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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1910—JANUARY TERM, 1911.

VOLUME LXXXVIII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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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.

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* Appointed October 31, 1910.
† After January 5, 1911.

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In Memoriam.

JOHN H. AMES.

At the session of the supreme court of the state of Nebraska, March 7, 1911, there being present Honorable MANOAH B. REESE, Chief Justice, Honorable JOHN B. BARNES, Honorable CHARLES B. LETTON, Honorable JESSE L. ROOT, Honorable WILLIAM B. ROSE, Honorable JACOB FAWCETT, and Honorable SAMUEL H. SEDGWICK, Associate Justices, the following proceedings were had:

MAY IT PLEASE YOUR HONORS:

On the 18th day of January, 1911, The Supreme Intelligence, Author of Light and Life, in His wisdom summoned from our midst to His everlasting home a widely known and greatly esteemed member of this bar. Many of us followed the casket enclosing all that was mortal of the one we mourn to his last resting place, where Wyuka

> "Waves above him her green leaves, dewy with Nature's teardrops,
> Grieving, if aught inanimate e'er grieves,
> Over the unreturning brave."

A little hillock marks the spot. Winter will whiten it with beautiful snow; Spring will clothe it with a mantle of green; Summer will deck it with roseate hues, and the hand of affection will plant the violet and myrtle; Hazy Autumn will come with delicate pencil of frost and transfer the tints of the rainbow to the foliage of nature, and the falling leaves, "rustling at the eddying gust," will lie lightly upon his grave; Morning will greet it with her earliest light, Night will guard it with brightest stars; but not for him the light of morning, the stars of night, the beauty of spring, the splendor of summer, the glory of autumn, or the majesty of winter; he has no more a part in that which is mortal.

It is fitting that this Honorable Court should pause for a brief space to bestow a last mark of respect upon the memory of one who was so long and so lately a member of this court, and that a few words of tribute may be spoken of him whom we knew and honored. It is not the time to dwell upon his *death*, for here in the community

which has known him so long and so well, in the hearing of those who cherish his memory now that he has gone, among the people whose confidence he enjoyed and repaid with fidelity, there is a touching fitness in telling over, however briefly, the record of his *life*, and, in its iteration, live over again the companionship of the one whose absence we deplore.

Life has two phases worthy of attention: The first considers the inherent elements of character; the second regards character in its application, in its motives, its achievements, its activity in practical life, its example for admiration and emulation.

JOHN H. AMES was born in Vermont in 1847. His parents moved to Chautauqua county, New York, when he was a child. In 1868 he was admitted to the bar in Buffalo, New York, coming to Lincoln in the next year; and here he resided, with the exception of a short time spent in St. Louis, until he was summoned to the unseen home, at the age of 64 years. For nearly 43 years he was a distinguished citizen of this state, an honored member of this bar, and for years a most worthy member of this court's commission.

He was kind, affable and generous. There dwelt within that house of clay a heart that vibrated to the touch of sympathy and friendship, and when he found a friend whose adoption would stand the test of true friendship, he "anchored him to his soul with hooks of steel."

As a lawyer he was a safe, conservative and wise counselor; he understood law as a science; he had a mind peculiarly adapted to the law; the broad principles of justice and equity which he found on every page of the law library were in perfect consonance with his own nature.

As a judge and jurist he possessed qualities of mind which eminently fitted him for the bench, as is attested by the many terse and illuminating opinions from his pen while serving as Court Commissioner. This judicial temperament, a keen and discriminating understanding, added to his long years of patient industry and profound study, gave him rank among the ablest members of his profession.

He took peculiar delight in the companionship of his brother members of the bar, as all can attest who ever met him professionally or shared his hospitality, and years of faithful, earnest devotion to the welfare and interest of the people of Nebraska have enshrined his memory in the hearts of its citizens.

Aside from a knowledge of the jurisprudence of his country, he

had a broad culture and wide range of general information, embracing history, philosophy, economics, politics, science and other subjects, not omitting religion. This familarity with all subjects, coupled with a mild and gentle humor which beamed from his eyes and brightened his smile, made him a most congenial and instructive conversationalist and companion.

A strong sense of duty was the foundation of his action. Bound by no party platforms, by no dogmas or creeds of the past, he stood four-sided to every blast that blew, and with Carlyle "looked boldly out with an unhampered mind from the thirty-two points of the compass" in search of truth. Persistently and at all times he sought to know the truth, the whole truth, and nothing but the truth, and in the glow of its white light, in the complete and full exercise of his intellectual processes, he wrought out for himself a philosophy of life which may be summed up in "The Fatherhood of God, the brotherhood of man, and the progress of mankind upward and onward forever." Endowed with a keen and analytical mind, an ease of expression, gifted with a comprehensive vocabulary and a ready pen, he rendered valuable service on many questions concerning the public welfare. It is fitting that we dwell upon the lives of such men; they are full of instruction; they point the way of usefulness and teach the science of honor and success; they stimulate the progress of civilization and leave their impress on every page of their life-history.

As we near the close of life, we note that so many who began the march with us have fallen by the wayside, "like leaves in wintry weather," that we sometimes feel as if the friends who have gone are more numerous than those who remain. One by one that noble band of pioneers in the profession of the law are leaving us. A little while and they will all have passed away. What we should treasure in these solemn events is not the trite lesson of the uncertainty of life, but that life be filled up with duty; therefore life is of deeper import than death. Life is our only opportunity to make up that record which must stand in the court of last resort and highest appeal, for even

> "Within the hollow crown
> That rounds the mortal temples of a king,
> Keeps Death his court."

Our friend, companion and brother is gone from us. His place may be filled with successors of greater talents and of more dazzling brilliancy, but it never will be filled by any man of more generous

impulses, nor by one more loyal to the interests of his fellow men and the common welfare. Therefore,

Whereas, We recognize that JOHN H. AMES was a lawyer of distinguished ability, a wise, able and safe counselor; that to the legal fraternity he was an example worthy of the best emulation for sincerity of purpose, honesty of conviction, untiring zeal, and an industry and assiduity which were proverbial; that his mental endowments were of a high order, a mind active, vigilant and intent; that he was a man of excellent understanding and most amiable manners; that, by shunning neither the labors nor the responsibilities entailed in the discharge of his public or private duties, he was secure against the shafts of envy or the intrigues of ambitious rivalry; that he was not intolerant or censorious toward others, but conceded to all the same independence of thought and action which he exercised for himself; that he was great in the essential qualities of mind, heart, sympathy, benevolence, charity, integrity, patriotism, loyalty and honor; that as a citizen he was a sincere and earnest advocate of economy in the administration of public affairs; that he was truly the friend of the people, observant of their wishes, conditions and interest; that as a friend he was not selfish in his attachments, basing friendship upon the value of friendship to himself: Therefore,

Be it Resolved, That in the death of JOHN H. AMES the state has lost a distinguished citizen of rare ability; the bar a member whose labors and discussions were of invaluable assistance to this tribunal in whose records they are preserved; that we will ever hold in reverential remembrance his eminent attainments, his character and bearing as a member of the profession and court; and that his death is to be deplored, not only by the legal fraternity, but by all who regret the loss of a good man:

Resolved, That while we would not disturb with a stranger's accents the sorrow of a stricken fireside where as husband and father centered his greatest interests, and that while mere words of sympathy cannot remove grief nor restore loss, yet we would assure the bereaved family of our deep sorrow and heartfelt sympathy:

Resolved, That these resolutions be spread upon the records of this court, and that a copy be sent to the family of the deceased.

A. J. SAWYER.
S. B. POUND.
W. D. OLDHAM.
EDSON RICH.
EDWARD F. PETTIS.

HONORABLE S. B. POUND:

MAY IT PLEASE YOUR HONORS:

In the death of Honorable JOHN H. AMES, whose loss we mourn today, a notable figure in the legal profession has dropped from the ranks of the members of the bar of this state. As a practitioner, as a profound student of the law, as a close and logical reasoner, he took high rank. He won his way, advancing by slow but firm and steady steps to the very front of his profession. He always looked for the principle involved in a case, and was impatient of precedent which did not square with the principle as he saw it. He was wedded to the law; he loved its history, its traditions, its mysteries, its literature, the noble masters who have practiced and administered it; he contemplated with a glow of admiration the large part it has played in the government of communities of people and the salutary influence it has exerted on the intercourse between states. He was engaged in many important causes, among which was the Bartley bond case. That case taxed his powers to the utmost. He was one of the sureties on the bond, and an adverse ending was likely to sweep away his private fortune. Much of the responsibility and management of the case fell upon him as chief counsel. It was a long, harrassing, and vexatious suit. The strain and stress to which he was subjected, exhausted his strength, impaired his health, weakened his constitution, and no doubt shortened his life. It is said that not one of the sureties on the bond now survives. It is claimed, and I believe the fact to be, that he was the author of the somewhat noted statute known as the "Slocumb Law." It is well known that his opinion was frequently sought upon intricate legal and constitutional questions involved in measures pending before the legislature.

To the power of intellect, coupled with the power of industry, must be attributed the main secret of his success. He owed little to attractive personality or to the urbanity of manners. Lacking those magnetic and popular qualities that attract and attach others to one possessing them, he commanded their respect and confidence by the originality of his thought, the persuasiveness of his logic, and the seriousness and forceful vigor of his phrase. Although devoted to his profession, he had an insatiable longing to explore, as opportunity offered, the wide field of knowledge, to unravel, if possible, some of the secrets of nature, to learn the history and get a clue to the destiny of man, and to solve some of the economic problems growing out of

the complexities of human affairs. He had an original and philosophic cast of mind that led him to seek for the seeds of things, the roots and hidden forces that lay beneath the surface. He was anxious to find verity as it really was, not merely as it appeared to be. He had to an unusual degree the gift of terse and lucid expression. He seldom indulged in the graces of speech for the sake of ornament, and yet his language had a certain attractiveness, owing to the accuracy and precision with which it conveyed his thoughts. He had a genial disposition; he envied no man the prize he had fairly won. He respected the honest opinions of others, however much they differed from his own.

But our brother is no more. His work is done. His voice is hushed. It will not be heard again within these walls. It remains for us, endowed with feebler powers, to strive to do that which may, in some degree, approach in worth the work which he has so nobly wrought.

By the Court:

It is ordered that the resolutions reported by the committee be spread upon the records of this court, and that they be published in the next volume of the reports.

M. B. Reese,
Chief Justice.

TABLE OF CASES REPORTED.

PAGE

Abbott v. Chicago, B. & Q. R. Co. 727
Allen, Lyons v. 41
Alt v. State 259
American Fire Ins. Co. v. Howell 493
Anderson v. Chicago & N. W. R. Co. 430
Anderson, In re 338
Andrews, Peterson v. 136
Arnett, North Platte Land & Water Co. v. 821
Aurora Nat. Bank, Hamilton County v. 280
Aurora State Bank v. Hayes-Eames Elevator Co. 187

Bailey v. Kling 699
Banker's Life Ins. Co., In re 43
Banking House of A. W. Clarke v. Ward 526
Barton, State v. 576
Battle Creek, Village of, Severa v. 127
Bearss, Gentry v. 742
Becker, Dresher v. 619
Bell v. Stedman 625
Birdsall, State v. 587
Blomenkamp, Howe v. 389
Boudreau, Henkel v. 784
Brady v. Central W. R. Co. 840
Bresee v. Seberger 632
Breslin, Hartington Nat. Bank v. 47
Brewer, Fletcher v. 196
Brinkley, Hickey v. 356
Brothers, Selders v. 61
Brown v. Chicago, B. & Q. R. Co. 604
Brown v. State 411
Brown County v. Keya Paha County 117
Bulgrin v. Schlechte 278
Bundy v. Wills 554
Burgert, Fairbanks, Morse & Co. v. 376
Burnett v. State 638
Byron Reed Co. v. City of Omaha 828

Callender, Doolittle v. 747
Campbell v. Luebben 214

PAGE
Card v. Mix 741
Carroll v. Village of Elmwood 352
Central W. R. Co., Brady v 840
Chapin v. Village of College View 229
Chicago, B. & Q. R. Co., Abbott v 727
Chicago, B. & Q. R. Co., Brown v 604
Chicago, B. & Q. R. Co., Conn v 732
Chicago, B. & Q. R. Co., Hall v 20
Chicago, B. & Q. R. Co., Jeffries v 268
Chicago, B. & Q. R. Co., Kayser v 343
Chicago, B. & Q. R. Co., Koeller v 712
Chicago, B. & Q. R. Co., Metz v 459
Chicago, B. & Q. R. Co., State v 669
Chicago & N. W. R. Co., Anderson v 430
Chicago, R. I. & P. R. Co., Hoyt v 161
Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission. 239
Citizens R. Co., McGahey v 218
City of Gothenburg, May v 772
City of Omaha, Byron Reed Co. v 828
City of Omaha, McCoy v 316
City of Omaha v. Philadelphia Mortgage & Trust Co 519
City of Pawnee City, O'Loughlin v 244
Clark v. Davies 67
Clay, Robinson & Co. v. Douglas County 363
Coates, Herold v 487
Cochran, Wells v 367
College View, Village of, Chapin v 229
College View, Village of, State v 232
Conn v. Chicago, B. & Q. R. Co 732
Cooper & Cole Bros., Van Horn v 687
Creighton, In re Estate of 107, 113
Creighton, Judson v 37
Cronin v. Cronin 141

Davies, Clark v 67
Diels v. Kennedy 777
Doolittle v. Callender 747
Douglas County, Clay, Robinson & Co. v 363
Doyle, Shevalier v 560
Dresher v. Becker 619

Eggleston v. Quinn 775
Elmwood, Village of, Carroll v 352
Equitable Land Co., McCabe v 453
Erb v. McMaster 817

Fairbanks, Morse & Co. v. Burgert 376

PAGE
Fauber v. Keim 379
First Catholic Church of Lincoln, State v..... 2
First Nat. Bank of Columbus, Stires v..... 529
Fisher, Jones v..... 627
Fletcher v. Brewer 196
Fowler v. McKay 387

Galloway v. State 447
Garfield County, Peck v..... 635
Gentry v. Bearss 742
Gering & Co., In re..... 192
Girard Trust Co. v. Paddock..... 359
Gleason v. Loose-Wiles Cracker & Candy Co..... 83
Gothenberg, City of, May v..... 772
Gray, In re Estate of..... 835
Grimes v. State 848
Grothe, Ingles v..... 745

Hall v. Chicago, B. & Q. R. Co..... 20
Hamilton County v. Aurora Nat. Bank..... 280
Haner v. Palmer 438
Hanks v. State 464
Hansen v. Hansen 517
Hardwick v. Snedeker 515
Hartington Nat. Bank v. Breslin..... 47
Hayden Bros., Jobst v..... 469
Hayes-Eames Elevator Co., Aurora State Bank v..... 187
Helphand v. Independent Telephone Co. of Omaha..... 542
Henderson v. Weidman 813
Henkel v. Boudreau 784
Hermanson, Stanley v..... 823
Herold v. Coates 487
Hickey v. Brinkley 356
Higinbotham v. McKenzie 323
Holt County, Shaw v..... 348
Hoover, Westover v..... 201
Howe v. Blomenkamp 389
Howell, American Fire Ins. Co. v..... 493
Howell, Westerfield v..... 463
Hoyt v. Chicago, R. I. & P. R. Co..... 161
Hunter v. Hunter 153
Hurlbut v. Proctor 491

Independent Telephone Co. of Omaha, Helphand v..... 542
Ingles v. Grothe 745
In re Application of Anderson..... 338
In re Application of Gering & Co..... 192

PAGE
In re Application of Metz Bros. Brewing Co..... 164
In re Assessment of Banker's Life Ins. Co..... 43
In re Estate of Creighton.....107, 113
In re Estate of Normand..... 767
In re Estate of Gray..... 835
In re Estate of Willits..... 805
In re Petition of Rose..... 92
Iowa State Traveling Men's Association, Tomson v..... 399

Jacobus, Malsbary v..... 751
Jeffries v. Chicago, B. & Q. R. Co..... 268
Jobst v. Hayden Bros..... 469
Johns v. State 145
Johnson v. Model Steam Laundy Co..... 12
Johnson v. State 328
Johnson v. State 565
Jones v. Fisher 627
Joyce v. State 599
Judson v. Creighton 37

Kaup v. Schinstock 95
Kayser v. Chicago, B. & Q. R. Co..... 343
Keim, Fauber v..... 379
Kennedy, Diels v..... 777
Keya Paha County, Brown County v..... 117
Kirby, Kurpgeweit v..... 72
Kling, Bailey v..... 699
Kloepper, Trenholm v..... 236
Knapp v. Reed 754
Kockrow v. Whisenand 640
Koeller v. Chicago, B. & Q. R. Co..... 712
Kramer v. Weigand 392
Krause v. State 473
Krull v. Rose 651
Krull v. Rose 655
Kuhlman v. Lemp Brewing Co..... 1
Kurpgeweit v. Kirby 72
Kutch v. Kutch 114

Lanning v. Musser 418
Lauff v. Village of Oakdale..... 320
Lemp Brewing Co., Kuhlman v..... 1
Lincoln & N. W. R. Co., Rice v..... 307
Loose-Wiles Cracker & Candy Co., Gleason v..... 83
Louis, Pettit v..... 496
Ludden, Tash v..... 292
Luebben, Campbell v..... 214

PAGE
Lynn v. Omaha Packing Co. 720
Lyons v. Allen 41

McCabe v. Equitable Land Co. 453
McCabe v. Reed 457
McCoy v. City of Omaha 316
McGahey v. Citizens R. Co. 218
McKay, Fowler v. 387
McKenzie, Higinbotham v. 323
McLane v. McLane 833
McMaster, Erb v. 817
Malone, Swindell v. 90
Malsbary v. Jacobus 751
Marquis, Olsen v. 610
Mason v. Rowley 801
May v. City of Gothenburg 772
Metz v. Chicago, B. & Q. R. Co. 459
Metz Bros. Brewing Co., In re 164
Mills v. Mills 596
Mix, Card v. 741
Model Steam Laundry Co., Johnson v. 12
Moore v. Sturm 793
Morrison v. State 682
Murdock, Stephenson v. 796
Musser, Lanning v. 418
Myers v. Myers 656

Nebraska State Ry. Commission, Chicago, R. I. & P. R. Co., v. 239
Nelson v. Wirthele 595
Newell v. Newell 705
New York Life Ins. Co., Rye v. 707
Neylon, Piper v. 253
Normand, In re Estate of 767
North Platte Land & Water Co. v. Arnett 821

Oakdale, Village of, Launt v. 320
O'Brien v. Schneider 479
O'Brien, Van Patten v. 382
O'Connor v. Waters 224
O'Loughlin v. City of Pawnee City 244
Olsen v. Marquis 610
Omaha, City of, Byron Reed Co. v. 828
Omaha, City of, McCoy v. 316
Omaha, City of, v. Philadelphia Mortgage & Trust Co. 519
Omaha & C. B. Street R. Co., Stewart v. 209
Omaha Electric Light & Power Co. v. Union Fuel Co. 423
Omaha Packing Co., Lynn v. 720

PAGE
Paddock, Girard Trust Co. v. 359
Palmer, Haner v. 438
Pawnee City, City of, O'Loughlin v. 244
Pawnee County, Wherry v. 503
Peck v. Garfield County 635
Pedersen v. Pedersen 55
Peterson v. Andrews 136
Pettit v. Louis 496
Philadelphia Mortgage & Trust Co., City of Omaha v. 519
Piper v. Neylon 253
Preuit v. Preuit 124
Proctor, Hurlbut v. 491

Quinn, Eggleston v. 775

Reams v. Sinclair 738
Reed, Knapp v. 754
Reed, McCabe v. 457
Rice v. Lincoln & N. W. R. Co. 307
Richards v. Smith 444
Rohrbough, Young v. 101
Rose, In re 92
Rose, Krull v. 651
Rose, Krull v. 655
Rosenbery v. Tibke 51
Rowley, Mason v. 801
Rye v. New York Life Ins. Co. 707

Searle, Wyman v. 26
Schinstock, Kaup v. 95
Schlechte, Bulgrin v. 278
Schneider, O'Brien v. 479
Schultz v. State 613
Seberger, Bresee v. 632
Sehestedt, Zwiebel v. 100
Selders v. Brothers 61
Severa v. Village of Battle Creek 127
Shaw v. Holt County 348
Shevalier v. Doyle 560
Shold v. Van Treeck 80
Sinclair, Reams v. 738
Smith, Richards v. 444
Snedeker, Hardwick v. 515
Stackhouse v. Stackhouse 184
Stalder, Sutorious v. 843
Stanley v. Hermanson 823
State, Alt v. 259

PAGE

State, Brown v. 411
State, Burnett v. 638
State v. Chicago, B. & Q. R. Co. 669
State v. First Catholic Church of Lincoln 2
State, Galloway v. 447
State, Grimes v. 848
State, Hanks v. 464
State, Johns v. 145
State, Johnson v. 328
State, Johnson v. 565
State, Joyce v. 599
State, Krause v. 473
State, Morrison v. 682
State, Schultz v. 613
State, Union P. R. Co. v. 247
State, Union P. R. Co. v. 547
State v. Union P. R. Co. 682
State v. Village of College View 232
State, White v. 177
State, ex rel. Ludden, v. Barton 576
State, ex rel. Tuttle, v. Birdsall 587
Stedman, Bell v. 625
Stephenson v. Murdock 796
Stewart v. Omaha & C. B. Street R. Co. 209
Stires v. First Nat. Bank of Columbus 529
Stuart, Zimmerer v. 530
Sturm, Moore v. 793
Supreme Lodge Royal Achates, Worley v. 440
Sutorious v. Stalder 843
Swindell v. Malone 90

Tash v. Ludden 292
Thorp, Tiernan v. 662
Tibke, Rosenbery v. 51
Tiernan v. Thorp 662
Tomson v. Iowa State Traveling Men's Association 399
Trenholm v. Kloepper 236

Union Fuel Co., Omaha Electric Light & Power Co. v. 423
Union P. R. Co. v State 247
Union P. R. Co. v. State 547
Union P. R. Co., State v. 682

Van Horn v. Cooper & Cole Bros. 687
Van Patten v. O'Brien 382
Van Treeck, Shold v. 80
Village of Battle Creek, Sevara v. 127

PAGE
Village of College View, Chapin v. 229
Village of College View, State v. 232
Village of Elmwood, Carroll v. 352
Village of Oakdale, Launt v. 320

Ward, Banking House of A. W. Clarke v. 526
Waters, O'Connor v. 224
Weidman, Henderson v. 813
Weigand, Kramer v. 392
Wells v. Cochran 367
Westerfield v. Howell 463
Westover v. Hoover 201
Wherry v. Pawnee County 503
Whisenand, Kockrow v. 640
White v. State 177
Willits, In re Estate of 805
Wills, Bundy v. 554
Wirthele, Nelson v. 595
Worley v. Supreme Lodge Royal Achates 440
Wyman v. Searle 26
Wyrick v. Wyrick 9

Young v. Rohrbough 101

Zimmerer v. Stuart 530
Zwiebel v. Sehestedt 100

CASES CITED BY THE COURT.

CASES MARKED * ARE OVERRULED IN THIS VOLUME.
CASES MARKED † ARE DISTINGUISHED IN THIS VOLUME.

PAGE

Acken v. Tinglehoff, 83 Neb. 296 63
Adams v. Crawford, 116 Cal. 495 385
Adams v. Hackett, 27 N. H. 289 169
Adams v. Union R. Co., 21 R. I. 134 7
Adams County v. Hunter, 78 Ia. 328 584
Agnew v. City of Pawnee City, 79 Neb. 603 668
Albin v. Parmele, 70 Neb. 740 809
Alexander v. Wilson, 144 Cal. 5 24
Allen v. Drew, 44 Vt. 174 482
Allen v. Rushforth, 77 Neb. 840 783
Allen v. Shackelton, 15 Ohio St. 145 98
Alling v. Fisher, 55 Neb. 239 742
Allyn v. State, 21 Neb. 593 ..... 259, 267
Ames v. Miller, 65 Neb. 204 631
Anderson v. Kannow, 3 Neb. (Unof.) 686 435
Andrews v. Hastings, 85 Neb. 548 624
Andrews v. Kingsbury, 212 Ill. 97 358
Andrews v. State, 21 Fla. 598 551
Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897 735
Anonymous, Minor (Ala.) 52 79
Anonymous, 4 Pick. (Mass.) 32 116
Arapahoe v. Albee, 24 Neb. 242 234
Arensten v. Moreland, 122 Wis. 167 200
Argabright v. State, 62 Neb. 402 334
Arlington Mill & Elevator Co. v. Yates, 57 Neb. 286 540
Armour Packing Co. v. Wynn, 119 Ga. 683 24
Ashford v. State, 36 Neb. 38 617
Atkins v. Gladwish, 25 Neb. 390 75
Atkinson v. Medford, 46 Me. 510 116
Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425 676
Auld v. Cathro, 128 N. W. (N. Dak.) 1025 839
Avery v. Brown, 31 Conn. 398 98
Avery v. Straw, 30 Me. 458 32
Ayres v. McConahey, 65 Neb. 588 820

PAGE
Bachelor v. Korb, 58 Neb. 122 391
Baird v. Shipman, 132 Ill. 16 106
Ballou v. Sherwood, 58 Neb. 20 101
Bank of Alma v. Hamilton, 85 Neb. 441 501
Bank of Miller v. Moore, 81 Neb. 566 98
Bank of Pittsburg v. Neal, 63 U. S. 96 49
Barber v. Hildebrand, 42 Neb. 400 ..... 71, 627
Barker v. Hume, 84 Neb. 235 557
Barney v. Chamberlain, 85 Neb. 785 ..... 455, 464
Barney v. State, 49 Neb. 515 149
Barr v. City of Omaha, 42 Neb. 341 238
Barr v. State, 45 Neb. 458 ..... 474, 478
Barthell v. Peter, 88 Wis. 316 627
Barton v. Union Cattle Co., 28 Neb. 350 89
Bates-Smith Investment Co. v. Scott, 56 Neb. 475 612
Bayha v. Webster County, 18 Neb. 131 584
Beatty v. Kurtz, 2 Pet. (U. S.) *566 9
Beatty v. Russell, 41 Neb. 321 71
Beck v. Staats, 80 Neb. 482 200
Bee Publishing Co. v. Shields, 68 Neb. 750 702
Bee Publishing Co. v. World Publishing Co., 59 Neb. 713 699
Bennett v. Alcott, 2 T. R. (Eng.) 166 79
Benton v. Sikyta, 84 Neb. 808 256
Berdolt v. Berdolt, 56 Neb. 792 124
* Bergeron v. State, 53 Neb. 752 ..... 614, 617
Berryman v. Schalander, 85 Neb. 281 503
Bevis v. Heflin, 63 Ind. 129 745
Binfield v. State, 15 Neb. 484 148
Birmingham Land & Loan Co. v. Thompson, 86 Ala. 146 627
Bischof v. Merchants Nat. Bank, 75 Neb. 838 88
Bisenius v. City of Randolph, 82 Neb. 520 231
Bixby v. Jewell, 72 Neb. 755 39
Blair v. Kingman Implement Co., 82 Neb. 344 377
Blakely v. Chicago, K. & N. R. Co., 46 Neb. 272 264
Blodgett v. McMurtry, 39 Neb. 210 385
Blomgren v. Anderson, 48 Neb. 240 729
Bloomfield v. Pinn, 84 Neb. 472 702
Boales v. Ferguson, 55 Neb. 565 381
Board of Commissioners v. Huffman, 134 Ind. 1 123
Board of Commissioners v. Rushville & V. G. R. Co., 87 Ind. 502 123
Board of Directors v. Collins, 46 Neb. 411 33
Boldt v. Budwig, 19 Neb. 739 76
Bollman v. Pasewalk, 22 Neb. 761 486
Booton v. State, 86 Neb. 114 334
Boston Steel & Iron Works Co. v. Steuer, 183 Mass. 140 50
Boyd v. McCann, 10 Md. 118 49

PAGE
Bracegirdle v. Orford, 2 M. & S. (Eng.) 77 78
Bradley v. City of Eau Claire, 56 Wis. 168 509
Bradshaw v. State, 17 Neb. 147 568
Brandon v. Jensen, 74 Neb. 569 39
Bremer v. St. Paul City R. Co., 107 Minn. 326 212
Bridges v. State, 37 Ark. 224 172
Briggs v. Shaw, 9 Allen (Mass.) 516 809
Brister v. State, 26 Ala. 107 789
Britton v. Larson, 23 Neb. 806 632
Britton v. Thornton, 112 U. S. 526 809
Brong v. Spence, 56 Neb. 638 ..... 128, 137
Bronson v. Albion Telephone Co., 67 Neb. 111 264
Brooks v. Dutcher, 22 Neb. 644 702
Brooks v. Dutcher, 24 Neb. 300 76
Brown v. Allen, 35 Ia. 306 815
Brown v. Hoag, 25 Minn. 373 819
Brown v. Incorporated Town of Chillicothe, 122 Ia. 640 131
Brown v. Kling, 101 Cal. 295 358
Brown v. Smith & Kelly, 86 Ga. 274 206
Bryant v. Dakota County, 53 Neb. 755 513
Bubster v. State, 33 Neb. 663 151
Buckhout v. Witwer, 157 Mich. 406 358
Burckhardt v. Burckhardt, 36 Ohio St. 261 99
Burlington & M. R. R. Co. v. Westover, 4 Neb. 268 731
Burnett v. State, 86 Neb. 11 639
Burroughs v. Clancey, 53 Ill. 30 98
Bush v. State, 62 Neb. 128 148
Butler v. Smith, 84 Neb. 78 453

Callan v. Pugh, 66 N. Y. Supp. 1118 208
Cambridge v. Rous, 8 Ves. Jr. (Eng.) 12 813
Campbell v. Farmers & Merchants Bank, 49 Neb. 143 365
Campbell v. Goodman, 23 Pa. Co. Ct. 609 564
Candy v. State, 8 Neb. 482 478
Capital Traction Co. v. Lusby, 12 App. D. C. 295 212
Card v. Deans, 84 Neb. 4 389
Carman v. Harris, 61 Neb. 635 33
Carter v. Leonard, 65 Neb. 670 42
Carter v. Root, 84 Neb. 723 473
Cartwright v. Pettus, 2 Ch. Cas. (Eng.) 214 740
Casey v. Burt County, 59 Neb. 624 486
Cass County v. Sarpy County, 83 Neb. 435 510
Cather v. Damerell, 5 Neb. (Unof.) 175 458
Cavanaugh v. Fenley, 94 Minn. 505 24
Central Coal & Iron Co. v. Grider's Adm'r, 115 Ky. 745 206
Chadwick v. Kelley, 187 U. S. 540 482

PAGE
Chapman v. City of Lincoln, 84 Neb. 534 88
Charter Gas-Engine Co. v. Coleridge State Bank, 54 Neb. 743 377
Chicago & A. R. Co. v. Flagg, 43 Ill. 365 77
Chicago, B. & Q. R. Co. v. Bell, 44 Neb. 44 713
Chicago, B. & Q. R. Co. v. City of Nebraska City, 53 Neb. 453 235
Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442 713
Chicago, B. & Q. R. Co. v. Englehart, 57 Neb. 444 264
Chicago, B. & Q. R. Co. v. Gustin, 35 Neb. 86 769
Chicago, B. & Q. R. Co. v. Healy, 76 Neb. 786 ..... 713, 718
Chicago, B. & Q. R. Co. v. Kellogg, 54 Neb. 138 148
Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1 ..... 238, 608
Chicago, B. & Q. R. Co. v. School District, 60 Neb. 164 ..... 646, 650
Chicago, B. & Q. R. Co. v. State, 47 Neb. 549 250
Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645 715
Chicago City R. Co. v. Robinson, 127 Ill. 9 212
Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission, 85 Neb. 818 243
Chicago, R. I. & P. R. Co. v. O'Neill, 58 Neb. 239 343
Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380 736
Chicago, R. I. & P. R. Co. v. Sporer, 69 Neb. 8 ..... 40, 607
Chicago, R. I. & P. R. Co. v. Witty, 32 Neb. 275 269
Chicago, St. P., M. & O. R. Co. v. McManigal, 73 Neb. 580 106
Chick v. Ives, 2 Neb. (Unof.) 879 809
Cincinnati Street R. Co. v. Snell, 54 Ohio St. 197 212
Citizens Bank v. Warfield, 85 Neb. 328 139
City of Beatrice v. Leary, 45 Neb. 149 ..... 735, 793
City of Central City v. Marquis, 75 Neb. 233 123
City of Chadron v. Glover, 43 Neb. 732 492
City of Decatur v. Vermillion, 77 Ill. 315 584
City of Des Moines v. Hall, 24 Ia. 234 354
City of Findlay v. Frey, 51 Ohio St. 390 482
City of Lincoln v. First Nat. Bank, 67 Neb. 401 523
City of Lincoln v. Smith, 28 Neb. 762 246
City of Lincoln v. Staley, 32 Neb. 63 396
City of Louisville v. Tatum, Embry & Co., 111 Ky. 747 366
City of McCook v. Parsons, 77 Neb. 132 133
City of Olympia v. Knox, 49 Wash. 537 831
City of Omaha v. Philadelphia Mortgage & Trust Co., 88 Neb. 519, 665
City of Ord v. Nash, 50 Neb. 335 246
City of Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460 264
City of South Omaha v. Powell, 50 Neb. 798 246
City of Wahoo v. Nethaway, 73 Neb. 54 354
City R. Co. v. Citizens Street R. Co., 166 U. S. 557 ..... 668, 775
Clapp v. Hughes, 1 Phila. (Pa.) 382 627
Clapp v. Otoe County, 45 C. C. A. 579 36
Clark v. Strong, 14 Neb. 229 486

PAGE

Clarke v. Koenig, 36 Neb. 572 315
Clarke v. Larremore, 188 U. S. 486 25
Clifford v. Thun, 74 Neb. 831 516
Clinton v. Chicago, B. & Q. R. Co., 60 Neb. 692 713
Close v. Fields, 2 Tex. 232 49
Clough v. State, 7 Neb. 320 ..... 468, 478, 603
Cochran v. Moriarty, 78 Neb. 669 372
Cohen v. Hawkins, 74 Neb. 249 427
Cohen v. Sioux City Traction Co., 141 Ia. 469 789
Colby v. Foxworthy, 80 Neb. 239 435
Coleman v. Spearman, Snodgrass & Co., 68 Neb. 28 110
Collins v. School District, 52 Me. 522 646
Columbian Athletic Club v. State, 143 Ind. 98 676
Converse v. United States, 21 How. (U. S.) 463 585
Cook v. Champlain Transportation Co., 1 Denio (N. Y.) 91 544
Coolidge v. Choate, 11 Met. (Mass.) 79 816
Corbett v. National Bank of Commerce, 44 Neb. 230 396
Cornelius v. City Water Co., 84 Neb. 130 693
Cornell v. Irvine, 56 Neb. 657 585
Costello v. Burke, 63 Ia. 361 740
Cowles v. School District, 23 Neb. 655 95
Cowles v. Thompson, 31 Neb. 479 564
Cox v. State, 28 Tex. App. 92 551
Craker v. Chicago & N. W. R. Co., 36 Wis. 657 77
Crall v. Poso Irrigation District, 87 Cal. 140 33
Crane Bros. Mfg. Co. v. Keck, 35 Neb. 683 368
Crocker v. Collins, 37 S. Car. 327 668
Croy v. State, 32 Ind. 384 551
Curry v. State, 5 Neb. 412 ..... 219, 608
Cushing v. Longfellow, 26 Me. 306 816

Daily v. Devlin, 21 N. Y. App. Div. 62 564
Dallas Mfg. Co. v. Townes, 148 Ala. 146 206
Daniels v. Intendant and Wardens of the Town of Athens, 55 Ga. 609 123
Daniels v. Tearney, 102 U. S. 415 820
Davis v. City of Omaha, 47 Neb. 836 88
Davis v. Neligh, 7 Neb. 78 98
Davis v. State, 31 Neb. 247 571
Davis Gasoline Engine Works Co. v. McHugh & Rate, 115 Ia. 415, 377
Dawson v. Dawson, 17 Neb. 671 766
D. C. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 24
Dean v. Handley, 2 Hem. & Mill. (Eng.) 635 812
DeLand v. Dixon Power & Lighting Co., 225 Ill. 212 740
Delashman v. Berry, 20 Mich. 292 1
Delory v. Blodgett, 185 Mass. 126 206

PAGE
Denning v. Butcher, 91 Ia. 425 840
Des Moines Bridge & Iron Works v. Marxen & Rokahr, 87 Neb. 684, 120
Detwiler v. City of Lansing, 95 Mich. 484 133
Diamond Match Co. v. Roeber, 106 N. Y. 473 358
District Township of the City of Dubuque v. City of Dubuque, 7 Ia. 262 436
Dobbins v. Oberman, 17 Neb. 163 256
Dobert v. Troy City R. Co., 91 Hun (N. Y.) 28 212
Dodd v. Kemnitz, 74 Neb. 634 199
Dodge v. Kiene, 28 Neb. 216 783
Dodge County v. Saunders County, 77 Neb. 787 121
Donahue v. Bragg, 49 Mo. App. 273 345
Donohue v. Dyer, 23 Ind. 521 79
Doody v. Vaughn, 7 Neb. 28 53
Dooley v. Meese, 31 Neb. 424 94
Doremus v. Root, 23 Wash. 710 106
Dorrington v. Powell, 52 Neb. 440 71
Dorsey v. Conrad, 49 Neb. 443 435
Douglas v. Hayes County, 82 Neb. 577 554
Douglas County v. Taylor, 50 Neb. 535 508
Downing v. Lewis, 59 Neb. 38 358
Draper v. Clayton, 87 Neb. 443 280
Driftwood Valley Turnpike Co. v. Board of Commissioners, 72 Ind. 226 123
Dringman v. Keith, 86 Neb. 476 96
Dunham v. Clogg, 30 Md. 284 49
Durham v. Durham, 10 L. R. Prob. Div. (Eng.) 80 116
Dwight v. Germania Life Ins. Co., 103 N. Y. 341 712
Dwinell v. Watkins, 86 Neb. 740 98

East v. Cain, 49 Mich. 473 79
East St. Louis R. Co. v. Louisville & N. R. Co., 149 Fed. 159 243
Eckman v. Hammond, 27 Neb. 611 486
Eddy v. City of Omaha, 72 Neb. 550 36
Edwards v. Edwards, 15 Beav. (Eng.) 357 811
Edwards v. State, 69 Neb. 386 465
Edwards & Bradford Lumber Co. v. Rank, 57 Neb. 323 540
Eggleston v. Quinn, 81 Neb. 457 776
Eldred v. Mackie, 178 Mass. 1 208
Elliott v. Atkins, 26 Neb. 403 163
Ellis v. McNaughton, 76 Mich. 237 106
Ellison v. Ellison, 65 Neb. 412 ..... 124, 598, 834
Engles v. Morgenstern, 85 Neb. 57 358
Erdmann v. Mutual Ins. Co., 44 Wis. 376 444
Erickson v. First Nat. Bank, 44 Neb. 622 98
Evans v. Bell, 6 Dana (Ky.) *479 564

PAGE
Ex parte Fisher, 6 Neb. 309 588
Ex parte Grubbs, 79 Miss. 358 589
Ex parte Harlan, 1 Okla. 48 589
Ex parte Stacey, 45 Or. 85 589
Ex parte Upson, 7 Cal. App. 531 589
Ex parte Williams, 121 Cal. 328 589
Ex parte Williford, 50 Tex. Cr. Rep. 417 589

Fairbanks, Morse & Co. v. Burgert, 81 Neb. 465 377
Fallbrook Irrigation District v. Bradley, 164 U. S. 112 33
Farmers Loan & Trust Co. v. Postal Telegraph Co., 55 Conn. 334 .. 740
Farmers & Merchants Bank v. German Nat. Bank, 59 Neb. 229 529
Farmers State Bank v. Yenney, 73 Neb. 338 729
Farraher v. City of Keokuk, 111 Ia. 310 121
Fearnley v. Fearnley, 44 Colo. 417 789
Felino v. Newcomb Lumber Co., 64 Neb. 335 501
Felton v. Fuller, 35 N. H. 226 816
Field v. Doyon, 64 Wis. 560 820
Filley v. Walker, 28 Neb. 506 558
Finders v. Bodle, 58 Neb. 57 280
First Nat. Bank v. Borchers, 83 Neb. 530 256
First Nat. Bank v. Reece, 64 Neb. 292 39
First Nat. Bank v. Security Nat. Bank, 34 Neb. 71 98
Fitch v. Martin, 84 Neb. 745 729
Floaten v. Ferrell, 24 Neb. 347 239
Foley v. State, 42 Neb. 233 851
Fort v. Battle, 13 Smed. & M. (Miss.) 133 381
Fox, Canfield Co. v. Graves, 46 Neb. 812 410
Foxworthy v. City of Hastings, 25 Neb. 133, 31 Neb. 825 133
Francisco v. Smith, 143 N. Y. 488 358
Freeholders of Sussex County v. Strader, 3 Harr. (N. J.) 108 123
Fromholz v. McGahey, 85 Neb. 205 110
Frye-Bruhn Co. v. Meyer, 58 C. C. A. 529 370
Funke v. Allen, 54 Neb. 407 783

Gainesville, H. & W. R. Co. v. Hall, 78 Tex. 169 346
Gardiner v. City of Omaha, 85 Neb. 681 830
Gauthier v. West, 45 Minn. 192 627
Gaylord v. Nebraska Savings & Exchange Bank, 54 Neb. 104 458
Gentry v. Bearss, 82 Neb. 787 743
George v. United States, 1 Okla. Cr. Rep. 307 152
German Nat. Bank v. Leonard, 40 Neb. 676 269
Gerner v. Mosher, 58 Neb. 135 429
Gersteman v. State, 35 Tex. Cr. Rep. 318 169
Gettinger v. State, 13 Neb. 308 238
Gibbs & Stanton v. State, 16 Vroom (N. J.) 379 476

PAGE

† Gies v. Storz Brewing Co., 75 Neb. 698 754
Gilcrest Lumber Co. v. Wilson, 84 Neb. 583 378
Gillian v. McDowall, 66 Neb. 814 628
Girard Trust Co. v. Paddock, 88 Neb. 359 742
Gladestry, The, 128 Fed. 591 206
Gonzales v. Broad, 57 Cal. 224 627
Gorey v. Kelly, 64 Neb. 605 66
Gothrupt v. Williamson, 61 Ind. 599 49
Graham v. Frazier, 49 Neb. 90 558
Grant v. Bartholomew, 57 Neb. 673 33
Greeley State Bank v. Line, 50 Neb. 434 458
Green v. Blackwell, 32 N. J. Eq. 768 112
Green v. Paul, 60 Neb. 7 101
Green v. Western Union Telegraph Co., 136 N. Car. 489 76
Greenhow v. Boyle, 7 Blackf. (Ind.) * 56 49
Gregory v. Village of Franklin, 77 Neb. 62 231
Gregsten v. City of Chicago, 145 Ill. 451 668
Griffin & Adams v. Harriman, 74 Ia. 436 32
Guengerich v. Smith, 36 Ia. 587 559
Guerrant v. Guerrant, 7 Va. Law Reg. 639 50
Gulf, C. & S. F. R. Co. v. Hayter, 93 Tex. 239 76

Hacker v. Howe, 72 Neb. 385 46
Haggland v. Stuart, 29 Neb. 69 36
Halbert v. Rosenbalm, 49 Neb. 498 148
Hale v. Hess & Co., 30 Neb. 42 781
Haley v. State, 42 Neb. 556 173
Halter v. State, 74 Neb. 757 251
Halvorsen v. Moon & Kerr Lumber Co., 87 Minn. 18 82
Hamer v. McKinley-Lanning Loan & Trust Co., 52 Neb. 705 101
Hamilton County v. Cunningham, 87 Neb. 650 287
Hamlin v. Schulte, 34 Minn. 534 627
Hammond v. Patterson, 85 Neb. 362 98
Hammond v. Shepard, 186 Ill. 235 740
Hans v. State, 50 Neb. 150 177
Hardy v. Norton, 66 Barb. (N. Y.) 527 49
Harral v. Gray, 10 Neb. 186 446
Harris v. Lincoln Traction Co., 78 Neb. 681 211
Harrisburg, The, 119 U. S. 199 513
Harrison v. Harrison, 80 Neb. 103 ..... 81, 229
Harrison v. State, 96 Tenn. 548 168
Hart v. Knights of the Maccabees of the World, 83 Neb. 423 .. 400, 406
Haven v. Pender, 11 L. R. Q. B. Div. (Eng.) 503 207
Hawley v. Fairbanks, 108 U. S. 543 36
Hazen v. Wilhelmie, 68 Neb. 79 427
Henry v. Vance, 111 Ky. 72 564

PAGE
Helming v. Forrester, 87 Neb. 438 280
Helphrey v. Redick, 21 Neb. 80 36
Henderson v. State, 85 Neb. 444 467
Herbison v. Taylor, 29 Neb. 217 350
Herdman v. Wheeler (1902), 1 K. B. (Eng.) 361 49
Herpolsheimer v. Funke, 1 Neb. (Unof.) 471 823
Herzog v. Campbell, 47 Neb. 370 702
Hespin v. Wendeln, 85 Neb. 172 229
Higgins v. Western Union Telegraph Co., 156 N. Y. 75 206
Hill v. Carter, 101 Mich. 158 559
Hill v. Pierson, 45 Neb. 503 89
Hill v. State, 42 Neb. 503 465
Hilmer v. Western Travelers Accident Ass'n, 86 Neb. 285 400
Hobbs v. Nashville, C. & St. L. R. 122 Ala. 602 820
Hobson v. Huxtable, 79 Neb. 334, 340 39
Hobson v. Huxtable, 79 Neb. 340 ..... 50[illegible]
Hoctor-Johnston Co. v. Billings, 65 Neb. 214 315
Hollingsworth v. Saunders County, 36 Neb. 141 ..... 508, 513
Holmes v. Mason, 80 Neb. 448 ..... 39, 390, 803
Holton v. Sampson, 81 Neb. 30 591
Home v. Pillans, 2 Myl. & K. (Eng. Ch.) 15 813
Hoock v. Bowman, 42 Neb. 80 623
Hopple v. Higbee, 23 N. J. Law, 342 815
Housh v. State, 43 Neb. 163 ..... 267, 571
Hubbart v. Walker, 19 Neb. 94 446
Hubenka v. Vach, 64 Neb. 170 492
Hubert v. State, 74 Neb. 226 331
Huffman v. Ellis, 64 Neb. 623 200
Hughes v. Osborn, 42 Ind. 450 488
Huguenot Mills v. Jempson & Co., 68 S. Car. 363 783
Humphrey Hardware Co. v. Herrick, 72 Neb. 878 48
Hunzinger v. State, 39 Neb. 653 166

Iler v. Ross, 64 Neb. 710 251
Illinois Steel Co. v. Mann, 170 Ill. 200 727
Illinois Trust & Savings Bank v. City of Arkansas City, 22 C. C. A. 171 775
Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452 712
In re Adamek, 82 Neb. 448 196
In re Anderson, 69 Neb. 686 250
In re Beals, 116 Fed. 530 24
In re Caldwell, 82 Neb. 544 587
In re Debs, 158 U. S. 564 675
In re Estate of Fletcher, 83 Neb. 156 40
In re Estate of Leavitt, 85 Neb. 521 40
In re Estate of Manning, 85 Neb. 60 40

PAGE
In re Estate of Nelson, 132 Cal. 182 839
In re Estate of Shapter, 35 Colo. 578 840
In re Estate of Van Alstine, 26 Utah, 193 839
In re Langston, 55 Neb. 310 530
In re McMonies, 75 Neb. 702 588
In re Phillips, 82 Neb. 45 166
In re Reusch, 79 Neb. 449 166
In re Ross, 6 Cal. App. 597 744
In re Ruef, 150 Cal 665 589
In re Tune, 115 Fed. 906 25
In re Walker's Will, 128 N. W. (Ia.) 386 840
In re Will of Hunt, 122 Wis. 460 839
Iowa News Co. v. Harris, 62 Ia. 501 142
Irvine v. Wood, 51 N. Y. 224 523

Jacobson v. Van Boening, 48 Neb. 80 735
Jaynes v. Omaha Street R. Co., 53 Neb. 631 88
Jensen, Juhl & Hensen v. Hallam, 51 Neb. 492 816
Jessen v. Willhite, 74 Neb. 608 66
Jobst v. Hayden Bros., 84 Neb. 735 471
John Deere Plow Co. v. Wyland, 69 Kan. 255 404
Johnson v. City of Milwaukee, 46 Wis. 568 131
Johnson v. Finley, 54 Neb. 733 34
Johnson v. State, 34 Neb. 257 ..... 568, 571
Johnson v. Wells, Fargo & Co., 6 Neb. 224 77
Johnson's Appeal, 115 Pa. St. 129 765
Johnston v. Craig, 61 Neb. 98 100
Johnston v. Milwaukee & Wyoming Investment Co., 49 Neb. 68 ... 198
Jones v. Kirkpatrick, 2 Tenn. Ch. 693 540
Joyce v. State, 88 Neb. 599 684

Kaeiser v. Nuckolls County, 14 Neb. 277 509
Kearney County v. Chicago, B. & Q. R. Co., 76 Neb. 861 ..... 728, 731
Keeler v. Manwarren, 61 Neb. 663 350
Keller v. Davis, 69 Neb. 494 588
Kelley v. City of Madison, 43 Wis. 638 509
Kelley v. Mason, 4 Ind. 618 488
Kelly v. Gwatkin, 108 Va. 6 558
Kelly v. Wiard, 49 Conn. 443 371
Kelman v. Calhoun, 43 Neb. 157 36
Kemp v. State, 89 Ala. 52 152
Kennedy v. Merrick, 46 Neb. 260 112
Kennison v. State, 83 Neb. 391 ..... 468, 552
Keplinger v. Woolsey, 4 Neb. (Unof.) 282 358
Kepner v. Ford, 16 N. Dak. 50 627
Kern v. Kern, 51 N. J. Eq. 574 117
Kerr v. McCreary, 86 Neb. 786 529

PAGE
Kilbride v. Moss, 113 Cal. 432 237
King v. Cooper, 128 N. Car. 347 638
King v. New York C. & H. R. R. Co., 66 N. Y. 181 208
King v. York County, 7 East (Eng.) 588 122
Kinkaid v. Hiatt, 24 Neb. 562 612
Kinney v. Eastern Trust & Banking Co., 59 C. C. A. 586 36
Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. (Unof.) 340 823
Kittle v. Fremont, 1 Neb. 329 89
Knapp v. Wallace, 41 N. Y. 477 627
Knights v. State, 58 Neb. 225 449
Knights of the Maccabees of the World v. Nitsch, 69 Neb. 372 406
Knox County v. Harshman, 133 U. S. 152 371
Kock v. Emmerling, 22 How. (U. S.) 69 627
Kofka v. Rosicky, 41 Neb. 328 ..... 81, 229, 315
Kotera v. American Smelting & Refining Co., 80 Neb. 648 688
Kreamer v. Irwin, 46 Neb. 827 781
Kutch v. Kutch, 85 Neb. 702 114

La Flume v. Jones, 5 Neb. 256 101
Lahrman v. Baumann, 76 Neb. 846 36
Laing v. Nelson, 40 Neb. 252 76
Lake Erie & W. R. Co. v. Fix, 88 Ind. 381 77
Lake Erie & W. R. Co. v. Scott, 132 Ill. 429 346
Lake Shore & M. S. R. Co. v. Goldberg, 2 Ill. App. 228 106
Lamaster v. Scofield & Cowperthwait, 5 Neb. 148 612
Lamb v. State, 41 Neb. 356 468
Lamb v. State, 69 Neb. 212 603
Lambert v. Stevens, 29 Neb. 283 341
Lancaster County v. Green, 54 Neb. 103 506
Langhorst v. Coon, 53 Neb. 765 71
Lascelles v. State, 90 Ga. 347 476
Lass v. Eisleben, 50 Mo. 122 345
Latenser v. Misner, 56 Neb. 340 834
Lee v. Smart, 45 Neb. 318 727
Leeman v. Perris Irrigation District, 140 Cal. 540 35
Lesieur v. Custer County, 61 Neb. 612 53
Letherman v. Hauser, 77 Neb. 731 89
Lett v. Hammond, 59 Neb. 339 612
Levara v. McNeny, 5 Neb. (Unof.) 318, 73 Neb. 414 391
Levells v. State, 32 Ark. 585 789
Levy v. Steinbach, 43 Md. 212 371
Lewis' Estate, 203 Pa. St. 219 809
Liberman v. State, 26 Neb. 464 851
Lillie v. State, 83 Neb. 268 469
Lincoln & B. H. R. Co. v. Sutherland, 44 Neb. 526 735

PAGE

Lincoln & Dawson County Irrigation District v. McNeal, 60 Neb. 613 35
Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279 783
Lincoln Traction Co. v. Brookover, 77 Neb. 221 608
Lloyd's Bank v. Cooke (1907), 1 K. B. (Eng.) 794 49
Lockwood v. Exchange Bank, 190 U. S. 294 25
Long v. State, 23 Neb. 33 262
Logan County v. Carnahan, 66 Neb. 685, 693 ..... 516, 630
Logan County v. McKinley-Lanning L. & T. Co., 70 Neb. 399 ..... 516, 630
Loney v. Courtnay, 24 Neb. 580 ..... 455, 464
Louisville City R. Co. v. Hudgins, 124 Ky. 79 212
Lutz v. Linthicum, 8 Pet. (U. S.) *165 389

McCabe v. Equitable Land Co., 88 Neb. 453 457
McClay v. Worrall, 18 Neb. 44 66
McClintock v. State Bank, 52 Neb. 130 434
McCulloch v. Valentine, 24 Neb. 215 809
McDonald v. Mackenzie, 24 Or. 573 371
McDowell v. Markey, 77 Neb. 141 42
McElroy v. Metropolitan Life Ins. Co., 84 Neb. 866 708
McFarland v. Flack, 87 Neb. 452 280
McGinnis v. Chicago, R. I. & P. R. Co., 200 Mo. 347 106
McGowan v. State, 40 So. (Ala.) 142 265
McIntyre v. Whitfield, 13 Smed. & M. (Miss.) 88 501
McKeighan v. Hopkins, 19 Neb. 33 625
McKnight v. Thompson, 39 Neb. 752 623
McLanahan v. Chamberlain, 85 Neb. 850 43
McLaughlin v. Etchison, 127 Ind. 474 589
McMath v. State, 55 Ga. 303 467
McMurrin v. Rigby, 80 Ia. 322 466
McNamara v. McNamara, 86 Neb. 631 706
McNeal v. Hunter, 72 Neb. 579 698
McNeil v. Morrow, Rich, Ch. Rep. (S. Car.) 172 745
McParland v. Peters, 87 Neb. 829 384
Madden v. Lancaster County, 65 Fed. 188 513
Magee v. Holland, 3 Dutch. (N. J.) 86 77
Mansfield v. Gregory, 8 Neb. 432 446
Marion v. State, 16 Neb. 349 149
Martin v. District of Columbia, 205 U. S. 135 483
Martin v. North Star Iron Works, 31 Minn. 407 545
Martin v. State, 89 Ala. 115 603
Martinez v. Thompson, 80 Tex. 568 121
Mason v. Spencer, 35 Kan. 512 482
Masters v. Marsh, 19 Neb. 458 398
Mathiesen v. Omaha Street R. Co., 3 Neb. (Unof.) 747 211
Matoushek v. Dutcher Sons, 67 Neb. 627 ..... 624, 698

PAGE
May v. First Nat. Bank, 74 Neb. 251 98
Mayer v. Thompson-Hutchison Building Co., 104 Ala. 611 106
Maxfield v. State, 54 Neb. 44 570
Meagher v. Driscoll, 99 Mass. 281 ..... 77, 816
Mercer Co. v. City of Omaha, 76 Neb. 289 830
Merchants Savings Bank v. Noll, 50 Neb. 615 439
Merrick v. Kennedy, 46 Neb. 264 111
Metcalf v. Metcalf, 73 Neb. 79 599
Michaelson v. Beemer, 72 Neb. 761 588
Michaelson v. Village of Tilden, 72 Neb. 744 231
Middleton v. Thompson, 163 Pa. St. 112 627
Miles v. Holt County, 86 Neb. 238 144
Miles v. Postal Telegraph Cable Co., 55 S. Car. 403 544
Miles v. Walker, 66 Neb. 728 77
Mill Creek Valley Street R. Co. v. Village of Carthage, 18 Ohio C. C. Rep. 216, 62 Ohio St. 636 668
Miller v. Chicago, B. & Q. R. Co., 85 Neb. 458 277
Miller v. Chicago, B. & Q. R. Co., 65 Fed. 305, 76 Fed. 439 717
Miller v. Hurford, 11 Neb. 377 638
Miller v. Miller, 63 Ia. 387 740
Mills v. Miller, 3 Neb. 87 612
Mills v. State, 53 Neb. 263 262
Minneapolis Threshing Machine Co. v. Regier, 51 Neb. 402 77
Mitchell v. Read, 61 N. Y. 123, 84 N. Y. 556 760
Moberly v. Alexander, 19 Ia. 162 98
Modern Woodmen of America v. Lane, 62 Neb. 89 444
Modern Woodmen of America v. Pringle, 76 Neb. 384, 388 444
Mollyneaux v. Wittenberg, 39 Neb. 547 358
Montgomery v. Board of Commissioners, 76 Ind. 362 2
Montgomery v. Willis, 45 Neb. 434 656
Moore v. Independent District, 55 Ia. 654 585
Moorehouse v. Crangle, 36 Ohio St. 130 237
Morgan v. Bergen, 3 Neb. 209 387
Morgan v. Hardy, 16 Neb. 427 315
Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406 735
Morrow v. Hanson, 9 Ga. 398 98
Morse v. Chicago, B. & Q. R. Co., 81 Neb. 745 736
Moss v. Robertson, 56 Neb. 774 111
Munger v. Beard & Bro., 79 Neb. 764 446
Municipality of Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296 9
Murphey v. Illinois Trust & Savings Bank, 57 Neb. 519 104
Murphey v. State, 43 Neb. 34 148
Murphy v. Gould, 40 Neb. 728 ..... 236, 239
Murphy v. State, 15 Neb. 383 467
Murray v. Burd, 65 Neb. 427 693

PAGE
Murray v. Currie, 6 L. R. C. P. Div. (Eng.) *24 206
Murray v. Mace, 41 Neb. 60 815
Musselman v. Barker, 26 Neb. 737 77
Myers v. Myers, 88 Neb. 656 ..... 596, 834

Nance v. Falls City, 16 Neb. 85 508
National Bank v. Miller, 51 Neb. 156 36
National Bank of Commerce v. Farmers & Merchants Nat. Bank, 87 Neb. 841 187
Neal v. Vansickle, 72 Neb. 105 482
Nebraska Telephone Co. v. State, 55 Neb. 627 264
Nelson v. Godfrey, 12 Ill. 20 666
Nelson v. Jenkins, 42 Neb. 133 742
New Orleans Water Works Co. v. Rivers, 115 U. S. 674 774
Nolan v. East, 132 Ill. App. 634 789
Norman v. Waite, 30 Neb. 302 199
Norwegian Plow Co. v. Bollman, 47 Neb. 186 371
Nuckolls County v. Peebler, 65 Neb. 356 585

Oakland Bank of Savings v. Applegarth, 67 Cal. 86 559
Odell v. Story, 81 Neb. 437 623
Olive v. Whitney Marble Co., 103 N. Y. 292 206
Oliver v. Monona County, 117 Ia. 43 484
Olmstead v. City of Red Cloud, 86 Neb. 528 246
Olney v. Omaha & C. B. Street R. Co., 78 Neb. 767 211
Olson v. Court of Honor, 100 Minn. 117 840
Omaha Bottling Co. v. Theiler, 59 Neb. 257 19
Omaha & N. P. R. Co. v. Janecek, 30 Neb. 276 346
Omaha & R. V. R. Co. v. Crow, 54 Neb. 756 796
Omaha & R. V. R. Co. v. Wright, 49 Neb. 456 733
Omaha Street R. Co. v. Boesen, 68 Neb. 437 793
Omaha Street R. Co. v. Cameron, 43 Neb. 297 211
Omaha Street R. Co. v. Mathiesen, 73 Neb. 820 ..... 211, 221
O'Mahoney v. Burdett, 7 L. R. H. L. (Eng.) 388 811
Ommaney v. Bevan, 18 Ves. Jr. (Eng.) *291 813
O'Neal v. Hines, 145 Ind. 32 358
Osborn Co. v. Jordan, 52 Neb. 465 625
O'Shea v. Kavanaugh, 65 Neb. 639 585
Otto v. Conroy, 76 Neb. 517 241
Ould v. Washington Hospital for Foundlings, 95 U. S. 303 9
Oyster v. Burlington Relief Department of Chicago, B. & Q. R. Co., 65 Neb. 789 716

Page v. Morrel, 3 Abb. App. Dec. (N. Y.) 433 49
Palmer v. Roath, 86 Mich. 602 377
Palmer v. Whitney, 166 Mass. 306 381
Parish v. Stone, 31 Mass. 198 564

PAGE
Parker v. Parker, 78 Neb. 535 839
Parkhurst v. Swift, 31 Ind. App. 521 206
Parkins v. Missouri P. R. Co., 4 Neb. (Unof.) 1, 13 693
Parkins v. Missouri P. R. Co., 76 Neb. 242 782
Patrick v. Norfolk Lumber Co., 81 Neb. 267 427
Patrick v. State, 16 Neb. 330 477
Paulsen v. Portland, 149 U. S. 30 241
Pearson v. International Distillery, 72 Ia. 348 169
Pelletreau v. Metropolitan Street R. Co., 74 App. Div. (N. Y.) 192, 174 N. Y. 503 212
Penn Township v. Perry County, 78 Pa. St. 457 123
Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer, 197 U. S. 407 404
People v. Chapman, 127 Ill. 387 482
People v. Logan, 123 Cal. 414 397
People v. McKane, 30 N. Y. Supp. 95 603
People v. Manning, 48 Cal. 335 551
People v. President and Trustees of the College of California, 38 Cal. 166 305
People v. Van Horn, 20 Colo. App. 215 646
People v. Williams, 242 Ill. 197 698
People's Furniture & Carpet Co. v. Crosby, 57 Neb. 282 559
Persons v. McDonald, 60 Neb. 452 387
Perry v. State, 44 Neb. 414 152
Peters v. Crittenden, 8 Tex. 131 488
Peterson v. Bauer, 83 Neb. 405 229
Peterson v. Estate of Bauer, 76 Neb. 652 81
Peterson v. Ramsey, 78 Neb. 235 456
Peterson v. State, 79 Neb. 132 250
Phelps v. Prusch, 83 Cal. 626 627
Phelps v. Whitaker, 37 Mich. 72 377
Philamalee v. State, 58 Neb. 320 571
Phœnix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400 358
Pierce v. Tiersch, 40 Ohio St. 168 98
Pillow v. Southwest Virginia Improvement Co., 92 Va. 144 740
Piper v. Neylon, 81 Neb. 481 254
Pittsburg, C. & St. L. R. Co. v. Hine, 25 Ohio St. 629 513
Planters Bank v. Hornberger, 4 Cold. (Tenn.) 531 564
Poole v. Lowe, 24 Colo. 475 820
Powder River Live Stock Co. v. Lamb, 38 Neb. 339 563
Power v. Douglas County, 75 Neb. 734 585
Prante v. Lompe, 77 Neb. 377 769
Preuit v. Preuit, 88 Neb. 124 834

Quigley v. Central P. R. Co., 11 Nev. 350 77
Quinn v. Eggleston, 76 Neb. 409 776

PAGE
Rapp v. Sarpy County, 71 Neb. 382, 385.....214, 222
Rathjen v. Chicago, B. & Q. R. Co., 85 Neb. 808..... 106
Ream v. State, 52 Neb. 727..... 603
Red Willow County v. Smith, 67 Neb. 213..... 585
Redlich v. Doll, 54 N. Y. 234..... 49
Reed v. City of Cedar Rapids, 138 Ia. 366..... 110
Reed v. Inhabitants of Acton, 120 Mass. 130..... 486
Reed v. Reed, 65 Neb. 849, 70 Neb. 775..... 160
Rema v. State, 52 Neb. 375..... 152
Renihan v. Wright, 125 Ind. 536..... 77
Rhea v. State, 63 Neb. 461..... 568
Rhyn v. McDonald, 82 Neb. 552..... 588
Rialto Irrigation District v. Brandon, 103 Cal. 384..... 33
Rice v. Eureka Paper Co., 174 N. Y. 385..... 727
Rice v. McCague, 61 Neb. 861..... 378
Rich v. Starbuck, 51 Ind. 87..... 49
Richards v. Leveille, 44 Neb. 38..... 365
Richards v. State, 22 Neb. 145..... 844
Richards v. State, 36 Neb. 17.....467, 571
Richardson v. City of Omaha, 78 Neb. 79..... 830
Richardson v. Commonwealth, 80 Va. 124..... 551
Richardson v. Doty, 44 Neb. 73..... 370
Richardson v. Scott's Bluff County, 59 Neb. 400..... 564
Richardson County v. Hull, 24 Neb. 536..... 507
Richardson Drug Co. v. Meyer, 54 Neb. 319..... 358
Ricker v. Blanchard & Bro., 45 N. H. 39..... 559
Risse v. Gasch, 43 Neb. 287..... 612
Ritter v. Drainage District, 78 Ark. 590..... 483
Roberts v. Kimmons, 65 Miss. 332..... 627
Roberts v. Lemont, 73 Neb. 365..... 358
Robinson v. Mathwick, 5 Neb. 252..... 53
Rogers v. Kansas City & O. R. Co., 52 Neb. 86..... 731
Rogers v. Sample, 28 Neb. 141..... 789
Rohrer v. Hastings Brewing Co., 83 Neb. 111..... 166
Roman v. Bressler, 32 Neb. 240..... 427
Ropes v. Upton, 125 Mass. 258..... 358
Rourke v. White Moss Colliery Co., 2 L. R. C. P. Div. (Eng.) 205. 206
Ruggles v. City of Fond du Lac, 53 Wis. 436..... 509
Rumery v. Loy, 61 Neb. 755..... 446
Russell v. Horn, Brannen & Forsyth Mfg. Co., 41 Neb. 567..... 782
Russell v. McCarthy, 70 Neb. 514..... 516
Russell v. State, 62 Neb. 512..... 478

Sadler v. Mobile Life Ins. Co., 60 Miss. 391..... 402
St. Louis v. State, 8 Neb. 405..... 568
St. Paul & Minneapolis Trust Co. v. Leck, 57 Minn. 87..... 370

PAGE
St. Tammany Water Works Co. v. New Orleans Water Works Co., 120 U. S. 64 775
Sampson v. Rochester, 60 N. H. 477 584
San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118 603
Sanford v. Litchenberger, 62 Neb. 501 459
Sapp v. Christie Bros., 79 Neb. 701, 705 ..... 720, 726
Sattler v. Chicago, R. I. & P. R. Co., 71 Neb. 213 40
Schenck v. Griffin, 38 N. J. Law, 462 139
Schick v. Whitcomb, 68 Neb. 784 739
Schnitter v. McManaman, 85 Neb. 337 809
School District v. Bowman, 178 Mo. 654 366
School District v. Union School District, 81 Mich. 339 646
Schooler v. Tilden, 71 Mo. 580 49
Schrandt v. Young, 2 Neb. (Unof.) 546 782
Schroeder v. Nielson, 39 Neb. 335 32
Schwanenfeldt v. Chicago, B. & Q. R. Co., 80 Neb. 790 607
Scott v. State, 30 Ala. 503 603
Seay v. Bank of Tennessee, 3 Sneed (Tenn.) 557 49
Severa v. Village of Battle Creek, 88 Neb. 127 247
Shavlik v. Walla, 86 Neb. 768 231
Shaw v. Township of Saline, 113 Mich. 342 123
Sheasley v. Keens, 48 Neb. 57 446
Shed v. Hawthorne, 3 Neb. 179 89
Sheibley v. Nelson, 84 Neb. 393 462
Shephard v. Calhoun, 72 Ill. 337 361
Sheriff v. Hull, 37 Ia. 174 559
Shold v. Van Treeck, 82 Neb. 99 80
Sietman v. Goeckner, 127 Ill. App. 67 488
Sims v. Alabama Brewing Co., 132 Ala. 311 564
Sims v. Glazener, 14 Ala. 695 816
Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578 727
Sioux City & P. R. Co. v. Washington County, 3 Neb. 30 45
Skidmore v. State, 80 Neb. 698 418
Smiley v. McDonald, 42 Neb. 5 251
Smith v. Carnahan, 83 Neb. 667 554
Smith v. Connecticut Railway & Lighting Co., 80 Conn. 268 221
Smith v. Foxworthy, 39 Neb. 214 101
Smith v. Kincaid, 29 Tenn. 72 559
Smith v. Meyers, 52 Neb. 70 ..... 77, 608
Smith v. Pittsburg, Ft. W. & C. R. Co., 23 Ohio St. 10 77
Smith v. Sheeley, 12 Wall. (U. S.) 358 820
Smith v. Smith, 60 Neb. 273 599
Smith v. Smith, 157 Ala. 79 813
Smith v. State, 32 Neb. 105 330
Smith v. Yoram, 37 Ia. 89 142
Sorensen v. Sorensen, 68 Neb. 483 ..... 120, 834

PAGE
Southworth v. Davison, 106 Minn. 119 358
Spellman v. Richmond & D. R. Co., 35 S. Car. 475 77
Spencer v. State, 13 Ohio, 401 616
Spiech v. Tierney, 56 Neb. 514 32
Spinney v. City of Lynn, 172 Mass. 464 366
Spitler v. James, 32 Ind. 202 49
Stahnka v. Kreitle, 66 Neb. 829 63
State v. Adams Express Co., 85 Neb. 25 679
State v. Alton, 105 Minn. 110 569
State v. Beal, 37 Ohio St. 108 617
State v. Bedard, 65 Vt. 278 467
State v. Burns, 48 Mo. 438 551
State v. Chicago, B. & Q. R. Co., 29 Neb. 412 ..... 241, 243
State v. Chicago, B. & Q. R. Co., 88 Neb. 669 682
State v. Colfax County, 51 Neb. 28 484
State v. Cornell, 60 Neb. 276 586
State v. Cosgrave, 85 Neb. 187 241
State v. Crawford, 28 Kan. 726 674
State v. Crinklaw, 40 Neb. 759 551
State v. Cronin, 75 Neb. 738 143
State v. Dent, 6 S. Car. 383 551
State v. Dimond, 44 Neb. 154 234
State v. District Court, 68 Minn. 242 831
State v. Drexel, 75 Neb. 751 45
State v. Easter, 30 Ohio St. 542 476
State v. Eskew, 64 Neb. 600 585
State v. Farrington, 86 Neb. 653 470
State v. Gayhart, 34 Neb. 192 638
State v. Hanson, 80 Neb. 724, 738 481
State v. Hardy, 7 Neb. 377 166
State v. Harris, 150 Mo. 56 467
State v. Hawkins, 91 N. Car. 626 172
State v. Hesner, 55 Ia. 494 183
State v. Hill, 47 Neb. 456 286
State v. Kaso, 25 Neb. 607 196
State v. Knapp, 8 Neb. 436 350
State v. Lincoln Street R. Co., 80 Neb. 333 234
State v. Lowenhaught, 11 Lea (Tenn.) 13 168
State v. Majors, 85 Neb. 375 292
State v. Martyn, 82 Neb. 225 550
State v. Meserve, 58 Neb. 451 584
State v. Meyers, 46 Neb. 152 467
State v. Missouri P. R. Co., 75 Neb. 4 264
State v. Murray, 24 Md. 310 745
State v. Nebraska Telephone Co., 17 Neb. 126 264
State v. Northwestern Endowment & Legacy Ass'n, 62 Wis. 174 .. 402

PAGE

State v. Otoe County, 6 Neb. 129 53
State v. Pacific Express Co., 80 Neb. 823 678
State v. Perry, 41 W. Va. 641 846
State v. Peterson, 110 Ia. 647 466
State v. Pischel, 16 Neb. 490 330
State v. Pollard, 174 Mo. 607 467
State v. Scampini, 77 Vt. 92 167
State v. School District, 13 Neb. 78 644
State v. School District, 42 Neb. 499 640
State v. School District, 54 Minn. 213 645
State v. Several Parcels of Land, 80 Neb. 424 36
State v. Shroyer, 104 Mo. 441 618
State v. Silver, 9 Neb. 85 584
State v. Sneff, 22 Neb. 481 267
State v. Spence, 53 So. (La.) 596 169
State v. Tarver, 11 Lea (Tenn.) 658 168
State v. United States Mutual Accident Ass'n, 67 Wis. 624 402
State v. Uridil, 37 Neb. 371 234
State v. Village of College View, 88 Neb. 232 230
State v. Wallichs, 12 Neb. 407, 15 Neb. 609, 16 Neb. 679 583
State Ins. Co. v. Buckstaff Bros. Mfg. Co., 47 Neb. 1 350
Steen v. Scheel, 46 Neb. 252 1
Stelling v. Peddicord, 78 Neb. 779 439
Stevick v. Northern P. R. Co., 39 Wash. 501 106
Stewart v. Omaha & C. B. Street R. Co., 83 Neb. 97 209
Stewart v. Smith, 50 Neb. 631 71
Stimson v. Alessandro Irrigation Co., 135 Cal. 389 35
Stires v. First Nat. Bank, 83 Neb. 193, 85 Neb. 800 529
Stochl v. Caley, 48 Neb. 786 623
Stone v. City of Nebraska City, 84 Neb. 789 241
Stone v. Hunt, 114 Mo. 66 545
Stone v. Snell, 86 Neb. 581 370
Stoner v. Keith County, 48 Neb. 279 584
Storz v. Finklestein, 48 Neb. 27 395
Stover v. Tompkins, 34 Neb. 465 361
Stowell v. Rialto Irrigation District, 155 Cal. 215 ..... 3b
Stringham v. Board of Supervisors of Winnebago County, 24 Wis. 594 507
Stroemer v. Van Orsdel, 74 Neb. 132, 143 564
Strong v. Campbell, 11 Barb. (N. Y.) 135 142
Stull v. Masilonka, 74 Neb. 309 ..... 455, 464
Stump v. Richardson County Bank, 24 Neb. 522 486
Sullivan v. New Bedford Gas & Edison Light Co., 190 Mass. 288 208
Supreme Tent, K. of M. W. v. Volkert, 25 Ind. App. 627 444
Swaney v. Gage County, 64 Neb. 627 513
Swarts v. Siegel, 54 C. C. A. 399 712

PAGE
Swift v. O'Neill, 187 Ill. 337 727
Swoboda v. Union P. R. Co., 87 Neb. 200 461

Taylor v. Illinois Commercial Men's Ass'n, 84 Neb. 799 402
Taylor v. State, 37 Neb. 788 569
Taylor v. State, 86 Neb. 795 395
Taylor v. State, 3 Tex. App. 169 603
Tealey v. Hoyte, 3 Tenn. Ch. 561 745
Teegarden v. Burton, 62 Neb. 639 361
Territory v. Norris, 1 Or. 107 580
Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 436
Theroux v. Northern P. R. Co., 64 Fed. 84 513
Thompson v. Ish, 99 Mo. 160 840
Thompson v. Ragan, 117 Ky. 577 24
Thompson v. West, 59 Neb. 677 36
Thomsen v. Dickey, 42 Neb. 314 638
Thrall v. Omaha Hotel Co., 5 Neb. 295 370
Tindall v. Peterson, 71 Neb. 160 39
Tinkham v. Town of Stockbridge, 64 Vt. 480 123
Town of Colton v. South Dakota Central Land Co., 126 N. W. (S. Dak.) 507 251
Townsend v. France, 2 Houst. (Del.) 441 49
Tracey v. State, 46 Neb. 361 468
Treacher & Co. v. Treacher, W. N. (1874, Eng.) 4 167
Trenholm v. Kloepper, 88 Neb. 236 217
† Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co., 86 Neb. 623 778
Tripp v. Hennessy 10 R. I. 129 172
Troup v. Morgan County, 109 Ala. 162 584
Trustees for Vincennes University v. State of Indiana, 14 How. (U. S.) 268 9
Turner v. Townsend, 42 Neb. 376 104
Turquoise, The, 114 Fed. 402 206

Uldrich v. Gilmore, 35 Neb. 288 66
Union P. R. Co. v. Keller, 36 Neb. 189 731
Union P. R. Co. v. Vincent, 58 Neb. 171 733
United State v. Brindle, 110 U. S. 688 585
United States v. Fero, 18 Fed. 901 331
United States v. Lamont, 155 U. S. 303 820
United States v. Western Union Telegraph Co., 50 Fed. 28 675
Up River Ice Co. v. Denler, 114 Mich. 296 358

Vander Ploeg v. Van Zuuk, 135 Ia. 350 50
Vertrees v. Gage County, 81 Neb. 213 223
Vila v. Grand Island E. L., I. & C. S. Co., 68 Neb. 222, 233 410
Village of Passaic v. State, 37 N. J. Law, 538 483
Village of Ponca v. Crawford, 18 Neb. 551 508

PAGE

Violet v. Rose, 39 Neb. 660 36
Voigt v. Detroit City, 184 U. S. 115 483
Vreeland v. Vetterlein, 33 N. J. Law. 247 328

Waldock v. Winfield, 2 L. R. (1901) K. B. Div. (Eng.) 596 206
Walla Walla City v. Walla Walla Water Co., 172 U. S. 1 775
Wally v. Union P. R. Co., 83 Neb. 658 221
Walters v. Chicago, B. & Q. R. Co., 74 Neb. 551 716
Walton v. Walton, 57 Neb. 102 599
Wardell v. McConnell, 23 Neb. 152 65
Warrick v. Rounds, 17 Neb. 411 66
Webb v. Baird, 11 Lea (Tenn.) 667 168
Webster v. City of Lincoln, 50 Neb. 1 45
Weiden v. Woodruff, 38 Mich. 130 377
Weinandt v. State, 80 Neb. 161 183
Weitz v. Independent District, 87 Ia. 81 585
Wells v. Cochran, 78 Neb. 612, 84 Neb. 278 368
Wenham v. State, 65 Neb. 394 251
Wenninger v. Lincoln Traction Co., 84 Neb. 385 221
Werlein v. New Orleans, 177 U. S. 390 9
Werner v. Cincinnati, 23 Ohio C. C. Rep. 475 544
West v. Western Union Telegraph Co., 39 Kan. 93 76
Western Travelers Accident Ass'n v. Tomson, 72 Neb. 661 401
Western Travelers Accident Ass'n v. Tomson, 72 Neb. 674, 680 ..408, 834
Western Union Telegraph Co. v. Wilhelm, 48 Neb. 910 778
Wheeler v. State, 79 Neb. 491 ..... 570, 616
Whitcher v. City of Somerville, 138 Mass. 454 122
White v. McGilliard, 140 Cal. 654 385
Whitman v. State, 17 Neb. 224 147
Whitney v. Whitney, 78 Neb. 240 127
Whittemore v. People, 227 Ill. 453 586
Wilber v. Reed, 84 Neb. 767 241
Wilbur v. Jeep, 37 Neb. 604 98
William Deering & Co. v. Peterson, 75 Minn. 118 820
Williams v. Fuller, 68 Neb. 354 76
Williams v. Smith, 68 Neb. 329 54
Williams v. State, 60 Neb. 526 617
Wimer v. Wimer, 82 Va. 890 740
Winslow v. State, 26 Neb. 308 617
Winters v. Winters, 102 Ia. 53 840
Wittenberg v. Mollyneaux, 55 Neb. 429, 60 Neb. 583 781
Wood v. Carr, 115 Ky. 303 24
Wood v. Omaha & C. B. Street R. Co., 84 Neb. 282 211
Wood v. State, 46 Neb. 58 467
Wood v. Vermont C. R. Co., 24 Vt. 608 123

PAGE
Wood & Houston v. Steele, 65 Ala. 436 371
Woodham v. Gelston, 1 Johns. (N. Y.) * 134 816
Woods v. West, 40 Neb. 307 827
Woolley v. Carter, 7 N. J. Law, * 85 815
Woolman v. Wirtsbaugh, 22 Neb. 490 624
Wyllie v. Palmer, 137 N. Y. 248 206

Yeiser v. Broadwell, 80 Neb. 718 612
Yik Hon v. Spring Valley Water Works, 65 Cal. 619 544
Yoesel v. Rieger, 75 Neb. 180 809
Young v. Kinney, 85 Neb. 131 729
Young v. Rohrbough, 84 Neb. 448, 86 Neb. 279 102

Zahradnicek v. Selby, 15 Neb. 579 638
Zelenka v. Union Stock Yards Co., 82 Neb. 511 221
Zimmerman v. Trude, 80 Neb. 503 110

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED.

NEBRASKA.

CONSTITUTION.

PAGE

Art. I, sec. 6 612
Art. III, sec. 11 110
Art. III, sec. 15 830
Art. III, sec. 22 583
Art. VI, sec. 2 669
Art. VI, sec. 19 109
Art. IX, sec. 1 364
Art. IX, sec. 3 557

SESSION LAWS.

1867.

P. 52 5
P. 80 294

1869.

P. 276 5

1881.

Ch. 61 166
Ch. 61, sec. 11 169
Ch. 78, subd. XIII, secs. 2, 3, 5 576

1887.

Ch. 10, secs. 60, 78, 94 830
Ch. 10, sec. 69 519
Ch. 16, sec. 15 302

1889.

Ch. 13 830
Ch. 57 279

1895.

Ch. 70 29
Ch. 70, secs. 10, 14, 59-64 27
Ch. 70, sec. 24 34

1897.

Ch. 10 316
Ch. 10, sec. 101*a* 318
Ch. 10, secs. 141, 151, 152 320

PAGE

Ch. 34 109

1899.

Ch. 78 33
Ch. 78, sec. 1 27
Ch. 78, sec. 24 34

1903.

Ch. 15 830
Ch. 90 294

1905.

Ch. 59 589
Ch. 59, secs. 1, 7 590
Ch. 115 422

1907.

Ch. 45, secs. 1, 7 591
Ch. 48 461
Ch. 82, sec. 3 166
Ch. 90 240
Ch. 90, sec. 2 242
Ch. 153 481

1909.

Ch. 83 669
Ch. 125 294
Ch. 126 294
Ch. 126, sec. 2 295

GENERAL STATUTES.

1873.

Ch. 48, sec. 12 581

REVISED STATUTES.

1866.

Ch. 47, secs. 19, 20 52

ANNOTATED STATUTES.

1909.

Ch. 32 166
Sec. 5345 10
Sec. 6971 291
Secs. 7152, 7176 195
Sec. 7161 169
Sec. 7168 791
Secs. 8980, 8981 352
Sec. 8982 353
Sec. 9200 189
Sec. 10555 433
Sec. 11503 94
Secs. 11721, 11722, 11724 579

COMPILED STATUTES.

1893.

PAGE

Ch. 13*a*, art. I, sec. 67, subd. IX 667

1895.

Ch. 93*a*, art. III 29
Ch. 93*a*, art. III, sec. 20 31
Ch. 93*a*, art. III, secs. 59-64 27

1897.

Ch. 28, secs. 9*c*-9*f* 109

1899.

Ch. 14, art. I, secs. 77, 104, 106 354
Ch. 78, sec. 3 54
Ch. 93*a*, art. III, sec. 19 33

1901.

Ch. 12*a*, sec. 109 520
Ch. 23, sec. 176, subd. 1 37
Ch. 36, sec. 3 39
Ch. 36, sec. 17 38
Ch. 77, art. I, sec. 117 31
Ch. 77, art. I, sec. 123 636
Ch. 77, art. I, sec. 124 635

1903.

Ch. 18, art. III 280
Ch. 18, art. III, sec. 18 283
Ch. 77, art. I, secs. 214, 215 422

1905.

Ch. 41 48

1907.

Ch. 14, art. I, sec. 69, subds. 27, 28 240
Ch. 21, sec. 3 459
Ch. 41, sec. 14 47
Ch. 72, art. VIII 240
Ch. 77, art. I, secs. 12, 19-27, 121, 124, 132 44
Ch. 78, sec. 110 242
Ch. 89, art. V 479
Ch. 89, art. V, sec. 3 480
Ch. 89, art. V, sec. 11 481

1909.

Ch. 7, sec. 20 148
Ch. 12*a*, sec. 250 830
Ch. 13, art. III, sec. 48, subd. 46 248
Ch. 14, art. I 352
Ch. 14, art. I, sec. 101 229
Ch. 15*a*, sec. 1 122

PAGE
Ch. 16, secs. 5, 8 399
Ch. 16, sec. 104 604
Ch. 18, art. I, sec. 22 505
Ch. 18, art. I, sec. 23 506
Ch. 18, art. I, sec. 23, subd. 5 507
Ch. 20, art. II, sec. 10 590
Ch. 20, sec. 46 111
Ch. 21, secs. 4, 5 719
Ch. 23, secs. 55, 89 389
Ch. 23, secs. 117, 118 391
Ch. 23, sec. 141 771
Ch. 25, sec. 7 124
Ch. 26*a*, sec. 1 259
Ch. 28, sec. 36 351
Ch. 37, sec. 1 848
Ch. 37, sec. 5 ..... 399, 844
Ch. 41, sec. 1 189
Ch. 41, sec. 30 187
Ch. 41, sec. 56 255
Ch. 41, sec. 118 191
Ch. 43, sec. 91 400
Ch. 43, secs. 91, 112 406
Ch. 50, sec. 11 177
Ch. 50, sec. 20 181
Ch. 50, secs. 38*a*-38*d* 672
Ch. 72, art. V, sec. 1*a* 430
Ch. 73, sec. 16 444
Ch. 73, sec. 53 312
Ch. 73, sec. 55 496
Ch. 73, sec. 61*a* 455, 464
Ch. 73, sec. 74 ..... 70, 326
Ch. 75, arts. I, II 589
Ch. 77, art. I, secs. 2, 12, 28, 29, 44 365
Ch. 77, art. I, sec. 210 31
Ch. 77, art. IX, sec. 7 548
Ch. 78, sec. 88 120
Ch. 78, sec. 89 122
Ch. 78, sec. 117 510
Ch. 79, subd. I, sec. 4 94
Ch. 79, subd. III, sec. 8 644
Ch. 79, subd. XIV 640
Ch. 79, subd. XIV, sec. 1 646
Ch. 79, subd. XIV, sec. 24 647
Ch. 89*a*, sec. 14 260
Ch. 89*a*, sec. 15 261

CODE.

PAGE

Ch. 41 (1851) 354
Sec. 12 98
Secs. 31, 106 612
Secs. 64, 880 488
Sec. 69 487
Secs. 145, 312 789
Secs. 314, 316 698
Sec. 333 835
Sec. 334 838
Sec. 341 377
Sec. 429 343
Secs. 567, 569 7
Sec. 850 42
Secs. 1019, 1020 758

CRIMINAL CODE.

Sec. 3 567
Sec. 6 329
Sec. 16 478
Sec. 48 614
Sec. 50*a* 684
Secs. 304-306, 458 351
Sec. 395 477
Sec. 419 412
Sec. 435 328
Secs. 439-442 476
Sec. 467 568
Sec. 584 473

UNITED STATES.

COMPILED STATUTES.

1901.

Vol. 3, p. 3450, ch. 541, sec. 67*f* 20

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1910.

BARBARA KUHLMAN, APPELLEE, V. WILLIAM J. LEMP BREWING COMPANY, APPELLANT.

FILED NOVEMBER 26, 1910. No. 16,069.

OPINION on motion for rehearing of case reported in 87 Neb. 72. *Former opinion corrected. Motion for rehearing overruled.*

PER CURIAM.

On the motion for a rehearing in this case it is strenuously contended that our decision is contrary to, and in effect overrules, *Steen v. Scheel*, 46 Neb. 252. If the statement in our opinion that "in April," before the lease expired, the tenant "informed the plaintiff that if a license to sell intoxicating liquors could not be procured it would not exercise its option to again lease the premises," was correct, then we think the decision would have that effect.

We have again examined the record, and find no evidence therein to sustain that statement. On the other hand, it would seem that the landlord was not notified of any such intention. The lease expired May 1, 1907, and the key was not delivered to the plaintiff until June 29 of that year, and the defendant held possession of the premises from the date of the expiration of the lease until that time. According to *Delashman v. Berry*, 20 Mich.

292, such holding over amounted to a renewal of the lease for another term of one year. See, also, *Montgomery v. Board of Commissioners*, 76 Ind. 362, 40 Am. Rep. 250; 2 Tiffany, Landlord and Tenant, pp. 1484, 1486; 24 Cyc. 1018.

Our opinion is hereby corrected to conform to the facts as shown by the record, and the motion for a rehearing is

OVERRULED.

STATE OF NEBRASKA, APPELLANT, V. FIRST CATHOLIC CHURCH OF LINCOLN ET AL., APPELLEES.

FILED NOVEMBER 26, 1910. No. 16,873.

Religious Societies: CONVEYANCES: VALIDITY. In the year 1869, the legislature passed an act authorizing the governor to execute deeds of conveyance to the trustees of churches or religious societies to which certain lots in the city of Lincoln had been assigned by the capital commissioners. Acting under such authority, the governor conveyed the lots in dispute in this action to certain named persons, as trustees, for the First Catholic Church of the city of Lincoln, which was not then incorporated. The trustees and their successors, by mesne conveyances, transferred the title to the property to the same society after its incorporation as a church organization. The society, previous to its incorporation, took possession of the property as soon as it was set over to them, and made valuable improvements thereon prior to the execution of the deed by the governor, in 1870, and has been in peaceable possession ever since, using the same for church and parochial school purposes, in strict accordance with the purposes of the sale by the state to its trustees. *Held*,

First, That the act of the legislature in providing that conveyances be made to "trustees of churches or religious societies" did not contemplate nor require that such religious societies should be incorporated before the state could be divested of its title.

Second, That the deed to the persons named as trustees vested the title in them for the use and beneficial interest of the society named in the trust and then existing.

Third, That the conveyances from the said trustees and their duly authorized successors to the church after its incorporation vested fee title in the church.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Arthur F. Mullen, Attorney General, for appellant.

A. J. Sawyer, T. J. Doyle and *G. L. De Lacy, contra.*

Smyth, Smith & Schall, amici curiæ.

REESE, C. J.

The attorney general, having been previously directed by the state board of public lands and buildings so to do, filed his petition in the district court for Lancaster county, in which it is alleged that the state acquired title to lots 7, 8 and 9, in block 65, in the city of Lincoln, on or about August 2, 1867, and under the provisions of an act of the legislature of June 14, 1867, and of an act approved February 15, 1869, respecting church lots, on the 6th day of September, 1870, sold and attempted to convey said lots to the First Catholic Church of Lincoln, and the deed of conveyance was made to Emanuel Hartig, Michael Hofmayer and Joseph Sands, as trustees of said church, and to their successors in trust therefor, and which deed was duly recorded in the deed record of Lancaster county; that the said Sands died intestate in the year 1882, and that Mrs. John Zimmerer and F. Joseph Sands are his children, and sole heirs; that after the execution of said deed P. W. O'Connor, James Ledwith and Thomas Heelan succeeded to said trusteeship, and as such attempted to convey the premises to the Right Reverend James O'Connor, the then bishop of the Catholic diocese of Nebraska, and to his successors in trust, as such bishop, for St. Theresa Congregation, which was the same organization as the said First Catholic Church, and that said deed was duly recorded;

that thereafter the Catholic diocese of Nebraska was divided, and the diocese of the city of Lincoln was established, and the Right Reverend Thomas Bonacum was duly made the first Catholic bishop of Lincoln, and on October 4, 1888, the said Bishop James O'Connor undertook to convey said premises to said Bishop Thomas Bonacum, which deed of conveyance was duly recorded; that thereafter on the 13th day of December, 1906, the said Bonacum, as bishop of Lincoln, attempted to convey the said premises to the First Catholic Church of Lincoln, otherwise known as St. Theresa Pro-Cathedral, the deed of conveyance being duly recorded in the proper deed records of Lancaster county. It is further alleged that the said First Catholic Church of Lincoln, alias St. Theresa Pro-Cathedral, was not legally incorporated at the time of the attempted conveyance by the state to its trustees, nor until about the month of December, 1906; that while the said church at all times maintained a church building and parochial school upon said premises, expending large sums of money in the construction of improvements thereon, and while the said property was constantly and permanently used for said church and school purposes, yet, the church not having been incorporated, it could not legally receive nor hold the property so conveyed to its trustees by the state, and, for that reason, it never acquired the title thereto, the title at all times remaining in the state, notwithstanding said church was at all the time referred to a *de facto* corporation; that the said Michael Hofmayer, one of the original trustees and a Benedictine father of the Catholic church, died in the year 1902, leaving no descendants, and his collateral heirs are unknown; that Emanuel Hartig and the heirs of Sands claim some interest in the property, by the conveyance and descent, but that their rights are denied by the state. The prayer of the petition is that the pretended deed from the state to the trustees of the then unincorporated church, and the subsequent conveyances, be canceled, set aside, and held for naught, and the title of the state quieted.

The defendants Sands and Zimmerer entered their voluntary appearance, and answered, disclaiming any title to or interest in the property, and asking that they be acquit of all costs. Similar action was taken by Hartig. The defendant First Catholic Church of Lincoln, alias St. Theresa Pro-Cathedral, answered, admitting substantially all the averments of the petition as to the conveyances, the absence of incorporation, etc., and averred that at the time the deed was made by the state to the trustees the defendant was a *de facto* corporation, at all times having a complete organization, and that the said trustees could and did hold the title to said property for it, that the church building has and had been at the time of the conveyance duly dedicated as such, that services had ever since been regularly held therein by the congregation composing the organization, and that the deed by the state was a valid conveyance and vested the title to the property in the church and its trustees. The acts of the legislature of June 14, 1867 (laws 1867, p. 52), and February 15, 1869 (laws 1869, p. 276), giving the authority for the conveyance, are cited and referred to by the title, but need not be further noticed here. It is claimed that full authority existed for the conveyance, that the state was thereby divested of its title to the property, and that through the conveyances the defendant became and is the absolute owner thereof, the trustees acting in no other capacity than as such trustees, and claiming no right nor authority over the property other than as the holders of the title in trust. All unadmitted averments of the petition are denied. The defendant, further answering by way of cross-petition, sets out substantially the same historical facts as are contained in the petition, with the exception that in the description of the property lot 10 is included as a part of the premises "described in the plaintiff's petition," but which does not therein occur; that the said lots were duly and regularly sold to defendant and conveyed as aforesaid by absolute deed; that all the conveyances prior to the vesting of the title in defendant were made in trust

for it and its use and benefit, and that it was and is the owner of the property. It is further set out that in an action pending in the district court for Lancaster county on the 14th day of December, 1906, which was an application of said church for authority to sell the said real estate, the court having full jurisdiction of the subject matter and of all the parties interested in said real estate, it was duly adjudged and decreed that the defendant was the owner in fee of the said lots 7, 8, 9 and 10, in block 65, in said city of Lincoln, and said title was adjudicated and confirmed in defendant, which said judgment and decree remain in full force and effect. It is alleged that the claims of the plaintiff are an interference with the free exercise, use and enjoyment of said premises by defendant, and the prayer is that the title to said property be quieted in said defendant church, as against the state and all other defendants. The state demurred to the answer of the church, assigning as the grounds therefor that the averments therein failed to state a defense to the petition. The demurrer was overruled, and, the state standing on its demurrer, a decree was entered in favor of defendant church. Plaintiff appeals.

The case has been elaborately briefed and argued at the bar of the court by the parties to the suit, and a comprehensive brief has been filed by Messrs. Smyth, Smith and Schall, as friends of the court, and as representing clients of theirs who, it is claimed, are interested in the result of the action for the reason that defendant claims to have made a contract with them for the sale of the property in dispute. It is stated in this brief that "there is nothing in controversy between the plaintiff and the defendants. It is purely a moot case, brought by the direction of the board of public lands and buildings, at the instance and request, as we think, of Bishop Bonacum. It is not even a moot case, so far as the plaintiff and the defendants are concerned, because in such a case there is something submitted for decision, while in this case there is nothing to submit for decision, as far as they are con-

cerned. Yet," it is said, "if this court should permit this case to be maintained, its action will be presented in the ecclesiastical tribunal, we fear, as a decision adverse to our clients of the points involved between them and the bishop, and we respectfully submit that this court should not be used to serve such a purpose."

We frankly admit that, if it were shown that the suit does not present conflicting interests between the parties to it, we would hesitate to take jurisdiction, even on appeal, but we are unable to find any evidence in the record that such is the case. The action is brought by and under the direction of the board of public lands and buildings, and it was evidently their intention to procure a settlement of the question of the title to the property. It is clear from the issues presented that the demands of the parties are adverse. The fact that the suit may be a friendly one, if true, would not of necessity render the suit a moot case. See sections 567 and 569 of the code. In *Adams v. Union R. Co.*, 21 R. I. 134, 44 L. R. A. 273, it is said: "A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a party of a determination simply because his motive in the assertion of such right is to secure such determination. It is a matter of common practice." We are also unable to see how a decision of this action in favor of defendant could by any course of reasoning affect adversely the rights of the third party to whom reference is made in the brief. If, as is claimed in the brief, there is a dispute as to whether a certain contract has been entered into, that question must be for the civil courts alone, and no ecclesiastical tribunal has any jurisdiction or power to adjudicate the question. If the property in question belongs to the state, this action would settle the question in its favor. If it belongs to the defendant, the decision must be equally conclusive. It is quite true that there is no controlling question of fact presented. The litigation pre-

sents only questions of law. Was the effort of the state officers to transfer the title effective? If so, was the title finally acquired by the church?

It is shown by the pleadings of both parties that the conveyance was made by the state to the three trustees of the First Catholic Church of Lincoln, the grant being unto said trustees "and their successors in trust for said church," as appears from a copy of the deed set out at length in the petition; that at that time the church was not incorporated, but was an organized association or body of worshippers occupying the property for the purpose of public worship according to the usages, forms and rites of the Roman Catholic church, and that such occupation and method of worship has been retained and practiced from that time (1870) to the present, the same organization having been since said date duly incorporated and the property conveyed to it by the legal successors in trust. The persons named were the recognized trustees of the church, and they, and their successors, so continued. The conveyance was in pursuance of a sale of the property under authority of law by the state to the trustees for the church. This conveyance was made in pursuance of the act of the legislature approved February 15, 1869 (laws 1869, p. 276), which approves the acts of the commissioners in "settling upon three lots in the town of Lincoln, for the use of each of the several religious denominations" and authorizes the governor to execute deeds of conveyance "to the trustees of those churches or religious societies, as soon as they shall have erected on those lots a building for public worship: Provided, said building shall be erected within two years." The deed bears date September 6, 1870, which was within less than two years after the passage of the act, and it is alleged in the answer that, prior to the time of the execution of the deed to lots 7, 8 and 9, the church had erected thereon a substantial brick church building which had been dedicated to the use of public worship. As the act of the legislature provided for the conveyance of "church lots" to the trus-

tees of "religious societies" without requiring them to be incorporated, it is clear that the conveyance was in strict compliance with the law. However, had that provision not been contained in the act, it is doubtless the law that the trustees could hold for an unincorporated society. *Municipality of Ponce v. Roman Catholic Apostolic Church,* 210 U. S. 296, 314; *Werlein v. New Orleans,* 177 U. S. 390, 401; *Ould v. Washington Hospital for Foundlings,* 95 U. S. 303; *Trustees for Vincennes University v. State of Indiana,* 14 How. (U. S.) 268; *Beatty v. Kurtz,* 2 Pet. (U. S.) *566.

The title to lot 10, in block 65, is not in dispute in this action, the state making no claim to it, nor does it appear that any one is claiming it adversely to the defendant. The district court, upon the averments of defendant's cross-petition, found the title to be in it, and the decree in that behalf will not be reviewed nor molested.

The decree of the district court is

AFFIRMED.

FLORENCE OCENA WYRICK, APPELLANT, V. DOUGLAS J. WYRICK, APPELLEE.

FILED NOVEMBER 26, 1910. No. 16,204.

Divorce: Alimony: TEMPORARY ALIMONY AND ATTORNEY'S FEES: ALLOWANCE BY SUPREME COURT. In a suit for a divorce, where it appears that the district court, by inadvertence or oversight, has failed to make an allowance for the plaintiff's support and maintenance during the pendency of the action, this court, on appeal, may make suitable provisions for that purpose, and for the payment of counsel fees, in addition to the permanent alimony allowed by that court.

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

L. B. Stiner, C. H. Epperson and *Paul E. Boslaugh,* for appellant.

S. W. Christy, L. E. Cottle and *R. D. Sutherland, contra.*

BARNES, J.

The appellant, who was the plaintiff in the district court for Clay county, commenced this action to obtain separate maintenance and support from her husband, Douglas J. Wyrick. An answer was filed to her petition, and thereupon by leave of the court she filed an amended petition praying for a divorce and alimony. The issues upon which the cause was tried were extreme cruelty, failure to provide, and adultery. The trial court resolved the issues thus presented in favor of the plaintiff, except as to the charge of adultery, which the court found was not sustained, and decreed that the plaintiff should recover as alimony the sum of $4,000, and $350 as attorney's fees; that the plaintiff should have and retain the furniture and household goods, and that the defendant should pay all the costs. The decree further provided that it should stand as a final determination of all property rights of and between the parties to the action. It appears that both parties are satisfied with the decree of divorce, but the plaintiff, being dissatisfied with the amount of alimony decreed to her, has brought the case here by appeal.

Section 5345, Ann. St. 1909, provides: "Upon every divorce from the bonds of matrimony for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, from any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the hus-

band, the character and situation of the parties, and all other circumstances of the case."

It thus appears that in awarding alimony, in an action for divorce, the district court is clothed with a fair measure of discretion. Indeed, it was frankly conceded upon the argument, by counsel for the appellant, that it was incumbent upon them to show that the trial court in this case had abused its discretion in fixing the amount of alimony in order to entitle the plaintiff to a decree of this court increasing the same.

Having this in mind, we have carefully examined the bill of exceptions, from which we think it fairly appears that, at the time the district court entered the decree appealed from, the value of the defendant's real estate, after deducting the incumbrances thereon, was about $16,000; that his personal property, in the nature of household furniture, was worth in the neighborhood of $1,000. This personal property was all given to the plaintiff, and her permanent alimony, as above stated, was fixed at the sum of $4,000. Allowances have been made to the plaintiff to cover the expense of the prosecution of this action, amounting to $800, which has been paid; thus making the amount awarded to the plaintiff, in round numbers, the sum of $5,800. Considering the age and ill health of the defendant, and the situation of the plaintiff, we are unable to say that the decree of the district court fixing the amount of plaintiff's permanent alimony, is either inequitable or unjust.

There is another phase of this case, however, which it seems to us must have escaped the attention of the district court. It was the duty of the defendant to support and maintain the plaintiff during the pendency of this action, and up to the time of the entry of the final decree by the district court. The record discloses that she expended in that behalf nearly $700, the most of which she was compelled to borrow, for it clearly appears that after their separation the defendant refused to contribute further to the plaintiff's support and maintenance. Therefore, the

district court should have allowed her this additional amount, and for the failure to do so she was without doubt justified in prosecuting this appeal. For that purpose, it was necessary for her to employ counsel and incur some additional expense by way of suit money, which expense has been awarded to her by this court. Taking this view of the matter, it would seem that, in order to enable her to pay counsel fees and recoup herself for the amount of money which she was required to expend for her support and maintenance during the pendency of this action, she should be allowed an additional sum of $1,000, out of which she should be required to pay her counsel for the prosecution of this appeal.

We are therefore of opinion that the judgment of the district court, so far as the allowance of permanent alimoney is concerned, should be affirmed; and a decree will here be entered to that effect; and the plaintiff is allowed the additional sum of $1,000 for her support during the pendency of this action and for counsel fees. With this modification, the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

MARTHA M. JOHNSON, APPELLEE, V. MODEL STEAM LAUNDRY COMPANY, APPELLANT.

FILED NOVEMBER 26, 1910. No. 16,207.

1. **Master and Servant:** ACTION FOR INJURIES: NEGLIGENCE: DIRECTING VERDICT. In an action by a servant against a master or employer for personal injuries, sustained while engaged in the master's service, it is necessary for the plaintiff to prove by competent evidence that the negligence of the master was the proximate cause of the injury complained of; and where the plaintiff fails to furnish such proof it is the duty of the trial court to direct the jury to return the verdict for the defendant.

2. **Evidence** examined, the substance of it stated in the opinion, and *held* insufficient to sustain a verdict for the plaintiff.

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

Greene, Breckenridge & Matters, for appellant.

Murdock & Pancoast, contra.

BARNES, J.

Action in the district court for Douglas county to recover damages for personal injuries sustained by the plaintiff while working in the defendant's laundry. The plaintiff had the verdict and judgment, and the defendant has appealed.

At the close of the evidence the defendant requested the trial court to direct a verdict in its favor, which was denied, and that ruling is now one of the several errors assigned and relied on for a reversal of the judgment. The allegations of negligence set forth in the amended petition, on which the cause was tried, were as follows: (*a*) The failure to furnish a reasonably safe guard upon the mangle on which the plaintiff was working at the time of her injury; (*b*) failure to use care and diligence to keep the machine in a reasonably safe condition; (*c*) failure to warn plaintiff of the danger of the service in which she was engaged; (*d*) operating the mangle at its highest rate of speed; (*e*) failure to use reasonable diligence to repair the mangle and keep it in repair; (*f*) failure to adjust the mangle so that it could be operated at less than its highest rate of speed.

The defendant, by its answer, admitted that the plaintiff was in its employ when she was injured; avers that she was familiar with the risks of her service, and the condition of the machine upon which she was at work; that the injury resulted to her from a risk incident to her employment; that the negligence of the plaintiff, or a fellow servant, or an unavoidable accident, caused the injury complained of; and denied each and every other averment of the plaintiff's petition.

It appears that the plaintiff, at the time of her injury, was a person of mature years, and had been engaged in laundry work, or working in different laundries, for some six years before that time; that her first service in the defendant's laundry commenced about 3½ years before she was hurt; that at the beginning of her services she worked on a sheet mangle about the size of the mangle on which she was working at the time of her injury; that the sheet mangle had a straight stationary guard, with just enough space at the bottom of it to let in the sheets, towels, or other articles that were to go underneath the guard and through the machine; that this mangle was constructed with rollers placed over a steam chest which furnished heat for the ironing, and the rollers pressed the sheets, or whatever articles were being ironed, down upon this steam chest. In short, that it was a machine precisely like the one she was working on at the time of the accident, with the exception that it had a stationary instead of a roller guard. After working upon the sheet mangle for about four months the plaintiff went to work for the Kimball laundry, where she ironed shirt bands, and from there she went back to the defendant's laundry, where she worked for a time on what was called a "coat machine"; that she worked at different laundries in Omaha where she had experience with different mangles; that she finally returned to the defendant, and again went to work upon the sheet mangle, where she had served for about three months prior to her injury; that she went to work on the mangle on which she was hurt on Wednesday before the accident occurred, at about 1 o'clock in the afternoon; that on Thursday morning she fed the mangle from 7 o'clock until noon. On that day there were five girls at work on the machine; two on the same side with the plaintiff, feeding, and three on the other side, folding; and in the afternoon plaintiff folded and some one else fed the machine.

The following testimony, which we quote from the bill of exceptions, will show, in plaintiff's own language, how well she was acquainted with the machine in question: "Q.

When did you first notice on this mangle that there was this revolving guard roller? A. Well, I knew it was a guard roller. Q. Yes; when did you first notice it? A. First notice it—why, it was put there for your hands—to protect your hands; anybody knew that. Q. No, no; when did you first notice that guard roller? A. Why, you would have to pass that mangle when you worked on the sheet mangle; that mangle was (interruption). Q. You had to pass that mangle when you were working on the sheet mangle? A. Yes, sir. Q. And you saw the roller guard on it then? A. Yes, sir. Q. And you knew that was what it was for? A. Certainly. Q. And that was a year or more before you went to work, wasn't it?—before you got hurt on it, I mean? A. Yes, sir. * * * Q. You knew how to feed into that machine, didn't you? A. I was showed how. Q. By whom? A. By the head girl. Q. When were you shown how to feed into that machine? A. When I worked there before. Q. Into this very machine? A. This very machine. Q. So you knew when you went to work on that machine how to feed it? A. I fed with the head girl. Q. And you knew how to feed into that mangle? A. Yes, at that time. Q. And you knew when Mr. Drake told you to go to work on this machine, at that time, you knew how to feed into that mangle? You hadn't forgotten how? You knew how to do it, didn't you? A. Yes. Q. You didn't have to have anybody tell you how, did you? A. No. Q. Now, you knew that this guard, this roller guard, revolved when the other rollers revolved, didn't you? A. Yes. * * * Q. Now, then, the next morning, Friday, which was the day you got hurt, you went to work at 7 o'clock at that mangle, didn't you? A. Yes, sir. Q. You didn't have to be told what to do that morning when you went to work, did you? A. Why—different work, yes. Q. That is, you were told what kind of work was going into the machine? A. Yes, sir. Q. And that was all that was necessary to tell you at that time? You knew what to do with the work that was given you to iron, didn't you? A. Yes. Q. You knew it had to

be fed into the mangle? A. Yes. Q. And you knew how to feed it into the mangle? A. Yes. * * * Q. Now, what kind of work were you ironing that morning? A. A fringed bed spread."

It appears that while feeding this fringed bed spread into the mangle, the plaintiff got her finger caught in the fringe and was unable to get it out. At the time her finger was caught the spread had gone about half way through the machine, and it was necessary to guide it by holding it with the fingers. She further testified as follows: "Q. Just before they got caught in the fringe, what were you doing with your fingers? A. When you feed a spread, or feed anything in the mangle, you can't put it in the mangle and let it go by itself. You have to hold onto it. Q. You were guiding it there with your fingers, were you? A. The mangle takes it and you have to hold it. Q. You were guiding it through the mangle with your fingers, were you? A. Yes, sir. Q. That was a part of your business, was it? That was part of the work you had to do? A. Yes. Q. And you knew that before that morning, didn't you? All your experience had taught you that? A. Taught me what? Q. That that was what you had to do, guide the articles through the mangle; when feeding you have to keep them from wrinkling? A. Certainly. Q. And at the time your fingers got caught that was what you were doing? A. Yes, sir. Q. And that was what you were there for—what you were hired for? A. Yes, sir. Q. Now, how far was your finger, your hand, from the guard when you first became aware of the fact that you were caught there? A. Well, the spread was about half way in the mangle. * * * Q. Now, Miss Johnson, can't you state how it was caught? A. Well, it was caught in the fringe and pulled me in the mangle; that is all I know. Q. That is all you know; you don't know how it was caught? A. It was caught in the fringe, that is all I know. Q. And you don't know how it came to get caught, do you? A. No, sir."

It further appears that there was a lever on this man-

gle, controlled by the operator, to start and stop it; and the speed at which the rollers would go was also subject to the control of the operator. The plaintiff herself did not fix the speed on the morning she was hurt, but it was fixed by another girl, who was her fellow servant, working upon the same machine at the time of her injury. When the bed spread started through the machine it was bound to go clear through, and anything fastened to or caught in the spread would have to go through with it unless the mangle was stopped. It seems clear, therefore, that if the machine had been equipped with a stationary guard it would not have prevented the injury, for in that case the plaintiff's hand would have been broken, torn and lacerated instead of being bruised and burned, as was disclosed by the evidence.

The plaintiff testified many times that she relied upon the guard to protect her from being hurt by getting her hands in the roller. She said she was not afraid of getting her hand caught, the guard was there to protect it, and she was positive in her statement that if the guard had stayed down in the proper place her hand would not have gone in. She further said that it was necessary in feeding into the mangle to keep her hands close up to the machine, and the guard roller was there as a warning as well as a guard.

It thus appears beyond question that the plaintiff was instructed in regard to her work; that she knew how to operate the mangle; that she knew what the roller guard was for; that she had used machines with both roller and stationary guards; that she knew the speed of the rollers was regulated by the operator working with her, and who was her fellow servant. Neither she nor any other witness testified that the mangle was defective, that the roller guard was defectively attached, and her sole contention appears to be that the mangle should have been supplied with a stationary guard instead of the roller guard.

The testimony which we have quoted shows exactly how her hand was drawn into the machine, but it does not dis-

close how her fingers became entangled in the fringe of the bed spread so that she could not extricate them. It appears that when she became aware of the fact that her hand was caught the bed spread was about half way through the mangle, and her fingers were a foot or more away from the guard roller; that she called to Miss Taylor, a fellow servant, who was working by her side, to stop the mangle, but Miss Taylor did not hear her, or failed to understand what was the matter; that she called to her again, and before Miss Taylor could stop the machine the plaintiff's hand was pulled into the rollers, and she thus sustained the injury complained of.

It appears that the guard roller in question had a play or uplift of about four inches, and the machine was thus constructed in order to permit the articles, which were being ironed, to go under it and into the rollers.

The defendant produced several disinterested witnesses, men who were skilled in the laundry business, and who were acquainted with the latest and best laundry machines in use at the time of the plaintiff's injury, who testified, without exception, that the machine in question was the latest and best one then in use, and that the roller guard with which it was equipped was the latest and best safety device known and in use on such machines. The only testimony to the contrary was the evidence of one Birdie Welburn, who testified over the defendant's objection that in her opinion a stationary guard was safer than a roller guard. Her testimony was clearly incompetent, and should have been excluded by the trial judge.

It appears from all of the evidence contained in the bill of exceptions that the real cause of the plaintiff's injury was the accident of her getting her fingers caught in the fringe of the bed spread which she was feeding into the mangle, so that she could not extricate them, and the failure of the girl who was working with her to hear or heed her cry for assistance in time to prevent her hand from being drawn into the machine. Upon this point plaintiff testified as follows: "Q. The time you were in-

jured, Miss Taylor was working on the same side of the mangle with you? A. Yes, sir. Q. And when you had your hand caught in the fringe you spoke to her and asked her to stop the mangle? A. I asked her to stop the mangle. Q. And she didn't hear you? A. No, sir. Q. And you asked her the second time, and she didn't hear you? A. No, sir. Q. That is right, is it? A. Yes, sir. Q. And it was Mr. Drake who stopped the machinery? A. Jennie stopped the mangle. Q. Oh, after you spoke to her two or three times? A. Yes, sir."

From the evidence above quoted, together with other facts shown by the record, it seems clear that the plaintiff failed to prove any of the acts of negligence on the part of the defendant charged in her petition. In *Omaha Bottling Co. v. Theiler,* 59 Neb. 257, it was said: "The measure of defendant's duty to its servants was the care required by the usual and ordinary usage of the business. The standard of due care is the conduct of the average prudent man. The appliances of the company were those in common and general use. Handled with ordinary care they were not dangerous. This being indisputably established, it follows that the negligence alleged in the original petition is without any foothold whatever in the proof."

The foregoing fully describes the situation in the case at bar. Indeed, all the cases agree that employers are not insurers of the safety of their employees. Absolute safety seems to be unattainable, and therefore employers are liable for the consequences, not of injury, but of negligence. The master does not guaranty the safety of his servants; he is not bound to furnish them with an absolutely safe place in which to work; but is bound simply to use reasonable care and prudence in providing a reasonably safe place in which, and reasonably safe appliances with which, to work. So far as the evidence in this case goes, it seems to establish, beyond question, that the defendant had discharged that measure of duty toward the plaintiff. The case seems to be one of those where the proximate cause of the injury was an unavoidable accident, and not the fault

or negligence of the defendant, and there is nothing in the record from which reasonable minds can reach any other conclusion. We are therefore of opinion that defendant's motion to direct a verdict in its favor should have been sustained. This view of the case renders it unnecessary for us to discuss any of the other errors assigned.

The judgment of the district court is therefore reversed and the cause is remanded for further proceedings.

REVERSED.

FAWCETT, J. not sitting.

WILLIAM H. HALL, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 26, 1910. No. 16,213.

1. **Bankruptcy:** EFFECT OF ADJUDICATION ON GARNISHMENT. A garnishment of funds belonging to an insolvent person within four months of the time he is adjudged a bankrupt is, within the meaning of the bankrupt act of 1898, dissolved and rendered null and void by the bankruptcy proceedings.

2. ———: EFFECT OF ACT ON STATE COURTS. The bankruptcy laws of congress enacted pursuant to the powers delegated to it by the federal constitution are binding upon the state as well as the federal courts, and the state courts are bound to respect the rights acquired under them.

3. ———: ———. The provisions of subdivision *f*, sec. 67 of the bankrupt act (3 U. S. Comp. St. 1901, p. 3450, ch. 541), and the proceedings of the federal court adjudging an insolvent debtor a bankrupt are a complete defense to the enforcement of judgments rendered by state courts against a garnishee within four months of the filing of the debtor's petition in bankruptcy.

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

James E. Kelby and *Arthur R. Wells*, for appellant.

J. O. Detweiler, contra.

BARNES, J.

In the months of June, July, and August, 1907, the appellee, William H. Hall, the plaintiff in the court below, was a married man and the head of a family residing in Douglas county, Nebraska. He was employed by the appellant as a switchman in its yards at Omaha, and had formerly lived at Creston, in Union county, Iowa. On proceedings had in the courts of that state and county, certain judgments were entered against him, and garnishment proceedings thereon were prosecuted against the appellant, the Chicago, Burlington & Quincy Railroad Company, as follows: On April 25, 1894, one B. N. Torrey recovered a judgment against Hall in the justice court of Union county, Iowa, for $24.40 debt, with 6 per cent. interest from that date, and $3.80 costs. July 8, 1907, a transcript of that judgment was filed in the office of the clerk of the district court for said county, and on July 26, 1907, an execution was issued by the clerk of that court on said judgment, which was duly served by the garnishment of the defendant company as a debtor of Hall. On August 27, 1907, the district court entered a personal judgment against the railroad company for $39.26 debt, with 6 per cent. interest from that date, and $17.65 costs. On July 20, 1907, one J. A. Rawls brought suit against Hall in the justice court of Union county, Iowa, and on July 29, 1907, judgment was rendered in said action against him for $52.50 debt, with 6 per cent. interest, and $2.20 costs. On the same day an execution was issued on that judgment, and the defendant railroad company was garnished as the debtor of Hall. On August 10, 1907, a personal judgment was rendered in said justice court in favor of Rawls and against the defendant company for $61.60, or so much thereof as should remain in its hands after the payment of the judgment rendered in the garnishment proceedings in favor of B. N. Torrey. In both the Torrey and Rawls cases the court which rendered the judgment against Hall had obtained jurisdiction by personal service of the orig-

inal notice in the state of Iowa as prescribed by the code of procedure of that state, and the courts rendering said judgments were courts of competent jurisdiction, and had personal jurisdiction of Hall and of the Chicago, Burlington & Quincy Railroad Company, the garnishee, together with the subject matter of said actions.

It further appears that Hall filed a voluntary petition in bankruptcy in the United States district court for the district of Nebraska, and on August 7, 1907, was, by that court, adjudged a bankrupt under the statutes of the United States. In the schedule which he filed in that court the bankrupt listed the several judgments above referred to, and the claim upon which they were founded, and also listed and claimed as exempt the wages which were due him from the appellant railroad company for the months of June and July, 1907, amounting to $187, and on March 18, 1908, the referee in bankruptcy set off these wages to Hall as exempt under the laws of Nebraska. No other property was listed, and therefore no trustee in bankruptcy was elected.

It is admitted by the parties that Hall was at all of said times insolvent, and earned the wages in question during the months of June and July, 1907. In the garnishment proceedings above referred to the railroad company made answer showing its indebtedness on account of said wages, and it was upon this disclosure that the judgments in the garnishment proceedings were rendered. It also appears that, prior to the entry of the judgments against the defendant company above referred to, garnishment proceedings had been instituted in a case brought by one Locke against the defendant Hall; that the railroad company had paid and satisfied the amount involved in that proceeding, and that the remainder of plaintiff's wages, amounting to $122.40, is the matter now in controversy; that the defendant railroad company has retained, and still has, that sum in its possession, which was earned as wages by Hall, as above stated. The defendant railroad company, claiming that it was liable for the pay-

ment of the judgments rendered against it in the garnishment proceedings above described, refused to pay the money so remaining in its hands to Hall, who thereupon brought this action. The suit was commenced in the county court of Douglas county, and the plaintiff had judgment. An appeal was prosecuted to the district court, where he again had judgment, and the railroad company has appealed to this court.

The appellant's contention, briefly stated, is as follows: That the judgments rendered against it in the Iowa courts are regular and are valid, subsisting liens or claims against it, which cannot be collaterally attacked or impeached; that under the Iowa law the wages of Hall, a resident of Nebraska, were subject to garnishment in the c[illegible] of that state, and that the rule of the Iowa courts refusing to give effect to Hall's Nebraska exemptions is valid, and must be enforced and respected in the courts of this state; and that such judgments constitute a complete defense to the plaintiff's action. On the other hand, it is contended by the plaintiff that by the terms of subdivision *f*, sec. 67 of the federal bankrupt law of 1898 (3 U. S. Comp. St. 1901, p. 3450, ch. 541) his adjudication as a bankrupt rendered the judgments of the Iowa courts against him and the defendant railroad company null and void, and therefore such judgments are no defense whatever to his right to recover in this action, and this is the only question presented for our determination.

Section 67, subdivision *f*, of the bankrupt act of 1898, reads: "All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judg-

ment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The effect of the foregoing provisions of the federal bankrupt law was determined by the supreme court of Minnesota in *Cavanaugh v. Fenley* (Chicago Great Western Railway Company, Garnishee) 94 Minn. 505, and it was there held that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of his petition in bankruptcy, shall be deemed null and void in case he is adjudged a bankrupt, whether such proceeding was voluntary or involuntary; and that the garnishment of funds belonging to an insolvent person within four months of the time he is adjudged a bankrupt is, within the meaning of the bankruptcy act, dissolved and rendered null and void by the bankruptcy proceedings, notwithstanding the insolvent person made no reference in his schedule of assets to the fact that the indebtedness had been garnished.

This rule, so far as we have been able to ascertain, has been generally adopted or followed by the courts of the other states wherever the question has been presented to them. *D. C. Wise Coal Co. v. Columbia Lead & Zinc Co.*, 123 Mo. App. 249; *Armour Packing Co. v. Wynn*, 119 Ga. 683; *Wood v. Carr*, 115 Ky. 303; *Alexander v. Wilson*, 144 Cal. 5; and *Thompson v. Ragan*, 117 Ky. 577.

This question has also been many times before the federal courts. In *In re Beals*, 116 Fed. 530, it was said: "Under bankruptcy act 1898, sec. 67*f*. an adjudication in

bankruptcy, whether in voluntary or involuntary proceedings, renders void a judgment against a garnishee rendered in an action brought against the bankrupt within four months prior to the filing of the petition, and when he was insolvent, and discharges the garnishee from liability thereon, and such judgment must thereafter be treated as a nullity whenever drawn in question, whether directly or collaterally." In *In re Tune,* 115 Fed. 906, this question was presented, and it was said: "Whatever benefit results from the annulment of attachment liens extends to exempt property as well as to that which is not exempt. It is the policy of the law to allow the bankrupt, as well as creditors, to benefit by the changed status." The case of *Clarke v. Larremore,* 188 U. S. 486, was one which involved the construction of the provisions of the bankruptcy law in question in this case, and it was said by Mr. Justice Brewer: "As judgment, execution and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication of bankruptcy. This nullity and invalidity relate back to the time of the entry of the judgment and affect that and all subsequent proceedings. The language of the statute is not 'when' but 'in case he is adjudged a bankrupt,' and the lien obtained through these legal proceedings was by the adjudication rendered null and void from its inception."

From the foregoing authorities, it seems clear that the plaintiff's contention should be upheld.

In support of defendant's position, our attention is directed to the case of *Lockwood v. Exchange Bank,* 190 U. S. 294, which seems to be greatly relied on by counsel. We think the facts of that case clearly distinguish it from the one at bar. There it appeared that the creditor held a contract against the bankrupt entered into more than four months before the filing of his petition in bankruptcy by which he specially waived and renounced all his right to the homestead exemption allowed him by the laws of the state of Georgia or the United States; and that such con-

tracts or waivers were generally upheld and enforced by the courts of that state. Therefore the federal court declined to administer and distribute the exempt property as an asset of the bankrupt and withheld his discharge until a reasonable time should elapse to enable the creditors to assert, in the state court, their rights to subject the exempt property to the satisfaction of their claims under the waivers given as security therefor.

From an examination of the other cases cited by counsel for the defendant, it would seem that they are distinguishable from the case at bar, and afford us no substantial authority for a reversal of the judgment of the district court.

It is further contended that the courts of the state of Iowa may proceed to collect the judgments rendered by them against the defendant, and that by so doing it will be compelled to pay them. We are of opinion that those judgments cannot be enforced, and that it is not at all likely that either the courts or the judgment creditors will make any attempt to enforce their payment. The bankruptcy laws of congress enacted pursuant to the powers delegated to it by the federal constitution are binding upon the state as well as the federal courts; the state courts are bound to respect the rights acquired under them, and it is not to be believed that any of our state courts will attempt to override or nullify any of such laws. But, if any such attempt is made, the bankruptcy proceedings furnish a complete and adequate defense thereto.

For the foregoing reasons, the judgment of the district court is right, and it is therefore

AFFIRMED.

JOHN M. WYMAN, APPELLANT, v. S. A. SEARLE, APPELLEE.

FILED NOVEMBER 26, 1910. No. 16,172.

1. **Taxation:** FORECLOSURE OF LIEN: DENIAL OF TITLE OF ASSIGNEE: BURDEN OF PROOF. If a defendant denies the plaintiff's title as assignee of a certificate of tax purchase, the burden of proof is

upon the plaintiff to establish his title, and possession of the certificate without proof that it was assigned to, or owned by, him will not satisfy that burden.

2. ———: ———: OFFER TO CONFESS JUDGMENT. In such a case, if the certificate represents taxes levied for general purposes, and assessments made by the officers of an irrigation district, an offer in the defendant's answer to confess judgment for the general taxes does not admit the plaintiff's title to the lien created by the district assessments.

3. ———: SALE OF WRONG TRACT: SUBROGATION. A county treasurer has no authority to sell one tract of land for the taxes levied upon another and distinct parcel of real estate; but, if the tracts were separately assessed and taxed, the sale will subrogate the tax purchaser to the lien of the public.

4. Judgment: IRRIGATION DISTRICTS: CONFIRMATION OF BOND ISSUES: EXCHANGE OF BONDS FOR PROPERTY. A special proceeding prosecuted under section 59 *et seq.*, ch. 70, laws 1895 (Comp. St. 1895, ch. 93*a*, art. III, sec. 59 *et seq.*) is an action *in rem*, and, if the court acquired jurisdiction of the subject, its decree cannot be successfully assailed in a collateral proceeding; but the statute does not authorize the court to confirm the exchange of bonds for property.

5. Waters: IRRIGATION DISTRICTS: EXCHANGE OF BONDS FOR PROPERTY. Section 10 of the act, *supra*, in 1897 authorized the directors of an irrigation district to exchange its bonds at par to pay for irrigation works, ditches, canals and reservoirs constructed or partially constructed within the district, and that authority is not limited by the provisions of section 14 of the act.

6. ———: ———: BONDS: BONA FIDE PURCHASERS. If the records of an irrigation district do not disclose that its directors were financially interested in the sale of an uncompleted ditch by another corporation to the district, an innocent holder for value of the district bonds delivered as a consideration for that sale may enforce payment thereof.

7. ———: ———: TAXES: AUTHORITY TO LEVY. Section 19 of the act, as amended by chapter 78, laws 1899, authorizes the directors of an irrigation district to levy taxes upon all real estate subject to taxation within the district for the purpose of creating a fund to pay for the upkeep of the ditch and the incidental expense of the district.

8. ———: ———: ———: COLLECTION: AUTHORITY OF COUNTY TREASURER. Said section, as amended by chapter 78, laws 1899, authorizes a county treasurer to receive in satisfaction of a general district tax warrants drawn upon the fund, but the

treasurer has no authority to accept the district bonds, or coupons clipped therefrom, in satisfaction of the general levy.

9. ———: ———: ———: ———: ———: SUBROGATION. The mistake of a treasurer in accepting coupons in payment for district general taxes will not deprive the public of its right to collect such taxes, nor will such payment subrogate the purchaser to the rights of the district.

10. ———: ———: PAYMENT FOR CONSTRUCTION WORK. Prior to March 31, 1899, the directors of an irrigation district did not have authority to obligate the district to pay for construction work until they had first created a construction fund.

11. **Judgment:** CONCLUSIVENESS: CANCELATION OF IRRIGATION DISTRICT TAXES. A *bona fide* purchaser for value of land for the taxes levied thereon by an irrigation district is not bound by a decree against the county treasurer and the district canceling those taxes, but entered in an action commenced subsequent to his purchase, and to which neither he nor his predecessor in title was a party.

12. **Taxation:** TENDER: INTEREST. If a property owner tenders the treasurer the amount of his general tax, but refuses to pay an invalid assessment, he should not be required to pay interest thereafter, provided he has been at all times subsequent thereto able, ready and willing to pay his taxes, but the proof should be clear and satisfactory to give him the benefit of the rule, and it will not be extended to doubtful cases nor to an instance where the property owner has offered, in an answer to a petition for the foreclosure of the tax lien, to pay the legal taxes with interest.

13. **Estoppel:** SALE OF LAND SUBJECT TO TAXES. The owner of real estate is not estopped to deny the legality of taxes levied thereon because he sold the land entirely on credit subject to taxes, and received title back from his grantee by a deed which also excepted taxes, if, as a matter of fact, the taxes formed no part of the consideration for the last transfer.

14. **Waters:** IRRIGATION DISTRICTS: VALIDITY OF TAX: ESTOPPEL. If the owner of real estate situated in an irrigation district receives no benefit from the construction of a ditch or from the water flowing therein, and no other grounds for an estoppel exist, he is not estopped from denying the legality of taxes laid to pay for that improvement.

APPEAL from the district court for Loup county: JAMES N. PAUL, JUDGE. *Reversed.*

A. S. Moon and *E. J. Clements,* for appellant.

C. I. Bragg, S. A. Searle and *H. A. Robbins, contra.*

ROOT, J.

This is an action to foreclose an alleged tax lien. The plaintiff prevailed as to part of his demand and has appealed. The defendant Searle has prosecuted a cross-appeal.

Some of the questions of law presented for our consideration should be determined, because they will be involved if the case is again tried in the district court. Mr. Searle will be referred to as the defendant. The defendant owns the east half and the northwest quarter of the northwest quarter and lot 4 in the southwest quarter of the northwest quarter of section 10, in township 22 north, of range 20 west of the sixth P. M. in Loup county, Nebraska. He also owns lot 3 in the southwest quarter of said section. The Loup river severs about 12 acres in the southwest corner of the northwest quarter from the remainder of said quarter section, and divides about 18 acres in the northeast corner of the southwest quarter from the remainder of that quarter section. The last tract is described as lot 3.

In 1894 certain individuals residing in the neighborhood of the defendant's land incorporated under the name of the Newton Irrigation Company for the purpose of constructing an irrigation canal and through that agency partially dug said ditch. In July, 1895, the stockholders of said corporation, in conjunction with other persons, formed an irrigation district under the provisions of chapter 70, laws 1895 (Comp. St. 1895, ch. 93*a*, art. III), for the purpose of acquiring the ditch and franchises of the irrigation company and completing said irrigation project. After the district was formed an estimate was made by an engineer of the extent and cost of the proposed ditch, including the value of the ditch to be acquired from

the company, and the electors within the district voted to authorize the execution and issuance of 210 district bonds, each one of the par value of $100, to pay for said improvements. The litigants stipulated that the district court for Loup county, upon the application of some person not described in the stipulation, confirmed the organization of said district and the issuance of said bonds. The bill of exceptions discloses that the directors of the district while in session passed a resolution authorizing the secretary, upon receipt of a warranty deed from the irrigation company conveying all of its property to the district, to deliver to said company 175 of the district bonds to be accepted by the company at par. Subsequently, in 1897, the deed was received and 174 of the bonds were delivered to the company. Thereafter A. C. Abbott contracted with the district to complete the ditch and equip it with all necessary appliances. Mr. Abbott performed his contract to the satisfaction of the directors of the district and its bonds numbered 1 to 10, inclusive, were delivered to him June 8, 1898, and its bonds numbered 11 to 31, inclusive, were delivered to him November 26, 1902, in payment for his services. Prior thereto the bonds had been advertised for sale, and Abbott had bid 95 per cent. of the par value therefor. He did not pay cash for the bonds, but accepted them at par upon his demand against the district. In the years 1897 to 1903 all lands subject to taxation in the district were taxed to create an interest fund and a district general fund. The defendant refused to pay those assessments, and the county treasurer refused to accept payment for state, county and school district taxes unless at the same time the district taxes were paid. In August, 1905, at private tax sale, a Mr. Bleakley procured from the treasurer a tax sale certificate for the northwest quarter of said section 10, and the plaintiff alleges that he is the owner of that certificate and the lien evidenced thereby.

In December, 1907, the district court for Loup county rendered a decree in an action wherein a Mr. Strohl and the defendant herein and other owners of land within the

irrigation district were plaintiffs, and said district, the irrigation company and the officers of those corporations, as well as the county treasurer and other individuals, were defendants, and adjudged that the bonds paid to Abbott for his work and certain other bonds in the hands of parties to that suit were void; that 21 bonds owned by a Mr. Tillman, defendant in that action, were valid; and that the court did not know, and would not attempt to determine, whether bonds held by individuals not parties to that suit were void or valid, but canceled all taxes levied by the officers of said district. The record does not disclose whether said suit was pending at the time the Bleakley certificate of tax sale was issued, but we assume from statements made at the bar during oral argument that the sale preceded the institution of that suit. The district court forclosed a lien in plaintiff's favor for the general taxes and for the taxes levied for maintaining the ditch, but held that all of the taxes levied for interest upon the irrigation district bonds were invalid.

Most of the questions material for an understanding of the rights of the parties and properly presented in the record can be disposed of upon the defendant's cross-appeal. In the first place, the defendant argues that the plaintiff does not own the certificate in suit. An assignment purporting to have been made by Mr. Bleakley appears upon the back of the instrument, but there is no proof that he made the assignment or parted with his title to the certificate. The plaintiff admits in his testimony that he received the instrument from a Mr. Lashmett, and that the name of Lenora Lashmett, the first assignee, if the instrument were assigned by Bleakley, was indorsed after Mrs. Lashmett departed this life. By section 20, art. III, ch. 93*a*, *supra*, taxes levied by the directors of irrigation districts are made a lien upon the real estate affected thereby, and all of the provisions of the revenue law for the collection of taxes apply to irrigation district taxes. Section 117, art. I, ch. 77, Comp. St. 1901, in force at the time the taxes in suit were levied, and section 210,

art. I, ch. 77, Comp. St. 1909, in force at the time this case was commenced, provide that a certificate of tax purchase "shall be assignable by indorsement, and an assignment thereof shall vest in the assignee, or his legal representative, all the right and title of the original purchaser." There being no evidence that Bleakley assigned the certificate or that Mr. Lashmett had any title thereto, the plaintiff has not proved title to the certificate. *Schroeder v. Nielson,* 39 Neb. 335. This defense does not apply to the general taxes because the defendant in his answer offers to confess judgment therefor, but he does not thereby waive his defenses to the irrigation taxes nor admit that the plaintiff owns any lien created by those levies. *Avery v. Straw,* 30 Me. 458; *Griffin & Adams v. Harriman,* 74 Ia. 436.

The defendant complains that the county treasurer included in the certificate the taxes levied upon lot 3, in the southwest quarter of section 10, and the proof supports his contention; but, if we understand the court's decree, those taxes are not made a lien upon the defendant's land situated in the northwest quarter of that section, nor does the plaintiff recover therefor against lot 3 in the southwest quarter thereof.

It was argued at the bar by the defendant that inasmuch as the certificate described the northwest quarter of the section, a part whereof he did not own, and also included taxes levied upon lot 3 in the southwest quarter, the certificate and the tax are alike void. In *Spiech v. Tierney,* 56 Neb. 514, we held that, where contiguous tracts of land owned by different parties at the time taxes are levied thereon are jointly valued for taxation and taxed, the tax cannot be apportioned and is void; but in the case at bar each lot and 40-acre tract is separately assessed and taxed, so that, while the sale and certificate are irregular, the transactions are sufficient to subrogate the purchaser to the lien and all of the rights of the public with respect to the tracts of land owned by the defendant and situated in the northwest quarter of the section, but the decree

should not describe the entire quarter section because the title of the owner of the fractional lot south of the Loup river, but in the northwest quarter of section 10, would be clouded thereby. Having determined that the evidence is insufficient to sustain the plaintiff's title to the public's lien for the district taxes, we should either modify, and, as modified, affirm, the decree of the district court, or reverse the decree and remand the cause for another trial. We conclude the latter course should be pursued because the plaintiff should be permitted to prove title to the certificate in suit and the validity of the tax involved in this foreclosure. It is the settled policy of the law in Nebraska to protect a tax purchaser to the extent that his money has satisfied valid tax liens upon the real estate described in his certificate of purchase. *Grant v. Bartholomew*, 57 Neb. 673; *Carman v. Harris*, 61 Neb. 635. If the proceedings prosecuted in the district court for Loup county, wherein a decree was rendered confirming the organization of said district, were commenced by some person having authority to do so, and the court acquired jurisdiction to render its judgment, that decree cannot be successfully assailed in a collateral proceeding. *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411; *Crall v. Poso Irrigation District*, 87 Cal. 140; *Rialto Irrigation District v. Brandon*, 103 Cal. 384; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112. If the district were created, the statute (Comp. St. 1899, ch. 93*a*, art. III, sec. 19) authorized its officers to levy an annual general tax upon the real estate in the district subject to taxation to pay for the upkeep of the ditch and the incidental expense of the district. Part of the tax lien foreclosed by the district court is represented by a district general tax. Bleakley paid and the county treasurer received in payment for all of the irrigation tax, the general levy as well as the bond interest fund, coupons clipped from certain of the district bonds. Section 19 of the act under consideration, as amended by chapter 78, laws 1899, authorizes the treasurer to receive in satisfaction of a general levy war-

rants drawn upon that fund, and for a bond interest levy coupons clipped from district bonds, but no officer is authorized to receive the coupons in payment of a general levy. Neither the state nor any of its subdivisions can be deprived of its revenue or of the lien created thereby by a mistake of the tax collector. *Johnson v. Finley*, 54 Neb. 733. The decree is therefore erroneous in so far as it foreclosures a lien for the district general levy. Mr. Bleakley, the tax purchaser, did not acquire a lien for district interest taxes, unless he paid therefor in cash or in coupons clipped from valid bonds or bonds purchased by some of his predecessors in title under such circumstances as to constitute them *bona fide* holders thereof.

The defendant argues that since it appears that the officers of the irrigation company conspired with the district directors and the engineer, upon whose estimate the bond election was held, to grossly overestimate the value of the uncompleted ditch of the irrigation company, and since the officers of the district were stockholders in the company, the holders of the 174 bonds delivered to pay for that ditch did not acquire title to those securities. It is also argued that section 24 of the act is a limitation upon the power of the directors of the district, and compels them to sell its bonds and create a fund before they can impose a liability upon the district for the purchase or the construction of a ditch. Section 10 of the act aforesaid provides, among other things: "Said board shall also have the right to acquire by purchase any irrigation works, ditches, canals or reservoirs already constructed or partially constructed for the use of said district. In case of purchase the bonds of the district hereinafter provided for may be used at their par value in payment." Prior to the amendment of section 24 in 1899, it did not refer to the exchange or sale of bonds, and was not intended to limit the specific authority theretofore granted the directors by section 10, *supra*. The provisions of section 14 of the act, to the effect that no bonds shall be sold until the directors shall make and enter upon the records a

resolution of their intention to sell the bonds and shall have advertised them for sale, is a plain limitation upon the power of the directors to sell, and as plainly not a limitation upon their authority to exchange, the district bonds. There is nothing in the context or general purpose of the original act to in any manner modify the foregoing construction of said section. The directors, therefore, were authorized to use the district bonds at par to pay for an uncompleted ditch within the district. We find nothing in the records of the district to advise a stranger that its officers were financially interested in the irrigation company, or that they had acted fraudulently or irregularly in purchasing the company's property. The decree of confirmation hereinbefore referred to does not adjudicate the legality of the transfer of the bonds to the irrigation company. The statute only authorizes a confirmation of bonds issued for the purpose of sale. *Stimson v. Alessandro Irrigation Co.,* 135 Cal. 389.

Prior to the amendment of section 24 in 1899, the directors did not have authority to exchange its bonds in payment for construction work nor to enter into contracts in the name of the district until a construction fund had been created by the sale of its bonds. No construction fund existed at the time the aforesaid contract was made with Mr. Abbott and the contract is therefore void. *Lincoln & Dawson County Irrigation District v. McNeal,* 60 Neb. 613; *Stimson v. Alessandro Irrigation Co., supra; Leeman v. Perris Irrigation District,* 140 Cal. 540; *Stowell v. Rialto Irrigation District,* 155 Cal. 215. Whether any or all of the bonds issued by the district or the coupons clipped therefrom were at any time in the hands of innocent purchasers is not apparent from the record before us, and we do not desire to embarrass a future trial of the case by any suggestions upon that subject. It is apparent that coupons clipped from some of those bonds were transferred by Mr. Bleakley to the county treasurer in payment of the interest tax levied upon the defendant's land, but the record discloses such

fraud and bad faith on the part of the directors in issuing all of the bonds referred to that it devolved upon the plaintiff to bring forward evidence to prove that either he or some person through whom he claimed title to the coupons in question was an innocent purchaser. *Haggland v. Stuart*, 29 Neb. 69; *Violet v. Rose*, 39 Neb. 660; *Kelman v. Calhoun*, 43 Neb. 157; *National Bank v. Miller*, 51 Neb. 156; *Thompson v. West*, 59 Neb. 677; *Lahrman v. Baumann*, 76 Neb. 846. The district court for Loup county in the case of Strohl against Newton Irrigation district, canceled all taxes levied by the officers of that district, but that decree does not affect the right of a holder of the bonds who is not in privity with the parties to that action to enforce any legal claim he may have against the district. *Helphrey v. Redick*, 21 Neb. 80; *Clapp v. Otoe County*, 45 C. C. A. 579; *Kinney v. Eastern Trust & Banking Co.*, 59 C. C. A. 586; *Hawley v. Fairbanks*, 108 U. S. 543. The defendant's land, however, should be held for no more of the district tax levy than was paid for by coupons owned at some period by a *bona fide* holder.

The proof of the defendant's tender to pay state, county and school taxes levied upon his land is not so definite as to time and amount as to bring him within the protection of the rule annnounced in *State v. Several Parcels of Land*, 80 Neb. 424, and his offer in his answer to confess judgment for those taxes, with interest, justified the district court in adding interest to the principal.

The plaintiff, in support of his appeal, argues that since the defendant, subsequent to the levy of the taxes in dispute, conveyed the land by a deed which excepted those taxes, and thereafter received title to the real estate by a deed which also excepted all taxes, he is within the rule announced in *Eddy v. City of Omaha*, 72 Neb. 550. In the cited case invalid assessments were deducted from the purchase price of real estate, and we held that the grantee was estopped from denying the validity of the taxes which formed part of the consideration for his purchase. But in the case at bar the defendant sold the land

upon credit. Subsequently the grantee, not having paid any of the purchase money, reconveyed the real estate to Mr. Searle and paid rent during the time said grantee controlled the land. The taxes formed no part of the consideration moving from Mr. Searle for the transfer of title to him, and the transaction does not estop him from defending against the tax in question. Nor do we think there is any proof to support the argument that, by reason of using water from the ditch, the defendant is estopped from questioning the tax. The evidence is undisputed that the defendant made no use of the ditch and that his land was not increased in value by reason of its construction.

The judgment of the district court is reversed, the cause is remanded for further proceedings, and the costs of this appeal are taxed to the plaintiff.

REVERSED.

BURTON T. JUDSON ET AL., APPELLEES, V. MARY SHERIDAN CREIGHTON ET AL., APPELLANTS.

FILED NOVEMBER 26, 1910. No. 16,176.

1. **Executors and Administrators:** HOMESTEAD: LIABILITY FOR DEBTS OF ESTATE. Where a homestead is selected during the lifetime of both husband and wife, and after the death of one the survivor resides upon the premises during his or her life, the real estate is not subject to sale for the satisfaction of the debts of either, which are not a lien thereon, nor to pay the costs of administering the estate of such survivor; but, if the title holding spouse dies intestate, the title descends to his or her heirs, whether direct or collateral, exempt from such debts.

2. ———: ASSETS. The property described in subdivision 1, sec. 176, ch. 23, Comp. St. 1901, is not an asset in the hands of an administrator whose decedent died in 1902.

3. **Trial:** REFUSAL TO SUBMIT ISSUE: INSUFFICIENCY OF EVIDENCE. It is not error for the court to refuse to submit to the jury a defense of equitable estoppel where the evidence is insufficient to sustain a material element of that defense.

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

L. H. Blackledge, for appellants.

W. C. Dorsey, contra.

ROOT, J.

This is an action in ejectment and for rents and profits. The plaintiffs prevailed, and the defendants appeal.

The plaintiffs are collateral heirs of DeJay Judson, deceased, who departed this life intestate in February, 1902, a resident of Harlan county, leaving no widow or direct heirs him surviving. The property in controversy was the homestead of Mr. Judson and his wife. Because the parties have presented this case upon the hypothesis that Mr. Judson held the legal title to said premises, and for no other reason, we shall adopt that theory.

In 1903 the administrator of Mr. Judson's estate, acting under a license of the district judge, sold the premises in controversy, in connection with two other lots, to the defendants' grantor. The sale was confirmed and a deed duly issued. The defendants argue that since the decedent left him surviving no widow, children or other persons dependent upon him for support, the homestead was subject to sale for the payment of his debts. Section 17, ch. 36, Comp. St. 1901, is as follows: "If the homestead was selected from the separate property of either husband or wife it vests, on the death of the person from whose property it was selected, in the survivor for life and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the pro-

visions of this chapter." The exceptions referred to are mechanics', laborers', and vendors' liens, and mortgages duly executed. Section 3, ch. 36, *supra.* It is not contended that the lots in controversy were sold to satisfy a mortgage debt or a lien. The words "in either case" in section 17, *supra,* refer to the selection of the homestead. *First Nat. Bank v. Reece,* 64 Neb. 292. Proof of residence is evidence of such selection. *Hobson v. Huxtable,* 79 Neb. 334, 340. If a homestead has been selected and the fee holding spouse survives his or her consort, such survivor may hold the homestead free from the demands of creditors. *First Nat. Bank v. Reece, supra.* The legislature has provided that the homestead shall descend free from all debts contracted by the husband or the wife, so that the heirs take title free from all claims of their decedent's creditors. The property, therefore, was not subject to sale for the satisfaction of DeJay Judson's debts. *Tindall v. Peterson,* 71 Neb. 160; *Bixby v. Jewell,* 72 Neb. 755; *Brandon v. Jensen,* 74 Neb. 569; *Holmes v. Mason,* 80 Neb. 448. There is ample evidence in the record to sustain the plaintiffs in their assertion of heirship. The decree of the county court adjudicates that relation and concludes the defendants upon that issue.

The defendants further contend that the plaintiffs are estopped to maintain this action because they accepted part of the proceeds of the administrator's sale with knowledge of the source from whence that money came. As we understand the record, the evidence to sustain this issue may be summed up as follows: The defendants introduced in evidence the record of the administrator's application for license to sell four lots, including the property in controversy, the orders made by the district judge, the administrator's deed, and the final order of distribution, together with the receipts of the heirs, and this evidence is supplemented by an admission that the homestead was described in the administrator's inventory and statements in the depositions of two of the plaintiffs that they knew their decedent's home had been sold by the adminis-

trator and that they were represented by counsel in the settlement of the estate. The district judge, upon the application for license, found that the debts against Judson's estate amounted to $815, the costs of administraton would amount to $250, and that the value of the personal assets of the deceased did not exceed $156.86. It appears that the administrator received $985 for the four lots. It further appears from the final order made by the county court that, after the administrator had paid all of the debts of the deceased and the costs of administering his estate, there remained in his possession $59.50, which the court ordered distributed among the plaintiffs as the heirs of the deceased. The money was thus distributed in sums ranging from $1.70 to $11.50. It nowhere appears that the administrator reported to the county court the proceeds of the sale of the homestead, or that he used that money to pay the debts of the deceased, or that the money distributed came from that fund. The administrator was a witness for the defendants, but was not interrogated upon this subject. It may be that the administrator did not receive any personal assets of the estate other than the $156.86 hereinbefore referred to; but if he did not, and there were no other personal assets of the deceased in existence at the time of his death, that money was exempt from the claims of creditors and the costs of administering the estate. In that event the heirs were entitled to the money by virtue of subdivision 1, sec. 176, ch. 23, Comp. St. 1901. *In re Estate of Fletcher,* 83 Neb. 156; *In re Estate of Manning,* 85 Neb. 60; *In re Estate of Leavitt,* 85 Neb. 521. If any of the proceeds of the sale of the homestead were received by the plaintiffs, that fact could easily have been established by the testimony of the administrator. To say the fact should be deduced from the evidence in this record is to indulge in mere conjecture. In our opinion, the district judge committed no error in refusing to submit the issue to the jury. *Chicago, R. I. & P. R. Co. v. Sporer,* 69 Neb. 8; *Sattler v. Chicago, R. I. & P. R. Co.,* 71 Neb. 213.

We find no error in the assignments argued, and the judgment of the district court is

AFFIRMED.

MICHAEL LYONS, APPELLANT, V. HUGH A. ALLEN, APPELLEE.

FILED NOVEMBER 26, 1910. No. 16,192.

Mortgages: FORECLOSURE: ALLEGATIONS AND PROOF. In an action to foreclose a real estate mortgage, the plaintiff is required to allege, and, if the allegation is denied, to prove, that no proceedings have been had at law for the recovery of the debt secured thereby, and if the mortgage, subsequent to maturity, has been owned by successive parties, the plaintiff should at least make *prima facie* proof that no such an action has been commenced by any of those persons.

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

W. R. Butler and *Sullivan & Rait,* for appellant.

M. F. Harrington, contra.

ROOT, J.

This is an action by the assignee of a mortgage to redeem from a tax foreclosure sale and to foreclose said mortgage. The defendant prevailed, and the plaintiff appeals.

It appears from the record that in February, 1889, Henry S. Davis, the owner of the land in controversy, executed a note to the Showalter Mortgage Company payable in five years, and to secure payment thereof executed a mortgage upon said real estate. February 11, 1902, the mortgagee assigned said note and mortgage to Ida A. Davis, and the assignment was duly recorded in January, 1905. During the year 1902 the plaintiff became

the owner of said note. In conformity with the requirements of section 850 of the code, the plaintiff alleged "that no proceedings have been had for the recovery, at law, of said debt secured by said mortgage, nor has said debt, or any portion thereof, been collected and paid." The defendant in his answer denied these allegations. The plaintiff did not appear at the trial of the case, but Mr. Butler, his counsel, testified in effect that since February, 1902, a date inferentially fixed as the commencement of the plaintiff's title to the note, no action at law had been commenced to collect the debt. No other testimony was offered upon this subject. The note is not in the bill of exceptions, nor were any indorsements thereon offered in evidence; the note matured in February, 1894, and there is no proof that, during the eight years intervening between that date and the time we may assume the plaintiff acquired title to the note, an action was not commenced thereon. The present owner of the land did not execute the note or promise to pay it, nor is the payor a party to this action.

In *Carter v. Leonard,* 65 Neb. 670, we held that where the allegation that no action at law had been commenced to collect the mortgage debt is denied in the answer, and the mortgage has been the property of several successive parties, the plaintiff should make *prima facie* proof that no action had been commenced by any of those persons. The evidence in the case at bar is almost parallel with that introduced in *McDowell v. Markey,* 77 Neb. 141, where the parties occupied practically the same relation with respect to each other as do the litigants in the case at bar. In the cited case, a judgment for the defendants was affirmed.

We should not be understood as holding that no evidence other than the testimony of every owner of the note and mortgage will suffice to prove the truth of the allegations required by section 850 of the code, but the plaintiff should at least prove facts and circumstances from which a court may reasonably deduce the ultimate facts. If the

payor of the note owns the mortgaged premises at the time the foreclosure suit is commenced, less evidence should be required to prove those allegations than in a case like the one at bar where the real estate has passed into a third person's hands without any obligation on his part to pay the mortgage debt. *McLanahan v. Chamberlain*, 85 Neb. 850. In our view of the case, it is unnecessary to discuss the assignments argued in the plaintiff's brief.

The judgment of the district court is right, and is

AFFIRMED.

IN RE ASSESSMENT OF BANKERS LIFE INSURANCE COMPANY. NOVIA Z. SNELL, APPELLANT, V. LANCASTER COUNTY ET AL., APPELLEES.

FILED NOVEMBER 26, 1910. No. 16,195.

1. **Taxation:** REDUCTION OF ASSESSMENT: RIGHT OF APPEAL. A taxpayer in Nebraska may appeal from an order of a county board of equalization sustaining another taxpayer's complaint that his property has been assessed too high, although the appellant did not file objections with, or appear before, that board.

2. ———: ———: ———: DISMISSAL. If the appellant in his notice to the parties interested states that he is a taxpayer in the county and the owner of a definitely described tract of land therein, and also states in his petition that he is a taxpayer in the county, his appeal should not be dismissed without a trial for the alleged reason that he is not a taxpayer.

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

Novia Z. Snell, pro se.

Charles O. Whedon, contra.

ROOT, J.

June 8, 1908, the county assessor of Lancaster county, without notice to the Bankers Life Insurance Company,

increased the valuation placed upon its personal property in the schedule prepared by the officers of the company. June 30 the board substantially reduced said assessment. July 10, Mr. Snell, appellant herein, served written notice upon the board, the county clerk, the county of Lancaster and the company that he would appeal from said order, and thereafter filed his petition in the district court with a transcript of said proceedings. On motion of the company the appeal was dismissed. Mr. Snell appeals.

The only question presented for our consideration is whether Mr. Snell had the right to appeal to the district court without having first appeared before the board of equalization. Section 12, art. I, ch. 77, Comp. St. 1907, provides that all property in the state not expressly exempt therefrom shall be subject to taxation and shall be taxed upon one-fifth of its actual value. Section 19 *et seq.*, art. I, ch. 77, *supra,* provides that all property shall be listed for taxation by the owner thereof and assessed upon actual view by the county assessor or his deputies. Section 132, art. I, ch. 77, *supra,* provides that the assessor or county clerk may at any time add to the tax rolls any property omitted therefrom for the current year. Section 121, art. I, ch. 77, *supra,* provides that the county board of equalization shall hold a session of not less than three days nor more than twenty days, commencing on the first Tuesday after the second Monday in June of each year, and shall fairly and impartially equalize the valuation of the personal property in the county, and, upon the complaint of any person who shall consider that his property is assessed too high or the property of another assessed too low, review and correct the assessment; and, upon notice to the party interested, assess property not listed or assessed for taxation. Section 124, art. I, ch. 77, *supra,* provides: "Appeals may be taken from any action of the county board of equalization to the district court within twenty days after its adjournment, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims

against the county. * * * The court shall hear the appeal as in equity without a jury, and determine anew all questions raised before the board which relate to the liability of the property to assessment, or the amount thereof, and any decision rendered therein shall be certified by the clerk of the court to the county clerk, who shall correct the assessment books in his office accordingly." The legislature has not specifically described the persons or class of persons who may appeal from an order made by a county board of equalization. Prior to 1903 such an order could only be reviewed in error proceedings. *Sioux City & P. R. Co. v. Washington County,* 3 Neb. 30; *Webster v. City of Lincoln,* 50 Neb. 1. In most cases error proceedings could not be successfully prosecuted without a bill of exceptions containing the evidence submitted to the board, and the result was that such orders were practically final. It seems to us therefore that, by granting the right of appeal in the general terms of the statute, the legislature intended to temper the power theretofore by law and the force of circumstances vested in the county boards of equalization. Ordinarily, where the owner of property requests the board of equalization to lower the assessor's valuation, the other taxpayers may safely rely upon the county assessor or some other officer to represent the public. If no reduction is made, the taxpayers other than the complainant have no reason to complain, but if the valuation is decreased, they are aggrieved and may remove the questions raised before the board to the district court for its judgment thereon. It is immaterial whether those questions were raised in the first instance by the owner of the property, by another taxpayer, or by some representative of the public; they affect every taxpayer and may be reviewed in the district court upon the appeal of any person adversely affected thereby. *State v. Drexel,* 75 Neb. 751.

We have not overlooked statements in certain of our opinions to the effect that a taxpayer should first advise the board concerning the overvaluation of his property, or

the undervaluation of his neighbor's property, before appealing to the courts for relief. In none of those cases had a complaint been made to the board by any taxpayer, and in every instance except the case of *Hacker v. Howe,* 72 Neb. 385, the controversy arose under the revenue laws preceding the act of 1903, *supra.* The point at issue and determined in the *Hacker* case, *supra,* was that, in equalizing the assessed valuations returned by the county boards of equalization, the state board of equalization had authority to raise the assessed valuation of all property in a county, notwithstanding the local assessing officers had, as they understood the facts, assessed all property within that county at its fair cash value. In none of the cases last referred to did this court hold that, where an issue had been raised before the board touching the assessed valuation of one taxpayer's property, another taxpayer could not appeal from an order reducing that valuation, unless he had complained concerning that assessment or had joined in the proceedings before the board.

It is argued that the record does not disclose that Mr. Snell is a taxpayer in Lancaster county or in the state of Nebraska. Mr. Snell has not been given an opportunity to prove that fact. If the appellant is not a taxpayer, his appeal will fail, but we should not assume the negative upon a judgment dismissing his appeal without a trial.

The judgment of the district court, therefore, is reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

HARTINGTON NATIONAL BANK, APPELLEE, v. W. J. BRESLIN; JOHN WIEBELHAUS, APPELLANT.

FILED NOVEMBER 26, 1910. No. 16,196.

Bills and Notes: BLANK SPACE FOR NAME OF PAYEE: LIABILITY OF MAKER. Defendant signed a promissory note which was perfect on its face, with the exception of a blank for the name of the payee, and entrusted it to his co-maker who delivered it in that form to a bank two days later, before it was due, in violation of an agreement that it should be used by him in buying a meat market, that the name of the seller should be inserted in the blank, and that the note should be returned to defendant if not used for that purpose. The bank accepted the note at its face value and afterward inserted its own name in the blank as payee. *Held*, That the instrument is not enforceable against defendant within the meaning of that part of the negotiable instruments law relating to the filling of blanks, and containing, among other things, the following provision: "In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time." Comp. St. 1905, ch. 41, sec. 14.

APPEAL from the district court for Cedar County: GUY T. GRAVES, JUDGE. *Reversed.*

B. Ready, for appellant.

R. J. Millard, contra.

ROSE, J.

This is a suit on a promissory note for $400, dated June 18, 1907, and due six months thence. W. J. Breslin and John Wiebelhaus were makers and the Hartigan National Bank was the payee and holder. The summons was not served on Breslin and the controversy is between the bank as plaintiff and Wiebelhaus as defendant. From a judgment on the verdict of a jury for the full amount of plaintiff's claim defendant has appealed.

The substance of the defense pleaded is: Defendant and Breslin signed the note, but left a blank for the name of the payee. It was agreed between them that the note should be used by Breslin in purchasing a meat market at Fordyce from the owner whose name was at the time unknown, but which afterward was found to be Jacob Hauri. In the event of a purchase Hauri's name was to be inserted in the blank, but otherwise the note was to be returned to defendant. The insertion of the name of the bank as payee was not authorized by defendant and he never consented thereto. The proof of these facts is uncontradicted.

On plaintiff's side of the case the following facts are shown without contradiction: When defendant signed the note he exacted as security from Breslin a deed to three lots in the city of Hartington and at the time of the trial the title thereto stood in defendant's name. In the meantime he had collected the rents and profits. When the note was delivered to plaintiff it was a perfect instrument, with the exception of a blank for the name of the payee. It had not been altered and bore on its face no intimation of the agreements pleaded as a defense. Breslin delivered the note to plaintiff on or before June 20, 1907, and in addition to a cash payment it was accepted by the bank at its face value in full satisfaction and discharge of a mortgage on Breslin's property. Afterward plaintiff inserted its own name in the blank as payee, having had no actual notice of the alleged agreements between the makers.

Plaintiff contends that defendant made no defense to the note and that on the undisputed evidence the judgment rendered was proper. This position seems to be correct, if the controversy is to be determined without regard to the negotiable instruments law of 1905. Comp. St., ch. 41. According to the rules of the law merchant, when defendant signed the note without restriction, leaving a blank for the name of the payee, and entrusted it to his comaker, he gave to a *bona fide* holder implied authority to fill the blank and perfect the instrument. *Humphrey*

Hardware Co. v. Herrick, 72 Neb. 878; *Page v. Morrel,* 3 Abb. App. Dec. (N. Y.) 433; *Redlich v. Doll,* 54 N. Y. 234; *Spitler v. James,* 32 Ind. 202; *Gothrupt v. Williamson,* 61 Ind. 599; *Bank of Pittsburgh v. Neal,* 63 U. S. 96. Under the law merchant a *bona fide* holder was permitted to insert his name in a blank left for the name of the payee. *Townsend v. France,* 2 Houst. (Del.) 441; *Rich v. Starbuck,* 51 Ind. 87; *Greenhow v. Boyle,* 7 Blackf. (Ind.) *56; *Dunham v. Clogg,* 30 Md. 284; *Boyd v. McCann,* 10 Md. 118; *Schooler v. Tilden,* 71 Mo. 580; *Hardy v. Norton,* 66 Barb. (N. Y.) 527; *Seay v. Bank of Tennessee,* 3 Sneed (Tenn.) 557; *Close v. Fields,* 2 Tex. 232. On the record presented there can be no doubt that in taking the note the bank acted honestly, relying upon a well-established custom. On the other hand, defendant took security for his own protection, signed the note with the name of the payee left blank, and entrusted it to Breslin, thus making it easy for him to mislead the bank to its injury. Under such circumstances the courts, in administering justice independently of legislative enactments, have as a rule protected the person least at fault and allowed the loss to fall upon the one whose conduct was the principal cause of the injury. This rule should be applied in the present case unless it has been changed by statute. Before the note was signed, however, the negotiable instruments law was passed and by it the transaction in controversy must be tested. Generally this act retains the rules of the law merchant, and its purpose, as suggested by its title, is "to establish a law uniform with the laws of other states." While England and most of the states of this country have been consistent in making such statutes uniform, an examination of the holdings of the courts in which those acts have been construed indicates a diversity of opinion. The view, however, that the provisions of section 14 of the Nebraska negotiable instruments act, which is invoked by defendent herein, change the rules of the law merchant in material respects appears to be unanimous. *Herdman v. Wheeler* (1902), 1 K. B. (Eng.) 361; *Lloyd's Bank v.*

Cooke (1907), 1 K. B. (Eng.) 794; *Boston Steel & Iron Works Co. v. Steuer,* 183 Mass. 140; *Vander Ploeg v. Van Zuuk,* 135 Ia. 350, 13 L. R. A. n. s. 490, and note.

Section 14 provides: "Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operate as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time." Comp. St. 1905, ch. 41, sec. 14.

Within the meaning of this language, defendant became a party to the note "prior to its completion," and therefore, in order that it may be enforced against him, the blank "must be filled up strictly in accordance with the authority given." *Guerrant v. Guerrant,* 7 Va. Law Reg. 639. That defendant gave plaintiff no authority to fill the blank with its own name is shown by uncontradicted testimony. The verdict against him, therefore, is not sustained by sufficient evidence—a question raised in both courts by an assignment of error. For this reason, the enforcement of the statute requires a reversal, which is ordered.

REVERSED AND REMANDED.

ABRAHAM ROSENBERY, APPELLEE, V. MARTIN TIBKE, APPELLANT.

FILED NOVEMBER 26, 1910. No. 16,216.

Highways: ESTABLISHMENT: PREREQUISITES. In an application to the board of county commissioners to establish a new public road, under the statute in force in 1876, the posting of four notices in the manner required by the statute, and the presentation of a petition to the board for such road, signed by at least ten landholders, residents of the county, accompanied by sworn proof of the posting of the notices, stating when and where such notices were posted, are essential prerequisites which must be complied with before the board can acquire any jurisdiction over the subject matter of the location and opening of such new road.

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

James P. English and *George A. Magney,* for appellant.

H. C. Brome and *Clinton Brome, contra.*

FAWCETT, J.

The controversy in this case is over a road on the half section line running north and south through section 26, township 15, range 13, in Douglas county. In 1876 the county commissioners attempted to establish a public road at the point indicated. In 1893 plaintiff purchased 60 acres of land, 40 acres of which was on one side and 20 acres on the other side of this road. Shortly thereafter he fenced his land in such a way as to leave a roadway 30 feet in width. Thereafter his neighbors fenced their lands in a similar manner. Plaintiff also planted fruit trees upon his land up to his fences. He also planted evergreen and other trees along the line of the road indicated. In 1908 the defendant, who was the road supervisor of the district for that year, notified plaintiff to remove his fences and trees, stating that it was his intention as commissioner to improve a road 66 feet in width, and

informed plaintiff that if he did not remove the fences and trees he, defendant, would remove them. Plaintiff thereupon applied for an injunction to restrain defendant from removing the fences, trees, etc. Upon final hearing plaintiff's suit was sustained and an injunction granted as prayed. Defendant appeals.

Plaintiff contends that the proceedings to establish a public road along the half section line in controversy did not accomplish that result. The statute in force at that time provides: "Whenever the inhabitants in any county desire the opening of a new road, or the discontinuance or change of any road heretofore established, they shall give at least twenty days' notice, by posting a notice on the court house door, and at three other public places in the vicinity of the road sought to be located, changed, or discontinued, setting forth the time when they will apply by petition to the board of county commissioners, giving a particular statement of the location, change, or discontinuance sought to be effected." Rev. St. 1866, ch. 47, sec. 19.

Section 20 provides: "Upon the presentation of a petition, signed by at least ten landholders, residents of the county, after notice given as provided in the preceding section, the board of county commissioners shall proceed to hear the parties interested in the case."

The notice of the application to the county commissioners for the location of the road contains nine signatures only, when the statute required ten. This was insufficient. The affidavit of posting the notices recites: "Henry Eicke, being duly sworn, says that four copies of the within notice were posted between the third and tenth days of January, 1876, as follows: One on the front door of the court house and three in the vicinity of the proposed road." It will be seen at a glance that this proof of posting is clearly insufficient as to three of the notices posted. The affidavit says that he posted "three in the vicinity of the proposed road." Where? On a back fence, where no one would ever see them? Were they all posted side by

side or in three different places? The statute required that they be posted in three "public places" in the vicinity of the road sought to be located. The petition finally presented to the board shows that it is based upon the notice and proof of posting, above set out. We have held that "proof of posting the notices should be made by affidavit of the party who posted the same, stating *when, where,* and by whom the notices were posted." *State v. Otoe County,* 6 Neb. 129. And in *Doody v. Vaughn,* 7 Neb. 28, we held: "In an application to the board of county commissioners to establish a new public road, the posting of four notices in the manner required by the statute, and the presentation of a petition to the board for such road, signed by at least ten landholders, residents of the county, are essential prerequisites which must be complied with before the board can acquire any jurisdiction over the subject matter of the location and opening of such new road."

In *Lesieur v. Custer County,* 61 Neb. 612, *State v. Otoe County,* and *Doody v. Vaughn, supra,* and *Robinson v. Mathwick,* 5 Neb. 252, cited by counsel for plaintiff, are approved. The latter case is quoted from as follows: "The board of county commissioners is a tribunal possessed of but a very limited jurisdiction, which is clearly defined by the statutes; and it is essential that all the facts necessary under the statute to authorize their action in any given case be affirmatively shown. In the location of a county road, the commissioners have no jurisdiction, unless the petition mentioned above be presented after due notice thereof has been given. If they presume to act without an observance of these plain statutory requirements, it would be without authority; and whatever they might do would be merely void." We therefore hold that no road was ever legally established by the county at the point in controversy.

But this is not all. There is no evidence in the record to show that the county ever made any attempt to open the road which it had assumed to locate. It was left as

open prairie, the topography being so steep that loaded wagons could not be driven over it. It remained in that condition for about 18 years, and until after plaintiff purchased the land. No attempt was ever made by the commissioners or road overseer to work any portion of the road over plaintiff's land until after plaintiff had built his fences, leaving a roadway 30 feet in width, and had plowed and worked the same so that it could be traveled over. The road overseer then appeared upon the scene and ordered plaintiff to remove his fences so that the road could be worked the full width of 66 feet. Plaintiff refused to comply with the demand, intimating that if it was insisted upon he would fence up the 30-foot road, The road authorities accepted the ultimatum laid down by plaintiff, and thereafter worked to some extent the 30-foot road. Matters continued thus until the second demand made by the defendant in 1908, over 30 years after the abortive attempt of the commissioners to locate a road, as above outlined. Defendant cites and places great reliance upon *Williams v. Smith,* 68 Neb. 329. Counsel say that "the question involved was identically the same as the one under consideration." In this statement we are unable to concur. In that case the road was not only established, but opened in 1879 and traveled from that time until 1892. In the latter year a large bridge on the road was destroyed, whereby the public use of the road was interrupted. After the washing out of the bridge, and in the same year, the owner of the land fenced up the road. Seven years later the road overseer demanded the removal of the fence, whereupon the landowner applied for an injunction, which was denied. That case turned entirely upon the construction placed upon the proviso in section 3, ch. 78, Comp. St. 1899, "that all roads that have not been used within five years shall be deemed vacated." We held that this proviso was intended to apply exclusively to roads that had not been used within five years before the enactment of such section, and that the proviso did not apply to roads which might remain un-

used for any portion of time after the enactment of the section referred to. That case and the one at bar are not at all parallel.

The judgment of the district court was clearly right, and it is

AFFIRMED.

ROSE, J., not sitting.

SOREN C. PEDERSEN, APPELLEE, V. ANNA M. PEDERSEN, APPELLANT.

FILED NOVEMBER 26, 1910. No. 16,203.

1. Divorce: EXTREME CRUELTY. An accusation made by a wife against her husband in which she charges him with the crime of incest with his daughter may not in all cases constitute such extreme cruelty as will alone furnish him with ground for divorce, but when such accusation is made maliciously and often repeated, together with other conduct showing a fixed purpose on her part to make it impossible for them to live together as husband and wife, it may amount to extreme cruelty.

2. ———: ALIMONY. When a divorce is granted to the husband on any ground except adultery committed by the wife, the court may allow permanent alimony to the wife out of the property of the husband.

3. ———: ———. For the reasons stated in the opinion, the decree is modified so as to allow the wife permanent alimony.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed in part and reversed in part, with directions.*

Byron G. Burbank, Nelson C. Pratt, McKenzie & Howell and *Edward P. Holmes, for appellant.*

G. W. Shields and McCoy & Olmstead, contra.

SEDGWICK, J.

A decree of divorce was rendered in the district court for Douglas county in favor of this plaintiff and against the defendant on the ground of extreme cruelty; and the court allowed no permanent alimony to the defendant. The defendant has appealed.

She insists that the evidence is not sufficient to justify the decree of divorce entered against her, and that in any event she should have been allowed permanent alimony, and asks for a decree for separate maintenance.

These parties were each between 50 and 60 years of age, and each had been married before. At the time of their marriage the plaintiff was living upon a farm a few miles from Omaha. He was the father of 10 children by a former marriage; three or four of them were under age, and some of them were living with him upon the farm. The defendant was supporting herself by dressmaking in Florence, a suburb of Omaha. She had no children of her own, but had cared for the children of her former husband with whom she had lived for 25 to 30 years. The petition alleges no act of personal violence on the part of the defendant against the plaintiff, but alleges many circumstances of more or less importance in which he says the defendant acted wilfully and maliciously with the purpose and intent of making his life miserable and with that result. He also alleges that the defendant, while they were living together, accused him of the crime of incest with his own daughter, and at about the time and after their separation repeated this accusation at various times and places and in the presence and hearing of many persons. The defendant admits that she made this accusation against the plaintiff, and says that the circumstances were such that she was justified in believing, and did believe, that the charge was true, and that so far as she published this charge she did so under advice of her counsel and friends and without any malicious motive. A large amount of evidence was taken, much of which seems to

have but little relevancy to the issue being tried. Most of this evidence is apparently ignored in the briefs, reference being made principally to the evidence of the parties themselves.

The duty devolves upon us by the statute to determine these issues *de novo* from the evidence before us. Owing to the condition of this record and the manner in which it is presented, this is a difficult thing to do. At the time of the marriage, which was in July, 1907, there were living with the plaintiff on his farm his daughter, 18 or 20 years of age, and two or three sons who were younger. When the defendant entered this family she found that their habits and mode of living had been entirely different from her own, and, having a quick temper and strong will, she at once inaugurated radical changes which would in most families be thought to improve their condition, but which seem to have been very unacceptable to the plaintiff and his children. The plaintiff testifies that "everything went fine" for 10 or 12 days, and that then the defendant worked to much and was too particular about house cleaning and in arranging the furniture about the house. She put up unnecessary curtains to the windows and made other changes in the domestic affairs, some of them quite radical and unexpected. When the plaintiff objected to these and similar things the defendant was insolent and quarrelsome, and matters became rapidly worse until there was continual quarreling and mutual hatred and abuse. The crisis came in less than three months, when the parties were separated. Then the defendant appeared to be avaricious and demanded large sums of money. It was impossible for these parties to live together, and marriage in this instance certainly was a failure. The characteristics and habits of both parties were such as to make the alliance impossible, and they both contributed to the condition that made the separation unavoidable. The plaintiff was not a man of bad disposition, and appears to have honestly striven to remedy the existing conditions. There is no evidence of viciousness on his part or that he ever at-

tempted to maliciously injure the defendant. The trial court appears to have been satisfied from the evidence that this was not true of the defendant. We think that the evidence justifies the finding that at the time of their separation the defendant determined to extort from the plaintiff as much money as she could, and to drive him to make such a settlement as she desired, and that she was determined to injure him in every way possible. It was with this end in view that she published the charge of incest against him. She insists that she believed that these charges were true, and she may have thought that the conditions were such as to make such a crime possible, but the circumstances show that she was certainly mistaken in her testimony that she upon one occasion witnessed the commission of the crime that she charged, and she does not testify to any facts or circumstances that would indicate that the plaintiff is of the disposition that could make it possible for him to commit such a crime. Her positive testimony that she witnessed the act tends to discredit her evidence, and there can be no doubt that she acted wilfully and maliciously in repeating this charge upon so many occasions and to so many different persons at about the time of their separation. She testifies that while they were living together she tried in every way she could to keep peace in the family and to do her whole duty, and it must be said in her justification that many of her actions that were complained of were to her credit rather than otherwise; but she never hesitated to use the most abusive language to the plaintiff and to his children, sometimes in anger and sometimes with the apparent purpose and intention of accomplishing some desired result. Her counsel contend that the charge of such a crime by the wife against the husband is not of itself sufficient to constitute extreme cruelty; but, if it would not be sufficient in all cases, still, under the circumstances in this case, we think that the trial court did right in so regarding it. It is said in the defendant's brief that, as adultery is a statutory ground for divorce, the accusation of adultery made by the wife

against the husband should never be considered as such extreme cruelty as would justify a divorce upon that ground; and that, as adultery is included in the crime of incest, it follows that an accusation of the latter should not be so regarded. We perhaps do not understand the reasoning of the brief upon this question. It may be that the charge of adultery made by the wife against her husband, even though wilfully and maliciously made, would not in all cases be sufficient of itself to constitute extreme cruelty within the meaning of the statute, but that such an accusation will be a species of cruelty cannot be doubted, and might under some circumstances and conditions be sufficient to constitute extreme cruelty. There can be no accusation that would tend more to bring a man into disgrace with his friends and neighbors than the charge that was made against this plaintiff. It is argued that no conduct will amount to extreme cruelty unless it is shown to affect the life or health of its victim. If physical or bodily health alone is meant, we think that this proposition cannot be sustained. Our statute provides that extreme cruelty is a ground for divorce, whether practiced by personal violence or other means. Cruelty, other than by personal violence, must operate upon the mind, and the legislature must have assumed that extreme cruelty might operate upon the mind and feelings alone.

The finding that the defendant was not entitled to permanent alimony we think is not supported by the evidence. The plaintiff has 228 acres of land near Omaha which is divided into two farms and fairly well improved, and 80 acres of land near Anselmo, this state. He also has some money loaned and in the banks and owns some corporate stock. The evidence is meager as to the value of the plaintiff's property. The defendant testified that at one time the plaintiff told her that his farm near Omaha was worth $50,000. This the plaintiff denies, but when upon the witness stand he refused to testify as to the value of the farm, stating that he did not know how much it was worth. The evidence that he produced from other witnesses would

place the value of this farm at $95 to $100 an acre, while the evidence produced by the plaintiff would place its value at about $150 an acre. The value of the plaintiff's property is evidently somewhere from $30,000 to $40,000. At the time of the marriage the defendant had some property, consisting of three or four lots and a building which was incumbered, and the evidence in regard to her property is also unsatisfactory. Her real estate, if clear of incumbrances, would probably be valued at about $3,500. It appears that she is somewhat in debt and has a very small income, and the stated sums which she received from a part of this property which she has recently sold are applied upon an indebtedness. It also appears that at the time of the marriage she was engaged in the dressmaking business, which was fairly remunerative and furnished her a substantial living, and that by this marriage her business was broken up, and that her income at the time of the trial was not sufficient for her support. The plaintiff has paid something toward her expenses in this litigation, probably somewhat less than $1,000 in all, and has incurred a considerable expense in his own behalf. The defendant has not benefited him in any way financially, and undoubtedly should not recover a large amount of alimony. The plaintiff's counsel insist that the defendant should not be allowed alimony when the divorce is granted on account of her misconduct, but this is not the rule. The statute expressly allows alimony in favor of the wife in all cases except in case the divorce is granted on account of adultery committed by the wife, and this court has many times allowed such alimony. The defendant should not be placed in a worse condition financially than she was at the time of her marriage, and we think she ought to be allowed the further sum of $2,000 for her alimony and attorney's fees, payable: $500 upon the entering of this decree in the district court, $500 six months, and $1,000 one year, thereafter, and that the plaintiff should pay all the costs in these proceedings.

The judgment of the district court disallowing alimony

is reversed, and in all other things affirmed; and the cause is remanded, with directions to enter a decree for alimony in accordance with this opinion.

JUDGMENT ACCORDINGLY.

FAWCETT and ROSE, JJ., not sitting.

EVA SELDERS, APPELLEE, V. JOHN S. BROTHERS ET AL., APPELLANTS.

FILED DECEMBER 10, 1910. No. 16,221.

1. **Intoxicating Liquors:** ACTION FOR LOSS OF SUPPORT: PLEADING AND PROOF: VARIANCE. In an action by a married woman against a licensed saloon-keeper for the loss of support for herself and her minor children, to which the sales of intoxicating liquors made by him to her husband has contributed, proof that prior to such sales the husband had been addicted to the excessive use of intoxicating liquors, but had reformed, and that by reason of such sales he had resumed that habit and become an habitual drunkard is competent, and does not constitute such a variance as requires the reversal of the judgment, although that fact is not specifically set forth in her petition.

2. ———: ———: MEASURE OF DAMAGES. If the means of support is totally destroyed, the full value of such means is the measure of damages; if only partially, then such damages should be allowed as would compensate for such partial destruction. The recovery in such an action is not limited to such damages as might compensate for loss of time while intoxication lasts, but the liability extends to such loss as is the direct result of such intoxication.

3. ———: ———: INSTRUCTIONS. Instructions examined and found to have been properly given.

4. ———: ———: AMOUNT OF DAMAGES. Where it is shown that the husband, prior to the sales of intoxicating liquor, was a man 45 years of age, in good health, a skilled mechanic, earning from $4 to $5 a day, that by reason of such sales he became an habitual drunkard, was broken down in health and incapable of contributing to the support of his family, a verdict for $2,000 cannot be said to be excessive.

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

Greene & Greene, Strode & Strode, and *Wilmer B. Comstock,* for appellants.

George A. Adams and *Morning & Ledwith, contra.*

BARNES, J.

Action in the district court for Lancaster county brought by the plaintiff in behalf of herself and her six minor children against the principal defendants, who were licensed saloon-keepers in the village of Havelock, and the surety on their bonds, for the loss of her means of support caused by the sales of intoxicating liquors to her husband. The plaintiff had the verdict and a judgment for $2,000, and defendants have appealed.

Appellants contend that plaintiff's petition does not state facts sufficient to constitute a cause of action, and discloses upon its face that she has sustained no damages by reason of the sales of intoxicating liquors complained of. The petition alleges, among other things, that the principal defendants obtained their licenses on or about the 21st of April, 1905; that they were engaged in the business of conducting licensed liquor saloons for the sale of intoxicating liquors in the village of Havelock from that time until about the 21st of April, 1906; that the sales of intoxicating liquors complained of occurred between the 1st of January, 1906, and the 21st of April of that year; that for more than a year and a half prior to the commencement of the action plaintiff's husband had acquired the habit of intoxication; that the liquor furnished him by the principal defendants contributed to his intoxicated condition, and rendered him unfit and unable to work and earn support for plaintiff and her minor children; that such sales contributed to the forming of her husband's uncontrollable appetite for strong drink to such

an extent that he is unable to resist the same, and because thereof is rendered utterly incompetent to work or labor or follow any useful avocation in life. The petition also states, with reasonable certainty, that his dissipated condition began about the time the principal defendants procured their licenses and commenced to sell him intoxicating liquors. It is therefore fairly shown that the sales of liquor complained of contributed to the loss of her means of support. This was sufficient to entitle the plaintiff to recover.

In *Acken v. Tinglehoff*, 83 Neb. 296, it was said: "The mere fact that the plaintiff's husband had used liquor excessively prior to the time that defendants sold to him is not sufficient to defeat the plaintiff's action. We are cited to *Stahnka v. Kreitle*, 66 Neb. 829, in support of defendants' contention that they are not liable for damages resulting from a like traffic before they engaged in the business. This proposition is sound but it cannot control this case, because the plaintiff does not seek to recover for her nonsupport prior to the time the defendants engaged in business. By considering the evidence in the light most favorable to the defendants, the fact still remains and stands out boldly that the wrongful conduct of the defendants contributed to the condition of the plaintiff's husband as alleged in the petition and proven at the trial. This being the situation, the defendants are liable."

It has also been held that the liquors furnished by a defendant need not be the sole cause of an alleged injury in order to permit an aggrieved party to recover. In the case at bar the record fairly discloses that the plaintiff's husband was a man about 45 years of age; that he was a stone mason by trade; a man of excellent health, industrious, and a competent workman, and earned, when employed, from $4.50 to $5 a day; that on and prior to the 1st of April, 1905, he had become somewhat addicted to the use of intoxicating liquors; that the plaintiff, in order to protect him and to work his reform, if possible, served notice upon the saloon-keepers of the city of Lincoln not

to furnish her husband with intoxicating liquors; that, after the service of such notice, Selders reformed to the extent that he followed his usual avocation, earned his usual amount of wages, and turned the same over to the plaintiff for the use and support of his family; that in the month of January, 1906, he went to work at his trade for a man of the name of Vanoy, who resided at or near Prairie Home; that, in going from his residence to the place of his employment, Selders passed through the village of Havelock; that he at once commenced to procure intoxicating liquor from the several principal defendants; that he not only drank in their saloons, but purchased intoxicating liquor by the bottle, which he carried with him to the place of his employment, and drank there during his working hours; that he immediately relapsed into a condition of habitual drunkenness, and since that time has furnished the plaintiff with little or no support whatever; that his drunkenness had continued until the trial of this cause in the district court, at which time he was in a state of ill health, was unable to work, and contributed nothing to the support of the plaintiff and their minor children; that his condition was such while working at Vanoy's that plaintiff notified the principal defendants not to furnish her husband with any more intoxicating liquors. These facts would seem to bring this case clearly within the rule of *Acken v. Tinglehoff, supra,* and therefore defendants' contention is not well founded. The foregoing also disposes of the defendants' second assignment of error.

The defendants further contend that there is a fatal variance between the proof and the allegations of plaintiff's petition. The plaintiff was permitted to prove that in May, 1905, she had prohibited the saloon-keepers in Lincoln from selling her husband intoxicating liquors, and for a time thereafter his habits with reference to drinking improved; that he had contributed to the support of his family, and, while he had been addicted to the use of intoxicating liquors, yet at the time of the alleged sales he

had reformed and restored himself to a condition of usefulness. The petition did not contain such an allegation, and it is claimed that this constituted such a variance as requires a reversal of the judgment. This precise question arose in *Acken v. Tinglehoff, supra,* and it was held that it was proper to show that the plaintiff's husband had lived a sober life prior to the time that the defendants began to furnish him with intoxicating liquors, and although he may have been a drinking man in former years, and had wholly or partially reformed, that the liquors furnished him by the defendants had caused him to resume his former habit of drunkenness, and had thus contributed to the plaintiff's injury by depriving her of her means of support; that such proof was admissible as bearing upon the question of her damages.

Defendants also contend that the district court erred in instructing the jury as follows: "In a case like that at bar the defendant saloon-keepers and their bondsmen are liable, not only for damages resulting directly from the acts of said saloon-keepers, but for all damages to which such acts contribute. So in this case if you find from the evidence that the saloon-keepers in question sold intoxicating liquors to plaintiff's husband, and if you further find from the evidence that he was thereby wholly or partially disqualified to earn a support for his family, or that on account of drunken and dissolute habits acquired in whole or in part as a result of the intoxicating liquors so furnished to him he failed in whole or in part to support them, then such saloon-keepers, together with their sureties, are liable for such injury to plaintiff's means of support for herself and said six minor children as shall result therefrom, and such liability continues, not only during the period of time covered by the license, but during the period of time which you shall find from the evidence such disqualification will be permanent, even though it shall continue beyond the year or years covered by said bond."

In *Wardell v. McConnell,* 23 Neb. 152, where a like

question was before the court, it was said: "The sureties upon the bond of a licensed vendor of intoxicating liquors are liable, not only for the damages resulting directly from the acts of their principals, but for all damages to which such acts contribute. And where, during the existence of a license based upon such bond, the principal sells intoxicating liquors to one who is disqualified to earn a support for his family, by reason of his intoxication, the liability of the surety attaches and continues throughout the period of such disqualification, whether the same terminates during the license year or continues for a longer time." We find from an examination of the authorities that this instruction has been frequently approved by this court. *Jessen v. Willhite,* 74 Neb. 608; *McClay v. Worrall,* 18 Neb. 44; *Gorey v. Kelly,* 64 Neb. 605; *Uldrich v. Gilmore,* 35 Neb. 288. It was said in the opinion in *Warrick v. Rounds,* 17 Neb. 411: "If the means of support is totally destroyed, the full value of such means is the measure of damages. If only partially, then such damages should be allowed as would compensate for such partial destruction. This rule does not limit a plaintiff in an action to such damages as might compensate for loss of time while intoxication lasts, but extends to such loss as is the direct result of such intoxication." It appears from the authorities that the instruction complained of is a proper one.

Complaint is made of the sixth paragraph of the instructions. This instruction is so long that for want of space we decline to quote it. It is sufficient to say that it has been approved in the numerous cases bearing upon the question involved in this controversy which we have heretofore decided.

Finally, it is contended that the judgment is excessive, and it is not supported by the evidence. We find that the record contains competent evidence which tends to show that the plaintiff's husband, since the sales to him of intoxicating liquors complained of, has become broken down in health and unable to perform hard labor; that prior to that time his health was good; that he had earned from

$4 to $5 a day, and had contributed to the support of his family; that since that time he has contributed practically nothing for that purpose. It was further shown that it requires about $20 a week to support plaintiff and her minor children; that since January, 1906, the plaintiff has been compelled to work out at house cleaning, take in washing, and do other menial labor in order to support herself and family; that her eldest son, who at the time of the trial was about 19 years old, and two of her daughters were compelled to leave school, obtain employment, and contribute their wages to support the family, and the evidence seems conclusive that her husband's debauched and practically helpless condition is, and will be, permanent. It also appears that Selders' life expectancy at the time of the wrongs complained of was about 20 years, and it may be presumed that for a greater portion of that time he would, if sober and in good health, contribute his wages to the support and maintenance of his family. We are therefore unable to say that the judgment is excessive.

A careful review of the record satisfies us that it contains no reversible error; that the defendants were accorded a fair trial, and the judgment o the district court is therefore

AFFIRMED.

LEANDER CLARK, APPELLANT, V. CHARLES K. DAVIES, APPELLEE.

FILED DECEMBER 10, 1910. No. 16,228.

1. **Brokers: PLEADING: VARIANCE.** A real estate broker suing and solely relying on a special contract for his commission cannot recover upon a *quantum meruit*.

2. ———: ———: ———. An owner, by a written contract, agreed to pay a real estate broker a commission of $840 if he should sell his 840-acre tract of land for $15 an acre. The broker failed to sell the land, but produced a customer to whom, after much negotiation, the owner himself succeeded in making a sale for about $11.30 an acre. The broker sued upon the contract, and sought

to recover the amount of his commission named therein, strictly according to its terms. *Held*, upon the facts above stated, that he was not entitled to recover in that form of action.

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

Frank E. Beeman and *John N. Dryden*, for appellant.

W. L. Hand, contra.

BARNES, J.

Action by a real estate broker to recover his commission for services rendered his principal in the sale of real estate. At the close of the evidence the district court directed the jury to return a verdict for the defendant, which was done, and judgment rendered thereon, and the plaintiff has brought the case here by appeal.

The contract or memorandum agreement between the parties reads as follows: "Platte Valley Land & Cattle Company, Kearney, Neb., Jan. 24, 1906. I hereby agree to pay a commission of $840 to above company if they sell my 840 acres in Custer Co., Neb.; price to be $15 per acre, this being the ranch purchased by me of L. Clark. C. K. Davies, L. A. Deneson, Platte Valley Land & Cattle Company." This memorandum was accompanied by a plat designating the land in question. It was alleged in the petition that the plaintiff, at the time the contract was made, and when the services were performed, was doing business in the name and style of the Platte Valley Land & Cattle Company; that when the contract was signed one L. A. Deneson was part owner of the land described therein, but before it was sold he had transferred his interest to the defendant; that the plaintiff afterwards, and on or about the 5th day of September, 1906, in pursuance of the contract, procured a purchaser for the real estate described therein, to wit, one Fred Goodell; that Goodell, through his attorney in fact, one J. C. Goodell, purchased the real estate for the sum of $9,500, and that the defend-

ant, Charles K. Davies, conveyed said premises to said purchaser; that the defendant failed, neglected and refused to pay the amount due plaintiff for his services; that there was due on the contract the sum of $1,000, for which sum, with interest, the plaintiff prayed judgment.

The defendant's answer contained, first, an allegation of defect of parties; second, a statement that the petition did not state facts sufficient to constitute a cause of action; and, third, a general denial.

The evidence introduced by the plaintiff tends to sustain the allegations of his petition. It appears that both before and after the memorandum agreement was signed plaintiff advertised the land for sale in the Stockman's Journal, published at South Omaha, Nebraska; that he took the agent of the purchaser to view the premises, which were situated some 60 miles from Kearney; that the agent was satisfied with the land and the improvements thereon, but was unwilling to pay the full price asked, to wit, $15 an acre; that plaintiff kept in touch with the purchaser's agent, and with the defendant, and brought them together; that these efforts continued from a time preceding the date of the contract up to the date of purchase; that the defendant reduced the price in order to effect the sale, which was finally consummated for the sum of $9,500, or something over $11 an acre. The defendant testified in his own behalf, and admitted that he had made the written contract above quoted with the plaintiff for the sale of the land in question. He also testified that the plaintiff did not negotiate a sale of the premises for $15 an acre, but that he made the sale himself at the reduced price of $9,500.

With the pleadings and the testimony in the condition above described, the trial court directed the jury to return a verdict for the defendant, upon the theory that the plaintiff had agreed to sell the land in question at $15 an acre for a commission of $840, and, as no evidence was introduced to show that he had actually sold it, therefore he was not entitled to recover. It is contended by the plaintiff that, having found a purchaser, and by his efforts

in that behalf having brought the purchaser and the owner of the land together, the owner by reducing the price, and thereby effecting the sale, could not deprive him of his right to recover the compensation mentioned in the contract. On the other hand, the defendant contends that the memorandum agreement is not a sufficient contract in law to entitle the plaintiff to recover; that it was not properly signed, and in fact several technical objections are urged as to the sufficiency of the memorandum agreement. We think there is no merit in these contentions. The contract or memorandum agreement, both in form and substance, complies substantially with the provisions of section 74, ch. 73, Comp. St. 1909, and when coupled with the description and the averments of the petition, if its terms were complied with, would sustain a judgment for the plaintiff.

It is further contended by the defendant that the contract in question is special; that by its terms the plaintiff was required, and agreed, to sell the defendant's land for $15 an acre, and, in case the plaintiff made such sale, then he was to have a commission of $840, or $1 an acre for the entire tract of 840 acres; otherwise, he was to receive nothing whatever for his services; that the plaintiff having failed to make the sale himself for that price, and the defendant having consummated the sale at a less price, therefore the plaintiff can recover nothing for his services.

Whenever a sale of real estate is effected through the efforts of the broker, or through information derived from him, so that he may be said to be the procuring cause of it, his services are regarded as highly meritorious and beneficial, and the law leans to that construction which will best secure the payment of his commission. It seems that we are committed to this rule, and if the plaintiff had brought this action to recover the value of his services, or upon a *quantum meruit*, we think that he would have been entitled to substantial relief. But this is an action on the contract in which he seeks to recover the amount of compensation provided thereby. There is nothing in the

pleadings or the proof which will authorize a recovery on any other theory. It is clearly shown that the plaintiff not only failed to sell the defendant's land, but failed to produce a purchaser who was ready and willing to purchase it and pay the price named in the contract; that after negotiations covering a period of more than eight months defendant, in order to make the sale, was compelled to reduce his price to about $11.30 an acre. This was such a substantial reduction as to exclude any assumption that the sale was made by the defendant at a less price in order to deprive the plaintiff of his commission.

This is simply a case where the broker was unable to make the sale, and has failed to comply with the terms of his agreement. Therefore he is not entitled to recover the compensation named therein. *Beatty v. Russell,* 41 Neb. 321; *Stewart v. Smith,* 50 Neb. 631; *Barber v. Hildebrand,* 42 Neb. 400; *Langhorst v. Coon,* 53 Neb. 765. In *Dorrington v. Powell,* 52 Neb. 440, it was held that a real estate broker suing and relying solely on a special contract cannot recover on a *quantum meruit.* That decision seems to require an affirmance of the judgment in the instant case. It is with reluctance we have reached this conclusion, for as a matter of equity plaintiff ought to be paid for the services which he rendered to the defendant, but to reverse the judgment would require us to violate precedent and establish a rule unsupported by authority.

The judgment of the district court is therefore

AFFIRMED.

ROSE, J., not sitting.

IDA KURPGEWEIT, APPELLEE, V. EDWARD KIRBY, APPELLANT.

FILED DECEMBER 10, 1910. No. 16,136.

1. **Trespass to Person:** ELEMENTS OF DAMAGES. The facts set forth in the opinion *held* to show a wanton and wilful trespass upon the person of the plaintiff, accompanied by such circumstances of aggravation as justifies the inclusion of mental suffering, humiliation and disgrace as proper elements of compensatory damages.

2. ———: MATTER IN AGGRAVATION. Matter in aggravation is something done by the defendant upon the occasion of the commission of the principal trespass, which is of a different legal character from, but not inconsistent with, the trespass.

3. ———: MEASURE OF DAMAGES: QUESTION FOR JURY. Where there is a direct invasion of personal rights under circumstances showing malice, or a wilful and wanton disregard of another's right to personal security, the amount of compensatory damages is not susceptible of exact computation, and must usually be left to the sound discretion of the jury.

4. **Appeal:** EXCESSIVE DAMAGES. Where, in such a case, considering all the circumstances, the verdict is for such amount as clearly shows it is the result of passion or prejudice, it cannot be upheld, and a remittitur will be required, or the case reversed and remanded for a new trial.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed on condition.*

M. F. Harrington, E. D. Kilbourn and *H. H. Kilburn*, for appellant.

W. E. Reed, contra.

LETTON, J.

The plaintiff is a young married woman living upon a farm with her husband. The defendant is a widower, a farmer residing in the same neighborhood. On the night of August 9, 1906, somewhere between the hours of 9 and 11 o'clock, and after the plaintiff's family had retired, the

defendant came to her home and stated that Mrs. Stubbert, a neighbor who lived with her husband about 2½ miles away, was about to be confined and was very sick; that two other women of plaintiff's acquaintance were at her home, and that they had requested that the plaintiff come over at once to assist. After some conversation the plaintiff took her three months' old infant and started for Stubbert's with the defendant in his buggy. When they arrived close to the Stubbert home, which stood back from the road and was reached by a lane, the defendant drove beyond the lane in the direction of his own home, and, upon plaintiff stating that was the Stubbert place, he turned back and was about to drive beyond the lane again, when the plaintiff jumped from the buggy with her infant and went to the house. She knocked at the door, and when it was opened asked Mrs. Stubbert if the other women whom defendant represented had sent for her were there, and was told they were not. She then asked if Mrs. Stubbert was sick, and was informed that there was nothing the matter with her. Upon thus finding out the deception which had been practiced upon her, she went into the house and became very much agitated and alarmed, crying and lamenting her condition, and foreseeing neighborhood gossip. The defendant in the meantime had stopped his team near the house, and after some conversation with Mr. Stubbert had come into the room. Some conversation then was had as to her going home. Mrs. Stubbert suggested that her son Frank, a young man, take her home, but plaintiff testifies she was afraid to go with him on account of the defendant saying he would meet them at the corner. Mrs. Stubbert then sent Frank for the plaintiff's husband, who came and took her home. It was proved that, in the conversation with Mr. Stubbert, defendant used language implying that plaintiff was a lewd and immoral woman. It was also shown that, after this event, gossip was rife in the neighborhood with respect to the plaintiff's character, and that some of these rumors and stories had been communicated to her, but the court in-

structed the jury to disregard all the evidence with regard to such matters, except as to what was said to plaintiff herself by others. These are, in substance, the facts testified to by the plaintiff.

The defendant admitted that the story by which he procured the plaintiff to leave home and ride with him that night was false, and the only explanation he offers for his despicable conduct is that he had been drinking that day, and that it was his intention in this way to play a joke on the Stubberts, who had been married late in life. He denies any improper advances or that he laid hands on the plaintiff, except that he put the corner of her apron over the baby's face to protect it from the cold.

The petition pleads the fraud and deception whereby plaintiff was decoyed from her home, an assault when she left the buggy, the derogatory statements as to her character made by defendant to Stubbert, loss of reputation and mental anguish, humiliation, mortification and disgrace by reason of the position she was placed in, and consequent gossip in the community. The answer is a general denial.

The plaintiff apparently is not very ready in her use of English. Her testimony is meager and much of it was drawn out by the use of leading questions. There is absolutely no evidence of any physical injury either direct or indirect to her person. The evidence clearly shows that she wept and was greatly agitated after she had been informed of the deception practiced upon her, and it is further shown that, in consequence of being told by neighbors that her reputation was suffering on account of the night ride with the defendant, she became somewhat nervous and suffered to some extent from sleeplessness.

In this state of the evidence the court gave the following instructions among others:

"No. 7. If you find for the plaintiff you will assess her damages at only such sum as you believe and find, from a full and fair consideration of all the facts and circumstances in evidence before you, will compensate her for

the physical and nervous pain, mental distress and agony, if any you find, resulting from such deceit and unlawful acts of the defendant, which you find were committed by him, and, in determining the amount of such damages, you will also consider mental pain and suffering, resulting from communications, which you find were made to her, that she was a subject of public notoriety and scandal in the community where she lived, naturally resulting from such wrongful act of defendant, such damages, however, in no case to exceed the sum of $25,000.

"No. 8. You are instructed that this is not an action for slander or libel, but an action for damages by reason of the alleged assault and assault and battery, and deceit practiced upon plaintiff by defendant to induce her to accompany him from her home, and if you find for the plaintiff, in determining the amount of her damages, you will in no manner consider or allow any sum as damages by reason of any alleged injury to her character and reputation by any statements concerning the same made by defendant or other persons.

"No. 2, tendered by plaintiff. Notwithstanding you may find from the evidence that the plaintiff bore no outward sign of physical suffering and pain, yet if you find from the evidence that plaintiff has by reason of defendant's acts and conduct toward and concerning plaintiff upon the night of July 27, 1906, suffered mental pain and anguish, your verdict should be for the plaintiff, and you should assess full damages therefor, not exceeding the amount claimed in her petition."

Defendant's counsel insist that there was error in the giving of these instructions; that where the evidence shows mental anguish unaccompanied by any physical injury, there can be no recovery; citing *Atkins v. Gladwish*, 25 Neb. 390, and a number of other cases mostly involving negligence or breach of contract. There is a decided conflict in the authorities as to whether in such cases there can be a recovery for mental suffering if unaccompanied by physical injury. In states allowing punitive or ex-

emplary damages such suffering may usually be considered by the jury as an element of damages, but in states where only compensatory damages are allowed the prevailing rule, with some exceptions, seems to be that there must be some physical injury, either directly or proximately caused by the wrongful act or omission, before mental pain and anguish may be taken into account, although in telegraph cases this distinction does not seem to exist. The reason given for the rule usually is that in the absence of any visible evidence of injury to the person the opportunities for putting forth unfounded claims for damages would be so numerous and the facilities afforded for depriving persons of their property by false charges would be so great that the courts will not open the door to the train of evils that might in all probability be expected to enter if such a rule were adopted. We do not think it necessary to consider or distinguish the cases bearing upon this subject here. A number of them may be found collected and reviewed in note to *West v. Western Union Telegraph Co.*, 7 Am. St. Rep. 530 (39 Kan. 93), in note to *Green v. Western Union Telegraph Co.*, 1 Am. & Eng. Ann. Cases, 349 (136 N. Car. 489), and in note to *Gulf, C. & S. F. R. Co. v. Hayter*, 77 Am. St. Rep. 856 (93 Tex. 239), which latter note, though dealing mainly with the subject of fright, includes many cases upon the general subject.

We consider the peculiar circumstances of this case to place it within the reason of another class of cases, where by an active and wilful or wanton act one has been injured in his personal rights and privileges, has been deprived of his liberty, or damaged in reputation, or outraged and humiliated in his personal self-respect or in the finer sentiments of his nature. Recovery for mental anguish, humiliation, and loss of reputation may be compensated without proof of actual pecuniary loss in actions for libel and slander where the matter is libelous *per se* (*Laing v. Nelson*, 40 Neb. 252; *Boldt v. Budwig*, 19 Neb. 739; *Brooks v. Dutcher*, 24 Neb. 300; *Williams v. Fuller*, 68 Neb. 354); in actions for malicious prosecution, which is

held to be an attack on one's reputation (*Miles v. Walker,* 66 Neb. 728; *Minneapolis Threshing Machine Co. v. Regier,* 51 Neb. 402); in actions for criminal conversation (*Smith v. Meyers,* 52 Neb. 70); for breach of promise (*Musselman v. Barker,* 26 Neb. 737); for digging up the dead body of plaintiff's son (*Meagher v. Driscoll,* 99 Mass. 281); for wrongful ejection from cars, and for a conductor kissing a female passenger against her will (*Smith v. Pittsburg, Ft. W. & C. R. Co.,* 23 Ohio St. 10; *Lake Erie & W. R. Co. v. Fix,* 88 Ind. 381; *Quigley v. Central P. R. Co.,* 11 Nev. 350; *Chicago & A. R. Co. v. Flagg,* 43 Ill. 365, 92 Am. Dec. 133; *Craker v. Chicago & N. W. R. Co.,* 36 Wis. 657, 17 Am. Rep. 504); for being deprived of the remains by an undertaker to whose care the dead body of a daughter had been committed (*Renihan v. Wright,* 125 Ind. 536, 9 L. R. A. 514); in an action for the abduction of a child (*Magee v. Holland,* 3 Dutch. (N. J.) 86, 72 Am. Dec. 341).

The question whether such damages are of the nature of exemplary or compensatory is sometimes a very close one; but, even in states which allow compensation only, damages are allowed which are not susceptible of precise computation and the amount of which must be left largely to the discretion of the jury, as witness the Nebraska cases above referred to. Note to *Spellman v. Richmond & D. R. Co.,* 28 Am. St. Rep. 858, 870 (35 S. Car. 475); 1 Sutherland, Damages (3d ed.) secs. 95, 96. The subject is discussed at length in *Smith v. Pittsburg, Ft. W. & C. R. Co., supra,* and in *Quigley v. Central P. R. Co., supra.* The latter is a Nevada case, in which state it is held (*Johnson v. Wells, Fargo & Co.,* 6 Nev. 224) that ordinarily mental anguish without physical injury is not a proper element of damages. If one is taken openly from his home by arrest under color of process he may be permitted to recover damages for loss of reputation and mental suffering. What reason can there be for refusing a like compensation to one who is decoyed from her home by fraud and deceit, under circumstances which cast a cloud upon her reputation and caused unfavorable comment upon her character? More-

over, the acts of the defendant resulted in damage of precisely the same character as that which would have been caused by an oral or written attack on her reputation. Why should it not be compensated for in a like manner and to the same extent?

Conceding, for the purpose of argument, the soundness of the contention by defendant's counsel that mental anguish without physical injury is not a proper element of damages in an action purely for assault, in this case the wrong was caused, and recovery is sought, not by and for the assault alone, but by the conjoined acts of deceit by which the plaintiff was induced to leave her home, the trespass upon her person by taking hold of her arm before reaching the Stubbert's home, the statements derogatory to her reputation made at the time by the defendant to Stubbert, and the mental suffering caused by the knowledge brought to the plaintiff as to the neighborhood gossip. We are of opinion that the argument does not fit the circumstances of this case; that *Atkins v. Gladwish, supra,* is distinguishable; and that the jury properly took into account all the circumstances accompanying the transaction. As the case was submitted to the jury it was really an action for a trespass upon the person of plaintiff, a direct invasion of her personal rights, and the accompanying circumstances of mental suffering, humiliation, and injury to her social standing and reputation in the neighborhood constituted matter in aggravation. Matter in aggravation is something done by the defendant upon the occasion of the commission of the principal trespass, which is of a different legal character from, but not inconsistent with, the trespass. Thus, upon a trespass for breaking and entering a house under a false charge that the plaintiff was concealing stolen property, whereby her quiet enjoyment was interrupted and her character was injured, it was held that the trespass was the substantial allegation, and the rest matter of aggravation only. *Bracegirdle v. Orford,* 2 M. & S. (Eng.) 77. In trespass *quare clausum fregit* the gist of the action was the unlawful entry, but it was alleged

in aggravation that the plaintiff's daughter was assaulted and ravished by the defendant. The assault was held to be merely matter of aggravation, and it was unnecessary to allege or prove a contract or loss of service. *Bennett v. Alcott,* 2 T. R. (Eng.) 166; *Donohue v. Dyer,* 23 Ind. 521. See, also, *East v. Cain,* 49 Mich. 473; *Anonymous,* Minor (Ala.) 52.

The case is unusual in its facts, and we have devoted more time and labor to the investigation of the legal principles governing its disposition than perhaps was necessary or appears in this opinion. We are satisfied the jury were entitled to consider the elements of damage submitted to them. In all cases of this class the damages are difficult of ascertainment, and must be left to the sound discretion of the jury. It is impossible to ascertain with any degree of precision what amount will compensate the plaintiff for the wrong suffered. Of course, if the verdict is for such an amount as to shock the conscience, or if it appears to be so disproportionate to the injury suffered that it appears to be the result of passion or prejudice, it cannot be upheld.

The verdict for $3,000, however, seems to be excessive, and, considering all the circumstances, we think it must have been the result of passion or prejudice on the part of the jury. The plaintiff, therefore, will be required to remit the sum of $1,500 as a condition of affirmance, otherwise the case will be reversed and remanded for a new trial.

JUDGMENT ACCORDINGLY.

ROSE, J., dissenting.

I dissent from the order requiring a remittitur as a condition of affirmance, for the reason that in my judgment the verdict is not excessive.

NELS SHOLD, ADMINISTRATOR, APPELLANT, V. PETER H. VAN TREECK ET AL., APPELLEES; STATE OF NEBRASKA, APPELLANT.

FILED DECEMBER 10, 1910. No. 16,166.

1. Appeal. DISMISSAL. An *ex parte* motion to dismiss an appeal in this court, based upon papers not a part of the transcript, and which have been filed without leave, should not be entertained.

2. ———: ABATEMENT: PRACTICE. When it is sought to show that an appeal has abated by reason of matters happening after the appeal has been perfected, the moving party should proceed by way of plea in abatement and service of notice on the adverse party.

3. Hearsay testimony which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved.

4. Evidence examined, and *held* to warrant a decree in favor of the defendants.

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

William T. Thompson, Attorney General, Grant G. Martin and *A. W. Crites,* for appellants.

A. M. Morrissey and *Allen G. Fisher, contra.*

LETTON, J.

A statement of the facts in this case may be found in the former opinion in *Shold v. Van Treeck,* 82 Neb. 99. At the second trial the court found generally in favor of defendants as to the amount due in excess of $515.40, the amount of the funeral and other expenses, found, further, that the state of Nebraska had no right to appear and dismissed the petition in intervention; it also found that the amount due had been paid into court, and decreed that the mortgages were satisfied. From this decree the administrator and the intervener filed a joint appeal. The tran-

script and precipe were filed in this court upon April 23, 1909, with a waiver by defendants of notice of appeal. On August 16, 1909, certificate of the clerk of the district court for Dawes county was filed without permission, setting forth what purported to be a list of papers filed in the case in the district court, and a copy of certain receipts upon the appearance docket. We are now asked to dismiss the appeal upon the strength of this certificate. We cannot consider this showing. If it is contended that the court lost jurisdiction on account of the action abating by payment and satisfaction of the decree, the matter should have been presented by the filing of a plea in abatement, and notice of the filing of the same being given to the adverse parties. Apparently no opportunity has been given by notice for the appellants to investigate and challenge, if they so desire, the correctness of the facts stated. Having proceeded to the final submission of the case in this manner, we can only consider the matters shown by the original transcript and the bill of exceptions.

In the view we take of the evidence, it is unnecessary to determine the right of intervention, or the law regarding the escheating of personal property.

Plaintiff contends that the allegations of the answer do not constitute a defense to the action, and that even if the answer is sufficient the evidence does not warrant a decree in favor of defendants. No attack on the answer was made by demurrer before the trial. By a liberal construction its somewhat general allegations may be held to plead a sufficient defense. The answer, in substance, prays for the specific performance of an alleged oral contract or agreement to make a testamentary disposition of property. The rule in this state is that such an oral agreement must be clearly and satisfactorily proved before a court of equity will enforce it. *Kofka v. Rosicky,* 41 Neb. 328; *Peterson v. Estate of Bauer,* 76 Neb. 652; *Harrison v. Harrison,* 80 Neb. 103. Is the evidence sufficient to warrant the court in finding that a valid and enforceable contract was made? A number of objections to the admission of evidence were

made and exceptions taken, but since the trial was to the court, and we must presume that only competent evidence was considered, these objections and the rulings thereon will not be reviewed.

Judge Sayrs, the county judge of Dawes county, testified to a conversation had with one Fanning, an attorney of Crawford, now deceased, and produced a paper in the form of an affidavit sworn to before him by Fanning, which was received in evidence over objection. The conversation and the written paper tended to corroborate the defendants' witnesses as to the existence of the agreement made between Jansen and Van Treeck. We are of opinion, both as to the conversation and the written paper, that such evidence is incompetent. Both are hearsay, and under no rule of evidence of which we have any knowledge can they be considered. The fact that Fanning has died since the statements were made by him does not operate to render them admissible. 1 Elliott, Evidence, sec. 315; 1 Greenleaf, Evidence (12th ed.), sec. 125; 2 Wigmore, Evidence, sec. 1576; 16 Cyc. 1195*b*; *Halvorsen v. Moon & Kerr Lumber Co.*, 87 Minn. 18. The result of this rule may be deplorable in some instances, and its abrogation by statute, as has been done in Massachusetts, may or may not be desirable, but it is an established rule of evidence, and we are not at liberty to change it. In deciding the case upon the facts, we must, therefore, as we presume the district court did, disregard the evidence of the county judge in respect to this matter.

It is unnecessary to set forth all the testimony. It shows that Jansen sold his farm to Van Treeck, taking a note of $300, and one of $800, due respectively in two and five years, and secured by mortgage; that on the day the papers were executed they desired Mr. Fanning to draw a will to evidence the agreement they had made that Jansen should have his home with Van Treeck, and that when he died Van Treeck was to give him a decent burial, pay all expenses, and have the remaining property. The only property Jansen had was the notes and mortgages. He

had lived with the Van Treecks for years, had no relatives in this country, or apparently in any other country. The Van Treecks are apparently the only intimate friends he had on earth, and the circumstances seem to enhance the probability that the testimony is true. While we think the district court was wrong in holding that the state had no right to intervene, we are satisfied its finding as to the facts was correct.

This being so, the judgment must be, and is,

AFFIRMED.

FAWCETT and ROSE, JJ., not sitting.

MICHAEL GLEASON, APPELLEE, V. LOOSE-WILES CRACKER & CANDY COMPANY, APPELLANT.

FILED DECEMBER 10, 1910. No. 16,223.

1. **Nuisance:** INJUNCTION. The process of injunction cannot be availed of by a private citizen to abate a public nuisance, unless he suffers special or peculiar injury therefrom, aside from that suffered by the general public.

2. ———: ———: EVIDENCE. Evidence examined, and *held* that it fails to show that any special injury or damage to the plaintiff's property will result if the proposed sidewalk is laid according to the plan now contemplated by the defendant. But, *held further*, that the restraining order and temporary injunction were properly allowed, for the reason that if the first plan were followed special damage to plaintiff would occur.

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

McGilton, Gaines & Smith, for appellant.

Mahoney & Kennedy, contra.

LETTON, J.

This is an action to enjoin the construction of a sidewalk. The plaintiff is the owner of a lot facing north on Chicago street, in the city of Omaha, and abutting to the east on Twelfth street which runs north and south. Chicago street has been improved by permanent curbs, gutters, and sewers, and Twelfth street at this point has like improvements, and is also paved as far north as Chicago street. Twelfth street is 100 feet wide, and 20 feet on each side is reserved for sidewalk use. On the plaintiff's lot there are three frame buildings opening on Twelfth street, one of which, a double house standing nearest the corner of Chicago street, is occupied by him as a dwelling, and the other two, which are one-story cottages, are rented for residence purposes. The defendant is the owner of the lot immediately south of that belonging to plaintiff. The rear end of this lot is directly across the alley from plaintiff's, and it faces on Davenport street, which is the first street south. The petition alleges that the defendant is constructing on this lot a building, the plan of which contemplates the erection of a raised sidewalk the full length of the lot and extending 20 feet into Twelfth street; that the proposed raised walk will be not less than seven feet above the sidewalk grade and will be covered with a gravel roof some ten feet high, which will specially damage plaintiff by cutting off the light, air, and view of plaintiff's premises from the south, will cut off the sunlight from a portion of the premises, and will permit snow, ice and sleet to accumulate thereon in the winter time, and thus make the premises less desirable and less comfortable for a home; that it will obstruct and cut off the direct and convenient thoroughfare to and from the principal business part of the city from the lot, will constitute a public nuisance, and be specially detrimental and damaging to plaintiff's property. The prayer was for an injunction to restrain the construction of any sidewalk above the present sidewalk grade on Twelfth street.

The answer admits the facts pleaded as to the ownership and situation of the respective properties with respect to the streets, pleads that this portion of Twelfth street is only suitable for wholesale houses or manufacturing establishments, and that there is a railroad track on the west side of the street within a few feet of the curb line running along the property of both plaintiff and defendant. It further pleads that the plaintiff has ready and direct access to the principal business part of the city by way of Chicago street and Thirteenth street, and denies that the contemplated sidewalk will in any way damage his property. It affirmatively pleads that in its business it receives daily several carloads of material which must be taken from cars on the track in Twelfth street into the building, and it is necessary that the passageway between the cars and the building be level, as otherwise it would endanger the safety of people traveling along the sidewalk during the unloading of barrels and other heavy material; that it has received from the city council by ordinance permission to construct the sidewalk on the level of Davenport street; that there is now a temporary sidewalk in front of the lot on Twelfth street, and that a permanent and substantial sidewalk is necessary; that the sidewalk thus authorized is in accordance with the practice of the mayor and council for many years throughout the wholesale part of the city, and that it will not inconvenience public travel along the street. It further alleges that the entrance to its building is about the middle of its frontage on Twelfth street; that the present plan is to construct the sidewalk upon a level from the southwest corner of its building on Davenport street along Davenport and Twelfth streets to the entrance where it will be about four feet above the street surface, and from there to slope it down at a grade of one foot in ten to a level with the curb at the alley, so that there will be an easy ascent from the alley to the point opposite the entrance to the building. In its reply the plaintiff pleads that it has had no notice of any intention to change the grade of Twelfth street or the sidewalk thereon, that no

change of grade has been made, and that no damages have been paid to him for any such change. A number of other denials are made, but the reply is in effect a general denial of the affirmative pleas in the answer.

The evidence shows that all of plaintiff's buildings are built close to the lot line facing east upon Twelfth street, that there is a space of five or six feet between the front of his houses and the present sidewalk, which has been fenced in by him, that the sidewalk is an old one made of boards, and that a large cottonwood tree stands in the sidewalk space. North of Chicago street Twelfth street is unpaved, and at the distance of about a block north is blocked by railroad tracks intersecting it. A large part of the travel of the workmen to and from the Union Pacific shops is over the sidewalk in question, and the street is also used by traffic to and from the Illinois Central freight station, which lies to the eastward on Chicago street. While the plaintiff and his tenants could reach the main business portion of the city by going one block west on Chicago street, thence south on Thirteenth street, it has been their custom for years to use Twelfth street in front of defendant's lot, which is, in fact, their most direct route to the business center.

After the defendant purchased the lot, and before commencing the work of building, an ordinance was passed by the city authorities granting defendant permission to maintain platforms or shipping docks on the west side of Twelfth street, 20 feet in width, to be constructed of concrete and cement, to be not more than seven feet high, and to be provided with steps at the ends and corners, the platform to be covered with a gravel roof with iron supports. After this ordinance was passed and approved, the plaintiff, learning of the purpose of defendant to erect this dock, procured a temporary injunction restraining the defendant from obstructing the sidewalk space, which was afterwards made perpetual. Defendant appeals.

The evidence for the defendant is that it is not its intention to erect a shipping dock such as is described in the

ordinance, but that it proposes to construct a level cement sidewalk from the southwest corner of its building at Twelfth and Davenport streets, along Davenport to the corner where it would be about two feet above the street, and from thence to the entrance to the building, and from that point the walk would slope to the north at a fall of one foot in ten until it reached the alley between its and plaintiff's lot; that in its business it uses heavy barrels and boxes of flour, lard and molasses, and that it is necessary for the safety of the public and of its employees that these articles, when unloaded from the cars, be dropped on a level surface, and not upon a sloping one such as would be the case if the walk was laid at the present grade of the street. It is also shown that the cost of handling the material would be increased.

The conclusion we draw from the evidence on this point is that defendant's anxiety for the level walk is not so much on account of concern for public safety as for convenience and economy in the cost of operation of its plant. There was much evidence adduced before the trial court which bears little relation to the real issue before the court. There is some testimony to the effect that the present grade of Twelfth street at this point is ⅜ of an inch to the foot, and that to the southward toward Douglas street the grade is much steeper, but this is indefinite, not based, so far as shown, upon any plat, profile, or survey, and not given by an engineer or proved by an ordinance. There is no evidence whatever to show that if the sidewalk is built on a level to the entrance, and then sloped to the alley, it would in any way interfere with public travel along the street. In fact, the conclusion we draw from the evidence is that a substantial cement sidewalk, 20 feet in width, would afford much better facilities for the public than the old brick sidewalk which occupied the ground previous to defendant's purchase of the property. The only witness produced to testify as to the effect of the proposed construction upon the view, and upon the passage of air along the sidewalk space if the contemplated improvement is

constructed, was Mrs. Miller, the plaintiff's daughter, but upon objection the court excluded most of her testimony on these points. She was, however, permitted to testify that Twelfth street to the south would not reach the level of a four-foot obstruction placed on the sidewalk space immediately east of defendant's lot. This, however, is at variance with her father's evidence, who testified that Twelfth street slopes upward to the south until it reaches Capitol avenue, and that from there to the south it is steeper. There is no evidence to show that the grade or height of the sidewalk on Twelfth street has ever been fixed by ordinance, or that it is required to be the same as the street or the curb line, or that there is a general ordinance in force governing these points. If no ordinance controls and the proposed walk permits convenient public travel, it is not even a public nuisance.

The plaintiff argues that the sidewalk is a part of the street; that the title to the streets is held by municipalities in trust for the use and benefit of the public; that the easements of view and of light and air belong to every one owning property abutting on the street, and will be protected by the courts against illegal encroachments—citing *Davis v. City of Omaha,* 47 Neb. 836; *Jaynes v. Omaha Street R. Co.,* 53 Neb. 631; *Bischof v. Merchants Nat. Bank,* 75 Neb. 838, and *Chapman v. City of Lincoln,* 84 Neb. 534.

We are satisfied with the law as laid down in the cases cited, but we do not see that it aids the plaintiff. Eliminating from our consideration the ordinance passed by the city council, for the reason that the defendant is not now seeking to proceed under the terms of the same and in conformity therewith, the question that first presents itself is whether the plaintiff has shown such a special damage to himself as warrants him to maintain an action to abate a public nuisance. The real inquiry is not whether the council had power by ordinance to authorize the defendant to erect such an obstruction as is described in the ordinance, but whether the proposed construction of the sidewalk at a level instead of on a slope shall be restrained at the suit of

a private individual. We are all of opinion that the evidence fails to show any special damage to the plaintiff which will be sustained if the sidewalk is constructed as the defendant now proposes. As we read the answer and the evidence, it is not proposed to cover the walk, but only to vary its surface slope. There is nothing in the record to warrant a finding that the slight change proposed will interfere with plaintiff's light, or air, or view, or in any way damage his property, and so far as we can judge it will provide better access to the business portion of the city for him and his tenants. We have said repeatedly that the process of injunction cannot be availed of by a private citizen to abate a public nuisance, unless he suffers special or peculiar injury therefrom, aside from that suffered by the general public. *Kittle v. Fremont,* 1 Neb. 329; *Shed v. Hawthorne,* 3 Neb. 179; *Barton v. Union Cattle Co.,* 28 Neb. 350; *Hill v. Pierson,* 45 Neb. 503; *Letherman v. Hauser,* 77 Neb. 731; *Bischof v. Merchants Nat. Bank, supra.* No such special injury is established by the evidence, and, hence, the plaintiff is not entitled to maintain this action. If, at any future time, he suffer any special damages by reason of any interference with the public highway, this action will be no bar. While coming to the conclusion announced, we are of opinion that at the time this action was begun, and the restraining order issued, the defendant intended to follow the plan of construction set forth in the ordinance, and that the restraining order and temporary injunction were properly granted upon the showing made. The plan being changed, the injunction as finally granted was unnecessary.

The plaintiff was justified in beginning the action and should recover his costs in the district court, but the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

ROBERT M. SWINDELL, APPELLANT, V. CHARLES MALONE, APPELLEE.

FILED DECEMBER 10, 1910. No. 16,234.

Appeal: REVIEW. Where the evidence discloses no right of action in the plaintiff, errors at the trial will not be considered in this court.

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

R. L. Keester, for appellant.

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

LETTON, J.

This action was brought to recover for expenses incurred in threshing two-thirds of a crop of wheat. Liabilty was denied, and a counterclaim was presented for wheat sold to plaintiff.

The plaintiff, Robert M. Swindell, who is the owner of a section of land in Harlan county, and L. L. Swindell are father and son. The father testifies that in October, 1906, he leased this land to his son for one-third of the crops raised thereon; that in 1906 and 1907 the defendant Malone farmed the land; that early in the threshing season of 1907 Malone and his son threshed out a portion of the crop and Malone took all that was threshed; that he refused to thresh the remainder of it; that the plaintiff, then using his son's machinery, threshed the remainder of the wheat, paying $76 for board and wages of the men that he employed for this purpose. On cross-examination he testifies that he had no authority or permission from his son to thresh the wheat, and that he threshed out and hauled to the elevator 2,130 bushels and 20 pounds.

L. L. Swindell testifies that he leased the land from his father and that he rented it to Malone; that "he was to

have one-third and I was to have one-third, and we were to give father one-third. I was to furnish the machinery and the horses and feed, and he was to do all the work and board himself." He further says that later he made an agreement with Malone whereby he was permitted to remove his stock and Malone was to finish the threshing, he agreeing to furnish an engineer and to pay Malone for tending the separator. The testimony of Malone is practically the same, except that he says that L. L. Swindell did not furnish the teams as agreed, and that when he left he wanted the defendant to thresh the remaining wheat, and said he would pay him for it, but Malone says he refused to do so because he was afraid he would not get his pay.

The jury found against the plaintiff and for the defendant for the amount of his counterclaim. The plaintiff contends that Malone was a subtenant of his son and was bound by the terms of the lease, that the agreement between Malone and L. L. Swindell was an assignment of the lease to Malone, and that the contract was made for the benefit of plaintiff, who had the right to bring action upon the promise made for his benefit in his own name. He also assigns error in giving a number of instructions.

We find it unnecessary to consider the assignments of error made by the plaintiff. The undisputed evidence shows that the plaintiff received not only his entire one-third of the crop, but that he also appropriated and hauled to an elevator the one-third of the wheat crop which belonged to his son, the whole amount being over 2,130 bushels. So far as shown, he has received the proceeds of all this, and has never accounted for any of it. If he has been put to extra expense in the collection of the rent from his son by way of payment for the board and wages of the men employed in threshing, he has the remedy in his own hands. No privity has been shown between Robert M. Swindell and Malone, and Malone positively denies any agreement to carry out young Swindell's contract with his father. The testimony of both the Swindells, taken together and uncontradicted, fails to disclose any cause of

action against Malone, while the liability for wheat purchased from him is admitted.

The district court would have been justified in refusing to submit the plaintiff's case and in directing a verdict for defendant for the amount of his counterclaim. No other judgment than that rendered could be upheld, and it is therefore

AFFIRMED.

IN RE PETITION OF E. A. ROSE ET AL.

SCHOOL DISTRICT NO. 11 ET AL., APPELLEES, V. J. O. COPPLE, APPELLANT.

FILED DECEMBER 10, 1910. No. 16,561.

School Districts: CONSOLIDATION: RIGHT TO CONTEST. A person who owns taxable property within the territorial limits of a school district, but who is not a legal voter therein, has no such interest in the matter of the consolidation of that district with an adjoining one as authorizes him to contest the annexation proceedings either at the original hearing before the county superintendent or upon a review of the same by the district court.

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

Moodie & Burke, Thomas L. Sloan and *Herman Freese*, for appellant.

H. L. Keefe and *E. D. Wigton, contra.*

LETTON, J.

On June 27, 1908, the petitions of J. J. Elkins and others and E. A. Rose and others, legal voters of school districts Nos. 11 and 12 of Thurston county, were filed with the county superintendent, praying that the territory belong- to school district No. 12 be added to school district No. 11, and school district No. 12 discontinued. Accompanying the petitions were affidavits that on the 16th day of June,

1908, notices were posted in three of the most public places in each of the school districts that the petitions would on the 27th day of June, 1908, be presented to the county superintendent at his office in Pender. At the time specified in the notices a hearing was had before the county superintendent. Objections were filed by J. O. Copple to the consolidation. His objections recited that he was "a resident taxpayer of school district No. 12," and in substance were that the district would be too large to allow the children school privileges, that the petitions are not signed by one-half the legal voters; that a number were induced to sign the petition by fraud and misrepresentation; that no notice was given as required by law, and no proof of notice is on file before the county superintendent. There was also filed an affidavit by Mr. Copple to the effect that "he is a landowner and a taxpayer of district No. 12;" that he did not learn of the hearing in time to prepare his showing, and asking that he be given a reasonable time to prepare his evidence.

After a hearing the county superintendent found that the legal requirements had been met, and "that no sufficient objections and protest had been filed against said petition." He consolidated the districts as prayed. A transcript of the proceedings and a petition in error were filed in the district court for Thurston county. The consolidated district appeared and filed a motion to dismiss the petition in error. This motion was sustained, for the reason, as the record recites, "that petitioner J. O. Copple is, and at all times since the filing of the proceeding herein has been, a resident of Bancroft, Nebraska, and not a resident or elector of any of the school districts involved in this action, and has no interest in this action." The petition in error was dismissed.

Both the county superintendent and the district court apparently found from the evidence that Copple was not a resident or elector of either school district, and that he had no interest in the matter. The evidence is not before us, but it is not contended in this court that Copple is a resi-

dent or voter in the districts. It is conceded that he is a taxpayer in school district No. 12. The question that is presented is whether a person who is not a legal voter in the district has any standing or any right to appear either before the county superintendent or the district court to make objections to a proposed consolidation. It is contended that a taxpayer has such an interest, and therefore has a right to appear.

The statute governing the matter (Comp. St. 1909, ch. 79, subd. I, sec. 4; Ann. St. 1909, sec. 11503) reads: "*Fourth.* * * * One district may be discontinued and its territory attached to other adjoining districts, upon petition signed by one-half of the legal voters in each district affected. *Fifth.* A list or lists of all the legal voters in each district * * * affected, made under the oath of a resident of each district * * * affected, together with an oath of a resident of each district, * * * that the legal notice provided for in the third clause of this section has been properly posted, shall be given the county superintendent when the petition is presented. By legal voters herein is meant all who are legal voters at an election for school district officers."

In *Dooley v. Meese,* 31 Neb. 424, which was a direct attack upon the authority of the county superintendent, it was held that, before the county superintendent proceeds to act upon such petitions, evidence should be before him showing at what places the notices were posted and the time of posting the same, and it was held that the county superintendent should not have acted in the absence of more definite proof of the time and place of the posting of the notices. The only proof before the county superintendent in that case at the time he acted was an affidavit to the effect "that proper legal notice" had been given, which stated no facts and was clearly a conclusion. Judge MAXWELL said in the opinion: "This is a direct attack upon the authority of the county superintendent to make the change in the boundaries of the district upon the notices heretofore set out. The court below held that

such notices were insufficient, and in this we think there is no error."

The proceedings were clearly irregular and subject to review by direct attack. But proceedings may be vulnerable to a direct attack by persons who are qualified and competent parties, and yet not absolutely void. The matter of the annexation and discontinuance of districts is wisely committed by the statute to the discretion of the legal voters and the county superintendent. They are presumably much better fitted to determine the proper adjustment of school facilities to local conditions than any nonresident, however much property he may own in the district. It is the children of residents whose welfare is affected. In *Cowles v. School District*, 23 Neb. 655, which was an action brought by a school district to restrain the county superintendent from changing its boundaries, it was held that the school district as a corporation could not maintain such an action, and in the opinion it is said: "The laws of this state, as well by policy as by letter, have left the control of the boundaries of school districts, primarily, with the legal voters of each district respectively." We find no statute authorizing a nonresident taxpayer to appear in these proceedings.

The district court committed no error in sustaining the motion to dismiss on the ground that the plaintiff in error had no litigable interest in the matter, and its judgment is therefore

AFFIRMED.

HERMAN J. KAUP ET AL., APPELLEES, V. HENRY SCHINSTOCK ET AL., APPELLANTS.

FILED DECEMBER 10, 1910. No. 16,162.

1. **Vendor and Purchaser:** FRAUD: REMEDIES. Persons induced by fraud to purchase and agree to pay for real estate may, if they act promptly after discovering the facts, rescind the contract or may retain the land and, within the time limited by statute,

maintain an action against the vendors for damages, or, whenever sued by their vendors to recover the price for which the land was sold, may plead such damages by way of recoupment.

2. Limitation of Actions: FRAUD. An action to recover damages for the defendants' alleged fraud is barred by the statute of limitations, if not commenced within four years of the date the plaintiff first discovered the fraud.

3. ———: ———: ACTION BY PURCHASER. An action prosecuted by the vendees for the cancelation of their overdue notes and a mortgage executed as part consideration for land they were induced to purchase from the defendants by reason of the latter's fraud, for the alleged reason that the amount of the plaintiffs' damages added to the money paid upon the mortgage equals or exceeds that debt, is in effect an action to recover damages for fraud, and cannot be maintained if commenced more than four years after the discovery of that fraud, and the defendants do not ask affirmative relief, but plead the statute of limitations as a defense.

4. ———: ———: ———. In such an action, so much of the relief as relates to quieting the plaintiffs' title as against the mortgage is incidental to the main object of the suit, and does not bring the case within the rule announced in *Dringman v. Keith*, 86 Neb. 476.

5. ———: RECOUPMENT. While the action, *supra*, cannot be maintained, the vendees may set up, by way of recoupment, their damages in any action prosecuted by the payees of said note, or any person claiming title to those instruments, to recover thereon or to foreclose said mortgage.

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

F. D. Hunker, A. R. Oleson and *R. R. Dickson,* for appellants.

R. M. Johnson and *M. F. Harrington, contra.*

ROOT, J.

This is an action to cancel two notes and a mortgage. The plaintiffs prevailed, and the defendants appeal.

In 1902 the parties to this action resided in Cuming county, and had been intimately acquainted for years. In

December of that year the defendants, for the consideration of $23,040, sold to the plaintiffs a ranch containing about 2,000 acres of land situated in Holt county. In March, 1903, the plaintiffs paid the defendants $9,940 in cash, and in May gave them three promissory notes, two for $5,000 each and one for $3,100. The notes were secured by a mortgage on the land conveyed. Subsequently the plaintiffs paid the $3,100 note and two years interest upon the $10,000. This action was commenced in April, 1908. The substance of the plaintiffs' complaint is that they were unacquainted with the ranch and it was covered with snow when they inspected it; that the defendants falsely and fraudulently misrepresented the quality of the soil and the amount of hay previously cut from the meadows upon the ranch, the number of cattle sustained thereon in preceding years, the boundaries of the ranch, and further falsely stated that tracts of land, to which they had no title, were included in the descriptions set forth in the deed, and misrepresented the value of the land. The defendants answered, denying all charges of fraud, and pleaded the four-years statute of limitations.

Giving the plaintiffs the benefit of every doubt, they must have discovered the defendants' fraud in the fall of 1903, certainly before March in 1904. Notwithstanding this fact they made no complaint concerning their plight, but in September, 1907, wrote the defendants promising to pay the $10,000 then unpaid upon the mortgage debt. The plaintiffs in explanation of their conduct testify they did not know until shortly before this action was commenced that they had any remedy, but having signed the notes thought they were compelled to pay them. We are not inclined to challenge the good faith of this testimony, but do not think it will relieve the plaintiffs from the legal consequences flowing from their long acquiescence in the transaction referred to in their petition. Assuming for the sake of argument that the plaintiffs were defrauded, they had an option, upon discovering the facts, to rescind the transaction or maintain an action for damages. By

selling and conveying a part of the property and in other ways treating it as their own for many years, the plaintiffs waived the right to rescind, but they still had a right, within the period fixed by the statute of limitations, to prosecute an action at law to recover their damages. *Hammond v. Patterson,* 85 Neb. 362. Section 12 of the code provides that an action for relief for fraud must be commenced within four years of the discovery by the plaintiff of that fraud. *Bank of Miller v. Moore,* 81 Neb. 566. The plaintiffs have a further right to recoup their damages should an action be commenced upon the notes or to foreclose the mortgage. *Dwinell v. Watkins,* 86 Neb. 740; *Avery v. Brown,* 31 Conn. 398; *Burroughs v. Clancey,* 53 Ill. 30; *Moberly v. Alexander,* 19 Ia. 162; *Allen v. Shackelton,* 15 Ohio St. 145; *Pierce v. Tiersch,* 40 Ohio St. 168. And the statute of limitations will not bar the defense of recoupment. *Morrow v. Hanson,* 9 Ga. 398; Wood, Limitations (3d ed.) sec. 282. At the time this section was commenced the notes were long past due, held by the payees, and cannot now be transferred free from any equities existing between the original parties. *Davis v. Neligh,* 7 Neb. 78; *First Nat. Bank v. Security Nat. Bank,* 34 Neb. 71; *Wilbur v. Jeep,* 37 Neb. 604; *May v. First Nat. Bank,* 74 Neb. 251.

In *Erickson v. First Nat. Bank,* 44 Neb. 622, we held that, if a maker or purported maker of a note has an absolute defense thereto in whosoever's hands it might appear, a court of equity should not enjoin the collection or transfer of the bill. The plaintiffs' counsel, however, argue that in the instant case the mortgage creates a cloud upon their clients' title to the ranch, and therefore equity should take jurisdiction of their complaint and cancel the notes and mortgage. The plaintiffs, however, do not ask the court to place all parties *in statu quo;* they do not contend the mortgage was void in its inception, but admit it was a valid lien to secure the payment of the $3,100 note; they do not say they have paid the $5,000 notes according to their tenor, but ask us to find and say, from a con-

sideration of the conflicting testimony of 45 witnesses, that the defendants should be mulcted in the sum of $10,000 damages by the cancelation of these instruments. We do not say that a jury's finding of so much damage upon the evidence before us should not be sustained, nor do we say a verdict for a smaller sum would be ag: st the weight of that evidence. It is true that the court would be compelled to weigh the evidence, if offered in support of a plea of recoupment in an action to foreclose the mortgage, but in that event the court would acquire jurisdiction by the commencement of an action that could only be maintained in equity, and a court of equity having once rightfully obtained jurisdiction of the case would settle all controversies between the parties with respect to the subject matter of the litigation. We have been cited no authorities to sustain the right of the plaintiffs, at a time when their action to recover damages is barred by the statute of limitations, to equitable relief in an action which contemplates they should hold the property and pay about four-twelfths of the purchase price by the application of their damages thereto. In *Burckhardt v. Burckhardt,* 36 Ohio St. 261, 280, Judge White in discussing the proposition says no such right exists. The proposition was not necessarily involved in the case, but the statement is entitled to some consideration.

This action is primarily one to recover damages, and should have been commenced within four years of the time the plaintiffs discovered the facts. Having failed to act within the time limited by law, the plaintiffs must wait until an attempt is made to foreclose the mortgage or to recover upon the notes.

The judgment of the district court, therefore, is reversed and the cause remanded, with directions to dismiss the action without prejudice to the plaintiffs' defense of recoupment in any action prosecuted upon the notes or the mortgage described in this action.

JUDGMENT ACCORDINGLY.

PHILIP ZWIEBEL ET AL., APPELLEES, V. WILLIAM SEHESTEDT ET AL., APPELLANTS.

FILED DECEMBER 10, 1910. No. 16,225.

1. **Mortgages**: FORECLOSURE: APPRAISAL: PRESUMPTIONS. "An order denying a motion to vacate an appraisement of property for judicial sale on the ground that the appraisers' valuation was too low will, in the absence of a bill of exceptions embodying the evidence given at the hearing, be presumed to be correct." *Johnston v. Craig*, 61 Neb. 98.

2. ———: ———: ———: CERTIFICATE OF LIENS: CONFIRMATION OF SALE. The failure of a county clerk to include in his certificate a statement of liens junior to those for the satisfaction of which the defendants' land is to be sold, and his failure to attach his official seal to said certificate, do not prejudice the owners of the equity of redemption, and should not prevent the confirmation of a sale otherwise regular and lawful.

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

Anthony E. Langdon, for appellants.

B. F. Thomas, Carl E. Herring and *H. Z. Wedgwood, contra.*

ROOT, J.

This is an appeal from an order overruling objections to the appraisal of, and to the confirmation of, a sale of certain real estate. The defendants appeal.

It is first argued that the appraised value of the real estate is too low. No bill of exceptions of the evidence submitted to the district court concerning the value of the real estate has been filed in this court, and we shall presume that the finding of the trial court upon the issue of value is sustained by the evidence. *Johnson v. Craig*, 61 Neb. 98.

The defendants contend that the district court erred in permitting the county clerk to attach his seal to his cer-

tificate of incumbrances, and that the certificate is insufficient in that it does not refer to any liens junior to those included in the decree of foreclosure. The appellants own the equity of redemption of the mortgaged premises, and would not have been prejudiced if no certificate of liens had been filed. *La Flume v. Jones,* 5 Neb. 256; *Smith v. Foxworthy,* 39 Neb. 214; *Hamer v. McKinley-Lanning Loan & Trust Co.,* 52 Neb. 705; *Ballou v. Sherwood,* 58 Neb. 20; *Green v. Paul,* 60 Neb. 7. It appears that the only incumbrances deducted were taxes, and that the property sold for more than two-thirds of its gross value as determined by the sheriff and the other appraisers.

For the reason that we find nothing in the record to suggest a suspicion that the appellants were in any manner prejudiced by the matters referred to in their brief, the judgment of the district court is

AFFIRMED.

JOSEPH J. YOUNG, ADMINISTRATOR, APPELLANT, V. MARION G. ROHRBOUGH ET AL.; COMMERCIAL BUILDING COMPANY, APPELLEE.

FILED DECEMBER 10, 1910. No. 16,726.

1. **Landlord and Tenant:** REPAIRS. Unless the landlord has agreed with his tenant to repair the demised premises, he is not liable to the tenant for failure to make such repairs.

2. **Judgment:** RES JUDICATA. If the directors of a corporation own a majority of its shares of stock, and have complete control and actual personal supervision of its affairs and assets, a judgment on the merits in their favor in an action for their alleged negligence in leasing part of a building owned by the corporation for a use that created an unusual hazard and resulted in serious injury to a tenant occupying another part of said building, and with negligently failing to repair said building, is a bar to an action against the corporation predicated upon the identical facts charged in the suit against the directors.

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

Herbert A. Whipple and *Nelson C. Pratt,* for appellant.

Benjamin S. Baker, contra.

ROOT, J.

This is the second appeal of this case. A statement of the pleadings and the facts may be found in our former opinions, reported in 84 Neb. 448, and 86 Neb. 279. After the case was reversed the defendant corporation pleaded the proceedings in the district court leading up to and including the judgment in favor of the Rohrboughs as a bar to a further prosecution of this suit. The plaintiff, in an amended reply, admitted the existence of the judgment and proceedings, but denied that he was concluded thereby. The district court sustained an objection to the introduction of any evidence. The motion should not have been sustained, but we shall treat it as a motion for a judgment upon the pleadings.

It will be remembered that the defendants Rohrbough, after constructiong the building in question, leased one story thereof to Baright, who sublet a suite of the rooms to a subordinate lodge of the Ben Hur order. Subsequently the Rohrboughs conveyed the building to the defendant Commercial Building Company, a corporation; but at all times they have owned an overwhelming majority of the corporate stock and constitute a majority of the board of directors. Thereafter the corporation leased the rooms immediately above the lodge rooms to the Young Men's Christian Association for gymnasium purposes. The plaintiff's intestate was injured by plastering falling from the wall of one of the lodge rooms. The pleader alleges that the building was negligently and improperly constructed and maintained, and that the upper story should not have been used for a gymnasium. Upon

the first trial of the case the evidence was identical as to all of the defendants with respect to the transaction complained of, subsequent to the transfer of the building to the corporation, and the district court made no distinction between the several defendants' liability. The jury found in favor of the Rohrboughs and against the corporation, and it appealed.

The principle of law controlling our former decision is stated in the syllabus of the opinion, reported in 86 Neb. 279 *et seq.*: "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." Counsel for the several litigants severally invoke the doctrine of the law of the case, but we find nothing in our opinions to interfere with the application of well-established principles of law to the facts in this suit. We did say: "What has been said concerning the effect of the verdict rendered 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." It seems reasonably plain that we thereby merely warned counsel that, should the defendant corporation not amend its answer so as to present in bar the judgment in the Rohrboughs' favor, the verdict in favor of those individuals would be immaterial in a future trial of the case. Whether that judgment would be a defense for the corporation, if properly pleaded, was not within the issues presented upon the former appeal, and was not determined.

Likewise with respect to the argument that a corporation might be liable for its agent's nonfeasance and the agent not liable, we stated that we did not take issue with the plaintiff's counsel. We did not approve or reject the doctrine announced in the argument and briefs, because the application of that principle was not involved in the judgment of reversal. The Rohrboughs were not

made parties to the first appeal to this court, and the judgment of reversal did not vacate the judgment of the district court in their favor. Upon the corporation's plea in bar based upon their codefendants' acquittal, the plaintiff was placed in the same situation as though he had prosecuted a separate suit against the Rohrboughs upon a petition containing all of the allegations set forth in the petition upon which all the parties first went to trial, and a judgment had been rendered in the Rohrboughs' favor, upon their answer in the nature of a general denial.

The precise question before the district court at the last trial was whether a judgment on the merits, acquitting the Rohrboughs of all negligence in discharging the duty imposed on them by law with respect to the plaintiff's intestate, is a bar to a suit against their principal for an alleged failure to perform that identical duty. Counsel for the plaintiff do not argue that they may further pursue the corporation for the alleged negligent construction of the building; but they contend that, since the building in question was constructed and rented for the use of the public, the law imposed upon the corporation a duty to exercise reasonable diligence to maintain that building in a reasonably safe condition for such use, but that the failure of its agents, the Rohrboughs, to perform those duties was a nonfeasance, for which no action would lie against them. The plaintiff does not contend, nor does it appear, that the lessor in any of the leases under consideration agreed to repair the demised premises. The landlord, therefore, was not obliged to make such repairs. *Turner v. Townsend*, 42 Neb. 376; *Murphey v. Illinois Trust & Savings Bank*, 57 Neb. 519. It is doubtless true that a landlord, after having leased a part of his building to one tenant, may not lease other parts of that structure to another person, to be used for a purpose that will endanger the health or life of his tenants while occupying the premises first leased; and if he negligently does so, and the tenants first referred to are injured in

health or body as a proximate result of the forces thus negligently set in motion by their landlord, he may be held liable. And, further, if the landlord leases the building knowing that his lessee will devote it to a use that amounts to a general invitation to the public to come upon the premises temporarily in the pursuit of business or of pleasure, he may not negligently so use, or authorize other persons to use, other parts of the building that those individuals will be subjected to an unusual hazard with respect to life or limb. So it may safely be assumed that if the upper story of the building in controversy could not be used for a gymnasium without danger to the persons rightfully in the rooms beneath, and as a result of that use an injury was inflicted upon some person in the lower rooms, as a matter of right the corporation would be liable therefor.

It should be kept in mind in the instant case that, if there was any negligence in renting the upper story of the corporation's building to the Young Men's Christian Association to be used as a gymnasium, that negligence was occasioned solely through the agency of the Rohrboughs, and if we assume that it was the duty of the landlord to perform any act to ameliorate the conditions made possible by the contract of lease, that duty could only be performed by the corporation through its sole agents, the Rohrboughs. This is not a case where the will and intelligence of a principal directs and controls an agent; but the corporation could conceive no thought nor give any instructions or orders except by the direction of its directors, the practical owners of the corporation and of its assets. In the suit against the Rohrboughs it would have been no defense to urge that they acted as agents for their principal, and therefore were not guilty. As responsible members of society they may not, whether acting for themselves or for another, negligently create a condition pregnant with danger to other members of that society, and escape liability therefor. Nor would they be permitted, while controlling their inanimate principal's

funds and affairs, to negligently fail to perform any duty that principal owed to a third person, and evade responsibility for an injury the proximate result of that negligence. The corporation in the instant case is liable, if liable at all, because the act was performed in furtherance of its business. *Ellis v. McNaughton,* 76 Mich. 237; *Baird v. Shipman,* 132 Ill. 16; *Mayer v. Thompson-Hutchison Building Co.,* 104 Ala. 611.

It now appears by the solemn judgment of the district court, after a trial upon the merits, that the Rohrboughs were not guilty of negligence with respect to any of the matters charged in the petition. The case cannot be considered as one where joint tortfeasors engaged in wrongdoing to the injury of some other person. In that event every person thus engaged must answer as though he alone had committed the tort; but in cases like the one at bar, if the injured person pursues the principal for the negligence of the agent, a prior judgment on the merits in favor of the agent upon the precise issue later urged against the principal, where it could only act or fail to act through that agent, is a bar to a recovery against either. *Chicago, St. P., M. & O. R. Co. v. McManigal,* 73 Neb. 580; *Rathjen v. Chicago, B. & Q. R. Co.,* 85 Neb. 808; *Doremus v. Root,* 23 Wash. 710, 54 L. R. A. 649; *McGinnis v. Chicago, R. I. & P. R. Co.,* 200 Mo. 347, 9 L. R. A. n. s. 880; *Lake Shore & M. S. R. Co. v. Goldberg,* 2 Ill. App. 228; *Stevick v. Northern P. R. Co.,* 39 Wash. 501.

The judgment of the district court, therefore, is right, and is

AFFIRMED.

IN RE ESTATE OF JOHN A. CREIGHTON.

JOHN A. MCSHANE ET AL., EXECUTORS, APPELLEES, V. ELLEN E. CANNON ET AL., APPELLEES; WILLIAM T. THOMPSON, ATTORNEY GENERAL, ET AL., INTERVENERS, APPELLANTS.

FILED DECEMBER 10, 1910. No. 16,775.

1. **Appeal:** TRANSCRIPT: SIGNATURE. If a third person, in the presence and by the request of a county judge, signs that official's name to a certificate, the name thus signed is the signature of said judge.

2. ———: MOTION TO DISMISS: SIGNATURE TO TRANSCRIPT: PRESUMPTIONS. If a motion to dismiss an appeal from a county court for the alleged reason that the county judge's signature to the certificate attached to the transcript is not genuine is overruled by the district court, this court will presume, in the absence of evidence to the contrary, that the judge signed said certificate or authorized his name to be attached thereto.

3. **Wills:** APPEAL: CERTIFICATE TO TRANSCRIPT: WAIVER OF DEFECTS. Although a duly certified transcript of the record and proceedings relative to the matter appealed from is essential to clothe the district court with authority to review an order of a county court distributing the property of a deceased person, yet, if the appellees appear in the district court and move it to enter interlocutory orders, they should not thereafter be heard to question the sufficiency of the certificate to the transcript.

4. ———: ———: JURISDICTION. In such a case, if the transcript contains a copy of the order appealed from and the pleadings of the parties with respect to the subject matter litigated, the mere fact that some order or material stipulation does not appear in the transcript will not prevent the district court from acquiring jurisdiction of the controversy by the filing of the transcript.

5. ———: ———: RIGHT OF APPEAL. If a testator bequeaths a sum of money to his executors to be held in trust by them for a lawful purpose, and the county court declares that bequest invalid and directs the money thus bequeathed to be paid to the testator's heirs, the executors have such an interest in the order that they may appeal therefrom.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, WILLIAM A. REDICK and ALEXANDER C. TROUP, JUDGES. *Motion to dismiss appeal overruled.*

Smyth, Smith & Schall, for appellants.

E. Wakeley, George W. Doane, Charles B. Keller, W. H. De France, Arthur C. Wakeley and *W. D. McHugh, contra.*

ROOT, J.

The appellees have submitted printed briefs and oral argument in support of their motion to dismiss this case. It appears that the testator in the tenth paragraph of his will bequeathed $50,000 to his executors, to be held by them in trust for the purpose of establishing and maintaining a home for "poor working girls" in the city of Omaha. In the thirteenth paragraph of his will the testator bequeathed the residue of his estate "to the legatees and beneficiaries hereinbefore mentioned, each of them to take and have the portion of such remainder as the bequest herein made to him or her bears to the whole of my estate." The testator's heirs, in a petition filed in the county court, attacked the aforesaid bequests and asked the court to distribute the money thus bequeathed as though the testator had died intestate. February 17, 1908, the court sustained the plaintiffs' contention, and the executors, in that capacity and as trustees, duly excepted to the judgment. March 12, 1908, a document purporting to be a transcript of said order and of certain of the pleadings in the county court was filed in the office of the clerk of the district court. The transcript is certified by "Charles Leslie, County Judge. By Clyde C. Sundblad, Clerk of the County Court," and is authenticated by the seal of the county court. March 31, 1908, the appellees filed a motion in the district court suggesting that the transcript was incomplete because it did not contain a copy of a stipulation and an order made by the county court with reference thereto, and moved the court to require the appellants to forthwith supply a certified copy of that document and said order. Subsequently the

appellees moved the court to dismiss the appeal because the transcript was not certified as by law required. In an amended motion the appellees assert that chapter 34, laws 1897 (Comp. St. 1897, ch. 28, sec. 9*c et seq.*) contravenes section 19, art. VI of the constitution, and is therefore void; that because of the invalidity of said act the clerk of the county court had no authority to sign the judge's name to said certificate and the case should be dismissed. May 10, 1909, the appellants were given permission to withdraw the transcript for recertification and thereafter to refile the document, which was done. Thereupon the appellees moved the district court to strike the transcript from the files, to strike the county judge's certificate from the transcript, to dismiss the appeal, and, subject to an order overruling that motion, to affirm the judgment of the county court. All of the motions were predicated upon the alleged defect in the certificate first attached to the transcript. Permission was given the appellees to withdraw their motion suggesting a diminution of the record, and their other motions were overruled. Subsequently the district court ordered the litigants to file pleadings. The appellees filed a petition wherein they allege: "They and each of them protest that this court is without jurisdiction of the subject matter of this appeal, and reserving all manner of objection to the jurisdiction of this court over the subject matter herein involved, for the reasons set forth in their amended motion to dismiss the appeal herein for lack of jurisdiction, filed herein February 24, 1909, and for the reasons set forth in their motion to strike the transcript and the certificate of the county judge of Douglas county, Nebraska, dated May 10, 1909, and filed in this court on that date."

The allegations in the various motions are not directly or by reference incorporated into the petition, and we find nothing therein to raise an issue that the transcript was not duly certified. If we consider the allegations quoted above as sufficient to present the alleged error of the court in overruling the motions to dismiss the appeal, we

must review those orders in the light of all the presumptions attending an order made by a district court within its jurisdiction.

In *Zimmerman v. Trude,* 80 Neb. 503, we held that chapter 34, laws 1897, *supra,* was not obnoxious to the provisions of section 11, art. III of the constitution, but the argument presented in the instant case has not heretofore been urged against the validity of said act. It is not necessary to pass upon the constitutionality of the act, but for the sake of argument we shall treat it as void.

It is apparent, however, that, while the law may not have clothed Sundblad with authority to sign the county judge's name, the clerk may have signed that name in the presence and by the express direction of that official, and, in that event, the signature would be the lawful signature of the county judge. *Reed v. City of Cedar Rapids,* 138 Ia. 366; 36 Cyc. 451. The appellants upon the hearing to dismiss the appeal may have proved that authority. No bill of exceptions is presented containing the evidence considered by the district court in passing upon these motions. To say the court decided the motions solely upon the questions of law presented by the argument that the statute, *supra,* is unconstitutional is to resolve the presumptions against the judgment of the district court, and that we should not do.

Furthermore, the appellees, by appearing in the district court and requesting an order in the case directing the appellants to procure and file certified copies of documents and orders alleged to be necessary to properly advise that court concerning the contention between the litigants, treated the appeal as properly lodged in that court, and are bound thereby. *Coleman v. Spearman, Snodgrass & Co.,* 68 Neb. 28.

The appellees cite and rely upon *Fromholz v. McGahey,* 85 Neb. 205, but in that case a transcript of the district court filed in this court was not authenticated by the seal of the court or the signature of the clerk, and the litigant moving to dismiss had not taken advantage of the simu-

lated appeal by asking for an order against the appellant. Moreover in appeals to this court the appellant is solely responsible for the proceedings essential to vest this court with jurisdiction, while the county judge, after an appeal has been "taken" in probate proceedings, is charged by law with the duty of perfecting that appeal. The legislature has not designated the particular act to be performed by a litigant to inform the county court that the appeal has been taken, but we are of opinion that the order given by the executors for a transcript for an appeal should be held sufficient to charge the county judge with notice that the appeal had been taken.

The appellees also argue that since the transcript first filed in the district court did not contain all of the documents considered by the county court in coming to its final conclusion, nor certain other orders, the district court did not acquire jurisdiction of the subject matter in dispute. Section 46, ch. 20, Comp. St. 1909, provides: "When such appeal is taken, the county court shall, on payment of his fees therefor, transmit to the clerk of the district court, within ten days after perfecting such appeal, a certified transcript of the record and proceedings relative to the matter appealed from."

The transcript was prepared according to orders given by counsel for the executors, and contained a copy of the pleadings filed with respect to the distribution of the estate in controversy and the order made thereon, wherein the bequests, *supra,* were declared invalid. In our opinion the transcript was sufficient to vest the district court with jurisdiction, and the appellees had their remedy by suggesting a diminution of the record. *Moss v. Robertson,* 56 Neb. 774.

The appellees further argue that the executors have no such an interest in the subject matter of the order as to authorize them to appeal therefrom, and cite *Merrick v. Kennedy,* 46 Neb. 264. In that case we did say: "The executor of an estate, as such, cannot prosecute an appeal from a final order of distribution made by the county

court, where he is not pecuniarily affected by such order." But in the opinion filed in a proceeding prosecuted in the same estate for a construction of the will, and reported in *Kennedy v. Merrick*, 46 Neb. 260, NORVAL, C. J., who wrote the opinion of the court in *Merrick v. Kennedy, supra*, says the executor had no interest in the estate of his testator because, "by the will, the executor is not made a trustee, and the will contains no provision making it his duty to hold, control, or manage the real estate or any legacy bestowed for the benefit of the devisees or legatees named therein."

In *Merrick v. Kennedy, supra*, the will created no trust for the executor to administer, and his entire duty would be performed by delivering to the legatees and devisees the property described in the order of distribution. In the instant case, however, the executors are charged by the will with the duty of administering a trust of such a character that it was difficult for any one other than themselves to protect the trust estate. In considering this subject Judge Dixon, in the case of *Green v. Blackwell*, 32 N. J. Eq. 768, says: "Whoever stands in a cause as the legal representative of interests which may be injuriously affected by the decree made, is, within the meaning of these laws, aggrieved, and, therefore, may appeal."

At the time the executors appealed no other persons had appeared in the county court or in the district court to represent the *cestui que trustent*, and the executors would have been shamefully derelict in the performance of their duty had they acquiesced in the order of the county court which diverted a fortune from the objects of the testator's bounty. By what has been said we do not prejudge the case on the merits, but are assuming for the purposes of this motion that the trust may be administered notwithstanding the objections made thereto.

The appellees assert that the attorney general has no authority to intervene in the case or to prosecute an appeal to this court. The briefs and arguments upon these

propositions are so meager that we shall reserve the question for consideration in disposing of the case upon its merits.

The motion to dismiss the case is

OVERRULED.

IN RE ESTATE OF JOHN A. CREIGHTON.

JAMES H. MCCREARY ET AL., APPELLEES, V. CATHERINE MCSHANE FURAY ET AL., APPELLEES; WILLIAM T. THOMPSON, ATTORNEY GENERAL, ET AL., INTERVENERS, APPELLANTS.

FILED DECEMBER 10, 1910. No. 16,776.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, WILLIAM A. REDICK and ALEXANDER C. TROUP, JUDGES. *Motion to dismiss appeal overruled.*

Smyth, Smith & Schall, for appellants.

E. Wakeley, George W. Doane, Charles B. Keller, W. H. De France, Arthur C. Wakeley and *W. D. McHugh, contra.*

ROOT, J.

The record in this case is in the same condition as is the record in *In re Estate of Creighton, ante,* p. 107. The appellees have filed objections to the jurisdiction of the court.

For the reasons stated in *In re Estate of Creighton, ante,* p. 107, the objections are

OVERRULED.

NELSON K UTCH, APPELLANT, V. ANNA KUTCH, APPELLEE.

FILED DECEMBER 10, 1910. No. 16,884.

1. **Marriage:** VALIDITY. The consent of competent parties is essential to a valid contract of marriage.

2. ———: SUIT TO ANNUL: QUANTUM OF PROOF. If a contract of marriage has not been consummated, the court should require no greater quantity of proof to sustain a finding of fraud or of mental incapacity in a suit to annul that contract than it demands to sustain those issues in any other cause.

3. ———: ———: EVIDENCE. If, in an action to annul a contract and ceremony of marriage because of the plaintiff's alleged mental incapacity and the defendant's alleged fraud, it appears that the plaintiff at the time he became a party to that contract and ceremony successfully managed property of the value of about $6,000, which he had accumulated, that he had been acquainted with the defendant five years preceding their marriage, courted her openly four months preceding the ceremony, which he voluntarily suggested should take place, successfully withstood one-half her demands for a marriage settlement preceding said celebration, and understood the nature of the contract and the duties and responsibilities incident to the marriage relation, the court will not dissolve the marriage, although the plaintiff is advanced in years, 46 years older than his wife, slovenly in habits, with impaired vision and hearing, and is forgetful concerning recent transactions, and the defendant probably was actuated largely by mercenary motives in entering into the contract and did not accord the plaintiff all of his conjugal rights.

APPEAL from the district court for Hamilton county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Charles P. Craft and *J. H. Grosvenor,* for appellant.

O. A. Abbott and *J. H. Edmondson, contra.*

ROOT, J.

This is the second appeal of this case. Our former opinion is reported in 85 Neb. 702. After the cause was remanded the case was retried upon the evidence adduced

at the first trial and the testimony of twelve witnesses, most of whom did not testify during the first hearing. Most of the additional testimony relates to the plaintiff's physical and mental condition at the time of, and prior to, the marriage under consideration. Many of these witnesses testified that the plaintiff was not mentally competent to transact business. The defendant prevailed at the second trial, and the plaintiff has appealed.

Counsel for the plaintiff earnestly argued that they produced sufficient evidence at the last trial to sustain the plaintiff's charge that his marriage to the defendant is the creature of fraud and undue influence. They further contend that our criticism of the plaintiff's children, because they acquired control of their father's property, is unjust and not sustained by the evidence. We did not intend to unjustly criticise those children, and concede they acted in all things for the welfare of their father. By the terms of the contract between the plaintiff and his children the latter agreed to sell so much of the corpus of his estate as might be necessary to maintain him in comfort; but while they were planning for his maintenance they were compelling his wife to become dependent upon their will for her support. We have again carefully read the evidence adduced at the first trial and find nothing to shake our confidence in our former opinion and judgment.

Waiving the point argued by the defendant, that the plaintiff does not state in his petition facts sufficient to constitute a cause of action, and considering the case in the light of the evidence, we are convinced the plaintiff has signally failed to make out a case justifying a court of equity to interfere in his behalf. At the time the contract was entered into and the ceremony performed, the plaintiff was advanced in years, his eyesight was poor, his hearing impaired, his memory treacherous, and his personal habits uncleanly; but he successfully controlled his property, consisting of rented houses and notes of hand, and had preserved his estate intact. The plaintiff is now, and for many years has been, an officer of the church of which he is a

member. The record of the plaintiff's testimony indicates connected thought, reasoning power, and a perfect understanding of the responsibilities and obligations of the marriage relation. If we accept the plaintiff's version of his courtship, it extended over four months' time, and when his sweetheart demanded a property settlement before marriage, he met her not more than half way with the statement that, if she was not content to accept a deed for one lot and a house, their relations should cease, and before the marriage ceremony he gave consideration to the means whereby he might support his wife. Subsequently we find him insisting upon all of his conjugal rights.

We are advised by the evidence that the marriage between the litigants has not been consummated, so that the weighty considerations of public policy, which, except for the gravest reasons, forbid the annulment of consummated marriages, do not influence our judgment in the instant case. It is true, as counsel for the plaintiff argue, that parties mentally incompetent to make other contracts cannot lawfully enter into a contract of marriage. The test of mental competency to enter into a contract of marriage formulated by Sir James Hannen in *Durham v. Durham*, 10 L. R. Prob. Div. (Eng.) 80, seems reasonable and as nearly accurate as a general proposition of law with respect to so complicated a subject can be stated. The rule announced is that a person is competent to enter into a contract of marriage if he has "a capacity to understand the nature of the contract, and the duties and responsibilities which it creates." In *Atkinson v. Medford*, 46 Me. 510, upon the issue of the mental capacity of a person to enter the marriage relation, an instruction given by the trial judge to the effect "that the same degree of mind sufficient to enable him to enter into a valid contract, or make a valid deed or will, would be sufficient to enable him to contract matrimony," was approved. In (*Anonymous*) 4 Pick. (Mass.) 32, we find a statement by the court that "they felt bound to require such evidence of insanity as in a civil action would justify a jury in finding the party incapable

of making a contract; that anything short of this would open a door to great abuses, * * * and that the fact of a party's being able to go through the marriage ceremony with propriety was *prima facie* evidence of sufficient understanding to make the contract." This statement of the law is somewhat radical, if applied to an unconsummated marriage, and does not receive our unqualified approval, but is cited for the purpose of showing the trend of judicial thought with regard to the subject under consideration. See, also, *Kern v. Kern,* 51 N. J. Eq. 574. Measured by any reasonable legal test, the evidence is overwhelming that the plaintiff had mental capacity to make the contract he entered into with the defendant.

Passing to the issue of fraud in inducing the plaintiff to enter the marriage relation, we refer the reader to our former opinion, which fairly reflects the evidence upon this point. No other evidence except the testimony tending to prove mental incompetency was adduced to sustain this issue at the last trial. As we understand the evidence, no false representations were made to the plaintiff to induce him to court or to marry the defendant, nor did she conceal from him any fact or circumstance he was entitled to know in advance of their marriage. We do not commend the judgment of either party in becoming man and wife, nor do we approve the defendant's conduct toward her infirm and impatient husband; but upon the record before us we hold that the plaintiff should not prevail.

The decree of the district court, therefore, is

AFFIRMED.

BROWN COUNTY, APPELLEE, V. KEYA PAHA COUNTY, APPELLANT.

FILED DECEMBER 10, 1910. No. 16,173.

1. Appeal: TRANSCRIPT: MOTION FOR NEW TRIAL: REVIEW. Where the transcript of the proceedings of the district court does not contain a copy of the motion for a new trial or disclose the contents

of any assignment therein, the inquiry in the supreme court on appeal is limited to the sufficiency of the pleadings to support the judgment.

2. ———: PETITION: SUFFICIENCY ON APPEAL. Where the sufficiency of the petition to support a judgment in favor of plaintiff is raised for the first time in the supreme court on appeal by defendant, it will be liberally construed for the purpose of upholding the proceedings of the trial court.

3. Counties: REPAIR OF BRIDGES: SUIT FOR CONTRIBUTION: SUFFICIENCY OF PETITION. In a suit by a county to recover from an adjoining county half the cost of repairing a bridge over a river dividing the counties, the petition *held* sufficient to require contribution for repairs as distinguished from a new bridge, where it was alleged in describing the damage that "a portion of said bridge had become damaged and in need of repair," and that the "portion of the bridge above referred to was entirely washed away and destroyed."

4. ———: ———: "REPAIR." The word "repair" as applied to bridges in the road laws means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.

5. ———: ———: SUIT FOR CONTRIBUTION: NOTICE. For the purpose of requiring a county to contribute to the expense incurred by an adjoining county in repairing a bridge over a river between them, a previous notice that it would be necessary to rebuild a portion which had been entirely washed away is sufficient to include an approach or abutment and any grading or riprapping essential to the proper construction thereof.

6. ———: ———: ———: SUFFICIENCY OF PETITION. Within the meaning of that part of the road law defining the duties of county boards in relation to bridges, approaches are parts of the bridge.

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

W. C. Brown, H. M. Duval and *Lear & Lear,* for appellant.

J. S. Davisson and *William M. Ely, contra.*

ROSE, J.

This litigation was commenced by Brown county, plaintiff, to recover from Keya Paha county, defendant, half the

cost of repairing or rebuilding a portion of the bridge on section 20, township 32, range 20, over the Niobrara river —the boundary between the counties. According to the petition, defendant, after notice had been given, declined to unite with plaintiff in a contract to repair or rebuild that portion of the bridge destroyed and refused to take any part in the work of restoring it. Afterward plaintiff repaired or rebuilt the bridge, paid for the work and materials, and filed with the county clerk of Keya Paha county a claim for half the expense. Two items made up the entire cost—one for $2,293.40, being the contract price of rebuilding, and the other for $745.86, being the contract price of grading and riprapping. Plaintiff's claim for half the sum of these items was rejected by the county board of Keya Paha county. Plaintiff appealed from the disallowance to the district court, where a judgment was rendered against defendant for $1,768.23. The case is presented here on an appeal by defendant from the judgment of the district court.

Though there appears in the transcript a recital that a motion for a new trial was filed and overruled, the record does not contain a copy of the motion or disclose the contents of any assignment of error. The inquiry here is therefore limited to the sufficiency of the petition to sustain the judgment from which the appeal is taken. On this point it is argued the petition shows on its face that the bridge had been washed out, that a new bridge was constructed, and that defendant did not enter into a contract to rebuild it, and is therefore not liable for any part of plaintiff's claim. The contention is that the right to enforce contribution is limited to repairs, in absence of a joint contract to restore the bridge. The basis of this proposition is found in the proviso appearing in the following statute:

"For the purpose of building or keeping in repair such bridge or bridges, it shall be lawful for the county boards of such adjoining counties to enter into joint contracts; and such contracts may be enforced, in law or equity,

against them jointly, the same as if entered into by individuals, and they may be proceeded against jointly by any parties interested in such bridge or bridges, for any neglect of duty in reference to such bridge or bridges, or for any damages growing out of such neglect; provided, that if either of such counties shall refuse to enter into contracts to carry out the provisions of this section, for the repair of any such bridge, it shall be lawful for the other of said counties to enter into such contract for all needful repairs, and recover by suit from the county so in default such proportion of the costs of making such repairs as it ought to pay, not exceeding one-half of the full amount so expended." Comp. St. 1909, ch. 78, sec. 88.

In a different form, the inquiry is: Has plaintiff, on a petition demanding relief under the terms of the foregoing proviso, which, as asserted by defendant, applies alone to repairs, recovered a judgment for half the cost of building a new bridge? The sufficiency of the petition was not attacked below by demurrer or motion, and is challenged for the first time in this court. Under a familiar rule, therefore, it must be liberally construed, for the purpose of upholding the judgment of the trial court. *Sorensen v. Sorensen,* 68 Neb. 483; *Des Moines Bridge & Iron Works v. Marxen & Rokahr,* 87 Neb. 684. The first and second paragraphs of the petition described the parties and the location of the bridge, and state that it was owned jointly by plaintiff and defendant. The third and fourth paragraphs state:

"(3) That for some time prior to the year 1905, a portion of said bridge had become damaged and in need of repair, and the plaintiff, through its board of county commissioners, often requested the said defendant, through its board of county commissioners, to join with said plaintiff in a contract to repair the said bridge, but such request was wholly ignored and consent refused by the said defendant.

"(4) That in the spring of the year 1905 that portion of the bridge above referred to was entirely washed away and destroyed by reason of a freshet and floating ice, and

on the 6th day of June, A. D. 1905, at a joint meeting of the boards of county commissioners of Brown and Keya Paha counties, the said board of county commissioners of Keya Paha county was notified by the board of county commissioners of Brown county that it would be necessary to rebuild the said bridge, and was requested to join with this plaintiff in a contract for rebuilding such bridge, but the said defendant county refused to take any part whatever in the rebuilding or repairing of said bridge."

In the petition the first two references to damages to the bridge are: "A portion of said bridge had become damaged and in need of repair," and "that *portion* of the bridge above referred to was entirely washed away and destroyed." Subsequent references in the petition are frequently made to "said bridge," without specifically confining the term to the portion washed away; but those words, when considered for the first time on appeal, will be construed to refer to the preceding term, namely, that "*portion* of the bridge" shown by prior allegations to have been damaged or washed away. According to this construction plaintiff's claim was for repairs. Only a portion of the bridge having been destroyed, the contracts to restore that part of it were for "repairs," within the meaning of the statute. "Repair" has been frequently defined as follows: "The word 'repair' means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction." *Martinez v. Thompson,* 80 Tex. 568; *Farraher v. City of Keokuk,* 111 Ia. 310. In this respect the petition is held sufficient to support the judgment of the trial court.

It is further insisted that in any event the petition is wholly insufficient to support that part of the judgment containing a recovery for half the expense of grading and riprapping. On this point it is asserted: There is nothing in the petition to show defendant was ever notified of a purpose on part of plaintiff to incur such an expense. The repairing or rebuilding did not include grading and riprapping. This contention is founded on the following doctrine, quoted from *Dodge County v. Saunders County,* 77

Neb. 787: "Where the only notice served under the statute notified the adjoining county that a bridge across a stream dividing the two counties was 'unsafe for public travel and that same must be repaired to make it safe for public passage,' the county so notified cannot be compelled to contribute toward the cost of new ice breaks not specified in nor contemplated in the notice, and not necessary to make the bridge safe for public travel."

The statute does not say what the notice shall contain, but the general term, "after reasonable notice," is used. Comp. St. 1909, ch. 78, sec. 89. The applicability of the rule quoted depends upon the petition, which states: "That for some time prior to the year 1905, a portion of said bridge had become damaged and in need of repair, and the plaintiff, through its board of county commissioners, often requested the said defendant, through its board of county commissioners, to join with said plaintiff in a contract to repair the said bridge;" and "that in the spring of the year 1905 that portion of the bridge above referred to was entirely washed away and destroyed by reason of a freshet and floating ice, and on the 6th day of June, A. D. 1905, at a joint meeting of the boards of county commissioners of Brown and Keya Paha counties, the said board of county commissioners of Keya Paha county was notified by the board of county commissioners of Brown county that it would be necessary to rebuild the said bridge." Here is an allegation that defendant was notified that it would be necessary to rebuild the bridge, referring to that portion destroyed. Grading and riprapping may be essential parts of approaches and abutments. Under the common law approaches and abutments were parts of bridges which counties were required to build and repair. *King v. York County,* 7 East (Eng.) 588; *Whitcher v. City of Somerville,* 138 Mass. 454. The road laws of this state do not change the common law in this respect, but, on the contrary, the legislature has adopted it. Comp. St. 1909, ch. 15*a*, sec. 1. The rule generally announced by the courts of last resort in this country is that an approach, within the meaning of

road laws, is a part of the bridge. *Board of Commissioners of Rush County v. Rushville & V. G. R. Co.,* 87 Ind. 502; *Driftwood Valley Turnpike Co. v. Board of Commissioners of Bartholomew County,* 72 Ind. 226, 237; *Board of Commissioners of Huntington County v. Huffman,* 134 Ind. 1; *Daniels v. Intendant and Wardens of the Town of Athens,* 55 Ga. 609; *Penn Township v. Perry County,* 78 Pa. St. 457; *Freeholders of Sussex County v. Strader,* 3 Harr. (N. J.) 108; *Shaw v. Township of Saline,* 113 Mich. 342; *Tinkham v. Town of Stockbridge,* 64 Vt. 480. The case cited by defendant does not announce a contrary rule and is not in point here. Where the notice states that it will be necessary to rebuild that portion entirely washed away, the construction of a necessary approach or abutment is fairly included. In the construction of bridges over streams, riprap is generally understood to be an irregular foundation or wall of stone likely to be washed by water. *Wood v. Vermont C. R. Co.,* 24 Vt. 608; Century Dictionary. Both grading and riprapping may be absolutely necessary to the construction of an abutment or an approach, and for the purpose of giving statutory notice under the road law may properly be considered parts of the bridge itself. For the reasons suggested, the allegations of the petition as to notice are sufficient, when questioned for the first time on appeal to the supreme court. In *City of Central City v. Marquis,* 75 Neb. 233, it was held that the word "bridge" did not include the approach thereto, but that ruling was made in construing a section of the charter of Central City, and does not control the interpretation of the general road laws or the decision on this point in the present case. The petition is sufficient to support the judgment.

AFFIRMED.

MARY L. PREUIT, APPELLEE, V. WILLIAM M. PREUIT, APPELLANT.

FILED DECEMBER 10, 1910. No. 16,212.

Divorce: EXTREME CRUELTY. Any unjustifiable conduct on the part of either a husband or wife, which so grievously wounds the mental feelings, or so utterly destroys the peace of mind, as to seriously impair the bodily health and endanger the life or reason of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 7, ch. 25, Comp. St. 1909, although no physical or personal violence may be inflicted, or even threatened.

APPEAL from the district court for York county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

W. L. Kirkpatrick and *A. B. Taylor,* for appellant.

Power & Meeker, contra.

FAWCETT, J.

From a decree of the district court for York county, granting plaintiff a divorce and substantial alimony, defendant appeals.

The petition alleges that the parties were married in York county in 1878; that nine children were born to this marriage, eight of whom are still living. "That along about the year 1901, soon after the youngest child, Edward Burton, was born, this defendant seemed to lose his affection for the plaintiff, and grew cold and indifferent toward her, and would not make any response to her greetings, and frequently during said year would not speak to her when she addressed him, and avoided her society, and such treatment by defendant of plaintiff grew worse and worse until about and more than two years ago, when defendant ceased to speak to plaintiff at all, and during the two years last past has at all times and continuously refused to speak to this plaintiff, has refused to make any re-

sponse to her when addressed by her, and has during the two years last past treated her with sullen silence and contempt, and has refused to show her any affection or consideration whatever, and has during said two years, and before their children, sought to and has grossly and wantonly humiliated this plaintiff by his sullen silence and contempt manifested toward her, and during said two years and more has neglected and refused to show any husband-like affection or consideration for her, and has never, for more than eight years last past, invited her to go out with him among the neighbors or to any place of entertainment or elsewhere, and has never during said eight years offered to take her anywhere or to any place of entertainment, and has never permitted her to share any social pleasures or entertainments with him whatever, and has never during the said eight years last past given her any pocket money or spending money to use on her own account, but has treated her like a menial, and defendant has during all said time in many other ways sought to and has greatly humiliated this plaintiff and wounded and crushed her feelings. That said conduct on defendant's part was without any cause or provocation on her part, and was wanton and wilful on the part of this defendant. That said conduct of defendant toward this plaintiff caused her to be greatly downhearted, grieved and distressed, prevented her from getting sleep, and kept her in a constant condition of mental and nervous agitation and distress, and occasioned several serious periods of sickness, at some of which times plaintiff did become afflicted with high fever and delirium and general nervous prostration, all caused by the cruel conduct and treatment of the defendant, as hereinbefore alleged, and said cruel treatment of this defendant toward plaintiff caused plaintiff to become, as she is on account thereof, broken in health and her nervous organism greatly impaired, and caused her to become a nervous wreck. On account of said cruel treatment of this plaintiff by defendant, it became and was unsafe for this plaintiff to longer live with defendant,

and she could not longer live with this defendant on account thereof without great and serious danger to her reason and her life, and this plaintiff on account thereof, and on account of the said cruel treatment of this defendant toward plaintiff, on the 17th day of August, 1908, left the home of herself and defendant, and went to the home of her son in York county, Nebraska, and ever since has been and still is living with her said son. That defendant, regardless of his duties as a husband, for and during more than eight years last past has been guilty of extreme cruelty toward the plaintiff, without any cause or provocation on her part, in the manner and form hereinbefore alleged." The petition then sets out the property owned by defendant, the names and ages of the eight children, and concludes with a prayer for divorce, together with a reasonable sum for alimony, and for the custody of the four minor children.

The answer admits the marriage, the ownership of the property described in plaintiff's petition, that plaintiff left defendant's home on August 17, and alleges that plaintiff left without any cause or provocation on the part of defendant, and that she remains away without any good reason therefor. The answer then proceeds at great length to charge plaintiff with substantially the same wrongs, both of omission and commission, charged against him in plaintiff's petition. In other words, the defense pleaded is that of recrimination, which defense defendant insists is recognized by our statute and is applicable to this case. The reply is a general denial.

The decree awarded plaintiff a divorce and $11,000 permanent alimony. The amount of the allowance is not questioned, the main contentions being: (*a*) That the petition does not state a cause of action for extreme cruelty; and (*b*) that the decree is not sustained by the evidence. The first point must be decided adversely to defendant, under the authority of *Berdolt v. Berdolt,* 56 Neb. 792, and *Ellison v. Ellison,* 65 Neb. 412.

We do not think it would serve any good purpose, either

to the parties to this unfortunate suit or to the public, to set out the evidence here. To do so in such a manner as to be of any service would require extending this opinion to an unwarranted length. We deem it sufficient to say that a careful examination of the evidence leads us to the same conclusion as that reached by the district court. We think plaintiff has sustained the allegations of her petition, and that defendant has failed to establish the counter charges contained in his answer.

Ellison v. Ellison, supra, when applied to the allegations of the petition and the facts in this case, is not in any manner limited or modified by *Whitney v. Whitney,* 78 Neb. 240.

The judgment of the district court is

AFFIRMED.

ANNA SEVERA, APPELLEE, V. VILLAGE OF BATTLE CREEK, APPELLANT.

FILED DECEMBER 10, 1910. No. 16,224.

1. **Municipal Corporations:** CARE OF SIDEWALKS: LIABILITY FOR INJURIES. A municipal corporation cannot delegate the construction and care of its sidewalks to a private individual or corporation, and thereby evade its responsibility for such care and supervision, and thus escape liability for any damage resulting from the failure of the person or corporation, to whom such care and supervision are delegated, to use that reasonable care and diligence to keep such sidewalks in a reasonably safe condition for travel, which devolve primarily upon the municipal corporation itself.

2. **Witnesses:** CROSS-EXAMINATION. Where, in an action for injuries from a defective sidewalk, the defense is interposed that the village never had any knowledge or notice, prior to the accident, of the defective and dangerous condition of said sidewalk, and upon the trial such village introduces one of its trustees as a witness, it is not error to permit the interrogation of such witness, upon cross-examination, as to statements made by him a few days after the accident, to the effect that prior to the accident he had called the attention of his associate trustees, during

a meeting of the board, to the dangerous condition of such sidewalk and the necessity existing for its repair.

3. ———: IMPEACHMENT. And in such a case, if such witness denies having made such statement, it is not error to permit plaintiff, upon rebuttal, to impeach such testimony.

4. Trial: INSTRUCTIONS. This court will not reverse a judgment for the refusal of an instruction, where the substance thereof has been given in other instructions.

5. Appeal: VERDICT: CONFLICTING EVIDENCE. "A verdict rendered on substantially conflicting evidence, and approved by the trial court, will not be set aside on the ground that it is not sustained by adequate proof." *Brong v. Spence*, 56 Neb. 638.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

Mapes & Hazen, for appellant.

Isaac Powers, H. F. Barnhart and *H. H. Kilburn, contra.*

FAWCETT, J.

Plaintiff alleges that on May 17, 1906, while walking on the sidewalk along the east side of Fourth street, commonly known as Depot street, in defendant village, she stumbled against a plank of said sidewalk, which her brother, who was walking with her, "had accidentally raised before her by stepping on the end projecting beyond the stringer," whereby plaintiff was tripped and thrown with great force and violence to the sidewalk, as a result of which she was greatly and permanently injured; that the sidewalk was defective in construction and had been allowed to become and remain out of repair, so that numerous planks of the walk were loose, and the nails holding others were easily drawn out by a person stepping on the end of the planks which projected for a long distance over and beyond the stringers upon which they were laid; that of the rotten and defective condition of the stringers and the dangerous condition of said sidewalk at the point where the accident

occurred "defendant then and for a long time previously had constructive and actual notice, and in not repairing the same or causing it to be done, or so providing as to prevent or warn persons from passing over the same and in and about the premises, was guilty of gross negligence and want of care;" that as a result plaintiff was so badly injured that she will be a cripple for life, to her damage in the sum of $5,000, for which she prays judgment. The answer alleges, first, that the petition does not state facts sufficient to constitute a cause of action; second, admits that the defendant is a municipal corporation as alleged in the petition; and, third, a general denial. There was a verdict and judgment for plaintiff, and defendant appeals.

The errors relied upon and discussed in defendant's brief are: "(1) That the sidewalk in question was not upon a street or alley within said village, but a private walk over which the village had not exercised authority or control. (2) An attempt was made and permitted by the court, over defendant's objections, to impeach Peter Neuark, a witness for defendant, with rebuttal testimony, upon a fact brought out on cross-examination, collateral and immaterial to the issues. (3) The refusal of the court to give instructions first, third, and sixth, requested by the defendant. (4) The verdict is not sustained by sufficient evidence." We will consider these assignments in the order named.

1. Fourth street, or Depot street, as it is sometimes called, is laid out upon the section line between section 1, town 23, range 3, and section 6, town 23, range 2. An inspection of the plats introduced in evidence would indicate that it runs from the quarter section corner between the two sections above named through the central part of the village north to the section corners between said sections; that some 500 or 600 feet south of the section corners the street crosses the right of way of the Chicago & Northwestern Railway Company. There is a continuous sidewalk on the east side of the street from the main part of the village north to the depot of said railway company.

Just before reaching the railroad right of way, Fourth street crosses Front street. The evidence shows that the village has at all times exercised supervision and control over the sidewalk in question from the business center to the north line of Front street, which is the south line of the railway company's right of way, and that that portion of the walk from the north line of Front street to the depot was constructed by the railway company, and that the company has at all times assumed to keep it in repair. There is no substantial evidence to show that the defendant ever had anything to do with either the construction or repair of that portion of the walk. It is undisputed, however, that the sidewalk upon the right of way is a continuation, upon the same alignment, of the sidewalk constructed and maintained by the village south of the right of way, and that it is within the limits of Fourth street. While it appears that the sidewalk does not extend north of the depot, but terminates at that point, it is undisputed that Fourth street extends across the right of way, through what is designated upon one of the plats as "Pioneer Township Site Co.'s Second Addition to Battle Creek," to the north section line of the sections referred to. The point where plaintiff sustained her injury was about half way between the south line of the right of way and the tracks of the railway company, so that it is undisputed that the accident occurred upon that portion of the sidewalk which had been constructed by the railway company. The section line road north of the northern terminus of Fourth street is the main traveled road leading into the village from the north, and is the road over which the people living north enter the village. There is no evidence that Fourth street, where it crosses the railroad right of way, or, more properly speaking, where the right of way crosses it, has ever been vacated, or the control over it surrendered to the railway company. It is clear, therefore, that this street, for its entire length north and south and across the right of way, is one of the public streets of defendant. It is stipulated in the record that "the

place where the accident occurred was at the time of said accident complained of, and now is, within the corporate limits of said village, and that the walk upon which said alleged accident occurred is within the said corporate limits." The question presented, therefore, is whether the fact that this sidewalk was constructed and its repairs assumed by the railway company, and the further fact that the village never exercised any care and supervision over it, relieves the defendant from liability for any dangerous defects occurring and permitted to remain upon such portion of the walk, of which defendant had actual notice, or which had existed for such a length of time as to constitute constructive notice of such dangerous defects. Defendant contends that such is the law. In this contention we cannot concur.

In *Brown v. Incorporated Town of Chillicothe,* 98 N. W. 502 (122 Ia. 640), it is held: "Where, in an action for injuries from a defective sidewalk, it appears that the sidewalk was in the proper place for a sidewalk—along one of the streets of the town—and had been there for a considerable time, it will be presumed that it was there by the town's consent.

"Where a town allows a sidewalk along its street to be built for the use of the public, and it is so used, it becomes the town's duty to see that it is kept in a safe condition." The opinion fully sustains the above quotations from the syllabus.

In *Johnson v. City of Milwaukee,* 46 Wis. 568, the syllabus reads: "In an action for injuries caused by the defective condition of a foot-bridge or apron crossing a gutter in a city street, it appeared that the apron was built by the owner of adjoining property, without consent of the city, near to but not directly in the line of a street crossing; and that the city had never formally adopted it, nor made any repairs upon it; but there was evidence that it had existed there, and been actually used as part of a public thoroughfare, for a considerable length of time, with knowledge of the city and without objection on its part.

Held, that proof of these facts would create a presumption that the city had adopted the apron as part of the street crossing, and had become liable for injuries caused by a defective condition of the apron, of which it had notice; and that the continuance of such condition for several weeks would create a presumption of notice." In the opinion on p. 570 the court say: "We are of the opinion that some of the instructions asked on the part of the plaintiff in this case were proper, and should have been given as requested. For instance, the first instruction, which was to the effect that if the jury should be satisfied, from the testimony, that, before and at the time of the accident, the general line and route for travelers on foot was over the place and crossing where the accident happened, and the crossing, including the place where the accident happened, was in continual use as a thoroughfare for travelers going back and forth, and the same was there several weeks or months before the accident, then, so far as this case was concerned, the question as to who made the crossing or any part of it, or placed it where it was, is immaterial, and that the plaintiff was under no obligation to ascertain or inquire who built the crossing or cross-walk, or how it came there. This instruction was applicable to the testimony; for it cannot be denied that there was abundant evidence tending to prove, and from which the jury might have found, that the public travel for persons on foot passed over the cross-walk which leads from the Fourth ward market in a northwesterly direction, to the sidewalk near the junction of Second and West Water streets, and over the platform or bridge where the plaintiff fell and broke his leg. If that crossing, including this bridge, platform or apron, as it is called, was in fact a thoroughfare in constant use by the public, the city was bound to keep it in repair, and was responsible to a person injured by reason of its failure to perform that duty, whether the city originally built the bridge or not. The correctness of this view would seem to be too obvious to need comment or illustration. For surely the responsibility or irresponsibility

of the city to keep a thoroughfare, or, in other words, a public crossing, in repair, cannot be made to rest or depend upon the fact that the city built it in the first place, or authorized it to be built. And so, if the bridge or apron was originally built by the owner of the adjoining lot without objection on the part of the city, and the city suffered it to remain and to be used by the public as a public way or crossing, the presumption would be that the city had adopted the structure as a part of the crosswalk. Under these circumstances the city would certainly be liable for an injury occurring by reason of the bridge or platform being in a dangerous condition."

Detwiler v. City of Lansing, 95 Mich. 484, is squarely in point, and is to the same effect. *Foxworthy v. City of Hastings*, 25 Neb. 133 and 31 Neb. 825, are to the same effect. *City of McCook v. Parsons*, 77 Neb. 132, cited by defendant, does not modify or destroy the force of *Foxworthy v. City of Hastings, supra.* In the *Parsons* case the opinion shows that "it does not appear from the petition either that the depot grounds or the place where the accident occurred were within the corporate limits of the defendant city, and the objection to the introduction of evidence should have been sustained." This is sufficient to show that the *Parsons* case is clearly distinguishable from the *Foxworthy* case and from the case at bar.

In harmony with the above cases, which meet with our entire approval, we hold that a municipal corporation cannot delegate the construction and care of its streets and sidewalks to a private individual or corporation, or even to a quasi-public corporation, and thereby evade its responsibility for such care and supervision, and thus escape liability for any damage resulting from the failure of the person or corporation, to whom such care and supervision are delegated, to use that reasonable care and diligence to keep such streets or sidewalks in a reasonably safe condition for travel, which devolve primarily upon the municipal corporation itself. It matters not that the railway company in the present case is the

owner of the land within its right of way abutting upon the street or sidewalk at the point where the accident occurred. So far as the defendant is concerned, it is in no different or better situation than it would be if such abutting land were owned by a private individual who had himself constructed such sidewalk and had assumed to keep it in repair. We think it will not be claimed that in such a case the village would be relieved of liability for the failure of such abutting landowner to properly perform the duty which he had assumed.

2. The position taken by the defendant throughout the trial was that its trustees or managing officers never had, prior to the accident, any knowledge or information as to the dangerous condition of the sidewalk in question. While introducing her evidence in chief, plaintiff attempted to show by the witness, Lambert Kerbel, a brother of plaintiff, that shortly after the accident he had a conversation with Peter Neuark, who at that time was a member of the village board of trustees, at which he, Neuark, stated that he had himself called the attention of "the village council" to the condition of the walk during a session of such board. The defendant objected to the evidence as incompetent, irrelevant and immaterial, and for the reason that no proper foundation had been laid. The objection was sustained. While defendant was making its case, it introduced Peter Neuark as a witness. Upon cross-examination of Mr. Neuark he was asked: "Mr. Neuark, I will ask you if it isn't a fact that on or about the 24th day of May, 1906, about a week after the accident that plaintiff complains of, if you didn't say in the saloon of Lambert Kerbel and in the presence of Lambert Kerbel, before this accident that you speak of, tell them that if they didn't repair that walk they would have damages to pay?" Objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination. The objection was overruled, and the witness, after first saying that he did not remember, finally answered, "I did not." Plaintiff then in rebuttal placed

Lambert Kerbel upon the stand, and the following examination was had: "Q. Did you have a conversation with Mr. Neuark a few days after the accident that the plaintiff has sustained on the sidewalk, in your saloon at Battle Creek, regarding the condition of that sidewalk? (Objected to and overruled.) A. Yes, sir. Q. Now, I will ask you if in that conversation the witness Neuark didn't say to you that he had a talk with the village board regarding the condition of this walk where Mrs. Severa received the injury, and that he said to the board that unless some action was taken to repair that walk that the city would have damages to pay? (The defendant objects to the question because the same is incompetent, irrelevant, and immaterial, and not proper impeachment testimony, no proper foundation laid. Objection overruled by the court, to which ruling the defendant excepts.) By the court: This is simply for the consideration as to its bearing upon his statement that he had no knowledge of any bad condition of the walk. A. He did. (The defendant moves to strike the answer as incompetent, irrelevant, and immaterial, no proper foundation laid. Motion overruled by the court, to which ruling the plaintiff excepts.)" It is strenuously insisted that this was error, upon the theory that it was a collateral fact brought out on cross-examination and immaterial to the issues. This contention must fail. We do not think this testimony was immaterial or that it was collateral in the strict sense of that term. The defendant was insisting that the village board never had any knowledge or notice of the defective condition of this sidewalk. Testimony, showing that one of the village board had stated within a week after the accident that he had at one time called the attention of the board, while it was in session, to the dangerous condition of the walk, and had warned them that if something were not done they were liable to have to pay damages on account of it, was, we think, fair rebuttal of the defense sought to be interposed. If any error was committed by the court as to this testi-

mony, it probably was in refusing to permit plaintiff to offer the testimony when introducing her case in chief; but, be that as it may, it certainly was not error to receive it in rebuttal.

3. This contention of defendant must also fail for the reason that everything contained in the three instructions tendered is substantially and fairly covered by the court in its instructions 5, 6, 12 and 13, given to the jury.

4. That the verdict is not sustained by sufficient evidence. Upon this point the evidence is conflicting. There is ample competent evidence in the record to sustain a verdict either way. In such a case, this court will not interfere. *Brong v. Spence*, 56 Neb. 638.

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

AFFIRMED.

ROSE, J., not sitting.

JOHN W. PETERSON, APPELLANT, V. ADELBERT B. ANDREWS, APPELLEE.

FILED DECEMBER 10, 1910. No. 16,238.

1. **Trial:** ADMISSION OF EVIDENCE: DISCRETION OF COURT. The reception of evidence collateral to the main issue, which may throw some light upon facts in dispute, or which may bear upon the credibility of witnesses, is ordinarily within the sound legal discretion of the trial court, and unless prejudice appears it is no ground for reversal.

2. **Appeal:** IMMATERIAL EVIDENCE: HARMLESS ERROR. An answer of a witness which should have been stricken out as being immaterial and the conclusion of the witness is not prejudicial unless it fairly appears from the record that the answer was calculated to mislead the jury to the injury of the moving party. *Peaks v. Lord*, 42 Neb. 15.

3. ———: INSTRUCTIONS: REVIEW. A party will not be heard to complain of an instruction which follows the averments of his pleading and the evidence offered by him in support thereof.

4. ———: VERDICT: CONFLICTING EVIDENCE. "A verdict rendered on substantially conflicting evidence, and approved by the trial court, will not be set aside on the ground that it is not sustained by adequate proof." *Brong v. Spence*, 56 Neb. 638.

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

Lewis C. Paulson, for appellant.

M. D. King, contra.

FAWCETT, J.

The controversy in this case is over a load of corn, worth about $30. It was tried in the county court, and an appeal taken to the district court, where there was a verdict and judgment for defendant, and plaintiff appeals.

Plaintiff alleges that, through his tenant, he delivered to defendant four loads of corn of the aggregate of 232 bushels; that it was agreed between plaintiff and defendant that defendant was to grind the corn into corn chops, for which plaintiff was to pay at the rate of 5 cents per hundred pounds; that defendant refused to grind the last or fourth load of corn of the aggregate of 58 bushels and refuses to pay for said load of corn, and has converted the same to his own use, to plaintiff's damage in the sum of $30.16. In his answer defendant admits that plaintiff delivered three loads of corn, for which he alleges settlement was made in full, and denies the delivery of the fourth load. The evidence as to whether or not a fourth load was ever delivered is clearly conflicting; so much so that a verdict either way would find sufficient evidence in the record to sustain it. Plaintiff's contention, therefore, that the verdict is not sustained by sufficient evidence, must fail. Plaintiff further insists that the court erred in excluding the testimony of the witnesses Blackburn and Christensen. Whatever corn was delivered by plaintiff to defendant was hauled to the mill by plain-

tiff's tenant, one A. C. Peterson. At the time the controversy arose between the parties Peterson had removed from plaintiff's farm to one of his own several miles distant. During a discussion between plaintiff and defendant of the matter in dispute, one Lauritz Nelson was present. At plaintiff's request he called up the tenant, A. C. Peterson, and asked him how many loads of corn he had delivered to defendant for plaintiff. Peterson answered that he thought it was two or three loads, but was not sure which. A few hours later, and on the same day, Peterson called up Nelson and stated that, after thinking the matter over, he was sure that he had hauled three loads. Upon the trial of the case, plaintiff introduced Peterson as a witness, and he then testified that he was sure he had hauled four loads. When interrogated as to his reason for saying he was sure he had hauled four loads, he stated that he remembered it because of the fact that he hauled the first two loads with his own wagon; that he then had a breakdown, and that he borrowed a wagon from his neighbor, Christensen, with which he hauled the other two loads; that, when he hauled the third load, he put the broken hind wheels of his wagon on the load and took them to Blackburn's blacksmith shop, and, when he hauled the fourth load, he went to the blacksmith shop and got his wheels and took them home with him. The testimony which the court excluded, and for the exclusion of which plaintiff now complains, is the testimony of Christensen that he loaned Peterson his wagon for the purpose, as stated by Peterson, that it was to haul corn for plaintiff, and the testimony of Blackburn as to the fact and time of his repairing Peterson's wagon wheels. This testimony was offered, of course, for the purpose of corroborating, by these collateral facts and circumstances, the testimony of Peterson; but this was entirely unnecessary, as no attempt was made to controvert Mr. Peterson's testimony as to the breaking of his wagon, the borrowing of Christensen's wagon, and the repairs made by Blackburn. We think, under the circum-

stances shown, that, while it would not have been error on the part of the court to have received such testimony and to have permitted it to go to the jury, it was not error to exclude it. The admissibility of such evidence is largely within the discretion of the trial court. In *Citizens Bank v. Warfield,* 85 Neb. 328, we held: "The reception of evidence collateral to the main issue which may throw some light upon facts in dispute is ordinarily within the sound legal discretion of the trial court, and unless prejudice appears it is no ground for reversal." In *Schenck v. Griffin,* 38 N. J. Law, 462, it is held: "The admission of evidence of extraneous circumstances not material to the issue which bear remotely on the issues involved in the cause, or upon the credibility of witnesses, is within the discretion of the judge, and its admission or rejection is no ground for reversal on error." The district court did not err in excluding the testimony referred to.

While upon the stand as a witness defendant was asked this question: "What do you say, Mr. Andrews, about this renter, or tenant, ever delivering to your mill, or to you at your mill or elevator, any other of this corn than what your books show excepting the three loads? A. According to my best knowledge and belief, I don't believe the corn was ever brought to the mill." Plaintiff moved to strike out the answer as irrelevant, immaterial, and as being the conclusion of the witness, which motion was overruled. In this ruling we think the district court erred; but we do not think, in the light of the examination which followed, that this answer could have prejudiced plaintiff in the minds of the jury. The next question asked was: "What do you say as to whether or not this fourth load was ever delivered to you personally? A. According to my knowledge, it was never delivered to me." This was the last question upon direct examination, and was immediately followed by the following question upon cross-examination: "Q. You say that all you know about it is what your books show about the delivery of the corn?

A. Yes, sir; that is all I know about any corn having been delivered to the mill by Mr. Peterson." This, together with the entire examination of defendant, shows that defendant does not assume to have any actual knowledge, and also shows that the ground of his belief, as expressed in the objectionable answer, was simply the fact that his books did not show the delivery of such corn. We do not think the error is sufficient to warrant a reversal of the case.

Objection is made to instruction No. 2, given by the court, in which the court instructed the jury that, in order to recover, the plaintiff was required to prove: (1) That he delivered four loads of corn to defendant. (2) The number of bushels contained in said loads. (3) The value of said corn per bushel at the time of the delivery thereof. Plaintiff insists this was error, for the reason that "the jury might well say that there was no proof on the part of the plaintiff as to the four loads. We were only required to prove as to the one load—the fourth load." The instruction follows the averments in the petition and the proofs offered by plaintiff in support thereof. Such being the fact, the objection is without merit.

The last complaint is that the court erred in instructing the jury that, if they found for plaintiff, the measure of his damages would be "the value of the corn on the date of delivery," which was in March or April, while plaintiff contends that his measure of damages would be the value of the corn in the following December, at the time he demanded payment therefor. It is unnecessary to consider this point, as plaintiff was not prejudiced by the giving of the instruction, for the reason that the jury did not find for plaintiff.

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

AFFIRMED.

ROSE, J., not sitting.

DENNIS H. CRONIN, APPELLANT, V. DANIEL J. CRONIN ET AL., APPELLEES.

FILED DECEMBER 10, 1910. No. 16,218.

1. **Taxation:** PUBLICATION OF DELINQUENT TAX LIST: DESIGNATION OF NEWSPAPER. When the county board has designated the newspaper in which the notice and delinquent tax list and notice of tax sale shall be published under the provisions of the act of 1903 for the collection of delinquent taxes, the treasurer has no discretion in the matter. It is his duty to publish the notice and tax list in the paper so designated within the time and in the manner provided by the act.

2. **Counties:** PUBLICATION OF DELINQUENT TAX LIST: LIABILITY OF TREASURER. When the treasurer refuses upon demand to furnish such notice and list to the proprietor of the paper so designated for publication, and such proprietor is damaged by such refusal, the treasurer is liable for such damages, and the same may be recovered in an action upon his official bond.

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

R. R. Dickson, for appellant.

McGilton, Gaines & Smith and *Arthur F. Mullen, contra.*

SEDGWICK, J.,

The plaintiff alleged in his petition in the district court that Holt county was proceeding under the act of 1903 for the collection of delinquent taxes, commonly called the "Scavenger Act," and in those proceedings the county board, pursuant to the statute, duly designated the "O'Neill Frontier," a newspaper then owned and published by the plaintiff, as the paper in which the delinquent tax list should be published, and that the treasurer of the county wilfully refused to furnish the plaintiff with the copy of the list for publication, but did furnish it to a rival paper in which it was published. The plain-

tiff in the action sought to recover damages from the treasurer and the sureties upon his official bond, who were made defendants, for the wrongful conduct of the treasurer in that regard. Each of the defendants separately filed a general demurrer to the petition, which demurrers were sustained by the court and the action dismissed. The plaintiff has appealed.

The plaintiff does not set out at large the facts from which the damages which he claims should be estimated, but no objection is made to the petition in the briefs upon this ground, and we are therefore assuming that the allegations are sufficient to show that the plaintiff has suffered at least some damages. The contention of the defendants is that the plaintiff has shown no such interest in this publication as would entitle him to maintain this action; that his interest is too remote and contingent to be the basis of a right of which the law takes cognizance; that this act was not passed to enable Mr. Cronin to receive benefits from his paper; "that was no part of the design of the legislature." It is said in the brief that the action of the county board designating the plaintiff's paper is not in any sense a contract; that the contract is made by the treasurer, and not by the county board; and that where there is no contract there can be no breach, and, as Cronin was under no obligation to publish the tax list, there was no obligation on the part of the treasurer to furnish him with the list, since in order that there shall be a binding contract there must be a mutual obligation.

The defendants have furnished us with an interesting brief in which they cite upon this proposition *Smith v. Yoram,* 37 Ia. 89; *Iowa News Co. v. Harris,* 62 Ia. 501, and *Strong v. Campbell,* 11 Barb. (N. Y.) 135. *Smith v. Yoram, supra,* was a proceeding by certiorari to correct the proceedings of the board of supervisors of Jones county in the matter of selecting a newspaper in which the laws and proceedings of the board should be published. In the opinion, quoting from a former decision

by that court, it was said: "No publisher has such a vested, personal interest in enforcing its provisions, that he can thus resort to the courts, and compel the board to select his paper and have these laws published therein. The duty is imposed on the board; they are the custodians of the power, but no one can insist upon its performance or exercise because he happens to be at the time the owner of a newspaper." *Strong v. Campbell, supra,* which was the decision of a *nisi prius* court, was an action for damages by the proprietor of a newspaper against a postmaster for refusing to receive proof in regard to the circulation of the paper and refusing "to give them the publishing of the list of letters remaining in the post office." The court, by Johnson, J., said: "I have not deemed it necessary to examine the questions raised as to the sufficiency of the averments in the declaration conceding the action to be maintainable, because in my judgment there is no foundation whatever in law for an action, under any conveivable state of pleading, for such a cause." While these and other similar cases which we have examined are perhaps distinguishable from the case at bar, it must be said that much of the reasoning employed might be applied to this case also. The circumstances out of which this litigation arose have been already twice considered by this court. In *State v. Cronin*, 75 Neb. 738, this plaintiff sought by mandamus to compel this defendant as county treasurer to furnish him with the notice in question for publication. The facts upon which this litigation depends were stated somewhat at length in that opinion. The principal question to be decided was whether the county board had duly designated the plaintiff's paper as the one in which the notice was to be published. It seems to have been conceded or assumed that, if the plaintiff's paper had been duly designated by the county board, the defendant as treasurer had no discretion in the matter, and, indeed, this would seem to be the effect of the legislation upon this subject. The right of the plaintiff as relator to main-

tain the action appears not to have been doubted or discussed. It was said that the trial court was justified in denying the writ, "because it appears to be conceded that it would have been unavailing had it issued, the time being too short after the decision of the district court to take the steps and make the preparation necessary to enable the appellant to publish the list within the time required by law." It is also said that "the appellant's right to publish the list * * * was a mere abstract right. * * * But the situation was different when this suit was begun. At that time, had the appellee moved promptly to the discharge of his duty, the appellant could have made the publication." While the writ was not awarded, the costs of the proceedings were taxed against the defendant. This was done solely upon the ground that the relator was entitled to the writ at the time that the action was begun. This, then, was a determination by this court that the plaintiff in this case had such an interest in the matter as to enable him to maintain an action against the defendant. Again, in *Miles v. Holt County*, 86 Neb. 238, which was an action against the county by the publisher of the newspaper in which the notice in question was actually published by the treasurer, it is said that the publication was made in the wrong paper; that the treasurer acted wilfully in the matter, and former decisions in this court in which similar rights have been asserted were cited and quoted from without criticism. It would seem that this court is committed to the proposition that the plaintiff has such an interest as to enable him to maintain the action. There are some considerations justifying this conclusion that perhaps cannot be found in the cases cited by the defendant. Under our statute, the duty is in the first instance imposed upon the county board to designate the paper in which these publications are to be made. When the county board has acted and has designated the paper for that publication, the treasurer has no discretion in the matter. It is his duty to furnish the notice for publica-

tion to the paper designated by the county board. The petition alleges that after this designation had been made this defendant was notified of that fact by the county clerk, and was personally notified by the plaintiff, and was informed by the plaintiff that he, the plaintiff, had made preparation to publish the list as directed by the county board and was ready to do so, and demanded that the list be furnished to him by the treasurer for that purpose, which was refused by the treasurer. If it is conceded, as it appears to be in these briefs, that the plaintiff had accepted the proposition of the county board to publish the list in his paper, and that the treasurer deprived him of the legitimate profit by his unlawful act, we think that the petition states a cause of action for such damages as the plaintiff has sustained by the misconduct of the defendant. The general demurrer of the defendant and his sureties should be overruled.

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

REVERSED.

ROSE, J., not sitting.

EBENEZER W. JOHNS V. STATE OF NEBRASKA.

FILED DECEMBER 15, 1910. No. 16,738.

1. Information: SUFFICIENCY. An information charging the defendant with wilfully, forcibly, burglariously and feloniously breaking and entering into a slaughter-house with the intent to take, steal and carry away certain described personal property, is equivalent to charging the defendant with malice, and the absence from the information of the word "maliciously" or the appearance therein of the letters "ialiciously" is an immaterial error, in nowise prejudicial to the defendant.

2. Criminal Law: ASSISTANT COUNSEL FOR STATE. The county attorney, under the direction of the district court, may procure the assistance of counsel in the prosecution of a person charged with a felony, and the appearance of such counsel in the case for the

first time while the jury is being selected, but before the defendant has exercised any peremptory challenge, is not erroneous.

3. ———: INDORSEMENT OF WITNESSES ON INFORMATION. It is within the discretion of the trial court to permit the county attorney to indorse the names of additional witnesses on the information after the filing thereof and before the trial, and, if the defendant does not request a postponement of the trial, no prejudice will be presumed because of such indorsement.

4. ———: EXCLUSION OF WITNESSES: DISCRETION OF COURT. It is within the sound discretion of the trial court to permit the witnesses to remain in the court room during the trial.

5. ———: ACCUSED AS WITNESS: CROSS-EXAMINATION. If the defendant testifies in his own behalf, the county attorney may, on cross-examination, ask him whether he has been convicted of a felony, and, if the witness equivocates in his answer, the prosecutor may ask such additional questions as may be reasonably necessary to bring out the fact of that conviction.

6. ———: REMARKS OF JUDGE. The district judge, in ruling upon objections to the introduction of evidence, should refrain from expressing his opinion concerning the weight of the evidence or the credibility of the witnesses, but a remark to the effect that the counsel by cross-examination had brought out some things he had better let alone is not so prejudicially erroneous as to justify the granting of a new trial.

7. ———: DEFENSES: INTOXICATION. In the absence of special circumstances, not appearing in the instant case, it is no defense for a defendant to prove that three hours after the offense was probably committed, and at a point 18 miles distant from the scene of the crime, he was under the influence of intoxicating liquors.

8. ———: EXCLUSION OF EVIDENCE. The proof is undisputed in this case that the defendant purchased in Germantown, where the offense for which he was being tried was committed, a quantity of intoxicating liquors, which he took to his home in Lincoln. *Held*, it was not prejudicial error to exclude proof of his declarations made before starting on that trip that he intended to purchase such liquors.

9. ———: ———. If the prosecuting witness does not testify that the defendant committed the offense charged in the information, it is not error to exclude statements made by that witness to the effect that he entertained a suspicion that some person other than the defendant committed the crime.

10. Larceny: EVIDENCE. In a prosecution for larceny, if the owner of of the property involved had custody thereof at the time the state

charges it was stolen, and testifies for the prosecution or is within the jurisdiction of the court, it is incumbent upon the state to prove by that person that he did not consent to the taking of his property; but, if that fact clearly appears from all of the testimony of the owner, a judgment of conviction will not be reversed because the witness did not in so many words testify that he did not give such consent.

11. ———: ———. The evidence examined and commented upon in the opinion, and *held* sufficient to sustain a conviction for burglary and grand larceny.

ERROR to the district court for Seward county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Landis & Schick, W. W. Towle and *George A. Adams,* for plaintiff in error.

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

ROOT, J.

The plaintiff in error, upon an information charging burglary and grand larceny, was convicted in the district court for Seward county, and this action is prosecuted to review the record of that conviction. The plaintiff in error will be hereinafter referred to as the defendant.

Counsel for the defendant contend that the first count in the information does not charge a criminal offense, for the reason that the letters "ialiciously" appear in the information in place of the word "maliciously." Section 48 of the criminal code, as amended in 1905, provides: "If any person shall wilfully, maliciously and forcibly break and enter," etc. The prosecutor charged that the defendant did "wilfully, ialiciously, forcibly, burglariously and feloniously, in the night season of said day, break and enter," etc. The substitution of the letter "i" for the letter "m" is evidently a clerical error. Eliminating those letters from the information, the remaining words charge in effect that the act was done maliciously within the meaning of the criminal law. *Whitman v. State,* 17 Neb.

224. The defect does not tend to prejudice the substantial rights of the defendant and will be ignored. Criminal code, sec. 412.

The defendant excepts to the appointment of Honorable J. J. Thomas to assist the county attorney, and emphasis is laid upon the alleged fact that the appointment was not made until after the state had passed for cause twelve jurors. Section 20, ch. 7, Comp. St. 1909, authorizes the county attorney under the direction of the district court to procure the assistance of counsel in the prosecution of a person charged with committing a felony. Such an assistant is not required to take an oath or to give a bond. *Bush v. State,* 62 Neb. 128. From an inspection of the transcript it appears that the appointment was made before the jury were called; but, from an objection recorded in the bill of exceptions, it appears the state had passed for cause twelve jurors when the order was made. In either event the defendant's counsel had an opportunity to examine all of the jurors touching their acquaintance or affiliation with the assistant counsel. The statute, *supra,* does not provide that an assistant prosecutor shall not be appointed before the cause is set for trial, and there is nothing in the record or argument to suggest that the defendant was in any manner prejudiced by the appearance of Judge Thomas subsequent to the time the cause was called for trial, and the assignment is not well taken.

The district court, over the defendant's objections, permitted the witnesses to remain in the court room during the trial. This subject is committed to the sound discretion of the trial court. We find nothing in the record to indicate that discretion was abused, although we think the better course would have been to separate the witnesses. *Binfield v. State,* 15 Neb. 484; *Murphey v. State,* 43 Neb. 34; *Halbert v. Rosenbalm,* 49 Neb. 498; *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 138. The court did not abuse its discretion in permitting the county attorney to add the names of six witnesses to the information two

days before the defendant was tried; he made no motion for a continuance, and there is nothing in the record to create so much as a suspicion that he was thereby surprised or prevented from making his defense. *Barney v. State,* 49 Neb. 515.

The defendant complains because he was asked on cross-examination whether he had not been twice convicted of a felony. The witness admitted he had been convicted once, but evaded the question with respect to the second conviction, and finally said the second time he pleaded guilty. It then became necessary for the state to show that a judgment had been entered on that plea, else the prosecutor could not lawfully ask the jury to consider the defendant's testimony in the light of the fact that he had twice been convicted of a felony. *Marion v. State,* 16 Neb. 349, 360. But nine questions were asked upon this subject, and seven of them were made necessary by the defendant's equivocation. We find nothing in the record to indicate a departure from a correct rule of practice with respect to these questions.

Error is predicated upon the following remark made by the trial judge at the time he sustained an objection to a cross-interrogatory: "I guess we had better sustain that. You have found some things about the box which you had better let alone." The statement was probably caused by the fact that a persistent cross-examination had strenghtened the state's testimony, and can as well be attributed to a desire to protect the defendant, as to an improper purpose. The remark should not have been made, but it was not addressed to the jury, did not disparage the testimony of any witness, and should not, we think, be held so prejudicially erroneous as to justify us in holding the defendant was not accorded an impartial trial. The other remark referred to was of so trifling a character that we shall make no further reference thereto.

The defendant excepts because the court excluded proof that Johns was intoxicated about midnight of the day the crime is alleged to have been committed. Proof of

that fact would not tend to prove that the defendant did not three hours earlier commit that crime, and the evidence was properly excluded.

The defendant excepts to the court's refusal to permit his neighbors to testify to his declaration to the effect that he was going to Germantown the night of the burglary to purchase intoxicating liquors. Whenever the intention with which an act is performed is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. In the case at bar it is established by uncontradicted testimony that the defendant did drive from Lincoln to Germantown and there purchase intoxicating liquor, some of which he consumed and the remainder was brought back by him to Lincoln. The fact that he intended to purchase liquor in Germantown would explain his presence in that village, and while the court might with propriety have admitted the evidence, we think the facts developed by the uncontradicted testimony gave him the benefit of all the advantage he was entitled to receive from a consideration of his declared intentions.

The court also excluded testimony offered to prove that the prosecuting witness had expressed an opinion that some one other than the defendant had stolen the hides referred to in the information. The evidence connecting defendant with the commission of the offense was all circumstantial, and the witness' opinion concerning the identity of the guilty party was neither relevant nor competent, and was rightfully excluded.

The defendant's counsel finally urge that the evidence is insufficient to sustain the judgment, and especially contend that there is no proof of the owner's nonconsent to the taking of his property. The evidence is undisputed that the hides were in the prosecuting witness' slaughterhouse during the afternoon of April 26, and that he closed and fastened the doors of the structure late in the evening of that day. Early the following morning the owner, Mr. Mitchell, discovered that one of these doors had been

forced open, and the hides were missing. An occasion particle of rock salt, such as the butcher used to cure the hides, was found along a line running from this door t the adjacent road. At this point the foot prints of horses and the impression made by small well-worn wagon tires indicated that a team hitched to an old wagon had been tied to the fence dividing the slaughter-house yard from the road. Identical foot prints and tire marks were found at a point about four blocks distant, where the defendant's team stood hitched after dark the evening of the 27th. Thereupon Mr. Mitchell, in company with the sheriff of Seward county, came to the defendant's house in Lincoln where they discovered the stains of bloody brine in the bottom of the wagon-box and brine stains upon the reach of the wagon used by the defendant the preceding evening. Small pieces of rock salt, similar to the salt used by Mitchell upon the missing hides, were also found in the wagon-box. Mitchell testified that from the appearance of the wagon-bed he was able to say that hides had been recently transported therein. There were also brine stains upon the defendant's shoes. Subsequent to the defendant's arrest, in answer to a question as to whether the hides had been found, he said: "No, they haven't found them; and they may have (or will have) a hell of a time to find them." The defendant sought to explain the incriminating circumstances, but it was for the jury to say under all of the circumstances whether they should believe him or the state's witnesses. The instructions were fair to the defendant in every particular, and we cannot say a finding of guilty under the circumstances detailed is not supported by the evidence.

With respect to the proof of the owner's nonconsent, it appears, in addition to what has been said, that the owner caused the defendant's premises to be searched for, but did not find, the hides. In *Bubster v. State,* 33 Neb. 663, it was said that the owner of the property alleged to have been stolen was apparently within reach of the court's process, but was not called to testify to his

nonconsent; that there was no proof from which that fact could be logically deduced, and the proof was insufficient. In *Perry v. State,* 44 Neb. 414, we held that, in prosecutions for larceny, if the owner of the property alleged to have been stolen is a witness for the state, it must appear from his testimony that he did not consent to its taking. In that case the state proved by the witness that his horses disappeared from the place where he had tied them, and five weeks thereafter were found in the defendant's possession. The owner was not asked whether he consented that his horses should be taken, nor was there any evidence from which that fact could be legitimately established.

In *Rema v. State,* 52 Neb. 375, the rule announced in *Perry v. State, supra,* is cited with approval, and a judgment of conviction was affirmed. Judge NORVAL, who wrote the opinion in *Perry v. State, supra,* said in *Rema v. State, supra:* "If we are able to comprehend the effect and force of the testimony, the answer must be that there was an entire lack of consent, although no witness in express terms so stated at the trial." It is therefore evident that this court is not committed to the doctrine that the owner, if a witness, must say in so many words that he did not consent to the taking of his property, but that the correct rule is that the nonconsent should clearly and unequivocally appear from a consideration of all of the owner's evidence. This principle is recognized quite generally by text-writers and the courts, and receives our approval. Rapalje, Larceny and Kindred Offenses, sec. 135; Underhill, Criminal Evidence (2d ed.) sec. 294; 25 Cyc. 113; *Kemp v. State,* 89 Ala. 52; *George v. United States,* 1 Okla. Cr. Rep. 307, 97 Pac. 1052.

That Mitchell did not consent to the taking of his property is clearly shown by his testimony. It satisfactorily appears from an inspection of the entire record that the defendant has had a fair trial.

The judgment of the district court, therefore, is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1911.

MARY HUNTER, APPELLEE, V. HENRY C. HUNTER, APPELLANT.

FILED JANUARY 9, 1911. No. 16,197.

1. Appeal: MOTION FOR NEW TRIAL: PRESUMPTIONS. In the absence of a showing in the transcript of the proceedings of the district court as to the date of the final adjournment of the term of said court, the supreme court will presume that a motion for a new trial, filed on the day of rendition of the judgment, or within three days thereafter, and which motion is referred to in the entry of the judgment as overruled, was filed during the term.

2. ———: RECORD: STATEMENTS OF CLERK. Statements in writing by the clerk of the court, not a part of the transcript of the record, or bill of exceptions, cannot be received for the purpose of contradicting the court records.

3. Divorce: PLEADING: MISJOINDER. Where a petition for a divorce contains as a part thereof a demand for the settlement and adjudication of property rights not growing out of the marriage relation, a demurrer thereto for misjoinder of causes of action should be sustained. If said objection is seasonably made, the trial court should not proceed with the case, but order the pleadings reformed so as to present only the suit for divorce. The district court having heard and decided that part of the cause demanding a divorce and finding there was no sufficient proof of marriage, the evidence is examined, and the decision and decree of no marriage is affirmed, and the judgment for damages is reversed and the cause in that behalf remanded.

APPEAL from the district court for Sioux county: JAMES J. HARRINGTON, JUDGE. *Affirmed in part and reversed in part. Action for divorce dismissed.*

Justin E. Porter, for appellant.

A. M. Morrissey and *Allen G. Fisher, contra.*

REESE, C. J.

This suit was commenced in the district court for Sioux county. Owing to the contention between counsel as to the nature of the action and the authority of the district court to render the judgment which was entered, we copy the petition in full. It is as follows:

"The plaintiff, for cause of action, alleges that she was born in the Kingdom of Denmark in the year 1864, and in 1886, she came to Sioux county, Nebraska, and met the defendant, then a man of mature years, aged 42; that thereupon the defendant, who was then engaged in the ranch business in said county, applied to the plaintiff, who was then a very comely woman, a member of an indigent family, unlettered in the English language, or in the laws or customs of this country, to enter his employ as a domestic servant at the agreed rate of $10 a month, and, in addition, there was to be furnished by the defendant sufficient and proper quantities of groceries and materials to prepare their subsistence and other necessary articles of housekeeping and living. And plaintiff alleges that the said contract has never yet been abrogated nor set aside, but, pursuant thereto, the plaintiff entered into the service of the said defendant as such domestic housekeeper, and remained at said house continuously, performing such contracted services thereat until November, 1904. And plaintiff alleges, further, that the defendant never paid her any of the stipulated wages, and has wholly failed from the date hereinafter mentioned, 1887, to furnish any of the necessary groceries or other articles necessary for the said housekeeping and

living of the parties thereto; that thereafter, at the premises aforesaid, the defendant proposed marriage to this plaintiff between the parties hereto, and the said proposal was accepted, and, in pursuance thereof, the said defendant represented to the said plaintiff, who was an inexperienced, foreign-born virgin, without experience or knowledge in relation to such matters, that the marriage might be performed by a ceremony before a minister, or by the defendant acknowledging and introducing her under his name as his wife, in either event to be accompanied by cohabitation, and accordingly this plaintiff believed, relied upon as true, and acted upon said representations of defendant, and from that date until November, 1904, the parties hereto have lived together, cohabited together, as man and wife, and each held themselves out as such, and from the date above mentioned the defendant has introduced plaintiff to their neighbors in the community where they have lived and elsewhere as his wife, and caused the fact of their marriage to be published in the newspapers of said county. And the plaintiff alleges that ever since the date of their said marriage the plaintiff has conducted herself toward the defendant as a faithful, chaste and dutiful wife, and, in addition to performing the ordinary housekeeper's duties above described, she has toiled in their fields as a farm hand in plowing, fertilizing, and harvesting their meadows and grain fields, and has herded, and pastured, and fed and watered, and harnessed and unharnessed their herds and horses in summer, and even in winter during the periods of sickness and the attacks of drunkenness hereinafter related. And plaintiff alleges that she has raised poultry and garden, and made butter and marketed the produce, and thereby provided their living and much of the household goods necessary continuously during their married life, without any help from defendant.

"And plaintiff alleges that during all their married life, the said defendant was habitually accustomed to the drinking of intoxicating liquors; and frequent intoxica-

tion. And plaintiff alleges, further, that plaintiff (defendant) always has been of poor judgment in matters of business, and been habitually a spendthrift, and that within the last year the said defendant has become very reckless and has squandered, and yet is squandering, in dissipation large sums of money, and continues still to do this; that he has converted a considerable portion of his property into houses which he lets for the purposes of prostitution, which places he frequents constantly; that he has conveyed without any honest consideration thereof a large house used as a place of prostitution, which has cost in the neighborhood of $3,000, to one Mercedes Goodwin, alias Madam Grant, a colored prostitute, and with her associates in the management of said business, together with gambling there carried on, and he has committed adultery there with the said colored woman; that, by reason of his so consorting with these lewd people, the plaintiff fears for her own health, if she shall longer cohabit with the defendant as his wife.

"Plaintiff alleges, further, that she has but small means in live stock and real estate of her own earning and saving of the possible value of $1,000, and that the defendant owns property consisting of real estate in Crawford, Nebraska, and of money deposited in the First National Bank, and of money due him from various residents of Dawes county, Nebraska, and of real estate and money loaned in Kern county, California, of the fair cash value of at least $70,000, and that defendant has threatened to convert all the said property in Dawes county into cash, and to remove it himself from said state.

"And plaintiff alleges, further, that there are no fruits of their said marriage.

"The plaintiff therefore prays judgment that the defendant, pending this suit, be enjoined and restrained from converting into money or movable property, and removing the same from Nebraska, the property therein situated; that on the final hearing the injunction be made perpetual. Plaintiff prays, further, that she be decreed

to be the lawful wife of said defendant, and that during the continuation of his misconduct above described she be excused from cohabiting with him as such, but that he be decreed to pay her as such separate maintenance a suitable sum commensurate with the income of his said property, and that she be given counsel fees in the sum of $1,000, and by decree an alimony out of said property situate in Dawes county, Nebraska, of $25,000. And plaintiff prays, further, that for the procuring of the testimony of witnesses and other necessary expenses in the maintaining of this suit, in addition to her separate maintainance mentioned above, she be allowed a suitable sum, not less than $300 in amount, and also counsel fees in the like sum, as well as her wages at their reasonable value of $25 a month during the period above mentioned, and for such other and further relief as may be just and equitable."

At the time of the filing of the petition plaintiff filed with the clerk a precipe for summons with the following directions: "Indorsed only—'Injunction asked, and divorce.'" A summons was issued and served, with the indorsement: "If defendant fail to appear and answer, the plaintiff will take judgment for divorce. Injunction asked." A demurrer was filed to the petition, but the transcript does not show any disposition of it.

The defendant answered the petition, denying the unadmitted allegations thereof, and averring that the alleged causes of action stated in the petition are inconsistent, repugnant and improperly joined; that plaintiff is not and never was the wife of defendant; that as Mary Hansen she was for some time in the employ of defendant as his housekeeper and servant, but in no other capacity, that he did, long before the commencement of the action, fully pay, satisfy and discharge, by payment, the claim of the said Mary Hansen for such services, and that there was a full and complete settlement, discharge and satisfaction of all accounts between them. Plaintiff replied by a general denial.

A trial was had to the court without the intervention of a jury, the record showing that, when the first witness was called, defendant objected to the introduction of any evidence for the reason that the petition did not state a cause of action, and that there were "two or more inconsistent and repugnant alleged causes of action, and are improperly joined." The objection was overruled, to which defendant excepted, and the following memorandum entered in the bill of exceptions: "By the court: The defendant specifically states that he does not waive a jury." The trial proceeded and resulted in a finding that the parties "were never married, and are not man and wife," and upon all other points found in favor of plaintiff, and that "the defendant is indebted to the plaintiff on the cause of action set out in the said petition in the sum of $2,000, and that plaintiff is entitled to judgment against defendant for said sum." The entry continues: "And thereupon the cause came on for hearing upon defendant's motion for new trial," which was overruled. A judgment was entered against defendant and in favor of plaintiff "for the full sum of $2,000, her debt," and costs. Execution was awarded for the collection of the same. Defendant appeals. In the brief and argument of plaintiff, she presents her "point on cross-appeal," but we find nothing in the record showing that a cross-appeal has been taken, nor that any effort has been made in that direction. The subject will not be referred to again.

It is insisted that the motion for a new trial was not filed until after the final adjournment of the district court. As we have seen, the journal entry of the findings and judgment of the court contains the recital that the "cause came on for hearing upon the defendant's motion for new trial, upon consideration whereof the court overrules said motion, to which defendant excepts." The judgment was rendered on the 3d day of December, 1908. The clerk's filing mark on the motion for new trial shows that it was filed on the same day. There is nothing in the record proper showing when the court ad-

journed. In view of the verity of the record, we must presume as matter of law that the motion was filed before final adjournment, whenever that may have been. If counsel designed insisting upon an objection that the motion was filed after the adjournment of the court for the term, he should have suggested a diminution of the record and filed a duly certified transcript of the record showing the date of the final adjournment. In the absence of such record, we have no way of knowing the true fact. There is a written statement by the clerk copied on the reverse side of the motion, but no part of the certificate of filing, dated January 13, 1909, but not under the seal of the court, by which it is sought to contradict the filing date on the motion, as well as the recitals of the journal entry, but as this is no part of either the transcript, or bill of exceptions, we cannot receive it as evidence of what it contains, and therefore it will not be further noticed.

From a reading of the petition, including the prayer, the precipe, and indorsement upon the summons, it must be apparent that the purpose of the action is for a decree of divorce, and for alimony, based and founded upon a common law marriage. No other conclusion can be drawn therefrom. It is true that there are averments by which it would seem that the pleader sought to recover servant's wages for the plaintiff during the time she alleges that she was the lawful wife of defendant. This, of course, could not be allowed in connection with a decree of marriage with divorce and the $25,000 alimony claimed. The two causes of action could not be blended in the same count of the petition, nor could defendant be deprived of his right to a jury trial upon an action at law for wages as was done in this case. The two causes of action, should it be held that there are two, are so entirely inconsistent as to require the holding of the demand for wages as mere surplusage, and not entitled to any consideration; the action being essentially in equity for divorce. The record shows without question that the

defendant availed himself of every legal method of objection to the procedure known to our practice—by demurrer, answer, objection to the introduction of evidence, and motion for new trial. The question is properly saved. In *Reed v. Reed*, 65 Neb. 849, the subject was before this court, and the law was clearly stated by Mr. Commissioner DUFFIE that, where objection is made, suits concerning the property rights of the parties cannot be joined with actions for divorce. It would serve no good purpose to rediscuss the matter here. The judgment of the district court was reversed and the cause was remanded for further proceedings. Upon the reappearance of the cause in the district court, the plaintiff sought to again present the same issues by an amended petition. The cause was then appealed to this court, when the rule was reannounced (*Reed v. Reed,* 70 Neb. 775), and was again heard upon another branch of the case at page 779, the two latter opinions having been written by Judge BARNES, then one of the commissioners. The question has been set at rest in this court, and the citation of other than the authorities referred to in those opinions is not necessary.

The action being in its essence one for divorce, the evidence has been examined, and it is found that the finding and decision of the district court that a marriage had not been established is approved and the decree is affirmed. The action for divorce is dismissed. The decision awarding a money judgment for wages alleged to be due is reversed, and that part of the case is remanded to the district court for further proceedings in accordance with law. The costs in this court are taxed to plaintiff.

JUDGMENT ACCORDINGLY.

FAWCETT, J., not sitting.

C. S. HOYT ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED JANUARY 9, 1911. No. 16,217.

Justice of the Peace: ATTORNEY'S LIEN: ENFORCEMENT: APPEAL. A employed B as his attorney, and commenced a suit in justice court against C. Pending the suit B filed with the papers in the case an attorney's lien. Before the day set for trial, and subsequent to the filing of the statement for lien, A and C settled their controversy, C paying A the amount agreed upon, which was in excess of the lien. On the day set for trial, C did not appear, when B applied orally to be admitted as a party plaintiff to the extent of enforcing his lien. The court permitted him to do so and, upon a hearing, rendered judgment against C for the amount of his claim. C appealed to the district court, where B filed a petition setting up his claim, less a credit thereon paid by A. C answered the petition by general denial, but objected to the introduction of evidence by demurrer *ore tenus*. The objection was overruled, the case heard on the merits, and judgment rendered against C. *Held*, That, while the proceedings in the justice court were irregular, the court had jurisdiction of the subject matter, and the judgment was not void. *Held*, further, that the appeal by C conferred jurisdiction upon the district court, and its judgment was valid.

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

William D. McHugh and *W. H. Herdman*, for appellant.

Oliver S. Erwin, contra.

REESE, C. J.

The original action, out of which the present one has grown, was instituted by C. S. Hoyt in justice court in Douglas county for the purpose of recovering the sum of $175.51 from the defendant on account of damage to property shipped over its line of railroad. Erwin was employed as the attorney for the plaintiff and commenced the action. The bill of particulars was filed November 1,

1906. The cause was finally continued for trial to January 4, 1907. On the 19th day of December, 1906, plaintiff's attorney filed a paper in said cause, which, after the title of the case, was as follows: "Notice is hereby given that I have and claim an attorney's lien in the above case for services rendered therein in the sum of $50. (Signed) Oliver S. Erwin." On the 4th day of January, 1907, the date to which the cause had been continued, the defendant did not appear, "but made default," the justice's docket reciting that "this cause coming on for hearing before me upon plaintiff's bill of particulars and the evidence was submitted to me, and Oliver S. Erwin was sworn and examined on behalf of plaintiff, who was also made party to the suit as plaintiff on his own motion, I find there is due, after being fully advised, to said Oliver S. Erwin for services rendered plaintiff, C. S. Hoyt, the sum of $50 and costs of this action taxed at $3.75," and for which judgment was rendered against the defendant. From this judgment defendant appealed to the district court.

When the cause appeared in the district court Erwin filed a petition alleging his relation to the case as the attorney for plaintiff; the filing of the notice of lien for $50; the subsequent payment of $30 by Hoyt; the settlement of Hoyt's claim by defendant after the filing of the notice of lien, without notice to Erwin; and that the amount paid Hoyt by defendant was $130. Judgment was demanded for the balance due Erwin on his lien. The answer of defendant was a general denial. The cause was tried to the court without the intervention of a jury. The court found in favor of Erwin, and rendered judgment in his favor against defendant for $21.85. Defendant appeals.

No question is raised by either the pleadings or briefs as to the sufficiency of the statement for lien, or want of service of notice upon defendant of Erwin's claim, and the subject will be passed without decision or further reference.

It is contended by defendant that neither the justice of the peace, nor the district court, had any jurisdiction of

the subject matter set up in the petition by Erwin, as between Erwin and defendant, and that both judgments were therefore void; that the petition filed by Erwin in the district court did not state a cause of action against defendant; that the judgment of the district court was not sustained by the evidence, and that it is contrary to law. It must be conceded that the proceedings in the justice court, as appears from the transcript of the docket of that court, were quite irregular and crude, but we are not able to say that the court had no jurisdiction of the subject matter of Erwin's claim. The lien was filed before the settlement with Hoyt and the payment to him by defendant of the amount agreed upon, and if the rule stated in *Elliott v. Atkins*, 26 Neb. 403, that the "claim for a lien may be filed with the papers in the case, and the adverse party will be chargeable with notice of its existence," can be applied to justice courts, the defendant had due notice of Erwin's rights at the time of the payment.

It is insisted that the procedure in the justice court was not sufficient to confer jurisdiction; that some pleading and application to be made a party to the suit, in addition to the statement of lien with the papers, should have been filed. That such course would have been a proper one cannot be denied; but, in view of the many holdings of this court that the rules of procedure which prevail in the courts of record should not be applied with the same strictness to justice courts, we cannot hold the judgment void. The appeal by defendant to the district court conferred upon that court the jurisdiction which the justice court had, and the filing of the petition by Erwin was not objectionable practice. The petition stated the principal facts quite indefinitely, it is true, but as issue was joined thereon without its sufficiency being questioned by motion or otherwise, preliminary to the answer, it would have to be held good on demurrer *ore tenus*.

There being no error discovered which would require the reversal of the judgment of the district court, it is

AFFIRMED.

IN RE APPLICATION OF METZ BROTHERS BREWING COMPANY FOR LIQUOR LICENSE.

J. M. LEIDY, APPELLANT, V. METZ BROTHERS BREWING COMPANY, APPELLEE.

FILED JANUARY 9, 1911. No. 16,533.

1. **Intoxicating Liquors:** SALES AT RETAIL. A manufacturer of beer who sells his product to unlicensed consumers for their use sells at retail within the meaning of chapter 82, laws 1907.

2. ———: ———: LICENSE. A manufacturer of beer who sells his product at retail is guilty of selling beer without a license, and, that fact being made to appear, an excise board should not issue a license to him in the year next succeeding the commission of that offense.

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

L. D. Holmes, Elmer E. Thomas and *W. R. Patrick,* for appellant.

Myron L. Learned, contra.

John C. Cowin and *John P. Breen, amici curiæ.*

REESE, C. J.

In December, 1909, Metz Brothers Brewing Company, a corporation, applied to the board of fire and police commissioners of the city of Omaha for license to sell at wholesale malt, spirituous, and vinous liquors during the license year commencing January 1, 1910. A remonstrance was filed alleging, among other things, that the applicant had sold malt liquors, to wit, beer, at retail during 1909. The board overruled the remonstrance and granted the license. An appeal was prosecuted forthwith to the district court for Douglas county and the judge presiding held that the applicant had been guilty of selling beer at retail as charged by the remonstrant, but that the

"Slocumb law" did not apply to such conduct, and the ruling of the board was confirmed. The remonstrant has appealed to this court.

The only witness produced before the board was Mr. Charles Metz, president of the corporation. His testimony is frank and unequivocal. It appears that in 1864 Metz & Brother, a partnership, were engaged in brewing beer in Omaha, and continued until the formation of the plaintiff corporation in 1894, and from the last named date until the present time said business had been conducted by the corporation. In 1909 the corporation was licensed to sell at wholesale intoxicating and malt liquors. During all of that year the licensee sold large quantities of beer to consumers; all of the liquor thus sold was placed in quart or pint bottles, which were sealed and thereafter packed in cases containing two dozen bottles. The boxes were securely fastened, and purchasers were not permitted to open a case or drink beer while upon the applicant's premises. The applicant and its predecessor in business sold beer to consumers in like manner for 15 years last past. The applicant does not solicit orders, but fills them whether received directly from purchasers or through the agency of the mail or telephone, and the greater part of case beer is sold direct to consumers. No discrimination is made in the price per case charged for beer between the smallest and largest order received. Before applicant's license was issued in 1909, the attorney for the board of fire and police commissioners prepared a written opinion advising the board that a brewer could not lawfully sell beer according to the course of business pursued by the applicant, and Metz Brothers Brewing Company was given, or procured, a copy of that opinion.

Counsel for the respective parties present the case in a double aspect. The applicant's counsel contends that the learned district judge erred in holding that Metz Brothers Brewing Company sold any beer at retail within the meaning of the "Gibson law," but that in any event a violation of that act should not disqualify a manufacturer

from receiving a license to manufacture beer and to sell it at wholesale. The remonstrant's counsel argue that the district judge's finding is correct, but his conclusion is unsound.

The traffic in intoxicating liquors is subject to such restraints and regulations as the legislature may prescribe. *State v. Hardy,* 7 Neb. 377; *Hunzinger v. State,* 39 Neb. 653; *In re Phillips,* 82 Neb. 45. Prior legislative enactments passed for the purpose of regulating and restricting that traffic were merged in the "Slocumb law" (laws 1881, ch. 61; Ann. St. 1909, ch. 32, sec. 7150 *et seq.*). The "Gibson law" (laws 1907, ch. 82) is supplemental to chapter 61, laws 1881. The act of 1907 has no independent title, but when enacted became a part of the Slocumb law as fully as though it had been originally written in the text of the earlier acts. *Rohrer v. Hastings Brewing Co.,* 83 Neb. 111. A corporation cannot qualify as a retail dealer in intoxicating or malt liquors. *Rohrer v. Hastings Brewing Co., supra.* By the terms of the Gibson act it is made unlawful for any person, natural or corporate, engaged in the manufacture of malt, spirituous or vinous liquors, to become interested directly or indirectly in any retail license for the sale of intoxicating or malt liquors, or to in any manner assist any retail dealer to procure such a license, or to lease premises for the use of such a retail dealer. Section 3 of the act (laws 1907, ch. 82) provides: "No liquor license issued to any person or corporation engaged as a manufacturer, wholesaler or jobber of malt, spirituous or vinous liquors shall entitle the holder thereof to engage, or in any manner to become interested, under pretext or otherwise, in the retail traffic in such liquors in this state." Within seven days after the Gibson act became effective, this court, in an opinion filed in the case of *In re Reusch,* 79 Neb. 449, stated: "We think that the intention of the legislature in the passage of sections 1, 2, 3 and 5 of the act assailed (laws 1907, ch. 82) was to prevent manufacturers, wholesalers or jobbers of intoxicating liquors, or their agents, from selling or being

interested in the sale of intoxicating liquors at retail." With this settled construction of the law, it becomes necessary to ascertain whether the applicant did, within the meaning of the statute, sell beer at retail in 1909.

The liquor traffic has frequently been classified for revenue and license purposes by acts of parliament and congressional and legislative enactments, and quantity has generally been the factor differentiating a wholesale from a retail sale. The fact that no such standard was adopted in the Gibson act is good evidence that some other element controls, one so well known that neither the persons engaged in the traffic, nor the officers charged with the enforcement of the law, should have any difficulty in understanding the test and making the application. Wholesale dealers as a rule sell only to merchants who buy to sell to the consumer, whereas retail dealers sell direct to the consumer, and not to other retail merchants.

The definition of the word "retail," as should be applied to sales as given in Webster's New International Dictionary, is: "To sell in small quantities, as by the single yard, pound, gallon, etc.; to sell directly to the consumer;" and in the Standard Dictionary: "To sell in small quantities, such as are immediately called for by consumers." If the contention of applicant is to prevail, the manufacturer can inclose two pints in a sealed package as easily as twenty-four and deliver to consumers, and thus practically nullify the provisions of our liquor laws and peddle his product throughout the city and country.

In *State v. Scampini,* 77 Vt. 92, the court considered the proper construction to be given the words "wholesale" and "retail" as applied to the liquor traffic. In that case, as in the one at bar, the statute to be construed did not classify according to the amount of liquor sold at any one time. The court held in the Vermont case that sales by wholesale are only those sold to persons having a license to sell direct to the consumer for consumption. The opinion cites with approval the definition given by Bacon, V. C., in *Treacher & Co. v. Treacher,* W. N. (1874, Eng.) 4,

which is as follows: "As a general rule 'wholesale' merchants dealt only with persons who bought to sell again, whilst 'retail' merchants dealt with consumers." The same definition is given to the words in 3 Stroud, Judicial Dictionary (2d ed.) p. 2237, and in 12 Ency. Laws of Eng. 587. The same distinction is made in classifying the liquor traffic in *State v. Lowenhaught,* 11 Lea (Tenn.) 13. Counsel for the applicant criticises the case last cited, and correctly argues that the statement is dictum as applied to the record in that case. But the Tennessee court adopt the same classification in *State v. Tarver,* 11 Lea (Tenn.) 658, where the question is necessarily involved in the decision made, and the court say: "That the distinction between a wholesale and retail dealer did not depend upon the quantity sold by either, but that sales to purchasers of packages or quantities for the purposes of trade or being resold, constituted a wholesale dealer; and sales to persons or customers for purposes of consumption constituted a retail dealer." See, also, *Webb v. Baird,* 11 Lea (Tenn.) 667. The question is considered and the question re-examined by the Tennessee court in *Harrison v. State,* 96 Tenn. 548, and the same conclusion reached that was attained in *State v. Tarver, supra.* The rule announced in the Vermont case and in the Tennessee cases is practical and unerring in its application. The limit which nature has placed upon the consumption of strong drinks by an individual will practically limit all sales to unlicensed consumers to purchases of a retail character. The mere fact that the applicant has engaged in the retail traffic for years will not work a repeal of a law enacted three years since, to prevent it, in common with all other manufacturers, from engaging in that business. The "original package" theory presented as a defense to sales of bottled beer by the case does not apply. The legislature has not said that a sale by wholesalers of their commodity in original packages shall not constitute a sale at retail. Should the law be so construed, every manufacturer and wholesaler might engage in the retail traffic, subject only

to their inability to sell by the drink. To adopt any standard other than the one we have suggested, in classifying the liquor traffic for the purposes of the liquor laws of this state, will involve the entire subject in doubt and uncertainty, and eventually will emasculate a highly remedial statute. The finding of the district judge that the sales were made at retail is sustained by the law and the evidence. See *State v. Spence*, 53 So. (La.) 596.

The conclusion announced that such a violation of law presents no bar to the granting of a wholesaler's license cannot be upheld. If a wholesaler sells at retail, he is in the plight of one who sells without a license, because his license affords no protection as against a prosecution. *Adams v. Hackett*, 27 N. H. 289; *Gersteman v. State*, 35 Tex. Cr. Rep. 318; *Pearson v. International Distillery*, 72 Ia. 348; *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111. The applicant, therefore, during the year 1909 violated section 11 of the Slocumb law (laws 1881, ch. 61; Ann. St. 1909, ch. 32, sec. 7161) and license should not have been granted it for the current year.

The judgment of the district court, therefore, is reversed and the cause remanded, with instructions to cancel the license issued to the applicant.

REVERSED.

BARNES, FAWCETT and SEDGWICK, JJ., dissenting.

We are unable to concur in the majority opinion. The reasons for our dissent, briefly stated, are as follows: The opinion holds that the sale by a brewer of sealed cases, containing 24 quart or pint bottles of beer, to one not a licensed retailer of intoxicating liquors is a sale at retail, and a violation of the statutes regulating the sale of intoxicating liquors regardless of conditions or price. It defines the terms wholesale and retail in a manner quite at variance with the generally adopted meaning of those words when applied to the sale of other commodities. The statement of facts contained in the majority opinion wholly eliminates the question of price, which ought to be

stated and considered in order to correctly decide the main question presented for our determination. It is agreed by the parties to this controversy that the Metz Brothers Brewing Company is solely a manufacturer of beer, and that its business has been conducted by it and its predecessor in the city of Omaha for more than 30 years; that during all of that time it has been disposing of its product in the following manner: That in 1909 the defendant had a wholesale license, but no license to do a retail business. During that year, as in all preceding years, it sold beer directly to individuals for their own use or own consumption, delivering it at the homes of citizens of Omaha, and shipping it to parties outside of the city in cases containing not less than two dozen bottles; some of the cases holding two dozen pint bottles and others two dozen quart bottles. The cases are made of wood with a hinged lid and catch. After a case is filled the lid is fastened down and sealed by putting a wire through the catch and fastening it so that no one can open the case except by breaking the seal or box. The defendant does not manufacture anything except beer, and does not handle liquors of any other description. It sold no beer in bottles to any one, either at the brewery or elsewhere, during 1909, except in cases containing the number of bottles above mentioned. No one can buy beer from the defendant by the glass, or any number of bottles less than a full case. The cases described are the original packages in which the beer is put up at the brewery, and the same kind of cases are sold to all, whether saloonkeepers for resale or individuals for home consumption. The retail price of the pints is 15 cents a bottle, and the quarts 25 cents a bottle. The price charged by the defendant for a case of pints is only $1.30, and for a case of quarts $2.25. The price is the same to all, and the question is not asked whether the case is for resale or for home consumption. It appears that only about 2 per cent of the bottled beer sold for home consumption is sold by saloons. There is no personal solicitation of orders for

beer. The orders for cases of beer come over the telephone and by mail, the former generally from citizens of Omaha, and the latter from persons outside of the city. Defendant keeps teams for the purpose of delivering its beer, but, so far as the evidence shows, saloon-keepers do not so deliver the beer sold by them. No purchaser of a case of beer at the brewery is ever permitted to open it and drink any of the beer on the premises. Defendant has never sold beer by the glass or the single bottle, or in any other manner than in the original packages above described. During the 30 years defendant and its predecessor have been in business its beer has been sold for home consumption in unbroken packages, the cases being of the same kind and size as sold to the saloon-keepers, either in or outside of Omaha. In many instances it is impossible to know whether an order is given by one who is a saloon-keeper or not. The percentage of beer which the defendant sells in original cases for home consumption is about 10 per cent. of its total output, the remaining 90 per cent. being sold to retail dealers. Former police boards, and the authorities of the city of Omaha, have been aware of the practice of the defendant in selling its beer in such unbroken packages for home consumption during all of the time it has been in business. Defendant's beer is made in Omaha, Nebraska, and the sales referred to in this case were made in that city to parties residing in the state, and in some instances to parties residing outside of the state. The beer is delivered either to residences or to saloons indiscriminately, and the same price is charged to all.

To our minds, the sales above described are sales at wholesale, and not at retail as held by the majority opinion. The Century Dictionary defines the word "wholesale" as follows: "Sale of goods by the piece or in large quantity, as distinguished from *retail.* * * * In the mass; in the gross; in great quantities; hence, without due discrimination or distinction;" and the word "retail" is defined as "a piece cut off; * * * a shred, rem-

nant; * * * The sale of commodities in small quantities or parcels, or at second-hand; a dealing out in small portions; opposed to *wholesale.* * * * In small quantities; a little at a time. * * * To sell in small quantities or parcels. * * * To sell at second-hand." And a "retailer" is defined as "one who sells or deals out goods in small parcels, or at second-hand." In *State v. Hawkins,* 91 N. Car. 626, it was said: "To *retail* means, generally, to sell by small quantities, in broken parts, in small lots or parcels, not in bulk." In *Bridges v. State,* 37 Ark. 224, the court said: "Alcohol is embraced in any one of the terms, *goods, wares* or *merchandise.* To sell by small parcels or quantities, and not in the gross, is *to retail.*" In *Tripp v. Hennessy,* 10 R. I. 129, it appears that the police officers purchased from Hennessy ten gallons of whiskey, which he drew from a cask containing a much larger quantity. The question presented was whether this was a sale at wholesale or retail. It was held that the word "wholesale" was used in the statutes in its common and popular sense. The court said: "The sale here involves the idea of breaking up, and dividing, and parceling out the goods which are held by the seller in larger parcels or packages in which he has purchased, and excludes the idea of selling a thing whole and unbroken." We think the court there announced the correct idea as to the distinction between wholesale and retail. Again, that question is not to be determined alone by the quantity, but by the quantity, the conditions, and the price. In that case there was a sale of ten gallons of whiskey, yet it was held that it was a sale at retail, because it was a sale of the broken portions of the original package. If the ten gallons of whiskey had been in H.'s place of business in the original package and he had sold it to the police officers, from the language of the court there could be no question but what it would have been held to be a sale at wholesale. For example, a manufacturer or a wholesale grocer sells a retailer a case containing two dozen cans of peaches at his wholesale price. No one will

contend that such a sale is not at wholesale. The retailer opens the case and sells a customer one can or a half dozen cans. That is a sale at retail. The brewer sells a case or two dozen bottles of beer direct to the saloon-keeper. That is conceded by the majority opinion to be a sale at wholesale. The saloon-keeper breaks the seal, opens the case, and sells a single bottle or a half dozen bottles to the consumer. That must be conceded to be a sale at retail. The difference therefore is that in the one case it is sold as a whole or original package for a wholesale price, while in the other the original package is broken up and the contents sold in smaller quantities to suit the consumer at a retail price, yet, according to the majority opinion, if the defendant received from both A and B, at the same hour, telephone orders for a case of beer each, the sale to A, if he were a saloon-keeper, would be at wholesale, and the sale to B, if he were not a licensed retail dealer in intoxicating liquors, would be at retail. We are utterly unable to concur either in the logic or the conclusion of this opinion.

In *Haley v. State*, 42 Neb. 556, it appears that bottles of intoxicating liquors were each enclosed in a paper wrapper or box, which was sealed with sealing wax, and a number of the paper boxes, each containing a flask of such liquor, were packed in a wooden box by a party in St. Louis, Missouri, and shipped to his agent at Republican City, Nebraska, and the agent opened the wooden box, took the paper boxes in which the flasks of liquor were contained therefrom, and sold them separately. This court held that the wooden box, and not the sealed paper box or wrapper and the bottle therein enclosed, was the original package, and such sale was a violation of the law of this state regulating the license and sale of malt, spirituous and vinous liquors. Under the reasoning in that case the wooden cases in which the defendant is selling its beer are the original packages, and we do not think the selling of such original packages, considering that they are sold at a wholesale price, is a sale of intoxi-

cating liquors at retail. In order to constitute a sale at retail, the original package must be broken up and its contents distributed or retailed to consumers. In our view of the matter, the word "retail" is very badly defined in the majority opinion. The tests by which to ascertain the meaning of that word, there set forth, are inadequate to explain the various meanings in which the word has been used in the different decisions of the courts, and in various business transactions. Its meaning is always to be determined from the context, from the circumstances under which it is used, and from the general scope, purpose and meaning of the article or provision in which it appears. It will not do to say that a sale to a consumer is a sale at retail, because consumers have the right to purchase at wholesale, and undoubtedly frequently do so. It will not do to say that a sale to one who has a license is a sale at wholesale, and to one who has no license is a sale at retail, because manifestly one who has a license may buy at retail, and one who has no license may purchase in wholesale lots. It will not do to say that the object of the Gibson law was to compel the manufacturer to deal with jobbers and retailers, because the spirit and intention of the Slocumb law, of which that law is a part, is to curb and restrict retailers and allow communities to expel them altogether, without preventing those individuals who insist upon their personal right to buy liquor from procuring it from the manufacturers and from using it themselves as they may see fit. It will not do to say that it is unlawful for the sellers of liquor, who are duly licensed, to deliver the articles that they sell. The statute will not bear such construction. It contains no provision upon that subject, except that section 5 of the original Slocumb law states that the license shall state the place where the liquor is being sold, and the form of the license prescribed leaves a blank for that purpose. This clearly is for the purpose of enabling the public to know where the business is located, and enable it to identify the responsible parties. It cannot be construed to mean

that the sales in all cases must be complete by delivery and payment at the particular building that is named in the license. To determine then the meaning of the word "retail" as it is used in the third section of the Gibson law, we must consider the whole act; the evil which existed at that time, which it was proposed to remedy, and the nature of the remedy adopted by the legislature. It is so notorious, and so much a matter of public interest, that courts may take notice that good citizens throughout the state were complaining of the method used by manufacturers and wholesalers of liquor through the instrumentalities of the public saloon. It is not necessary to enumerate the evils that were supposed to originate from this unholy combination. The first section of the act forbids manufacturers to become interested in any liquor license for the retail sale of liquors. The second section prohibits manufacturers to assist in procuring a license for sale at retail. Section 3 provides that the license to a wholesaler shall not entitle him to engage in retail traffic in liquors. Section 4 prohibits him from constructing or renting any buildings, etc., in which to conduct "the retail sale" of liquors; and Section 5 forbids any person from soliciting or receiving from any person, trust or association as aforesaid, any assistance in procuring any license for the retail sale of liquors, and also forbids any person from leasing any building, etc., owned by any one engaged in the manufacture, or as a wholesaler of liquors, in which to conduct the retail trade. The act does not define what the legislature meant by the retail sale, nor what was meant by manufacture and jobbing. There is no direct provision in the act from which it can be determined when a man is a jobber or when he is engaged in the retail trade. Considering the evil that the legislature was seeking to remedy, the purpose that it had in view, and the remedy that it proposed to provide, it was wholly unnecessary to define retail and wholesale. The matter was thoroughly understood. The legislature was aiming at the manufacturer on the one side and the saloon on the

other, and everybody knew what that meant. They did not say that the manufacturer shall sell only at wholesale, and shall not sell at retail, but they used invariably the expression, "retail sale," meaning the retail business, as it was then known, to wit, the saloon business. The legislature followed up this purpose from every point. It forbade the manufacturer to assist the saloon-keeper to get a license; it forbade him to have any interest in licenses; it forbade him to own any interest in the saloon business; it forbade anybody that had stock in his company to own any interest in the saloon business, and it forbade the saloon-keeper to ask or to receive the assistance of the manufacturer in getting a license, or to let or use any building for saloon purposes that the manufacturer was in any way interested in. Through it all is the manifest purpose to divorce the manufacturers from the saloon business, and it seems clear to us that the legislature never intended to prohibit the manufacture and sale of beer entirely. The policy of the law plainly is to require those who insist upon buying intoxicating liquor as a personal privilege to take it directly from the manufacturer without encouraging saloons or jobbers, and to interfere as little as possible with those citizens who disapprove of the whole business. The fact that the legislature failed to define the words "wholesale" and "retail," we are told in the majority opinion, should require us to construe those words in a special or limited sense, and they should not be given their ordinary and commonly understood meaning. To our minds that fact presents the strongest reason for giving the words their generally understood and commonly accepted definition, and it seems clear that the legislature intended that this should be done.

Finally, for the courts to undertake to suppress the brewers of this state by the indirect method of refusing a license to carry on their business as a penalty for transacting it as they have done for 30 years with the acquiescence of the public, and without any statute directly

and plainly changing that custom, and without giving them, with their enormous capital, an opportunity to adjust themselves, their property and their business to new conditions, would be not only unjust and oppressive, but an invasion of the province of the legislature. We are of opinion that such an important change in the policy of the state should be made by direct and unequivocal legislation, and with reasonable opportunity to capital so invested to adjust itself to the changed conditions, and not by judicial declaration.

To our minds it seems clear that the district court was wrong in holding that the sales in question were retail sales; that its judgment, although based upon other premises, was right and should be affirmed.

ALTON D. WHITE V. STATE OF NEBRASKA.

FILED JANUARY 9, 1911. No. 16,715.

1. **Intoxicating Liquors:** ILLEGAL SALES: EVIDENCE. In a prosecution for selling intoxicating liquors in violation of law, it was charged in the information that the accused did, on a date named, unlawfully sell to a person designated an intoxicating and spirituous liquor, to wit, giving the name or quality of the liquor alleged to have been sold. The proof showed the sales, that though labeled and branded by another name, which was for the purpose of deception, the liquor contained to a large degree the kind and quality alleged in the information, and that it was intoxicating. *Held*, That the evidence sufficiently sustained the averments of the information under the provisions of section 11, ch. 50, Comp. St. 1909.

2. **Criminal Law:** SEPARATE OFFENSES: SENTENCE. Under the rule stated in *Hans v. State*, 50 Neb. 150, it is competent for the prosecution to allege and prove the keeping for the purpose of unlawful sale, in separate counts, several different kinds of liquors, thus forming distinct counts and charges, and upon a verdict of guilty upon each count a separate sentence for each may be imposed.

3. ———: INSTRUCTIONS. The instructions given to a jury upon a trial are to be considered as a whole and construed together. If

when so considered and construed they present no erroneous statements of law, the fact that an isolated instruction may be indefinite or incomplete will not be considered prejudically erroneous if the law is fully and correctly stated in other instructions.

ERROR to the district court for Boone county: JAMES R. HANNA, JUDGE. *Affirmed.*

C. E. Spear, F. J. Mack and *T. J. Doyle,* for plaintiff in error.

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

REESE, C. J.

Plaintiff in error was prosecuted in the district court for Boone county for 14 violations of the liquor laws of this state. The jury found him guilty on each of the 14 counts of the information, and a fine of $250 on each count was imposed. The cause is brought to this court by proceedings in error for review. Plaintiff in error was engaged in the drug business at St. Edwards, in said county, and, as disclosed by evidence received by the court after verdict, has been frequently prosecuted and fined for similar violations of the liquor laws of the state. The principal contention is that the verdict of the jury is not supported by sufficient evidence. This will require a brief statement of the evidence bearing upon each count of the information. The bill of exceptions has been carefully examined, but owing to the length of the information, and extent of the evidence, our discussion of the facts must of necessity be limited. There is no claim that the accused had either a license or permit to sell intoxicating liquor.

By section 11, ch. 50, Comp. St. 1909, it is made a misdemeanor, punishable by a fine of not less than $100 nor more than $500, for any person to sell without license or permit any "malt, spirituous, or vinous liquors, or any intoxicating drinks," etc. In each of the counts for sell-

ing, the information charges the sale of "intoxicating" liquor, and which is followed by the general statement of the kind or quality of the liquor alleged to have been sold. It appears from the evidence that many of the drinks were disposed of under fictitious names printed on labels pasted by the manufacturer upon the bottles, the evident purpose of which was to deceive, and under which the liquor could be sold but without its real quality being known until drank and followed by intoxication. Some of the counts charge the unlawful sale of "intoxicating and spirituous liquor, to wit, whisky," while others, following the same language, charge the sale of "Meta Malta," "Mead's Malt," "Queen Bee," "Krug's Life Malt," etc. The return and testimony of the sheriff show that under a search warrant and search of the premises he found "Whisky," "Cherry Creek," "Meta Malta (branded 'intoxicating')," "Hawkeye Bitters," and "Krug's Life Malt," all or nearly all of which were sufficiently proved to be whisky, or to contain whisky to a great extent. Under these circumstances the prosecutor alleged that the liquors sold were "intoxicating liquors."

The first count in the information charges that on or about the 10th day of March, 1909, the accused sold to William Schuler "intoxicating and spirituous liquor, to wit, whisky." Schuler was called as a witness, and testified that about that time he was in the drug store of plaintiff in error and that he "bought stuff there to drink," that he "got some stuff there that was supposed to be good to drink, I guess 75 cents a pint or $1.50 for a quart"; that he had drunk liquor ever since he knew anybody; that he drank a part of the liquor so purchased; that it was spirituous and intoxicating; and that he purchased it of plaintiff in error. On the cross-examination, with reference to another date and transaction, the witness was asked what he meant by spirituous liquor. His answer was: "Spiritual liquor." Whether this answer was prompted by ignorance, or a disposition to be "smart" and bandy words with the attorney, is not clear. He

stated what he meant was that the liquor was "as near pure as I could get at that time," and in another answer he said: "Getting pretty close to the pure stuff." That his idea was that "malt liquor is a poor quality of liquor, and spirituous is a good quality." On re-examination he testified that the liquors he obtained at the drug store of plaintiff in error, as testified to by him, tasted like whisky and contained whisky in them. This was sufficient to justify a submission of the question to the jury, and, although contradicted by plaintiff in error, the jury being satisfied beyond a reasonable doubt, the verdict as to that count would have to stand. The testimony of the same witness as bearing upon the same charges contained in counts 2, 3, 4 and 5 was practically to the same effect, except that in some cases it was more definite and positive as to some of the liquors purchased. It is not deemed necessary to pursue this inquiry further. The sixth count was sustained by the testimony of Ed Trosper, who stated upon the stand that about the time alleged he bought drinks at the place of business of plaintiff in error that tasted like "skee," by which he afterward testified he meant "whisky"; that it was intoxicating if taken in sufficient quantities, and that it was spirituous liquor. The seventh, eighth and ninth counts were also sustained in the same way. The tenth count was sufficiently sustained by the witness Gumm, who testified that he purchased the drinks on or about the date named; that it would intoxicate; that it tasted like whisky; that he would call it poor whisky; that he was familiar with the taste and effect of that liquor, and that it intoxicated him. The eleventh count was clearly proved if the witness was telling the truth, and of that the jury were the sole judges. The twelfth count was also sustained by Gumm. He stated that on or about the date named he called for "Queen Bee" and purchased it of plaintiff in error; that he drank it; that it was intoxicating, he becoming intoxicated on it; that it tasted like, and must have contained, whisky.

The testimony of these witnesses, while in some degree convincing, is not so clear and positive on some features as might be desired, as it clearly appears that they avoided stating in clear and direct language what they knew to be the truth, seeming rather to evade making direct and positive answers. But on the further progress of the trial the identical receptacles and labels taken from the store of plaintiff in error and corresponding with the liquors described by the witnesses were presented, the liquors tasted and tested in the presence of the jury, so that there could be no rational question as to their spirituous and intoxicating quality, whisky being an essential, if not preponderating, ingredient. We find no sufficient grounds to question the correctness of the verdict upon each of the 12 counts. It is true that plaintiff in error upon the stand contradicted many of the material statements of the witnesses in positive and direct terms, and that witnesses were called who testified that their reputations for truth and veracity were bad, but this presented questions of fact for solution by the jury, and they have passed upon them, and, there being enough to sustain the verdict, their finding must be final.

As to the thirteenth and fourteenth counts of the information, a more serious question is presented. The thirteenth count charges plaintiff in error with unlawfully keeping in his possession for the purpose of sale "intoxicating and malt liquor, to wit, 'Krug's Life Malt,'" and the fourteenth count charges that at the same time and place he kept for the same purpose "intoxicating and spirituous liquor, to wit, whisky," thus separating the quality of liquors alleged to have been kept, and presenting the question of two crimes, whereas it is contended that, if there were any ground for such charge, but one offense could be properly charged and a prosecution based thereon. Section 20, ch. 50, Comp. St. 1909, provides: "It shall be unlawful for any person to keep for the purpose of sale without license any malt, spirituous, or vinous liquors in the state of Nebraska, and any person or per-

sons who shall be found in possession of any intoxicating liquors in this state, with the intention of disposing of the same without license in violation of this chapter, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined," etc. It has been the understanding of the writer that the different kinds of liquor, or any number of kinds, so kept for sale, constituted but one offense, that of keeping liquors for the purpose of sale in violation of law. We find, however, that this identical question was before this court in *Hans v. State,* 50 Neb. 150, and it was there squarely held by a unanimous court that the liquors might be segregated as to quality and two offenses charged, the court saying: "The sixteenth count of the information charges the unlawful keeping for the purpose of sale without a license certain vinous liquors, consisting of a half barrel of 'Raspberry Wine,' and the seventeenth count charges the keeping for the same unlawful purpose certain spirituous liquors, consisting of two cases of 'Tom and Jerry.' Therefore two separate and distinct offenses are alleged, and, the defendant having been convicted of both, a separate sentence for each within the limit fixed by section 11, ch. 50, Comp. St., was properly imposed for each offense." This having been declared to be the law, we are not inclined to reinvestigate the subject, and will abide by it.

Complaint is made of the tenth instruction given by the trial court. It is as follows: "You are instructed that if you find, beyond a reasonable doubt, that the defendant made any of the sales of liquors, as charged in any of the counts of the information, or that he was keeping for the purpose of unlawful sale any of the liquors as charged in the information, it is sufficient if the state prove, beyond a reasonable doubt, that any of such liquors so sold or so kept for the purpose of unlawful sale were either malt, spirituous or intoxicating liquors." The criticism upon this instruction is that it is indefinite, that "it says one thing and means another," and that, "if whisky is alleged, the proof of any kind of malt liquor is

sufficient." If this instruction stood alone, we might hesitate to approve it, but, when considered in connection with other instructions given, we are unable to see where it could have been misleading. By the fifth instruction the jury were told that, in order to sustain a conviction upon any count, the "truth of every material allegation contained in such count of said information must be proved to the satisfaction of the jury beyond a reasonable doubt"; and in the ninth instruction that, before the jury could "find the defendant guilty of any or all the counts contained in the information, the state will have to prove beyond a reasonable doubt every material averment of such count or counts of the information"; and in the thirteenth instruction that if the jury "fail to find that the allegations in any or all of the several counts of the information have been established beyond a reasonable doubt to your satisfaction, as defined in these instructions, you should then find the defendant not guilty as to any or all of said counts of said information, as to which you find the proof has failed, as defined in these instructions." When these instructions are considered together, it does not appear that the tenth could have been misunderstood by the jury. It seems clear that they were informed that the guilt of plaintiff in error of the violation of the law as charged in each count must be established or the accused could not be found guilty of the charge contained in such count.

It is strongly urged in the brief of plaintiff in error that the proof does not sustain the charges as to the quality of the liquors sold; that an indictment charging the unlawful sale of whisky is not supported by proof of the sale of other intoxicating liquors, as decided in *State v. Hesner,* 55 Ia. 494. This may be conceded as being the law, as held in *Weinandt v. State,* 80 Neb. 161, that "it is a well-recognized principle that proof of unlawful sales of whisky will not sustain a charge of unlawful sale of beer, or the reverse," and yet not call for a reversal of the judgment in this case, owing to the

language of the statute above quoted, and the proof that the liquors sold were of the quality charged in the information, although designated by the labels on the bottles as something else. As we have said, it is clear that the labels were intended to deceive and did not honestly state the contents of the bottles upon which they were pasted. The proof was beyond question that they contained, at least, a mixture of the kind of liquor charged, and that the liquor was intoxicating.

We are unable to detect any error in the trial which requires a reversal of the judgment of the district court, and it is therefore

AFFIRMED.

ORLANDO STACKHOUSE, APPELLEE, V. NANNIE H. STACKHOUSE, APPELLANT.

FILED JANUARY 9, 1911. No. 16,222.

1. **Divorce:** ADULTERY: EVIDENCE. In an action for a divorce on the ground of adultery, it is not always necessary to show the overt act; the charge may be sufficiently proved by the evidence of such circumstances as will lead a just and reasonable man's mind to the conclusion of guilt.
2. **Evidence** examined, the substance of it stated in the opinion, and found sufficient to sustain the judgment.

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

Bernard McNeny and *J. C. Saylor*, for appellant.

J. G. Thompson and *Gomer Thomas, contra.*

BARNES, J.

Action for divorce by the husband, in which the wife was charged with adultery. A trial in the district court for Harlan county resulted in a decree for the plaintiff, from which the defendant has appealed.

Defendant's only contention is that the judgment is not sustained by the evidence, and the question for our consideration is solely one of fact. We have read the evidence, from which it appears, beyond question, that the defendant, for nearly a year before her marriage with the plaintiff, made her home in Alma, Nebraska, with one Burdick (her alleged paramour), whose wife was in a state of ill health; that during that time their conduct toward each other was so affectionate as to excite notice and to cause comment; that during that period they, without the presence of the wife, visited at the home of one Vaughn, who lived in the country some distance from the town of Alma; that while at the Vaughn home they were so affectionate that the Vaughns were induced to believe that they were father and daughter; that they were discovered together in a buggy in Vaughn's barn in the night time by the hired man, and when upon inquiry it was found that they were not father and daughter, the Vaughns, who were respectable people, requested the man not to come to their home again unless he brought his wife with him; that this conduct continued up to about January, 1907, when the plaintiff and the defendant were married; that the plaintiff at that time had no knowledge of the foregoing facts; that immediately following the marriage plaintiff and defendant visited in Illinois for some six weeks, when they returned to Nebraska, the defendant going to the home of her alleged paramour in Alma, and the plaintiff going to his own home, where the defendant joined him in about a week thereafter; that they lived together at the Stackhouse home until about the 26th of July, 1907, when they separated, she going to the Burdick home and he remaining on the farm. It appears that the defendant and Burdick corresponded by letter during all of the time she lived with the plaintiff, letters passing between them as often as two or three times a week; that Burdick visited them frequently, and would nearly always remain in the house until after the plaintiff had departed to take up his farm work; that on one occa-

sion, when plaintiff suddenly returned to the house, he found defendant sitting on Burdick's lap. This aroused Stackhouse's suspicions, and he finally determined to secure one of the letters from Burdick to his wife. This he did, but, according to his testimony, he lost it before he found a favorable opportunity to read it. It appears that the defendant was expecting this letter, and when she failed to receive it she instituted inquiry, which disclosed that it had been delivered to her husband; she then demanded the letter of him, and, upon being told that it was lost, she became violent in her conduct and language toward him and threatened and attempted to commit suicide. This was shortly before the final separation, and no doubt hastened that event.

The record contains much other evidence of an incriminating nature. Without quoting the testimony, we may say that, although the overt act was not shown, still the plaintiff's conduct with Burdick was such as to warrant the district court in granting plaintiff a decree. In 14 Cyc. 693, it is said: "The charge of adultery may be sufficiently proved by evidence of circumstances leading to an inference of guilt. It is impossible fully to indicate the circumstances which will lead to such a conclusion, because they may be infinitely diversified by the situation and character of the parties, and by many other incidental matters which may be apparently slight and delicate in themselves, but which may have most important bearings in the particular case."

We think the evidence contained in the record is amply sufficient to sustain the decree, and the judgment of the district court is therefore

AFFIRMED.

REESE, C. J., and SEDGWICK, J., dissent.

AURORA STATE BANK, APPELLEE, V. HAYES-EAMES ELEVATOR COMPANY ET AL., APPELLANTS.

FILED JANUARY 9, 1911. No. 16,251.

1. **Banks and Banking:** CHECKS: PAYMENT: EFFECT. Payment by a bank of a check drawn upon it does not constitute such bank a holder within the meaning of the negotiable instruments law (Comp. St. 1909, ch. 41, sec. 30), providing that an instrument is negotiated when it is transferred so as to constitute the transferee a holder thereof. *National Bank of Commerce v. Farmers & Merchants Nat. Bank*, 87 Neb. 841, followed.

2. ———: ———: ———: ———. Payment by a bank of a check drawn upon it, in the usual course and in the absence of fraud or mistake of fact, extinguishes the instrument, and the bank by thereafter putting it in circulation cannot create a liability thereon against its maker or prior indorser.

APPEAL from the district court for Hamilton county: GEORGE F. CORCORAN, JUDGE. *Reversed and dismissed as to appellants and affirmed as to other defendants.*

Flansburg & Williams, for appellants.

J. H. Edmondson and *Charles P. Craft, contra.*

BARNES, J.

Action by the Aurora State Bank against the Hayes-Eames Elevator Company, M. Wagner, O. E. Bedell, and A. M. Glover, upon a written instrument which reads as follows:

"No. 541 Giltner, Neb. 2-28-1906.

"Pay to the order of M. Wagner $573.80, five hundred seventy three 80-100 dollars.

"Gross For Sc a 30 per bu.

"Tare Hayes-Eames Elevator Co.

"Net lbs. O. E. Bedell.

"Net 1A, 12 10 bus. 57654."

On the back of the instrument are the following indorsements: "M. Wagner." "A. M. Glover." And across its

face is written: "Protested for nonpayment this 28 day of March, 1906. Charles Glover, Notary Public."

There was a trial to the court without the intervention of a jury. The plaintiff had judgment against the defendants, the elevator company and M. Wagner, and they have appealed. The facts disclosed by the record are in substance as follows: At the time, and for more than five years before the instrument in suit was made, the appellant, the Hayes-Eames Elevator Company, was engaged in buying and shipping grain in the village of Giltner, Hamilton county, Nebraska, by and through one O. E. Bedell, its agent at that place. During all of that time it was the custom of the elevator company to draw its checks in payment for grain purchased, which were understood to be drawn upon the Bank of Bromfield, located and doing a banking business in that village. The bank invariably paid said checks and charged them to the account of the elevator company. At the close of each day's business the agent of the company made a report of the business done, and of the checks drawn by him on the bank at Giltner, to the main office of the company at Lincoln, Nebraska, and in case of any overdraft he made a sight draft on the Lincoln office to cover the amount thereof. On the 28th day of February, 1906, following the usual custom, Bedell, the agent of the elevator company, drew the check in question, which in form and substance is the same as its ordinary grain check, and delivered it to M. Wagner, who immediately presented it to the Bank of Bromfield, and it was paid, but not canceled. Wagner took the money received as payment of the check and deposited it in the Citizens Bank of Giltner to the credit of the elevator company. It further appears that for some time before the issuance and payment of the check in question there was a disagreement between the elevator company and the Bromfield bank as to the state of the elevator company's account, and the company had been trying to have the bank examine and correct the discrepancy, but without success. When the check was

drawn the elevator company claimed a credit at the bank of $3.10 more than the check called for, while the bank now claims that the check caused a large overdraft. It also appears that one month after the presentation and payment of the check the president of the bank delivered it to his brother, one A. M. Glover, who wrote his name on the back thereof, in turn delivered it to the plaintiff, the Aurora State Bank, and received therefor $73.80 in cash and $500 in New York exchange. The check was then sent to the plaintiff's Omaha correspondent for collection. Payment thereof was demanded of the bank of Bromfield, which was refused, the check was protested, and the plaintiff thereupon brought this action against the elevator company *et al.* to recover the sum named therein, with interest. The trial court gave the plaintiff judgment for that amount, on the theory that the check was a negotiable instrument, and notwithstanding the foregoing facts the Aurora State Bank was entitled, as a *bona fide* holder, to recover the amount of the check from its maker.

The defendants contend (*a*) that the court erred in treating the check as a negotiable instrument; (*b*) that when the Bank of Bromfield paid the check to the person named therein its liability as maker was discharged, and such payment did not constitute the bank a holder within the meaning of the negotiable instruments act so as to again put the check into circulation, and thus render the maker liable for its payment.

In support of defendants' first assignment, our attention is directed to the first section of the negotiable instruments act (Comp. St. 1909, ch. 41; Ann. St. 1909, sec. 9200), where, among other things, it is provided: "Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty." It will be observed by an examination of the check in question that the name of the drawee is not indicated therein at all, and therefore it would seem that the instrument is nonnegotiable, at least in form; but we

find it unnecessary to determine that question in order to properly dispose of this appeal. A similar question to the one raised by defendants' second contention was before us in *National Bank of Commerce v. Farmers & Merchants Nat. Bank,* 87 Neb. 841. In that case a certain forged check was presented to the plaintiff, which was the drawee bank, by the defendant through the clearing house and paid without detection. Afterwards, when the forgery was detected, plaintiff demanded repayment of the check of the defendant bank, and upon refusal brought suit to recover the amount thereof. It was held that, when the check was presented to the drawee bank and paid in due course, such payment was not a negotiation of it within the meaning of the negotiable instruments act, but was an extinguishment of the instrument. It was there said: "'An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof.' To 'negotiate' is defined in the Century Dictionary: 'To treat with another or others; * * * to arrange for or procure by negotiation; bring about by mutual arrangement, discussion, or bargaining; * * * to put into circulation by transference and assignment of claim by indorsement: as, to *negotiate* a bill of exchange; * * * to dispose of by sale or transfer; as, to *negotiate* securities.' In 5 Words and Phrases, 4771, it is said: 'To "negotiate" means to conclude by bargain, treaty, or agreement; * * * to transfer, to sell, to pass, to procure by mutual intercourse and agreement with another, to arrange for, to settle by dealing and management. * * * The power to "negotiate" a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorsee or holder. * * * "Negotiation" means the act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person.' If A gives B a check on C's bank, and B presents the check at the counter of C, no negotia-

tion is necessary or had, he simply demands and receives payment; but, if B goes to D store and buys a bill of goods and tenders the indorsed check in payment, he negotiates the check. The difference is clear and well defined. The presentation by defendant of the check in controversy, *for payment,* was not a 'negotiation' of the check within the meaning of the statute quoted.. Nor do we think that the payment by a bank of a check drawn upon it constitutes such bank a 'holder' within the meaning of the statute. * * * When a check is presented to the bank upon which it is drawn, and is paid by such bank, such payment discharges the instrument (Comp. St. 1909, ch. 41, sec 118), and the bank is not thereafter, within the meaning of the statute, a 'holder' of such check."

We think the foregoing clearly disposes of the question involved in the case at bar. When the Bank of Bromfield paid the check in question in the usual course, and in the absence of fraud or mistake, such payment extinguished the instrument, and the bank could not thereafter reissue it so as to create a liability thereon against the maker or prior indorser thereof. We are therefore of opinion that the district court erred in rendering judgment for the plaintiff and against the appellants; and, as to the Hayes-Eames Elevator Company and M. Wagner, that judgment is reversed and the action is dismissed; but this decision is not to be taken as an adjudication between the Hayes-Eames Elevator Company and the Bank of Bromfield as to the condition or state of their disputed account. The other defendants not having appealed, the judgment of the district court, as to them, is hereby affirmed.

JUDGMENT ACCORDINGLY.

REESE, C. J., not sitting.

IN RE APPLICATION OF GERING & COMPANY FOR LIQUOR LICENSE.

SARAH E. KERR ET AL., APPELLANTS, V. GERING & COMPANY, APPELLEE.

FILED JANUARY 9, 1911. No. 16,743.

1. Appeal: FINAL JUDGMENT. A judgment of the district court dismissing an appeal from the order of a licensing board granting a druggist's permit to sell intoxicating liquors is a final judgment from which an appeal may be taken to the supreme court, and the fact that the district court assumes to direct further action by the licensing board does not deprive the aggrieved party of that right.

2. Intoxicating Liquors: APPEAL: MOTION TO DISMISS. The statute provides that, on an appeal from the order of the licensing board, the evidence taken before that board shall be certified to the district court, and the case be there tried and determined upon such evidence only, and, where an appeal is prosecuted from the judgment of the district court, the clerk of that court is required to certify such transcript of the evidence to the court of review. When this is properly done, a motion to dismiss the appeal for want of a bill of exceptions should be overruled.

3. Appeal: MOOT QUESTION. Such an appeal cannot be said to present only a moot question if heard during the term of the license or permit, unless it appears that the same has been relinquished by the applicant and canceled by the action of the licensing board.

4. Intoxicating Liquors: LICENSE: DISCRETION OF LICENSING BOARD. Where it is shown by competent evidence that the applicant for the permit has violated the provisions of chapter 50 of the Compiled Statutes, commonly called the "Slocumb law," during the year preceding the filing of his application, the licensing board has no discretion, but is bound to refuse him a permit; and for the district court to hold otherwise is reversible error.

APPEAL from the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Reversed with directions.*

A. G. Wolfenbarger and *John M. Leyda,* for appellants.

Matthew Gering, contra.

BARNES, J.

This is an appeal in the matter of an application for a druggist's permit to sell intoxicating liquors. It appears that on the 5th day of April, 1910, Henry Gering & Company made an application to the mayor and city council of Plattsmouth for a permit to sell malt, spirituous and vinous liquors in that city for medicinal, mechanical and chemical purposes during the ensuing year; that on the 25th day of April, following, a remonstrance was filed against the application charging the applicant with a violation of the liquor law during the previous year, in that the applicant had failed, neglected and refused to file any report of his sales of intoxicating liquors during that time under the druggist's permit granted to him for the year 1909; that in due time there was a hearing before the said council. The remonstrance was overruled and the permit was issued. The remonstrators appealed to the district court, where the appeal was dismissed, and from that order they have appealed to this court. Hereafter they will be called the plaintiffs, and the applicant will be designated as the defendant.

The defendant has filed a motion to dismiss the appeal, and that question is first in order for our determination. The motion is based on three grounds: (*a*) That the judgment of the district court was not a final judgment; (*b*) that the record contains no bill of exceptions; and (*c*) that the defendant has disposed of his drug store, and therefore the record presents only a moot question. These contentions will be considered in the order in which they are stated.

It appears that when the plaintiffs perfected their appeal to the district court the city council failed to cancel or withhold the defendant's permit, and such proceedings were had that the district court required them to take such action. Thereafter the district court upon the hearing rendered a judgment dismissing the appeal in the words and figures following: "Now on this 24th day of

May, A. D. 1910, the court finds, on question of law arising in the case on the undisputed facts material to the issues joined, in favor of the respondent and against the appellants. The appeal is dismissed and the matter remanded to the city council for such action as the council may see fit to take. The permit having been revoked by order of this court is not to be issued except on the further action of the city council. Appellants except." The dismissal of the appeal contained in the foregoing order was a final disposition of the case so far as the district court was concerned. That court had nothing more to do with it and could make no further order therein after dismissing the appeal. It was therefore an appealable order, and authorized the plaintiffs to bring the case to this court for review. That portion of the order following the dismissal of the appeal, by which the district court attempted to direct the city council as to further proceedings, could not deprive the plaintiffs of their right to appeal. The dismissal of the plaintiffs' appeal had the legal effect of reinstating the defendant's permit, and if the city council had thereafter refused to issue it they could have been compelled to do so by mandamus.

Defendant's contention that the record contains no bill of exceptions is beside the mark. The statute provides that, where an appeal is taken in such cases to the district court, the city council or the licensing board shall transmit to the district court a certified copy of all of the evidence taken upon the hearing, and the cause shall be tried and disposed of upon such evidence only. The record discloses that the evidence taken before the city council in this case was properly certified to the district court. The record here contains a transcript of that evidence, and the clerk of the district court has appended thereto his certificate in the manner provided by law. This constitutes the only bill of exceptions necessary to invest this court with jurisdiction to review the judgment of the district court.

The contention that the record presents only a moot

question cannot be sustained. When the district court dismissed the plaintiffs' appeal the defendant was entitled to his permit, and it appears that for some time thereafter he enjoyed its benefits. If it be a fact that defendant has disposed of his stock of drugs to another who is conducting the business in the same building formerly used by him for that purpose, that fact does not prevent him from repurchasing the stock or again engaging in the business in the same building and making sales of intoxicating liquors under the terms of his permit. It is not shown that the permit has been relinquished, nor has it been canceled by the city council. It further appears that this case was advanced under the rule in order to secure the plaintiffs the benefit of their appeal; that the permit in question will not expire until April, 1911, and therefore it cannot be said that in deciding this case we would only be deciding a moot question.

The defendant has not favored us with a brief, but was permitted to argue the case orally. Upon such argument it was further contended that there was no competent evidence in the record tending to show that the defendant had sold any intoxicating liquors under the permit issued to him for the year 1909. An examination of the testimony, as certified to this court, shows that the defendant, both in cross-examination of the plaintiffs' witnesses and upon his direct examination of his own, clearly established the fact of such sales. This being the case, it was necessary for him to file a report of such sales at the times and in the manner provided by section 7176, Ann. St. 1909, and his failure to do so is not disputed. This was a direct violation of the provisions of the liquor law. By section 7152, Ann. St. 1909, it is provided: "If there be any objection, protest, or remonstrance filed in the office where the application is made against the issuance of said license, the county board shall appoint a day for hearing of said case, and if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this act within

the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license." It follows that the city council had no discretion in the matter, and the defendant's application should have been denied. *In re Adamek,* 82 Neb. 448; *State v. Kaso,* 25 Neb. 607.

For the foregoing reasons, we are of opinion that the district court erred in dismissing plaintiffs' appeal. The judgment of that court is therefore reversed, and it is ordered that the permit in question be canceled.

JUDGMENT ACCORDINGLY.

COLUMBUS W. FLETCHER, APPELLANT, V. FRANK E. BREWER, APPELLEE.

FILED JANUARY 9, 1911. No. 16,201.

1. **New Trial:** ASSIGNMENT OF ERROR IN INSTRUCTIONS. Where a general assignment is made in a motion for a new trial that the court erred in giving a group of instructions, it is not error to overrule the motion if any one of the instructions in the group has been properly given.

2. **Trial:** CONTRACT: CONSTRUCTION: QUESTION FOR COURT. Under the circumstances in this case, it was the duty of the court, and not of the jury, to determine the meaning of the written contract in evidence.

3. **Parol evidence** may be received to supply an omission as to the time at which delivery of a deed is to be made, if the time is not fixed in the contract.

4. **Vendor and Purchaser:** CONTRACT OF SALE: TIME OF DELIVERY. Where in a written contract for the sale of real estate no time is definitely fixed for the delivery of the deed, yet from the context it is apparent that in the contemplation of the parties it must be delivered before a certain time, in the absence of evidence to supply the omission the court should construe the contract to mean that the delivery should be made within a reasonable time,

and on or before the date at which it must be delivered in order to carry out the terms of the contract and give a mortgage to secure the unpaid purchase money.

5. ———: ———: TITLE IN THIRD PERSON. Evidence that the buyer of real estate knew at the time his vendor entered into an absolute contract of sale that the title to the property was in a third person is immaterial under the pleadings in this case.

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

Aaron Wall, for appellant.

Robert P. Starr and *W. H. Thompson, contra.*

LETTON, J.

This was an action to recover damages for breach of a written contract for the sale of real estate. The contract is in the ordinary form, save in one respect mentioned later. The defense pleaded is that at the time the contract was entered into the land was owned by one Philena Campbell who lived in Illinois; that the defendant had corresponded with her husband and negotiated with him for the purchase of the land; that plaintiff knew these facts and knew that it was uncertain as to whether the premises would be conveyed by her; that it was agreed that no part of the purchase money should be paid until a deed was made by the Campbells to Fletcher and deposited in the bank at Loup City; that in pursuance of this agreement there was written in the contract the words, "when deed in bank," which meant, and was intended to mean, when the deed was executed by Campbell to Fletcher and placed in the Loup City bank; that Campbell refused to make the deed, and that plaintiff acquiesced in the refusal and abandoned the contract and has in no manner complied with its conditions. The trial resulted in a judgment for the defendant, from which plaintiff appeals.

Plaintiff complains that the court erred in admitting oral evidence for the purpose of varying the terms of the written contract, in giving paragraphs 5, 6 and 7 of the instructions, and in refusing to give paragraphs 2, 3 and 4 of the instructions requested by the plaintiff. For convenience we will consider these complaints in inverse order.

The rule has long been established in this court that parties complaining of errors at the trial must point them out specifically to the district court in the motion for a new trial. Where a general assignment is made that the court erred in giving a group of instructions, it is not error for that court to overrule the motion for a new trial if any one of the instructions in the group has been properly given. *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68. It is clear that several of the instructions given were correct statements of the law, and hence the assignment of error is not well taken.

Coming now to the instructions requested by the plaintiff and refused. This error was also assigned *en masse* in the motion for a new trial; but, since we are satisfied that the court erred in refusing to give each and all of them, the assignment was sufficient. By the first of the instructions requested and refused the jury were told that the contract was unconditional, that the defendant was thereby bound to convey the title, and that if he failed to perform he would be required to answer in damages to the extent of the plaintiff's loss; the second told the jury that Brewer had a right to enter into the contract even if he knew he was not the owner of the real estate at the time of making it, and that the title was in another; and the third, that the law recognizes in Brewer the right to presume he would be able to acquire the title to the land in time to enable him to fulfil his contract, and that if he has contracted to convey and fails to fulfil his contract he will be liable in damages the same as if he had been the actual owner of the title at the time. No instructions given by the court covered these points, and

they should have been given to the jury. By instruction No. 5, given on its own motion, the court apparently made plaintiff's recovery depend upon whether the jury believed that the contract was an unconditional one. We think it was the duty of the court to construe the contract, and to direct them as the plaintiff requested in this respect.

The plaintiff further complains of error in the admission of evidence. At the trial plaintiff testified to a conversation with respect to the time of payment of the $500. When the defendant came to the stand he testified that the title to the land when the contract was entered into was in the name of Mrs. Campbell. He was then asked what conversation he had at that time with Mr. Fletcher with reference to that fact. This was objected to as immaterial, incompetent, and as an attempt to vary the terms of the written contract by parol evidence. The objection was overruled and exception taken. However, a number of other questions were asked and answered and considerable testimony along this line was received without objection for the purpose of showing Fletcher's knowledge that Brewer did not own the land. We are of opinion that the court erred in admitting this evidence on account of it being immaterial whether Fletcher knew this or not. Brewer had a right to sell and Fletcher to buy even if this were the fact. There is neither pleading nor proof to bring the case within the rule of *Norman v. Waite,* 30 Neb. 302, and *Dodd v. Kemnitz,* 74 Neb. 634.

The contract itself is plain and unambiguous, unless it may be said that the words, "when deed in bank," contained a latent ambiguity which requires explanation. It is contended that this expression is ambiguous as to the person who was to execute the deed, and therefore that parol testimony was admissible to explain it. We are not of that opinion. The contract is that "the said party of the first part will convey and assure to the party of the second part, in fee simple, clear of all incumbrances whatever, by good and sufficient abstract and warranty deed."

This is an agreement that Brewer will "convey and assure." The purchaser agreed to pay $2,800 "in the manner following, $500 cash in hand paid, when deed in bank, the receipt whereof is hereby acknowledged, and the balance, $900 March 1, 1908, and $1,400 on five years' time, interest payable annually at 6 per cent. per annum from March 1, 1908, same to be a first mortgage lien on the premises." The contract was made on September 4, 1907, and a check on sufficient funds in the same bank payable to Brewer's order was left in the bank by Fletcher to be paid when the deed was deposited. The only matter that was left open or which was susceptible of addition or explanation was the time of deposit of the deed. Since no time was fixed in the contract, and none appears to have been fixed by the parties, so far as the evidence discloses, the court should construe the writing to mean that the deed should be delivered within a reasonable time, and on or before March 1, 1908, when the next payment was to be made. If the parties agreed to a definite time, but did not incorporate it in the writing, parol evidence might be received to supply the omission. *Huffman v. Ellis,* 64 Neb. 623; 17 Cyc. 741.

We think the contract to sell is plain and unambiguous, and that the fact that the defendant did not own the land at the time he made it is not important. He made a written agreement to sell and convey, and must abide by his contract. He is in the position of every other vendor who sells for future delivery property of which he is not in possession. The buyer is entitled to rely upon the contract, and the seller takes the chances of not being able to perform. *Beck v. Staats,* 80 Neb. 482; *Arensten v. Moreland,* 122 Wis. 167, 65 L. R. A. 973; 2 Warvelle, Vendors (2d ed.) sec. 936; 2 Sutherland, Damages (3d ed.) sec. 581.

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

REVERSED.

EDWARD WESTOVER, APPELLEE, V. ABRAHAM L. HOOVER ET AL., APPELLANTS.

FILED JANUARY 9, 1911. No. 16,249.

1. **Master and Servant:** INDEPENDENT CONTRACTOR. One who contracts to sink a well at an agreed price per foot if he procures a supply of water, and not to be paid if he fail to do so, using his own materials and machinery, and furnishing his own labor, is an independent contractor.

2. ———: EXISTENCE OF RELATION. A person who is in the general employment of one person may be temporarily in the service of another with respect to a particular transaction or piece of work so that the relation of master and servant arises between them, even though the general employer may have an interest in the special work.

3. ———: DUTIES OF MASTER. In such case the duty of using care to see that a safe place to work is furnished, or proper warning given, devolves upon the special employer.

4. ———: ———. Where the independent contract is to be carried out on the general employer's premises, he owes the same duty to the independent contractor and his servants as to any other persons invited to the particular portion of the premises where the work is to be carried on.

5. Evidence examined, and *held* not to sustain the verdict.

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

J. B. Strode, E. C. Strode and *D. C. Burnett*, for appellants.

E. P. Holmes and *G. L. De Lacey, contra.*

LETTON, J.

This is an action for personal injuries alleged to have been suffered by the plaintiff while in the defendant's service on account of having been set to work by one Devore, the defendants' foreman, in an unsafe place, near a pit

containing an ice machine in operation, which was not properly lighted, a piston and revolving wheel upon which was left unguarded, and no warning was given him as to the danger, by reason of which his heel was caught and crushed by the revolving wheel and piston. The defense is a denial that the relation of master and servant existed; an allegation that plaintiff was in the employ of an independent contractor; a plea that plaintiff was familiar with the premises; assumption of risk; and contributory negligence.

Defendants are proprietors of a hotel with a large basement or cellar under the building containing boilers, engines, pumps, and other machinery used in the operation of the business. The plaintiff is a young man 23 years of age, of considerable experience in working around machinery, having been employed for about a year at the city waterworks, part of the time running one of the pumps there. About a week before the accident he was employed by Devore, defendants' foreman, to dig a pit in the basement, in which it was proposed to bore a new well and to place pumping machinery, and to do other common labor. Prior to this time one Loso, who was in the well-boring business, had made a contract with the defendants whereby he was to bore a well in the pit where plaintiff worked. He was to furnish the labor, machinery, and material, except such material as had been taken from the old well, and was to receive $1.50 a foot if he procured a supply of water, and no payment if he failed to do so. On the Saturday before the accident, A. L. Hoover, one of the defendants, telephoned to Loso urging him to come and do the work. Loso informed him that he was short of laborers, as two of his men were sick. Hoover then told him that he had some extra help that he could use. On Monday forenoon, about 11 o'clock, Loso came to the hotel. Up to this point there is no conflict in the evidence.

Plaintiff testifies that when he finished the work which he was doing, about 11 o'clock in the forenoon, Devore

told him to go to Loso's place to help Loso bring in some machinery that afternoon, and gave him street car fare to that point. Devore denies this, and says that he told plaintiff his work was done, but that Loso needed help, and that he could get a job with him. Loso says that when he came to the hotel that morning Devore brought out three men to him, and that he took the plaintiff and another named Stone to use in his work. Plaintiff went to Loso's and assisted him in bringing to the hotel a small engine and other machinery to use in sinking the well. Loso and he worked at placing this engine in the basement that afternoon, but did not finish setting it that day. A large ice machine about twelve feet high stood in a pit about three feet deep in the floor of the basement. The basement floor and the sides and floor of the pit were made of concrete. There was a space of three feet between the end of the machine and the walls of the pit. There being another pit nearby, it was necessary to set Loso's engine so that a pulley projected over one corner of the pit. Plaintiff testifies that the next morning, while Loso and he were "lining up" the engine so as to set it properly for running the machinery at the well, Loso said, "We will put the belt on," and lifted the center portion of the belt, while the plaintiff went into the pit in order to slip the belt over the pulley; that in the act of doing so his foot slipped, or he stepped back, when his heel was caught by a projecting crank pin on the wheel of the ice machine, and was crushed between the pin and the floor of the pit. There is a lower pit about eight inches deeper than the main pit. The crank pin of the revolving wheel came about one-half inch from the edge of the lower pit and went down into it about two inches as it revolved. He testifies that it was dark at that place, and that while he had knowledge that the ice machine was there, and that it had three cylinders and piston rods and wheels, he was not familiar with the location or construction of the revolving wheel at the bottom of the pit; that the piston rod is flush with or

just inside the machine, and the revolving wheel is about flush with the end of the machine. On cross-examination he says he cannot say whether Loso told him to get into the pit or not, but that he thought the most convenient way to put the belt on the pulley was by getting into the pit. The pulley was about 18 inches above the floor of the basement and about 4½ feet above the floor of the pit. He first testified that it was dark at this point, but afterwards said that there were a number of electric lights near the machine, and, finally, "that it was quite light down there," and that he did not think he was hurt because the lights were not burning. After being hurt he pulled his foot out and rolled or lay on the side of the pit. He testified that he then saw for the first time that the base of the ice machine was in a lower pit about eight inches deep. He has not been to the locality of the accident since that time. It is evident from his testimony that there was light enough to enable him to see the wheel and crank which he describes, and also sufficient to enable him to see that the crank decended into the lower pit when the piston rod came down.

The evidence in behalf of the defendants is very positive that there are a large number of electric lights in the basement, in the boiler room, and around the machinery; that these lights are all on one circuit, and were kept burning night and day.

In the discussion of the legal principles involved, we will assume that the testimony of the plaintiff and his witnesses and the undisputed testimony of the others was true, since the jury found for him by their verdict. The sole question presented is whether the evidence is sufficient to support a verdict for the plaintiff against the proprietors of the hotel. It is clear that Loso was an independent contractor. In fact, this is undisputed. Accepting the plaintiff's statement that Devore directed him to work for Loso, also Loso's undisputed testimony that he made no contract or agreement as to employment and wages with the plaintiff, but that he used the men

that Devore pointed out to him under the previous arrangement with Hoover, the question arises whether at the time of the injury the relation of master and servant existed between plaintiff and defendants.

The plaintiff's theory is that while he was engaged in the defendants' service he was furnished an unsafe and dangerous place in which to work, and was not warned of the danger, and that consequently the defendants are liable. The defendants contend that at the time he was hurt he was working for Loso, and not for them; that it was unnecessary for him to enter the pit; that the ice machine was properly constructed and properly lighted; and that the accident was the result of plaintiff's own carelessness. We think that the relation of master and servant at this particular time and with relation to this particular work existed between Loso and the plaintiff, and not between him and the defendants. While, according to his evidence, he could look to them for wages, he was not under their control or direction, but was working for Loso in the prosecution of his independent contract. It is true that his time was kept by Devore, but the entry in the timebook, which was produced at plaintiff's instance, shows that the time of both Stone and Westover was kept, as the book recites, "for Loso."

Some very interesting questions often arise where the general servant of one enters into the special service of another. While the general prinicples are well settled, the circumstances of each particular case determine whether the general employer or the special or both are liable in case of an accident either to an employee or to a third person. In order to hold one liable for injury to a man in his employment, the relation of master and servant must exist at the time and with relation to the very occupation or transaction in which the servant is engaged. The fact of employment may or may not be significant, depending upon all the circumstances. If I employ a chaffeur, and if while he is running my car, without my knowledge or consent, for his own purposes,

he is hurt by reason of a defect in the car of which I was aware, no court would hold me liable on account of the fact alone that he was in my employment. The master is the person in whose work he is engaged, and who has the right to direct and control his actions. "The payment of an employee by the day, or the control and supervision of the work by the employer, though important considerations, are not in themselves decisive of the fact that the two are master and servant. * * * Servants who are employed and paid by one person may nevertheless be, *ad hoc,* the servants of another in a particular transaction, and that, too, even where their general employer is interested in the work. Obviously they may desert the service of their lawful master, and work for another; or he may lend their services to another person, abandoning to the latter all control over them; or they may, without consulting their master, but in good faith, assist a person independently employed to do something which will benefit their master, but with which neither he nor they have any right to interfere, and in which they act entirely under the control of such other person." Shearman and Redfield, Law of Negligence (5th ed.) secs. 160, 161. *Murray v. Currie,* 6 L. R. C. P. Div. (Eng.) *24; *Dallas Mfg. Co. v. Townes,* 148 Ala. 146, 41 So. 988; *Olive v. Whitney Marble Co.,* 103 N. Y. 292; *The Turquoise,* 114 Fed. 402; *Rourke v. White Moss Colliery Co.,* 2 L. R. C. P. Div. (Eng.) 205; *Wyllie v. Palmer,* 137 N. Y. 248, 19 L. R. A. 285; *The Gladestry,* 128 Fed. 591; *Delory v. Blodgett,* 185 Mass. 126; *Parkhurst v. Swift,* 31 Ind. App. 521; *Waldock v. Winfield,* 2 L. R. (1901) K. B. Div. (Eng.) 596; *Higgins v. Western Union Telegraph Co.,* 156 N. Y. 75; *Brown v. Smith & Kelley,* 86 Ga. 274, 22 Am. St. Rep. 456; *Central Coal & Iron Co. v. Grider's Adm'r,* 115 Ky. 745, 65 L. R. A. 455, and note on page 445.

It is apparent from the facts stated that the defendants were under no special obligations or duty to furnish the plaintiff a safe place to work, since he was not, strictly

speaking, working for them; but, since by the contract with Loso the defendants invited Loso and his employees upon their premises for the purpose of performing the contract, the duty of defendant to Loso and to plaintiff was the same as to all other persons whom they might invite to that particular portion of the basement. If that portion of the premises in which a contractor is required to work is subject to special hazard, whether on account of the absence of lights, the presence of dangerous machinery, or other dangers the existence of which is not apparent and obvious, it is the owner's duty to warn the persons whom he has invited there of the risks to which they may be exposed, and if he fails in this duty, and in consequence thereof the invitee is injured, an action for damages will lie. The principle is the same as where a storekeeper leaves an open and unguarded trapdoor where his customers might reasonably be expected to walk. At the same time a person inviting contractors to a place where machinery in operation is in plain sight has the right to assume that they are possessed of ordinary common sense and a knowledge of the risk ordinarily incurred by working in close proximity to moving machinery. If the dangers are open and obvious he is entitled to rely upon the exercise of ordinary care, but if the dangers are of a hidden and concealed nature then he must take pains to give warning of the same, otherwise he may make himself liable in a proper action if a contractor or his employee is injured by such neglect. 4 Thompson, Law of Negligence, sec. 3736; *Haven v. Pender,* 11 L. R. Q. B. Div. (Eng.) 503.

Applying these principles to the facts in this case, there is nothing to show that the ice machine was other than properly constructed and properly equipped and managed in every way, or that the fact that it was placed in a pit about three feet below the floor of the basement was in any way a negligent placing or construction of the machine.

It is shown without dispute that there was plenty of

room for persons not engaged in the operation of the machine to pass over the main floor of the basement, and that plaintiff had no duty to perform in respect to its operation. A day or two before the accident he had been occupied in wheeling dirt from the new well and emptying it into the old one, passing close by the corner of the pit, but he says that, while he knew in a general way of the operations of the machine, he gave it no attention.

The ground of recovery alleged by the plaintiff is that he was defendants' servant, and that under the direction of their foreman, Devore, he was put to work in a dangerous place without warning. No instructions are in the record, so we must presume the jury were instructed in accordance with the issues made by the pleadings. The proof failing to show that the relation of master and servant existed between the parties at the time, and in respect to the transaction, the plaintiff cannot recover. *Eldred v. Mackie,* 178 Mass. 1; *Sullivan v. New Bedford Gas & Edison Light Co.,* 190 Mass. 288; *Callan v. Pugh,* 66 N. Y. Supp. 1118; *King v. New York C. & H. R. R. Co.,* 66 N. Y. 181.

We are also of the opinion that, even if the pleadings would permit recovery upon the theory that the defendants were guilty of a breach of duty in inviting Loso and his workmen into a place of danger, the evidence would not support a verdict. The plaintiff shows that he could see the revolving wheel in the bottom of the pit, and his father, who went to work for Loso in his place after the accident, testifies that by standing on a plank which was across the corner of the pit he put the belt on the pulley the next morning without going into the pit.

The evidence does not justify the verdict, and the judgment of the district court is

REVERSED.

REESE, C. J., not sitting.

ROBERT A. STEWART, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JANUARY 9, 1911. No. 16,748.

1. **Street Railways:** RIGHTS OF TRAVELERS. A street railway company and an ordinary traveler have equal rights of travel on the streets of a city, but each must observe due care to avoid accidents, taking into account the fact that the street car is confined to the track, while pedestrians have freedom of movement.

2. ———: CARE REQUIRED AT CROSSINGS. The employees in charge of the operation of a street car are held to great caution when crossing a street intersection at a point where a car upon the opposite track is, or has been, very recently discharging passengers. The motorman should keep a sharp lookout, give ample and timely warning of the approach of the car, and have it under such control that it can be readily stopped if necessary.

3. ———: INJURIES: QUESTIONS FOR JURY. Questions as to whether a bell was sounded, or as to whether the rate of speed of the car was excessive, where the evidence is conflicting, should be submitted to the jury.

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

John L. Webster and *W. J. Connell*, for appellant.

H. C. Brome and *Clinton Brome, contra.*

LETTON, J.

A statement of the evidence given at a former trial of this case may be found in the opinion in *Stewart v. Omaha & C. B. Street R. Co.*, 83 Neb. 97. At the second trial the result was a verdict for the plaintiff, from which defendant has appealed. At this trial much of the testimony taken at the former trial was read and some other testimony adduced. The evidence on behalf of the plaintiff as to the distance he was carried and the place where the north-bound car stopped is practically the same as

at the former trial. His testimony now is that the car from which he alighted was from 10 to 20 feet away when he looked to the south, while at the former trial he said he thought it was about 10 feet. As to this he was not positive, however. A plat is in evidence which shows that, if he had looked to the south from the point where he alighted at a time when the south bound car was 10 feet away, he would have had an unobstructed view of the other track for a long distance, except so far as his view was cut off by the south-bound car.

The plaintiff's testimony is that in his opinion the car that struck him was moving at the rate of about 20 miles an hour. The motorman and other employees of the defendant testify that the north-bound car was moving at the rate of about eight miles an hour when the plaintiff was struck, and that he was struck when he was about the middle of the intersection. On the former appeal we held that there was sufficient evidence that the car was being operated at a dangerous rate of speed, and of negligence in failing to give sufficient warning of its approach, to require the submission of those questions to a jury, and we further held that the evidence of contributory negligence was not clear enough to justify the court in directing a verdict for the defendant on that account.

1. The defendant claims that new and additional evidence was produced at the trial destructive of any inference that the plaintiff had used reasonable prudence in stepping in front of the approaching car in the manner he did, and also that the evidence fails to show any negligence on its part. A large number of cases have been collected through the industry of counsel which hold in substance that, under facts somewhat similar to those in this case, plaintiff will be held as a matter of law to be guilty of such negligence as will preclude a recovery. Whatever the rule in some states may be with respect to the rights of pedestrians and street cars upon the streets of a city, the law in this state is settled that neither the street car nor the pedestrian has any priority or privi-

leged right over the other; that an electric street railway company and an ordinary traveler upon the street are required to observe an equal degree of care to prevent accidents, and that neither has a right of way superior to that of the other. *Omaha Street R. Co. v. Cameron,* 43 Neb. 297; *Mathiesen v. Omaha Street R. Co.,* 3 Neb. (Unof.) 747; *Omaha Street R. Co. v. Mathiesen,* 73 Neb. 820; *Olney v. Omaha & C. B. Street R. Co.,* 78 Neb. 767.

We agree with counsel for defendant that under ordinary circumstances one who negligently attempts to cross a street railway track in front of an approaching car cannot recover for injuries caused by a collision therewith, unless those in charge wilfully or wantonly produce the collision, or fail to exercise ordinary care to prevent the accident after knowledge of the probable danger. *Harris v. Lincoln Traction Co.,* 78 Neb. 681; *Wood v. Omaha & C. B. Street R. Co.,* 84 Neb. 282. But the crucial question is whether or not the person injured negligently attempted to cross. We find no evidence in the record which leads us to change the conclusion we arrived at on the former appeal, that under the circumstances of this case the question of whether the plaintiff was negligent or not was a matter for the jury to determine. We think that the employees in charge of a street car should be held to great caution when crossing a street intersection at a point where a car upon the opposite track is, or very recently has been, discharging passengers, that the motorman should keep a sharp lookout, give ample and timely warning of the approach of the car, and have it under such control that he can promptly stop it upon the appearance of danger. This seems to be the more humane and modern doctrine. We see no reason to adopt one which will in any degree relax the care and caution of employees engaged in the operation of such dangerous instrumentalities as electrically operated street railways within the busy streets of a city.

The supreme court of Minnesota recently had before it for consideration the question of the relative degree

of care required of pedestrians and the motorman in charge of a street car approaching a crossing where a street car upon a parallel track is discharging passengers. The opinion collects the authorities and reaches the same conclusion as that arrived at by this court. *Bremer v. St. Paul City R. Co.,* 107 Minn. 326. Other authorities are collected in the note to it in 21 L. R. A. n. s. 887. This is the rule adopted in states containing cities of the magnitude of New York, Chicago, Washington, Cincinnati, Cleveland, St. Paul, and Minneapolis. *Pelletreau v. Metropolitan Street R. Co.,* 74 App. Div. (N. Y.) 192, 77 N. Y. Supp. 386, affirmed in 174 N. Y. 503; *Dobert v. Troy City R. Co.,* 91 Hun (N. Y.) 28, 36 N. Y. Supp. 105; *Chicago City R. Co. v. Robinson,* 127 Ill. 9, 4 L. R. A. 126; *Capital Traction Co. v. Lusby,* 12 App. D. C. 295; *Cincinnati Street R. Co. v. Snell,* 54 Ohio St. 197, 32 L. R. A. 276. A case which perhaps goes to the limit in holding street car companies liable under such circumstances is *Louisville City R. Co. v. Hudgins,* 124 Ky. 79, 98 S. W. 275, 7 L. R. A. n. s. 152. We merely cite this case as showing the modern tendency, and not as indicating that this court would take the same view under like circumstances,

2. As to the claim that there is no proof of negligence. No one except the conductor and motorman seems to have heard the gong or bell until just an instant before the plaintiff was struck. Several witnesses were standing upon the street corner, and none of them heard it. If the bell had been ringing loudly when the plaintiff was within a few feet of the track, it is probable that he would have noticed it, although the fact that he did not hear it is not conclusive that it was not rung. People often absent-mindedly disregard the most obvious warnings. The testimony being conflicting, it was for the jury to consider.

3. The motorman testified the car was moving at the rate of eight miles an hour. The district court instructed the jury that eight miles an hour might be a negligent rate of speed under some circumstances. This is strongly urged as erroneous, but we see nothing wrong in it. If a street

car approached behind another car at the rate of eight miles an hour without signals of its approach, and at a point where persons alighting from another car might reasonably be expected to appear, this might be a negligent rate of speed, while, ordinarily, eight miles an hour is not a negligent rate. The question as to whether the rate of speed was negligent under the circumstances was properly left to the jury, and we think the evidence sustains the verdict.

4. Defendant complains that the court erred in permitting the plaintiff to give his opinion as to the rate of speed of the car that struck him. He was asked whether he could approximately state the speed, to which he replied affirmatively. He was then asked what his judgment was as to the speed of the car at the time it struck him. Counsel for defendant objected that no proper foundation had been laid for such testimony, and was allowed to conduct a lengthy cross-examination for the purpose of eliciting the facts upon which the witness based his estimate. It is apparent from this cross-examination that his opinion was based upon his observations during the short interval from the time he saw the car until he was struck, from a view of the buildings and surrounding objects with respect to the moving car, and from the force with which it struck him. He testified he thought the car was moving at the rate of 20 miles an hour, but it might be more and it might be less. This is very indefinite. We are inclined to think that, his opportunities for observation being so limited, his opinion was of little or no value, but, since all these facts were before the jury, we think defendant suffered no prejudice by allowing them to determine for themselves what weight they would give to his opinion. Counsel himself argues that from his cross-examination it clearly appeared that the plaintiff was utterly unable to judge speed. Probably the jury took this view and believed the testimony of the defendant on this point.

5. It is also urged that it was error to instruct the jury

that the burden of proof was upon the defendant to show the fact of contributory negligence on the part of plaintiff. This, however, is settled law in this state. *Rapp v. Sarpy County,* 71 Neb. 382, 385. We think counsel misapprehends the instruction given. He argues that if the plaintiff was guilty of negligence directly contributing to his own injuries, and this appeared from his own testimony, he could not recover. But the instruction expressly took care that the jury were not misled by saying: "If you find from a preponderance of the *testimony offered by both parties* that the plaintiff was guilty of negligence in attempting to cross the track in the manner and under all the facts and circumstances in evidence before you, and that his negligence directly contributed in any degree to the cause of his injury, then the plaintiff cannot recover, and you should find for the defendant." The facts in this case with respect to contributory negligence lie very close to the line, but the whole matter was for the jury. We find no error, and the judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

GEORGE W. CAMPBELL, APPELLEE, V. MELCHOIR L. LUEBBEN, APPELLANT.

FILED JANUARY 9, 1911. No. 16,128.

1. Appeal: REVIEW. A new trial should not be granted where no verdict other than the one rendered would be sustained by the law and the evidence.
2. Trial: INSTRUCTIONS. The court should not submit an instruction permitting a recovery upon a state of facts not admitted by the litigants or supported by any evidence.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed with directions.*

Robert S. Mockett, for appellant.

John M. Stewart, contra.

ROOT, J.

The plaintiff prosecutes two alleged causes of action against the defendant, the first upon a written agreement by the defendant to pay the plaintiff $1,000 for 10 shares of stock in the Luebben Baler Company, and the second upon an alleged oral agreement to "take back all such stock previously purchased or thereafter purchased, and repay to plaintiff the amounts that plaintiff had paid for all such stock at any time plaintiff became dissatisfied with such investments and desired the money he had paid therefor returned." The defendant admits making the written agreement, but contends that he has not been given the notice therein provided for, and denies making the oral contract. He also pleads the statute of frauds as a defense to the second cause of action. The plaintiff prevailed upon both causes of action. The defendant appeals.

The verdict contains separate findings, one for each cause of action. In so far as the first cause of action is concerned, we are of the opinion that the verdict is sustained by sufficient evidence. Copies of letters sent by the plaintiff to the defendant in the spring of 1907, and especially the letter of April 24, 1907, should receive no other construction than that the plaintiff had requested Mr. Luebben to comply with his contract. It is true, as suggested by the defendant's counsel, that the court permitted a recovery upon the alleged oral contract for the stock involved in the first, as well as for the stock referred to in the second cause of action, but we are of the opinion that upon the pleadings and the proof no verdict other than the one returned can be sustained with respect to the first cause of action.

The defendant excepts to the sixth instruction given

by the court upon its own motion, to the effect that if "the plaintiff purchased stock in the Luebben Baler Company through the defendant, and that plaintiff was induced to make such purchase by the promise and agreement of the defendant to repurchase all stock theretofore purchased through said defendant of the Luebben Baler Company, and to repurchase all stock then or thereafter purchased pursuant to such promise or agreement to so repurchase such stock, and to make such repurchase at any time plaintiff might want the money so invested, or became dissatisfied with such investment, then you will find for the plaintiff."

The briefs contain an exhaustive argument concerning the application of the statute of frauds to the oral agreement referred to in the second cause of action, and the defendant criticizes the sixth instruction because it ignores that statute. If the testimony were undisputed that an oral promise was made by the defendant, while acting as agent for his principal, to purchase from the plaintiff the stock bought by him from that principal, the statute would necessarily be involved in this case. But we find no evidence of such a promise. The record discloses that the defendant, in connection with other individuals, incorporated the Luebben Baler Company for the purpose of manufacturing a machine intended for use in baling hay; that the corporation exchanged a considerable fraction of its stock for the patent owned by Luebben and his associates, and the remainder of that stock was placed in the corporation's treasury to be sold for the purpose of furnishing capital to the company to be used in manufacturing and selling machines. Fifteen shares of the treasury stock were sold to the plaintiff upon the corporation's promise to refund the price thus paid so soon as a certain number of its machines should be manufactured and sold. The defendant also executed the written agreement referred to in the first paragraph of this opinion. Subsequently the plaintiff became secretary of the company. He testifies that the defendant urged him to

purchase more treasury stock from the corporation, and said: "If you people are dissatisfied and want your money back, I will pay you every dollar of your money back." The plaintiff's wife and daughter corroborate his testimony with regard to the defendant's statement. If the defendant made the promise, the case may fall within the rule announced in *Trenholm v. Kloepper*, p. 236, *post*, but it is not an agreement to purchase stock. Thereafter at intervals the plaintiff purchased from the corporation treasury stock, aggregating 49 shares, for $4,900, and the corporation agreed to refund this money out of the proceeds of the sale of its machines. During this time the plaintiff was in a position to know as much about the affairs of the corporation as any other person, and purchased 170 shares of stock originally issued to one of the promoters. The plaintiff did not testify that he was induced by the defendant's promise to purchase the 49 shares of stock last acquired from the corporation.

The defendant in his testimony squarely denies having made any promise to purchase the plaintiff's stock or to pay him any money, except the $1,000 referred to in the written contract. In the state of the record, a finding by the jury for or against either party concerning the oral promise testified to by the plaintiff would be sustained by the evidence. If the testimony were not in conflict we should incline to the view that, while the instructions did not submit the facts as testified to by the plaintiff and his witnesses, the charge is not prejudicially erroneous, but, in view of the sharp conflict in the evidence, we are of opinion that the instruction should not be approved.

The judgment of the district court, therefore, is reversed and a new trial granted upon the plaintiff's second cause of action, but the court is directed to enter a judgment in the plaintiff's favor upon the verdict returned upon the first cause of action, with legal interest from the date that verdict was rendered.

REVERSED.

THOMAS H. MCGAHEY, APPELLEE, V. CITIZENS RAILWAY COMPANY, APPELLANT.

FILED JANUARY 9, 1911. No. 16,241.

1. **Street Railways:** INJURY AT CROSSING: NEGLIGENCE. If the driver of a vehicle at a street intersection is reasonably justified in believing that he can pass over a street railway track before an approaching car, if propelled at its usual and ordinary rate of speed, will reach that point, he should not be held, as a matter of law, guilty of negligence in attempting to cross.

2. ———: ———: ———: QUESTION FOR JURY. If there is evidence tending to prove that a heavy, unwieldy vehicle was almost upon and being propelled across a street railway track at the intersection of two public streets, and that the motorman in control of a street car approaching said intersection at right angles to the course of the vehicle either did not act with reasonable diligence to decrease the speed of said car so as prevent a collision, or after the car had been brought almost to a stand-still permitted it to start suddenly and move at a greatly accelerated rate of speed so as to collide with said vehicle, it is not error to submit to the jury the issue of the motorman's negligence in failing to control the car before as well as after he was apprised of the driver's perilous position.

3. ———: ———: ———: ———. If the pleader charges a cause of action based upon the defendant's negligence in operating a street car, and also alleges that the motorman in charge, after knowing that the plaintiff was in a dangerous position with respect to said car, negligently failed to exercise ordinary care to control it, and evidence is received tending to support those allegations, the case may be submitted to the jury upon both theories.

4. **Negligence:** DEFENSE OF CONTRIBUTORY NEGLIGENCE: BURDEN OF PROOF. If the defendant pleads that the plaintiff was guilty of contributory negligence, or that the accident resulted solely from his negligence, the burden is upon the defendant to prove those defenses, and does not shift during the trial of the case, but he should receive the benefit of the plaintiff's evidence tending to prove those issues.

5. ———: ———: COMPARATIVE NEGLIGENCE: INSTRUCTIONS. The defendant, however, is not prejudiced by an instruction that the burden is not upon him to prove contributory negligence if the plaintiff's testimony proves that fact, and instructions to that effect do not involve the doctrine of comparative negligence.

6. ———: CONTRIBUTORY NEGLIGENCE. The plaintiff's negligence will not defeat a recovery unless it was the sole cause of the plaintiff's injury, or concurred or co-operated with the defendant's negligence as a proximate cause of the accident.

7. Trial: WITHDRAWAL OF EVIDENCE. It is not error to withdraw from the jury's consideration facts which by no reasonable construction tend to establish a defense to the action or to mitigate the plaintiff's damages.

8. ———: INSTRUCTIONS. "Where instructions requested are substanially given in the charge prepared by the court on its own motion, it is not error to refuse to repeat them, though expressed in language different from that used by the court." *Curry v. State*, 5 Neb. 412.

9. The evidence examined and commented upon in the opinion, and *held* sufficient to sustain the verdict.

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

Hainer & Smith and *Clark & Allen*, for appellant.

Halleck F. Rose and *Wilmer B. Comstock*, *contra.*

ROOT, J.

The gist of this action is the defendant's alleged negligence in operating a street car so that the plaintiff was injured and his vehicle damaged while crossing the defendant's railway at the intersection of Seventeenth and N streets in the city of Lincoln. The plaintiff prevailed, and the defendant appeals.

The testimony is conflicting and parts of it are extravagant; but, since the jury found for the plaintiff, it is our duty to consider the transaction in the light most favorable to him.

It appears that N and Seventeenth streets are each paved and 100 feet in width; that a sidewalk and parkway cover 20 feet of the space on each side of the streets, and the defendant maintains a double-track railway on N street, which runs east and west; that the surface of N

street slopes slightly toward the east, and the gutters are seven-tenths of a foot lower than the crest of the street. It further appears that there are dwelling houses along the south side of N street westward from Seventeenth street, so situated that the porches are flush with the lot line, and there are seven shade trees between the curb and sidewalk on the south side of N street west of Seventeenth. The accident occurred about 8 o'clock in the forenoon of a still, clear day in September, while the plaintiff was driving northward on the east side of Seventeenth street riding upon an air compressor eight feet in height which weighed about 5,200 pounds and was painted a brilliant red. The plaintiff's vehicle had almost cleared the southernmost railway track when one of the defendant's cars moving eastward collided with a rear wheel of the air compressor, and as a result the vehicle was damaged and the plaintiff injured. The testimony discloses that the plaintiff, about the time his team crossed the footpath on the south side of N street, noticed the car in question, and calculated he could drive over the track before the car would cross Seventeenth street; that subsequently, as he urged his horses forward, he raised one hand as a warning. The motorman and conductor upon the car both testify to having noticed the signal, but the testimony is in hopeless conflict concerning the space then intervening between the car and the air compressor. The plaintiff says the distance was about 125 feet, the defendant's employees say about 45 feet. The jury would be justified in finding, from all of the evidence, that the motorman did not see the plaintiff until the latter raised his hand. One witness testifies that the car was well under control as it entered the intersection of said streets, but immediately thereafter the speed rapidly increased until the collision occurred, and that directly after the accident the motorman exclaimed that he "thought the old fool was going to get off of the track when he started up this second time." If the motorman did not notice so conspicuous an object as the plaintiff's vehicle until the

car was almost upon the footpath on the west side of Seventeenth street, the jury might say he was not on the lookout for teams or pedestrians. If the car was 125 feet distant from the plaintiff when the motorman noticed the former's uplifted hand, and thereupon applied all of his power to the brakes upon the car, it must have been running at a terrific rate of speed or else the appliances were defective or ill-suited for controlling its movements. If, as the witness Skinner testifies, the car was well under control at the time it approached said intersection, but its speed was thereafter suddenly accelerated, there was gross disregard for the plaintiff's safety. The court therefore was justified in submitting the cause in a double aspect; that is to say, to permit the jury to find whether the defendant was negligent in failing to exercise reasonable care to control the speed of its car at the time of and shortly preceding the accident, or to find whether the motorman, after discovering the plaintiff's perilous situation, brought about possibly by his own negligence, failed to use ordinary care to avert the accident. *Omaha Street R. Co. v. Mathiesen,* 73 Neb. 820; *Zelenka v. Union Stock Yards Co.,* 82 Neb. 511; *Wally v. Union P. R. Co.,* 83 Neb. 658; *Wenninger v. Lincoln Traction Co.,* 84 Neb. 385; *Smith v. Connecticut Railway & Lighting Co.,* 80 Conn. 268, 17 L. R. A. n. s. 707.

The defendant criticizes the instructions in so far as they recognize the "last clear chance" doctrine, and insists that no such a cause of action is stated in the petition. It appears, however, that the pleader, after charging many alleged acts of negligence on the part of the defendant and its employees, alleged that the motorman negligently failed to stop the car after he knew the plaintiff was in a perilous situation. The defendant did not move to compel the plaintiff to make the petition more definite or to separately number and state the causes of action, and the court was justified in submitting the case upon the theory that it involved the law of the "last clear chance."

The jury were instructed that the burden of proof was upon the plaintiff to prove by a preponderance of the evidence the material allegations in the petition, and the third instruction is as follows: "When the plaintiff has so shown these facts, then the burden of proof is upon the defendant to prove by a preponderance of the evidence the allegations in its answer constituting its defense to plaintiff's action; that is to say, that any injuries received by the plaintiff were the proximate result of his own negligence, or that his own negligence contributed thereto as a proximate cause thereof. If, however, the plaintiff's own testimony shows that he was guilty of negligence at the time of the accident, then the burden would not be upon the defendant to show such fact."

The defendant insists these instructions submitted the law of comparative negligence to the jury. We do not so understand the charge. We do not approve the third instruction because the burden of proving contributory negligence does not shift during a trial, but remains with the defendant if he pleads that defense. *Rapp v. Sarpy County,* 71 Neb. 382. The court evidently desired to instruct the jury that contributory negligence might be established by the plaintiff's evidence and they should give the defendant the benefit of all evidence upon that issue irrespective of the source from which it came. The plaintiff's testimony upon direct as well as upon cross-examination is such that the jury might have found that he was guilty of contributory negligence, and the defendant was entitled to an instruction giving him the benefit of that testimony. We are of opinion that the instructions did present that principle to the jury, and in so far as the court relieved the defendant of the burden of proof it has no just ground for complaint. The defendant's counsel, however, argue that the jury should not have been told that contributory negligence to constitute a defense must have been a proximate cause of the accident. A fair construction of this instruction is that the plaintiff's negligence would not bar a recovery un-

less it concurred or co-operated with the negligence of the defendant as the proximate cause of the accident, or was in itself the proximate cause thereof. Thus considered, the instruction is in harmony with the law as announced in *Vertrees v. Gage County,* 81 Neb. 213. See, also, authorities collated in 29 Cyc. 505.

Exception is taken to an instruction to the effect that the plaintiff had a right to "drive his team and air compressor across the tracks of the defendant and through the street intersection in question in the condition as to equipment of the vehicle and team disclosed by the evidence." The court further instructed the jury that any failure on the plaintiff's part to exercise ordinary care in the control of said vehicle would constitute contributory negligence. It appears that the air compressor was not equipped with brakes, and that no breeching was attached to the harness upon the horses, and complaint is made that the instruction withdrew from the jury the alleged negligence of the plaintiff in failing to provide those accessories to his vehicle and harness, but the proof is certain that the want of brakes or of breeching in no manner contributed to the accident. The surface of the street was up-grade from the gutter to the track, and the plaintiff's failure to halt before crossing cannot be attributed to the condition of the harness or to the want of brakes upon the air compressor.

The defendant's counsel print in their brief nine instructions requested by them and not given by the court. The court's charge contained the greater part of the principles of law embodied in those instructions, and, so far as we are advised, no error was committed in not giving them verbatim. *Curry v. State,* 5 Neb. 412.

Upon a consideration of the entire record, we find no error prejudicial to the defendant. The judgment of the district court, therefore, is

AFFIRMED.

CHARLES O'CONNOR, APPELLEE, V. MICHAEL WATERS, ADMINISTRATOR, ET AL., APPELLANTS.

FILED JANUARY 9, 1911. No. 16,243.

1. **Specific Performance:** EVIDENCE. The direct, clear and uncontradicted testimony of two disinterested witnesses to the effect that a father, subsequent to his son's majority, promised that if the son would remain at home and care for his parents during their natural life he should have a definitely described tract of real estate, and testimony that the son for over 20 years, and up to the time his parents departed this life, performed his agreement, may, if believed by the court, support a decree for the specific performance of that contract.
2. **Appeal:** DEFENSE NOT RAISED BELOW. In such a case, if the other children claim the real estate under their father's will, but do not plead that the farm was their ancestor's homestead at the time the contract was made, and no such issue is tried in the district court, the defendants will not be heard in this court to urge that defense.

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

Sullivan & Griffin, Alfred Pizey, F. S. Berry and *M. C. Beck,* for appellants.

J. J. McAllister and *R. E. Evans, contra.*

ROOT, J.

This is an action to enforce the specific performance of an oral contract, by the terms of which Patrick O'Connor agreed to convey or devise to his son, the plaintiff, a quarter section of land in Dakota county. The plaintiff prevailed, and the defendants appeal.

It appears that in 1879, Patrick O'Connor, now deceased, in company with his wife and seven children, came to Dakota county, and two years subsequently acquired title to the land in controversy. Patrick O'Connor's four daughters remained at home until they entered

the marriage relation, but the sons, Morris and John, and Charles, the plaintiff, did not marry. Patrick O'Connor made some inconsiderable provision for his daughters when they married, and in 1897, shortly before his wife died, conveyed a farm to his son Morris. The plaintiff was born in 1862, and has lived upon the land in controversy since his father acquired title thereto. Patrick O'Connor was a sucessful breeder of and dealer in live stock. While the testimony is conflicting, it fairly appears therefrom that Charles O'Connor was industrious and a successful farmer, and that he worked upon the home farm, assisted in caring for his father's live stock, cultivated rented farms, and superintended the men hired to assist in the farm work. So far as we are advised, the profits growing out of the sale of the crops and the live stock grown upon these farms were received by Patrick O'Connor. In short, if the testimony correctly portrays the facts, Charles O'Connor, before his father's death, received little other than five horses, his support, and a fairly generous supply of spending money in return for the services rendered by him since he attained his majority in 1883.

Morris O'Connor, the plaintiff's brother, testified in substance that he departed from home to work for himself, but returned in 1884 and remained until 1897, upon his father's promise to purchase the witness a farm if he would work and help pay for it, which was done. Morris also testifies: "He (his father) told me right in front of Charlie, right in front of the barn door, that the home place would be Charlie's; that he had made an agreement that he was to stay on the place and take care of him and my mother, until they were through with the place; when they died the place would be his; and if I stayed home and helped him to pay for another place he would buy one for me." This testimony is clear, direct and certain that the promise was made. No one contradicts the testimony. Possibly no one other than the plaintiff could deny it, but if Morris O'Connor should be believed,

the deceased admitted the obligation pleaded in the petition.

The witness Hartnett was called and testified as a witness for both sides of this controversy. Hartnett testifies to a conversation with Patrick O'Connor in 1897, after Mrs. O'Connor's death, as follows: "I asked him (Patrick O'Connor), I says, 'Charlie wanted me to ask you what you was going to do for him,' and he says, 'I will give him this place at my death; I promised Charlie O'Connor's mother on her death bed that this should be his place, and I shall keep my promise, and, in case I do not do it, I want you, John Hartnett, to remember that I have to give it to him.' And Charlie says, 'What will I have to show for that?' He says, 'You have John Hartnett for a witness that I promised you.'" This testimony not only corroborates Morris O'Connor, but leaves the impression that Patrick O'Connor did not propose to reduce his promise to writing, and that his wife for some reason feared he would not fulfil his obligation. Possibly Charles O'Connor was his mother's favorite child; he had performed his part of the contract for 14 years, and his mother's concern lest her husband might repudiate that contract is convincing evidence that it actually was made.

Seven other witnesses testified to Patrick O'Connor's repeated declarations that the plaintiff should have the farm when the declarant died. Many of these statements are testamentary in character, but some of them indicate that O'Connor recognized a contractual obligation on his part to devise or convey the farm to the plaintiff. There are circumstances tending to discredit some of these witnesses, but the witness Hartnett appears to be above reproach. Morris and his sister, Annie Mullin, refused to defend this action; it is contested by the other three sisters and the son John.

Patrick O'Connor died in December, 1905, and five days before dissolution executed a will, which has been duly probated, whereby $500 is bequeathed to the plaintiff, and

various other sums, aggregating $5,600, are bequeathed to the other children and for charity. The testator charged the draughtsman of the will not to permit the plaintiff to know its contents until subsequent to the testator's death. The defendants brought forward witnesses who testified in effect that the testator had frequently declared that he would divide his estate in equal shares between the plaintiff and his sister Mary, and she testifies to a conversation between the testator, the plaintiff, Morris O'Connor, Mrs. Mullin, and the witness, in 1897, wherein her father said in effect that he intended to and would divide his estate equally between the witness and the plaintiff after the other daughters and the son John had been provided for. The witness gave two different and contradictory versions of this conversation, and there are facts and circumstances appearing in the record which tend in some degree to detract from her credit. Mrs. Mullin practically contradicts her sister, and Morris flatly denies that any such statements were made.

In view of the fact that two disinterested witnesses have testified in clear and certain terms to the admissions of the deceased that he had agreed to transfer the farm to the plaintiff, corroborated as they are by seven other witnesses, we shall find that the promise was made. The evidence is wholly inadequate to justify a belief that Patrick O'Connor repudiated his contract, unless the execution of his will five days before his death had that effect. We do not question the right of a parent to repudiate, or a court of equity to cancel, a contract, whereby a parent, in consideration for his support, conveys his home, or agrees to convey his home, to a child or to a stranger, and subsequently the grantee or promisee fails reasonably to fulfil his part of the contract. But Patrick O'Connor made no complaint of the plaintiff's conduct.

The next inquiry is whether there was such performance on the part of the plaintiff as to justify a judgment

of specific performance. The trial court rigidly excluded all of the plaintiff's own testimony tending to show that performance or negativing the payment of compensation for the services rendered his father during the 22 years succeeding the witness' majority. Notwithstanding this fact, there is a mass of testimony tending strongly to prove that during all those years the plaintiff was the mainstay of his father's business, and that the elder man received practically all of the fruits of his son's labor and skill. We feel justified in finding that those benefits were bestowed by the plaintiff in reliance upon his father's promise, and that it is difficult, if not impossible, to fix their value. Furthermore, by remaining at home, the plaintiff yielded whatever advantage might have come to him by engaging in business on his own account; that he might have signally failed does not detract from the value of the consideration involved in the waiver of his opportunity.

We agree with the defendants' counsel that courts look with suspicion upon claims of this character brought forward, as they generally are, after death has closed the lips of one party thereto. On the other hand, the parties not infrequently are unacquainted with the character of evidence demanded by the law to establish beyond controversy a contract affecting title to real estate, and where the arrangement is between parent and child, the younger person generally has no thought that the elder will not redeem his promise. The court, in its desire to do justice between the conflicting claimants, should not lose sight of the difficulties under which the living, as well as the representatives of the dead, labor, but should carefully examine the testimony in the light of the circumstances surrounding the parties, should consider their education and prejudices, should attempt to think as they probably thought, and, after weighing all the facts and circumstances brought to its attention by the evidence, find whether the plaintiff and the other party to the alleged contract did enter into an agreement, and, if so,

whether it was substantially performed on the plaintiff's part. This we have attempted to do, and, after a mature consideration of the evidence, find that the contract was made substantially as alleged, and that the plaintiff should have the relief prayed for in his petition. *Kofka v. Rosicky*, 41 Neb. 328; *Harrison v. Harrison*, 80 Neb. 103; *Peterson v. Bauer*, 83 Neb. 405; *Hespin v. Wendeln*, 85 Neb. 172.

The defendants argue that, since the real estate constituted the homestead of Patrick O'Connor and his wife at the time the contract was made, it should be given no effect so far as that estate is concerned, and the decree of the district court should at least be modified. No such an issue is joined by the pleadings, nor was that defense tried in the district court, and we are of opinion it has been waived.

Upon the entire record we find that the judgment of the district court is right, and it is

AFFIRMED.

REESE, C. J., not sitting.

HOWARD A. CHAPIN ET AL., APPELLANTS, V. VILLAGE OF COLLEGE VIEW ET AL., APPELLEES.

FILED JANUARY 9, 1911. No. 16,261.

1. **Municipal Corporations:** PROCEEDINGS TO DISCONNECT LANDS: REVIEW. A judgment of the district court in a proceeding prosecuted under section 101, art. I, ch. 14, Comp. St. 1909, to exclude territory from the boundaries of a municipal corporation will not be set aside on appeal, unless it is made to appear that the trial court committed an important mistake of fact, or made an erroneous inference of fact or of law.

2. ———: ———: ———. And this rule applies with peculiar force where the trial judge inspected the premises before rendering judgment.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Tibbets & Anderson, for appellants.

Field, Ricketts & Ricketts and *T. J. Doyle, contra.*

ROOT, J.

This is a proceeding prosecuted under the provisions of section 101, art. I, ch. 14, Comp. St. 1909, to disconnect from the village of College View four irregular but contiguous tracts of land aggregating 27 acres. The defendants prevailed, and the plaintiffs appeal.

The history of College View, published in *State v. Village of College View,* p. 232, *post,* is referred to as part of this opinion. The plaintiffs, in 1892, purchased five acres of their present holdings, and acquired the remainder thereof in 1898. This land is not platted and is used solely for agricultural and horticultural purposes. The land immediately to the south at one time was platted as an addition to College View, but subsequently the streets and alleys were vacated and the land excluded from the village limits. The land immediately west of the plaintiffs' property was also detached from the village, and various other tracts of real estate have been separated from the village by the action of its trustees or the judgments of the court. Thirty-five acres of land immediately east of the plaintiffs' premises are used for pasturage, but this tract has been divided into smaller parcels of from one acre to five acres each, which are on the market for sale. The business center of the village is about one-half mile from the plaintiffs' property, but permanent sidewalks extend two-thirds of that distance, and are being extended year by year. The plaintiffs' principal place of business is in Lincoln, where most of their mail is received; their children attend the Lincoln public schools, and there is but little community of interest between the litigants and the

other residents of College View. On the other hand, the plaintiffs receive mail at College View and are entitled to increasing in population, and part of the growth is westward in the direction of the plaintiffs' land. The village trustees have not been generous in improving the highways adjacent and near to the plaintiffs' real estate, but the village school privileges. College View is steadily there has not been an entire failure to observe the duties cast upon them by the law in this respect. Recently a traction company constructed a line of street railway from Lincoln to within a short distance of the plaintiffs' land. Suburban homes are being constructed at intervals along the line of that railway, and, while the proof is not strong, we do not think we should say that there is an entire absence of evidence to prove some community of interest between the plaintiffs' premises and the other parts of College View.

It appears that the district judge during the trial, with the consent of the litigants, inspected the plaintiffs' property and its surroundings. Doubtless the information thereby received was a potent factor in determining the judgment subsequently rendered. From the nature of things, that evidence is not before us.

In *Shavlik v. Walla,* 86 Neb. 768, we said, in substance, that under such circumstances the court's findings were entitled to great weight. Furthermore, in proceedings like the one at bar, the judgment of the trial court should be sustained, unless it committed an important mistake of fact, or made an erroneous inference of fact or of law. *Michaelson v. Village of Tilden,* 72 Neb. 744; *Gregory v. Village of Franklin,* 77 Neb. 62; *Bisenius v. City of Randolph,* 82 Neb. 520.

We do not feel justified in saying that the district court committed any such error, and its judgment, therefore, is

AFFIRMED.

REESE, C. J., not sitting.

STATE, EX REL. W. WOOD BUTE, APPELLANT, V. VILLAGE OF COLLEGE VIEW ET AL., APPELLEES.

FILED JANUARY 9, 1911. No. 16,262.

1. **Quo Warranto:** INCLUSION OF LANDS IN MUNICIPALITY. A nonresident owner of agricultural lands illegally included within the boundaries of a village may maintain proceedings by quo warranto for the purpose of preventing the municipality from exercising jurisdiction over his real estate.

2. ———: ———: LACHES. But in such a case the relator should not prevail if he and those under whom he claims title, for 16 years after the municipality, under color and claim of right, assumed to treat said property as part of the village, stood by without substantial objection until streets were graded and a permanent sidewalk built so as to connect the relator's property with the built-up part of the village, and his land lies between the business section of the village and the only railway within its limits.

APPEAL from the district court for Lancaster county: WILLARD S. STEWART, JUDGE. *Affirmed.*

Tibbets & Anderson, for appellant.

Field, Ricketts & Ricketts and *T. J. Doyle, contra.*

ROOT, J.

This is a proceeding in the nature of a writ of quo warranto to exclude the village of College View and its trustees from taxing or otherwise exercising authority over the relator's real estate. The respondents prevailed, and the relator appeals.

In 1892 the county commisioners of Lancaster county incorporated four sections of land and the inhabitants thereof as the village of College View. The relator charges that the jurisdictional facts essential to clothe the commissioners with authority to make that order did not exist; that his property is suitable and used for agricul-

tural purposes only, and receives no benefits whatever from the village government, but was included within the corporation's boundaries for the sole purpose of levying taxes thereon. The respondents plead the facts which, they assert, authorized the commissioners to make the order of incorporation, deny the allegations in the petition, and plead the statute of limitations, laches, and an estoppel.

College View is about five miles from the business center of the city of Lincoln and is connected therewith by two lines of street railway. A college, with an attendance of about 500 students, a sanitarium, various industries, retail stores, and about 300 dwelling houses are located within the village, which now contains about 1,500 inhabitants. Since 1892 the village has maintained a municipal government, and the proof shows that it is a flourishing and growing community. A line of the Chicago, Burlington & Quincy Railway Company's railway runs through the southern part of the village about a mile distant from the post office, and the relator's tract of land, which contains about 43 acres, lies immediately north of the railway company's right of way. A sidewalk extends along the east side of the highway immediately east of the relator's land, northward through the business part of the village, and street lights are maintained to within 40 rods of his premises. The land abutting the east side of this highway is subdivided into tracts of from one to five acres each. The railway company does not maintain a station at College View, but delivers freight in car-load lots. Passengers come and go by the way of Lincoln, and the express companies serve the people of College View by the use of street cars.

The argument in the relator's brief suggests that we should annul the order of incorporation made by the commissioners in 1892, but at the bar the argument expressed the thought that not the organization but the legitimate boundaries of the corporation should be considered and defined. The people of an unincorporated community

may be united in a municipal corporation if the statutory conditions precedent exist and the procedure provided by law is followed, but a *de facto* municipal corporation is recognized by the law. *Arapahoe v. Albee,* 24 Neb. 242. To create a *de facto* corporation, there must exist a valid statute authorizing incorporation, organization in good faith thereunder by at least a colorable compliance with the law, and an assumption of corporate power. 28 Cyc. 172. All of these elements exist in the history of College View. Furthermore, by making the corporation a party to this action, the relator admits its existence. *State v. Uridil,* 37 Neb. 371; *State v. Lincoln Street R. Co.,* 80 Neb. 333.

In *State v. Dimond,* 44 Neb. 154, it was determined that, in cases like the one at bar, proceedings in the nature of a writ of quo warranto might be prosecuted to relieve the relator's real estate from the unlawful exercise of authority with respect to taxation by municipal authorities, and that decision has been affirmed in an unbroken line of decisions. The relator argues that the statute of limitations does not apply to the case at bar. Whether the statute of limitations will bar a proceeding in the nature of a writ of quo warranto, or an information in that nature, where private ends, and not public interests, will be subserved by the judgment sought, is an interesting question. Since the relator does not insist that we should annul the order creating the corporation of College View, it is unnecesary to determine that point. The relator does not reside upon the territory in dispute, and hence, under the rule announced in *State v. Dimond, supra,* should be permitted to urge his suit in the form in which it is presented. Whatever may be said with respect to parts of the territory included within the original boundaries of College View, there were good reasons for exercising jurisdiction over the relator's tract; it lies between the college campus and the business part of the village, on the one hand, and the railway just referred to, on the other. By including this property, the village

could extend its police regulations over the railway and side-tracks and such other improvements as the railway company might make for the benefit of the citizens of College View. True, the land immediately east of the relator's property forms a connecting link between the built-up part of the village and the railway, but to include this land and exclude the relator's would mar an otherwise more harmonious outline, and would probably give rise to endless disputes between the village trustees, on the one hand, and the county commissioners and the road overseer, on the other, over the maintenance of the highway. The relator's grantor engaged in an abortive lawsuit to oust the village trustees from exercising authority over this land, but with that exception the owners stood idly by until the village constructed, or caused to be constructed, the sidewalk just referred to, the greater part of which is permanent, so that the relator is furnished a convenient way from his property to his post office, trading places, church, schools, and to the street railway, which furnishes him with transportation to the greater part of the city of Lincoln.

We are of the opinion that the relator's laches and the laches of those under whom he claims title are such, when considered in connection with the facts developed by the evidence in this case, that he should not prevail. *State v. Lincoln Street R. Co.*, 80 Neb. 333. We have not overlooked the case of *Chicago, B. & Q. R. Co. v. City of Nebraska City*, 53 Neb. 453, but in that suit the property owner acted immediately after the city sought to enforce a tax levied upon property without its boundaries, but within the limits described in a void ordinance passed for the purpose of bringing the real estate within the city limits.

Upon the entire record, we find that the judgment of the district court is right, and it is

AFFIRMED.

REESE, C. J., not sitting.

BELLE S. TRENHOLM, APPELLEE, V. WILLIAM KLOEPPER, APPELLANT.

FILED JANUARY 9, 1911. No. 16,503.

1. **Statute of Frauds:** ORIGINAL CONTRACT. If an officer of a corporation orally promises a prospective purchaser of the corporate stock to repay the purchase price at any time and the purchaser acts upon the promise, the agreement is an original contract, and is not within the statute of frauds. The promisor does not thereby agree to answer for the debt, default or misdoings of another person, nor does he agree to purchase goods, wares, merchandise or things in action.

2. **Corporations:** SALE OF STOCK: ESTOPPEL. And in such a case the purchaser is not estopped from maintaining her action because, intermediate the date of her purchase and the day she requested the promisor to perform, she surrendered her certificate to the corporation and received in lieu thereof another certificate representing her original purchase, and a stock dividend.

3. **Trial:** INSTRUCTIONS. Where the law is not misstated by the trial court, but a legal proposition germane to the principles of law announced is not included in the instructions, a party will not be heard to complain if he did not submit to the trial court an instruction containing the proposition omitted as aforesaid.

4. **Appeal:** SPECIAL FINDINGS: DISCRETION OF COURT. "Interrogatories for special findings may be submitted to the jury or refused in the discretion of the trial court, and unless there has been an abuse of discretion in that regard, the ruling will not be disturbed." *Murphy v. Gould*, 40 Neb. 728.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

George W. Berge, for appellant.

T. J. Doyle and *G. L. De Lacy, contra.*

ROOT, J.

The plaintiff alleges in her petition that in January, 1905, she bought from the defendant ten shares of the capital stock of a corporation; that to induce her to make said purchase the defendant orally agreed to pay to her

upon demand the amount of money she should pay for said stock; that she has requested the defendant to pay said money, but he refuses, etc. The defendant denies the alleged agreement, and pleads the statute of frauds and an alleged estoppel. Plaintiff prevailed, and the defendant appeals.

1. The argument of counsel goes largely to the application of the statute of frauds to the transaction testified to by the plaintiff. The defendant testified in substance that in his negotiations with the plaintiff he acted solely as an agent of the corporation. It appears from the plaintiff's evidence that she is a widow; that during her husband's lifetime the plaintiff and the defendant were neighbors and friends; that subsequent to her husband's death the defendant suggested to the plaintiff that she purchase stock in the Lincoln Transfer Company, a corporation. The plaintiff testified: "I told Mr. Kloepper that I would not put my money into stock unless I could get it out when I needed it; that I did not have the money to spare to leave my money in there any length of time, not any great length of time, and he said any time I notified him and gave him three or four months' notice I could have my money." The plaintiff further testifies that in purchasing the stock she relied upon the defendant's statement that he would pay her the money if requested so to do.

The transaction, as we view it, is not within the statute of frauds. The agreement is not to answer for the debt, default or misdoings of the corporation, or of any other person, nor to purchase the stock sold to Mrs. Trenholm, but is an original undertaking on the part of the defendant that, if the plaintiff will purchase and pay for the stock, he will thereafter, upon a contingency, pay her a definite sum of money. On the plaintiff's part, the contract was fully executed, and the defendant cannot escape the consequences of his undertaking because he did not own the stock purchased in reliance upon his promise. *Moorehouse v. Crangle,* 36 Ohio St. 130; *Kilbride v. Moss,*

113 Cal. 432. The fact that the plaintiff is willing to transfer her stock to the defendant does not transfer his contract into one of bargain and sale.

2. After the certificate was issued to the plaintiff, the corporation increased its capital stock and a stock dividend was declared by those in control of its affairs. The plaintiff, in common with the other stockholders, returned her certificate of stock and received a certificate including the shares she purchased and those issued as a dividend. Counsel argue that plaintiff is thereby estopped from maintaining this action. We are not advised that the defendant changed his position by reason of the facts just referred to. If the dividend is of any value, the plaintiff has offered him not only the stock she received in the first instance, but accumulated dividends as well, so that he will be benefited rather than injured by the facts pleaded as an estoppel.

3. The defendant argues that instruction numbered 5 is erroneous because it assumes that the plaintiff purchased the stock in question from the defendant, and not from the transfer company. Whether the plaintiff purchased the stock from the defendant or from the corporation is immaterial. The material element is the defendant's promise to pay the plaintiff upon demand should she purchase the stock and subsequently become dissatisfied with her bargain. If, however, we grant, for the sake of the argument, that the ownership of the stock before it was transferred is a material element in this case, the instruction does not misstate the law. The defendant did not by a proper instruction challenge the judge's attention to the principle of law now contended for. The defendant, therefore, will not be heard to complain in this court. *Gettinger v. State,* 13 Neb. 308; *Barr v. City of Omaha,* 42 Neb. 341; *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 1.

4. The court refused to submit certain interrogatories for special findings tendered by the defendant. The giving or refusing to give such interrogatories rests in the sound

judicial discretion of the trial court, and, unless there has been an abuse of that discretion, the ruling will not be reversed. *Floaten v. Ferrell*, 24 Neb. 347; *Murphy v. Gould*, 40 Neb. 728. Had the jury answered the interrogatories as counsel suggest they should have been answered, the findings would not be inconsistent with the general verdict, so that the defendant was not prejudiced by the action of the district court. The instructions tendered by the defendant and refused by the court are framed upon the theory that the statute of frauds is a defense to this action. Having held to the contrary, we further hold that the court did not err in refusing to give those instructions.

Upon the entire record, we are satisfied that the defendant has had a fair trial, and that the verdict is sustained by the evidence and the law. The judgment of the district court, therefore, is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.

FILED JANUARY 9, 1911. No. 16,707.

Railroads: CROSSINGS: POWERS OF RAILWAY COMMISSION. The state railway commission has no authority to order a railway company to construct a crossing over its railway at a point within the limits of a village where no street has been opened.

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

M. A. Low, P. E. Walker, E. P. Holmes and *G. L. De Lacy*, for appellant.

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

ROOT, J.

In April, 1907, the trustees of the village of Hallam, acting under subdivisions 27 and 28, sec. 69, art I, ch. 14, Comp. St. 1907, condemned a right of way for a village street over the right of way and railway tracks of the Chicago, Rock Island & Pacific Railway Company. Subsequently a complaint was filed in the office of the Nebraska state railway commission to compel the railway company to "open up said public street and place a crossing across its said line of railway over said street, so that said street may be used by the citizens of Hallam and the traveling public in said village." The railway company answered, challenging the jurisdiction of the commission over the subject matter of the controversy, and contending that all and singular the condemnation proceedings are void, and that the statute under which the village trustees acted is unconstitutional. After a hearing upon the merits, the commission ordered the railway company "to construct and thereafter maintain a suitable crossing, including such culverts, approaches and planking as may be necessary, over its roadbed and track where Walnut street in the village of Hallam, Nebraska, intersects the same, and in the construction and maintenance of said crossing to do all that is required in providing a safe and suitable highway by reason of the construction of the railroad roadbed and track." Thereupon the railway company commenced an action in the district court for Lancaster county to annul said order. Issues were joined, and upon a hearing there was judgment for the commission. The railway company appeals.

The principal arguments relate to the jurisdiction of the commission over the subject matter of the complaint. The commission contends that by virtue of the amendment to the constitution creating the railway commission and the enactment of chapter 90, laws 1907 (Comp. St. 1907, ch. 72, art. VIII) it has exclusive original jurisdiction over the contention between the authorities of the

village of Hallam and the railway company. *State v. Chicago, B. & Q. R. Co.,* 29 Neb. 412, is also cited by the attorney general. At the time the amendment to the constitution was adopted, and subsequently when the railway commission statute was enacted, the statutes provided that village trustees might by ordinance create, open, widen, extend, improve and vacate streets within the village limits, "and to take private property for public use: * * * Provided, however, that in all cases the city or village shall make the person or persons, whose property shall be taken or injured thereby, adequate compensation therefor, to be determined by the assessment of five disinterested householders, who shall be elected and compensated as may be prescribed by ordinance and who shall in the discharge of their duties act under oath," etc. Comp. St., ch. 14, art. I, sec. 69, subds. 27, 28, *supra.*

Acting under this grant of power, the trustees of the village of Hallam by ordinance extended Walnut street by condemning a right of way across the railway company's right of way, and the company's damage was ascertained by five householders of the village elected in conformity to the provision of the ordinance. If the statute, the ordinance and the proceedings thereunder are lawful, the village authorities by legal process can compel the railway company to relax its exclusive control over the right of way thus condemned, and to construct a safe and suitable crossing over its railway. The authority granted the trustees to locate and open streets is administrative in its character, and its exercise, when pursued within the limitations of the law, should not be reviewed by the courts. *Otto v. Conroy,* 76 Neb. 517; *Stone v. City of Nebraska City,* 84 Neb. 789. Notice, however, must be given the property owner so that he may appear before the appraisers and protect his rights. *Wilber v. Reed,* 84 Neb. 767. The legislature may authorize a municipality to enact an ordinance defining a reasonable procedure for the exercise of its authority. *State v. Cosgrave,* 85 Neb. 187; *Paulsen v. Portland,* 149 U. S. 30, 38. This the

trustees attempted to do. The amendment to the constitution provides: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But in the absence of specific legislation the commission shall exercise the powers and perform the duties enumerated in this provision." The act of 1907, *supra,* among other things, provides: "Section 2. (*b*) Said commission shall have the power to regulate the rates and services of, and to exercise a general control over all railroads * * * engaged in the transportation of freight or passengers within the state. (*c*) Said commission shall investigate any and all cases of alleged neglect or violations of the laws of the state by any railway company, * * * subject to the provisions hereof, doing business in this state, or by the officers, agents or employees thereof, and take such action with reference thereto as may be provided herein, or under the laws of this state providing for the regulation of railway companies. * * * (*i*) The said commission shall have power to examine into and inspect, from time to time, the condition of each railway, or common carrier, its equipment, and the manner of its conduct and management with regard to the public safety and convenience in the state." Section 110, ch. 78, Comp. St. 1907, provides that any railroad corporation whose railway crosses "any public or private road shall make and keep in good repair good and sufficient crossings on all such roads including all the grading, bridges, ditches and culverts that may be necessary, within their right of way."

The commission statute, being general in its scope, repeals by implication all earlier statutes in conflict therewith; it is remedial in character, and should be liberally construed, but neither by direct language nor fair implication does it vest the commission with power to compel a railroad company to permit any part of its right of way to be used for a village street. The statute was enacted for practical purposes, and should not be construed so as

to encourage suitors to engage in fruitless contests before the commission, and thereby divert its energies from the important legitimate subjects which demand its undivided attention. In the instant case any order the commission might make will be a vain thing. If the crossing is constructed the public will not thereby secure any relief, because the railway company controls all approaches thereto. We do not question the commission's authority to inspect railway crossings and to compel a railway company to construct them so as to safeguard the lives of passengers and employees upon its cars, but no such contention exists in the case at bar. The evidence introduced before the commission and in the district court is before us, and it clearly appears therefrom that the commission tried the question of whether public interest dictated that Walnut street should be opened across the railway company's right of way. We are convinced the legislature did not intend to withdraw from village and city authorities the jurisdiction theretofore granted them over this subject. *East St. Louis R. Co. v. Louisville & N. R. Co.*, 149 Fed. 159. The precise point now considered was not presented in *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412. That case refers to a statute subsequently held invalid, and the judgment is controlled by the provisions of section 110, ch. 78, Comp. St. 1907, *supra*, which by express terms is limited to country roads, and does not refer to streets in villages or cities. Neither does *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission*, 85 Neb. 818, sustain the attitude assumed by the commission in the case at bar. In the reported case we approved an order made to compel the carrier to furnish its patrons a station and accessories for the receipt and discharge of passengers and freight. In the instant case, if the proceedings in condemnation are valid, the village has an adequate remedy by mandamus, one it will be compelled to pursue should the order of the commission be affirmed and the railroad build the crossing, but refuse to permit travel over its right of way. If, as the railroad company con-

tends, the condemnation proceedings are void, either because the statute is unconstitutional or because its provisions have not been observed, the commission can enter no order to aid the one it has made upon the complaint filed in the case at bar. We should not presume that the legislature intended the commission to devote its valuable time to such inconclusive proceedings.

The judgment of the district court therefore is reversed, with directions to enter an order dismissing the proceedings before the commission.

REVERSED.

REESE, C. J., not sitting.

ELLA O'LOUGHLIN, APPELLEE, V. CITY OF PAWNEE CITY, APPELLANT.

FILED JANUARY 9, 1911. No. 16,215.

1. **Municipal Corporations:** DEFECTIVE SIDEWALKS: LIABILITY FOR INJURIES. By showing that a sidewalk is on the outskirts of a city and not frequently used by the public, the city cannot escape liability for neglecting to repair such walk, where it is situated within the corporate limits of the city along a street at the usual place for a sidewalk.

2. ———: ———: ———: NOTICE. In an action against a city for injuries from a defective sidewalk, proof of defendant's actual notice of the defects is not essential to a recovery, unless made so by statute, where the proofs justify a finding that the unsafe condition had existed for a year or more—a length of time sufficient to charge the city with notice.

3. ———: ———: ———. A city of the second class having less than 5,000 inhabitants cannot escape liability for neglecting to repair a defective sidewalk because notice of the defect and of the resulting injury had not been given according to the requirements of a charter applicable alone to cities of another class.

4. ———: ———: ———. A sidewalk constructed in a city along a public street in the usual place under the directions of the city, and afterward controlled by it and used by the public, should be

repaired by the city, and the city may be liable for damages resulting from negligence in failing to do so though the sidewalk is not within the limits of the street as originally platted.

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

Story & Story, for appellant.

J. C. Dort, contra.

ROSE, J.

For personal injuries caused by falling on a defective sidewalk, plaintiff recovered a judgment against defendant for $1,000, and the latter has appealed.

Under issues properly raised by the pleadings, there is proof tending to show: The sidewalk on which plaintiff was injured had been constructed on the surface of the ground by nailing boards across stringers. Some of the boards were loose, some were missing and others were broken. When walking on the sidewalk, plaintiff saw the condition of the boards ahead of her, and in attempting to get off was thrown by a loose board. Her right shoulder was dislocated, causing a laceration of the capsule of the shoulder joint. The injuries were permanent, limiting the action of the joint and resulting in atrophy of some of the muscles of the shoulder and arm. She was a professional nurse and her earning capacity as such was permanently impaired.

Insufficiency of the evidence to sustain the verdict is the first point argued. While the testimony is conflicting in some respects, a careful consideration of all the proofs adduced by both parties has led to the conclusion that the jury were justified in finding from the evidence that plaintiff, without negligence on her part, was injured through the negligence of defendant in failing to keep the sidewalk in a reasonably safe condition for travel at the

place of the injury, and that the damages sustained amounted to $1,000.

Defendant insists it was not negligent, for the reason that the sidewalk was on the outskirts of the city; that the accident occurred near the end of the sidewalk where it was not frequently used by the public; that the sidewalk had been repaired two months before plaintiff was injured and that there was no subsequent notice of the defects. This argument is untenable for the following reasons: The jury found in favor of the plaintiff on proof that the walk was within the city limits, that the repairs were insufficient, and that after they were made defendant had been notified of the unsafe condition of the walk. Conceding the sidewalk was on the outskirts of the city and infrequently used by the public, those facts would not justify defendant's failure to make repairs. *City of Ord v. Nash*, 50 Neb. 335; *City of South Omaha v. Powell*, 50 Neb. 798. Besides, there is proof to justify a finding that the walk at the place of the injury had been in an unsafe condition for a year or more. This was sufficient to charge defendant with notice of the defects. *City of Lincoln v. Smith*, 28 Neb. 762; *Olmstead v. City of Red Cloud*, 86 Neb. 528.

A reversal is also asked because defendant never had any written, statutory notice of the defective condition of the sidewalk, nor of the nature and extent of the injury, nor of the time and place thereof. Defendant is a city of the second class having less than 5,000 inhabitants, and its charter at the time of the injury did not require such notice. *Olmstead v. City of Red Cloud*, 86 Neb. 528. Plaintiff did, however, before bringing suit, file her claim with the city council.

It is also contended that the sidewalk is not located upon any street, alley or other property of the city as required by ordinance, and that therefore the city is not liable for damages. On this point it is said the street was originally 33 feet wide, that the sidewalk is not within the limits thereof, and that the street has never been ex-

tended to include the sidewalk space. Defendant cannot escape liability on this ground. In its brief it is admitted that the sidewalk is inside the city limits. The proofs show that the sidewalk runs along the street in the usual place in front of abutting lots. It was constructed under the directions of the city perhaps five years before the accident and has been used by the public ever since. In the meantime it has been under the control of the city. Under such circumstances it was the duty of the city to repair the sidewalk, and it is liable to plaintiff for the damages resulting from its negligence in failing to perform that duty. *Severa v. Village of Battle Creek*, *ante*, p. 127; *City of South Omaha v. Powell*, 50 Neb. 798; *City of Ord v. Nash*, 50 Neb. 335.

Some of the instructions are assailed as erroneous, but most of the criticism is directed to those in harmony with the rules just stated, and in the others no error prejudicial to defendant has been found. All of the assignments have been examined without finding a reversible error, and the judgment is

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY V. STATE OF NEBRASKA.

FILED JANUARY 9, 1911. No. 16,244.

Municipal Corporations: REGULATION OF STOCK-YARDS: ORDINANCES: VALIDITY. Where a city, under power expressly delegated by the legislature, passes an ordinance regulating the location of stock-yards, the regulation stands on the same footing as a statute, and will not be declared void as an arbitrary or unreasonable interference with the rights of the owners of stock-yards under the guise of police regulation, unless that fact is shown by satisfactory evidence.

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

Edson Rich, C. A. Robinson and *J. A. Sheean*, for plaintiff in error.

E. C. Calkins and *H. M. Sinclair, contra.*

ROSE, J.

In the police court of the city of Kearney the Union Pacific Railroad Company, defendant, was convicted of violating a city ordinance regulating the location of stock-yards. Upon appeal to the district court for Buffalo county, defendant was ordered to pay a fine of $10 for the offense described, and as plaintiff in error it now presents to this court for review the record of its conviction.

Among the powers which the legislature delegated to the city of Kearney to be exercised by ordinance are the following: "To make regulations to secure the general health of the city, to prescribe rules for the prevention, abatement, and removal of nuisances; to make and prescribe regulations for the construction, location, and keeping in order of all slaughter-houses, stock-yards, warehouses, sheds, stables, barns, dairies, or other places where offensive matter is kept, or is likely to accumulate, within the corporate limits or within five miles, and to limit, or fix, the maximum number of swine or neat cattle that may be kept in sheds, stables, barns, feed lots, or other inclosure within the city." Comp. St. 1909, ch. 13, art. III, sec. 48, subd. 46.

In exercising the powers thus granted, the city of Kearney passed an ordinance containing the following provisions: "It is hereby made unlawful for any person or persons, firm, partnership, corporation or association, to erect, keep or maintain any stock-yards or pens which are kept or used for the yarding or keeping of any horses, cattle, hogs or sheep in the city of Kearney within the following limits, bounded as follows: By Tenth avenue on the west, on the north by Thirty-first street, thence south on Q street to the Union Pacific railroad tracks,

thence west on said railroad tracks to K street, thence south on K street to the B. & M. railroad tracks, thence east on said B. & M. railroad tracks to Q street, thence south on Q street to Eleventh street, thence west on Eleventh street to where Eleventh street intersects Tenth avenue."

It is established by the evidence without any controversy that within the limits thus described defendant's stock-yards were located and maintained at the time charged in the information, namely, May 28, 1908. It was for this infraction of the law defendant was fined, and the only defense to the prosecution is the invalidity of the ordinance. The stock-yards have been in the present location seven or eight years. The ordinance, if valid, will require their removal, and defendant argues that the city of Kearney had no express power to make such a regulation. This proposition is clearly at variance with the language copied from the charter, which grants to the city in express terms power to make and prescribe regulations for the location of stock-yards, where offensive matter is kept or is likely to accumulate.

It is further argued: "The ordinance was void, because maintaining stock-yards within the prescribed limits was made illegal even though maintained in a perfectly legal manner, and no distinction was made between such as might be thus *properly* maintained and those that might be as a matter of fact a *nuisance*. In other words, the ordinance makes illegal that which might otherwise be perfectly legal; that is to say, it makes illegal the maintaining of the stock-yards though maintained in a manner not open to criticism." These and other reasons are urged to show that the regulation is an unreasonable and unconstitutional invasion of private rights and of private property. Apparently the ordinance is on its face a sanitary measure adopted by the city for the purpose of promoting public health, comfort and welfare. The exercise of the police power for such a purpose is an essential function of municipal government and does not necessarily await

the exigencies of an existing nuisance. When opportunely and wisely exercised, the police power generally prevents nuisances. In discussing an ordinance forbidding the distribution of handbills in public places, a custom not necessarily a nuisance *per se*, this court in an opinion by POUND, C., said: "The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition. A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the constitution. In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached." *In re Anderson,* 69 Neb. 686.

The right to make regulations for the public health and welfare may be asserted directly by the legislature or delegated to municipalities. *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549. When the latter method is adopted, as in the present case, a city ordinance stands on the same footing as a statute. Within the jurisdiction of the city government it has the force of law, and can only be held void for reasons which would justify a court in declaring a statute invalid. *In re Anderson,* 69 Neb. 686. Like a statute, an ordinance passed in the exercise of police power properly delegated to a city is presumably valid, and "the courts will not interfere with its enforcement until the unreasonableness or want of necessity of such measure is made to appear by satisfactory evidence." *Peterson v. State,* 79 Neb. 132. This court in an opinion by Judge BARNES said: "All property in this state is held subject to rules regulating the common good and the general welfare of our people. This is the price of our ad-

vanced civilization, and of the protection afforded by law to the right of ownership and the use and enjoyment of the property itself. Rights of property, like other social and conventional rights, are subject to reasonable limitations in their enjoyment, and to such reasonable restraints and regulations by law as the legislature, under the governing and controlling power vested in them by the constitution, may think expedient." *Wenham v. State,* 65 Neb. 394. The supreme court of South Dakota recently held that a city, when expressly authorized by statute, may exclude stock-yards from a residence locality specifically defined by ordinance instead of attempting to regulate them within the district described. *Town of Colton v. South Dakota Central Land Co.*, 126 N. W. (S. Dak.) 507. The reasonableness of such an ordinance, however, is a proper subject of judicial inquiry. *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549; *Halter v. State,* 74 Neb. 757; *Iler v. Ross,* 64 Neb. 710. The test of the validity of such regulations is "whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained." *Smiley v. MacDonald,* 42 Neb. 5. A later definition is: "The test in such cases is whether the regulation in question is a *bona fide* exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation." *In re Anderson,* 69 Neb. 686; *Wenham v. State,* 65 Neb. 394. When thus tested, is the ordinance under which defendant was convicted void?

Some of defendant's employees testified that the stock-yards were in good condition and were properly managed when the ordinance was passed, though generally admitting that offensive conditions had existed at times. It was also testified that accumulated matter had been removed once or twice a year, and that the surface of the ground had been raised and the drainage improved by the use of cinders, sand, stone and brickbats. One of the witnesses for defendant further testified in effect that a place on or near defendant's right of way five blocks east of the pres-

ent site would be outside of the territory from which the stock-yards were by the ordinance excluded, but that the people there would object to that location, and to avoid trouble it would be necessary, if the regulation is enforceable, to select a site outside of the city—a distance of a mile and a half. He further stated that the latter location would require 1,200 feet of additional track and an expenditure of from $4,000 to $6,000.

On behalf of the state a number of witnesses residing in the vicinity gave testimony tending to prove in substance the following facts: The stock-yards had been located in a residence neighborhood within five blocks of the principal street of the city. The natural surface of the ground was low, and occasionally stagnant water collected there. The raising of the surface did not entirely remedy the defect. In addition to the use of the grounds for shipping stock, hog-buyers were permitted to use them constantly for feeding purposes. The yards were frequently in a bad condition. Offensive matter was allowed to accumulate, and it emitted noisome and nauseating odors which entered dwelling houses in the neighborhood or interfered with the ventilation thereof. The trial court evidently believed testimony of this nature, and it indicates that the police regulation in question had some relation to public health or public welfare, and that such was in fact the end sought to be attained, when the ordinance and the presumption in favor of its validity are considered.

It was not satisfactorily shown that the site within five blocks of the present location was in a residence portion of the city, or that it would be inconvenient or otherwise unsuitable, or that it would require the condemnation of additional land for railway purposes. Neither was it shown what it would cost to make the change, nor that additional tracks would be required. The general statement of a witness that the people there would object to such a location, without disclosing the nature of their objections or facts showing their right to make them, is not alone a sufficient reason for rejecting it or for con-

cluding that the sanitary measure in question was unreasonable.

The record does not show the trial court was in error in holding it had not been satisfactorily shown that the regulation was an arbitrary or unreasonable interference with the rights of defendant under the guise of police regulation. On the entire record the ordinance was properly upheld, and the judgment is

AFFIRMED.

REESE, C. J., not sitting.

JOHN F. PIPER, APPELLANT, V. JOHN NEYLON, APPELLEE.

FILED JANUARY 9, 1911. No. 16,429.

Notes: TRIAL: DIRECTING VERDICT. In a suit on an unpaid, past due negotiable promissory note, it is error for the trial court to refuse a request for a peremptory instruction in favor of plaintiff, where the uncontradicted evidence of witnesses whose credibility is not questioned shows that plaintiff is a *bona fide* holder of the note, and that he purchased it for value before maturity without knowledge of any infirmity therein and of facts indicating bad faith in taking it.

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

Burkett, Wilson & Brown, for appellant.

Shepherd & Ripley and *J. B. Strode, contra.*

ROSE, J.

This is a suit on a promissory note for $700 dated December 26, 1901, and due July 1, 1903. The petition contains a copy of the note, and in substance states: It was executed by John Neylon, defendant, and was delivered to Lee Parker, payee, from whom John F. Piper,

plaintiff, purchased it before maturity for value in the regular course of business, without notice of any equities between the maker and the payee. It was indorsed "Lee Parker, Without Recourse," May 1, 1903, and delivered to plaintiff the same day. After maturity it was placed with the Farmers Bank of Lyons and the First National Bank of Lincoln for collection. Upon defendant's failure to make payment, the note was returned to plaintiff. Defendant in his answer admitted the execution of the note, but stated that it was given in payment of a worthless stallion which defendant, by false and fraudulent representations of Parker, was induced to buy for breeding purposes alone. The answer further alleges: "The plaintiff is not an innocent purchaser and *bona fide* holder of said note, having had at all times full notice and knowledge of the equities between the parties and of the terms of the said sale, and of the representations inducing the same, and that, as defendant is informed and believes, he is not, in fact, the owner of said note, but merely a cover and shield for the said Lee Parker in his attempt to collect the same." The reply is a general denial. A judgment in favor of defendant was reversed here on a former appeal. *Piper v. Neylon,* 81 Neb. 481. The case was retried, and at the second trial defendant again prevailed. This is an appeal by plaintiff.

One of the rulings challenged as a ground of reversal is the refusal of the trial court to give at the request of plaintiff an instruction directing a verdict in his favor. Plaintiff's reason why the peremptory instruction should have been given is that there is no evidence contradicting proof that plaintiff is an innocent purchaser and *bona fide* holder of the note without notice of the equities between the parties to it.

In making his case in chief, plaintiff introduced the note in evidence, and in addition testified to these facts: In his own handwriting the payee, May 1, 1903, indorsed on the back of the note the words, "Lee Parker, Without Recourse," and plaintiff received it at the time in part pay-

ment of a house which he had sold to Parker, and has at all times since been the owner of the note. Plaintiff was examined also as a witness on behalf of defendant, and in answering the latter's questions testified in substance: In August, 1903, plaintiff wrote on the back of the note the following: "Pay First National Bank, Lincoln, Neb. The Farmers Bank, Lyons, Neb. By John F. Piper, A. Cash." Plaintiff knew the circumstances under which he made this indorsement and the purpose thereof. He sent it to the First National Bank of Lincoln for collection, through the Farmers Bank. The note belonged to him personally. It did not belong to the Farmers Bank, but was left there for collection. Over the objection of plaintiff, the indorsement last quoted was admitted in evidence. Whether it was competent to show by parol the purpose and effect of the indorsement is a question not presented or decided, proof of that nature having been adduced by defendant in examining plaintiff as his own witness. Proof of misrepresentations inducing the sale of the horse and of his worthlessness for breeding purposes was also admitted. In rebuttal plaintiff testified that at the time he purchased the note he had no knowledge of the terms and conditions of the sale of the horse; that he had no such knowledge when he delivered to Parker the deed to the property for which the note had been accepted in part payment; that prior to the delivery of the deed he did not know defendant claimed there had been misrepresentations in the sale of the horse or that a warranty had been given or broken; that after the delivery of the note to plaintiff no one else had any interest in it.

That part of the negotiable instruments act applicable to an issue like the one presented is as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Comp. St. 1909, ch. 41, sec. 56. Before this pro-

vision was enacted the law was the same. *Dobbins v. Oberman*, 17 Neb. 163; *First State Bank v. Borchers*, 83 Neb. 530; *Benton v. Sikyta*, 84 Neb. 808. The proofs on behalf of plaintiff fully meet the requirements of this rule in showing that he had no knowledge of any infirmity in the note, and that he did not act in bad faith in taking it. If his proofs are uncontradicted, the peremptory instruction requested should have been given.

To show that plaintiff is not an innocent purchaser nor the owner of the note, and that there is sufficient evidence to sustain the verdict, defendant refers to four items of his proof which will be considered in the order presented.

1. Defendant asserts that ownership on the part of the Farmers Bank is indicated by the indorsement: "Pay First National Bank, Lincoln, Neb. The Farmers Bank, Lyons, Neb. By John F. Piper, A. Cash." This of course had no reference to the *bona fides* of plaintiff's purchase. Defendant called plaintiff as a witness and proved by him that he had previously purchased the note. Defendant likewise proved, before introducing the indorsement, as already stated, that it meant the paper was indorsed for collection only; that the Farmers Bank was not the owner and that plaintiff was. These facts were proved by defendant's own witness, and they are not in any way contradicted by the indorsement, when its import is thus shown. Neither does it contradict other proof that plaintiff is an innocent purchaser and the owner of the note. The indorsement was therefore immaterial and should have been excluded. This conclusion makes it unnecessary to determine whether defendant could impeach his own witness in the manner described.

2. The following letter was admitted over plaintiff's objections, and is pointed out by defendant as evidence sustaining the verdict: "Walton Everett, Pres't, Fremont Everett, Vice Pres't, W. S. Newmyer, Cashier, John F. Piper, Ass't Cashier. The Farmers Bank. A State Bank. Lyons, Neb., Aug. 28th, 1903. Sawyer & Snell,

Lincoln, Nebraska. Dear Sirs: Replying to yours under date of the 26th, we wish to say that this is the first letter we have received with reference to the Neylon note since your advice as to charge for collection. We want this note collected, and it looks easy to us with the amount of security that is behind it and Mr. Neylon's property statement. Get the money on the note and we will stand for 10 per cent. collection fee if we have to do so. Sincerely yours, John F. Piper, A. Cash." Before this letter was received in evidence, defendant had called plaintiff as a witness and had shown by him that he was the owner of the note, and as such had left it with the Farmers Bank for collection. The letter contains no assertion of ownership by the bank, but relates alone to the business of collection. It in no manner contradicts any of plaintiff's testimony. Considered as Piper's individual letter, it was a privileged communication between a client and his attorneys. As a letter of the bank, it was written nearly three months after plaintiff bought the note, and is consistent with his proof that he is the present owner, and that the note was intrusted to the Farmers Bank for collection only. In any event, it does not tend to support the verdict and cannot be considered for that purpose.

3. The suit was commenced in the county court, and in the petition therein it was alleged plaintiff bought the note in October, 1902. After plaintiff in his testimony in the county court had given May 1, 1903, as the correct date, the petition was amended to conform thereto. It is now insisted that the date as originally pleaded and the subsequent change are consistent with the other documents in showing plaintiff was not the owner of the note May 1, 1903, as alleged in his petition in the district court and as stated in his testimony therein. This contention is not meritorious. Both dates are anterior to the maturity of the note. In both petitions and in his testimony plaintiff asserted he owned the note before it matured, and there is nothing in the record to show that proof of the date as originally pleaded and as changed was

material. Plaintiff did not verify the petition filed in the county court. It had been verified by his attorney and filed before it was submitted to plaintiff. There is nothing in the evidence to show that he had at the time any knowledge of the error. In testifying in the county court, however, he gave the correct date, and the petition by leave of court was amended to conform to the proof. His own conduct in the county court therefore is in this respect consistent with his pleading and with his testimony in the district court. The proof of the date originally pleaded and of the change is, under the circumstances disclosed, clearly immaterial.

4. It is also insisted that the following letter, to which objection was properly made, indicates ownership on the part of the bank: "Law Offices of Sawyer & Snell, Lincoln, Neb. July 31, 1903. John Neylon, Davey, Neb. Dear Sir: The Farmers Bank of Lyons, Nebraska, has placed in our hands for collection your note for $700 in favor of Lee Parker, dated December 26, 1901. Please inform us at once what you intend to do in the matter so that we may govern our actions accordingly. Respectfully, Sawyer & Snell." This letter, like the second item, is consistent with the uncontradicted proof that plaintiff indorsed the note to the Farmers Bank for collection, and that he is the owner and holder—proof adduced by defendant when plaintiff was testifying as the former's witness. Neither this letter nor the four items combined, when considered with the entire bill of exceptions, are sufficient to support a finding that plaintiff is not an innocent purchaser or not a *bona fide* holder of the note. The peremptory instruction requested should therefore have been given.

For the errors pointed out, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

JOHN ALT V. STATE OF NEBRASKA.

FILED JANUARY 9, 1911. No. 16,767.

1. **Criminal Law:** INSTRUCTIONS. In a criminal prosecution, the trial court in giving instructions may describe the offense in the language of the statute.

2. ———: ———. In charging the jury, it is not necessarily improper to make quotations from the statute under which defendant is being prosecuted.

3. **Telegraphs and Telephones:** USE OF HIGHWAYS. The act granting to electric power companies the right to use public highways for poles and wires (Comp. St. 1909, ch. 26*a*., sec. 1) does not apply to telephone companies whose operations are confined exclusively to telephone service.

4. ———: RIGHTS AT RAILROAD CROSSINGS. Where a telephone company constructs its lines along a public highway in a proper manner under the terms of a legislative grant and uses them in the public service, a railroad company has no authority, either by itself or by an employee, to treat the wires at a railroad crossing as a nuisance and cut them down, if they do not in any way endanger railroad employees or interfere with the moving of trains or with the railroad right of way.

5. ———: ———. In determining the respective rights of a telephone company and a railroad company at a place where the telephone wires on a public highway cross the railroad right of way, the rights of the public as well as property rights should be considered.

6. **Criminal Law:** DIRECTING ACQUITTAL. Where the evidence in a criminal prosecution will sustain a conviction for the offense charged in the information, it is error to direct an acquittal.

7. ———: CRIMES OF AGENTS. "The fact that a defendant was acting as the agent of another in the commission of an offense will afford no excuse or justification for the act in a prosecution therefor." *Allyn v. State*, 21 Neb. 593.

8. ———: MALICE. In criminal law, "malice" may denote that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.

9. ———: CUTTING TELEPHONE WIRES: MALICE. In a prosecution against a railroad employee for cutting telephone wires on a highway at a railroad crossing, the trial court properly held the jury were justified in finding that defendant, though following the

instruction of his employer, did not act without malice, where the proof showed that the wires did not in any way endanger railroad employees or interfere with moving trains, or with the railroad right of way, and that he had been told by an agent of the telephone company not to cut the wires and had been warned of the consequences.

ERROR to the district court for Hall county: JAMES R. HANNA, JUDGE. *Affirmed.*

J. E. Kelby and *O. A. Abbott,* for plaintiff in error.

William T. Thompson, Attorney General, George W. Ayres, J. L. Cleary and *Bayard H. Paine, contra.*

ROSE, J.

On a section-line highway running north and south between Grand Island and the Soldiers' Home, John Alt, defendant, cut the York County Telephone Company's toll-wires March 7, 1910, where they cross the right of way and track of the Chicago, Burlington & Quincy Railroad Company. Under the charge that he was guilty of the offense described, he was convicted and sentenced to pay a fine of $50. As plaintiff in error, defendant now presents for review the record of his conviction.

The statute which defendant was convicted of violating provides: "That any telegraph or telephone company incorporated or doing business in this state shall be and is hereby granted the right of way along any of the public roads of the state for the erection of poles and wires; provided, that poles shall be set at least six feet within the boundary line of said roadway and not placed so as to interfere with road crossings; and provided, that said wires shall be placed at the height of not less than twenty feet above all road crossings." Comp. St. 1909, ch. 89*a*, sec. 14.

"Any person or persons who shall break, injure, destroy, or otherwise interfere with the poles, wires, or fixtures of any telegraph or telephone company in this state shall

be subject to action and penalty prescribed in section 98, chapter 13, criminal code." Comp. St. 1909, ch. 89*a*, sec. 15.

Defendant did not attempt to controvert proof of these facts: Assuming to act under authority of the statute quoted, the York County Telephone Company in September, 1909, erected its poles along the highway. Six telephone wires were strung on the poles in December, 1909, and thereafter were used for long-distance service, but they had been cut at the railroad crossing a number of times before defendant was arrested. Early in the morning, March 7, 1910, Charles J. Palmer, an agent of the telephone company, hid behind a big signboard and watched the crossing. Pretty soon a section gang came up the railroad on a hand-car and stopped. A little later a bridge gang of which defendant was a member arrived in the same manner, but before any overt act had been committed Palmer accosted them and a conversation in regard to the wires ensued. At that time the wires crossing the railroad track were supported by two 45-foot poles, one being north of the track and the other south of it. The poles were 115 feet apart. One was seven feet and the other eight feet outside of the railroad right of way. Both were six feet within the boundary line of the highway. The wires were 30 feet above the rails at the crossing and were in good condition. There was nothing about either the poles or the wires to interfere with the passage of trains or with a man on a box car. That the wires in no way disturbed railroad traffic or endangered employees is further evidenced by the fact that an attorney for the railroad company, in testifying on behalf of defendant to the civil nature of the controversy, said that had a suit been brought to enjoin the cutting of the wires they would have been allowed to remain without a temporary injunction until the termination of the suit. With the poles and the wires in the situation and condition indicated by this undisputed proof, the conversation to which reference has been made took place. According to the

testimony of Palmer, the sum of what was then said and done is: The section foreman said he "couldn't see any reason why the Burlington wanted the wires cut." Defendant, who was an employee of the railroad company, asked if he should cut the wires, and the section foreman suggested: "You came out here to cut them?" Defendant answered "Yes," and was told: "Do as you please." Palmer warned defendant he had better not do it, and said in his presence he would be arrested if he did. Afterward defendant climbed a pole, cut one of the wires at a place outside of the railroad right of way, and was told by Palmer to cut no more, but immediately cut the others.

Correspondence between the respective counsel for the two companies and oral proof were adduced by defendant to show that in the cutting of the wires he acted under the direction of his employer; that the direction was given in the assertion of a legal right to prevent the telephone company from running its wires across the right of way without permission of the railroad company, and that defendant acted without the malice essential to the commission of a crime.

Defendant argues that the conviction should be reversed because the court gave an instruction containing a copy of the statute violated. It is proper to describe an offense in the language of the statute. *Long v. State,* 23 Neb. 33. To quote from the statute under which defendant is being prosecuted is not necessarily erroneous. *Mills v. State,* 53 Neb. 263. Defendant does not question these principles, but insists that the trial court, in quoting without explanation the statute which authorizes telephone companies to use the highways for poles and wires, deprived him of the benefit of another statute prohibiting such companies from crossing the right of way of a railroad company without its permission. That act, among other things, provides: "That all persons, associations, and corporations engaged in the generating and transmitting of electric current for sale in this state for power or other purposes, are hereby granted the right of way for

all necessary poles and wires along, within, and across any of the public highways of this state." Comp. St. 1909, ch. 26*a*, sec. 1. Provision is also made for suspending such wires across railroad tracks and for fining those who do so in violation of the terms of the statute. In the present case the evidence shows that the York County Telephone Company's wires which crossed the railroad right of way were used alone for long-distance telephone service, and not for the purposes described in the statute. It is apparent from the entire act that it does not apply to telephone lines constructed and used exclusively for such a purpose, and that it affords no justification for the conduct of defendant in cutting the wires.

Further complaint is: The instruction was given without qualification and left the jury to infer that the telephone company had acquired an absolute right to the use of the highway without regard to the following considerations: The railroad company owns the fee to the land at the crossing. The public has a mere easement for highway purposes. The wires subject the railroad right of way to an additional burden. The telephone company has no right to cross the track without permission. When permission is given, the railroad company is entitled to compensation. Overhead wires are dangerous. The wires should be laid in a conduit under the track. The burden of keeping the crossing in a safe condition for travel is on the railroad company. Conceding all these propositions for the purpose of the argument, but for no other purpose, did defendant have a lawful right to cut the wires, when directed by his employer to do so? A text-writer says: "A telephone wire stretched over the property of another without authority, but causing no obstruction, is not a nuisance which may be summarily abated by cutting the wire." McMillan, Telephone Law, sec. 88.

Reasons for applying this doctrine to the present case are obvious. The state, in the proper exercise of its power to control public highways, may authorize a tele-

phone company to use them for its poles and wires. 1 Joyce, Electric Law (2d ed.) sec. 143. The legislature exercised that power, and it was under the legislative grant that the telephone company acted in constructing its lines. It was a common carrier of intelligence and news. *State v. Nebraska Telephone Co.,* 17 Neb. 126; *Nebraska Telephone Co. v. State,* 55 Neb. 627. It was devoting its property to a public use when its wires were cut. *City of Plattsmouth v. Nebraska Telephone Co.,* 80 Neb. 460. To protect that use and the property invested in the enterprise the legislature made interference with the wires unlawful. The rights of the public as well as property rights must be considered in matters of this kind. "If in any way avoidable," said this court in an opinion by Commissioner RYAN, "there should be tolerated no resort to so radical a measure as the interruption of traffic." *Blakely v. Chicago, K. & N. R. Co.,* 46 Neb. 272. *Chicago, B. & Q. R. Co. v. Englehart,* 57 Neb. 444; *State v. Missouri P. R. Co.,* 75 Neb. 4.

In *Bronson v. Albion Telephone Co.,* 67 Neb. 111, this court, in an opinion by Commissioner POUND, said: "We do not think public utilities of this kind ought to be suspended until every abutting owner upon the streets or highways to be used has been duly appeased. If he has been substantially or appreciably injured, an action at law will ordinarily afford him full compensation. If he has not, no opportunity for extorting an unreasonable settlement should be afforded him."

In a case in point the following language was used by the supreme court of Alabama, though the opinion was not officially reported: "The theory of the defense was, and is, that, as the owner of the telephone line without the consent of the railroad company, and without condemnation proceedings, had crossed the right of way of the railroad company, the railroad company had the right to cut and remove the wire, and its employee acting under its instructions could therefore be guilty of no offense. The facts in the case will not justify such defense. The tel-

ephone line as constructed created no obstruction to the railroad company in the operation of its road, and if it should be conceded that the owner of the telephone line violated the property rights of the railroad company, in erecting the telephone line without first having obtained consent, or having taken condemnation proceedings, this would not authorize the defendant, under the instructions of the railroad company, to take the law into his own hands, in plain violation of the statute. The statute is clear and unambiguous in its language, and makes it an offense for any one to wilfully cut a telephone line. It makes no exception, and certainly the facts in the case before us do not create one, but leave the defendant undoubtedly within its provisions. Nor is it material whether the cutting was done with an evil motive or purpose. It is enough if it was done wilfully." *McGowan v. State,* 40 So. (Ala.) 142.

When defendant cut the wires in the public highway, they were not obstructing trains or endangering railroad employees. If the rights or property of the railroad company were invaded by the telephone company, as suggested by defendant, the courts were open for the purpose of granting adequate relief. Under the facts disclosed by the record, the protection of those rights did not justify a resort to violence or require the destruction of property which was at the time on a public highway and being used in the public service, and the jury were justified in so finding. In giving the instruction assailed, the district court did not err.

Another assignment of error involves the following instructions:

"(12) You are instructed that where there is in fact a controversy between two parties over their legal rights and one of the parties does or causes to be done an act in the honest belief that he is protecting his own property, there can be no such criminal intent as is necessary to make such act punishable as a crime, and in this case, if you find that there was a controversy between the rail-

road company and the telephone company in good faith over their respective rights in regard to the construction of a telephone line across the tracks and right of way of the railroad company, and, in pursuance thereof, the railroad company directed the defendant, who was then in its employ, to remove the wires of the telephone company from its tracks and right of way in the course of such employment, and defendant in good faith and without malice cut the wires, then you should return a verdict of not guilty.

"(13) You are instructed that, if you find from all of the evidence in the case that the poles and wires of the York County Telephone Company were erected and constructed in a careful, skilled, and workmanlike manner, and as provided by law, and so as to offer security to life and property in operation of railroad, and that the wires thereof crossed the right of way of the railroad company, that they were not interfering with the use of the railroad company in its use and occupancy of its right of way, and that said telephone line at the point of said intersection was in good condition and in a good state of repair at the time it is charged that said wires were cut, and that they were occupying a legally established highway in said county at a point crossed by said railroad company, then said railroad company would not have the right to cut and remove the wires of the telephone company, nor could the railroad legally authorize any of its employees to cut or molest the said wires."

Defendant insists that instruction 13 misstates the law and nullifies instruction 12. This criticism is not well founded. Instruction 13 is in harmony with the views already expressed in discussing another assignment of error. The instructions should be considered together. Notwithstanding what is said in instruction 13, the jury were previously told in instruction 12 to acquit defendant, if they found there was a *bona fide* controversy between the companies over their respective rights, and that in pursuance thereof he was directed by his employer to

remove the wires, and obeyed the direction in good faith and without malice. Defendant was not entitled to a more favorable instruction on this subject, unless it was the duty of the court to direct a verdict of acquittal. Should such a verdict have been directed? It is suggested in argument that, "whenever it becomes apparent that the criminal law is being used to determine private rights or to secure private advantage, the court of its own motion should at once stop the proceedings and discharge the defendant." The state in the usual manner filed the information and conducted the prosecution. Defendant was not entitled to an acquittal on account of the civil nature of the controversy between the companies, if the evidence justified a verdict of guilty. Where the evidence will sustain a conviction, it is error to direct an acquittal. *State v. Sneff,* 22 Neb. 481. Criminal laws cannot be defeated because offenses grow out of civil controversies. Defendant was not excusable on account of his agency, if the state proved that he committed the offense charged. The law on this point is: "The fact that a defendant was acting as the agent of another in the commission of an offense will afford no excuse or justification for the act in a prosecution therefor." *Allyn v. State,* 21 Neb. 593. The course suggested by defendant on this phase of the case is not warranted by the evidence outlined herein.

Defendant also contends that the conviction cannot be sustained because there was no evidence of malice on his part. He testified he had no ill will toward the telephone company. Malice, however, in its legal sense, does not necessarily signify ill will toward a particular individual, but "denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse." *Housh v. State,* 43 Neb. 163. Under all the circumstances disclosed, the jury were justified in finding there was "malice" in defendant's act, within the meaning of that word as legally defined. Knowing at the time he cut the wires that they were in

the public highway and that they did not interfere with the traffic of his employer or endanger its employees, he deliberately and wilfully cut them, after he had been told not to do so and had been warned of the consequences.

A reversal is also asked because two witnesses for defendant were not permitted to testify to their knowledge of injuries resulting from overhead telephone wires. The questions calling for testimony of this character had no reference to the wires or place in controversy, and objections thereto were properly sustained.

There is no error in the record, and the judgment is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

WILLIAM JEFFRIES, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 9, 1911. No. 16,214.

1. **Appeal:** REVIEW. Legal propositions not germane to the evidence in the case under review will not be considered.

2. **Carriers:** UNNECESSARY DELAY. It is the duty of a railroad company, engaged as a common carrier, receiving freight to be transported, to carry it without unnecessary delay. A delay of 24 hours at a station on the way is an unnecessary delay, unless it is explained and excused by something which the law recognizes as sufficient. Under the evidence in this case, the excuse that the company had annulled a regular freight train scheduled to leave a connecting point an hour after the arrival of a car of horses at such point *held* not a sufficient excuse.

3. ———: LIVE STOCK: DUTIES OF CARETAKER. When a shipper of live stock is provided by the railroad company with free transportation for a caretaker and the caretaker actually accompanies the stock during the entire time of such shipment, the carrier has a right to rely upon the caretaker to notify its agents in charge of its train whenever he thinks the necessities of the case require the unloading or feeding and watering of such live stock.

4. **Appeal:** DUTY TO REQUEST INSTRUCTIONS. "Before error can be predicated upon the failure of the court to present a particular feature of a case to the jury, the party complaining should, by an appropriate instruction, request the court to charge upon that feature." *German Nat. Bank v. Leonard*, 40 Neb. 676.

5. ———: INSTRUCTIONS: REVIEW. A judgment will not be reversed because the trial court refused to give an instruction asked, when the substance of such instruction is included in other instructions given.

6. **Carriers:** CONTRACT OF SHIPMENT: LIABILITY FOR NEGLIGENCE. "A common carrier of live stock cannot, by contract with a shipper, relieve itself, either in whole or in part, from liability for injury or loss resulting from its own negligence." *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb. 275.

7. **Appeal:** ERRORS NOT AFFECTING SUBSTANTIAL RIGHTS. It is the duty of this court, in reviewing a case on appeal, to disregard any error or defect in the proceedings in the court below, which does not affect the substantial rights of the adverse party; and, in obedience to that duty, no judgment will be reversed by reason alone of such error or defect.

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

J. E. Kelby, A. R. Wells and *W. S. Morlan,* for appellant.

P. E. Reeder and *Perry, Lambe & Butler, contra.*

FAWCETT, J.

The issues are fairly stated in defendant's brief: "The petition in this action stated two causes of action. The first seeks to recover $250 damages to a shipment of horses from Norton, Kansas, to Palisade, Nebraska, March 25, 1906, and the second asks for $1,300 damages to a shipment of six horses and one jack from Orleans, Nebraska, to Palisade, Nebraska, March 23, 1907. In the first cause of action the charges of negligence are (*a*) negligent rough handling; (*b*) failure to unload for the purpose of water and feed; and (*c*) negligent delay. In

the second cause of action the same grounds of negligence are alleged as in the first, and, in addition, it is claimed that there was a verbal agreement that the said shipment should be transported on fast freight train No. 77 from Oxford to McCook. The answer to each cause of action denied the charges of negligence contained in the petition, and by way of further answer pleaded written and printed contracts of shipment under which it was alleged (*a*) that, in consideration of free transportation furnished by the defendant for a caretaker who accompanied each of said shipments, it was agreed that the said animals should be loaded, unloaded, fed and watered by the owner or his agents, and that said animals were to be in the sole charge of such caretaker for the purpose of attention to and care of said animals, and the defendant should not be responsible for such attention and care, and that the plaintiff should load, unload, water and feed said animals, and that a caretaker did in fact accompany each shipment; (*b*) that the defendant should not be liable for injury to said animals in loading or unloading or injuries which said animals might cause to themselves or to each other or which resulted from the nature or propensity of such animals; and (*c*) that defendant did not agree to deliver said animals at destination at any specified time. The plaintiff recovered $150 on the first cause of action and $770 on the second, a total of $920 with interest."

The reply denies every allegation of new matter contained in the answer, and alleges that no notice was ever brought to the attention of plaintiff as to any limitation contained in the purported contracts between plaintiff and defendant; that plaintiff had no knowledge of any such limitations and did not in any manner assent thereto, and that such limitations are not effective as between plaintiff and defendant. There was a trial to the court and jury, which resulted in a verdict and judgment, as above indicated, from which defendant appeals.

Defendant in its brief assigns six grounds for a re-

versal of the judgment, which we will consider in their numerical order.

1. "Damage due to inherent propensities of the animals." It is argued that there is an exception to the rule of the carrier's liability as an insurer which exempts it from responsibility for injuries so caused. The law unquestionably is as contended for by defendant, but the trouble is the facts in this case do not fit the law. There is an entire absence of evidence even tending to show that the injuries complained of were caused by the animals themselves or were the result of the nature or propensities of the animals. This point need not therefore be further considered.

2. "Delays." Under this assignment defendant insists that the court erred in stating the issues to the jury, in that it stated plaintiff's cause of action in substantially the terms of the petition, and objects to instructions 4 and 4 "continued," for the reason that negligent delay was given as one of the grounds upon which the jury might find against the defendant. The evidence shows that the horses included in the first cause of action were loaded at Norton, Kansas, March 25, 1906, at 2 o'clock A. M.; that they were shipped as a car-load lot; that an employee of plaintiff, called a "caretaker," accompanied the shipment. The car left Norton one hour later and arrived at Republican City at 8 o'clock the same morning. A regular freight train was scheduled to leave Republican City for McCook on defendant's road at 9 A. M., but on this particular morning, upon arrival at Republican City, the caretaker was advised that the regular freight train for that morning had been annulled and an extra "run out at an earlier hour." The result was that the shipment was delayed at Republican City for 12 hours and did not leave there until 8 o'clock of that evening, which was 11 hours later than it would have left if the regular morning freight train had not been annulled and the extra run out ahead of schedule time. The car reached McCook, a connecting point, at 8 A. M. the next

morning, March 26, about 15 minutes after the freight train had left McCook for Palisade. The result was that the car was delayed at McCook until 10 o'clock the next morning—a delay of 26 hours. From McCook to Palisade, the point of destination, there was no further delay. It will be seen that if the regular freight train out of Republican City on the morning of the 25th had not been annulled, or when it was annulled if the extra had been held until its schedule time, there would have been a delay of only one hour at that point, and the car would have reached McCook in ample time to have connected with the train for Palisade on the morning of March 26. The evidence shows that when the horses arrived at Palisade they were in bad condition, a part of that bad condition being stiffness and swollen joints. In the light of this record, we cannot say the court erred in submitting that question to the jury. The shipment covered by the second cause of action was a shipment of six horses and a jack. This also was shipped as a car-load lot. The car left Orleans at 1 o'clock P. M., March 23, 1907. The petition alleges that defendant agreed to attach the car, when it reached Oxford, the point connecting with its main line, to train No. 77, which was due to leave Oxford that evening. When interrogated as to that, plaintiff testified: "Q. You may state what train, if any, the agent at Orleans told you, when he accepted this car-load of horses and jack for shipment, that the horses would be shipped on from Oxford to McCook. A. I don't remember that he told me the train, but I remember that he told me that I would get out of there in the evening." It is contended by defendant that the contract of shipment was in writing; that the defendant did not agree to transport the shipment in any particular time, and that verbal evidence to vary the terms of the written contract was inadmissible; that the written contract is conclusively deemed to contain the contract of shipment. As a proposition of law, this contention is sound, but we do not think the testimony above quoted should be held to

vary the terms of the written contract. It stated the information that was imparted to plaintiff by defendant's agent at the time he accepted the shipment, as to what progress would be made in transporting plaintiff's stock under the written contract. The car reached Oxford at 4 o'clock in the afternoon of March 23. No. 77 was a fast through freight and passed through Oxford that evening. The agent at Oxford took the matter up with the chief dispatcher at division headquarters, and asked him if the car could be attached to No. 77. The dispatcher answered that 77 had its full tonnage and could not take any more cars. Defendant offered no evidence to show what constituted the full tonnage of No. 77, or to in any manner substantiate the statement made by the chief dispatcher, but assumes that his statement was true, and argues that the car "was then put upon the first available west-bound train." This train did not leave Oxford until 7:15 P. M., March 24, causing a delay of 27 hours at that point. It arrived at McCook at 1:05 on the morning of the 25th, and left there some five or six hours later, arriving at Palisade without further delay. March 23 was Saturday. There was no train between McCook and Palisade on Sunday, so that the car was transported from McCook to Palisade upon the same train Monday morning upon which it would have been taken had defendant conveyed it from Oxford to McCook on No. 77 Saturday evening. Hence, defendant argues that plaintiff suffered no injury by reason of the delay occurring at Oxford, instead of at McCook, which would necessarily have occurred had the car gone on No. 77. Counsel for plaintiff argues that plaintiff resided at McCook, and had private and suitable accommodations for caring for the horses and jack and permitting them to rest over Sunday, if they had been delivered there Saturday night in accordance with the assurance given him by the agent of the company at the point of shipment; but this contention we think fails to find support in the evidence. It is also contended by plaintiff that McCook was the regular and

ordinary feeding place. This fact is supported by the evidence, but there is no evidence to show that the yards at Oxford, in which the stock was kept by defendant during the 27 hours delay at that point, were not just as good in every way as any yards that might have been used at McCook. When plaintiff shipped this stock from Orleans Saturday noon, he knew they could not reach Palisade until Monday morning. They did in fact reach there at that time, and we are unable to discover from the evidence any reason for supposing that there was any material difference to plaintiff whether the stock was taken from the car and rested and fed at Oxford or McCook. If, therefore, the submission of the question of delay as to the second cause of action were prejudicial, it would call for a reversal of the judgment upon the second cause of action; but we are unable to say it was prejudicial, for reasons hereinafter given.

3. "Unloading." Defendant urges that the court erred in submitting to the jury the question of negligence on the part of the defendant in failing to unload and properly feed and care for the animals in transit, and that the court submitted this issue to the jury in both causes of action. It is argued that it was the duty of the caretakers, who were furnished transportation and accompanied the shipments for that purpose, to care for the animals in transit and see that they were properly unloaded, fed and watered; that, if they desired to unload at any point, it was their duty to request the carrier to set the car at the stock yards for unloading. The testimony upon this point offered by plaintiff was that, when the car, covered by the first cause of action, reached Republican City, and again when it reached McCook, it was placed upon a side-track at points where the stock could not be unloaded. Witnesses testified that the defendant did not furnish plaintiff facilities for unloading, feeding and watering; but no witness for plaintiff testified that any request was ever made of defendant to change the location of the car, or to run it up to a chute where the

stock could be unloaded. The evidence is substantially the same as to the second cause of action, the only difference being that as to the stock covered by the first shipment defendant did not, upon its own motion, at any time unload the stock and feed and water it, while it did so at Oxford with the second shipment. We think defendant's contention upon this point is sound, that, when a shipper is provided transportation for a caretaker and the caretaker actually accompanies the stock during the entire time of the shipment, it is his duty, if the defendant does not offer to unload and feed and water the stock, to request that facilities for so doing be given. We think the company has a right to rely upon the caretaker to notify its agents in charge of the train whenever he thinks the necessities of the case require the unloading or feeding and watering of the stock. The effect of this will be considered in connection with the next assignment.

4. "Duty of the court to instruct the jury." Under this head defendant's brief states: "As already pointed out, the court submitted to the jury the issues of negligent delay and negligent failure to unload, when the record contains no evidence to sustain the plaintiff's claims. It was prejudicial error on the part of the trial court to thus submit to the jury issues which there was no evidence in the record to sustain. * * * It was the duty of the court to instruct the jury as to the law without request, announcing the correct legal rules applicable to the facts in issue and setting out the material facts which the plaintiff must prove in order to recover." This raises the question whether or not it was the duty of the defendant to request the court to charge the jury that defendant would not be liable for any failure to furnish facilities for unloading and feeding and watering unless requested so to do by the caretaker, or whether the court was bound to charge upon that point upon its own motion. We are inclined to take the former view and to hold that, by reason of defendant's failure to request instructions upon this point, the error of the court discussed under point 3 was waived.

5. "Negligence of the plaintiff." Under this assignment it is contended that the court erred in refusing to give instructions 7 and 8, requested by defendant. No. 7 reads: "The court instructs the jury, if you find from the evidence the negligence of the plaintiff or of those acting for him contributed to the losses and injuries of which he complains in his first cause of action, then you must find for defendant on the first cause of action." No. 8 reads: "The court instructs the jury, if you find from the evidence plaintiff by his negligence or those acting for him contributed to the losses of which he complains, you cannot allow plaintiff anything for such losses or damages." We think these instructions are clearly too limited in their scope. Under a fair interpretation of them, if the negligence of plaintiff or his caretaker, in not requesting defendant to furnish facilities to unload and feed and water, contributed to the stiffness of the animals, no recovery whatever could be had by plaintiff, notwithstanding the fact that the evidence clearly shows that, by reason of the rough handling of the trains, the horses were cut, bruised and otherwise seriously injured. Furthermore, we think that instruction No. 4, requested by defendant, and given by the court, sufficiently covered this point. It reads as follows: "The court instructs the jury, if you find from the evidence the defendant was not guilty of negligence in handling either or both of the shipments described in plaintiff's petition, then you will go no further, but you must at once render a verdict in favor of the defendant for such shipment or shipments. If you find in favor of the plaintiff upon the above proposition, you must next inquire whether or not plaintiff or those acting for him were exercising due and reasonable care at the time of the alleged injuries, if, by the exercise of reasonable care, the plaintiff or those acting for him could have avoided the losses or damages, then he is not entitled to recover in this action, notwithstanding you may believe from the evidence that the employees of defendant in charge of these shipments were guilty of negligence in handling them."

6. "Released valuation." This assignment relates to the question as to whether or not the company could limit its liability or damage, by reason of its negligence, to any particular sum, in this case not to exceed $100 upon each animal. That precise question was decided adversely to defendant's contention, in *Miller v. Chicago, B. & Q. R. Co.*, 85 Neb. 458. That case being decisive of this point, it will not be considered further.

No complaint is made in defendant's brief that the verdict of the jury is excessive, nor is any attempt made to justify the manner in which these shipments were handled by the agents in charge of defendant's trains. There is ample testimony both by plaintiff and by disinterested witnesses that, in each instance, when the stock was shipped it was in good condition, and when it reached its destination the animals, without exception, were in bad condition. One had a gash four inches long over one eye; some of the others had the skin knocked off in places; the joints were badly swollen upon several; others had lumps upon them; the jack, when it reached its destination and was placed in the barn, was standing upon three legs. Several instances are related by the witnesses showing that, when those in charge of the trains were switching, they struck the cars containing plaintiff's stock so violently as to knock the horses down, in one instance also knocked the caretaker down and put out his lantern; that in the first shipment that occurred twice while the car stood at Republican City; that in the second shipment, after one of these bumps, the caretaker went to the man in charge of another car in the train, and asked for assistance. The party appealed to accompanied him to his car, and testified that the 2 by 12 timber, which had been spiked to the car as a partition between the jack and one of the stallions, had been broken; that the rope around the jack's neck, by which he had been tied, was also broken; that the jack was lying upon his side under the stallion; that they got him out and got him up. The evidence as to the rough handling is very strong indeed, and the tes-

timony as to the condition the animals were in when they reached their destination we think was sufficient to have supported a larger verdict than was returned by the jury. We also think that the evidence as to the condition the horses were in when they reached their destination shows that those injuries were chiefly the result of the rough handling of the stock by defendant's agents. The evidence upon this point is so convincing that we think this judgment would have to be affirmed upon the ground that no other verdict would have been justified under the evidence; so that, even if the court may have given instructions upon other branches of the case, which would have been better not given, we cannot say that the giving of them was prejudical error. This appears to be a proper case for the application of section 145 of the code.

Upon the whole record, we are all of the opinion that the judgment of the district court is right, and it is

AFFIRMED.

ALEXANDER A. M. BULGRIN ET AL., APPELLEES, V. ALMA SCHLECHTE, APPELLANT.

FILED JANUARY 9, 1911. No. 16,248.

Appeal: STARE DECISIS. Where the only question presented on appeal to this court is one of law which has already by frequent decisions of this court become the settled law in this state, it will not ordinarily be again considered.

APPEAL from the district court for York county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

C. F. Stroman, for appellant.

A. B. Taylor and *A. G. Wray, contra.*

FAWCETT, J.

The facts in this case, which the brief of defendant concedes "are not in dispute," are: Albert L. Bulgrin died

intestate about October 25, 1889. At the time of his death he was the owner of and occupied as a homestead the southeast quarter of section 33, township 10 north, of range 1 west, of the sixth P. M., in York county, Nebraska. He left surviving four children, Alexander, Paul, Wanda and Robert, and his widow, Emma. In the settlement of his estate the probate court entered the following decree: "It is therefore ordered, adjudged, and decreed that said homestead of Albert L. Bulgrin, deceased, descend to Emma Bulgrin, the widow of Albert L. Bulgrin, deceased, in absolute title, subject to the incumbrance on the same, and that she pay to the other heirs their shares as follows": To the four children above named the sum of $330.25 each. These sums she never paid. Later on she married one Lewis Schlechte. Defendant was the issue of said second marriage. About October 11, 1899, Emma died, and in the settlement of her estate the county court entered the following decree: "The court finds that the deceased died seized of real estate as follows"—describing the land as above set out. In that decree the county court also adjudged that the four children of Albert L. and Emma Bulgrin, and the defendant, Alma Schlechte, were the heirs of Emma, deceased, and that the five "are entitled to, and that the said property, both real and personal, descends to them equally, share and share alike." Plaintiffs brought this suit in the district court for York county to quiet their title as against the decrees entered by the county court. The court entered a decree in their favor as prayed, and defendant, by her guardian *ad litem*, appeals.

As stated in defendant's brief, "the matter resolves itself into a question of law." Defendant contends: (*a*) That what is commonly known as the "Baker act" (laws 1889, ch. 57) was valid, and that the district court erred in holding the decrees of the county court, entered under the terms of the Baker act, void; (*b*) that the decrees of the county court were never appealed from, and for that reason the district court erred in permitting them to be

assailed collaterally. The points presented and argued by defendant have all been carefully considered and decided adversely to her contention in *Finders v. Bodle*, 58 Neb. 57; *Draper v. Clayton*, 87 Neb. 443; *Helming v. Forrester*, 87 Neb. 438; and *McFarland v. Flack*, 87 Neb. 452. Under the above decisions, these questions are now foreclosed in this state.

The judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

HAMILTON COUNTY, APPELLEE, V. AURORA NATIONAL BANK, APPELLANT.

FILED JANUARY 9, 1911. No. 16,609.

1. **Counties:** DEPOSITS OF PUBLIC MONEYS. The purpose of article III, ch. 18, Comp. St. 1903, commonly called the "depository law," was to provide a place for the safe-keeping of public money; to obtain interest thereon where it was possible to do so, and to relieve state and country treasurers from liability as insurers of so much of the public money as should be placed in depository banks.

2. ———: ———: INTEREST. The treasurer of H. county purchased, with county funds which he was unable to place in depository banks, with the approval and authority of the county board, and for the sole purpose of obtaining a safe place in which to keep the public money, noninterest-bearing demand certificates of a bank which in good faith had refused to qualify as a depository under the provisions of article III, ch. 18, Comp. St. 1903. The certificates were treated and used as cash by the treasurer in transacting the county business and were paid in full on demand. Neither the treasurer nor the bank in any manner profited by the transaction. *Held*, That the bank was not liable to the county for interest upon the public money with which the certificates were purchased.

APPEAL from the district court for Hamilton county: HARRY S. DUNGAN, JUDGE. *Reversed.*

Hainer & Smith and *C. P. Craft,* for appellant.

A. M. Post, Albert & Wagner and *J. A. Whitmore, contra.*

FAWCETT, J.

Action by Hamilton county against the Aurora National Bank to recover interest on public funds placed by the county treasurer in the Aurora State Bank for safe keeping. The plaintiff had judgment, and the defendant has appealed.

The record discloses the following undisputed facts: That one J. B. Cunningham took office as treasurer of Hamilton county in January, 1902, and served four years; that he was succeeded by one George Wanek, who was still in office when this action was tried; that the defendant bank is the successor of the Aurora State Bank, with which the transactions on which the plaintiff bases its right of action were had; that during the incumbency of the above named treasurers the county had on hand a sum of money largely in excess of the amount for which it could obtain county depositories under the provisions of article III, ch. 18, Comp. St. 1903; that it was agreed upon the trial, and is now conceded, that the county's safe and vault were manifestly unsafe for the keeping of large sums of money; that the treasurer and the county board used their utmost endeavors to secure depository banks which would take all of the county funds and pay interest thereon according to the terms of the depository law; that they succeeded in securing some depositories, but not a sufficient number having the necessary financial strength to take all of said funds, and there was thus left a large amount of public money in the hands of the county treasurer to be otherwise kept and cared for; that after the efforts of the county treasurer and the county board to secure depository banks, not only in Hamilton county, but in adjoining counties, sufficient in amount and finan-

cial strength to take the surplus fund, had failed, the county treasurer from time to time deposited such funds, in his own name, in the Aurora State Bank, which had not complied with the depository law, taking therefor noninterest-bearing demand certificates of deposit, which he immediately indorsed to himself as county treasurer, and deposited in the county vault for safe-keeping; that this was all done with the full knowledge of the county board, and these certificates were in all respects used and treated by the treasurer and the county board as cash, in the transaction of the business of the treasurer's office, and were so treated in the settlements made, as provided by law, between the treasurer and the county board; that no money was taken from any depository bank and put into demand certificates, but, on the contrary, the depository banks were at all times furnished with all the money they could take under the law, and only the excess or surplus funds were held in the demand certificates above described; that no profit or interest was realized by either the county, the treasurer, or the bank, directly or indirectly, from these transactions; that the certificates were all paid in full on demand, and on the 1st day of January, 1908, the county had withdrawn from the Aurora State Bank all of its public money so deposited, and the bank did not owe the county anything, unless it was liable for interest on the transactions above described; that the treasurer and the county board acted in good faith in the transactions above described, for the sole purpose of safe-guarding the county funds; that none of the transactions complained of was had with the defendant, the Aurora National Bank, which was organized as the successor of the Aurora State Bank some two months after the county had withdrawn all of its funds from said last-named bank and surrendered all of such certificates of deposit to the bank for cancelation.

The only disputed question involved in this controversy, as shown by the record, is the contention made by the plaintiff that there was an agreement or conspiracy be-

tween some of the banks of Hamilton county, including the Aurora State Bank, not to qualify as depositories, and thus obtain the use of the county money without the payment of interest. Upon this point we have carefully examined the record and are of the opinion that the plaintiff failed to show any such conspiracy or agreement. The only evidence in support of this claim is the testimony of two witnesses, who stated, in substance, that at a meeting of a part of the officers of some of the banks doing business in Hamilton county they heard the president of the Aurora State Bank say that the banks were foolish to give bonds, because they would obtain the money anyway, and would not have to pay any interest on it. On cross-examination, however, the witnesses were unable to state whether this occurred at or near the beginning of Mr. Cunningham's term of office, or some two years prior thereto, at a time when the banks had under consideration the question of signing the official bond of one Hammond, who was Cunningham's predecessor in office. That these statements were made at the earlier date is shown by the president of the Aurora State Bank, who testified that the only meeting at which any such statements could have occurred was held at the beginning of Hammond's term of office, when the question under consideration was whether or not the banks of Hamilton county would sign the treasurer's official bond. When we consider the testimony upon this point with all of the other evidence in the case, and in the light of the established fact that the banks, doing business at Aurora during the official incumbency of Treasurer Cunningham, had more money of their own than they could profitably loan or invest, that the Aurora State Bank refused to take the money in question if required to pay interest thereon, we are of the opinion that this contention must fail.

It follows that, if any authority exists by which the judgment of the district court can be sustained, it is found in the provisions of section 18, art. III, ch. 18, Comp. St. 1903, which then read as follows: "The county

treasurer of each and every county of the state of Nebraska shall deposit, and at all times keep on deposit for safe-keeping, in the state, national or private banks doing business in the county, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such county treasurer. Any such bank located in the county may apply for the privilege of keeping such moneys upon the following conditions: All such deposits shall be subject to payment when demanded by the county treasurer on his check, and by all banks receiving and holding such deposits, interest shall be paid amounting to not less than two (2) per cent. per annum, upon the amount so deposited, as hereinafter provided, and subject also to such regulations as are imposed by law, and the rules adopted by the county treasurer for holding and receiving such deposits. It shall be the duty of the county board to act on such application, or applications of any and all banks, state, national or private, as may ask for the privilege of becoming the depository of such moneys, as well as to approve the bonds of those selected incident to such relation, and the county treasurer shall not deposit such money or any part thereof, in any bank or banks, other than such as may have been so selected by the county board for such purposes, if any such bank or banks have been so selected by the county board, and on all deposits he may make in any bank whatsoever, interest shall be paid at a rate not less than two (2) per cent. per annum; and where more than one bank may have been so selected by the county board for such purpose, he shall not give a preference, to any one or more of them, in the money he may so deposit, but shall keep deposited with each of said banks, such a part of said moneys, as the capital stock of such bank is a part of the amount of all the capital stock of all the banks so selected, so that such moneys may at all times be deposited with said banks *pro rata*, as to their capital stock."

Counsel for plaintiff strenuously contend that the

clause, "and on all deposits he may make in any bank whatsoever, interest shall be paid at a rate not less than two (2) per cent. per annum," renders the defendant absolutely liable for the interest sought to be recovered in this action. It is argued that it was contemplated by the legislature, when it passed the depository law, that the state and county treasurers, notwithstanding its provisions, would deposit the public funds in banks other than designated depositories, and for that reason inserted therein the clause last above quoted. We are of the opinion that this argument is unsound. To so hold would be to convict the legislature, when passing a law for the relief of treasurers which would enable them to avoid liability for public funds by depositing them in accordance with such law, of believing that they, the treasurers, would deliberately violate the law and thereby lay themselves liable to criminal prosecution. No such thought, in our judgment, was in the minds of the legislature when the act under consideration was passed. On the contrary, we think that the purpose of the act was to provide a place for the safe-keeping of the public money; to obtain interest thereon where it was possible to do so, and to relieve the treasurer from liability as an insurer of so much of the fund as should be placed in depository banks. If the bank, during the time referred to, had more money of its own than it could profitably use, there was no incentive for it to enter into any unlawful combination to obtain the county funds, the obtaining of which, to lie idle in its vaults, would simply impose upon it increased labor and added responsibility. It is immaterial that, while this money was being from time to time deposited, the officers of the bank obtained the knowledge that the treasurer was holding and using the certificates as county funds. Nor do we think that the fact that the money was so deposited should, in the light of the other facts shown, be regarded as evidence of any trick or attempt to deceive on the part of either the bank or the treasurer. It is as if the bank had said to the treasurer, "We will not have

any dealings with you as treasurer, but if you want us to act as custodian, for *you*, of the county money, for which you are personally responsible, which you have not been able to deposit in depository banks and for the safe-keeping of which the county has failed to provide you a safe place, we will accommodate you, but we will only deal with you as an individual, and not as treasurer." The depositing of the money in the bank by the treasurer, as was done, did not relieve him or his bondsmen of any liability whatever. If the bank had failed while it held such deposits, the treasurer and his bondsmen would have had to make the loss good to the county. The treasurer was in a most unfortunate situation. If he had not been able to make some such arrangement as was made with the bank, he would have been compelled to either resign his office or to run a risk of loss by robbery, which we do not think he could have induced any bondsmen to assume. This case impresses us as one of absolute fair dealing between the bank and the county treasurer. The bank had no use for the money and did not want it. The treasurer was afraid to keep it in the county vaults. As a personal accommodation to him, the bank acted as his custodian for its safe-keeping, and we do not think it thereby became any more liable for interest upon the deposit than would a safety deposit vault company if it had rented the treasurer space in its vaults for the custody of county funds. Furthermore, this action of the bank and county treasurer was fully approved and ratified by the county board. They realized the situation as fully as did the bank and the treasurer. The deposit was not made by the treasurer and accepted by the bank clandestinely, but was done openly and with the full knowledge, acquiescence and approval of the county board.

In *State v. Hill*, 47 Neb. 456, in paragraphs 16 and 17 of the syllabus by POST, C. J., we held: "(16) A state treasurer who on taking charge of the office, instead of demanding the funds due from his predecessor in cash, accepts

in payment thereof certificates of deposit issued by a bank in which such funds have been deposited for safe-keeping, is chargeable upon his bond for the amount of such payment, and his liability therefor is not affected by the fact that he is unable to realize the money upon such certificates by reason of the subsequent failure of said bank.

"(17) Such a transaction, if in good faith by both parties, amounts to a settlement within the meaning of the statute, which will, to the extent of the payment so made, relieve the retiring treasurer, since the state is not entitled to concurrent remedies upon the bonds of successive officers to enforce the same liability, and whatever is in such case sufficient in law to charge the incumbent will operate *per se* to discharge his predeccessor."

We think the rule there announced is applicable here. Under that rule the deposit by Mr. Cunningham of the money in the bank for safe-keeping upon certificates of deposit issued by the bank did not affect his liability nor that of his bondsmen upon his treasurer's bond. Even if so depositing the money were contrary to law, which we do not decide, such act could be ratified by the county, and if such transaction were in good faith on the part of both himself and the county board fully adjusted and a settlement between them had, and the money so deposited all received by the county, such settlement, under the above rule, absolutely relieved Mr. Cunningham from all liability to the county for such transaction, and we have so held in *Hamilton County v. Cunningham,* 87 Neb. 650. This being true, then by parity of reasoning the bank, by its prompt payment of the funds on demand, was also relieved of all liability. If this transaction of depositing the money in the bank by Cunningham was in violation of law, as claimed, both Cunningham and the bank were parties to such violation, and would be equally liable therefor; and if the transaction, being in perfect good faith, were such that by its ultimate result either of the parties thereto was released, we see no escape from holding that both were released.

We think it must be conceded that the bank cannot, under the evidence before us, be held liable for interest, unless clearly made so by the act above set out; and to our minds the legislative intent in the enactment of the clause over which the contention in this case has arisen is far from being clear. Inconsistent expressions may be found in the statutes regarding the duty of the county treasurer in keeping the money of the county. It is impossible to construe literally all of the language used by the legislature. It is unnecessary to decide in this case whether section 21 of the act should be construed to forbid the deposit of money in banks not selected by the county board as depositories when there are no regularly selected depositories in which the treasurer can deposit the county funds, nor is it necessary to determine the proper construction of the first clause of section 18 of the act, or the effect of the amendment of that section by the act of 1903, which forbids depositing money in other banks when there are depository banks in which the money can be kept. As we view the act, the whole intent and purpose of the section and following sections appear to be that of securing the county funds by depositing them in banks which have qualified by giving the regular security. Section 18 prescribes a particular class of banks in which such deposits should be made. Section 21 renders it criminal to profit by depositing elsewhere. Construed consistently with other statutes on the same subject, the sentence in section 18, "and on all deposits he may make in any bank whatsoever, interest shall be paid," appears to have reference to depository banks, and it would seem that it was not the purpose of the legislature to so radically change the true subject of the section and sentence as to encourage deposits in violation of law to the extent of providing for the payment of interest on such deposits. It would be an anomaly to declare a particular act criminal and at the same time anticipate the violation of the law by the performance of that act.

The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED.

ROSE, J., not sitting.

BARNES, J., dissenting.

I am unable to concur in the majority opinion, and briefly state some of the reasons for my dissent. In construing statutes the court should take account of the conditions existing prior to their enactment, the mischief sought to be prevented thereby, and the means adopted to accomplish that purpose. To that end courts are required to make use of the knowledge common to all persons of such existing conditions. It is a well-known fact that for many years prior to the enactment of our depository law, in its original form, it had been the universal custom of our state and county treasurers to deposit the public moneys in such banks as would pay them the highest rate of interest thereon, to convert this interest to their own use, and thus increase their salaries and fees beyond the compensation allowed them by law. This practice had, in many instances, resulted in loss of the public funds, and many unsuccessful suits had been instituted to recover the interest thus converted to the use of such officers. It therefore seems clear that the legislative purpose in passing the depository act of 1901 was to provide a safe place for keeping the public money, to obtain interest thereon to the use and benefit of the public, and prevent the appropriation of such interest by the public officers. The effect of the original act was to immediately put a stop to the payment of interest to treasurers on public funds deposited in banks, and interest at the rate of 2 per cent. per annum was thereafter paid to the counties by depository banks. In the course of time it was ascertained, and it became a well-known fact, that many banks were practically annulling the provisions of the depository law by assisting in the election of county treasurers who were friendly to them, and by

then refusing to qualify as county depositories, under the provisions of that act, they were obtaining the use of public money without the payment of any interest whatsoever. When this course had been pursued to such an extent that it also became a matter of common knowledge, the legislature amended the depository law by the act of 1903, and inserted therein the clause that, on all deposits the treasurer may make in any bank whatsoever, interest shall be paid at the rate of 2 per cent. per annum. Construing the amendment in the light of the conditions above mentioned, which were then well known and understood, and which the courts should not refuse to recognize, we are of opinion that it was the intention of the legislature to make the amended act apply to transactions like those in the case at bar, and thus prevent the banks by the adoption of any scheme or device, and irrespective of any condition whatsoever, from obtaining the use of the public money without the payment of interest thereon. It will not do to say that the amendment in question was intended to apply alone to depository banks, for that matter was fully covered by the terms of the original act. It is conceded by the majority opinion that the officers of the defendant bank well knew that treasurer Cunningham was, as a matter of fact, by the purchase of the certificates in question, depositing the county money in their bank for safe-keeping. It is said that the bank had no use for this money, and obtained no benefit from such deposits. With this I cannot agree. The testimony discloses that the bank did not need the money for the purpose of extending its loans, and that is as far as the evidence goes. It must be conceded, however, that the deposit of this money, amounting at times to as much as $30,000, did benefit the bank. It swelled the amount of its available assets; it enabled it to increase the amount of its banking business; and was a benefit to its financial standing. It follows that it is no hardship for the bank to be required to pay interest at the rate of 2 per cent. per annum on the average daily balances of the funds so deposited

therein from and after April 3, 1903, at which time the amendment in question became operative. It may be suggested that the amendment of 1909 repealed the section of the depository law in which the clause in question is found. I am satisfied, however, after an examination of this matter, that the intention of the legislature was not to repeal that section, but to repeal another and different section of the depository law, and, where such intention is clear, it is the settled law of this state that the repeal will operate only upon the section which was intended to be repealed. We think, however, the suggestion is wholly immaterial, because if, as contended, the section containing the clause in question was repealed, such repeal did not destroy the causes of action which had accrued thereunder prior to the adoption of the amendment of 1909. Section 6971, Ann. St. 1909, provides: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." It seems to me that the majority opinion in effect nullifies the provisions of the depository law, and, if carried to its legitimate conclusion, will permit the continuance of those reprehensible practices which it was especially enacted to prevent.

I am of opinion that the defendant bank should be held liable for the payment of 2 per cent. annual interest on the daily balances of the public money of Hamilton county deposited therein from and after the adoption of the amendment of 1903; that the judgment of the district court should be reversed and the cause remanded to that court, with directions to take an account of the amount of interest thus due from the bank to the county and render a judgment accordingly.

ROOT, J., concurs in this dissenting opinion.

IRA E. TASH, APPELLANT, V. LUTHER P. LUDDEN ET AL., APPELLEES.

FILED JANUARY 9, 1911. No. 16,858.

1. Schools: NORMAL SCHOOLS: VALIDITY OF STATUTE. April 5, 1909, the legislature passed an act to establish and locate an additional state normal school; and, supposing at the time that another act passed April 1, 1909, creating the "Normal Board of Education," was a valid act, and that such board was the one upon which would devolve the carrying into effect of the said first named act, its name was used in said act. By subsequent proceedings in this court, in *State v. Majors*, 85 Neb. 375, the act of April 1, 1909, was held unconstitutional and void. *Held*, That the act of April 5, 1909, was not invalidated by the mistake of the legislature as to name, and that the duty of carrying it into effect devolved upon the existing board, defendant herein.

2. ———: ———: LOCATION: CONSTRUCTION OF STATUTE. The act of April 5, 1909, provided that cities and towns competing for the location of the state normal school should file their applications with the secretary of the Normal Board of Education within 60 days after the said act became effective. *Held*, That time was not of the essence of the thing to be done, and that such provision was directory merely, and not mandatory.

3. ———: ———: ———: ———. And the fact that prior to the decision of this court in *State v. Majors*, 85 Neb. 375, on November 15, 1909, the Board of Education was unwilling to take the responsibility of establishing and locating the school provided for in said act did not deprive said board of its right to thereafter proceed with the discharge of the duties enjoined by said act.

4. ———: ———: ———: ———. And the fact that the city of Chadron filed its application with the "Normal Board of Education," instead of with the Board of Education, did not preclude such city from having its application considered by the Board of Education after it had resumed the exercise of its powers and functions, it appearing that said application was received and filed by said board before it had taken any action in the premises.

5. ———: ———: ———: ———. And the failure of defendant board to visit the various cities and towns competing for the location of the state normal school and select a site for the location of said school within the time specified in the act of the legislature was immaterial, as the later visitation of such points and selection of such site accomplished the substantial purposes of the statute.

6. Corporations: POWER TO DISPOSE OF PROPERTY. All corporations capable of taking and holding property have the *jus disponendi* as fully as natural persons, except so far as they are restrained by statute, or are prohibited by their articles of incorporation or outstanding contracts; and under this general power a corporation may dispose of the whole of its property for any lawful purpose.

7. Colleges and Universities: POWER TO DISPOSE OF PROPERTY. A college incorporated by the statutory number of resident freeholders, for "the promotion of Christian education by harmoniously developing the moral, mental and physical powers of those who share its advantages," which obtains its real estate by purchase and receives its title thereto in an unconditional warranty deed, and whose trustees are elected "by the Northwestern Association of Congregational Churches in Nebraska," and which obtains a considerable portion of its funds by soliciting and obtaining "written subscriptions by way of contributions from people of all denominations and of no denomination, which were given and paid in the treasury of the corporation without any written condition, trust, purpose or obligation, except that the same were to be used for the purposes of the corporation in purchasing land, erecting buildings, putting them up and supplying the school," does not thereby become a religious, sectarian or eleemosynary corporation or institution, so as to preclude a sale by the trustees of said corporation of any or all of its property, real or personal, which sale will not divert the property from the purpose for which it was obtained and used by such corporation.

8. Schools: NORMAL SCHOOLS: LOCATION. The evidence examined and set out in the opinion as to the acts of the Board of Education, defendant herein, subsequent to the decision of this court in *State v. Majors*, 85 Neb. 375, in relation to the establishment and location of an additional normal school at Chadron, *held* within the scope of the powers delegated to such board by the act of April 5, 1909.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

C. C. Flansburg, for appellant.

Arthur T. Mullen, Attorney General, Grant G. Martin, Frank M. Hall and *Albert W. Crites, contra.*

FAWCETT, J.

By the act of June 20, 1867, the legislature established and located the first state normal school at Peru. Laws 1867, p. 80. By the act of April 8, 1903, the legislature authorized the Board of Education to establish and locate one additional normal school. Laws 1903, ch. 90. Under the latter act, what is known as the "Kearney Normal School" was established and located in that city. April 5, 1909, the legislature passed an act to establish and locate an additional state normal school "at some suitable location west of the east line of the Sixth congressional district and north of the 42 parallel of latitude in the state of Nebraska." Laws 1909, ch. 126. April 1, 1909, the legislature passed an act creating a board to be known as the "Normal Board of Education," and providing that such board "shall have control and direction of the normal education of the state, including normal schools and junior normals, and which board shall succeed to and take the place of and exercise the powers of the present 'Board of Education,' as herein provided. Said 'Normal Board of Education' shall be composed of seven members, five of whom shall be appointed by the governor, by and with the advice and consent of the senate. The state treasurer and state superintendent of public instruction shall be, by virtue of their office, members of the said board." Laws 1909, ch. 125. The act last above noted was passed with an emergency clause, and provided that "the five persons first appointed by the governor as members of said board, shall be appointed within ten days after this act takes effect and before the adjournment of the present session of the legislature if practicable." In accordance therewith the governor appointed the five members provided for, and they were confirmed by the senate. One of the members so appointed was Senator Thomas J. Majors, a member of the senate, who participated in the passage of said act. The attorney general, believing that the duties of the "Board of Education" and of the "Normal

Board of Education" were conflicting, and that the validity of the act creating the latter board was doubtful, instituted proceedings against Senator Majors and the other gentlemen holding as members of the Normal Board of Education by appointment of the governor to determine the validity of the act referred to. The result was that on November 15, 1909, this court decided that the said act of April 1, 1909, creating the said "Normal Board of Education" was unconstitutional and void. *State v. Majors,* 85 Neb. 375. During the pendency of the suit of *State v. Majors,* neither board attempted to perform any of the functions of their office, except to receive and file such papers and documents as might be tendered.

Section 2 of the act of April 5, 1909 (laws 1909, ch. 126), providing for an additional state normal school, reads as follows: "Within sixty days after this act takes effect the various towns, villages and cities in the aforesaid territory competing for the location of said normal school shall transmit to the secretary of the Normal Board of Education in a sealed envelope an application for said normal school together with such other information as may be deemed proper together with a good and sufficient bond for a deed to the state of Nebraska for 80 acres of land to be used perpetually for a site for said school in the event that such city, town or village is finally selected within ten days after September 1, 1909. The normal school board shall visit the various villages, towns and cities competing for said normal school and said board shall select therefrom a site for said school, said board shall be governed in the selection of said site by the educational interests of said territory and the state of Nebraska. Before any proposal shall be definitely accepted the city, village or town making such proposal shall present a good and sufficient deed of conveyance of said site to the state of Nebraska, free and clear of all liens and incumbrances, and an abstract of title to be examined and approved by the attorney general. The said board shall forthwith thereafter employ a competent architect to

prepare plans and specifications for a suitable building or buildings, and upon the adoption of the same the board shall at once advertise for sealed proposals for the erection and completion of said building or buildings in accordance with such plans and specifications, and shall let the contract to the lowest approved bidder therefor, who shall be required to enter into a written contract for the erection and completion of said building or buildings in accordance with the plans and specifications adopted by said board. Said contractor shall be required to give a bond for the faithful performance of the contract, to be approved by the board, in such amount as it shall prescribe. Said board shall have authority to employ an architect to superintend the construction of said building. Upon the completion of the transfer of the site to the state, the said board shall so notify the auditor of public accounts in writing."

The passage of the act for the creation of an additional normal school brought into the field six competitors for the location thereof, viz., Ainsworth, Alliance, Chadron, Crawford, Gordon, and Rushville. The city of Alliance filed its application with both boards. The city of Chadron and the other competitors filed their applications with the Normal Board of Education alone, but after the decision in *State v. Majors,* these applications were all transferred to the Board of Education, and, having been received by that board before any steps were taken by it in the premises, the essential requirement of the act, in that particular, was complied with. After the decision of this court in *State v. Majors,* the Board of Education reassumed its duties and functions. The city of Chadron filed with its application a bond for a deed to the state of Nebraska of 80 acres of land, in accordance with the terms of section 2, *supra.* After reassuming the exercise of its powers and functions, the defendant board notified all competing towns that applications would be received and considered, as required by said act. On or about January 3, 1910, defendant board commenced their round

of visitation and visited all of the cities and towns above enumerated. After considering all the advantages and disadvantages of each location tendered, the board selected the city of Chadron as the site for such normal school, and immediately notified the various competing towns and cities of such selection. The 80 acres of land proposed to be donated by the city of Chadron has for 15 or 20 years last past been owned by the Chadron academy, a corporation with its principal place of transacting its business in the city of Chadron, and incorporated for "the promotion of Christian education by harmoniously developing the moral, mental and physical powers of those who share its advantages; the erection and maintenance of such buildings and structures as may be deemed necessary, and to purchase real estate as a site therefor; and especially to do all things necessary or expedient for the benefit and development of an educational institution." The articles of incorporation provided that the existence of the corporation should commence on the 24th day of July, 1888, and continue indefinitely. It further provided that the business of the corporation "shall be conducted by a board of twelve trustees to be elected by the Northwestern Association of Congregational Churches in Nebraska at such time and place, and in such manner, as shall be prescribed by the constitution and by-laws of said corporation." After deciding that the city of Chadron was the proper place for the location of the normal school, defendant board imposed some additional conditions upon the city. The city at once furnished the board a good and sufficient bond that it would comply with such additional conditions. This bond and the bond for a deed were both duly approved by the board. Abstracts of title to the land tendered were then furnished the board by the city, and were at once delivered by the secretary of the board to the attorney general for his examination and approval. At the time of the commencement of this suit, the attorney general had not completed his examination of such abstracts, and hence had not approved the same.

Plaintiff bases his claim for an injunction restraining the board from locating the normal school at Chadron upon the following grounds: "First. Appellees had no power or authority to select a site or to take any action whatever under the law, the sole right of selection being vested in another tribunal, to wit, the 'Normal Board of Education.' Second. The land offered as a site belongs to an eleemosynary institution holding title in trust, without any authority to sell and convey, and the state could not take title through said deed. Third. Appellees selected a site, chose an architect, approved his plans for a building, and appropriated $30,000 for its erection before the title was approved or passed upon by the attorney general."

The case was commenced in the district court for Lancaster county. Trial to the court. Finding and decree for defendant, and plaintiff appeals.

It is urged by defendants that plaintiff, in his capacity as a taxpayer and president of the Alliance Commercial Club, is not entitled to maintain this suit; and, further, that the petition showing that the abstract of title which had been furnished was in the hands of the attorney general, but had not yet been examined and approved by him, the suit was premature, and plaintiff's petition was properly dismissed for that reason alone. Inasmuch as important educational interests of the state are involved, and for the purpose of avoiding possible further litigation, we will not follow the line of least resistance by disposing of the case upon either of the points named, but will consider it upon the merits; and in doing so we will consider plaintiff's contentions in the order above set out.

First. Had defendant board authority in the premises? It is contended by plaintiff that, by the passage of the act of April 1, 1909, the legislative purpose was to create the Normal Board of Education in addition to the existing Board of Education. He argues that there can be no doubt about this, because the language of the statute is "*created* a board." He further says: "But whether the

legislature intended to *'create'* a new tribunal, as stated in the act, or merely to substitute the 'Normal Board of Education' for the existing Board of Education, is, for the purpose of this discussion, entirely immaterial, as the legislative intent manifested by this act was certainly to do one or the other." In this statement we concur. It was undoubtedly the "intent" of the legislature to either create a new board, or to substitute a new board for the existing board; but the trouble is, by failing to comply with constitutional requirements, it failed to do either. The fact that the governor appointed a "Normal Board of Education" before the act creating it was declared invalid by the judgment of this court does not alter the fact that the legislature failed to abolish or supersede the existing board by either creating a new board in addition thereto, or by substituting a new board therefor. This being true, we think this case must be considered as though the act of April 1, 1909, had never been passed; and, in determining whether the board of education has proceeded according to law in locating a normal school in the city of Chadron, we must look alone to the act of April 5, 1909. Looking at that act, the question arises: What did the legislature have in contemplation when it passed and what was its purpose in passing it? That intent and purpose we gather from the title to the act, which reads: "An act to establish and locate an additional state normal school at some suitable place as hereinafter provided and to provide for the erection of buildings, payment, maintenance and receiving donations for same, and to provide an appropriation therefor." That was what the legislature had in mind and what it purposed doing. Nebraska is a state of large dimensions. Its extreme length is 420 miles, extreme width 208 miles, and total area 77,520 square miles, of which 712 square miles only are water. Peru, the location of the first normal school, is in the southeast corner of the state, about 60 miles in an air-line from Lincoln, the capital of the state. Kearney, the location of the second normal school, is south

and a little east of the center of the state, 120 miles in an air-line from Lincoln. Chadron is in the northwest corner of the state, 355 miles in an air-line from Lincoln. From Chadron to Kearney, the location of the nearest normal school, is 250 miles in an air-line. These distances will show the reasons actuating the legislature in desiring to locate a third normal school in the northwestern portion of the state. While that portion of the state is more sparsely settled than the eastern and central portions, the people residing within the boundary described in the act are as much entitled to the benefit of state normal school privileges as the residents of other portions of the state; but their great distance from the other normal schools and the expense attendant upon sending their children to those schools have in many cases been prohibitive. In order to ameliorate their condition and to put them upon an equal footing with their more fortunate fellow citizens in the eastern and middle portions of the state, the legislature wisely and very justly provided by the act under consideration for a third normal school for their benefit. The purpose of the act under consideration, therefore, was the establishment of a normal school within the territory designated. That was the sole and controlling purpose; and, inasmuch as the legislature itself, while it might have located the school at a particular place, could not attend to all of the details of its location, that duty was naturally assigned to the school board. Believing at the time they passed that act that the act of April 1, 1909, was a valid act, and that the name of the board upon which would devolve the carrying into effect of the act it was then passing was the "Normal Board of Education," that name was used in the act. We think it would be trifling with the acts of the legislature for the court, on account of this nonessential mistake in denominating the board, to nullify the act and thereby prevent the carrying out of the wise and just purpose of the legislature. We are unwilling to do so.

It is further contended by plaintiff that neither board

visited any town, city or village competing for said place within ten days after September 1, 1909, or selected any site for said school from any of said competing places during the year 1909. The failure of the "Normal Board of Education" to act was entirely immaterial; and such failure on the part of the existing board did not in any manner affect the validity of its subsequent acts. The reason for its failure to act was the pendency of the suit of *State v. Majors,* and we think it was fully justified in awaiting the decision in that case before entering upon the work of selecting a site and contracting for the establishment of so important a state institution as a normal school. Time was not of the essence of the thing to be done. It was directory merely. It could not have been the intention of the legislature that, if the board for any reason was unable to visit the various cities and towns competing for the location of the school within the ten days, the act should fail. To illustrate: The act gave competing points until and including August 31, within which to file their applications. Six cities and towns had filed such applications. Others might have filed. Suppose applications had been filed on the last day of August and the board had started out on the morning of the next day to visit the several cities and towns for the purpose of examining the lands tendered and making an investigation of the situation and circumstances surrounding each application and the desirability of each competing point as a location for the school, and, by reason of the number of applicants and the distances between the several points, they were unable to complete the visitation and make a proper examination of each proposed site within the prescribed ten days, could it have been the intention of the legislature that they should either make a superficial examination only, or neglect entirely to visit some of the competing points? The mere statement of the proposition is its own answer. The authorities are numerous and uniform, as stated by Cooley, Constitutional Limitations (6th ed.) p. 92: "Those directions which are not of

the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute." In the case at bar, "the essence of the thing to be done" was the visiting of the competing points and the selection of a site for the school provided for in the act. The failure to make the visitation and selection within the time specified in the act did not prejudice the rights of any one, but when made at a later date "it accomplished the substantial purposes of the statute." We therefore hold that the defendant board had full power and authority to proceed under the act in question, to select a site and to take any and all other steps necessary to carry the act into effect.

Second. Did the Chadron Academy have authority to sell the land in question to the citizens of Chadron and to deed the same by their direction to the state? It is argued by plaintiff that the Chadron Academy was an eleemosynary institution, and held its property in trust, without any authority to sell and convey. In this contentention we are unable to concur. The Chadron Academy was organized and incorporated in 1888, under chapter 16, Comp. St. 1887. Section 15 of that chapter reads: "Any number of persons, not less than five, desiring to establish a college, university, normal school, or other institution for the purpose of promoting education, religion, morality, agriculture or the fine arts, may, by complying with the provisions of this subdivision, become a body corporate and politic with perpetual succession, and may assume a corporate name by which they may sue and be sued, plead and be impleaded in all courts of law and equity; may have a corporate seal, and the same alter and break at pleasure; may hold all kinds of estate, real, personal or

mixed, which they may acquire by purchase, donation, devise, or otherwise, necessary to accomplish the objects of the incorporation, and the same to dispose of and convey at pleasure." This section has remained intact from the date of its first enactment to the present time, and still appears as section 15, ch. 16, Comp. St. 1909. At the beginning of the trial it was stipulated between the parties that the cause should be submitted to the court upon its merits "upon the pleadings, and the following instruments and evidence: First, the petition of the plaintiff; second, the affidavit of Luther P. Ludden to discharge the temporary restraining order, together with all the exhibits thereto annexed; third, the stipulation of the parties filed March 30, 1910, and the certified copy of a deed from Judson K. Deming and wife to the Chadron Academy." The stipulation filed March 30, referred to, provides: "That the following shall be deemed and taken as facts in addition to those embraced in the affidavits of the parties: That the Chadron Academy solicited and obtained written subscriptions by way of contributions from people of all denominations and of no denomination, which were given and paid in the treasury of the corporation without any written condition, trust, purpose or obligation, except that the same were to be used for the purposes of the corporation in purchasing land, erecting buildings, putting them up and supplying the school. That the Chadron Academy was a corporation formed without stock or stockholders, or dividends or gain." The deed from Deming and wife to the Chadron Academy, referred to in the stipulation, is an ordinary short-form warranty deed, and is made for a consideration of $3,200.

It will thus be seen that there is no foundation for plaintiff's second contention that "the land offered as a site belongs to an eleemosynary institution, holding title in trust, without any authority to sell and convey." There is nothing in the deed to the academy, nothing in the character of the donations it received, nothing in its articles of incorporation, nor anything in the statute which

forbids or even by implication prohibits the academy from selling the land in question, precisely as was done in this case. On the contrary, the authority is clearly given by the statute, "the same to dispose of and convey at pleasure." The corporation was formed by six resident freeholders of Dawes county, and the fact that in the articles of incorporation it was provided that their board of trustees were to be elected "by the Northwestern Association of Congregational Churches in Nebraska," is not sufficient to constitute it a sectarian or religious corporation; nor will the purposes to which the land will be appropriated, when it is used for a state normal school, be any violation or change of the purposes for which the corporation was formed, viz., "the promotion of Christian education by harmoniously developing the moral, mental and physical powers of those who share its advantages." This is a Christian country, Nebraska is a Christian state, and its normal schools are Christian schools; not sectarian, nor what would be termed religious schools; nor was the Chadron Academy such a school. The Chadron Academy had full authority to sell and convey the land, as proposed; and in so doing it will not be causing it to be devoted to any other or different purpose than that for which it was used while still held by it. Instead of being a detriment to those attending the school, the change will be of incalculable benefit to them. The Chadron Academy, as the record shows, has never paid its way. The establishment of the normal school at Chadron and the taking of the land off its hands and devoting it to educational purposes, under the laws of the state, will be a godsend to it. At the time these negotiations began, its indebtedness had steadily increased to a total of about $17,000, the principal part of which seems to have been represented by a mortgage given to a church extension society. The consideration paid by the citizens of Chadron was $7,000, which sum the extension society agreed to accept and release its mortgage, thus satisfying the debt. The academy seems therefore to have been con-

tinuing its operations by the grace of its creditors, and it is a fair presumption that in its encumbered condition it could not provide its students with anything like the advantages or facilities for "harmoniously developing the (their) moral, mental and physical powers," as will be afforded them by a normal school endowed with the wealth of a great state.

In *People v. President and Trustees of the College of California,* 38 Cal. 166, the supreme court of California had before it a case substantially on all fours with the case at bar. In the syllabus it is held: "All corporations capable of taking and holding property have the *jus disponendi* as fully as natural persons, except so far as they are restrained by statute. Under this general power, a corporation may dispose of the whole of its property for any lawful purpose. * * * It was for the president and trustees of the College of California to decide whether the public interest would be subserved by dissolving the corporation and devoting its property, after the payment of its debts, to the support of the state university." The opinion of the court, by Crockett, J., contains so much discussion applicable to the case at bar that we will not weaken the opinion by quotations therefrom, but refer to it as a clear and able discussion of the question under consideration here. It is so clearly in point and its reasoning appears to us so sound that we refrain from further citations. Without further discussion of the subject, we hold that the Chadron Academy had full power and authority to sell and convey the land in controversy for the purposes for which such sale was made.

Third. Under this assignment it is contended that the appellees selected the site, chose an architect, approved his plan for a building, and appropriated $30,000 for its erection before the title was approved or passed upon by the attorney general. It is true that the defendant board selected the site and chose an architect, but the evidence does not sustain the charge that defendant board had approved the architect's final plans for a building or that it

had appropriated $30,000 for its erection. The proceedings of the board, which are introduced in evidence, show that the board received bids from several architects for the new normal building at Chadron and the administration building at Peru; that the bids of Mr. Bair and Mr. Berlinghof were identical; whereupon a motion was duly made, seconded and adopted, "that the board accept the offer of Mr. Berlinghof." At the next meeting of the board the minutes recite: "Mr. Berlinghof presented the preliminary studies for the new building at Chadron. After considering the same, Mr. Ludden moved and Mr. Brian seconded: That the studies as presented be approved and that the architect be instructed to prepare plans in accordance therewith." So far as the evidence before us shows, this is the limit to which the board had gone in approving plans for a building. As to the charge that the board had appropriated $30,000 for the erection of the building, the record stands thus: By section 4 of the act under which the board was proceeding, the legislature appropriated the sum of $35,000, or so much thereof as might be necessary for the purpose of carrying into effect the provisions of the act. At a meeting of the board on February 8, 1910, we have this record: "Mr. Ludden moved and Mr. Bishop seconded: That the blank for the amount of the cost of the building at Chadron be filled in at $30,000. The motion was adopted." By this action all that the board did was to determine that they would use only $30,000 of the $35,000 appropriated by the legislature, for the construction of a building at Chadron. The fact that the board took the preliminary steps above outlined before the attorney general had passed upon the abstracts was not sufficient to warrant plaintiff in bringing this suit. They had not yet actually appropriated the $30,000, but had simply designated that as the amount beyond which they would not go, and so that the board would have a standard by which to guide the architect in the preparation of his final plans and specifications, and to guide the board itself in calling for bids thereupon and

in ultimately letting the contract for the construction of the building. No fraud or bad faith on the part of the board is urged.

Upon consideration of the whole case we hold that, if the title to the land tendered receives the approval of the attorney general, the defendant board may lawfully proceed with the establishment of a normal school at Chadron and the erection of suitable buildings therefor, in accordance with the act of April 5, 1909, *supra*.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., not sitting.

SAMUEL H. RICE, APPELLANT, V. LINCOLN & NORTHWESTERN RAILROAD COMPANY ET AL., APPELLEES.

FILED JANUARY 9, 1911. No. 16,211.

1. **Vendor and Purchaser:** LAND CONTRACT: CONSTRUCTION. A contract to convey a specified tract of land for a certain purpose, for a specified price, with an option to the purchaser to take additional land at the same price if found to be necessary for said purpose, one dollar of said purchase price being advanced at the making of the contract as earnest money, is not completed by accepting a deed of the specified land and paying the remainder of the purchase price, so as to rescind the option provided for in the contract; the time specified for exercising the option not having then expired.

2. **Contracts:** CONSTRUCTION. Punctuation marks in a contract will not be allowed, in a court of equity, to give the contract an unconscionable and inequitable meaning.

3. ———: ———. Equity will not construe doubtful language in a contract so as to defeat the contract as in violation of the law against perpetuities, if it is reasonably susceptible of a construction that will validate the contract.

4. **Specific Performance:** CONTRACT FOR RIGHT OF WAY. When a railroad company needs land for the construction and operation of its road, it is contemplated by the statute that the parties will

agree as to the land to be taken and the compensation to be paid therefor, and a contract made upon such agreement will be enforced specifically unless manifestly inequitable. The fact that the statute provides a complete remedy for the railroad company when the parties are unable to agree may be taken into consideration with evidence tending to show that a contract for that purpose is inequitable and unconscionable.

5. ———: INEQUITABLE CONTRACTS. In an action to specifically enforce a contract to convey real estate, if the court is satisfied from the evidence that the result of enforcing it would be so burdensome and injurious to the defendant that it could not have been reasonably intended by the parties as the effect of the agreement, it will not be specifically enforced.

6. ———: ———. The evidence showing the circumstances of the making of the contract, and the results of a literal enforcement, is examined, and it is found that the legal effect of the contract with the construction contended for would be too inequitable and unconscionable to be enforced by a court of equity.

APPEAL from the district court for Seward county: GEORGE F. CORCORAN, JUDGE. *Reversed.*

R. P. Anderson, J. J. Thomas and *Edwin Vail,* for appellant.

J. E. Kelby, R. S. Norval and *F. E. Bishop, contra.*

SEDGWICK, J.

The plaintiff is the owner of certain real estate in Seward county, and began this action in the district court for that county to recover damages which he alleged he had sustained by reason of the wrongful act of the defendants upon and in relation to the said real estate. The defendants for answer and counterclaim alleged that the plaintiff had before that time contracted to sell and convey the real estate in question to the defendant, the Lincoln & Northwestern Railroad Company, upon certain conditions and terms which had all been complied with, and had afterwards refused to convey the same in accordance with his contract, and asked for a specific performance of the

contract. The defendants also asked that the issue tendered by the counterclaim be first tried by the court without a jury. The court thereupon determined that the issue tendered by the answer and counterclaim should be first tried, and upon such trial found the issues in favor of defendants and entered a decree for the specific performance of the contract alleged by the defendants. The plaintiff has appealed.

It appears that plaintiff was the owner of the S. E. ¼ of the S. W. ¼ of section 4, in township 9 N., of range 4 E., in Seward county. The railroad company was about to construct a line of road along the north side of this tract of land, and on the 10th day of May, 1906, entered into the following contract with the plaintiff: "Contract for Right of Way. For the consideration of the sum of one dollar to me/us in hand paid, I, S. H. Rice, a single man, of Seward county and state of Nebraska, hereby covenant to and with the Lincoln & Northwestern Railroad Company that I will convey by good and sufficient deed, unincumbered, the right of way for the railroad of said company, all that part of the S. E. ¼ of the S. W. ¼ of sec. 4-9-4-E, lying and being north of a line drawn 75 feet from and parallel to on the south side of the center line of said railroad as now located on and across said land. We further agree that said company may proceed in the construction of said road over said land, and we will sell to the said railroad company such additional right of way as they may require at the rate of $60 dollars per acre, with the privilege of changing any watercourse necessary in the construction of said road, and the right to build and maintain a snow fence for the term of five months each year at any point where said snow fence may be deemed necessary within two hundred feet of either side of its right of way on said described land beginning November 15th and ending April 15th of each succeeding year; and I agree to settle all damage to tenant on account of his leasehold. Provided, that said railroad company shall during the years 1906 and 1907 construct its said railroad

from on said land to.....and pay the said S. H. Rice the sum of $150, then this obligation shall be of force and virtue in law; but if said company shall neglect or refuse to pay the said sum within 1 month from date, then either party may have the damages for right of way assessed as provided by law. Witness our hands hereto this 10th day of May, A. D. 1906. S. H. Rice. Witness: J. M. Saxton." (Indorsed) "S. H. Rice. Pd. 5-24-06. Draft 786. Pt. of S. E. ¼ S. W. ¼ Sec. 4-9-4-E."

During the years of 1906 and 1907 the railroad company constructed its railroad, using the tract of land described in the contract. On the 6th of September, 1907, the company served upon the plaintiff a demand in writing to convey to the company a strip of said land 65 feet wide and about 400 feet long adjoining on the south the strip of land described and specified in the said contract which the plaintiff had already conveyed to the company pursuant to the contract. With this written demand the company tendered $36 as the price of said land at $60 per acre, as stated in the contract, and also tendered a draft of a deed of the land demanded to be executed to the company from the plaintiff.

1. The first contention of the plaintiff is that, when the original right of way deed was executed by him to the company, any supposed claim that the company might have by virtue of the contract for the option to purchase more land was rescinded by the parties. The consideration of $1 named in the contract was paid by the company to the plaintiff at the time that the contract was executed, and, when the deed of right of way specified in the contract was executed by the plaintiff to the company, the amount specified in the contract as the purchase price of the land, $150, was paid by the company to the plaintiff, and the $1 which had been paid by the company at the time of the execution of the contract was returned by the plaintiff to the company. This transaction, it was urged, operated as a completion of the contract, and no consideration remained for the option which the company

is now claiming. We do not think that this transaction will admit of such a construction. The consideration for the contract entered into by the parties was the purchase by the company of the tract of land described and specified in the contract and the payment of $150 therefor. This would be a sufficient consideration for all the agreements of either party in the contract. The $1 was advanced as a part of the $150, and, when the deed was executed, the plaintiff was entitled to the remainder of $149. He was paid by a check which had been prepared by the company and which called for $150, and he therefore returned the $1. This transaction therefore cannot be considered an abandonment of any of the terms of the contract by either party.

2. The second proposition of the plaintiff as stated in the brief is as follows: "The said contract, assuming it to be otherwise valid, was void so far as it sought to bestow upon the railroad company the option to purchase additional lands, because it violated the rule against perpetuities." It appears to be conceded by the company that if the exercise of its option to purchase was not limited as to time, and the contract had by express terms been extended to the "heirs, executors, administrators and assigns and the owner or owners for the time being of the lands conveyed and all persons who should and might be interested therein," it would violate the rule against perpetuities. The company contends that it does not violate this rule for two reasons: The contract by its terms is personal to this plaintiff only, and it is limited in time to the construction of the railroad which again in express terms is limited to the two years named in the contract.

The contention that the contract was personal to the plaintiff and did not run with the land, and is therefore limited to the life of the plaintiff, is confidently presented in the brief. Our statute provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of

justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." Comp. St. 1909, ch. 73, sec. 53. It has been held that covenants in a deed of a party in possession of land run with the land when the deed names the grantee personally with no other words. In the view that we take of the second proposition of defendant upon this point, it is not necessary to determine whether the true construction of this contract is that the deed given pursuant thereto should contain covenants running with the land.

The second proposition of defendant on this point, that the contract should be construed to limit the exercise of the option to the time of the construction of the road, we think is right. "We further agree that said company may proceed in the construction of said road over said land, and we will sell to the said railroad company such additional right of way as they may require at the rate of $60 dollars per acre, with the privilege of changing any watercourse necessary in the construction of said road." By the first paragraph of the contract plaintiff agreed to convey "the right of way for the railroad of said company." The company was to "proceed with the construction of said road over said land," and might need for that purpose "additional right of way." The evidence shows that orchard, farm buildings and other valuable improvements are located so near to the right of way that, if this contract should be construed to mean that after the road was completed the company might take such part of the farm as it saw fit, it would be too unconscionable to be enforced in a court of equity. Punctuation marks in a contract will not be allowed, in a court of equity, to give the contract an unconscionable and inequitable meaning. If this contract were written with the clause "with the privilege of changing any watercourse necessary" in parentheses, it would perhaps be patent to all that the words following, "in the construction of said road," limit the words, "as

they may require." The agreement is that, if the company should require "additional right of way * * * in the construction of said road," plaintiff shall convey it and be paid therefor at $60 per acre. The exercise of the option, then, was limited to the two years in which the construction was to be completed, and the rule against perpetuities is not violated.

3. The third contention of the plaintiff, that the defendants have an adequate remedy at law independently of the contract, is perhaps of importance in connection with the general equities of the case. It was, of course, proper and desirable that the parties adjust the matter by an agreement between them, and a contract for that purpose, otherwise unobjectionable, might be enforced The statute, however, contemplates that without a contract between the parties the company can obtain such land as it needs for the proper maintenance and operation of the road through the simple method pointed out by the statute and without unnecessary litigation.

4. The fourth objection that the plaintiff makes to this decree is that "it would be inequitable to enforce specific performance of this contract." We think this objection is well taken. Mr. Hoagland, who was the company's engineer, was a witness for the defendant, and testified quite at length as to the construction of the road and the necessity of this additional land in that construction. As the engineer for the company it devolved upon him to determine what land was needed by the company in the construction of the road. He says that it was first decided that 150 feet of right of way was needed, and if in practice it was found that more was needed it was intended to obtain it later. When the improvement was begun, Middle Creek, which was very irregular in that locality, crossed the right of way opposite the land in question three times, running in a general direction from south to north. The public highway was north of the right of way. A new channel was cut straightening the creek so that it would cross the right of way but once. It

was necessary to fill in the bed of the old channel where it formerly crossed the right of way. This channel was at some points as much as 36 feet below the required grade. The creek where this filling was done had been fed by springs, and it was necessary to place tiling to carry off the water. On the south side the base of the fill extended to within about 25 feet of the south line of the original right of way. The engineer stated that at one point it was within 23 feet, and Mr. Rice testified that it was 25 feet at the nearest point. The public road was changed to the south side of the right of way, passing under the railroad at the point nearly opposite the east line of the plaintiff's land, and then running west along the shelf or "berm" constructed by the company. This shelf or berm was 25 feet wide, and was placed by the company along the grade to protect it from surface water, and perhaps for other purposes. The slope of the grade, together with this shelf or berm, extended within about four feet of the south line of the original right of way. The engineer testified that it was necessary that the drainage tiling should extend about 10 feet south of the south line of the right of way, and in maintaining the drain "it would be necessary to take up the tiling and reset them," and that he figured on getting the dirt from the east end of this strip to make a fill which would be necessary in the future, and that additional right of way was required for these and other similar purposes. The plaintiff testified that this additional strip 65 feet wide extended to within 10 feet of his barn and within 12 feet of his house, and takes in both of his granaries and his grove.

It appears from the evidence that, when this contract was made, there was some discussion between the plaintiff and the company's agent as to the probability that any more land would be necessary in the construction of the road; and the plaintiff testified that the company's agent then said, "We might need it for additional trackage or other purposes in connection with building the road." and that he said to the agent, "If that is the case, they will not

put any trackage down there." His understanding was that if the company should put another track there, or some improvement of that kind, they might call upon him for additional right of way. If it is admitted that it is for the company and its engineer to determine how much right of way is necessary for the proper construction, maintenance and operation of the road, still, when we consider what use the company expects to make of this additional land, it seems clear that any one not an expert engineer would not have contemplated that this contract would have involved such serious consequences to the plaintiff's property.

It has been frequently decided by this court that "courts of equity will not always enforce a specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and merits of each case, as it is presented." *Morgan v. Hardy,* 16 Neb. 427. In *Clarke v. Koenig,* 36 Neb. 572, it is said: "Specific performance is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court." See, also, *Kofka v. Rosicky,* 41 Neb. 328. In *Hoctor-Johnston Co. v. Billings,* 65 Neb. 214, it appears that the trial court took the evidence in full in regard to the circumstances surrounding the making of the contract, and in the opinion of the court by HOLCOMB, J., this evidence is discussed without regard to the express language of the contract itself, and its force is considered as tending to show that the specific enforcement of the contract would be inequitable. This evidence shows clearly that the plaintiff never contemplated that any such amount of land would be required as is now demanded. The plaintiff was asked how the taking of this amount of land would affect his farm, and upon objection was not allowed to answer. This evidence would have been proper in the case. The case was carefully tried along the line of a rigid enforcement of an express contract. The former decisions of this court would require a more liberal in-

vestigation as to the real equities between the parties. If the defendant, the Lincoln & Northwestern Railroad Company, under this contract could take the plaintiff's timber and his granaries at $60 an acre, it might by the same construction have extended its demand a few feet farther so as to take his house and barn also. The said defendant is not without remedy. It can demand such land as is needed for the proper maintenance of the road; and it will only be required to pay the plaintiff his actual damages caused by such taking.

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

REVERSED.

FAWCETT, J., concurs in the conclusion.

FRANK L. MCCOY ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED JANUARY 9, 1911. No. 16,231.

1. **Municipal Corporations:** STREET IMPROVEMENTS: VALIDITY OF ORDINANCES. The mayor and council of cities of the metropolitan class had power under the act of 1897 (laws 1897, ch. 10) to prescribe by ordinance duties of the board of public works not specified in the statute.

2. ———: ———: ———. The ordinance of the city of Omaha directing the board of public works to advertise for bids for street improvements was within the power of the mayor and council and valid.

3. ———: ———: NOTICE: PRESUMPTIONS. A notice inviting bids for street improvements, signed by the chairman and secretary of the board of public works, will be presumed to have been authorized by that board in the absence of evidence to the contrary.

4. ———: ———: VALIDITY OF PROCEEDINGS. It was not necessary that the city council should fix a definite time and place for property owners to file protest against a street improvement, or to designate their choice of material. The statute of 1897 provided that 30 days should be allowed for those purposes after the

publication of the ordinance authorizing the improvement, and if such time was allowed before proceeding with the improvement the statute was complied with.

5. ———: ———: EQUALIZATION OF ASSESSMENTS: NOTICE. The act of 1897 required the council to sit as a board of equalization of special assessments on certain specified days, and to give notice of such sitting "for at least six days prior thereto." Notice given for six days immediately prior to one of the days fixed by statute for such sitting that on said day so fixed by statute assessments in a certain specified district would be equalized was sufficient.

6. ———: ———: ———: ———. Under that statute notice of the sitting of the council as a board of equalization might be given by the board of public works when specifically directed by the mayor and council to give such notice.

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

McCoy & Olmstead, pro se.

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

SEDGWICK, J.

In July, 1899, the mayor and council of the city of Omaha enacted an ordinance, No. 4606, creating street improvement district No. 679, embracing that part of Thirty-fifth street which lies between Farnam and Dodge streets. Pursuant to this ordinance and other ordinances and proceedings on the part of the mayor and council and other officers, the specified district was improved by paving and curbing the street, and special assessments were levied against the lots abutting thereon. These plaintiffs, who are owners of lots abutting on said improvement, brought this action to enjoin the collection of said special assessments. Upon trial in the district court for Douglas county there were general findings against the plaintiffs and their action dismissed. The plaintiffs have appealed.

It is contended that no valid action was taken by the proper authorities fixing the time within which bids might

be made for the construction of the work, or fixing the time within which property owners might protest against the improvement, or in which property owners might express their preference as to the material to be used, and also that the council took no action in fixing the time for the equalization of assessments and gave no notice of the meeting for the purpose of equalizing the assessments. The city charter (laws 1897, ch. 10, sec. 101*a*) provides that the board of public works and the members of said board shall perform such duties, not specified in the statute, as may be devolved upon them by ordinance. The ordinance above referred to creating the improvement district provided that the board of public works should "advertise for bids for the improvement of said street," and should also publish a notice to property owners within the district to select the material for the pavement within their district. There was another ordinance of the city of Omaha in force at that time prescribing the powers and duties of the board of public works. This ordinance provided that it shall be the duty of the board to advertise for such proposals, and that the advertisement should be for a period of not less than two weeks, "in the official daily paper of the city, said advertisement to be inserted at least twice a week." The notice to bidders was published July 18, 19, 20, 21, 22 and 24, the 23d being Sunday. The ordinance in this respect was not strictly complied with, as it was not published twice in the second week. This notice is assailed for this defect in its publication. It is not alleged that any one was prevented from bidding, nor that too much was paid for the improvement. This defect in the notice was not jurisdictional. On the 18th day of July notices were published which appear to be considered to be sufficient in form and in the manner of their publication to give the necessary notice to property owners to select material for the paving, and also to give notice of the time limited for protesting against the improvement. The general objection made to these notices is that they do not appear to have been authorized by any

positive action of the city council or the board of public works. They are signed, "Board of Public Works, Andrew Rosewater, Chairman; William Coburn, Secretary." The board of public works consisted of three members. The duties of the chairman were very prominent. There could be no quorum of the board to do business without the chairman, and the chairman with either of the other members constituted a quorum. It was the duty of this board, under the statute and the ordinances above referred to, to make these publications. The two officers signing these notices constituted a majority of the board, and were, by the statute, made a quorum for the transaction of the business of the board. It seems apparent that their action could not be challenged collaterally as not being authorized by the board.

As we understand plaintiffs' briefs, they rely upon the further contention, also, that it was required by the statute that the time and place of receiving proposals for the work, and for filing protests by property owners, and for selecting materials by property owners should be specifically fixed by the mayor and council; that the fixing of these times and places was jurisdictional, and as this was not done the assessments are void. There does not seem to be any merit in this contention. The provision of the statute is that, if protest is filed within 30 days after the publication of the ordinance, the improvement shall not be authorized; and it shall be the duty of the mayor and council to give the property owners 30 days to designate materials, and the improvements "shall be done with contracts with the lowest responsible bidder." These respective provisions of the statute were fully complied with, and it was not required that the time should be definitely fixed in advance when these matters would be acted upon by the mayor and council. There is no allegation in the petition that any property owners were prevented from protesting against the improvements, or selecting materials, or that the work was not let to the lowest bidder, or that any who desired were prevented from bidding.

Section 151 of the statute (laws 1897, ch. 10) requires that the council "shall sit as a board of equalization for all special assessments, excepting for wooden sidewalks, which may be hereafter levied, on the second Tuesday of each of the following months, to wit, March, June, September and December. Such sessions to be held between the hours of 10 A. M. and 5 P. M. in the city council chamber, and such sessions shall be for not less than three consecutive days." The city council convened on the 12th day of December, 1899, as a board of equalization, and continued in session for three successive days from 10 A. M. to 5 P. M. on each day, pursuant to notice signed by a majority of the board of public works. The statute (section 152) requires that notice of this meeting of the council as a board of equalization shall be given by the city council "in the same manner as is above provided in the case of general taxes." This relates to section 141, which requires that notice of the sitting of the board of equalization shall be given "for at least six days prior thereto," and was sufficiently complied with. It was published from the 5th to the 11th of December, inclusive. It was not necessary that the members of the city council should give this notice in person. The council by ordinance directed the board of public works to give the notice, specifying what the notice should be, and this was a substantial compliance with the statute. The proceedings of the council so far as they relate to the matters complained of in the brief appear to be sufficient.

The judgment of the district court is therefore

AFFIRMED.

WILLIAM R. LAUNT, APPELLEE, V. VILLAGE OF OAKDALE, APPELLANT.

FILED JANUARY 9, 1911. No. 16,246.

1. **Municipal Corporations:** LIABILITY FOR SERVICES: EVIDENCE: PRESUMPTIONS. In an action for services superintending an improve-

ment of water-works owned by a village, such improvement having been completed and all other bills therefor paid by the village board, it will not be presumed that the improvement was made without recommendation and approval of the water commissioner, there being no evidence so indicating.

2. ———: ———. If one agrees to perform a certain service for a village gratuitously, he may withdraw such promise at any time before the same is performed, and notice of such action is sufficient if duly given to one member of a committee of the village board in charge of the improvement upon which the services are performed, and if the committee then continues his employment the village will be liable for the value of the services thereafter rendered.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Affirmed.*

M. D. Tyler, for appellant.

N. D. Jackson and *C. H. Kelsey, contra.*

SEDGWICK, J.

The plaintiff sued the village of Oakdale to recover for his alleged services in superintending changes made in the pumping station and wells of the water-works owned by the defendant. He recovered a judgment in the district court, and the defendant has appealed to this court.

The evidence shows that the pumps failed to furnish sufficient water because they were placed too high above the supply. The village board appointed a committee of two members to attend to the matter. The members of this committee negotiated with the plaintiff and an excavation was made, walled up with cement blocks, dropping the pumps some 16 feet lower. The plaintiff superintended this work and also performed some of the labor himself. The principal contention on the part of the defendant is that the evidence is not sufficient to justify the verdict and judgment. The plaintiff testifies that his services were worth $5 a day. Another witness,

who appears to have some knowledge of such matters, testifies the same. This is all of the evidence that was offered by either party upon that point. Plaintiff also testified that he began the improvements in the fore part of April, and that the work was carried on from time to time until the latter part of October, 1907, and that he devoted more than 60 days to the work. Afterwards, upon cross-examination, he stated that he was employed 60 days on the work. The members of the committee of the village testify that the plaintiff offered to do the work and not make any charges against the village. Plaintiff testified that before commencing the work he told the committee that he would not make any charges unless the work was successful. This discrepancy in the testimony is not of much importance, because soon after the work was begun the plaintiff had conversation with the committee in which he testifies that he told them that he expected to be paid for the work. The members of the committee testified that his language was that he thought if his work was successful he ought to be paid. The court instructed the jury that, if they found that the plaintiff notified the defendant's committee that he did expect pay for the work, and if, knowing this, the committee continued him in the work, the defendant would be liable for the value of the services.

It is insisted in the brief that nothing can be recovered by the plaintiff because he had no valid contract with the city to perform the work, and this contention is based upon two propositions: That the village itself could not enter into a contract for the repairing of its water-works system, unless the same was recommended and approved by the water commissioner, and that the evidence does not show that the two members of the committee acted together in making the supposed contract with the plaintiff. It appears that other men were employed in making this improvement, and that the village board paid the other bills so incurred, and we cannot presume that all this was done without approval of the commissioner and

without the proper action of the committee, in the absence of any evidence tending to show that such was the case, or any such defense alleged in the pleadings.

A claim for a considerable amount against the defendant that had been filed and allowed in favor of the plaintiff was offered in evidence, and it is insisted that this claim covered the services that the plaintiff is now suing for, or at least that it shows that he is suing for services in superintending the very work which he himself performed and has been paid for, but this contention is not supported by the evidence. The evidence is not as clear and satisfactory as might be desired. The verdict was for $242.10, which would pay for nearly 50 days' work, and the plaintiff has not furnished any itemized statement of the time which he devoted to this service, but there is no evidence contradicting his general statement that he was employed at least 60 days, and we cannot see that the verdict is wholly unsupported by the evidence.

The judgment of the district court is

AFFIRMED.

BARNES and FAWCETT, JJ., dissent.

REESE, C. J., not sitting.

CHARLES E. HIGINBOTHAM ET AL., APPELLANTS, V. JOHN MCKENZIE, APPELLEE.

FILED JANUARY 9, 1911. No. 16,259.

Brokers: SALE OF LAND: RIGHT TO COMMISSION. When the owner of real estate authorizes several respective brokers or agents to sell or exchange the same, but gives neither an exclusive agency, the agent or broker who actually effects the sale or exchange is entitled to the commissions. The agent under such contract who negotiates with a purchaser, but does not effect a sale, cannot recover commissions.

APPEAL from the district court for Adams county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Tibbets, Morey & Fuller, for appellants.

R. A. Batty, contra.

SEDGWICK, J.

These plaintiffs began this action against the defendant in the district court for Adams county to recover commissions upon the sale of the defendant's ranch. The trial resulted in a verdict in favor of the defendant, and the plaintiffs have appealed.

In October, 1906, Thomas M. Jones, one of these plaintiffs, who was then residing at or near Hastings, met the defendant at Madrid, near which town the defendant's ranch was situated, and told the defendant his business, which he testified was "handling western Nebraska land, selling land," and the defendant thereupon told him that he wanted to sell his ranch, and wrote out and signed the memorandum which is relied upon by the plaintiffs as a contract of agency authorizing them to sell the defendant's ranch. This memorandum contained a somewhat detailed description of the ranch, which consisted of about 1,520 acres, describing quite fully the improvements on the ranch, and after the description were the following words: "$10 an acre, ½ cash, balance to suit purchaser, 12½ an acre, if trade. Commission 5 per cent." —signed by John McKenzie. This memorandum was delivered to Mr. Jones on the 9th day of October, 1906, and was signed by him. The other two plaintiffs were at that time engaged in real estate business in the firm name of Higinbotham & Pickens, and the evidence shows that soon afterwards Mr. Jones entered into an arrangement with Higinbotham & Pickens whereby the three became joint owners of this contract, and perhaps of other business of a similar nature. Soon afterwards Mr.

McKenzie was at Hastings, and Mr. Jones took him to the livery barn of Groenwald & DeMuth, in Hastings, and introduced the defendant to one of the partners, and proposed a trade of the livery barn and stock for the ranch of defendant. The defendant also placed the ranch for sale with A. C. Tompkins & Company, a real estate firm of Hastings, and also with other firms in Hastings. Afterwards the ranch was traded for the barn and stock, and the defendant insists that the trade was made through the said firm of A. C. Tompkins & Company, and that they were entitled to the commissions, and it appears from the evidence that before the commencement of the suit the defendant had paid the said firm of Tompkins & Company a commission of $950 for their services in making the exchange. The plaintiffs insist that the exchange was made through their efforts, and that they are therefore entitled to the commission for which they have sued. Mr. Jones testified that, after the interview which he procured between the defendant and the owners of the livery barn, he several times on different occasions interviewed the owners of the barn, and explained the advantages of the defendant's ranch and otherwise endeavored to bring about the exchange.

The theory of the plaintiffs as expressed in their brief is as follows: "If our theory of the law is correct, all we had to prove was the existence of a valid contract of brokerage, the bringing of the parties together, during the period of the employment, and the fact that the parties did actually make the deal negotiated by plaintiffs." We cannot agree to this theory as applied to the facts in this case. The purpose of the act of the legislature requiring contracts of agency for the sale of land to be in writing was to prevent controversies so far as practicable in regard to those matters. Cases frequently arose in which it was difficult to determine whether there was in fact any contract of agency between the parties, and, if there was, what the agreement of the parties was in regard to the commissions allowed. The disputes that

arose in regard to the authority of different agents to act in the matter, and in regard to their compensation, led to many law suits and sometimes even to perjury. To avoid these evils the law requires that the authority of the agent shall be in writing signed by both parties, and that the writing shall describe the land and determine the commissions to be allowed "in case of sale by the broker or agent." Comp. St. 1909, ch. 73, sec. 74. The owner of the land may give a broker or agent the exclusive right to negotiate a sale or exchange, and, if he does and the sale or exchange is negotiated according to the terms of the contract of agency, the agent or broker is entitled to the agreed commissions if he procures a purchaser "able and willing to purchase," even if the owner or some other person should interfere and complete the transaction. The memorandum in this case, even if it should be considered a contract in compliance with the statute, gives no exclusive right to these plaintiffs as agents. A. C. Tompkins & Company had a similar memorandum, as did also others, and each had equal authority to effect a sale. When the transaction was completed, the agent so authorized who had endeavored to accomplish such result, and who had in fact effected the sale, was entitled to the commission. Which of the agents did in fact effect the exchange? Under the circumstances in this case this is a difficult question to answer. If there is blame for this uncertainty it rests with the plaintiffs as well as the defendant. They might have insisted upon an exclusive agency, and were not obliged to devote their time and efforts to the undertaking without such contract. Perhaps the efforts of both agents contributed to the result. If so, it may be said that both have earned a commission, but surely the defendant is not liable for a double commission. No commission was due unless a sale or exchange was made, and the only way to determine which of the contending agents is entitled to the commission is to ascertain which effected the sale or exchange. This difficult duty has been per-

formed by the jury, and, if the question was regularly submitted, the verdict must stand.

A number of instructions were requested by plaintiffs, four of which were given and seven refused. For the most part the refused instructions were based upon the theory advanced by plaintiffs that has been stated, and cannot be sustained. One request was to instruct a verdict for the plaintiffs. Another was to the effect that the plaintiffs might act as agents for both parties in the transaction, and that under the issues in this case that would not prevent their recovery. Of course, one cannot act for conflicting interests in a transaction, unless both parties know that he is so acting and consent thereto. We cannot see that the court erred in refusing instructions asked by plaintiffs.

The eighth instruction given by the court is complained of. The first part of this instruction states the question to be determined correctly. The instruction then says: "If the jury find from the evidence that the plaintiffs, or any of them, procured for the defendant a purchaser or purchasers for his property, who were ready, able and willing to purchase, or trade for, the property at the price and upon the terms named by the owner, then the plaintiffs are entitled to recover, and the amount of your verdict will be, as shown by the undisputed evidence in this case, the sum of $950." This language is inconsistent with a later clause in the instruction, and the error in this part of the instruction, if any, is prejudicial to the defendant and not to the plaintiffs. The following instruction is complained of: "The jury are instructed that, where several brokers are openly employed to effect the sale of the same property, the entire duty of the seller is performed by remaining neutral between them, and he has the right to make the sale to a buyer produced by either or any of them without being called upon to decide between these agents as to which of them was the primary cause of the purchase." This instruction is borrowed from the syllabus in a similar case in New Jersey,

Vreeland v. Vetterlein, 33 N. J. Law, 247. We think it correctly states the law as applicable to the facts in this case. Mr. Chief Justice Beasley's discussion in that case of the principles of law upon which the decision depends is applicable here.

The case seems to have been fairly submitted to the jury, and the judgment of the district court is

AFFIRMED.

WILLIAM H. JOHNSON V. STATE OF NEBRASKA.

FILED JANUARY 9, 1911. No. 16,679.

1. **Indictment:** DUPLICITY. An indictment under section 6 of the criminal code should not charge in the same count that the defendant used and employed, and advised to be used and employed, instruments to procure an abortion, but such indictment is not demurrable for duplicity, since the allegation that defendant advised such instruments to be used and employed does not state an offense without alleging that some person other than the defendant committed the act; it is immaterial that the defendant advised the act which he committed himself, and such allegation should be rejected as surplusage.

2. **Indictment and Information:** ELECTION. If an information and an indictment are both pending in the same court at the same time charging the same party with the same offense, the prosecutor should be required to elect under which he will proceed, as required by section 435 of the criminal code; but that section has no application when the defendant has waived examination before the magistrate and has been held to appear in the district court, and has been indicted by the grand jury for the offense charged before the magistrate, and no information has been filed.

3. **Criminal Law:** WITNESSES: DISCRETION OF COURT. In a trial for felony, the prosecution should examine in the first instance such witnesses as have knowledge of the *res gestæ*. If such witnesses prove hostile to the prosecution, the court has discretion to allow such examination as will bring out the truth before the jury. When, however, the *res gestæ* is clearly proved, and the defendant is represented by competent counsel, the court has discretion to refuse to require the prosecution to call witnesses supposed to be interested in the defense.

4. ———: INSTRUCTIONS. The trial court is not required to instruct the jury in the precise language requested by the defendant, though such request correctly states the law. If an instruction is given substantially stating the law as requested it is sufficient.

5. ———: DYING DECLARATIONS: QUESTIONS FOR COURT AND JURY. Whether a sufficient foundation has been laid to admit evidence of statements of a deceased person is a question of law for the court. If such evidence is admitted, it is for the jury to determine its reliability and weight.

6. ———: EVIDENCE: REVIEW. Unless it appears that the evidence in the trial of a criminal case is so deficient that all reasonable minds, if uninfluenced by passion or prejudice, must agree that there is reasonable doubt of the guilt of the defendant, a reviewing court cannot set aside the verdict of the jury as unsupported by the evidence.

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

L. C. Burr, for plaintiff in error.

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

SEDGWICK, J.

The defendant was prosecuted under section 6 of the criminal code. The defendant was found guilty. The sentence was imprisonment in the penitentiary, as provided by the statute, and he has brought the case here for review.

1. The defendant moved to quash the indictment for duplicity, and in other ways raised the question whether this indictment charges more than one offense against the defendant. The part of the indictment challenged charges that the defendant "unlawfully, feloniously and maliciously did then and there use and employ, and did then and there unlawfully and wilfully advise to be used and employed in and upon the body and womb of the said Amanda Mueller, mother of said vitalized embryo, certain instruments," etc., and section 6 of the criminal

code is as follows: "Any physician or other person who shall administer, or advise to be administered, to any pregnant woman with a vitalized embryo, or fœtus, at any stage of uterogestation, any medicine, drug, or substance whatever, or who shall use or employ, or advise to be used or employed, any instrument or other means with intent thereby to destroy such vitalized embryo or fœtus, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall in case of the death of such vitalized embryo, or fœtus, or mother, in consequence thereof, be imprisoned in the penitentiary not less than one nor more than ten years."

It is insisted that to "use and employ" instruments to produce an abortion and to "advise to be used and employed" instruments for that purpose constitute two distinct offenses. It is contended by the state that but one offense is charged in the indictment, and that is, "causing the death of Amanda Mueller by means of certain things done to bring about an abortion," and that it was proper for the state "to allege the commission of the offense in any one or all of the ways inhibited by the statute." The defendant cites and apparently relies upon *State v. Pischel,* 16 Neb. 490, and *Smith v. State,* 32 Neb. 105. Both of these cases were prosecutions for selling liquors in violation of the statute. In *State v. Pischel,* the indictment alleged that the defendant on the 22d day of October, 1882, "and on all the several days between said 22d day of October in the year aforesaid and the first day of April" in the following year did "unlawfully and knowingly sell and give away malt, spirituous, and vinous liquors, and intoxicating drinks," etc. It was held that the indictment was too indefinite. "The act of selling any one of the kinds of liquors named in the law, as well as the act of giving away any of them under a pretext, is a crime. The indictment charges the whole." In *Smith v. State, supra,* the indictment was also held to be too indefinite. It was somewhat more definite than the one

above stated, but it charged that the defendant sold and gave away "spirituous, vinous, and intoxicating liquors." In both of these cases it was thought that the charge was too indefinite in that it did not state the kind of liquor sold, whether spirituous, malt or vinous, and did not state definitely when and to whom the sale was made. Neither of these cases is authority for the position taken by the defendant in the case at bar. In *Hubert v. State*, 74 Neb. 226, this court approved of the statement of the law in *United States v. Fero*, 18 Fed. 901, as follows: "Where a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons, or at different times, they may, when committed by the same person at the same time, be coupled in one count as constituting one offense." Mr. Bishop states the law as follows: "If, as is common in legislation, a statute makes it punishable to do a particular thing specified, 'or' another thing, 'or' another, one commits the offense who does any one of the things, or any two, or more, or all of them. And the indictment may charge him with any one, or with any large number, at the election of the pleader; employing, if the allegation is of more than one, the conjunction 'and' where 'or' occurs in the statute." Bishop, Statutory Crimes (3d ed.), sec. 244. If one advises another to "use and employ" instruments to commit crime, he is accessory before the fact and is morally as culpable as one who uses the instruments under his advice. By this statute he is made legally a principal in the crime. The allegation that the defendant did "unlawfully and wilfully advise to be used and employed certain instruments" is too indefinite to constitute the charge of an offense under this statute. No one is alleged in the indictment to have performed the act, except the defendant himself, and therefore to give these words any effect or meaning in this indictment they must be construed as charging that the defendant

advised the operation which he himself performed; but this construction renders the allegation superfluous. If the defendant performed the operation himself, it would make no difference whether he advised it. We think, therefore, that the court might have considered these words superfluous and might have stricken them from the indictment. If the prosecutor had been in doubt as to whether the defendant performed the operation himself, or advised and procured some one else to perform it, he might have added a second count to the information charging the latter. In this count it would be necessary to show by proper allegation how the crime was committed, and who committed it, and that the defendant had advised the use and employment of instruments before the act. The allegation of advising the use of the instruments as alleged in this indictment is not good pleading, and under some circumstances might have been very prejudicial to the rights of the defendant.

At the close of the evidence the defendant requested the following instruction: "The jury are further instructed that there is no evidence in this action that defendant advised to be used and employed an instrument, or other means, with intent thereby to destroy a vitalized embryo or fœtus of which Amanda Mueller was pregnant, and you will therefore find him not guilty of such charge in said indictment." There was no evidence that the defendant advised the use of instruments, and the jury might properly have been so instructed. The court appears to have treated this part of the charge of the indictment as surplusage, and in instruction No. 4, given by the court on its own motion, the jury are told unequivocally that, in order to convict the defendant, they must find "that said defendant, William H. Johnson, did unlawfully, wilfully, and maliciously make an assault upon said Amanda Mueller, and that said defendant unlawfully, wilfully, and maliciously did use and employ in and upon the body and womb of said Amanda Mueller certain instruments or instrument." This ex-

cludes the possibility that the defendant might have been guilty by advising the use and employment of instruments, and appears to have fully protected the rights of the defendant in that regard.

2. The next contention of the defendant is that the court erred in not requiring the prosecutor to elect whether he would proceed upon the indictment found by the grand jury or upon information. It appears that immediately after the alleged offense complaint was made before a justice of the peace and a warrant issued against the defendant, who waived examination and was held to appear at the next term of the district court. At the next term the grand jury returned an indictment against the defendant and no information was filed. When the motion was made to require the state to elect how it would proceed, the court entered an order upon the journal in which it was recited that "the plaintiff in open court disclaims any purpose of prosecuting two actions against the defendant, and shows to the court that no information has been filed against the defendant in this court." It is clear that section 435 of the criminal code has no application under the circumstances in this case. That section provides: "If there be at any time pending against the same defendant two or more indictments for the same criminal act, the prosecuting attorney shall be required to elect upon which he will proceed." No doubt the statute would apply where both an information and an indictment were pending in the same court for the same act, but that was not the case here; no information having been filed. The grand jury having taken action and found an indictment, there was no occasion for any information and the practice pursued appears to be the proper one.

3. The defendant complains that the state did not place upon the witness-stand certain witnesses whose names were indorsed upon the indictment. Three witnesses were specified in this connection. Two of them were called by the defendant and fully examined and cross-examined

in the case. The third was the mother of the deceased girl, who was not examined as witness by either party. This question is discussed somewhat in *Argabright v. State,* 62 Neb. 402, and is mentioned in *Booton v. State,* 86 Neb. 114.

It is the duty of the prosecuting attorney to assist the jury in ascertaining the truth in regard to the charge against the defendant in a criminal prosecution, and it has been held that witnesses who can give evidence tending to show whether the crime charged has in fact been committed must be called by the prosecution in the first instance. In the case at bar the proof of the *res gestæ* is beyond question. There is no doubt from the evidence that instruments were used upon the deceased by some one with the purpose and intention of producing an abortion. It was not claimed that these three witnesses would add anything in their testimony to the evidence bearing upon that question. It is argued that without doubt the mother of the deceased could testify to confessions made to her as to the guilty party, and that such evidence might be obtained in a cross-examination. No case has been cited in which the prosecutor has been required to put a witness upon the stand for such a purpose. The trial court necessarily had great latitude of discretion in the matter of the examination and cross-examination of witnesses. The better practice undoubtedly is to examine in the first instance all witnesses who are supposed to have knowledge as to the principal facts constituting the offense charged, and generally also those who personally have knowledge of facts bearing directly upon the question of the guilt or innocence of the defendant. If these witnesses prove to be hostile to the state, or manifest a desire to shield the defendant, the prosecution will be allowed, in the discretion of the court, to press them more closely in order to bring the whole truth before the jury. When, however, the *res gestæ* is clearly proved, and the defendant is represented by competent counsel, it will not be considered an abuse of discretion on the part

of the trial court to refuse to require the prosecution to call witnesses supposed to be interested in the defense. If the defendant had found it necessary to call the mother of the deceased girl to prove important matters that could not otherwise be established, and it became apparent that she was more interested in convicting the defendant than in establishing the real facts in the case, the trial judge has ample discretion to allow such examination as should be found necessary to bring out the truth. There was clearly no abuse of discretion in refusing to require the prosecution to examine these three witnesses in chief, and nothing to indicate that the defendant was prejudiced by this action of the court.

4. The defendant complains that the court refused to give the jury a requested instruction as follows: "The law presumes that persons charged with a crime are innocent until they are proved by competent evidence to be guilty. To the benefit of this presumption the defendant is entitled, and this presumption stands as his sufficient protection, unless it has been removed by evidence proving his guilt beyond a reasonable doubt." We think the defendant is mistaken in saying in his brief that no instruction was given in the place of this one requested by him. The fifth instruction given by the court is to substantially the same effect.

The defendant requested the court to instruct the jury that, if they found certain things to be true in regard to the dying statement of the deceased, they should disregard the statement. This instruction was properly refused. It is for the court to say whether a sufficient foundation has been laid for proving a dying statement. In this case a sufficient foundation was laid, and it was properly admitted in evidence. It was for the jury to say how much force and effect should be given to this evidence, and that matter was properly submitted to the jury in the seventh instruction given by the court.

5. The remaining question to be considered in this case is as to the sufficiency of the evidence to support

the verdict and judgment. It has already been said that the evidence is conclusive that the death of the deceased was caused by the use of an instrument of some kind in attempting to produce an abortion. The theory of the defense was that the deceased used this instrument herself. The evidence was without contradiction that soon after the instrument was used a respectable physician was called to attend the deceased. He was not informed of the cause of her trouble, and treated her for several days, and he testified that when he found that she was already in a dying condition he informed her of that fact, and told her that she ought to make a true statement of the cause of her condition, and that she thereupon told him in detail the cause of her trouble, and that he then told her that she could not live and that she ought to tell the facts to her father, which she consented to do, and thereupon her father was called to the room and was told in her presence that she was in a dying condition, and she was told by the physician that she ought to repeat to her father what she had told to him. She then stated in the presence of her father and the physician, as they both testify, that the young man who was responsible for her condition had taken her to the office of this defendant, and that she went to his office three several times, and that at each visit he performed an operation upon her, and that the third time the operation was very painful. It appears that just before this statement was made another respectable physician had been called in consultation, and had advised that she be removed to a sanitarium and submit to an operation. This he said he advised upon the theory that there was always hope as long as there was life, and that he had known similar cases in which an operation had saved life. It appears that the deceased was aware of this advice, and, if she indulged the hope that this operation might save her life, this would tend to weaken the force of her dying statement; but it appears that when her father desired to have this operation performed she protested that it

was useless, as she was dying anyway, but finally consented at her father's request. Under these circumstances, as before stated, we think it was proper to allow this statement in evidence, leaving the question of its reliability for the determination of the jury.

The young man that she implicates was called as a witness by the prosecution. He testifies that he called upon the defendant at his office and represented himself to be a married man, having been married but a short time, and that his wife was pregnant and desired to be relieved of it, and that the defendant told him that in such case a dilation was generally all that was necessary and that he would make an examination for a specified sum, and that, if the dilation was necessary, he would make an additional charge for that. Thereupon the witness told him that he would send his wife to the office, and in pursuance of that he sent the deceased there. His testimony conflicts with the dying statement of the deceased in two particulars. He denies all responsibility for her condition, but fails to explain his interest in the case, and also denies that he went with her to the office. The defendant testified that this young man came to his office and represented that he was recently married and that his wife was in trouble, but denied that he represented that she desired to be relieved of her pregnancy. He also testified that soon afterwards a young woman came to his office, representing that she was sent by her husband who had called upon him, and that he made an examination and informed her that he could not tell the cause of her trouble, and that she had better wait for another month and call again. He testified that she never called again, and denies that he used any instruments or in any way attempted to produce an abortion. He was examined and cross-examined at large, and made some statements upon the witness stand that may have been regarded by the jury as discrediting his testimony; and, while the evidence of his guilt is not so clear and satisfactory as to remove all doubt, we cannot say that reason-

able minds, if uninfluenced by passion or prejudice, must have agreed that the evidence was not sufficient to establish the guilt of the defendant beyond a reasonable doubt. If the jury are mistaken, the result is indeed deplorable, but the theory of the law is that there is no more certain method of ascertaining the truth in such criminal prosecutions than by the verdict of twelve fair and impartial men; and we find nothing in this record to indicate that this jury was actuated by any other motive or purpose than to ascertain the real truth of the matter.

Under such circumstances, the court is without power to interfere; and, finding no error in the record, the judgment of the district court is

AFFIRMED.

IN RE APPLICATION OF CARL W. ANDERSON FOR LIQUOR LICENSE.

AUGUSTE DECK, APPELLANT, V. CARL W. ANDERSON, APPELLEE.

FILED JANUARY 9, 1911. No. 16,800.

1. **Intoxicating Liquors:** PETITION FOR LICENSE: FREEHOLDERS. Four signers upon a petition for saloon license had jointly purchased a lot in the principal business part of a small village for $500, had paid $250 in cash, and given notes for the remainder. When they purchased the lot they did not know that the party for whom they signed would be an applicant for license. *Held*, That they were freeholders and competent to sign as such.

2. ———: ———: QUALIFICATION OF PETITIONERS. The fact that purchasers of real estate knew that such purchase would qualify them to sign petition for saloon license, and that they desired to be so qualified, and did sign the petition for the applicant for license soon after obtaining their deed would not disqualify them as such petitioners, if they in fact purchased the real estate in good faith as an investment and the same was so held by them.

APPEAL from the district court for Wayne county: ANSON A. WELCH, JUDGE. *Affirmed.*

Berry & Berry and *A. R. Davis,* for appellant.

H. E. Siman, contra.

SEDGWICK, J.

Carl W. Anderson applied to the board of trustees of the village of Hoskins, of Wayne county, for saloon license. A remonstrance was filed, and upon hearing a license was granted by the board. The remonstrator appealed to the district court, where the action of the village board was affirmed, and appeal was taken to this court.

A transcript of the petition for license filed with the village board is duly certified in the record, and it shows the signatures of 32 petitioners. The remonstrator stated several grounds for refusing the license, some of which were waived upon the hearing, and the remaining objections to granting the license stated in the remonstrance are "because the petition filed by the said Carl W. Anderson, applicant, with the village clerk of said village is not signed by 30, or the requisite number of resident freeholders, as required by law," and "that Frank Phillips, Fred Buss, Glenn Green, Frank Hart, and E. H. Kruger, whose names appear on petition of applicant, are not *bona fide* freeholders."

The principal contention was whether the signers challenged in the remonstrance as not *bona fide* freeholders were in fact such freeholders. The evidence shows that Fred Buss, one of the petitioners whose qualifications were challenged, was a married man and has been living with his family on a tract of land embracing nearly a block in the said village for more than three years; that his father was the owner of the tract, and that a short time before he signed the petition his father gave him the tract of land on which he lived. There was a mistake in the deed first executed by his father, and afterwards another deed was made to correct the mistake, and was sent by his father to the proper office to be recorded. His

father testified as a witness that he gave the land to his son, and that he, the father, owned the remainder of the block upon which there was also a dwelling house. We have not noticed any evidence in the record as to the value of this property. If it has constituted the residence of the petitioner for more than three years, and there is no evidence to the contrary, it will be presumed to be of sufficient value, and there can be no doubt that this petitioner was fully qualified.

There is considerable evidence as to the qualifications of the four other petitioners who were challenged by the remonstrance. The hearing upon this application before the village board was begun on the 14th day of May, 1910. The precise time when this petition was signed by these petitioners does not appear. The evidence shows that these four petitioners, some time in the month of March, 1910, jointly purchased a business lot in the village. The lot was 25 feet in width by 150 feet in length. It was located next to the bank. Nearly all the other lots in the same block were occupied by buildings. The contract price of the lot was $500. They paid $250 of the purchase price at the time they procured their deed, which was dated on the 28th day of April, 1910. For the remaining $250 they gave notes. They made the contract for the lot with Mr. Kautz, who was acting for his wife, the owner of the lot. The deed was executed by Mrs. Kautz, her husband joining with her. They testified that they bought the lot for speculation and had made no use of it. They thought it would increase in value. One of them testified that they had never heard of Carl Anderson's application for saloon license when they bought the lot, and that they did not buy it for the purpose of qualifying themselves as petitioners. One witness, the applicant for license, testified that the lot in question was worth $700 at the time of said purchase. The foregoing facts in regard to the purchase of the lot do not seem to be controverted. Several circumstances are urged as showing that the purchase of this lot was not in good

faith, but was solely for the purpose of qualifying them as petitioners. Mr. Kautz, from whom they bought it, was conducting a saloon, and one of the four purchasers was employed by him in the saloon and paid his proportion of the purchase price with $5 in cash, the remainder being allowed upon his wages. They were not dealers in real estate, and do not appear to have purchased any other real estate in Haskins. They had not paid the notes at the time of the hearing. They signed a petition for saloon license for another party at about the time they purchased the lot. One of the four paid $75 of the first payment, a part of that payment being for another of the four who was not able to pay the full amount. The remonstrator called no witnesses.

We must conclude that the value of the lot was at least $500, and that the uncontradicted evidence produced by the applicant shows that these four petitioners were resident freeholders, as required by the statute. In *Lambert v. Stevens,* 29 Neb. 283, it is held that, when the remonstrance denies "that certain named petitioners are resident freeholders," the burden of proof is upon the applicant to prove that they are qualified petitioners. This evidence shows that these parties were the owners of valuable real estate in the village before it was known that this applicant would ask for license. It may perhaps be inferred from the whole evidence that these petitioners appreciated the privileges enjoyed by freholders in general, and that they had this in mind, which formed one of the inducements to purchase this property. They knew that none but freeholders were qualified as petitioners for saloon license, and that if they purchased this real estate they could exercise that privilege, which otherwise they could not do. Resident owners of real estate who refuse to sign such petitions are counted against granting saloon license, and those interested either way in such matters might desire for that reason to be owners of real estate. This desire may have been, and probably was, one inducement to these parties to purchase this

property; but that fact would not necessarily disqualify them as freeholders under the statute, if the purchase was made in good faith as a *bona fide* investment and the property was so held.

It was stipulated that 19 persons, specifically named, and stated in the stipulation to be signers on the petition, were duly qualified. Two of the names in this stipulation are not found in exactly the same spelling upon the petition as appears from the transcript in the record. This may result from inaccuracy in copying the names from the original papers. The stipulation names 19 persons specifically, and states that the persons so named are signers on the petition; and as 17 of these are identical with the names on the petition, and there are two other names on the petition somewhat similar in spelling to the remaining two found in the stipulation, and there is no other evidence in the record as to their qualifications, it must be presumed that these two signers of the petition were intended in the stipulation and were duly qualified. Seven others, August Buss, August Ruhlow, Charles Green, Clara Wetzlich, Mrs. G. B. Miller, H. C. (or J. I.) Green, and Elena Buss, were shown without doubt to be resident freeholders, so that with these five that were specially challenged there were at least 31 qualified signers upon the petition. This was sufficient under the law, and it is not necessary to discuss or consider the testimony offered tending to show that there were less than 60 resident freeholders in the village.

The judgment of the district court is

AFFIRMED.

REESE, C. J., not sitting.

GEORGE KAYSER ET AL., APPELLEES, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JANUARY 24, 1911. No. 16,242.

1. **Husband and Wife:** JOINDER. The homestead of husband and wife was held in the name of the wife. An action for damages was instituted growing out of the alleged diminution in the value of the property by reason of the contiguous construction of railroad tracks and freight yards. The petition alleged that the real estate was the property of both husband and wife, and they were joined as plaintiffs. No issue as to ownership was specifically raised by the answer. *Held*, That the plaintiffs were properly joined, and there was no error in overruling an objection to the question as to the ownership or interest of the husband.

2. ———: PARTIES. Had the husband been an unnecessary party plaintiff, that fact would not prevent a recovery, as judgment could have been rendered for either party, if successful, under the provisions of section 429 of the code.

3. **Eminent Domain:** MEASURE OF DAMAGES: EVIDENCE. In their efforts to prove the amount of damages sustained by plaintiffs, certain competent witnesses were asked as to the market value of the property immediately before the construction of defendant's tracks and the value after the laying of the tracks and their use for the transfer of freight. This was the proper practice. *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239. On cross-examination the witnesses were asked as to the elements considered by them in arriving at their valuations, some of which were shown not to be proper to have been taken into consideration This cross-examination was proper as tending to weaken the force or weight of their testimony, but did not so destroy it as to require the whole thereof, including that which was competent, to be stricken out and withdrawn from the consideration of the jury.

4. ———: ———. "The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239.

5. ———: ———. Those elements include injury from smoke, noise, soot, cinders and vibration.

6. ———: EXCESSIVE DAMAGES. The testimony of witnesses as to the extent of the diminution in value of plaintiffs' property by reason of the construction of lines of track and their use by engines and cars was conflicting. The jury were sent out by the court to view the premises. *Held*, That the verdict, while apparently large, but within the estimates of some of the witnesses, could not be molested.

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

James E. Kelby, H. F. Rose, Frank E. Bishop and *John C. Stevens,* for appellant.

Tibbets, Morey & Fuller, contra.

REESE, C. J.

This is an appeal from the district court for Adams county. The action was instituted for the purpose of recovering damages alleged to have been sustained by reason of the construction of certain railroad tracks on the opposite side of the street in front of plaintiffs' residence in the city of Hastings. The facts briefly stated are that the line and tracks of defendant's railroad had previously been constructed about one block, or from 300 to 350 feet, south of and parallel to First street in said city. Between that street and the tracks was a block of lots with residence improvements thereon; that portion on the north side of the block fronting on First street. Plaintiffs' residence is situated on the north side of said street, fronting to the south thereon. Prior to the commencement of this action the defendant obtained, by purchase or condemnation, all the lots south of First street, removed the dwellings and other buildings, trees and shrubbery therefrom, excavated the ground from 3 to 7 feet, placed 4 tracks thereon, and constructed its freight depot and platform on and against the curb line on the south side of the street, the platform extending to within the width of an alley (about 20 feet) of a point south of and in front of plaintiffs' residence, the tracks extending

the whole distance of the block. The action was for the diminution in value of plaintiffs' residence property by reason of the construction of the tracks, the practically constant use thereof by switch engines and freight cars in the transfer of freight, and the "noise, jarring, dust, smoke, soot, cinders and noxious odors created by such traffic." With the exception of the allegation of the corporate capacity of defendant, and that it has owned and operated a line of railroad through the city of Hastings for more than 20 years, the answer is a general denial. There was a jury trial, which resulted in a verdict and judgment in favor of plaintiffs. Defendant appeals.

The evidence shows the making of the change in defendant's tracks from the main line to the point south of plaintiff's residence substantially as alleged in the petition, and as above outlined. The plaintiffs are husband and wife. The title to the property is held in the name of the wife, and it is shown to be the homestead of both and their family, consisting of one daughter. The action having been brought in the names of both the husband and wife, it is contended that there is a misjoinder of parties plaintiff, it being insisted that the husband was improperly joined. There was no proof as to by whom the consideration for the purchase of the property was paid, but both plaintiffs testified that the property belonged to both. This evidence was objected to at the time it was offered, and an adverse ruling by the court is now assigned for error. The defendant asked for an instruction directing a verdict in its favor upon that ground, which was refused. As this direct issue was not presented by answer, it may be questioned whether or not it was waived. *Donahue v. Bragg,* 49 Mo. App. 273; *Lass v. Eisleben,* 50 Mo. 122. However, we are not prepared to say that the husband was not a proper party, even had there been no proof of his ownership. The residence was the homestead of the family—his home—and it was alleged and sufficiently proved that the full enjoyment of that home was interrupted. Should the objection

to the evidence that the lots were the joint property of both have been sustained? We think not. The joint ownership was alleged in the petition. The deed showed that the title was held in the name of the wife. It was entirely proper to prove the husband's interest. But, even were this not true, we are unable to see how the joining of the husband could in any event work to the prejudice of defendant. By the provisions of section 429 of the code, a judgment may be given for or against one or more of several plaintiffs, and this would not require a dismissal of the action if it should appear that the husband was an unnecessary party; the judgment, if in favor of either plaintiff, could be entered in accordance with the fact.

On the trial of the question of the extent of damages sustained, the testimony offered and received was as to the difference in the value of the property immediately before and after the construction of defendant's tracks and freight platform on the side of the street opposite plaintiffs' dwelling. This was the proper measure of damages. *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239. And in estimating the amount of damages sustained the jury may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of the property. *Chicago, R. I. & P. R. Co. v. O'Neill, supra.* And this includes injury from smoke, soot and cinders from passing engines where no part of the land is actually taken (*Omaha & N. P. R. Co. v. Janecek,* 30 Neb. 276), also from noise and vibration caused by the operating of a railroad near the property, though not along a public highway (*Gainesville, H. & W. R. Co. v. Hall*, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 298). And such damages may be recovered if the tracks are on the opposite side of the highway. *Lake Erie & W. R. Co. v. Scott,* 132 Ill. 429, 8 L. R. A. 330.

Upon cross-examination of the witnesses who had testified to the diminution in value of plaintiffs' property,

they were asked as to the elements considered by them in arriving at their opinions, some of which were not entitled to consideration in arriving at the conclusion, but which the witnesses testified they considered. Upon the close of their testimony, defendant's counsel moved to strike out all the testimony of those witnesses, which motion the court overruled. This ruling is assigned for error. There was no error in the decision. The cross-examination, while proper, could only have the effect of weakening the testimony of the witnesses, and of which the jury were the sole judges. A portion, at least, of the testimony of each witness was competent and material, and the motion to strike out the whole should not be sustained.

Certain witnesses were asked to state the condition of the block on the opposite side of the street before the appropriation of the block by defendant. This was objected to and the objection overruled, to which defendant excepted, and the ruling is now assigned for error. The answers were that the block was occupied by residences, trees, shrubbery, etc., which added to the beauty of the surroundings, and protected plaintiffs' property from the smoke, soot, cinders and noise caused by the operation of the trains, engines and cars on the tracks to the south, all of which improvements had been removed and the ground appropriated to the use of the tracks within the excavation above referred to, thereby rendering plaintiffs' home of less value as residence property. This evidence seems to be of little, if any, importance and might have been well excluded, but the error in receiving it, if such there were, was cured by the giving of instruction numbered 2, given at the request of defendant, which is as follows: "The jury are instructed that if you find in favor of the plaintiffs, in arriving at the amount of your verdict, you must give consideration only to the claims of damage stated in the petition; that is, on account of noise, jarring, dust, smoke, soot, cinders and noxious odors caused by the operation of the railroad tracks and trains in connection with the freight depot, and you must

not allow any damages for any other claims or consideration, even though testimony of witnesses may have been received on other causes and consideration of damage." This eliminated every consideration except those named and left no ground for complaint.

It is contended that the verdict of the jury, which is $1,100, is excessive. Eight witnesses were examined as to values by plaintiffs, and two by defendant. There was considerable discrepancy in their testimony. Of the eight, two placed the diminution in value at $1,000, two at from $800 to $1,000, one at $900, one at $600, one at $800, and one at $1,200 to $1,400. Of the two witnesses for defendant, one testified there was no diminution, while the other placed it at from $200 to $300. In addition to the testimony of witnesses, the jury were sent to view the premises and the information there obtained was considered by them. While we are persuaded that the verdict was the full measure of the damage proved, yet we cannot see that the excess, if any there is, calls for the interference of this court.

The judgment of the district court is therefore

AFFIRMED.

RAFE SHAW, APPELLEE, V. HOLT COUNTY, APPELLANT.

FILED JANUARY 24, 1911. No. 16,280.

1. **Counties:** SPECIAL BAILIFF: LIABILITY FOR SERVICES. There is no provision of law conferring power on the district court to appoint a special bailiff to take and detain in custody for an indefinite time a witness for the state in a criminal prosecution, and thereby create an indebtedness against the county in which such prosecution is pending.
2. ———: ———: ———. The petition, the substance of which is set out in the opinion, *held* not to contain facts sufficient to constitute a cause of action against the defendant county.

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

Edward H. Whelan, for appellant.

R. R. Dickson, contra.

REESE, C. J.

This is an appeal from a judgment of the district court for Holt county. Plaintiff filed a claim against the county, before the county board of supervisors, in which it was recited that the county was indebted to him in the sum of $166, as bailiff, appointed by the judge of the district court to take charge of a witness for the state in a criminal prosecution then pending against a person charged with the crime of murder; that the witness was placed in plaintiff's custody, and that he retained said custody for 83 days, for which he was entitled to $2 a day. The county board rejected the claim, when plaintiff appealed to the district court. He filed his petition in said court wherein he alleged that on the 16th day of March, 1903, he was by the order of the district court appointed as special bailiff of said court to take charge of and have the custody of the body of James T. Thompson, a witness for the state in a criminal prosecution wherein one Edward Slattery was being prosecuted for the crime of murdering Henry Shaw; that the said Thompson was required to enter into a recognizance in the sum of $1,000 conditioned for his appearance to testify as a witness in said cause, but failed to give the recognizance, whereupon plaintiff was appointed as said special bailiff and had the charge and custody of said Thompson from the said 16th day of March, 1903, for the period of 83 days; that plaintiff during said time "looked after said Thompson as per order of the district court," and produced said Thompson in court on the trial of said cause as directed by the order of the court, and that plaintiff is entitled to have for his said services the sum of $2 a day, making due him the sum of $166, which had not been paid, and for which judgment was demanded.

The defendant county answered, first, by a general denial. The answer also contained paragraphs 2, 3, 4, 5, 6 and 7, which were all stricken out by order of the court on motion of plaintiff, and to which defendant excepted, but which, under our view of the case, need not be further noticed. The transcript contains what purports to be a stipulation of the facts, but as no such stipulation has been preserved by a bill of exceptions it cannot be considered. *State v. Knapp,* 8 Neb. 436; *Herbison v. Taylor,* 29 Neb. 217; *State Ins. Co. v. Buckstaff Bros. Mfg. Co.,* 47 Neb. 1; *Keeler v. Manwarren,* 61 Neb. 663. The cause was tried to the court without the intervention of a jury, being "submitted to the court upon the pleadings, stipulations and the evidence. On consideration whereof the court finds for the plaintiff and against the defendant," and judgment was entered for $208.60. There was no motion for a new trial, nor is there any bill of exceptions. This precludes any examination into the merits of the case upon the facts, and the sole question left is as to whether a cause of action is stated in the petition.

In this investigation two questions are presented: First. Is there any statutory authority for an order of the district court requiring witnesses for the state to enter into a recognizance for their appearance in court to testify? Second. If such authority does exist, either by statute or by force of the common law, has the court authority to appoint a special bailiff to take into custody and detain such witnesses indefinitely, or to such time as the principal cause may come on for trial. The record before us nowhere contains any copy of the order of the district court requiring bail of the witness or the appointment of plaintiff as special bailiff. The fact is averred in the petition and denied by the answer. Our attention has not been called to any provision of the statute requiring any order for the admission of witnesses to bail; upon the contrary, it is conceded by the briefs of both parties that no such statute exists. The authority of an examing magistrate to admit witnesses to bail seems to be pro-

vided by section 304 *et seq.* of the criminal code. There is also authority for the district court to require the recognizance of witnesses on the part of the state in case the venue of the cause is changed from one county to another. Criminal code, sec. 458. But neither of those provisions require the giving of bail by witnesses pending a trial in the district court for the county wherein the offense is alleged to have been committed. Whether or not the authority existed for making the order requiring the witness Thompson to give bail for his appearance as a witness upon the trial is not a controlling question in this case, and is not decided. If, however, such authority does exist, either by virtue of the statute or under the rules of the common law, we are yet unable to find any authority for the appointment of a special bailiff to take and detain in custody, for an indefinite time, such witnesses as may be unable to comply with the order and give the required bail. Were this power to be exercised without limit, it will readily appear that it might be abused to an extent that would render the expense of criminal prosecutions a burden, such as could not be borne. There is ample authority given by section 36, ch. 28, Comp. St. 1909, for the appointment of bailiffs "to wait on the grand jury and the court during the term" of court, but that does not include the appointment of bailiffs for the purpose named. We conclude, therefore, that there was no sufficient authority for the appointment of plaintiff as special bailiff in the case, as alleged, to the extent of imposing the burden upon the county of paying his per diem, and that the facts alleged in the petition do not constitute a cause of action against defendant.

The judgment of the district court is reversed, and the cause is dismissed.

REVERSED AND DISMISSED.

HUGH H. CARROLL, APPELLANT, V. VILLAGE OF ELMWOOD ET AL., APPELLEES.

FILED JANUARY 24, 1911. No. 16,266.

Municipal Corporations: TITLE TO STREETS. Where land is platted for and dedicated to city or village purposes in accordance with the provisions of article I, ch. 14, Comp. St. 1909, the city or village acquires the ownership of the streets, alleys and public grounds in fee simple, and an abutting lot owner cannot maintain an action against the city or village to recover the value of the natural products of the soil grown upon the surface of an adjacent street which has been converted to the use of the municipality.

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

A. N. Sullivan, for appellant.

Byron Clark, William Deles Dernier and *William A. Robertson, contra.*

BARNES, J.

Action by a lot owner in the village of Elmwood to recover the value of the grass or hay grown on a street of the village adjacent to his lots and appropriated by the village trustees to the use of the corporation.

It appears that in the month of July, 1886, the owners of the land on which the village of Elmwood is situated duly caused the same to be surveyed and platted, and the plat acknowledged in the manner provided by sections 8980, 8981, Ann. St. 1909. After such acknowledgment they duly filed the plat for record as therein provided, and thus dedicated the streets, alleys and public grounds, as shown in said plat, to the public use as and for the village of Elmwood; that thereupon said village was organized and has existed and exercised the powers and duties of a municipal corporation from thence to the present time; that the plaintiff had purchased, and at the time of the

commencement of this action owned, certain lots in the said village abutting upon one of the public streets so dedicated as aforesaid; that in the month of August, 1907, the plaintiff cut the grass growing upon the street on which his lots abutted; that immediately thereafter the trustees of the village caused the same to be removed, without the consent of the plaintiff, and converted it to the use of the corporation. The plaintiff thereupon brought this action in the justice court of Cass county to recover the value of the grass or hay thus appropriated, the defendants had judgment, and the plaintiff appealed to the district court. On the trial, and after the introduction of the evidence, that court directed the jury to return a verdict for the defendants, which was accordingly done. Plaintiff took the proper exceptions, and has brought the case here by appeal, so that the sole question presented by this record is whether as an abutting owner the plaintiff can maintain an action to recover the value of the grass or hay which grew naturally upon the surface of the village street.

The plaintiff invokes the common-law rule in support of his contention that he was entitled to recover the value of the grass or hay growing in the village street (the natural production of the soil) appropriated by the defendants, and cites authorities from many of the states where that rule prevails. In 2 Dillon, Municipal Corporations (4th ed.) sec. 663, it is said: "Where the public acquires only the use, and *the fee remains in the original proprietor or abutter,* the latter is considered to be the owner of the soil for all purposes not inconsistent with the public rights, and may maintain actions accordingly." In this state, however, a different rule prevails. Section 8982, Ann. St. 1909, provides: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious, or educational purposes." The law of Iowa on this subject is identical with

the section of our statutes above quoted, and in that state it was held that laying off and recording a town plat or an addition thereto under chapter 41 of the code of 1851 had the effect to vest in the corporation the fee-simple title to and exclusive right of dominion over the streets and alleys thus dedicated to public use, and that in such case neither the original proprietor nor his grantees have the right to the subterraneous deposits of coal within the limits of such street, and the corporation was allowed to maintain an action against the abutting lot owner for coal mined and taken by him from beneath the same. *City of Des Moines v. Hall,* 24 Ia. 234.

In 2 Dillon, Municipal Corporations (4th ed.) sec. 664, it is said: "Where, however, the *fee or legal title* passes from the original proprietor, as in some states it is declared it shall, in statutory dedications, and in cases where land is acquired for streets and public purposes by the exercise of the right of eminent domain, such proprietor or the adjoining owner cannot maintain an action for injuries to the soil, or ejectment, but he nevertheless has a remedy for any special injury to his rights by the unauthorized acts of others." In *City of Wahoo v. Nethaway,* 73 Neb. 54, in speaking of the statute above quoted, this court said: "It would seem that there is in this state much reason for holding that incorporated cities should, in actions relating to their streets, be subject to the operation of the statute of limitations. They own in fee simple the streets, alleys and other public places within their corporate limits. See Comp. St. 1899, ch. 14, art. I, secs. 104, 106. They may maintain ejectment to recover possession of them; they may, speaking generally, vacate them either in whole or in part. The right is even given to sell and dispose of them, and apply the money derived from the sale to any legitimate municipal purpose. See Comp. St. 1899, ch. 14, art. I, sec. 77. In other words, municipal corporations are invested with a sort of proprietary interest in this class of property, and may be required, therefore, to guard it with the same

degree of vigilance as that which is exacted of private owners. It is believed that the authorities are all agreed upon the proposition that as to property which is held in private ownership, and not upon public trusts, municipal corporations are on the same footing with private individuals and equally affected by the limitation laws." And it was held prior to the passage of the act of 1899 that the statute of limitations would run against the lands of a municipal corporation the same as against the lands of a private individual. It follows, therefore, that, the village of Elmwood being the owner in fee of the streets upon which the plaintiff's lots abutted, it was entitled to use and appropriate the grass or other natural products of the soil growing upon the surface thereof, and the plaintiff, having no legal title to the streets, could not maintain an action against the city for the conversion to its own use of any of such products.

We wish it to be thoroughly understood, however, that by this holding the plaintiff is not to be deprived of any of his rights to the use and occupation of the streets, or any of the equitable or incidental rights that accrue to him by reason of his abutting ownership. Neither do we follow the rule announced in *City of Des Moines v. Hall,* 24 Ia. 234, to the extent of holding that the city would be entitled to minerals, if any should be found, underlying the surface of its streets. It is sufficient for the disposition of this case to declare that the plaintiff cannot maintain this action to recover the value of the hay growing upon the street adjacent to his lots.

It is contended by counsel for the plaintiff that by the language of the dedication of the plat the original owners retained the title to the streets, and only dedicated the same to the public use. The acknowledgment of the plat seems to be in the ordinary and usual form. It reads as follows: "We, the undersigned owners and proprietors of the land included in the accompanying plat of Elmwood, Cass county, Nebraska, do hereby approve of the division of the grounds into lots, and ratify the said plat;

and do hereby dedicate to the public use the streets and alleys as thereon shown, and in accordance with the survey thereof." This dedication did not have the effect contended for by plaintiff, and did not restrict the rights of the village or the public to a mere use and occupation of its streets, but was a sufficient compliance with the statute, and, when taken together with the survey, the filing and recording of the plat, operated as a conveyance of the streets designated thereon in fee simple to the corporation. Indeed, if the plat had been filed and recorded without any acknowldgment, the acceptance of the grant and a continuous occupancy of the streets since 1886, with the consent of the plaintiff and his grantors, would be sufficient to estop him from now claiming that the village has not the fee-simple title thereto declared by the statutes.

We are therefore of opinion that the judgment of the district court was right, and, for the foregoing reasons, it is

AFFIRMED.

CHARLES N. HICKEY ET AL., APPELLEES, V. BENJAMIN L. BRINKLEY ET AL., APPELLANTS.

FILED JANUARY 24, 1911. No. 16,279.

1. **Contracts:** TRADE AGREEMENT: ASSIGNABILITY. The defendants, who were the owners of a livery and feed business, sold the same to one H. and executed at the same time an agreement with a penalty of $500, conditioned that they would not engage in the business in that vicinity for a period of ten years. Afterwards H. sold the business and assigned the agreement to the plaintiffs. *Held*, That the contract was assignable to the purchaser of the business.

2. **Election of Remedies.** *Held*, further, that in such a case, where the defendants violated the contract by again engaging in the business, the plaintiffs had the election whether to sue for damages upon the bond or to apply for an injunction to restrain the breach of the negative contract.

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

Stull & Hawxby, for appellants.

Kelligar & Ferneau, contra.

LETTON, J.

In 1905 the defendants were the owners of a livery and feed business in the village of Johnson. In September of that year they sold the business, together with the real estate on which it was conducted, to one Charles N. Hickey, and at the same time, as a part of the transaction, executed an agreement in the form of a bond with a penalty in the sum of of $500, which, after reciting the fact of the sale, provided "that the said B. L. Brinkley and Olive Brinkley will not themselves or permit any one of their family or in their employ to engage in the livery or feed business in said village of Johnson or vicinity for a period of ten years from this date. Hickey continued the business until September, 1908, when he sold the personal property, real estate, and good will of the business to the plaintiffs in this action, assigning to them the bond and agreement given by defendants. After the sale to Hickey the defendants continued to do a livery business to some extent, and so continued after the sale by Hickey to plaintiffs and up to the beginning of this action. The plaintiffs testify that their business has been seriously damaged by the competition of defendants. Hickey was joined as a plaintiff, but the action was dismissed as to him and a permanent injunction allowed against the defendants.

The defendants urged that there is no equity in the bill, for the reason that plaintiffs have an adequate remedy at law by an action on the bond, that the amount of money named therein as a penalty was intended as liquidated damages, and that since no insolvency has been shown the

only right of action for a violation of the contract is one at law for the amount named in the bond. We think this position is untenable. We have held contracts of the nature of the one under consideration not to be unreasonable in their terms and not void as against public policy. *Molyneaux v. Wittenberg,* 39 Neb. 547; *Downing v. Lewis,* 59 Neb. 38; *Roberts v. Lemont,* 73 Neb. 365; *Engles v. Morgenstern,* 85 Neb. 57.

We are also of opinion that a contract of this nature which is intended to protect the good will of the business is assignable to the purchaser of the business. *Francisco v. Smith,* 143 N. Y. 488; *Up River Ice Co. v. Denler,* 114 Mich. 296; *Southworth v. Davison,* 106 Minn. 119. We are further of the opinion that the very purpose of this contract would be defeated if the person selling the business was allowed to pay the sum named in the bond as a penalty and then be at liberty to destroy the business which he sold and take away the good will of the vendee. The intention of the parties was to guard against the property sold becoming valueless to the purchaser by reason of the seller again resuming business in that locality. It is not reasonable to suppose that the purchaser of the business intended that if the seller would pay him $500 he would be at liberty at any time to break his contract and enter into competition with him in the same business. *Phœnix Ins. Co. v. Continental Ins. Co.,* 87 N. Y. 400; *Diamond Match Co. v. Roeber,* 106 N. Y. 473; *O'Neal v. Hines,* 145 Ind. 32; *Andrews v. Kingsbury,* 212 Ill. 97; *Brown v. Kling,* 101 Cal. 295; *Buckhout v. Witwer,* 157 Mich. 406; *Ropes v. Upton,* 125 Mass. 258; *Keplinger v. Woolsey,* 4 Neb. (Unof.) 282; *Richardson Drug Co. v. Meyer,* 54 Neb. 319; 22 Cyc. 866*c*. We do not find any evidence from which it can be said that the sum named was intended as liquidated damages.

On account of the fact that both the amount of the business done by the defendants in competition with plaintiffs and the amount of damages suffered would be exceedingly difficult to prove, the only adequate remedy which can

be afforded is by an injunction restraining the defendants from carrying on the business as agreed in the contract.

The judgment of the district court is therefore

AFFIRMED.

GIRARD TRUST COMPANY, APPELLANT, V. IRA J. PADDOCK ET AL., APPELLEES.

FILED JANUARY 24, 1911. No. 16,155.

1. **Appeal:** QUESTIONS OF FACT: REVIEW. A bill of exceptions which purports to exhibit all of the evidence adduced during the trial of an action should contain that evidence, and ordinarily, if it does not, the questions of fact will not be considered in this court. But if it clearly appears in an action in equity that evidence which was thus omitted is immaterial and irrelevant, this court will examine the bill of exceptions and retry the case.

2. **Trusts:** ACTION BY TRUSTEE OF EXPRESS TRUST: PARTIES. Under section 32 of the code, a corporation, the trustee of an express trust, may maintain an action in its own name, with respect to the subject matter of the trust, even though its name has been changed by an act of the legislature, and it need not join the *cestui que trust* as a plaintiff or implead it as a defendant in the action.

3. **Mortgages:** LAW GOVERNING. A promissory note which is secured by a mortgage upon real estate within this state, signed in Iowa, payable in Pennsylvania, and containing a clause that it shall be governed according to the laws of Nebraska, should not be construed according to the laws of Iowa.

4. **Limitation of Actions:** MORTGAGES: INTEREST PAYMENTS. Where, after the maturity of a note secured by a real estate mortgage, interest payments are made thereon, an action may be maintained on the mortgage at any time within ten years after the date of the last payment.

5. **Evidence:** MORTGAGES: INTEREST PAYMENTS: ADMISSIONS. And if the defendants in such an action admit that interest payments were made upon the mortgage debt while it was in force, and do not plead or prove that the payments were not made by the owner of the equity of redemption, and it appears that the person who owned the equity at that time had agreed to pay the mortgage debt, the admission will be construed to refer to him.

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

A. W. Crites, for appellant.

A. M. Morrissey and *A. G. Fisher, contra.*

ROOT, J.

January 1, 1890, Ira J. Paddock, a resident of the state of Iowa, mortgaged the premises in dispute to secure the payment of his debt for $350 due January 1, 1895. March 24, 1890, the mortgage and the note secured thereby were assigned to the Girard Life Insurance Annuity & Trust Company, as trustee, to secure the mortgagee's debenture bonds and with authority to collect the debt. March 26, 1896, the mortgagor and the mortgagee agreed in writing to extend the maturity of the debt until January 1, 1899, but this agreement was not recorded. In 1895 Paddock sold the land by a verbal agreement to his brother, who subsequently sold the premises to one Baldwin, and in August, 1896, Baldwin sold the land to the defendant McGannon. Title was transferred directly from Ira J. Paddock to McGannon by a quitclaim deed dated February 24, 1898, and recorded January 21, 1899. This conveyance is made subject to a mortgage not definitely described. No deeds were recorded intermediate the execution of the mortgage and the deed to McGannon. Paddock testifies, in substance, that he signed a deed for the land, but no grantee was named therein. There is no proof that this blank was ever filled. The plaintiff alleges: "That the interest on said bond or note has not been paid since January 1, 1897, and that the principal indebtedness and the interest since January 1, 1897, have not been paid, nor any part thereof, and there is now due and owing to the plaintiff on account of said note and mortgage," etc. During the trial the parties stipulated with respect to the debt that "no amounts have ever been

collected and paid except as stated in the petition." The plaintiff's petition was dismissed and a decree entered quieting title in the defendant McGannon.

Considerable argument is presented with respect to the statute of limitations. In *Teegarden v. Burton,* 62 Neb. 639, we held that the statute did not bar an action to foreclose a mortgage until ten years after the last payment upon the debt. The stipulation is general, and in no manner intimates that the payments were not made by the owner of the equity of redemption. Ira J. Paddock testifies that, when the land was sold to his brother and subsequently when it was sold to Baldwin, the grantees agreed to pay the mortgage debt. Thereby the grantee became a principal debtor. *Stover v. Tompkins,* 34 Neb. 465. No one contends that Ira J. Paddock made these payments, and upon the entire record we think that a presumption arises that they were made by the primary debtor, who in the ordinary course of business would be expected to pay the interest upon the debt. *Shephard v. Calhoun,* 72 Ill. 337. This suit was commenced in October, 1906, less than ten years subsequent to January 1, 1897, and we are of opinion that the statute of limitations does not bar the action.

The defendants argue that, since the bill of exceptions does not contain copies of certain Iowa statutes received in evidence, it does not present all of the evidence considered by the trial court and we should not pass upon the issues of fact. This evidence was presented to sustain an argument that the note and mortgage should be construed according to the laws of Iowa, that we should hold the mortgage void, that the record thereof did not give McGannon constructive notice of the lien, and that the statute of limitations barred this action five years subsequent to the maturity of the note. The mortgage was executed in strict conformity with the law of Nebraska and encumbered Nebraska land. The note was payable in Pennsylvania, and the parties stipulated that it should be governed by the laws of this state. No part of the con-

tract was to be performed in Iowa, and, so far as we are advised, it was executed in that state for the sole reason that the mortgagor resided there. The evidence was clearly irrelevant and immaterial, and, while the plaintiff had been inexcusably careless in settling the bill, we should not refuse to examine its contents.

Counsel are in error in contending that the plaintiff did reply to the defendants' supplemental answer. We find nothing to sustain the argument that the plaintiff is not the real party in interest or that there is a defect of parties plaintiff. The Pennsylvania legislature changed the name of the Girard Life Insurance Annuity & Trust Company to the Girard Trust Company, and in the latter name the plaintiff prosecutes this action. Changing the plaintiff's name did not change its identity. It is the trustee of an express trust, and may maintain this action under section 32 of the code. Nor is it material that a receiver was appointed for the McKinley-Lanning Loan & Trust Company, the original mortgagee. It parted with its title to the note and mortgage in controversy 13 years before that receiver was appointed, and there is neither pleading nor proof to suggest that subsequently it became entitled to the possession of those instruments or to recover the debt evidenced thereby.

Some reference is made in the defendant McGannon's brief to alleged facts which we consider immaterial for a proper understanding of this case, and this opinion should not be extended by further reference thereto. Upon the entire record, we find no defense to the plaintiff's petition, but do find that its mortgage should be foreclosed. The decree ignores the defendant Coffee's alleged mortgage and he has not appealed, but that may be accounted for by the plaintiff's defeat.

The judgment of the district court, therefore, is reversed and the cause remanded, with instructions to render a decree foreclosing the plaintiff's mortgage with 10 per cent. annual interest from January 1, 1897, that it be decreed a first lien upon the mortgaged premises, and to

ascertain what, if anything, is due upon the defendant Coffee's mortgage and to give him such relief as he may be entitled to, subject, however, to the plaintiff's lien.

REVERSED.

CLAY, ROBINSON & COMPANY, APPELLEE, V. DOUGLAS COUNTY ET AL., APPELLANTS.

FILED JANUARY 24, 1911. No. 16,174.

1. Taxation: PARTNERSHIP CREDITS: PLACE OF TAXATION The credits of a partnership engaged in the live stock commission and money loaning business, that maintains but one office in Nebraska, are subject to taxation in the county, township, precinct, city and school district where that office is located.

2. ———: ———: ———. The doctrine that movables follow the person will not be applied so as to defeat the taxation of partnership credits evidenced by promissory notes executed by residents of Nebraska and payable in Chicago to a partnership transacting business in this state, where it appears that the payee for many years has maintained and still maintains an office and a place of business in Nebraska in charge of an agent, through whom the loans evidenced by the notes were negotiated, and at which place an extensive commission business is transacted by the partnership.

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

James P. English and *Alfred G. Ellick,* for appellants.

Crofoot & Scott, contra.

ROOT, J.

This is an appeal from a judgment of the district court vacating an order made by the board of equalization of Douglas county which increased the assessed valuation of the plaintiff's credits.

The facts are that the plaintiff is a partnership composed of five persons, all nonresidents of Nebraska. It maintains an office in South Omaha, and transacts business at no other point in the state, but its principal place of business is in Chicago. The plaintiff buys and sells live stock upon commission and loans money to live stock men. The plaintiff's South Omaha office is in charge of a Mr. Reed, and this gentleman is vested with great discretion in making loans, which are always evidenced by promissory notes payable at the plaintiff's Chicago office. Whenever a loan is negotiated, Reed draws a draft on the plaintiff in Chicago and deposits it to the partnership credit in a bank in South Omaha where it keeps an account, the draft is forthwith honored, and a check is drawn upon that bank payable to the borrower. The note and any collateral security given by the borrower are immediately transmitted to Chicago and there remain until the debt is paid, whereupon they are returned to Reed for the debtor. Notes are not sent to South Omaha for collection, but Reed accepts payments thereon, deposits the collections, and immediately transmits the proceeds to Chicago. Occasionally a payment is applied to satisfy a pending application for a loan. The plaintiff also transacts an extensive live stock commission business in South Omaha. The plaintiff admitted that during the year involved in this inquiry its average capital, loaned as aforesaid to residents of Nebraska, equalled $25,000, the amount of the assessed valuation in dispute. The plaintiff contends that its domicile is in Chicago, that the situs of its choses in action follows its person to that domicile, and that the board had no power to separate that situs from the plaintiff's ownership so as to establish a situs in Nebraska for the purposes of taxation.

Section 1, art. IX of the constitution, provides: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be

ascertained in such manner as the legislature shall direct." Section 2, art. I, ch. 77, Comp. St. 1909, declares that "the term 'personal property' includes every tangible and intangible thing which is the subject of ownership and not real property as defined in section one of this act." Section 12 provides: "All property in this state not expressly exempt therefrom, shall be subject to taxation," etc. Section 28 commands every resident adult to list for taxation all of his "moneys, credits, bonds, or stocks, shares of stock * * * and all other personal property," and to likewise list "all moneys and other personal property invested, loaned or otherwise controlled by him as the agent or attorney, or on account of any other person or persons, company, or corporation whatsoever, and all moneys deposited subject to his order, check or draft, and credits due from any person," etc. Section 29 provides that personal property, with certain exceptions not applicable to the plaintiff's case, shall be listed and assessed "in the county, precinct, township, city, village, and school district where the owner resides. * * * The capital stock and franchise of corporations and persons * * * shall be listed and taxed * * * where the principal office or place of business of such corporation or person is located within this state. If there be no principal office or place of business in this state, then at the place in this state where any such corporation or person transacts business." Section 44, provides: "The property of banks or bankers, or other companies, and merchants except as hereinafter specifically provided shall be listed and taxed in the county, township, precinct, city, village and school district where the business is done."

A partnership is an entity distinct and separate from that of its members, and is recognized in law as a person. *Richards v. Leveille,* 44 Neb. 38; *Campbell v. Farmers & Merchants Bank,* 49 Neb. 143. By establishing an office in South Omaha and by transacting business at that point for many years, the plaintiff acquired a domicile in this state for all practical purposes, became amenable to its

laws, and subject to taxation upon at least so much of its property as it employed and controlled within the state. The plaintiff does not contend that its capital invested in Nebraska loans has been taxed in a sister state, so that no equities intervene to deter the application of our revenue laws. The plaintiff engages in an extensive and profitable business within this commonwealth, and asserts the right to escape its just share of the burdens of taxation by a course of business which, however much it might protect a natural person, in our judgment presents no obstacle in the instant case to the enforcement of the taxing laws of this state. Text-writers, reason and courts quite generally hold that the property of a partnership should be taxed at the place where its business is carried on. 1 Cooley, Taxation (3d ed.) p. 659; 1 Desty, Taxation, p 299; *School District v. Bowman,* 178 Mo. 654; *City of Louisville v. Tatum, Embry & Co.,* 111 Ky. 747; *Spinney v. City of Lynn,* 172 Mass. 464. Since the plaintiff has but one place of business in Nebraska, there is no question of conflicting locations to cloud the issue. Nor does the fact that all of its members reside without the state, and that its principal place of business is in Chicago, render uncertain the right of the assessor to tax the property in dispute. The plaintiff's person, although intangible, is within the state of Nebraska, and, in so far as the doctrine that movables follow the person of their owner applies, it holds the credits in dispute within this state. We do not presume to say that all of the plaintiff's credits, without regard to the place where they originated or heedless of the state where the capital they represent is invested, should be taxed in Nebraska, but only that these credits, forming part of the plaintiff's capital invested in Nebraska, should be taxed according to the plain provisions of the constitution and of the statutes just referred to.

The judgment of the district court, therefore, is reversed, with directions to reinstate the assessment of the county board.

REVERSED.

P. A. WELLS, EXECUTOR, APPELLANT, V. HERMAN E. COCHRAN ET AL., APPELLEES.

FILED JANUARY 24, 1911. No. 16,185.

1. **Exceptions, Bill of:** SERVICE. It is not necessary to serve a proposed bill of exceptions upon one who purchases the subject matter of the litigation while the action is pending and continues the litigation in the name of the assignor. Service upon the defendant is sufficient.

2. **Judgment:** EQUITABLE SET-OFF. Where peculiar equities intervene between the parties, a court of equity may enjoin the collection of a judgment until the debtor litigates an unliquidated claim against his creditor, and if the debtor succeeds the court may set off the judgments so far as one may equal the other.

3. ———: ———. If an executor sued for his testator's debt is prevented from proving a set-off by the unconscionable conduct of an insolvent plaintiff, and by his own innocent mistake, a court of equity may, in its discretion, enjoin the collection of the judgment until the set-off is liquidated in an action at law, and subsequently set off the judgments so far as they equal each other.

4. ———: ———. The evidence examined, and commented upon in the opinion, and *held* to establish the executor's right to equitable relief.

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

Lysle I. Abbott, for appellant.

Arthur S. Churchill, contra.

ROOT, J.

The defendant Cochran, an attorney at law, negotiated a real estate trade for John P. Johnson, and subsequently recovered judgment against him in justice court upon his note given for services rendered. Johnson appealed to the district court. In both courts the defendant as a defense and counterclaim pleaded that Cochran was indebted to him in the sum of $500 for money had and

received for Johnson's use. While this suit was pending Johnson died, and Mr. Wells, an attorney at law, the plaintiff herein, as executor of the last will and testament of the deceased, was substituted as the defendant. While Mr. Wells was trying a case in one division of the district court, Mr. Cochran appeared in the division where his suit was pending, and, in the absence of any one representing the Johnson estate, caused judgment to be entered by default upon his note. The court refused to set aside the default, and thereupon Mr. Wells, as executor, commenced an original action against Cochran to recover $500 upon the cause of action theretofore pleaded as a set-off. This case has twice appeared in this court. *Wells v. Cochran,* 78 Neb. 612, 84 Neb. 278. In the meantime Cochran sued Mr. Moriarty, the surety upon the undertaking given by Johnson to appeal the suit, first referred to, to the district court, and after considerable litigation recovered judgment. Mr. Moriarty was indemnified by Johnson, and if the judgment is collected the assets of the Johnson estate will be depleted to that extent. Mr. Cochran is insolvent, and this action is prosecuted to restrain the collection of that judgment until the suit prosecuted by Wells shall have been determined, and for equitable relief. After issue joined, but before trial, Mr. Cochran sold and assigned the judgment to his counsel, who intervened in the action. The court dismissed the plaintiff's petition. The plaintiff appeals.

The intervener moves to quash the bill of exceptions because it was not served upon him. The bill was served upon Cochran and he made no suggestions of amendment. The intervener was not substituted for Cochran as the defendant, but the action continued in the name of the original parties according to the provisions of section 45 of the code. The interests of the defendant and the intervener are identical and service of the bill upon either, in the circumstances of this case, binds both. *Crane Bros. Mfg. Co. v. Keck,* 35 Neb. 683.

Upon the merits the defendant contends that, since the

district court refused to grant the executor a new trial in the law action, it conclusively appears that he was negligent in not appearing for trial, and, having failed to litigate his set-off in that action, equity should not interfere in his behalf. The principle invoked is sound, but there are exceptions to all general rules. The executor's remedy in trying the set-off in the action at law was not complete and adequate because the case had been appealed from justice court, and the district court could not render judgment for more than $200, although the executor's demand, after deducting the amount of the Cochran note, would exceed that sum. Notwithstanding this fact Mr. Wells was willing to submit the set-off in the action at law, but was not heard because of his adversary's unconscionable conduct. Judge Story says, in substance, that the equities which should move a court of equity to extend the doctrine of set-off are so various "as to admit of no comprehensive enumeration." 2 Story, Equity Jurisprudence (13th ed.) sec. 1437*a*. In section 885, commenting upon the right and duty of a court of equity to enjoin the enforcement of a judgment recovered in an action at law, the learned author says: "Indeed the occasions on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances. In general it may be stated that in all cases where by accident, or mistake, or fraud, or otherwise a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained. * * * If any such unfair advantage has been already obtained by proceedings at law to a judgment, it will in like manner control the judgment and restore the injured party to his original rights." In section 886 the author says: "The injunction is not confined to any one point of the proceedings at law; but it may, upon a proper case being pre-

sented to the court, be granted at any stage of the suit * * * to stay trial; sometimes after verdict to stay judgment; sometimes after judgment to stay execution."

The affidavits used on the application to set aside the default were introduced in evidence in this case by the defendant and should be considered competent against him. They show, to say the least, that Mr. Wells was under the impression that the case would not be tried until a later day; that Mr. Cochran was swift to take judgment by default against his adversary, and tenacious in resisting inquiry into a charge involving his honor and integrity as a man and as an officer of the court. We think that Mr. Cochran thereby obtained an unfair advantage, and, while that fact in itself might not justify a court of equity in interfering with the execution of the judgment, yet, when we consider that Cochran is insolvent and to permit him to collect the judgment will forever dissipate and may misapply the trust funds in the executor's hands, notwithstanding a money judgment may be rendered against Cochran, we think a peculiar equity intervenes to justify equity in assuming jurisdiction of this case.

In *Thrall v. Omaha Hotel Co.*, 5 Neb. 295, the insolvency of a party against whom a set-off was claimed is recognized as sufficient to justify the intervention of a court of equity. See, also, *Richardson v. Doty*, 44 Neb. 73; *Stone v. Snell*, 86 Neb. 581; *Frye-Bruhn Co. v. Meyer*, 58 C. C. A. 529; *St. Paul & Minneapolis Trust Co. v. Leck*, 57 Minn. 87.

In *Wright v. Salisbury*, 46 Mo. 26, a set-off was allowed in equity although it had been pleaded in an action at law, but not prosecuted to judgment. In *Allen v. Medill & Barret*, 14 Ohio 445, a creditor promised while his suit was pending to credit the defendant with the amount of an unliquidated claim after judgment, and for that reason the defendant did not appear. The creditor was insolvent, and after judgment refused to give the credit, and the court in an action in equity, while recognizing the general rule contended for by the defendant herein, held that,

since the one party was insolvent and the other was misled by the insolvent's dishonest conduct, it should credit the unliquidated claim upon the judgment. See, also, *Kelly v. Wiard,* 49 Conn. 443; *Levy v. Steinbach,* 43 Md. 212; *McDonald v. Mackenzie,* 24 Or. 573; *Wood & Houston v. Steele,* 65 Ala. 436. What has been said does not discredit *Norwegian Plow Co. v. Bollman,* 47 Neb. 186. In that case an attempt was made to impeach a judgment fairly rendered upon the merits, while in this case the plaintiff seeks to restrain the collection of a judgment unfairly procured, until he can reduce his demand to judgment and use it to pay the other, to the end that he may adequately protect the trust funds in his hands. Nor does this opinion run counter to the general statements of law found in *Knox County v. Harshman,* 133 U. S. 152, and relied on by the defendant. In that case the plaintiff sought to enjoin the defendant from suing out a writ of mandamus theretofore awarded by the supreme court, something no court of last resort would tolerate. The statement was evidently copied from 2 Story, Equity Jurisprudence (13th ed.) sec. 887, wherein the learned author discusses a bill of review exhibited for the purpose of securing a new trial in an action at law, and is not in point in a case involving the doctrine of equitable set-off.

What has been said concerning Mr. Cochran's liability to the Johnson estate should not be considered as an opinion that the executor should prevail in his action at law, but merely that the evidence satisfies us that the executor is prosecuting his demand in good faith and that it should be submitted to a jury.

The other propositions argued in the briefs do not in our judgment control this case, and the opinion will not be extended by further reference thereto. Upon the entire record, we find that the plaintiff has made out a case for equitable relief.

The judgment of the district court, therefore, is reversed and the cause remanded, with instructions to enter a judgment restraining the defendant and the intervener

from collecting the judgment against Mr. Moriarty until the litigation between the executor of the estate of John P. Johnson and the defendant is finally determined, and, if in consequence thereof a judgment shall be rendered against Herman E. Cochran, that subsequently, in so far as it will apply, the judgment shall be set off against the judgments recovered by him and referred to in this opinion.

REVERSED.

SEDGWICK, J., dissenting.

There is very little, if any, controversy as to the facts of the case, so far as they relate to the principal question presented upon this appeal. In 1902 the defendant, Cochran, who is an attorney at law, practicing at the bar of Douglas county, in this state, and is also engaged in real estate transactions, was acting for one Johnson in the exchange of some of Mr. Johnson's property for other property. After the business was settled Mr. Johnson, it is claimed, executed and delivered to Mr. Cochran his promissory note by which he agreed to pay Mr. Cochran between $40 and $50 for expenses and on account of services rendered by Mr. Cochran in the transaction mentioned. Afterwards, Mr. Cochran brought suit upon this note, and Mr. Johnson defended it, alleging that in the transaction mentioned Mr. Cochran had received a sum of money which really belonged to Mr. Johnson, and had withheld from Mr. Johnson the knowledge of the fact that he had received the money, and had converted the money to his own use. This action was tried in justice court in Douglas county and there resulted in judgment in favor of Mr. Cochran, and was appealed by Mr. Johnson to the district court. That action has been twice in this court (*Wells v. Cochran*, 78 Neb. 612, 84 Neb. 278), and the suit against Mr. Moriarty as surety upon the appeal bond has also been in this court (*Cochran v. Moriarty*, 78 Neb. 669), and there have been many trials in the district court arising out of this controversy.

Immediately after the above mentioned judgment in

the district court in favor of Mr. Cochran and against the estate of Johnson, the plaintiff, as executor, began an action at law upon the identical claim which he had set up as a defense in the action in which the judgment was obtained. That action has run a devious course through all the courts and appears to be still pending.

The plaintiff believes that, if Cochran is not allowed to collect his judgment against Moriarty until plaintiff is able to try finally his counterclaim against Cochran, he will be able to recover a judgment and set it off against the judgment which Cochran holds against Moriarty, and that the latter judgment should be enjoined until his suit against Cochran is finally disposed of. The only reason that he gives in his petition for failing to assert his counterclaim in the action at law in which Cochran obtained his judgment is that "said Cochran, while plaintiff was engaged in another division of said district court, called up said case for hearing and obtained judgment against plaintiff for $69.45 and costs by default, whereupon plaintiff commenced a suit in the said district court" upon the same counterclaim. And so it appears that all of this litigation has been occasioned because this plaintiff, who is an attorney, was trying another case when he should have been attending to his own. The law should and does, if properly applied, discourage and prevent such unnecessary litigation. The disgraceful results are not inherent in the law, but in the manner of administering it. Ordinarily the whole matter should have been satisfactorily settled upon the first hearing in the justice court. If, however, the justice of the peace, as sometimes happens, misunderstood the legal rights of the parties so that there was in fact no substantial trial of the matters in controversy, and it became necessary to appeal to the district court, an investigation of the facts in dispute in that court ought ordinarily to end such a controversy.

Affidavits which were filed by plaintiff upon a motion in the district court to set aside the default which he complains of were offered in evidence and received by the

court upon the trial of the case at bar. They were received, however, over the objection of this defendant that they were incompetent and irrelevant under this issue, as they clearly were, and evidently were not considered by the trial court. They are now made the basis of the majority opinion. They show that plaintiff relied upon some verbal promises and representations of opposing counsel as to the time of trial of the cause then pending, and so failed to appear in court to make his defense. Even if the trial court erred in refusing to set aside the judgment complained of and allow the defense of the counterclaim to be heard, such error could only be corrected by a direct appeal to this court for that purpose. But no such issue is tendered in the petition for the injunction against the judgment. The mere fact that the defendant was also an attorney and engaged in the trial of another case when his case was reached for trial is not sufficient to explain his neglect to defend. "A judgment at law obtained through the fraudulent conduct of the judgment creditor will not be enjoined where the defense could have been made at law." *Norwegian Plow Co. v. Bollman,* 47 Neb. 186, 192. In the case at bar the plaintiff not only had an opportunity to litigate his claim in the action in which the judgment against him was obtained, but he actually did set it up as a counterclaim, a claim arising out of the same transaction as that on which he was being sued. Unless he was prevented by fraud, accident, or mistake from making his defense in the law action, he was not entitled to a new trial in that action, much less in a subsequent action in equity. Before the statutes providing for counterclaims and set-offs were introduced in this country, the courts of equity enjoined the collection of judgments in certain cases in which it was made to appear that equity required that set-offs and counterclaims should be allowed. Since these statutes allowing set-offs and counterclaims have been enacted, it has been held that courts of equity will under proper circumstances enjoin the collection of judgments in cases

where the statutory provision for set-off and counterclaim in law actions will not apply. It was natural therefore that some of the earlier decisions of inferior courts overlooked the distinction, and some of the earlier cases from the lower courts may be found that will upon first reading appear to justify the conclusion of the majority opinion.

The case does not involve an equitable set-off; it has to do with a statutory counterclaim. When a counterclaim is provided for by statute, the holder of it does not have to ask a court of equity for leave to use it. All that is required of him is to use it at the time and in the manner that the statute provides. This case has to do with a judgment. The question is: When will equity interfere with a judgment so as to allow a statutory counterclaim that might have been used to defeat the judgment? This is a plain question, and has been plainly answered by many courts. "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents." *Knox County v. Harshman,* 133 U. S. 152. In this case, as above stated, the plaintiff did not have "an equitable defense of which he could not avail himself at law," and so he does not stand upon the first ground named by the United States court. He had a statutory counterclaim, "a good defense at law," and the sole question here is: Was he prevented from availing himself of that defense "by fraud or accident, unmixed with negligence of himself or his agents"? This question is not much discussed in the majority opinion. The effect of insolvency as a ground for equitable set-off is dwelt upon, but as this is a statutory counterclaim, and not an equitable set-off, that discussion is not applicable. The cases cited for the most part involve elements of equitable set-off when the circumstances are such that the statute or common law do not allow that defense, and have

nothing to do with statutory or common law set-off or counterclaim. The discussion of equitable set-off in this case leads, so far as I can see, to confusion. The plaintiff had "a good defense at law," in the action in which the judgment was obtained which he now seeks to have equity interfere with. The insolvency of the plaintiff in that action would not prevent making the defense of counterclaim, and I do not see that the plaintiff in this action has shown that he was prevented from making that defense "by fraud or accident, unmixed with negligence of himself or his agents." That being so, the judgment of the district court is right.

FAIRBANKS, MORSE & COMPANY, APPELLANT, V. GEORGE BURGERT, APPELLEE.

FILED JANUARY 24, 1911. No. 16,270.

1. **Sales:** PERFORMANCE OF CONDITION: BURDEN OF PROOF. If a defendant's liability depends upon a condition which he has not waived, the burden is upon the plaintiff to prove a performance thereof.
2. ———: ACTION: DEFENSE: BURDEN OF PROOF. If the defendant, in an action to enforce a conditional liability evidenced by a written order for machinery, pleads and proves that before the order was delivered the plaintiff represented that the condition should be construed as an equivalent to representations theretofore made with respect to the machinery, and that the defendant believed and relied thereon, the condition should be thus construed, but the burden is upon the defendant to establish that fact, if it is denied by the plaintiff.
3. **Trial:** QUESTION FOR JURY. If the evidence is conflicting with respect to a material issue, that issue should be submitted to the jury.

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

J. C. Dort, for appellant.

Story & Story, contra.

ROOT, J.

Upon a former appeal of this case the judgment was reversed because the court did not submit the issues of fact to the jury. 81 Neb. 465. We held that it was competent for the defendant to prove that representations made to him by the plaintiff's agent formed an inducement for the order upon which this action is predicated. It is provided in the order that "all the above (machinery ordered) for the sum of $225, which amount I will pay 60 days after outfit is erected and in good running order." The defendant contends in effect that he was unacquainted with, and had no opportunity to examine, the machinery ordered; that he believed and acted upon the representations made by the plaintiff's agent that the grinder would grind ear corn, shelled corn, and oats, and the windmill furnish sufficient power to drive the grinder for that purpose; and that when the order was written the agent said that the words "to drive the grinder" and "good running order," written therein, meant that the machinery would properly grind such grain. The order was but an agreement to purchase upon the condition named. *Davis Gasoline Engine Works Co. v. McHugh & Rate,* 115 Ia. 415. Until that condition shall have been performed, the plaintiff may not recover. *Charter Gas-Engine Co. v. Coleridge State Bank,* 54 Neb. 743.

If the plaintiff's agent made the statements at the time and in the manner testified to by the defendant, and he relied thereon, it should be bound thereby. Code, sec. 341; *Blair v. Kingman Implement Co.,* 82 Neb. 344. The two defenses pleaded, while closely related, are distinct, and either, if established, will defeat the plaintiff's action.

If false representations concerning material facts, made to induce the defendant to sign the order, were relied upon by him in ignorance of the facts, he could rescind upon learning the truth. *Phelps v. Whitaker,* 37 Mich. 72; *Weiden v. Woodruff,* 38 Mich. 130; *Palmer v. Routh,* 86

Mich. 602. If those representations were embodied in the order and the truth thereof made a condition to the defendant's liability, he may rely thereon, and need not act affirmatively to protect himself, and the burden would be upon the plaintiff to prove that the condition had been performed. The burden, however, is upon the defendant to prove that the plaintiff's agent assured him that the alleged construction should be given the words contained in the order. The plaintiff's agents contradict the defendant, and testify in substance that they told him that a "fourteen-foot" windmill would not furnish sufficient power to operate the grinder, but that he should purchase a "sixteen-foot" windmill or a gasoline engine, and that the defendant stated that he had investigated the subject, knew what was needful, and that the "fourteen-foot" mill was suitable and ample for his purpose.

In the third instruction, given by the court at the defendant's request, the jury were told that, if they found from the evidence that the machinery was ordered for the purpose of grinding grain and it did not after a fair trial perform that service, it was not in good running order, and they should, in that event, find for the defendant. The general proposition of law is not entirely accurate. One may sell machinery for a definite use without necessarily impliedly warranting that it will be fit therefor. *Gilcrest Lumber Co. v. Wilson,* 84 Neb. 583; 2 Mechem, Sales, sec. 1314. The terms of the order are not so accurate and susceptible of but one construction as to exclude from consideration the situation of the parties, their conduct, the nature of their transaction, and the attendant circumstances, but all of these should be considered in construing the order in question. *Rice v. McCague,* 61 Neb. 861.

We are of opinion that the order, when read in the light of these circumstances, should not necessarily be construed as an agreement that the machinery will successfully grind corn and oats. If the defendant was warned before he parted with control of the order that the windmill would probably prove unsatisfactory and

not furnish sufficient power to drive the grinder, the condition should not be construed as he contends. The instruction withdrew from the jury this important issue of fact, the vital one in the case, and we are constrained to say that the giving thereof was error prejudicial to the plaintiff.

The judgment of the district court, therefore, is reversed and the cause remanded for further proceedings.

REVERSED.

CATHERINE FAUBER, APPELLANT, V. HARRISON KEIM, APPELLEE.

FILED JANUARY 24, 1911. No. 16,703.

1. **Executors and Administrators:** DISTRIBUTION OF ESTATE: RATIFICATION. An executor should not distribute his testator's estate without an order of the probate court made after due notice to all parties interested, but if he prorates the assets among all of the legatees upon the assumption that the bequests are all in the same class, and the legatees, not being under any disability, accept and retain their dividends for ten years with knowledge of the facts and without complaint, they will thereby ratify the transaction.

2. ———: ———. But in such a case the executor will also be held to the theory upon which he distributed the estate.

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

Hall, Woods & Pound, for appellant.

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

ROOT, J.

Our opinion reversing the first judgment rendered in this action is reported in 85 Neb. 217. The plaintiff has

appealed from a judgment in her favor for $363.40. A copy of the will and a statement of many of the essential facts may be found in our former opinion, to which reference is made.

The plaintiff contends that her legacy is specific and should be preferred to the bequests made to her brothers and to her sisters other than Cerilla, and that since her brother Harrison, the executor, accepted the farm upon which that legacy is charged, he is personally liable therefor. It was determined upon the former appeal that the land was charged with the lien. In his will the testator first bequeathed to his wife her specific exemptions, the life use of two rooms to be selected by her in a dwelling house, and the interest on $3,000, which is charged upon the farm. Thereafter he bequeathed legacies aggregating $2,376 to six of his children, and finally he bequeathed to the plaintiff $1,817, and to her sister Cerilla $373. If the testator should survive the plaintiff's husband, her legacy is payable immediately upon her father's death, but, if her husband survives her father, she is to receive 7 per cent. annual interest upon her legacy during her husband's natural life, and the principal sum in the event of his death.

The evidence tends to prove that the executor in treating all legacies as of equal rank acted upon the advice of the county judge, and possibly in conformity with an unrecorded order made by that official, but the proof does not show that notice was given of the executor's intention to apply therefor. The plaintiff's letter of date February 8, 1889, sent by her to the executor, bears strong internal evidence that she was acquainted at that early day with the contents of her father's will.

The defendant in 1893, after paying the testator's debts and the costs of administration, assumed to prorate the residue of the estate among all of the legatees. The plaintiff must have known from her correspondence and from the amount of the interest remitted annually by her brother that he, as executor, had paid her brothers and

sisters on the theory that her legacy was not preferred to theirs. After the plaintiff's mother died in 1903, the executor assumed to prorate the $600, representing the principal sum upon which interest had been paid to the parent, among all of the legatees, and the plaintiff's interest payments were increased thereby. The plaintiff testifies that she refused to sign vouchers in full satisfaction of her annuity, but, so far as we are advised, made no other protest until about the time this suit was commenced in 1905. An executor should not distribute his testator's estate among the legatees without an order of the court made upon proper notice, and, if he does so, will assume the responsibility of paying the proper person. *Boales v. Ferguson,* 55 Neb. 565. But if he makes a distribution without the order and the legatees accept the fruits of that distribution under circumstances fairly charging them with knowledge that payments are being made to the other legatees on the theory that the correct portion is being paid to all of them, and no objection is made thereto for over ten years, we are of opinion that, if they are not under disability, they should be held to have ratified his action. *Fort v. Battle,* 13 Smed. & M. (Miss.) 133; *Palmer v. Whitney,* 166 Mass. 306. Estoppels are mutual, and while we are of opinion that the plaintiff must abide by the distribution of her father's estate according to the action of her brother, the executor, he also shall be bound thereby and should account to her for her pro rata share of the $600 principal released from the interest charge payable to the mother. This sum, as we figure it, is $238.83, which, added to the first dividend, amounts to $602.23.

The decree of the district court is therefore modified so as to increase the plaintiff's lien to $602.23, and, as modified, the judgment is affirmed; defendant to pay all costs of the action.

AFFIRMED AS MODIFIED.

WATIE VAN PATTEN, APPELLANT, V. ROBERT O'BRIEN ET AL., APPELLEES; W. F. BUCHANAN, INTERVENER, APPELLANT.

FILED JANUARY 24, 1911. No 16,158.

1. **Quieting Title:** DEFENSES. In a suit to quiet title a defendant in possession may, without proving title in himself, defeat the action by showing that plaintiff has no title to or interest in the land.

2. ———: DEFENSE OF ADVERSE POSSESSION: EVIDENCE. Where plaintiff is defeated in a suit to quiet title and defendants rely alone on adverse possession for a defense and pray for the cancelation of an outlawed mortgage which an intervener seeks without avail to foreclose, defendants are not entitled to affirmative relief, if their proof in any material respect fails to show that they have been in the actual, continuous, open, notorious, exclusive, adverse possession of the realty for ten years, claiming to be owners.

3. ———: INTERVENTION: RELIEF. Where both plaintiff and defendant are defeated in a suit to quiet title, an intervener seeking to foreclose an outlawed mortgage *held* not entitled to a foreclosure, the owner of the equity of redemption not being a party to the action.

APPEAL from the district court for Dundy county: ROBERT C. ORR, JUDGE. *Affirmed in part and reversed in part.*

Ralph D. Brown and *Venrick & Green,* for appellant.

P. W. Scott, contra.

J. W. James, for intervener.

ROSE, J.

The subject of litigation is a quarter-section of land in Dundy county. Plaintiff asserts ownership, relies on a quitclaim deed, and prays for the quieting of her title, for the cancelation of an outlawed mortgage for $750 and for rents and profits amounting to $400. Defendants

claim the land by adverse possession, and ask the court to quiet their title, to cancel the outlawed mortgage and to dismiss plaintiff's petition. Intervener bought the mortgage for $50, and prays for a foreclosure, averring that plaintiff acquired the legal title to the mortgaged premises by means of her quitclaim deed; that as part consideration for the conveyance she assumed the mortgage, thereby estopping herself from invoking the statute of limitations to defeat her agreement to pay the debt secured; that defendants have no interest in the land. In substance the findings of the trial court are: Plaintiff has no title to or interest in the land. The mortgage is barred by the statute of limitations. The land belongs to defendants by adverse possession, and their title is clouded by intervener's mortgage. On these findings plaintiff's petition was dismissed. The title to the land was quieted in defendants. Foreclosure was denied and the mortgage canceled. Plaintiff and the intervener appeal.

1. The first question presented is the correctness of the holding that plaintiff has no title. By record evidence she showed: The United States issued a patent to Joseph Dufak May 25, 1891. The patentee and his wife conveyed the land to Frank H. Kaylor by warranty deed January 29, 1894. Plaintiff procured a quitclaim deed from Kaylor December 24, 1905. It is now argued that the record evidence thus showing title in plaintiff is unquestioned, that such title is good as against defendants, and that consequently she has made a *prima facie* case entitling her to relief, since, as she contends, she is not required to show a title good as against all the world. The record evidence, however, is not the only proof adduced by plaintiff in support of her title. After defendants and intervener had rested, plaintiff in rebuttal called as witnesses her husband and I. R. Darnell. It is shown without contradiction that both were her agents in procuring the quitclaim deed. On direct examination they testified to conversations relating to plaintiff's purchase and to the consideration. Van Patten said the expressed

consideration was one dollar and that the consideration actually paid was $50. Both stated nothing was said about the mortgage. On cross-examination as to further conversations, it was shown by both of these witnesses that, when thus acting as agents for plaintiff, they were told by Kaylor he had deeded the land either to "Bob Doty or the old gentleman." Kaylor's deposition was admitted in evidence, and it tends to prove: By warranty deed Kaylor for a valuable consideration conveyed the land to J. R. Doty before executing the quitclaim deed. The second deed was made for the consideration paid for the first with the understanding on part of Kaylor that he was making the former title good. One dollar was tendered to him at the time, but it was rejected. After acquiring title J. R. Doty died, leaving children. Doty was not a relative of plaintiff. The proofs further show that plaintiff's claim to title rests alone on her quitclaim deed, and that she was never in possession of the premises.

Plaintiff contends her title is not defeated by oral proof showing her agents had been told by her grantor that he had previously deeded the land either to "Bob Doty or the old gentleman," and that such testimony is incompetent. This proof was properly brought out on cross-examination of plaintiff's witnesses who had testified on direct examination to the conversations leading up to the transfer and to the consideration paid. She was bound by the knowledge of her agents. Kaylor's statement that he had previously deeded the land to another was sufficient notice to put her on inquiry. *McParland v. Peters,* 87 Neb. 829. Plaintiff having gone into the question of consideration and into the conversations leading up to the execution of the quitclaim deed, the trial court properly considered the testimony of Kaylor on the same subjects. It shows that prior to the execution of the quitclaim deed he had conveyed the land to J. R. Doty by warranty deed, and that he had no title whatever to convey to plaintiff. Having been put on inquiry by her grantor, she was chargeable with knowledge of these facts, if they were

not already known to her. Proof that the first deed had been recorded was unnecessary, because it was shown plaintiff knew of its existence. She had no title from any source and had never been in possession. The trial court, therefore, properly dismissed her petition. In a suit to quiet title a defendant in possession may, without proving title in himself, defeat the action by showing that plaintiff has no title to or interest in the land. *Blodgett v. McMurtry,* 39 Neb. 210; *Adams v. Crawford,* 116 Cal. 495; *White v. McGilliard,* 140 Cal. 654.

2. Was the title properly quieted in defendants on the ground of adverse possession? The dismissal of plaintiff's petition for want of title leaves their possession undisturbed. Should the affirmative relief have been granted? They not only undertook to defeat plaintiff's claim, but asked for the cancelation of the mortgage. In seeking such redress they assumed the attitude of plaintiffs. In this situation the burden was on them to show adverse possession for the full statutory period of ten years. Defendants are brothers, four in number, and obtained relief jointly. If the proof is insufficient in any material respect, the title should not have been quieted in them. Two of them were witnesses, and their testimony tends to show that they had used the land for farming or grazing continuously without interruption under claim of ownership since the spring of 1896. The suit was commenced May 15, 1906. They had never paid the taxes. Kaylor bought the land in 1904, and there is proof showing that he afterward visited the premises, found the father of defendants in possession under a lease from Dufak, told him he owned the land, said it was all right for him to remain, and ratified Dufak's lease. It seems the senior O'Brien claimed at the time he had a right to stay there anyway, but how he obtained this right is not shown, unless it was created by his lease from Dufak. The time and manner of terminating this lease and of O'Brien's possession under it are not proved. Neither possession of land under a lease nor the mere act of hold-

ing over after it expires is adverse. There is proof that the senior O'Brien was in possession under a lease in 1894, and that he and two of his sons farmed part of the land in 1895. Two or three of the defendants were minors and lived with their father from 1895 to 1898. Defendants now assert that, while some of them were still minors in the spring of 1906, they were in the actual, open, notorious, exclusive, adverse possession of the real estate, claiming to be owners. The period of time for which the father leased the land does not appear. If he went into possession under a lease for a term of years, the owner would hardly assume without actual notice that the possession of the minors during the stipulated period was adverse. To sustain the defense under such conditions there should be evidence of the circumstances under which the father's tenancy terminated, or of unequivocal acts showing the time and manner in which the possession of his sons began. The owner should have had actual notice of the adverse claim of defendants, or their possession should have been so open and notorious as to imply such notice. In these respects the testimony relating to the early part of the ten-year period covered by their proofs is incomplete. It does appear, however, that one of the defendants stated on cross-examination he thought the "Doty brothers" cultivated the land in 1895; that another defendant said "Robert Doty" farmed part of the land in 1895; and that a disinterested witness testified the "Doty boys" farmed the land in 1895; but it is not shown that any person so described was the holder of the legal title, or that the J. R. Doty named as grantee in Kaylor's warranty deed was in possession of his property in 1895. For anything appearing in the record the Dotys who then farmed the land may have been sublessees of the senior O'Brien, Dufak's lessee. On this branch of the case the evidence is insufficient to sustain a decree quieting the title in defendants, and the cancelation of the mortgage as prayed in their answer was erroneous.

3. Should the mortgage pleaded by intervener be fore-

closed? According to the evidence the owner of the equity of redemption is not a party to the suit. Plaintiff has no title and did not agree to pay the mortgage. Defendants failed to establish title by adverse possession. The mortgage debt matured June 1, 1895. The suit was commenced May 15, 1906. It is stipulated by the parties that since June 1, 1895, neither the mortgagor nor any one for him has paid anything on the principal note secured. On its face, therefore, the mortgage is barred by the statute of limitations. Intervener in seeking to foreclose his mortgage pleaded that defendants have no title, and his plea has been sustained. Foreclosure under such circumstances would be a vain thing, and it was properly denied.

In so far as the decree quiets the title in defendants and cancels the mortgage it is reversed. The dismissal of plaintiff's petition is affirmed and the petition of intervener is dismissed. The parties will be required to pay their own costs.

JUDGMENT ACCORDINGLY.

MARY L. FOWLER, APPELLEE, V. JANE MCKAY, APPELLANT.

FILED JANUARY 24, 1911. No. 16,209.

Principal and Agent: CONTRACTS: LIABILITY. Parties contracting in their own names do not exclude their personal responsibility by describing themselves as agents of another, and such a contract is their obligation, and not that of their principal. *Persons v. McDonald*, 60 Neb. 452; *Morgan v. Bergen*, 3 Neb. 209.

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

Morlan, Ritchie & Wolff, for appellant.

Perry, Lambe & Butler, contra.

ROSE, J.

Specific performance of a written contract for the conveyance of two lots in Cambridge was the relief granted to plaintiff by the trial court, and from the decree in her favor defendant has appealed.

In her answer defendant admitted ownership of the lots, but denied other averments of the petition, one of which was that she had entered into the contract. Plaintiff pleaded the contract *in extenso,* and it is introduced by these words: "This agreement made and entered into this 20th day of December, 1905, by and between Miller & Carmichael, agents of Jennie McKay, party of the first part, and W. H. Faling, party of the second part, witnesseth." The terms of the agreement to sell and convey the lots were accepted by the party of the first part as thus described: "Miller & Carmichael, agents of Jennie McKay." The contract is signed: "Miller & Carmichael, Ag'ts, By C. D. Carmichael." The instrument was acknowledged by "C. D. Carmichael, of the firm of Miller & Carmichael," whom the notary certifies "to be the identical person whose name is affixed to the foregoing conveyance as grantor." On the back of the contract there is an assignment by Faling to plaintiff. This contract therefore purports to be made by Miller & Carmichael, and not to be made by Jennie McKay, or Jane McKay, defendant. It purports to be acknowledged by C. D. Carmichael, of the firm of Miller & Carmichael, as grantor, and not by defendant. It was not made in the name of Jennie McKay as principal, and does not purport to be so made. She did not sign it or receive any part of the purchase price. She is the only party defendant, and resides in Michigan. The contract was made in Nebraska, and the other parties thereto and the assignee are residents of this state. The words, "Agents of Jennie McKay," following Miller & Carmichael in the body of the instrument, and the contraction, "ag'ts," following Miller & Carmichael, as signed at the end, are merely *descriptio*

personarum, which do not exclude the personal responsibility of Miller & Carmichael. This doctrine was announced by Judge Story in 1834. *Lutz v. Linthicum*, 8 Pet. (U. S.) *165.

The record showing the facts narrated, it is argued as a ground of reversal that the contract is the personal obligation of Miller & Carmichael, by whom it was made, and not the agreement of defendant. In the early history of this court it was held: "It is a well-established rule of law that if an agent convey or covenant in his own name, as attorney or agent of the principal, and attests the deed, either in his own name, or in his own name as agent or attorney, the instrument has no operation as the deed of the principal." *Morgan v. Bergen*, 3 Neb. 209. The rule has been followed ever since. It was stated in *Persons v. McDonald*, 60 Neb. 452, as follows: "A contract, to be binding upon a principal when executed by another person, must be made in the name of the principal. If one contract in his own name, describing himself as attorney for his principal, the contract is the obligation of the attorney, and not of the principal."

In the present case the application of the doctrine stated defeats specific performance of the contract pleaded by plaintiff. The judgment of the district court is therefore reversed and the action dismissed at the costs of plaintiff.

REVERSED AND DISMISSED.

RALPH WARNER HOWE ET AL., APPELLANTS, V. CLARA BLOMENKAMP ET AL., APPELLEES.

FILED JANUARY 24, 1911. No. 16,258.

1. **Guardian and Ward:** SALE OF LAND: OATH. The statute requiring a guardian to take and subscribe an oath before fixing the time and place for the sale of his ward's land is mandatory, and a sale made without compliance therewith is void. Comp. St. 1909, ch. 23, secs. 55, 89; *Card v. Deans*, 84 Neb. 4.

2. **Limitation of Actions:** QUIETING TITLE TO HOMESTEAD: SUIT BY HEIR. A suit by an heir to quiet his title to the homestead of his ancestor may be commenced any time within ten years after the cause of action accrues, or within ten years after he attains majority. *Holmes v. Mason*, 80 Neb. 448.

3. **Guardian and Ward:** VOID SALE: ESTOPPEL. In a suit by an heir to quiet his title to the homestead of his ancestor, defendant claiming title through a void sale by a guardian of plaintiff, the latter, who did not receive any of the proceeds of the void sale, is not estopped by a settlement with another guardian from assserting title to the homestead, where the settlement related alone to funds arising from a pension.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Reversed.*

Tibbets, Morey & Fuller, for appellants.

J. W. James and *Karl D. Beghtol, contra.*

ROSE, J.

Plaintiffs have appealed from a decree dismissing their suit to quiet title. The land described in the petition is an 80-acre tract in Adams county. While George W. Howe owned and occupied it as a homestead with his wife and seven minor children, he died intestate November 2, 1880. At that time its value was less than $2,000. The plaintiffs, Ralph Warner Howe and Victor Edmond Howe, are sons of the decedent, and claim an undivided seventh interest each in the land, the widow having died in November, 1906. The other children claim no interest in the land. A guardian for plaintiffs was appointed by the county court of Adams county December 13, 1890. For the alleged purpose of investing the proceeds for their benefit, the land was sold at guardian's sale June 6, 1891. Failure of the guardian to take and subscribe the statutory oath before fixing the time and place of sale, other defects in the proceedings and fraud are pleaded to show that the guardian's sale is void. The principal defendants are the widow and the heirs of John H. Blomenkamp, and

they claim title through mesne conveyances from the purchaser at the guardian's sale. Two of Bloomenkamp's mortgagees are also defendants. The defenses summarized by defendants are: "(1) That the guardian's sale was not absolutely void but voidable only; (2) being voidable only, that the statute of limitations had run against the rights of plaintiffs; (3) that the wards are by their own acts in settling with their guardian estopped from maintaining this suit."

1. The statute requires a guardian, before fixing the time and place of sale, to take and subscribe an oath in substance "that in disposing of the real estate which he is licensed to sell he will exert his best endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested." Comp. St. 1909, ch. 23, secs. 55, 89. The judicial record in evidence shows that the land was sold by the guardian June 6, 1891, and that the oath was not taken until June 8, 1891. The requirements of the statute in this respect were therefore disregarded. The guardian's failure to take and subscribe the necessary oath within the time prescribed by statute made the sale absolutely void, according to the rule announced in three former decisions. *Bachelor v. Korb,* 58 Neb. 122; *Levara v. McNeny,* 5 Neb. (Unof.) 318, 73 Neb. 414; *Card v. Deans,* 84 Neb. 4. Consideration of other defects and of the charges of fraud are therefore unnecessary.

2. The next defense is that plaintiffs did not bring suit within five years after attaining majority, and that consequently the action is barred by the statute of limitations. Comp. St. 1909, ch. 23, secs. 117, 118. This statute does not apply to a void sale of the property of a ward, and the rule applicable here is: "An action by an heir to quiet his title to the homestead of his ancestor may be maintained at any time within ten years after his right of action accrues, or the attainment of his majority." *Holmes v. Mason,* 80 Neb. 448. Under this rule the action is not barred.

3. The defense that plaintiffs are estopped by their settlement with their guardian is also futile. It is shown by the record that they did not receive any of the proceeds of the guardian's sale. The settlement relied upon as an estoppel was made with a curator in Missouri and related alone to funds arising from a pension. It is too plain for argument that plaintiffs were not thus estopped from asserting their right to the land inherited from their father.

On the face of the record, plaintiffs were clearly entitled to a decree quieting their title and the suit was erroneously dismissed. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

CATHERINE KRAMER, APPELLEE, V. JOHN A. WEIGAND, APPELLANT.

FILED JANUARY 24, 1911. No. 16,273.

1. Continuance: DISCRETION OF COURT. The rule is well settled in this state that an order denying a continuance of a cause will not be reversed except for an abuse of discretion.

2. ———: TIME OF APPLICATION. It is the duty of a party when surprised by the nonappearance of a material witness, who has been duly subpœnaed, under circumstances which are known by him when the case is called for trial and which give him no reason to expect that such witness intends to appear, to at once apply to the court for a postponement of the trial or a continuance of the cause; and, if he fails so to do and enters upon the trial, he does so at his peril; and, in such a case, it will not be held to be an abuse of discretion for the court to refuse to grant a continuance, not applied for until after the other side has rested.

3. Appeal: RULINGS ON EVIDENCE. Rulings of the trial court in the admission and exclusion of evidence, examined and set out in the opinion, *held* no error.

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

H. C. Vail, for appellant.

W. R. Patrick, *A. E. Garten* and *O. M. Needham*, *contra*.

FAWCETT, J.

On May 22, 1908, plaintiff filed a complaint before the county judge of Boone county, charging that she was an unmarried woman, that she was then pregnant with a bastard child, and that defendant was the father of such child. Defendant was held to the district court, where, upon trial duly had, judgment was rendered in favor of plaintiff, and defendant appeals.

Five errors are assigned for a reversal, which we will consider in the order in which they appear in defendant's brief.

1. That the court erred in overruling defendant's application for a continuance. From the statements made in defendant's brief, it appears that the case stood for trial at 9 o'clock A. M. December 16. December 7 defendant filed in the office of the clerk a precipe for a subpœna for witnesses, one of whom was Albert Umlauf. The subpœna was returned December 9, duly served upon the witness named, and with the statement that no demand was made by Umlauf for witness fees. It appears from the statement of counsel for defendant in his brief that when the case was called for trial, and before the *voir dire* examination of the jurors commenced, he made a statement to the court that a subpœna had been duly served upon the witness Umlauf, that a return of service had been made, and "that on the evening of the 15th day of December defendant sent his hired man to the place where the witness Umlauf was working in order to bring Umlauf to the home of defendant so he could come with defendant to Albion December 16 to be a witness in this case. That Umlauf stated to defendant's hired man that he would finish corn husking and then come over to defendant's house and go with him to Albion December 16. That the witness

Umlauf did not appear at the residence of defendant as he promised, and did not make his appearance in court at the opening of the trial of this case. That defendant had been informed that the party where Umlauf was working had stated that Umlauf had left their place the evening of December 15, and that was all defendant was able to learn as to the whereabouts of the said Umlauf. That defendant had made his arrangements to go to trial at that time, and that he was ready to go to trial, provided he could obtain the presence of the witness Umlauf, who was a material witness for the defense. That defendant would insist upon the presence of the witness before proceeding to place his defense before the jury, and that, if the witness failed to appear before the time the plaintiff had introduced her evidence, the defendant would make a showing for a continuance on account of the absence of the witness." There is no showing as to what the court said when counsel made this statement, nor is there any intimation in the record that the court advised him that the trial might proceed subject to his right to make such a showing after plaintiff had rested, in the event that the witness Umlauf did not appear. After the jury had been selected, defendant filed an affidavit stating the facts of the service of the subpœna and the nonappearance of Umlauf, in which affidavit he stated "that said witness is not in attendance at court, and affiant on inquiry has been unable to learn the present whereabouts of the said witness," whereupon the court issued an attachment, which proved unavailing, as the witness was not found. On the next day, December 17, after plaintiff had rested, defendant moved for a continuance of the case and filed the affidavit of defendant in support thereof. The affidavit recites the facts substantially as above set out, and further states that the last information affiant had been able to procure as to the whereabouts of the witness was from persons who had seen the witness in Petersburg on the evening of December 15 at about 8 o'clock; that the witness Umlauf was a material

witness, and then set out the facts which he stated Umlauf would, if present, testify to, which facts, it must be conceded, constituted material testimony. The affidavit further stated: "Affiant believes that the said Albert Umlauf has temporarily left Petersburg, Nebraska, to avoid the attendance as a witness in this case. Affiant further believes if the court will continue this case that he will be able to find the said Albert Umlauf, and take his testimony in the case." The court overruled the motion for a continuance and the trial proceeded. The rule is well settled than "an order denying a continuance of a cause will not be reversed except for an abuse of discretion." *Storz v. Finklestein,* 48 Neb. 27; *Taylor v. State,* 86 Neb. 795. In the face of this rule defendant's contention must fail. We cannot say that under the facts and circumstances shown the court abused its discretion in denying the continuance. Defendant knew when the case was called for trial all the facts within his knowledge at the time he made his application for a continuance after plaintiff had rested. He then knew, as shown by the statement of his counsel, that Umlauf had not kept his promise to go to defendant's house on the evening of the 15th and accompany defendant to the county seat on the morning of the 16th. He had also then been advised that the gentleman for whom Umlauf had been working had stated that Umlauf had left his place the evening of the 15th for parts unknown. With that knowledge then in his possession, if he did not desire to run the risk of a trial without the presence of Umlauf, he should at once have made his application for a continuance; and this is especially true when no assurance was given him by the court that in proceeding with the trial he did not waive his right to subsequently make such application. He had no right to consume the time of the court and put plaintiff to the trouble and expense of proceeding with the trial of her case upon the mere hope, which his own statement shows was unfounded; that the witness would appear in time to serve his purpose. We think the true rule

should be, and is, that it is the duty of a party when surprised by the nonappearance of a material witness, who has been duly subpœnaed, under circumstances which are known by him when the case is called for trial and which give him no reason to expect such witness intends to appear, to at once apply to the court for a postponement of the trial or a continuance of the case; that, if he fails so to do and enters upon the trial, he does so at his peril, and it will not be an abuse of discretion for the court to refuse, after the other side has rested, to grant a continuance. In *City of Lincoln v. Staley*, 32 Neb. 63, we held: "Where a case is called which a party is not prepared to try, he should move for a continuance, stating the grounds on which a continuance is sought, supported, if necessary, by affidavits." In the opinion in that case, speaking through Mr. Justice MAXWELL, we said: "If, after the jury has been impaneled, witnesses on behalf of a party have absented themselves so that their testimony cannot be had, that fact should be brought to the attention of the court by affidavit, together with the statement of the testimony which was expected to be given by them. The court, on a sufficient showing, will allow the moving party to withdraw a juror and continue the case to a later day in the term or to a succeeding term, but at his costs if he was at fault. A party cannot, however, proceed with the trial without objection and after a verdict against him set up defects as grounds for a new trial which should have been brought to the attention of the court before the case was submitted to the jury." In *Corbett v. National Bank of Commerce*, 44 Neb. 230, it appeared that when the case was regularly reached for trial one of the attorneys for the defendant orally stated that "the attorney for the defendant"—evidently meaning senior counsel in the case—was unavoidably absent from the state, but would soon return and attend to the trial of the case called, if it should be postponed for a short time. The trial judge insisted that the case must be dismissed, tried or continued generally. Plaintiff, being unwilling to have

the case disposed of, insisted upon a trial, which resulted in a judgment for the plaintiff. This was alleged as error in the motion for a new trial. In the syllabus we held: "An attorney whose case is called for trial, if unprepared, should at once make such showing to entitle him to a postponement as lies within his power, and, if he fails so to do, he will not be permitted in support of a motion for a new trial to urge such matters within his knowledge as, properly presented, should have operated to excuse his entering upon a trial in the first instance." Paraphrasing that syllabus, we think an attorney whose case is called for trial, if unprepared, on account of the absence of a material witness who he has no reason to expect will appear during the trial, should at once make such showing to entitle him to a postponement or continuance, and, if he fails so to do, he will not be permitted at a later stage of the trial, and after plaintiff's case is all in, to urge such matters within his knowledge as, properly presented, should have operated to excuse his entering upon a trial in the first instance. See, also, *People v. Logan*, 123 Cal. 414.

2. "The plaintiff was allowed on her direct examination to state that she had never had intercourse with any male person other than the defendant." It is argued that the effect of her statement was to elicit from the witness a purely collateral issue and that it could not make any difference under the issues joined whether plaintiff had ever sustained illicit relations with any one other than defendant, unless it was during the period of gestation. We do not think the court erred in admitting this testimony. Defendant throughout the trial and in his statements prior to the trial had been associating plaintiff's name with a number of other men in a manner calculated to create the impression that she had been guilty of illicit relations with some one or more of those men. In such a case we think it was perfectly proper for the court to permit plaintiff to answer generally that she had never sustained illicit relations with any man other than the defendant.

3. "Plaintiff was allowed, in her direct examination, to

state that she told defendant that he had a wife and ought to leave her alone, and that defendant stated to her that he did not care for his wife," and other testimony of a like character. Defendant was insisting that one reason why plaintiff's accusation was improbable was that defendant's wife was a healthy woman, that they had a family of children, and that the most cordial relations existed between the defendant and his wife. We think the testimony objected to was properly received.

4. Under the fourth assignment it is contended that the court erred in permitting plaintiff to testify that defendant, at the time she lived in his home, objected to her having any company. It had been claimed by defendant that during that time he had exercised care over her and had objected to her keeping company with young men whom he considered objectionable. The testimony objected to was for the purpose of showing that he objected to her keeping company with any young man. We are unable to see any error in admitting it.

5. "On page 24 of the transcript, in plaintiff's direct examination, she was allowed to testify that she was mistaken when she testified she had intercourse on the 22d day of September instead of the 15th." It seems that in the examination before the county judge she testified that her first intercourse with defendant was on September 22, and in the trial in the district court she fixed the date one week earlier, September 15. On cross-examination counsel for defendant sought to interrogate the witness as to the discrepancy in date between her testimony in the county court and in the district court, but upon objection of plaintiff was not permitted to do so. Counsel in his brief says: "The theory of the trial court in limiting the cross-examination was based on the case of *Masters v. Marsh,* 19 Neb. 458, which excluded cross-examination as to the different statements made in the two courts. With all due respect to the court, the effect of the rule in the *Masters* case is to cut off and curtail cross-examination." We do not see how this could in any manner prejudice

defendant. Having upon the trial fixed the date of defendant's first act of intercourse with her at a date materially different from that stated in her examination before the county judge, defendant had the full benefit of that contradiction; and the question was submitted to the jury under an instruction which is not questioned. Moreover, *Masters v. Marsh, supra,* is in harmony with section 5, ch. 37, Comp. St. 1909. It has never been overruled, nor do we see any reason why it should be.

No error in the giving or refusing of instructions is assigned in defendant's brief, nor is there any assignment that the evidence received is insufficient to sustain the verdict, nor that the amount of the judgment is excessive. Defendant appears to have had a fair trial, and, finding no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

ISABELLE MCHENRY TOMSON, APPELLEE, V. IOWA STATE TRAVELING MEN'S ASSOCIATION, APPELLANT.

FILED JANUARY 24, 1911. No. 16,564.

1. **Insurance:** FOREIGN COMPANIES: SERVICE OF PROCESS. A foreign fraternal accident company or association may select its agents upon whom process may be served, in the manner provided in section 5, ch. 16, Comp. St. 1909; failing to do so the law converts into agents, upon whom summons may be served, any and all persons doing any of the things named in section 8, ch. 16, the performance and fruits of which acts are accepted by such company or association.

2. **Corporations:** FOREIGN CORPORATIONS TRANSACTING BUSINESS IN THE STATE. A single transaction by a foreign corporation may constitute a doing of business in this state within the meaning of the statutes of the state making certain requirements of foreign corporations conditions precedent to their doing business in the state, where such transaction is a part of the ordinary business of such corporation and indicates a purpose to carry on a substantial part of its dealings here.

3. ———: ———: ESTOPPEL. Where it appears that a foreign accident corporation is actively soliciting membership in this state, and is annually receiving a large sum of money from our citizens in the form of assessments to aid it in carrying out its contracts here and elsewhere, it will not be heard to say that it is not doing business in the state.

4. **Trial:** QUESTION FOR COURT. The effect of evidence given in support of and in opposition to an objection to jurisdiction, where there is no conflict in such evidence, is for the court; and it is not error to refuse to submit the same to the jury.

5. **Insurance:** ACTION ON POLICY: REAL PARTY IN INTEREST. Where the widow of a deceased member of a fraternal accident association is named as beneficiary in the application of such deceased member, which is in the custody of defendant, and in ignorance of the provision in her favor in such application she sues in her representative capacity as administratrix of the estate of such deceased member, and after learning of the provisions in such application continues to prosecute such action, *held* a bar to any subsequent individual claim as such beneficiary, and that such suit will be sustained as against an objection that she, in such representative capacity, is not the real party in interest.

6. ———: ———: EVIDENCE. The rule announced in *Hart v. Knights of the Maccabees of the World*, 83 Neb. 423, that "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," applies to all fraternal insurance companies doing business in this state, whether domestic or foreign, and whether licensed to do business in the state or not.

7. ———: FRATERNAL BENEFICIARY ASSOCIATION. The character of defendant examined, as set out in the opinion, and *held* that defendant is a fraternal beneficiary association formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, as defined in section 91, ch. 43, Comp. St. 1909.

8. ———: NOTICE OF ACCIDENT. Question re-examined, and the law announced in the second paragraph of the syllabus in *Hilmer v. Western Travelers Accident Ass'n*, 86 Neb. 285, reaffirmed.

9. **Limitation of Actions:** AMENDED PETITION; NEW CAUSE OF ACTION. The amended petition, upon which trial was had, compared with the original petition, and *held* no change in the cause of action; the only difference being in the amount of recovery demanded,

10. ———: ———: ———. And the original petition having been filed within five years after plaintiff's right of action upon the benefit certificate in suit accrued, a recovery upon the amended petition is not barred by the statute of limitations.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

Sullivan & Sullivan, T. J. Doyle and *G. L. De Lacy*, for appellant.

Burr & Marlay, contra.

FAWCETT, J.

From a judgment in plaintiff's favor for the death by accident of her husband, defendant appeals.

A concise statement of the accident is given in *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 661. A sufficient statement of the issues will appear in the discussion of the different assignments hereinafter considered.

We find at the very threshold of the case an objection to the jurisdiction of the court. Two reasons are assigned in support of this objection: (*a*) That no summons was ever served upon defendant, or upon any authorized agent of defendant; (*b*) that defendant was not at the time of the service of the summons, and in fact has never been, engaged in business in Nebraska. It appears that summons was served upon one Charles E. Latshaw, who was a Nebraska member of the defendant association, and who at the request of the defendant had solicited business for it, in one instance taking the application, collecting the admission fee and transmitting the application and fee to defendant company at its office in Des Moines, upon which application a certificate of membership was issued. The secretary of defendant testified: "Q. What is your process of getting new members in Nebraska? A. Our process of getting new members in Nebraska is by correspondence, requesting our membership to send us new members. Q. That is, in your notice of assessment? A. In our assess-

ment we always request them to get us any new members that they possibly can. Q. And you put in there a blank form of application? A. I send them a blank form of application and ask them to get their friends to join."

In the affidavit of Mr. Latshaw, introduced upon the hearing of the motion to quash the service and return of summons, he testified that with each notice of assessment he received from defendant a blank application for membership and a request from the home office that he obtain new members in said company; that this has been the invariable rule of the company since he has been a member; that he has known of a great many new members being obtained by old members through this method; that between the 20th of March and the 20th of April, 1904, he received from the company such a blank application and request, and acting thereon he solicited one Louis Klein to become a member of defendant company; that he took the blank which had been sent him, filled it out, and obtained Mr. Klein's signature thereto; that Mr. Klein gave him an order upon his employer for the $4 membership fee; that he took the order to Mr. Klein's employer, who gave him a check for the amount; that he collected the amount of the check, remitted the amount, together with application, to defendant at Des Moines, and that defendant issued to Mr. Klein a certificate of membership on that application. We think this constituted Mr. Latshaw an agent of defendant upon whom service of summons could be made. The fact that he received no compensation from defendant for soliciting business for it is immaterial. In *Taylor v. Illinois Commercial Men's Ass'n*, 84 Neb. 799, we sustained a service of summons under very similar conditions. See, also, *State v. Northwestern Endowment & Legacy Ass'n*, 62 Wis. 174; *State v. United States Mutual Accident Ass'n*, 67 Wis. 624; and *Sadler v. Mobile Life Ins. Co.*, 60 Miss. 391, in which the Mississippi court say that "an insurance company is not bound * * * by acts of a volunteer, whom it disowns, and whose services it declines, but is bound if it accepts the

fruits of his act; and, *a fortiori,* if it authorizes a person to act, it is bound by service of process on such agent. * * * Foreign companies may select their agents in the manner provided in section 1073; failing to do this the law converts into agents, upon whom process may be served, any and all persons doing any of the things named in section 1085, the performance and fruits of which acts are accepted by the company." In like manner we say that foreign companies may select their agents or representatives upon whom service of summons may be made in the manner provided in section 5, ch. 16, Comp. St. 1909, but, failing to do this, the law converts into agents, upon whom process may be served, any and all persons doing any of the things named in section 8, ch. 16, Comp. St. 1909, the performance and fruits of which acts are accepted by the company. We therefore hold that the service of summons was properly made in this case.

The second contention of defendant, that the company was not doing business in Nebraska, is equally untenable. Among the exhibits introduced in evidence upon the hearing of the objection to jurisdiction were the 23d and 24th annual reports of defendant company. The former shows that during the year from December 6, 1902, to December 5, 1903, the defendant paid accident claims to 50 Nebraska certificate holders, and the latter shows that for the next year it paid accident claims to an additional 50 residents of Nebraska. If the company were doing so fortunate a business that the assessments upon each member amounted to only $9 a year, as stated in their numerous circulars introduced in evidence, and they paid 100 accident claims in two years, it is quite apparent that it must have a large membership in this state; for it is a matter of common knowledge that only a small percentage of persons carrying accident insurance are ever so unfortunate as to be called upon to present claims against the companies in which they are insured. In the light of this record, we think it is a juggling of terms to claim that the company is not doing business in Nebraska, simply

because, in violation of our statutes, it has never complied with the law by regularly appointing agents to represent it in this state. In *John Deere Plow Co v. Wyland,* 69 Kan. 255, the first paragraph of the syllabus reads: "A single transaction by a foreign corporation may constitute a doing of business in this state within the meaning of section 1283, Gen. St. 1901, making certain requirements of foreign corporations doing business in the state, where such transaction is a part of the ordinary business of the corporation, and indicates a purpose to carry on a substantial part of its dealings here." See, also, *Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer,* 197 U. S. 407.

It is next insisted that no facts are averred in the petition of a contract upon the part of the defendant to pay plaintiff $5,000, or any other sum, on account of death. The petition is not as full and explicit as it might or probably should have been. Had it been assailed by motion or demurrer, plaintiff would doubtless have been compelled to supply the defects, and, as the judgment must be reversed upon another point and the case remanded for further proceedings, they doubtless will be supplied.

It is next objected that plaintiff, as administratrix, is not the real party in interest; that the agreement of the company was to pay in case of accidental death to the beneficiary named in the application, if any, and, if none, then to the heirs of the member. The certificate of membership, which was the only document in plaintiff's possession at the time of the commencement of the action, did not disclose the beneficiary. The application, which she had never seen, was in the custody of defendant. The heirs of Mr. Tomson at the time of his decease were plaintiff herself and a son. It appears from the application of Mr. Tomson that plaintiff was named therein as beneficiary, and it is argued that for that reason she could only maintain an action in her individual name. If she had not been named in the application as beneficiary, then the certificate would have been payable to the heirs of the deceased, which in this case would have been the son. By

bringing the present action as administratrix, Mrs. Tomson has effectually foreclosed herself from ever asserting any individual right of action against the defendant, and has in effect joined the son with herself as plaintiffs. She thereby in effect assigns to the son a portion of her cause of action; and, inasmuch as she is herself prosecuting the action for the benefit of herself and the son, she has joined as plaintiffs every person who could in any event have been a beneficiary. This did not therefore prejudice any one but plaintiff herself, and defendant cannot complain. Moreover, the petition upon that point was not in any manner assailed until the commencement of the trial, when it was included in the objections to the introduction of any evidence, above set out. Up to that time defendant had recognized plaintiff, in her capacity as administratrix, as the real party in interest and the one entitled to prosecute the action. In its answer it admits her appointment and qualification as administratrix, admits the issuance of certificate to deceased and his death, and in paragraph 9 alleges that "said plaintiff as beneficiary under the contract sued on did not notify defendant of the death or make proof of death," etc.; thus by its pleading expressly recognizing plaintiff, as administratrix, as the real party in interest and the one entitled to prosecute the action.

It is next objected that the court erred in permitting plaintiff to offer segregated portions of defendant's by-laws and refusing to permit defendant to introduce the other portions. When plaintiff attempted to introduce segregated portions of a single section of the by-laws—section 2 of article 6—by putting them together, with the intervening words omitted, the court very properly sustained defendant's objection thereto. No attempt was made to otherwise prove the fact sought to be established by the evidence thus offered and excluded. This left plaintiff without evidence to establish a material [illegible]ue in the case—the amount payable under the certificate or policy in suit. It follows that the verdict must fail for want of sufficient evidence to support it. In refusing to

permit defendant to introduce any part of its by-laws, the court did not err. Defendant has for years been doing a large business in the state of Nebraska; it has not only failed but refused, when requested so to do by the auditor, to comply with the laws of this state which would entitle it to admission into the state; it has not filed with the auditor its constitution, or by-laws and amendments thereto, and hence we think was not entitled to the benefit of any of the provisions of such by-laws. As applied to fraternal insurance companies, we have held in *Knights of the Maccabees of the World v. Nitsch,* 69 Neb. 372, and *Hart v. Knights of the Maccabees of the World,* 83 Neb. 423, that "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." But it is contended by defendant that section 112, ch. 43, Comp. St. 1909, does not apply to defendant; that it is organized and doing business under a different statute. In making this assertion defendant overlooks the fact that defendant is not organized under any statute of Nebraska, nor has it been admitted to do business in this state under any statute of Nebraska. Section 91, ch. 43, Comp. St. 1909, defines a fraternal beneficiary association as follows: "A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such society shall have a lodge system, with ritualistic form of work and representative form of government." Because of the latter clause in that section defendant insists that section 112, *supra,* does not apply; but we think this contention must fail. In its answer defendant alleges that it is "an Iowa corporation, duly organized and existing under chapter 2, art. IX of the code of Iowa, and amendments thereto, as a fraternal organization or society, and is not organized for pecuniary profit." This shows it to be identically

the same kind of an association as is defined in section 91, ch. 43, *supra;* the only difference being that defendant does not allege that such society shall have a lodge system, with ritualistic form of work and representative form of government. The section of the Iowa code is not set out in full in the answer, neither was proof made thereof upon the trial. The portion of it which is alleged by defendant, being so similar in all other respects to section 91, ch. 43, *supra,* we might well be warranted in assuming that it is substantially the same throughout; but whether that be true or not, and conceding that the Iowa code does not require, and that defendant does not have, a lodge system with ritualistic form of work and representative form of government, the fact remains that it is a fraternal beneficiary corporation formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. This brings it within the purview of our statute upon which the *Hart* and *Nitsch* cases, *supra,* are predicated. We therefore hold that, not having filed its by-laws and amendments thereto with the auditor of public accounts, as required by section 112, ch. 43, *supra,* defendant cannot have the benefit of its by-laws and amendments thereto in defending against the present action.

It is next contended that plaintiff cannot recover by reason of a failure to give notice within 15 days after the happening of the accident or the death of the assured. The reply alleges and the proof shows that on and after February 22, 1902, which was four days after the happening of the alleged accident, the deceased was totally disabled, mentally and physically, was helpless and nearly blind and confined to his bed, and was not in a condition to notify defendant of the accident; but in about two months thereafter the wife of the deceased wrote to defendant in relation to the matter. By this letter defendant was clearly apprised of the fact that the deceased was claiming a liability against it by reason of the alleged accident of February 18. In the twenty-fourth annual report of the defendant hereinbefore referred to, we find, in

the report of the general counsel of defendant, a report as to the claim of plaintiff in this case. After giving what he called the facts in the case, he said: "Investigation convinced the officers of the association that the runaway had nothing whatever to do with the ultimate disability and death of Mr. Tomson, and therefore it is disputing the claim." A former action involving this same accident was removed by defendant to the federal court, and from a judgment by default obtained by plaintiff in the district court, while said action was pending in the federal court, defendant appealed to this court and obtained a reversal. The conduct of defendant in these cases shows that it has at all times denied any liability by reason of the alleged accident of February 18, and the death of Mr. Tomson. And finally in its answer in this case it denies all liability. In the light of the physical condition of deceased after the accident, and the conduct of defendant in denying all liability, this contention of defendant cannot, under former decisions of this court, be sustained. *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285; *Western Travelers Accident Ass'n v. Tomson,* 72 Neb. 674. In the former of these two cases, we held: "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." In the latter of the two cases, we held: "If an insurance company, sued for an alleged loss, denies the loss, it waives proof of notice of the same." This quotation is made from the third paragraph of the syllabus on rehearing. In passing upon a second motion for rehearing, 72 Neb. 680, we held: "The third paragraph of the syllabus appears to be an inaccurate statement of the law. If the insurance company has no notice, express or implied, of any claim of loss until suit is begun therefor, it may undoubtedly answer, both that there was in fact no loss, and that the

claimants never gave any notice of the alleged loss pursuant to the terms of the policy. The syllabus is modified accordingly." So far as this case is concerned, the modification of the third paragraph of the syllabus above quoted has no force, for in the present case defendant had notice of the claim long before the present suit was begun.

It is next contended that plaintiff is barred by the statute of limitations for the reason that her amended petition, upon which the case went to trial, was not filed until May 8, 1909, which was more than five years after the death of said Hays B. Tomson. In the trial of the case counsel for defendant offered in evidence, as exhibit O, the original petition filed in this case, for the purpose, as stated by him, of showing "that the cause of action in exhibit O was an entirely separate and distinct cause of action, a claim for total disability, and not for death. We offer it in evidence in support of the plea of the statute of limitations interposed in this case." The original petition thus offered is essentially an exact copy of the amended petition upon which the trial was had. It sets out the appointment of plaintiff as administratrix, the incorporation of defendant, the certificate in full, the payment of premiums upon the certificate, the accident of February 18, 1902, the death of Hays B. Tomson in September, 1903, and adds: "Plaintiff further alleges that the said deceased was on the said 18th and 22d day of February, 1902, permanently and totally disabled by said accident, and never recovered therefrom and died from the effects thereof, and at the date of said accident there were more than 16,000 members of said association which, under an assessment under the by-laws of said association of an amount exceeding less than $2 per member at the date of said accident, would amount to the sum of $2,500. Wherefore plaintiff prays judgment against the defendant for $2,500, together with interest thereon at the rate of 7 per cent. per annum from the 18th day of February, 1902, and costs of this action." We think the amended petition does not state a new or separate and distinct cause of ac-

tion; the only difference which can be claimed is in the prayer, which is no portion of the statement of facts required to constitute a cause of action. *Fox, Canfield & Co. v. Graves,* 46 Neb. 812; *Vila v. Grand Island E. L., I. & C. S. Co.,* 68 Neb. 222, 237. In the original petition plaintiff prays for judgment in the sum of $2,500, and in the amended petition for $5,000, evidently mistaking the measure of her recovery under the allegations contained in the original petition; but on discovery of her mistake she amended her prayer so as to recover the amount which the allegations in both petitions, if true, entitled her to.

Finally, it is objected that the verdict is not sustained by the evidence. A recovery in favor of this same plaintiff against the Western Travelers Accident Association (72 Neb. 661), for the same accident upon which she seeks recovery in this case, was sustained by this court. The evidence as to the accident will be found fully reviewed in that case and it would serve no good purpose to repeat it here. We are satisfied with the conclusion there reached, and, if the amount payable under the certificate had been shown in this case, the evidence would have been sufficient to take the case to the jury.

In the light of the conclusion we have reached, it will not be necessary to consider the alleged errors in giving and refusing instructions. The trial court in charging the jury proceeded upon the theory that the evidence before them was sufficient to sustain a verdict either way. That theory being found to be wrong, it is needless to say that the court erred in its instructions given and refused upon such theory.

For the failure of proof upon a material issue, as above noted, the judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

LETTON, J., concurs in the conclusion.

THOMAS J. BROWN V. STATE OF NEBRASKA.

FILED JANUARY 24, 1911. No. 16,825.

1. **Indictment:** JOINDER: LARCENY AND RECEIVING STOLEN PROPERTY. It is proper to unite two counts in an indictment, one charging larceny and another charging receiving stolen property, knowing it to be stolen. Criminal code, sec. 419.

2. **Criminal Law:** TRIAL: REMARKS OF JUDGE. It is the duty of the trial court to see that the jurors who try the case are not improperly prejudiced against the defendant by remarks made in their hearing either before or after they are called as jurors in the case. The judgment will not be reversed because of such remarks by the court unless the record clearly shows the language used and that it was in its nature prejudicial to the defendant.

3. **Larceny:** INDICTMENT: SUFFICIENCY. The indictment charged that the defendant at the time and place named "did then and there unlawfully, wilfully and feloniously steal, take and drive away seven cows of the value of $210, *and* the personal property of Thomas Byron." *Held*, That it sufficiently charged the ownership of the property stolen.

4. **Witnesses:** IMPEACHMENT. When a witness upon cross-examination admits making statements out of court inconsistent with her evidence upon the trial, it is erroneous to permit other witnesses to testify to the statements admitted by the witness, and to detail the circumstances under which the statements were made.

5. **Criminal Law:** CROSS-EXAMINATION OF ACCUSED: REVIEW. The judgment of the trial court will not be reversed for supposed errors in the cross-examination of the defendant unless the record shows that the court abused its discretion in permitting the cross-examination complained of, and that the circumstances were such that the defendant might probably be prejudiced thereby.

6. ———: INSTRUCTIONS: REASONABLE DOUBT. In a criminal prosecution, an instruction that, "The doubt which a juror is allowed to retain on his mind, and under which he should render his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. And a juror is not allowed to create sources or material of doubt by resorting to trivial or fanciful suppositions and re-

mote conjectures as to possible states of fact different from that established by the evidence"—has been disapproved by this court. Under the circumstances of this case it was prejudicially erroneous.

7. **Larceny:** TRIAL: INSTRUCTIONS. Certain instructions given by the court and refusals to instruct as requested are examined, and the rulings thereon found not to be prejudicially erroneous.

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

F. M. Walcott, A. M. Morrissey and *Allen G. Fisher,* for plaintiff in error.

Arthur F. Mullen, Attorney General, and *George W. Ayres, contra.*

SEDGWICK, J.

The defendant in the court below, who is plaintiff in error here, was convicted in the district court for Cherry county of the crime of stealing cattle and was sentenced to seven years in the penitentiary. He has brought the case here for review.

1. The first objection made by the defendant is that the court refused to require the prosecuting attorney to elect upon which count of the information he would proceed. One count of the information charged the defendant with stealing cattle and another count charged him with receiving the cattle, knowing that they had been stolen. Larceny and receiving stolen property are generally supposed to be so connected with the same transaction as not to require an election. 1 Bishop, New Criminal Procedure (4th ed.) sec. 457. Section 419 of our criminal code so provides. That section is as follows: "An indictment for larceny may contain also a count for obtaining the same property by false pretenses, or a count for embezzlement thereof, and for receiving or concealing the same property, knowing it to have been stolen; and the jury may convict of either offense, and may find all or any

of the persons indicted guilty of either of the offenses charged in the indictment." There was therefore no error in this ruling of the court.

2. It is also insisted in the briefs that immediately before this case was called for trial another prosecution for cattle stealing had been tried with a verdict of not guilty, and that the court had reprimanded the jury with remarks tending strongly to prejudice any defendant that might be put upon trial thereafter upon such a charge before members of the same jury or other jurors who had heard the court's language. There is no evidence in the record of any such transaction except certain affidavits of the defendant in which some alleged facts and some conclusions are recited. The facts set forth in this affidavit are not sufficient to support the argument now made upon this point. The record of the trial discloses no prejudice upon the part of the court against the defendant's case, and no such action on the part of the court will be admitted unless clearly shown by the proof.

3. In September or the first part of October, 1909, eight or nine head of cattle were missed from the range of one Carter, in Cherry county, the property of one Byron. The Carter range embraced several sections of land and contained something over 1,000 head of cattle, and among these cattle were 25 or 30 head belonging to the said Byron. In the month of March following, these missing cattle were seen by Mr. Carter in the inclosure of this defendant, about 25 or 30 miles from the range upon which they had been kept. It was thereupon arranged with the county attorney and the sheriff that a Mr. Hyde should go to the place of the defendant and attempt to buy the cattle in question, which was done. Mr. Hyde testified that at first the defendant, who had 25 or 30 head of cattle, declined to sell any, but afterwards informed Mr. Hyde that he had some cattle with "off brands" which he would sell. Mr. Hyde had represented to the defendant that he was trying to buy a few cattle for a friend of his in Keya Paha county, and finally succeeded in purchasing the cattle in

question, to be delivered at Arabia, some seven miles distant, and paid the defendant $5 on the contract. That same day the defendant drove these cattle to Arabia, and was there met by the sheriff with a warrant for his arrest for stealing the cattle. Another witness also testified that at about the time the cattle were missing from the range he had seen this defendant driving with a team and wagon toward the said range and not many miles distant therefrom. This the defendant denied. While the defendant was under arrest upon this charge he was taken to his home by the sheriff, and on the way he told the sheriff that he had bought these cattle from a stranger who represented that his name was Hammers, and also represented that he lived near Marsh Lake, which was some 25 or 30 miles distant; that the said Hammers was driving the cattle from his home to Valentine expecting to sell them to a specified dealer there. The defendant also stated to the sheriff that there was no other person present at the time of this purchase except the defendant's wife, who heard the contract. Afterwards, while the defendant was in jail, the county attorney procured a subpœna for the defendant's wife and caused her to be brought to town by the deputy sheriff and taken to his office. There he told her that her husband had stated that he had bought the cattle as above recited, and that she was present, and asked her if that was the fact, whereupon she answered him to the effect that she paid no attention to her husband's business. He then took her in the sheriff's office and in his presence repeated the same question, to which she made substantially the same answer. The defendant's wife was called as a witness in his behalf at the trial, and she testified that she was present when her husband bought the cattle from the stranger, stating the details substantially as her husband had stated them. In her cross-examination she was asked whether these questions had been put to her in the county attorney's office and in the sheriff's office, and after some hesitation she answered that they were, and she was fur-

ther asked if she answered that question to the attorney and sheriff that she did not know, and after again hesitating she answered that she did. She testified that she thought they were trying to take advantage of her and did not know what to answer them. This cross-examination was objected to, but the objections were overruled. Afterwards the county attorney and the sheriff both went upon the witness-stand and testified in detail to the questioning of this woman in the county attorney's and sheriff's offices, and to her answers, all substantially as she had testified to herself upon her cross-examination. This testimony was objected to for the reason, among other things, that it did not contradict in any respect the testimony of Mrs. Brown, since she had admitted fully upon the witness-stand the matters that the county attorney and sheriff were testifying to. This objection was overruled and the evidence admitted. This, we think, was error on the part of the trial court. When a witness is asked in cross-examination as to statements that she has made out of court for the purpose of laying the foundation for impeachment, and admits fully that she has made such statements, that is all that the cross-examination is entitled to. It is not competent to put another witness upon the stand to prove a statement which the witness has admitted in her cross-examination. In this case this manner of proceeding might be highly prejudicial to the defendant.

These cattle had been openly in the possession of the defendant for about six months. There was therefore little, if any, presumption of guilt from the possession of the stolen property. The defendant testified that he had the money in the house to pay for the cattle, $172. Upon cross-examination he gave the names of men apparently well known in the community from whom he had recently received the money for property he had sold them. These statements were not contradicted. If the defendant had taken these cattle from the range where they were kept by the owner, or if he had found them after they had escaped

from the range and had afterwards determined feloniously to convert them to his own use, he was guilty of the crime charged against him. There was no direct evidence that he had done either of these things. If, on the other hand, some stranger had taken them from the range where they were kept or had found them after they had escaped and had sold them to the defendant, and the defendant had bought them in good faith relying upon the representation of the party in possession of them, he was not guilty of either of the crimes charged. This was the real issue submitted to the jury, and the explanation of the defendant and his wife as to how the cattle came into the possession of the defendant was for the consideration of the jury. If the jury believed the evidence of the defendant and his wife upon this matter, they must of course find the defendant not guilty. When the county attorney and sheriff were allowed by the court to detail at large their conversation with the defendant's wife, after having brought her to the office by the unwarranted use of the process of the court, the jury must have considered the evidence of importance, and, since it could have had no other purpose than to discredit the testimony of the defendant's wife, it was at least probable that it was so regarded by the jury.

The tenth instruction given by the court is as follows: "The jury are instructed that, where a witness has intentionally testified falsely to a material fact or facts in the trial of a case, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as the testimony of such witness may be corroborated by other substantial testimony or evidence." This would have been applicable to the testimony if the jury believed that the facts were as the testimony of the county attorney and the sheriff was intended to show that the defendant's wife admitted them to be. So far as we have observed, it has no relation to any other testimony in the case. This tends to make the error of receiving the testimony of the county attorney and sheriff in regard to her statements made to them the more dangerous.

4. When the cattle were found upon defendant's premises, other cattle with private brands were also found. Upon cross-examination the defendant was asked in regard to these other cattle. He answered that two of them he had had about a week and another about two weeks. This cross-examination was objected to, and it is now insisted that it was prejudically erroneous. It is intimated that another prosecution was pending in the same court for the theft of these other cattle, and that this cross-examination was for the purpose of discrediting the defendant by insinuating that he participated in that theft also. Such a course would be erroneous and prejudicial, but the record does not present the question. It does not show that there was any other prosecution pending, or that the defendant was in any way prejudiced by this cross-examination.

5. The court gave an instruction copied in part from the famous anarchist case which this court has so often disapproved. "The doubt which a juror is allowed to retain on his mind, and under which he should render his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict, is not a reasonable doubt. And a juror is not allowed to create sources or material of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of fact different from that established by the evidence." The instruction as given is disapproved, and under the circumstances in this case was prejudicial to the defendant.

6. Hearsay evidence was erroneously admitted as to the cattle having been seen at plaintiff's place; but, as all parties concede that the cattle were there at the time specified, this evidence could not have been prejudicial. The defendant requested the court to instruct the jury to the effect that, unless the "defendant, himself in person," went to the range or pasture where the cattle were and took and drove them away with the purpose and intention

to convert them to his own use, they must find him not guilty. The defendant sold these cattle as his own, and if at any time while they were in his possession he, knowing that they were the property of another who had never consented that the possession should be transferred to him, concluded to steal them, he would be guilty as charged. *Skidmore v. State,* 80 Neb. 698, is not in point. In that case the defendant was not actually or constructively present and participating at any time while the property was being converted. The defendant complains of the refusal of the court to instruct the jury as requested in the second instruction offered by his counsel. The substance of this request is given in better form in instructions 5 and 12, given by the court.

We do not find any error in the orders of the court complained of in regard to the plea in abatement filed by the defendant relating to the form of complaint before the examining magistrate or relating to the calling of the grand jury. The objection that the indictment contained the words "and the personal property of Thomas Byron," instead of the words "of the personal property of Thomas Byron," is immaterial.

The sentence of seven years under the evidence in this case seems severe, but, as there must be a new trial for the errors above indicated, we have refrained from discussing that question.

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

REVERSED.

FAWCETT, J., not sitting.

WILLIAM H. LANNING, APPELLEE, V. MICHAEL P. MUSSER ET AL., APPELLANTS.

FILED FEBRUARY 15, 1911. No. 16,301.

1. **Adverse Possession.** To constitute title to real estate by adverse possession and limitation, the possession must be open, notorious,

exclusive and adverse to the owner and every other person during the entire statutory period of 10 years.

2. ———: EVIDENCE. Where the land in question was adjacent to lands owned and occupied by the claimant, was not inclosed, nor were any buildings or other improvements thereon, the live stock of the claimant allowed to cross over and graze upon the land, the live stock of others not being excluded therefrom—the land being an open common—this did not constitute such adverse and exclusive possession as would ripen into a title by limitation.

3. Taxation: TAX FORECLOSURE SALE: NOTICE TO REDEEM: SERVICE. Where real estate was purchased at tax sale under the law as it existed in 1903 and during the month of June, 1905, the notice of expiration of time in which to redeem was not required to state the time when the purchaser would apply for a deed. The sheriff of the county where the notice was to be served was the proper person to serve the same, the service being made by him in his official capacity.

4. ———: ———: ———: CONSTRUCTIVE SERVICE. The notice of expiration of time in which to redeem was directed to C. as "receiver of the McKinley-Lanning Loan & Trust Company, Herman A. Peters," and was served upon Peters by the sheriff, but C. was a nonresident of the county and personal service could not be made upon him therein. Notice was given by publication. The notice, as published, was directed to C. as "receiver of the McKinley Loan & Trust Company." C. was the receiver of the McKinley-Lanning Loan & Trust Company. *Held*, That the notice as published was deficient and did not confer jurisdiction.

5. ———: ———: ———: PROOF OF SERVICE. The affidavit of the publisher of the newspaper in which the notice was published stated that the notice was published three consecutive weeks in said newspaper, the first publication being made on the 30th day of June, and the last publication on the 14th day of July. The affidavit was sworn to on the 2d day of July of the same year. *Held*, That the proof of publication was insufficient.

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

A. M. Morrissey, R. C. Patterson and *A. G. Fisher*, for appellants.

A. W. Crites, contra.

REESE, C. J.

This is an action to quiet the title to lands described in the pleadings. The decree of the district court went in favor of the plaintiff. The defendants appeal, and file separate briefs.

The defendants filed a motion to strike out certain designated portions of plaintiff's petition, and at the same time and in connection with the motion each one filed a general demurrer and answer. It is claimed in the briefs that the motion to strike and the demurrers were overruled over defendants' exceptions. The record before us fails to show any action by the court upon said motion and demurrers, and the cause proceeded to trial upon the issues as formed in the pleadings. No error can be predicated upon this part of the case. If defendants desired rulings upon that motion and demurrers, they should have requested action of the court, and that should have been done before filing the subsequent pleading. The filing of the answers without a ruling waived both. The action, as against Musser, was to cancel a treasurer's tax deed which is alleged to be void for want of compliance with the law. Tender and offer to redeem is alleged. As against Peters, the allegation is that he is in possession of the property without right, but by what authority he claims to own the land is not shown by the county records, and plaintiff does not know. By his answer Musser pleads adverse possession for Peters, and asserts title in favor of himself under his tax deed, and denies tender and offer to redeem by plaintiff. Peters asserts title by adverse possession and limitation. As to Peters' defense the evidence fails to establish his claim. Aside from the evidence submitted that he sought to and did become the tenant of the holder of the legal title during the statutory period, there is no such evidence of exclusive adverse possession as the law requires by which a title can accrue or possession can be protected. The evidence clearly establishes the fact that during the whole time of his alleged

possession the land had been unimproved, unfenced, uncultivated, and without buildings of any kind—an open common. He owned a large flock of sheep which pastured upon that and other lands, not owned by him, and upon which the stock of other people could go at pleasure. No effort at exclusive possession is shown. It is shown that at some time a fire-guard had been plowed on two sides of the land, but that same fire-guard was extended around a number of other tracts owned by others, as well as himself, and it is apparent that its only purpose was to prevent fires from burning off the pasture of a large tract which he desired to protect. During the progress of the trial, and after plaintiff had rested, Peters orally asked leave to amend paragraph three of his answer. There was no amended answer presented or offered to be filed. The proposed amendment consists of more than a page of typewritten matter, stated verbally to the court. It presented no radically new issue. The questions therein sought to be raised were investigated by the evidence and tried, so that the error, if any, worked no prejudice to defendant. But, aside from that, there was no error in refusing an amendment, proposed as this was. So far as is shown by the record, it was never reduced to writing and presented to the court for its ruling.

Plaintiff's title rests upon a proceeding by the county of Sheridan to foreclose a tax lien upon the land. That suit was commenced in 1899. The decree of foreclosure was entered October 9 of that year. On the 9th of November following an order of sale was issued. At the sale Peters was the purchaser. The return was made. the sale confirmed, over the objections of Lanning, one of the parties to the suit, and deed ordered. Before the execution of any deed by the sheriff all parties to the action, including Peters, appeared in open court, and it was stipulated and agreed "by all of said parties that said sheriff's deed should convey said tract of land to said Equitable Land Company instead of to the said purchaser H. A. Peters." It was further stipulated that the defendants,

W. H. Lanning, trustee, and W. H. Lanning, should withdraw from the files of the cause the supersedeas bond and bill of exceptions theretofore filed. The court thereupon entered an order directing the sheriff to make the deed to the Equitable Land Company, through which plaintiff claims title, instead of to Peters, which was done. Peters now seeks to avoid that transaction by showing that the land company did not carry out its agreement with him by refunding to him the taxes which he had paid and giving him a lease upon the land, and alleges that upon its failure so to do he repudiated the agreement and continued his adverse possession. That he continued such possession as he had, without interruption by plaintiff's grantor, is without question, but it is equally clear that it was neither adverse nor exclusive. The order of the district court directing the deed to be made to the land company was right, and has never been assailed, reversed, or set aside, and the evidence in this case shows no reason why it should be.

The notice of expiration of time within which to redeem from tax sale, given by Musser to Carnahan, receiver of the McKinley-Lanning Loan & Trust Company, the then owner, and to Peters, is attacked by plaintiff as not having complied with the requirements of section 214, art. I, ch. 77, Comp. St. 1909, in that it was served by the sheriff, without affidavit of service, and that it did not notify the parties that after the expiration of three months from the date of service "the deed would be applied for." In this counsel have overlooked the fact that the notice and service and return thereof comply with the requirements of the law in force at the date of service. Comp. St. 1903, ch. 77, art. I, sec. 214. This section was amended by chapter 115, laws 1905, to read as the provision now is, but the amended law cannot be applied to this case.

Carnahan, the receiver of the McKinley-Lanning Loan & Trust Company, was a nonresident of Sheridan county at the time of the giving of the notice of expiration of time for redemption, and under the provisions of section 215,

art. I, ch. 77, Comp. St. 1903, notice was given to him by publication in a newspaper. The notice served on Peters ran to "W. H. Carnahan, receiver of the McKinley-Lanning Loan & Trust Company, Herman A. Peters," and was returned served on Peters, but that after diligent search the sheriff was "unable to find W. H. Carnahan, receiver of McKinley-Lanning Loan & Trust Co., in Sheridan county." The notice as published ran to "W. H. Carnahan, receiver of the McKinley Loan & Trust Company, Herman A. Peters." The company of which Carnahan was receiver was the "McKinley-Lanning Loan & Trust Company." The published notice was therefore insufficient to confer jurisdiction over him. It also appears by the record of the affidavit of the publisher of the newspaper that the notice was published "3 consecutive weeks, the first publication having been made on the 30 day of June 1905, and the last publication on the 14 day of July 1905," but the jurat of the notary before whom the affidavit was sworn to certifies that it was subscribed in his presence and sworn to before him on the "2 day of July 1905," which was before the publication could have been completed. The proof of publication was therefore defective and not in compliance with the law.

It follows that the decree of the district court should be affirmed, which is done.

AFFIRMED.

LETTON, J., concurs in the conclusion.

FAWCETT, J., not sitting.

OMAHA ELECTRIC LIGHT & POWER COMPANY, APPELLEE, V. UNION FUEL COMPANY, APPELLANT.

FILED FEBRUARY 15, 1911. No. 16,305.

1. Deceit: PROOF. It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of deceit, it is necessary for the complaining party to prove that his adversary

has made a false representation of material facts; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage.

2. **Sales:** FALSE REPRESENTATIONS: ACTION: INSTRUCTIONS. In an action to recover back money paid for property which the plaintiff alleges was purchased in reliance upon false representations as to its quality, an instruction to the trial jury that if the plaintiff made the purchase under a contract for property of a certain quality, and that the defendant through misrepresentation and fraud delivered property of an inferior quality and the plaintiff was thereby damaged through the fraud of defendant, their verdict should be for plaintiff, is *held* erroneous, the element of the absence of knowledge on the part of plaintiff as to the quality of the property delivered and received, and that of plaintiff having been deceived by the representations, being omitted from such instruction.

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

Smyth, Smith & Schall, for appellant.

Weaver & Giller, contra.

REESE, C. J.

This action was instituted in the district court for Douglas county. In the petition the corporate capacity of both plaintiff and defendant is averred, and it is alleged, in substance, that between the 28th day of December, 1906, and the 22d day of February, 1907, the defendant offered to sell plaintiff 14 cars of Cherokee slack or steam coal for the sum of $1,583.49, and falsely and fraudulently represented to plaintiff that the coal so offered was Cherokee slack or steam coal; that plaintiff relied upon said representation, and was thereby induced to and did purchase said coal of defendant and paid therefor the sum of $1,583.49; that the coal so furnished and sold to plaintiff was not the coal contracted to be sold and delivered to plaintiff, but was slack or steam coal of an inferior and

cheaper quality, and not worth the said sum of $1,583.49, nor in excess of the sum of $933.49; that the false representations were made by defendant with intent to cheat and defraud plaintiff, and by reason thereof plaintiff has sustained damages in the sum of $660, for which, with interest, judgment is demanded.

The defendant, for answer, admits the corporate capacity of the parties; pleads a general denial of unadmitted averments; admits the sale of coal substantially as alleged; alleges that upon the delivery of the coal to plaintiff it was examined and inspected by plaintiff at and before its delivery, was accepted, approved and used by plaintiff, and after it was consumed was paid for with full knowledge of the kind and quality thereof. Judgment dismissing plaintiff's action is demanded.

For reply, plaintiff denies that the coal mentioned in its petition, sold to plaintiff by defendant, was inspected and examined at or before delivery; admits that the kind and quality of coal was approved and accepted by plaintiff; but avers that the approval and acceptance was based solely on, and was by reason of, the false and fraudulent representations of defendant, as alleged in the petition. The knowledge of the kind and quality of the coal when paid for is denied, and it is alleged that the true kind and quality of the coal was not discovered by plaintiff until after it was consumed and paid for, when plaintiff demanded of defendant a return of the excess of money so paid. The cause was tried to a jury, and a verdict finding in favor of plaintiff in the sum of $388.15 was returned, upon which a judgment was rendered. Defendant appeals.

It is shown by the evidence that plaintiff ordered and received from defendant a number of cars of slack coal during the months of November and December, 1906, and January and February, 1907, the exact number is not exactly stated, but perhaps from 40 to 50 cars, which were consumed immediately upon delivery, all of which was paid for during the fore part of the month succeeding its

receipt by plaintiff. Some time after the full payment for the coal, plaintiff claimed that defendant had practiced a fraud upon it in the delivery of 14 of the car-loads by a misrepresentation of the quality or kind of coal delivered, in representing it to be Cherokee slack, a superior quality, when in fact it was Iowa and Missouri slack of an inferior grade and value, and this suit is to recover the damages alleged to have been thereby sustained. It is shown that the coal was delivered in car-load lots at the power-house of plaintiff, received by its employees, and often immediately unloaded and consumed in the furnaces. It sufficiently appears that the Cherokee slack coal is mined in a certain district or locality in southeastern Kansas, known as the Cherokee district, that the steam producing quality of that coal is superior to that of either the Iowa or Missouri product and was worth more in the Omaha market than those grades, and that by a visual inspection the difference can be detected by one accustomed to the handling of those coals. It appears from the evidence that, on the first of the month succeeding the deliveries of the previous month, the bills for the price were presented for payment, and payment was made by the 10th of the month in which the bills were presented. This was the custom of the parties. In perhaps every instance the coal was consumed before payment, and in most cases before the presentation of the bills, for it is shown that on some occasions the coal would be conveyed into the furnaces and consumed as fast as unloaded from the cars. It is insisted by plaintiff that there was a fraudulent representation as to the quality of the coal contained in the 14 cars, that it relied upon the statements made, was damaged, and that the alleged fraud was not discovered until after its acceptance and payment, and therefore it is entitled to recover back such part of the money so paid as will compensate the loss.

It is contended by defendant that "representations of quality" do not survive the acceptance of goods by the

vendee where the quality is known or can be ascertained by inspection at the time the goods are delivered. *Roman v. Bressler,* 32 Neb. 240; *Hazen v. Wilhelmic,* 68 Neb. 79; *Cohen v. Hawkins,* 74 Neb. 249; and *Patrick v. Norfolk Lumber Co.,* 81 Neb. 267, in addition to a number of cases from other states, are cited in support of the principle contended for. On the part of plaintiff, it is contended that the doctrine of those cases should not be applied for the reason that the fraud of defendant is clearly shown, and it should not be permitted to hide behind the rule contended for. While the fact was sought to be explained by defendant, there is evidence in the record which tends to prove, and from which the jury might find, that when defendant's attention was called to the fact that it was claimed that a fraud had been practiced upon plaintiff in the quality of the coal delivered, defendant procured and exhibited to plaintiff fictitious bills of lading or expense bills alleged to have been issued by the railroad company by which the coals were delivered to defendant. Proof of this action on the part of defendant, if as claimed by plaintiff, could be received as lending color to defendant's conduct and actions at the time of the contract and delivery of the coal and showing a plan and purpose to deceive, although the alleged false bills were presented many months after the delivery of the coal and payment of the price.

The assignments of error are limited to alleged errors of the district court in giving certain instructions to the jury, in refusing to give a direction for a verdict in favor of defendant, and in overruling the motion for a new trial. There are three principal instructions which may be said to submit the case to the jury and which we quote. They are as follows:

No. 2. "Before the plaintiff can recover in this case it must establish by a prepondrance of the evidence: First, that the contract for coal between plaintiff and defendant was a contract for Cherokee coal. Second, that the defendant, through misrepresentation and fraud upon plain-

tiff, delivered Iowa and Missouri slack coal and collected therefor the price of Cherokee coal, and that said slack coal so delivered was of an inferior quality as compared with Cherokee coal and that plaintiff was thereby damaged."

No. 3. "If the plaintiff has satisfied you by a preponderance of the evidence that the contract was for Cherokee coal, and that the defendant, through misrepresentation and fraud on plaintiff, delivered to plaintiff Iowa and Missouri slack coal and collected therefor the price of Cherokee coal, and you further find that said coal so delivered was of an inferior quality and plaintiff was thereby damaged, through the fraud and misrepresentation of the defendant, then you are instructed your verdict should be for the plaintiff."

No. 4. "You are instructed this action is predicated on the fraud of the defendant, and unless the defendant is guilty of fraud by knowingly and wilfully delivering Iowa and Missouri slack or steam coal to the plaintiff while representing and claiming that the same was Cherokee slack or steam coal, the plaintiff cannot recover. In this connection you are further instructed that, if the plaintiff has failed to satisfy you by a preponderance of the evidence that the defendant delivered to the plaintiff Iowa and Missouri slack or steam coal while at the same time claiming and representing that the same was Cherokee slack or steam coal, then your verdict should be for the defendant."

The principal objection is made to the instruction numbered 3. In Bigelow on Fraud, ch. 1, sec. 1, the subject of fraud and deceit is introduced in the following statement: "It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that he made it with knowledge of its falsity; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with

intent that it should be acted upon; and that it was acted upon by the complaining party to his damage." The rule holding that the false representations must have been made with knowledge of their falsity on the part of the party making them has been modified in this state, and it has been held that averment and proof of *scienter* in an action for fraud and deceit is not necessary. *Gerner v. Mosher*, 58 Neb. 135, 149, and cases therein cited. But it is clear that the lack of knowledge on the part of plaintiff should be made to appear and the instruction should not have been given in the form in which it was submitted. In measuring the instruction by this rule it will be apparent that the trial court, doubtless by oversight, failed to include some of the material elements of fraud. There is no suggestion that it should be found from the evidence that plaintiff did not know of the true quality of the coal at the time it was delivered, or believed and relied upon the representations made and was ignorant of their falsity. In order to successfully maintain the action for fraud these elements must exist, and an instruction which, in stating the facts to be found, omits them, is to that extent erroneous. There can be no doubt but that, had plaintiff known what kind of coal it was receiving during the time the coal was being delivered, there could be no fraud, for it would not have been deceived. It follows that the instruction was prejudicially erroneous and therefore a new trial will be granted.

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

REVERSED.

FAWCETT, J., not sitting.