by taxation of property benefited', merely prescribes the rule of apportionment of such special taxes, and does not prohibit the legislature from conferring the power to make local improvements by special assessments or taxation * * * upon other municipal corporations than those designated." *State v. Dodge County,* 8 Neb. 124. *Darst v. Griffin,* 31 Neb. 668; *Dodge County v. Acom,* 61 Neb. 376. We have adhered to this construction for more than 30 years, and it has had an important bearing upon the development of the state. It is by virtue of this construction placed upon section 6, art. IX, that the appellee and other public corporations are empowered to advance the welfare and prosperity of the state.

In *Heffner v. Cass and Morgan Counties,* 193 Ill. 439, 58 L. R. A. 353, the supreme court of Illinois said: " 'A county is a public corporation, which exists only for public purposes connected with the administration of the state government, and it and its revenues are alike, where no express constitutional restriction is found to the contrary, subject to legislative control (p. 449).' * * * 'They were created to perform public, and not private, functions. They are wholly public in their character, and are a portion of the state organization. All their powers are conferred, and duties imposed, by the constitution and statutes of the state. They are public, and all the property they hold is for public use. It belongs to the public, and the county is but the agent invested with the title to be held for the public. * * * The property held by the county was only acquired and held by authority conferred by the legislature, and for public use, and the property being held for the public is under the uncontrolled power of the general assembly, as it is not inhibited in its absolute control. The county could neither hold nor dispose of property unless authorized by the constitution or statute, and the legislature has the power to

sell or dispose of it without the consent of the county authorities (p. 448).'"

The effect of the enactment of section 19, ch. 161, laws 1905, was simply a declaration of the legislature that any public corporation engaged in a work of public utility shall have the right and power to collect, by way of special assessment, benefits which are found to accrue to public property from another public corporation. Under the rule laid down by the legislature, however, the benefits assessed must not exceed the benefits conferred, and a procedure is provided by which this issue may be determined, and a right to a review of such decision by the courts is preserved to both parties. No provision of the constitution has been pointed out which denies such power where the assessments do not exceed the benefits, and we have not succeeded in finding any such. To drain a large tract of land and render it fit for habitation and use, and to facilitate the interchange of communication across it, is the proper use of the taxing power, and was so held in the leading case of *Tide-water Co. v. Coster, supra.*

The constitution of Illinois is in many respects like the constitution of this state, and the supreme court of that state has said: "If a highway over marshy or swampy ground shall be drained, it will be improved, and the public will be benefited thereby. That will be done by the drainage district which it was the duty of the highway district to do, and therefore it imposes no burden on the highway district that it shall be required to contribute, in proportion to the benefit thus received, for the improvement whereby it is produced, but, on the contrary, it ratably distributes the cost of public improvement in accordance with the spirit of our constitution." *Commissioners of Highways v. Commissioners of Drainage District,* 127 Ill. 581. For the foregoing reasons we are constrained to hold that the appellant's contention upon this point is not well founded.

3. Appellant assails the act in question as a violation

of section 6 of the bill of rights (Const. art. I) preserving inviolate the trial by jury. It is provided by section 17 of the act, as it appears in the Compiled Statutes of 1909 (ch. 89, art. IV), that when an appeal to the district court is perfected from the order of the board of drainage supervisors assessing benefits and fixing the amount to be paid therefor, "the same shall be docketed and filed as in appeals in other civil actions to said court, and said court shall hear and determine all such objections in a summary manner as a case in equity." This is the provision which it is claimed violates the fundamental law. The provisions of section 6 of the bill of rights are intended to secure and protect the right of trial by jury in cases where such right existed at the common law; and it has been held that they are not intended, unless such affirmative intention is expressly stated, to extend the right of trial by jury to cases in which no such right existed at the common law, as in cases of taxation. 1 Page and Jones, Taxation by Assessment, sec. 202. In *Harris v. People,* 218 Ill. 439, speaking of this question, the supreme court of that state said: "A property owner is not entitled to have a trial by jury upon the question whether his property is benefited to the extent of the special tax levied against it for the construction of a sidewalk authorized by an ordinance passed under the sidewalk act of 1875." In *Trigger v. Drainage District,* 193 Ill. 230, it was held: "The provisions of sections 16 and 37 of the levee act, which authorize the assessment of benefits by the drainage commissioners when the court so orders, are not in violation of the constitutional guaranty of the right of trial by jury." The decision in that case followed *Briggs v. Union Drainage District,* 140 Ill. 53. To the same effect are *Indianapolis & Cumberland Gravel Road Co. v. Christian,* 93 Ind. 360; *In re Bradley,* 108 Ia. 476; *Howe v. City of Cambridge,* 114 Mass. 388; *Mound City Land & Stock Co. v. Miller,* 170 Mo. 240; *State v. Henry,* 28 Wash. 38, and many other cases.

It is true that it has been held in many cases that where

the amount to be paid as compensation to the owners of property taken or injured by the improvement for which the assessment is levied, as well as the assessment itself, is to be determined without a jury, such legislation is unconstitutional, not because of the provision for a determination and assessment of the amount of the benefits, but because one whose property is taken under the law of eminent domain is entitled to have the value of that property ascertained by the verdict of a jury if he so desires. The act in question in this case, however, is not open to that objection, for it is provided that the value of the property taken for the improvement by the exercise of the power of eminent domain is to be determined by a jury trial. We are therefore of opinion that the provision above quoted is not violative of section 6 of the bill of rights.

4. Counsel for appellant also contend that "the title to the act in question does not indicate that a highway shall be assessed for benefits." In other words, their contention is that the act is broader than its title, and is therefore in conflict with section 11, art. III of the constitution, which provides, among other things: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Turning to the session laws of 1903, ch. 116, we find that the title to the act reads as follows: "An act to provide for the formation of drainage districts; for the reclamation and protection of swamp, overflowed or submerged lands; to provide for the acquirement of rights of way, easements and franchises, or other property necessary to carry out the purposes of this act; to describe the course of procedure to be followed to accomplish such object; and to prescribe a penalty for the wilful and malicious injury or interference with the rights or property of said districts." This seems to be a well-prepared and comprehensive title, and is broad enough to authorize the legislature to incorporate in the body of the act all provisions necessary to carry out the purpose of the legislation. The act of 1881

(laws 1881, ch. 51), commonly known as the "Drainage Act", was passed with the following title: "An act to provide for draining marsh or swamp lands in the state of Nebraska." This act has been persistently assailed as violating the provisions of the constitution in many respects, and, among others, that its title was too broad, or that it was not sufficiently comprehensive. We have sustained that act against all assaults of this character, as will be found by an examination of *Omaha & N. P. R. Co. v. Sarpy County,* 82 Neb. 140; *Tyson v. Washington County,* 78 Neb. 211; *Dodge County v. Acom,* 61 Neb. 376; *Dodge County v. Acom,* 72 Neb. 71; *Morris v. Washington County,* 72 Neb. 174; *Darst v. Griffin,* 31 Neb. 668. The title of the act in question is both comprehensive and particular, and, as stated above, will support any honest legislation having the object to promote drainage of swamp, overflowed or submerged lands, and the raising of revenues necessary to pay the expenses incident thereto from any public subdivision of the state itself controlling lands within the district, or which is charged with any public duty concerning such lands. *Paxton & Hershey I. C. & L. Co. v. Farmers & Merchants I. & L. Co.,* 45 Neb. 884.

5. Appellant further contends that the drainage act conflicts with section 1, art. II of the constitution, which divides the powers of state government into three departments. That question was considered and determined in the case of *Barnes v. Minor,* 80 Neb. 189, where it was held: "The power of the legislature over the subject of procedure, within limits not impairing the inherent powers or jurisdiction of the courts, is not restricted; and it is competent to require, by statute, a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation." We find that decision supported by 1 Page and Jones, Taxation by Assessment, secs. 205, 207; *State v. Bates,* 96 Minn. 110, and many other authorities. We are

therefore constrained to follow our decision in that case, and thus dispose of the present contention.

6. Counsel for appellant strenuously insist that in passing the drainage act in question the legislature had no power to direct that assessments for benefits to highways should be made against the county, because the county of Richardson had theretofore adopted township organization, and was governed by the terms of that act. From an examination of our statutes it appears that in counties under township organization the responsibility for the construction and maintenance of highways is divided between the county proper and the townships. The laws controlling this feature of our county government are, to some extent, in a state of confusion, but since 1887 it has been the duty of the counties to construct and keep in repair the bridges over streams. Ann. St. 1909, secs. 6192, 6195. Again, the power to contract for the construction of bridges costing $100 or more was taken from the townships and given to the county boards in 1905. Ann. St. 1909, sec. 6126. The legislature of 1909 also shifted the burden of damages from the towns to the counties caused by opening, widening or vacating roads. Ann. St. 1909, sec. 6157. In 1905 the legislature passed an act directing county boards to tax delinquent road districts 5 mills as an extraordinary tax, and to continue that process until all past due indebtedness was liquidated. Ann. St. 1909, secs. 6171-6176. It thus appears that step by step power has been transferred from the towns to the counties, and liabilities have accordingly been shifted. No reason suggests itself why the powers of the supervisors of drainage districts are not as extensive in counties under township organization as in other counties. They can apportion to the road in the one case as well as in the other its proper proportion of the cost and expense of the improvement. It was the evident intention of the lawmaking power that in counties under township organization such expense should be paid out of the general funds of the county, and under the law such counties

have ample power to make levies to meet such expenses. Section 4485, Ann. St. 1909, provides: "In addition to the powers hereinbefore conferred upon all county boards, the board of supervisors shall have power to appropriate funds to aid in the construction of roads and bridges not exceeding 2 mills of the levy for the current year." It appears that the levy in the case at bar was divided into 20 annual instalments, and the annual expense to the county would therefore be about $1,500. This expense is easily within the taxing power of the county, and it seems clear that it was not the intention of the legislature to place this burden on a subdivision of the county having no taxing power to meet the obligation. We are therefore of opinion that the assessment was properly made against the county.

7. Finally, it is contended that the assessment appealed from is speculative and excessive, and therefore should be set aside and held for naught. An examination of the bill of exceptions discloses that the preliminary report of the engineer apportioned the costs and benefits to the appellant at $24,079, the total costs of the improvement in the district being the sum of $277,264.57. Objections were filed by the county, and a hearing was had before the board of supervisors, where the assessment was reduced to $18,600, and the engineer was directed to reapportion this sum to the various roads within the drainage district. The county appealed from this decision, and on the trial in the district court the finding and adjustment made by the board of supervisors was declared to be equitable and fair, and the assessment as equalized was confirmed by the court. Without quoting the evidence, it is sufficient to say that it appears that the engineer of the drainage district was a man of experience, having been engaged in his profession about 13 years; that he had been largely engaged in drainage projects similar to the one in question; that he was acquainted with every mile of road in the drainage district, and had personally examined each mile before he made the assessment. He testified both as to

the method of ascertaining the benefits and the amount of the same, and detailed the course he pursued, which seems to have been the one contemplated by the statute. The appellant admits that the improvement would result in benefits to the highways situated within the district. No attempt was made to show how much or how little such benefits may be, and there is no evidence in the record which shows that the sum fixed by the board was either improper or excessive. Again, there is no evidence in the bill of exceptions by which the district court could have fixed the assessment at any other figure. In *Dodge County v. Acom,* 72 Neb. 71, it was said: "It is a matter of common knowledge that drainage benefits such lands, but the manner and extent of such benefits are best known and understood by engineers who are experts in the matter of sanitation and land drainage. Therefore when the engineer in charge of such work has examined the lands, has made his estimates, and reported them to the county board, in the absence of fraud, such report ought to, and does, furnish *prima facie* evidence of the benefits which will accrue to each tract of land, and such evidence is sufficient to sustain the orders of the board, unless it is overcome by competent proof to the contrary."

Having considered all of the material or essential assignments presented by counsel for the appellant, and finding no error in the record, the judgment of the district court is, in all things,

AFFIRMED.

SEDGWICK, J., dissents.

IN RE ESTATE OF JOHN F. WHITON.

JAMES J. CARLIN, ADMINISTRATOR, ET AL., APPELLEES, V. FLORENCE E. SEWALL ET AL., APPELLANTS.

FILED MARCH 28, 1910. No. 15,947.

1. **Executors and Administrators: ALLOWANCE TO WIDOW: NOTICE.** While it is proper that notice of the time and place of hearing be given to the heirs as well as to the administrator, when application is made to the county court for an allowance to the widow, an order made without notice to the heirs is not void for want of jurisdiction. *In re Estate of Fletcher*, 83 Neb. 156.

2. ———: ACCOUNTING: OBJECTIONS. Where parties filing special objections to certain items of the final report of an administrator pray that "said report be allowed as to all other items and disallowed as to the items charged", they thereby consent to the allowance of all items other than those specially objected to, and it is proper for the court to exclude all evidence not relevant to the disputed items.

3. ———: ———: TITLE TO REALTY. The title to real estate cannot be adjudicated upon objections to the final report of an administrator.

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

Allen G. Fisher and *Fannie M. B. O'Linn*, for appellants.

J. A. Douglas and *Arthur F. Mullen, contra.*

LETTON, J.

This is an appeal from a judgment of the district court for Rock county affirming on appeal certain orders made by the county court of that county in the matter of the Estate of John F. Whiton, deceased. Two separate appeals were taken from the county court, but these were consolidated and tried as one case in the district court upon the papers filed in the county court.

As nearly as we can determine from the confused mass of papers presented in this appeal, it appears that on the 15th day of June, 1907, a motion was filed in the county court by the appellants herein, Florence E. Sewall, Sylvester G. Whiton, and Charlotte B. Brady, as heirs of John F. Whiton, deceased. The motion prayed that the administrator "be required to collect a reasonable rent from Helen J. Whiton for the use of the hotel furniture belonging to said estate, and that he also be ordered to discontinue any and all future payments of the widow's allowance of $25 a month to Helen J. Whiton, widow of deceased, until the further order of the court." A hearing was had upon this motion, all parties being represented by counsel. The court sustained the same in part, but overruled it as to the discontinuance of the widow's allowance, to which ruling the heirs excepted, gave notice of appeal, and filed an appeal bond. The transcript next contains the application for allowance to the widow, and the order allowing the same, which was made September 29, 1906, the widow and administrator both appearing.

The final report of J. J. Carlin, administrator, was filed in the county court on September 10, 1907. Objections were made and filed by the three heirs above named to the allowance of the items in the report of payment to the widow of $25 a month under the former order of the court, "because the purported orders therefor were made without notice to parties and without jurisdiction, and contrary to law, and without evidence, and because the personal estate was assigned to the widow by appraisers on May 1, 1906." Objection was also made "because there is no charge therein shown for rents collected by said administrator for lots 1 and 2, in block 4, in the town of Bassett, Nebraska, which he has permitted to be occupied by one Helen J. Whiton, against the will and without the order of this or any other court in that behalf, and said property is fairly worth $60 a month from April 11, 1906, to date, making $1,020." The objections

were overruled, and the court proceeded to make a final settlement of the estate. It found that Helen J. Whiton was the widow and the appellants were the heirs of deceased, and distributed the personal property in accordance with the report and findings. Exceptions were taken and a bond for appeal filed. Objection was made by the administrator in the district court to the appeal bonds, but leave was given to file amended bonds, which was done, and under the views which we have adopted it becomes unnecessary to consider whether the appeals were regularly taken.

After consolidation, and at the trial in the district court, the administrator first offered in evidence his original final report showing the payments made to the widow, with other items charged and credited, which was objected to, but the objection was overruled. The administrator then rested. It was then stipulated that the evidence taken in another suit between the same parties involving the title to the real estate for the rents of which it was sought to charge the administrator should be taken as evidence in this case, and that additional evidence might be received. The heirs then offered to show that a large amount of personal property was not included in the inventory. This evidence was properly excluded for the reason that it was not within the issues. The administrator then testified that he considered $25 a month a reasonable allowance to the widow under the circumstances.

Upon oral argument in this court the appellants contended that there was no proof that Helen J. Whiton was the widow of deceased; that, on the contrary, the proof showed that, on account of the invalidity of certain divorce proceedings instituted by a former wife of deceased, the marriage of Helen J. Whiton to the deceased was void, and that she was not, in fact, the widow of deceased. It was further argued that the hotel property in the town of Bassett occupied by the widow was not the homestead

of deceased, and that, no notice having been given to the heirs of the application for an allowance to be made to the widow, the order directing the payment of the same was void, and the administrator was liable to the heirs for the amount paid. A number of other arguments were made which were foreign to the issues in this case, although perhaps pertinent to and within the issues of the other case pending between the parties.

We think it clear that, under the record as presented here, the appeal from the county court to the district court only brought up for investigation the items in the final report specifically objected to, and the order of the county court on the motion to discontinue the payment of the widow's allowance. In the objections to the final report filed by the appellants we find the following: "Wherefore the said heirs at law pray that said report be allowed as to all other items and disallowed as to the items charged." By this request the heirs consented to the allowance of all items in the report, other than those specially objected to, and they cannot appeal from an order or judgment rendered with their consent and for which they themselves prayed. The district court properly excluded the evidence as to other items.

As the record stands, there seem to be only two questions presented. The first is as to the validity of the original order making the allowance of $25 a month to the widow because made without notice to the heirs. The application for the allowance was duly filed and a hearing had at which the administrator was present. Our attention has not been called to any statutory provision which renders notice to heirs of an application for an allowance to the widow necessary. Probably, especially in cases where a controversy is likely to arise between the widow and heirs, it might be better practice to give such notice, but it is not indispensable in order to give the court jurisdiction of the matter. *In re Estate of Fletcher*, 83 Neb. 156. The amount of the allowance seems not to be unreasonable, and no error appears in the order made

by the county court, or in its affirmance by the district court.

The second question is as to the objection to the final report that there is no charge for rents collected by the administrator for property in Bassett occupied by the widow. The fourth finding of the county court in its final decree is that the deceased "died seized of some right, title and interest" in lots 1, 2, 6, 25 and 26, in block 4, Bassett, Nebraska, and 13 acres of land in that vicinity. It appears that the title to this real estate is in controversy in another action between the same parties, Helen J. Whiton, as widow, claiming in that case to be entitled to one-half of the hotel property as a homestead, and to be the beneficial owner of the other half by virtue of a certain constructive or resulting trust relationship between herself and deceased. The record does not show that the question of whether or not Helen J. Whiton was the widow of deceased had ever been raised by any one in any preliminary stage of the proceedings in the county court. On the contrary, in papers filed by the heirs, she is described as "Helen J. Whiton, widow of John F. Whiton, deceased." There is no showing that the administrator ever collected any money as rent from the widow, nor does it appear that any request was ever made to him by the heirs to take possession of the property or to collect rents. The record shows that the heirs knew that Helen J. Whiton claimed to be the owner of the property, and that they were litigating this claim. There was no need to sell the property to pay debts, and, so far as we can gather from the record, the administrator seems to have tacitly yielded any right he had to the possession of the real estate during administration to the heirs and the widow so that the real parties in interest might fight the matter out themselves. Under these circumstances, we are of opinion that the question of whether or not Helen J. Whiton is the widow of the deceased, and whether or not she is entitled to a homestead interest in the undivided one-half of the hotel property, or to the bene-

ficial interest in the remainder of the real estate by virtue of a trust, cannot be litigated upon the narrow issue presented here, whether the administrator should be charged with rent of the premises the title of which is in dispute. We think the district court was warranted in overruling this objection, and affirming the judgment of the county court.

We cannot undertake in this case to examine the record and determine the issues in the partition case. While the proceedings in this case in both county and district courts seem to have been somewhat irregular and the record is confused, we find no substantial error therein, and the judgment of the district court must be

AFFIRMED.

HANNAH BRYANT, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED MARCH 28, 1910. No. 15,962.

1. **Witnesses: PRIVILEGED COMMUNICATIONS.** A statement of fact or opinion expressed by a physician to a patient in the course of a professional visit, based upon a relation of facts by the patient, or upon a physical examination by the physician, is a part of the same transaction, and is as much privileged as the facts or statements of the patient on which it is based.

2. ———: ———: **WAIVER.** A waiver of the privilege or benefit of the protecting statute is a waiver of the disqualification of the physician as to the whole transaction, and not as to a part of it only.

3. **Insurance: FALSE REPRESENTATIONS: EVIDENCE.** Where an issue is made as to false representation in an application for life insurance as to good health and freedom from disease, knowledge by the applicant at the time that he is or has been afflicted with tuberculosis of the lungs or tuberculosis of the bones of the wrist is a material matter, which the defendant is entitled to prove by any competent evidence.

4. ———: ———: **EFFECT.** "An incorrect or untrue answer in an application for life insurance in reference to matters of opinion or judgment will not avoid the policy if made in good faith and

without intention to deceive," but "an untrue answer in an application for life insurance in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk will avoid the policy." *Royal Neighbors of America v. Wallace*, 73 Neb. 409.

5. ———: ———: MATERIALITY. Evidence that the applicant when seeking medical advice was told by his physician that he was suffering from tuberculosis is material upon the issue whether the statements in the application were made honestly and in good faith, and is admissible when the privilege is waived.

6. Evidence: ADMISSIBILITY. In order to avoid needless expense and delay, where evidence is in the form of depositions, and the court upon inspection can see that, while the form of question may be technically objectionable, yet the answer furnishes proper evidence, it would facilitate the administration of justice to heed substance rather than form, overrule the objection, and admit the testimony.

7. Trial: INSTRUCTIONS. Instructions which state conflicting propositions of law and tend to confuse the jury are erroneous.

8. ———: ———. An instruction which withdraws from a jury all defenses but one, where there is evidence tending to prove another defense pleaded, is erroneous.

9. ———: ———. Other instructions examined and criticised.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

Benjamin D. Smith, Willis E. Reed and *Thomas S. Allen*, for appellant.

William V. Allen and *William L. Dowling, contra.*

LETTON, J.

Action upon a benefit certificate issued by the defendant, a fraternal beneficiary association. No question is made as to the issuance of the certificate and the death of the assured, but the payment is resisted upon the ground that the application, certificate and by-laws constitute the contract, and that the assured made false answers to certain questions in the application which were material to the risk. The questions and answers

referred to are as follows: "14. (*a*) Have you, within the last seven years, been treated by or consulted any person, physician or physicians in regard to personal ailment? No. * * * 17. Are you now of sound body, mind, and health, and free from disease or injury, of good moral character and exemplary habits? Yes. * * * 33. (*a*) Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms? Consumption. No. Habitual coughing. No. Lungs. No." The reply alleges that the assured made general statements to the examining physician, who was the agent of defendant, from which statements the answers were written out in the application by the medical examiner, and that the same are not the answers made by the assured, and that the answers made to the physician were merely expressions of opinion, and were not intended as warranties.

The assured, on January 16, 1907, when he made the application, was a little over 30 years of age. In August, 1904 or 1905 (the evidence does not clearly indicate which year), he sprained his wrist while driving, and soon after hurt it again. His widow testifies that in September, 1905, he saw a physician in regard to this injury, and that in May, 1906, he went to Omaha to be operated upon.

In the application the following waiver of privilege is found: "I hereby expressly waive for myself and my beneficiary or beneficiaries the privilege or benefits of any and all laws which are now or may be hereafter in force making incompetent the testimony of or disqualifying any physician from testifying concerning any information obtained by him in a professional capacity. And I further expressly waive for myself and my beneficiary or beneficiaries the provision of any law, and the statutes of any state, now in force or that hereafter may be enacted, that would, in the absence of this agreement, modify or conflict with my contract with this society, or cause it to be construed in any way contrary to its express lan-

guage." This was treated by the trial court as an effective waiver of the privilege of the assured as to any communications by him to the examining physician, but, as will be hereafter shown, not as a complete waiver of all that was said by patient and physician at the time of the physical examination.

Dr. Long testifies that about January 25, 1905, he was consulted by the assured with reference to the injury to his wrist, and that, upon making an ocular and tactual examination, he diagnosed the condition as tuberculosis of the bones of the wrist joint. He was then asked whether he told Mr. Bryant at that time what he was suffering with. The plaintiff objected to the question "as incompetent, irrelevant and immaterial, because no proper foundation has been made, because the relation of physician and client existed at the time, and the communication is privileged and could not be waived by Mr. Bryant in advance." This objection was sustained by the court, to which ruling the defendant excepted. The defendant then offered to prove the fact sought to be elicited, which was objected to, and the objection sustained. The witness then testified that from the examination and diagnosis he then made he was of opinion that tuberculosis must have existed in the system before that time.

Dr. A. P. Condon of Omaha testified that he was a practicing surgeon, that he became acquainted with the assured in June, 1905, that at that time Mr. Bryant had a tubercular inflammation of the wrist joint and carpal bone, that the bones and joints were diseased to such an extent that it became necessary to amputate the arm just above the wrist. His evidence was taken by deposition, and the record shows the following: "Q. 23. You may state now whether or not at the time you made this examination, or at the time you performed the operation, you explained to Mr. Bryant the nature of his ailment? A. I don't remember, but I do always explain to my patients the nature of their ailments. Q. 24. And what is

your best judgment as to whether or not you told him at this time that he had tuberculosis of the wrist? A. I am sure I did, because I used that as an argument for the amputation." Plaintiff objected to all that part of the answer to question 23 after the words, "I don't remember", as incompetent, irrelevant and immaterial, not a statement of facts, which objection was sustained. Objection was also made to question 24, "because the same is incompetent, irrelevant and immaterial, and no foundation laid", which objection was sustained. Defendant excepted to both rulings.

Dr. Bush testified that about March 10, 1907, he was consulted by the assured at Sumner, Nebraska, and that at that time he was suffering from tuberculosis of the lungs. Dr. Jones testifies that he was present at the amputation of the arm, that the disease was tuberculosis of the wrist, that on March 23, 1907, he was called to attend Mr. Bryant, that he then had acute miliary tuberculosis of the lungs. The court, holding the view that the applicant had by the written waiver in the application waived the statutory privilege as to confidential communications to his physician, permitted Dr. Smart to testify that he had been consulted by Bryant one or two years before his death, and that he then diagnosed his ailment as tuberculosis of the lungs, but excluded testimony offered that the witness told Bryant at that time that he had this disease. The court said in this connection: "I will state, so far as that waiver is concerned, it does not require you to divulge any communication which you made to your patient, simply information which you received of the condition in which you found him; and, to the extent of any communication which you made to him, it would be a privileged communication which has not been waived." This seems to have been the reason for the ruling as to all evidence of like nature.

The evidence of some of the physicians is to the effect that germs of tuberculosis are present in about 78 per cent. of people generally, that a person may carry these

germs all his life and die in the ordinary course of nature, and not from tuberculosis. The testimony of Dr. Baker, examining physician of the defendant, is that at the time the examination of Bryant was made by him it would have been impossible to determine whether or not he was infected with tuberculosis without making a microscopical examination of some of the tissues, and that from all external appearance he was in perfect health. He also testifies that, had he known the facts as to the former tuberculous condition, he would have rejected the application. The testimony further shows that about the 20th of February, 1907, the assured moved from Madison to Sumner, Nebraska, that the weather was at the time exceedingly inclement, snowy and cold, that he then caught cold, was hoarse, and from that time on suffered from a severe cold in the throat and lungs, that he consulted physicians in March for this trouble, and that he died on the 24th of May thereafter from acute tuberculosis of the lungs.

The application shows the following as to the amputation: "16. (*a*) Have you ever had any local disease, personal injury, or serious illness? Yes. (*b*) If so, explain fully, giving dates. Had hand amputated 2 years ago because of an injury. (*c*) Was recovery complete? Yes. * * * 30. (*a*) Have you ever undergone a surgical operation? Yes. (*b*) If so, when? June, 1904. (*c*) Give character of operation. Amputation of hand. (*d*) Was recovery complete? Yes. (*e*) Give names and addresses of attending surgeons and physicians. A. P. Condon, Omaha." And also a repetition of the same information on another page.

The defendant contends, first, that the court erred in refusing to permit the physicians who attended Bryant prior to the time he became a member of the society to state whether or not each told him at the time of the consultation that he had tuberculosis; and, second, that the court erred in giving and refusing certain instructions.

As to the refusal to permit evidence that Bryant was

told by his physicians that he had tuberculosis: The offered evidence by Dr. Condon to the effect that he told Bryant at the time of the amputation of his hand that he was suffering from tuberculosis of the wrist was apparently excluded upon the same theory as that of the other doctors, that the communication from the physician to the patient was a privileged one, and had not been waived. We cannot take the same view as the learned trial court. A statement of fact or opinion expressed by a physician to a patient in the course of a professional visit, based upon a relation of facts by the patient, or upon a physical examination by the physician, is as much a privileged communication as the facts or statements upon which it is based. It is a part of the same transaction, and if the statute excludes the facts disclosed by the patient, it must equally exclude the statements and the opinions, expressed or unexpressed, of the physician, if its protection is to be of any avail. If the physician is permitted to disclose what he said to the patient, the patient's privilege to prevent the disclosure of a communication by him to the physician or the result of an examination would be of little use, for by indirection a disclosure of the nature of the disease would in many instances be made. *Sovereign Camp, W. O. W., v. Grandon*, 64 Neb. 39; 4 Wigmore, Evidence, sec. 2384, and note; *Jones v. Preferred Bankers Life Assurance Co.*, 120 Mich. 211; *Nelson v. Nederland Life Ins. Co.*, 110 Ia. 600; *Smart v. Kansas City*, 208 Mo. 162, 14 L. R. A. n. s. 565. A waiver of the privilege or benefit of the protecting statute is a waiver of the disqualification of the physician as to the whole transaction, and not as to a part of it only. In view of the statements in the application, the knowledge of his condition by the applicant was a material fact in the case, and one which the defendant was entitled to prove by any competent evidence within its reach. If the applicant had no knowledge of the fact that his lungs were afflicted with tuberculosis or that it was tubercular disease of the bones of the wrist that rendered

necessary the amputation of his arm, and the answers to the questions in the application were not made as absolute statements of facts, but as matters of belief or opinion and as to which he might be honestly mistaken, then, under the former decisions of this court, the answers were mere representations, and his beneficiary might recover if they were made honestly and in good faith. *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842; *Modern Woodmen Accident Ass'n v. Shryock*, 54 Neb. 250; *Royal Neighbors of America v. Wallace*, 64 Neb. 330, 66 Neb. 543; *Bankers Union of the World v. Mixon*, 74 Neb. 36; *Modern Woodmen of America v. Wilson*, 76 Neb. 344; *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 11 L. R. A. n. s. 981, and note.

If the evidence should prove, however, that he had consulted reputable physicians as to his condition, and that he had been told by them that he was suffering from such an insidious and dangerous disease as tuberculosis at a time so near the time of making the application as to rebut and repel the idea of forgetfulness or good faith on his part, the concealment of such a fact, so material to the risk, and one that, if known, his application would have been rejected, would avoid the contract. *Royal Neighbors of America v. Wallace*, 73 Neb. 409; *Ætna Life Ins. Co. v. Rehlaender*, 68 Neb. 284, and cases cited. In Judge SEDGWICK'S opinion in the *Wallace* case (73 Neb. 409) the distinction is clearly pointed out, and the proper rule announced, to which doctrine we adhere.

The offered evidence would tend to show notice and knowledge by the applicant of the actual facts as to his condition before he made the representations. It was material to the issues, and, since the privilege was waived, was admissible. The two questions above referred to propounded to Dr. Condon were objectionable in form, and the answer to the first, except as to the portion admitted, was properly excluded. However, the evidence was in the form of a deposition, the questions and answers were within the power of inspection by the court,

and, while question 24 was objectionable in form, the answer elicited was pertinent. This being the case, we think the objection should have been overruled and the evidence admitted.

In order to avoid needless expense and delay, where evidence is in the form of depositions, and the court upon inspection can see that, while the form of question may be technically objectionable, yet the answer furnishes proper evidence, it would facilitate the administration of justice to heed substance rather than form, overrule the objection, and admit the testimony. The exclusion of proof tending to show that the assured knew he had been ailing with tuberculosis before he made the application, we think was prejudicially erroneous.

Complaint is made as to the giving and refusal of a number of instructions. Instruction No. 12 is as follows: "You are instructed that in the medical examination, which was a part of said Ellard E. Bryant's application for said benefit certificate, said Ellard E. Bryant's answers disclose that in the month of June, 1904, he had undergone a surgical operation for the amputation of a hand by Dr. A. P. Condon, a surgeon at Omaha, and that if you find from the evidence that the said Ellard E. Bryant had during the seven years immediately preceding the date of making such application had any knowledge that he had any other serious ailment, or had any knowledge of facts which furnish sufficient reason for him to believe that he was or might be at that time, or at any time during the seven years immediately preceding the application, afflicted with any other serious ailment or disease for which he had consulted persons or physicians, other than that for which he had consulted the said A. P. Condon, then his answer 'no' to said question, 'Have you within the last seven years been treated for or consulted any person, physician or physicians in regard to personal ailments?' would not void said benefit certificate." This instruction tells the jury that if Bryant during the seven years preceding the date of making

the application had any knowledge that he had any serious ailment, other than the amputation of the arm, or any knowledge of facts which furnish sufficient reason for him to believe that he was afflicted with any other serious ailment or disease, then his answer in the negative would not void the certificate. By this instruction the protection to the insurer which notice of former ailments would have given, if the assured had stated that he had consulted other physicians, was entirely taken away, and the question and answer were treated as being wholly immaterial to the risk. We cannot understand upon what theory this instruction can be upheld. Whether he had consulted physicians in regard to personal ailments was a proper subject of inquiry. The instruction is inconsistent with instruction No. 14, which is to the effect that if to the same question the applicant answered "no", and at the same time knew or had sufficient reason to believe that he had been afflicted by a serious ailment, other than that which necessitated the amputation, then the verdict should be for the defendant. The giving of such conflicting instructions must have confused the jury, and deprived the defendant of a correct statement of law in that behalf.

We are also of opinion that while, as the evidence stands, perhaps it was not erroneous to refuse to give instruction No. 9, requested by the defendant, with respect to the applicant's knowledge that he was afflicted with a fatal disease, the court having excluded the evidence of the physicians tending to show such knowledge, still, if such evidence is offered and received at another trial, an instruction along this line, if the facts warrant it, is one which the defendant is entitled to have given to the jury, if it so requests. *Royal Neighbors of America v. Wallace*, 73 Neb. 409.

With the exception of instructions Nos. 12 and 14, hereinbefore mentioned, and instruction No. 9, which limits the question of deceit to the camp examining physician, the instructions given by the court upon its own motion seem

fairly to present the issues in the case to the jury. We find no prejudicial error in the refusal to give the other instructions requested by the defendant. We doubt whether the giving of instruction No. 7 at the request of the plaintiff was proper, for the reason that there seems to be no evidence in the record upon which to base the same, and unless further evidence makes it proper it should not be given again. We believe also that instruction No. 8, requested by the plaintiff, should not have been given, because this instruction takes away from the defendant the protection afforded by the questions in the application relative to the applicant having consulted physicians for personal ailments, and specifically directs a verdict for the plaintiff, "unless the defendant shall have proved by a preponderance of the evidence that Ellard E. Bryant, the insured, wilfully misrepresented his condition of health at and before the time such certificate or policy was issued, knowing it to be different from what he stated it to be, or knowing of facts which furnished sufficient reasons for him to believe he was afflicted with some disease." This is not the only material matter in the case, and the defense should not have been so limited. We think it unnecessary to discuss the instructions at greater length, because, since the evidence will probably be different upon a new trial, some of the instructions given at this trial may prove to be inappropriate. The issues in the case are simple. If the evidence does not materially differ from that in this record, save in respect to the reception of the excluded testimony of the doctors, there is no need for long and involved instructions, since the questions of law involved have already been settled by this court.

For the errors pointed out, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

W. H. McINTYRE, APPELLEE, V. FRANK H. CUNNINGHAM, APPELLANT.

FILED MARCH 28, 1910. No. 15,949.

1. Contracts: TIME OF PERFORMANCE: CONDITIONS PRECEDENT. In determining whether stipulations as to the time of performing a contract for the sale of chattels are conditions precedent, the court will attempt to discover what the parties really intended, and if time appears, on a fair consideration of the contract and of the facts and circumstances surrounding the parties, to be of the essence of the contract, stipulations in regard thereto will be held conditions precedent.
2. Appeal: EXCESSIVE VERDICT: REVIEW. In a suit upon an account where the evidence is conflicting and counsel complain that the recovery is excessive, they should indicate in their oral or written argument the part of the record that will sustain their contention. Failing to do so, such an assignment will ordinarily be overruled.

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

Lambert & Winters, for appellant.

Montgomery & Hall and *E. R. Leigh, contra.*

ROOT, J.

This is an action for a balance due for goods manufactured by the plaintiff and sold to the defendant according to a written contract between them. Defendant counterclaimed. Plaintiff prevailed, and defendant appeals.

1. In 1905 defendant was president of the National Association of Rural Letter Carriers. Prior thereto he had devised a mail cart which he expected to sell to rural mail carriers. Plaintiff is a manufacturer of buggies, carriages, carts and wagons. Defendant, in February, 1905, conferred with plaintiff's sales agent, and on the 27th day of that month signed the following writing prepared by said agent: "Auburn, Indiana, 2-27-'05. Auburn Wagon

& Buggy Works, Auburn, Ind. Dear Sirs: Please enter my order for five hundred (500) two-wheeled carts at twenty-five dollars ($25) each, net. I hereby hand you two hundred dollars ($200) as a cash payment on this contract, and desire that the terms on the remainder be as follows: On each and every cart I order from you I will remit ten dollars ($10) and furnish you full shipping instructions. These carts are to be crated and delivered F. O. B. cars, Auburn, Indiana, at the above price, and a separate invoice sent to me covering each shipment. On the first of each and every month you will render me a statement for the carts shipped during the month, giving me credit for the amount of ten dollars ($10) paid on each cart, and the balance that will then be due on each and every cart I will pay you in cash. It is understood that I will take all of these carts within twelve months from May 1st, 1905, and settle for the same in full within that time and in accordance with the terms above. These carts are to be built according to the sample sent you, and according to our verbal understanding with each other when I was at your factory, and it is also agreed that such minor changes as we have this day decided upon are to be made. Bodies are to be painted white, gears gold stripes and white, lettering to be as follows: Association. U. S. Mail, R. F. D. Route No. —. Please start on this order at once, and be prepared to ship these carts as promptly as you possibly can after I send you orders. Yours truly, —. P. S. If these wagons are ordered with the better grade of wheels an extra charge of $2.50 is to be made. See copy of guarantee, which I understand you place on all of these carts. F. H. Cunningham."

Prior to May 1, 1906, defendant sent plaintiff orders for 171 carts, 51 of which were shipped subsequent to that date. May 2, 1906, plaintiff wrote defendant that, owing to an advance in the price of raw material, he would not fill any more orders for carts at the old price. May 8 defendant sent plaintiff 11 orders for carts, and inclosed checks aggregating $110. May 10 plaintiff re-

turned the checks and orders, again stating he would not fill any more orders at the old price. He also requested defendant to remit sufficient funds to pay in full for the carts ordered before that date, but not shipped. Defendant did not comply with this demand, and plaintiff shipped the carts without prepayment therefor. About May 16, 1906, defendant, after an examination of his accounts at plaintiff's factory, claimed and was given credit for commission on carts sold by plaintiff direct to carriers, but made no complaint because plaintiff had refused to furnish defendant any more carts at $25 a vehicle.

The trial court instructed the jury that the defendant was not entitled to recover for the plaintiff's refusal to fill orders sent subsequent to May 1, 1906. Defendant's counsel specifically limit their complaint to this attitude of the court and the alleged failure of the jury to give credit for the $200 paid February 27, 1905. No other features of the case will be discussed.

Defendant now insists that time was not of the essence of the contract, and that plaintiff's refusal to fill orders sent him subsequent to May 1, released defendant from the burden of sending shipping directions for, or advance payments upon, the 321 carts. Plaintiff contends for the converse of these propositions. It may be the contracting parties could have stated more definitely the terms of their contract, but we think their intention may be ascertained with reasonable certainty. The order in the first instance is for 500 vehicles, but subsequently it is qualified so that the carts are to be delivered only according to shipping instructions to be sent by the defendant. This condition of the contract prevented plaintiff from delivering carts except as the defendant might designate, and the defendant's agreement to take all of the carts within 12 months of May 1, 1905, should be construed to amount to an agreement on his part to furnish plaintiff within that time shipping instructions for all of these carts so they might be delivered within or soon after the close of the

year. The defendant had also agreed to advance $10 upon each cart ordered. It would manifestly be unreasonable to hold that the plaintiff undertook to bind himself to keep on hand for an indefinite period for defendant's use carts of a peculiar design not adapted for the general trade, but rather, it seems to us, the limitation of 12 months within which defendant bound himself to take the carts was intended for plaintiff's protection, and that time was of the essence of the contract. *Higgins v. Delaware, L. & W. R. Co.*, 60 N. Y. 553; *Townes v. Oklahoma Mill Co.*, 85 Ark. 596, 109 S. W. 548; *Russell v. Witt*, 38 Ind. 9.

It is suggested that the plaintiff did not have the 321 carts ready to tender, but was in arrears in filling the orders on hand, May 2, 1906. All of these orders were filled with as much dispatch as could be expected, the character of the goods being considered. By the terms of the contract between the parties the plaintiff had no right to tender a single cart or any number of carts, so as to create an obligation on the part of the defendant to pay therefor, until Cunningham had ordered such cart or carts, and the right of Cunningham to order the vehicles expired with the 2d day of May, 1906. We are of opinion that the district court was right in holding that defendant should have ordered the 321 carts and paid $10 a vehicle before May 2, 1906, in order to hold plaintiff liable for a nondelivery thereof.

2. Defendant contends he has not been given credit for the $200 deposited with plaintiff February 27, 1905, but he has failed to refer to any evidence in the bill of exceptions to sustain his contention. The testimony and the exhibits cover over 300 pages of the bill of exceptions. We find reference in the defendant's testimony to many checks and other documents not introduced in evidence, but nowhere has he prepared a statement of his account with plaintiff. Defendant admitted that the last 51 carts and some extras furnished him entitle plaintiff to a credit of $1,384.75. The defendant testifies that he should be

credited with $510, the aggregate of 51 checks of $10 each, the $200 deposit referred to, and $60 for commissions on carts sold by the plaintiff direct to mail carriers. Deducting these credits, there would be a balance of $614.75 due the plaintiff on account. The verdict of the jury was for $670.85 principal. Plaintiff's bookkeeper testifies that the commission was credited on the account preceding the charge for the 51 carts, and, if this were done, the balance due the plaintiff, according to defendant's testimony, would exceed the verdict by $3.90. It is true one item of counterclaim was submitted to the jury, but the verdict does not inform us whether they did or did not find in defendant's favor thereon. In the state of the record and the briefs the recovery will not be held excessive.

The judgment of the district court is right, and is

AFFIRMED.

LETTON, J., not sitting.

NEBRASKA MATERIAL COMPANY, APPELLANT, V. FRANK R. SEELIG, APPELLEE.

FILED MARCH 28, 1910. No. 15,963.

Mechanics' Liens: FORECLOSURE: PLEADING: EVIDENCE. If the defendant in an action to foreclose a mechanic's lien for material furnished a contractor files a general denial, it is incumbent upon the plaintiff to prove that his sworn account for a lien was filed in the office of the register of deeds within 60 days of the date he furnished some part of the material referred to in his account, and the production of the original verified account will not satisfy the law upon this subject.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Samuel J. Tuttle and *Talbot & Allen,* for appellant.

M. M. Starr and *T. F. A. Williams, contra.*

ROOT, J.

This action is prosecuted to foreclose a mechanic's lien for material alleged to have been furnished a contractor for the construction of a sidewalk. Defendant prevailed, and plaintiff appeals.

The defendant filed a general denial, coupled with a statement that, notwithstanding he denied all liability, he was willing to pay $8.50 for material used in constructing a sidewalk within his lot lines. The district court made a general finding in favor of defendant. There is not a scintilla of evidence in the record to show when the improvement in question was completed, nor to prove the day, month or year any of the material in question was furnished or delivered. The verified account filed with the register of deeds was received in evidence, and defendant's counsel admitted in open court that the material used in constructing the sidewalk had been delivered by plaintiff, but the vital fact, that a part of the material had been furnished within 60 days of November 28, 1906, the day the account was filed, was not admitted, and cannot be proved by the production of that account. No judgment other than the one rendered can be sustained upon the record. *Urlau v. Ruhe,* 63 Neb. 883; *Sabin v. Cameron,* 82 Neb. 106.

The judgment of the district court, therefore, is

AFFIRMED.

LETTON, J., not sitting.

RICHARD HALL, APPELLANT, V. BAKER FURNITURE COMPANY, APPELLEE.

FILED MARCH 28, 1910. No. 16,325.

1. **Appeal:** LAW OF CASE. On an appeal to this court the determination of a question directly involved therein becomes the law of the case and ordinarily will not be departed from on a subsequent appeal in the same case.

2. **Corporations:** TAKING OVER PARTNERSHIP ASSETS: RIGHTS OF CREDITORS. The general rule that equity will not permit a corporation to receive all of the assets of an insolvent partnership in consideration of the corporate stock, and hold such assets free from the claims of the partnership creditors, does not apply where a corporation is formed by such partners, and a third person, who, in good faith and in the well-grounded belief that the partnership debts are satisfied, invests a large sum of money in such reorganization and receives corporate stock therefor; but the creditors will be permitted to seize only the partners' interest in said corporation to satisfy such debts.

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

E. C. Strode and *Hall & Stout,* for appellant.

Brome & Brome and *F. A. Brogan, contra.*

ROOT, J.

This is an action in equity to reach the alleged assets of Charles Shiverick & Company, a partnership, and to charge the defendant, a corporation, with a partnership debt. The defendant prevailed, and the plaintiff appeals.

This case has been heretofore considered on a petition in error. *Baker Furniture Co. v. Hall,* 76 Neb. 88, 93. On that hearing we did not try the cause anew, but found that the evidence did not sustain the judgment of the district court and remanded the cause for further proceedings. The case is now before us upon appeal and will be tried *de novo.*

Counsel for the plaintiff contend that we did not accurately state the facts or correctly announce the law in our former opinion. We do not think there is any material variance between the facts and our statement in regard thereto, but in view of counsel's complaint we shall restate the facts as they appear to us.

In 1870 Charles Shiverick founded the Shiverick furniture business in Omaha. In 1889 Arthur Shiverick became interested in that business. Subsequently, the exact date not being shown, it passed into the hands of Arthur Shiverick and Ella C. Shiverick, and they transacted business under the firm name of Charles Shiverick & Company. In 1892 the plaintiff loaned to Charles Shiverick & Company $6,000, and received as evidence of that debt the promissory note of Charles Shiverick & Company and Arthur Shiverick, payable two years from date. In 1893 the partnership suffered a loss by fire. About that time business depression diminished its sales, and subsequently it became seriously involved financially. In October, 1899, in addition to plaintiff's claim, the firm owed Joseph L. Baker $5,700, the First National Bank of Omaha $34,000, various relatives $27,000, and for merchandise over $6,000. The evidence is conflicting concerning the value of the firm's assets. Arthur Shiverick, a witness hostile to the defendant, testifies the assets were worth $27,000 cash, but we think, making due allowance for taxes subsequently canceled, and for shrinkage in the value of book accounts and bills receivable, the firm's property was not worth to exceed $25,000, and probably it would not have sold for that amount at forced sale. The value of the good will of the business is not included in this estimate. Baker was pressing the Shivericks for money, and was told by Arthur Shiverick that, if the firm's debts were satisfied, its business could be managed so as to return a great profit. Shiverick also said he could secure the release of his relatives' claims; for $5,000 the bank would satisfy $24,000 of the firm's obligations and take the notes of the Shivericks for the remaining $10,000

due it; that $5,000 would pay all but about $1,100 due for merchandise, and the firm would then owe no other debts. Arthur Shiverick prepared and submitted to the bank and to Baker a written statement purporting to show all of the firm's obligations as above set forth. Thereupon the First National Bank, Baker and the members of the Shiverick firm signed a contract, wherein, in consideration for their mutual promises, it was agreed that the Shivericks and Baker should form a corporation, to be known as the Shiverick Furniture Company, to take over the assets and the business of the partnership; Baker should pay the bank $5,000, it would take the individual obligations of the Shivericks for $10,000, secured by a mortgage upon Texas real estate owned by Mrs. Shiverick, and satisfy the remainder of its claim against the firm; the relatives were to satisfy their claims against the Shivericks; Baker was to furnish $5,000 to be used in paying the firm's bills for merchandise, and he was to release his claim against the firm. Baker was to have 384 shares of the capital stock of the corporation. The Shivericks guaranteed Baker a dividend of 10 per cent. per annum on 250 of said 384 shares. To secure their guarantee and any advances Baker might make them in the future, the Shivericks assigned to him 115 shares of the corporate stock. Baker gave the Shivericks an option to purchase for 50 cents on the dollar 115 of the 384 shares of stock absolutely transferred to him, and it was agreed that the dividends declared upon the stock held by Baker as security should be placed to the credit of that stock for not to exceed three years, or during that period until the Shivericks should exercise their option to purchase. All of these arrangements were carried out. The partnership transferred all of its assets to the corporation. One share of capital stock was issued by the corporation to Baker, 499 shares were issued to the Shivericks and by them transferred to him. The Shivericks and Baker, by the terms of the articles of incorporation of the Shiverick Furniture Company, became its directors and officers. Arthur Shiverick

was given charge of the business and paid a salary of $300 a month.

While these negotiations were being carried on, and until after the deal had been consummated, the plaintiff was in Europe. He learned the latter part of 1899 that the corporation had been formed, but testifies he did not know until 1902 that Baker, and not the Shivericks, controlled the corporation. Mr. Hall also testifies that Arthur Shiverick said the new concern was making money and would pay Hall's note. Plaintiff is a lawyer engaged in the practice of his profession, and in 1899, and for some time thereafter, was a member of the firm of Hall & McCulloch. This firm had rendered the Shivericks professional services and had not been paid therefor. Baker was not apprised of that fact when he entered into the contract with Shiverick and the bank. There is no entry in the Shivericks' books to indicate the debt to Hall. The books had never been balanced and Arthur Shiverick informed Baker they were not correct; but Shiverick stated that the debts of said firm were all described in his written statement made to Baker and the bank at the time of the reorganization. The obligation to Hall is not referred to in that statement.

Up to May 1, 1901, Baker advanced to the Shivericks for their private use about $1,200. The Shivericks did not pay the bank any interest accruing upon their notes for $10,000, and in 1900 it brought suits and recovered several judgments in the county court and in the district court for Douglas county against them. Thereafter the bank garnished the Shiverick Furniture Company. Hall & McCulloch represented the Shivericks in said litigation and about that time took from Arthur Shiverick an assignment of his salary due and to become due, collected his earnings for some months, and repaid the greater part to him. Baker in the meantime had loaned the corporation considerable money and had indorsed its notes. About the 15th of June, 1901, Baker purchased all of the bank's judgments against the Shivericks, amounting, with

interest, to more than $12,000. While said garnishment proceedings were pending, Baker learned that Hall claimed to be a creditor of the Shivericks, and in May, 1902, inspected the Shiverick note in Hall's office. Thereupon Baker caused the articles of incorporation to be amended so as to change the corporate name to the Baker Furniture Company and to increase the number of directors. Two of Baker's employees were elected as directors, Shiverick was ousted, and Baker took control of the business. In October, 1902, Baker commenced an action in equity in the district court for Douglas county to foreclose his lien upon the Shiverick stock. The Shivericks were represented by Hall & McCulloch in that action, and in their answer filed in December, 1902, asserted that Baker had paid but $1,250 for the bank judgments, alleged other facts to avoid their contract with Baker, and asked that Baker be decreed to return to them one-half of the corporate stock upon payment of the money advanced by Baker to them as individuals subsequent to said incorporation, and $1,250, with interest on said sums. April, 16, 1903, the court found that the Shivericks were jointly liable to Baker in the sum of about $12,000, and severally liable to him in the further sums of $9,078 and $4,995, and directed their interests in the stock of the defendant corporation to be sold to satisfy those sums. An appeal was prosecuted to this court, and the judgment of the district court was affirmed February 2, 1904, without an opinion, because the appellants did not brief their case. October 11, 1904, the stock was sold by the sheriff and purchased by Mr. Baker for $3,050. In February, 1903, the Shivericks, as individuals, and Charles Shiverick & Company confessed judgment in favor of the plaintiff herein. An execution was thereafter issued and returned *nulla bona*. This action was commenced in July, 1903.

Counsel for the plaintiff argue that the Shiverick Furniture Company was a mere continuation of the partnership of Charles Shiverick & Company; that there was no consideration for the transfer of the assets of the part-

nership to the corporation; that the parties who organized the corporation agreed to pay the partnership debts, and the corporation, by its manager, agreed with Mr. Hall to pay the note given by the Shivericks to him.

The third and fourth propositions are not strongly urged and cannot be maintained. There is a statement in the contract that the Shivericks "will and shall be absolutely freed from all indebtedness to all parties, except on said notes to said bank, aggregating ten thousand dollars ($10,000), and such other notes and evidences of indebtedness as it now holds, and except an indebtedness of said Ella Shiverick to said Baker not exceeding one thousand dollars ($1,000) which she may hereafter owe to him for moneys which he may advance on her behalf." This statement, however, should be construed in the light of the representations made by the Shivericks, the undoubted understanding of Baker based on those representations, and with regard to the parties named in the agreement. Baker never intended to agree, and did not agree, to pay any debts, or that the corporation, when formed, should pay any debts except those specifically mentioned in the contract. Mr. Hall testifies that Arthur Shiverick said the corporation would pay Hall's note, but Shiverick did not have authority to bind the defendant by that statement, and it has never agreed to assume that debt.

The first and second propositions will be considered together. This is an action in equity, and mere forms will be disregarded. If the evidence discloses that the Shivericks and Mr. Baker entered into a scheme to hinder, delay or defraud the partnership creditors, or any of them, in collecting the partnership debts, and that the Shiverick Furniture Company has been used as a mere cloak to cover and carry out that design, or if there was no consideration for the transfer of the partnership assets, the plaintiff should recover. On the other hand, if the transaction was honest, upon a sufficient consideration, and within the power of the parties to lawfully consummate,

the defendant should not be mulcted because, at the very instant those assets were transferred to the corporation, a cash consideration was not paid by the corporation to the partnership therefor. The law will consider the actual relations sustained by the parties to each other. All of the documents signed and acts performed in reorganizing the business of the partnership will be considered as parts of one transaction. If a sufficient consideration moved for the transfer of the partnership assets, it is not material that the bank received directly from Baker $5,000 and the creditors of the partnership received another $5,000 of his money, in the place of Baker paying the cash for corporate stock; the corporation paying the cash to the partnership, and it in turn paying that money to the Shiverick creditors.

Notwithstanding the earnest, almost violent, argument of learned counsel, we adhere to our former opinion that the corporation was not a mere successor of the partnership so as to become liable for the latter's debts. It is true that the purpose of the parties was to permit the Shivericks to continue in business; that the corporation succeeded to that business and received all of the partnership assets. It is equally true that the Shivericks did not continue, and it was not intended they should continue, in business alone. It is also a fact that Joseph Baker's money satisfied the greater part of the firm's outstanding debts for merchandise, dispelled $34,000 of the firm's indebtedness, and gave the Shivericks an improved standing in the financial world. From the moment that Joseph Baker parted with his $10,000 it was impossible for the Shivericks to place him in his former situation. Had the Shivericks merely incorporated, and without consideration transferred the partnership assets to the corporation, the levy of an execution by a partnership creditor upon those assets, or the recovery of a judgment against the corportion by a like creditor and its satisfaction by process of law, would prejudice no person. And this fact of a substantial consideration moving from a third party

acting in absolute good faith distinguishes the instant case from those cited by learned counsel for the plaintiff. Counsel insist, however, that the case at bar is ruled by *Reed Bros. Co. v. First Nat. Bank*, 46 Neb. 168, and pointedly complain because we did not cite or distinguish that case in our former opinion. In the cited case a partnership transacted business under the name and style of "Reed Bros. & Co." Subsequently a corporation was formed under the name of "Reed Bros. Company." E. L. Reed, a member of the firm, took a bill of sale to himself of all of its assets in consideration of his guarantee to pay its debts, and transferred those assets to the corporation in consideration of its corporate stock. Mr. Reed then divided the greater part of that stock among the members of the partnership in such proportion as their interests therein bore to the aggregate of the assets of the partnership. A Mr. Bellows gave his note for ten shares of the corporate stock, but his obligation and the stock were subsequently canceled. R. S. Wilkinson was a creditor of the partnership, and several shares of the corporate stock were issued to his wife in payment of his claim. One of the partners paid Reed $690 for stock and received other stock for his partnership interests. The corporation, Reed Bros. Company, was formed in April, 1900. The partnership was then indebted upon its promissory notes to the First National Bank of Weeping Water. Those obligations were renewed until July, 1891, and then the corporation gave its notes in renewal of the partnership notes. In a suit upon these bills, the corporation denied having executed the instruments, but the trial court held against it upon that issue, and we affirmed that finding. In discussing the consideration moving to support the notes, we had occasion to say, and did say: "Where a partnership engaged in a general mercantile business, in straitened and failing circumstances, incorporated, and the assets and business of the partnership were transferred or assigned to the corporation and appropriated to its objects and purposes, the business of the

partnership being continued by the corporation, the corporation was presumptively liable for the partnership debts." There was no substantial consideration moving from any party to the transaction except Leach, and he had actual knowledge of the partnership debt to the bank; in fact, he managed the partnership business and signed the earlier notes for the partnership and as surety, so that he did not enter the deal with the partnership and the corporation as an innocent purchaser. It was held upon the evidence that the corporation was a mere continuation of the partnership and liable for the notes in suit.

Counsel also cite *Wilson v. Æolian Co.*, 72 N. Y. Supp. 150, but in that case one corporation absorbed the assets of another. The court say those assets constituted a trust fund for the payment of corporate creditors, could be traced into the possession of the corporate successor, and it be held liable therefor. In the instant case the assets were partnership property.

In *Ætna Ins. Co. v. Bank of Wilcox*, 48 Neb. 544, it is held that a partnership does not hold its property in trust for its creditors. The members of a partnership may be sued for its debt, and all of their property not exempt seized to satisfy the judgment; but when corporate assets are dissipated a judgment against it is valueless. That fact renders *Wilson v. Æolian Co., supra,* and many of the cases cited by counsel, valueless in the case at bar.

Our former opinion recognizes plaintiff's right to seize the Shivericks' interest in the corporate property, or any interest they may have in the corporation, and concedes his right to inquire into the proceedings instituted and methods pursued by Baker whereby the Shivericks were divested of that interest. The proof before us is conclusive that the Shivericks' interest in the corporation has been lawfully extinguished. Counsel for plaintiff argue that Baker paid but a nominal sum, $800, for an assignment of the bank's judgments aggregating $12,000; but we do not recall any evidence to support that assertion, nor is the fact material. The judgments represented an

indebtedness originally owing by the partnership, and thereafter assumed by the individual partners. No one has suggested the partnership did not receive every dollar represented by the principal of that debt. The bank's equities were as great as are those of the plaintiff, and whatever equities it had were transmitted by assignment to Baker. "Equity aids the vigilant and not those who slumber upon their rights." Mr. Hall made no move in court to collect his claim from the Shivericks until after Baker instituted his action to foreclose their interests in the stock he held as collateral, and the instant cause was not commenced until the district court for Douglas county had ordered that stock sold to satisfy judgments aggregating over $20,000. It may be that personal considerations for the Shivericks, arising from years of friendship and intimate relation, stayed the plaintiff's hand for nearly a decade after his note matured. While his long forebearance may be commended in the forum of friendship, it cannot be accepted in a court of justice as a reason for depriving Mr. Baker of the money he invested in good faith, or of the rights of the bank, purchased and paid for by him.

We have not forgotten that this action is against the corporation, and not Mr. Baker individually; but he owns all of the corporate stock, and we cannot and ought not to shut our eyes to that fact. *Home Fire Ins. Co. v. Barber,* 67 Neb. 644, 665. We are under obligations to counsel for the respective parties for their written and oral presentation of the facts and the law. We have requested briefs and arguments upon features of the case not mentioned in this opinion, and counsel have responded cheerfully and diligently. Upon final consultation we concluded those propositions do not control and should not influence the case. Upon mature consideration we hold that the law of the case as announced in our former opinion is correct and rules the present appeal.

The evidence produced upon the last trial does not

justify a judgment for the plaintiff, and for that reason the judgment of the district court is

AFFIRMED.

BARNES, J., not sitting.

STATE, EX REL. B. K. BUSHEE, RELATOR, V. WILLIAM G. WHITMORE ET AL., RESPONDENTS.

FILED MARCH 28, 1910. No. 16,427.

REHEARING of case reported in 85 Neb. 566. *Judgment modified.*

ROOT, J.

The state treasurer and the respondents request us to make our opinion more definite and certain. The only brief filed in support of the application was prepared by the respondents, and a considerable part of their argument is devoted to the proposition that experimental stations ought not to be considered in connection with the college of agriculture. The argument is not without merit, but should be presented to the legislature rather than to this court. We reiterate that the subject of education has been delegated to the legislative branch of the government, and the maintenance of the stations under consideration is not so foreign to the subject of education as to justify the courts in sustaining the respondents in refusing to obey the legislative will. It is suggested that the regents and the treasurer do not agree concerning the fund out of which the appropriations for these stations should be paid. The respondents argue that the money should not be taken from the 95 per cent. of the 1 mill levy appropriated by chapter 192, laws 1909, and that since the legislature in the general appropriation bill sought to relieve the temporary university fund of the

burden of these appropriations, and the governor frustrated that intent by vetoing these items in the general appropriation bill, we ought to hold that the appropriations should be paid from the remaining 5 per cent. of the 1 mill levy.

It will be observed that the legislature has made most of its appropriations for the use of the university so as not to hamper the regents in maintaining that institution. But in the matter of installing and maintaining these stations, the regents are not vested with discretion, except that they need not expend the $20,000 appropriated if a smaller amount will carry out the purpose of the legislature. It is true that the legislature attempted to relieve the temporary university fund from the burden of these appropriations, but the legislature knew it was within the power of the governor to veto the items in the general apropriation fund for the benefit of the experimental stations, and, with that knowledge, did not amend chapters 143 and 144, laws 1909, so as to exclude the appropriations therefrom. It would seem, therefore, that the legislature intended the appropriations to be paid from the temporary university fund, if the governor was not willing that they should be paid from the general fund.

The 1 mill levy, although a part of the temporary university fund, may not be expended unless appropriated by the legislature. The appropriation of 95 per cent. of that levy by chapter 192, *supra,* made available for the purposes expressed in that law, a sum of money equal to 95 per cent. of said levy. Chapters 143 and 144, *supra,* set apart from the temporary fund $20,000, or so much of that sum as may be necessary to carry out the purposes of the legislature as expressed therein. Chapter 192 places at the disposal of the regents the money thereby appropriated, and they are vested with considerable discretion in its application. Chapters 143 and 144 not only place money in the temporary fund at the disposal of the regents, but direct its expenditure so far as may be

necessary to install and maintain the experimental stations. So it seems to us the appropriations made by chapters 143 and 144 should be preferred to those upon the same fund and couched in general terms; that the appropriations made by chapters 143 and 144 should be charged against the temporary fund, and not against any particular part thereof.

Our opinion is modified to conform to this memorandum.

JUDGMENT MODIFIED.

GEORGE T. HAMILTON ET AL., APPELLEES, V. WILLIAM V. ALLEN ET AL., APPELLANTS.

FILED MARCH 28, 1910. No. 15,812.

1. Cross-Appeal: DISMISSAL. Where a full examination of the merits of an appeal shows that cross-appellants are entitled to no relief except that already granted by the trial court, a motion by appellants to dismiss the cross-appeal may be disregarded.

2. Appeal: DISMISSAL: REVIEW. On appeal from a decree in equity, failure of the trial court to dismiss the suit for misjoinder of plaintiffs and of causes of action does not require a reversal, where the record clearly shows appellants were in nowise prejudiced.

3. Attorney and Client: SUIT FOR AN ACCOUNTING: BURDEN OF PROOF. Where attorneys purchase from their clients and resell the subject matter of their employment, the burden is on them, when sued by their clients for resulting profits, to prove the original purchase price was fair.

4. ———: ———: EVIDENCE. In a suit to recover the profits made by attorneys out of an undivided half interest in land purchased from their clients, subject to a life estate, evidence of the prices realized, when the identical property was exchanged or resold at a large profit by the attorneys at various times within a few months, may be considered in determining whether the price paid by the attorneys was fair, where their witnesses testified to the changes in values in the meantime, and that the undivided interest had no market value at the time of the original purchase.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

William V. Allen, pro se.

M. D. Tyler, N. D. Jackson and *Mapes & Hazen,* for appellants.

O. A. Abbott and *James Nichols, contra.*

ROSE, J.

This is a suit in equity to require defendants to account as fiduciaries for the profits made by them out of the interests of plaintiffs in 720 acres of land in Madison county, or as trustees holding title for the benefit of plaintiffs. The realty described was formerly owned by James B. Gibbs, who died intestate without issue June 5, 1901. It seems to be conceded that, under the statutes then in force, his widow, Nancy C. Gibbs, took a life estate in all the land in controversy, and that subject thereto the title descended to six heirs, each inheriting an undivided one-sixth interest. These heirs and their relationship to intestate are as follows: George T. Hamilton, half-brother; Annie Minehart and Matilda Rodeck, half-sisters; Margaret A. Owens and Susan Beck, full sisters; Lizzie M. Mazurie, niece, the only child of a deceased sister of the full-blood. The heirs named are plaintiffs, with the exception of Matilda Rodeck, who died after the death of James B. Gibbs. Her heirs are Ida McKee, Harry Rodeck and William Rodeck, and they are plaintiffs also.

William V. Allen and Willis E. Reed, who were formerly partners as Allen & Reed, and George W. Losey and wife are defendants. Losey was administrator of the Gibbs estate, and by mesne conveyances to which the heirs were not parties acquired title to 160 acres of the Gibbs land. The petition seeks to charge him and his wife as trustees holding title for the benefit of plaintiffs.

John S. Robinson, now deceased, was attorney for the heirs of the full-blood, and during the existence of that relation bought from his clients their undivided half interest, subject to the widow's life estate, taking title in the name of Thomas F. Memminger. The property thus acquired was sold by Robinson, and after his death his clients filed claims against his estate to require an accounting. The county court rejected the claims, and from the disallowance appeals were taken to the district court, where the cases were settled by stipulation. Allen and Reed were attorneys for the heirs of the half-blood, and during the existence of that relation bought from their clients the latter's undivided half interest, subject to the widow's life estate. After the title of all the heirs had been purchased by their attorneys, the latter conveyed to the widow their interest in 160 acres accupied by her as a homestead in exchange for her life estate in the remainder of the 720 acres. Within a short time the property acquired by Allen and Reed from the heirs of the half-blood was resold at a profit. In the petition the attorneys are charged with fraud in suppressing and misrepresenting facts affecting the interests of their clients and the value of their property. Any joint liability of defendants to plaintiffs seems to rest on the following averment of the petition:

"Plaintiffs allege that said William V. Allen, Willis E. Reed and John S. Robinson, not regarding their duties and obligations as such attorneys, as aforesaid, but contriving and intending to procure title to themselves from said heirs at grossly inadequate prices, they, the said William V. Allen, Willis E. Reed, John S. Robinson and defendant, George W. Losey, entered into an agreement to procure conveyances of and from said heirs of their interest in all of said lands, to the end and for the purpose of exchanging a part thereof with the said Nancy C. Gibbs, for a conveyance, satisfaction and release of her life estate in the residue, and holding such residue for the common gain, profit, and advantage of them, the said William V.

Allen, Willis E. Reed, John S. Robinson and George W. Losey."

All charges of fraud and the conspiracy to procure from the heirs their property at grossly inadequate prices and to divide the resulting profits are denied by defendants, and in separate answers by Allen and Reed faithful performance of their duties as attorneys is alleged.

The district court upon a full hearing found, in substance, that there had been no conspiracy formed as pleaded in plaintiffs' petition; that in purchasing the interests of the heirs Allen and Reed and Robinson had no previous understanding among themselves or with the widow as to any future disposition of the property purchased; that there was no fraud or wrongdoing on the part of Losey, and that the conveyances to him were valid; that Allen and Reed were accountable for the profits made by them out of the property purchased from their clients. As to the heirs of the full-blood and Losey and wife the suit was dismissed. Judgment was entered against Allen and Reed in favor of their clients for $11,592.37. Allen and Reed appeal, and plaintiffs have filed a cross-appeal.

Two preliminary matters are presented. The first is a motion by defendants to dismiss the cross-appeal of plaintiffs. It is unnecessary to pass on this motion, since an examination of the entire record in considering the appeal of Allen and Reed has led to the conclusion that the averments upon which cross-appellants seek redress are not established by the evidence. Their right to the relief denied by the trial court depends upon the truth of the allegation that defendants and John S. Robinson entered into and carried out an agreement to procure plaintiffs' title at grossly inadequate prices, or that plaintiffs were injured by the misconduct of Losey or other fiduciaries. The finding of the district court to the effect that the conspiracy pleaded had never been formed is clearly sustained by the evidence. Any claim which the heirs of the full-blood may have had against the estate of John S. Robinson on account of his breach of duty as their attorney

was settled in the district court for Madison county in the cases appealed from the county court, and plaintiffs' right of recovery for injuries growing out of the conspiracy pleaded was lost with their failure to prove that charge. Defendant Losey is not answerable in this suit to any of the plaintiffs, unless he was guilty of a breach of trust or participated in some species of fraud through which they were injured. There was no direct conveyance from the heirs to him, and an examination of every transaction with which he was in any way connected results in the approval of the trial court's finding that he was guilty of no wrong or fraud which made him plaintiffs' trustee, or required him to answer to them for acquiring title with which they had parted. It follows that on the merits of the case the findings assailed by cross-appellants must be approved. A ruling on defendants' motion is therefore unnecessary.

The other preliminary matter is also presented by defendants. They argue that there is a misjoinder of parties plaintiff and of causes of action. Conceding this position to be well taken, when viewed from a technical standpoint, it does not necessarily follow that defendants were prejudiced by the action of the trial court in refusing to dismiss the suit or in deciding the controversy between Allen and Reed and their clients, after it was found that the evidence disclosed no joint liability of defendants to plaintiffs. The suit was one in equity. The court had jurisdiction of the parties. A statute declares that "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others." Code, sec. 46. "Judgment may be given for or against one or more of several plaintiffs", says the code, "and for or against one or more of several defendants." Code, sec. 429. The record indicates clearly that, in the adjudication of the controversy between Allen and Reed and their clients, the trial court was not influenced in the slightest degree by testimony relating to other issues or to other parties. Allen and Reed understood

the issues that resulted in the decree against them. In the petition their employment and professional relations were pleaded. The purchase of their clients' property, the prices paid, and what each received, when the property was resold, were also stated. There was a specific prayer for relief as against them, and a prayer for general relief. The petition is held sufficient to require them to account. In separate answers they denied fraud, and pleaded the faithful performance of all their duties as attorneys. They accepted the real issue as to their accountability to their clients, and offered proof to show they paid a fair price for the property purchased. On such a record it cannot be possible that they were prejudiced by the failure to dismiss the suit for the misjoinders challenged, or that the trial court erred to their prejudice in retaining for adjudication the controversy between them and their clients. In these respects the trial court will be sustained.

The important question for determination is: Shall Allen and Reed be required to account for the profits made by them out of the real estate purchased from their clients? The clients lived in Delaware, and what they knew about their inherited property and their rights during the time they held the title was, in a large measure at least, learned either directly or indirectly from their attorneys, Allen and Reed. The employment of counsel and the nature of their professional relations are not open to serious controversy. They had authority in writing from each of their clients, as follows: "I desire you, as attorneys, to look after my interests, whatever they may be, in the estate of James B. Gibbs, late of Madison county, Nebraska, deceased, for which I agree to pay you a reasonable attorney's fee out of my share of the estate." They were authorized to sell their clients' interests in the subject matter of their employment, and the relations continued until they became the purchasers thereof. After some correspondence the clients executed and delivered the following document: "Stanton, Dela-

ware, April 21, 1902. To Messrs. Allen & Reed, Madison, Nebraska. We and each of us do hereby authorize you to sell all our interest in the estate of James B. Gibbs, deceased, for the sum of $3,000 net to us, we to be at no expense and the aforesaid sum of $3,000 to be paid us for our joint interests in the said estate. The purchaser at said sale is to take our interests in the said estate, subject to the dower or other rights of the widow of the said James B. Gibbs in the same, and also subject to the rights or claims of any and all creditors of the said James B. Gibbs in the said estate, and the amount of the above stated consideration shall not be subject to deduction on account of commissions or counsel fees or from any other cause whatsoever; provided that said sale shall be made within sixty days from this date. In witness whereof, we, Annie Minehart, Matilda Rodeck, and George T. Hamilton have hereunto set our hands the day and year aforesaid. Annie Minehart. Matilda Rodeck. George T. Hamilton."

June 14, 1902, Allen and Reed wrote to F. M. Walker, Wilmington, Delaware, a local attorney for the heirs of the half-blood, as follows: "Inclosed herewith please find common form of deed to be signed and acknowledged and witnessed by Hamilton and wife and his two sisters. We expect a Mr. Douglass to take this deed, if he can raise the money; but as you will notice, we have left the grantee blank, and if he fails to produce $3,000 to send to pay for the deed, and also pay us our fees in addition, we will wish to let some other person take same, and if they fail, as a last resort, we will take it ourselves. So please have Hamilton and his sisters sign a letter or statement to the First National Bank of this place to fill into the inclosed deed such person or persons as our firm directs, and deliver deed to us, upon the payment of $3,000, and our firm signing a receipt releasing all claims for attorney's fees, expense, etc. You draw such as we are to sign as you understand the same. Please attend to this at

once as the writer (Reed) must leave for the west to be gone some time."

Following is the reply: "Wilmington, Del., June 26, 1902. Messrs. Allen & Reed, Madison, Nebraska. Dear Sirs: I am sending today through my bank here the executed deed of Hamilton and wife and his sisters to the First National Bank of Madison, with authority to the cashier of the First National Bank of Madison to fill in the name of the grantee or grantees and deliver on payment of $3,000, as requested by you in your letter of the 14th inst. As you have stated in the deed that the grantee takes subject to dower and creditors' rights of Mr. Gibbs, I do not think it worth while to take any release from them, and as you have stated that the amount to be paid Hamilton and his sisters is $3,000, without any deduction for your counsel fees or other expenses, I am satisfied with your statement in that matter. Hoping that you may be able to close the matter soon, I remain, Very truly yours, F. M. Walker."

The deed, executed in blank by the clients, was received by the First National Bank of Madison during the latter part of June, 1902. June 30, 1902, Allen and Reed directed the bank to insert in the blanks their own names as grantees, and paid the purchase price. Within a few months the property was sold by them at a large profit. The record shows, and it is proper to say, that the senior member of the firm objected to taking the title of his clients, and only consented when informed that the firm obligation to do so had already been given. When the attorneys directed the bank to insert their names in the deed, they acted both for themselves and their clients. In that act they united their personal interests with those of their clients. Their conduct was dual in character. Upon these facts equity raises a presumption against the validity of the transaction, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. Such is the rule of general acceptation, as applied to dealings between

fiduciaries and their principals in which both parties knowingly and intentionally deal with each other. 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 957. It is dictated by high considerations of public policy, and springs from the philosophy of the Galilean who declared, "No man can serve two masters", and who prayed, "Lead us not into temptation." It is founded on His divine knowledge of the human heart. The doctrine is firmly established in this state. In a different form it was made applicable to the conduct of executive state officers by a constitutional provision that they shall receive no compensation except their salaries, and that their fees for services shall be paid in advance into the state treasury. The legislature by adopting that part of the common law not inconsistent with the constitution and statutes, has adopted the same rule for the protection of confidential relations. The courts have steadfastly required of attorneys the same high standard of professional accountability, and have consistently enforced the doctrine in both actions at law and suits in equity. A late expression of this court, in an opinion by Judge BARNES, is as follows: "Where the attorney purchases the subject of the suit the client may set aside the purchase at will, unless the attorney shows by clear and conclusive proof that no advantage was taken; that everything was explained to the client, and that the price was fair and reasonable." *Levara v. McNeny,* 73 Neb. 414. The power to enforce this rule does not depend upon proof of actual fraud. Its application is the same whether attorneys abuse their trust or act on generous impulses to assume risks and burdens of clients who are poor. Its enforcement does not involve an inquiry into the motives which prompt clients to sue for profits, when viewed from an ethical standpoint. Solicitude for them on account of their improvident contracts is not the basis of relief. The doctrine is founded on public policy. It is demanded by the welfare of society. It arises from the necessity of protecting proper relations of trust and confidence wherever they exist.

Adherence to a principle which deprives fiduciaries of undue profits lessens the temptation to violate confidential relations.

The attorneys are familiar with the rule stated, and their answer to plaintiffs' demand for its enforcement is that it is shown by uncontradicted evidence that the price paid was the full value of the property purchased. On this issue some of the witnesses expressed opinions as to the value of an heir's undivided one-sixth interest, subject to the widow's life estate. The opinions were based on general knowledge of land values, but knowledge of the value of an undivided sixth or half interest in land subject to a life estate was very meager. Two witnesses, one a banker and the other a dealer in real estate, testified that the interest of each heir, or an undivided one-sixth interest, had no market value, and that its value was purely speculative. They did not state the value for speculative purposes. The testimony of defendant Reed was to the same effect, and in addition he said: "I considered that the undivided one-sixth interest in the 720 acres which was embarrassed with the life estate of Mrs. Gibbs, considering her age and condition of health, was purely speculative, and that $1,000 was really more than it was actually worth, but we figured we might get that amount out of it." It is insisted by the attorneys that this testimony, or testimony of like import, is the only competent proof of value at the time of the original purchase, and that it is uncontradicted and must be accepted as conclusive evidence that the price paid was the fair value of the property. That this is the only alternative cannot be conceded. The property purchased by Allen and Reed was resold within a short time. Copies of their deeds appear in the evidence, and the consideration is correctly stated therein, according to one of the grantors. The prices were fixed by mutual understanding of the parties to the transfers. The trial court made these matters the subject of inquiry. Intestate's land is described in the petition as follows: The west

half of section 6, the southeast quarter of section 5, the southwest quarter of section 7, all in township 22 north, range 2 west of the sixth principal meridian, and the south half of the southwest quarter of section 31, in township 23 north, range 2 west of the sixth principal meridian, and containing, according to government survey, 720 acres, more or less. At the time of the death of Gibbs the northwest quarter of section 6 was occupied by himself and wife as their home, and is described in the record as a homestead. An undivided half interest in this land, subject to the widow's life estate, is what Allen and Reed bought. How they disposed of it, including dates, descriptions, prices and grantees, is shown by the following findings of the district court:

"July 7, 1902, William V. Allen and Willis E. Reed, and their wives, conveyed an undivided one-half interest in the northwest quarter and the north half of the southwest quarter of section six, township twenty-two north, range two west of the sixth principal meridian, to Nancy C. Gibbs; and on the same day Nancy C. Gibbs conveyed to said William V. Allen and Willis E. Reed her life estate in the rest of said land of which the said James B. Gibbs died seized, and paid them $3,000. August 9, 1902, Thomas F. Memminger and wife conveyed the undivided one-half remainder in the northwest quarter and the north half of the southwest quarter of section six, township twenty-two north, range two west of the sixth principal meridian, to Nancy C. Gibbs, for which she paid nothing, but the same was in part fulfillment of an agreement to vest the fee title thereof in her by the said Allen and Reed."

"August 9, 1902, William V. Allen and wife, Willis E. Reed and wife, and Thomas F. Memminger and wife, at the request of John S. Robinson, conveyed to John Prauner, Jr., the south half of the southwest quarter of section thirty-one, township twenty-three north, range two west of the sixth principal meridian, for which Allen and Reed received $3,600. About the same day said Allen

and wife and said Reed and wife conveyed to George W. Losey the undivided one-half of the southeast quarter of section five, township twenty-two north, range two west of the sixth principal meridian, for $3,250. The same day Thomas F. Memminger and wife conveyed to said Losey the undivided one-half of the same premises for $3,250. January 5, 1903, Memminger and wife for one dollar conveyed to John S. Robinson and George W. Losey the undivided one-half of the southwest quarter of section seven, and the south half of the southwest quarter of section six, all in township twenty-two north, range two west of the sixth principal meridian; and January 3, 1903, said Allen and said Reed and their wives, and John S. Robinson and his wife, and George W. Losey and his wife conveyed to Vaclav Dvorak the southwest quarter of section seven, township twenty-two north, range two west of the sixth principal meridian, for $7,500; and January 16, 1903, said Allen and wife and Reed and wife, Robinson and wife and George W. Losey and wife conveyed the south half of the southwest quarter of section six, township twenty-two north, range two west of the sixth principal meridian, to Ralph E. Simmons for $3,500. That by the aforesaid several transfers and conveyances of said lands, and as consideration therefor, the said defendants Allen and Reed have received from the interests therein of their said clients, George T. Hamilton, Matilda Rodeck and Annie Minehart, the several sums respectively set forth and at the dates as follows, to wit: August 9, 1902, of Nancy C. Gibbs, $3,000; of George W. Losey, $3,250; of John Prauner, Jr., $1,800; January 3, 1903, of W. M. Dvorak, $3,750; February 16, 1903, of Ralph E. Simmons, $1,750; total $13,550; and that said Allen and Reed have paid out on account of said sales and interests of their said clients in the aforesaid real estate the several sums, at the dates set forth, as follows: June 30, 1902, to their said clients $3,000; August 9, 1902, to the said John S. Robinson to procure a conveyance to the widow of said James B. Gibbs of the interest of his clients

in the 240 acres conveyed to said widow, and to procure a settlement of the claim of Margaret A. Owens against said estate, $2,000; total $5,000."

It thus appears that on what amounted to an investment of $5,000 in the clients' property June 30, 1902, the attorneys realized on exchanges and resales between that date and February 16, 1903, $13,550. May the prices on resale be considered as evidence that the price paid to the clients was unfair? The prices on resale are shown by deeds admitted in evidence. On cross-examination defendant Reed was asked: "And within six months from the time you made your purchase, you sold all of this land, and none of it for less than $40 an acre?" This was answered without objection: "The respective deeds show the consideration." The considerations proved by deeds and oral testimony are not opinions based on knowledge of sales of other lands, but are positive proofs of the actual prices realized from mutual and voluntary exchanges and sales of the identical interests purchased. Subsequent changes in the prices are explained. Reed testified that in 1902 prices increased after the purchase $10 to $15 an acre, but a dealer in real estate made an estimate of $2.50 to $7 an acre. With this explanation of the rise in prices after the original purchase, there is no good reason why realized prices amounting to $13,550 for an undivided half interest, when mutually and voluntarily agreed upon by the parties to the resales, should be wholly excluded as evidence of value at the time of the original purchase. The burden was on the attorneys to show by "clear and conclusive proof that no advantage was taken" and that "the price was fair and reasonable." The proof was directed to those questions. The purpose of the testimony is not to fix the precise sum which shall be paid for land taken from the owner without his consent. Proof of what the undivided half interest brought on resale should not be rejected in the present case, under the rule that in a proceeding to condemn land for railway purposes the owner should not be required to state on cross-

examination what he previously paid for land intersected by the right of way. *Dietrichs v. Lincoln & N. W. R. Co.*, 12 Neb. 225; *Omaha S. R. Co. v. Todd,* 39 Neb. 818; *Chicago, R. I. & P. R. Co. v. Griffith,* 44 Neb. 690. Testimony that an undivided sixth interest subject to the widow's life estate had no market value, and the meager general knowledge on which defendant Reed based his opinion that the estate mentioned was not worth $1,000, suggest a substantial reason for considering, in connection with proof of the rise in values, evidence that the undivided half interest purchased by the attorneys was exchanged or resold for $13,550 within a short time. In *Rawson v. Prior,* 57 Vt. 612, the court said: "What property sells for, which has no regular market price, *may* be proper evidence tending to show its value."

Upon a showing of the fiduciary relation, and that the fiduciary purchased the property of his principal and sold it within a short time at a large advance, the fiduciary, under the rule in equity heretofore stated, is chargeable, *prima facie,* with the profits made upon the resale. The principal in such a case is not put to the burden of proving the actual market value at the date of conveyance to the fiduciary. That rule necessarily implies that the price actually received upon a resale by the fiduciary is provable against him. In view of the great disparity between the price paid by Allen and Reed and the prices received by them, proof that the actual increase in the market value of lands was not more than from $2.50 to $15 an acre certainly warrants a finding that the price paid by them was below the fair value, under the rule which makes the prices at which they conveyed competent proof against them.

Another consideration which leads to the conclusion that the proofs are not sufficient to warrant a denial of relief to the clients is that on July 7, 1902, seven days after the delivery of the deed by which the attorneys took title, they had entirely disincumbered their title of the embarrassment of the widow's life estate. This was ac-

complished by their obtaining her deed of conveyance of 480 acres and $3,000 in exchange for their own deed and the deed of their cotenant in the remainder, or fee estate in 240 acres, to the widow. This adjustment, which operated to make the title merchantable, was well nigh contemporaneous with their own acquisition of title. Their previous employment as attorneys to safeguard the interests of their clients in these lands, enlarged by express written power to sell, obligated them to bestow their skill and judgment in their clients' cause, and to give full advice as to the most appropriate means of disentangling and disincumbering the title of the life estate of the widow, so that the property of the clients would become merchantable. Where this object is fairly within the purview of the retainer, so that completion of the service of the attorneys may be expected to make the title a merchantable one, equity will not regard as conclusive a showing of value based upon the hypothesis that the embarrassment of the title which gave rise to the retainer made the lands unmerchantable. Without disparaging the motives of the attorneys whose dealings are here in question, any other rule would permit attorneys, after having ascertained by their employment that there was a feasible and practicable method of terminating the life estate by conveying to the life tenant the fee of a fractional area of the lands, to justify their own acquisition of title at a depreciated valuation, when their knowledge derived by their employment in a confidential relationship assured them of their area of merchantable land. Equity does not sanction any rule which, in a situation so sensitive, affords a motive or temptation to profit by betrayal of fiduciary obligations. So, upon the undisputed facts disclosed by the record, the court is not bound or concluded by testimony that the value of an undivided one-sixth interest in the lands, embarrassed by the life estate of the widow, was of no market value, or that its market value was not in excess of $1,000, the sum paid. The proof of the attorneys as to value was directed principally to a one-sixth

interest. In the present case the three heirs had previously authorized a sale of their entire interest, and they in fact joined in one deed. The latter fact, while material, is not the controlling consideration. The vital consideration is the confidential relationship. Under their employment the attorneys had opportunity to gain special knowledge of means to clear the title, and of the actual worth of the interests acquired, and of speedy means of disposal on the footing of a merchantable title. To permit them now to justify upon a showing of depreciated value of a small interest in an embarrassed title, as rated in the market in the estimation of dealers in real estate generally, would operate, practically, to relieve them of their just burdens of accountability as fiduciaries.

When evidence of the prices on resale is considered, the attorneys have not shown by clear and convincing proofs that the price paid to their clients was fair. On the contrary, the proper deduction from all the evidence is that the price was inadequate. The right of the clients to an accounting is therefore established. This conclusion makes it unnecessary to inquire into the correctness of the several findings of the trial court or into its reasons for its decree. It was conceded in oral argument by counsel for plaintiffs, however, that the judgment was excessive, and permission will be given to the district court to correct any errors in the account as set out in the decree. It further appears from documents quoted herein that expenses incurred and fees earned by Allen and Reed were parts of the consideration for the interests purchased, and the circumstances are such that, upon proper evidence, they should be credited with these items; the amounts, as to reasonableness, to be determined by the trial court. To this end the attorneys will be permitted to make the necessary proof, if they so desire. For these purposes the judgment is reversed and the cause remanded for further proceedings.

REVERSED.