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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1911.

VOLUME LXXXIX.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

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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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RULES OF THE SUPREME COURT.

2. (Amended June 26, 1911.) **Submission of Cases.**—A cause shall be regarded as regularly reached for submission at the expiration of the time hereinafter provided for the service and filing of briefs.

Rules adopted April 25, 1911.

ABSTRACTS.

16. In all cases the party bringing a cause into this court shall print and furnish a complete abstract or abridgment of the record with references to the pages of the record abstracted. And where the record contains the evidence, it shall be condensed in narrative form in the abstract, so as to clearly and concisely present its substance; provided, that in felony cases when the question to be presented is as to the sufficiency of the evidence the abstract may refer to the bill of exceptions with or without abstracting the same as the parties elect. Such parts of the evidence as bear upon other questions presented must be duly abstracted. The abstract shall contain a complete index, alphabetically arranged, giving the page where each paper or exhibit may be found, with the names of the witnesses and the pages of the direct, cross and redirect examination. The abstract must be sufficient to fully present every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part.

17. **Abstract in Original Cases.**—The rules herein established for printing abstracts shall apply to all cases wherein the court is called on to exercise original jurisdiction. In such cases the plaintiff or his attorney must print and serve such abstract on the defendant or his attorney within thirty days after issue is joined, or, if evidence is taken, within thirty days after the evidence is returned to this court; and the defendant or his attorney in like manner, if he deem the abstract of plaintiff imperfect or unfair, may within twenty days thereafter print and serve upon the plaintiff or his attorney such further abstract as he may deem necessary.

18. Abstracts shall be printed and in all respects, including service and filing, conform to rule 9, and shall be bound separately from the brief. The cost of printing abstracts shall be taxed as provided by rule for taxing costs of briefs.

19. **Form of Abstract.**—Abstracts of record shall be made substantially in the following form:

SUPREME COURT OF NEBRASKA.

John Doe
v.
Richard Roe. } ABSTRACT.

Appeal from (or error to).....county.....Judge.

A. B., for plaintiff and appellant (or appellee or plaintiff in error).

D. E., for defendant and appellant (or appellee or defendant in error).

On the.....day of....., 19...., the plaintiff filed petition in court below, stating the cause of action to be:

(Set out only so much of petition necessary to an understanding of the questions to be presented and no more. Omit all formal parts; abbreviate and condense. If there is an appearance, or if no question is raised about summons, return, etc., omit.)

On the.....day of....., 19...., defendant demurred. (State grounds. If defendant filed motion and the ruling thereon is one of the questions to be considered, set it out in the same way.)

And on the.....day of....., 19...., the court sustained (or overruled) the same. (In every instance let every abstract be in chronological order of the events in the case; let each ruling appear in the proper connection. If the defendant pleaded over and thereby waived his right to be heard upon these rulings, no mention need be made of them.)

And on the.....day of....., 19...., the defendant filed his answer setting up his defense as follows: (Set out substance of defense, and reply, if any, omitting formal parts. Frame the abstract so as to present all questions to be reviewed, raised before issue joined.)

At the trial on the.....day of....., 19...., (to a jury or the court, as the case may be) the following proceedings were had:

(Set out so much of the bill of exceptions as is necessary to show the ruling of the court to which exceptions were taken and relied upon during the progress of the trial. In abstracting evidence use the narrative form, abbreviating and condensing, omitting interrogatories except such as may be necessary to a correct understanding of the answers thereto and on which error is assigned.)

INSTRUCTIONS.

Where no objection is made to the giving or refusing of any instruction, omit all, but where there is objection as to the giving or refusal to give any instruction or instructions, set out the whole charge, pointing out specifically the instructions excepted to.

VERDICT.

On the.....day of....., 19...., the jury returned the following verdict into court: (State substance of the verdict.)

(If the case be tried by the court, instead of the instructions and verdict of the jury, set out so much of the findings of fact and conclusions of law, and requests for findings, if any, together with the exceptions relating thereto, as may be necessary to present the errors complained of.)

MOTION FOR NEW TRIAL.

On the.....day of....., 19...., the plaintiff (or defendant) moved for a new trial upon the following grounds:

(Set out the grounds for new trial relied upon, and omit all others.)

On the.....day of....., 19...., the court sustained (or overruled) said motion. (State exception, if any.)

JUDGMENT.

On the.....day of....., 19...., the following judgment was entered: (Set out the judgment or order appealed from.)

On the.....day of....., 19...., notice of appeal was filed in the district court. (If any question is raised on this notice set out a copy.)

If supersedeas bond or other undertaking was filed below, state the fact with the amount and names of sureties.

On the.....day of....., 19...., the cause was filed in the supreme court.

(This outline is presented for the purpose of indicating the character of the abstracts contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is: PRESERVE EVERYTHING MATERIAL TO THE QUESTION TO BE DECIDED AND OMIT EVERYTHING ELSE.)

20. Abstracts will be required pursuant to these rules in all cases filed in this court on or after the 7th day of April, 1911, and also in all other cases in which the brief of appellant, or plaintiff in error, or plaintiff in cases of original jurisdiction, is not served or filed on or before June 1, 1911.

In all cases docketed in this court prior to April 7, 1911, either party may prepare and file abstracts of the record under these rules, in which case the cause shall be advanced for hearing.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1911.

LENA M. LILLIE, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED APRIL 8, 1911. No. 16,365.

1. Appearance. "An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant." *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 273.

2. ———. "A defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally." *Cropsey v. Wiggenhorn*, 3 Neb. 108.

3. Insurance: ACTION: DEFENSES: EVIDENCE: ADMISSIBILITY. In a civil action upon a benefit certificate, issued by a fraternal beneficiary society, and which contained a clause that, if the death of the member shall occur by the hands of his beneficiary, except by accident, the certificate should be void, the fact, if true, that the beneficiary had murdered the assured would constitute a defense to the action. The evidence of the commission of the crime would depend upon the proof of the fact of the criminal act. A certified transcript of the record of conviction of the beneficiary is not admissible as substantive evidence of the facts upon which the prosecution was founded, nor of the fact of the murder of the assured by the beneficiary.

4. Trial: INSTRUCTIONS. An instruction to a jury that the result of a criminal prosecution for the commission of the acts which would

avoid the certificate was not to be considered by them *held* properly given.

5. Evidence: ORAL EVIDENCE TO EXPLAIN LETTERS. Certain letters, written by plaintiff to a bucket shop dealer, were introduced in evidence by defendant. The meaning of the language contained in the letters could not be understood by one not acquainted with the circumstances under which they were written. *Held.* That there was no prejudicial error in permitting plaintiff to explain the circumstances and her meaning in the language used.

6. Insurance: TRIAL: QUESTION OF FACT. The question of the murder of the assured by plaintiff was exhaustively investigated upon the trial by the production of oral evidence of circumstances tending to prove and disprove the charge. The only witness present at the time of the killing of decedent was plaintiff, who took the witness-stand and testified to facts which, if true, established her innocence. The question of fact was for the jury, and with their finding on conflicting and circumstantial evidence the supreme court cannot interfere.

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

Talbot & Allen, C. J. Garlow and *Tibbets & Anderson,* for appellant.

Matt Miller and *L. C. Burr, contra.*

REESE, C. J.

This action was commenced in the district court for Lancaster county, and is upon a benefit certificate for the sum of $3,000, issued upon the life of Harvey Lillie, payable to Lena M. Lillie, his wife, upon his death. The petition is in the usual form, and its averments need not be here specifically noticed, except to say that it is alleged that defendant is a fraternal beneficiary society, incorporated and doing business under and by virtue of the laws of the state of Illinois, with its principal place of business in the city of Rock Island, in said state, and authorized to transact business in Nebraska. A summons was issued and returned by the sheriff of Lancaster county as having been served upon the defendant "by delivering

in person to E. M. Searle, Jr., state auditor, agent for service and attorney in fact for said Modern Woodmen of America, a true and certified copy of the same, and also on A. R. Talbot, head consul for Modern Woodmen of America, at his office and principal place of business of the Modern Woodmen of America in the city of Lincoln, within and for the state of Nebraska, by delivering to him in person a true and certified copy of this writ with all indorsements thereon."

The defendant filed a paper, of which the following is a copy, omitting the caption: "Comes now the defendant appearing specially, and for the purpose of this motion only, and objects to the jurisdiction of the court over the defendant and also over the subject matter of the suit for the following reasons: First. Because plaintiff's petition fails to show a legal capacity to bring or maintain said suit. Second. Because plaintiff's petition fails to show that she has any legal capacity to bring or maintain said suit in Lancaster county, Nebraska. Third. Because plaintiff's petition fails to show that the contract sued upon is one enforceable at law. Fourth. Because plaintiff's petition fails to show that she has complied with the statutory provisions of this state to entitle her to prosecute said action. Fifth. Because the court has acquired no jurisdiction over the defendant by reason of defects shown on the face of the petition."

This objection to the jurisdiction was overruled, and defendant's exception noted. It may be doubted if this was in fact and in law a special appearance for the sole purpose of challenging the jurisdiction of the court over the person of defendant. It will be noted that the challenge includes the contention that the court has no jurisdiction of the subject matter of the suit.

In *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 273, we held on rehearing (quoting the syllabus) that "an appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal plead-

ing, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not." This is practically a reiteration of the holding of the first opinion beginning at page 267 (71 Neb. 267), and in the body of which it is said that such an objection was "in the nature of a demurrer to the jurisdiction of the court, and was in itself an appearance in the case."

It will also be noted that the objections presented in the first and second grounds of challenge are practically, if not strictly, the grounds of demurrer contained in section 94 of the code. The paper filed constituted a general appearance in the case. Again at a later date defendant filed a demurrer to the petition, the second ground of which was that "the court has no jurisdiction of the subject matter of the action," and the third that "the petition does not state facts sufficient to constitute a cause of action." This, also, was clearly a general appearance, notwithstanding the demurrer contained the statement that it was filed "without any intention of waiving its rights to insist upon the special appearance overruled by this court." The simple fact of the presentation of the questions *was* a waiver of a special appearance, had one been made. On a still later date defendant filed a motion for a more specific statement of the petition, and that the court require certain facts to be set out therein. This, also, was a general appearance. *Cropsey v. Wiggenhorn,* 3 Neb. 108; *Crowell v. Galloway,* 3 Neb. 215.

It is insisted by defendant that, under the provisions of section 96, ch. 43, Comp. St. 1909, an action of this kind cannot, without the consent of a defendant, be maintained in any court except where some of the conditions prescribed in that section exist. The section is as follows: "Such society may be sued in any county in which is kept their principal place of business or in which the beneficiary contract was made or in which the death of the member occurred, or in the county of the residence of such deceased member; but actions to recover old age,

sick or accidental benefits may, at the option of the beneficiary, be brought in the county of his residence."

In the brief of defendant it is said: "We will not contend that the action is not transitory, nor will we contend that the district court of Lancaster county could not have jurisdiction of the subject matter of (by) consent of the parties or waiver of defendant as to jurisdiction." It will appear from this that it is not contended that where consent is given, or rather where no objection is made, the judgment would be void, but of full force and validity. In effect the contention is that, where none of the condiditions named in the section exists, it will depend upon the election of a defendant as to jurisdiction of the court to hear and determine the case upon its merits. If this should be held to be the true effect of the statute, it would rest with defendant to give or refuse to give the district court jurisdiction in all cases where none of the specified conditions exist. Suppose a beneficiary resided in this state, the assured resided and died in another state, the defendant, a foreign corporation, had no principal place of business in this state, and the contract was made in a foreign state, the beneficiary would find the doors of all the courts of the state closed against her, or him, and no suit could be maintained in this state in any court, except by virtue of the consent and permission of the defendant. We cannot give such construction to the section under consideration. Just what the purpose of its enactment was, whether to add to and extend the jurisdiction of courts, or to make certain the local jurisdiction where any one of the conditions exist, we need not now inquire. The district court is a court of general common law jurisdiction, and the statute has by general law provided methods of acquiring jurisdiction over the person of foreign companies of the class to which defendant belongs, and it will not do to say that by the section under consideration the method of acquiring jurisdiction by general law is destroyed and the procedure limited to cases where the provisions above referred to exist. Such

could not have been the purpose of the legislature. However, if the contention of defendant should be correct, there can be no doubt of the general appearance by defendant, and that alone would be consenting to the jurisdiction of the court over it. It has been suggested by some of the members of the court that the section (Comp. St. 1909, ch. 43, sec. 96) is intended to apply alone to domestic societies, and has no reference to foreign associations, to which class defendant belongs. But upon that question we express no opinion.

The answer, in addition to the presentation of the question of jurisdiction, being practically the same as the motion and demurrer, consisted of certain admissions and a general denial of unadmitted averments, and set out certain clauses of the application and benefit certificate, and alleged that plaintiff, in violation of the express terms of the certificate, had caused the death of the member by the wilful, intentional and unlawful act of her, the beneficiary —in short, that she had murdered him. The fact of her arrest, prosecution and conviction of his murder, the verdict of the jury finding her guilty of murder in the first degree, and her sentence to imprisonment in the penitentiary for life are set out by copy of the proceedings and judgment. Plaintiff moved the court to strike out that part of the answer setting out her trial and conviction. The motion was sustained, but no exception was taken to the order. The order did not include the allegation that plaintiff had murdered the assured, leaving that issue to be tried. Plaintiff replied by a general denial. A large number of witnesses were sworn, chiefly upon the issue thus presented, forming a bill of exceptions of near 2,300 pages of typewritten matter. This evidence became material by reason of there being a clause in the benefit certificate that, if the death of the member was caused "by the hands of his beneficiary, * * * except by accident," the certificate should become null and void.

In addition to the oral testimony in support of the de-

fense that plaintiff had murdered the assured member, defendant offered in evidence certified copies of the information filed in the district court for Butler county charging plaintiff with the murder of Harvey Lillie, the assured, the verdict of the jury thereon finding the accused guilty and fixing her punishment at imprisonment for life, the judgment and sentence of the district court, the mandate of affirmance by the supreme court, and the judgment of the district court thereon. The offered documentary evidence was objected to by plaintiff as incompetent, immaterial and irrelevant. The objection was sustained, and the documents excluded, to which defendant excepted, and that ruling is now assigned for error. The purpose of the evidence now under consideration was evidently to strengthen and support the oral testimony adduced for the purpose of maintaining the defense pleaded in the answer. It could not be insisted upon as an adjudication of the fact in issue, or as a bar to a recovery, for it was not an action or proceeding between the same parties. Neither could it have the effect of an estoppel by record.

The question then arises: Was it competent as substantive evidence in this suit upon the benefit certificate to prove that plaintiff had, in fact, murdered her husband, the assured? The answer must be that it was clearly not admissible. In *Wisnieski v. Vanek,* 5 Neb. (Unof.) 512, it is held that where a defendant in a criminal prosecution enters a plea of guilty, and judgment is rendered thereon, proof of the plea may be received in a civil suit against him for damages growing out of the same transaction as an admission or confession of the act charged, but that it is not conclusive of the fact and may be controverted as any other open question; that it is not the judgment itself that is admitted against him. The record offered shows that there was a jury trial of the criminal prosecution, and therefore there was no plea of guilty. It is fundamental and elementary that in a civil suit, where the defense is that plaintiff had by a

criminal act violated the provisions of the contract upon which the action is based, the record of his conviction in a criminal prosecution of such criminal act, which is pleaded as a defense, cannot be received as substantive proof of such violation. 1 Greenleaf, Evidence (16th ed.) sec. 537; 2 Black, Judgments (2d ed.) sec. 529; 7 Ency. of Evidence, 850, and cases cited in note 80; 23 Cyc. 1348, and cases cited in note 28; Jones, Evidence (2d ed.) sec. 589 (606) p. 745; 1 Wharton, Law of Evidence (3d ed.) sec. 776; Underhill, Evidence, sec. 156; *Betts v. New Hartford*, 25 Conn. *180. See, also, *Sickler v. Mannix*, 68 Neb. 21. As the only purpose for which the record was offered was to establish the fact upon which the judgment was rendered and which was pleaded and insisted upon as a defense in this case, there was no error in excluding it. There is no doubt but that judgments of conviction are competent and sometimes important evidence in cases where they are admissible, as for the purpose of impeaching a witness, to establish outlawry, the destruction of civil rights, and the like, but in such cases the records are admissible only for the purpose of proving the existence of the judgments, and not to prove the facts upon which they were founded.

Instruction numbered 9 reminded the jury of statements and references to the alleged conviction of plaintiff in the district court for Butler county, and directed them to pay no attention to the result of that prosecution, that it had nothing to do with their verdict, and they should disregard all such statements and allusions. There was no error in the instruction. The fact of that conviction had no place in the trial of this cause.

It is said in defendant's brief that the court erred in permitting plaintiff to withdraw testimony of good character, but there is no indication as to where in the bill of exceptions the testimony or ruling can be found, as required by clause "h" of rule 9 of this court, and we will have to be excused from searching the four volumes of the bill of exceptions for that specific ruling.

It is argued that the court erred in allowing plaintiff to place her interpretation upon certain letters introduced by defendant which she had written to a certain bucket shop dealer in David City. Those letters were cautionary in their character, and to one unacquainted with the facts as she understood them are susceptible of two constructions—one in her favor, the other against her—and in some respects they were incomplete and their meaning was obscure. She was permitted to explain what she meant by certain phrases and sentences contained in them. The explanation consisted in a statement of the condition of her whole dealing, instead of a part only as she insisted had been unjustly used to her disadvantage. This was followed by the application of those facts to the language used—what she referred to—and what she meant. Common fairness would seem to give her the right to make the explanation, of the truth of which the jury would have to be the judge.

The question of the murder of the assured by plaintiff, the beneficiary, was thoroughly and quite exhaustively tried by the introduction of oral testimony, and all the facts and circumstances in connection with the death of the decedent appear to have been fully investigated. Plaintiff was a witness in her own behalf and gave her version of the death of her husband, which, if true, would demonstrate that she was not guilty of his murder. She was thoroughly and searchingly cross-examined. The whole subject was submitted to the jury, and their finding on the facts must be accepted as binding upon this court.

Complaint is made of the instructions given the jury by the court. They have been examined, and appear to have been given in accordance with the views herein above expressed, and do not require specific notice here. The main question of fact upon which the case depended was for the jury. We detect no reversible error by the district court.

The judgment is

AFFIRMED.

JOHN M. MCGOWAN ET AL., APPELLEES, V. GATE CITY MALT COMPANY, APPELLEE; JAMES STEWART & COMPANY, APPELLANT.

FILED APRIL 8, 1911. No. 16,373.

1. **Mechanics' Liens:** SUBSTANTIAL PERFORMANCE OF CONTRACT. In a suit to foreclose a mechanic's lien for labor performed and material furnished in the construction of a building under contract, relief will not be denied the plaintiff because of omissions in the performance of the contract in details of the work, or time of completion, when there has been a substantial performance on his part; the defendant having his remedy in damages.

2. ———: ———. The contract between the contractor and subcontractor provided for the payment of 80 per cent. of the value of material delivered and in place monthly, as the work progressed, the remaining 20 per cent. to be paid "within 30 days after the completion and acceptance of this work," but did not specify by whom the acceptance was to be made. The contract being thus incomplete, it is *held* that a substantial compliance therewith in the matter of execution and surrender of the work and material to the contractor was sufficient to enable the subcontractor to maintain his action, without waiting for the completion of the structure by the contractor and its acceptance by the owner, but subject to any defense the contractor might have for damages on account of noncompliance with details.

3. **Contracts:** BUILDING CONTRACT: EXTRAS. The contract between the contractor and subcontractor provided that no work done or material furnished by the subcontractor should be considered as extra or paid for as such, unless a separate agreement in writing therefor should be made before the commencement of such work or furnishing of such material. The contractor was a nonresident of the state, having its principal places of business out of the state. The work was under the direction of superintendents in charge and upon the ground. Extras were ordered by them and furnished by the subcontractor without such written agreement, that clause of the contract being ignored. It is *held* that the absence of such written agreement cannot, under the circumstances, furnish the contractor a defense to the claim for such extras actually furnished.

4. ———: ———: CONSTRUCTION. *Held, also,* That the clause in the contract that no orders for extra work should be given "by employees upon the job" did not include superintendents in charge.

5. ———: ———: LIABILITY FOR MATERIAL. Where a contractor purchases and furnishes material to a subcontractor, informing him of the cost and the price that will be charged, the subcontractor has his election, either to accept and use the material or reject it. If he accepts and makes use of the material he will be held liable for the price previously fixed by the contractor.

6. Appeal: EVIDENCE: SUFFICIENCY. Where a claim was made by a subcontractor against the contractor for the *use* of scaffolding material belonging to such subcontractor, and the evidence showed that both parties had lumber of the kind upon the ground and used the same to some extent without discrimination, no sufficient proof of the quantity used nor value of such use being made, the evidence in support of such claim *held* insufficient to justify its allowance.

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

S. N. Taylor, S. C. Taylor, H. A. Hamilton and *W. H. Hatteroth,* for appellant.

Mahoney & Kennedy and *McGilton, Gaines & Smith, contra.*

REESE, C. J.

This is an action by plaintiffs, as subcontractors, against James Stewart & Company, as principal contractors, and the Gate City Malt Company, the owner, by which a judgment is sought against James Stewart & Company, contractors, and the foreclosure of a mechanic's lien on lot 6, in block 16, and lots 1, 2 and 3, in block 18, in the city of South Omaha, as against the owner of said property.

The pleadings are of great length and cannot be set out in detail here. It must be sufficient to say that it is alleged in the petition that the defendants James Stewart & Company entered into a contract with defendant Gate City Malt Company to furnish the material and construct buildings on the lots described above in the city of South Omaha, and subsequently, by a contract

with plaintiffs, sublet a portion thereof to them and by which plaintiffs were to furnish the material and do the brick and concrete work for the prices and upon the terms set out in said contract, all of which was done and performed by plaintiffs, amounting to the total sum of $31,923.49; that defendants had paid to plaintiffs thereon the sum of $25,524.70, and no more, and that there remained due and unpaid thereon the sum of $6,398.79, for which judgment was demanded as against James Stewart & Company, and for the foreclosure of the mechanic's lien as against the Gate City Malt Company. The contract with the items of account are set out in the petition as exhibits, but they need not be here stated.

The answer of defendants James Stewart & Company is of considerable length. By it the contract with plaintiffs is admitted, and, in substance, it is admitted that plaintiffs furnished material and labor thereunder, but by way of counterclaim it is alleged that plaintiffs so failed to comply with the contract as to result in serious loss and damage to defendants. Among the items presented by defendants are: Balance due on brick furnished to plaintiffs, $113.25; demurrage on cars plaintiffs failed to unload, $238; making connections of water pipes, $65. It is alleged that by the terms of the contract 80 per cent. in value of the labor and material furnished by plaintiffs was to be paid as the work progressed; the remaining 20 per cent. was to be withheld until the work was finished and accepted; that the 20 per cent. is included in plaintiffs' petition, but that the work has never been accepted; that there is nothing due plaintiffs until such acceptance, and therefore the suit is prematurely brought and cannot be maintained; that owing to the many violations of the provisions of the contract, both in the manner of doing the work and the failure to complete the structure within the time limited by the contract, plaintiffs having thereby failed in its performance, no action can be maintained thereon. The answer of the Gate City Malt Company is practically a general denial of the averments

of the petition and of any indebtedness to plaintiffs, it having no contractual relations with them. Plaintiffs' reply to this answer is a general denial.

Plaintiffs' reply to the answer of James Stewart & Company is to the effect that they had brick of their own purchase, sufficient to meet all demands as the work progressed, and the purchase of brick by defendants was therefore unnecessary, but to accommodate defendants plaintiffs had used them and allowed defendants the same price for which they had purchased brick for themselves; that defendants had purchased their brick at 50 cents a thousand more than plaintiffs had purchased their own brick, but that they had accepted defendants' brick at the same price for which they had purchased, to wit, $7 a thousand; that the demurrage charge was occasioned by the unnecessary purchase and shipment of brick in such large quantities by defendants that they could not be unloaded from the cars, the demurrage being caused by the unnecessary act of defendants, and plaintiffs were not liable therefor. It is alleged that the piping for water was done for defendants' own use and benefit, and not for or at the request of plaintiffs; that immediately upon the completion of the buildings the Gate City Malt Company, defendant, had taken possession thereof and has since occupied the same; that defendants are estopped to object to plaintiffs' work because all of said work was done under defendants' immediate supervision and direction. The cause was tried to the court, the result being a general finding in favor of plaintiffs. The amount found due, including interest, was $7,282.37, and an order of sale was directed to issue for the sale of the property in case of nonpayment. Defendants James Stewart & Company appeal.

Each party has furnished elaborate, able and extended briefs, and the cause was quite exhaustively argued at the bar of this court. The bill of exceptions is of great length, and consists largely of details which it is impossible for us to follow without extending this opinion

to an unnecessary and unreasonable length. Reversing, to some extent, the order of the presentation of the subjects by defendants in their brief, we notice the contention that plaintiffs' action cannot be maintained upon the contract until there is a performance of its conditions by them. This contention is, in a general way, correct. That one cannot maintain an action on a contract without a prior substantial compliance on his part is the well-settled law, but this principle must have a reasonable application. If there is a substantial performance the action thereon may be maintained, but without prejudice to any set-off or counterclaim which may be presented by the defendant in the action. This is a reasonable and just rule, and is the well-settled law of this state. *Hahn v. Bonacum,* 76 Neb. 837, and cases there cited; *Nebraska Plumbing Supply Co. v. Payne,* 84 Neb. 390; *Grove-Wharton Construction Co. v. Clarke,* 86 Neb. 831. There can be no doubt but there was at least a substantial compliance with the plaintiffs' contract on their part, and therefore the action can be maintained, but subject to damages, if any, which defendants may have suffered.

Defendants further contend that the decree of the district court should be reversed "because the contract between the parties provided that the final payment of 20 per cent. (of the contract price) should be made only after the approval and acceptance of the work by the supervising architect." The contract provides that the payments for the work are "to be made on or about the 20th of each month at the rate of 80 per cent. of the value of material delivered and in place during the preceding month, as determined by the contractor or the architect; and the remaining 20 per cent. within 30 days after the completion and acceptance of this work." It may be noted that the contract does not specify by whom the acceptance of the work is to be made, whether by the architect, the owner, or the contractor. We are inclined to the belief that as between the contractor and the subcontractor (and they are the only parties to this appeal)

the completion of the work and its surrender to the contractor would be a sufficient compliance with this provision, but subject to any damage he might sustain by failure to comply with details. However, we do not base our decision exclusively upon this. The clause is incomplete, and a compliance with the contract is all that can be required under it. We do not think that the language should be construed to mean that the subcontractor should be compelled to await the final completion of the whole building by the contractor and its acceptance by the architect or owner before the 20 per cent. would become due. Nor do we understand that defendants so contend. Such a construction would be wholly unreasonable. In neither of these contentions can we see any just, legal or equitable reason why plaintiffs should not be permitted to maintain this action for what is justly due them, even though there had been no formal acceptance. *Hahn v. Bonacum, supra.*

The bill of exceptions contains a great number of charges by plaintiffs for extras alleged to have been furnished and extra labor performed by plaintiffs. The contract provides, in substance, that no work done or material furnished by the subcontractor shall be considered as extra or paid for as extra, unless a separate agreement in writing therefor shall have been made before the commencement of such work or the furnishing of such material. It is also stipulated therein "that no orders for work supposed to be 'extra' shall be given by employees upon the job or recognized as extra by the contractor." The contractors have their places of business in Chicago, Illinois, and other cities, and were represented in South Omaha upon the construction work by agents known as superintendents. It is shown by the evidence that many changes and extras were ordered by them, the orders complied with, and the extras in the way of labor and material furnished as required. Of all such extras so provided by plaintiffs we have not observed a single case where the orders were given or the material or labor

furnished under a separate agreement in writing as required by the contract. In *Campbell v. Kimball,* 87 Neb. 309, we held under somewhat similar conditions that, if this provision of the contract was ignored by the parties to it and the extras were ordered and furnished, the terms of the contract would furnish no defense to the claim for such extras. See, also, *Jobst v. Hayden Bros.,* 84 Neb. 735. Any other rule would be against conscience and would often work serious injustice. The contract between plaintiffs and defendants is signed "James Stewart & Company, by W. R. Sinks," and defendants are alleged to be a partnership. Their line of business as contractors extends over many states of the Union, and judging by their literature their places of business are in Chicago, New York, Pittsburgh and New Orleans, and therefore they necessarily transact their business and superintend their contracts by agents located at the points where their work is being done. The superintendents when placed in control of their construction work must be considered as representing the company, and are not "employees upon the job" in the sense as used in the contract. While in charge of the construction of a particular building, they are to all intents and purposes the company, and the line of conduct pursued by them in the way of giving directions will be as binding upon the company as if adopted by a member or general managing agent. The contention therefore that no recovery can be had for extras if furnished under the circumstances named cannot be sustained.

In addition to the great number of demands by plaintiffs, the defendants present a number of counter charges for material, damages for failure to comply with the contract, labor furnished plaintiffs, etc. On many, if not all, of these issues the evidence is conflicting and contradictory. Considering the great length of the bill of exceptions and these issues as presented, all of which have been examined and carefully read, the findings of the district court, in so far as they are approved, will not be

specifically noticed. The claims presented by plaintiffs were practically all allowed by that court, and its findings in that behalf will not be molested, except as hereinafter stated.

It appears from the evidence that defendants furnished to plaintiffs some 223,000 bricks to be used in the construction work. Judging by the correspondence shown in the record, defendants believed plaintiffs were not receiving, of the bricks ordered by them, a sufficient number to push the work as it ought to have been crowded, when, apparently without any request by them, the bricks were purchased by defendants, shipped and delivered to plaintiffs, and used by them. Invoices were furnished plaintiffs by defendants, together with checks payable to the person from whom the purchase had been made, with instructions that if found correct plaintiffs should transmit the checks to the seller, which was done. For those bricks defendants paid $7.50 a thousand. The bricks which plaintiffs had contracted for were to be furnished them at the rate of $7 a thousand. The evidence is clear that plaintiffs were advised of the price which defendants were paying, and that they refused to allow the 50 cents a thousand above the price they were paying. Had plaintiffs refused to accept and use the bricks furnished by defendants, they could not have been required to pay any portion of the price for which the bricks were purchased by defendants. But having been informed what the cost would be, and still accepting and using them, they ought in all good conscience to have given defendants credit for the price paid, instead of for the price at which they had contracted with those from whom they were purchasing. The difference is 50 cents a thousand or $111.50, for which defendants are entitled to credit. As to other items of counterclaim presented by defendants, we can see no sufficient reason for reversing the findings of the district court, but will not discuss them separately here.

A claim is made against defendants for $300 for the

use of plaintiffs' scaffolding lumber by defendants, and which was allowed by the trial court. This claim is for the *use* of the lumber referred to, and of which some portion was broken and otherwise destroyed. Upon this part of the case the evidence is far from satisfactory. There is little, if any, doubt that in the construction of the immense building under contract the lumber of the parties became to some extent intermingled, and not much care was taken by either one to observe as to the ownership of their material of the class under consideration. Each had a large quantity on the premises. It was largely of inferior grade and value, so rendered by the use to which it was being applied. The evidence bearing upon the quantity used is largely, if not entirely, guesswork and estimates upon a very uncertain basis, and by some of the witnesses it is said there was no appreciable difference between the lumber used by each, belonging to the other. It is probable that to some extent the plaintiffs may have been the loser in this use, but there seems to be no way of even approximating the actual amount, if such loss has been sustained, and we are persuaded that this part of the demand has not been sufficiently proved.

Much time and attention upon the trial were devoted to a clause in the contract forbidding the erection of a hoist within the building, and which was violated by plaintiffs, and their hoist for lifting material was placed therein. This seems to have been necessary, owing to the contour and topography of the site upon which the building was erected. However, we fail to find any sufficient proof that defendants were in any way injured or damaged thereby, and the subject will not be further noticed.

As the decree of the district court was for $411.50 more than we find plaintiffs entitled to, the cause will be remanded to that court, with directions to enter a decree in all respects similar to the one heretofore rendered except that the amount thereof shall be for $6,870.87, instead of $7,282.37, the same to bear interest from the

date fixed in the original decree, to wit, April 19, 1909, at the rate of 7 per cent. per annum.

JUDGMENT REDUCED.

FAWCETT, J., not sitting.

ALICE T. LANNING, APPELLANT, V. JOHN HAASES, JR., ET AL., APPELLEES.

FILED APRIL 8, 1911. No. 16,384.

1. **Affidavits.** An affidavit subscribed and sworn to before a person not authorized by law to administer oaths is void and no affidavit.

2. **Taxation:** REDEMPTION: NOTICE: PROOF OF PUBLICATION: AFFIDAVIT. The proof of the publication of a notice of the time within which redemption of real estate from sale for taxes can be made must be by affidavit. Such "affidavit" sworn to before a person who gives his official title as "U. S. Comm.," he having no authority to administer oaths, is not an affidavit within the meaning of section 367 of the code, and a tax deed issued thereon is void.

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

A. W. Crites, for appellant.

William Mitchell and *B. F. Gilman, contra.*

REESE, C. J.

This action was commenced in the district court for Box Butte county for the foreclosure of a mortgage on the northwest quarter of section 22, township 25 north, of range 48, in said county. A number of persons were made defendants, but we have to do with but one; no

other defendant having appeared or filed briefs. The one referred to is Chenia A. Newberry, who claims to hold a tax deed upon the property by which it is claimed that all rights under the mortgage have been extinguished Newberry answered setting up his alleged title under the tax deed, and issues were formed thereon as to its validity. The district court rendered a decree by which Newberry's tax title was held valid, refused a foreclosure of the mortgage, dismissed plaintiff's petition, and quieted Newberry's title. Plaintiff appeals.

If Newberry's title can be sustained, it must be conceded that the rights of the mortgagee were terminated, and she has no ground to complain. If the tax deed is defective to the extent of rendering that conveyance void, plaintiff has a right to foreclose her mortgage, subject to the lien for taxes, and from which she has the right to redeem. One of the principal questions as to the validity of Newberry's title seems to be as to the proof of the publication of the notice of the expiration of the time within which redemption could be made. The statute (Ann. St. 1909, secs. 11113, 11114) requires the giving of this notice, and, if necessary, its publication in a newspaper. It is provided that the proof of publication shall be by affidavit of the publisher, manager or foreman of the newspaper. "An affidavit is a written declaration under oath, made without notice to the adverse party." Code, sec. 367. If it must be under oath, it must be necessarily sworn to before some one authorized to administer oaths. The affidavit of publication was made before "T. J. O'Keefe, U. S. Comm." Just what "U. S. Comm." should be held to mean is not shown, but it is assumed that the letters and words were intended to mean "United States Commissioner." It is admitted by appellee that such officer has no power or authority to administer a binding oath in this kind of proceeding, and we have been unable to find where any such authority is given. This being true, it must follow that the statement contained in the writing by which an affidavit was attempted

to be made was not legally sworn to, and we are left with no affidavit or other proof of publication. The giving of the notice is a condition precedent to the issuance of a deed. Ann. St. 1909, sec. 11113. The proof thereof is specially prescribed. Ann. St. 1909, sec. 11114. It necessarily follows that the tax deed was ineffectual to pass the title to the purchaser, and plaintiff was entitled to the foreclosure of her mortgage and to redeem from the tax sale.

The decree of the district court is reversed, and the cause is remanded to that court, with directions to enter a decree canceling the title of defendant Newberry, and foreclosing plaintiff's mortgage.

REVERSED.

ALFRED W. DOWNEY ET AL., APPELLEES, V. FRANK COYKENDALL, APPELLANT.

FILED APRIL 8, 1911. No. 16,358.

1. **Judges:** EXCESSIVE FEES: ACTION: DEFENSES. A police judge sued under the provisions of section 34, ch. 28, Comp. St. 1909, for taking excessive fees may not justify the taking of such fees by mistake, ignorance, absence of a corrupt motive or the existence of an agreement by the party injured.

2. **Statutes:** CONSTRUCTION: FEES. Statutes giving fees are to be strictly construed and are not to be extended by implication, and where a complaint is filed against several persons the same fees should be charged as if there were but a single defendant until demand is made for separate trials, and then fees should only be charged for such extra duties as are necessarily caused by such separation.

3. **Evidence:** DOCKET ENTRIES OF POLICE JUDGE. Ordinarily the entries in the docket of a police judge, made by himself or under his direction, are conclusive evidence in an action against him for charging, demanding and taking excessive fees.

4. **Trial:** DIRECTING VERDICT. Where at the close of the evidence in a jury trial there is left no question of fact to be determined, it is

not error for the trial court to direct a verdict in favor of the party who under the law of the case is entitled to the judgment.

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

Hainer & Smith and *C. P. Craft,* for appellant.

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

BARNES, J.

This case is before us on a second appeal. The former appeal was from a judgment in favor of the plaintiff and resulted in a reversal. The cause was remanded to the district court, where it was tried a second time, and the plaintiff again had a directed verdict and the judgment, from which the defendant has appealed.

The action was brought to recover illegal fees alleged to have been charged and collected by the defendant as police judge of the city of Aurora in certain actions wherein the plaintiff and other members of the commercial club of that city were prosecuted for a violation of the city ordinances, together with the sum of $50 as a penalty for charging and collecting such illegal and excessive fees. There is little or no conflict in the evidence, and it may be said that it appears, without question: That the defendant was police judge of the city of Aurora on the 8th day of January, 1906, at which time a complaint was filed with him charging the plaintiff and seven other persons named with maintaining a building wherein persons were unlawfully permitted to assemble for the purpose of drinking intoxicating liquors. The defendant thereupon issued a warrant for the plaintiff and the seven others charged with him, who were thereafter brought before the defendant, as such police judge. One of the persons thus arrested demanded a separate trial, which was had, and which resulted in a conviction and the imposition of a fine of $50 and costs. Negotiations were

then had for a settlement of the case, and it was finally agreed that four of the eight persons should plead guilty of a disturbance of the peace and should each be fined the sum of $10, and that upon the payment of such fines and the costs of prosecution the complaint should be dismissed. Pending the negotiations for this settlement, the city attorney filed another complaint against 24 persons, including the plaintiff and the other members of the Aurora commercial club, charging them with a like offense, and still another complaint against the eight persons first complained of for disorderly conduct. When the settlement was effected, defendant estimated the costs in all of the cases at $175. He arrived at this estimate by treating the case of each individual defendant in each of said complaints as a separate and independent cause, and taxed the costs as if there had been 40 separate cases. This amount of $175 was paid to the defendant, but there is a slight dispute as to the manner of its payment; the defendant contending that he received the gross amount with the understanding that, if when the costs were accurately ascertained such sum should be insufficient to liquidate the same, the parties making such payment would make good the deficiency, and, if such sum proved more than sufficient, the excess should be returned to them. It further appears that so much of defendant's docket as included the entries in each of those cases was introduced in evidence upon the trial, and those entries show conclusively and particularly each step that was taken from the time of the commencement of the proceeding until the settlement above mentioned was made. It thus appears that on the complaint in which eight persons were jointly charged eight separate cases were docketed; that fees for docketing eight complaints were taxed and charged against the defendant when, as a matter of fact, but one complaint was taken; that fees for issuing eight warrants were taxed and charged when but one warrant was issued; and that many other items of excessive and illegal fees were charged and taxed in those

cases. It also appears that the settlement above mentioned was made on January 16, 1906, and upon that day the defendant's docket entry in each of the eight cases closed with the following: "January 16, 1906, at 9:00 A. M. This cause dismissed and costs paid. Frank Coykendall, Police Judge." There was a like entry taxing like fees in all of the other cases. Indeed, that fact is not seriously questioned, for it is said in the defendant's brief in speaking of the amount of illegal fees found by the trial court to have been collected: "We are satisfied that this amount is not correct, and that the costs and fees which the police judge had a right to collect on account of the services rendered by himself and the officers, and the fees to witnesses, exceeded the sum of $94.60; but the fact is there was not due for fees upon these several matters, including the four fines each for $10, the sum of $175, being the amount deposited with the police judge." So it may be said that there is no dispute as to the fact that defendant actually received from the plaintiff and others a larger sum than the legal fees which could be taxed in the several cases which had been brought before him.

It is contended, however, that the defendant was not guilty of the charge of collecting and receiving illegal fees, because of the agreement above mentioned. We are satisfied that the agreement or understanding which is pleaded by the defendant in justification of his action was made or had substantially as claimed by him. Therefore, the main question for our determination is: Does that agreement or understanding constitute a defense to the plaintiff's cause of action? A like question was before this court in *Cobbey v. Burks,* 11 Neb. 157, 38 Am. Rep. 364. In that case we held: "Mistake or ignorance without corrupt intent is no defense in an action on the statutory penalty for an officer taking greater fees than are allowed by law." It appears that Pennsylvania has a statute similar to our own, and a like question was before the supreme court of that state

in *Coates v. Wallace,* 17 Serg. & Rawle (Pa.) 75, and it was said by that court: "The penalty imposed by this act may be incurred by exacting fees, which are supposed at the time to be legally demandable. By the very words of the prohibitory clause the *taking* is the gist of the offense. Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him, with an unusual attention, clearness and precision. On any other principle, a conviction would seldom take place, even in cases of the most flagrant abuse; for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril, and we are of opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids." That language was quoted and approved by this court in the case first above cited. *Leese v. Courier Publishing & Printing Co.,* 75 Neb. 391, was a case where the defendant ordered a transcript in order to perfect an appeal, and as a condition for making such transcript the justice required the defendant to pay him 10 cents for filing the appeal bond, 15 cents for entering it on the docket, and 25 cents for its approval and the memorandum of approval indorsed thereon. A portion of those fees the justice was not entitled to charge or receive, and we said in the opinion in that case: "We entertain no doubt that these charges were made and collected by the plaintiff in error in the utmost good faith, with the conviction that he was entitled to charge and receive the same; however, in doing so he acted at his peril. The statute as applied to the facts in this case is manifestly unjust. It is evident, however, that under the facts there was no course open to the trial court except to direct a verdict for the plaintiff." And a judgment against the justice for the statutory penalty was affirmed.

As above stated, the docket of the police court was introduced in evidence. The defendant is bound by the recitals contained therein, for those entries were made by him, and they conclusively show that he not only taxed the illegal fees in question, but declared over his own signature that they were paid. We therefore conclude that the agreement or understanding relied on by the defendant related to the cases which were commenced subsequent to those founded on the first complaint and is no defense to this action.

It is contended, however, that the trial court erred in not submitting that question to the jury. This contention is not sound because, conceding that the agreement relied on by the defendant was made as claimed, its legal effect was a question for the court, and not one to be determined by the jury.

Finally, defendant insists that the jury should have been allowed to determine the amount of the illegal fees in question. It appears that the docket entries made by the defendant contain all of the items of fees and costs charged and received by him, and it was the duty of the trial court to separate the legal from the illegal charges, and thus ascertain the correct amount of fees which the defendant was entitled to charge and receive. In conclusion, we may say that we are satisfied from an examination of the record that the finding on that question is fully sustained by the evidence, and that the judgment appealed from is the only one which could have lawfully been rendered in this case. Therefore the court did not err in directing a verdict for the plaintiff.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

REESE, C. J., dissenting.

I cannot agree to the opinion of the majority in this case. I do not think the mere fact that defendant entered

the illegal fees upon his docket is of itself a violation of the statute or creates a cause of action. He may have thought he was entitled to them and so entered them upon his docket, yet that fact alone does not render him liable. His ignorance is no excuse, but it does not of itself create a liability. In order to create a liability for the penalty, or liquidated damages, the officer must take the excessive fees. Defendant did not do this. It is not enough that he "demand" the fee, although defendant did not do even that. It was discovered that a number of men had violated the law. A multitude of arrests followed. For reasons which were deemed proper and right, it was agreed that pleas of guilty should be entered and a light fine imposed, together with taxation of costs in each case. The amount of costs could not be *then* ascertained and taxed. It was agreed that a certain amount of money should be left with the defendant, and, if it should be found not to be sufficient, the deficiency should be made up by the arrested parties. Should the amount be found to be too much, the excess or overpayment should be refunded to them. This was a lawful agreement. It was simply a case of mutual trust and confidence. The amount agreed to be left with defendant was $175. By all rules of law, justice or common understanding it was simply a deposit with him to secure or make certain their payment, and subject to future computation or investigation. He held the deposit, and a short time later requested the attorney who appeared for defendants in the criminal prosecutions to assist in the investigation of the question of the fees in order that the correct amount might be ascertained, but the attorney declined to do so. He then called upon some of the parties themselves to join in the inquiry, but they refused. Nothing was left for him to do but to await their will and pleasure, holding the deposit subject to what might be found to be due. It may be said that there was no agreement that they should assist in the investigation and computation; but the very fact that the agreement was made that the matter should be held open im-

plied their friendly assistance. The case strikes me as one of exceedingly bad faith on the part of the members of the so-called "Commercial Club," and, as expressed by one of them, an effort to "cinch" defendant by reason of his reliance upon their personal honor and integrity, which, as it turned out, proved to be absent. I cannot but look upon the action of the parties and this suit as an unfair, unjust and dishonest proceeding in order to obtain revenge against an officer who, so far as this record shows, sought to discharge his duty and at the same time accommodate the arrested parties so far as he might by a reliance upon their personal honor.

I agree that the fee statutes should be strictly construed as against the officers of the law, and that it is right to enforce its penalties when deserved, but I am far from believing that the law is a trap into which officers may be thus inveigled simply because they rely upon the word of those with whom they are called to deal.

I believe the judgment of the district court should be reversed.

ELLA E. LATSON, APPELLANT, V. OLIVE D. BUCK ET AL., APPELLEES.

FILED APRIL 8, 1911. No. 16,966.

1. **Brokers:** AUTHORITY: SALE OF LAND. A real estate agent having the land of another for sale or trade, under an agreement with his principal by which he is to have all he can obtain over and above a certain fixed amount for his commission, may, in the absence of actionable fraud or deceit or objection by his principal, fix its selling or trading price at any sum at which he may be able to lawfully sell or otherwise dispose of it in trade.

2. ———: COMMISSIONS: RIGHTS OF PURCHASER. Where a third party in purchasing or trading for such real estate causes a part of the consideration to be conveyed to the agent, or to another designated by him, which is retained by such agent as his commission, such third person, in the absence of actionable deceit, fraud or confidential relation, cannot maintain an action to re-

cover the property which was retained by the agent as commission.

3. ———: ACTION FOR FRAUD: EVIDENCE. Evidence examined, and found insufficient to establish either the relation of principal and agent between the plaintiff and the defendants, or such fraud or deceit as would entitle the plaintiff to equitable relief.

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

Byron G. Burbank and *John C. Wharton*, for appellant.

Smyth, Smith & Schall, contra.

BARNES, J.

This case is before us a second time. By our former opinion it was held that the allegations of the petition were sufficient to state a cause of action, and the judgment of the district court sustaining an objection to the introduction of any evidence in support of it was for that reason reversed. Thereafter there was a trial of the case upon its merits, which resulted in a general finding in favor of the defendants, and a dismissal of the action for want of equity. The plaintiff has appealed from that judgment.

It appears that the action was based on the theory that the defendants, by taking advantage of the confidential or fiduciary relations alleged to have been in existence between them and the plaintiff as principal and agent, defrauded her and obtained title from her to three certain houses and lots in the city of Omaha, which she prayed the court to order the defendants to reconvey to her, and for general equitable relief.

This being an appeal in equity, we have tried the case *de novo*. From a careful consideration of the evidence, it appears: That in the month of August, 1907, one T. B. Holman was the owner of 230 acres of land in Sarpy county; 160 acres of this land was clear of incumbrances, but on the remaining 70 acres there was due the state the

sum of $568 as a balance of the purchase price; that on the 24th day of that month Holman and the defendants David R. Buck and son entered into an agreement by which the defendants were given an option to handle, sell or purchase said land, and were to have as their commission all they could obtain for it over and above the sum of $2,500; the purchaser was to assume the payment of the amount due to the state as aforesaid, and Holman was to receive $2,500 in cash. Thereupon the defendants, who were real estate dealers, doing business in the city of Omaha, proceeded to advertise the farm for sale or trade. At the same time the plaintiff was the owner of the lots in question, on which there were three small dwellings. It appears that she was anxious to exchange her property for a flat or rooming house, and to that end went to the office of the defendants and interviewed the elder Buck, informing him of her desires. At that interview he informed her that one Doctor Impey was the owner of a brick house which he desired to exchange for other property. It appears that she saw Doctor Impey, but failed to make any arrangement with him, for the reason that he did not want her property, as it would not suit his purposes. It further appears that the defendants informed the plaintiff that they had the land above mentioned for sale or trade, but were unable to offer it to her at that time because they had another customer with whom negotiations were pending. It also appears that later on the negotiations were discontinued, and thereupon the defendants informed the plaintiff that they would trade the land to her for her houses and lots, if satisfactory arrangements could be made. It seems that at first she was not disposed to trade for the land, but later on concluded to examine it, and went with the defendant David R. Buck, Sr., to the premises, where they spent a part of a day, and made a thorough examination of the land, its quality, location, improvements, and everything connected with it; that the plaintiff at that time procured samples of the corn growing on the land, and of the hay, which was

then in the stack, and took the same home with her in order to consult with her sister about the advisability of making a trade. Meanwhile the defendants had inquired the price of the plaintiff's property, and she informed them that she considered the lots in question worth $4,500.

Thereafter the defendants informed the plaintiff that they would trade her the farm for her houses and lots, she to assume the balance of the purchase price due the state on the school land, pay them the sum of $1,500 in cash, and convey her houses and lots to whomsoever they might designate. At first she informed the defendants that she thought they ought to make a less price, or induce the owner to sell or trade the property to her for a less price than that above mentioned. Later on they informed her that that was the best they could do so far as the price was concerned. She thereupon agreed to convey her houses and lots to whomsoever the defendants might name, pay a small plumbing bill of $75.10 that might become a lien on her houses, pay the defendants $1,500 in cash, and assume the balance of the purchase price due the state upon the land in question and they on their part were to convey the land to her, or to whomsoever she might designate. She thereupon paid the defendants $200 to bind the bargain, taking their receipt for the same, and entered into a written agreement in accordance with the terms and conditions of the trade as above stated. The defendants procured an abstract of title to the farm and delivered it to the plaintiff, and it appears that she did not rely on the defendants in this matter at all, but took the abstract of title to one Judge Covell, a practicing attorney in the city of Omaha, for his examination and opinion. Some defects were found in the abstract, which were finally corrected in accordance with the suggestions of her attorney.

In the meantime Holman, the owner of the land, and his wife, returned from Colorado, where they were then living, to Sarpy county; and upon being notified of the pending trade they came to the office of the defendants and executed and delivered a deed of the land to the plain-

tiff. She thereupon procured a deed of the houses and lots in question to be executed and delivered to the defendant Olive D. Buck. A mortgage upon her houses and lots was executed to a loan company represented by Honorable John C. Wharton for a sufficient sum of money with which to pay the difference between the $1,500 in cash to be paid by the plaintiff and the $2,500 which was the cash purchase price of the land, which was to go to Mr. Holman. The negotiations were concluded, the loan procured, the trade was completed, the conveyances were all made, and the deal was thus finally closed. It appears that about a year and a half after the transaction was completed the plaintiff ascertained by inquiry from Holman, the former owner of the land, that he had received from the defendants $2,500 as the purchase price of his land, instead of some Colorado property which she says she understood was to be exchanged therefor. The plaintiff thereupon informed Holman that the defendants had cheated him, and that he ought to sue to recover the houses and lots in question. This he declined to do, and stated to the plaintiff that he had received all that he asked for the land, and was satisfied with the whole deal. Thereafter she conceived the idea that the defendants had cheated her out of her houses and lots, and commenced this action to recover them.

The testimony discloses, without dispute, that the plaintiff was familiar with the values of real estate; that she was, to some extent, a real estate dealer on her own account and for others. Upon her cross-examination she admitted that during her residence in Omaha, of some 15 or 20 years, she had been engaged for herself and others in from 20 to 40 real estate deals. While on the witness-stand she declared positively that she considered the defendants as her agents in making the trade in question; but her statement must give way to the fact as disclosed by the great weight of the evidence, which convinces us that she acted wholly for herself in the transaction complained of. It appears that she knew—in fact, she admitted that she knew—the defendants were the agents of Holman for the

sale of his land—she stated in conversation with several of the witnesses that the defendants said something about their having an option on the land. Four or five disinterested witnesses testified that while the negotiations were pending, and at or about the time the abstract was examined, the plaintiff informed them that she believed the defendants were getting her houses and lots for their commission, but that it did not make any difference to her, because she was making a good trade anyway. This the plaintiff denied, but we are constrained to accept the testimony of disinterested and apparently unprejudiced witnesses in preference to the plaintiff's statements. It appears that the plaintiff was a shrewd business woman, and made no mistake in consummating the trade in question. The value of the land which she procured was at that time from $35 to $40 an acre, the lowest estimate of its value was $35 an acre. It appears that the houses and lots in question which she conveyed to the defendant Olive D. Buck were actually worth at that time between $2,500 and $3,000, the highest estimate of their value being $3,000. It thus appears that she obtained the land in question, worth at that time at the lowest calculation $7,150, in exchange for her houses and lots, worth $3,000, $1,500 in cash, and the assumption of the payment of $568, the balance of the purchase price for the 70 acres of school land. She therefore paid for the land the equivalent of $5,068; she has ever since retained it, and has never offered to convey it either to the defendants or to Holman; she made, by the exchange of the property and money for the Holman land, about $2,000; while the defendants, as their commission on the transaction, obtained an equity in the houses and lots, which the plaintiff conveyed to Olive D. Buck, of the value of $2,000.

At first it seemed strange to us that Holman would part with so valuable a tract of land for so small an amount of money, but he explained that matter upon the witness-stand by saying that he had moved to Colorado at the time he gave the defendants the option on his farm; that he

wanted to dispose of it because at that time the Missouri river had headed for it, and he was of the opinion that it would be all washed away in a short time, and he wanted to get all he could out of it before that contingency happened. It appears, however, that before the plaintiff went to examine the land the river had changed its course, the current having set in another direction, and so the land was left intact, and its undisputed value at the time the trade was consummated, was $7,150.

It follows that the district court was right in his general finding for the defendants, for there appears to be no equity in her case. The judgment of the district court is therefore

AFFIRMED.

ALEX SCHULTZ V. STATE OF NEBRASKA.

FILED APRIL 8, 1911. No. 16,995.

1. **Homicide:** OPERATION OF AUTOMOBILE: MANSLAUGHTER: INFORMATION. Substance of the information stated in the opinion, and *held* sufficient to charge the defendant with the crime of manslaughter by carelessly, recklessly, unlawfully and wilfully driving his automobile on the public streets and highways of the city of Omaha, thereby causing the death of another.

2. ———: ———: ———. One who drives an automobile wilfully, recklessly, carelessly and negligently, and at a rate of speed forbidden by the statute, upon the public streets or highways of this state, and thereby causes the death of another, is guilty of criminal homicide.

3. ———: INSTRUCTIONS: AUTOMOBILES: UNLAWFUL SPEED. On the trial of a person charged with such crime, it is permissible for the court to define an unlawful rate of speed in the language of the statute regulating the use of motor vehicles upon the public streets and highways of this state.

4. **Constitutional Law:** POWERS OF JUDICIARY AND LEGISLATURE. Ordinarily the courts will not substitute their opinions for the judgment of the legislature as to the reasonableness of an act fixing the rate of speed at which motor vehicles may be lawfully driven.

5. **Criminal Law:** INSTRUCTIONS. Where the substance of an instruction requested by the defendant has been given by the court upon his own motion, he is not required to repeat it because of such request.

6. ———: ———. Where there is no evidence upon which to predicate a requested instruction, it is proper for the court to refuse to give it.

7. **Homicide:** OPERATION OF AUTOMOBILE: NEGLIGENCE. Where a person wilfully, recklessly, carelessly and negligently, and at an unlawful rate of speed, as defined by the statute, drives his automobile upon the public streets and highways of this state and thereby kills another, negligence of the driver of another car in which the deceased was riding when he was killed cannot be invoked, under ordinary circumstances, to relieve such person of criminal liability.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

W. W. Slabaugh, J. W. Battin and *S. F. Neble, for* plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

BARNES, J.

Alex Schultz, hereafter called the defendant, was prosecuted in the district court for Douglas county on a charge of manslaughter. His trial resulted in a conviction, and he was sentenced to serve a term of three years in the state penitentiary. From that judgment he has brought the case here by a petition in error.

1. Defendant's first contention is that the information on which he was tried does not charge a crime, in that it fails to state that defendant committed an assault. The charging part of the information reads as follows: "That on the 21st day of June in the year of our Lord nineteen hundred and ten, Alex Schultz, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being in said county, and then

and there being upon a public highway, to wit: at the intersection or crossing of Thirty-fourth and Leavenworth streets in the city of Omaha, which said streets are public highways, and the said Thirty-fourth street at the point aforesaid being a part of the boulevard system of said city, and the said intersection or crossing being a place at which there is much traffic, did then and there negligently, carelessly, recklessly, unlawfully and feloniously drive, propel and operate a motor vehicle, commonly called an automobile, upon said public streets and highways and at said crossing or intersection aforesaid, at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of said streets and highways at the place aforesaid, and having regard to the safety of the public, and did then and there so drive, propel and operate said automobile at a rate of speed so as to endanger the life and limb of persons using and traveling said streets and highways at the point aforesaid, and at a rate of speed in excess of the rate permitted by law, and then and there, while so negligently, carelessly, and unlawfully propelling, driving and operating said automobile, did in and upon one William Krug make an assault, and the said automobile which he, the said Alex Schultz, was then and there upon said streets and public highways, and at said intersection and crossing, so negligently, carelessly and unlawfully propelling, driving, and operating, in and against the said William Krug unlawfully and maliciously did force and drive, and him, the said William Krug, did then and there throw to and upon the ground, curbstone and pavement, and did then and there and thereby give to the said William Krug, in and upon the upper part of the body and head of him, the said William Krug, certain contusions, fractures and mortal wounds, of which the said William Krug on said 21st day of June, 1910, in said county and state did die; and so the said Alex Schultz, him, the said William Krug, in the manner aforesaid, and unintentionally while in the commission of said unlawful act, did then and there unlaw-

fully and feloniously kill and slay; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska."

It thus appears that the information not only charges an assault, but contains every element necessary to constitute the crime of manslaughter. The record also discloses that the defendant fully understood the nature of the charge against him, and conducted his defense in such a manner as to have exonerated himself from criminal liability had the jury believed his evidence. A like question was before the supreme court of Missouri in *State v. Watson,* 216 Mo. 420, upon a similar information, in which the defendant was charged with killing a pedestrian while carelessly, recklessly and negligently running his automobile over and upon a certain street in the city of St. Louis. Speaking of the information in that case, the court said: "This, in our opinion, is a sufficient charge and fully informed the defendant of the nature and character of the offense he was called upon to answer. It was not, in our judgment, essential that the information should undertake to set out in detail in what such carelessness, recklessness and culpable negligence consisted, but the charge that he operated and propelled this automobile along a public street carelessly, recklessly and with culpable negligence was in effect notifying the defendant that he was not using, operating or propelling his automobile in accordance with the law or the ordinances of the city regulating the use and operation of such machines." From the foregoing we are of opinion that the information in this case was sufficient in all respects to charge the defendant with the offense of which he was convicted.

2. Defendant's second and third assignments of error will be considered together. They each, in a different form, raise the question of the rate of speed at which automobiles may be operated upon the public streets and highways of this state. By section 147, ch. 78, Comp. St. 1909, it is provided: "No person shall operate a motor vehicle on a public highway at a rate of speed greater than is reason-

able and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, or in any event in the close built-up portions of a city, town or village, at a greater rate than one (1) mile in six (6) minutes, or elsewhere in a city, town or village, at a greater rate than one (1) mile in four (4) minutes, or elsewhere outside of the city, town or village, at a greater rate than twenty miles per hour; * * * and in no event greater than is reasonable and proper, having regard to the traffic then on such highways and the safety of the public." The trial court by paragraph 5 of his instructions charged the jury in substance that, in order to convict the defendant, they must find from the evidence beyond a reasonable doubt that William Krug was alive June 21, 1910; that on the same day he was killed, and his death was the result of an unlawful act on the part of Alex Schultz; that such killing occurred on the streets of Omaha; that it was the result of a collision between the automobile driven by Schultz at an unlawful rate of speed and the automobile in which Krug at that time was riding. In defining an unlawful rate of speed, the court's instruction, No. 6, stated the substance of the section of the statute above quoted. The giving of those instructions is jointly assigned as error, and it is argued that the conviction cannot be maintained solely because of a violation of the speed limit fixed by law. It will be observed that this case is not prosecuted solely for a violation of the speed limit fixed by the statute, but is based in fact on the negligent, reckless, careless and dangerous driving of his automobile by the defendant. In a recent case in Connecticut the defendant was found guilty of manslaughter in negligently and recklessly driving his automobile over a man named Morgan. In that case the court took occasion to read to the jury the automobile act of that state, which is quite similar to the statutes of Nebraska, regulating the use of automobiles on public streets and highways. It was claimed that it was error to read those statutes and apply them in that case, but the supreme court of Connecti-

cut found no error in the instruction. It was there said: "One who wilfully drives an automobile in a public street of this state at a rate of speed or in a manner expressly forbidden by statute, and thereby causes the death of another, or one who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to cause the death of another is guilty of criminal homicide." *State v. Campbell,* 82 Conn. 671.

It will be observed that by instruction 5 the court told the jury that to find the defendant guilty they must find from the evidence beyond a reasonable doubt that he operated his machine at an unlawful rate of speed. This is explained in instruction No. 6 as a speed greater than is reasonable and proper, having regard to the traffic and the use of the highway, or so as to injure the life or limb of any person, as defined by the words of the statute, and it was thereupon properly left to the jury to determine whether or not the defendant was driving his automobile at an unlawful rate of speed when the collision occurred. We find no error in the instructions complained of.

It is argued that the act regulating the speed of motor vehicles is unconstitutional and void. because it is unreasonable. No authorities are cited in support of this argument, and we doubt if any authority can be found to sustain it. The act seems to be a proper exercise of the police power of the state. The legislature no doubt was aware of this new method of public travel, and, recognizing the fact that the automobile furnishes a means of transportation by which a speed may be attained greater than by any other vehicle in common use, deemed it necessary to regulate its use in such manner as to prevent collisions and accidents like the one in the case at bar, and, having due regard to the safety of life and limb of all persons rightfully upon our public streets and highways, passed the act in question defining the methods of operation and the rate of speed which would in their judgment best subserve the public interest. In such case the courts should not under ordinary circumstances substitute their

opinions for the judgment of the legislative branch of the government as to the reasonableness of such regulation.

3. Error is assigned because of the refusal of the trial court to give instructions 17, 24, and 26, requested by the defendant. By No. 17 the court was asked to instruct the jury that, if they had any reasonable doubt that the death of William Krug was the natural and probable result of the collision, they should find the defendant not guilty. It appears that the substance of that instruction was given by the court on his own motion, and it was unnecessary to repeat it at the request of the defendant.

By instruction No. 24 the court was asked to charge the jury that, if they had any reasonable doubt as to whether or not William Krug was thrown from the gray car because of the plunge forward by the gray car, and that as a result of being thrown from said car he was killed, and that such plunge forward was made by the driver of the gray car, then they should find the defendant not guilty. That instruction was properly refused because there was no evidence upon which to predicate such a defense, as we shall presently see. Instruction 26 was in substance a repetition of instruction 24, and was therefore properly refused.

4. Error is assigned for giving instruction No. 7 by the court on his own motion, and the refusal to give instruction No. 25 requested by the defendant. By instruction No. 25 the court was requested to instruct the jury on the law of contributory negligence, to wit, negligence on the part of the driver of the car in which Krug was riding. In support of this contention defendant cites *State v. Stentz*, 33 Wash. 444. In that case the jury were informed that if they should find from the evidence that the deceased came to his death by the mutual mistake of the deceased and the defendant in the honest endeavor to avoid a collision both on the part of the deceased and the defendant, then in that event such killing would be accidental, and not criminal, and their verdict should be not guilty. But in the same paragraph it was further said: "Gentlemen

of the jury, I instruct you that, if the defendant was at the time alleged in this information engaged in an unlawful act, to wit, the act of driving horses and a wagon upon the public highway in such a manner as to endanger the lives and persons of others, and such unlawful act resulted in the killing of the person named in the information mentioned, it would then be immaterial whether the killing was accidental or intentional. The defendant would be guilty." It will thus be seen that the case cited does not support the defendant's contention. On the other hand, in *State v. Campbell, supra,* the court said: "Contributory negligence, as such, is not available as a defense in a criminal prosecution for a homicide caused by the gross and reckless misconduct of the accused; although the decedent's behavior is admissible in evidence, and may have a material bearing upon the question of the defendant's guilt. If, however, the culpable negligence of the accused is found to be the cause of the decedent's death, the former is responsible under the criminal law, whether the decedent's failure to use due care contributed to his injury or not." The rule of law concerning contributory negligence by the injured person, as a defense in civil actions for damages for personal injuries had no application to this case. The state was required to prove the alleged unlawful act of the accused and its consequences, but not that the deceased exercised due care to avoid the consequences of the unlawful act. The authorities are not in conflict as to this question. Uniformly the courts have said a man will not be excused for killing another, even though his victim was negligent. While contributory negligence is a complete defense to an action for private injury resulting from homicide, it is no defense to a prosecution for a public wrong. 21 Am. & Eng. Ency. Law (2d ed.) 195. We think the refusal of this instruction was clearly right for the further reason that the evidence disclosed no theory upon which such an instruction could be predicated.

It is also contended that there is a distinction between

offenses *mala prohibita* and *mala in se.* The distinction, if any, is not accounted of much practical consequence by the text-writers. 21 Am. & Eng. Ency. of Law (2d ed.) 190; 1 Bishop, New Criminal Law, sec. 333. In *State v. Stanton,* 37 Conn. 421, it was said: "Where a man was knowingly engaged in a criminal act, and untentionally committed a greater offense than the one intended, proof of an intent was not essential to a conviction for the latter crime. We perceive no error in this part of the charge. The defendant claims that the proposition of the court, though correct when applied to crimes which are *mala in se,* is not correct when applied to crimes which are *mala prohibita.* We do not recognize the distinction as law. The cases cited by the defendant's counsel are all cases where the prisoner was engaged in doing a lawful act and the offense was committed through carelessness." There seems to be no conflict in the decisions where the defendant is violating some statute, and where his manner is negligent and careless. The courts in such cases uniformly say that he is guilty of manslaughter if the death of some other person is the result. *Ford v. State,* 71 Neb. 246; *Flinn v. State,* 24 Ind. 286; *Bias v. United States,* 3 Ind. Ter. 27, 53 S. W. 471; *Adams v. State,* 65 Ind. 565; *Thompson v. State,* 131 Ala. 18; *Irwin v. Judge,* 81 Conn. 492; *State v. Watson,* 216 Mo. 420.

5. It is contended that the verdict is not supported by sufficient evidence. This question is not discussed in the defendant's brief. We deem it proper, however, to state the facts as they appear from the record. On the morning of June 21, 1910, the deceased and his friend McCormick were riding in an automobile driven by one William H. Wallace. They were going north on what is called Central boulevard, which is one of the principal streets of the city of Omaha. As they approached the intersection of the boulevard with Leavenworth street, which is also one of the principal thoroughfares of that city, they were driving at the rate of from eight to ten miles an hour. The southeast corner of Leavenworth street, where it crosses the

boulevard, is what is called a blind corner. It appears that trees and shrubs were growing on the east side of the boulevard clear up to its intersection with Leavenworth street, so that persons approaching from the east on that street were unable to see vehicles approaching from the south on the boulevard until they reached the intersection. While the car in which the deceased was riding was crossing Leavenworth street, the automobile driven by the defendant approached the intersection from the east at an excessive rate of speed, and struck it with such force as to cause the death of Mr. Krug. The state produced five or six persons, some of whom were within 100 feet of where the collision occurred and saw the entire transaction, who without substantial variance testified that the defendant's car as it approached the intersection and up to the very instant of the collision was running at a speed of between 30 and 50 miles an hour. It appears that Central boulevard at the place where it crosses Leavenworth street is one of the main-traveled streets of the city of Omaha, and is extensively used by persons driving automobiles; that Leavenworth street is also used by them as well as by all other kinds of conveyances. A number of the witnesses who resided within a few hundred feet of that intersection testified that there was no time of the day during business hours that both of those streets were not occupied by automobiles and other vehicles. It appears that, as the defendant's car approached the intersection, he discovered the presence of the automobile in which the deceased was riding; that he saw a collision was imminent, and, in order to avoid it, he turned his automobile to the left so as to pass behind the one in which the deceased was riding. This was the proper course for him to pursue, and accorded in all respects with the rules of the road. It also appears that when the driver of the car in which the deceased was riding, which was proceeding at a rate of speed not exceeding eight to twelve miles an hour, discovered the approach of the defendant's machine, he applied additional power in an attempt to get out of

the way and avoid a collision. This was the proper course for him to pursue, and in all respects accorded with the rules of the road. Notwithstanding all of this, the speed of the defendant's car was so great that, although he discovered the presence of the other car when he was from 150 to 200 feet distant from it, he was unable to avoid the collision, and struck the Wallace automobile at about the right hind wheel with such tremendous force that it was lifted off from the pavement, thrown into the air several feet, and, while it was going north when the collision occurred, when it again struck the pavement it was facing south. It was thrown from 20 to 25 feet in a northwesterly direction, and landed against a telephone pole at the edge of the curb, while the machine in which the defendant was riding, although it had a wheel broken by the impact of the collision, could not be stopped until it ran a distance of 152 feet, jumped over the curb, which was from ten inches to a foot in height, went across the sidewalk, and hung on the edge of a hole in a vacant lot on the left hand side of the street. At least two of the witnesses who were looking directly at the cars when the collision occurred, testified that the deceased, who was a man weighing over 200 pounds, was thrown into the air from 10 to 15 feet, and a distance of from 25 to 30 feet, and struck on his head on the pavement or curbstone, receiving such injuries that he almost instantly died.

It thus appears that the excessive, unlawful, negligent, and reckless rate of speed at which the defendant was driving his car as he approached the intersection of the boulevard and Leavenworth streets was the sole cause of the collision which resulted in the death of William Krug. It was claimed by the defendant that Wallace, who drove the car in which the deceased was riding, was guilty of contributory negligence in applying his extra power, or, in other words, in attempting to speed up, as some of the witnesses designated it, at the time of the collision. There is no merit in this contention, for the evidence is clear that Wallace, recognizing the danger, attempted in a proper

manner to avoid it, and, if he had not applied his extra power in order to move out of the way, the defendant's machine would have struck his automobile about the center, instead of striking it at or about the right hind wheel. At least two of the witnesses for the state who lived in the immediate vicinity of the intersection in question testified that they had observed the passing and running of automobiles upon both the boulevard and Leavenworth streets for many years, and that in all that time they had never seen an automobile running as fast as the one which the defendant was driving at the time the collision occurred. It is true that the defendant and some of those who were riding in the car with him testified that they were driving at a rate of speed not exceeding 12 to 20 miles an hour. But this testimony must give way to the physical facts shown by the result of the collision. It is utterly inconsistent with such results. Each of the machines with its load weighed something like 5,000 pounds, and the speed at which the automobile driven by the defendant was going was so great, and the impact was so powerful, as to lift the automobile in which the deceased was riding bodily into the air and hurl it the distance of from 20 to 25 feet; not only this, but to completely reverse its direction, so that when it landed against the telephone pole it was facing south, while at the time of the collision it was moving and facing north. The testimony of the defendant and those riding with him serves but to illustrate the axiom of the law of evidence that officers and crews of respective vessels or vehicles where collisions have occurred will defend the vessels to which they are attached. It seems to be a curious psychological fact that, when passengers are aboard of a vessel or other means of conveyance, they appear to be controlled by the same bias. 2 Moore, Facts, sec. 1110.

6. Finally, it is contended that the court erred in excluding the evidence offered by the defendant to prove that McCormick, the friend of the deceased, who sat at his left side in the rear seat of the Wallace car, said within

a minute or so after the collision: "I told the damn fool to look out." It is claimed that this was a part of the *res gestæ,* and was therefore admissible as tending to prove that the driver of the car in which Krug was riding was guilty of contributory negligence. What we have heretofore said in regard to that question is a sufficient answer to this assignment.

We are aware of the importance of our decision of this case, both to the defendant and to the public. The questions presented by the record are before us for the first time, and we have examined them with great care. We recognize the necessity, utility and convenience of the automobile as a means of travel, and it is neither our purpose nor our desire to unnecessarily hamper or restrict its reasonable use. On the other hand, we deem it our duty to hold the persons who make use of such machines to that degree of care necessary for the protection of the lives of all persons who are rightfully upon the public highways and streets of our state. The statute regulating the use of such machines was passed solely for that purpose, and amounts to a valid exercise of the police power of the state. This view accords with the great weight of authority. In Berry, Law of Automobiles, sec. 159, it is said: "One may be criminally responsible for the negligent operation of an automobile. A person is guilty of criminal negligence when he does some act or omits some duty under circumstances showing an actual intent to injure, or when the breach of duty is so flagrant as to warrant an implication that the resulting injury was intended; that is, when his negligent conduct is incompatible with a proper regard for human life. Negligence is the gist of the offense, and, in the absence of recklessness or of want of due caution, there is no criminal liability. Actual intent is not an essential element of the offense. It is enough if there is shown a neglect and reckless indifference of the lives and safety of others." The evidence contained in the rcord conclusively establishes a case of negligent and reckless indifference to the lives and safety of others on the part of

the defendant sufficient to sustain his conviction and justify the judgment of which he complains.

We find no reversible error, and the judgment of the district court is

AFFIRMED.

LAMOREAUX & PETERSON, APPELLANTS, V. PHELAN, SHIRLEY & CALLAHAN, APPELLEES.

FILED APRIL 8, 1911. No. 16,368.

1. **Contracts:** ACCEPTANCE. Where an offer is made by A and accepted by B with the further agreement that B shall at once proceed to examine the subject matter of the contract to ascertain whether it corresponds with the representations made and shall immediately notify a designated employee of A whether he will accept the contract, notification to that effect to the proper person before a withdrawal of the offer and within the time contemplated by the parties will constitute a meeting of the minds and will close the contract.

2. ———: RESCISSION: MISTAKE. Where, after its acceptance, a party seeks on the ground of mistake to be absolved or released from an offer to contract, the fact concerning which the mistake was made must be material to the transaction, and of such a nature that, if the real facts had been known to him, he would not have made the offer. If the mistake was with reference to some fact not essential to the terms of the contract, or if it is not of such a nature that the conduct of the offering party was really determined or controlled by it, or if he would have made the offer even if the fact had been known to him, then he is not entitled to any relief on the ground of mistake.

3. ———: ———: ———. Where an offer was made by one partner to enter into a contract with another person to remove earth at a stipulated price per cubic yard, extending over several miles of a line of railroad in process of construction, the fact that before the offer was made another partner in the firm had already let a contract for a small portion of the offered work, which fact was unknown to the partner making the offer, does not necessarily constitute a mutual mistake between the parties to the contract.

4. ———: ———: ———. Evidence examined, and *held* that under the circumstances in this case the defendants are not entitled to be relieved from their offer on the ground of mistake.

5. ———: ACCEPTANCE. An offer was made in Omaha by a firm of railroad contractors to another firm engaged in the same business to let them a contract to do a large amount of grading in Montana involving the removal of nearly 600,000 yards of material at a stipulated price per yard, which offer was accepted with the condition that the firm to which the work was offered should at once examine the proposed work to ascertain whether it corresponded with the representations made, and should immediately notify a designated employee at the place where the work lay whether the firm would accept the contract. A member of the latter firm at once went to Montana for this purpose. Before the examination was made, he was informed by this employee, who had no authority to vary or modify the terms of the offer, that a portion of the work containing about 15,000 yards had been let to other parties before the offer was made, to which he replied in substance that it was a small matter and made no difference. He then told this employee that the work was as represented and that his firm accepted. *Held*, first, that the inclusion of the portion of the work which had been previously let was not an essential element in the making of the contract, and that the notice to the designated employee that his firm accepted and would do the work was an unconditional acceptance of the offer made.

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

D. W. Merrow and *J. W. Woodrough*, for appellants.

Mahoney & Kennedy, contra.

LETTON, J.

This is an action for loss of profits arising from the alleged breach by defendants of a grading contract. At the close of the testimony in behalf of plaintiffs, the defendants moved for a directed verdict on the ground that the evidence was insufficient to establish the existence of a contract. The motion was sustained, and a judgment of dismissal entered, from which plaintiffs appeal.

The firm of Lamoreaux & Peterson is composed of Albert A. Lamoreaux and Edward Peterson. The members of the firm of Phelan, Shirley & Callahan are Ed-

ward Phelan, Michael Shirley, and William Callahan. Both parties are railroad contractors. In March, 1907, defendants held a contract to do a large amount of grading upon the Pacific coast extension of the Chicago, Milwaukee & St. Paul Railway Company in Montana. On March 28, 1907, a conversation was had in the office of plaintiffs in Omaha between Messrs. Lamoreaux & Peterson and Michael Shirley of the defendant firm. Plaintiffs' account of this conversation is in substance that at that time Shirley produced two profiles, one showing a section of work west of Forsythe, Montana (hereafter referred to as the west work), containing approximately about 400,000 yards of material to be removed, the other profile covering what will hereafter be designated as the east work. Shirley at first proposed to let a contract for the west work, but, upon being told more work was wanted, he said there was about 200,000 yards on the east work which they could have. An extended conversation took place with reference to the width of the cuts, the material to be removed, the quality of the water in that locality, the distance of the work from the town of Forsythe, and the condition of the roads for hauling supplies, also as to the price to be paid for moving the various kinds of material, which was fixed at 23 cents for earth work, 35 cents for hard-pan, 40 cents for loose rock, 55 cents for sand rock, 75 cents for solid rock, and 1 cent a yard for overhauling over 600 feet. Shirley also stated that the work must be done by November 1, 1907. In the profiles produced by Shirley, the line of railroad grade is marked with numbers at distances of 100 feet, which are known as stations. The profile of the west work included 162 stations. Shirley marked the profile of the west work at station 8,010, and said that he wanted to let all of the work from station 8,010 to the west end of the profile, station 7,390, and station 8,613 to station 2,159 on the profile of east work. Plaintiffs testify that they then accepted the offer with the reservation that Peterson should go to Montana that night to

examine the work, and it was agreed that, if he found it as represented by Mr. Shirley, he was to notify George Campbell, who was the foreman of Phelan, Shirley & Callahan at Forsythe.

It may be well at this stage to examine the pleadings as to the making of a contract. The petition alleges the details of the offer, alleges its acceptance by the plaintiffs, "but (plaintiffs) reserved the privilege of first visiting that portion of the roadbed to be so graded with the understanding that, if the work was such as defendants represented it to be to plaintiffs, the plaintiffs were to notify the defendants' agent then upon or in charge of defendants' business on said portion of said roadbed, whereupon the said contract for doing said work was to become absolute and binding upon the parties plaintiffs and defendants." It further alleges that on April 1 the agent was notified as had been agreed upon, "and thereupon the contract became absolute between the parties and binding on them."

The answer denies that the offer included all the work named in the petition, and alleges that defendants "made an oral proposition to the plaintiffs to sublet to said plaintiffs the grading of stations numbered 7,400 to 8,010, * * * at the prices stated in the petition of plaintiffs upon condition that the plaintiffs should inspect said work, and immediately upon such inspection telegraph defendants from Forsythe, Montana, an acceptance of said proposition," and afterwards agree upon the details of a written contract setting forth the terms of the contract and the specifications for the work. It further alleges: "That before said offer was made to plaintiffs by the defendants one of the members of the defendant firm had sublet to another party stations numbered 7,925 to 8,010. Said subletting was not known to the member of the defendant firm who made the aforesaid offer to plaintiffs at the time said offer was made, but after said offer was made, and before the member of the plaintiff firm * * * had made an examination of said work or had

signified any purpose to accept the aforesaid offer, said member of plaintiff firm was notified and informed of the fact that said stations had been sublet to another party." It pleads this was a withdrawal of the whole offer, and further denies the acceptance of any proposition, and that any contract was ever agreed upon. The reply is practically a general denial.

Returning to the testimony: Peterson left for Montana that night, taking with him another railroad contractor named Nicholson. He reached Forsythe on Saturday. Callahan of the defendant firm had a grading camp about 17 miles east of Forsythe. The east work was about two miles east of Callahan's camp. Peterson went to the camp, and on Sunday morning he, Nicholson, and Campbell started to drive to the west work, which was a distance of about 30 miles west. On the way Campbell told him that the work from 8,010 to 7,965 had been let to another party. Peterson said: "That did not make any difference about that little piece of work; didn't amount to nothing anyhow." The weather was inclement and the roads were muddy, so they turned back and went to look at the east work. While examining it, Campbell told Peterson there was another mile of work east of it they could have if they wanted it, which had been let to other parties who were not able to complete it. The next day they examined the west work, and after doing so Peterson told Campbell the work was "good work and just as Mr. Shirley had represented," and they "would take it." They then went to see the engineer in charge of the work, and Peterson arranged with Campbell to have a well dug and to furnish grain for the teams. When they returned, Campbell showed Peterson a telegram which had been received from Shirley, dated Omaha, April 1, reading: "Has Peterson taken work he looked at? Answer. Phelan, Shirley & Callahan." Peterson told Campbell to answer it at once, and went to the telegraph office at Forsythe with him. Campbell went in the room where the telegraph operator was. Peterson sent a

message to Lamoreaux. Nicholson and Peterson stopped at Billings, Montana, on their way home. They met Callahan at a hotel at that place. Callahan asked how the work was, and Peterson told him it was all right and just as Shirley represented it, and that he had arranged with Campbell to dig a well and deliver feed. They arrived in Omaha on the 4th of April. On that day a letter was received from Shirley, addressed to Lamoreaux & Peterson, dated at Aberdeen, South Dakota, on April 2. In substance this letter stated that he had received a telegram from Campbell saying Peterson liked the work and would sign up for it on his arrival in Omaha, also stating that they could have the work from station 7,925 to the west end of the profile; that at the time he told Peterson he could have the work from 8,010 west the work was let from 8,010 to 7,925; also stating the work would have to be completed before October 1, 1907, restating the price the same as in the oral conversation, and saying: "If you decide to do this work, you can ship at once and we can make contract when I get home to Omaha. * * * If you decide you don't want this work, wish you would please notify Mr. O'Hanlon at once on receipt of this letter at our office, or you can call him up over the phone, but I would like to have you do this work. I don't want you to wait until I get home for you to decide whether you want the work or not." On April 5 Peterson had a conversation with one O'Hanlon, an employee of defendants, at the defendants' office. After this conversation, and on the same day, plaintiffs sent the following telegram to defendants at Forsythe: "How much work can we have east of Callahan camp? Lamoreaux & Peterson." On the evening of the 5th a reply was received from Mr. Shirley at Forsythe, saying: "None east Callahan's camp. Do you want the other? Answer." In reply to this a night message was then sent by plaintiffs, saying: "We want and insist on having all the work agreed upon between us before Peterson left Omaha. Lamoreaux & Peterson."

Peterson testifies that his intention was by this to include as east work 8,613 to 2,519, and as west work 7,390 to 8,010, and that at the time he sent it he knew that 7,925 to 8,010 had been let before he talked with Shirley. At 3:25 on the afternoon of April 6, plaintiffs received the following telegram from Mr. Shirley at Forsythe: "We will hold work from 7,925 to 7,400 until 2 o'clock today." On April 8 plaintiffs received a telegram dated Forsythe, April 7: "You did not do as you agreed. Let work to another party. Phelan, Shirley & Callahan." This terminated the negotiations. The evidence further shows that the parties were acquaintances of long standing, and that plaintiffs had some time past performed a great deal of work under a subcontract for Phelan & Shirley in Iowa and Missouri without a written contract. It also shows that Callahan was in Omaha about March 30; that he at that time sent one O'Connor to Montana to look at work, and that O'Connor on April 8 contracted for a part of the work at a reduced price. It should be said that O'Connor testifies he was told that he was second, and that if the first parties did not take the work he could have it.

The sole question presented is whether the evidence makes a *prima facie* case showing the existence of a completed and binding contract between the parties. Assuming the facts to be as the plaintiffs testify, it is clear that the conversation in Omaha amounted to a proposal by Shirley and a conditional acceptance by Lamoreaux & Peterson. The plaintiffs' position is that, when Peterson told Campbell that the work was as represented by Shirley, was good work, and that they would do the work, this was an acceptance of the proposition and constituted a complete and binding contract. The defendants' position is, to quote from their brief, "that before Peterson had examined any of the work, either east or west, he was notified that a part of the work included in Shirley's proposition at Omaha had already been let to another party, and that upon that account defendants could not

let to the plaintiffs the identical work embodied in Shirley's proposition. In other words, he was notified that Shirley's proposition was withdrawn. This notice was reinforced by Shirley's letter from Aberdeen. What did Peterson say when he was told that stations 7,925 to 8,010 were already let, and that his firm could not have them? The only answer that he claims to have made was, as above shown; 'That did not make any difference about that little piece of work, didn't amount to nothing anyhow.' What does this answer mean? Does it mean that the fact that defendants had already let the work to another party makes no difference as to the rights of the plaintiffs, and that plaintiffs will insist that defendants break their contract with the other party and still give this work to plaintiffs, or does it mean that plaintiffs are willing to accept the remainder of the work without these 85 stations? * * * If it means * * * that plaintiffs will accept what remains of the work after cutting out these 85 stations, then it is not an acceptance of the identical offer made in Omaha, but is in the nature of a counter proposition, which is always a rejection of the original proposition."

It is also argued that the belief on the part of Shirley and the plaintiffs that it was within defendants' power to let 7,925 to 8,010 was a mutual mistake, and that no acceptance was made that did not include 7,925 to 8,010. Defendants have cited a number of authorities in support of the proposition that, if the acceptance of an offer is coupled with a condition which requires a counter acceptance, the minds of the parties do not meet and no contract is concluded. The proposition is elementary and requires no citation of authorities to support it, but it is not applicable here, because Peterson made no conditions when he told Campbell they would do the work. Did Peterson's acceptance and notification to Campbell close the contract? Plaintiffs were offered the contract to grade a definite section of track. They accepted subject to the privilege of examination and with the duty of

notifying Campbell of the acceptance. Before examination Campbell, who it is conceded by defendants was not vested with any authority to change or modify the offer or to do aught in the matter except to communicate to headquarters the fact whether Peterson accepted or rejected the proposition, told Peterson that a portion of the work had been let. Did this constitute a withdrawal of the offer before acceptance? The portion of the work spoken of was relatively small, about 15,000 yards, and it was not essential that it should be performed by the party contracting to do the other work. It was not like a portion of a building, a bridge, or other structure, work on a portion of which by others might be an obstacle to the proper carrying out of the contract. The proposed contract was to remove earth, rock, and other material to be paid for by the cubic yard. It could make no material difference to defendants whether plaintiffs removed the material on this section of the work or whether others equally reliable did so. The only thing of consequence to them was that they should be satisfied as to the persons with whom they contracted and as to the price, and since they had already made a contract with others these matters must have been satisfactory. Under these circumstances it could really have been a matter of little moment to them whether plaintiffs or Cartwright & Rumelhart held the contract for this portion of the work. They were apparently willing to deal with either. Moreover, the letter of Shirley from Aberdeen shows that the fact that 85 stations were let had no effect upon his mind with respect to the acceptance by plaintiffs of the remainder of the work. Defendants were still willing to allow the remainder of the west work to be done by plaintiffs for the same price.

These considerations apply likewise to the question of whether defendants were entitled to be relieved from their offer on the ground of mistake. Mr. Pomeroy says, speaking of the power of equity to relieve against mistakes: "The fact concerning which the mistake is made must be

material to the transaction, affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in either case the mistake will not be ground for any relief affirmative or defensive." 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 856. In *Grymes v. Sanders*, 93 U. S. 55, Mr. Justice Swayne says: "A mistake as to a matter of fact, to warrant relief in equity, must be material; and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved." See, also, 1 Page, Contracts, sec. 155.

Again, subject of course to exceptions, it is a general rule that an offer to contract can only be revoked or withdrawn by one vested with authority to do so. Under the facts in this case, so far as the plaintiffs were concerned, unless the offer had been withdrawn either by a member of the defendant firm or by some one authorized to act for them with respect to the proposal, the contract was closed when it was unconditionally accepted by Peterson. Suppose that after this acceptance, accompanied as it was by the arrangements made with Campbell for the digging of a well and for the furnishing of grain and hay, plaintiffs had refused to perform the contract, and defendants had been obliged to employ others at an increased compensation to do the work, could the plaintiffs (especially after having stated that the fact of the previous letting of the 85 stations made no difference) be heard to say that they had not accepted, or that the offer

had been withdrawn before they accepted it? We think not. Two answers could be given to such a claim: First, that Campbell had no authority to modify or change the terms of the offer, and consequently the acceptance bound both parties (1 Parsons, Contracts (5th ed.) sec. II, p. 480 *et seq.;* 1 Addison, Contracts, p. *40); and, second, that after plaintiffs knew the facts they accepted, and at the same time waived their right to damages. We are of the opinion that, when Peterson notified Campbell that his firm would do the work, it was an acceptance of the offer; that waiving their right to the section let to Cartwright & Rumelhart was not a counter proposal; and that the contract was closed by such acceptance. To hold otherwise would be to permit the defendants to take advantage of their own mistake in an unimportant matter to relieve themselves from their offer. We also think that it was not a mutual mistake, as defendants' counsel maintain. It was the failure of one partner to inform the others of his own action.

The evidence which has been narrated of events following the acceptance of the offer really has no bearing upon the question now considered, except as it may furnish light respecting the truth of the testimony. As to the conclusion to be drawn from the facts, plaintiffs insist that the sinister inference may be made that defendants deliberately broke the contract upon ascertaining that the work could be let at a lower price, while defendants maintain that, among other evidence, the letter of Mr. Shirley shows an earnest desire to have plaintiffs enter into a contract, and that it was the intention of both parties that a written contract should be made before it was effective. With these matters at this stage of the case we have nothing to do, since we find that by the acceptance by Peterson the minds of the parties met and the contract was closed. This, in connection with evidence as to loss of profits, was sufficient to make a *prima facie* case to go to the jury.

We are therefore of opinion that the learned trial court

erred in directing a verdict for the defendants. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

SOLOMON DAVISON, APPELLEE, V. GEORGE A. LAND, APPELLANT.

FILED APRIL 8, 1911. No. 16,382.

Trial: DIRECTING VERDICT. At the conclusion of the plaintiff's evidence, plaintiff and defendant each moved the court for a directed verdict. Defendant then asked to withdraw his motion and to be allowed to introduce evidence. This request was refused, and a verdict directed for plaintiff. *Held,* That in such case prejudicial error will not be presumed, and the judgment of the district court will be affirmed under section 145 of the code, where the record does not disclose any facts showing that defendant suffered any prejudice or that he had a substantial defense to the action.

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

J. L. White, E. P. Pyle and *L. M. Graham,* for appellant.

C. H. Tanner and *Perry, Lambe & Butler, contra.*

LETTON, J.

This is an action for damages for the tearing down of a portion of a line fence by the defendant. The answer was a general denial. A number of witnesses were examined on behalf of plaintiff. The evidence tended to prove that defendant interfered with and damaged the fence, and that the cost of necessary repairs would not exceed $1.50. When plaintiff rested, defendant moved

for an instructed verdict in his favor. Plaintiff also moved that the jury be instructed to return a verdict in his favor. Defendant then asked to withdraw his motion for an instruction, and to be allowed to call a witness in his own behalf. This request was refused, and the court announced it would instruct for plaintiff. The jury were thereupon instructed to return a verdict for plaintiff for his actual damages, not exceeding the sum of $1.50. Exceptions were taken to these proceedings, a motion for a new trial filed and overruled, and judgment rendered on this verdict.

The defendant complains of the refusal of the court to permit him to withdraw his motion and introduce testimony. Where parties each request a direction to the jury for a verdict in their favor, they submit the case to the court upon an issue of law. *Segear v. Westcott,* 83 Neb. 515; *Dorsey v. Wellman,* 85 Neb. 262. Where a party seasonably desires to withdraw such a request and to introduce evidence, the court should allow it to be done. It is elementary, however, that error will not be presumed, but must affirmatively appear. The record does not disclose any facts showing that the defendant suffered any prejudice by the ruling. We are not informed as to the nature of the evidence he desired to introduce, or as to whether it would constitute a defense. Under the circumstances of this case, we cheerfully apply section 145 of the code and affirm the judgment of the district court.

AFFIRMED.

HERMAN MEYER, APPELLANT, V. CHARLES PERKINS, APPELLEE.

FILED APRIL 8, 1911. No. 16,354.

Fences: DIVISION FENCES: ESTABLISHMENT BY AGREEMENT. **An oral contract between the owners of coterminous tracts of real estate that a hedge fence theretofore planted by one of them practi-**

cally upon the dividing line between their farms shall be a division fence, that one proprietor shall own the northern half thereof and shall care for and repair it and the other shall own, care for and repair the other half, after the agreement has been executed and observed for more than ten consecutive years, is binding upon the parties thereto and such of their successors in title as have notice thereof.

2. ———: ———: REMOVAL. After the hedge has been divided, neither proprietor has a right to remove his portion, except between the first day of December and the first day of the following April, and after having given the 60 days' notice provided for by section 10, art. II, ch. 2, Comp. St. 1889, unless he immediately replaces the hedge with some other lawful fence.

3. ———: ———: MAINTENANCE. In the event that a hedge thus divided shall have grown so as to interfere with the use of the adjoining land and the respective parties cannot agree concerning the trimming of the hedge, they should submit their differences to the fence viewers to make an order regarding the dimensions to which the hedge may be trimmed and maintained, and, when lawfully made, that order will bind the proprietors.

4. ———: ———: DESTRUCTION: INJUNCTION. A court of equity has authority to enjoin the unlawful destruction of a hedge fence.

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

O. B. Polk, for appellant.

George W. Berge, contra.

ROOT, J.

This is an action to enjoin the defendant from trespassing on the plaintiff's land, and from cutting, destroying or removing any part of a hedge growing, as alleged, upon his premises and close to the boundary. The defendant prevailed, and the plaintiff appeals.

In 1879 John Chapman planted an Osage orange hedge for 160 rods along and but a few inches east of the western boundary of the land now owned by the plaintiff, and from that time made no claim to the

land west of his hedge. In 1889 Mr. Chapman's son-in-law, Perkins, the defendant herein, purchased the land immediately west of Mr. Chapman's land. In 1900 the plaintiff purchased the Chapman farm. The defendant four months after his purchase entered into an oral contract with Mr. Chapman, by the terms of which Perkins was to maintain the south 80 rods of the hedge and Chapman the northern 80 rods thereof. Both of these parties testify that Perkins from thenceforward cared for the southern half of the hedge, that it was their understanding that he became the owner thereof, and that the hedge at all times has been regarded as the dividing line between the respective farms. The testimony of these witnesses is not altogether satisfactory because given in part in response to leading questions, but, taking all of the testimony on this point and the evidence of the conduct of Chapman and Perkins, we conclude that an agreement was made for a division of the hedge fence, and that Chapman waived his right to compensation under the statute. The effect of this agreement and the conduct of the parties thereto for the 11 years intervening between that date and the time Chapman sold his farm to Meyer was to vest in Perkins title to the south half of the hedge burdened with all of the duties which the laws casts upon the owner of a part of a division fence. The plaintiff contends that the hedge is a part of his real estate, that no interest could or can be created therein, except by a writing sufficient to convey title to or an easement in the land, and that the contract between Perkins and Chapman does not bind the plaintiff because at the time of his purchase he had no notice that Chapman had incumbered the farm with an easement in Perkins' favor. At the time the hedge was planted, article II, ch. 2, Comp. St. 1889, was in force. Section 2, art. II, *supra,* provides that the owners of coterminous tracts of real estate shall each make and maintain a just proportion of a division fence, unless they or either of them elect to let their or his lands lie open. Section 3 provides: "When any per-

son shall have chosen to let his lands lie open, if he shall afterwards enclose the same, or if the owner of lands adjoining upon the enclosure of another, shall enclose the same upon the enclosure of another, he shall pay to the owner of the adjoining lands a just proportion of the value, at the time, of any division fence that shall have been made by such adjoining owner, or he shall immediately build his proportion of such division fence." The value of the fence and the amount one owner shall contribute, if not agreed to by the parties, is to be settled by fence viewers who are to be selected from the justices of the peace in the county.

Section 10, art. II, *supra,* provides that any person who shall have made his proportion of a division fence may remove the same between the 1st day of December and the 1st day of the following April by giving 60 days' written notice to the other party in interest. While the statute provides a procedure for ascertaining and fixing the rights and duties of coterminous proprietors with respect to a division fence, it is not exclusive, but they may by contract adjust their respective rights and obligations. The authorities are conflicting as to whether a contract of that character is within the statute of frauds. Respectable authorities hold to the contrary. *Guyer v. Stratton,* 29 Conn. 421; *Baynes v. Chastain,* 68 Ind. 376; *Ivins v. Ackerson,* 38 N. J. Law, 220; *Henry v. Jones,* 28 Ala. 385; *York v. Davis,* 11 N. H. 241; *Blood v. Spaulding,* 57 Vt. 422; *Walker v. McAfee,* 82 Kan. 182, 27 L. R. A. n. s. 226. Perkins by electing to use the hedge to enclose his field became liable to Chapman for one-half the value of that fence, and the fact that Chapman was willing to waive that compensation in consideration of their relations and of Perkins' agreement to maintain the south half of the hedge cannot concern a subsequent purchaser. Meyer knew at the time he purchased the farm that the hedge was and had been for years a division fence; he knew that Perkins became liable for contribution many years preceding the time Chapman transferred the farm;

he also knew, or should have known, that no award of compensation for Mr. Chapman and no report of a division of the fence had been filed in the office of the county clerk, and that therefore there probably was an existing contract, possibly in parol, between Chapman and Perkins with respect to that subject. The hedge must have attained such dimensions at the time of the plaintiff's purchase that he knew, or should have known, that it had been growing many years, so that, if Perkins' interest therein should be considered an easement in the Chapman farm, it was open and notorious, so as to put Meyer upon inquiry. *Arterburn v. Beard,* 86 Neb. 733. The plaintiff testified in substance that he did inquire of Mr. Chapman, and was told that the hedge all belonged to him, but no inquiry was made of Mr. Perkins. In the light of the facts in this case, it is immaterial whether the contract was oral or written. It has been executed and acted upon for more than ten years, and the situation and condition of the hedge gave ample notice of Mr. Perkins' rights. But, while the defendant acquired an interest in the hedge, he did not have a right to destroy or render it valueless for the purposes for which it was planted. Perkins, when restrained, had cut the hedge trees flush with the earth, or nearly so, for a space of 30 rods, and, until the sprouts shall grow and attain a considerable size, the hedge at this point will not perform its office as a division fence. We do not think the defendant should be thus permitted to work his will. If, as he argues, the hedge had grown so as to shade and render useless for agricultural purposes a strip of valuable land, and good husbandry dictates that the hedge should be trimmed and restrained within more narrow bounds than it now occupies, and he cannot agree with the plaintiff as to the extent of that trimming, we are of opinion that he should call upon the fence viewers to fix those limits. Section 29 of the original fence law (Rev. St. 1866, p. 10) provided: "Any structure or hedge, or ditch in the nature of a fence used for the purposes of en-

closure, which is such that good husbandmen generally keep, shall be deemed a lawful fence." The act of February 12, 1867 (Comp. St. 1889, ch. 2, art. II, sec. 18) describes a lawful fence, whether rail, board, rail and post, pole and post, or wire. This act deals with the dimensions of fences, including Osage orange hedge. The provision in subdivision 3 of said act that an Osage orange hedge "shall be such as the fence viewers shall decide a lawful fence" in our judgment vests the fence viewers with authority to adjust any differences that may arise between the owners of a division hedge fence, and to make an order concerning the limits within which it may be restrained so as to conform as nearly as may be to the artificial fences described in the statute. If Perkins preferred to substitute for his half of the hedge any other lawful fence, we are of opinion that he had the right to do so, but he does not contend that he intended to substitute a fence for the hedge, but pleads and testifies that cutting the hedge trees flush with the earth would improve the hedge. While this might be the fact if sufficient time were allowed for the hedge to grow, we do not think the plaintiff should be deprived of a fence during that period.

The defendant argues that the plaintiff should have appealed to the fence viewers, and not to the courts; but, in view of the fact that the defendant was rapidly destroying the hedge and did not propose to substitute a lawful fence, an order made by the fence viewers would come too late and would not furnish an adequate remedy. Equity will restrain the unlawful destruction of a hedge. *Sapp v. Roberts,* 18 Neb. 299.

We do not think that the plaintiff has any such an interest in the severed hedge trees as to entitle him to a judgment for their value, but if the defendant did not proceed in accordance with the fence law, or if he does not propose to immediately replace the hedge with a lawful fence, the plaintiff is entitled to a judgment restraining the further unlawful destruction of the hedge,

and, upon proper averments, for such damages as he may have suffered by the absence of a fence between the litigants' farms. There is no proof that the fence law was observed by the defendant, and a consideration of the entire record induces the belief that it was ignored by him. We do not care to make a finding to that effect, but shall permit the parties to make proof of the facts by granting a new trial. If it shall then appear that the fence law has not been observed by the defendant, or that he did not intend to immediately construct a lawful fence in place of the hedge, he should be enjoined from further unlawfully cutting down the hedge trees.

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

REVERSED.

LETTON, J., not sitting.

PETER P. WHITE, APPELLEE, V. CHARLES H. SLAMA, APPELLANT.

FILED APRIL 8, 1911. No. 16,786.

1. Elections: ELECTORS: RESIDENCE. If a man whose family resides in a foreign country or in a sister state comes into Nebraska temporarily for the purpose of working upon a railway, and while engaged in that vocation boards in a box car which is moved from station to station according to the directions of his superintendent, and as his work progresses, and immediately after the work is completed departs from the community, and while there performs no act other than to vote, nor makes any statement tending to prove an intention to acquire a residence in this state, he is not a resident within the meaning of section 1, art. VII of the constitution, nor an elector, notwithstanding the car in which he boards may have remained on a side-track in a voting precinct during the greater part of four months next preceding the election.

2. ———: ILLEGAL VOTES: CIRCUMSTANTIAL EVIDENCE. Circumstantial evidence is competent to prove which candidate received the benefit of illegal votes cast at an election.

3. ———: MARKED BALLOTS. A ballot should not be treated as void solely because it is marked in a peculiar manner; but, if the voter's intention can be ascertained from an inspection of the ballot, it should be counted in accordance with that intent.

4. ———: ———: PRESUMPTIONS. Ordinarily, in the absence of extrinsic evidence, the court will not presume that an irregularly marked ballot was thus prepared for the purpose of identifying the elector.

5. ———: ———. A ballot marked solely with a line or combination of lines wholly within a party circle should be counted for the candidates of that party, if there is no evidence that the lines were traced for the purpose of identifying the ballot.

6. ———: ———. A ballot marked with a well-defined cross within a party circle should not be rejected because of marks without that circle which extend into another party circle, where it appears from all of the lines that the elector intended the cross to evidence his vote.

7. ———: REJECTED BALLOTS. Where no more ballots are cast than the number of electors voting, and upon a recount one of those ballots is found in an envelope marked by the election board "rejected," and transmitted under their seal as part of their record to the county clerk, but neither the ballot nor the envelope is marked "spoiled" or "unused," and it appears probable from the testimony that the ballot was thus segregated from the other ballots by mistake, it should be counted, if fair on its face and not impeached by any fact or circumstance appearing in the evidence.

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

C. B. Peterson, B. E. Hendricks and *Simpson & Good,* for appellant.

E. P. Smith, J. H. Barry and *H. Gilkeson, contra.*

ROOT, J.

This is an appeal from an order of ouster entered in the district court in proceedings instituted to contest the incumbent's title to the office of county judge of Saunders county. The district court found that White, the con-

testant, received 2,029 and Slama, the incumbent and contestee, 2,009 legal votes. The contestee argues that 36 votes cast for him were not counted and 9 too many votes were counted for the contestant.

We will first consider the alleged illegal votes which the court deducted from the incumbent's vote as canvassed and returned from Union precinct. The proof shows that in April, 1909, 25 Italian laborers came from Chicago to Ashland, in Saunders county, and during the spring and summer worked upon the railway between Ashland, Nebraska, and Sioux City, Iowa. During the warm weather these men cooked their meals and ate and slept out of doors; in cold or stormy weather they boarded and slept in five box cars, which were moved from station to station according to the order of their foreman. None of these men were within the state prior to April, 1909; some of them were married, but, so far as we are advised, their families were in Italy or in Chicago. Six of the men testified in this case, and it unequivocally appears that they are not and never have been citizens or residents of Nebraska, and that at least four of them have not declared their intention to become citizens of the United States. The box cars just referred to were switched upon the side-track at Yutan, in Union precinct, about the 17th of June, 1909, and there remained most of the time intermediate that date and October 29, upon which day the cars and the men were transferred to Fremont, in Dodge county, where they remained until the evening of November 1, at which time they were brought back to Yutan.

In the forenoon of November 2, election day, the Italians worked upon the railway grade, destroyed garbage that had accumulated in the neighborhood of the cars during the preceding weeks, and burned discarded railway ties. The preceding evening a Mr. Schulze, a saloon-keeper who affiliates with the republican party, stored two kegs of beer in a local merchant's ice chest for the use of these men; in the forenoon of November 2

Tony Caliendo, interpreter and time-keeper for the Italian workmen, and Mr. McDermot, their boss, who also affiliates with the republican party, conferred with Schulze. At this meeting Caliendo was told to take sample ballots, which were furnished him by Schulze, and instruct the Italians to vote by making a cross in the second party circle, which would, if received by the election board, cast a vote for all of the republican nominees. Caliendo took the ballots, interviewed all of the Italians at the boarding cars, gave every man a sample ballot containing a cross in the republican party circle, and told him how to vote. Between 12 and 1 o'clock the 25 Italians, including Caliendo, in company with McDermot, went in a body to the polls and voted while the democratic judge of election was absent for dinner. In the afternoon of that day the Italians consumed the beer provided by Schulze for their benefit, engaged in various amusements, and about 6:30 o'clock the following morning departed from the county, to which none of them, with the exception of Caliendo, have since voluntarily returned.

About the 1st of January, 1910, seven of these men were arrested for violating the election laws, and subsequently six of the prisoners testified for the contestant. Caliendo stated the facts in substance as we have detailed them, and said that he voted a ticket marked in the second circle; the other five Italian workmen testified in substance that they were instructed how to vote by Caliendo, and were given sample ballots marked in the second party circle, and that they voted an official ballot marked in that manner. One Italian under arrest was in Wahoo, the county seat of Saunders county, at the time of the trial, but was not called as a witness; the remainder of the 25 laborers had dispersed to points unknown to the contestant. The proof further shows beyond question that one of the Italians signed his name upon the back of the official ballot received and cast by him. This ballot is in evidence and bears a cross mark in the republican party circle. The contestant received but 39 votes in Union

precinct; 38 legal voters were called as witnesses, 29 of whom testified to having voted for White, but 9 claimed privilege and refused to state for whom they voted. Two hundred persons voted in Union precinct; the incumbent received 154 votes, which, added to the 29 votes shown to have been cast for the contestant, leaves 17 votes unaccounted for. Upon the foregoing state of facts, the contestee contends that there is not sufficient proof that the Italians not interrogated as witnesses were not lawful electors of Saunders county, nor that all of them voted for him.

Whether an individual asserting the right to vote has established a residence within the meaning of section 1, art. VII of the constitution, is a judicial question. *Berry v. Wilcox,* 44 Neb. 82. But there is no absolute criterion by which to determine that fact. In *Berry v. Wilcox, supra,* it is said: "One's residence is where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove." In the case at bar these laborers had no boarding place other than the box cars, but they could have entertained no thought that Yutan, more than Ashland, Fremont or any other station upon the line of railway, was the point to which they expected to return when, in obedience to orders, they shifted from one locality to another upon the line of the railway, nor did they have any control over the movements of these cars; all of their tools and personal effects were removed with them October 29, when they rode to Fremont, and if their foreman had not, in obedience to directions from his superior, ordered the cars returned to Yutan, these men would not have returned to Union precinct.

We are unable to discover a single element, other than the bodily presence of these men in Union precinct on the day of election and their age, tending to establish their qualifications to vote at the election in question. On the

other hand, we think the established facts and the deductions which a court should draw from other facts appearing in the evidence not only justify, but imperatively require, a finding that they were not qualified electors. *People v. Teague,* 106 N. Car. 576; *Howard v. Skinner,* 87 Md. 556, 40 L. R. A. 753; *Sorenson v Sorenson,* 189 Ill. 179. McDermot, the foreman of these men, was unmarried and resided in Fremont; he also voted at the election. The evidence discloses that he registered in Fremont as a republican and affiliates with that party.

Having found that the votes were illegal, the next inquiry is whether the evidence will justify a finding that they were cast for Judge Slama. The voter is in the best position to know for whom he voted, but circumstantial evidence is competent to prove that fact, and where the facts and circumstances from which the finding is made are clearly established, and the inference is the only one which can fairly and reasonably be deduced therefrom, the court should not hesitate to act upon circumstantial evidence and therefrom find the ultimate fact. *Western Travelers Accident Ass'n v. Holbrook,* 65 Neb. 469. The testimony of Caliendo and of the other Italian witnesses is uncontradicted. So, also, is the testimony of the other witnesses concerning the facts connected with the voting of these men. McDermont is silent; Schulze does not appear; the local republican committeeman, who was present when these men voted, does not testify; and not one of the many suspicious circumstances appearing in the evidence are in any manner explained by the contestee. Some of these circumstances, if segregated from the others or skilfully arranged in groups, may seem inconclusive, but when weighed separately and compared as a whole, giving to each due weight, in combination they constitute convincing proof. In this connection we quote the language of Mr. Justice Clifford, reported in *The Slavers,* 2 Wall. (U. S.) 383, 401: "Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by

moral coincidences, be sufficient to constitute conclusive proof." And so it seems to us an application of the rule to the facts in the case at bar permits but one conclusion, and that is that these illegal votes were cast for Judge Slama.

In considering the argument that some of these ballots may have been cast for the contestant, and that there is no proof that the Italians voted straight ballots, it may be said that these men did not vote for candidates or for individuals; they had no comprehension of the elective franchise, but were following orders to put a cross in a definitely described circle. If that act, in connection with depositing the ballots in the ballot box, counted for Judge Slama, well and good; if for the contestant, Mr. White, they would have been in no manner disappointed or disturbed. We entertain no doubt that the mark was inscribed in the second circle upon every one of the 25 ballots cast by the Italian laborers. *Sorenson v. Sorenson, supra; Rexroth v. Schein,* 206 Ill. 80; *Widmayer v. Davis,* 231 Ill. 42; *People v. Teague, supra; Black v. Pate,* 130 Ala. 514. The fact that one Italian within the jurisdiction of the court was not called as a witness is an exculpatory circumstance, but it does not destroy the probative value of all the other undisputed facts and circumstances appearing in the record with respect to the issue under consideration. There is no proof in the record that Judge Slama was responsible for the conduct of these Italian laborers, and counsel for the contestant, at the bar, disclaimed any such contention, but for the purposes of this case it is immaterial whether party organization or misguided personal zeal inspired this plain violation of the law. No court should permit a candidate to hold an office by virtue of such a fraud. While the evidence is not so strong that McDermot voted the republican ticket, we think it is *prima facie* sufficient. Notwithstanding what has been said, if the contestee is correct that he should have credit for 16 votes not counted by the court and that 9 votes counted for the contestant

should be deducted, the judgment of the district court should be reversed.

The ballot marked exhibit "N" contended for by the contestee should not be counted for him; there is no mark in any party circle upon this ballot, but a cross appears in the square opposite the contestant's name, and a cross was marked in the square opposite the blank line next below Judge Slama's name. If, as the contestee contends, the cross last referred to should be considered as if it were marked in the square opposite his name, a vote was cast for both the contestant and the contestee, and the ballot could not be counted for either. With this ballot eliminated, there remain 15 rejected ballots contended for by the contestee.

Among the nine ballots alleged to have been erroneously counted for the contestant are exhibits 4, D, F, and L. Exhibit 4 is marked solely with a horizontal line in the democratic party circle. Upon exhibit D appears a cross inclosed in an acute angle within the democratic party circle, and no other mark. Upon exhibit F lines were drawn through the names of both candidates, for county superintendent of public instruction and through the names of both candidates for assessor. The name "John Nelson" was written upon the ballot as a candidate for county treasurer, and a cross was marked opposite his name. A cross was also marked in the square opposite the contestant's name. Exhibit L was marked by several crosses within the democratic party circle. The marks upon all of these ballots are within a party circle. Section 146, ch. 26, Comp. St. 1909, among other things, provides that a cross in a party circle casts a vote for every candidate nominated by that party. Section 151, ch. 26, *supra*, also provides that, "when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, then it shall be the duty of the judges of election to count such part." This court has ever construed the Australian ballot law with great liberality, to the end that the voter's intent may be ascertained and given effect.

State v. Russell, 34 Neb. 116; *Spurgin v. Thompson,* 37 Neb. 39; *Bingham v. Broadwell,* 73 Neb. 605; *Griffith v. Bonawitz,* 73 Neb. 622. It seems plain to us that the electors in marking and casting these ballots intended to vote for Mr. White. The contestant, however, argues that exhibits D, F, and L, and exhibit 55, which will be later referred to, are so marked as to permit the identification of the electors who cast the ballots, and therefore should be rejected. No evidence of extrinsic facts was received or offered to suggest why the electors did not content themselves with marking a simple cross, instead of tracing the marks we find upon the ballots, nor do we know why those marks were made. If the evidence suggested that these ballots were thus marked for the purpose of advising a candidate or the public that any elector cast the particular ballot, we should exclude them. Unaided as we are by evidence other than the ballots, we shall not indulge in presumptions of wrongdoing, but shall count them for the candidate for whom they appear to have been cast. *Bingham v. Broadwell, supra; Griffith v. Bonawitz, supra; Gauvreau v. Van Patten,* 83 Neb. 64; *Bates v. Crumbaugh,* 114 Ky. 447; *Woodward v. Sarsons & Sadler,* 32 L. T. (Eng. 1875) 867, 872.

Upon exhibit 55 a cross was marked in the people's independent party circle; random lines were extended from outside to points within the prohibition party circle; a blur appears without, but close to, both of these circles, and lines were drawn from the blur so as to converge near the center of the cross in the people's independent party circle. No other mark appears upon the face of the ballot, except lines drawn by the election board canceling the names of the candidates in road district No. 13. The elector evidently did not believe that he had spoiled the ballot, but thought the election board could ascertain his intention therefrom. The district court construed the ballot as a vote for the contestant. While it is not clear that the elector intended to vote the people's independent party ticket, we are of opinion that the evidence preponderates in favor of the finding of the district court.

Exhibit 42 is a ballot from Oak Creek precinct, and was counted in favor of the contestant; it was found among other ballots in an envelope marked "rejected ballots" and returned by the election board. Neither the ballot nor the envelope was marked "spoiled" or "unused," as the statute requires in case an elector returns a ballot which by mistake he improperly marks. The elector did not make a mark within any party circle, but made a cross opposite the names of various candidates, including the contestant. None of these marks are within the squares, but are upon the leader running from the candidate's name to his party's name. The cross extends more above than below White's leader, and we think evidences the elector's intention to vote for the contestant. There was no excess of ballots cast in that precinct, nor did the district court by counting this ballot increase the vote as canvassed and returned by the local board.

This disposes of six of the nine contested ballots counted by the district court in the contestant's favor, and if all of the remaining ballots contended for by the contestee should be counted in his favor and those objected to by him should be rejected, and we do not determine that they should or should not be thus disposed of, the contestant would still have a majority of two. The contestee did not assign in his motion for a new trial any error because the court did not count exhibit 20 in his favor. Possibly this fact might justify us in ignoring this ballot, and, if we did so, the contestant's undoubted majority would be increased to three. If we should count the ballots as they appear in the record, ignoring technical objections with respect to practice, the contestant, rather than the contestee, would profit thereby. But, since sufficient has been found to sustain the judgment of the district court, it is affirmed without further comment.

AFFIRMED.

REESE, C. J., not sitting.

LETTON, J., concurring.

I concur in the opinion, but I am convinced that at least ten ballots counted for the incumbent by the election board should not have been counted for him.

I also think that the judgment of the district court as to two other ballots counted for White by that court, but not considered or awarded to him by the opinion, was correct and should be followed.

MARY MILLER, APPELLEE, V. JANE WORTH, APPELLANT.

FILED APRIL 8, 1909. No. 16,322.

1. Deeds: CANCELATION: UNDUE INFLUENCE. In equity a warranty deed may be canceled on proof justifying findings that it was a gift from grantor to her sister; that grantor was physically and mentally weak, and that grantee was strong both mentally and physically; that, in addition to their sisterhood, relations of trust and confidence existed between them in business affairs, grantor relying on her sister; that the deed deprived grantor's children of her property, and that these and other circumstances warrant the conclusion that the deed was procured by undue influence of grantee.

2. ———: UNDUE INFLUENCE: RATIFICATION. A deed procured by undue influence as a gift from a person who is weak mentally cannot be sustained on the ground of ratification, where a duly appointed guardian is insisting on a cancelation, and the evidence shows that grantee's influence over grantor has continued without interruption and that the latter has not improved mentally.

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

Matthew Gering, for appellant.

Byron Clark and *W. A. Robertson, contra.*

ROSE, J.

This is a suit to cancel a warranty deed to 80 acres of land in Cass county and two lots in the village of Murray. Mary Miller, plaintiff, was grantor, and her only sister, Jane Worth, defendant, was grantee. The conveyance included practically all of the property owned by plaintiff, but she reserved a life estate. She lived in a house on the lots and received an annual income of $250 from the land. The suit was instituted by her next friend, John Murray, Jr. Later David J. Pitman was appointed guardian and substituted for her next friend. The trial court canceled the deed, and defendant has appealed.

The grounds on which plaintiff demanded relief were mental incompetency of grantor and undue influence of grantee. The pleadings put these facts in issue and the evidence was directed thereto. The question presented is: Under the evidence, should the deed be canceled? The testimony is far too voluminous for extended analysis in an opinion of reasonable length. It has all been examined with care, however, for the purpose of reaching the proper conclusion.

Plaintiff was 62 years of age at the time of the trial, and was then living with her second husband, Chris. Miller. Her only children, three daughters, were the issue of a former marriage with George Young. After the children grew up, their parents were divorced. Two of the daughters were married and had homes of their own. The other daughter lived with her father, who remarried and moved from his home in Cass county to Oklahoma. To meet plaintiff's proofs, defendant adduced testimony tending to show: After plaintiff was separated from her first husband she repeatedly told neighbors, friends and acquaintances that her daughters had taken the side of their father and had mistreated, neglected and abandoned her. She did not intend that they should have her property. Her sister had always stood by her and had treated her kindly and she intended to

give her property to her sister. To this end she had made three wills, but, fearing a contest, had voluntarily deeded her real estate to defendant, who had never done anything to turn plaintiff against her daughters or asked for the property. Many witnesses who had observed the conduct of plaintiff during recent years testified they saw nothing unusual in her behavior and expressed the opinion she was mentally competent to make the deed.

On the other hand, there is oral or documentary proof tending to show by direct statement or proper inference the following: Defendant lived on a farm near Pender, in Thurston county. Plaintiff went to visit her there in February, 1905, and returned to Murray in July of the same year. In the meantime plaintiff had been very ill. When she left home she was a large, corpulent woman. When she returned she was weak and emaciated and never recovered her health. According to her physicians, she had diabetes and was suffering from general neurasthenia. Protracted anxiety, grief, worry and excitement are disclosed by the evidence and are among the recognized causes of neurasthenia. Symptoms of this affliction, such as physical weakness, insomnia, loss of power to concentrate the mind, and fear, are also shown by the evidence, independently of the testimony of experts. A physician who treated her in 1905 expressed the opinion that she was incapable of attending to business. The deed was executed November 9, 1905. Plaintiff had previously confessed to her sister a belief in fortune-telling and they had gone together to have their fortunes told. When talking to her sister, defendant said a fortune-teller had told her she was going to get some property, but plaintiff's prospect was less hopeful, for she was cautioned that some one was trying to beat her out of her property; that he wanted it to invest, and if he got it he would beat her out of it. After plaintiff returned from Pender she repeatedly told neighbors and acquaintances of her experiences with fortune-tellers; that she believed in them, and that they had helped her. Some-

times when alone in her own house she would become boisterous and use violent language. At other times she would stand in her yard for a long time apparently distracted. She inherited from her father a violent temper. She denounced her children as undutiful, though there is nothing in the record to justify her antipathy for them. As early as July 25, 1901, defendant wrote to one of plaintiff's daughters a letter containing the statement: "Your ma's mind wasn't just right when she was here." It may fairly be inferred from the testimony that the attorney who drew the deed suspected at the time that "the old lady was off a little," as he expressed it. It is at least questionable whether the life estate reserved by plaintiff in her deed would have been sufficient for her support during protracted periods of illness.

While plaintiff was struggling with her unhappy lot and laboring under the infirmities described, her sister was an exceptionally vigorous, strong-minded woman. She transacted her own business. She attended sales, bought stock, accompanied shipments to the stock-yards, and sold her own cattle. On one occasion she addressed the supreme court in her own behalf in a case wherein she was a party. Plaintiff looked to her for advice, expressed herself as having great confidence in her, and frequently said the only relative she could depend upon was her sister. At Pender they frequently talked together about plaintiff's property. Plaintiff testified she asked her for it. Defendant admitted on cross-examination that plaintiff relied upon her when she was sick, and that she sometimes appealed to her for advice in business matters and that it was given. Plaintiff did not confide in her daughters when executing the wills and the deed, and in this regard she evidently respected the wishes of defendant. With the relations, circumstances and conditions in the situation described, defendant appeared at the home of plaintiff in Murray at 1 o'clock in the morning, November 9, 1905. The same morning at 9 o'clock H. Wade Gillis, with a supply of blank deeds,

also appeared at the request of defendant. He was unknown to plaintiff, and his office was at Tekamah in another county. He drew the deed in controversy at plaintiff's home, and promptly secured the services of a notary who took the acknowledgment there. Plaintiff was at the time weak, nervous and agitated. She signed her name "Mary Ung," instead of "Mary Young." At 1 o'clock P. M., the same day, the deed was recorded at Plattsmouth. Gillis was defendant's attorney and received from her $25 for his services. He admitted on the witness-stand that he advised plaintiff to sign the deed. She did not have independent advice or counsel. The register of deeds immediately notified defendant at Pender of the error in grantor's signature. Defendant promptly returned to Murray, had the deed corrected, and went back to Pender on the first train.

The conveyance was a gift. The only consideration was correctly described in the deed as "love and affection." Plaintiff was decrepit, physically weak and at least mentally infirm. Defendant was strong, both mentally and physically. The evidence makes it clear that in business matters plaintiff looked to her sister for advice and relied upon her. In addition to their sisterhood, the relation between them was one of trust and confidence. It was defendant's accepted duty to advise her sister. Her obligation in that respect was the same, whether the relation of confidence grew out of a sense of sisterly affection or was officiously cultivated for mercenary ends. In either situation equity demands restitution for any abuse of confidence resulting in an undue advantage to defendant. Defendant was in a sensitive position when she accepted a gift which her attorney advised plaintiff to make. Haste and secrecy in so important a matter were not satisfactorily explained. Three wills had been made. Each new one increased the advantage of defendant, and the deed was more beneficial to her than any of the wills. The soothing influence of time and the approach of death did not restore the daughters to normal relations with

their mother. Three years after the deed was executed plaintiff and defendant went together to a bank in Plattsmouth, and plaintiff then made a deposit in the name of "Mary Miller or Jane Worth." The explanation of this transaction was that it would permit defendant to draw the money, "if anything happened" to plaintiff. This act of business sagacity scarcely originated with plaintiff. An officer of the bank testified that defendant at the time said: "The children are trying to get the money away from Mrs. Miller." When all the circumstances are considered in connection with the relations of the parties and the mental and physical condition of plaintiff, there is convincing proof that the deed was procured by means of undue influence on the part of defendant. In this respect the finding here will be the same as that of the trial court.

Ratification by plaintiff is invoked to sustain the deed, but this position is wholly untenable. A duly appointed guardian insisted on a cancelation, and the evidence shows that defendant's influence over her sister continued, even after the guardian was appointed, and that plaintiff's mental condition did not improve. The evidence justifies the decree below.

AFFIRMED.

FRANK C. BURKE, RECEIVER, APPELLEE, V. R. SCHEER ET AL., APPELLANTS.

FILED APRIL 8, 1911. No. 16,326.

1. **Insurance:** INSOLVENCY: SUIT TO ENFORCE LIABILITY OF MEMBERS. A single suit in equity cannot be maintained by the receiver of an insolvent mutual hail insurance company, organized under chapter 43, Comp. St. 1909, against all of the policy-holders of such insolvent company, for the separate liability of each policy-holder for unpaid assessments, whether levied by the directors of the company before insolvency, or by the court thereafter, on the ground that such single suit would prevent

a multiplicity of actions at law; nor can such a suit be maintained on the ground that it is ancillary or auxiliary to the main insolvency proceeding; nor upon the ground that the money when collected would become part of a fund that would be distributed under the direction of the court, since no question is involved in whch the defendants have a common interest, and the suit is merely an aggregation of separate actions at law, each involving separate issues and having no relation to each other, except that there is a common plaintiff, and in each of which the remedy at law is adequate, and is the remedy pointed out by the statutes governing such companies.

2. ———: ———: ———: PROCESS. Nor can the receiver join in one action all policy-holders or members of such company who are severally liable for individual unpaid assessments, those who reside in counties other than the county where the suit is brought, as well as those who reside within such county, and issue summons to such other counties to obtain service upon such nonresidents.

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

Hainer & Smith and *G. F. Rose,* for appellants.

E. P. Holmes and *G. L. De Lacy, contra.*

FAWCETT, J.

The Mutual Hail Insurance Society, a corporation organized under the provisions of "An act to authorize the organization of Mutual Hail Insurance Companies" (Comp. St. 1909, ch. 43), which for the sake of brevity will be designated the company, was, on February 19, 1908, by the district court for Lancaster county, adjudged insolvent, and plaintiff was appointed receiver. The court found the liabilities of the company to be $13,277.95. There being no funds in the hands of the receiver with which to pay these liabilities, the court made an assessment upon the policy-holders of the company, 254 in number and residing in many different counties, of $1.25 an acre for the number of acres covered by their several policies. The receiver was then instructed to bring suit

against all the policy-holders. Only three of the policy-holders were residents of Lancaster county. The receiver brought this suit in the district court for Lancaster county against all of the 254 policy-holders, and had summons directed to the sheriff of each of the outside counties where any of the policy-holders resided. The defendant, George Sporl, for a separate answer alleged that, at the time of the commencement of this action and for a long time prior thereto and ever since, he was and has been a resident of Nance county; that the only defendants in this suit residing within the county of Lancaster at the time of the commencement thereof were Charles Newman, J. W. Jacoby, and G. M. Coffman; that the summons for the answering defendant was issued by the clerk of the district court for Lancaster county, directed to the sheriff of Nance county, and by said sheriff served upon said defendant in said Nance county; that no other service was made upon him, and that he has made no voluntary appearance in said cause; that the petition does not set forth any joint liability against the answering defendant, or the said defendants or either of them residing in Lancaster county, and that the answering defendant is not and was not jointly liable with the defendants residing in Lancaster county or any of the defendants mentioned in the petition for any sum of money whatever. Wherefore said defendant "challenges the jurisdiction of the court over his person, and alleges the fact to be that said action is not rightly brought against him in said Lancaster county."

A general demurrer to the answer was sustained, and, defendant electing to stand upon his answer, judgment was entered against him for $146.25, from which judgment he prosecutes this appeal.

The main grounds assigned by plaintiff as a basis for his right to join these 254 actions at law in one suit in equity, and to send process for 251 of the defendants to the numerous outside counties in the state, are: That the company issued to each of the defendants, on or about

the day mentioned in their respective applications, a policy of insurance insuring him against loss or damage to his crops, "which several policy each one of the defendants received and now holds, and each of the defendants, by virtue thereof, is a member of the said Mutual Hail Insurance Society of Nebraska; that each of the defendants duly signed and delivered to the said corporation * * * an application in writing, and became thereby bound and holden, as is provided by law, for his ratable share of all the losses and expenses of said society incurred while he was a member, and each of the defendants is indebted to the said corporation and its creditors in the specific sum so assessed against him;" that the aggregate sum of all the individual assessments of the defendants, if realized, would be more than sufficient to pay the costs and the principal and interest due the creditors; but that certain of the defendants have removed from the state, and others are insolvent; that in order to make a just, ratable and equitable distribution among the members of the burden of said corporate debts, a court of equity should take into account the losses in collections that will result from such removals and insolvency, "and, upon rendition of judgments for the full amounts of said assessments, plaintiff will submit to the court whether execution should immediately issue for the full liability, or whether, in the first instance, an execution for a part only thereof would be considered adequate for the collection of a sum sufficient to discharge all of the said liabilities and costs;" that this suit is ancillary only to the main receivership suit; that the funds to be derived from the proceedings are trust funds for equal and ratable distribution among the creditors, and the application and distribution thereof should be ordered and directed by a court of equity; that separate and independent actions at law against each of the defendants would require a multiplicity of law suits, "and would lead to excessive and interminable complications, and inflame and excessively aggregate the costs of administering the

affairs of said corporation, so as to become burdensome upon said trust, in that costs of separate suits and costs of reputable counsel or attorneys would necessarily equal or exceed in most cases the entire avails of individual actions commenced in justice court, with right of successive appeals to the supreme court; that attempts to enforce said liabilities by such separate suits would leave open to controversy an issue in each separate suit as to the necessity of enforcing said assessment in full, and as to whether the amount of all the unpaid debts sufficiently justified the enforcement of said full assessment against each individual member;" that in all of the aforesaid respects plaintiff is without an adequate remedy at law, and that the collection of sums necessary to discharge said debts can only be made in equity, and the affairs of the company can only be administered by and through the aid of a court of equity. The prayer of the petition is that the court may inquire and determine that the defendants are members of the company, ascertain the particular time for which they carried insurance, the particular debts accruing against the company during the term of membership of each of the defendants, and fix and decree the amount of the liability of each one of the defendants; "that a several judgment be entered in favor of plaintiff and against each one of the defendants found liable as a contributory upon said assessment to the payment of the corporate debts of the said Mutual Hail Insurance Society of Nebraska and the costs of this proceeding, and that execution be awarded against each defendant for the amount so found due from him, or, if the sums apparently collectible upon said judgment should appear to the court to be in excess of that required for the payment of said debts and costs, then the amount for which execution shall issue in the first instance against each defendant may be ascertained and determined by the court."

It will be observed that the petition expressly alleges that the company "issued to each one of the defendants"

a "several policy" upon his individual application, and that "each of the defendants" is indebted to the said corporation and its creditors "in the specific sum" so assessed against "him," and that in the prayer the court is asked to ascertain "the particular term" for which each policy-holder carried insurance that the court decree the amount of the liability of "each one of the defendants," and that "a several judgment" be entered in favor of plaintiff and "against each one of the defendants." It is apparent, therefore, that plaintiff is seeking in this suit in equity to obtain 254 judgments at law. Section 121, ch. 43, Comp. St. 1909, governing companies of this character, provides: "Such companies may issue policies only on growing crops, insuring against damage or loss by hail, and for any time not beyond the life of its charter. * * * All persons insured shall make application in writing, obliging (obligating) themselves to the company for the payment of losses and expenses as required by the by-laws of the company. The liability of the members may be limited by the by-laws, provided that if the total amount collected in any year shall be insufficient to pay all losses and expenses for that year, then the persons sustaining losses shall receive their proportion of the fund realized from the assessment, in full satisfaction of their loss; and no member shall be required to pay more than the amount of his obligation." No by-laws are shown to have ever been adopted, and it is argued by plaintiff that, because the liability of the members has not been limited by the by-laws, therefore their liability is unlimited, and that each member or policy-holder is personally liable for all of the debts of the company. The trouble with this contention is that the statute quoted fixes a maximum liability, viz., "and no member shall be required to pay more than the amount of his obligation." No limitation less than that fixed by the statute having been fixed by the by-laws of the company, it may be conceded that each policy-holder would be liable for the company's debts to the full amount of his obligation,

but that does not render him liable for the entire debts of the company. It would be hard to conceive how any such company could induce substantial and conservative farmers to insure their growing crops when by so doing they would incur such a liability.

Section 124 of the act under which the company was operating provides: "Suits at law may be brought against any member of such company who shall neglect or refuse to pay any obligation given by him or her according to the provisions of this act, and the directors or officers of any company so formed who shall wilfully refuse or neglect to perform the duties imposed upon them by the provisions of this act shall be liable in their individual capacity to the person sustaining such loss." The legislature has, therefore, prescribed both the maximum of a member's liability and the form of action by which the payment of that liability may be enforced; and we do not think the fact that the company has become insolvent can in any manner enlarge such liability or change the form of action which may be resorted to for its enforcement. The claim that the present suit will avoid a multiplicity of suits is without merit. Except as it may operate as a "big stick" in preventing policy-holders from defending the suit at long range, it would not materially lessen the litigation, as each defendant would have a perfect right to employ counsel, set up his separate and independent defenses, and demand a separate jury trial. *Hale v. Allinson,* 102 Fed. 790, affirmed in 188 U. S. 56; High, Receivers (4th ed.) sec. 316; *Republic Life Ins. Co. v. Swigert,* 135 Ill. 150; *Winters v. Armstrong,* 37 Fed. 508; *Smith v. Johnson,* 57 Ohio St. 486; Smith, Receiverships, sec. 231.

The cases cited by plaintiff, from this and other courts, to the effect that a creditor of an insolvent corporation cannot bring a separate action against an individual stockholder of such corporation for the unpaid portion of his stock subscription, but that a receiver should be appointed to bring suit for the benefit of all the creditors,

are not in point here. Nor can any of those cases be held to apply to a case like this, where the statute itself has fixed the kind of action that may be resorted to. The reason for those holdings is apparent. If each of the 55 creditors in this case were permitted to commence a separate action against each of the 254 policy-holders, and each of the 254 policy-holders, in order to avoid paying more than his ratable proportion of the indebtedness, should be compelled to bring an action for contribution against each of his 253 copolicy-holders, the courts of this state would be kept busy for a number of years to come in disposing of this litigation. The court in this case did right in instructing the receiver to collect from the policy-holders, by suit if necessary, the amounts due from them under their contracts with the company; but it would not be warranted in ordering, nor do we understand from the allegations of the petition that it did in fact order, the receiver to proceed against all of the defendants by a suit in equity. It is the duty of the receiver to obey the order of the court, but in so doing the constitutional rights of each defendant must be recognized, and he will have to proceed by separate actions at law in which each defendant may have the right to defend his own suit free from the embarrassing presence of other defendants with whom he has no joint liability. The fact that this may be expensive and may result in the creditors failing to receive payment of their demands in full is a circumstance which cannot be considered. There is ample authority to sustain our holding, in addition to the cases above cited, but we do not deem it necessary to take the time or to enlarge this opinion by a reference to them.

The judgment of the district court is reversed and the cause remanded, with directions to overrule plaintiff's demurrer.

REVERSED.

EMIL POLENSKE ET AL., APPELLANTS, V. ALBERT S. ENNIS ET AL., APPELLEES.

FILED APRIL 8, 1911. No. 16,361.

Venue: SUMMONS TO ANOTHER COUNTY. "The test for determining whether an action is rightly brought in one county against the defendant found and served therein, so that others made defendants thereto may be served in a foreign county, is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action—whether his interest in the action and in the result thereof is adverse to that of the plaintiff." *Barry v. Wachosky*, 57 Neb. 534.

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

M. A. Hartigan, for appellants.

W. S. Morlan, contra.

FAWCETT, J.

From a judgment of the district court for Adams county, dismissing plaintiffs' action against the defendant School District No. 17, Red Willow county, for want of jurisdiction, plaintiffs appeal. As the controversy here is solely between the plaintiffs and defendant school district, the parties will be referred to simply as plaintiffs and defendant.

November 14, 1906, defendant entered into a written contract with one R. M. Liberty for the construction of a large school building, and he gave defendant a contractor's bond, with the Bankers Surety Company as surety. On the same day the contractor entered into a subcontract with one A. S. Ennis, by which Ennis agreed "to furnish all material and labor necessary to build and complete all masonry, * * * including all iron, structural iron, galvanized iron, steel ceiling in place and complete." Plaintiffs furnished the subcontractor, Ennis, a quantity

of brick for use in the construction of the school building. October 1, 1907, plaintiffs presented to Mr. Ennis a written statement showing a balance due them, and received from him, as they allege, an assignment of his claim against the defendant. After obtaining this assignment, plaintiffs brought this suit against all of the parties named, in the district court for Adams county, where they obtained service upon Ennis. Summons was thereupon sent to Red Willow county and served upon defendant. Defendant appeared specially and challenged the jurisdiction of the court over defendant, for the reason, among others, that "there is no privity between the defendants Albert S. Ennis, Richard M. Liberty, the Bankers Surety Company of Cleveland, Ohio, and this defendant." The special appearance was sustained and plaintiffs' action dismissed as to defendant school district. This presents the only question for consideration on this appeal.

Plaintiffs' amended petition will make the matter plain. The petition alleges that plaintiffs are a partnership; that Ennis and Liberty entered into a contract with their codefendant school district for the erection of the building referred to; that the surety company became surety for the labor and material used in said building; that plaintiffs furnished brick for the erection of the building; "that said brick were used in the construction of said school building, and that the defendant Albert S. Ennis was a subcontractor under his codefendant Richard M. Liberty, but that, from time to time, the said school district recognized him (Ennis) as a contractor, paid moneys direct to him, and upon his order when so requested, upon the original contract for the erection of said building; that there is coming to, due and payable from said school district to the defendant Albert S. Ennis, the sum of $4,900 upon the contract as aforesaid as such contractor, which is now due and payable from said school district to the said Ennis, which amount said school district promised and agreed to pay.

"These plaintiffs further show unto the court that the defendant Albert S. Ennis has assigned, set over and guaranteed the payment of the moneys due and owing to him from his codefendant School District No. 17, Red Willow County, McCook, Nebraska, for the purpose of paying the amount due and payable to these plaintiffs.

"The plaintiffs further show unto the court that the defendants Richard M. Liberty and school district, as aforesaid, and the surety company have conspired and federated together to cheat and defraud these plaintiffs in this, to wit, they claim and allege that there is nothing due or coming to their codefendant, Albert S. Ennis; that there is nothing due or coming to said plaintiffs by reason of said assignment, which claim and assumption they well know to be false and fraudulent as against these plaintiffs.

"Plaintiffs allege that said school district has now in its possession a large amount of money due the said Albert S. Ennis, and by him assigned to these plaintiffs. That said school district has paid over to its codefendant Richard M. Liberty a large amount of money since the making of the assignment aforesaid, and after these plaintiffs had given them notice of such assignment of the moneys belonging to the defendant Albert S. Ennis; that said school district is withholding large sums of money due said Ennis, claiming that their codefendant surety company has demanded that the same be withheld and payment refused. But these plaintiffs show unto the court that said defendants, they, each and every of them, refuse to give any accounting or make any accounting for the money in their hands due and payable to these plaintiffs by reason of the assignment aforesaid of the moneys due and coming to the said Albert S. Ennis.

"Plaintiffs further show that Albert S. Ennis is insolvent, and, unless these plaintiffs have the benefit of the moneys to them assigned, they will suffer the loss of their claim and indebtedness to them and suffer thereby irreparable injury."

The above are all of the averments contained in the amended petition, and they clearly show that Ennis was not a necessary party to plaintiffs' action. They had obtained from him an assignment of his claim against the defendant. According to the allegations of their own petition, there is ample funds in the hands of the defendant to pay the amount of their claim under that assignment. They are not seeking to recover upon a lien for material furnished, but base their right upon their assignment of Ennis' claim against defendant for an alleged balance due him, which, so far as the petition advises us, may be wholly for iron and steel furnished by other material men. Their petition contains no allegation of any liability on the part of Ennis to them, other than that contained in their statement for brick furnished him, for which they say he assigned and set over to them his claim against the defendant, "for the purpose of paying the amount due and payable" to them. Their petition shows that Ennis is insolvent, so that a judgment against him would avail them nothing, and it was evidently for this reason that they obtained from him the assignment in question. It is clear from plaintiffs' own statements that they took the assignment from Ennis of his claim against the defendant in full satisfaction of their claim against him. Hence, there is no privity of liability between Ennis and the defendant, nor has Ennis any interest in the subject of litigation, which is adverse to that of plaintiffs.

The test of plaintiffs' right to join defendant with Ennis in an action brought in a county other than the county of defendant's residence is well stated in the second paragraph of the syllabus in *Barry v. Wachosky*, 57 Neb. 534: "The test for determining whether an action is rightly brought in one county against the defendant found and served therein, so that others made defendants thereto may be served in a foreign county, is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action—whether

his interest in the action and in the result thereof is adverse to that of the plaintiff."

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

AFFIRMED.

FRANK L. MCCOY ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED APRIL 8, 1911. No. 16,231.

MOTION for rehearing of case reported in 88 Neb. 316. *Motion overruled.*

SEDGWICK, J.

It is said in the opinion that the two officers of the board of public works who signed the notice for bids constituted a majority of the board. This was a mistake. The notice was signed by the president and secretary. The president is the principal member of the board, as is pointed out in the opinion, but the secretary is not a member of the board. The board consists of the city engineer, the comptroller, and the building inspector, and the secretary of the advisory board acts as secretary of this board also. The board of public works was required by ordinance to give this notice; the notice was duly given, and the bids for the construction of the improvement were received and the work done. This board had no discretion in the matter; it was required by ordinance to have this notice published, and the notice was published. We think that is sufficient. At all events, the jurisdiction of the city council to levy the assessment complained of did not depend upon this notice. The jurisdictional notice was properly given. It is not complained that too much was paid for the work, or that there would have been more bidding if the board had spread upon its records a formal order directing the

president and secretary to sign and publish this notice. If such a formal proceeding was necessary, the irregularity was not such as to render the whole proceeding of the council void and subject to collateral attack.

The motion for rehearing is

OVERRULED.

PETER FREDERICK, SR., APPELLEE, V. MARY GEHLING, APPELLANT; JOHN W. BUCKMINSTER, INTERVENER, APPELLANT.

FILED APRIL 8, 1911. No. 16,349.

1. **Quieting Title:** DEFENSES: DEMURRER. In an action to remove a mortgage as a cloud from plaintiff's title which he had acquired by purchase of the real estate at execution sale, it was alleged in the answer that plaintiff formerly had two mortgages which were liens upon the real estate prior to the lien of the execution judgment, and that the owner of the fee had paid these mortgages with the proceeds of another mortgage which he gave on the same land for that purpose, which mortgage had in turn been paid with the money loaned by defendant for which defendant's mortgage was given, and that all this was done with the knowledge of plaintiff. *Held*, That such answer was not subject to general demurrer.

2. ———: ———: ———. In such case the further allegation that the plaintiff, knowing that the defendant's mortgage had been so given and received, and that all prior mortgages had been in fact so paid without being canceled on the record, procured the said prior mortgages to be deducted by the appraisers from the value of the land in the execution sale and so purchased the land at about one-fifth of its real value, and afterwards procured the said prior mortgages to be released, with the purpose of defrauding defendant, her mortgage being subsequent to the lien of the judgment under which plaintiff purchased the land, is held to state a defense as against a general demurrer.

3. **Parties:** INTERVENTION. In such an action the owner of the fee has such an interest in the land which is the subject of litigation as to enable him to intervene and contest the plaintiff's title and assert the homestead character of the land.

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

J. H. Edmunds and *Edwin Falloon,* for appellants.

A. W. Crites and *Reavis & Reavis, contra.*

SEDGWICK, J.

A general demurrer was sustained to the defendant's answer and judgment on the petition rendered in favor of the plaintiff, and the petition in intervention was stricken from the files. The defendant and intervener have appealed.

The plaintiff brought the action to "remove the cloud cast" by a mortgage of defendant upon a quarter section of land in Sheridan county. He alleged in his petition that in 1902 a judgment was rendered in justice court in Richardson county against one Buckminster and his wife in favor of certain persons not now parties to these proceedings, and that the judgment was transcripted to the district court for Richardson county, and afterwards, in December, 1904, to the district court for Sheridan county, and thereby became a lien upon the said quarter section of land, which was the land of the said Buckminster that execution was issued on the said judgment and was by the sheriff of Sheridan county levied upon the said land, which was sold upon said execution according to law on the 20th day of May, 1907, and was purchased at said sale by the plaintiff; that the sale was afterwards confirmed by the district court and a deed executed to the plaintiff by the sheriff on the 18th day of June, 1907, which deed was duly recorded, and that by these proceedings the plaintiff became "vested with the absolute title in fee simple to the lands." The petition then alleges that, after the lien of said judgment had attached to the land, the defendant Mary Gehling procured a mortgage on the land for the sum of $600 and

caused the same to be recorded; that this mortgage was a subsequent lien to the plaintiff's title, and he asks that it be removed as a cloud upon his title.

The answer is not artistically drawn. It appears to rely upon two defenses: That plaintiff himself had two several mortgages upon the land that were prior to the lien of the judgment under which he purchased it, and that a third mortgage was given to obtain the money with which to pay off plaintiff's mortgages, the proceeds of which were used for that purpose, and that the defendant's mortgage was in turn given for money loaned by defendant to pay the third mortgage, and the proceeds thereof were so used, so that the defendant's mortgage ought in equity to be adjudged prior to plaintiff's lien. The allegations of the answer upon this point, after describing defendant's mortgage, are "that with the proceeds of said $600 said John W. Buckminster on the 20th day of April, 1907, paid said A. E. Buckminster his said note and mortgage, and A. E. Buckminster executed a release of said mortgage; * * * that said $600 which was borrowed of this defendant as aforesaid was used to pay off the mortgage recorded in book 10 on page 110 of mortgage records of said Sheridan county, which mortgage is more particularly described in the preceding paragraph of this amended answer." It is also alleged in the answer that the plaintiff knew of these facts, and knew that this money borrowed of the defendant was used to pay off the mortgage, which was given to pay the mortgages which he himself held. The second defense is that, when the plaintiff purchased the land at execution sale, he knew that the three prior mortgages had been paid with the proceeds of the defendant's mortgage, and, as the record did not disclose the fact of the payment, he was able to and did procure the three prior mortgages to be deducted as liens by the appraisers, thus enabling him to purchase the land for a fraction of its real value, and upon a lien that appeared upon the records to be prior to defendant's mortgage, thereby perpetrating a

fraud upon the court and its officers, as well as upon the defendant.

1. The principal question discussed in plaintiff's brief is whether the answer sufficiently alleges that the mortgages which had been paid off were in fact deducted as liens in the appraisement of the land. The defendant in the brief assumes that this matter is sufficiently alleged in the answer, and the plaintiff, who filed his brief afterwards, contends strenuously that it is not sufficiently alleged. If the land was worth from $1,600 to $1,700 at the time of the sale upon execution and the plaintiff procured it to be appraised at $500 by having the three mortgages which had been paid off deducted as liens, and so bought the land for about one-fifth of its value, he ought not to prevail in this action as against the defendant Mrs. Gehling. The plaintiff does not allege when his execution was issued, nor when it was levied, but the answer alleges that the land was sold thereunder on the 30th day of May, and the sale confirmed on the 14th day of June, 1907, and that the execution was issued on the 20th day of March, 1907. The Plaintiff's brief does not give due consideration to the various allegations contained in the answer. The matters relied upon by plaintiff should have been presented in reply to the answer. The answer, as against the general demurrer, sufficiently alleges that the mortgages which had been paid were deducted as liens by the appraisers from the value of the land. This allegation is in the answer: "That these liens were deducted from the value of said premises and said premises were appraised by said appraisers after said liens had been deducted at the sum of $500." And again: "That at the time said sale was made said liens were still of record and in force on said land and deducted from its appraised value," and that "said Peter Frederick in fact bought said land charged with said liens; * * * that said land, at the time it was purchased by the plaintiff, was worth at least $1,700, and was in fact appraised at that amount if the fact is taken into consideration that said appraisers still considered at the time said appraise-

ment was made that said liens were still subsisting against said land." In the plaintiff's brief it is argued that this allegation of the answer that the land was worth $1,700 at the time it was appraised is shown to be untrue by computation because the amount of the liens was only $1,182.32 and the land was appraised at $500, making in all $1,682.32, or $17.68 less than $1,700; but this defect would not be much more than the interest that would accrue on these liens from the time of the appraisement to the time of the sheriff's sale. At least the difference would not be so great as to overcome all of these allegations in the answer as to the method of appraisement.

2. The intervener set up the facts as to the fraudulent conduct of the plaintiff in purchasing the land at the execution sale, and also alleged that the land was his homestead and that the plaintiff's judgment was never a lien thereon. The allegations as to its being a homestead are indefinite and perhaps insufficient, but it seems that the controversy here is in regard to the land itself. The plaintiff claims the land and is seeking to quiet his title, and the intervener claims the land and alleges that the plaintiff's supposed title is fraudulent and ought to be set aside. The defendant is seeking to fasten a lien upon the land, and this appears to present a proper case for the intervener, John W. Buckminster, to assert and test his claim in the land. If the action of the court in sustaining the motion to strike the petition in intervention from the files can be sustained, it can only be upon the ground that it was in fact a general demurrer, and that the pleading does not state facts sufficient to entitle the intervener to any relief. The allegations are very general, and might not admit a full investigation of the rights of the parties, but cannot be disposed of upon a general demurrer or motion to strike out the pleading.

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

REVERSED.

LETTON, J., not sitting.

BARNES, J., dissenting.

My understanding of the answer of the defendant, Mary Gehling, and the conclusions to be drawn from its allegations differ from those expressed by the majority. I am of opinion that the answer fails to state facts sufficient to entitle the defendant to any relief by way of subrogation. It appears that the intervener, John W. Buckminster, allowed the land in question to be sold at the plaintiff's execution sale without protest or objection, and at that time made no homestead claim to the same. By the allegations of his petition he has not shown that he has any such interest in the controversy between the plaintiff and the defendant, Mary Gehling, as would give him the right to be made a party by intervention. Therefore the order of the district court striking his petition of intervention from the files was right.

As I view the pleadings, the judgment of the district court should be affirmed.

FAWCETT, J.

I concur in so much of the above dissent as refers to the attempted intervention by John W. Buckminster.

JOHN A. KEMMERLING V. STATE OF NEBRASKA.

FILED APRIL 8, 1911. No. 16,978.

1. Contempt: INCOMPETENT EVIDENCE: REVIEW. Upon review in this court of a trial by the district court without a jury, it will not be presumed that the trial court acted upon or considered incompetent evidence. The action of that court in admitting evidence will not be reviewed.

2. ———: REVIEW. The evidence in the record is found to be sufficient to support the judgment.

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

A. S. Ritchie and *J. W. Woodrough,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

SEDGWICK, J.

The defendant was convicted of contempt of court in the district court for Douglas county, and has brought the case here for review upon petition in error. The substance of the charge against him was that, while he was a juror of the regular panel, he agreed with the claim agent of the Omaha & Council Bluffs Street Railway Company to use his influence as a juror in a certain case pending in the district court in which that company was defendant, and prevent a verdict against the company, for the agreed amount of $25, and received the sum of $5 upon said agreement.

1. It is first argued in the brief that a prosecution for contempt not committed in the presence of the court is essentially a criminal prosecution, and should be tried and determined as such with the exception that the defendant is not entitled in such prosecution to trial by jury. This proposition is not contested by the attorney general and will not be further discussed.

2. The next contention is that the evidence of two witnesses was incompetent and was improperly received. It has frequently been held by this court that, in the trial of a case before the district court and without a jury, it will not be presumed that in determining the issue presented the court acted upon or considered incompetent evidence.

3. It is contended that the evidence in the case is not sufficient to support a judgment of conviction. The al

legation in the information that the agreement of the juror to use his influence was with reference to the case of West against the Omaha & Council Bluffs Street Railway Company, it is insisted was not proved upon the trial. There were several cases pending against the company, but there is no evidence that the defendant was a juror in any of those cases except the case specified in the information. The defendant did not testify in his own behalf, nor did the claim agent of the company, but the defendant called the foreman of the jury in the specified case, and he testified that the defendant served upon that jury, and voted for a verdict in favor of the company, and that the jury failed to agree. There is also evidence that the defendant, after that case had been tried, stated that he had fulfilled his agreement and was the cause of "hanging the jury."

We think that the evidence, being wholly uncontradicted or explained by the defendant himself or any other witness, is sufficient, upon a point not of the substance of the offense, to justify the finding of the court, who was familiar with all of these cases and the part taken therein by the defendant as juror. The substance of the offense charged was proved beyond question.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. CITY OF CRAWFORD, APPELLEE, V. CHRISTOPHER H. BISPING ET AL., APPELLANTS.

FILED APRIL 8, 1911. No. 16,999.

1. **Mandamus:** RIGHT TO ANSWER AFTER DEMURRER OVERRULED. When a demurrer to an application for a writ of mandamus or to the alternative writ itself is overruled, the respondents should ordinarily be allowed to answer. This is so when the demurrer has been sustained by the trial court, and is overruled by this court upon appeal. In such case when the judgment of the trial

court is reversed and the cause remanded generally, or with specific instructions to allow the relator to amend, the respondents should ordinarily be allowed to answer after relator has amended his application for the writ.

2. ———: ISSUES: TRIAL. When it appears to the trial court upon the objections of respondents to the allowance of a writ of mandamus that there is a substantial issue of fact upon which the right to the relief demanded depends, an alternative writ should be issued returnable to the county where the action is pending. Such issues cannot be tried at chambers.

3. ———: PLEADINGS. When the alternative writ is issued, it must contain all of the facts upon which the relator relies. The writ and return, or answer, thereto constitute the issues. No other pleadings are allowed.

4. ———: PROCEDURE. When upon notice of application for a writ of mandamus the respondents appear and object to the allowance of any writ, and no substantial issue of fact is presented by the objections of respondents, the court may issue a peremptory writ, and the district judge has such jurisdiction at chambers in any county in his district, and without issuing any alternative writ.

5. ———: RETURN. If a general denial in the objections or answer to the application for the writ of mandamus is inconsistent with other allegations or admissions in the answer, such general denial should be disregarded.

6. ———: ———. The application of the city of Crawford for a writ of mandamus alleged that "the relator is and has been since May, 1907, a municipal corporation, having a population of more than 1,000, existing under the laws of Nebraska as a city," that prior to that time the same territory was incorporated and styled the "Village of Crawford," and that the relator "succeeded to all the rights of said village." *Held*, That the denial of the answer "that the said relator is a city of the second class, and that it has ever been such city," is not a sufficient allegation of fact to constitute a defense.

7. Highways: ROAD FUND: CLAIMS AGAINST COUNTIES: POWER TO COMPROMISE. When a county has collected money for the road fund upon property of a city or village, one-half of such money belongs to the city or village, and should be paid over by the county treasurer upon demand. The officers of the city or village have no power to compromise the right to such money. The payment of a part by warrant which is received by the city or village as full payment, and an order of the county

board "disallowing" the remainder of a claim filed for the whole amount, and the fact that no appeal has been taken from such order, constitute no defense in favor of the county.

8. ———: ———: ———: DEFENSES. The allegation that the county "disputed the receipt of said sum of money in good faith" is too indefinite to furnish, in any view, a basis for a compromise; it not appearing from the allegation what part of the city's claim was disputed by the county, and no facts being alleged from which it can be determined whether there was in fact a genuine controversy.

9. Mandamus: CLAIMS AGAINST COUNTIES: DEFENSES This action having been pending for more than 15 months, an answer was filed alleging that no estimate or appropriation has been made or published to provide for the payment of the money, and there is now no cash in the treasury, nor any levy against which a warrant could be issued, nor any adjudication of the claim by any court or by the county officers. *Held*, That these allegations constitute no defense.

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

Edwin D. Crites, for appellants.

Earl McDowell, A. M. Morrissey and *A. G. Fisher, contra.*

SEDGWICK, J.

The principal facts in this case are recited in the opinion on the former appeal. *City of Crawford v. Darrow*, 87 Neb. 494. When the cause was returned to the district court, the relator with leave of the court amended the title of the cause. The term of office of one of the respondents expired during the pendency of this action, and by amendment the name of his successor was substituted as respondent. The relator then applied to one of the judges of the court at chambers for a peremptory writ. The attorney for the respondents appeared and filed an answer in the names of the original respondents, ignoring the substitution of the name of the new member. The judge thereupon entered the following order: "The judge being

of opinion that the said answer being filed after an appeal and remand comes too late, and therefore refuses to consider the same." He thereupon ordered a peremptory writ of mandamus to issue. The respondents have appealed. Afterwards the district judge allowed the respondents to supersede the order by giving an undertaking in the sum of $200.

Upon the former appeal to this court, it appeared that the trial court had sustained a general demurrer of the respondents to the relator's application for the writ. This court reversed the judgment of the trial court and remanded the cause, "with leave to relator to amend the alternative writ if one has been issued, if deemed necessary, and, in case none has issued, to amend its petition, if so advised."

1. The first contention is that the trial court erred in refusing to consider the answer of the respondents. In *Long v. State,* 17 Neb. 60, Judges REESE and MAXWELL expressed the opinion that, when a demurrer to a writ is overruled, "the defendant still may be permitted by the court to file an answer to the writ." In *State v. Chicago, St. P., M. & O. R. Co.,* 19 Neb. 476, the case of *Long v. State, supra,* is cited as authority for the proposition that a demurrer is the proper pleading to test the sufficiency of a petition for a writ of mandamus, and it is said that the ordinary rule of pleading applies in mandamus cases. This view of the law has been adhered to in subsequent cases. The action of this court upon the former appeal was in effect to overrule the demurrer of the respondents which the trial court had sustained, and when the cause was remanded the respondent under such circumstances should ordinarily be allowed to answer. The fact that the trial court sustained the demurrer indicates, if it does not determine, that the respondents had sufficient reason to file such demurrer in good faith. The decision of this court allowing a relator to amend his proceedings should not be construed as denying the right of the respondents to answer upon the overruling of their de-

murrer. If the relator had amended the substance of its application for the writ, alleging additional grounds therefor, it would follow, as a matter of course, that the respondents were entitled to answer. The reason then given by the trial court, if taken literally, does not justify the ruling.

2. The relator has strangely ignored the regular order of procedure in such cases. When application for the writ is made, and notice of the application is given, the respondent may appear and object to the allowance of any writ. If a demurrer is filed to the application, as was done in this case, and the demurrer is overruled, as was also done by this court, ordinarily the respondents may allege such facts as will show that no writ should issue. The rule as to pleading over and amendments is the same as in other civil cases. If objections to the application for the writ are filed, as was done in this case after the demurrer had been overruled by this court, the trial court should consider whether the objections show that there are substantial issues of fact between the parties, and, if it appears that there are such issues to be tried, the alternative writ should be issued returnable in the county where the action is pending and can be tried. The alternative writ should allege all of the facts that the relator relies upon as entitling him to the relief by mandamus. When the writ is served upon respondents or service waived, the respondents must make a return (answer) to the allegations of the writ. The writ and return form the issues. No other pleadings are required. The allegations of the return are regarded as denied, and must be proved by respondent. If at the hearing upon the application for the writ the objections of respondents to the issuing of the writ are insufficient or frivolous, no alternative writ is necessary. In such case the court should issue a peremptory writ at once, if the application and evidence offered by relator are sufficient to entitle him to that relief. The district judge at chambers has jurisdiction to order a peremptory writ of mandamus,

if no substantial issue of fact is presented by the answer or objections of respondents. *Mayer v. State,* 52 Neb. 764.

The same case holds that, if the respondent by answer or objection to the writ makes it appear that it will be necessary to determine substantial questions of fact in the case, a peremptory writ cannot be issued at chambers; issues must be formed by the alternative writ and return, and such issue must be tried in court.

3. The objection of respondents, then, that the court should have directed the issuance of an alternative writ, and that the court erred in granting the peremptory writ upon the pleadings without evidence, and that the court had no jurisdiction at chambers to grant the peremptory writ, all depend upon the sufficiency of the answer. If the allegations of the answer were sufficient to constitute a defense, these objections are well taken; but, if the allegations of the answer filed furnish no sufficient reason in law to refuse the relief demanded, then the trial court should for that reason have ordered the peremptory writ, and the fact that the language used by the court may be construed to furnish an insufficient reason for the judgment will not require a reversal.

4. It will be seen from the statement of facts in the opinion upon the former appeal that the action was to require the proper authorities of the county to issue a warrant in favor of the city of Crawford for one-half of the road fund that had been collected upon property within the city for certain specified years. The answer begins with a qualified general denial in these words: "Denies each and every allegation therein contained except so far as said allegations are hereinafter admitted or qualified." There is a special denial in the answer "that the said relator is a city of the second class within said state and that it has ever been such city." It is alleged in the petition that the village of Crawford had become a city by increase of population, and "the relator is and has been since May, 1907, a municipal corporation, having a population of more than 1,000, existing under the

laws of Nebraska as a city;" that prior to that time the same territory was incorporated and styled the "Village of Crawford," and that the relator "succeeded to all the rights of said village." This special denial is not a sufficient answer to these allegations. The money in controversy was received by the county during a series of several years, and during that time, according to the allegations of the petition, the village of Crawford, the population having increased to more than a thousand, became, by operation of law, the city of Crawford. If the relator is not a *de facto* city of the second class, facts should be alleged from which that matter can be determined.

5. Another allegation of the answer is that the relator first made the claim against the county of $1,439.54 "for an alleged one-half of road taxes collected within the village of Crawford for previous years," and that the respondents allowed one-half of that amount and issued a warrant which the relator accepted. It was decided in *City of Chadron v. Dawes County,* 82 Neb. 614, that one-half of the road tax collected within the city or village by the county authorities belongs to such city or village, and is not held by the county as owner or debtor, but in trust for the city or village to which it belongs, and this holding is cited with approval in the opinion upon the former appeal in this case. It would not therefore constitute such a claim against the county as the authorities of the city could compromise or cancel in whole or in part. It was the duty of the county treasurer to pay over this money to the city upon demand, unless by some wrongful action of the county authorities he had been prevented from so doing. These allegations of the answer therefore stated no defense.

6. It is further alleged in the answer that the respondents "did in good faith dispute and deny the receipt of said sum of money, and do now deny and dispute the receipt of the same and the liability of said county to said village therefor, and were about to disallow said claim in its entirety." These allegations do not furnish

sufficient ground to authorize a compromise of the claim of the relator. There is attached to the answer, as a part thereof, an exhibit which shows the itemized claim of the relator against the county, amounting to $1,439.64. The allegation that the county denies the receipt of said sum of money is too indefinite to show that there was in fact any controversy in good faith as to the amount of money in the hands of the county belonging to the city. It is not stated what the contention of the county is in that regard. It does not appear what part nor how much of the claim of the city was contested by the county. Construing this allegation most strictly against the county, it does not allege a contest in good faith of a sufficient amount of the claim to furnish a consideration for a compromise, nor does it state any reason for such contest or dispute of the plaintiff's claim or any fact upon which any such dispute could be justified. The allegation of a supposed compromise based upon such a controversy would not constitute any defense to the allowance of the mandamus.

7. It is further alleged in the answer that after the supposed compromise had been made the respondents allowed one-half of said claim as made, and disallowed the other half, and issued a warrant for the one-half allowed, which was received by the relator as full payment of the claim, and that no appeal was taken by the relator from the action of the county board in disallowing one-half of the claim. In *City of Chadron v. Dawes County,* 82 Neb. 614, it was said: "The fund had been raised in the exercise of a governmental function, for governmental purposes, and, we think, was held in governmental capacity. But whether so or not, it seems clear to us that the county held that portion belonging to the city as a public trust; that it was the continuing duty of the county to faithfully execute the trust by paying over the money." There was nothing for the county board to adjudicate in the matter. The county had in its treasury money that belonged to the city. It was the duty of the county treas-

urer, as before stated, to pay this money over to the city on demand. The county board had transferred it to the general fund of the county. This action was considered an obstruction in the way of the treasurer's performing his duty. It was enough for the city to request the county board to remove this obstruction and permit the county treasurer to perform his duty. The filing of the claim with the county board must be considered as an application on the part of the city for an order to return this money to the proper fund so that the treasurer might comply with the law, and the county board had no jurisdiction to take any other action.

8. These various allegations of the answer amount to an admission that the county had collected from the property of the city for the road fund an amount of money substantially as alleged in the petition, and that one-half of the amount so collected had been paid over to the city and the other half retained by the county. The qualified general denial in the answer is inconsistent with these admissions, and therefore is of no avail as a defense.

9. The allegation "that there is now no cash in the treasury of said county, or any estimate or appropriation to cover said claim, nor any levy against which a warrant therefor could be drawn, nor any adjudication by any court whereby these respondents as a board of county commissioners of said county or by any board of county commissioners of said county under which a warrant therefor can be drawn," and the allegation that one of the original respondents "has gone out of office and has been succeeded by Martin J. Weber, who has not been served," constitute no defense. The respondents cannot defend their action by disposing of the money that was in the treasury at the time the action was begun, as they may have done so far as this allegation goes, nor can they object that the writ runs against one who was not properly served, but has appealed, and is now a proper party. It does not appear from the answer that the respondents

have any substantial defense, and the court therefore did right in disregarding the answer.

The judgment of the district court is

AFFIRMED.

GEORGE NIXON V. STATE OF NEBRASKA.

FILED APRIL 24, 1911. No. 16,890.

1. **Larceny:** SUFFICIENCY OF EVIDENCE. In a prosecution for burglary and larceny, the jury found the accused not guilty of burglary, but guilty of larceny, and that the value of the property stolen was $50. The evidence is examined, the substance set out in the opinion, and it is *held* that there was sufficient to support a conviction of larceny.

2. ———: ———. While it is necessary, in order to sustain a verdict of guilty of larceny, to prove that the property alleged to have been stolen was taken without the consent of the owner, yet it is not always required that such proof be by direct evidence. If all the facts and circumstances shown establish the fact of nonconsent, that will be held sufficient.

3. ———: SENTENCE. Plaintiff in error being found guilty of stealing property of the value of $50, a sentence to the penitentiary for three years therefor *held* excessive, and reduced to two years.

ERROR to the district court for Nemaha county: LEANDER M. PEMBERTON, JUDGE. *Affirmed. Sentence reduced.*

E. B. Quackenbush and *F. G. Hawxby,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

Plaintiff in error was charged in the district court with the crime of burglary and larceny by breaking into

a store and stealing goods therefrom. He was tried for both offenses, and was found not guilty of burglary, but guilty of larceny; the value of the property found to have been stolen being fixed at $50. He was sentenced to the penitentiary for a term of three years. From that judgment he prosecutes error to this court.

It is contended by plaintiff in error that the verdict of the jury is not supported by sufficient evidence: First, that there is no competent evidence that any property was stolen; second, that even if such were the case, it was not shown that plaintiff in error committed the theft; third, that the goods alleged to be stolen, and claimed to have been found in the possession of plaintiff in error, were not of sufficient value to constitute grand larceny; fourth, that there was no proof that the goods were taken without the consent of the owner.

Referring to the first, second and third of these contentions, the evidence shows that the store and the goods therein were owned by a firm under the firm name of Young & Klinger, situated in the village of Julian, in Nemaha county; that they employed three clerks; that on the 1st day of January, 1910, they were called to their telephone by the sheriff of Otoe county, and inquired of if they had lost any goods out of their store; that they and their clerks immediately commenced an investigation, and discovered, as they thought, that quite a quantity of their goods had been stolen. It is not necessary that we set out here a list of the goods that were discovered to have been abstracted, as quite a quantity of the contents of the store, consisting of clothing, jewelry, shoes, and groceries, were thought to have been taken. One of the members of the firm went to Nebraska City, where the sheriff of Otoe county held plaintiff in error and another in custody, when it was discovered that they had in their possession a number of articles corresponding in quality, appearance and make with the goods kept in the store, but none of them had any distinctve marks which indicated that they had constituted a part of

Young & Klinger's stock, excepting a pair of drawers of a peculiar color, which were practically identified as having been a part of the stock of goods, and a finger ring, which was clearly identified. No witnesses could testify positively that the identified goods, or those that were missed from the stock, had not been sold by one of the proprietors or some of the clerks. It was shown that plaintiff in error, who was a stranger in the community, had been seen loitering around in the vicinity of Julian at or about the time the theft was committed, occupying empty box cars and a schoolhouse nearby, and the remnants of partly used property, empty cans and the like, similar to the missing goods, were found where plaintiff in error was shown to have been. The evidence was circumstantial. There was no proof of a breaking into the store building. Neither windows, doors, locks nor fastenings showed any signs of having been molested, but the evidence is clear enough that goods had recently been stolen from the store. Considering the whole case, we cannot say that there was not sufficient evidence to sustain the verdict of guilty of larceny.

Fourth: There was no direct proof that the goods were taken without the consent of the owners, but all the testimony of the proprietors and clerks strongly and clearly leads to the conclusion that no such consent was ever given. See *Johns v. State,* 88 Neb. 145. We find no reversible error in the record.

As we have seen, the verdict of the jury found the value of the stolen property to be $50. This must be accepted as the true value. We are persuaded that the sentence is disproportionate to the offense, and excessive.

The judgment will therefore be modified by a reduction of the term of confinement to two years. As thus modified, the judgment of the district court is

AFFIRMED.

JAMES MCNAMARA, APPELLEE, V. PETER E. GUNDERSON, APPELLANT.

FILED APRIL 24, 1911. No. 16,324.

1. **Process:** NAMES UNKNOWN. In law the name of a person consists of one given name and one surname, the two, using the given name first and the surname last, constitute such person's legal name; and to be ignorant of either the given name or surname of such a one is to be ignorant of the person's name within the meaning of section 148 of the code.

2. **Tax Foreclosure:** CONSTRUCTIVE SERVICE: JURISDICTION. In an action to foreclose a tax lien where there has been no administrative sale of the real estate, no personal service of summons, no appearance by any of the defendants, and the land itself is not made a party, if either the Christian or surname of the owner or the occupier of the premises is unknown, and there has been no attempt to comply with the provisions of section 148 of the code, the court is without jurisdiction to render a decree which will deprive the owner of his right of redemption.

3. EVIDENCE examined, and found sufficient to sustain the judgment of the district court.

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

Wilcox & Halligan and *J. A. Sheean,* for appellant.

Hoagland & Hoagland, contra.

BARNES, J.

Action to redeem a quarter section of land, situated in Lincoln county, from tax sale and to quiet the title thereto. The plaintiff had the judgment, and the defendant has appealed.

It appears that the Union Pacific Railroad Company obtained a patent to the land in question from the United States; that one Katherine E. Farrell made a contract for the purchase thereof with the company, and assigned her contract to her daughter, Anna Elizabeth Farrell,

who on the 24th day of June, 1891, married one George P. Stauduhr, of Rock Island, Illinois, where she has ever since resided; that she assumed the name of Anna Elizabeth Stauduhr, and ever since her marriage has been known by that name; that when she paid the purchase price for the land in question, according to the terms of the contract, the railroad company conveyed the same to her by warranty deed as Anna Elizabeth Farrell, because she was so named in the assignment of the contract; that her deed was duly recorded on the 5th day of November, 1906, in the deed records of Lincoln county, Nebraska; that on the 1st day of December, 1906, she, together with her husband, sold and conveyed the land to the plaintiff, James McNamara, and at that time there was nothing of record which showed that the defendant had any interest therein. It further appears that, while the title to the land was in the railroad company, certain taxes were assessed thereon; that they became delinquent, and on the 1st day of September, 1901, without any previous administrative sale, the county attorney of Lincoln county commenced an action in the district court to foreclose the lien for the delinquent taxes and subject the land to judicial sale for the payment of the same. The Union Pacific Railroad Company was not made a party to the action, although at that time it had the record title. Ann Elizabeth Farrell, ——— Farrell, her husband, first and real name unknown, Hy C. Wivill, John Doe, real name unknown, occupant, and Richard Roe, real name unknown, were the defendants named in the petition. There was an attempted service by publication, but no personal service whatsoever. There was no attempt to comply with the provisions of section 148 of the code, which reads as follows: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition,

that he could not discover the true name, and the summons must contain the words 'real name unknown' and a copy thereof must be personally served upon the defendant." On the 15th day of April, 1902, a decree was rendered forclosing the tax lien; sale of the premises was made by the sheriff under said decree to the defendant Peter E Gunderson by the name of "P" Gunderson; the sale was afterwards confirmed, and the sheriff executed and delivered to the defendant a deed to the premises, which was recorded in the deed records of Lincoln county on the 26th day of December, 1906. The defendant went into possession of the premises, and now claims to be the owner thereof under and by virtue of the sheriff's deed. It appears that neither the plaintiff nor his grantors ever had any actual notice of the pendency of the tax foreclosure proceeding, and the district court, upon the record and the evidence adduced at the trial, found that the tax foreclosure proceeding was void and insufficient to cut off the plaintiff's right of redemption, and rendered a decree allowing the plaintiff to redeem the premises from the tax lien upon the payment of the amount bid by the defendant at the foreclosure sale, together with interest, penalties, costs and the value of defendant's permanent improvements, from which was deducted the sum of $70 as rents and profits while the defendant was in possession of the premises.

The defendant contends that the proceedings in the foreclosure suit were regular and the decree is not subject to collateral attack; while the plaintiff asserts that it was void for many reasons. If for any reason the decree in the foreclosure case was void, then the judgment appealed from must be affirmed. It is conceded that there is no element of estoppel in this case, and it is apparent that the record title to the land in question was in the railroad company at all times prior to the 5th day of November, 1906. Therefore the taxes which became delinquent and which were the basis of the foreclosure proceedings must have been assessed against that company. The record

owner against whom the property was assessed was not made a party to the foreclosure suit. The assignee of the sale contract was named in the petition as Ann Elizabeth Farrell, while her true name was Anna Elizabeth Stauduhr; the alleged occupant was described as John Doe, real name unknown, and the verification to the petition did not contain the statement required in such cases by the provisions of section 148 of the code. There was no personal service of summons and no appearance by any of the defendants and none of them had any actual notice of the pendency of the action. In *Gillian v. McDowall,* 66 Neb. 814, which was an action to foreclose a tax lien, it was held that, where the true name of a party is unknown, the proper course is to proceed under section 148 of the code by stating in the verification of the petition that the true name of the defendant could not be discovered, and obtain personal service upon him. It would seem that this rule should apply to the occupant of the premises in an action to foreclose a tax lien. As to the assignee of the sale contract, if she should be treated as the owner, which seems to have been the course pursued by the county attorney in the foreclosure suit, it appears that she was not sued by her true name, for two reasons: First, her real surname was Stauduhr, and not Farrell, and that fact could, without doubt, have been ascertained by proper inquiry; second, she was designated as Ann, while her first or Christian name was Anna. No explanation of this method of procedure, or the necessity therefor, was contained in the petition, neither was it referred to in the verification. We cannot presume that Ann Elizabeth Farrell is Anna Elizabeth Stauduhr or Anna Elizabeth Farrell; the two names are distinctly different, and no presumption arises that they are used to designate one and the same person. It has always been the rule in this state that in law the name of a person consists of one given name and one surname, the two, using the given name first and the surname last, constitute such person's legal name; and to be ignorant of

either the given name or surname of such a one is to be ignorant of such person's name within the meaning of section 148 of the code. *Enewold v. Olsen*, 39 Neb. 59. While we do not decide that a married woman may not be sued by the name she had previously borne, it is sufficient to say that, if an attempt is made to sue her by that name, both her former christian name and surname should be correctly stated; and if it is sought to deprive her of the title to her property in a tax foreclosure proceeding, without personal service of summons, and her land is not made a party, a failure in that respect will render a judgment cutting off her right of redemption subject to collateral attack. We are therefore of opinion that the district court rightly held that the decree in the tax foreclosure proceeding was not a bar to the plaintiff's right to redeem his land from the judicial tax sale.

This renders it unnecessary for us to determine any of the other objections to the tax foreclosure decree which have been presented by counsel for the plaintiff. No objection has been made that the decree in the instant case was insufficient in form or incorrect in amount. We are of opinion that the judgment of the district court was right, and it is

AFFIRMED.

FAWCETT, J., not sitting.

GILBERT R. BOLEN, APPELLEE, V. A. A. WRIGHT ET AL., APPELLANTS.

FILED APRIL 24, 1911. No. 16,403.

1. **Usury, Defense of by Partners.** Usury may be pleaded by one copartner who, for a consideration, has assumed the payment of a partnership debt, and the debt of his copartner, for which he was personally liable as a member of the firm and as surety, although after the dissolution of the partnership he has renewed the note tainted with usury by the execution of one in his own name.

2. Notes: BONA FIDE PURCHASER: BURDEN OF PROOF. Where usury in the original transaction for which a negotiable promissory note has been given is proved, a party who claims to have purchased the note before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value, before maturity, and without notice.

3. Usury: RELIEF IN EQUITY. When a borrower goes into a court of equity to seek relief from an usurious contract, he should be required to pay the amount of the principal and lawful interest as a consideration for such relief, and it is the duty of the court in granting him relief to render a decree or judgment for the actual amount of the loan, with 7 per cent. interest thereon.

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

Lambert & Winters and *W. R. Patrick,* for appellants.

T. A. Hollister, contra.

BARNES, J.

Appeal from a decree of the district court for Douglas county enjoining the collection of a promissory note and canceling a chattel mortgage given to secure its payment. The defendants contend that the trial court erred in allowing the plaintiff to interpose the plea of usury, and this question will be determined first in the order of the assignments.

It appears that the plaintiff and his brother, Ernest Bolen, were engaged as partners in the transfer business in South Omaha, Nebraska, under the name and style of Bolen Brothers, and on the 15th day of June, 1907, borrowed of the defendant Wright the sum of $200, and gave a note therefor for $210; the $10 being for interest thereon at the rate of 5 per cent. a month. At the same time Ernest Bolen borrowed $300 of the said defendant, and executed his individual note therefor for the sum of $315; the $15 being for interest at the rate of 5 per cent. a month. These notes were renewed from time to time and payments were made on them; the rate of interest charged

each time and in all of the transactions being 5 per cent. a month until the amount of money received by the firm and by Ernest Bolen from the defendant Wright was the sum of $870. On the 4th day of January, 1908, the whole transaction was merged in a note for $913.50 signed by Bolen Brothers, and Ernest Bolen, in which was included the sum of $43.50 as interest at the rate of 5 per cent. a month. This note was secured by a chattel mortgage upon the property of the Bolen Brothers Transfer Company. On the 1st day of May, 1908, Gilbert R. Bolen purchased from his brother, Ernest, his share in the Bolen Brothers Transfer Company, and has since conducted the business under the name of the Gilbert R. Bolen Transfer Company. On the 17th day of June, 1908, Gilbert gave Wright a note for the sum of $827.90, and executed a chattel mortgage on his transfer company property securing the same. This note was a renewal of the note for $913.50, less a credit of $39.40 which also included interest at 5 per cent. a month. This note was renewed October 19, 1908. Thereafter, on the 15th day of February, 1909, plaintiff executed and delivered to the defendant Wright a new note for $665.25, secured by a chattel mortgage on his property, which last named note and mortgage was a continuation of all of the former transactions, and was the balance due on the note given October 9, 1908, for the sum of $827.90 after deducting a payment of $162.35. It thus appears without question that the transaction from its inception, and in all of its parts, was tainted with the vice of usury.

It was claimed by the defendants that the plaintiff having purchased the interest of his brother in the transfer company, and having assumed the payment of his brother's share of the indebtedness in that transaction, is now estopped to plead usury, and is as a matter of law liable for the whole amount of the principal, together with the usurious interest as evidenced by the last note of $665.25, which is the note in suit. In support of this claim defendants have cited a number of cases, com-

mencing with *Cheney v. Dunlap,* 27 Neb. 401, and ending with *People's Building, Loan & Savings Ass'n v. Pickard,* 2 Neb. (Unof.) 144. From an examination of those cases, it appears that the controlling point in each of them was that the person seeking to interpose the plea of usury was a stranger to the usurious contract, and it was held: "A mere purchaser of the equity of redemption, being neither surety nor privy, cannot avail himself of the usurious contract of his grantor to which he is a stranger and plead usury in such contract." *Cheney v. Dunlap, supra.*

It must be observed, however, in the case at bar that the plaintiff was not a stranger to the usurious transaction. At the time he purchased his brother's interest in the transfer company he was liable for the whole amount of the indebtedness as a member of the firm, and as surety for his brother. This case, therefore, should be ruled by *Beals v. Lewis,* 43 Ohio St. 220. In that case it appeared that A, B, and C were partners, and executed a promissory note to D, embracing usurious interest, and also executed to him a mortgage on real estate to secure the note. A conveyed to B and C his interest in the partnership property, including the real estate mortgaged; B and C agreeing in consideration thereof to pay the firm debts, including the debt to D. It was held: "That B and C were not estopped to assert such usury, in an action by D for the sale of the mortgaged premises." In *Machinists' Bank v. Krum,* 15 Ia. 49, it was said: "In an action against a copartnership upon a note tainted with usury, either partner may set it up as a defense, without the consent of his copartners. The defense may also be pleaded by one copartner who has for a consideration assumed the payment of the copartnership debt, and who has, under the dissolution of the copartnership renewed the note tainted with usury, by the execution of a new one, in his own name. *Aliter* as to a third party, who, for a consideration, has assumed the payment of a note thus tainted." This principle also seems to have been recognized by this court in *National Mutual Building &*

Loan Ass'n v. Retzman, 69 Neb. 667. We are therefore of opinion that the trial court rightly held that the plaintiff could avail himself of his plea of usury.

There is a further contention that the district court erred in finding that the defendant Caldwell was not a purchaser of the note in question before due, in good faith, and without notice of its usurious nature. We have read the testimony relating to this phase of the transaction, from which it appears that the defendants have for years occupied adjoining offices; that Caldwell had full knowledge of the chattel loan business conducted by the defendant Wright, and it is a significant fact that immediately after he claims to have purchased the note and mortgage in question, and some two months before it became due, without any apparent excuse therefor, he placed the same in his attorney's hands for immediate collection. Again, at the trial of this case he displayed no interest as to its result; and, considering his conduct in connection with the conduct of defendant Wright immediately before he claims to have sold the note in question to his codefendant, we are of opinion that Caldwell did not sustain the burden of proof which the law requires of him in such cases. Where usury in the original transaction for which a negotiable promissory note has been given is proved, a party who claims to have purchased the note before maturity must assume the burden of proof to show that he is a *bona fide* purchaser for value, before maturity, and without notice. *Darst v. Backus,* 18 Neb. 231; *Colby v. Parker,* 34 Neb. 510; *Knox v. Williams,* 24 Neb. 630; *McDonald v. Aufdengarten,* 41 Neb. 40.

Finally, it is contended by the defendants that, plaintiff having brought this action in equity for a cancelation of the note and mortgage in question, he should be required to do equity by paying the amount of money actually borrowed with the legal rate of interest thereon. We think the rule is that, where a borrower goes into a court of equity to seek relief from a usurious contract, he should be required to pay the amount of the principal and lawful

interest as a condition for such relief, and it is the duty of the court in granting him relief to render a decree for the actual amount of the loan, with 7 per cent. interest thereon. *Eiseman v. Gallagher,* 24 Neb. 79. The plaintiff, having brought this action in a court of equity, should be required to do equity by paying the amount of money which was actually received from the defendant Wright, together with interest thereon at the rate of 7 per cent. per annum.

This holding requires us to ascertain the interest computed at the legal rate upon $870, which it is conceded was the amount of money actually furnished to the plaintiff and his brother, Ernest, by the defendant Wright, and determine the amount legally due to the defendants; to compute the amount of the payments which have been made thereon by the plaintiff, and thus ascertain the balance due upon the note and mortgage in question. We have examined the evidence with care, and are satisfied that the computations of the district court are correct if no interest is allowed. By allowing defendants to recover interest at the legal rate, it appears that at the time the decree was rendered by the district court there was due to the defendants the sum of $67.46. It follows that the judgment appealed from should be reversed, and it is so ordered, and the cause is remanded to the district court, with directions to enter a judgment in favor of the defendants and against the plaintiff for $67.46, with legal interest thereon from the date of the former decree, and, upon the payment of that sum by the plaintiff to the clerk of the district court for the benefit of the defendants, the decree shall become operative as a payment of the note and a discharge and satisfaction of the chattel mortgage in question herein; and it is further ordered that each party shall pay the costs incurred by him in this court.

JUDGMENT ACCORDINGLY.

HENRY DEINES, APPELLANT, V. HENRY SCHWIND ET AL., APPELLEES.

FILED APRIL 24, 1911. No. 16,420.

Appeal: MOOT QUESTION. Where, on the hearing of an appeal, it is disclosed that the record presents nothing but a moot question for the determination of the supreme court, ordinarily the proceeding will be dismissed or the judgment of the district court will be affirmed.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Dismissed.*

George W. Berge, for appellant.

Harry A. Reese, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Lancaster county in a proceeding where an application for a writ of habeas corpus was denied.

It appears that in 1893 the wife of the relator departed this life leaving two children and the relator surviving her. The youngest child, a girl, was at that time only three days' old. Certain informal proceedings were had by which the respondents adopted this child, took her to their home, and from thence to the present time have treated her as their own daughter. The relator has never contributed anything to her support, maintenance or education; and, although all of the parties have lived continuously in this state, relator had seen this child but twice in the 16 years prior to the commencement of this action. He claims to have made this application to obtain possession of his daughter because her education has been neglected. It appears, however, that the respondents have not been neglectful of their duty in that matter, but on the contrary have sent her to school and endeavored to give her an education suitable to her station

in life. It further appears that an illness which she suffered in her infancy so impaired her memory as to make all of their efforts of little or no avail. She appears to be able to assist her foster mother in the work about the house; she is in good physical health, is well cared for, is happy and contented, and desires to remain with her foster parents. It also appears that she is now more than 18 years of age, and, having arrived at her majority, is entitled to exercise her own choice and determine her abiding place for herself.

The record thus presents only a moot question for our determination. For this reason, we decline to further consider the questions presented by the record, and the proceeding is

DISMISSED.

REESE, C. J., and SEDGWICK, J., not sitting.

HEINRICH SIEKER, APPELLANT, V. AUGUST SIEKER, ADMINISTRATOR, ET AL., APPELLEES.

FILED APRIL 24, 1911. No. 16,392.

Vendor and Purchaser: CONTRACT: RESCISSION. Where parties have entered into a contract for the purchase and sale of real estate, they may afterwards by the destruction of the written paper evidencing the same, under an oral agreement that the contract shall be rescinded and thereafter held for naught, effectually do away with the previous agreement.

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

France & France, for appellant.

C. F. Stroman and *Power & Meeker, contra.*

LETTON, J.

This is an action for the specific performance of a written contract for the sale of real estate. The plaintiff, Heinrich Sieker, is the son of Karl Sieker, now deceased, and of Wilhelmina Sieker, who is the principal defendant. The full execution of the contract is denied, but we are satisfied that the evidence establishes the fact that in May, 1907, Karl Sieker and his wife, Wilhelmina, entered into a written contract, which was made out in duplicate and duly executed and acknowledged, for the sale to plaintiff of 80 acres of land which was occupied by them as their homestead. Karl Sieker died in December, 1907, leaving a will whereby he devised the land to his wife. After the father's death the duplicate contracts were destroyed. Plaintiff alleges that his mother and his brothers, August and Louis Sieker, fraudulently, against his will, and without his consent, obtained from him his copy of the agreement and wrongfully destroyed the same; while the defendants contend that both copies of the contract were destroyed with his knowledge and consent, and with the full intention on the part of plaintiff and of all the parties interested that the sale should not be consummated, but that the contract should be rescinded and revoked, all the rights of plaintiff there under abandoned, and the money which had been paid by him on the contract returned to him. This is one of the not uncommon cases of family differences and disputes arising over the disposition of property, which are ordinarily productive of more bitterness and hard feeling than any other class of cases. The older members of the Sieker family seem to side with the plaintiff; while the younger members take the part of the mother. Since we believe the contract was valid, the only question left is whether it was voluntarily and by mutual consent rescinded and abandoned.

The testimony of plaintiff is that in June, 1908, while he was still living at the family home, his mother, acting

on her own suggestion, procured his duplicate copy of the contract and burned it in his presence, but without his consent.

His mother's testimony, which was taken with the aid of an interpreter, is in substance that the sale of the 80 acres was made by the parents to Heinrich for the purpose of procuring money with which to buy a larger tract of land; that through an unforseen contingency the purchase of the other tract fell through, the family were unable to obtain possession, and were liable to be without a home; that after the father's death she and Heinrich had a conversation, and Heinrich told her that father had died and she could have the land back, that he did not want to keep it, to which she assented; that a day or two after this, in the presence of her sons, August and Louis, and her daughter, Wilhelmina, she asked Heinrich what to do with the contracts; that he said they could burn them up; that he then went into his room and brought his copy, and she got hers. She was sitting by the stove; he gave her his copy, and she then, with his knowledge and consent, put both copies in the stove and burned them up. She also testifies that, in repayment of the $500 which had been paid by Heinrich on the contract, she paid him $150 in May, 1908, which he wanted for the purpose of buying a horse, and in September of the same year she paid the remaining $350. Heinrich admits the payment of the $350, but explains it by saying that $200 of it was for rent, and $150 for borrowed money, and he denies receiving the $150 which she testifies was paid him in May. The testimony of the mother as to the conversation attending the destruction of the contract is directly corroborated by that of August, Louis, and Wilhelmina, who were present at the time. There is other testimony as to collateral matters tending to throw some light on the issue, but this is also in conflict and requires no discussion. The district court found generally for the defendants, and plaintiff appeals.

While we agree with the plaintiff that the simple burn-

ing up of a contract whereby an interest in real estate has passed to another does not in any way rescind the contract, we are convinced that there is something more in this case than the mere destruction of the papers. We are satisfied from the evidence that it was the intention of plaintiff at the time he procured his copy of the contract, delivered it to his mother, and consented to its destruction, to rescind and abandon the contract and allow his mother to retain her home, and that his purpose to do so was as certainly evidenced by the surrender and destruction of the paper as it would have been had he executed a written release or revocation. We think it is now settled law that, where parties have entered into a contract for the purchase and sale of real estate, they may afterwards by the destruction of the written paper evidencing the same, under an oral agreement that the contract shall be rescinded and thereafter held for naught, effectually do away with the previous agreement. The destruction of the written contract with the intention of revesting the title in the original owner will be held in equity to have as much effect as a written conveyance. *Spier v. Schappel,* 86 Neb. 335; *Ottow v. Friese,* 126 N. W. (N. Dak.) 503; *Mahon v. Leech,* 11 N. Dak. 181; *Lowther Oil Co. v. Miller-Sibley Oil Co.,* 53 W. Va. 501, 97 Am. St. Rep. 1027; 2 Warvelle, Vendors (2d ed.) sec. 826.

The witnesses are for the most part of German parentage, with but a superficial knowledge of the English language. The plaintiff is handicapped by this, and also apparently by a lack of knowledge of ordinary business affairs. The district court had all the parties before it, and, no doubt, was better able to determine the truth or falsity of their testimony than we are. From the record before us, we feel satisfied that the conclusion of the district court was correct. Its judgment is therefore

AFFIRMED.

DENNIS KELEHER, APPELLEE, V. MARY KELEHER KELLY ET AL., APPELLANTS.

FILED APRIL 24, 1911. No. 16,404.

1. **Tenancy in Common: ADVERSE POSSESSION: LIMITATIONS.** The statute of limitations will begin to run in favor of a cotenant in possession claiming title in himself to the entire estate as against the other cotenants, as soon as knowledge of the fact that he is in possession asserting that he owns the entire estate, hostile and adverse to any claim of right in them, is clearly brought home to them.

2. **Limitation of Actions: RIGHTS OF HEIRS.** Where the right to bring an action to recover land is barred by the statute of limitations during the lifetime of one claiming title to the same, the right of his heirs is also barred.

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

T. J. Doyle and *G. L. De Lacy,* for appellants.

L. C. Burr and *C. C. Marlay, contra.*

LETTON, J.

Margaret Keleher died intestate in 1881, in Lancaster county, Nebraska, leaving children surviving her as follows: Dennis Keleher, the plaintiff; Patrick Keleher, the father of defendants Keleher; Michael Keleher, who afterwards died unmarried and intestate; and Mary Brassel, now deceased, the mother of defendants Brassel. At the time of her death Margaret Keleher owned a homestead of 80 acres of land in the same county. Administration was had of the estate the plaintiff being appointed administrator. In the administration proceedings it became necessary to sell the real estate to pay the debts of the deceased. Application was made to the district court, a license was issued and the land sold to one Malone. Immediately afterwards Malone conveyed the premises to

plaintiff. This deed was placed on record on December 2, 1882. In September, 1884, Patrick Keleher and Mary Brassel began an action in the district court for Lancaster county against the plaintiff, Mike Keleher, and James Malone, alleging that each of the plaintiffs was the owner of an undivided one-fourth interest in the premises, and specifically pleading the invalidity of the proceedings whereby the plaintiff acquired the alleged title to the premises. This action was afterwards dismissed for failure to give security for costs. Patrick Keleher died in 1905. Plaintiff has been in the actual, open, and notorious possession of the land claiming title to the entire estate ever since his deed from Malone was placed upon record in December, 1882. He has paid the taxes accruing, and has made some slight improvements.

This action was brought by him to quiet his title. Those of the defendants who are the heirs of Patrick Keleher filed an answer and cross-petition, alleging the invalidity of the administration proceedings; that their father was the owner of an undivided one-third interest in the land, and praying that this interest may be quieted in them. The Brassel heirs filed no answer.

That Patrick Keleher and Mary Brassel knew in 1884 that the plaintiff was claiming the entire title to the land as against them, and each of them, and that he was in actual possession of the same, is shown by the fact that they began an action against him, alleging these facts. For 20 years after they had this knowledge, they left the plaintiff in quiet and undisturbed possession. The doctrine of cotenancy has no application where one cotenant virtually ousts the others and actively asserts a hostile title in himself of which they have full notice. The right of action of Patrick Keleher, through whom defendants claim title, had been barred by the statute of limitations for more than 10 years before he died. This was an effectual bar as against any cause of action on their part. *Ballou v. Sherwood*, 32 Neb. 666; *Lyons v. Carr*, 77 Neb. 883.

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

AFFIRMED.

SEDGWICK, J., not sitting.

FREDERICK O. FLESNER, APPELLEE, V. GEORGE STEINBRUCK, APPELLANT.

FILED APRIL 24, 1911. No. 16,308.

1. Waters: PREVENTING NATURAL DRAINAGE. Every interference by one landowner with the natural drainage to the injury of the land of another is unreasonable, if not made by the former in the reasonable use of his own property.

2. ———: ———. It is not a reasonable use of one's property to construct a dike across a natural drain upon farm lands for the sole purpose of preventing the flow of unpolluted water from a neighbor's land in the natural course of drainage, where such flow had theretofore at all times been uninterrupted.

3. ———: CHANGING COURSE OF DRAINAGE. A lower proprietor has no lawful cause for complaint because the upper proprietor, in the exercise of good husbandry, by the use of ditches changes the course of drainage upon his own premises, but permits the water to flow without an appreciable increase in volume upon the servient estate in a natural drain, where it would have appeared if the ditches had not been constructed.

4. ———: ———. If an upper proprietor, in the interest of good husbandry, and without negligence, collects in a ditch surface water, which formerly spread over his premises, and accelerates its flow in the natural course of drainage through a natural drain onto the lands of his neighbor, he is not liable therefor.

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

Paul E. Boslaugh and *C. H. Sloan,* for appellant.

A. C. Epperson and *L. B. Stiner, contra.*

ROOT, J.

This is an action for an injunction to restrain the defendant from interfering with the flow of water. The defendant asked for an injunction to restrain the plaintiff from discharging water upon the defendant's premises. The plaintiff prevailed and the defendant appeals.

The plaintiff is the owner of the southeast quarter of section 26, and the defendant owns the west half of the southwest quarter and the south half of the northwest quarter of section 25, in town 7, range 8, in Clay County. There is a public highway between the respective farms. The plaintiff purchased his property in 1892, and the defendant acquired his farm by inheritance in 1902 or 1903. These farms, and the other tracts of land in their vicinity are flat, but there is a slight depression about 12 inches lower than the surrounding territory in the east half of section 26 wherein the surplus water accumulates. In a state of nature this water would flow north and east so as to cross the section line north of the east quarter corner, from thence it would pass on to the defendant's land into a sag, and after that depression was filled the water would spread north and east over the surrounding land. About 40 rods east of this sag there is another shallow basin, and about 120 rods further eastward there is a draw. These sags are dry the greater part of the year, the beds are cultivated, and crops are usually grown therein. More than ten years before this suit was commenced, the plaintiff constructed, and subsequently has maintained a shallow ditch parallel and close to the northern boundary of his farm from a point on the highway westward about 100 rods, and from that point southwestward to the west line of his farm. This ditch diverts water from the sag so that it will flow to the highway about 140 yards south of the point where it would otherwise pass from section 26, but it continues northward on the west side of the highway to the point where it has ever flowed onto section 25. Until about four years be-

fore this suit was instituted, the highway was not worked, but in 1904 it was graded, ditches were cut on either side of the grade, and a 12 inch tile was laid across the way at the point where the testimony shows the water has always crossed the section line. The defendant dammed the plaintiff's ditch at the point where it emerged from the field, plugged the tile, and subsequently built a straw stack on his own premises on the line of the highway and opposite the culvert where assembled storm waters have flowed since the memory of man runs not to the contrary. The defendant justifies his conduct on the ground that the ditches and the culvert cause a greater amount of water to flow upon his premises than would be cast thereon if no such improvements had been made, and that he is protecting himself against a common enemy, surface water.

The plaintiff, on the other hand, asserts that the natural course of drainage for a considerable territory, including his farm, is along a line which is covered by the straw stack; that no more water has been cast upon the defendant's premises than it would have received if the prairies had remained unbroken; that by constructing a ditch at a slight expense the defendant can relieve his land of the water of which he complains; and that he has acted maliciously for the sole purpose of injuring the plaintiff. The plaintiff also pleads that the defendant's father for many years recognized the plaintiff's right of drainage over the premises now owned by the defendant, and that he acquired his heritage subject to an easement of drainage appurtenant to the plaintiff's premises.

We are satisfied with the court's finding that there is a natural tendency for the water falling upon section 26 to flow along the line marked by the culvert in the highway and onto section 25. The defendant does not have an unqualified right to exclude surface water from his premises, but, if he exercises that privilege, must use ordinary care so as to not unnecessarily injure his neighbor. This principle of law has been repeatedly announced by

this court. Our former decisions on this point are referred to in *Conn v. Chicago, B. & Q. R. Co.*, 88 Neb. 732. In considering this subject in *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179, the New Hampshire court, by Bartlett, J., say: "As in these cases of the water-course, so in the drainage, a man may exercise his own right on his own land as he pleases, provided he does not interfere with the rights of others. The rights are correlative, and from the necessity of the case the right of each is only to a reasonable user or management; and whatever exercise of one's right or use of one's privilege in such case is, under all the circumstances, and in view of the rights of others, such a reasonable user or management, is not an infringement of the rights of others; but any interference by one landowner with the natural drainage, injurious to the land of another, and not reasonable, is unjustifiable. Every interference by one landowner with the natural drainage, actually injurious to the land of another, would be unreasonable, if not made by the former in the reasonable use of his own property."

The defendant was not protecting his own premises against the flow of diffused surface water or of polluted water. The water had been assembled by the force of gravitation, and was flowing in a body in the course of natural drainage before it reached his premises. The obstructions interposed by the defendant were not mere incidents accompanying improvements which he was making upon his own premises, but they were created for the sole purpose of preventing the movement of water in a natural drain provided by nature and utilized by his neighbors for the drainage of the surrounding territory. In constructing dikes in the path of that drain and in the highway, and by filling in the culvert that was laid for the purpose of improving the public way, the defendant was not, in the light of the evidence in this case making a reasonable use of his own property.

The defendant contends that the plaintiff by constructing the ditch along the northern boundary of his farm

unlawfully diverted the water from its natural course to the defendant's field; but the fact is that the water reaches that field at the identical point where it would appear but for this ditch. Although the ditch along the western side of the highway is employed to withdraw the water from the plaintiff's field and from his neighbor's farm to the north, the water is returned to its course before it reaches the defendant's premises. The plaintiff and his neighbor to the north have title to the west half of the highway subject to the easement of the public, the highway officials make no objection, and the defendant has no just ground for complaint on this score.

It may be that the ditches and the culvert accelerate and slightly increase the flow of water upon and over the defendant's premises, although there is evidence to the contrary. Assuming for the sake of argument that such is the fact, there is no evidence to sustain a finding that those improvements were negligently constructed or are improperly maintained, but the evidence clearly proves that they are in the interest of good husbandry and are necessary for the improvement of the highway, and that the defendant at a slight expense to himself may not only pass on this water, but as well the water which flows from his own fields into this sag. The plaintiff therefore was within his rights. *Aldritt v. Fleischauer,* 74 Neb. 66; *Manteufel v. Wetzel,* 133 Wis. 619, 19 L. R. A. n. s. 167.

A careful consideration of the record convinces us that the judgment of the district court is right, and it is

AFFIRMED.

WILLIAM HAFFKE ET AL., APPELLEES, V. H. J. COFFIN ET AL., APPELLANTS.

FILED APRIL 24, 1911. No. 16,383.

1. Damages: PENALTY. Ordinarily a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation whereof is to cover the damages which the party, in whose favor the stipulation is made, may sustain from a breach of the contract by the opposite party.

2. Indemnity Bond: BREACH: PLEADING AND PROOF. In an action upon a bond of indemnity, it is incumbent upon the plaintiff to plead and prove, not only a breach of the contract, but the amount of damages he has sustained thereby.

3. Estoppel: RECITALS IN BOND. A recital in a bond, given to secure the performance of an antecedent contract for the exchange of real estate for personal property, that the chattels are of the agreed and stipulated value of $4,500, is not contractual in its nature, and does not estop either party from proving the actual value.

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

E. J. Clements and *C. E. Foster*, for appellants.

C. E. Herring and *C. Haffke*, *contra.*

ROOT, J.

In December, 1907, the plaintiffs entered into a written contract to transfer "their livery and hack business located in the city of Omaha," to W. P. Thorp and Charles I. Bragg for the consideration of two quarter sections of land in Loup county. Thorp and Bragg were to convey this land to the plaintiffs, and were also to furnish "a merchantable abstract" of title; the title deeds were to be placed in escrow "until the abstract is approved by the parties of the first part."

The plaintiffs delivered their chattels to the defendant H. J. Coffin, who was interested in the transaction. They

approved the abstract of title and accepted the deed for one quarter section of land, but did not approve the abstract of title or accept the deed for the other tract. Thereupon in January, 1908, the defendants executed and delivered to the plaintiffs the bond in suit, which is as follows: "Know All Men by These Presents: That H. J. Coffin, as principal, and the National Fidelity & Casualty Company, as surety, are held and firmly bound unto Charles Haffke and William Haffke in the sum of two thousand five hundred dollars ($2,500) for the payment of which well and truly to be made we do bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents, upon condition as follows:

"Whereas, the said H. J. Coffin has sold and agreed to convey unto said Charles Haffke and William Haffke, for the consideration of two thousand and five hundred dollars ($2,500) the following described premises, to wit: The north half of the northwest quarter of section twenty-six (26), and the north half of the northeast quarter of section twenty-seven (27), in township twenty-one (21) north of range nineteen (19) west of the sixth principal meridian, in Loup county and state of Nebraska; and the said Charles Haffke and William Haffke have purchased said premises, and have made payments therefor as follows: By delivering to said H. J. Coffin chattels and personal property of the agreed and stipulated value of four thousand five hundred dollars ($4,500), one-half of which has this day been paid.

"Therefore, the condition of this obligation is such that if the above bounden H. J. Coffin and National Fidelity & Casualty Company, of Omaha, Nebraska, will perfect the title to said premises, furnish to said Charles Haffke and William Haffke an abstract of title thereof showing a good and perfect title to said premises in the said H. J. Coffin, to be approved by Guy R. C. Read, Esquire, of Omaha, Nebraska, and will convey said premises by deed of general warranty, and clear of all incumbrances, unto the

said Charles Haffke and William Haffke on or before the first day of October, 1908, then this obligation to be void, otherwise to be and remain in full force and effect."

The plaintiffs plead a breach of the bond as follows: "That default has been made in the conditions stated in said bond and defendants have failed and neglected to perfect the title to said premises, and have failed and neglected to furnish the plaintiffs an abstract of title thereof showing a good and perfect title to said premises in the said H. J. Coffin, approved by the said Guy R. C. Read; and have failed and neglected to convey said premises by deed of general warranty, clear of all incumbrances, unto the said plaintiffs, on or before October 1, 1908." There is no allegation of the value of the tract of land, nor that the plaintiffs have been damaged, but they plead that there is due them from the defendants $2,500, for which, with interest from October 1, 1908, and costs of suit, they pray judgment.

The defendants answered, admitting the execution of the bond; alleged that the chattels transferred by the plaintiffs in consideration for the real estate were not worth to exceed $1,600; that the title to the quarter section of land which had not been accepted by the plaintiffs had been perfected according to the requisitions of the plaintiffs' counsel, but that they refused to accept the deed or the abstract. The reply traverses these allegations. The cause was tried to the court, and it found that the $2,500 mentioned in the bond was intended by the parties as liquidated damages, and gave judgment for that sum, with interest. The defendants appeal.

Although there is no specific agreement in the bond that $2,500 shall be taken and considered as the amount of damages the plaintiffs will sustain for a breach of that instrument, plaintiffs assert that the damages flowing from the defendants' failure to perfect title to the land are uncertain, and it is evident from an inspection of the undertaking that the parties thereto adjusted the question of damages, agreed upon the value of the land in ad-

vance of the sale, made that value of the essence of the contract, and are estopped to controvert that fact, but have irrevocably elected to pay $2,500 in lieu of transferring title to the land. The contract to trade contains no stipulation as to the value of either tract of land or of the plaintiffs' personal property so that an agreed valuation for the property to be exchanged was not an inducing cause or consideration for this contract. The bond evidently was not within the contemplation of the parties at the time the contract to trade was entered into. Subsequent developments probably suggested the necessity for some security, other than the personal responsibility of Thorp and Bragg, that the title to the quarter section of land which the plaintiffs did not accept should be perfected, and the bond in suit was given to the end that the defendant Coffin might perfect that title and the chattels might be delivered.

There is no specific agreement in this bond that $2,500, or any other sum, is agreed to as liquidated damages, or that if the title is not perfected, or the abstract is not furnished, or the title is not conveyed, or that if there is a total failure to perform, the plaintiffs' damages shall be taken and considered to amount to $2,500, or to any other sum. There is nothing in the bond or in any evidence extrinsic thereto to suggest that the property transferred by the plaintiffs was of so unusual a character that it would be difficult to prove its value, nor is there anything in the record tending to prove that the market value of the land or the value of an abstract of title thereto cannot easily be ascertained by recourse to evidence, nor are we advised that any incumbrance that may exist upon the land or any imperfections in the title cannot be removed, or that the depreciation in value of the title by reason of their existence cannot readily be ascertained. In fact, there is neither allegation nor proof that the transaction under consideration is different, except as to the special features that might inhere in any contract to trade, from scores of contracts entered into within this state every

week in the year. In the light of these facts, should the bond be construed as an agreement to pay liquidated damages?

This subject was discussed in *Brennan v. Clark,* 29 Neb. 385, and the court, speaking through MAXWELL, J., say: "In construing a contract to determine whether or not a provision therein for the payment of a stipulated sum in case of default by one of the parties is to be considered as a penalty or liquidated damages, the court will consider the subject matter, the language employed, and the intention of the parties. If the construction is doubtful, the agreement will be considered a penalty merely. If damages result from the performance or omission of acts, which damages are certain or can be ascertained by evidence, the stipulated sum is considered as a penalty; but, where the acts or omissions occasioning damages are not susceptible of measurement by a pecuniary standard, the sum stipulated ordinarily will be regarded as liquidated damages." This case was approved and followed in *Squires v. Elwood,* 33 Neb. 126; *Gillilan v. Rollins,* 41 Neb. 540; and *Lee v. Carroll Normal School Co.,* 1 Neb. (Unof.) 681. See, also, *Davis v. Gillett,* 52 N. H. 126; *Cimarron Land Co. v. Barton,* 51 Kan. 554; *Kelley v. Seay,* 3 Okla. 527, 41 Pac. 615; and *Tayloe v. Sandiford,* 7 Wheat. (U. S.) *13.

Counsel for the plaintiffs urge that the case at bar should be ruled by *Sun Printing & Publishing Ass'n v. Moore,* 183 U. S. 642. The opinion was written by the present chief justice of that court, and contains an interesting discussion of the law. In that case the parties had agreed in the contract, which the bond was given to secure, that the value of the yacht chartered should, for the purpose of the charter, be considered and taken at the sum of $75,000, and that the vessel should be returned in good condition or paid for. The vessel was lost at sea and never returned to the owner. Mr. Justice White says that parties may contract for liquidated damages for the breach of a contract, and if the court, upon a fair

consideration of that contract, is convinced that such a stipulation was made, should enforce it. In satisfying himself that the parties intended to so agree, the learned justice mentions as one potent fact that the yacht had no market value. In the instant case the property to be conveyed, and the consideration therefor, had a market value, and, according to the testimony produced, the land is worth not to exceed $800. The expense of procuring an abstract would probably not exceed $50, and it is not consonant with reason to say, in the absence of specific language to that effect, that the parties intended the defendants should pay $2,500 for the failure to perform any one or all of the conditions of this bond.

Counsel argue that there is a stipulation in the undertaking that the personal property was worth $4,500. There is a statement to this effect, but it plainly refers to a past transaction, the agreement to trade, and forms no part of the consideration for the execution of the bond, so as to estop the defendants from making proof of the fact. *Commonwealth Mutual Fire Ins. Co. v. Hayden Bros.*, 60 Neb. 636; *Fagan v. Hook*, 134 Ia. 381.

Upon a consideration of the entire bond and the contract which it was given to secure, we are of opinion that this case should be ruled by *Brennan v. Clark, supra.* The testimony with respect to a breach of the bond is evasive, and suggests that, although an abstract showing perfect title in the plaintiffs or their grantors was not delivered October 10, 1908, it was delivered on some other date. It may be that the plaintiffs have been damaged in the sum of $2,500, but they have neither pleaded nor proved that fact.

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

REVERSED.

HARVEY M. HAWKINS, APPELLEE, V. ANDES N. COLLINS, APPELLANT.

FILED APRIL 24, 1911. No. 16,398.

1. **Negligence:** SETTING OUT FIRE. One who sets out a fire on his own premises without taking such precautions as a reasonable man should to prevent it from spreading to his neighbor's premises is negligent, and the fact that 48 hours intervened between the setting out of the fire and the time it spread to those premises does not in itself necessarily acquit him of negligence.

2. **Evidence of Value.** In an action for damages for the destruction by fire of a barn, granary and personal property, the owner is *prima facie* qualified to testify to the value of his property.

3. **Appeal:** VARIANCE. Proof that the defendant's negligence caused the death of plaintiff's colt is not a material variance from an allegation that by reason of that negligence the plaintiff lost a horse.

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

R. J. Millard, for appellant.

J. C. Robinson, contra.

ROOT, J.

This is an action for damages caused, as alleged, by the defendant's negligent failure to properly watch and care for fire kindled by him upon his own premises, and which subsequently spread to the plaintiff's farm and destroyed his property. The plaintiff prevailed, and the defendant appeals.

The only errors argued in the brief relate to the admission of testimony and the sufficiency of the evidence to sustain the verdict. The subjects are closely related and will be considered together.

The testimony is conflicting concerning the defendant's negligence; but, since the jury found for the plaintiff, we must consider the evidence in the light most favorable

to him. As thus considered, it will sustain the theory advanced by the plaintiff that the defendant set fire to two old straw stacks, or "butts," and that he negligently failed to control it, but negligently permitted it to smoulder and burn until by a change in the direction and the velocity of the wind a fire was kindled in the dry stubble in the field surrounding the stacks, and thereby the fire spread to the plaintiff's premises and destroyed his property. The defendant had burned the stubble for a distance around the stacks, but the increased velocity of the wind was evidently sufficient, not only to fan the smouldering embers into a blaze, but also to carry some of them beyond the fire-guard. There was nothing extraordinary in the change of direction or velocity of the wind, no more than might be expected at that season of the year in Nebraska.

The defendant does not argue that these elements constituted an intervening cause sufficient to excuse his negligence, but stoutly contends that the fire spread from a straw stack which was set on fire by some unknown cause. The defendant had the right to destroy by fire the stacks and remnants of stacks which encumbered his field, but fire is a dangerous element, and, when used, the law charges the party employing it to an exercise of reasonable care and caution to care for and control it so that it shall not spread to his neighbor's premises, and if he fails to exercise that care, he is liable for damages caused thereby. The fact that two days intervened between the kindling of the fire and the time it spread to the plaintiff's premises did not of necessity break the causal connection between the defendant's negligence and the destruction of the plaintiff's property; the defendant's duty to exercise reasonable prudence to control the fire until it was extinguished or rendered harmless to his neighbor was a continuing duty which was not discharged so long as the fire existed. *Krippner v. Biebl,* 28 Minn. 139; *Haverly v. State Line & S. R. Co.,* 135 Pa. St. 50; *Allen v. Bainbridge,* 145 Mich. 366.

The plaintiff, by reason of his relation to the property as its owner and his intimate acquaintance therewith,

was qualified to testify to its value. *Hespen v. Union P. R. Co.*, 82 Neb. 495. The fact that one animal is referred to in the petition as a horse, but is described in the testimony as a colt, is an immaterial variance in nowise prejudicial to the defendant, and should not reverse the judgment. Code, sec. 145.

The other matters referred to in the brief are not material or of sufficient importance, as we understand the record, to justify further extending this opinion. The case was fairly submitted to the jury, and its verdict, rendered upon conflicting evidence, should be sustained.

AFFIRMED.

JAMES C. WOODWARD, APPELLANT, V. CAROLYN D. WOODWARD, APPELLEE.

FILED APRIL 24, 1911. No. 16,413.

1. **Trusts:** RESULTING TRUST: HUSBAND AND WIFE. Where, upon a purchase of real estate, the legal title is taken in the name of a woman, while the consideration or part of it is paid by her husband, but not by way of a gift or a loan to her, a resulting trust immediately arises from the transaction, unless it would be a fraud to enforce that trust, and the wife will hold the title in trust for her husband to the extent that he paid the purchase price of the property.

2. ———: ———: ———. And if part of the purchase price is evidenced by the husband's note secured by a mortgage upon the real estate, which he subsequently pays, the note should be considered as a part payment made at the time it was executed, and to that extent will enlarge his estate.

3. ———: ———: ———. The fact that the property was purchased upon an express oral agreement of the wife to hold it, or any part thereof, in trust for him does not destroy the trust arising from the transaction, but should be considered as tending to rebut the presumption that the money was paid as a settlement upon her.

4. ———: ———: ENFORCEMENT: SUPPLEMENTAL PLEADINGS. If, pending litigation between the husband and wife, she is divorced and secures a judgment for alimony, the fact may be pleaded by supplemental answer, and the court should impress the trust estate with a lien to satisfy the judgment, unless other equitable considerations intervene to defeat that relief.

APPEAL from the district court for Polk county: GEORGE F. CORCORAN, JUDGE. *Reversed with directions.*

Mills, Mills & Beebe and *Hastings & Coufal,* for appellant.

Matt Miller and *J. B. Pospisil, contra.*

ROOT, J.

This is an action to establish a trust in real estate. The defendant prevailed, and the plaintiff appeals.

The parties were formerly husband and wife, but that relation ceased after this action was commenced. The plaintiff pleads the purchase in sucession of three tracts of real estate, and that the legal title thereto was vested in the defendant upon an agreement on her part to hold the title in trust for him to the extent that he contributed to the purchase price; that the last tract, which is the subject of this litigation, cost $3,200, and that he contributed $1,500 to the purchase price and expended $250 in improving the premises. The answer is in the nature of a general denial.

Counsel for plaintiff insist that this pleading contains a negative pregnant which admits the contract, but we are satisfied that the litigants and the trial court considered those allegations as traversed by the answer, and we shall so construe the pleading. If any agreement were made, it was oral, and it is not contended that by any act of the parties that agreement has been taken out of the statute of frauds. Plaintiff's counsel concede that their client's case must stand or fall upon the law with respect to resulting trusts.

We do not think the evidence justifies a finding that the plaintiff paid any part of the purchase price of the lots first bought, although he expended considerable money in repairing and beautifying the property. The proceeds of the sale of this property eventually were in-

vested in the second tract herein referred to; the contract for this property was made in the plaintiff's name, but the deed which was subsequently executed is to the defendant. The proof is satisfactory that the plaintiff paid $300 of the first payment upon this property, and that he subsequently paid $300 of the incumbrance thereon, which was evidenced by a note signed by the plaintiff, as well as by the defendant. This property was also sold, and the proceeds were invested in the property involved in this litigation.

The proof satisfies us that the plaintiff paid $200 on the first payment made on this property. The plaintiff also contends that he expended money for repairing and improving this property, but the amount thus expended is not satisfactorily established by the evidence, nor would it be material for the purpose of establishing the trust. While the defendant denied that she held the property, or any part thereof, in trust for the plaintiff, and denied having agreed to so hold it, she admits that previously, upon an agreement to live apart from him, she paid him $1,200 for his interest in this property, and that subsequently, having been reconciled, he returned the money. We are not inclined to accept this amount as the measure of the plaintiff's contribution to the purchase price of the property, because other elements of consideration may have entered into this payment, but we think this admission by her so corroborates him that we should hold that the money he contributed to the purchase of this property should not be considered as a settlement in her favor, but that, if no principle of law prevents, we should grant him relief.

The rule is well stated: "Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration or a part of it is given or paid by another, not in the way of a loan to the grantee, the parties being strangers to each other, a resulting trust immediately arises from the transaction (unless it would be enforcing a fraud to raise a resulting

trust), and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds." 1 Perry, Trusts (6th ed.) sec. 126. And where the *cestui que trust* subsequently pays his note representing part of the purchase price, but secured by a mortgage upon the land, the note will be considered as a payment made at the date of the conveyance, and his estate will be enlarged to that extent. *Leonard v. Green,* 34 Minn. 137. If the money is paid by a husband and the title taken in the name of his wife, a settlement, and not a resulting trust, will be presumed, but the presumption may be rebutted and the trust enforced. *Persons v. Persons,* 25 N. J. Eq. 250; *Duvale v. Duvale,* 54 N. J. Eq. 581. The fact that an unenforceable oral contract was made between the parties with respect to the trust estate does not defeat the resulting trust which the law creates in favor of the husband, but should be ignored, except in so far as it may rebut the presumption of a settlement. *Smithsonian Institution v. Meech,* 169 U. S. 398. The property in litigation was purchased for $3,200; the plaintiff paid $800 of the purchase price, and the defendant holds an undivided one-fourth part of the title in trust for him. It was stated at the bar that the defendant, subsequent to the commencement of this action, recovered a judgment against the plaintiff for alimony. This judgment is not a lien upon an equitable title, nor, since the plaintiff is not in possession of the property, can it be sold upon execution. *First Nat. Bank v. Tighe,* 49 Neb. 299. However, this is an action in equity, and, if a trust is established in the plaintiff's favor, it should be impressed with a lien to satisfy her judgment, should she by supplemental answer set up that judgment, if other equitable considerations do not forbid that relief.

The judgment of the district court, therefore, is reversed, with directions to enter a judgment declaring a trust in the plaintiff's favor to an undivided one-fourth part of the property described in the action, but the defendant is given permission to so amend her answer as

to plead her judgment for alimony against the plaintiff, and the court is directed to make such order with respect thereto as may seem just and equitable.

REVERSED.

MERTON D. HOOVER, APPELLEE, V. JOSEPH DE KLOTZ, APPELLANT.

FILED APRIL 24, 1911. No. 16,415.

1. Assault and Battery: RIGHT OF RESISTANCE: LIABILITY FOR DAMAGES. A person unlawfully assaulted is not bound to retreat to the wall before he may lawfully resist the aggressor with such force as may seem reasonably necessary for his own protection. If, being unlawfully assaulted, he instinctively interposes between himself and the aggressor an edged tool, which the assailant comes in contact with to his injury, the person attacked is not liable in damages therefor.

2. Trial: WITHDRAWAL OF ISSUE FROM JURY. If an affirmative defense is supported by sufficient competent evidence, it is error for the court to withdraw that defense from the jury.

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

W. B. Comstock, for appellant.

Tibbets & Anderson, contra.

ROOT, J.

This is an action for damages for an assault and battery. The plaintiff prevailed, and the defendant appeals.

The defendant pleaded self-defense, and that, while he was interposing a meat cleaver between himself and the plaintiff, the latter struck the instrument and wounded himself. The plaintiff's testimony that the defendant made an unprovoked assault upon him with a cleaver is corroborated by other evidence. The defendant's testi-

mony that, as the plaintiff suddenly attacked him, he instinctively interposed the cleaver, and the plaintiff struck his arm thereon to his injury, is also corroborated by other testimony. The plaintiff is larger and more powerful than is the defendant, and the parties during the affray occupied common ground.

The court on its own motion instructed the jury as follows: "If one attacks another with a dangerous weapon, without just cause, and that other is injured, then the attacking party must respond to the party attacked in damages. On the other hand, when a person is attacked, it is his duty to flee, if he can do so with safety to himself, before he would kill the attacking party, or inflict upon that party great bodily injury. In other words, as the books have it, the party attacked must retreat to the wall. But by this is not meant that a party must always flee, or even attempt flight. The circumstances of the attack might be such, the weapon with which he is menaced, of such a character, that retreat might well increase his peril. By retreating to the wall is only meant that the party must avail himself of any apparent and reasonable avenues of escape by which his danger might be averted and the necessity of striking his assailant avoided. But, if the attack is of such a nature, the weapon of such a character, that to attempt a retreat might increase the danger, the party need not retreat." This instruction purports to state the conditions upon which the defendant may justify his conduct. The instruction is not applicable to the facts in this case as testified to by either litigant. No witness testifies that the plaintiff was armed with a weapon, nor does the defendant say that the plaintiff attempted to kill him. On the other hand, while the instruction is predicated upon a hypothesis finding no support in the record, it assumes to instruct the jury that, before the defendant may be heard to justify on the ground of self-defense, he must have retreated to the wall, unless by so doing his danger would have been increased. Now, it is plain from the evidence that the defendant would

have been in no greater jeopardy had he retreated, and it is also undisputed that he did not retreat, so that the defendant's defense was by this instruction practically withdrawn from the jury. Authorities are cited by counsel for the respective parties to sustain or to defeat this instruction, but these cases are based upon facts so different, even in their general features, from those in the case at bar that they lend but slight assistance in determining the rule applicable to the instant case. Bearing in mind that the one party had no advantage over the other because of the location where the difficulty occurred, that the plaintiff was not armed with any weapon, and that the defendant does not contend that he believed the plaintiff was thus armed, we should put aside those cases where the plea of self-defense was interposed to a complaint for injuries inflicted in repelling an armed antagonist. This court is not committed to the doctrine that a person unlawfully assaulted must fly to the wall before he may lawfully strike a blow in self-defense, but, on the contrary, we have said as a general proposition that a person unlawfully assaulted may stand his ground and repel force by the exercise of such force as to him reasonably seems necessary to protect his person or property from injury. *Fosbinder v. Svitak,* 16 Neb. 499; *Morris v. Miller,* 83 Neb. 218. While the general proposition is sound, it cannot be successfully invoked to justify the use of force or weapons out of all proportion to the necessities of the case. A meat cleaver in the hands of an adult is a dangerous weapon, and its use to repel an ordinary assault should not be disproportionate to that assault. *Close v. Cooper,* 34 Ohio St. 98; *Foss v. Smith,* 76 Vt. 113; *McQuiggan v. Ladd,* 79 Vt. 90, 14 L. R. A. n. s. 689.

Of course, if the cleaver were raised instinctively by the defendant so that the plaintiff's arm came in contact therewith while he was attempting to strike the defendant, the defendant would not be liable. The plaintiff argues that, because the defendant so testified, the instruction criticised, if erroneous, could not have prejudiced him. We

are of opinion, however, that the defendant could not lawfully use the cleaver, whether by striking the plaintiff or by placing it in position where the plaintiff would collide therewith, without some justification; that his justification in this case is the defense of his person from an unlawful assault, and that, since his requests to charge presented that thought, he was entitled to have the subject fairly presented to the jury in the court's instructions. We do not express any opinion as to the *bona fides* of that defense, but there is sufficient substance in the evidence to entitle the defendant to have his theory of the case submitted to the jury. It was therefore not only error to give the instruction quoted, but also error not to instruct according to the defendant's theory, presented by the pleadings, the proof, and the requests to charge. *Hancock & Walters v. Stout,* 28 Neb. 301; *Hartwig v. Gordon,* 37 Neb. 657; *Chicago, R. I. & P. R. Co. v. Buckstaff,* 65 Neb. 334; *Hauber v. Leibold,* 76 Neb. 706.

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

REVERSED.

SEDGWICK, J., not sitting.

STATE, EX REL. JOHN HABERLAN, APPELLANT, V. DON L. LOVE, MAYOR, ET AL., APPELLEES.

FILED APRIL 24, 1911. No. 16,762.

1. **Municipal Corporations:** POWER OF LEGISLATURE: PENSIONS TO FIREMEN. It is competent for the legislature to require cities of the metropolitan class and cities of the first class to pension superannuated firemen and to pay those pensions from the funds of the fire department.

2. **Constitutional Law:** TAXATION: PENSIONS TO FIREMEN. Such legislation is not obnoxious to the declaration in section 7, art. IX of the constitution, that "the legislature shall not impose taxes

upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

3. ———: LOAN OF STATE'S CREDIT: PENSIONS TO FIREMEN. Nor is the legislation repugnant to section 3, art. XII of the constitution, which provides that "the credit of the state shall never be given or loaned in aid of any individual, association, or corporation."

4. ———: EXTRA COMPENSATION TO OFFICERS: PENSIONS TO FIREMEN. Nor does such legislation contravene section 16, art. III of the constitution, which provides that "the legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into."

5. Municipal Corporations: PENSIONS TO FIREMEN. A fireman, who in 1904, after more than 21 years' service in the fire department of the city of Lincoln, elected to retire therefrom and to receive the pension provided for by chapter 39, laws 1895, is entitled to that pension.

6. ———: ———. A fireman entitled to a service pension, no part of which is paid for injuries inflicted while in that vocation and as a result thereof, may only receive the pension provided by law at the time of his retirement.

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

W. C. Frampton, Price & Abbott and *Lysle I. Abbott,* for appellant.

C. C. Flansburg and *Leonard Flansburg, contra.*

ROOT, J.

This is a mandamus proceeding to compel the officers of the city of Lincoln "to place plaintiff upon the retired list of firemen in said city and pay him a pension of $50 a month, and that said pension be dated from April 1, 1904." No alternative writ was issued, but the respondents filed a general demurrer, which was sustained by the district court, and the relator's application was dismissed. The relator appeals.

In 1895, the legislature, by chapter 39, laws 1895, provided: "That all metropolitan cities and cities of the first

class having a paid fire department, shall pension all firemen of the paid fire department whenever such firemen shall have first served in such fire department for the period of twenty-one years, and shall elect to retire from active service and go upon the retired list. Such pension shall be paid by the city in the same manner as firemen upon the active list are paid, and such pension shall be twenty-five per cent. of the amount of salary such retiring fireman shall be receiving at the time that he goes upon such pension list." The act also directs that pensions shall be paid to firemen permanently disabled while in the line of duty, and that pensions shall be paid to the widows and the orphans of firemen whose death shall have been caused by injuries received while in the line of duty. By the amendment of 1909 the pension is increased to 50 per cent. of the fireman's salary at the time "he goes upon such pension list," provided the pension shall be at least $50 a month. Comp. St. 1909, ch. 30, sec. 11 *et seq.* The respondents' counsel contend that the statute is void because repugnant to section 7, art. IX, section 16, art. III, and section 3, art. XII, of the constitution.

Among other things, section 7, art. IX of the constitution, declares: "The legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." *State v. Wheeler*, 33 Neb. 563, is cited to sustain the proposition that a tax for the support of a fire department is levied for a corporate purpose, and from this statement and declarations subsequently made in *German-American Fire Ins. Co. v. Minden*, 51 Neb. 870, *Aachen & Munich Fire Ins. Co. v. City of Omaha*, 72 Neb. 518, *State v. Moores*, 55 Neb. 480, and *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109, the conclusion is reached that a city in maintaining a fire department exercises private and corporate rather than governmental power. The opinion in *State v. Wheeler*, *supra*, did turn upon the thought that the tax sought to be exacted from foreign insurance companies for the bene-

fit of the fire department in metropolitan cities was a tax for corporate purposes, but the subject was not discussed in the briefs upon the theory that a municipality may exercise governmental duties distinct from private or corporate functions, or that any distinction should be made between them, but rather it was assumed that, if the exaction should be classified as a tax, it was laid for a corporate purpose, and so the court following the arguments of counsel, said that the money demanded was a tax laid for corporate purposes.

In *German-American Fire Ins. Co. v. Minden, supra,* the decision rests solely upon the principle that the ordinance considered was void because no procedure for the collection of the tax, other than by a criminal prosecution, was provided.

In *Aachen & Munich Fire Ins. Co. v. City of Omaha, supra,* at page 530, in the commissioners' opinion, which the court adopted, it is said: "It is admitted by the demurrer that the assessment complained of was made by the tax commissioner of the city of Omaha for municipal purposes only." Upon this hypothesis the opinion was rendered.

On the other hand, in *Gillespie v. City of Lincoln,* 35 Neb. 34, in an exhaustive and well-reasoned opinion by Judge POST, this court held that firemen should be placed in the same classification as policemen and health officers; that they are public or state officers vested with such powers as the statute confers, and that the duties they perform do not relate to the corporate functions of the municipality. This opinion is sustained by the overwhelming weight of authority. 2 Abbott, Municipal Corporations, sec. 700; *Cunningham v. City of Seattle,* 40 Wash. 59, 4 L. R. A. n. s. 629, and note; *Brown v. District of Columbia,* 29 D. C. App. 273; *Phœnix Assurance Co. v. Fire Department,* 117 Ala. 631, 42 L. R. A. 468; *Firemen's Benevolent Ass'n v. Lounsbury,* 21 Ill. *511.

Gillespie v. City of Lincoln, supra, has not been criticised or in any manner discredited by this court, and must

be held to state the correct general principle of law. In sustaining the right of the legislature to authorize the governor to select commissioners who shall appoint and control members of the police force and of the fire department in metropolitan cities, the functions of firemen are recognized as governmental rather than proprietary. *Redell v. Moores*, 63 Neb. 219. So, therefore, while the city of Lincoln has the right, and in its charter is given specific authority, to assemble appliances for the extinguishment of fires, to employ firemen, and to levy and collect taxes to pay the expense of the fire department, and while that purpose is a public one, it is not a corporate purpose within the prohibition in section 7, art. IX of the constitution.

We do not understand that by enforcing the provisions of the statute the credit of the state is given or loaned in aid of any individual or corporation. Section 3, art. XII of the constitution, was intended to prevent the state from extending its credit to private enterprises. *Oxnard Beet Sugar Co. v. State*, 73 Neb. 66.

Section 16, art. III of the constitution, provides: "The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into." The respondents insist that the statute under consideration offends against this part of the fundamental law. A fireman's pension may be classified as part of his compensation for services rendered, or it may be said that it is paid to him for the purpose of stimulating all those engaged in a like public duty to prevent and suppress the destruction of property and the loss of human life incident to those conflagrations which the utmost vigilance may minimize, but cannot entirely prevent in populous cities. Within whichever class the pension may fall, public funds may be appropriated in conformity with legislative authority to pay the fireman, and the money is thereby expended for a public purpose. Gray, Limitations of Taxing Power and Public Indebtedness, sec. 336; *Trustees of Ex-*

empt Firemen's Benevolent Fund v. Roome, 93 N. Y. 313; *Phœnix Assurance Co. v. Fire Department, supra; Firemen's Benevolent Ass'n v. Lounsbury, supra.* And a pension granted to a fireman, who has served since the law became effective, cannot be said in reason to be a gratuity, nor the grant of extra compensation. *Commonwealth v. Walton,* 182 Pa. St. 373; *Commonwealth v. Barker,* 211 Pa. St. 610. The statute, therefore, does not contravene section 16, art. III of the constitution.

Finally, the respondents contend that, inasmuch as the relator did not serve as a fireman for 21 years subsequent to the enactment of chapter 39, *supra,* he is not entitled to a pension, and cite *State v. Ziegenhein,* 144 Mo. 283. In that case the statute construed provided: "That any person who shall serve as a policeman * * * for twenty years," etc., whereas, our statute directs that cities of a certain class shall pension "all firemen of the paid department whenever such firemen *shall have* first served in such fire department for the period of twenty-one years," etc. A comparison of the statutes demonstrates the inapplicability of the *Ziegenhein* case to the case at bar, and should convince the reader that the Nebraska legislature intended the statute to apply to all firemen who have served for the period of 21 years. Of course, the fireman must have been in the service and must have retired while the law was in force, because he must have elected to retire from the service before he could be placed upon the retired list, and he could not thus elect if he were not in the service. This brings us to an important feature of the case, and that is the relator prays for a writ to compel the respondents to enroll him as a retired fireman and to place his name upon the pension list. To this extent we are satisfied that the demurrer was improperly sustained.

The relator also asks that the respondents be compelled to pay him arrears of pension at the rate of $50 a month. Chapter 39, laws 1895, only authorized the payment of a pension to the extent of 25 per cent. of the fireman's sal-

ary at the time he retires from the service. The relator was being paid $80 a month at the time he retired in 1904, so that at that time he was entitled to a pension of but $20 a month. The enactment of 1909 increases the percentage to 50 per cent., but provides that at least $50 a month shall be paid. If the city of Lincoln had discharged its liability to the relator, he would have received no more than $20 a month prior to July 1, 1909. Clearly the city should not be penalized by increasing that obligation 150 per cent. So that by no fair construction of the statute should he be paid $50 a month from the date he ceased to serve as a fireman until the amendment of 1909. Whether coincident with the taking effect of that statute he became entitled to $50 a month is an important and interesting question.

In considering the right of the state to grant pensions, we enter an unexplored field from a local standpoint. In the constitution of 1866, the constitution adopted by the convention in 1871, but not ratified by the people, and in the constitution of 1875, the right of the state to loan its credit to individuals or to grant extra compensation to any officer of or contractor with the state is definitely and positively forbidden. At no time has the policy of the state encouraged the creation of an office-holding class. Rotation in office within the dominant party and rotation in office by the change in party control of state, county, city and village government has been a recognized feature of our civic life. It was not until 1871 that the congress of the United States seriously considered the subject of reform in the civil service and the creation of a force of permanent employees in government service, and agitation for the payment of pensions to civil officers is a subject of more recent development. The constitutional prohibitions just referred to were not formulated and adopted with a view to the eradication of evil practices then prevalent in the commonwealth. The state has generally, to say the least, been frugal in fixing official salaries, and it may have been anticipated that attempts might be made

by appropriations or *ex post facto* laws to favor individuals or to create charges upon the public treasury for services that others would have been willing to render for the compensation provided by law.

In applying these limitations to the instant case, it may be conceded that the pension forms an inducement to the individual to enter and remain in the service of the fire department, and that the pension in a sense is part of the compensation paid for those services. 2 Goodnow, Comparative Administrative Law, p. 74; Gray, Limitations of Taxing Power and Public Indebtedness, sec. 336. In this aspect of the case, if no part of the service was rendered subsequent to the enactmnt of the law, the compensation would be a gratuity forbidden by the fundamental law of the state. *Mead v. Inhabitants of Acton*, 139 Mass. 341. But the relator continued in the service nine years after the law was enacted, and thereby earned a right to his pension under that act so long as it shall remain in force. The amendment of 1909 does not repeal the act of 1895 so as to deprive the relator of his right to a pension; but, since he rendered the state no services subsequent to the enactment of that amendment to increase his pension would violate section 16, art. III of the constitution.

The fact that some firemen earned their pensions by serving a comparatively short time subsequent to 1895, whereas others were compelled to continue in the service for a greater length of time, does not make the legislation void. The constitutional limitations do not apply to such conditions. The legislature is not restrained from paying unequal compensation for official services so long as its laws with regard thereto are general. Legislation must be couched in general terms, and in its application exact equality cannot always be obtained among individuals. These limitations do not restrain the legislature from appropriating money for the benefit of firemen disabled in the service while in the discharge of their duty, or for the benefit of the widow and the children of a fireman fatally

injured while in that service and in the line of duty. It is a matter of common knowledge that the legislature appropriates money for the benefit of citizens injured while assisting in the capture of criminals, and its right to do so does not rest upon the principle that thereby compensation is paid for the time devoted to the public service, nor is the appropriation a gratuity, but it is justified upon the broad ground that the state owes the citizen a moral duty to pay him for injuries received while discharging a duty imposed by the necessities of the state upon all citizens, but which he has performed for them. The duty to extinguish conflagrations is also a public one, and the state is under the same moral obligation to its injured firemen that it owes to the citizen who is injured while assisting in the capture of a criminal. The legislature may transform that duty into a legal obligation, and impose it upon the municipalities by statutes general in their application to the class of cities affected thereby, and, so long as the law is not repealed, that obligation will be enforced by the courts.

It therefore seems to us that the writ should not issue in the form prayed for, and ordinarily we would not hesitate to affirm the judgment of the district court It may be the trial court was moved by some such considerations to deny the writ, but the arguments of counsel do not so advise us, and, in view of the importance of this case to the pensioners upon the rolls of the Omaha department who have appeared here by counsel, as well as to the relator, we hold that the judgment of the district court should be reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., and LETTON, J., not sitting.

W. B. ZENTMIRE, APPELLANT, V. EDWIN F. BRAILEY, SHERIFF, ET AL., APPELLEES.

FILED APRIL 24, 1911. No. 16,391.

1. Attorney's Lien: ATTACHED PROPERTY. An attorney's lien in due form, when filed in a pending action, binds realty previously attached therein to satisfy the client's claim.

2. ———: ———: FRAUDULENT DISMISSAL OF ACTION. A plaintiff, by dismissing his action in fraud of his attorney's rights, cannot thereby prevent the enforcement of the attorney's lien on property attached to satisfy plaintiff's claim.

3. ———: ———: ———: SERVICE OF NOTICE TO VACATE DISMISSAL. A nonresident defendant whose realty has been legally attached to satisfy plaintiff's claim is chargeable with notice of the lien of plaintiff's attorney, when duly filed in the case, and notice to vacate a dismissal procured in fraud of the attorney's rights may be served on counsel who appeared for defendant.

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

Lambert & Winters, for appellant.

Gurley & Woodrough and *D. O. Dwyer, contra.*

ROSE, J.

The relief sought by plaintiff is an injunction to prevent the enforcement of an attorney's lien on real estate attached in a former action. D. O. Dwyer, an attorney at law, was employed by Frank Stanley to collect from John B. Dodson $1,760 as stipulated commission for the sale of land. Under his employment Dwyer, to collect the sum stated, began an action in favor of his client and against Dodson in the district court for Douglas county, August 12, 1908, and immediately attached a lot in South Omaha as the property of the debtor. An attorney's lien for $500 was filed in the case by Dwyer October 12, 1908. After a conference between Stanley and Dodson, the former dis-

missed his action and discharged the attachment October 27, 1908, without paying Dwyer for his services and without his knowledge or consent. This occurred when Dwyer was taking depositions at Tecumseh on behalf of his client. The court entered an order of dismissal, but did not at the time know of the existence of the attorney's lien. The same day a deed conveying the attached lot to W. P. Zentmire, Dodson's father-in-law, was filed in the office of the register of deeds. A few days later, during the term at which the case was dismissed, Dwyer intervened, procured an order vacating the dismissal and reinstating the attachment to the extent of his lien, and obtained a decree for the full amount of his fees and for the foreclosure of his lien against the attached property. Though notice of the proceedings on Dwyer's behalf was in due time served on the attorneys who had entered their appearance for Dodson, he neither appeared in person nor by counsel after the action had been dismissed. To prevent the sale of the attached property to satisfy the attorney's lien, Zentmire brought this suit in equity against Dwyer and the sheriff of Douglas county. The injunction was denied, and plaintiff appealed.

In arguing the errors assigned, plaintiff asserts: The dismissal of the action terminated the litigation between the parties thereto. There was no fraud in the proceedings. Neither party could ask for a reinstatement of the case or appeal from the judgment of dismissal. The services of Lambert & Winters as attorneys for Dodson ended when the case was dismissed. Subsequent service on them was not notice to their client, and gave the court no jurisdiction to vacate the dismissal or to reinstate the attachment. Dodson did not appear in the action at law after the case was dismissed. The attorney's lien did not bind the attached property. Zentmire was an innocent purchaser, having bought the realty after the attachment was dissolved and before it was reinstated. His rights under his purchase were not affected by the subsequent reinstatement. Plaintiff concludes, therefore, that the trial

court was without jurisdiction to vacate the dismissal or to reinstate the attachment or to subject the attached property to the payment of the attorney's lien. For the reasons urged, it is insisted by plaintiff that he should be protected by injunction from the void decree. In a number of material respects these views of the law cannot be adopted.

1. Did the attorney's lien, when filed, bind the attached property? A text-writer says: "When an attachment has been made, the lien of the attachment inures to the benefit of the attorney for his fees and costs, and this cannot be defeated by any settlement made by the client with the debtor, without his consent." 1 Jones, Liens (2d ed.) sec. 232. In asserting his lien, Dwyer invoked a right granted by statute in the following language: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." Comp. St. 1909, ch. 7, sec 8. This provision is declaratory of the common law, and gives an attorney a charging or specific lien upon money in the hands of the adverse party to an action. *Cones v. Brooks*, 60 Neb. 698. The lien may attach to a judgment in favor of a client who is an executor, though the services were rendered on behalf of testator's estate. *Burleigh v. Palmer*, 74 Neb. 122. A judgment in favor of prosecutrix in a bastardy proceeding may be subjected to the lien of her attorney for professional services therein. *Taylor v. Stull*, 79 Neb. 295. The reasons for subjecting such judgments to attorneys' liens apply to attachments. Dwyer, by skill and industry in asserting the rights of his client, placed the attached property in the custody of the law to satisfy a debt of the owner. While the attachment was not a judgment, it was nevertheless a lien obtained through a process of the court. If it was effective for the purpose of collect-

ing the client's claim when the cause was dismissed, it served the purpose of a judgment. On this point the ruling is that the attached realty was charged with the attorney's lien as soon as it was filed. *Gist, Ex'r, v. Hanly,* 33 Ark. 233; *Pleasants, Adm'r, v. Kortrecht,* 5 Heisk. (Tenn.) 694; *Hunt v. McClanahan,* 1 Heisk. (Tenn.) 503.

2. Did the dismissal deprive the attorney of his right to enforce his lien on the attached property? The lien created in favor of the attorney a right independent of the wish or control of any of the suitors. The law is that the statutory lien of an attorney is paramount to any rights of the parties to the action. *Rice & Gorum v. Day,* 33 Neb. 204. It cannot be defeated by the stipulation of the litigants or by a dismissal without the attorney's consent. *Aspinwall v. Sabin,* 22 Neb. 73. Stanley, therefore, by dismissing the action when his attorney was absent and by failing to call to the attention of the court the existence of the lien of the attorney, did not deprive him of his right to the benefits thereof.

3. Did the court have jurisdiction to vacate the dismissal and to reinstate the attachment to the extent of the attorney's lien? In granting such relief the court, during the term at which the attachment was discharged, acted promptly on proper pleadings filed by the lienor. Jurisdiction, therefore, was not lost by delay. For the purpose of this inquiry, it is immaterial whether the client's conduct was prompted by a purpose to assert a legal right or to cheat his attorney out of compensation for services. In either view, he interfered with an independent, statutory right of his attorney and wrongfully discharged property from a lien over which he had no control. He also procured an order discharging the attachment without informing the court of the existence of the lien. Otherwise, the rights of the attorney would have been protected by the court. Courts properly intervene to protect attorneys from fraudulent settlements or dismissals which would prevent the collection of just compensation for professional services. *Potter v. Ajax Mining Co.,* 19 Utah,

421. When Dodson procured a dismissal during the existence of the attorney's lien, he acted at his peril. He was bound to know that Stanley had no authority to release the attached property from the attorney's lien. In requiring attorneys to answer to their clients, the courts fix a high standard of professional accountability, and, in dealing with the conduct of clients toward their attorneys, fraud and imposition should not be tolerated. The supreme court of Tennessee wisely observed: "While it is the duty of the courts to protect clients against all unfair advantages on the part of their counsel, it is a duty of equal obligation to shield the attorney, so far as practicable, against the bad faith and ingratitude of clients." *Hunt v. McClanahan,* 1 Heisk. (Tenn.) 503. In the present case the conduct of the client was, in contemplation of law, a fraud upon his attorney. *Pleasants, Adm'r, v. Kortrecht,* 5 Heisk. (Tenn.) 694. The court had not lost control over its own order of dismissal when the attachment was reinstated. Under the circumstances of this case, the notice to the counsel who appeared for Dodson was sufficient. *Merriam v. Gordon,* 17 Neb. 325.

4. Was plaintiff an innocent purchaser of the attached property, having purchased it, as he asserts, after the action was dismissed and before the court reinstated the attachment? The legal effect of the attachment was to bring Dodson into court and to charge the property with a lien in favor of Stanley for the satisfaction of his claim. The attorney's lien was filed in the case and bound the property itself. "This claim," said Judge Maxwell, "may be filed with the papers in the case, and the adverse party will be chargeable with notice of its existence." *Elliott v. Atkins,* 26 Neb. 403. When plaintiff made the purchase on which he relies, there was in the files of the case an unsatisfied attorney's lien which Stanley had no authority to release. The very day of the dismissal, and during the term at which it was rendered and while the court had control over its judgment for the purpose of changing or correcting it, plaintiff bought the attached

property from his son-in-law, Dodson. An examination of the entire record, when all the circumstances connected with the transfer are considered, leads to the conclusion that the trial court properly found that plaintiff was not an innocent purchaser.

There is no error in the order denying the injunction, and the judgment is

AFFIRMED.

JOHN WITT, APPELLEE, V. OLD LINE BANKERS LIFE INSURANCE COMPANY, APPELLANT.

FILED APRIL 24, 1911. No. 16,395.

1. Contracts: PLEADING. In stating a cause of action on a contract, plaintiff must at least allege facts showing that it was executed by, or is the obligation of, defendant, where it is set out in the petition and purports on its face to be the personal obligation of another, and not of defendant.

2. ———: ———: PERFORMANCE OF CONDITIONS. In a suit on a conditional contract for the payment of money, plaintiff must either comply with section 128 of the code by alleging generally that he "duly performed all the conditions on his part," or specifically allege facts showing that he performed all the stipulated conditions precedent to his right to a recovery.

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

E. F. Pettis, for appellant.

Courtright & Sidner, contra.

ROSE, J.

This is a suit to recover back an advance premium of $237.85 paid by plaintiff to defendant on a subsequently rejected application for life insurance. A demurrer to the petition was overruled. Defendant refused to plead fur-

ther. A judgment in favor of plaintiff for the full amount of his claim followed. Defendant has appealed.

The correctness of the ruling on the demurrer is the question submitted. In the petition it is alleged: Defendant is a corporation organized and doing business under the laws of Nebraska as a life insurance company. August 10, 1905, plaintiff applied to defendant in writing for insurance on his life in the sum of $5,000, and delivered the application to defendant. Defendant has the original application, and plaintiff has no copy. At the same time plaintiff paid defendant $237.85 as an advance premium in the event of the approval of his application and the issuance of a policy, and received from defendant a contract in writing, as follows: "No. 42817. Conditional Receipt. Amount $237.85. Received at Scribner, State of Neb., this 10 day of Aug., 1905, of John Witt, the sum of $237.85, in payment of premium upon $5,000 policy which he has this day applied for to the Old Line Bankers Life Insurance Company of Lincoln, Nebraska. Policy to date at issue, providing said application is approved by said company; otherwise said payment is to be returned to said applicant. It is hereby agreed and understood that a refusal, after being written, on the part of the applicant to submit to a medical examination, shall forfeit the payment herein. It is understood and agreed that all the premiums are due in advance and payable in cash, therefore, when notes are taken by the agent as an accommodation to the party insured, any refusal afterwards to accept the policy, or any tender of said policy back to the company or to an agent, will not in anywise release the party insured from liability on said notes, as the same must be promptly paid, whether the party desires to continue insurance or otherwise. John Witt, Applicant. C. K. Huntington, Agent."

The petition further alleges: Huntington was the agent of defendant, and was duly qualified to make the contract. The contract was executed in duplicate and a copy delivered to each of the parties. Defendant declined to

approve plaintiff's application, and ever since has refused to issue a life insurance policy to plaintiff. No part of the advance premium paid to defendant has ever been returned to plaintiff. The amount due plaintiff is also pleaded, and there is a prayer for judgment therefor. The paragraph alleging performance of the contract on the part of plaintiff is as follows: "At said time the defendant named to the plaintiff O. C. Hopper as a physician to whom the plaintiff should submit himself for a medical examination, and thereupon the plaintiff did submit to a medical examination by said physician, who did make a medical examination of plaintiff in writing, and delivered the same to the defendant."

1. The sufficiency of the petition is challenged on the ground it is nowhere stated therein that the receipt pleaded was executed by defendant. Defendant is not a party to the receipt. The place for the signature is filled as follows: "C. K. Huntington, Agent." The word "agent" is merely descriptive of the person. *Morgan v. Bergen,* 3 Neb. 209. The receipt containing the conditional promise to return the advance premium, therefore, purports on its face to be the contract of "C. K. Huntington," and not the contract of the "Old Line Bankers Life Insurance Company," defendant. Following earlier cases, this court in *Fowler v. McKay,* 88 Neb. 387, ruled: "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." Having sued the Old Line Bankers Life Insurance Company on a contract purporting on its face to be the personal obligation of another, it was incumbent on plaintiff, at least, to allege in some form facts showing that defendant executed it or that it is the obligation of defendant. Allegations pleading these essential facts cannot be found in the petition, and they should not be inferred from equivocal or doubtful language, since the petition is being tested by demurrer

and must be construed most strongly against the pleader. *Gibson v. Parlin & Orindorff,* 13 Neb. 292. Failing to show by proper allegations that defendant entered into and is bound by the contract on which the suit is based, the petition is fatally defective, and the demurrer should have been sustained.

2. An argument more vehemently presented, however, is directed to the proposition that plaintiff did not sufficiently allege performance on his part as a condition of his right to recover back the advance premium paid. The promise to return the money was conditional. Plaintiff was therefore required, in stating a cause of action, to allege that he performed all of the conditions precedent to his right to a recovery. *Livesey v. Omaha Hotel Co.,* 5 Neb. 50; *Estabrook v. Omaha Hotel Co.,* 5 Neb. 76; *Husenetter v. Gullikson,* 55 Neb. 32; *Burwell & Ord Irrigation & Power Co. v. Wilson,* 57 Neb. 396. In this respect an allegation that plaintiff duly performed all of such conditions on his part would have been sufficient under the code, which declares: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part." Code, sec. 128. Plaintiff, however, did not see fit to avail himself of this liberal statutory provision. Neither did he comply with the common law rule that the pleader must show specifically the time, place and manner of performance. Bliss, Code Pleading (2d ed.) sec. 301. The stipulations relating to the return of the premium and requiring plaintiff to submit to the examination are: "Policy to date at issue, providing said application is approved by said company; otherwise said payment is to be returned to said applicant. It is hereby agreed and understood that a refusal, after being written, on the part of the applicant to submit to a medical examination, shall forfeit the payment herein." The examination contemplated by the contract was, of course, the requisite medical examination required by all reputable life insurance companies before assuming a risk. On the face of the contract

the assurer was not limited to a single examination by the physician first designated, like the one pleaded. The report of the examiner may have omitted some fact vital to the assuming of the hazard. Symptoms requiring an examination by a specialist may have been reported to defendant as a result of the examination pleaded. Plaintiff's right to the policy for which he stipulated depended upon an examination commensurate with the risk to be assumed. In the very nature of the policy for which the advance premium was paid, a single examination, if incomplete or unsatisfactory, could never have been within the contemplation of the parties. Safe underwriting forbids such a construction of the contract. For anything appearing in the allegations relating to performance on the part of plaintiff, his own capricious refusal to submit to further examination may be the sole cause of defendant's failure to issue the policy.

When the entire pleading is considered in connection with the contract, the allegation that "thereupon the plaintiff did submit to a medical examination by said physician, who did make a medical examination of plaintiff in writing" amounts to no more than a conclusion of law, which must be disregarded in testing the petition. *Kruse v. Johnson,* 87 Neb. 694. Such a conclusion is not admitted by the demurrer. *Markey v. School District,* 58 Neb. 479. Not having alleged performance in the general language authorized by statute, plaintiff was required to state specifically the facts showing that he complied with the conditions of his contract. On this subject the supreme court of Indiana said: "If a party does not make the general allegation authorized by the statute, but undertakes to make a specific allegation of performance, he must make it with the particularity and strictness required by the rules of the common law." *Home Ins. Co. v. Duke,* 43 Ind. 418.

Under any proper rule of pleading, performance on the part of plaintiff is not sufficiently alleged. On this ground also the demurrer should have been sustained. The judg-

ment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., dissenting.

The majority opinion, in my judgment, is so clearly wrong that I cannot permit it to go down without expressing my dissent.

The petition alleges:

"(1.) The defendant is a corporation organized and doing business under the laws of Nebraska as a life insurance company.

"(2.) On or about August 10, 1905, the plaintiff made application to the defendant in writing, for a life insurance policy on the life of the plaintiff, to be written by the defendant in the sum of $5,000, and delivered said written application to the defendant, and defendant has the same and plaintiff has no copy thereof.

"(3.) At the same time the plaintiff paid to the defendant $237.85 as advance premium on said policy in case said application was approved and policy issued, and received from the defendant a contract in writing in words and figures as follows: 'No. 42817. Conditional Receipt. Amount $237.85. Received at Scribner, State of Neb., this 10 day of Aug., 1905, of John Witt, the sum of $237.85, in payment of premium upon $5,000 policy which he has this day applied for to the Old Line Bankers Life Insurance Company of Lincoln, Nebraska. Policy to date at issue, providing said application is approved by said Company; otherwise said payment is to be returned to said applicant. It is hereby agreed and understood that a refusal, after being written, on the part of the applicant to submit to a medical examination, shall forfeit the payment herein. It is understood and agreed that all the premiums are due in advance and payable in cash; therefore, when notes are taken by the agent as an accommodation to the party insured, any refusal afterwards to accept the policy, or any tender of said policy back to the company or to an agent, will not in anywise release the

party insured from liability on said notes, as the same must be promptly paid, whether the party desires to continue insurance or otherwise. John Witt, Applicant. C. K. Huntington, Agent.'

"(4.) At said time said C. K. Huntington, who signed said contract, was the agent of the defendant, and duly qualified to make said contract.

"(5.) Said contract was executed in duplicate and duly delivered to each of the parties hereto, the plaintiff taking one copy and the defendant taking one copy.

"(6.) At said time defendant named to the plaintiff O. C. Hopper as a physician to whom the plaintiff should submit himself for a medical examination, and thereupon the plaintiff did submit to a medical examination by said physician, who did make a medical examination of plaintiff in writing, and delivered the same to the defendant.

"(7.) During all of the times above mentioned, the plaintiff has been, and now is, a resident of Dodge county, Nebraska, and each and all of the transactions above mentioned happened and occurred in Dodge county, Nebraska, and said payment was made and contract entered into in Dodge county, Nebraska, and said policy of insurance was to have been delivered to plaintiff in Dodge county, Nebraska, and in lieu thereof said repayment of the premium advanced was payable to the plaintiff in Dodge county, Nebraska.

"(8.) The defendant declined to approve plaintiff's said application, and has ever since said time refused, and does now refuse, to issue a life insurance policy to plaintiff."

In his brief, counsel for defendant says that his main contention is "that there is no allegation in the amended petition, either in accord with common law rules or section 128 of the code, to the effect that appellee had duly performed all the conditions on his part to be done or performed or complied with." That section was never intended to be the exclusive method of pleading a compliance with all the essential requirements of a contract. Let

us analyze this petition and see what it in fact alleges. It alleges that plaintiff made a written application to defendant for a policy upon his life, and at the time of making the application paid to defendant as an advance premium $237.85, at the same time receiving from defendant the contract in writing, denominated a "conditional receipt," set out in the third paragraph. This receipt recites that this sum of money was received in payment of premium upon a policy which he had that day applied for: "Policy to date at issue, providing said application is approved by said company; otherwise said payment is to be returned to said applicant." We think it is clear that the payment of this advance premium, to be applied upon the policy if issued, and to be returned providing the plaintiff's application should not be approved, constitutes the contract which was then and there entered into between the parties. What follows in the conditional receipt is in effect a collateral agreement for a forfeiture, viz., a forfeiture of the payment he had made in the event that he refused, "after being written," that is, after his application had been written out, "to submit to a medical examination," or afterwards refused to accept a policy issued upon such application. The allegations that plaintiff submitted to an examination which defendant declined to approve and that defendant had at all times refused to issue a policy to plaintiff negative the forfeiture; and, if defendant desired to avail itself of such forfeiture, it should have done so by affirmative allegations in an answer.

The conditional receipt was signed "John Witt, Applicant. C. K. Huntington, Agent." If the petition stopped there, it might be urged that this paper was not the contract of defendant, but was simply the personal contract of Mr. Huntington; but that contention must give way to the next two paragraphs of the petition which allege that Huntington, who signed the contract, "was the agent of the defendant, and duly qualified to make said contract," and that "said contract was executed in duplicate and

duly delivered to each of the parties hereto, the plaintiff taking one copy and the defendant taking one copy." Not that plaintiff took one copy and Huntington the other, but that plaintiff and defendant each took a copy. While the word "agent" after the signature of Mr. Huntington to the conditional receipt might, under certain circumstances, be considered *descriptio personæ,* it cannot be so taken in the light of the allegations immediately following his signature, as above set out. It does violence to every rule of code pleading and ignores the plain meaning of unambiguous language to hold that the allegations of the petition above referred to, taken in connection with the contract, do not allege that the contract was the contract of defendant, and not that of Huntington.

As showing that defendant had complied with the terms of the contract by submitting to a medical examination, the sixth paragraph of the petition expressly alleges that "at said time defendant named to the plaintiff O. C. Hopper as a physician to whom the plaintiff should submit himself for a medical examination and thereupon the plaintiff did submit to a medical examination by said physician, who did make a medical examination of plaintiff in writing, and delivered the same to the defendant." Again we assert, it would be doing violence to every rule of code pleading to say that this allegation does not clearly mean that plaintiff submitted himself for a medical examination to the physician designated by defendant, and that such physician made a medical examination of plaintiff and delivered the same in writing to defendant. Plaintiff's agreement was that he would submit to a medical examination by a physician and take the policy which should thereafter be delivered by defendant. He did not agree to submit to a series of examinations. His agreement was "to submit to *a* medical examination." If defendant did not see fit to issue a policy upon that examination, plaintiff was absolved from any further duty, and was thereafter entitled to a return of his money. Notwithstanding plain-

tiff had done all that was required of him, the petition alleges "defendant declined to approve said application, and has ever since said time refused, and does now refuse, to issue a life insurance policy to plaintiff." We think the petition fairly and substantially alleges in detail a performance by plaintiff of every condition to be performed on his part precedent to his right to demand a return of his money. This was sufficient, and it would have been superfluous to have added the general allegation permitted by section 128 of the code, the only office of which is to enable poor lawyers to secure pleadings which will withstand demurrer, by alleging a mere conclusion.

In *Pfister v. Sentinel Co.*, 108 Wis. 572, 580, the court say: "It is elementary law, as applied to code pleadings, that a complaint will not be overthrown on demurrer unless it is wholly insufficient. Every reasonable intendment is to be made in its favor"—citing *Morse v. Gilman*, 16 Wis. *504, and a number of other cases. *Morse v. Gilman* holds: "Every reasonable intendment and presumption is to be made in favor of a pleading, and a complaint will not be held bad on demurrer, however defective, uncertain or redundant may be the mode of the statement of facts, if a cause of action may be gathered from it, and it is not so defective that taking all the facts to be admitted, the court can say that they do not constitute any cause of action whatever." That case is cited with approval and the rule announced followed by this court in *Roberts v. Samson*, 50 Neb. 745.

There is another theory upon which the judgment below should be affirmed. If everything that is alleged in reference to the conditional receipt above set out were entirely eliminated from the petition, the petition would still state a cause of action against the defendant for money had and received. It was therefore invulnerable to a general demurrer.

REESE, C. J., and LETTON, J., concur in above dissent.

JAMES A. MARTIN, APPELLANT, V. ALBERT G. HARVEY, APPELLEE.

FILED APRIL 24, 1911. No. 16,343.

1. **Trial:** MOTION TO DIRECT VERDICT: EFFECT. Where each party to a trial by jury requests the court to direct a verdict in his favor, he waives the right to thereafter insist that any question of fact should have been submitted to the jury.

2. **Ejectment:** EVIDENCE UNDER GENERAL DENIAL. Under a general denial, in an action of ejectment, the defendant may show that a deed in plaintiff's chain of title was a forgery.

3. ———: ———. The defendant, under such an answer, may prove, by any legal evidence he may have, any fact which will defeat the plaintiff's action.

4. Evidence examined and set out in the opinion *held* sufficient to sustain the judgment of the trial court.

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

J. L. McPheely, for appellant.

Morlan, Ritchie & Wolff, contra.

FAWCETT, J.

This is an action of ejectment to recover the possession of the northeast quarter of section 30, township 5, range 38, in Chase county. The petition is in the usual form. The answer admits that defendant is in possession, and denies every other allegation in plaintiff's petition. After both sides had rested, plaintiff and defendant each requested the court to direct the jury to return a verdict in his favor. The court overruled plaintiff's and sustained defendant's motion, and directed the jury to return a verdict in favor of defendant, which was done. A motion for a new trial was overruled and judgment entered upon the verdict. Plaintiff appeals.

Plaintiff's fourth and fifth assignments of error are

that the court erred in directing a verdict for defendant. By requesting a directed verdict, the right to insist upon the submission of any question to the jury was waived. *Dorsey v. Wellman,* 85 Neb. 262; *Phœnix Ins. Co. v. Kerr,* 129 Fed. 723, and cases there cited.

The only other assignment of error argued in plaintiff's brief is that the verdict is not sustained by the evidence. One of the links in plaintiff's chain of title is a deed from Samuel Harvey to John E. Kelley, dated September 25, 1899, for an express consideration of $600. The original deed was not produced. After showing that it was not in the possession of plaintiff, the record of the deed was received in evidence. Defendant, who is a son of the grantor in that deed, contends that the deed was a forgery. It is insisted by plaintiff that proof of that fact cannot be made under a general denial in the answer. In the syllabus in *Staley v. Housel,* 35 Neb. 160, we held: "(1.) Under a general denial, in an action of ejectment, the defendant may show that a deed in plaintiff's chain of title was procured by fraud and undue means. (2.) The defendant, under such an answer, may prove, by any legal evidence which he may have, any fact which will defeat the plaintiff's cause of action." This rule has been steadfastly adhered to in this court. The only proof offered by plaintiff of the execution of the deed in question, outside of the record of the deed itself, is in the testimony of Mr. Kelley, the grantee in that deed. As already stated, the deed purports to have been executed September 25, 1899. Mr. Kelley testified: "I paid either $15 or $25 in cash, and paid off the mortgage and taxes that were then accumulated against the land. The mortgage was held by the Sullivan's Saving Institution, originally $400, with accrued interest and taxes, amounting to $600, is what I paid him. Q. Where was the transaction had? A. In my office at McCook, Nebraska." After giving a short description of the man who executed the deed, he testifies: "I sold the land for $300 to John and Francis Woods." On cross-examination he was asked: "Q. Who was that man you

described a while ago, what was his name? A. Samuel Harvey. Q. When did you first meet him? A. The first time I remember of meeting him was when he executed this deed. Q. And when was the last time you saw him? A. That was the only time that I saw him. Q. Where did this man say he lived? A. At Lincoln, Nebraska. Q. Did you ever see him in Lincoln? A. I never did." The name of the notary before whom the deed purports to have been acknowledged is Lillian H. McCarl. She was not produced as a witness.

The evidence shows Mr. Kelley to have been an attorney and dealer in real estate. It is natural to suppose that such a man would promptly record a deed to property for which he had paid a substantial consideration; but the evidence shows that the deed he claims to have received was not recorded until two days after he had conveyed the land to the Woods brothers, for one-half the amount which he claims to have paid for it. No explanation is attempted to be made as to how he and Mr. Harvey happened to meet on September 25, 1899. So far as the record shows, there had never been any correspondence between them. Under the testimony of Mr. Kelley it would appear that Mr. Harvey entered his office that day, sold him his quarter section of land for from $15 to $25, subject to a $400 mortgage with interest and taxes, executed a deed therefor, and departed. On the part of defendant it is shown that during the entire year of 1899 Mr. Harvey was living with a son in Lincoln; that he had undergone an operation for strangulated hernia; that he was afflicted with kidney trouble; that he was infirm to the extent of being almost helpless; that in September, 1899, he was unable to walk even an inconsiderable distance without assistance. The son, with whom he was living, and the defendant both testified that he never was away from Lincoln during that entire year; that he could not have made a trip to McCook without assistance. Their testimony is corroborated quite strongly by four other witnesses, one of whom was the grocer with whom they traded, whose

store was in the same block. This testimony affects an important link in plaintiff's chain of title, and is sufficient to sustain the judgment of the trial court. It is insisted by plaintiff that the record does not reveal whether or not the court considered this question, or, in other words, that the record does not show that it was upon the strength of this testimony that the court directed a verdict in favor of defendant. As this testimony presents the most important question in the case, and the only theory upon which the court could properly have directed a verdict for defendant for the whole of the premises in controversy, we must assume that the court found that the deed from Samuel Harvey to John E. Kelley was a forgery. This being an action at law, and this testimony being sufficient to sustain the action of the court in directing a verdict for defendant, and to support the judgment, we cannot interfere.

The judgment of the district court is therefore

AFFIRMED.

JACOB STRAUSS ET AL., APPELLEES, V. MONITOR SPECIALTY COMPANY ET AL.; M. J. RAMAEKERS, APPELLANT.

FILED APRIL 24, 1911. No. 16,396.

1. **Notes:** REFORMATION: PLEADING. Petition examined and set out in the opinion *held* sufficient to sustain a judgment reforming the promissory notes in suit.

2. ———: ———: EVIDENCE. Evidence examined and set out in the opinion *held* clearly sufficient to sustain the allegations of the petition, and the judgment.

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

A. M. Post and *C. N. McElfresh,* for appellant.

Crane & Boucher and *A. E. Henly, contra.*

FAWCETT, J.

The petition alleges substantially: That the defendant the Monitor Specialty Company is a Nebraska corporation; that on February 18, 1908, said defendant was adjudged a bankrupt, and defendant Abel V. Shotwell was appointed trustee in bankruptcy of its estate; that during all of the times mentioned in the petition defendant D. G. Walker was the president and defendant M. J. Ramaekers the secretary and treasurer of the corporation; that on November 14, 1907, the defendant corporation made and executed three promissory notes, one for $300 due on or before December 14 after date, one for $300 due on or before December 24 after date, and the third for $202.90 due on or before January 14 after date. These notes were all alike in form, payable to the order of "ourselves," and signed "The Monitor Specialty Co., by D. G. Walker, President, by M. J. Ramaekers, Sec'y & Treas." Each note was indorsed upon the back as follows: "D. G. Walker. M. J. Ramaekers." That after the notes were so signed and indorsed "all of said defendants for a valuable consideration delivered said notes to these plaintiffs." That at the time of the execution and delivery of the notes "it was the intention of the defendants to execute to these plaintiffs valid and enforceable promissory notes aggregating said sum of $802.90, but that at said time said defendant the Monitor Specialty Company failed to indorse said notes, by reason of which failure to indorse said notes these plaintiffs are unable to enforce same against said defendants, and will be unable to enforce same unless this court shall require said defendant the Monitor Specialty Company to indorse same. * * * That at the time of the execution and delivery of said promissory notes, as herein set forth, it was agreed and understood that said notes should be indorsed by the defendant the Monitor Specialty Company, but that through inadvertence and mistake said defendant the Monitor Specialty Company failed and omitted to indorse said notes, and said defend-

ant the Monitor Specialty Company has failed and refused, and still fails and refuses, to indorse said notes, though often requested by these plaintiffs so to do, and said defendants the Monitor Specialty Company, D. G. Walker, and M. J. Ramaekers claim and contend that, by reason of the failure and omission of said the Monitor Specialty Company to indorse said notes, same are of no force or effect and create no liability against the said mentioned defendants." That when the notes became due they were duly presented to the defendant corporation for payment, but were not paid, whereupon said notes were duly protested for nonpayment, "of all of which said D. G. Walker and M. J. Ramaekers had due notice," the cost of said protest, $9.30, being paid by plaintiffs. That plaintiffs are the owners and holders of same, and that there is now due and owing to the plaintiffs thereon the sum of $802.90, together with interest and the further sum of $9.30 protest.

The prayer of the petition is that the defendants the Monitor Specialty Company and D. G. Walker, as president, and M. J. Ramaekers, as secretary and treasurer, and Abel V. Shotwell, as trustee in bankruptcy, be required forthwith to indorse said notes in the name of the Monitor Specialty Company as of the date of November 14, 1907, by writing across the back of said note the name of said "The Monitor Specialty Co., by D. G. Walker, President, by M. J. Ramaekers, Secretary and Treasurer, and by Abel V. Shotwell, Trustee in Bankruptcy of the estate of said The Monitor Specialty Co.;" and that plaintiffs recover judgment against the defendants the Monitor Specialty Company, D. G. Walker, and M. J. Ramaekers for the amount of said notes and interest.

The answer admits the corporate capacity of defendant the Monitor Specialty Company; that defendant Shotwell is trustee in bankruptcy of the estate of said bankrupt; that defendant the Monitor Specialty Company is indebted to plaintiffs "in the sum of about $800, but on open account, less certain dividends paid thereon," and denies

each and every other allegation in the petition. Further answering, defendants allege that the petition does not state facts sufficient to constitute a cause of action, and that several causes of action are improperly joined. There was a trial to the court, which resulted in a decree of reformation and judgment upon the notes as prayed in plaintiffs' petition. Defendant Ramaekers alone appeals.

At the opening of the trial defendant objected to the introduction of any evidence on the part of plaintiffs, "for the reason that the petition filed by said plaintiff does not state facts sufficient to constitute a cause of action; and for the reason that several causes of action in said petition are improperly joined." This objection was overruled, which ruling is now assigned as error. The objection that several causes of action were improperly joined is not discussed in the briefs. It will therefore be treated as abandoned and the objection to the sufficiency of the petition alone considered. The defendant contends that, in order to obtain the reformation of a written instrument, the right to such reformation must be established by evidence which is "clear, convincing, satisfactory, specific, and free from reasonable controversy; and that complainant was free from negligence," and that, if that degree of proof is required, the petition, upon which the action is based, should allege the facts with equal clearness and certainty. We think defendant has stated the rule a little more strongly than it has ever been applied in this court; yet we concede that his contention is substantially correct. Our understanding, however, of the clearness and certainty of allegation and proof necessary to sustain a suit for reformation of a written instrument is that it must be sufficient to satisfy the mind that the contract as written is not the contract intended by the parties, and that the error or deficiency therein is the result of a mutual mistake of law or fact on the part of the parties to such contract. Does this petition meet that requirement? Let us see. It alleges that at the time of the execution and delivery of the notes in controversy "it was the intention of

the defendants to execute to these plaintiffs valid and enforceable promissory notes aggregating said sum of $802.90." It is contended by defendant that this allegation is insufficient. The petition had already alleged the giving, indorsing and delivery of the notes in suit and had set them out in full. The effect, therefore, of the allegation just quoted is that it was the intention of the defendants in executing these notes to execute valid and enforceable notes; and the allegation complained of is immediately followed by a statement of the fact which rendered them unenforceable. We are unable to concur in defendant's contention.

The petition further alleges that at the time of the execution and delivery of the notes "it was agreed and understood that said notes should be indorsed by the defendant the Monitor Specialty Company, but that through inadvertence and mistake said defendant the Monitor Specialty Company failed and omitted to indorse said notes." If it was the agreement that the notes which were made payable to "ourselves" were to be indorsed by the maker, the Monitor Specialty Company, that agreement, if carried out, would have made the notes "valid and enforceable." They were not so indorsed, the petition alleges, "through inadvertence and mistake." We think this allegation was sufficient. We therefore hold that the petition stated a cause of action.

The next point urged is that the decree and judgment of the court are against the weight of evidence, and that the court erred in overruling defendant's motion, upon plaintiffs' rest, for a dismissal of the action and in entering judgment for plaintiffs. The evidence shows that at the time the notes were drawn President Walker and Secretary Ramaekers resided at Lindsay, Nebraska, which place appears to have been the home office of the defendant corporation. The company at that time maintained an office in Omaha, of which one Charles E. Charnquist was the manager. On the day the notes were written, one A. K. Cardoza, a representative of plaintiffs, called upon Mr.

Charnquist in his office in Omaha in relation to the settlement of the account then due from defendant corporation to plaintiffs. Mr. Cardoza died prior to the trial of this case, and plaintiffs were compelled to rely upon Mr. Charnquist for testimony as to what occurred at the time the notes were drawn. At the time of testifying, Mr. Charnquist was not in the employ of the defendant corporation. His testimony is to the effect that when Mr. Cardoza called he demanded payment of plaintiffs' account, and eventually suggested "that the company give him notes in payment of the account, consequently those notes were given." The notes were written out by Mr. Charnquist. When it came to the naming of the payee in the notes, he asked Cardoza "who he wanted the notes payable to." Cardoza answered: Make them payable to "ourselves." Mr. Charnquist says he then turned around and looked at Cardoza, and said: "Why not make the notes payable to you or the Strauss Brothers Company direct, and he began to get sort of angry, and said that his father had instructed him from early childhood to draw up all his checks and papers payable to myself or ourselves, and emphasized very strongly more than once that his father had been supreme judge for a good many years in the state of New York, and insisted that I make the notes payable to 'ourselves,' and have them signed by the president and secretary of the Monitor Specialty Company and indorsed by them individually or by D. G. Walker and M. J. Ramaekers." He further testified: "I made the remark to him that the notes would not be good to him or anybody else, notes that were made payable to ourselves and signed by them, and indorsed by M. J. Ramaekers and D. G. Walker individually, but he became very uneasy and got up and paced the floor, and insisted that they should be made that way, and insisted that I immediately write out the blanks and also write a letter and send up there, which I did. I done just as he told me to." It is now insisted that this testimony shows that the deficiency in the notes is due to the action of Car-

doza; that the notes were drawn as he demanded, and hence plaintiffs are not now entitled to have them reformed. It is argued that Mr. Charnquist had been a banker and knew that notes drawn as these were would not be good, but Mr. Charnquist further testified that nothing was said between him and Cardoza about these notes being indorsed by the Monitor Specialty Company. It is apparent therefore that the only discussion between Cardoza and Charnquist about the validity of the paper was in reference to the face of the notes. So far as the validity of the face of the notes is concerned, Cardoza was right and Charnquist, notwithstanding his prior banking experience, was wrong. The notes were properly drawn upon their face. The fact that upon their face they were made payable to "ourselves" did not render them invalid or in any manner unenforceable. The fact that, in order to complete the making of the notes, it was required that they be indorsed by the maker upon the back was not discussed by Cardoza and Charnquist, and hence what they said about the form of the notes has no bearing upon the right of plaintiffs to a reformation. When the notes were finally drawn, as insisted upon by Cardoza, they were sent by Charnquist to the home office at Lindsay for execution by the president and secretary, who alone had authority to execute them. When they received the notes, it was their duty to execute them, not merely to sign them upon the face, as that would not be a complete execution of the instruments. It was their duty not only to sign them upon their face, but to indorse them upon the back. This they failed to do, either through ignorance of the law, through inadvertence, or as a fraud upon the plaintiffs. In the absence of evidence, we will not impute fraud to these gentlemen. The law in such a case will presume that they did not intend to defraud, but intended to execute to plaintiffs valid promissory notes for an indebtedness which was then due, and in and by which notes the company would obtain an extension of that indebtedness for periods ranging from 30 to 60 days; and the law will

indulge a like presumption of honesty as to the indorsers, Walker and Ramaekers, viz., that, when they personally indorsed the notes, they intended to indorse and thought they were indorsing valid promissory notes for a valuable consideration, viz., the extension of time for the payment of the indebtedness of the company for which they were respectively president and secretary. Defendants have not seen fit to offer any explanation of the transaction in question. President Walker, it would seem, recognizes the justice of the decree of the district court, in that he has not appealed therefrom either individually or for the corporation. Mr. Charnquist further testified: "Q. State whether or not these notes which you have identified as exhibits 2, 4 and 6 were intended to take the place of the indebtedness of the Monitor Specialty Company to Strauss Brothers Company on the books of the company, and were to be considered as in settlement of that indebtedness? A. Why, as far as I know, that was the intention." The thought cannot be entertained for a moment that any of the parties intended to substitute unenforceable notes for an undisputed account.

The testimony of Thomas D. Crane is to the effect that he is one of the attorneys for plaintiffs; that on December 24, 1907, his firm received the notes in question from plaintiffs; that within two or three days thereafter he called upon Mr. Charnquist in relation to them; that he had a number of conversations with Mr. Charnquist, and that he, Charnquist, never in any of those conversations said anything about the alleged invalidity of the notes; that, when requested to make payment, he said that they were getting ready to send out statements to their customers, and that along about January 10 their remittances would be coming in, "and that these notes would be settled as soon as possible thereafter." Upon one occasion Charnquist called at the witness's office, when the matter was again discussed, and he was told by Mr. Crane that plaintiffs were urging them to bring suit unless the notes were paid, and that he also referred to

other claims his firm had in their hands which would have to be sued if not paid promptly; that Charnquist gave him two checks, one for $100 and one for $50, telling witness that he could apply these sums on any of the claims he wanted to; that the witness told him that he would apply them on the two claims his firm had had the longest, but that he would expect him to make the next payment on the Strauss Brothers notes, "and he said he would get around to it and do so." The witness also testified that his firm had received two small dividends upon plaintiffs' claim from the trustee in bankruptcy; that no objections whatever were made in the bankruptcy proceedings by the trustee or the Monitor Specialty Company or anybody else that these notes were incomplete and insufficient; that on November 24, 1907, he had a conversation with President D. G. Walker, at Lindsay, Nebraska; that in that conversation Dr. Walker said to him, "Yes; we will sign that note; we want to treat Robbins & Prokesch (whose claim Mr. Crane was then representing) in the same way we have treated the other creditors, and we will give our note to secure the claim of Robbins & Prokesch the same as we have Strauss Brothers and other creditors;" that the Robbins & Prokesch note was signed the next day, when he says, "I tried to get him to have some of the other stockholders in the Monitor Specialty Company sign with him to secure the indebtedness due to our clients, Robbins & Prokesch, but he said that all of the stockholders in the Monitor Specialty Company had recently executed a note for $5,000 which they had intended to negotiate and raise the money to pay off their indebtedness, and he mentioned the indebtedness of Robbins & Prokesch, Strauss Brothers Company, and the Enger-Kress Pocketbook Company, but he said the panic came on, and he said the very day of the panic he came to Omaha or sent down to Omaha this $5,000 note, and that the First National Bank of Omaha had agreed to advance the money on it, but the panic coming on stopped it. He said, if it

hadn't been for the panic, Robbins & Prokesch, Strauss Brothers and Enger-Kress would all have been paid." When asked if he had ever had any conversation with Mr. Ramaekers about the notes, he answered: "When the note was signed on the morning of November 25, 1907, Dr. Walker stated to Mr. Rameakers that this note was given to secure the merchandise indebtedness due to Robbins & Prokesch, the same as the other notes had been given."

It will thus be seen that from the time these notes were signed and delivered to plaintiffs the defendants and Charnquist all treated them as valid in all respects, and never once intimated that they entertained any thought of their invalidity. It was not until counsel for plaintiffs brought suit upon the notes in the county court that this claim was made. It would seem that defendants interposed a demurrer in that court. Mr. Crane testified that the defendants' attorney informed his partner, in the presence of the witness, the grounds of his demurrer, stating that it was because the notes were informal and made payable to the order of "ourselves" and not indorsed by the Monitor Specialty Company, that thereupon counsel dismissed the action in the county court without prejudice and commenced the present suit.

To our minds the proof meets every condition insisted upon by defendants. We think it established beyond reasonable doubt that at the time these notes were signed and delivered defendants thought they were giving, and plaintiffs thought they were receiving, valid notes for the indebtedness due from defendants to plaintiffs, and that the failure upon the part of defendant corporation to indorse the notes was the result of either inadvertence or mistake. In the face of this record, it would be a travesty upon justice to permit defendant Ramaekers to escape his just liability upon these notes, which could only be done upon the theory that he, the secretary and treasurer of defendant company, when he indorsed the notes individually and sent them to plaintiffs, knew that the notes

were invalid, and that he, as an officer of the company, was thereby perpetrating a fraud upon plaintiffs.

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

AFFIRMED.

STATE BANK OF BEAVER COUNTY, APPELLEE, V. TOM BRADSTREET, APPELLANT.

FILED APRIL 24, 1911. No. 16,406.

1. Appeal: BILL OF EXCEPTIONS: CERTIFICATION. The rule is settled that this court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions when not authenticated as such by the certificate of the clerk of the trial court.

2. Bills and Notes: ACCEPTANCE. The telegram set out in the opinion *held* to be an unconditional acceptance of the draft sued upon.

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

Harrison & Prince, for appellant.

Bayard H. Paine, contra.

FAWCETT, J.

The petition alleges that one J. A. McMillan presented to plaintiff bank the following draft: "Beaver, Utah, 11-6 1906. Tom Bradstreet; Pay to the order of State Bank of Beaver County $250, two hundred and fifty 00-100 dollars"—and requested plaintiff to cash the same, which plaintiff declined to do; that McMillan then requested the draft to be forwarded for collection; that thereafter McMillan returned to plaintiff bank, after said draft had been forwarded for collection, and again requested plaintiff to cash the same, which plaintiff refused to do unless the draft should first be accepted by the defendant upon whom it was drawn; that at the request of

McMillan plaintiff sent a telegram to defendant, asking him if he would pay the draft, and received from defendant the following: "November 7, 1906. To Beaver County State Bank, Milford, Ut. Will pay McMillan's draft on me two fifty for horses. T. Bradstreet"; that plaintiff, relying upon this acceptance, paid McMillan the full sum of $250 and became the owner of the draft; that the draft, after being forwarded through plaintiff's regular correspondents, was in due and regular course of business, upon the 14th day of November, 1906, presented to defendant for payment and payment was refused; that said draft was thereupon protested for nonpayment at a cost of $3.10, which the plaintiff was compelled to pay—and prays judgment for the face of the draft, with interest and protest fees.

The answer admits the corporate capacity of plaintiff, the drawing of the draft by McMillan, the sending of the telegram by defendant, and his refusal to pay the same, and then proceeds to set out the business relations existing between defendant and McMillan, and a custom under which defendant from time to time made loans to and accepted drafts made by McMillan; that the acceptance in question was a conditional acceptance, which did not bind defendant unless McMillan used the proceeds of the draft for the purchase of horses to be shipped to defendant; that the money was not used for such purpose, but was used for other and different purposes, and that all of these things were "well known to plaintiff, or could, by the exercise of ordinary care, have been known to plaintiff." The reply was a general denial. Trial to the court. Judgment for plaintiff. Defendant appeals.

The question as to whether or not the facts alleged by defendant as an affirmative defense were established upon the trial could only be determined by an inspection of a bill of exceptions. We find, upon examination, that there is attached to the transcript a document purporting to be a bill of exceptions, but no attempt at authentication of the bill is made, as required by section 587*b* of the code.

We have repeatedly held that in such a case such purported bill of exceptions cannot be considered by us for any purpose, and that this court will, on its own motion, refuse to consider a document appearing in the record, and purporting to be a bill of exceptions, which is not authenticated by the certificate of the clerk of the court below. *Palmer v. Mizner,* 70 Neb. 200.

The only question before us then is: Is the judgment sustained by the pleadings? It is contended that the acceptance upon its face shows it to be a conditional acceptance; that the words "for horses" constituted such a limitation upon the acceptor's liability, that he cannot be held unless it appears that the proceeds of the draft were used for the purchase of horses. This contention implies that it was the duty of the plaintiff, when it cashed the draft for Mr. McMillan, to follow him out of the bank and see to it that he used the proceeds of the draft for that purpose, and no other. Such is not the law. *Bissell v. Lewis,* 4 Mich. 450, and *Coffman v. Campbell & Co.,* 87 Ill. 98, are in point and the reasoning of those cases meets our approval. In *Coffman v. Campbell & Co.,* the acceptance was: "Will pay A. Harper draft, twenty-three hundred dollars, for stock." The exact similarity of that acceptance and the one under consideration here is apparent. In the syllabus in that case it is held: "A telegram agreeing to accept a person's draft for a certain sum, 'for stock,' is not a conditional contract, but an absolute undertaking to accept and pay the same; and a party discounting the draft, on the faith of such telegram, is entitled to recover the amount of the party so agreeing to accept. * * * In a telegram to a party, in relation to a draft, that the person sending the dispatch 'will pay A B's draft, twenty-three hundred dollars, for stock,' the words, 'for stock,' subserves no purpose as between the payee and the acceptor. At most, those words are but an indication of the nature of the consideration as between the drawer and the acceptor."

The reasoning of the majority opinion in *Coffman v.*

Campbell & Co., concurred in by five of the seven justices, is, we think, unanswerable.

AFFIRMED.

DANIEL G. WINSLOW ET AL., APPELLEES, V. JEFFREY W. WINSLOW, APPELLANT.

FILED APRIL 24, 1911. No. 16,206.

1. **Deeds:** DEED FROM PARENT TO CHILD: PRESUMPTIONS. No presumption arises against the validity of a conveyance from a parent to a child from the mere fact of that relation.
2. ———: ———: ———. When a deed is executed without consideration by an aged parent shortly before her death, whereby all of the grantor's estate is conveyed to one child to the exclusion of her other children, without any apparent reason for so doing, the courts will scrutinize the transaction with care; the presumption is against the validity of the deed.
3. ———: ———: ———: EVIDENCE. The evidence is found to be insufficient to overcome the presumption against the validity of the deed from mother to son under the circumstances surrounding its execution.

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

J. H. Edmunds, for appellant.

A. W. Crites and *C. Patterson, contra.*

SEDGWICK, J.

Catherine Winslow died at Pine Ridge, Nebraska, in February, 1907. She was nearly 71 years of age at the time of her death, and left surviving her four children. two sons and two daughters. She owned 320 acres of land which she had acquired under the homestead and preemption laws. She had been divorced from her husband, and within the year prior to her death had executed two deeds. In the one she conveyed this land to her son Jeffrey Winslow, and in the other to her daughter, Mrs.

Corder. After her death this action was brought by her heirs to set aside these deeds, and upon the trial in the district court for Sheridan county a judgment was entered canceling the deeds. In this judgment Mrs. Corder acquiesced, but the son Jeffrey Winslow has appealed to this court.

The daughters were married, and one of them, Mrs. Corder, never lived with her mother upon this land until December, 1889; from that time she remained there between three and four years. The other daughter and the two sons lived upon the farm with their mother until the daughter was married and left her mother, in 1899. From that time for about five years the son, Daniel Winslow, who was an unmarried man, tilled the farm, and the son Jeffrey was absent from home. Daniel was away from home on a visit in the winter of 1903-1904, and, when he returned in March of 1904, he found his mother confined to her bed with a broken hip. She appears to have desired that the two sons should jointly care for the farm, but this was not satisfactory to the boys, and the result was that Jeffrey, who was also a single man, remained with his mother. Thereupon at her suggestion a contract of lease was prepared whereby Jeffrey, in consideration of a portion of the crops and a share of the increase of his mother's live stock, was to have the use of the land for five years, but this instrument was not executed until Mrs. Winslow, in June, signed the deed to Jeffrey which is now in question. Jeffrey testified upon the trial that, before the deed was made and during the time that the negotiations for the lease were pending, he agreed with his mother to stay with her and care for her during the remainder of her life; and that before the deed was recorded he gave her $200 in cash. There was considerable evidence in the case, and the question for the trial court to determine was whether this deed was the voluntary and free act of Mrs. Winslow, or whether it was executed upon impulse caused by undue and improper influence, and without consideration and appreciation on the part

of Mrs. Winslow of the circumstances and conditions then existing, and the true nature and effect of the transaction.

No presumption arises against the validity of a conveyance from a parent to a child from the mere fact of that relation. *Gibson v. Hammang*, 63 Neb. 349; *Ward v. Ward*, 86 Neb. 744. When, however, a deed is executed without consideration by an aged parent shortly before her death, whereby all of the grantor's estate is conveyed to one child to the exclusion of her other children, the courts will scrutinize the transaction with jealous care, and the presumption is against the validity of the deed. *Nelson v. Wickham*, 86 Neb. 46; *Bennett v. Bennett*, 65 Neb. 432. There is some evidence in the record tending to show that one of the daughters had been somewhat neglectful of her mother's welfare, and had failed in some respects in the devotion which a child usually shows toward an aged and decrepit parent, but this daughter had contributed part of her earnings as a school teacher to the family support, and it may be that the thought in her mind that she had not been fully compensated was in some degree the cause of her neglect. During the latter part of her life, Mrs. Winslow was suffering from feeble health and several accidents which she had sustained, and while she was not insane, but had an active mind, she appears to have been of an impulsive disposition, acting frequently without due consideration as to consequences and without that deliberation which might enable her to realize the full result of her actions. Daniel, the youngest of the children, lived at home and worked for the benefit of his mother and the family longer than any of his brothers and sisters. After he had grown to young manhood, he frequently worked out for wages, but brought his wages home, and they also were applied to the use of his mother and the family. The defendant Jeffrey is the eldest son. He appears to have been considerable of a rover and trader, but seems never to have accumulated anything. She seems to have had a penchant for making deeds. She offered at one time to deed the land to her

daughter, the plaintiff, Mrs. Atwater, but Mrs. Atwater and her husband both declined to accept a deed, telling her that that was not the proper thing to do. At another time she made a will in which she gave the home place to Daniel, making certain bequests to some of the others, and giving defendant Jeffrey one dollar. In September, 1903, the fall before she made the deed in controversy here to Jeffrey, she made a deed of the land to Daniel. It was left in a bank. She subsequently went to the bank and got the deed and destroyed it, just as she probably would have done with Jeffrey's deed, had he not recorded it. About two years or so before she died, she went to the office of a Mr. Gilmore, a practicing attorney at Hays Springs, in company with her son Daniel, and asked Mr. Gilmore to draw a will in Daniel's favor. After instructing him as to the provisions of the will, she departed, and about two or three weeks later she returned to the office with Jeffrey and wanted the will changed so as to give everything to him. Mr. Gilmore did nothing further toward preparing the will. He testified that, when he first knew Mrs. Winslow, she was a pretty bright woman, but that at the time she appeared at his office she was not what she was when he first knew her, "that is, in her mental make-up"; that he "figured" she was not mentally competent. On cross-examination he testified: "Q. Had you ever noticed anything along that line until you were inquired of as a witness in this case? A. With reference to this woman? Q. Yes. A. Yes, sir; I did. Q. When was it, and what was it? A. Well, sir, that was why I didn't complete the second will, I figured it was a waste of my time to do it." As above stated, the deed to Daniel was made in September, 1903. Jeffrey and Daniel were both at home during the winter. When they declined to work the farm jointly, as above stated, Jeffrey stayed on the farm and Daniel left. A Mr. and Mrs. Schmidt lived about a mile and a half from the Winslow place. On April 1, 1904, Jeffrey and his mother went to the Schmidt home, and Schmidt prepared for them the five-year lease of the

lands above mentioned. Mr. Schmidt testified that the lease was signed by Mrs. Winslow and Jeffrey at that time, but Jeffrey testified that it was not signed until the date of its acknowledgment, June 16, 1904. He states that, after the lease was drawn, Schmidt told them that it would have to be acknowledged before a justice of the peace. Jeffrey and his mother returned home, leaving the lease with Schmidt. On June 16, 1904, Jeffrey and his mother again went to Schmidt's home, where by previous appointment they were met by Justice Lake and his wife. They all remained at Schmidt's house for dinner. During the forenoon Justice Lake prepared the deed from Mrs. Winslow to Jeffrey for the half section of land. After the deed was signed and acknowledged, Justice Lake handed it to Jeffrey, stating that that now belonged to him. Jeffrey put the deed in his pocket. At that time, or within an hour thereafter, the lease was acknowledged and left in Schmidt's hands. After Jeffrey and his mother had gotten into the buggy to drive home, the mother, Mr. Schmidt testifies, said: "'Jeff, what did you do with that deed?' and he said, 'I have got it,' and she said 'You had better leave it here with Henry Schmidt. It will be safer than if you take it home and put it in your trunk.' So Jeff took it out of his pocket and gave it to me." The deed remained in the possession of Mr. Schmidt until the 13th of the next month, when Jeffrey alone called at the residence of Mr. Schmidt and asked for it. Schmidt gave it to him, and he took it to the county seat and had it recorded. After it was recorded, Jeffrey returned it to Mr. Schmidt. Jeffrey had the deed recorded without the knowledge of his mother. Mrs. Atwater testified that, after her mother's death, she had a talk with Jeffrey, in which he claimed to have paid a thousand dollars for the place, and at another time said that his mother had given it to him; that he also said that his mother had asked for the deed back again after it was made, and he said he did not do business that way. "Q. Did he tell you what induced her to ask for a return of the deed? A. Well,

she was dissatisfied, dissatisfied with him. She wasn't getting the care she should have. Q. That is what he said, was it? A. Yes, sir; that is what he said she told him. Q. And that is why she asked for the return of the deed? A. Yes, sir." This testimony was not denied by Jeffrey. Mrs. Winslow seems to have soon become very much dissatisfied with her life with Jeffrey, and she then opened up correspondence with her daughter, defendant, Mrs. Corder, with a view to having the daughter take her to her home. In the meantime Daniel had ascertained that Jeffrey had a recorded deed for the farm, and had upbraided his mother for giving the deed. This was the first Mrs. Winslow knew that the deed had been recorded. She at once consulted a lawyer, who told her that the deed was void. The five-year lease was also recorded at the same time with the deed. The result of her correspondence with Mrs. Corder was that that lady went to see her mother and talked the matter over with her, whereupon Mrs. Winslow executed a deed to Mrs. Corder for the half section of land, and also gave her a bill of sale of all her personal property, worth about $500. Mrs. Corder then took her mother to her home at the Pine Ridge agency, where she made her very comfortable until she died, about two months and five or six days thereafter. That Mrs. Winslow even then did not understand that she had made a final disposition of her estate is shown by the fact that during the two months that she was with Mrs. Corder, and not long before she died, in writing to Jeffrey on two different occasions, she told him that she expected to be able to work again pretty soon and then she would return to the farm.

There was evidence tending to prove that she had the use of her mental faculties during all this time, and was capable of transacting business matters, at least those of minor importance and of an ordinary and simple character, but the circumstances, of which we have mentioned a few, as disclosed in the evidence, indicate that she had no fixed purpose as to the final disposition of the prop-

erty; her likes and dislikes were momentary, and not based upon an understanding and consideration of actual conditions; that her son Jeffrey was not only willing, but extremely anxious to obtain the property without consideration and to the exclusion of his brother and sisters, and that it was very easy for him to take advantage of his mother's condition, and cause her to do that which was not her own desire, but his alone.

From all the evidence, we conclude that the defendant, Jeffrey W. Winslow, has not produced sufficient evidence to overcome the presumption against the validity of the deed which arises from the circumstances surrounding its execution, and cannot find from all the evidence that he paid any valuable consideration therefor. We therefore conclude that the judgment of the district court is right, and it is

AFFIRMED.

WILLIAM T. TATE, APPELLEE, V. NEWTON BIGGS ET AL., APPELLANTS.

FILED APRIL 24, 1911. No. 16,410.

1. **Taxation:** SALE FOR TAXES: TREASURER'S RETURN. The return which a county treasurer is required to make to the county clerk of his public sales of real estate for taxes must be certified and signed by him.

2. ———: ———: NOTICE. The treasurer's notice of tax sales must contain substantially all of the matters specified in the statute. If it omits the statement that so much of each tract as may be necessary will be sold for the taxes, interest and costs thereon, and that it will be made by the treasurer at public auction on the first Monday of November next thereafter, the sale made pursuant thereto will be invalid.

3. ———: TAX DEED: CONCLUSIVENESS. Section 221 of the revenue law (Comp. St. 1903, ch. 77, art. I) will not be construed to mean that a tax deed shall be conclusive evidence of all matters not recited in that section.

4. **Abandonment:** TITLE TO REALTY. Facts recited in the opinion *held* not to amount to an abandonment of a legal title in real estate. Whether such title can be lost by abandonment, *quære.*

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

Hoagland & Hoagland and *Leroy Martin,* for appellants.

Courtright & Sidner, contra.

C. S. Allen, amicus curiæ.

SEDGWICK, J.

The plaintiff began this action in the district court for Cheyenne county to set aside a tax deed of certain lands in that county and to redeem the lands from the tax sale. The decree of the district court was in his favor, and the defendants have appealed.

The plaintiff alleged that the land was conveyed by the United States to the Union Pacific Railroad Company, and by that company to one Arthur W. Oborne, who, with his wife, conveyed the land to the plaintiff by deed. The petition alleges many defects in the proceedings resulting in the tax sale and deed; and in his brief plaintiff relies upon three contentions: First, that the notice of sale was defective; second, that no sufficient return of the public sale was made by the treasurer to the county clerk, the sale upon which the deed was issued being a private sale; third, that the sale was excessive.

1. The defendants, who are appellants, contend that the trial court determined the case solely upon the second of the foregoing contentions of the plaintiff, holding that the return of the treasurer to the county clerk was insufficient. There was some controversy in the evidence as to whether any attempt was made by the treasurer to comply with the statute requiring him to make a return of the public sales before selling any of the land at private sale, but we think that it sufficiently appears that the following document in typewriting was filed by the treasurer with the county clerk as his return, and that no other return was made by him:

"Land sold at public auction by A. K. Greenlee, Co. Treas. Cheyenne County, Nebraska, 1905.

Number	Date	Sold to	Description	Amount
1251	Nov. 7	Jas. Thompson	N. E. 2-15 49	$8 95
1252	Nov. 10	L. G. Simon	S. S. E. 5-14-48	24 50

"Sidney, Nebr., Nov. 11th, 1905."

(Indorsed) "Filed Nov. 12, 1905. R. E. Barrett, Co. Clerk."

Section 204 of the revenue act of 1903 (Comp. St. 1903, ch. 77, art. I) provides: "The treasurer shall keep a sale book showing in separate columns the number and date of each certificate of sale, the name of the owners or owner if known, the description of each tract of land or town lot, the name of the purchaser, the total amount of taxes and costs for which sold, the amount of subsequent taxes paid by the purchaser and date of payment." Section 205 is as follows: "On or before the first Monday of December following the sale of real property, the treasurer shall file in the office of the county clerk a return thereon as the same shall appear on the treasurer's sale book and such return duly certified shall be evidence of the regularity of the proceedings." Section 206 provides that lands may be sold at private sale after "the treasurer shall have made his return."

The revenue law of 1879, which was replaced by the act of 1903, also provided that private sales might be made after the treasurer had made return of his public sale, and under that act it was many times held by this court that no valid private sale could be made by the treasurer until after he had made this return. The defendants contend that the statement filed with the county clerk by the treasurer without the signature of the treasurer or any certificate thereon is sufficient. If a return of the public sales must be made by the treasurer before any valid private sale can be made, as has been so often held by this court, it must be, of course, such a return

as the statute prescribes; that is, whatever the statute directs as to the form and character of the return must be complied with or it cannot be said to be a return at all, within the meaning of the statute. Does the statute intend that the return shall be signed and certified to by the treasurer? The act of 1879 (laws 1879, p. 275, sec. 112) provided that after making the public sale the treasurer should file "a return thereof, as the same shall appear on said sale book, and such certificate shall be evidence of the legality of the proceedings." The former act called the return a "certificate", and, of course, unless it contained some language that would amount to an assertion by the treasurer that it was a correct return of his proceedings, it could not be a certificate, and would not be such a return as was contemplated by that act. There is no apparent reason for a change of the phraseology. We think that the language of the act of 1903 must have the same construction. The return must be filed, and such return must be duly certified. The word "return" has a legal meaning, more or less definite and certain. Webster's New International Dictionary defines it: "(a) The rendering back or delivery of a writ, precept, or execution, to the proper officer or court. This is now usually done by filing the document, properly indorsed, in the clerk's office. (b) The certificate of an officer stating what he has done in or about the execution of a writ, precept, etc., indorsed on the document. (c) The sending back of a commission with the certificate of the commissioners." The treasurer derives his authority to make the sale from the tax list furnished him by the county clerk. This list is in some respects analogous to a writ of execution, and this affords some explanation of the use of the technical word "return" in the statute. The act of 1879 did not require this return to show the name of the owners or owner of the land, but by the act of 1903 this is required, but the paper relied upon as a return does not give this information. We think the trial court was right in holding that there was no sufficient return by the treasurer of the public sale.

2. One of the objections made by plaintiff against the validity of the tax deed is that the notice of the tax sale is insufficient. The act of 1879 provided for no notice, but by the amendment of 1885 a notice of tax sale was required, and the statute provided what it should contain. "The notice shall contain a notification that all lands, on which the taxes of the preceding year, naming it, remain unpaid, will be sold, and the time and place of the sale, and said notice must contain a list of the lands to be sold and the amount of taxes due thereon." Laws 1885, ch. 73, sec. 1 (109). The notice published was as follows: "Notice of Tax Sale. The following is a list of lands and town lots on which taxes for the year 1904 and prior years are delinquent and unpaid, and which will be offered for sale for taxes at the county treasurer's office in the village of Sidney, Cheyenne county, Nebraska, on and after the first Monday in November, 1905, between the hours of 9 o'clock A. M. and 4 o'clock P. M. A. K. Greenlee, County Treasurer. October 1, 1905. Township 12, range 47, sec. 1 nw, $2.60; 2 sw, $13.68," etc. It appears to substantially comply with the amendment of 1885. The act of 1903 required that the "treasurer shall * * * make out a list of all lands and town lots subject to sale, and the amount of all delinquent taxes against each with interest to the date of sale, describing such land and town lots as the same are described on the tax list, with an accompanying notice stating that so much of each tract of land or town lot described in said list as may be necessary for that purpose will, on the first Monday of November next thereafter, be sold by him at public auction." Comp. St. 1903, ch. 77, art. I, sec. 194. The published notice offers only the entire tract; it fails to state that so much of each tract as may be necessary will be sold. It does not state that the sale will be made by the treasurer, nor that it will be at public auction, nor that it will be for the taxes, interest and costs thereon, nor that it will be on the first Monday of November next thereafter. This notice is not a compliance with the present statute.

3. The third objection which the plaintiff makes to the tax deed is that the land was sold for a greater amount than the taxes, interest and costs thereon. It is claimed that the entire land was sold without offering to sell "so much of each tract * * * as may be necessary * * * for the taxes, interest and costs thereon," and that it was sold for more than the taxes, interest and costs amount to. Of course, such a sale would be invalid, but these allegations are disputed by the defendant, and the parties appear to derive different results from the computation which they have made. The sale is invalid for the reasons given, and we do not find it necessary to discuss these computations.

4. It is contended that the statute makes the tax deed conclusive as to the matters herein discussed. Sections 220 and 221 of the act of 1903 (Comp. St. 1903, ch. 77, art. I) are taken entirely from section 130 of the act of 1879 (laws 1879, p. 328), omitting a few significant words. The first part of said section 130 is as follows: "Deeds made by the county treasurer as aforesaid shall be presumptive evidence in all the courts of this state, in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts: (1) That the real property conveyed was subject to taxation for the year or years stated in the deed; (2) that the taxes were not paid at any time before the sale; (3) that the real property conveyed had not been redeemed from the sale at the date of the deed; (4) that the property had been listed and assessed; (5) that the taxes were levied according to law; (6) that the property was sold for taxes as stated in the deed; (7) that notice had been served and due publication had as required in section 123 of this chapter, before the time of redemption expired." It then provides that the treasurer's deed shall be conclusive evidence of certain things, and concludes the section with the provision, which is inserted as section 221 of the act of 1903, and is as follows: "And in all controversies and suits

involving the title to real property claimed and held under and by virtue of a deed made substantially as aforesaid by the treasurer, the person claiming title adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state, or that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property; but no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid; provided, that in any case where a person had paid his taxes, and through mistake in the entry made in the treasurer's books or in the receipt, the land upon which the taxes were paid was afterwards sold, the treasurer's deed shall not convey the title; provided, further, that in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same or in the purchaser to defeat the same, and if fraud is so established such sale and title shall be void." This made it incumbent upon the person claiming the title adverse to the tax deed to disprove matters of which the tax deed was presumptive evidence, but this language in the said section 130 could not be construed to mean that a tax deed was conclusive evidence of any of those things of which the section expressly provided that it should be presumptive evidence only. In the act of 1903

the words "and it shall be conclusive evidence of the following facts", which were found in the former act, were omitted, and those facts of which the tax deed was made the conclusive evidence in the former act were in the latter act added to section 220, which specifies the facts of which the tax deed shall be presumptive evidence. The two sections of the present law must be construed together and made consistent with each other. To hold that the tax deed is conclusive evidence of all matters not recited in section 221, as urged by defendants, would make that section inconsistent with section 220, which provides that the tax deed shall be presumptive evidence only of the matters therein specified. The legislature will be presumed to have knowledge of the construction that had been given to section 130 of the act of 1879, and to have intended the same construction to be given to similar language in sections 220 and 221 of the present act. By omitting to provide that the tax deed shall be conclusive evidence of these matters and classifying them all as matters of which the tax deed is presumptive evidence only, the legislature must have intended that section 221 would be construed as the same language has been construed many times by this court while the act of 1879 was in force, and that language has always been construed as consistent with that part of the said section 130 which made the tax deed presumptive evidence only of certain matters therein so specified. Section 221, therefore, of the present act, which recites some of those things of which the tax deed is presumptive evidence, cannot be construed to intend to make the tax deed conclusive evidence of all matters not therein recited. The notice of sale must be given substantially as the statute provides, and the treasurer must make return of his public sales before selling lands at private sale. The tax deed is not conclusive evidence that these requirements have been complied with.

5. At the conclusion of the trial the defendants asked leave to amend their answer by inserting a plea of aban-

donment of the land by plaintiff's grantor, and estoppel by reason of laches. The court refused to permit such amendment, and this ruling is now assigned as error. The plea offered, after stating the conclusion of the pleader that there had been such abandonment, alleges the facts upon which such conclusion is predicated. They are that Oborne, plaintiff's grantor, for a long time prior to 1908 (date of plaintiff's deed) failed to pay the taxes duly levied upon the land, and failed and refused to place his deed of conveyance from the Union Pacific Railroad Company upon record with the further allegation that, "by reason of such abandonment and the tax proceedings herein, the said Oborne and plaintiff are estopped by their acts aforesaid to reassert title to said premises and to question the validity and regularity of the proceedings upon which defendants' title is based." At common law legal title to land could not be lost by abandonment. If this rule is applicable to our conditions it has been adopted by our statute. This, however, we do not find it necessary to determine in this case, since the acts pleaded would not amount to an abandonment, even in those jurisdictions which have followed the rules of the Spanish law.

The decree of the district court is

AFFIRMED.

JERRY J. HANKS V. STATE OF NEBRASKA.

FILED APRIL 24, 1911. No. 16,749.

MOTION for rehearing of case reported in 88 Neb. 464. *Motion overruled. Sentence reduced.*

SEDGWICK, J.

The motion for rehearing is based principally upon the insufficiency of the evidence to support the conviction. It

is contended that the evidence does not show beyond a reasonable doubt that the prosecuting witness resisted the advances of the defendant to the extent of her ability. The evidence is not conclusive that she objected with any degree of determination to some of defendant's conduct of which she now complains. Considering her youth and surroundings, the jury may have found that, although her conduct was not such as is expected of young women of chaste character, she never contemplated that the defendant would attempt the act which constituted the crime, and was surprised and overpowered by him. In view of the character of this evidence and of the circumstances under which it is alleged that this crime was committed, and especially the youth and former history and surroundings of defendant, we think that the penalty imposed is too severe. There is some argument in the brief upon matters that are not properly in the record. The technical objections urged have, perhaps, been already sufficiently discussed. The punishment imposed by the district court is reduced to three years' imprisonment in the penitentiary, and in all other particulars the former opinion is adhered to, and the motion for rehearing is

OVERRULED.

ROSE, J., dissenting.

I concur in the order denying a rehearing, but dissent from the reduction of the sentence. Defendant was convicted of rape. The statutory penalty is imprisonment in the penitentiary for not more than twenty years nor less than three years. Criminal code, sec. 12. The trial court imposed a sentence of seven years and the majority now reduce it to three—the minimum. The jury, the trial court and this court have said the evidence is sufficient to sustain a conviction. The testimony tends to show that defendant had ostentatiously fixed the night before the felony as a time to indulge his lust for prosecutrix. In my opinion it is fairly inferable from all the circumstances that he had not done so at any previous time. I

do not think the evidence justifies the inference that prosecutrix was unchaste when she was assaulted. A defendant who has been found guilty of rape cannot be sentenced for a shorter period than three years, even where his victim is a common prostitute, and I am unwilling to concede that the sentence in this case should be reduced to the minimum.

ROOT, J., concurs in the dissent.

OSCAR ALLEN, APPELLEE, V. SCHOOL DISTRICT NOS. 19 AND 41, JOINT, OF BUFFALO AND HALL COUNTIES, NEBRASKA, APPELLANT.

FILED APRIL 24, 1911. No. 16,920.

1. **Schools and School Districts:** BONDS: ELECTIONS: NECESSITY FOR PETITION. Section 3, subd. XV, ch. 79, Comp. St. 1909, requires that, before an election is called under the preceding section upon the question of issuing bonds of the school district, a petition must be filed with the school board suggesting the calling of such election, and that such petition must suggest that the bonds be issued for some one or all of the purposes specified in the statute. An election for that purpose called without such petition is invalid and does not authorize the issuing of the bonds.

2. ——: ——: ——: SUFFICIENCY OF PETITION. In such case, if the petition suggests that the bonds be issued "to build a new public school building," an election called to vote upon the proposition to issue bonds for the purpose of "building *and furnishing* a new school house" is invalid.

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

John J. Sullivan, for appellant.

E. C. Page, contra.

SEDGWICK, J.

The defendant school district issued bonds in the sum of $30,000, and the plaintiff contracted with the district to purchase the bonds when they were duly issued so as to be a valid and binding obligation of the district, and deposited his check with his proposition to buy the bonds, and the check is now under the control of the school district. The plaintiff has demanded the return of the check on the ground that the bonds are invalid.

Under the stipulation of facts, the question depends upon the validity of the bonds, and that in turn depends upon the sufficiency of the petition filed with the school board suggesting the calling of the election. Section 2, subd. XV, ch. 79, Comp. St. 1909, provides: "No bonds shall be issued until the question has been submitted to the qualified electors of the district, and two-thirds of all the qualified electors present, and voting on the question, shall have declared by their votes in favor of issuing the same at an election called for the purpose, upon a notice given by the officers of the district, at least twenty days prior to such election." Section 3 of the same subdivision provides: "No vote shall be ordered upon the issuance of such bonds, unless a petition shall be presented to the district board, suggesting that a vote be taken for or against the issuing of such amount of bonds as may therein be asked for, to purchase a site for, or build a school house, or houses, or for furnishing the necessary furniture and apparatus for the same, or for all of these purposes, which petition shall be signed by at least one-third of the qualified voters of such district; provided, that the board of education in any city of the metropolitan class may order a vote upon the issuance of such bonds, without a petition therefor." The petition presented to the district board suggested that a vote be taken for or against the issuing of the bonds in the amount of $30,000 "to build a new public school building." The petition was regular in form and signed by

the required number of petitioners, and pursuant thereto an election was called and notice thereof duly posted as the law requires, in which notice it was stated that the proposed bonds were to be issued for the purpose of "building and furnishing a new school house" The objection to the legality of the bonds is that the election was called for the purpose of voting upon the question of issuing bonds for the building and furnishing a new school house, and the petition of the voters authorizing the calling of the election suggested the single purpose of building, and not of furnishing. It appears to be conceded that the provisions of the statute are mandatory, and must be substantially complied with, or the bonds issued will not be valid.

The argument is that they have been substantially complied with. The question depends upon the meaning of the third section. The purposes for which the electors may by petition suggest the calling of an election to vote upon the question of issuing bonds are: "To purchase a site for, or build a school house, or houses, or for furnishing the necessary furniture and apparatus for the same, or for all of these purposes." It seems clear that the school board is without power to call an election to issue bonds for any purpose that is not suggested in the petition signed by the necessary number of electors of the district. Bonds that are issued for any purpose that is not suggested by this petition are issued in violation of the statute. In the petition filed by the voters in this case there was no suggestion that bonds be issued for the purpose of furnishing the school house. Therefore the school board was without authority to issue bonds or to call an election for that purpose. The fact that the voters may suggest the issuing of the bonds for any and all of the purposes mentioned does not authorize the calling of an election for all of the purposes mentioned in the statute, unless such action is suggested in the petition. This seems to us to be the plain meaning of the statute, and we think that there is a substantial reason

for such restriction upon the power of the board. It will be noticed that at the election it is not required that a majority of the voters of the district shall declare by their votes in favor of issuing the bonds, but only two-thirds of those present and voting upon the question. This may be a very small minority of the qualified voters of the district. One-third of all the voters of the district may be in favor of issuing bonds for the purpose of building a new school house, but not in favor of expending the money so raised for new furniture. Undoubtedly it is often expected that a new building will be newly furnished, but, if the furniture already owned by the district is sufficient for the new building in the judgment of the electors, the statute permits them to so determine. Manifestly the several purposes for which bonds may be issued as named in the statute are separate and distinct, and the intention of the statute is to prevent a small minority who may participate in the election from devoting the proceeds of the bonds to any one of these purposes, not suggested in the petition. It must first be ascertained that at least one-third of the electors of the district are in favor of so expending the money raised by the issuing of the bonds. School districts are classified by statute, and ordinary districts which contain no city of 1,500 or more inhabitants cannot hold an election to vote upon the question of issuing bonds for any of the purposes enumerated in the statute, unless such purpose is suggested by petition of at least one-third of the electors of the district. In districts which include cities having a large number of inhabitants many questions are necessarily referred to the representatives of the people; but in the smaller districts all of the electors are informed as to the condition and needs of the district, and the burden of taxation for the support of the school falls upon so few individuals that they are expected to consider and determine such matters for themselves without the necessity of delegating such authority. The requirement of this petition before calling the election guarantees that

at least one-third of all of the electors in the district approve of issuing bonds in the amount named for the particular purpose specified, and the funds so provided must be devoted to the purpose specified, and not devoted to any purpose named in the statute, and not specified in the petition. Therefore the distinction that the statute makes is not a technical one, but is substantial, and whether the policy of the legislature in this regard is sound or otherwise, the courts are without power to interfere.

This was the judgment of the district court, and we conclude that it is right, and it is therefore

AFFIRMED.

ANTONINO NOCITA, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MAY 6, 1911. No. 16,359.

1. **Master and Servant:** FELLOW SERVANTS. "Employment in the service of a common master is not alone sufficient to constitute two men fellow servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some consociation in the same department of duty or line of employment." *Union P. R. Co. v. Erickson*, 41 Neb. 1.

2. **Carriers:** INJURY: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. "Whether the act of a party in attempting to board a moving street car is negligence or not is generally a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case." *Omaha Street R. Co. v. Martin*, 48 Neb. 65.

3. **Trial:** NEGLIGENCE: QUESTIONS FOR COURT AND JURY. "It is for the court to say what act or omission is evidence of negligence, but generally it is for the jury to say whether the evidence establishes negligence." *Omaha Street R. Co. v. Martin*, 48 Neb. 65.

4. **Carriers:** INJURY: NEGLIGENCE. Even if the rule, sometimes announced, that the unbending test of negligence is the ordinary usage of the business in which defendant was engaged is the

law, it could have no application to the question of negligence growing out of a sudden and violent jerking and starting of a street car, by which a plaintiff was injured.

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

Green, Breckenridge & Matters, for appellant.

James C. Kinsler, contra.

REESE, C. J.

This is an action for damages resulting from a personal injury. Plaintiff recovered a judgment, and defendant appeals.

No serious question is presented as to the pleadings, and they will not be noticed, except to say that they are in the usual form, and the issues presented by the contentions of the parties will be sufficiently stated by the discussion of the points raised.

The evidence is, to some extent, conflicting, but when considered as a whole the conflict is more apparent than real. There was sufficient submitted to the jury to sustain a finding that, at the time of the accident plaintiff was in the employ of defendant as a laborer on the extension of defendant's line of street railway from Albright to Fort Crook, and in the group of workmen known as "spikers," whose duty it was to drive spikes into the cross-ties, and by which the track rails were held in place; that he and practically all the other laborers on the construction work resided in the cities of Omaha and South Omaha, and defendant provided a work train consisting of a motor car and flat car trailer, by which the men and materials were transported from the cities named to and from their work on the extension line; that on the morning of the accident plaintiff and another were standing on the street crossing waiting for the approach of the car, as was their custom; that, as the car approached the place where they were standing, plaintiff

signaled the motorman to stop, in order that he and the other person might board the car to be carried to their work; that there had been a rain that morning, or during the night before, and it was then cloudy, and plaintiff was carrying his dinner bucket and an umbrella; that, upon his signal being given, the motorman cut off the electrical current, or power, and applied the brakes, for the purpose of stopping the cars; that the cars were brought to nearly a full stop at the usual stopping place, when plaintiff sought to get on board, and in doing so caught hold of the upright prepared for that use and stepped with one foot upon the step of the car, when at that moment the power was applied and the car was jerked violently forward, throwing plaintiff under the car in such a way as to cause his lower limbs to come under the wheels, one leg being run over near the knee, and being so badly crushed and lacerated as to require its amputation above the knee, and the foot of the other being so crushed as to require the amputation of one of his toes. No question is raised as to the fact of the injuries, as above stated, nor as to the amount of the recovery, provided plaintiff is entitled to recover at all. By the answer, all negligence of defendant is denied, and it is alleged that "the injuries received by the plaintiff were directly caused by his own negligence in attempting to board its car while the same was in motion."

It is alleged in the petition that the speed of the car was "slowed down" as it approached and crossed Williams street, until it came to almost a stop at the usual stopping place on the south side of Williams street. The evidence all showed that the car had not entirely ceased its motion when plaintiff attempted to get on board, and such is conceded to be the fact. But there was sufficient evidence to sustain a finding by the jury that the car (or train, as it is called in the evidence) came almost to a full stop at the usual place for stopping cars to receive and discharge those who might desire to board or leave the cars, and that at the time plaintiff

sought to get on board the rate of speed was not to exceed one-quarter of a mile an hour, or one mile in four hours, which would scarcely amount to a movement—much less than one-half the speed an ordinary person would walk.

The question of the negligence of plaintiff in undertaking to board the car while so moving was submitted to the jury with appropriate instructions. There was also sufficient evidence to warrant the jury in finding that just at the moment when plaintiff took hold of the support and placed his foot upon the step, where the motorman saw or could have seen him, the cars were started forward with such a violent jerk as to dislodge those on board from their seats, and by its action pull or jerk plaintiff loose from his hold and throw him under the car wheels. This question of negligence on the part of defendant was also submitted to the jury with proper instructions. Thus we have the question of the negligence of both parties submitted to the jury.

After the close of the evidence, counsel for defendant moved the court to instruct the jury to return a verdict in favor of defendant, and assigned the following grounds therefor: "(1) That the testimony fails to show, and does not tend to show, that the injury to the plaintiff resulted from actionable negligence on the part of the defendant as the proximate cause thereof. (2) The testimony shows that the defendant's motorman, at the time of the accident to the plaintiff, was operating the motor train in the usual and customary manner. (3) The testimony shows that the plaintiff's conduct, in attempting to board the train before it came to a stop, was the proximate cause of his injury. (4) If neither defendant nor plaintiff were guilty of negligence proximately contributing to the injury, then the injury was itself an accident. (5) If said injury resulted from the negligence of Gillespie, such negligence was the negligence of a fellow servant of the plaintiff, and he cannot recover." (Gillespie was the motorman in charge of the car.)

As to the first ground for the motion, we have already said in substance, that what the testimony showed or failed to show as to negligence on the part of defendant was solely for the jury. The testimony of the witnesses, not entirely harmonious, was before them, and it was for them to decide. As to the second, it can hardly be said that the evidence showed conclusively that the motor train was operated in the usual and customary manner, even if the fact, if shown, would constitute an absolute defense, which we do not concede.

As to the third ground, no court could rightly hold that, as matter of law, under the circumstances as detailed by some of the witnesses, plaintiff was guilty of contributory negligence which was the proximate cause of his injury. If the facts were as detailed by some of the witnesses, he probably was not. It was for the jury to decide as to which theory of the facts was the correct one.

As to the fourth and fifth grounds, they clearly involved questions of fact which it was not the province of the court to decide. The motion was rightly overruled. Under the evidence, the cause presented questions of fact which could only be submitted to the jury for solution. If the evidence most favorable to plaintiff was believed by the jury, they were justified in finding that, under the circumstances, plaintiff was not guilty of negligence in his efforts to board the train, owing to its very slow movement, for, for all practicable purposes, it had come to a full stop, and but for the violent lurch or jerk forward he would have ben in no danger whatever, and therefore guilty of no negligence. This being true, the cases cited by defendant upon this point are not controlling.

It is insisted that the court erred in refusing to give to the jury instruction numbered 2 asked by defendant. The instruction is quite lengthy, and need not be set out here in full. We may assume that it was in part correct, yet other portions were inapplicable to the case. It was sought to have the jury instructed that, in order to justify a finding that "defendant, through its motorman, was

negligent in the operation and control of the motor car that ran over Nocita's leg, the plaintiff must establish, by a preponderance of the evidence, that the car was not operated as such cars and trains are ordinarily operated under similar circumstances and conditions; for the unbending test of negligence is the ordinary usage of the business. And the mere fact that an accident happened and the plaintiff received an injury does not raise any presumption that the defendant was negligent in the operation of its motor car and train." While the writer hereof takes little stock in the "unbending test" rule, as each case should be governed by its own facts and circumstances, yet, under no circumstances, could the so-called "unbending test" rule be applied to this case, even if it were a rational one, as there was no proof that the "ordinary usage of the business" was to apply the full force of the power just at the moment of time when plaintiff would be thrown from the car, as he was, and subjected to the danger of the injury, which he actually suffered. The question of the general operation and management of the train and cars was not in the case, and the cases cited do not apply.

Complaint is made of the refusal of the district court to give the fifth instruction asked by defendant. This instruction was a direction to return a verdict in favor of defendant, and contained the statement that plaintiff and the motorman were fellow servants; that defendant was not liable for the motorman's negligence, and the verdict should be in defendant's favor. There was no error in refusing this instruction. There is nothing in the evidence which proves that the motorman and plaintiff were fellow servants. Plaintiff, when at his work, was engaged in spiking down the rails. Gillespie, the motorman, was serving as lineman, putting up poles and wires at a distance from the track layers. True, they were the servants of the same employer, but they were not engaged in the same kind of labor. Plaintiff was under the foreman of the "gang" with which he labored, while Gillespie,

was at that time the foreman of the wiring gang. A part of his duties was to run the cars from Omaha to the place of disembarkation, but in this there was was no connection whatever with the transportation of plaintiff, such as to render them fellow servants. *Union P. R. Co. v. Erickson*, 41 Neb. 1, 13. "The plaintiff was not associated with defendant's motorman in running the car. His employment was in nowise connected with the operation of cars. For these reasons, plaintiff was not a fellow servant of the motormen." *Haas v. St. L. & S. R. Co.*, 111 Mo. App. 706, 715, 90 S. W. 1155, 1157.

It is insisted that the court erred "in applying the so-called 'last chance' doctrine to the facts of this case, and the misstatement of that rule." In this connection reference is had to the tenth instruction given to the jury. That instruction is too long to be here copied. Its substance is that if, in considering the question of the contributory negligence of plaintiff, such negligence would not necessarily prevent a recovery, if, after placing himself in a place of danger, the motorman saw or might have seen him and negligently failed to stop the car, or negligently started it with a jerk while plaintiff was so situated, such negligence was the proximate cause of plaintiff's injury. As hereinbefore stated, the car in which plaintiff sought passage had practically come to a stop at the time he attempted to board it. There was perhaps no negligence on his part in making the attempt. At any rate, the question was for the jury to decide. *Omaha Street R. Co. v. Martin*, 48 Neb. 65. There is practically no dispute but that, at the time plaintiff made the effort to enter the car, the train was sent violently forward with such force as to break the hold of plaintiff and throw him under the wheels of the car. The jury must have found, and rightly too, that the act of the motorman was one of negligence—a needless, careless, affirmative act, by which the life of plaintiff was endangered. If any objection to the instruction could be maintained, it would be that it was more favorable to defendant than the facts war-

ranted. However, the instruction was evidently given to cover the case as contended for by defendant, and does not contain a misstatment of the law to its prejudice. It was properly given. *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 71.

We find no error in the record prejudicial to defendant, and the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF KARL SIEKER.

HEINRICH SIEKER, APPELLANT, V. AUGUST SIEKER, ADMINISTRATOR, ET AL., APPELLEES.

FILED MAY 6, 1911. No. 16,393.

Wills: PROBATE: NOTICE. Section 140, ch. 23, Comp. St. 1909, provides that the notice of the time and place for hearing an application for probating a will shall "be given by personal service on all persons interested, or by publication under an order of such court, in such newspaper printed in this state as the judge shall direct." This confers the discretion upon the county court to order the notice to be given personally to all persons interested, or, instead thereof, that it be given by publication. The fact that the immediate relatives of the decedent all reside within the county where the application for probate is made will not render bad the service by publication, and the court will have jurisdiction to hear the cause and decide the questions involved in such hearing.

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

France & France, for appellant.

C. F. Stroman and *Power & Meeker, contra.*

REESE, C. J.

Karl Sieker, a resident of York county, died testate in said county on the 9th day of December, 1907, leaving a

widow and a family of children, of which plaintiff was one. After the death of Karl, and on the 10th day of February, 1908, his will was presented to the county court for probate. The widow and all the heirs resided in York county. Upon the production of the will, with the petition of August Sieker, for its admission to probate, the county judge made an order reciting the fact of the application for the probating of the will, and fixing the 7th day of March, 1908, at the hour of 10 o'clock A. M., at the judge's office, as the time and place for hearing the petition, and directed that the order be published for three successive weeks in the York County Republican, a weekly newspaper published and of general circulation in said county, "when all persons interested in said matter may appear and show cause why the prayer of petitioner should not be granted." The notice was published as ordered, and on the date named the will was admitted to probate, and, the widow declining to act as executrix, August Sieker was appointed administrator with the will annexed. In October, 1908, plaintiff filed his petition in the county court praying that the order probating the will might be vacated and set aside, and the application for its probate be opened in order that he might contest the same. The reasons assigned by him for the opening of the case, though deemed meritorious by him, need not be stated here. His petition was denied by the county court, when he appealed to the district court, where the order made by the county court denying his petition was affirmed. Plaintiff appeals to this court.

The only contention by plaintiff is that the publication of the notice was not sufficient to give the county court jurisdiction to hear the matter of the probating of the will. The widow and heirs, of which plaintiff is one, all resided in York county. No personal service was had upon any of them, and plaintiff had no knowledge of the proceeding until long after the entry of the decree. The sole question therefore is: Was the publication of the notice all that the law required?

The statute providing for notice of an application for the probate of a will is section 140, ch. 23, Comp. St. 1909 (Ann. St. 1909, sec. 5005), and is as follows: "When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, and shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of such court, in such newspaper printed in this state as the judge shall direct, three weeks successively, previous to the time appointed, and no will shall be proved until notice shall be given as herein provided." By this section there appears to be a discretion lodged with the county judge to cause the notice to be served personally *or* by publication. It will be observed that the notice is not specifically required to be given to the heirs, but to "all persons interested." This is probably the reason why the practice has become almost universal to give the notice by publication, for no court can know in advance who may be interested in the matter of the probate of a will. The "interest" may be confined to heirs, devisees and legatees, or it may extend to others unknown to the county judge and to the petitioner. In case the order should be for personal service, it is quite possible that no jurisdiction would be had over "interested" parties not served, and, as to them, the proceeding be void. By giving the notice by publication this danger is avoided.

In Dame, Probate and Administration, sec. 82, in discussing the question of notice, it is said: "The method of service of the notice rests in the discretion of the court. It may be by personal service upon all parties interested, or by publication in such newspaper, printed in this state, as the court may direct, for three successive weeks previous to the time appointed. The notice must appear in three successive publications of the paper designated. It is not necessary that the last publication be 21 days from the first. The practice generally prevailing is to give

notice by publication, and thus avoid the necessity of the court passing upon the question, without having the evidence before it, of who are interested in the estate."

In 2 Black, Judgments (2d ed.) sec. 635, it is said: "The action of a probate court having jurisdiction, in admitting a will to probate or in rejecting it, is in the nature of a proceeding *in rem*, and, so long as it remains in force, it is conclusive as to the due execution and the validity of the will, both upon all the parties who may be before the court and upon all other persons whatever, in all proceedings arising out of the will or where the parties claim under or are connected with it—(citing a number of cases in the note). 'The proceeding,' says the supreme court of Vermont, 'is in form and substance upon the will itself. No process is issued against any one, but all persons interested in determining the state or condition of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the status of the subject matter of the proceeding. The judgment is upon the thing itself; and, when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this state is concerned), just what the judgment declares it to be'"—citing *Woodruff v. Taylor*, 20 Vt. 65. We have examined this case, and, while not founded upon a cause similar to the one under consideration, it contains a clear exposition of the difference between cases *in rem* and *in personam*, and shows quite clearly that in the former class of cases, where notice is given by publication, the *status* of the *rem* (the thing) is conclusively established.

The case of *Miller v. Estate of Miller*, 69 Neb. 441, is cited with confidence by defendant. We are unable to ascertain from the opinion what notice of the hearing upon the petition to probate the will was given, but assume that it was by publication, since it was alleged by

the plaintiff that he had no actual notice or knowledge of the time set for hearing, nor for a long time after the rendition of the decree probating the will. The court, by ALBERT, C., held that the probating of a will was a proceeding *in rem,* and that actual notice was not essential to the validity of the decree.

In *In re Estate of Brusha,* 87 Neb. 254, the contention was that the order appointing an administrator was void for want of sufficient notice. The notice was given by publication. The language of the statute (Comp. St. 1909, ch. 23, sec. 195) upon the subject of notice is the same as in section 140, now under consideration, the notice to be given "by personal service on all persons interested, or by publication under an order of such court in such newspaper printed in this state as he (the judge) may direct." In that case we held that "this statute leaves the matter to the probate court to determine what publication shall be made in case personal service is not had upon the parties interested." The same rule should be applied to section 140.

We have given due consideration to the carefully prepared brief filed by appellant, but we are satisfied that the provisions of the civil code cited cannot be applied to this case. The publication of the notice was in compliance with the statute, and the order of the county court directing the publication was sufficient authority without the previous filing of an affidavit therefor. While we think the procedure was in strict conformity with the statute, yet, did we hesitate to so hold, we would not be inclined to adopt the view contended for by plaintiff, for to so decide would overturn a great majority of the orders admitting wills to probate, as the almost universal practice has been that followed by the county court in this case, and it has become a rule of property, and titles acquired thereunder should not be thus disturbed. See *White v. German Ins. Co.,* 15 Neb. 660.

The judgment of the district court holding the notice sufficient is

AFFIRMED.

OMAHA COOPERAGE COMPANY, APPELLEE, V. CENTRAL STATES COOPERAGE COMPANY, APPELLANT.

FILED MAY 6, 1911. No. 16,423.

Contracts: BREACH: PETITION: SUFFICIENCY. Petition examined, its substance stated in the opinion, and *held* sufficient to resist a general demurrer.

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

William H. Crow and *Joseph Crow,* for appellant.

Smyth, Smith & Schall, contra.

BARNES, J.

Action to recover damages for breach of contract for the purchase and sale of certain cooperage supplies. Defendant filed a general demurrer to the plaintiff's petition, which was overruled. Defendant elected to stand upon its demurrer, and judgment was rendered for the plaintiff. Defendant has appealed.

It appears from the allegations of the petition that the plaintiff, at the dates named therein, was a corporation organized under the laws of the state of Nebraska, and was doing a cooperage business at South Omaha, in said state; that the defendant, at that time, was a corporation duly organized under the laws of the state of Indiana, and was engaged in the sale of cooperage supplies at New Castle, in that state; that the plaintiff desired to purchase certain cooperage supplies for the purpose of carrying on its business, and on the 8th day of February, 1907, wrote the defendant the following letter: "South Omaha, Neb., Feb. 8, 1907. Central States Cooperage Co., New Castle, Ind. Gentlemen: We are in the market for car-load of 23⅝″ mill-run heading, and also a car-load of mill-run, No. 1, or No. 2, 19⅛″. If you have anything to offer

kindly quote us, and oblige. Yours truly, Omaha Cooperage Company, R. M. Welch, President." On the receipt of this letter, the defendant wrote the plaintiff as follows: "New Castle, Ind., 2-11-07. Omaha Cooperage Co., South Omaha, Neb. Gentlemen: Referring to your favor 8th received, we quote you on M. R. 23⅝" heading, 13 cents, No. 2, 19⅛", 7½ cents, and No. 1, 8¾ cents, delivered South Omaha. We could make shipment of this stock within the next 30 days if the order was placed at once. Respectfully, Central States Cooperage Company, by H. E. Jennings."

It thus appears that the defendant responded to the exact inquiry made by the plaintiff, and further advised the plaintiff that it could make the shipment within 30 days if the order was placed at once. After the receipt of that letter, and on the 13th day of February, the plaintiff replied as follows: "South Omaha, Neb., February 13, 1907. Central States Cooperage Co., New Castle, Ind. Gentlemen: Your letter 11th. Please book our order for car-load of M. R. 23⅝" heading at 13c and a car-load of 19⅛" heading at 8¾c delivered, shipment to be made within the next 30 days. We want the car-load of 19⅛" heading just as soon as we can possibly get it, and we would thank you to rush all possible. Yours truly, Omaha Cooperage Company, R. M. Welch, President."

The petition charges that each and all of said letters were signed by the parties whose names are subscribed thereto, and were received by the parties to whom the same were addressed. Again, on February 19, the defendant wrote the plaintiff in relation to its order the following letter: "New Castle, Ind., 2-19-07. Omaha Cooperage Co., S. Omaha, Neb. Gentlemen: Feb'y 11th in answer to your inquiry we quoted you on 23⅝" and 19⅛" heading. We are very desirous of having your order for this stock, and if same has not already been placed we would be pleased to hear from you. Respectfully, Central States Cooperage Company, by H. E. Jennings."

It thus appears that the defendant again renewed its

offer to sell the specific cooperage ordered by the plaintiff at a specified price. On February 21 the plaintiff replied to the defendant as follows: "South Omaha, Neb., February 21, 1907. Central States Cooperage Co., New Castle, Ind. Gentlemen: Referring to yours of the 19th, on February 13th we wrote you as follows: 'Your letter 11th. Please book our order for car-load of M. R. 23⅝" heading at 13c and a car-load of 19⅛" heading at 8¾c delivered, shipment to be made within the next 30 days. We want the car-load 19⅛" heading just as soon as we can possibly get it, and we would thank you to rush all possible.' Please be governed accordingly. Yours truly, Omaha Cooperage Company, R. M. Welch, President." By this letter the plaintiff again accepted the defendant's offer, and asked it to ship the cooperage at once. These letters were aided by the proper and necessary averments, and they seem to be amply sufficient to establish a contract of purchase and sale, as claimed by the plaintiff. When the defendant replied to plaintiff's first letter, it knew the number of car-loads of cooperage that plaintiff desired to purchase, and knew exactly of what materials the plaintiff was asking prices. It said, in effect: We will furnish you the car-load of 23⅝" heading at 13 cents, and we will furnish you a car-load of No. 2, 19⅛", at 7½ cents; or we will furnish you a car-load of No. 1 at 8¾ cents, delivered at South Omaha. Upon the receipt of that letter, the plaintiff answered by its letter of February 13, 1907, in substance: All right, your proposition is accepted. We will take the car-load of 23⅝" at 13 cents, and the car-load of 19⅛" at 8¾ cents, shipment to be made in 30 days. It thus appears that a specific unqualified offer to plaintiff was distinctly and unqualifiedly accepted.

In *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, it was said: "In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attend-

ing its execution, and will consider the relations of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties, and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view."

Applying that rule to this case, it seems clear that the plaintiff inquired of the defendant at what price it would furnish two car-loads of cooperage. The defendant by letter, in no uncertain terms, gave the plaintiff the information desired, and offered to sell to the plaintiff the cooperage it desired to purchase at prices definitely fixed by its letter. This offer the plaintiff unqualifiedly accepted, and it seems clear that the letters set out, aided by proper averments, were sufficient to constitute a contract of purchase and sale, as claimed by the plaintiff. The petition properly alleged the breach of this contract, stated the amount of the damages by reason thereof, and concluded with a suitable prayer for judgment. In short, it was not vulnerable to a general demurrer.

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

AFFIRMED.

ROOT, J., not sitting.

IRA MILLER, ADMINISTRATOR, APPELLEE, V. THOMAS W. HANNA, APPELLANT.

FILED MAY 6, 1911. No. 16,442.

1. **Descent and Distribution:** CURTESY: LIABILITY OF LAND FOR DEBTS. By the provisions of section 29, ch. 23, Comp. St. 1887, the lands of which a married woman died seized descended to her surviving husband as a tenant by curtesy subject to sale for the payment of her debts.

2. **Executors and Administrators: SALE OF LAND TO PAY DEBTS.** The proceeding to sell the land of a deceased person for the payment of his debts as provided by sec. 67 *et seq.*, ch. 23, Comp. St. 1909, is special and partakes of the nature of a proceeding *in rem.*

3. ———: ———. Where it is made to appear to the judge of the district court that the order authorizing the sale does not comply with the provisions of the statute, and is void for any reason, it is his duty to refuse to confirm the sale made thereunder.

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

F. A. Boehmer and *I. P. Hewitt,* for appellant.

Burkett, Wilson & Brown, contra.

BARNES, J.

This is an appeal from an order of the district court for Lancaster county confirming an administrator's sale of the interest of a remainderman in 160 acres of land situated in Dawson county.

It appears that in the month of April, 1907, one Jennie E. Miller departed this life in Lancaster county, Nebraska, intestate and without issue, leaving surviving her a husband and her father, one Thomas W. Hanna. Deceased left no debts, except the expenses incurred during her last illness and for her burial. At the time of her death she was the owner in fee in her own right of 160 acres of land situated in Dawson county, Nebraska. On the 5th day of December, 1907, Ira Miller, who was her husband, was by the order of the county court of Lancaster county appointed administrator of her estate. Subsequent to his appointment he procured an order of the county court allowing him $597 as a claim against the estate of his deceased wife on account of the debts above mentioned. On the 3d day of August, 1908, the administrator commenced an action in the district court for Lancaster county to obtain a license to sell the Dawson county land for the payment of his claim against the estate of his de-

ceased wife. An order for the sale of the land in question was made, by which it was provided that it should be sold subject to the life estate of the surviving husband. The land was advertised for sale, and the interest in remainder of the father of the deceased was offered for sale and sold for the sum of $600. When application was made to confirm the sale, appellant, who had no notice of the proceeding until after the order of sale was made, filed objections, which were overruled, the sale was confirmed, and he presents the record to this court for a reversal of the order of confirmation.

Appellant's first contention is that the husband is primarily liable for the expenses of the last illness and burial of his wife, and, until an execution against him is returned unsatisfied, no claim of that nature can be allowed against her estate. That question seems to have been foreclosed by the order of the county court. That court has original jurisdiction in the matter of the settlement and allowance of claims against the estates of deceased persons; and, where no appeal is taken from the order of that court, such order is, ordinarily, binding and conclusive upon all persons interested in the estate, and cannot be collaterally attacked.

It is next contended that the estate which the appellee took in the land belonging to his wife at the time of her death is liable for her debts, and that the order of the district judge for the sale of her land, subject to the life estate of the husband, for the payment of her debts is void, and may be attacked on a motion to confirm the sale, and therefore the order of confirmation should be reversed. On the other hand, it is contended that the appellee took an estate by curtesy in the lands of which his wife was seized at the time of her death which is not liable for her debts. Considering this to have been the rule at the common law, it seems clear that this rule has been greatly modified by our statutes. Section 1, ch. 53, Comp. St. 1909, provides: "The property, real and personal, which any woman in this state may own at the time of her mar-

riage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property, which shall come to her by descent, devise or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts." The statute in force at the time of the death of the intestate provides that, when any married women, seized in her own right of any estate of inheritance in lands, shall die leaving no issue, the lands shall descend to her surviving husband during his natural lifetime as tenant by curtesy, and, after his decease, to her father. Section 30, ch. 23, Comp. St. 1887, by which this proceeding is to be governed, provides, among other things: "When any person shall die seized of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following."

Under statutes very similar in their provisions to the sections of our law above quoted, the courts of several of our sister states have held that the estate which the husband takes in the lands of the wife at the time of her death is subject to her debts. *Arrowsmith v. Arrowsmith,* 8 Hun (N. Y.) 606, was a case where all the land of the wife was sold to pay her debts. The court there said: "The respondent (meaning the husband), however, took such estate subject to the payment of the debts of his wife. During her life the property was absolutely hers, and she was entitled to receive the rents and profits thereof to her own use, and all debts by her contracted became a charge upon her property, as much as if she had been in fact an unmarried woman." In *Bennett v. Camp,* 54 Vt. 36, the court said: "But the right to occupy as tenant by the curtesy, like inheritance by an heir in real estate, is subject to be defeated to the whole or a part of the estate, by the necessity of a sale of so much as may be

required to pay the debts and expenses of administration, which cannot be discharged from the personal estate of the intestate." It appears that Mississippi had a statute, prior to the abolition of dower and curtesy in that state, that provided for an estate as a tenant by curtesy in all lands of which a married woman should die seized or possessed, and the supreme court of that state in *Stewart v. Ross,* 50 Miss. 776, said: "The right of the husband * * * becomes vested when the wife dies seized. It is subject to be defeated by the joint conveyance of husband and wife, by sale under legal process for the wife's debts, and, lastly, by a last will disposing of the estate as allowed by the statute of 1867. Curtesy attaches, under the statute, to all lands not conveyed by the husband and wife, not sold for her debts, nor devised by last will, or, in the words of the statute, to the lands of which she died seized."

Considering the provisions of our statutes in the light of the foregoing decisions, we conclude that the estate which descended to the appellee at the time of the death of his wife is liable for her debts, and that he took only a life estate in the residue of her lands which would remain after the payment of the debts and expenses which have been allowed against her estate. It follows that the judge of the district court had no power to make the order complained of, because the effect of that order was to deprive the remainderman of all interest in the estate, and declare that the life estate of the husband was not subject to the payment of the debts of his deceased wife.

It is contended, however, that the validity of the order cannot be questioned on the motion to confirm the sale, and if the sale was regularly conducted the court could not refuse the order of confirmation. We do not so understand this question. The proceeding to sell the land of a deceased person for the payment of his debts is a special one, and jurisdiction to make the order is conferred by statute upon the district judge in contradistinction from the district court. The statutes provide that upon the

filing of a petition by the administrator for a license to sell real estate for the purpose of paying the debts of a deceased person, the judge of the district court shall make an order directing all persons interested in the estate to appear before him at a time and place therein to be specified, not less than six weeks and not more than ten weeks from the time of making such order, and show cause why a license should not be granted. It is further provided that the judge of the district court at the time and place appointed in such order, or at such other time as the hearing shall be adjourned to, upon proof of due service, or publication of a copy of the order, or upon filing consent in writing to such sale by all persons interested, shall proceed to the hearing of the petition, and, if consent is not filed, shall hear and examine the allegations and proofs of the petitioner and all persons interested in the estate; that, if it shall appear that it is necessary to sell a part of the real estate, etc., the court may authorize the sale; that the administrator shall give bond to the judge of the district court, and that the judge of the district court may require a further bond from the executor or administrator when he shall deem it necessary. Finally, it is provided that the executor or administrator making any such sale shall make a return of his proceedings to the judge of the district court granting the sale. If it shall appear to the district judge that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property, etc., he shall make an order confirming the sale. It thus appears that, from the time the petition is filed to the final confirmation of the sale, the whole transaction partakes of the nature of a proceeding *in rem,* and so long as anything remains to be done by the judge of the district court, upon whom special jurisdiction to conduct the proceeding is conferred, he has full power to make any proper or necessary order therein, and if he discovers that a mistake has been made, and that his order does not accord with the authority conferred upon him by statute, he may

correct the proceedings, and until such correction is made he should refuse to confirm the sale. *Prudential Real Estate Co. v. Hall*, 79 Neb. 808.

In this case it appears that the interest of the remainderman in the entire 160 acres of land was extinguished for a sum insufficient to pay the claim in question and the costs of conducting the suit. The property, as it was exposed for sale under the order complained of, could not have been expected to bring an amount at all commensurate with its value, and the sale, as conducted, amounts to a fraud upon the rights of the remainderman. The order of the district judge should have directed the administrator to sell the land in question, or so much thereof as should be found necessary to pay the administrator's claim, and a sale so conducted would, under present values, have taken only a small portion of the quarter section, leaving the life estate of the husband and the estate in remainder of the father of the decedent as to the remainder of the land intact for the benefit of both of them. We are therefore of opinion that the judge of the district court should have refused to confirm the sale in question.

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

REVERSED.

DRAINAGE DISTRICT NO. 1, RICHARDSON COUNTY, APPELLANT, V. THOMAS G. BOWKER, APPELLEE.

FILED MAY 6, 1911. No. 16,444.

1. **Drainage Districts: ASSESSMENT OF BENEFITS: APPEAL: BURDEN OF PROOF.** On the trial of an appeal from the findings and order of the board of a drainage district, organized under the provisions of chapter 161, laws 1905, assessing benefits to land situated within such district, it is not reversible error to instruct the jury that the burden of proof is on the district to show that the lands assessed will be benefited by the construction of the drainage improvement.

2. ———: ———: ———: QUESTION FOR JURY. Under the provisions of that chapter as it stood prior to the amendments of 1909, (laws 1909, ch. 147), it was not reversible error to submit the question of the amount of such benefits to a jury.

3. Evidence examined, and *held* sufficient to sustain the judgment.

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

Kelligar & Ferneau, A. R. Scott, E. Falloon and *A. R. Keim,* for appellant.

Reavis & Reavis, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Richardson county in the matter of the assessment of the lands of one Thomas G. Bowker for the benefits accruing thereto by a system of drainage established and constructed by drainage district No. 1 of that county. It appears that Bowker is the owner of 1,070 acres of land situated within the drainage district, and that he filed his objections to the assessments in question before the drainage board, which were overruled, and he thereupon perfected an appeal to the district court, where the cause was tried to a jury, a verdict was returned by which his assessment was reduced to some extent, and the amount thereof was fixed at the sum of $6,599.44. Judgment was rendered on the verdict, and, as above stated, the drainage district has appealed.

The appellant presents, and has argued, the following assignments of error: First. The court erred in giving instruction numbered 1, requested by the appellee, thereby placing the burden of proof upon the drainage district. Second. The court erred in submitting the question of the amount of the assessments to the jury. Third. The court erred in holding that there was any competent evidence to submit to a jury upon which they could reduce or change the assessment made by the drainage board.

These assignments will be disposed of in the order in which they have been presented.

1. The instruction complained of reads as follows: "You are instructed that, before you can find a verdict in favor of the drainage district, you must first find that the land of Mr. Bowker will in fact be benefited by the construction of the proposed drainage improvement. The question as to whether or not said land would be benefited is a question of fact for you alone to decide. The court has no right to pass on that question. The burden of proving that this land will be in fact benefited by the construction of such drainage improvement is upon the drainage district and, if they have not so proved by a preponderance of the evidence, you should return a verdict in favor of Mr. Bowker."

Upon the appeal of a landowner from the findings and order of assessment made by the drainage board, the question of the amount of benefits to his land can always be tried, and this was the question that was tried by the district court in this case. Section 17 of the drainage act (laws 1905, ch. 161) provides that the bond upon appeal to the district court shall be conditioned "the same as in appeals to the district court from civil actions in justice's court in this state." The secretary of the drainage board files a transcript and the papers in the district court, and that court thereupon has jurisdiction. The statute then provides that the appeal shall be docketed and filed as in appeals in other civil actions to said court. It is further provided that the procedure in the district court shall be the same as in matters appealed from the board of county commissioners. To illustrate: When a claim is filed against the county and is allowed by the county commissioners, and an appeal is taken to the district court, the question in that court is whether the claimant is entitled to recover anything against the county, and, if so, how much? He is the plaintiff, and must file a petition, and in the first instance prove his claim. This is true whether the claimant appeals or whether a taxpayer appeals from an

allowance of the claim. In either case the claimant must file his petition and prove his claim, and this is so in cases like the one at bar. If the assessment against the land is unsatisfactory, and an appeal is taken to the district court, the procedure thereon is, by express provision of the statute, the same as the procedure in cases appealed from the county board. This provision is reasonable and logical. The drainage district in such case is the moving party. It asserts that the landowner should pay a certain amount of money toward the improvement, and alleges that this is because his land is benefited in at least that amount by the improvement. The drainage district has the affirmative side of the proposition, and should first present its evidence in order to maintain its position. No doubt the report of the engineer when approved and confirmed by the drainage board is *prima facie* evidence of the matters therein required to be stated, but this fact does not change the burden of proof. If the drainage district has the burden, it can use the engineer's report, if so confirmed and approved in the first instance, as evidence to sustain that burden. However, when the evidence is all before the court and jury, it is proper to tell them that the burden of proof as to the amount of benefits to the land of the defendant (for the landowner is virtually a defendant) is upon the drainage district. Such, in effect, was the instruction complained of, and it seems clear that the drainage district was not prejudiced thereby, because the jury found that Bowker's lands were, as a matter of fact benefited by the drainage improvement; and, having so found, it follows that, even if the instruction was not technically correct, the error, if any, was without prejudice.

2. Considering appellant's second contention, that the court erred in submitting the amount of the assessments to the jury, we find from the record that no objection was made to the impaneling of the jury, but thereafter, and when evidence was first offered, objection was made that "the case now called for hearing, is not a case contemplated by the drainage law or the

statute of Nebraska as an action to be determined by a jury. It is a case that should be submitted to the court only." The objection was overruled, and an exception was noted. It appears that the trial of this case was conducted under the provisions of the drainage act of 1905, and before the amendments of 1909 took effect. By section 17 of the original act as found in chapter 161, laws 1905, relating to appeals in such cases, it is provided that, upon the filing of the transcript and a bond in the district court, that court has jurisdiction of the cause, which shall be docketed and filed as appeals in other cases to said court, "provided on appeal the procedure shall be the same as in matters appealed from the board of county commissioners." This provision seems to be broad enough to authorize the district court to submit the question of the amount of benefits to a jury, and to so hold in no way conflicts with our own opinion in *Drainage District No. 1 v. Richardson County,* 86 Neb. 355, for what was there said was based on a construction of the law as amended by the act of 1909.

Again, we are of opinion that the objection to a jury trial was not seasonably made. If a party desires to object to a trial by jury, he should do so before the jury is impaneled; an objection made thereafter to the introduction of evidence should be considered as of no avail.

3. In disposing of appellant's third contention, to wit, that there was no competent evidence to submit to the jury, and upon which they could reduce or change the assessment made by the drainage board, we have examined the bill of exceptions, and find therein the testimony of a large number of witnesses showing, or tending to show, that the assessments for benefits upon the several subdivisions of Mr. Bowker's land was too high. Upon this point the evidence is conflicting. It seems that the jury has fairly solved that question. At any rate we are unable to say that the verdict is not sustained by the evidence.

Finally, the case seems to have been fairly tried, and the result appears to be just as between the parties.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

SOLOMON S. GALLATIN, APPELLEE, V. TRI-STATE LAND COMPANY, APPELLANT.

FILED MAY 6, 1911. No. 17,028.

1. **Taxation:** SALE FOR TAXES. A county treasurer must make return of his public sales of real estate for taxes to the county clerk, as provided by section 205, art. I, ch. 77, Comp. St. 1903, before he is authorized to sell lands at private tax sale.

2. ———: ———: NOTICE. The treasurer's notice of tax sales must contain substantially all of the matters specified in the statute. If it omits the statement that so much of each tract as may be necessary will be sold for the taxes, interest and costs thereon, or if the amount of the taxes against each tract are incorrectly stated, the sale made pursuant to such defective notice will be invalid.

3. ———: ———: TAX DEED: CONCLUSIVENESS. Section 221 of the revenue law (Comp. St. 1903, ch. 77, art. I) will not be construed to mean that a tax deed shall be conclusive evidence of all matters not recited in that section; and, where sufficient competent evidence is produced to overcome the presumptions created by the tax deed, it may be declared void.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Wright, Duffie & Wright, for appellant.

Morrow & Morrow, contra.

BARNES, J.

Action to set aside a tax deed and redeem the land described therein from the lien for taxes. The plaintiff had the judgment, and the defendant has appealed.

From the printed abstract and the agreed statements contained therein, it appears that the plaintiff is now and ever since the 27th day of August, 1898, has been the owner in fee of the northwest quarter of section 29, township 23, range 55, in Scott's Bluff county, Nebraska; that on the 7th day of December, 1903, the treasurer of that county sold said land at private sale for the delinquent taxes for the years 1901 and 1902 to one Vesta Funkhouser for the sum of $18.55, and delivered to her a certificate of purchase therefor; that on the 8th day of December, 1905, the treasurer of Scott's Bluff county executed and delivered a tax deed to said Vesta Funkhouser, whereby he purported to convey said lands to her, the tax deed being based on the sale above mentioned; that thereafter Vesta Funkhouser executed and delivered a deed conveying said premises, and all the interest which she had acquired therein by virtue of her tax deed, to one Mattie Frank; that on or about the 13th day of October, 1906, Mattie Frank and her husband, William Frank, conveyed the land in question to the defendant, the Tri-State Land Company, together with all the interest which they or each of them acquired in and to the premises by virtue of the conveyance of Vesta Funkhouser.

Upon the trial of the issues joined, the district court for Scott's Bluff county found, among others, the following facts: That on or before the first Monday of December, 1903, and before selling the land in question at private sale, the county treasurer of Scott's Bluff county filed in the office of the county clerk of said county a return of the public sale of lands for delinquent taxes as the same appeared on the treasurer's sale book. To this finding the plaintiff excepted. That the county treasurer did not make any return of the duplicate certificate of the sale of said land to the county clerk of said county, nor did he file a duplicate certificate thereof with the county clerk, nor was any duplicate certificate of said sale filed in the office of the county clerk of said county at any time prior to the execution of said tax deed. To this finding the defendant excepted.

The board of county commissioners did not designate any paper for the publication of the delinquent tax list for the year 1903, but said board of county commissioners did designate the Mitchell Index as the official paper of said county, in which the treasurer caused the delinquent tax list for that year to be published, together with a notice that the lands described in said list would be offered for sale for the taxes due and delinquent thereon; that said notice was defective and irregular as to the land of the plaintiff in this, that it did not state the amount of delinquent taxes assessed against said land, the amount stated in the notice being $8.88, whereas the true and correct amount of taxes against said land was $18.05, and that it did not appear that the county treasurer's name or signature was subjoined to the list of lands published, but his name or signature was subjoined to the notice of sale, and the list of lands immediately following his name or signature; nor did the published notice show any amount due for interest thereon. To this finding the defendant excepted.

That the treasurer did not post, or cause to be posted, in any place in his office a copy of the list of lands to be sold in the year 1903 for delinquent taxes, nor a copy of the notice of sale thereof, and no copy of said list or notice was at any time posted in the office of the county treasurer of said county, and no list whatsoever of lands sold for delinquent taxes for the year 1903, or notice of lands for sale, was ever posted in any place in the office of the county treasurer. To this finding the defendant excepted.

That the alleged notice of expiration of the time for the redemption from sale which was given by publication only, was defective, in that it failed to state that the purchaser would apply for a deed for said premises.

The court further found, as a conclusion of law, that the sale of the land in question to Vesta Funkhouser for the taxes due and delinquent thereon was void; that the deed issued thereon to her was illegal and void and con-

veyed no title to her; that her grantors acquired no title to said premises by virtue of said tax sale and deed; that defendant has no title to said premises, but has a lien thereon for the amount paid by it and its grantors in purchasing said lands at tax sale, together with all subsequent taxes paid by them, with interest, penalties and costs paid thereon. Thereupon the court entered the decree complained of, and taxed the costs to the defendant.

An examination of the testimony contained in the printed abstract leads us to the conclusion that the findings of the district court are correct, with the exception of the one relating to the filing of the return of the public sale conducted by the treasurer for the delinquent taxes for the year 1903, and upon this point we find that there is no competent evidence in the record showing, or tending to show, that the county treasurer of Scott's Bluff county filed a return of the public sale of lands for delinquent taxes for the year 1903 in the office of the county clerk of said county at any time before the land in question was sold at private sale to Vesta Funkhouser.

It is the defendant's contention that the treasurer's tax deed in question, by the provisions of section 221, art. I, ch. 77, Comp. St. 1903, is conclusive evidence that all of the provisions of the statute and all prerequisites of the law were complied with by the taxing officers and the county treasurer up to and including the issuance thereof, and that by the execution and delivery of the tax deed to its grantor and the mesne conveyances above mentioned it obtained and has a perfect title in fee to the lands described therein, which the plaintiff cannot successfully assail. In this we think the defendant is mistaken. That question was recently before this court in *Tate v. Biggs*, *ante*, p. 195, where it was held that section 221 of the revenue law (Comp. St. 1903, ch. 77, art. I) will not be construed to mean that a tax deed shall be conclusive evidence of all matters not recited in that section. We think this case is ruled by that decision, and further comment upon this point is unnecessary, and it is enough

to say that, when sufficient competent evidence is produced to overcome the presumption raised by the deed, it may be declared void.

Finally, it has been frequently held that the notice of tax sale must contain substantially all of the matters specified in the statute; that if it omits the statement that so much of each tract as may be necessary will be sold for the taxes, interest and costs thereon, and that it will be sold by the treasurer at public auction on the first Monday of November next thereafter, a sale made pursuant thereto will be void.

It appears that the notice in this case was not only defective and irregular in this respect, but it also failed to correctly state the amount of taxes due upon the land in question. Neither was there any published notice showing the amount of interest due thereon. This, together with the fact that the treasurer failed to make return of his public sales for the year 1903 to the county clerk before selling the plaintiff's land at private sale, are a sufficient departure from the provisions of the statute governing tax sales as to render such sale void. Therefore, a tax deed based on such a sale is also void.

For the foregoing reasons, we are of opinion that the judgment of the district court was right and should be affirmed, and it is so ordered.

AFFIRMED.

FELLEY M. MILLER, APPELLEE, V. ANNA M. MILLER, APPELLANT.

FILED MAY 6, 1911. No. 16,434.

1. **Divorce:** EXTREME CRUELTY. "There may be extreme cruelty justifying a decree of divorce without physical injury or violence. Unjustifiable conduct on the part of husband or wife, which utterly destroys the legitimate ends and objects of matrimony, may constitute extreme cruelty." *Myers v. Myers*, 88 Neb. 656.

2. ———: ———. The mere fact that a husband and wife are living

apart when false charges of adultery are wantonly made by one spouse against the other does not of itself prevent such charges from constituting extreme cruelty.

3. ———: ———. The fact of separation is relevant and important only as it may aid in determining the question whether such charges caused great mental suffering on the part of the spouse wantonly and falsely accused.

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

Hoagland & Hoagland and *George A. Magney,* for appellant.

Wilcox & Halligan, contra.

LETTON, J.

The plaintiff began this action in the district court for Deuel county on March 5, 1908. In the petition he sets up certain specific acts which he alleges constitute extreme cruelty on the part of defendant. On the 31st of July an amended petition, omitting the former allegations as to cruelty, was filed, alleging extreme cruelty on the part of the defendant by the writing of a letter to him about September 9, 1907, containing certain false and foul charges against him of adultery and unnatural crimes, of such a nature that they caused him great humiliation and mental anguish, and further charging that on or about July 8, 1908, she wrongfully and falsely made similar charges to certain acquaintances of plaintiff; that all of such charges were false and untrue, and caused him great shame, humiliation, and disgrace, as well as mental anguish and suffering. The defense amounts practically to a general denial, with a plea that the plaintiff is not a resident of Deuel county, and that his residence is in Douglas county.

The plaintiff is a railway mail clerk. He, together with his wife and a grown daughter by a former wife, resided in Omaha until July, 1905, at which time he filed a peti-

tion in the district court for Douglas county, praying for a divorce from the defendant on the ground of extreme cruelty. He left defendant on that day and has resided apart from her ever since. An answer was filed, praying that the divorce be denied and for a decree of separate maintenance and support. After the testimony was introduced, the plaintiff dismissed the action without prejudice, but the court gave defendant a judgment for support in the sum of $25 a month.

1. About the time the first action for divorce was brought, the plaintiff obtained permission from the post office department to remove his residence from Douglas county to Deuel county, where his brother lives. Plaintiff's run extends from Omaha to Cheyenne. He works six days and rests for the next seven days. He rents a room in each of these cities to occupy while taking his regular runs, but spends the time between runs at his brother's home in Deuel county. His daughter also makes her home there during her vacations, but attends school at North Platte while school is in session. Plaintiff has never voted in Deuel county, but has served as a juror there, and he has not voted in Douglas county since he moved. We feel satisfied that he is a *bona fide* resident of Deuel county and entitled to maintain this action in the district court for that county.

2. It is unnecessary in the consideration of this case to relate the acts and doings of the defendant which are relied upon to sustain the decree of divorce. We are satisfied that they would be sufficient to constitute extreme cruelty on the part of a wife toward a husband if they were living together at the time of their commission. The parties, however, at this time were living apart, and the question is presented whether such acts constitute a sufficient foundation for a decree of divorce under such circumstances, and when a decree for separate maintenance is in force against the husband. The actions of defendant and the charges made by her, as testified to by the three witnesses called by the plaintiff, were clearly of a nature

such as to bring him into public disgrace and ignominy. A person of whom such words were spoken must necessarily suffer extreme shame, humiliation, and anguish of mind. The plaintiff testifies that he was thereby compelled to shun the busy streets, to keep away from his friends and acquaintances, and that he suffered extreme shame, humiliation, and mental agony.

An unfounded and malicious accusation of infidelity, when made by the husband against the wife, is usually held to constitute such extreme cruelty as to warrant a divorce. *Walton v. Walton,* 57 Neb. 102; *Ellison v. Ellison,* 65 Neb. 412. Cases holding the converse of this doctrine are not so common, but, upon principle, where the accusations are of the gross and vile nature of those made by the defendant in this case, are wantonly and falsely made, and where they have the result testified to by the plaintiff, we see no reason why the sex of the injured party should change the rule. Perhaps where a charge of adultery is made by the wife, the tougher fibre of the male makes him better able to sustain the charge with equanimity than one of the gentler sex under a like accusation, and, hence, few cases are to be found where such an accusation made against the husband, standing alone, is held to be extreme cruelty. But, where the charge is bestiality and unnatural crime, and the result of the accusation is shown to be as destructive of the purpose of the marriage relation as that of a false charge of adultery against a wife, the matter of sex alone should make no difference in the legal effect. *MacDonald v. MacDonald,* 155 Cal. 665; *Myers v. Myers,* 88 Neb. 656.

Upon the question of the effect of the separation upon the right of the husband to a divorce for extreme cruelty consisting of false and scandalous charges, we are of the same opinion as that expressed by the supreme court of California in *MacDonald v. MacDonald, supra,* which is, substantially, that the mere fact that the parties are living apart when false charges are maliciously made by one spouse against the other does not necessarily prevent

such charges constituting extreme cruelty. It is relevant and important only as it may aid in determining the question whether such charges inflicted grievous mental suffering upon the injured party. See, also, 1 Bishop, Marriage, Divorce, and Separation, secs. 1282, 1300, 1302, 1306; 1 Nelson, Divorce and Separation, p. 306. While the words and acts of the defendant perhaps were not so aggravating and unbearable as they would have been if the parties had been living together, yet the very fact that it is the wife who makes such charges against the husband must inevitably tend to render them more credible than if made by a stranger. We cannot see that the fact that the marriage bond has been weakened to a certain extent can or should operate to take away the sting and venom of false charges, or render that innocuous which under other circumstances would constitute such extreme cruelty as is recognized by the law as a just and proper ground for the entire dissolution of the marriage tie. The effect upon the plaintiff's peace of mind would be equally great in the one case as in the other.

We are disposed to view with charity some of the actions of the defendant in this case on account of her time of life, but under all the evidence we think the decree of the district court was justified. It is therefore

AFFIRMED.

FAWCETT, J., concurs in the conclusion.

ANNIE E. HOWELL, APPELLEE, V. ERASTUS L. HOWELL, APPELLANT.

FILED MAY 6, 1911. No. 16,436.

1. **Divorce:** DECREE: OPENING DURING TERM. A decree rendered in a divorce case is usually within the control of the district court during the term at which it is rendered. If the court believes it necessary in the interest of justice to open it up and allow

further evidence to be taken at the same term, the matter is entirely within its discretion, and, unless an abuse of this discretion has been shown, this court will not interfere with it.

2. Evidence examined, and *held* not to support the findings and decree.

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

F. W. Fitch, for appellant.

Weaver & Giller, contra.

LETTON, J.

This is an appeal from a decree of divorce granted by the district court for Douglas county. The petition charges habitual drunkenness on the part of defendant, and also cruelty and inhuman treatment. The case was called for trial on the 25th of May, 1909, and the evidence on behalf of plaintiff taken. At the conclusion of plaintiff's case defendant moved to dismiss, whereupon the court found against the plaintiff and dismissed the cause. Three days later, and at the same term of court, plaintiff filed a motion asking that the decree be vacated and set aside, and to be permitted to introduce further proof, on the ground of newly discovered evidence. On the 12th day of June the court set aside the decree. Testimony was then taken, the matter taken under advisement, and at a later day in the same term the court found that the plaintiff was entitled to a decree of divorce on the ground of extreme cruelty. The appellant makes two contentions: First, that the district court had no jurisdiction to enter the decree; and, second, that the decree is not sustained by the evidence.

As to the jurisdiction of the court to set aside the decree and open the case for further testimony, this was entirely within the discretion of the court, and, unless an abuse of its discretion has been shown, we cannot interfere with it. This court has been very liberal in holding that decrees of the district court are largely within its control during the term at which rendered. If the court

believes it necessary in the interests of justice to open up a decree in a divorce action at the same term and allow further evidence to be taken, it has that power. While this is a power that ought not to be lightly exercised, still, unless substantial injury to the rights of the complaining party has been shown, the final judgment will not be interfered with.

Defendant is charged in the petition with drunkenness, but the evidence totally fails to sustain this charge. He seems to have been intoxicated but once during all the years of their marriage. It is undisputed that he was a constant drinker of liquor, amounting, as the plaintiff testifies, to about a quart of whiskey in a week or ten days, but it is shown that it had been recommended by a physician, that both husband and wife believed that it was necessary for his health, and that she herself procured much of the whiskey for him under that impression.

The evidence as to the charges of cruelty adduced before the first judgment was rendered was also insufficient, and this judgment was clearly right, as the evidence then stood. The parties were married on October 7, 1888, at Norton, Kansas. At that time plaintiff was 18 years of age and the defendant was 37. From there they moved to Nebraska City, and later to South Omaha, where they went into the dairy business, at first leasing, and afterwards purchasing, a small tract of land for that purpose. When they first came to South Omaha, which was in 1900, they had two children, the older boy being 9 years old, and the younger son 6. The plaintiff appears to have been a strong and healthy woman, while the defendant was somewhat frail and of a nervous temperament. The proof shows that the wife was much the more energetic and efficient in the work connected with the dairy; that the greater part of the labor both in the house and connected with the business fell upon her shoulders, while the defendant took life more easily. Plaintiff complains very bitterly that she was compelled to do the heavy work about the place, milk the cows in winter and summer,

clean out the stable, and take care of the children, while defendant, as she testifies, remained in bed until she had the work done, when he would arise, eat his breakfast, and go out with the wagon to deliver the milk to the customers. She testifies that he compelled her to do this work; but we are satisfied that there was no actual compulsion about it, more than that she, and he also for that matter, believed that it was necessary the work should be done, and that he was physically unable to do it. They afterwards sold the dairy and divided the proceeds; plaintiff taking a rooming house in Omaha, and defendant going out as an agent or salesman. He returned and wanted to live with her again, but she refused to have anything to do with him, and seeks in this action to restrain him from molesting her.

The real question in this case is whether the additional evidence produced after the judgment was opened was sufficient, when taken in connection with that previously adduced, to warrant a finding that the charges in the petition had been sustained. This evidence is, in substance, that he was guilty of compelling her to submit to excessive sexual intercourse under conditions which were injurious to her health, and which were degrading in their tendency. This testimony is flatly denied by the defendant, and does not seem to be corroborated, while other testimony seems to indicate in some degree another reason for plaintiff's desire to get rid of the defendant. The specific allegations of cruelty in the petition are meagre, though set forth in many words, and such as are set forth were not proved at the trial. The additional evidence does not support and is not responsive to the specific allegations of cruelty made by the petition, and when the incompetent and hearsay testimony is disregarded there is little evidence left applicable to any material allegation. Such being the case, the judgment of the district court must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

SWAIN LARSON, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 6, 1911. No. 16,424.

1. **Appeal:** ADMISSION OF EVIDENCE. "Error cannot be predicated on the admission of testimony identical with that already admitted without objection." *Robinson v. City of Omaha*, 84 Neb. 642.

2. ———: INSTRUCTIONS: STATEMENT OF ISSUES: NECESSITY TO REQUEST INSTRUCTIONS. It is the duty of the trial judge on his own motion to state to the jury the issues presented by the pleadings, and he should not hand the jury those documents with the statement that they constitute the issues; but if the substance of the issue is correctly stated in other instructions, and the defeated litigant does not present an instruction containing a more detailed statement, it is in no position to complain in this court that the issues were not sufficienctly stated to the jury.

3. ———: ———: HARMLESS ERROR. A judgment should not be reversed because one clause in an instruction does not correctly state the law, unless it is evident that the error prejudiced the complaining party.

4. **Railroads:** KILLING ANIMALS: FENCING RIGHT OF WAY. If a railway company fails to erect and maintain a fence along its right of way as required by statute, and in consequence horses go upon the railway track and are killed by one of the company's locomotive engines, the mere fact that two miles distant from the point where they entered the right of way they escaped from their driver and ran away will not exonerate the company.

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

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

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

ROOT, J.

This is an action to recover damages for the loss of two horses killed, as alleged, by reason of the defendant's failure to maintain a fence as required by section 1, art.

I, ch. 72, Comp. St. 1909. The plaintiff prevailed, and the defendant appeals.

The trial judge would have observed a more correct practice had he not delivered the pleadings to the jury with a written instruction that "these pleadings constitute the issues in this case"; and, if the jury had not been otherwise advised concerning the issues, we would not hesitate to reverse the judgment. The issues joined are simple, and were fairly stated in the second and fourth instructions, wherein the jury were told that the burden was upon the plaintiff to prove by a preponderance of the evidence that his horses were killed on the defendant's right of way by one of its locomotive engines, "and were enabled to get upon said railroad track by reason of the fence on the north side of defendant's track being out of repair"; but that, if the plaintiff's carelessness or negligence caused the horses to go upon the track, the defendant was not liable. Furthermore, in *Barney v. Pinkham*, 37 Neb. 664, and in *Sanford v. Craig*, 52 Neb. 483, we held that, if counsel desired a more detailed statement of the issues than appears in the court's charge, it is their duty to request an instruction conforming to their views. The defendant, so far as we are advised, made no requests for instructions, and its complaint is without merit. Of course, the inaction of counsel would not cure a misstatement of the issues, but no misstatement was made.

The defendant contends that instruction numbered 3 permitted the jury to return a verdict for the plaintiff if they found that the fence was out of repair, although it might have been amply sufficient to turn horses that were not running away. One clause of this instruction might be thus construed, but it should be read in connection with other parts of the instruction and with the other instructions given. In the same instruction the jury were told that if they found from the evidence that the fence at the point where the team entered the right of way "was an ordinarily well-built five-wire fence with posts one rod apart, and that at the time of the injury to the horses

said fence was in good repair, then the plaintiff cannot recover." They had also been informed that the statute required the defendant to erect and maintain "fences on each side of their railroad suitable and amply sufficient to prevent cattle and horses from getting on the track of said railroad." The statute so provides. Comp. St. 1909, ch. 72, art. I, sec. 1. If the testimony given by the plaintiff's witnesses is true, the fence at the point in question would not under ordinary circumstances repel horses; if the defendant's witnesses should be believed, the fence was amply sufficient for that purpose and was in perfect repair. The jury, in accepting the testimony adduced by the plaintiff, must necessarily have believed, not only that the fence was out of repair, but that it would not repel horses. Under these circumstances we do not think that there was prejudicial error in giving instruction numbered 3.

The horses commenced to run about two miles from the point where they were killed, but there is no direct evidence that they were running when they entered the right of way, although from whatever presumption may exist and the facts and circumstances shown by the evidence the jury might have so found. The defendant, however, did not request an instruction that it was not compelled to construct or maintain an impassable barrier to live stock, or one that would turn a runaway team; and, if the jury found that the fence was amply sufficient under ordinary circumstances to repel horses, their verdict should be for the defendant. Had a request of this character been made and the instruction refused, it is not improbable that the defendant would have had just cause for complaint. *Shellabarger v. Chicago, R. I. & P. R. Co.*, 66 Ia. 18. But if the fence, because of its construction or condition of repair, did not comply with the statute, the mere fact that the horses were running away at the time they entered the right of way would not exonerate the company. *Chicago & A. R. Co. v. Utley*, 38 Ill. 410. Taking the instructions together, we find no prejudicial

misstatement of the law, and the defendant is in no condition to complain because the issues and its possible defense as developed by the evidence were not more sharply defined.

Witnesses testified to the condition of the fence at the point where the team entered the right of way and for a considerable distance therefrom. Some of this testimony went in without objection, and to some objections were made and overruled. Under these circumstances the defendant will not be heard to complain. *Robinson v. City of Omaha,* 84 Neb. 642.

Sufficient has been said to demonstrate that the evidence will sustain a finding that the defendant is liable. There is no complaint that the damages are excessive. Upon a consideration of the entire evidence, we find no error prejudicial to defendant, and the judgment of the district court is

AFFIRMED.

BARNES and FAWCETT, JJ., dissent.

THOMAS WARD MCMANUS, EXECUTOR, APPELLANT, V. CAMILLA S. W. BURROWS, APPELLEE.

FILED MAY 6, 1911. No. 16,439.

Eminent Domain: CONDEMNATION MONEY: RIGHTS OF DEVISEE AND EXECUTOR. As between the devisee of real estate in Nebraska and an executor whose sole warrant of authority is his letters testamentary issued by a court of a sister state, there being no contention that unpaid claims exist against the estate or that the executor was in possession of the real estate, the devisee has the better right to condemnation money in the possession of the county judge.

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

W. M. Cain, for appellant.

A. M. Post, contra.

ROOT, J.

Camilla S. McManus, late of the state of Missouri, at the time of her decease testate, owned a quarter section of land in Colfax county. By the terms of Mrs. McManus' will, which has been admitted to probate in the courts of Nebraska and Missouri having jurisdiction of the subject matter, her entire estate is devised; one-sixth part to a granddaughter, one-half to a son, who is the executor of her will, and the residue to a trustee. Subsequent to Mrs. McManus' death a railway company condemned a right of way across the farm in Colfax county, and deposited with the county judge the amount of the award. The executor applied to the county judge for all of the money, but, upon the granddaughter's objections and application, the money was paid to the several devisees according to the terms of the will. The executor prosecuted error proceedings to the district court, and from a judgment affirming the order of the county judge an appeal is prosecuted to this court. Neither litigant questions the jurisdiction of the county judge to make the order, and this subject will not be discussed or decided.

There is nothing in the record to suggest that the estate is not solvent, nor that all of the claims against it have not been paid; there is nothing to advise us that the executor, at the time the land was condemned, or subsequently, had possession thereof; there is no contention that by the terms of the will Mrs. Burrows, the granddaughter and devisee, is not entitled to one-sixth part of the condemnation money, nor is there assertion or proof that the executor has received letters testamentary from any probate court in this state. The condemnation money stands in the place of the land. *Omaha Bridge & Terminal R. Co. v. Reed,* 69 Neb. 514. If the executor had been ap-

pointed by a county judge in this state, had not been directed by that court to take possession of his testatrix' real estate, and there were no unpaid claims against the estate, his right to the possession of the land or to the condemnation money would not be paramount to the rights of the devisees. *Tunnicliff v. Fox*, 68 Neb. 811; *Lewon v. Heath*, 53 Neb. 707. In the circumstances of this case, the devisee, and not the executor, is entitled to the money. *Buckner v. Charleston & S. R. Co.*, 7 S. Car. 325; *Hankins, Adm'r, v. Kimball*, 57 Ind. 42.

The judgment of the district court therefore is

AFFIRMED.

WILLIAM A. GORDON, APPELLANT, V. AUGUST HENNINGS ET AL., APPELLEES.

FILED MAY 6, 1911. No. 16,443.

1. **Attorney and Client:** ATTORNEY'S LIEN. An attorney at law entitled to practice his profession in this state has a charging lien upon money in the hands of an adverse party in an action or proceeding.

2. ———: AUTHORITY OF ATTORNEY: COLLECTION OF MONEY. The attorney by virtue of his employment, and while that relation exists, has authority to collect and receive money due his client in an action or proceeding in which the attorney rightfully appears, but that authority ceases with the severance of the relation of attorney and client.

3. ———: ATTORNEY'S LIEN: CITY WARRANTS. If an attorney at law duly acquires possession of city warrants drawn to the order of his client, he has a charging lien thereon, as well as upon money appropriated by the city for their payment, to satisfy any balance due him from his client for legal services rendered in and about all transactions leading up to the execution of the warrants and for money expended by him for the benefit of his client in such litigation; but, if the attorney is discharged from his employment before the warrants are collected, and both the attorney and the city treasurer are notified of such discharge and the revocation of the attorney's authority to collect, the treasurer will pay at

his own risk and that of his bondsmen any money in excess of the balance actually due the attorney from his client for such services and money expended.

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

L. D. Holmes, for appellant.

M. L. Learned, A. G. Ellick, McGilton, Gaines & Smith, Crofoot & Scott and *Stout & Rose, contra.*

ROOT, J.

A history of the transaction out of which this litigation arises may be found in *Gordon v. City of Omaha,* 77 Neb. 556. That suit was prosecuted by the plaintiff herein against the city; the instant one is against the bondsmen of the late city treasurer. From a judgment rendered upon a directed verdict in the defendants' favor the plaintiff appeals.

The defendants justify the court's instruction on two grounds: First, the opinion in *Gordon v. City of Omaha, supra;* second, for the alleged reason that, until Judge Gordon shall have settled with his counsel Mr. Eller, this action cannot be maintained. *Gordon v. City of Omaha, supra,* holds that under the city charter notice to the treasurer that Eller had been discharged, and therefore was not authorized to collect the Gordon warrants, was not notice to the city. The opinion does not hold that, if Hennings with notice of these facts paid the money to Eller, he would not be liable to the plaintiff therefor. By executing the undertaking, the bondsmen agreed that their obligation should remain in force if the city treasurer did not faithfully discharge all of the duties of his office. The principal duty which the law casts upon the treasurer is to pay to the persons named in the warrants the funds in his hands appropriated for that purpose. Mr. Hennings did not pay the warrants to the person to whose order they were drawn, nor to the individual to

whom the claims had been assigned. Hennings paid the money by color of his office, and both he and his bondsmen became liable to the party injured thereby. *Turner, Frazer & Co. v. Killian,* 12 Neb. 580; *Barker v. Wheeler,* 71 Neb. 740. The first defense is not seriously insisted upon, and we are of opinion that it should fail.

As to the second defense, Judge Gordon and the plaintiff disclose in their testimony that Mr. Eller, while attorney for Judge Gordon, secured possession of the warrants, and subsequently refused to deliver them to either Gordon until he was paid a balance of $1,400, which he assserted was due him for legal services rendered in the litigation which brought these warrants into existence. An inference may be drawn from this testimony that subsequently Mr. Eller was paid $575 on this account, but, construing the testimony in the light most favorable to the defendants, Mr. Eller did not assert a charging lien in excess of $1,400. The face of the warrants aggregated $1,600. The testimony further discloses that Mr. Eller also claimed money for legal services rendered Judge Gordon in litigation not connected with the suits against the city or its officers over his right to the office of police judge or the amount of his salary, but this contention could not enlarge the attorney's charging lien, nor, since Judge Gordon's interest in the claim against the city had been assigned for a valuable consideration to his son before Mr. Eller secured possession of the warrants, could the attorney successfully assert a retaining lien upon those instruments to secure money due him for legal services in litigation in no manner connected with his client's claim to the office or to the salary. The evidence therefore was sufficient to sustain a finding that Mr. Eller had received from the city treasurer $200, and possibly $775, in excess of his charging lien. The defendants argue that, until Mr. Eller's lien shall have been discharged, no part of the warrants or the money paid upon them can be said to be the separate property of Judge Gordon or of his assignee, and cite *Van Etten v.*

State, 24 Neb. 734. In that case the attorney, while the relation of client and attorney existed, rightfully collected his client's money, and was entitled to a portion thereof for his services, and for these reasons it was held that he could not be convicted of embezzlement until his account with his client had been settled amicably or by an adjudication.

In the instant case Eller was not attorney for Judge Gordon when the money was collected, but had been discharged by his client and specifically instructed not to collect the warrants. Of course, this discharge did not dissolve the lien which the law gave Mr. Eller upon the money in the city's possession, nor destroy his equitable right to so much of the fund as might be necessary to satisfy that lien, but this fact withdrew the attorney's authority to collect the money over his client's objection. The city treasurer, with knowledge of the facts, assumed to judge between the contesting claims, paid the money to the individual to whom the warrants were not payable, and in defiance of a warning not to do so. In our judgment the city treasurer and his bondsmen became liable to respond to the plaintiff, should it subsequently appear that Mr. Eller had been overpaid.

Upon a future trial of the case, the evidence may prove an entirely different state of facts. This opinion is based upon the uncontradicted evidence adduced by the plaintiff, and should not be considered as foreclosing proof of any fact in issue in the case. The district court erred in sustaining the motion to direct a verdict, and its judgment therefore is reversed and the cause is remanded for further proceedings.

REVERSED.

HAMILTON COUNTY, APPELLEE, V. AURORA NATIONAL BANK, APPELLANT.

FILED MAY 6, 1911. No. 16,609.

Judges: DISQUALIFICATION. An attorney, by presenting a question of law in the district court in one case at the time the identical question is submitted by other counsel in another not involving the first attorney's client, does not disqualify himself from sitting in the second case on appeal if he subsequently becomes a member of this court.

MOTION to vacate the judgment in this case reported in 88 Neb. 280. *Motion overruled.*

ROOT, J.

The appellee has filed a motion requesting the court to vacate the judgment of reversal, for the alleged reason that Judge SEDGWICK was not qualified to act as a judge in this case, and without his vote the judgment of the district court could not have been reversed.

Judges ROSE and SEDGWICK did not hear the oral arguments, because Judge ROSE, while deputy attorney general participated in an opinion to the state treasurer with respect to the subject matter of this litigation. Judge SEDGWICK, before his election, appeared as counsel for the county treasurer in the case of *Hamilton County v. Cunningham,* which was finally determined in 87 Neb. 650, and for that reason preferred not to sit in the instant case. The five judges before whom this case was argued were unable to agree upon the judgment, but divided three to two. Section 2, art. VI of the constitution, provides that a majority of the seven judges constituting the court shall be necessary to pronounce a decision. In this dilemma the five sitting members insisted that Judge SEDGWICK should take part in the decision, and he reluctantly consented. At that time the principal facts upon which the plaintiff predicates its contention that Judge SEDGWICK is disqualified had escaped his recollection, and were unknown to the

other members of the court. These facts are that in Mr. Cunningham's answer it was alleged as a separate defense that counsel for the plaintiff were not authorized to commence or prosecute the action. In the instant case the identical defense was raised by a plea before answer. The question of law, which was decided by Judge Corcoran adversely to the defendant, was preliminary and unimportant, and has not been passed upon by this court in either case. Since the question of law appeared in both cases, Judge SEDGWICK presented an argument in the interest of his client, although he had not been employed by and did not appear for either party in this suit. Until the motion was filed in this court, Judge SEDGWICK did not suspect that any person considered that he was attorney for any party to this suit.

The statute, section 37, ch. 19, Comp. St. 1909, provides: "A judge or justice is disqualified from acting as such, except by mutual consent of parties, in any case wherein he is a party, or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, * * * or where he has been attorney for either party in the action or proceedings and such mutual consent must be in writing and made a part of the record."

No suggestion is made, nor is it a fact, that Judge SEDGWICK has the slightest interest in the event of this suit, nor is he related to any party thereto. At common law the fact that the judge had been counsel in the case before being elevated to the bench did not disqualify him. *Taylor v. Williams,* 26 Tex. 583. The statute has enlarged the law, but it should not be construed to cover cases not within its letter or reason. *Houston & T. C. R. Co. v. Ryan,* 44 Tex. 426; *McFaddin v. Preston,* 54 Tex. 403.

If Judge SEDGWICK had waited until his client's case was tried upon the merits before arguing the right of plaintiff's counsel to prosecute the action, it is not probable that they would now contend that by making the argument he became attorney for a party that had not employed him, for whom he did not appear, and with whom the relation of

client and attorney did not exist. The fact that the district court in the interest of economy permitted indentical questions of law arising in two distinct cases to be submitted at one hearing by counsel for the respective litigants cannot create a relation which never existed. We are satisfied that Judge SEDGWICK is not disqualified.

The writer of this opinion, speaking for himself only, adheres to the position taken by Judge BARNES in his dissenting opinion, and for the reasons therein set forth believes that a rehearing should be granted. But the motion to vacate the judgment because of the alleged disqualification of Judge SEDGWICK should be

OVERRULED.

ROSE and SEDGWICK, JJ., took no part in this decision.

C. F. WILSON V. STATE OF NEBRASKA.

FILED MAY 6, 1911. No. 16,897.

Physicians and Surgeons: LICENSES: INFORMATION. A statement in an information that the accused did treat and profess to heal a certain named patient, "without having a certificate or license issued by the state board of health, and filed in the office of the clerk of Custer county, Nebraska, as required by law," does not negative the fact that a license issued by the state board may have been filed in the office of the county clerk of the county where the accused resides.

ERROR to the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Silas A. Holcomb and *Morris & Hartwell,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

ROOT, J.

The plaintiff in error prays for a reversal of a judgment of conviction on a charge of practicing medicine without a license.

The information charges that the accused, "late of the county aforesaid (Custer), on the 11th day of March, 1910, * * * then and there being in said county and state aforesaid, the said C. F. Wilson did then and there at the times herein set out unlawfully practice medicine and profess to heal, and did treat for physical ailment one Herman C. Olsen, without having a certificate or license issued by the state board of health, and filed in the office of the clerk of Custer county, Nebraska, as required by law." There is no allegation in the information that the accused resides in Custer county. The accused requested the district court to quash the information, for the alleged reason that it did not state facts sufficient to constitute the offense of unlawfully practicing medicine or of practicing medicine without a license, and did not state facts sufficient to constitute any offense under the laws of Nebraska. This motion was overruled, and the accused then entered his plea of not guilty.

Chapter 55, Comp. St. 1909, forbids the practice of medicine as therein defined, unless the practitioner shall have first procured from the state board of health a license, and shall have filed it in the office of the county clerk of the county wherein the licentiate resides or in the county in which he intends to practice. The prosecutor does not charge that a license was not issued, nor that a license was not filed in the county where the accused resides. Every fact stated in the information may be true, and the accused be not guilty. The subject is discussed in *Jones v. State,* 49 Neb. 609, wherein the court by POST, C. J., say, in substance, that the law is satisfied by registration in the county of the physician's residence, and that "it follows from such an interpretation that an indictment or information charging the practice by the accused of medicine, sur-

gery, or obstetrics in a designated county, without having procured the registration therein of the statutory certificate, and without disclosing the county of his residence, would not state an offense under the statute cited." The defect is one of substance. The defendant at the first opportunity challenged the county attorney's attention to the fact, and has at all times preserved his right to raise the question in this court. In our opinion the information is fatally defective, and the motion to quash should have been sustained.

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

REVERSED.

ÆTNA INDEMNITY COMPANY, APPELLEE, V. JAMES MALONE ET AL., APPELLANTS.

FILED MAY 6, 1911. No. 16,409.

1. **Trusts:** CONSTRUCTIVE TRUSTS: STOLEN PROPERTY: JURISDICTION IN EQUITY. In a suit to declare and enforce a constructive trust with respect to stolen property, fiduciary relations between the parties are not essential to the jurisdiction of a court of equity.

2. **Injunction:** POLICE OFFICERS: MONEY TAKEN FROM BURGLARS. A court of equity may enjoin a police officer from transferring a fund taken by him from burglars who procured it by robbing a bank, and may restore it to the owner thereof.

3. **Trusts:** MONEY TAKEN FROM BURGLARS: EVIDENCE. In a suit to trace a stolen fund through burglars to a police officer who took it from them when they were prisoners, the allegations of the petition may be established by a preponderance of the evidence.

4. ———: ———: ———. Proof that a bank had been robbed of a certain sum of money, and that an identified silver dollar, taken by a police officer from burglars shortly after the bank had been robbed, their possession being unexplained, was a part of the money so stolen, when considered with surrounding circumstances, may sustain a finding that other money taken from the burglars at the same time and in the same manner was also a part of the money stolen from the bank.

5. Appeal: ADMISSION OF EVIDENCE. The admission of incompetent evidence is not reversible error in a case tried to a court without a jury, where the judgment rendered is sustained by other evidence properly admitted.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

E. C. Strode and *Greene & Greene,* for appellants.

Burkett, Wilson & Brown, contra.

ROSE, J.

This is a suit to enjoin two police officers of the city of Lincoln from transferring money taken by them from burglars who procured it by robbing a bank, and to recover the fund thus taken on the ground that plaintiff had indemnified the bank against burglary, had paid the indemnity, and had succeeded to the rights of indemnitee. In addition to the police officers, the burglars were made defendants, and judgment against them for the full amount stolen was part of the relief demanded by plaintiff. In both particulars plaintiff prevailed, and defendants have appealed.

The petition states facts showing: Plaintiff is a Connecticut corporation duly authorized to indemnify banks against burglary and safe-blowing in Nebraska. For a number of years the Chapman State Bank has been transacting business under the laws of Nebraska, at Chapman, Merrick county. August 30, 1905, plaintiff indemnified the bank named against burglary. When the policy was in force November 27, 1905, burglars forcibly entered the bank, blew open a safe, and took $2,475 in cash, whereby plaintiff became liable to the bank for $2,000. The burglary was committed by defendants John Burke, Thomas Reiley and John Dorn, and they were arrested by police officers of Lincoln, December 2, 1905. While they were in custody defendant James Malone, city detective of Lincoln, and Philip H. Cooper, chief of police of Lincoln,

took from Burke $451.65, from Reiley $752.97, from Dorn $9.50. This money was taken from the bank when the burglary was committed, and is now in possession of Malone and Cooper. Afterward the prisoners were turned over to the sheriff of Merrick county. Later Burke and Reiley were convicted of the burglary and are serving terms in the penitentiary therefor. Plaintiff settled its liability for indemnity by paying the bank $2,000, and, pursuant to the terms of the policy, took from the bank an assignment of its right to the money in the hands of the police officers and of its claim against the burglars, who are insolvent. Malone and Cooper refuse to turn over to plaintiff the money in their hands, and will transfer it to others unless restrained by the court. In answering the petition, Malone and Cooper pleaded they were notified that the prisoners had assigned to their attorneys the money in controversy, and that Malone is entitled to retain $700 as an unpaid reward offered by plaintiff, if the money belongs to the latter. Defendants Burke and Reiley in their answer deny that plaintiff had authority to write indemnity against burglary in this state, deny that they took from the bank the money in controversy, and deny that it belonged to plaintiff by assignment or otherwise; but allege that the money was assigned to and is owned by their attorneys, and that it was not the sort of money or of the denominations lost by the bank at the time of the burglary. The reply to both answers was a general denial.

The first proposition argued by defendants relates to the nature of the case. Is it a suit in equity or an action at law? It was heard below without a jury, over the objection of defendants, and this is urged as error. The main purpose of the litigation, as shown by the petition, was to trace the stolen fund through the burglars into the hands of the police officers and restore it to the owner. It is alleged that the burglars are insolvent. The recovery of a judgment against them was consequently a secondary matter. They had in their possession only a

portion of the amount stolen, when searched, and as to that plaintiff was seeking redress by enjoining the policemen from transferring it to others and by establishing a constructive trust. In the petition there was no attempt to describe the particular denominations of money taken from the bank or found in the hands of the burglars or the police officers. There had been opportunity to change the currency into different items. Defendants were no less accountable because their possession grew out of a felony. Confidential relations are not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to stolen property. It may be traced through the thief into a different form of property and restored to the beneficial owner. In contriving means to cheat an owner out of his property, a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found. *Nebraska Nat. Bank v. Johnson,* 51 Neb. 546; *Newton v. Porter,* 5 Lans. (N. Y.) 416. The trial court treated the case as one in equity, and in doing so made no mistake. Having assumed jurisdiction for that purpose, it was properly retained for other purposes.

It is further argued that the money taken by the policemen from the burglars was not identified as the money taken from the bank at the time of the burglary, and that therefore there is no evidence to sustain the judgment of the trial court. The burglars procured the money in controversy by committing a felony. Evidence that they were guilty beyond a reasonable doubt was essential to their conviction in the criminal court; but, in a suit in equity to restore the stolen funds to the owner, plaintiff is only required to establish the allegations of the petition by a preponderance of the evidence. *Nebraska Nat. Bank v. Johnson,* 51 Neb. 546. Even in a criminal case a burglary may be shown by circumstantial evidence. *Morrison v. State,* 88 Neb. 682.

A silver dollar taken from the burglars by the police officers was described by the cashier of the bank as fol-

lows: "On Wednesday night prior to the robbery I rolled and placed in the safe some rolls of silver dollars. My attention was particularly called to a mutilated dollar which I rolled and put in the safe. On account of its bent condition, it would not go in the roll without bulging the ends of the paper roll, and at the time I noticed that the end of the roll was bulged. This mutilated dollar had three dents on one side of it near the edge, which bent it so it would not lay down close to another silver dollar. To the best of my knowledge it was bent on the eagle side of the dollar." By fair inference from the testimony this identical coin was traced from the bank to Malone through the burglars, in whose possession it was found shortly after the burglary had been committed. Their possession of the coin was not explained. In a prosecution for larceny, the unexplained possession by accused of a portion of the stolen property, shortly after the theft, when considered with all the evidence adduced at the trial, may be sufficient to sustain a finding that he stole the whole. *Thompson v. State*, 6 Neb. 102; *Palmer v. State*, 70 Neb. 136. The application of this principle to the present case leads to a holding that the judgment is supported by the evidence. The finding of the trial court will therefore be sustained.

Malone claims the right to retain $700 as a reward, but under the evidence he is not entitled thereto.

The principal argument was directed to the proposition that the record of the conviction of the burglars in the criminal case was erroneously admitted in evidence, but discussion of that question is unnecessary, since the evidence was sufficient without such proof, and prejudice will not be presumed from its admission, the case having been heard before the court without a jury.

Other questions are raised, but do not suggest a sufficient reason for a reversal.

AFFIRMED.

REESE, C. J., concurs in the result.

SEDGWICK, J., not sitting.

IN RE ESTATE OF HERMAN RUSCH.

HERMINE MUCHOW, GUARDIAN, APPELLANT, V. ANNA KATZ, ADMINISTRATRIX, APPELLEE.

FILED MAY 6, 1911. No. 16,417.

Courts: JURISDICTION: ALLOWANCE FOR MAINTENANCE OF CHILD. Where the district court grants a divorce to a wife, commits to her the custody of a minor child, and requires the husband to pay a fixed sum for the child's maintenance during minority, the county court, after the death of the husband, has no authority, in passing on a claim against decedent's estate for an additional allowance for the same purpose, to increase the amount fixed by the decree of the district court, as long as it remains unchanged.

APPEAL from the district court for Johnson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Oscar Douglas and *Hugh La Master,* for appellant.

S. P. Davidson, contra.

ROSE, J.

This is a controversy over the allowance of a 2,000-dollar claim against the estate of Herman Rusch, deceased, for the support of his infant daughter, Emma E. Rusch. The claim was filed in the county court of Johnson county by the infant's mother and guardian, Hermine Muchow, formerly Hermine Rusch, the parents having been divorced. Objections were filed by Anna Katz, administratrix of decedent's estate. The county court allowed the claim to the extent of $500, and the administratrix appealed to the district court, the guardian's petition therein stating, in substance: Since November 8, 1908, plaintiff has been the duly appointed and acting guardian of Emma E. Rusch, a minor ten years of age. Decedent and plaintiff were husband and wife from December, 1896, to July 14, 1906. The minor named is their daughter. In the district court for Johnson county plaintiff, on the ground of extreme cruelty,

obtained a divorce. Under the decree of separation, the custody, control and care of the child were committed to plaintiff, who was allowed $1,000 for her support during her minority. The decree is now in full force and effect. Herman Rusch died in Johnson county, May 17, 1907, leaving a will by which he attempted to give all of his property to his five other children, nothing being left to his infant daughter Emma E. Rusch, though he had at the time of his death property of the value of $30,000 above all debts and incumbrances. Since the divorce was granted, it has cost upwards of $3.50 a week to properly board, clothe, educate and maintain the ward, as her station in life requires. From the date of the filing of plaintiff's claim until the ward arrives at her majority, it will require upwards of $4 a week to properly support and maintain her. No provision has been made for her support and maintenance, except the $1,000 mentioned, a considerable portion of which has already been used. The amount remaining is wholly insufficient for the purposes stated, and it will require at least $2,000 more. There is a prayer for the allowance of the claim in full. A demurrer to the petition was sustained, and from a judgment of dismissal plaintiff has appealed.

The demurrer raises the point that the subject matter of plaintiff's claim was within the jurisdiction of the district court in the divorce case, and that consequently it could not be adjudicated by the county court, nor taken to the district court by appeal. The sum of plaintiff's argument on this question seems to be: The defendant in the divorce case is dead and the cause cannot be revived against his estate. The claim for an additional amount for the support of the ward was not adjudicated therein and may be allowed at any time. It is the duty of a father to support his minor child after his wife procures a divorce on the ground of extreme cruelty. Since the death of the ward's father, the settlement of his estate, including plaintiff's claim, has been a matter within the exclusive jurisdiction of the county court, under the constitutional

provision that "county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estate of deceased persons, appointment of guardians, and settlement of their accounts." Const. art. VI, sec. 16. In support of this argument *Eldred v. Eldred*, 62 Neb. 613, is cited. The rules therein announced are: "A decree of divorce obtained by a wife upon service by publication, without appearance of defendant, in a foreign state, is a bar to an action for alimony in this state, to be awarded out of his property here;" and "the fact that the marriage relation is dissolved does not relieve the father of the duty to support his minor children, and will not defeat an action therefor." In the case cited, however, the court, when severing the marriage relation in the divorce suit, made no provision for the support of the minor child. That decision, therefore, does not control here.

In the present case the validity of the decree granting the divorce and making an allowance for the support of plaintiff's ward is unquestioned. Both of these matters were within the original jurisdiction of the district court in the divorce case. The statute provides: "Upon pronouncing a sentence or decree of nullity of a marriage, and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain.

"The court may from time to time, afterwards, on the petition of either of the parents, revive and alter such decree concerning the care, custody, and maintenance of the children, or any of them, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children shall require.

"Upon every divorce from the bonds of matrimony * * * 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 husband, the character and situation of the parties and all other circumstances of the case." Comp St. 1909, ch. 25, secs. 15, 16, 22.

It thus appears that the district court not only had jurisdiction to make full provision for the care, custody and maintenance of the child, but in acting within that jurisdiction retained power to revive and alter the decree to meet changing circumstances and conditions. In the legitimate exercise of its authority the district court assumed jurisdiction over the entire subject of maintenance before decedent left any estate to settle in the county court. This jurisdiction was not lost by the death of a party to the suit. It is a familiar rule that, where a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes. The county court, by passing on a claim against decedent's estate for the ward's support, cannot deprive the district court of its jurisdiction to amend its own decree fixing the amount necessary for that purpose. The district court allowed $1,000 for the support of the ward during her minority, and part of it has not been used. On the assumption that an allowance is grossly excessive under changed conditions, could the county court, in settling decedent's estate, order the guardian to turn a portion of the unexpended balance over to the administratrix without a modification of the decree? Reasons for an affirmative answer are not apparent, nor is the authority of the county court to increase the allowance any more evident. To do either would be to modify in a collateral proceeding the decree of a court of superior jurisdiction. The law has created no such anomaly.

It is insisted by plaintiff, however, that she is without a forum, if she cannot obtain redress in the county court,

because the statute, so she asserts, provides no way to revive the decree of divorce after the death of the husband. This argument is not persuasive. The decree relates to both divorce and maintenance. Revivor as to the latter subject alone is necessary. The divorce would not be disturbed. The statute quoted expressly provides that the court, from time to time, may revive and alter the decree "concerning the care, custody and maintenance of the children." As to maintenance the decree is subject to change. It may bind the father while he is living and his estate when he is dead. The obligation of a father to support his helpless offspring may survive both divorce and death. *Miller v. Miller,* 64 Me. 484; *Seibly v. Person,* 105 Mich. 584.

The trial court properly sustained the demurrer, and the judgment is

AFFIRMED.

FLORA V. HARPER, APPELLEE, V. JOHN ROBERT HARPER ET AL., APPELLANTS.

FILED MAY 6, 1911. No. 16,428.

Partition: ALLOWANCE TO ATTORNEY. Where all the proceedings in partition, from the time the decree confirming shares is entered until distribution is made under a sale by a referee, are amicable and are properly conducted by plaintiff's attorney exclusively, the trial court may allow him a reasonable fee to be paid by the interested parties in proportion to their interest in the property sold.

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

Albert & Wagner, for appellants.

R. P. Drake and *A. M. Post, contra.*

ROSE, J.

This is an appeal by defendants from an order allowing a fee of $750 to plaintiff's attorney in a suit for partition. Flora V. Harper, widow of Joseph Harper, deceased, is the sole plaintiff. The only defendants who were adjudged to have an interest in the lands in controversy are six children and heirs at law of decedent; plaintiff being his second wife and the mother of one of the defendants only. After the share of each interested party was established by decree, plaintiff consented to the sale of the lands, including her homestead, the present value of which she agreed to take in money. Later the lands were sold by a referee, and the proceeds were distributed according to the respective shares of the parties. Out of the common fund the trial court allowed the attorney for plaintiff a fee for his services.

The only question presented by the appeal is stated by defendants as follows: "Does the record justify the allowance of a fee of $750 to plaintiff's attorney as a part of the costs in the case?" In assailing the allowance, defendants assert that the proceedings were adversary, and argue that no fee can be allowed as costs for the compensation of plaintiff's attorney without violating the following rule: "The plaintiff's attorney's fees are not taxable as costs in an action for partition where the proceedings are adversary." *Oliver v. Lansing,* 57 Neb. 352. Plaintiff's attorney insists that the proceedings were amicable throughout, and that the fee was properly allowed under the following doctrine: "A partition proceeding is one for the benefit of all the parties in interest, and where such proceedings are amicable it is proper for the trial court to allow the attorneys conducting the proceedings a reasonable attorney's fee, and to require the payment of the same by the parties in proportion to their interest in the property involved." *Johnson v. Emerick,* 74 Neb. 303.

The record fairly shows that the attorney for plaintiff

in drawing her petition asked for more than she was entitled to recover, and that defendants properly employed other counsel to resist the demand for unwarranted relief. To the partition, however, no resistance was made. There is no bill of exceptions, but the transcript shows that the hostility to plaintiff's excessive demand ended with the decree confirming shares and ordering the sale. Afterward, at least, plaintiff's attorney conducted the proceedings for the benefit of all parties entitled to share in the distribution of the proceeds. A referee was appointed. Several tracts of land were advertised and sold at sums aggregating more than $37,000. The sales were confirmed. Deeds were made to the purchasers. The proceeds were distributed among the parties entitled thereto, and defendants accepted the fruits of the services rendered by plaintiff's attorney in these proceedings. There is nothing to show that in conducting them he was assisted by counsel for defendants. He claimed from the common fund $1,200 as an attorney's fee. Defendants objected to the allowance of any sum for that purpose. The trial court allowed $750, but made no special findings. The allowance itself necessarily includes, at least, a general finding that the important proceedings relating to the sale, to the transfer of title, and to the distribution of more than $37,000 were not adversary, and the transcript contains nothing to show that, from the time the shares were confirmed until plaintiff's attorney demanded compensation for his services, the proceedings were not amicable. The amount of the fee, if allowable in any sum, is not questioned. On the face of the transcript, therefore, the allowance was proper, under the rule announced in the case last cited.

AFFIRMED.

LETTON, J., took no part in this decision.

MICHAEL F. HARRINGTON ET AL., APPELLEES, V. JOHN HEDLUND, APPELLANT.

FILED MAY 6, 1911. No. 16,445.

1. **Continuance:** DISCRETION OF COURT: REVIEW. In absence of an abuse of discretion on part of the trial court, reversible error does not appear in an order denying a continuance.

2. **Appeal:** ADMISSION OF EVIDENCE: OBJECTIONS. Appellant cannot predicate error on the admission of incompetent testimony to which he made no objection.

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

John A. Davies, for appellant.

R. R. Dickson, contra.

ROSE, J.

Plaintiffs are attorneys at law, and brought this action to recover $320 for professional services in procuring for defendant the title to a quarter-section of land in Boyd county. Defendant had settled on the land, and attempted to obtain a patent for it from the federal government under the homestead laws, but was defeated because it was in that part of the Fort Randall Military Reservation selected by the state as school lands in lieu of other school lands of which the state had been deprived by early homesteaders. Defendant's controversies extended over a series of years, and he eventually acquired title from the state. In the meantime his claims were alternately presented by plaintiffs to the federal land office, to the interior department at Washington, and to the state legislature, and he was in constant litigation in both state and federal courts. In these matters plaintiffs also acted on behalf of other settlers similarly situated. The case was tried to a jury, and from a judgment for the full amount of their claim defendant has appealed.

1. The first assignment of error is based on an order overruling a motion by defendant for a continuance. He resided in Boyd county, but was sued in Holt. An affidavit in support of the motion shows, in substance: The defense is based on a contract whereby plaintiffs agreed that, if they were unable to secure the land for defendant at $7 an acre, no charge against him would be made by them except for expenses, which have already been paid. To establish his defense he relies upon the attendance of 15 residents of Boyd county, who were present when the agreement was made, and against whom plaintiffs assert that they have claims for professional services. For the purpose of enforcing such claims, plaintiffs have threatened his Boyd county witnesses with suits in Holt county, and in consequence they refuse to attend court therein to testify on behalf of defendant. It is therefore necessary to take their depositions. Defendant expects to show by them that plaintiffs have not performed their agreement with him, and will have the depositions ready by the next term of court. He was taken by surprise when plaintiffs threatened to sue his witnesses. The motion is not made for the purpose of delay.

This suit was commenced originally in the county court of Holt county, and was afterward appealed to the district court. Defendant therefore had ample time for preparation. The proofs show that, before commencing this suit, plaintiffs threatened to sue him in Holt county, if he did not pay them their fees. Having himself been thus threatened, he ought not to have been surprised by like threats to sue other clients similarly situated. With the record in the condition described, it cannot be said on appeal that the trial court abused its discretion in overruling the motion.

2. Error in admitting proof that plaintiffs appeared before a committee of the legislature on behalf of defendant, though they made no claim in their petition for such services, is also assigned. While some objections to testimony of this character were interposed, details of all the

facts relating thereto were admitted without objection. It follows that the judgment cannot be reversed on this ground.

No other assignment of error being urged, the judgment is

AFFIRMED.

WILLIAM C. BRUCKER ET AL., APPELLEES, V. M. F. KAIRN ET AL., APPELLANTS.

FILED MAY 6, 1911. No. 16,374.

1. **Sales:** FALSE REPRESENTATIONS: REMEDIES. If, to induce a party to purchase what is claimed to be an imported Percheron stallion, representations are made by the vendor of material facts which, if true, would greatly enhance the value of the animal, but which are false and known by the vendor to be false; or, if without knowledge of their falsity the statements are made by the vendor as representations of positive facts, they will, if believed to be true and relied and acted upon by the vendee in making the purchase, to his injury, support an action by the vendee for damages or for a rescission of the contract.

2. **Fraud:** FALSE REPRESENTATIONS. "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Foley v. Holtry*, 43 Neb. 133.

3. **Appeal:** INSTRUCTIONS: REVIEW. This court will not search for error in the instructions. It is the duty of counsel who assails them to point out with reasonable particularity the error therein; failing so to do, it will be presumed that none exists.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

L. W. Colby, for appellants.

Hazlett & Jack and *S. D. Killen, contra.*

FAWCETT, J.

The petition alleges substantially: That on November 14, 1904, plaintiffs associated themselves together under the name of the Barneston Percheron Horse Company, for the purpose of purchasing and using an imported Percheron stallion named "Ulin"; that defendants, for the purpose of selling the horse referred to, represented to plaintiffs that they represented Robert Burgess & Son of Wenona, Illinois; that the stallion was the property of said Illinois firm; that it was a Percheron stallion and registered as such in France; that it was imported by the Illinois firm from France and again registered in the United States as a Percheron horse; that, in addition to said oral representations, they furnished plaintiffs a certain printed and written instrument, attached to the petition as exhibit A, in and by which defendants represented that the horse they were offering to sell to plaintiffs was a Percheron horse named "Ulin"; that on said day defendants delivered to plaintiffs a second printed and written instrument, exhibit B, in which the horse they were offering to sell plaintiffs was described as a Percheron stallion named "Ulin," and that said horse was the property of said Illinois firm; that defendants also executed and delivered to plaintiffs a bill of sale, exhibit C, "purporting to be executed by M. F. Kairn, agent for Robert Burgess & Son of Wenona, Illinois, and purporting to sell a certain stallion named 'Ulin' to these plaintiffs," a copy of which is attached to the petition; that, relying upon said oral and written representations, and believing the same were true, plaintiffs purchased from defendants the stallion referred to, "which they believed was a Percheron horse named 'Ulin,' and imported by Robert Burgess & Son, and registered in France as a Percheron horse, and that said horse was registered as a Percheron horse in the United States, and that said horse was the property of Robert Burgess & Son and imported by them; and, believing all the representations so made by said de-

fendants, did purchase said horse and pay the defendants the sum of three thousand ($3,000) dollars therefor;" that all of said representations so made by defendants were wholly false, and were made for the fraudulent purpose of inducing plaintiffs "to purchase a certain horse owned by them, and which horse, sold to these plaintiffs, was not a Percheron horse, was not registered in France as a Percheron horse, was not imported by Robert Burgess & Son of Wenona, Illinois, was not registered in the United States as a Percheron horse, and was not and is not the horse represented by defendants to plaintiffs; that said horse was not of the value of $3,000, nor was it of the value to exceed $200. And, by reason of said false and fraudulent representations, plaintiffs were defrauded by said defendants out of the money so paid as above, and that they were damaged in the sum of $2,800 by reason of said fraudulent and false representations so made as above." A second cause of action was set out, but it was withdrawn from the jury during the trial, and no errors are predicated thereon by either party. The prayer is for $2,800 and interest.

Exhibit A recites: "Know all men by these presents: That Burgess & Son has this day sold to" plaintiffs (naming them), "the Percheron stallion, named Ulin." This paper is signed "M. F. Kairn."

Exhibit B reads: "Certificate of insurance. Robert Burgess & Son. Wenona, Illinois. The Only Importing Firm on Earth that Makes an Investment Safe by Replacing the Horse in Case of Death. It is mutually agreed by and between Robert Burgess & Son, of Wenona, Illinois, parties of the first part, and the purchasers of the stallion Percheron Ulin 11,548, parties of the second part," etc. This paper is also signed "M. F. Kairn."

Exhibit C, the bill of sale, reads as follows: "Know all men by these presents: That Burgess and Son of Wenona, Ill., by their agent, *M. F. Kairn* of the county of *Marshall*, state of Ill., party of the first part, for and in consideration of the sum of *three thousand & no-100*

dollars, lawful money of the United States, to *him* in hand paid, at or before the delivery of these presents by *Barneston Percheron Horse Co. of Barneston, Nebr.*, party of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said party of the second part, *their* executors, administrators, and assigns *Burgess and Son, stallion named Ulin, color gray, aged six (6) years,* belonging to *him,* and now in *his* possession, at the place last aforesaid. To have and to hold the same unto the said party of the second part, *his* executors, administrators, and assigns, forever. And *I* do, for *my* heirs, executors, and administrators, covenant and agree to and with the said party of the second part, *their* executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels hereby made, unto the said *party* of the second part, *their* executors, administrators, and assigns, against all and every person and persons whomsoever. In witness whereof, I have hereunto set my hand this fourteenth day of Nov. 1904. M. F. Kairn, as agent for Burgess & Son. Signed and delivered in the presence of ———."

Service was not obtained upon defendant Kairn. Defendant Dixon appeared and answered for himself, first, that the petition does not state facts sufficient to constitute a cause of action; second, a general denial. There was a trial to the district court for Gage county and a jury, which resulted in a verdict and judgment for plaintiffs for $1,500. Defendant Dixon appeals.

The only assignments of error argued by defendant are (1) the insufficiency of the petition; (2) error in permitting certain evidence to be introduced over defendants' objection; and (3) error in the giving of instructions. These only will be considered, and in the order named.

1. The chief objection to the petition is the failure to allege that the representations made by defendant and relied upon by plaintiffs are not alleged to have been made

by defendants "with a full knowledge of the falsity of the same." While this may have been the rule in earlier days, we do not think it is now the rule anywhere. It certainly is not in this state. *Olcott v. Bolton,* 50 Neb. 779. Defendant further urges that "the purchaser could not blindly trust when he should know, and close his eyes where ordinary diligence required him to see." While that contention is true in some cases, it has no application when the representation is a positive statement of fact, where an investigation would be required to discover the truth. In such a case, a person is justified in relying upon the representations so made. *Foley v. Holtry,* 43 Neb. 133.

2. Questions 234, 235, 237, 238, 249, 251 and 252, and the answers thereto, were testimony given by Mr. Rawley, one of the plaintiffs as to statements made by Kairn to the witness and some of the other plaintiffs in his presence, when defendant Dixon was not present. This testimony was as to statements made to the witness and his coplaintiffs by Kairn, that the horse was an imported French Percheron horse, that Kairn said he was representing Robert Burgess & Son in the transaction, "and that they were a company of them out here selling horses." Mr. Rawley further testified that during the negotiations he met defendant Dixon; that a conversation occurred between the witness and Kairn and Dixon. "Q. State what it was. A. Why, Kairn and I went down to Oketo, and Dixon was there, and he made me acquainted with him as foreman of this bunch of men working for Burgess & Son. Q. Did you believe what Kairn said to you there in the presence of Dixon? A. Why, yes, I believed him." He was then asked if Mr. Dixon was where he could hear the statement made by Mr. Kairn, to which he answered, "Yes." "Q. What did he do upon Mr. Kairn saying those words, what did Mr. Dixon do? A. He shook hands with me. Q. Did Mr. Dixon deny the truth of that statement of Kairn's? A. No, he did not." He then testified: "We looked at another horse there, another stallion. Q. What, if anything, did Mr. Dixon say? A. Why, I asked them what their price was on that horse,

and I think it was $2,700, and I said, 'Why, he is a larger horse than you have in Barneston' (the horse Ulin), and Dixon said, 'Why, the horse we have in Barneston is an imported horse, and this is an American bred horse,' he said, 'That is the difference';" that he believed what Mr. Dixon said about the horse at Barneston—the horse Ulin—being imported.

The deposition of Kairn was taken by plaintiffs. He identified the pedigree which was furnished plaintiffs, which he gave to plaintiff Rawley in two parts—the French part and the American part. He testified that he received these documents from Dixon for the purpose of using them in connection with the sale of this horse. The testimony of two witnesses, introduced as experts on handwriting, is to the effect that the word "gray" in the American part of the pedigree is in the handwriting of defendant Dixon. Kairn also identified two letters received by him from Dixon and two written by him to Dixon. The expert witnesses on handwriting both testified that the handwriting in the letters from Dixon to Kairn is the same as the handwriting in the word "gray" above referred to. In the light of this direct connection of Dixon with Kairn, the court did not err in admitting the testimony above referred to. The testimony of the witness Brichat and of Kairn shows that the horse sold to plaintiffs was not an imported French Percheron, but was foaled in Washington county, Kansas, and was never owned by the importers, Burgess & Sons. Mr. Brichat testified that he had known the horse ever since he was foaled, and owned him part of the time.

It would serve no good purpose to refer further to the evidence in this case. It is amply sufficient to show that defendant Dixon was acting in concert with Kairn in the sale of this horse; that they perpetrated a fraud upon plaintiffs, and that Dixon received the greater portion of the "spoils." Having jointly participated in the fraud that was perpetrated upon plaintiffs, each is liable for the fraud and misrepresentations of the other in regard to the business then in hand. This proposition is so well established

and universally recognized that citation of authorities is unnecessary.

3. Defendant's entire discussion of this point is in the following language: "The instructions given to the jury are contrary to law and are erroneous." This is too general. It is no part of our duty to search the instructions, or any other part of the record, for error. That duty rests upon counsel who assigns error. If he believes that the court below has committed error, it is his duty to aid this court by pointing out such error with reasonable particularity.

No error having been called to our attention, the judgment of the district court is

AFFIRMED.

MARY ANN MAUZY ET AL., APPELLANTS, V. CLAUS HINRICHS ET AL., APPELLEES.

FILED MAY 6, 1911. No. 16,389.

1. **Descent and Distribution:** SCHOOL LANDS. The interest of a vendee in possession of school lands under a contract of purchase from the state, part of the purchase price of the land having been paid, at his death, descends to his heirs, and does not pass to his administrator. It is alienable, descendible and devisable in like manner as if it were real estate held by a legal title.

2. **Appeal:** ISSUES. The supreme court will not consider on appeal issues not tendered by the pleadings.

3. ———: THEORY OF CASE. Parties will as a rule be restricted in the supreme court to the theory upon which the cause was tried in the court below.

4. Evidence examined and referred to in the opinion, *held* insufficient to entitle plaintiffs to any of the relief demanded in their petition.

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

J. C. McNerney and *O. B. Polk,* for appellants.

J. J. Thomas, Edwin Vail and *Norval Bros., contra.*

FAWCETT, J.

On or about February 27, 1884, Neils Christensen purchased from the state of Nebraska 40 acres, and on January 1, 1885, the other 120 acres of the land in controversy, at $7 an acre, paying in each instance one-tenth of the purchase price. He took possession of the land and continued to make the interest payments thereon until on or about October 28, 1888, when he departed this life, leaving surviving him his widow, Minnie, and his children, Mary A., Elizabeth K., Clara J., John H. and Rosa L. Rosa L. at that time was about seven months old. She died in 1893, leaving her brother and sisters and mother, above named, as her sole heirs at law. At the time of the death of Mr. Christensen the children were all minors; the eldest being less than nine years of age. The mother was subsequently appointed administratrix of her husband's estate and guardian of the minor children. At the time of the trial of this case she had not been discharged either as administratrix or guardian. After the death of Mr. Christensen the administratrix made two or three payments of interest upon the school land contracts, but neither she nor Mr. Christensen in his lifetime ever made any further payments of principal. On May 4, 1891, by and with the written approval of the probate judge, she, as administratrix, sold and assigned the two land contracts to one A. L. Craig, for a cash consideration of $1,600, said assignments being filed on the next day in the office of the commisioner of public lands and buildings. Upon May 28, 1891, Craig assigned the contracts to Harriet I. Jones, and on May 24, 1897, Mrs. Jones assigned them to her son, Harry T. Jones, one of the defendants herein. Mr. Jones held the contracts until January 8, 1901, when he made full and final payment of the amount due upon the two contracts

and received deeds from the state for the lands described therein. On July 8, 1902, Jones conveyed the land in controversy, by warranty deed, to defendant Claus Hinrichs for a consideration of $5,000. During the time that Harriet I. and Harry T. Jones held the lands under the contracts and deeds respectively, they made valuable improvemnts thereon, in the construction of buildings and fences and breaking and cultivation of the land. Defendant Hinrichs was in possession of the lands for a number of years, prior to the time he purchased them, as a tenant of Mr. Jones, and after his purchase he took possession as owner and has held the same ever since. Plaintiffs brought this suit to recover the lands in controversy as heirs of Neils Christensen and Rosa L. Christensen, and based their right to a recovery upon the ground that the assignments of the school land contracts by Minnie Christensen as administratrix, even though with the approval of the probate judge, were void and of no force or effect; that neither Craig, nor any person under him, acquired any right, interest or title thereby to said lands. They allege that the defendants and each of them at all times had full notice and knowledge of the state of the title to the lands and of the rights of plaintiffs therein; that defendant Harry T. Jones took and held the legal title to the lands as trustee for and in behalf of plaintiffs; and that defendant Hinrichs took the legal title from Jones with full knowledge and notice of said trust and of the record title to the lands, and now holds the legal title in trust for plaintiffs. Trial to the court. Decree for defendants. Plaintiffs appeal.

At the time Hinrichs purchased the land from Jones he borrowed $1,000 of the purchase money from the Jones National Bank, giving a mortgage therefor; but, as the record shows that that mortgage was afterwards fully paid by Mr. Hinrichs and released of record, no reason is apparent to us why that question should be considered here. No attempt was made by plaintiffs upon the trial to show actual notice to any of the assignees of the contracts other

than that appearing upon the face of the contracts, or rather upon the first assignments thereto by the administratrix, upon the face of which assignments it appeared that she was assigning the contracts as administratrix, and that the probate judge had, in writing, approved her action; nor was any attempt made by plaintiffs to show any actual notice to defendant Hinrichs of any interest of the plaintiffs in the lands he was purchasing. As to defendant Hinrichs, it is urged that he made no examination of the records in the office of the county clerk of Seward county to ascertain the condition of the title, but that he purchased the land and took the title, relying upon the ability of his grantor, Harry T. Jones, to make good his covenants of warranty. It is the duty of one purchasing lands to make an inspection of the records, so as to ascertain the true condition of the title, and, if he fails so to do, he will be chargeable with everything which the records would have shown had he made such examination, but nothing more. In the present case, if Mr. Hinrichs had examined the records in the office of the county clerk, he would have learned from such records that Neils Christensen had purchased these lands from the state under school land contracts on the dates already stated, and that on the 8th day of January, 1901, payment in full of the balance due upon those contracts had been made by "Harry T. Jones, assignee," and that the state had issued to Mr. Jones deeds for the lands. The recitals in the deeds from the state are as follows: "Whereas on the 8th day of January, 1885 (in the one deed; February 27, 1884, in the other), all that tract or parcel of common school land of the state of Nebraska hereinafter mentioned and particularly described was sold in the manner provided by law to Neils Christensen of the county of Seward, and state of Nebraska, for the aggregate price of eight hundred and forty dollars (in the one case, and two hundred and eighty dollars in the other), has been fully paid to the proper receiving officer for the state of Nebraska, by Harry T. Jones, assignee, as shown by the records in the office of the

commissioner of public lands and buildings, and said sum being the whole amount of the purchase price for the said tract or parcel of land hereinafter described, now know ye," etc. We are unable to see anything in these deeds to put Mr. Hinrichs upon inquiry. He had a perfect right to assume that the officers of the state had done their duty and had not issued deeds to any one not entitled thereto. The officers of the state having recited in their deeds that the school lands had been purchased by Neils Christensen and that the full purchase price had been paid by "Harry T. Jones, assignee," we do not think he was required to investigate the question as to how Harry T. Jones became the assignee, but that any prudent man or examiner of abstracts would have been warranted in assuming from those recitals that Harry T. Jones was the direct assignee of Neils Christensen. The uncontradicted evidence shows that Mr. Hinrichs did not know Christensen nor any members of his family; that he knew nothing about his estate or what had been done with it, or of the assignments which had been made by the various parties above noted; and that he had been a tenant under Mr. Jones for about seven years, immediately prior to his purchase of the land, during all of which time he never had heard the title of Mr. Jones questioned. We are unable to find anything in the record even tending to show that Mr. Hinrichs was not a purchaser in good faith for a full and fair consideration, and without notice, either actual or constructive, of any outstanding equities or defects in the title. As to him, therefore, the judgment of the district court was clearly right.

It is now contended by plaintiffs that, even if defendant Hinrichs be held to be an innocent purchaser of the land without notice, that "would not relieve appellee Jones from a judgment in appellants' favor and against him for the consideration received by him from Hinrichs," upon the ground that "he, while constructive trustee for appellants, sold the trust property and appropriated the fund to his own use." The trouble with this contention is

that such a judgment could not find support either in the pleadings or the evidence. There is no doubt about the soundness of the contention that the administratrix had no authority, either with or without the approval of the county judge, to sell the equity of the plaintiffs in the lands described in the contracts, or to assign the contracts themselves which were the evidences of such equitable interest. Such authority could be obtained only through a proper proceeding in the district court. But, conceding that everything alleged by plaintiffs as to the unauthorized sale and assignment of the land and contracts, and conceding, without deciding, that defendant Harry T. Jones was chargeable with notice of the unauthorized assignments to Craig, under whom he held his assignments through the intermediate assignment of Harriet I. Jones, then, at the time of commencing this suit, plaintiffs had an election between two remedies; one to follow the land and recover it if found in any one who was not an innocent purchaser, or an action at law against Jones for their damages; in which action either side would be entitled to a jury trial.

We think that under a fair construction of their petition they elected to follow the land, and thereby, for the purposes of this case, waived their other remedy; but, conceding that they might pursue both remedies in one action or suit, and, if they fail to reach the land, obtain a money judgment for damages, they have not done so in this case. There is nothing in either the allegations or prayer of their petition to advise defendant Jones that they were seeking to recover a judgment against him for their damages, and the record plainly shows that the case was not tried in the court below upon any such theory. The prayer of their petition as to Jones is in the following language: "For a decree * * * finding and declaring that the defendant Harry T. Jones took and held the legal title to said lands as trustee only for and on behalf of these plaintiffs, and that his grantee, the defendant Claus Hinrichs, took and received the legal title of said lands with notice of the said trust and notice of the

rights of these plaintiffs in and to said lands; * * * that an accounting be had of the amount paid by the defendant Jones upon the balance of the purchase price of said lands with interest to the state of Nebraska, and of the amount paid for taxes upon said lands by defendants, and of the amount and value of the rents, issues, and profits of said lands due to plaintiffs; that plaintiffs have judgment against defendants for any balance which may be found in their favor on said accounting; that they have judgment against defendants for their costs herein expended, and for such other and further and different relief as to the court may seem just and equitable in the premises."

It surely cannot be urged that the language of their prayer: "That an accounting be had of the amount paid by the defendant Jones upon the balance of the purchase price of said lands with interest to the state of Nebraska, and of the amount paid for taxes upon said lands by defendants, and of the amount and value of the rents, issues, and profits of said lands due to plaintiffs; that plaintiffs have judgment against defendants for any balance which may be found in their favor on said accounting"—is tantamount to a prayer that they be given a money judgment against Jones "for the consideration received by him from Hinrichs." We shall not extend this opinion by setting out the evidence. It is sufficient to say that the evidence falls as far short of showing a right to a money judgment against Jones as do the allegations and prayer of their petition. It is evident, therefore, that the court did not err in refusing plaintiffs any relief against defendant Jones.

From a careful examination of the pleadings and evidence, we are unable to discover any error in the record, and the judgment of the district court is therefore

AFFIRMED.

EDGAR GOFF V. STATE OF NEBRASKA.

FILED MAY 6, 1911. No. 17,056.

1. **Information:** SUFFICIENCY. "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute." *Cordson v. State*, 77 Neb. 416.

2. **Criminal Law:** INSTRUCTIONS: EXCEPTIONS. "It has been the settled rule of this court since the decision of *McReady v. Rogers*, 1 Neb. 124, that a general exception to a charge to a jury is unavailing unless the entire charge is erroneous." *Redman v. Voss*, 46 Neb. 512.

ERROR to the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Andrew P. Moran, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

FAWCETT, J.

Edgar Goff, hereinafter called the defendant, was tried in the district court for Otoe county under section 16 of the criminal code for a felonious assault. He was found guilty and sentenced to the penitentiary for a term of two years. He now prosecutes error to this court. Section 16 is as follows: "If any person shall maliciously shoot, stab, cut or shoot at any other person, with intent to kill, wound, or maim such person, every person so offending shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

His first contention is that the information upon which he was tried does not state facts sufficient to charge him with the commission of any crime, in that it does not allege "that any weapon of any kind was used in making the assault," and therefore the defendant had no knowl-

edge that the state would attempt to prove that the assault was made with a knife, and that defendant was thereby taken by surprise. It is urged that the information should make the charge specifically and definitely in order that the accused may know the nature of the charge against him. A number of authorities are cited, but we do not deem it necessary to refer to them, as we think that question is definitely settled in this state. We have repeatedly held that, where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. *Murphey v. State,* 43 Neb. 34; *Leisenberg v. State,* 60 Neb. 628; *Chapman v. State,* 61 Neb. 888; *Cordson v. State,* 77 Neb. 416. We do not think there is any force in the argument that, under an information which charges that the defendant did unlawfully, wilfully and maliciously cut and stab, evidence that the cutting and stabbing was done with a knife would be any surprise to the defendant. Common everyday language implies that cutting and stabbing is done with a knife. While one might be stabbed with a fork or cut with a razor, he could not be both cut and stabbed with either. But, be that as it may, the information in this case follows the statute and was sufficient.

It is next contended that the court erred in its instructions to the jury, and erred in refusing a number of instructions requested by defendant. The only exception noted to these instructions is found in a paper filed in the case, which recites: "Comes now the defendant Edgar Goff and excepts to the instructions given by the court, and excepts especially to the following numbered instructions given by the court: Numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16. The defendant Edgar Goff excepts to the following instructions refused by the court, and especially to the following: Numbered 1, 2, 3, 4, 5, 6, 7, and offered by def." Under the oft-repeated holding of this court, this exception is not sufficient. *McReady v. Rogers,* 1 Neb. 124; *Redman v. Voss,* 46 Neb. 512; *Union P. R. Co. v. Montgomery,* 49 Neb. 429; *Bennett v. Mc-*

Donald, 52 Neb. 278. We repeat what we said in the second paragraph of the syllabus in *Redman v. Voss, supra:* "It has been the settled rule of this court since the decision of *McReady v. Rogers,* 1 Neb. 124, that a general exception to a charge to a jury is unavailing unless the entire charge is erroneous." The exceptions in this case being general, both as to the instructions given by the court and as to those requested by defendant and refused, they are insufficient to lay the foundation for their review. We are the more ready to adhere to the rule last above announced by reason of the fact that, if defendant had properly saved his exceptions, it would not have availed him anything in this case, as a careful examination of the instructions given and refused does not disclose any error.

No complaint is made as to the sufficiency of the evidence to sustain the verdict. The record shows that the defendant was the aggressor from the beginning to the end of the affray in which he committed the crime for which he stands convicted. He had a fair trial, and was convicted upon sufficient, competent testimony, and must stand the consequences of his unlawful and unprovoked offense.

The judgment of the district court is

AFFIRMED.

JOHN D. CANNELL ET AL., APPELLANTS, V. JAMES J. ROUSH ET AL., APPELLEES.

FILED MAY 6, 1911. No. 16,401.

1. **Appeal:** REVERSAL. When the plaintiff is entitled to judgment upon the facts established by the evidence without any substantial conflict, a verdict and judgment for defendant will be reversed upon appeal.

2. **Brokers:** ACTION FOR COMMISSIONS: ESTOPPEL. When a broker is duly employed by the owner to assist in exchanging property, and an opportunity is found and exchange made by the joint efforts of the broker and the owner of the property exchanged, the

owner will not be permitted to deny that the assistance of the broker was the proximate cause of the desired result.

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

J. T. McCuistion and *F. N. Prout,* for appellants.

Heasty, Barnes & Rain, contra.

SEDGWICK, J.

The defendants exchanged a stock of merchandise at Alexandria, this state, for a farm in Iowa. Afterwards the plaintiffs brought this action to recover commissions for their services as agents in assisting the defendants in making the exchange. The verdict and judgment were in favor of the defendants, and the plaintiffs have appealed.

There is no controversy as to the principal facts. By correspondence the defendants employed the plaintiffs, who are co-partners in business, to find a purchaser to exchange with them a farm for their stock of merchandise. Thereupon the plaintiffs procured a description of the stock of merchandise and advertised the proposition of exchange in a state paper, receiving several propositions, some of which were through one Johnson, a real estate agent at Council Bluffs. The plaintiffs informed the defendants of these propositions, and the defendants then came to Lincoln, where the plaintiffs were doing business, and one of the plaintiffs went with the defendants to investigate one of the properties that had been suggested by the plaintiffs, which is located near Chalco, this state, and then to see another property in Decatur county, Iowa, owned by one Henderson, and after investigating this property the defendant and the said Henderson, after some negotiations, found that they were not able to agree upon the exchange of property, and Mr. Henderson then informed the plaintiffs and the defendants that he had an acquaintance who lived near Tingley, in the state of Iowa, who had a farm that he desired to exchange for a stock of

merchandise, and he thought this farm might suit the plaintiffs. Thereupon, the parties all went to Tingley to see the proposed property for exchange.

Upon their arrival there, they examined the property in company with Mr. Shay, its owner, and propositions of exchange were made between defendant Roush and Mr. Shay. Mr. Roush testifies: "I told him that I couldn't make any permanent deal; that I would see the other partners of the firm before I made any other deal; I didn't know whether I wanted to make a deal or not; I would confer with them." Mr. Roush's partners in the business were his father and his wife. It was then arranged that, if Mr. Roush's report of the Shay property should be satisfactory to the other members of his firm, Mr. Shay or Mr. Henderson would go to Alexandria and look at the defendants' property. With this understanding the parties went to their respective homes, and the plaintiffs heard nothing further about the transaction until some time later they learned that the exchange had actually been made. It is now insisted by the defendants, and this seems to be the view taken by the jury, that the plaintiffs did not "have anything to do with the negotiations between Shay and Roush; that the trade was finally consummated by and between Henderson, Shay and Roush at Alexandria; that the trade was not made as a result of Cannell's exertions and Cannell was not the procuring cause, and it was not through the efforts of Cannell Brothers that the defendants 'got in communication' with Henderson and Shay." As already stated, these plaintiffs were expressly employed by the defendants in writing, through correspondence, to assist the defendants in exchanging their stock of merchandise for other property. When the plaintiffs had found, through their advertising at their own expense, opportunities which seemed favorable to make such exchange, and had notified the defendants of these opportunities, and the defendants went to investigate them, one of the plaintiffs accompanied the defendants, and when they found that the exchanges which they had in view

had failed, they learned, through one of the plaintiff's clients with whom they had hoped to make an exchange, that there might be an opportunity to make this exchange with Mr. Shay. Mr. Roush testified that, when it was found that he could not make the exchange with Mr. Henderson, he said to Mr. Cannell: "The deal is off, and we might as well go home." He now suggests that this had reference to his contract with Mr. Cannell, but this is manifestly not the case. It referred plainly to the deal which they expected to make with Mr. Henderson. There is nothing in the record to indicate that Mr. Cannell's services were no longer desired by Mr. Roush in the attempt to find an opportunity to make a favorable exchange, and they proceeded together to examine the Shay property. There is a little conflict in the evidence upon some minor points, but we have taken it as stated by Mr. Roush, or as clearly shown by uncontradicted evidence.

Do these facts show that Mr. Cannell found a customer with whom the exchange was made, as contemplated in the contract of agency between the defendants and Mr. Cannell? The evidence is uncontradicted that Mr. Cannell took an active part with the defendants in finding Mr. Shay and investigating the property which he proposed to exchange, and that his assistance in this regard was valuable to the defendants. The defendants duly employed the plaintiffs for this service in the beginning; they allowed them to continue their active assistance under their contract of employment; they have availed themselves of these services, and it was too late to repudiate them after the exchange was completed. They were jointly and severally active in bringing about this exchange. Neither party can maintain that he alone accomplished it. Each is estopped to deny that the efforts of the other were the proximate cause of the result. We think that under this evidence the plaintiffs were entitled to the agreed commission as a matter of law.

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

REVERSED.

MICHAEL H. MCCARTHY, APPELLEE, V. EDMOND H. BENEDICT ET AL., APPELLANTS.

FILED MAY 23, 1911. No. 16,421.

1. **Mortgages:** FORECLOSURE: MATURITY OF DEBT. A provision in a mortgage given to secure a promissory note stipulating for the payment of interest semiannually, and that, if the interest is not paid when the same is due, the whole of the debt and interest shall immediately become due and payable and the mortgage may be foreclosed, is permissive merely, and the entire debt will not become due unless the mortgagee elect so to declare by instituting an action on the note or to foreclose. See *Lowenstein v. Phelan*, 17 Neb. 429.

2. **Judgment:** VALIDITY. A decree quieting title and canceling a mortgage, as barred by the statute of limitations, before the expiration of 10 years after maturity of the debt secured by it, would be erroneous, at least, and, if jurisdiction over the owner of the note and mortgage were not acquired, would be void. Whether the taking of an appeal from such decree would be such an appearance as to confer jurisdiction, provided the petition stated a cause of action, is not decided.

3. ———: ———: CONCLUSIVENESS. Assuming that the petition in such case stated a cause of action, and that jurisdiction over the persons of the defendants in the suit was acquired, such decree would not be binding upon the then holder of the note and mortgage, unless he were made a party to the suit and jurisdiction obtained over him. In such case he would not be precluded from bringing an action within the statutory period of limitations to foreclose his mortgage.

4. ———: ———: BURDEN OF PROOF. Where such action is brought and proceeds to a decree and issuance of an order of sale, and the sale is enjoined by the owner of the fee, basing his action upon the decree quieting his title and canceling the mortgage, it is incumbent upon him to allege and prove that in such suit the then holder of the note and mortgage was a party defendant over whom jurisdiction was obtained.

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

E. H. Benedict and *Flansburg & Williams,* for appellants.

M. F. Harrington, contra.

REESE, C. J.

This is an action to enjoin the sale of real estate under a decree foreclosing a mortgage. From a rather imperfect record before us, it is made to appear that on September 25, 1888, one Searl, the then owner of the real estate involved, executed a mortgage to the Nebraska Mortgage & Investment Company to secure a debt for $800 due October 1, 1893. The interest was payable semiannually. The mortgage contains a clause that, if there was a default in the payment of interest as it accrued, the debt should thereby be matured. The interest due March 1, 1890, was not paid, and no further payment of interest has been made. The mortgage was duly recorded on the 27th day of September, 1888. Through mesne conveyances plaintiff became the owner of the legal title to the property on the 5th day of May, 1902. On th 20th day of September, of the same year, he conveyed the property to Edwin S. Eves by warranty deed, but the conveyance was only in trust to enable Eves to make some kind of a trade for plaintiff. There was nothing placed of record to show the trust character of the conveyance, nor the interest retained by plaintiff. On the 1st day of November, of the same year, Eves reconveyed the land to plaintiff by warranty deed, but the deed was never recorded, and was finally lost. On the 21st day of December, 1906, Eves and wife executed to plaintiff a quitclaim deed, which was recorded on the 9th day of February, 1907. We are unable to find any direct proof that the deed from plaintiff to Eves was recorded, but from various recitals contained in the record we assume that it was. It was stipulated upon the trial in the district court that "plaintiff never took the actual possession of said land, except that between four and five

years ago he rented it one season to a Mr. Friend, so that he might cut hay thereon, and outside of that the actual (only?) possession the plaintiff has had of the land would be constructive possession by reason of his ownership." On the 7th day of May, 1902, plaintiff commenced a suit in the district court for Holt county to quiet his title as against said mortgage, alleging that, by the failure to pay the interest as it became due the mortgage debt was matured and became due and payable on the 1st day of May, 1890; that the 10 years' statute of limitations had elapsed, and the mortgage was no longer a lien, but remained a cloud upon his title. The parties named as defendants in that action were: "John Doe, real name unknown; the southeast quarter of section 23, in township 33, range 15 west in Holt county, Nebraska; the Nebraska Mortgage & Investment Company; and Charles K. Collins, as receiver of the Nebraska Mortgage & Investment Company." Notice of the pendency of the action was given by publication alone. It is alleged in the petition in this case, and admitted, that the mortgage was given to the Nebraska Mortgage & Investment Company of "Fremont, Dodge county, Nebraska." If that company, or the receiver, were domiciled in this state it is not apparent that jurisdiction could be acquired by publication. It is stipulated that the defendant in this case "had no notice of actual entry of the decree, or the pendency of the suit, until after the decree was entered." He was not a party to it.

On the 18th day of September, 1902, a decree was entered finding that, by reason of the nonpayment of interest, the debt had been matured, and that more than 10 years had elapsed prior to the commencement of the suit, and the mortgage was barred and was no lien on the land. The title was quieted and the mortgage was canceled. It cannot be doubted that that decree was at best erroneous. *Lowenstein v. Phelan*, 17 Neb. 429; *Richardson v. Warner*, 28 Fed. 343. An appeal was taken from the decree to the supreme court, and was here affirmed "for want of briefs," so stipulated on the trial. In taking that appeal, defend-

ant acted as attorney for the appellants. While it is true that the statute of limitations had not run against the mortgage at the time of the commencement of that suit, nor at the time of the trial and entry of the decree, yet, if the district court acquired jurisdiction over the parties to the suit, the decree would be binding and final as to them, provided the petition stated a cause of action, and, if the mortgage was at that time held by any party to that suit, the right of defendant in this action would be foreclosed. On that question of jurisdiction we are left in darkness.

It is alleged that on the 25th day of September, 1903, "the defendant Edmund H. Benedict, claiming to have purchased the said mortgage and the obligation by it secured, commenced an action in the district court for Holt county, Nebraska, against Alexander Searl, Edwin S. Eves, Ida Eves, his wife, and the Commercial Investment Company" to foreclose the mortgage executed by Searl to the Nebraska Mortgage & Investment Company. At that time no one was in the actual possession or occupancy of the land in question. Plaintiff had no deed on file or of record; the record showing that Eves was the owner of the property. Plaintiff was not made a party to that suit. Summons were served upon Eves and wife personally, but no appearance was made by any defendant in that foreclosure proceeding, and a decree was entered foreclosing the mortgage and finding the amount due to be $2,500. That decree was entered on the 2d day of April, 1908. On the 6th day of February, 1909, defendant caused an order of sale to issue directing the sale of the property, and placed the same in the hands of the sheriff for execution, when this suit was brought enjoining the sale.

It is contended that, at the time of the commencement of the suit by plaintiff to quiet title, the mortgage was barred by limitation; that the decree canceling the mortgage and quieting title is a bar to the foreclosure and cancels the mortgage, even if the bar by limitation did not previously exist; and that defendant's foreclosure of the mortgage was a void proceeding. It is stipulated that

plaintiff had no actual notice of the foreclosure proceedings until "two or three days before" the commencement of the present suit by him, having only such notice "as the record might impute." The cause was tried upon an agreed statement of facts, apparently given orally to the court, and which falls far short of being satisfactory. The mortgage was not barred by limitation at the time of the commencement of the foreclosure suit, as 10 years had not elapsed from the maturity of the note, unless the decree quieting the title, erroneous as it was, had the effect of canceling the mortgage. This would depend upon the jurisdiction of the court over the then owner of the note and mortgage. If the Nebraska Mortgage & Investment Company, or Collins as its receiver, if he were such, was the owner, the appearance in taking the appeal to this court might cure any defect in the jurisdiction over them, but this we do not now decide. If they were not such owner, the decree quieting the title could have no effect upon the validity of the mortgage. As we have seen, it is alleged in the petition "that on the 25th day of September, 1903, the defendant Edmund H. Benedict, claiming to have purchased the said mortgage and the obligation by it secured," commenced his action to foreclose the mortgage, but we find nothing anywhere in the record showing when the mortgage and investment company disposed of the note or when he became such owner. If before the suit to quiet the title, his rights were not affected by the decree, even if otherwise valid, as he was not a party to the action.

It is apparent that plaintiff has not been barred of his right to redeem from the mortgage. As he was not a party to the decree of foreclosure, his right was not affected thereby, and he should not be required to redeem from the decree, and for this reason the question as to the amount found due in the decree being excessive is not a material one.

The decree of the district court is reversed, and the cause is remanded, with directions to that court to enter a decree permitting plaintiff to redeem the land within a rea-

sonable time by the payment of principal and interest due upon the mortgage if he elects to do so. In the event he fails to redeem within the time fixed by that court, the injunction to be dissolved.

REVERSED.

IN RE ORNAN J. KING.

FILED MAY 23, 1911. No. 16,954.

ORIGINAL application for writ of habeas corpus. *Writ denied.*

John L. Webster and *Earl D. Babst,* for petitioner.

Grant G. Martin, Attorney General, George W. Ayres and *F. M. Tyrrell, contra.*

REESE, C. J.

Practically the only difference between this case and *In re Agnew,* p. 306, *post,* is that in this case plaintiff purchased the Uneeda Biscuit of the agent of the manufacturer, in this state, after the bundle or package in which the goods were imported had been broken, when the smaller units were purchased by plaintiff, exposed for sale and sold by him at retail. The same principles of law govern as in the *Agnew* case, and the decision therein is followed.

The petition is denied, and plaintiff is remanded to the custody of the sheriff of Lancaster county.

WRIT DENIED.

FAWCETT and ROSE, JJ., not sitting.

IN RE BURTON T. PAGE.

FILED MAY 23, 1911. No. 16,955.

1. **Stipulations.** An agreed statement and stipulation of the facts upon which a cause is to be decided should contain nothing but the material facts in issue. More than this is surplusage and redundant.

2. ———: EXHIBITS. Where a cause in an original action is submitted upon an agreed stipulation of facts in writing, and the stipulation refers to and embodies certain exhibits by specific reference, and they are presented to the court, explained and their use demonstrated during the argument, they become, and must be treated as a part of the evidence in the case and considered as fully as though the elucidation were embodied in the stipulation.

3. **Commerce:** INTERSTATE AND INTRASTATE. When goods, inclosed in a receptacle or package, are shipped from a point in one state to a point in another, they become and are a part of the interstate commerce of the country and retain that distinctive character until sold or the original package in which they were consigned is broken after they arrive at the point of destination. If the original package is broken by the consignee for the purpose of the sale of the smaller units or packages contained in the original inclosure, the interstate quality of the whole is lost, and the consignment becomes a part of the body of the property of the state and is subject to its laws.

4. **Habeas Corpus:** BURDEN OF PROOF. In an original application for a writ of habeas corpus whereby the plaintiff seeks his discharge from the custody of an officer holding a warrant or commitment regular on its face, it devolves upon the plaintiff to show that his detention is unlawful. Failing to do so, the application will be dismissed and the plaintiff remanded to the custody of the officer holding the authority for his detention.

ORIGINAL application for writ of habeas corpus. *Writ denied.*

John Lee Webster and *Earl D. Babst,* for petitioner.

Grant G. Martin, Attorney General, George W. Ayres and *F. M. Tyrrell, contra.*

REESE, C. J.

This is a companion case with *In re Agnew*, p. 306, *post*, and *In re King, ante*, p. 298, all having been submitted upon the same "agreed stipulation of facts," argued at the same time, and submitted on the same briefs.

Before entering upon a discussion of the case, we wish to enter our most emphatic disapproval of the manner of submission upon the so-called "agreed stipulation of facts," and to say that, had we known before argument of what we would have to encounter in the persual of the "stipulation of facts," we certainly should have refused to allow the cases to be submitted thereon, and have insisted that a reasonable stipulation should be filed. The agreed stipulation consists of 28 pages of printed matter of brief size, consisting of an historical sketch of the growth and development of the cracker trade, the receptacles in which the crackers were shipped, the handling of the crackers with the hands of the seller, weighing them in scales in which they were placed by the use of a scoop, then delivered or sent to the customers at their homes with other articles purchased, "such as soap, fish, cheese, kerosene, fruits, vegetables," etc., and by which they, "from their porous and crisp nature were subject to the baleful effects of the air, moisture, and dust, and deteriorated rapidly in substance and flavor, and were liable to, and frequently did, absorb to a greater or less degree a taste or flavor of the other articles with which they were so placed or commingled," etc. Then follows a history of the development of the package system of the National Biscuit Company, beginning with a history of the patented wrapper or paper box, made by machinery, and the placing therein of the biscuit "untouched by human hands and uncontaminated by the worst surroundings of its journey from the factory to the table of the consumer," the wonderful sale of " 'Uneeda Biscuit' at the uniform price of 5 cents per package," the "hundreds of millions of packages of 'Uneeda Biscuit' having been so manufactured and advertised and sold through-

out the United States without, in a single instance, any statement being printed on the label of the net weight or measure of the contents exclusive of the container, but always, and in every instance, advertised and sold with the printed statement on the label, 'Five Cents a Package.'" We are next regaled with a lucid and soul-stirring history of the construction of the two factories, one in the city of New York, and the other in Chicago, "at a cost * * * of several millions of dollars," and "arranged with special reference to the use of a series of machines and mechanical appliances invented for it, and so connected and placed that, in the process of manufacture, the crackers are carried by descending pans from the ovens on the top floor of the buildings to moving tables on a lower floor, where at the end of said tables are machines which by one stroke so assist in the simultaneous folding of a carton blank and a sheet of paraffin paper that the two become a unitary box structure, calculated to exclude air, moisture, dust, dirt, and vermin," until they "come along on the moving tables and their conveyors, and an employee takes whole, selected biscuit and puts them into the open package, just as quickly, easily and accurately as a chord is struck by a musician on an organ or piano, and the biscuit are then touched by human hands for the first and only time until opened in the home of the consumer." The method of filling the packages, the care to avoid breakages, "neither be too crowded nor too loose," are elaborately explained, as well as the automatic closing machines, the application of the "red Iner-seal Trade Mark" on each end, the formation of the "bundle," the placing of the bundle label "showing the legend 'Uneeda Biscuit, National Biscuit Company,'" then "trucked to cars for shipment," etc., the great value of plates and dies for printing labels and wrappers, the use of the best and highest grades of flour, the resultant "light, crisp and flaky" cracker, "which are prime elements of superiority and value."

After the patient perusal of the foregoing, but little of which is above referred to, there are about three pages of

cuts and prints of the 54 different kinds of packages, and, following this, three maps of the United States showing the location and boundary of each state and territory in the Union, excepting Alaska, Hawaii, Guam, Porto Rico, and the Philippine Islands. Why they are omitted is not explained. The margin of these maps are fairly well filled with legends showing the route of travel from the factory of supposedly all the different brands of crackers from the "Zu Zu Ginger Snaps" to "Barnum's Animals." Among other statements following the foregoing may be noted a reference to the extensive advertising of the "biscuit" and the aggregate of sales for the years 1889 to 1910, and a copious extract from the decision of a federal court upon the subject of the validity of the patent of a carton or wrapper in a cause where the question of an infringement was presented. The importance of that decision upon the questions here presented is not perceived. There is also a synopsis of the pure food laws of the United States and of all the states, which is scarcely deemed of sufficient importance to warrant their inclusion in a stipulation of facts in this case. The foregoing is but a brief epitome of the unimportant and unnecessary portions of the "stipulation." When we reflect the only purpose of this application is to ascertain if the provisions of the law of this state, requiring the net weight of the contents of a package to be upon it, shall be observed, the extended "stipulation" would hardly seem necessary. We are wholly unable to conceive why the records of this court should be loaded down with this great mass of what seems to us to be immaterial matter, to say nothing of consuming the time of the already overworked judges in reading it. An agreed statement of the facts upon which a cause is to be decided should contain nothing but the material facts in issue. More than this is surplusage and worse than redundant.

The material facts in this case differ from those in the two companion cases in that Page is not, strictly speaking, a retail dealer, but is said to be an agent of the foreign

manfacturer, and is conducting a "distributing house" in the city of Lincoln on behalf of the manufacturer, and is selling the manufactured articles to merchants, and possibly to others, within this state. The material and essential inquiry is as to whether he sells the imported product in the original and unbroken package in which it is shipped from the factories at New York and Chicago to him, or whether he breaks the package and sells the smaller and included packages separately? The decisions, some of which are cited in *In re Agnew,* hold that the right to import from another state or nation carries with it the right to sell; but, in order that the property retain its distinctive characteristic of interstate commerce in a sale, it must be sold in the unbroken, identical package as when shipped by the consignor. If the container or package consists of smaller units or packages, and the original or outside package is broken and the smaller units or packages are sold, the protection of the law of interstate commerce is gone, and the property at once becomes a part of the body of the property of the state and is subject to its laws. This is too well settled to be open to dispute. The controlling question therefore is: Were Page's sales made in the original, unbroken packages, as when consigned to him, or were said packages, or containers, broken and the smaller packages sold therefrom? The "agreed stipulation of facts" is not quite clear as to his procedure. Instead of a segregation of the parts of the so-called stipulation of facts so as to refer to and dispose of the facts of each case separately, they are so commingled as to render it necessary to refer to those of the other cases in order to ascertain the true facts. Paragraph 10 of the stipulation contains a general statement of the method of handling the packages by Page. It is as follows:

"That after these packages of Uneeda Biscuit are wrapped into bundles, each containing one dozen packages, they are shipped without change of condition direct to National Biscuit Company, Lincoln, Nebraska, in charge of Burton T. Page, sales agent and employee of said National

Biscuit Company, and placed without change of condition into a sales agency or warehouse of the National Biscuit Company, located and operated at Lincoln, Nebraska, and are offered for sale by said Burton T. Page to the retail grocers of Lincoln. In answer to orders given by the retail grocers, Burton T. Page delivers said bundles in the same unbroken and unopened condition as when the same are shipped from the city of New York, in the state of New York, or from the city of Chicago, in the state of Illinois, and received by him, the said Burton T. Page, at Lincoln, Nebraska, as sales agent and employee of said National Biscuit Company, and in no other way."

It may be noted that each package sold contains one dozen smaller packages. The latter are the packages which are sold by the retailers at 5 cents each. Also that Page delivers "said bundles" to the retailer without breaking them. In paragraph 12, which refers to sales by King, it is stipulated that "King purchases, through the said Burton T. Page, Uneeda Biscuit from the National Biscuit Company by the dozen packages, and the said Ornan J. King receives bundles, each containing one dozen packages of Uneeda Biscuit in the same unchanged and unbroken condition as when said bundles left said National Biscuit Company at its factories in the city of New York, in the state of New York, and in the city of Chicago, in the state of Illinois, and said Ornan J. King places said bundles on the shelves and counters of his grocery store as an article of merchandise, so that the said bundle, from the time it was formed in New York or Chicago, trucked to a railroad car, placed in such railroad car, transported in car-load and part car-load lots, placed in the warehouse or sales agency of said National Biscuit Company at Lincoln, in the state of Nebraska, trucked in wagons to the store of the said Ornan J. King, and displayed by the said Ornan J. King on his shelves and counters in said store, has not been changed in any respect whatsoever, or inclosed in or united to, or formed as a part of, any other article of merchandise, bundle or box, or parcel of any kind or descrip-

tion, but is in said Ornan J. King's store in the same condition as when formed in bundles in said factories of said National Biscuit Company and shipped by it as an article of commerce to Lincoln, in the state of Nebraska, and as received by said Ornan J. King in his said retail grocery store at Lincoln, in the state of Nebraska." This paragraph is misleading, wherein it is sought to show that the bundles purchased by King are the original packages shipped from the factories in New York and Chicago, which clearly they are not. But it is shown that the purchases are by the dozen packages, which are the 5-cent packages. In paragraph 16 it is stated that the packages "have printed thereon the price of each, and are sold by the National Biscuit Company to the dealer by the dozen," and resold singly by the dealer. These "dozens" are contained in a square bundle containing one dozen of the 5-cent packages, and, as most clearly appears, they are the bundles which are sold to the retailer by Page. An illustration of this bundle is shown and verifies the above beyond question. But these bundles of dozens are not the original packages shipped from the factories. There are two cuts or illustrations of these original packages, which are presented in the agreed statement, and they each contain more than one of the "dozen" packages.

At the argument of the cases before the bar of this court, certain exhibits, presumably those referred to in the twenty-fifth paragraph of the stipulation, showing the manner in which the goods were packed and shipped, were presented, and explanations of how they were sold by Page were given, which, of course, constituted a part of the evidence upon which this decision must be made. As then elucidated, and taken in connection with the stipulation of facts, it appears beyond question that Page receives the consignment of goods in paper-board cases containing two or more bundles or receptacles, each containing one dozen small 5-cent packages, on neither of which is there any brand showing their

contents by weight or measure. These bundles, containing one dozen other packages yet smaller in size, are removed and sold to the retailer, who in turn sells the 5-cent packages to the consumer. From this it appears that the goods are not sold to the retailer in the original package, as shipped from the factory, and therefore the sales are not protected by the interstate commerce law. Our attention is directed to a portion of paragraph 26 of the stipulation which refers to a specific sale made by Page to a person therein named, and which is within itself contradictory. It is said that Page sold to the person named "one large package, described in paragraph 15 of this stipulation as a bundle, containing 12 small packages" of Uneeda Biscuit, etc. We have been advised of but one style of package containing "12 small packages," and that one contains 12 of the 5-cent packages. When we turn to paragraph 15 and observe the package there illustrated, we find a receptacle containing more than 24 of the "small packages" and which is certainly not the bundle containing "12 small packages," so frequently referred to in the stipulation, arguments and briefs.

It is fundamental that in a proceeding of this kind it devolves upon plaintiff (Page) to show that his detention is unlawful. This he has failed to do. His petition is dismissed, and he is remanded to the custody of the sheriff of Lancaster county.

WRIT DENIED.

FAWCETT and ROSE, JJ., not sitting.

IN RE LEW AGNEW.

FILED MAY 23, 1911. No. 16,957.

1. Commerce: INTERSTATE AND INTRASTATE. An original package as governed by interstate commerce law is that which is delivered by the importer to the carrier at the initial point of shipment, and retains its form and contents until received by the consignee in the same condition as when shipped. If, upon arriving at its

destination in a foreign state, the package is broken and its contents, in smaller units, is offered for sale, and enters into the retail commerce of the state, the distinctive quality of interstate commerce is lost, and the goods become at once subject to state laws.

2. ———: ———. The laws of congress governing and controlling interstate commerce can have effect upon property only during the time it retains its distinctive interstate quality, or character, of commerce. When such property is shipped to and enters the body of the property of the state, the original packages being broken and the contents offered and sold to retailers or consumers, its interstate quality is lost and it ceases to be subject to congressional control.

3. Food: PURE FOOD LAW: CONSTITUTIONALITY. A law of this state requiring packages containing articles of food to be branded with a statement of the net contents by weight when offered for sale in the retail trade imposes no obligation upon the manufacturer in a foreign state. The requirement operates alone upon the dealer who is selling the product at retail as a part of the body of the property of the state and exclusively under state control.

4. ———: ———: ———. The pure food law of this state (Comp. St., 1909, ch. 33) is confined to the regulation of intrastate commerce, and does not in any sense pretend to control interstate commerce. If, however, some of its provisions should be found to encroach upon the regulation of interstate commerce, that fact would not necessarily require the whole act to be declared void.

ORIGINAL application for writ of habeas corpus. *Writ denied.*

John Lee Webster and *Earl D. Babst,* for petitioner.

Grant G. Martin, Attorney General, George W. Ayres and *F. M. Tyrrell, contra.*

REESE, C. J.

This is an original application by Lew Agnew, whom we will designate as plaintiff, for a writ of habeas corpus. The petition is of unusual length and cannot be set out here in full. It must be sufficient to state that it is alleged therein that a complaint was filed in the office of the county judge of Pawnee county charging plaintiff with a violation of the

pure food laws of this state in the sale of a misbranded package of food known as "Uneeda Biscuit," the same being a wheat product, which had not been put up in package form by any retailer, the misbranding consisting of a failure to have placed upon said package a correct statement of the net weight or measure of the contents of the package; that a warrant was thereupon issued by the county judge and placed in the hands of the respondent, the sheriff of Pawnee county, who arrested plaintiff, and was holding him in custody, thus restraining him of his liberty, which, it is alleged, is in violation of law. The writ was issued, directed to the sheriff of said county, who has made his return setting up copies of the complaint and the warrant for the arrest of plaintiff thereunder, the arrest and custody as his justification.

The prosecution of plaintiff was instituted under the provisions of chapter 33, Comp. St. 1909, the sections of which, applicable to this case, are sections 8, 22, and 23 of the chapter. Sections 22 and 23 provide the penalty to be imposed for violations of the act, and section 8 defines misbranding, and declares that the failure to state upon a package of food, of the kind specified, the net weight or measure of the contents of the package, exclusive of the container, shall be misbranding.

It seems to be conceded that plaintiff has violated the provisions of the law, provided the law is constitutional and valid, but it is contended that the act of the legislature, and especially section 8 thereof, is unconstitutional and void, as being in derogation of the law of congress, and violative of the constitution of the United States, and therefore the detention of plaintiff is without warrant or authority of law, and is, for that reason, illegal.

The questions involved were argued at considerable length at the bar of the court, and the cause has been submitted thereon and upon extended briefs by plaintiff and the attorney general. It will be impossible for us to consider all the propositions presented by plaintiff without extending this opinion to an unreasonable length. Indeed,

there are many subjects discussed which we are unable to see have any bearing upon the merits of the case. The cause is submitted upon an alleged agreed statement of the facts supposed to be material to this inquiry, much of which is, as we believe, wholly outside of the legal propositions involved.

As we view the case, it is deemed sufficient to say that the article, the sale of which forms the basis of plaintiff's arrest, was, and is, manufactured by a corporation known as the National Biscuit Company, with its factories in New York and Chicago, the product being put up in small boxes or packages, the retail price of which is 5 cents a package. These packages are packed in larger receptacles containing one dozen of the smaller ones, and those receptacles in turn are shipped from the factory in yet larger bundles or containers to the points of distribution in the various states. The product handled by plaintiff in his retail trade is shipped to him from a distributing agency at St. Joseph, Missouri, encased in the larger bundle, which he receives, opens, and from which he removes the smaller bundles and places them upon his shelves, but from which he removes the small 5-cent packages, and these he offers for sale in his regular retail trade, singly or in numbers to suit his customers. This it is claimed is interstate commerce, and all jurisdiction or authority over it by the state and state laws is prohibited by the clause of the constitution of the United States (article I, sec. 8) which provides: "Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with Indian tribes." It is claimed that the manufacture, shipping and sale of the Uneeda biscuits is interstate commerce, and that the characteristic or distinctive quality of such commerce follows the product into the states and into the hands of the retail dealer. We apprehend that, under the decisions of the federal supreme, subordinate and state courts the shipment of the products of the factories in New York and Chicago into the different states of the Union, other

than New York and Illinois, does constitute interstate commerce, and the regulation of that traffic rests with congress. But we are not willing to concede that, when such goods are shipped into this state in packages containing many small units of the product, and after they enter the state such packages are broken and their contents sold by retailers by the smallest unit to the consumer in the ordinary retail trade, they retain their quality of interstate commerce. If this were true, the only condition necessary to protect the retailer from a violation of state laws would be that the goods which he sells, no matter how remote from the manufacturer by mesne sales and transfers, shall have been manufactured in another state and shipped therefrom into this state. It never was the purpose of the provision of the constitution under consideration to thus protect violators of state laws by following the articles throughout the ramifications of the intrastate commerce and trade with the interstate quality. Whatever may have been the character of the commerce before the breaking of bulk and entry of the product into the general commerce of the state, that distinctive character or quality of interstate commerce is lost, and the product becomes subject to state regulation and control, upon the happening of that event, and neither the constitution nor any law of congress can have any authority or control over it to the exclusion of the power of the state. In short, it becomes a part of the domestic commerce of the state and subject to its laws. *May v. New Orleans,* 178 U. S. 496; *McGregor v. Cone,* 104 Ia. 465; *Smith v. State,* 54 Ark. 248; *Kimmell v. State,* 104 Tenn. 184; *Croy v. Obion County,* 104 Tenn. 525; *Austin v. State,* 101 Tenn. 563, affirmed, *Austin v. Tennessee,* 179 U. S. 343; *In re Harmon,* 43 Fed. 372; 6 Words and Phrases, p. 5059, and cases there cited; *Haley v. State,* 42 Neb. 556; *Parks Bros. & Co. v. Nez Perce County,* 13 Idaho, 298, annotated in 12 Am. & Eng. Ann. Cases, p. 1116.

It is contended that since congress has enacted a pure food law and has provided against misbranding of food, subject to interstate commerce regulation, the state is

thereby deprived of power to enact laws upon a similar subject. In the act of congress, approved June 30, 1906, 34 U. S. St. at Large, pt. 1, ch. 3915, p. 770, it is provided that, if packages are branded, the brand shall state the truth, but there seems to be no provision requiring interstate commerce packages or parcels to be branded at all. Many cases are cited from which it is contended that the law is settled that if congress takes any action upon the subject of the kind that fact excludes the states from enacting any law thereon. It is perhaps true that, where the state law in any degree impinges upon the subject of interstate commerce, such acts are void in so far as that commerce is concerned. But we are persuaded that that question cannot arise here, as the subject in hand does not involve any consideration of interstate commerce. The bundles or original packages having been broken after their delivery to the consignee within this state, it has entirely lost its distinctive interstate quality, and has become subject alone to the jurisdiction of the state, and an act or law of congress can follow it no further. If the state should see proper, as in this case, to enact laws for the purpose of protecting its citizens against fraud or deception in weights or quantities in the matter of the *sale* of such goods as are clearly within its exclusive jurisdiction, we are wholly unable to see by what right or authority congress can interfere. Indeed, as this conclusion appears so reasonable and sensible, we decline to pursue the subject further, except to say that we do not think the cases cited by plaintiff hold otherwise. The grant of the constitution to congress does not and cannot reach so far as to prohibit the states from the protection of their citizens against fraud in the sale of property, over which they alone have jurisdiction, to their own people.

The argument that because it would be quite inconvenient to brand the packages with the net weight of the contents the law should be held bad cannot be considered as an objection to the validity of the law itself, but might with greater propriety be directed to the legislature, should it

be thought of sufficient importance to require attention. In this connection it is urged that by the law of this state an attempt is made to control the manufacturer in New York and Chicago in its methods of manufacture and shipments. No such effort is made. We find nothing in the law requiring that the manufacturer should brand. The only purpose is to reach the seller within this state, and it is wholly immaterial by whom the brand is affixed. If the seller desires to handle the goods, he must see that the law is obeyed in his sale.

It is further contended, in effect, that the law of this state does not seek to confine its provisions to intrastate commerce, but that its provisions can as well include interstate commerce, and also, as some of its provisions may include forbidden legislation, the whole act must be held void, but particularly the eighth section. As to the former contention, we deem it sufficient to say that we find no ground or authority for holding that the act is intended to apply to anything but the commerce within the state and to commodities being sold within its well-known jurisdiction. As to the latter, we have not sought to ascertain if other provisions within the act may or may not be objectionable as beyond the power of the state, for the reason that such investigation would be wholly unnecessary. If some provision should be found which is violative of the constitution, that fact would not necessarily render the whole act void. In 36 Cyc. 983, it is said in the text: "The weight of authority is to the effect that, where a state statute is primarily intended to regulate domestic commerce, it will be sustained so far as it relates to such commerce, although it contains clauses invalid as attempting to regulate interstate commerce"—citing a number of authorities in the note. See, also, *Standard Oil Co. v. State*, 117 Tenn. 618; *Austin v. State*, 101 Tenn. 563; *State v. Lancaster County*, 6 Neb. 474; *State v. Lancaster County*, 17 Neb. 85; 3 Neb. Syn. Digest, p. 2964.

Other questions are presented in the brief of plaintiff, but none of which is believed to be vital to a proper de-

cision of this case, and this opinion will not be further extended.

It follows that plaintiff's petition must be dismissed and he be remanded to the custody of the sheriff of Pawnee county, which is done. Petition dismissed, and plaintiff remanded to custody.

WRIT DENIED.

FAWCETT and ROSE, JJ., not sitting.

WILLIAM COFFMAN V. STATE OF NEBRASKA.

FILED MAY 23, 1911. No. 17,011.

1. **Criminal Law**: INSTRUCTIONS: REVERSAL. Where an instruction to a jury is requested by a defendant on trial, and is given by the court in the language as requested, the giving of the instruction, even if erroneous, will not, as a general rule, require the reversal of a judgment.

2. ———: ———: ———. Where an instruction is given by the court upon its own motion, the legal effect of which is practically the same as one given upon the request of the defendant on trial, even if erroneous, a judgment of conviction will not be set aside, unless it clearly appears that the giving of such instruction worked a prejudice to the accused.

ERROR to the district court for Otoe county: HARVEY D. TRAVIS, JUDGE. *Affirmed. Sentence reduced.*

Oliver G. Leidigh, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

An information was filed in the district court for Otoe county by the county attorney charging plaintiff in error with the crime of burglary and larceny by breaking and

entering a barn in the night-time and stealing a saddle. The trial resulted in a verdict finding plaintiff in error guilty of burglary, and he was sentenced to a term in the penitentiary. He presents the case to this court for review by proceedings in error.

The cause was tried throughout upon the theory that it was necessary to charge and prove that the breaking and entering occurred in the night season; the court so instructing the jury. It is apparent that both court and counsel overlooked the change in the statute by the act of 1905, by which the phrase "in the night season" was eliminated. This, however, could work no prejudice to plaintiff in error, and need not be further noticed. *Schultz v. State,* 88 Neb. 613.

Soon after the discovery of the alleged burglary and larceny, plaintiff in error was apprehended in South Omaha at a pawnshop, where he sought to sell the saddle alleged to have been stolen, when he was returned to the Otoe county jail and there confined until the time of his trial. The length of his imprisonment was from about the 1st day of April until the 1st day of June, of the year 1910.

On the trial the sheriff of Otoe county was called as a witness on the part of the state. We copy his testimony bearing on the question in hand. Questioned by the county attorney: "Q. Do you know the defendant William Coffman? A. Yes, sir. Q. Have you at any time since the filing of the complaint in the first instance had any conversation with him about this saddle? A. Yes, sir. Q. Can you state to the court when that was? A. Well, I couldn't state exactly. It was the day we had Oram the last time—the judge was down here. Q. Where was it you had this conversation with him? A. Down in jail. Q. You may state to the jury what he said at that time. A. Why, he said he would come up and plead guilty that he took the saddle, but he wouldn't plead guilty to breaking the place in. I told him he had better not do anything like that. He had better consult with his attorney." This was the whole of the testimony in chief upon this subject. The

cross-examination was as follows: "Q. Mr. Fischer, it was along about the first of April when he was arrested and put in jail? A. Something like that. Q. He has been in jail ever since, hasn't he? A. Yes, sir. Q. At that time from his general line of talk, didn't he seem to understand that he would have to stay in jail possibly until fall for trial? A. No; I think not. He was just anxious to have his hearing and get through with it. Q. Did he say at that time, Mr. Fischer, to get this over he would plead guilty to taking the saddle? A. To get this over? Q. Yes, sir; at the time Oram came up for hearing, pleaded guilty, and was released on probation? A. Yes, sir; he did. Q. He said he wouldn't plead guilty to the burglary? A. He said he wouldn't plead guilty to the breaking, but he would plead guilty to taking the saddle." This was all the evidence upon that subject.

Upon this part of the case the court gave the following instructions: No. 9. "You are instructed that the evidence purporting to show an admission by the accused is admitted for the purpose of connecting the accused with the offense, and you cannot convict the accused of a felony upon his own unsupported admission of guilt, but such admission must be corroborated by other competent testimony sufficient to prove that a crime was committed and that the accused is guilty of the offense beyond a reasonable doubt." No. 15. "The jury are instructed that, if from the evidence they believe the defendant made the confession given in evidence in this case, the jury should consider such confession precisely as they would any other evidence or testimony. The jury are at liberty to judge of it like other evidence, in the light of the circumstances as disclosed by the evidence, but a confession alone is not sufficient evidence that a crime is committed. There should be other proof that the property was stolen. The confession is admitted for the purpose of connecting the defendant with the offense."

In view of the evidence above quoted, neither one of the foregoing instructi ns could receive the unqualified ap-

proval of this court, but the record shows that instruction No. 9, given by the court, is identical with No. 15 of those requested by plaintiff in error. The rule is well settled that a party will not be heard to allege error in the giving of an instruction which he has himself requested.

In considering instruction No. 15, given by the court upon its own motion, in which the word "confession" was used, it is the opinion of a majority of the court that the effect of this instruction could not be treated as prejudicially erroneous, since in legal effect it is not materially different from the one given upon the request of plaintiff in error.

While the evidence is held sufficient to support the verdict of guilty of the burglary, it must be conceded that it is not so direct and clear as to the act of "breaking" into a barn as might be. As to the stealing of the saddle, the evidence is sufficient, aside from plaintiff in error's statement to the sheriff, to establish his guilt. The evidence as to the value of the saddle varied from $20 to $40. It might be doubted whether the evidence is sufficient to show that the theft of the saddle alone would constitute a felony, but upon the whole record we cannot say that the judgment of conviction should be reversed. The penalty imposed was imprisonment in the penitentiary for two years. Upon consideration of the whole case, it is the unanimous opinion of the members of the court that the term of imprisonment is greater by one year than should have been imposed, and, to that extent, is excessive.

The sentence and judgment of the court will therefore be modified to that extent, leaving the term of imprisonment stand for one year.

As thus modified, the judgment is

AFFIRMED.

ROOT, J., concurs in the conclusion.

FLORA HACKER ET AL., APPELLANTS, V. FREDERICK E. HOOVER, APPELLEE.

FILED MAY 23, 1911. No. 16,452.

1. **Deeds:** VALIDITY: MENTAL CAPACITY. In determining the mental capacity of a grantor to execute a deed, if it clearly appears that when the deed was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of his property, what he had done and what he proposed to do with it, and to decide intelligently whether or not he desired to make the conveyance, it cannot be said that he was incompetent or incapable of executing the instrument.

2. ———: ———: UNDUE INFLUENCE: PARENT AND CHILD. The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affection, confidence and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor.

3. **Evidence** examined, and found to require an affirmance of the judgment of the district court.

APPEAL from the district court for Nemaha county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

E. B. Quackenbush and *C. F. Reavis,* for appellants.

H. A. Lambert, Kelligar & Ferneau and *Stull & Haxxby, contra.*

BARNES, J.

Action to set aside a deed to 156 acres of land situated in Nemaha county, Nebraska, made to the defendant, Frederick E. Hoover, by his mother, Harriet Hoover, executed, acknowledged and delivered on the 24th day of October, 1898. The defendant had the judgment, and the plaintiffs have appealed.

It appears, without question, that Harriet Hoover, who was a widow about 68 years of age, on the 14th day of July,

1898, made, executed and delivered to her son, the defendant herein, a deed to the land in question, which contained a reservation in the nature of a life lease; that in October following she saw a statement in a newspaper to the effect that such a deed had been declared void, and that immediately thereafter she went to the office of the county judge of that county, called his attention to the newspaper article, and insisted on executing the deed in question. At the same time she required the defendant to execute and deliver to her a life lease of the premises by another instrument, thus protecting herself from any loss of her means of support during the remainder of her life.

It further appears, without dispute, that Mrs. Hoover and her husband purchased the land in question as early as the year 1857, and took title thereto in her name; that Doctor Hoover died, leaving her a widow with four children, in 1876; that from that time until her death, with some short intervals, she together with her family, including the plaintiffs, made this land their home until the early spring of 1898; that she permitted the defendant and his brother Edward (who died some years ago), together with the plaintiffs, to farm certain portions of the homestead and take the proceeds thereof for themselves, with the exception of her own support and maintenance, which seems to have been furnished to her by the defendant; that when the plaintiff, Mrs. Hacker, married the first time, she brought her husband, whose name was Bucheneau, to the family home, where they remained for some time before they left for a home of their own elsewhere; that Bucheneau was a man of profligate and dissipated habits, and his wife procured a divorce from him, when she and her three small children returned to the family home, where her children were raised and practically educated by the bounty of their grandmother, which came from the proceeds of the farm; that this state of affairs continued until after Mrs. Hacker married her present husband. It also appears that, in the year 1879, Hattie Hoover, the other daughter of the grantor, married one Linder Bradfield, who seems to have

been a person without property, and brought him to live at the family home; that thereafter, and until the early spring of 1898, Bradfield farmed that portion of the premises, the use of which was claimed by his wife and Mrs. Hacker; that his conduct was not satisfactory to Mrs. Hoover, and especially so much of it as related to his selling a span of horses claimed by his wife. This seems to have caused Mrs. Hoover to serve a notice upon him to quit the premises, and, as he desired and was about to move to Oklahoma, an arrangement was perfected by Attorney Cornell, acting for the Bradfields, by which they claimed and took away from the premises about $1,500 worth of personal property, leaving to Mrs. Hoover very little, if anything, of value, except the farm. In this trouble Mrs. Hacker took sides with her sister, Mrs. Bradfield, and this so incensed their mother, and she was so impressed with what she thought was the injustice of the transaction, that she declared to them that, if they persisted in depriving her of her property in that manner, it was all that they would ever get. This was in May, 1898, and in October following the deed in question was executed.

To reverse the judgment of the district court, the plaintiffs contend: First, that Mrs. Hoover was incompetent by reason of her mental condition to execute the deed in question; second, that the deed was procured by the undue influence of the defendant.

As to the first question, the plaintiffs attempted to show that their mother was an habitual user of opium, and that by its excessive use she had so weakened her mental faculties that she was incapable of transacting any business and was mentally incompetent to make the conveyance. It appears that Mrs. Hoover was in the habit of taking small quantities of gum opium from time to time during most of her life; but, notwithstanding the evidence produced by the plaintiffs, it seems clear that the amount which she took was so small that it did not affect her mental capacity to any extent whatever. Doctor Bell Andrews, who was the family physician, and who testified most strongly

against her competency, said that he did not think she took opium in sufficient quantities to have affected her mind. It also appears beyond question that for months at a time she voluntarily quit taking the drug, and did not use it at all at her death. This shows that it had little, if any, effect upon her. She was not in any sense an opium fiend, and her health up to a short time before her death was good. Mrs. Hacker testified that her mother was a rugged woman up to the time of her first stroke of paralysis, which was in 1900, and about two years after the deed in question was made. The most complete proof of her perfect sanity and her competency to transact business is Mrs. Hoover's own testimony, taken in April, 1905, which was nearly seven years after making the deed, and after she had suffered one paralytic stroke. This testimony is intelligent and coherent, and is a consistent statement of the transaction. It clearly appears therefrom that she knew all about her property, where she got it, how long she had had it, how it had been managed, and what she had done with it. It also shows that she had a remarkable strength of will of her own, and she possessed the ability to answer all questions put to her on her cross-examination clearly and intelligently. She appears to have quickly caught the object and purpose of the attorney in putting the questions to her. In short, her evidence discloses that she was a woman of intelligence; that she possessed great clearness of mind and memory, which was remarkable in a woman of her age. From her own testimony and the testimony of her friends and neighbors covering many years, including the year in which the deeds above mentioned were made, we are satisfied that she was a woman of sound mind, perfectly competent to execute the deeds at the time she did; that she had no delusions whatever, and, while she felt that perhaps she was not doing what her friends and neighbors expected her to do, neverthless she was determined to do it. She knew what property the plaintiffs had taken, and that they had not had any part of the farm, and she was not laboring under any delusion on that subject. She says

she told her daughters at the time of the settlement in the spring of 1898 that if they took the property which they did take they would never get anything more. As above stated the evidence shows that she was capable of taking care of herself. She did not deprive herself of the use of her property, as is usual in such cases, but took a life lease on it, and thereby retained its use as certainly as if the deed had not been made. It appears that she had no intention of letting the defendant beat her out of this property, or of depending alone upon him for her support. There was nothing improvident in her conduct, and we are satisfied that the district court correctly held that she was competent to make the deeds at the time she made them, and remained so from that time until her death.

Plaintiffs' second contention presents a more difficult question for our determination. Ordinarily a deed or gift from a parent to a child does not raise a presumption of undue influence; but in the instant case the circumstances and the relations between Mrs. Hoover and her son, who is the defendant, were of such a nature that, taken with her disposition of the property, seem to require him to assume the burden of proving that the making of the deed in question was not caused by any undue influence on his part. *Gibson v. Hammang,* 63 Neb. 349. The law, however, is well settled that if the grantor was competent to convey, and the conveyance was her voluntary act and deed, it is valid, no matter how inequitable it may appear to the court. In this case the land was Mrs. Hoover's, and, if she acted freely and intelligently in the matter of disposing of it, she could do with it as she pleased. Therefore the only remaining question is: Did the defendant have such influence over his mother that he induced her to deed the property to him against her real wish and desire, and contrary to what she would have done if he had not abused her confidence by using his influence to induce her to convey to him what she really desired to divide between all of her children alike?

The mere fact that she gave him the property is not

sufficient to prove undue influence. She had the right to do that if she really desired that he should have it in preference to the others. The most that can be said for the evidence on the part of the plaintiffs is that it shows the defendant had a desire to have the property and he had an opportunity to use his influence in order to get it. There is no direct evidence, however, that he did so use his influence at any time, and the plaintiffs' case in that respect rests upon circumstantial evidence alone. As opposed to this, we have the testimony of the grantor herself, taken and perpetuated as provided by law, from which it appears that she knew better than any one else why she made the deed. She testified positively and without equivocation that she was not persuaded or induced by any person whomsoever to make the deed; that she did it of her own free good-will, and this was stated repeatedly, and her evidence is fully supported by the testimony of the defendant. She stated clearly when she made the deed and why she made it; that it was done after long and careful deliberation. She says that she talked the matter over with the defendant, and that he did not say anything one way or the other, but she supposed, like any one else, that he was willing to take the farm; that he would be a fool if he would not. It seems clear from the evidence that the trouble arose out of the settlement above mentioned which was made between Hattie Bradfield and her mother in the spring of 1898. The old lady believed that the daughter had wronged her in that transaction; that Mrs. Bradfield had taken too much personal property, and that she had been left destitute. It is apparent that she had some trouble with her son-in-law; that she did not like him; and this trouble had something to do with her making the deed. It may be true that Mrs. Bradfield did not take any more than she was entitled to, and that Mrs. Hacker did not get anything except the bounty which had theretofore been provided by her mother in rearing and educating her family of small children; but Mrs. Hoover knew just what they got, what they had theretofore had, and believed,

up to the time of her death, that they were getting in that settlement what they were not entitled to. She said on her cross-examination in answer to the question: "Q. What did you say to them, and what did you do with reference to keeping them from taking this stuff you speak of? A. I told them if they took it they would never get anything more, that's what I told them." Whether her action was right or wrong is not a question for us to decide. The court is not the keeper of her conscience. The question for us to determine is whether she acted freely and voluntarily in the matter. If she did, her action was final and is binding upon the court, no matter what we may think of its justice or equity. The evidence satisfies us that Mrs. Hoover was a much stronger character than her son Fred, and there is very little likelihood of his having influenced her against her will. We are of opinion he could have only done so by actual fraud or falsehood, and upon those questions there is no evidence in the record. The fact that the defendant had the opportunity and probably the desire to influence his mother to make the deed is not sufficient to overcome her direct and positive testimony that he did not so influence her or attempt to do so, but that she acted of her own free will and accord in the matter. Where the evidence clearly shows competency and perfect freedom on the part of a grantor in making a deed, the court will not be justified in setting it aside. *Sawyer v. White,* 122 Fed. 223; *Schley v. Horan,* 82 Neb. 704; *Fjone v. Fjone,* 16 N. Dak. 100.

From a careful consideration of all of the evidence, we conclude that the trial court did not err in holding the deed in question valid. There is contained in the briefs some discussion of the statute of limitations, but our conclusions, as above stated, render it unnecessary to consider that question. We are of opinion that the judgment of the district court was right, and it is therefore

AFFIRMED.

CLARK SUMMERS, APPELLEE, V. WILLIAM CHISHOLM ET AL., APPELLANTS.

FILED MAY 23, 1911. No. 16,462.

1. **Justice of the Peace:** APPEAL: TRANSCRIPT: AMENDMENT. Where an appeal has been taken from a justice court to the district court, and it clearly appears that in preparing the transcript the justice has inadvertently omitted a portion of the proceedings in his court, or has failed to include or mention a paper filed therein, the district court may, in the furtherance of justice, permit the transcript to be amended or the missing paper supplied, and it would be error to refuse such permission.

2. ———: ———: PLEADING. In making up the issues in the district court, it is proper for the plaintiff to file a reply denying the allegations of the defendants' answer, and, if the identity of the cause of action tried in the justice court has been preserved by the petition and answer, the filing of a reply does not change the issues.

3. **New Trial, Motion for:** TIME. The statute requiring a written motion for a new trial to be made at the term at which the verdict was rendered and within three days after its rendition, except for newly discovered evidence, is mandatory, and, if the motion is afterwards made, it is of no avail to the party filing it.

4. **Appeal:** MOTION FOR NEW TRIAL. Unless a motion for a new trial is filed within three days after the verdict or decision, this court cannot examine any errors which it is alleged occurred at the trial; and in such case the only question which can be considered by this court is whether the pleadings are sufficient to sustain the judgment.

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

A. M. Morrissey and *Allen G. Fisher,* for appellants.

Albert W. Crites, contra.

BARNES, J.

This action was commenced in justice court of Dawes county to recover damages for or on account of an al-

leged breach of warranty of a gasoline engine sold and delivered by the defendants to the plaintiff. On the trial in that court the defendants had the verdict and judgment. Upon a trial on appeal to the district court the plaintiff had judgment, and the defendants have appealed.

It appears that, immediately after judgment was rendered by the justice of the peace, the plaintiff filed an appeal bond, which was approved, and in due time a transcript of the judgment was filed in the office of the clerk of the district court for the purpose of perfecting an appeal. It also appears that in making the transcript the justice failed to include his docket entry of the filing and approval of the appeal bond; but that document was duly transmitted to the clerk of the district court, and a copy of it appears in the transcript filed in this court. When the defect in the justice's transcript was discovered, defendants moved to strike it from the files, and the plaintiff thereupon suggested a diminution of the record. Leave was granted by the district court to file an additional transcript in order to supply the omission above mentioned, which was accordingly done, and the motion to strike and dismiss the appeal was overruled. This ruling is assigned as error.

Where it clearly appears that in preparing a transcript the justice of the peace has inadvertently omitted a portion of the proceedings in his court, or has failed to include or mention a paper filed therein, the district court to which an appeal has been taken may, in the furtherance of justice, permit the transcript to be amended or the missing paper supplied, and it would be error to refuse such permission.

It further appears that, after defendants filed their answer to the plaintiff's petition in the district court, plaintiff filed a reply which was a general denial of the matters contained in the answer. Defendants thereupon moved to strike the reply from the files because of an alleged change of issues. The motion was overruled, and for that ruling defendants also assign error. The record discloses that

the petition in the district court was founded on the identical cause of action set forth in plaintiff's bill of particulars in the justice court. It is true that the petition is not couched in the same words as was the bill of particulars, and that its statements are somewhat amplified. This, however, is allowable in pleadings in the district court, and, if the identity of the cause of action is preserved, there can be no cause of complaint on that score.

After the answer was filed in the district court, it then became necessary for the plaintiff to reply; otherwise, under the provisions of section 134 of the code, the allegations of the answer would stand admitted, and defendants would be entitled to a judgment on the pleadings. While a reply to the defendants' answer or bill of particulars is not required in justice court, it does not follow that no reply can be filed in the district court. On the contrary, where the issues in the district court are made up in appeal cases, they should be framed under the rules of pleading in force in that court. The motion to strike the reply was therefore properly overruled.

Finally, it conclusively appears from the record that the trial in the district court was concluded, the verdict was returned, and judgment thereon was rendered on the 19th day of June, 1909. No written motion for a new trial was filed until the 25th day of that month, some six days after verdict and judgment. The motion was not based on the ground of newly discovered evidence, and therefore was not filed in time. It follows that the only question left for our consideration is: Are the pleadings sufficient to sustain the judgment. It is true that the judgment recites that a motion for a new trial was overruled, but this must have been an oral motion, or an oral notice of a motion for a new trial, for the record discloses that no motion was in fact filed until six days after final judgment was rendered. We are not at liberty to dispute the verity of the record. A motion for a new trial must be in writing, and must also be filed within three days after the return of the verdict or the rendition of the judgment in the district court; other-

wise, it cannot be considered. In *Phœnix Ins. Co. v. Readinger*, 28 Neb. 587, it was held that a motion for a new trial must be in writing, and must specify causes therefor which are sufficient in law to authorize the granting of the same. An oral motion or one in writing in which no cause or causes for a new trial are assigned, will not justify the granting of a new trial. Nor will the overruling of such a motion be sufficient to present errors of law to either the trial or reviewing court. This rule was followed and approved in *Cedar County v. Goetz*, 3 Neb. (Unof.) 172.

From an examination of the record, it appears that the pleadings are sufficient to sustain the judgment, and for the foregoing reasons the judgment of the district court is

AFFIRMED.

EDWARD B. COWLES, APPELLEE, V. HARRIET COWLES, APPELLANT.

FILED MAY 23, 1911. No. 16,470.

1. **Trusts:** DEVISE OF LANDS HELD IN TRUST. Where one person buys real estate paying the purchase price thereof, and for convenience the title is taken in the name of another, the person so taking the title will hold the property in trust for the person paying the purchase price; and if the trustee, at the request of the owner, devises the property to another for the same purpose, the trust relation follows the property and the devisee also holds it in trust for such owner.

2. ———: ———: RELIEF IN EQUITY. Where the real estate thus conveyed is not the subject of fraudulent alienation, the fact that the title was taken in the name of another to avoid the payment of a judgment does not estop the owner from maintaining an action in equity to recover the title thereof.

3. **Evidence** examined, and found sufficient to sustain the judgment of the district court.

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

Wolfner, Healy & Young and *Heasty, Barnes & Rain*, for appellant.

C. H. Denney, *contra*.

BARNES, J.

This action was commenced in the district court for Jefferson county by Edward B. Cowles, hereafter called the plaintiff, to obtain a decree declaring him to be the owner in fee of the west half of the northeast quarter and the east half of the northwest quarter of section 6, township 3, north of range 3 east, situated in said county, and quiet his title thereto. Service was had upon the defendant, who at that time was in Chicago, Illinois, and, owing to illness, she failed to appear in time and the plaintiff had a default decree. Thereafter she filed a petition to open the decree, which was sustained, and upon issues joined a trial of the case was had upon its merits, which reulted in a second decree for the plaintiff, and the defendant has appealed.

Appellant assigns three reasons for a reversal of the decree. First, because the plaintiff failed to establish any trust; second, the petitioner did not come into court with clean hands; third, the plaintiff has always recognized the title of the defendant, and hence there could be no adverse possession.

Upon reading the evidence we find that on the 7th day of May, 1872, plaintiff purchased the land in question by contract from the Burlington & Missouri River Railroad Company and paid one-tenth of the purchase price in cash; that he thereafter, from time to time, made the deferred payments, and therefore we find that plaintiff paid the full purchase price of the land. We further find that at the time of his purchase he took possession of the premises, and that such possesion has been continuous and uninterrupted to the present time; that he placed valuable improvements upon the land, including a dwelling house,

barn and other suitable buildings, and made it his home; that in 1873 he brought his father and mother from their former home in Michigan, and that they thereafter lived with him upon the premises as one family until the death of his father, which occurred shortly thereafter; that he also brought the other members of his family, including the defendant, and installed them in the family home, and that the farm in question was considered the home of the entire family, of which the plaintiff appears to have been the head. We further find that the plaintiff has paid all of the taxes assessed against the premises from the date of its purchase to the present time, and has paid for all of the improvements made thereon; that he has collected all of the rents and profits, out of which he has maintained the family, including the defendant, for a considerable portion of the time, and especially for two or three years while she was an invalid and unable to care for herself. We further find that at the time of the final payment to the railroad company the defendant assigned the contract of purchase to his mother, Helen H. Cowles, and requested the company to make a deed of the land to her. It appears that this was done in order to avoid the payment of a judgment, which had previously been rendered against the plaintiff, and which he claims to be unjust and invalid by reason of his having previously paid the debt upon which the judgment was founded; that thereafter, and at the plaintiff's request, his mother made a will devising the land in question to the defendant. The evidence shows without dispute that the defendant never claimed any interest in the land, but always recognized it as belonging to her brother, until about the time this action was commenced; that she told several persons, among whom was the plaintiff's wife, that she had no interest in the land; that it belonged to the plaintiff. This was before the plaintiff's marriage, and the defendant informed his prospective wife that as soon as the marriage took place she would deed the land to her. It is not claimed that the defendant ever had any pecuniary interest in the land, or that she

ever in any way contributed anything towards the purchase price thereof; that for some reason not disclosed by the record, the defendant, after the plaintiff's marriage, refused to make the deed which she had promised to execute, and, instead of carrying out her agreement, began to assert a claim of ownership thereof. The facts are not in dispute. The defendant offered no testimony to establish her alleged ownership, but relied upon her contentions as above stated.

In disposing of defendant's first contention, it is sufficient to say that the well-established rule in this state is that when one person buys real estate and pays the purchase price thereof, and the title is taken for convenience in the name of another, the person taking the title will hold the property in trust for the person paying the purchase price. *Hoehne v. Breitkreitz,* 5 Neb. 110; *Chicago, B. & Q. R. Co. v. First Nat. Bank,* 58 Neb. 548; *Kobarg v. Greeder,* 51 Neb. 365; *Detwiler v. Detwiler,* 30 Neb. 338. The undisputed facts of this case are sufficient to establish the trust relation. When, at plaintiff's request, his mother devised the land to the defendant, who is his sister, that trust relation was transmitted to her, and thereafter she held the legal title in trust for the plaintiff.

It is strenuously contended, however, that plaintiff can have no relief in a court of equity because the transaction by which the title to his land was taken in the name of his mother was fraudulent, and therefore he does not come into court with clean hands. There are two reasons why this contention cannot be maintained: First, the defendant, by her pleading, has not challenged the *bona fides* of the transaction, and therefore, strictly speaking, she was not entitled to any relief on that ground; second, it appears from the evidence, and beyond peradventure, that the land in question was, at all times, the homestead of the plaintiff, that he was the head of the family which resided with him thereon. It is therefore clear that this homestead, which was at that time worth less than $2,000 was not the subject of fraudulent alienation. In *Derby v.*

Weyrich, 8 Neb. 174, it was held: "Property which is exempt by law from liability for the owner's debts is not susceptible of a fraudulent alienation." It was said in the opinion: "Property which is exempt by a positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation, and consequently is not within the statute. The creditors cannot be said to be creditors as to that particular property so as to make a transfer of it matter of concern to them. The debtor, as to that property, may be considered as without creditors, and he has the right to dispose of it as though he had no creditors." *Schribar v. Platt*, 19 Neb. 631; *Baumann v. Franse*, 37 Neb. 807; *Clark v. Clark*, 21 Neb. 402; *Cutler v. Meeker*, 71 Neb. 732. It would seem clear from the foregoing authorities that plaintiff's second contention cannot be sustained.

Finally, defendant's claim that plaintiff always recognized her title to the premises seems to be wholly unsupported by the testimony. The evidence clearly establishes the fact that, not only the defendant, but every member of the plaintiff's family, of which she was one, always recognized him to be the owner of the land in question. It is shown, without dispute, that defendant always, except a short time prior to the commencement of this action, openly and positively declared that she had no interest in the premises; that it belonged to the plaintiff, and that she intended, as soon as the plaintiff married, to convey it to his wife; that after his marriage she told his wife that she thought it was better for the head of the family to have the title to the land, and that she would convey it to the plaintiff.

Upon the facts of this case, as shown by the evidence, the judgment of the district court was clearly right, and it is therefore

AFFIRMED.

LETTON, J., not sitting.

JOHN H. BARRY, APPELLEE, V. FRANK W. ANDERSON, APPELLANT.

FILED MAY 23, 1911. No. 16,416.

Appeal: COLLATERAL EVIDENCE. The receipt or rejection of collateral evidence is largely within the discretion of the trial court, and his rulings in that regard will rarely be disturbed.

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

C. H. Slama, for appellant.

Jesse M. Galloway and *J. H. Barry, contra.*

LETTON, J.

The plaintiff, who is an attorney at law, began this action against the defendant to recover the sum of $200 for legal services. The defendant answered substantially that in 1897 he employed the plaintiff to foreclose certain tax certificates and procure him a good title to a certain tract of land; that plaintiff instituted an action for this purpose, which was prosecuted to final judgment, and afterwards advised him that the title procured was a good and merchantable title; that he paid plaintiff for the services, and, relying on this advice, he sold the land; that the title was afterwards attacked in two certain civil actions, which were the identical actions for which the plaintiff claims payment in this suit, and that plaintiff agreed to act for him in these suits for a nominal charge. He also pleads payment. The reply is virtually a general denial.

The real controversy is whether or not the plaintiff agreed to appear and assist in the defense of the two cases attacking the title for a mere nominal fee, as the defendant testified. The court instructed the jury that, if they found from the evidence that the parties agreed that the plaintiff should render his services for a merely nominal

sum, and further believed that the sum of $25, admitted to be paid by the defendant to plaintiff, was in full payment for such charge, then they should find for the defendant; that if, on the other hand, they did not find from the evidence that the contract or agreement was made as claimed by the defendant, then they should determine from the evidence what was a reasonable compensation for the services rendered, and render their verdict for that sum, not exceeding $200. The jury found for the plaintiff, and assessed his recovery at the sum of $75.

The principal error assigned is that the court erred in excluding the original files of the tax foreclosure case begun in 1897, in which the plaintiff acted as defendant's attorney. Defendant argues that these exhibits show that this action was unadvisedly brought, and that the title to the premises procured thereby was defective; the object being to corroborate defendant's testimony by giving a reason for plaintiff agreeing to act for a nominal sum. We think it sufficiently appears from the evidence that the defense of the two actions in which the plaintiff appeared was necessitated by the inconclusive character of the proceedings in the original case, but we fail to see how the defense has in anywise been prejudiced by the exclusion of these exhibits. The controversy is not as to whether the plaintiff was morally bound to appear gratuitously in the latter cases, but it is as to whether or not he did agree to appear and defend for a mere nominal sum. This was a question of fact, which depends upon the weight to be given the testimony. Plaintiff testified that he agreed to serve for a reasonable fee. The proof on his part estimated the value of the services to be from $400 to $1,000 for both cases. Defendant testified that he told plaintiff that, if he had conducted the first case properly, the trouble would not have arisen, and that he (defendant) really ought not to pay anything. "He said he must have a little, and I says, 'well, it must be mighty little' "—and that plaintiff then seemed to be satisfied. This dispute is the gist of the case.

The excluded evidence was collateral. Perhaps it may have a remote bearing upon the issues involved, but we think that it would throw so little light upon them that it was within the discretion of the court as to whether it should be admitted or not. We have repeatedly said: "The receipt or rejection of collateral evidence is largely within the discretion of the trial judge, and his rulings in that regard will rarely be disturbed." *Young v. Kinney*, 85 Neb. 131; *Fitch v. Martin*, 84 Neb. 745; *Peterson v. Andrews*, 88 Neb. 136. This doctrine is settled in this court.

The judgment of the district court is therefore

AFFIRMED.

IN RE ESTATE OF FAYETTE S. BUSH.

CARL F. BENJAMIN, ADMINISTRATOR DE BONIS NON, APPELLANT, V. GALE BUSH ET AL., APPELLEES.

FILED MAY 23, 1911. No. 16,456.

1. **Wills:** SPECIFIC LEGACIES. A bequest of "All money that I may have in the Omaha National Bank of Omaha, state of Nebraska, except therefrom the sum of fifteen hundred ($1,500) dollars," which was otherwise disposed of by the will, is a specific legacy. Three other bequests, in form, "I direct that five hundred (500) dollars of said money (hereinbefore referred to in the Omaha National Bank) be paid to my grandson," are also specific legacies.

2. **Executors and Administrators:** DISCHARGE OF DUTIES. "The care, prudence, and judgment which the man of fair average capacity and ability exercises in the transaction of his own business furnishes the standard to govern an administrator in the discharge of his trust duties." *Dundas v. Chrisman*, 25 Neb. 495.

3. ———: ALLOWANCE FOR COSTS AND ATTORNEY'S FEES. Where an ancillary administrator expends money for court costs and attorney's fees in good faith in an honest effort to preserve a part of the assets, he is entitled to recover for such expenses if for any sufficient and well-founded reason the claim is settled by a reasonable compromise, even though the action and the compromise were not previously authorized by the county court.

4. ———: USE OF MONEY OF ESTATE: INTEREST. "It is a settled principle of law that, where an administrator mingles the funds of the estate with his own and uses them for his own benefit, he is chargeable with interest." *Westover v. Carman's Estate*, 49 Neb. 397.

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

Baldrige, De Bord & Fradenburg and *Fremont Benjamin*, for appellant.

A. S. Churchill and *John G. Kuhn, contra.*

LETTON, J.

Fayette S. Bush died April 24, 1907, near Los Angeles, California. In his will he made the following provisions: "Fourthly: I give and devise to my son, Ralph E. Bush, of Omaha, State of Nebraska, all those certain lots, pieces or parcels of land situate lying and being in the cities of Omaha and South Omaha, County of Douglas, State of Nebraska, that I might have at the time of my death. Also one half (½) interest in the life insurance policy I have in the Bankers Life Association of Des Moines, State of Iowa, all money that I may have in the Omaha National Bank of Omaha, State of Nebraska, except therefrom the sum of fifteen hundred ($1,500) dollars which said sum of fifteen hundred ($1,500) dollars, in said Omaha National Bank, shall be divided and distributed as hereinafter directed.

"Fifthly: I direct that five hundred ($500) dollars of said money (hereinbefore referred to in the Omaha National Bank) be paid to my grandson Gale Bush, five hundred (500) dollars to my grandson Eldon Bush, and five hundred (500) dollars to my granddaughter Fay Bush, and the said several sums of five hundred dollars shall be placed in the said Omaha National Bank of Omaha, Nebraska, on interest during the minority of said grandchildren and as each one comes to the age of their ma-

jority, the five hundred dollars so placed to each one's credit with the accumulated interest thereon shall be paid to said grandchild.

"Lastly, I hereby nominate and appoint my wife, Effie B. Bush, the executrix of this my last will and testament and it is my wish that she be allowed to act as such executrix without bond, and hereby revoke all former wills by me made."

The money on deposit in the Omaha National Bank was evidenced by a negotiable certificate of deposit which came to the hands of his executrix. Soon after the death of the testator, Nellie Bush, the mother and guardian of the legatees Gale Bush, Eldon Bush, and Fay Bush, who resided with these minor children in the state of Iowa, went to the office of Fremont Benjamin, an attorney at law in Council Bluffs, Iowa. She told him of the death and of the will and legacy. She also said she had no confidence in the executrix, and was afraid that, if she was permitted to retain the money, her children would never receive it. She desired to know if she could not as guardian receive the money. Mr. Benjamin undertook to accomplish this. He thereupon began proceedings for the probate of the will in Douglas county, Nebraska, where certain real estate of deceased was situated, and on its probate procured the appointment of an administrator with the will annexed. He then demanded the money on deposit from the Omaha National Bank, and notified it not to pay it to the California executrix. He next began a suit in equity in the district court for the administrator against the executrix and the Omaha National Bank to recover the money on deposit. The bank appeared and demurred to the petition, and Messrs. Crane & Boucher appeared as attorneys for the executrix and filed a general denial. Pending the proceedings, such correspondence was had with the executrix and her attorneys in California that afterwards at a conference in Omaha between the attorneys Crane & Boucher for the executrix, Mr. E. M. Martin, acting for Ralph E. Bush, and Mr. Benjamin for the administrator, it was agreed

that the certificate of deposit be delivered to the administrator on the payment of their attorney fee of $50 to Crane & Boucher and of the costs of the case. The action was dismissed as to the bank, and a judgment by consent entered in favor of the administrator and against Effie B. Bush, executrix, for the certificate of deposit. The certificate was then delivered to the administrator, and the money on deposit, which with interest at that time amounted to $1,981.91, was on the 10th day of January, 1908, paid to him by the bank.

On April 11, 1908, Carl F. Benjamin, administrator, filed his final report in the county court of Douglas county as such administrator, setting forth the facts as to the suit against the executrix and the settlement. He also recited that it was agreed by E. M. Martin, acting for Ralph E. Bush, that there should be paid out of Ralph E. Bush's share $6.81 on Crane & Boucher's fees and $6.77 costs of suit; that $50 had been paid to Crane & Boucher as attorney fees, $48.40 court costs and expenses, and $468.43 to Ralph E. Bush, leaving $1,414.08 in his hands. He asked for an allowance of $62.50 statutory fee from the $1,500 devised the minors. He also asked for a reasonable attorney's fee to be paid Fremont Benjamin for services as attorney. Objections were filed to this report by Nellie Bush, as guardian of the minors, in substance alleging that the $500 legacies were specific in nature; that the money by the terms of the will was to be left in the Omaha National Bank, and the administrator had no right to it, and had no authority to make the compromise. She objected to the allowance of any compensation to the administrator, or to the payment of any costs or attorney's fees, and prayed for an order on the administrator to pay over the full amount of $1,500, with 7 per cent. interest.

An amended report was then filed by the administrator, setting out the facts more specifically, and with this was filed the itemized bill of Fremont Benjamin for $175 for services as attorney. Amplified objections were filed to the report as amended by John G. Kuhn, guardian *ad*

litem for the minors. The county court found that the $500 bequests were specific, and that no part of the costs should be charged against them; that there was no necessity for the suit against the executrix and the Omaha National Bank; that it was not authorized by the court, and no allowance should be made for costs and expenses connected with it; that the administrator is entitled to a commission of $74.55, the attorney a fee of $35, and the guardian *ad litem* a fee of $25; that the administrator should have in his hands $1,649.90 in cash. It was ordered that the administrator pay $500, with any interest said sum may have earned, to the guardian for each minor.

On appeal to the district court, that court made substantially the same findings as the county court; found in addition that the executrix was ready and willing to carry out the provisions of the will, that on January 10, 1908, the administrator did not deposit the money in the Omaha National Bank as required by the will, but diverted it; found that the claim for payment to Ralph E. Bush should be allowed in the sum of $299.31, and the remainder disallowed. It was ordered that the administrator pay into county court for the use of each of the minors $500, with 3 per cent. interest from January 10, 1908 (the date of withdrawal from the bank), to the date of the decree in the county court, and with 7 per cent. interest from that date; that the fees of the guardian *ad litem* be fixed and allowed by the county court as part of costs of administration, and that the costs of the appeal be paid by the administrator. From this judgment this appeal has been taken.

It was argued by counsel for the guardian *ad litem* that the legacies to the minors are specific legacies, and that of Ralph E. Bush a general one, and that, if so, the entire amount bequeathed to them must be paid over for the children without deduction for costs or expenses. It is clear that the legacies to the children are specific in their nature, but that to Ralph is equally so. The authorities are uniform that such bequests as "All the books in my

library," "All the horses in my stable," "All the furniture in my house," "All the money in a certain bank" are specific. Note to *Snyder's Estate,* 11 L. R. A. n. s. 49, 55 (217 Pa. St. 71); 2 Redfield, Law of Wills (2d ed.) pp. 134, 135; 2 Williams, Law of Executors (7th Am. ed.) p. 440, and note; *Perkins v. Mathes,* 49 N. H. 107; 7 Words and Phrases, p. 6600. Under the facts presented, we think all four of these legacies were specific with respect to the general estate of the deceased. They must be considered then with respect to each other as of the same rank, and, while the rule of exoneration will apply as against the general estate, no priority exists in favor of one over another.

The principal question presented is whether the court erred in refusing to allow the administrator for expenses incurred in the action to recover the certificate of deposit. It is the duty of a guardian to exercise due and proper care to protect and conserve the estate of his ward. In the mind of Nellie Bush, the mother of the children and their authorized guardian, there was what seems from her evidence to have been a well-grounded fear that if the fund was permitted to remain in such condition that the executrix in California, whom the will provided should be appointed without bond, could withdraw it, there was grave danger that it might be lost to the children. This being so, she did the natural and proper thing, consulted a reputable attorney and laid the facts before him for the purpose of taking steps to effectually secure the legacies. The advice which the attorney gave her under this statement of fact seems to have been sound. He proceeded to secure the appointment of an administrator with the will annexed, and afterwards took steps to prevent the payment of the fund by the Omaha National Bank to the executrix. On the same day, July 12, 1907, he wrote to the executrix, or her attorney, endeavoring to have her turn over the certificate of deposit without legal proceedings. In response to this letter, her attorney replied that she was desirous of having the estate settled as promptly and amicably as possible, but that he was of opinion that

the county court of Douglas county had no jurisdiction over the money in the bank, that the California court alone had jurisdiction, and that any payment she might make to the Nebraska administrator would be void. After the receipt of this letter, Mr. Benjamin began an action in the district court to impound the fund in the bank and for the delivery of the deposit, which suit was subsequently compromised as set forth in the administrator's report.

The administrator had not been previously authorized by the county court to bring this suit or to compromise the matter. For his own protection an administrator should always apply to the county court for leave to compromise and settle actions by him brought with respect to the recovery of assets of the estate, and should receive the sanction of the court before proceeding; otherwise, he takes the risk upon himself of being compelled personally to respond to the estate for the full claim and for the costs and expenses. If the circumstances at the time the suit was begun were not sufficient to justify a prudent and cautious man in undertaking its prosecution, or the compromise is one which men of average business ability would not have made, the administrator cannot be allowed credit for the costs, expenses or deduction. Schouler, Wills and Administration, secs. 298-387, and note. The same rule applies with reference to such matters as applies to all other business transactions of an administrator with reference to the estate. Good faith and diligence are required of him. If in the exercise of sound reason under the circumstances of the case it would seem to an ordinary, prudent and cautious man necessary for the best interests of his trust to act as he did, the compromise should be approved by allowing the claims caused thereby in his final report, even though subsequent events should show that the action was unnecessary. *Dundas v. Chrisman*, 25 Neb. 495; *McDowell v. First Nat. Bank*, 73 Neb. 307; *In re Estate of Bullion*, 87 Neb. 700; 2 Woerner, American Law of Administration (2d. ed.) secs. 323, 324; 2 Perry, Trusts and Trustees (6th ed.) sec. 916.

It is not to be presumed that such officers are infallible, nor are they to be charged with greater wisdom than that of ordinary, prudent persons in the conduct of such matters. The interests of minors must be protected by ordinary mortals, and a rule which required more than ordinary wisdom or foresight on the part of trustees would by its harshness lead probably to worse evils than the present common-sense doctrine. It would seem that any prudent and cautious attorney acting in behalf of these minors, after their guardian and mother had told him (as Mrs. Bush testifies she told Mr. Benjamin) that she had no confidence in the executrix, that she was afraid she might squander the money in California, that in some matters she had not been strictly honest, that, if the money was administered in California, she did not expect to get any of it for the children, and for that reason she wanted to get the money here under her control, would have advised and taken legal steps of some nature to preserve this fund. We are of opinion that both Mrs. Bush, as guardian, and Mr. Benjamin, as attorney, were justified in proceeding in Nebraska as they did with respect to this fund, rather than in California. Whether the steps taken in all respects were in accordance with strict legal principles is not so material here as whether they were justified by the apparent necessity. If no proceedings had been brought, and Mrs. Bush's fears had proved to be well founded by the executrix drawing the money and squandering it, would she not have been subject to censure if she had taken no action in behalf of her wards? Whether an ancillary administrator has the legal right to impound such assets as these is not the question. It is rather, if he does so in good faith, shall he recover any reasonable sums paid out in so doing? We are all of the opinion that the compromise with the attorneys for the executrix by which the control of the fund was transferred to the local administrator was not unfair, unjust to the minor legatees, or improvidently made. The general rule in equity is that, where it is necessary to incur costs or expenses in order to

protect a fund in which several are interested, the necessary expense shall be borne by the fund and prorated in proportion to the interests of the persons owning the fund. 2 Perry, Trusts and Trustees (6th ed.) sec. 910; *Marshall v. Piggott,* 78 Neb. 722. We are therefore of opinion that the entire costs and expenses of procuring the fund to be brought under the control of the administrator in this state should be prorated between the various owners in proportion to their interest therein, and the administrator should be credited as against the minor heirs only with that proportion of the total costs and expenses which $1,500 bears to the entire fund, or, in other words, that the shares of these minors should bear no more than their proper proportion.

When the administrator received the fund, he placed it to the credit of the Benjamin Real Estate company. "It is a settled principle of law that, where an administrator mingles the funds of the estate with his own and uses them for his own benefit, he is chargeable with interest." *Westover v. Carman's Estate,* 49 Neb. 397; *In re Estate of Bullion, supra.* He is therefore liable for interest at the legal rate for all the money in his hands from the date of its withdrawal. The administrator should be credited with the costs and expenses of the administration proper in the county court, including a reasonable fee to Mr. Benjamin for his services in the matter of the claim of Crofoot & Scott, and the preparation of the necessary petitions, reports, etc., and also with the statutory allowance to the administrator. He should also be credited as against the minor legatees in the proportion that $1,500 bears to the whole amount of money in the fund when received by him with the costs and expenses in the suit in district court, etc., as set out in the administrator's report, including a reasonable attorney's fee to Mr. Benjamin for services in that matter. It appears that the administrator is a son of the attorney, barely of age. The father appears practically to have administered the estate. The amount of the statutory compensation to the

administrator under the circumstances should be applied on the attorney's compensation. The guardian *ad litem* should be paid from the minors' shares.

It being impossible to finally adjust the account in this court, the decree of the district court is reversed and the cause remanded, with directions to adjust the account of the administrator as respects the minors in accordance with this opinion.

REVERSED.

LORENCE R. FREADRICH ET AL. V. STATE OF NEBRASKA.

FILED MAY 23, 1911. No. 16,989.

1. **Food:** SALES: MARKING WEIGHT ON PACKAGES. A corporation, whose principal business in manufacturing and selling a certain food product in package form is at wholesale, *held* not to be exempted from the requirement of the statute as to marking the weight or measure of the net contents of the package on the label by reason of the fact that it also maintains at its packing house a retail store at which it sells packages of the same nature at retail to consumers.

2. **Constitutional Law:** "PURE FOOD LAW." An act of the legislature which in effect places persons who manufacture and sell, or who sell either at wholesale or retail, certain specified food products in package form, not put up by retailers, in one class, and retailers who put up and sell the same products in package form themselves in another class, and provides that such foods sold in package form, not put up by the retailer, shall bear a printed label showing net weight or measure of the contents, does not deprive one who sells a "misbranded" package of the equal protection of the laws, and is not violative of the fourteenth amendment to the constitution of the United States.

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

T. J. Mahoney and *J. A. C. Kennedy,* for plaintiffs in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

LETTON, J.

Defendant was convicted of selling a misbranded pail of lard.

He contends that the law under which he was convicted (Comp. St. 1909, ch. 33; Ann. St. 1909, secs. 9818-9840), known as the "Pure Food Law," is in contravention of the fourteenth amendment to the constitution of the United States, in that it deprives him of his property and of liberty without due process of law, and denies him the equal protection of the laws. It is also contended that the package sold was put up by a retailer, and therefore that the sale was permitted by the statute. For convenience we will consider the latter point first. The stipulation of facts recites:

"4. That on said 22d day of September, 1909, said defendants sold to one Harriet S. MacMurphy in the county of Lancaster and state of Nebraska, for use in said state of Nebraska, one pail of lard in package form, said package not having been put up by said defendants, and said package being other than canned corn, and not having any statement printed or stated on the outside of said package of the net weight or measure of the contents thereof exclusive of the container. Said package contained an article of food, to-wit, lard."

"6. The principal business of said Armour & Company at and prior to said 22d day of September, 1909, was the slaughtering of cattle, hogs, and sheep, the dressing of the meat of said animals and the production, preparation, sale and marketing of the various food productions derived from the slaughtering of said animals, among which is lard, one of the products derived from the carcasses of hogs. Said Armour & Company at and prior to the 22d day of September, 1909, sold the largest part of the output of each of its packing houses in wholesale quantities and at wholesale trade, but at all of said times said Armour & Company maintained and operated, at its packing house in South Omaha, Douglas County, Nebraska,

a retail meat market at which it sold at retail, direct to consumers, lard and meat products.

"7. The package or pail of lard above mentioned which was sold by these defendants on the 22d of September, 1909, as above stated, was put up by said Armour & Company at its packing house in South Omaha, Nebraska, and was sold by said Armour & Company to these defendants with other like packages in wholesale quantities and as a part of the wholesale trade of said Armour & Company, and said package was sold by these defendants to said Harriet S. MacMurphy in the course of their regular retail trade and as a retail sale.

"8. Said package was sold by these defendants to said Harriet S. MacMurphy not as a package of any stated or given weight or measure but simply as a 'pail of lard.' "

Section 22, ch. 33, Comp. St. 1909 (Ann. St. 1909, sec. 9839), which is the provision under which this prosecution was brought, provides: "That no person shall within this state manufacture for sale therein, or have in his possession with intent to sell, offer or expose for sale, or sell any * * * article of food * * * which is adulterated or misbranded within the meaning of this act." Section 8 of the same act (Ann. St. 1909, sec. 9825) contains a very long, involved, verbose, and awkwardly expressed exposition of the term "misbranded" as used in the act. It seems to have for its foundation the act of congress upon the same subject, but has a number of variations therefrom. So far as applies to the question here, and omitting the portions thereof which do not refer to the present controversy, it is as follows: "That for the purposes of this act an article shall also be deemed to be misbranded * * * Third. If sold for use in Nebraska and in package form, other than canned corn; if every such package, as provided and named below, does not bear a correct statement clearly printed on the outside of the main label, of the contents and also of the net weight or measure of the contents exclusive of the container, viz., all dairy products, lard, cottolene, * * *

Provided, however, that the provision shall not apply to packages put up by the retailer, nor to packages on hand by any retailer at the time of taking effect of this act."

The argument is that, since Armour & Company operate a retail store in South Omaha and are "retailers" in respect to the traffic therein, though wholesalers and manufacturers with respect to the preparation, putting up and selling to defendant of the particular package sold by him, they must be held to be retailers for all purposes, under section 251 of the criminal code, because a penal statute may not be extended by implication beyond its express terms. It is also said: "This package was put up by Armour & Company. Armour & Company is shown by the stipulation of facts to be a retailer. Consequently, under the plain import of the words, and eliminating all straining after the supposed spirit, the act does not apply to the package in question in this case."

This argument seems to be based on the assumption that a corporation or person can act in but one capacity or engage in but one business; or else that it may, chameleon-like, change its complexion to suit the exigencies of the occasion, and adopt such a description of itself as may seem best to fit the emergency. Could it be contended that an ordinance regulating retail dealers in South Omaha could not operate on Armour & Company's retail store because, one branch of their business being wholesale, they thereby became wholesalers, or that an ordinance governing wholesalers or manufacturers could not apply to them because they are retailers? With the putting up or selling of the pail of lard, Armour & Company as retailers had nothing to do. It was Armour & Company, packers, who put up the lard in the package, and, as the stipulation recites, "it was sold * * * as a part of the wholesale trade of said Armour & Company." One might as well say that one having the right to sell goods as a merchant in a building in the ordinary course of business must also have the right to sell goods as a peddler without license or restriction, though a regulating ordi-

nance as to the latter calling was in force; or that a saloon-keeper who sells wine made from grapes grown by himself (as he may do without a license in this state) may sell all kinds of intoxicating liquors because of his right to sell such wine as a producer.

As to the contention that the act violates the fourteenth amendment: One of the principal objections made is that the law deprives defendant of the equal protection of the law because "it interposes impediments in the pursuits of one person which are not applied to the same pursuits of others under like circumstances; and it attempts to accomplish this under the mere guise of classification, when the classification is purely arbitrary and is not based on any difference which bears a just and proper relation to the attempted classification." It is asked why should a statement of the weight or measure be required upon a pail of lard, and not upon a can of oysters, or upon a can of syrup, and not upon a can of salmon, or upon a can of peaches or cherries, while peas or beans may be sold unbranded? In answer to this it may be said that it was within the power of the legislature to require all foods put up in packages to bear upon the package the net weight or measure of the contents. By the terms of the act this is required in the case of "all dairy products, lard, cottolene, or any other article used as a substitute for lard, wheat products, oat products and corn products and mixtures, prepared or unprepared; sugar, syrup and molasses, tea, coffee, canned, dried fruit." Comp. St. 1909, ch. 33, sec. 8. It is possible that experience taught the legislature that the opportunities for fraud or deception in the weight or measure of the articles embraced in this classification were greater than in the case of other products, or that the volume of trade and consumption of these articles of food was so much greater and more important than that of other articles that it was wise to include them only.

It is possible, nay even probable, that there are many other articles which should be embraced within the provi-

sions of the act, but, does the mere fact that the legislature has not included all that it might include vitiate the law as respects those within its terms? We think not. The fact that the legislature did not cover all articles of food is not a just ground of complaint. As well say that acts governing the sale of intoxicating liquors are invalid because all other intoxicating substances are not included. Legislation is to a large extent an evolutionary process, and legislatures often work by piecemeal. Not infrequently they approach a new subject of legislation in a timid and halting spirit, and it often takes years and many sessions to frame legislation covering a whole subject. A good example of this is to be found in the legislation in this state with respect to combinations in restraint of trade. *State v. Omaha Elevator Co.*, 75 Neb. 637. Mr. Justice Holmes says in *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 26 Sup. Ct. Rep. 66: "Again, if an evil is specially experienced in a particular branch of business, the constitution embodies no prohibition of laws confined to the evil, or *doctrinaire* requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation. *Otis v. Parker*, 187 U. S. 606. And if this is true, then in view of the possible teachings to be drawn from a practical knowledge of the business concerned, it is proper that courts should be very cautious in condemning what legislatures have approved." *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. Rep. 114; *State v. Moore*, 104 N. Car. 714.

The argument as to the wisdom or lack of wisdom in failing to include certain other classes of foods is one which might properly have been presented to the legislature, but is not one which appeals to the court. The classification may be, to some extent, arbitrary in its nature, but it is difficult to draw the line, and there may have been, and no doubt were, reasons appealing to the legislative mind which are not presented here and are not

apparent to us, but which may, nevertheless, exist. The court does not sit to review the wisdom of legislative acts. Its only function in this respect is to determine whether it has acted in such a manner as to violate the constitutional provisions.

It is said, however, that the most vicious classification in the act is that which undertakes to discriminate between persons, and which makes identically the same act done by one person a crime which if done by another is perfectly innocent; that if a retailer may purchase lard in bulk and put it up in pails exactly like the one in question in this case, and sell it without any label as to weight or measure, he has committed no crime, while if this was done by a manufacturer or wholesaler the statute makes the act a crime. This may be true, indeed under the act must be true, but does this result of necessity deprive either the retailer or the wholesaler of the equal protection of the laws? The argument made is that classification is not in itself a complete protection against attack on a statute which attempts to discriminate between different classes of persons, and that in order to sustain such a law "it must appear that the interests of the public generally as distinguished from those of a class are involved, and the means must be reasonably necessary for the accomplishment of the purpose; that the act must have a direct relation as a means to an end, and the end itself must be appropriate and legitimate; that no impediment should be interposed to the pursuits of any one, except such as are applied to the same pursuits by others under like circumstances; and no greater burdens should be laid upon one than are laid upon others in the same calling and condition. It must appear that the classification is upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

Much stress is laid on the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, and the case of *Low v. Rees Printing Co.*, 41 Neb. 127, and

a number of other cases of undoubted force are cited as sustaining these principles. We have no quarrel with the principles. The difficulty is in their application. Time and necessary limitations to the length of this opinion prevent setting forth all the objections urged, but among them it is said this is "a classification not based on the kind of article sold, not based on any theory that there may be greater opportunities for cheats in goods sold in package form than in sales made in bulk, or on the theory that there is greater likelihood of cheating in the sale of one kind of article than in another, but it is based solely and simply on a mere matter of personality. It cannot be defended on the theory of the public interest, because the wholesaler and the retailer are alike free to refuse to trade when and with whom they will. It cannot be justified on the theory of corporate regulation, because the wholesaler may be, and often is, a natural person, and the retailer may be, and often is, a corporation. It puts a greater burden upon one man than on another under precisely the same conditions. It puts impediments in the way of one that are not interposed in the case of the other. It offends flagrantly against every principle of equal protection of the law."

These are grave and weighty criticisms, but we are more impressed by other considerations. In our view the act is, in respect to the matter involved, practically a police regulation governing the manufacturing for sale in this state and the selling of certain kinds of food in closed packages put up by wholesalers, manufacturers, or persons other than retailers. All persons engaged in the same business—the manufacture for sale in this state or the selling of certain food products in package form put up by other than retailers—are treated alike by the statute. The fact that packages put up by the retailer are not included in this regulation we think is not material. It is very probable that the legislature ascertained that by far the greater quantity of food products put up in closed packages are prepared and sold by wholesalers, and that the

comparatively insignificant quantity put up by the retailer, with the opportunities for inspection and correction afforded by the nearness of his customer, furnish a sufficient ground to classify and discriminate. Furthermore, it is a matter of common knowledge that foods are seldom put up in closed package form by retailers (though the stipulation recites that lard is put up and sold by retailers in like pails), while within the last few years there has been an immense development (much to be welcomed upon sanitary grounds) of the practice of putting up foods at the place of their preparation or manufacture in tightly closed or sealed receptacles, so that the consumer may receive the same with the liability of contamination by exposure to unclean handling or liability of infection entirely done away with. This practice has grown with the demand of the public for better sanitary conditions, and has been met by the enterprising and intelligent manufacturer by ingenious methods of inclosing various articles of food in different receptacles best suited for the purpose.

The principal object of the legislature was to protect the public from the danger of fraud caused by the absence of uniformity in the amount of goods placed within the respective packages. The legislation is of the same nature as that concerned with the prevention of fraud by the regulation of weights and measures. Mr. Freund (Freund, Police Power, secs. 273, 274) points out that statutes not infrequently prescribe that certain forms of package shall contain a fixed amount by weight and measure; that such provisions are found with regard to hay, fish, fruit, hoops, staves, etc., and that of a similar nature are statutes prescribing the manner in which bread shall be sold, the measures by which milk shall be sold, and other provisions of like character.

The protection of the public from fraud by requiring the net weight or measure of the contents of closed packages to be marked upon the outside thereof is clearly within the police powers of the state. Where the neces-

sities of life are sold to a large extent in package form, it is almost as necessary that the public should be protected against imposition by scrimping the contents of a package, as it is that it be protected against adulterated goods, or deception in quality by means of coloring, or against false weights or measures. The fraction of an ounce taken from the contents of a single package may wrong a single consumer but little, but where hundreds of thousands of packages are sent out, as is done by large concerns, the additional profit to the manufacturer or wholesaler will be correspondingly great and the temptation to lower the contents may be too much to be withstood. This is a fraud or deception against which the consumer is almost incapable of defending himself, but one which the legislature, acting for all the people, may foresee and guard against.

We think there is a reasonable difference of condition between the wholesaler or manufacturer selling such packages of food and the retailer who puts up the packages himself and sells them to his immediate customers, and that this difference furnishes a reasonable basis for classification. If in such cases short weight or short measure is used, or packages, which by artful means deceive the eye as to their contents, are put up, the ultimate consumer is usually far removed from the guilty manufacturer or wholesaler, and is practically without a remedy under the prevailing methods of the trade in this country at the present time; while, if the same act were perpetrated by the retailer from whom he purchases, the offender is within his reach and several methods of relief from further exaction are open to him.

A case nearly in point is *St. John v. New York*, 201 U. S. 633, 26 Sup. Ct. Rep. 554, in which case a statute of the state of New York by which producing and unproducing venders of milk were classified differently with respect to the sale of milk was considered. It was argued in that case, as in this, that the act of selling by members of one class was permitted, while the act of sell-

ing by members of the other class was prohibited or penalized. Mr. Justice McKenna, writing the opinion, says: "If we could look no further than the mere act of selling, the injustice of the law might be demonstrated, but something more must be considered. Not only the final purpose of the law must be considered, but the means of its administration—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. The ultimate purpose is that wholesome milk shall reach the consumer, and it is the conception of the law that milk below a certain strength is not wholesome, but a difference is made between milk naturally deficient and milk made so by dilution. It is not for us to say that this is not a proper difference, and regarding it the law fixes its standard by milk in the condition that it comes from the herd. It is certain that if milk starts pure from the producer it will reach the consumer pure, if not tampered with on the way. To prevent such tampering the law is framed and its penalties adjusted. As the standard established can be proved in the hands of a producing vender he is exempt from the penalty; as it cannot certainly be proved in the hands of other venders so as to prevent evasions of the law, such venders are not exempt. In the one case the source of the milk can be known and the tests of the statute applied; in the other case this would be impossible, except in few instances." See, also, *American Sugar Refining Co. v. Louisiana,* 179 U. S. 89, 21 Sup. Ct. Rep. 43; *Reymann Brewing Co. v. Brister,* 179 U. S. 445, 21 Sup. Ct. Rep. 201; *Heath & Milligan Mfg. Co. v. Worst,* 207 U. S. 338, 28 Sup. Ct. Rep. 114.

It was held in *Cox v. Texas,* 202 U. S. 446, 26 Sup. Ct. Rep. 671, that liquor sellers were not denied the equal protection of the laws because producers or manufacturers of wines were exempted, while the wines were in their hands, from the tax imposed upon other liquor dealers, though both might be selling the same kind of wine. The main argument in that case, as in this, was based upon the

decision in *Connolly v. Union Sewer Pipe Co., supra,* and on the notion that the statute discriminated between two classes of persons.

A Georgia statute imposed a tax upon certain persons hiring men to labor outside the state, but not upon persons engaged in hiring persons to work within the state. This was held in *Williams v. Fears,* 179 U. S. 270, 21 Sup. Ct. Rep. 128, not to violate the fourteenth amendment. See, also, *Cook v. Marshall County,* 196 U. S. 261, 25 Sup. Ct. Rep. 233; *Halter v. Nebraska,* 205 U. S. 34, 27 Sup. Ct. Rep. 419; *State v. Moore,* 104 N. Car. 714.

The argument in *St. John v. New York, supra,* is that the classification is made for the purpose of aiding in the efficient administration and enforcement of the law, and that there is a proper and justifiable distinction between the two classes of dealers, considering the purposes of the law and the means to be observed to effect that purpose. And so in this case the purchaser deals with and relies upon the retailer. If the retailer puts up packages himself, and there is fraud in the quantity or weight, he knows that he is committing a fraud and is wholly responsible for it. If, on the other hand, the retailer buys packages from the wholesaler which he supposes to be genuine and honest, and sells as he buys, he has no means of knowing whether he is committing a fraud or not, and therefore packages that as such are to pass from hand to hand should be branded, so that all parties dealing with them may know that they are not guilty of fraud in so doing.

In conclusion, we adopt the views of Mr. Justice Holmes expressed in *Noble State Bank v. Haskell,* 219 U. S. 104, 31 Sup. Ct. Rep. 186: "In answering that question (whether the statute violates the fourteenth amendment) we must be cautious about pressing the broad words of the fourteenth amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great

guaranties in the bill of rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power. * * * It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States,* 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The statute under consideration places all persons who sell packages of the specified products put up by other than retailers under the same restrictions, subject to like penalties and punishments, so that every person engaged in the same business is equal both with respect to burden and with respect to the protection of the law. This being the case, it does not violate any of the provisions of the fourteenth amendment. *Powell v. Pennsylvania,* 127 U. S. 678, 8 Sup. Ct. Rep. 992; *Barbier v. Connolly,* 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley,* 113 U. S. 703, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co. v. Humes,* 115 U. S. 512, 6 Sup. Ct. Rep. 110.

The case was submitted to the district court upon a stipulation of facts. Where grave questions of constitutional law are concerned involving the construction of the constitution of the state or of the fourteenth amendment to the constitution of the United States, we are reluctant to act in a case where the facts which are presented to us are only such as are agreed upon by counsel. It has been our experience that the real facts upon which the determination of a case depends are often better arrived at by the process of examination and cross-examination of witnesses than by stipulation. The court prefers that, where

questions of fact are involved in cases of the importance of this, they should be determined upon the testimony of witnesses, rather than by agreed statements.

The judgment of the district court is

AFFIRMED.

FAWCETT and ROSE, JJ., not sitting.

JACOB LICHTENSTEIGER V. STATE OF NEBRASKA.

FILED MAY 23, 1911. No. 16,990.

Food: PURE FOOD LAW: COTTOLENE. A proviso in a statute is generally intended to except something from its operation which would otherwise be within its provisions. Under the pure food law of 1909, a package of cottolene, if sold for use in Nebraska, must bear a statement on the label of the net weight or measure of the contents exclusive of the container, unless it contains the other brands and marks upon the label provided for in the first or second subdivisions of the proviso to section 8, ch. 33, Comp. St. 1909 (Ann. St. 1909, sec. 9825).

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

T. J. Mahoney and *J. A. C. Kennedy,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

LETTON, J.

Plaintiff in error was convicted of selling a misbranded can of cottolene. The case was tried by consent upon an agreed statement of facts. From this statement it appears that the pail or can of cottolene had no statement printed or written on the label of the net weight or measure of the contents exclusive of the container; that the

cottolene was manufactured by the N. K. Fairbank Company at Chicago, was sold with other like packages in wholesale quantities to a wholesale grocer in Lincoln, by this grocer in like quantities to defendant, and by the defendant to another person as a retail sale. That the word "cottolene" is a name adopted by the manufacturers as the distinctive name of a compound, and that cottolene is a proprietary article manufactured by said N. K. Fairbank Company which is not an imitation of or offered for sale under the distinctive name of any other article; that cottolene is a mixture or compound composed of cottonseed oil and beef fat and no other substance, and does not contain any added poisonous or deleterious ingredients; that on the outside of the package, among other matters, is set forth the name, the place of manufacture, the words, "Cottolene, Cottonseed Oil—Oleo Stearine," and on the side of the pail, among other printed matter, the following: "Cottolene contains nothing but pure vegetable oil and choice pressed beef fat, prepared by our exclusive methods;" that for many years past cottolene has not been sold by weight or measure, or in packages intended to pass as or for any fixed or given weight or measure, and that the package sold by the defendant was not sold as containing any fixed weight or measure, but was sold simply as a pail of cottolene.

1. The same contention is made in this case with respect to the statute being in violation of the fourteenth amendment of the constitution of the United States as is made in *Freadrich v. State, ante,* p. 343, and on this point the case is ruled by the opinion therein.

2. Plaintiff in error insists that under a proper interpretation of the statute the package of cottolene sold was not "misbranded," for the reason that while the third subdivision of the first paragraph of chapter 67, laws 1909 (Comp. St. 1909, ch. 33, sec. 8; Ann. St. 1909, sec. 9825), provides that articles of food shall be misbranded: "Third. If sold for use in Nebraska and in package form, other than canned corn; if every such package, as provided

and named below, does not bear a correct statement clearly printed on the outside of the main label, of the contents and also of the net weight or measure of the contents exclusive of the container, viz., all dairy products, lard, cottolene, or any other article used as a substitute for lard, wheat products, oat products and corn products and mixtures, prepared or unprepared; sugar, syrup and molasses, tea, coffee, canned, dried fruit," still that by a later general proviso in the same section it is "provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of, or offered for sale, under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced, and the ingredients composing said food. Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale, and the ingredients composing said articles."

It will be seen that the statute first includes "cottolene" among the class of articles which are to be deemed "misbranded" unless the weight or measure of the net contents is printed on the label, but afterwards provides that an article of food which does not contain any added poisonous or deleterious ingredients, if a mixture or compound sold under its own distinctive name, and not an imitation of, or offered for sale under the distinctive name of, another article, if the place of manufacture and the ingredients composing the food accompany the name on the label, and compounds, if labeled so as to plainly indicate that they are compounds, and the ingredients composing the articles

are also plainly indicated on the label, "shall not be deemed to be misbranded." By the agreed statement of facts it is shown that the label fully complied with the requirements of the proviso as to the class described in the first subdivision. It is difficult to say what the legislature intended by requiring in one portion of the section that packages of cottolene should be deemed misbranded if sold without a statement of the weight or measure on the outside of the container, and by later providing that the class of food products within which cottolene plainly belongs should not be deemed misbranded if put up in packages with the identical information printed on the label which the pail of cottolene sold bore on its label. Reference to other products named in the same section rather increases the uncertainty than clarifies the meaning. The same provision is made with reference to wheat products, oat products, and corn products and mixtures. It is a well-known fact, of which we think we are justified in taking judicial notice, that many wheat products, oat products, and corn products and mixtures are upon the market in package form under distinctive names, and complying with the first subdivision of the proviso. If the proviso is held not to apply to the third subdivision of section 8, all such articles, compounds or mixtures, though sold as preparations under their own distinctive names and apparently intended to be exempted, must be branded with the net weight or measure of the contents of the package.

What is the effect of the proviso? "A proviso is something engrafted upon a preceding enactment, and is legitimately used, for the purpose of taking special cases out of the general enactments, and providing specially for them." Dwarris (Potter), Statutes and Constitutions, p. 118. "The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause." *Wayman v. Southard,* 10 Wheat. (U. S.) 1. *Voorhees v. Jackson,* 10 Pet. (U. S.) *449; 2 Sutherland (Lewis), Statutory Construction (2d

ed.) sec. 351. Under these principles we must hold that the proviso controls the preceding provision. Section 251 of the criminal code provides, among other things: "No person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against its spirit." This being the law, we cannot say under the contradictory provisions of the pure food statute that the selling of such a package of cottolene as described in the evidence is made penal by the plain import of the words of the statute. Under the law of 1909, a package of cottolene, if sold for use in Nebraska, must bear a statement on the label of the net weight or measure of the contents exclusive of the container, unless it contains the other brands and marks upon the label provided for in the first or second subdivisions of the proviso. The stipulation of facts shows that the label complies with all the requirements of the first subdivision of the proviso, and, this being so, the statute declares: "It shall not be deemed to be adulterated or misbranded." This is the meaning the legislative department of the government has given to this statute. The legislature of 1911 perceived the confused, contradictory, and ineffective character of these provisions, and amended this section so as to require the net weight to be placed on packages of compounds and mixtures, as well as on packages of unmixed products.

Taking the 1909 statute as we find it, we are convinced the evidence does not support the conviction. The judgment of the district court is

REVERSED.

FAWCETT and ROSE, JJ., not sitting.

OLENA SWANSON, ADMINISTRATRIX, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT.

FILED MAY 23, 1911. No. 16,338.

1. **Master and Servant:** INJURY TO SERVANT: NEGLIGENCE. A trackman working in obedience to the orders of his foreman upon a railway track in a stock yards, and in such a position that he could not see cars shunted down the track against empty cars standing thereon in close proximity to him, ordinarily has a right to rely upon his foreman's uniform custom to watch and warn him of approaching cars.

2. ———: ———: LIABILITY: CONTRIBUTORY NEGLIGENCE. And if, under those circumstances, the foreman departs from his men under circumstances justifying a belief that he intends to occupy a more advantageous point from whence to watch for cars, and without informing them they must rely solely upon their own senses for protection, and he knows that a switching crew and engine are engaged in kicking cars down the track upon which his men are working, but out of their line of vision and that of the switchmen, and does not inform them of the situation, and as a proximate result thereof one of his men is injured by a moving car, the employer is liable if the injured employee is not guilty of contributory negligence.

3. **Appeal:** ERROR NOT AFFECTING SUBSTANTIAL RIGHTS. In reviewing the record of an action in the district court, this court will disregard any error or defect in the proceedings which does not affect the substantial rights of the complaining litigant, and will refuse to reverse a judgment because of any such error.

4. **Death:** EXCESSIVE DAMAGES. In an action to recover for the widow's sole benefit for the death of her husband, a recovery of $5,000 is excessive in view of the fact that he was 65 years of age at the time of his death, earned but $12.50 a week, and had no source of income other than the result of common labor.

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

Greene, Breckenridge & Matters, for appellant.

H. C. Murphy and *J. C. Kinsler, contra.*

ROOT, J.

This is an action to recover damages for the death of August Swanson, which was caused, as alleged, by the defendant's negligence. The plaintiff prevailed, and the defendant appeals.

The defendant in the prosecution of its business employs several switching crews and a number of trackmen. at the point where Swanson was killed three lines of railway lie parallel to each other and to about 40 connected pens used to restrain live stock which are unloaded from cars upon the track nearest the pens. This track is described as the "chute track," the other tracks are known as the "middle" and "outside" tracks, respectively. Early in the forenoon of the day in question, Swanson and several other laborers were working upon the chute track, but were disturbed by the approach of a train of cars loaded with live stock. In obedience to the orders of John Sund, their foreman, a number of the men went to a distant part of the yards, while Swanson and several other of the men commenced to clean the middle track at a point opposite to where they had been working on the chute track. To comply with the orders, it was necessary for the men to go upon the middle track and with their shovels remove therefrom accumulated sand, cinders, offal and rubbish. At the time this change was made, several empty stock cars or box cars, variously estimated at from three to eight in number, were standing upon the middle track, where they had been shunted by a switching crew which was engaged in "sorting empties" further down the track to the south. Swanson and the other men worked northward from the empties. Sund testifies that he hired and discharged men in his gang, that he directed their movements, watched for approaching cars or engines, and warned his men, and this had been his uniform custom. Swanson had worked for the defendant in the capacity of a sectionman for more than five years before his death, and Sund had been his foreman during that period. Within a

few minutes of the time the men commenced to clean the middle track, the empty cars were moved slowly forward for the space of about 50 feet, evidently propelled by the impact of other empty cars which had been kicked down the track, and the men moved a corresponding distance northward, but continued their work. The men were working at intervals for a distance of four rail lengths from the empties, and Sund was at the extreme northern limit of this space. Because of the stock train, the curve in the tracks, and the empty cars south of the men, it was impossible for them to see cars or a locomotive moving upon the track south of the empties. Sund left his men at work and walked southward past the empty cars to the switch engine, which at the time was not moving, and spoke to the engineer, but did not tell him or any of the switching crew that the sectionmen were at work on the middle track north of the empty cars, neither did he direct any person to keep a look out and warn the men while he was away from them. Within ten minutes after Sund's departure, about 13 empty cars were at one time shunted down the middle track at the rate of from four to ten miles per hour. The force of the impact of these cars with the other empty cars was so great that the latter moved forward so quickly that Swanson, who was in the act of thrusting his shovel into the soil while he was in a stooping posture, was knocked down, caught upon the rails, and three cars and the front wheels of a fourth car ran over him causing instant death.

The defense is a denial of the defendant's alleged negligence, and a plea of contributory negligence and of an assumption of risk. There are also some allegations in the answer evidently inserted to raise an issue that the defendant is not a railroad company. The trial judge, over the defendant's objections, submitted to the jury five distinct alleged negligent acts of the defendant, upon the proof of any one of which a verdict might be returned in the plaintiff's favor. The defendant by requested instructions sought to have all of these contentions withdrawn

from the jury, and now most strenuously argues that there is no competent evidence to sustain them. For the sake of argument, it may be conceded that the evidence will not sustain every charge of negligence thus submitted to the jury, but there is no conflict in the evidence concerning the foreman's relation to Swanson, or that it was his uniform custom to watch for approaching cars or engines while his men were working upon the track under circumstances at all like those surrounding them at the time Swanson was killed and to warn them of the facts. While the deduction of negligence or the want of negligence from primary facts admitted or proved in a particular case is one for the trier of fact to draw, yet it is inconceivable that any intelligent, fair-minded jury would fail to find the defendant negligent in respect to the conduct of John Sund in leaving his men at work behind, but in close proximity to, the barrier of empty cars without substituting another man to discharge his duty to watch and to warn, or, in default of so doing, in failing to notify them that for the time being they must depend solely upon their own senses for protection, or in failing to notify the switching crew of the position of his men. *Mullin v. Central R. Co.*, 77 N. J. Law, 241. We are of opinion that, if the court committed any error in submitting grounds for recovery that are not sustained by the proof, in the peculiar condition of the evidence that error is without prejudice and does not justify a reversal of the case. Code, sec. 145. We are further of the opinion that it is immaterial whether or not the plaintiff is a railroad company within the meaning of the employer's liability act (Comp. St. 1909, ch. 21, sec. 3 *et seq.*).

The court took the view that the defendant is a railroad company, and instructed the jury that Swanson's contributory negligence, if he were negligent, should only be considered in diminution of the recovery, if his negligence was slight and the defendant's negligence was by comparison gross. A learned argument was presented upon this subject, but we are of opinion that the law thus argued is not necessarily involved in this case.

The evidence to sustain the plea of contributory negligence, as we understand the record, is about as follows: Witnesses stated that sectionmen are required to protect themselves while working on the track and to keep a lookout for trains; that Sund, when about to depart from his gang, said "Be on the lookout, men!" that Swanson did not face the empty cars and worked too close thereto, notwithstanding a warning given by a Mr. Anderson that if he (Swanson) was not careful the cars "would drop down on him." Sund did not tell his men that he would not watch for or warn them, and he was going in the proper direction to secure a view of cars coming down the track from the south. It seems improbable that Swanson heard his foreman's statement uttered 120 feet distant from where Swanson was at work; but, if it is conceded that he did, the men were not told that they would be thrown upon their own resources for protection. In cleaning the track the men were in constant motion shoveling and walking to and fro. Swanson had a right to rely upon Sund. The foreman took no exception to the positions assumed by his men, and we think there is little, if any, evidence to sustain a deduction of contributory negligence. The issue, however, was submitted to the jury. Under the instructions, if the jury found Swanson guilty of contributory negligence, it was their duty to make a corresponding deduction in the recovery, provided they found that the defendant's negligence was gross in comparison. The verdict is for $5,000, a sum that precludes a belief that the jury found the deceased guilty of contributory negligence. If the jury rejected this defense, as they had a right to do, it is immaterial whether or not the doctrine of comparative negligence was properly submitted to them. We think section 145 of the code controls this phase of the case. In our judgment to this point prejudicial error has not been established by defendant.

It is argued that the recovery is excessive, and a comparison of all of the evidence on this subject convinces us the defendant has just cause for complaint. Swanson at

the time of his death was 65 years of age, was survived by his widow, but, as we understand the evidence, by no children. For eight years preceding his death he had worked as a sectionhand and received $12.50 a week, plus some indefinite amount for overtime. There were no children to receive a father's care. There is no proof that he was the master of a trade, or that he could earn money by any means other than by hard manual labor. Swanson's expectancy of life at the time of his death was between 12 and 13 years. We are not unmindful of the fact that but for this accident he might have lived to be 80 or 90 years of age, but it is not within the bounds of probability that until past 75 years of age he would retain the ability to perform the hard physical labor which seemed his only source of income. Had Swanson remained in the defendant's employ for 12 years at the wage paid him at the time of his death, losing no time because of sickness or of bad weather, he would have received $7,800. One-half of that sum would in all probability be required for his own support. The widow is not entitled to receive more than the present financial value to her of her husband's life. If Swanson had not died, but should continue to earn without diminution in amount or for lost time the wages paid him at the time of his death, and had contributed one-half of his earnings to his wife for 13 years, or until he attained 78 years of age, the present value of that contribution on the basis of 5 per cent. interest would be $3,056. Cases will arise where the courts should not hold a jury to a hard and fast rule of the present value of probable financial contributions in the future, but there is little, if anything, in the evidence in this case to justify a relaxation of the rule that there must be evidence from which the financial loss may with reasonable accuracy be computed. *Nilson v. Chicago, B. & Q. R. Co.*, 84 Neb. 595.

Under all of the circumstances of this case, we are of opinion that any recovery in excess of $3,500 is excessive, and that, unless $1,500 is remitted as of the date of the judgment, it will be reversed and the cause remanded. If.

however, that remittitur is filed within 60 days of the filing of this opinion, the judgment of the district court will be affirmed.

JUDGMENT ACCORDINGLY.

WILLIAM F. JUSTICE, APPELLEE, V. ALBERT L. BUTTON ET AL., APPELLANTS.

FILED MAY 23, 1911. No. 16,448.

1. **Vendor and Purchaser**: CONTRACT: TITLE. Ordinarily there is an implied agreement on the part of the vendor in every contract for the sale of land that he will transfer a good title to the vendee, unless the contract relieves the vendor of that obligation.

2. ———: ———: ———. A good title is one that can be sold to a reasonably prudent man who might desire the property, or a title that can be mortgaged to a person of reasonable prudence as security for the loan of money.

3. ———: ———: DEFECTIVE TITLE. Unreleased and unsatisfied trust deeds executed to secure the payment of a debt constitute such a defect in the title that a vendee will be excused from accepting it, although upon the face of the record the statute of limitations may have barred the creditor or the trustee from foreclosing the deed or from selling the land thereunder.

4. ———: DEFECTIVE TITLE: RECOVERY OF PRICE. A purchaser of land, so long as the contract remains executory, may as a general rule recover back the purchase money he has paid thereon, if the vendor's title be not such as the purchaser is under the contract entitled to demand.

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

Flansburg & Williams, for appellants.

John M. Stewart, R. M. Proudfit and *D. H. McClenahan, contra.*

ROOT, J.

In January, 1908, the defendant Button Land Company, by a written contract with the plaintiff, agreed to sell him a tract of land in Colorado and received $300 upon the purchase price. At that time the defendant did not own the land, but this fact was known to the plaintiff. Shortly thereafter the defendant orally agreed to furnish the plaintiff an abstract of title. Both parties treat this agreement as supported by the consideration which sustains the written contract, and we shall so consider it. The deal was to be closed on or before March 5, 1908, but the defendant could not perform on that day. On the 12th of March the plaintiff wrote and sent to the defendant a letter to the effect that, since it was some time past the date when the abstract was to be furnished and no word had been received with regard thereto, if the check for $300 were returned the plaintiff would call the deal off. Subsequently the defendant furnished the plaintiff an abstract of title, and offered him a deed for the land, but signed by a third person. The plaintiff objected that the title was not good, and that the time had long since expired within which the contract should have been performed. Subsequently the plaintiff brought this action to recover the $300. The defendant tendered the abstract and the deed in court, and asked that the plaintiff be required to specifically perform his contract. The case was tried as an action in equity, and both litigants were dismissed from court. The plaintiff appeals, and the defendant has filed a cross-appeal.

It is conceded that two trust deeds conveying this property to a trustee to secure the payment of an indebtedness were executed in 1889, and that they have not been released. The defendant, however, argues that, since a tax deed was subsequently issued for this land, and the affidavits attached to the abstract prove that the parties under whom he claims title have held possession by virtue of that deed for more than seven years preceding the

tender, and because the creditors are not within the exceptions in the Colorado statute of limitations, the deeds are not an incumbrance upon the land. The Colorado statute is neither pleaded nor proved; but, assuming that it is as contended for by the defendant, neither creditor makes a statement that the debt has been paid, and they would not be bound by an affidavit sworn to by the owner of the land. *Peckham v. Stewart,* 97 Cal. 147. The defendant did not in terms agree to furnish a marketable title, but that agreement is ordinarily implied in every real estate contract that does not fairly negative that obligation. That is, to furnish a title upon the security of which the vendee could procure a loan from a reasonably prudent man, or that would be taken by a reasonably prudent purchaser, should the vendee desire to sell. *Moore v. Williams,* 115 N. Y. 586; *Meyer v. Madreperla,* 68 N. J. Law, 258; *Durham v. Hadley,* 47 Kan. 73; *Fagan v. Hook,* 134 Ia. 381. The statute of limitations does not operate so successfully to cut off mortgage liens as it does to extinguish a legal title. In Nebraska, ten years continuous, hostile, adverse possession, under a claim of right, will create in the occupant a title which the courts will quiet against the holder of the legal title of record unless he is within some statutory exception; but as against the mortgagee the courts have been exceedingly tender, and ordinarily require payment of the debt as a condition to relief, without regard to the time the debt has remained unpaid. *Henry v. Henry,* 73 Neb. 752; 3 Pomeroy, Equity Jurisprudence (3d ed.) secs. 1219, 1221; *Farmers Loan & Trust Co. v. Denver, L. & G. R. Co.,* 60 C. C. A. 588.

The plaintiff was justified in refusing to accept the deed, and the defendant is not in position to demand a performance of the contract. The plaintiff was therefore entitled to recover the purchase money. *Maxwell v. Gregory,* 53 Neb. 5. The provision in the contract for a forfeiture of the payments if the contract is not completed cannot be invoked by a vendor who is unable to perform for want of sufficient title. *Platte Land Co. v. Hubbard,* 12

Colo. App. 465; *Lewis v. White,* 16 Ohio St. 444. We do not think the record discloses that the plaintiff has, in any important particular, changed his position since this suit was commenced, but that while he may have placed more emphasis upon the defendant's failure to perform upon the law day than any other fact, he also objected to the title because of the trust deeds. The court therefore erred in dismissing the plaintiff's petition, but it was right in denyng the defendant any relief.

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

REVERSED.

CASPER HAGEDORN, APPELLEE, V. FRANK MALY ET AL., APPELLANTS.

FILED MAY 23, 1911. No. 16,451.

Waters: DIVERSION: INJUNCTION. A landowner may enjoin the obstruction of an old, established drainage channel and the digging and maintenance of a ditch whereby surface water collected from a considerable area will be diverted from the natural course of drainage and poured onto his lands to his damage.

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

T. M. Franse, for appellants.

F. D. Hunker and *A. R. Oleson, contra.*

ROOT, J.

This is an action in equity to restrain the defendants from cutting a dike and from maintaining a ditch so that water will flow over and upon the plaintiff's land. The plaintiff prevailed, and the defendants appeal.

The plaintiff's land is east and south of the defendants'

farms. The Elkhorn river, into which the water from the territory to the west flows through sloughs, swales and other waterways, is still further eastward. In a state of nature the surface water, which originated upon a considerable area west of the defendants' land, flowed northeastward into a swale, and thence southeastward through that depression into the Elkhorn river. To shorten the course and to confine the water within more narrow bounds, the defendants about 24 years ago constructed a ditch east and west on the line between the north half and the south half of the northwest quarter of section 16, town 21, range 6, to the line running north and south through the center of the section, and from thence constructed the ditch northward so as to intersect the swale. This ditch is now from five to seven feet in depth, from four to six feet wide at the bottom, and from ten to twelve feet wide at the top. Parallel dikes are constructed on both sides of and close to the ditch, so that at the angle where the ditch turns northward the dikes are about five feet high. The swale referred to has become clogged with dirt and debris, which was deposited by the water from the ditch, and in consequence water does not flow therein so freely as it did in bygone years. The northwest corner of the plaintiff's farm is coincident with the exterior of the angle of the dike. The defendants dug a shallow, narrow ditch from the angle eastward upon the defendant Maly's land, parallel and close to the northern boundary of the plaintiff's farm, and deposited the excavated dirt along the northern side of this ditch, cut the embankment at the angle, and obstructed the older ditch at the point where it turned northward, and thereby made a way for the waters flowing eastward in the old ditch, so that the greater part flowed into the smaller drain, from whence a considerable part of it flowed to the south and upon the plaintiff's land to its injury and his damage. While a small fraction of this water would in the natural course of drainage flow eastward and southward, by far the greater part of it is diverted out of its natural course one-half mile west of the plaintiff's

land, is gathered up and confined in the ditch, and by those acts of the defendants is poured upon the plaintiff's premises out of the course of natural drainage and to his damage. This the defendants have no right to do. *Fremont, E. & M. V. R. Co. v. Marley,* 25 Neb. 138; *Jacobson v. Van Boening,* 48 Neb. 80; *Nelson v. Wirthele,* 88 Neb. 595.

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

AFFIRMED.

ALFRED HAZLETT ET AL., APPELLANTS, V. ESTATE OF THOMAS MOORE ET AL., APPELLEES.

FILED MAY 23, 1911. No. 16,464.

Executors and Administrators: ALLOWANCE TO ATTORNEYS. Attorneys who, under employment by executors of a will, render necessary services beneficial to the testator's estate in the settlement thereof may, in a proper case, file with the county court an itemized bill for their compensation, and the county court has authority to allow a reasonable amount for that purpose as a claim against the estate, where those in control of it refuse to pay the claim and object to any allowance therefor.

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

Hazlett & Jack, pro se.

E. O. Kretsinger and *Rinaker & Kidd, contra.*

ROSE, J.

As attorneys at law plaintiffs are seeking to recover the reasonable value of professional services rendered by them on behalf of the estate of Thomas Moore, deceased. An itemized bill for their fees was presented to and allowed by the county court as a claim against decedent's estate. From the order of the county court an appeal was taken

to the district court, where a demurrer to plaintiffs' petition was sustained and the claim disallowed. Plaintiffs have appealed to this court.

The record presents the sufficiency of the petition to state a cause of action. The authority of plaintiffs to practice law is properly shown by the petition. It is also alleged therein that they performed on behalf of the estate of the decedent the professional services disclosed by an itemized statement attached to the petition. It is further stated that the services were rendered upon the request of two of the executors of decedent's will, and, as shown by the itemized statement mentioned, were of the reasonable value of $145, no part of which has been paid, except the sum of $30, and that the amount due from the estate is $110. In the fourth and fifth paragraphs of the petition it is alleged:

"That the said services were rendered at the request and direction of George Nicholas and George Buss, two of the executors of said estate; that at the direction and request and with the approval of said two executors of the estate of said Thomas Moore, deceased, plaintiffs filed their statement of account and claim against said estate for said services with the county court of Gage county, Nebraska, on the 15th day of September, 1906; that, at the time of rendering said services before mentioned, one Thomas W. Moore was the third executor of said estate; that, because a portion of said legal services were particularly useful to said estate, in preventing the said Thomas W. Moore from despoiling said estate, he refused to take part in the payment of plaintiffs' claim for legal services above set forth; and that the said Thomas W. Moore as one of the said executors had obtained possession of all the money and personal property of said estate and excluded the other two executors therefrom; and that the two executors who employed plaintiffs had not at any time any money or property of said estate in their hands with which to pay the claim of plaintiffs; and that the said two executors

did not at the time of or after the rendition of said services have in their hands any money or property of said estate, but that the money and personal property of said estate was taken and kept solely and alone by the said Thomas W. Moore, one of the executors of said estate, who for the reasons aforesaid, and for no other, refused to make payment to plaintiffs.

"That after said claim had been filed in the county court of Gage county, Nebraska, objections were filed to the same by James T. Moore, who had been appointed administrator *de bonis non* of said estate, in place of said George Nicholas, George Buss, and Thomas W. Moore, executors, though at the time of the filing of the claim by plaintiffs none of the said executors had yet filed his final report, nor been finally discharged, nor had a settlement at that time with said estate; that objections also to said claim of plaintiffs were filed in said county court by Thomas W. Moore, who is the only person appearing in this court in opposition to the claim of plaintiffs; that thereafter on the 30th day of July, 1907, the plaintiffs and the administrator *de bonis non* of said estate, and the said Thomas W. Moore and all parties in interest in said estate appeared personally and consented that a hearing be had at that time upon plaintiffs' said claim by said county court of Gage county, Nebraska, and that said county court after a full hearing allowed plaintiffs' said claim in the sum of $115; that said order was appealed from by Thomas W. Moore, personally, and by no one else."

The defendant named in the petition is "The Estate of Thomas Moore, deceased." The demurrer, omitting the title and the signature, follows: "Now comes Thomas W. Moore, as defendant herein, an objector in the court below, and an heir and devisee under the will of Thomas Moore, deceased, and demurs to the petition of the plaintiffs, for the following reasons, to wit: 1. Said petition does not state facts sufficient to constitute a cause of action against the defendant or this demurrant. 2. That two executors could not bind said defendant and make it liable for any

amount of attorney's fee to the plaintiffs, as alleged in the petition; that they could only bind themselves. 3. The court has no jurisdiction of the person or the subject matter of the action."

Was the demurrer properly sustained? To maintain the affirmative of this question, demurrant observes that the petition shows on its face there was no contractual relation between plaintiffs and decedent, and that the contract relating to the performance of professional services and to the payment of fees was made with two executors of decedent's will. In this connection demurrant relies on the following doctrine announced by the supreme court of Iowa: "The services were rendered the administrator, and not the deceased, and the sole question in the case is whether the claim is one against the estate or against the administrator personally. If the latter, then the suit should have been brought against him personally. If the former, then the court was in error in sustaining the demurrer. There is a manifest distinction between debts of the decedent and liabilities contracted by his personal representative. The former are strictly claims against the estate, while the latter, although in the interest of and on behalf of the estate, is a personal liability of the representative. * * * It follows, then, that the estate is not liable to an attorney for his services at the instance of an administrator, but that the latter is himself liable in a suit by the attorney. There is little or no variation in the authorities on these propositions." *Clark v. Sayre,* 122 Ia. 591.

This doctrine is well supported by precedent, but there is both reason and authority for a different rule. The petition states these facts: Plaintiffs, under their employment, acted on behalf of the estate. They were employed by legal representatives of decedent. They prevented the despoiling of the estate, and their services were beneficial thereto. The representatives who controlled the estate refused to pay plaintiffs their fees, and objected to the allowance of their claim. The law is that the estate of

decedent is chargeable with the expenses of its administration. Comp. St. 1909, ch. 23, sec. 201. Sometimes an allowance for the services of attorneys may be included in such expenses. In his final account an executor should ordinarily be credited with reasonable attorney fees paid by him in proceedings to probate the will. *In re Estate of Hentges,* 86 Neb. 75. "A guardian has authority to bind the estate of the ward by a contract for services reasonably necessary to the preservation or management of such estate." *McCoy v. Lane,* 66 Neb. 847. The estate itself is ultimately liable for compensation for such services, and the rule is applicable to executors. It is the policy of the law to protect attorneys in their right to reasonable compensation. To that end an attorney's lien is authorized by statute. This lien attaches to money coming into an attorney's hands for the estate of a deceased person, where the client is an executor. *Burleigh v. Palmer,* 74 Neb. 122. If an attorney employed by an executor can satisfy his lien out of money in his hands, but belonging to the estate, why should not the estate answer to him directly, where no money to which a lien can attach comes into his possession? Having, at the request of executors charged with the duty of executing a will, performed services on behalf of the estate, why, in recovering his fees, should he be driven to the circuitous course of first pursuing the executor personally and afterward the estate itself? Under the constitution and statutes the county court in the settlement of estates of deceased persons has the powers of a court of chancery. *Williams v. Miles,* 63 Neb. 859. In the exercise of this jurisdiction the services of counsel may be absolutely essential to the proper protection of the estate, and in passing on claims the power of the court to prevent any wrongful or unreasonable charge by an attorney is complete. Where the services of an attorney are necessary in the settlement of an estate of a deceased person, he should not be unnecessarily hampered in his employment or in the collection of his fees. Where the estate is ultimately chargeable with attorney's fees which the executor

refuses to pay or approve, the better rule under the constitution and statutes of this state is that an itemized bill therefor may be presented to the county court and allowed as a claim against the estate, in so far as the charges are reasonable and just. In this view of the law, plaintiffs' petition on appeal to the district court is not demurrable. The reasons for this conclusion have already been applied to the allowance of attorneys' fees out of the estate of a ward. *McCoy v. Lane,* 66 Neb. 847. In principle the case cited does not differ from the present one. In holding that the petition did not state a cause of action, the trial court was in error.

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

REVERSED.

FIRST NATIONAL BANK OF SCRIBNER, APPELLEE, V. GEORGE A. GOLDER ET AL.; OSCAR C. HOPPER, APPELLANT.

FILED MAY 23, 1911. No. 16,467.

1. Appeal: STRIKING PARAGRAPH OF ANSWER. An order striking a paragraph from an answer is not erroneous, where the matter thus eliminated is pleaded in other parts of the same answer.

2. ———: INSTRUCTIONS: WAIVER. On appeal, a defense that the note on which the action is based was never delivered is unavailing, where defendant failed to except to an instruction that the delivery is conclusively established by the evidence.

3. ———: CONFLICTING EVIDENCE. A fact determined by a jury upon conflicting evidence is conclusive on appeal, unless the finding is manifestly wrong.

4. Notes: CONSIDERATION. A consideration moving to one of several joint makers of a promissory note is good as to all.

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

Henry M. Kidder, for appellant.

G. L. Loomis and *H. C. Maynard, contra.*

ROSE, J.

This is an action on a promissory note for $263.50, dated July 11, 1905, and due September 1, 1906. The names of the makers are George A. Golder, Charles K. Huntington and Oscar C. Hopper. J. L. Reinard was payee, and he immediately indorsed the note to the First National Bank, Scribner, of which he was cashier. The summons was served on Hopper alone, and he is the only answering defendant. A trial resulted in a verdict and judgment against him and in favor of the bank for the amount of the note and interest, and he has appealed to this court.

Hopper admitted that he signed the note, but pleaded that he did so without consideration. The nature of his defense is shown by the third and fourth paragraphs of his answer, which are as follows:

"3. This defendant for a further defense to plaintiff's action alleges that the said promissory note was executed by defendant George A. Golder as one part of an executory contract; that the said contract was an application for life insurance made to the Security Mutual Insurance Company of Lincoln, Nebraska, which, together with the promissory note described in plaintiff's petition, was a proposition to the said insurance company to issue its policy of insurance upon the life of said George A. Golder; and that, at the time of the signing of the said promissory note by this defendant, the said application for insurance and the said promissory note had not been submitted to the said Security Mutual Insurance Company and had not been accepted by the said insurance company, and the said Security Mutual Insurance Company had not issued its policy upon the life of defendant George A. Golder. Therefore this defendant alleges that the said promissory

note was without consideration, and the said promissory note was not delivered, and therefore void; and that the plaintiff knew of the facts herein alleged, and plaintiff was not at that time, and is not now, the owner and holder of the said promissory note in good faith.

"4. This defendant, for a further defense to plaintiff's action, alleges that he signed the said promissory note upon the request of plaintiff, through J. L. Reinard, its cashier and managing officer, and for the accommodation of said J. L. Reinard and the plaintiff, and upon the representations made by the said J. L. Reinard for himself and the plaintiff that the said George A. Golder, the maker of said note, was solvent, that there was no liability upon the part of this defendant by signing said note, and for the accommodation of said J. L. Reinard and plaintiff that the said note would bear the name of a resident of Dodge county, Nebraska, so that the note would pass the examination of the bank inspectors and be approved; that the signing of said note by this defendant was without the knowledge or consent of defendant George A. Golder, or of the said Security Mutual Insurance Company; that, depending upon the representations made by the said J. L. Reinard, as herein set out, and upon the request, as herein alleged, this defendant signed the said note; that, because of the matters herein alleged that as accommodation maker for the accommodation of the plaintiff and J. L. Reinard, there is no liability on the part of this defendant to the plaintiff on the said promissory note; that, because of the representation on the part of said J. L. Reinard that there was no liability on the part of this defendant by signing the said note, the plaintiff is estopped from now asserting that there is now a liability; that plaintiff is estopped from alleging that this defendant is a surety on said note for defendant George A. Golder, or is a joint maker with the said Golder."

1. On motion of plaintiff, the court struck from the answer the fifth paragraph thereof, and of this ruling complaint is made. The allegations herein quoted from

the answer contain in a different form the substance of the paragraph eliminated in the manner stated. For this reason, the judgment will not be reversed on the ground urged.

2. A considerable portion of defendant's argument is devoted to the defense that the note was never delivered. It is insisted that non-delivery is established by the evidence. Defendant admits that he signed the note. The proof that it was duly delivered is at least sufficient to sustain a finding against defendant on this issue. The jury were instructed: "The execution and delivery of this note to the plaintiff by defendant Hopper is conclusively established by the evidence." No objection was made to the giving of this instruction. Having been satisfactory to defendant when the case was submitted to the jury, it is now too late to urge the defense that there was no delivery.

3. The judgment is also assailed as erroneous because the evidence, from the standpoint of defendant, establishes the fact that he signed the note for the accommodation of plaintiff at the request of plaintiff's cashier, relying upon the latter's statement that Golder, the maker, was solvent, and upon an agreement that he assumed no liability. Defendant adduced testimony tending to establish this defense, but the material proof in support of it is directly contradicted by plaintiff's cashier. There is also proof of these facts: Huntington was an agent of the Security Mutual Insurance Company, and as such procured Golder's application for life insurance in the sum of $5,000. The applicant could not pay the first year's premium in cash and the note was executed to raise money for that purpose. The assurer did not accept notes for premiums. To meet the emergency, Huntington asked the bank to discount the note when it bore the signatures of himself and Golder. The bank rejected such security as insufficient. Hopper is a physician, and was at the time an examiner for the assurer named. He signed the note at the solicitation of Huntington to make it bankable, and became liable to plaintiff for its payment. Im-

mediately afterward, the bank discounted the note and sent the proceeds to the insurer. The latter received the money and sent the policy to Golder. The insurance was in force until forfeited for nonpayment of the second year's premium.

The issue to which this conflicting testimony was directed was submitted to the jury, and their finding was against defendant. For the purposes of review, it settled the fact adversely to him.

4. The following instruction is challenged as erroneous: "If the jury believe from the evidence that the defendant Hopper signed said note at the request of one of the other signers, Huntington, then in that case the consideration received by the other signer, Golder, would be a sufficient consideration for the defendant Hopper for signing said note, and the defendant Hopper in that case would be liable for the full amount of said note and interest thereon."

This instruction was applicable to the evidence, and was not prejudicial to defendant, when considered with another instruction in which the jury were directed to return a verdict in his favor, if they believed from the evidence that he signed the note at the request of plaintiff for the purpose of making it conform to the requirements of the bank examiners, with the understanding on part of plaintiff that defendant was not to become liable on it. The instruction quoted is in harmony with the rule that a consideration moving to one of several joint makers of a promissory note is good as to all.

All questions presented have been considered and no prejudicial error has been found in the record.

AFFIRMED.

FAWCETT, J., not sitting.

CHARLES F. EISELEY, APPELLANT, V. NORFOLK NATIONAL BANK ET AL., APPELLLEES.

FILED MAY 23, 1911. No. 16,419.

1. **Attachment:** RATIFICATION BY DEBTOR. Where a defendant in attachment does not in such action assail the validity of the attachment, or the truthfulness of the affidavit upon which it is based, but within a few days after the levy of such attachment voluntarily executes and delivers to the attachment creditor, or to the attorneys of such creditor for his benefit, a bill of sale of all of the attached goods and chattels, subject to certain other indebtedness of and judgments against such attachment debtor, he thereby ratifies and confirms such attachment, and cannot thereafter proceed against the judgment creditor or the surety upon the attachment bond for damages claimed to have been sustained by reason of an alleged unlawful and fraudulent procurement and levy of such attachment.

2. ———: DIRECTING VERDICT. Evidence examined and referred to in the opinion *held* sufficient to sustain the action of the trial court in directing a verdict for the defendant, and sufficient to sustain the judgment entered thereon.

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

W. V. Allen and *W. L. Dowling,* for appellant.

M. D. Tyler, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Madison county against the Norfolk National Bank and the defendant Rainbolt to recover damages for an alleged wrongful attachment levied upon plaintiff's stock of hardware in the city of Norfolk, the bank being the plaintiff in such attachment suit, and defendant Rainbolt surety upon the attachment bond. The case was subsequently dismissed as to the bank, and the trial proceeded against defendant Rainbolt individually. After both sides had

rested, defendant moved for a directed verdict in his favor. The motion was sustained, and from a judgment entered upon the verdict so returned plaintiff appeals.

The pleadings, the evidence, the assignments of error, and the briefs in this court are all unnecessararily voluminous and will not be referred to in detail. As we view the record, after a very careful examination of the same, the real questions involved are quite simple. The record shows that for a number of years prior to September 25, 1896, plaintiff had been engaged in the hardware business in the city of Norfolk. According to his own testimony, plaintiff's business for the two years immediately prior to said date had not been as profitable as in previous years, and, notwitstanding the fact that plaintiff had reduced his stock $1,000 during the two years prior to the date named, he had not been able to promptly meet his liabilities. During the last three months of 1895 at least three of plaintiff's creditors had reduced their claims to judgments against him in the county court of Madison county. The answer of defendant sets out these judgments. The return of the sheriff upon the attachment sued out by the bank shows that the attachment was levied September 26, subject to a prior levy on the day preceding under executions upon four judgments, viz., the three judgments set out in the answer, and one in favor of George Bishop for $142. At the time of levying the executions above referred to, on September 25, 1896, possession of the stock was taken by the sheriff. On the next morning, September 26, the bank obtained a writ of attachment and placed the same in the hands of the sheriff, who at once levied the same, subject to his levy under the four executions set out in his return. Plaintiff testified that the attachment was procured without his knowledge and in the face of an assurance given by him on the evening of the 25th, after the executions had been levied, that he would pay the bank's claim of $1,500 and accrued interest on the next morning. Upon the trial plaintiff introduced as a witness Mr. W. H.

Bucholz, who at the time the attachment was levied was cashier of the bank, but who now has no connection therewith. He testified that on the evening before the attachment was issued, and after the executions had been levied, he called upon plaintiff at plaintiff's residence, and had a general talk with him about his affairs generally; that in that conversation they discussed plaintiff's financial situation, "trying to find some way by which we could save part of the stock that was being threatened, the stock of goods, and apply the proceeds on his home, the mortgage upon his home, in order to save the home for Mr. Eiseley." He further testified: "I urged him, if he was going to have trouble, to give the bank a preference lien on that $1,500, and have that secured by the stock in addition to what we already had, and he said he couldn't do that because he had promised Mr. Mann, he had given his word he would not give anybody any security on that stock that night or that day. Then I proposed that we talk over the attachment, and he said that could be done without his violating his word; to go ahead." Notwithstanding Mr. Bucholz had been introduced as a witness by plaintiff and his veracity thereby vouched for, plaintiff was subsequently permitted to contradict this testimony given by him. We do not think that under the evidence appearing in this record any weight can be given to this attempted contradiction by plaintiff of a reputable witness whom he had himself placed upon the stand. As has been said, the attachment was levied on the morning of September 26. Two days later, on September 28, plaintiff and the firm of Powers & Hays, attorneys representing both the judgment creditors and the attaching creditor, took the matter up in the office of the attorneys, and as a result of that interview plaintiff executed and delivered to Powers & Hays a bill of sale of all of the personal property which had been levied upon under the executions and attachment, subject to an account of $200 and interest to the I. L. Elwood Manufacturing Company; a judgment of $111.90, with interest and costs, in favor of the C. Sydney

Shepherd Company; a judgment of $309.81, with interest and costs, in favor of the Michigan Stove Company; a judgment of $109.40, with interest and costs, in favor of the Northfield Knife Company (the three judgments set out in defendant's answer); and a note (upon which the attachment was based) in favor of the Norfolk National Bank for the sum of $1,831.25, and the interest accrued and to accrue thereon. When this bill of sale was executed and delivered to the attorneys, the levies under the executions and attachment were all released, and Powers & Hays took possession of the stock of hardware under the bill of sale. In something less than two months thereafter, the sheriff levied upon this stock, then in the hands of Powers & Hays, under a tax distress warrant against the plaintiff, covering taxes from 1891 to 1896, aggregating about $490, took possession of the stock under such levy and sold the same.

On November 13, 1897, plaintiff commenced an action in the district court for Madison county against the bank and Powers & Hays and the sheriff, Joseph J. Clements, to recover the value of the stock of hardware in controversy, on the ground that said defendants had converted the same to their own use. The petition in that case set out the execution and delivery of the bill of sale above referred to, and the taking possession of the stock thereunder by Powers & Hays. That case proceeded to trial, and resulted in a judgment in favor of defendants therein, the Norfolk National Bank and Powers & Hays, and against Sheriff Clements for the full value of the stock, which judgment Mr. Clements paid in full.

On September 28, 1898, plaintiff filed in the United States district court for the district of Nebraska a voluntary petition in bankruptcy. In that case he scheduled a large amount of liabilities, and no assets except $100 of exempt property consisting of "necessary household and kitchen furniture." He was duly adjudged a bankrupt and in due course obtained his discharge.

The above facts are, with the exception of the claim

that the attachment was levied with the prior consent of plaintiff, either admitted or indisputably established. Plaintiff claims that the affidavit, upon which the attachment was issued, was false, and that in obtaining such attachment the bank "acted unlawfully, wilfully, wrongfully, and maliciously and without probable cause, whereby the plaintiff sustained damages in the sum of $3,025"; that by reason of said attachment plaintiff's stock of hardware, which he alleges was of the then fair cash value of $3,000, was entirely lost; that plaintiff's business as a retail hardware merchant, which he alleges was then of the actual and fair value of $2,500 per annum, was totally destroyed and rendered valueless; that plaintiff's store building in which said stock was kept was locked up by the sheriff under said writ of attachment, and occupied by the bank with said stock for the period of two months, whereby plaintiff lost the rent of said building for that time, of the reasonable and fair value of $60; that the bank through its officers, agents and attorneys, while the stock was being held under said writ, removed from said stock $200 worth which has never been accounted for; that, while the stock was in the custody of the sheriff under said writ of attachment, the bank wrongfully, unlawfully and wilfully permitted the sheriff to levy a tax distress warrant on a part of the same for $234.63, personal taxes due from the plaintiff to the county, the money to pay which plaintiff had given the said bank under its promise that it would pay said taxes. The evidence indisputably shows that the last item referred to had been given to the bank to pay the taxes upon certain real estate of the plaintiff, and that the same had all been paid by the bank and the surplus of $4 or $5 placed to plaintiff's credit upon his open account. The goods claimed to have been removed from the stock were not removed during the time the sheriff was in possession under the writ of attachment, but consist of an amount of less than $200, received from the sale of a portion of the goods by Powers & Hays, after they had

taken possession of the stock under their bill of sale. The item of $60 for rent is equally without merit, as the total time that the sheriff was in possession, under both the executions and writ of attachment, was only three days. During all of the rest of the time the possession of the store building was by Powers & Hays under the bill of sale which had been voluntarily given them by plaintiff. The item for the value of the stock taken was fully adjudicated and a full and complete recovery therefor had by plaintiff in the litigation above referred to, which resulted in the judgment against the sheriff, and which was fully paid.

This leaves the only item for consideration plaintiff's claim for the destruction of his business, which, as plaintiff states in his brief, is "the gist of the damage claimed in this action." We are unable to discover any ground upon which this claim can be sustained. The bank did not close or stop the running of plaintiff's business. That was effectually done on the previous day by the possession taken by the sheriff under his executions. In addition thereto, we think that the action of the sheriff in levying the executions and of the bank in suing out and levying its writ of attachment were all acquiesced in and ratified by the voluntary bill of sale given by plaintiff two days later to Powers & Hays for the very purpose of enabling them to dispose of the stock and settle the claims of the judgment and attachment creditors, and in consideration for which bill of sale the levies of the executions and attachments were all released. If the attachment had been issued "unlawfully, wilfully, wrongfully, and maliciously and without probable cause," and was based upon a false affidavit, plaintiff could have had those matters determined in that action, and, if his allegations are true, could have fixed the liability of the bank, and of defendant Rainbolt as surety upon the attachment bond. He did not see fit to pursue that course, but, instead, voluntarily sold and assigned all of his right, title and interest in the goods attached to the attorneys of the attaching

creditor for the benefit of the latter, and thus obtained the discharge of the attachment. We do not think such a course of procedure can be held to lay a foundation for an action for damages against the attaching creditor or upon the attachment bond for a wrongful levy of such attachment. The attachment was levied September 26, 1896. It was discharged, as the result of plaintiff's voluntary act, September 28, 1896. This action was not instituted until September 24, 1906. We are unwilling to give our approval to such a course of procedure. We do not find anything in the record to indicate that the bank was attempting to obtain any undue advantage of the plaintiff, but, on the contrary, it appears to have been his friend to the extent of standing by him for nearly a year after he had suffered judgments to go against him, and, when it resorted to attachment, as shown by the testimony of Mr. Bucholz, it did so in an attempt to aid rather than to further embarrass him.

It would serve no good purpose to review any of the other questions discussed in briefs of counsel. We have examined all of the assignments of error as to the rulings upon the pleadings and in the admission and exclusion of evidence, and find no prejudicial error in any of them. The court may have erred in its rulings as to the effect of the bankruptcy proceedings, but it is immaterial to discuss that point, for the reason that, in the conclusion reached, we have proceeded upon the theory (without actually deciding the point) that plaintiff was right in that contention, and that the bankruptcy proceedings did not divest him of his claim, if any he had, by reason of the suing out of the attachment by the bank. Under the undisputed evidence, there was no question of fact for the jury to determine; hence, the trial court did right in directing a verdict for the defendant.

The judgment of the district court is therefore

AFFIRMED.

BARNES, J., took no part in the decision.

LETTON, J., concurs in the conclusion.

MARY B. HOWELL, APPELLEE, V. ANNA K. BOWMAN, APPELLANT.

FILED MAY 23, 1911. No. 16,431.

1. Landlord and Tenant: EVIDENCE. Where in an action of forcible entry and detention the defense that a lease signed by defendant was obtained by duress is established, but it further appears that soon after signing such lease defendant told her attorney of the circumstances under which the same was signed, and continued for a period of seven months thereafter to pay rent monthly to the lessor named in such lease, without protest or any act of repudiation, *held* a ratification of the lease as made and sufficient to sustain a judgment establishing the relation of landlord and tenant between the parties thereto.

2. Appeal: FINDINGS. The findings of the trial court, in a law action, supported by competent evidence, will not be set aside simply because it does not comport with the conclusion which this court, as triers of fact, might have reached.

3. ———: ———. In order to justify a reversal of the findings of the court below, in a law action, on a question of fact, such findings must be shown to be clearly wrong.

4. Trial: REQUESTS FOR DIRECTED VERDICT: WAIVER. Where each party to a trial requests the court to direct a verdict in his favor, he waives the right to thereafter insist that any question of fact should have been submitted to the jury.

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

G. W. Shields, for appellant.

T. W. Blackburn, contra.

FAWCETT, J.

This is an action of forcible entry and detention commenced in justice court in Douglas county. Judgment was there entered for plaintiff, and defendant appealed to the district court, where trial was had to the court and a jury. When both sides had rested, plaintiff and defendant each moved for a directed verdict. The motion of

defendant was overruled and that of plaintiff sustained, and a verdict of guilty directed in favor of plaintiff. From a judgment entered upon such verdict, defendant appeals.

The controlling questions in this case are: First, did the relation of landlord and tenant exist between defendant and plaintiff or between defendant and Catherine E. Henneberry, from whom by mesne conveyances plaintiff derived title to the property in controversy? and, second, was defendant duly served with the statutory three days' notice to quit prior to the commencement of this action in justice court? The record shows that defendant's father, with his family, of which defendant was a member, entered into possession of the premises in 1867. Defendant's mother, father and brother all died there, the father in 1886 and the brother in 1890. Ever since the death of her brother defendant has resided there alone. A lease was introduced in evidence, dated August 16, 1905, signed by Catherine E. Henneberry, by Garvin Brothers, agents, and by defendant. Defendant testified that on the morning of that day one of the members of the firm of Garvin Brothers, James Allen, deputy United States marshal, and A. R. Hensel, a constable, came to her home; that they took hold of her furniture and said they were going to set it out in the street unless she signed that lease; that she could not communicate with her attorney, and did not know what to do; that they insisted upon her signing it, and she finally said: "I will sign this under protest." The blank space in the lease for designating the amount of rent to be paid thereunder is blank, but defendant testified that she paid $1 a month. The lease was for one month, from August 16, 1905, to September 16, 1905.

This lease is vigorously assailed by counsel for defendant at being without consideration and as having been "conceived in fraud, bad faith, brutality, and duress;" language which we think is fully justified by the circumstances attending its execution. Mr. Garvin and Mr. Allen were not put upon the stand to contradict the testimony of defendant. Constable Hensel was introduced as a witness,

and the only contradiction he gave was that nothing was said about duress. It appears therefore that these three able-bodied men, two of them well known officials, swooped down upon this lone woman on that morning, and coerced her into signing the lease in order, as she believed, to prevent having her furniture set out upon the street. If the establishing of the relation of landlord and tenant between defendant and Mrs. Henneberry depended alone upon the signing of the lease and the payment of one month's rent upon that day, we would have no hesitation in holding that neither Mrs. Henneberry nor any of her grantees obtained any rights thereunder; but defendant testified that, after the execution of this lease, she told her attorney about it, before the commencement of this suit. "Q. When did you tell him, near, about when? A. Oh, perhaps a month or more. Q. What did he say to you? Go on and pay the rent? A. I do not know what he did say. Q. You did not stop paying the rent after he told you? A. No. Q. You went right on? A. Yes, sir. Q. You continued to pay the rent without any protest further than what you have stated up to and including some time in April, 1906? A. I did not consider that it was necessary. Q. Answer the question, you did do that? A. Yes, sir." It appears therefore from her own testimony that about a month after she had been coerced into signing the lease she told her attorney about it, and yet she continued, thereafter, to pay the rent from month to month for about seven months longer, or about eight months in all, without repudiating the lease or ever again entering any protest. She was not acting under duress when she made these subsequent monthly payments of rent. This was clearly a ratification of the lease, and we see no escape from holding that the relation of landlord and tenant thereafter existed between defendant and Mrs. Henneberry and the latter's grantees.

Section 1022 of the code, relating to actions of forcible entry and detention, provides: "It shall be the duty of the party desiring to commence an action under this chap-

ter, to notify the adverse party to leave the premises for the possession of which the action is about to be brought, which notice shall be served at least three days before commencing the action, by leaving a written copy with the defendant, or at his usual place of abode if he cannot be found." The notice served in this case was dated November 8, and required defendant to vacate the premises in controversy within four days from the time such notice should be served upon her. A copy of the notice was introduced in evidence, with the indorsement thereon by constable Hensel that he served the notice November 9, 1907, by leaving a true copy of the same at the usual place of residence of defendant. Hensel was called as a witness, and the substance of his testimony on direct and cross-examination is that, when he went to defendant's residence to serve the notice, he rapped first on one door and then on another, and that, getting no response, he inquired at the place next door and at Hayden's warehouse across the street, and then went and put the notice under defendant's door. When plaintiff was introducing her evidence in rebuttal, Hensel was again placed upon the stand, and then testified that he went to defendant's residence twice that day, once in the morning and the second time in the afternoon, and was unable to obtain any response to his raps either time. He says, upon this last examination, that he served the notice in the afternoon, but of this we entertain some doubt. His testimony, when he was upon the stand the first time, indicates pretty clearly that the notice was put under the door at the time of his first visit, if indeed he made a second visit. His testimony the second time looks very much like an attempt to bolster up his testimony given in chief.

However that may be, this is a law action, and we have repeatedly held that we will not set aside a verdict or the findings of a trial court, unless such verdict or findings are clearly wrong, even though we might have found differently had we been sitting as the triers of fact. The trial court held that the notice in question was duly served, and we cannot say that such holding is clearly wrong.

It is urged in defendant's brief that, "if the proof of notice to quit in the manner provided by the law was not satisfactory, or was not such as to leave no other reasonable inference in any ordinary mind than that the notice was properly given, then the case should have been submitted to the jury on proper instructions, and the peremptory instruction for the plaintiff was error." This would be true but for the fact that, by the mutual motions of the parties for a directed verdict, all questions of fact involved in the case were withdrawn from the jury and submitted to the court for its determination. *Dorsey v. Wellman,* 85 Neb. 262; *Phenix Ins. Co. v. Kerr,* 129 Fed. 723; *Martin v. Harvey, ante,* p. 173.

Upon a consideration of the whole case, we reluctantly conclude that the judgment of the district court should be, and it is,

AFFIRMED.

LETTON, J., concurs in the conclusion.

MARY FITZGERALD, ADMINISTRATRIX, APPELLANT, V. UNION STOCK YARDS COMPANY, APPELLEE.

FILED MAY 23, 1911. No. 16,360.

1. Judgment: SATISFACTION: JOINT WRONGDOERS. Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can he had.

2. Torts: SETTLEMENT: JOINT TORT-FEASORS: RELEASE. If one of several joint wrongdoers makes full payment of damages caused by injury done, there can be no further recovery for the same injury.

3. ———: ———: ———: ———. If one of several joint wrongdoers makes settlement with the injured party and pays him damages which he agrees to receive and does receive as full compensation for all damages sustained, it will release all of the joint wrongdoers.

4. ———: ———: ———: ———. Settlement with one of several joint wrongdoers and payment of damages is not a defense to an

action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered. If the settlement is in writing, oral evidence is competent to show the intention of the parties thereto in an action against one not a party to the settlement; affixing a private seal to such writing is without effect.

5. **Trial:** DIRECTING VERDICT. If the evidence is substantially conflicting upon a material issue, it presents a question for the jury. Evidence in this case is found to be insufficient to justify the court in directing the verdict.

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

Smyth, Smith & Schall, for appellant.

Greene, Breckenridge & Matters, contra.

SEDGWICK, J.

Martin Fitzgerald, a young man about 23 years of age, was in the employ of the Chicago, Burlington & Quincy Railroad Company as a switchman in the yards at South Omaha. Because of a defect in one of the cars of the company, it was necessary to use a chain in coupling it with the tender of the engine, and Fitzgerald was directed by the foreman to go between the car and the tender for that purpose. While he was so employed, the defendant company drove a train of cars against the train on which he was working, which forced the car and locomotive together and instantly killed him. His mother, the plaintiff, as administratrix of his estate, brought this action against the defendant for damages caused by his death. The defendant denied that it was negligent, and alleged that this plaintiff and the father of the deceased had brought an action against the Chicago, Burlington & Quincy Railroad Company upon the same cause of action, and that the negligence of the defendant in that action was the cause of the injury complained of, and that the same parties also brought an action against the same railroad company as beneficiaries of the relief department of that company, and

that afterwards both of the said actions were settled, and that the railroad company paid the plaintiff $4,400 in full settlement of the damages caused by the death of the said Fitzgerald, and $2,200 in full settlement of the benefits to which they were entitled from the relief fund. Upon the conclusion of the evidence, the court instructed the jury to find a verdict for the defendant. The plaintiff has appealed.

The parties agree that there are three principal questions to be determined in the case: 1. Were the defendant and the railroad company jointly liable for the death of the deceased; that is, were they joint tort-feasors? 2. If they were joint tort-feasors, could the plaintiff settle with and release one of them without releasing the other? 3. If the plaintiff could settle with and release the railroad company from liability, and at the same time reserve its right of action against this defendant, is the testimony in the case sufficient to establish that it was the intention and agreement of the parties to settle with and release only the railroad company and reserve a right of action against this defendant? It was also contended by the defendant that in any event the evidence was not sufficient to show that this defendant was negligent, and that that negligence was the proximate cause of the injury complained of.

Upon the first question there is some controversy in the evidence, and we do not find it necessary to discuss this evidence in view of our conclusion upon the second proposition. If both parties are liable for the same injury, they are jointly and severally liable; that is, for the purposes of the case, they are joint tort-feasors. It is conceded in the pleading and briefs that the railroad company was liable. If this defendant was not guilty of negligence which was the proximate cause of the death of young Fitzgerald, then that of itself is a sufficient defense in this action.

If it is conceded that the railroad company and this defendant were joint tort-feasors, would the settlement with the railroad company operate as a release of this defend-

ant? While the action of Mr. and Mrs. Fitzgerald, as the parents of the deceased, was pending against the railroad company, they compromised with the railroad company by an agreement in writing, called a receipt and contract of settlement and release, as follows:

"Burlington Route. Feb., 1908. Audit Number, 253. Department Number F. B. T. 1468. Chicago, Burlington & Quincy Railroad Company, Lines West of the Missouri River. 2-29-08.

"To Mary Fitzgerald, as administratrix of the estate of Martin J. Fitzgerald, deceased, Edward A. Fitzgerald and Mary Fitzgerald, father and mother of said deceased. South Omaha, Nebraska. Paid Voucher. This is to certify that I, Mary Fitzgerald, as administratrix of the estate of Martin J. Fitzgerald, deceased, have this day received from the treasury of the Chicago, Burlington & Quincy Railroad Company, the sum of forty-four hundred ($4,400) dollars. And this is to certify that we, Edward A. Fitzgerald and Mary Fitzgerald, father and mother of said deceased, have this day received from the relief fund of the relief department of said company draft No. 30,984, for twenty-one hundred ($2,100) dollars, same being amount of death benefit due us as beneficiaries of said deceased. And in consideration of the above payments, we, Mary Fitzgerald, as such administratrix, and Edward A. Fitzgerald and Mary Fitzgerald, as such father and mother, hereby acknowledge full payment, settlement, release and satisfaction and discharge of all claims and demands of any nature whatsover, which we, or either of us, as such administratrix or as such parents, may have or claim to have either against the Chicago, Burlington & Quincy Railroad Company or its said relief department, or both of them, arising from, growing out of or to grow out of the death of Martin J. Fitzgerald aforesaid, from injuries inflicted upon his person by reason of his being struck, run over and crushed by switching train in yards at South Omaha, Nebraska, on or about October 15th, 1907. Member R. D. Draft No. 1187. Claim No. F. D.

50, Neb. Approved: B. F. Thomas. Approved: James E. Kelby. Approved: H. D. Foster, Asst. Auditor."

"Contract of Settlement and Release. Whereas, I have agreed upon a settlement of all claims against the Chicago, Burlington & Quincy Railway Company arising from the circumstances set out in the foregoing memorandum, which is made a part of this agreement, and in said settlement have included all damages sustained by me, those not yet ascertained or developed, if any there shall be, as well as those now known, and also have included and settled all other causes of action at this date existing in my behalf against said company, whether arising upon contract or tort, and whether like or unlike the demand specifically referred to above: Now, in consideration of the payment to me of forty-four hundred dollars ($4,400) hereby acknowledged and declared to be the full and only consideration moving to me, the receipt of which is hereby acknowledged, I do hereby release and forever discharge the Chicago, Burlington & Quincy R. R. Company, its lessors, lessees and controlled companies, and its and their officers, employees, relief department, successors and assigns, of and from all debts, suits, causes of action, claims and demands whatsoever, at law or in equity, which I now have, or to which I may hereafter become entitled on account of the circumstances above set out including damages not yet ascertained or developed, if any there shall be, as well as those now known, and also of and from all or any other causes or things to this date, whether like or unlike the premises, and whether arising in contract or in tort. In witness whereof I have hereunto set my hand and seal this 29th day of February, 1908. Read to the said Mary Fitzgerald, Admrx., etc., and Edward A. Fitzgerald, and subscribed by him in our presence, this 29th day of February 1908. Mary her X mark Fitzgerald, as administratrix of the estate of Martin J. Fitzgerald, deceased. Witness: Mary Fitzgerald. Edward A. Fitzgerald, Father. Mary her X mark Fitzgerald, Mother. Witness for Edward A.

Fitzgerald, and for mark of Mary Fitzgerald: C. J. Smith."

This court, so far as we have noticed, has not considered and determined the precise question involved. In *Wardell v. McConnell,* 25 Neb. 558, the syllabus is as follows: "The rule is that where the damages are uncertain, accord and satisfaction before judgment by one of several joint wrongdoers is satisfaction as to all; but the discharge of a party not shown to be a joint wrongdoer will not operate as a discharge of the other defendants." The point involved in the case and decided by the court is stated in the last paragraph of the syllabus. It is said in the opinion that "the testimony fails to show that Huber had ever sold intoxicating liquor to J. B. McConnell, the husband of the plaintiff in that action, and it is expressly proved that Mrs. McConnell had no facts in her possession at the time of bringing the action to justify her in joining Huber as defendant, and if the testimony before us is to be believed, a verdict must have been rendered in his favor.

The opinion cites *McReady v. Rogers,* 1 Neb. 124, in which it is stated: "Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had." In *Iddings v. Citizens State Bank,* 3 Neb. (Unof.) 750, *Wardell v. McConnell, supra,* is cited, and the point decided in that case is reaffirmed in these words: "The discharge of a party not shown to be a joint wrongdoer will not operate as a discharge of the other defendants." It must not be inferred therefore from these cases that this court has passed upon the question whether a settlement and release of one of several joint wrongdoers will necessarily amount to an accord and satisfaction of all damages suffered, and so discharge all of the parties liable therefor. In *Lovejoy v. Murray,* 70 U. S. 1, the following propositions are decided: A judgment not fully satisfied against one or more co-tresspassers is no bar to an action against one not joined in the first suit. Persons engaged in committing

the same trespass are joint and several trespassers, and not joint trespassers exclusively. Satisfaction accepted in full for injury done precludes plaintiff from second recovery for same damages, though he may have obtained two or more judgments for the same tort. This is the leading case in that court upon those propositions, and has been followed as such in subsequent cases in that court, and in the various state courts.

In the case at bar we have a complete settlement and release of one of the parties liable from all claims of damage arising from one injury caused, as we are now supposing, by the joint action of several parties. Whether this should operate as release of all the parties jointly liable is a question that has been much discussed by the courts in this country and in England, and upon which there have been conflicting opinions. In ancient times it was quite uniformly answered in the affirmative. Such releases were usually formal and executed under seal; and, if they recited that all the damages occasioned by the injury had been satisfied, they were held to be conclusive upon the parties executing them. The rule then was, as it has since universally been held to be, that a party was not entitled to more than one satisfaction for an injury done him. If the injury had been fully compensated, he had no further right of action, and the release executed under seal acknowledging full compensation for the injury could not be contradicted or explained. It would seem that, if the courts in later decisions had kept this principle in mind, some of the uncertainty of the law upon this question might have been avoided. If a settlement by one of several joint wrongdoers, in which he admitted that the damages caused by the wrong done amounted to a certain specified sum, was not conclusive against the other wrongdoer, it is a little difficult to understand by what reasoning it could be made conclusive in his favor. It would seem that the real question would be whether the party injured had in fact been fully compensated for his injury, and his admission that his injury was limited to a certain sum, which

admission was made for the purpose of obtaining a settlement with one of the parties who caused his injury, might under some circumstances have been considered open to explanation. When, however, he made such admission with due solemnity and under seal, it was in the earlier cases, at least, held to be conclusive against him. There is reason in holding that, if one of the joint wrongdoers acted for all and assumed to settle the whole matter and make full settlement of all claims of the injured party, such settlement might be binding upon all parties. We do not see upon principle why a part satisfaction and release of one wrongdoer should operate in favor of other wrongdoers. It is generally held that there is no right of contribution existing between wrongdoers, and the collection of part satisfaction from one is not an injury, but rather a benefit, to the others. It is not the policy of the law to encourage litigation, but rather to favor settlement. Several wrongdoers who are jointly and severally liable for the injury done may not agree as to their liability, nor as to the desirability of adjusting the matter. Some of them might be willing to compromise with the injured party by paying a just proportion of the whole damage done, and be unwilling or even unable to pay the whole damage. Some men are quite eager for litigation; others will do anything reasonable to avoid it. If some of the wrongdoers are willing to adjust the matter by paying their reasonable proportion of the damage done, and the injured party can accept such payment and still reserve his claim against the more stubborn ones, such a construction of the law would seem to facilitate settlement and tend to avoid litigation. This idea is stated and elaborated in *Louisville & Evansville Mail Co. v. Barnes' Adm'r,* 117 Ky. 860. See, also, *Bloss v. Plymale,* 3 W. Va. 393; *Robertson v. Trammell,* 37 Tex. Civ. App. 53, 83 S. W. 258; *O'Shea v. New York C. & St. L. R. Co.,* 105 Fed. 559; *Carey v. Bilby,* 129 Fed. 203; *Gilbert v. Finch,* 173 N. Y. 455, 61 L. R. A. 807; *Home Telephone Co. v. Fields,* 150 Ala. 306, 43 So. 711; *El Paso &*

S. W. R. Co. v. Darr, 93 S. W. (Tex. Civ. App.) 166; *City of Chicago v. Babcock,* 143 Ill. 358. In 24 Am. & Eng. Ency. Law (2d ed.) 307, the law is stated as follows: "But it is a well-settled rule that, where a release of one wrongdoer is not a technical release under seal, then the intention of the parties is to govern, and it becomes a question of fact for the court or jury whether or not what the releasor has received was received in full satisfaction of his wrong; and, if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrongdoers." Private seals do not affect the equity or legality of written instruments or contracts in this state. Comp. St. 1909, ch. 81, sec. 1. If this defendant was not a joint trespasser with the railroad company, it is conceded that the defense of settlement fails, and that, if defendant's negligence was the proximate cause of the injury, the court should have submitted the case to the jury with instruction to ascertain the amount of the plaintiff's damages, and, after allowing the amount that had been received thereon, find their verdict for the remainder.

If the defendant and the railroad company were joint tort-feasors, as we have assumed in this discussion, the question is: Has the plaintiff been fully recompensed for the injury done? If the plaintiff received this money from the railroad company as full compensation for the damages caused by the injury complained of, and agreed with the railroad company to so receive it, and the parties were jointly liable for the wrong done, it would seem that the authorities generally hold that she is bound by that agreement, and cannot now maintain this action against this defendant, even though this defendant did not directly nor indirectly take any part in the settlement or contribute anything towards the consideration therefor. It was held by this court in the cases cited above that, even where there had been an accord and satisfaction with one party for the injury done, and that party formally released, it would not operate as a defense for the party whose wrongful act caused the injury, unless the party released was also in

fact a joint wrongdoer. If this principle is conversely stated, an injured party who releases one of several joint wrongdoers from liability, for a consideration which he agrees to accept as full compensation for the injury done, thereby releases all who were jointly and severally liable therefor. This is in harmony with the authorities in general. This court considers itself committed to this rule.

The evidence is not such as to require the court to find as a matter of law that there was such an agreement. The rule that oral evidence is inadmissible to vary the terms of written instruments is generally applied only in suits between parties to the instrument. "It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others." 1 Greenleaf, Evidence (16th ed.) sec. 279. It will be seen that there is no such express provision in the receipt and contract of settlement. When these papers were presented to the plaintiff for her signature, the question was asked: "Does this release only the Burlington?" And it was answered by both the plaintiff's counsel and Mr. Thomas, who represented the railroad company, that it only released that company, and the papers were thereupon executed by this plaintiff. We do not think the court should so construe the transaction as matter of law. Under the circumstances disclosed in this record, the question was for the jury. The plaintiff can have but one satisfaction for the injury. She can only recover from this defendant, in any event, the amount of damages occasioned by the injury, less such payment as she has received thereon.

In this discussion we have also assumed that the defendant was negligent, and that its negligence was a proximate cause of the injury complained of, but this has been assumed only for the purpose of discussion. The evidence is conflicting as to the negligence of this defendant, and

whether such negligence, if any, was the proximate cause of the injury. This question, also, should be submitted to the jury for its determination.

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

REVERSED.

REESE, C. J., concurs in this conclusion.

IN RE ESTATE OF ACHSAH HOLLOWAY.

COE C. HOLLOWAY, APPELLEE, V. J. ARTHUR TILLSON, ADMINISTRATOR, APPELLANT.

FILED MAY 23, 1911. No. 16,438.

1. **Executors and Administrators:** CLAIMS: REFERENCE: STIPULATIONS: WAIVER. Upon appeal to the district court from an adjustment by the county court of a controversy in settling an estate involving many items of claim and counterclaim, the district court ordered formal pleadings filed. The parties stipulated that copies of the itemized statements filed by the respective parties in county court might be filed in lieu of such pleadings. The referee appointed by the district court found generally upon each item, stating the balance. The district court, upon motion, refused to set aside the report of the referee, and refused to recommit the case for special findings of the facts supporting specified items of the report. *Held*, That the parties had waived the right to object to the report on the ground that these findings of fact were insufficient and are not entitled to a reversal because of these rulings.

2. **Appeal:** FINDINGS OF REFEREE: PRESUMPTIONS. The rule that a court will not be presumed to have based its decision upon incompetent evidence when the record shows sufficient competent evidence to support it applies also to the findings of a referee in stating an account.

3. **Witnesses:** COMPETENCY: TRANSACTIONS WITH DECEDENT. When the representative of a deceased person is a party to an action, one having a direct legal interest in the controversy will not be allowed to testify to transactions with the deceased. This would

apply to identification of checks drawn by the witness and delivered to the deceased. If the witness is allowed to identify the checks without objection, and is fully cross-examined thereon, an objection to the introduction of the checks in evidence is properly overruled.

4. **Appeal:** REVIEW. Many questions asked of witnesses by appellant upon cross-examination were upon objection disallowed by the court. Also appellant specified in the brief many items of account that he claims are not supported by the evidence. Upon examination of the record, the evidence is found to be sufficient, and no prejudicial error is found in the rulings of the court thereon.

5. **Limitation of Actions:** ACCOUNTS. Where there is a running account between the parties consisting of unsettled items of debit and credit and the dealing between the parties was continuous, and not interrupted for a sufficient length of time for the running of the statute, such items of account are not barred by the statute of limitations.

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

J. Arthur Tillson and *Fred A. Nye,* for appellant.

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

SEDGWICK, J.

Coe C. Holloway, the claimant, filed his claim in the county court of Buffalo county against the estate of his mother, Achsah Holloway. The claim, as filed, consists of a large number of items and amounted to something over $14,000. The administrator of the estate filed objections to the claim and alleged a large number of items against the claimant and in favor of the estate. Commissioners were appointed by the county court, who investigated the respective claims and found that there was due the administrator from the claimant $9,224.53. From this finding and the order of the county court thereon, the claimant appealed to the district court. The district court referred the matter to the Honorable H. J. Whitmore to report findings of fact and conclusions of law.

The referee reported that there was due to the estate from the claimant $3,228.83 and interest at 7 per cent. from the 18th day of January, 1909, to the 1st day of May of that year, which was the date of the report. From the judgment upon this report the administrator has appealed to this court.

1. When the report of the referee was filed in the district court, the administrator filed a motion for further findings of fact by the referee, which was overruled, and this ruling is now assigned as error. By stipulation between the parties the dispute was confined to 13 items of credit claimed by Mr. Holloway. One of these items, as stated by the claimant, was "Dec. 22, 1888, $1,385.69, notes of Ira and Achsah Holloway." Ira Holloway, the father of the claimant, died some time before the death of the claimant's mother. The object of the motion for further findings of fact was to require the referee to find the facts in regard to this and other items. When the court ordered that the claimant file a petition and the administrator an answer, the claimant filed as his petition a mere duplicate of the statement of the items of debit and credit filed by him in the county court. The administrator thereupon filed as his answer a duplicate of his statement of items as filed in the county court. It was stipulated by the parties that the cause should be tried upon these informal statements, thus waiving a compliance on the part of the complainant with the order of the district court to file a formal petition. So far as we have observed, both parties proceeded in the trial as though formal pleadings had been filed. There is no doubt that the order of the district court requiring the claimant to file the petition was a proper and necessary order in this case. The facts should have been as fully pleaded as is required in an ordinary action on such an account. After the court had directed that formal issue be made up, the administrator waived this and consented to proceed to trial upon these informal statements of account. In his answer he added some allegations in regard to these items by way

of defense, and, if the referee had found for the administrator in regard to these items, he would have undoubtedly found whether the allegations of the answer in regard thereto were sustained by the evidence. When he found in favor of the claimant as to these items, his findings were as definite as the allegations upon which they were based. Without doubt, if the order of the court had been complied with, the administrator would have been in a better position to resist these claims, but, after the parties have elected to try the issues as they were presented, they ought not now to be allowed to complain of uncertainties which result from the pleadings to which they consented. What we have said in regard to this item applies also to the other items similarly tried.

2. The second contention of the administrator is that "the conclusions of law in the referee's report are contrary to law because not supported by the findings of fact found in said report." The brief quotes from the opinion of Judge Cooley in *Weirich v. Cook,* 39 Mich. 134, in which it is said: "His conclusions should have been based upon such a statement of facts as would have enabled us to see that they were legitimate; such a statement as would show why the defendant should be charged with the sum for which he advises judgment." This objection is substantially answered in what we have already said.

Ira Holloway, the claimant's father, owned a large part of the stock of the bank in Gibbon, of which the claimant was cashier and apparently the principal manager. Some of the items that the accounts presented related to business transactions of Ira Holloway. By his will he gave this bank stock and his interest in these accounts to his wife, Achsah Holloway, and the business of the bank and the management of this property by this claimant continued as it was before, without any change, except the substitution of the name of Achsah Holloway in the place of Ira Holloway upon the books. This continued for nearly 20 years after the death of Ira Holloway and until the death of Achsah Holloway. After this ad-

ministrator was appointed he took charge of the interest of Achsah Holloway and to some extent participated in the management of the business. He now seriously contends that the report of the referee should have been set aside because it contains no special findings in regard to the transfer of the interest of Ira Holloway to Achsah Holloway, but in this the report follows the statement of the claim, which by the consent of the parties was treated as a petition; and for the reasons already stated we think that the administrator is not now entitled to have the issues reframed and another trial ordered.

3. The third objection of the administrator relates to item No. 9, already referred to, which is: "Dec. 22, 1888, $1,385.69, notes of Ira and Achsah Holloway."

Ira and Achsah Holloway were residents of the state of Michigan. The estate of Achsah Holloway was probated in that state. A paper was offered in evidence which purported to be a copy from the records of the court in that state in which the probate proceedings were had. This was objected to as incompetent, and that no sufficient foundation was laid for receiving it in evidence. It was apparently not properly certified, and it seems that the objection was well taken, but this appears to be immaterial. The trial being before a referee, he will not be presumed to have based his decision upon incompetent evidence. There was other evidence, including the testimony of one of the employees of the bank, which, being uncontradicted, was sufficient to support the finding of the referee in regard to this item.

4. Certain checks drawn by the claimant in favor of Achsah Holloway were received in evidence over the objection of the adinistrator, and it is now objected that they were incompetent because they were identified solely by the evidence of the claimant himself, and it is claimed that he was incompetent, under section 329 of the code. The claimant was allowed to testify fully without objection to the making and delivery of the checks, and when the checks were offered in evidence, among many other objections, it is noted that the

witness was incompetent to identify the checks. We think, however, this objection came too late. After having received his evidence without a suggestion to the referee that he was disqualified, and without any attempt to strike his evidence from the record, the ground urged was not sufficient to require the referee to reject the checks.

5. The administrator complains that he was not permitted to cross-examine the claimant as to his salary as cashier in the Commercial Bank of Gibbon. There are several pages of questions in regard to this matter recited in the brief, but it does not clearly appear how answers to these questions would have assisted the referee in determining the matter before him.

Many pages of the brief are devoted to the discussion of the insufficiency of the evidence to prove certain other credits allowed the claimant. The bill of exceptions and record are very voluminous. We cannot enter into a detailed discussion of this evidence, nor of the arguments predicated thereon. It is sufficient to say that we do not find such a failure of evidence as to these items as to require us to reverse the findings of the referee and the judgment of the district court.

The administrator urges that some of these disputed items were barred by the statute of limitations. Where there are unsettled items of debit and credit in an account between parties, each succeeding item is applied upon the true balance. If the dealings between the parties are suspended for a sufficient length of time, the statute of limitations will run, but, if the transactions are continuous, the statute will not apply. The method of computing interest was favorable to the claimant, but this was in accordance with the stipulation of the parties.

The whole record is unnecessarily complicated and unsatisfactory; the pleadings are indefinite, and much of the evidence is irrelevant. We have not found any substantial error requiring a reversal of the judgment, and it is therefore

AFFIRMED.

M. D. TYLER, APPELLEE, v. MARY J. WINDER, APPELLANT.

FILED MAY 23, 1911. No. 16,447.

Husband and Wife: CONTRACTS OF MARRIED WOMEN: EMPLOYMENT OF ATTORNEY. A married woman who has no separate estate may employ an attorney to begin and prosecute or defend an action for divorce, and make a valid contract to compensate the attorney for his service in such action.

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

John W. Cooper, for appellant.

Mapes & Hazen and *Allen & Dowling, contra.*

SEDGWICK, J.

The defendant employed the plaintiff as an attorney at law to defend her in an action for divorce brought against her by her husband. The plaintiff brought this action to recover the value of his services rendered in that employment. The cause was tried in the district court for Madison county without a jury, and a judgment entered for the plaintiff. The defendant has appealed.

A motion was made in this court to dismiss the appeal, but, as we are satisfied that the judgment is right upon the merits, we prefer to place our decision upon that ground. It appears that when the divorce proceedings were begun this defendant had no property or estate in her own right. The defense is coverture. It is insisted that as the defendant had no property at the time of the employment she could not have incurred liability with reference to her separate property, trade and business, or upon the faith and credit thereof. The construction of the married woman's act of 1871 and amendments thereto has several times been before this court, but the precise question here involved has not perhaps been before considered. In the early case of *Webb v. Hoselton,* 4 Neb.

308, which was decided in 1876, it was determined that a note given by a married woman and secured by a mortgage on her separate estate was a valid obligation, and that case is followed in *Davis v. First Nat. Bank,* 5 Neb. 242, and *Gregory v. Hartley,* 6 Neb. 356, and many later cases. In *Grand Island Banking Co. v. Wright,* 53 Neb. 574, and *Kocher v. Cornell,* 59 Neb. 315, it was held that, when a married woman signs a note as surety, it must be made to appear that she did so intending to charge her separate estate. In the latter case the fifth and sixth paragraphs of the syllabus are: "The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract. A mere hope of succession to an estate is not property." In considering the enforcement of a general contract of surety, and in determining whether in making such a contract the intention was to bind the separate property of a married woman, these paragraphs of the syllabus may be considered appropriate. *Farmers Bank v. Boyd,* 67 Neb. 497; *Northwall Co. v. Osgood,* 80 Neb. 764, and cases there cited are decided upon similar principles. In *Northwall Co. v. Osgood, supra,* the defendant, a married woman, was sued upon a note which she signed at the request of her husband, and which was given in payment for a gasoline engine purchased by her husband, in which she had no interest. This court has frequently decided that in such cases, and in all cases where a married woman has signed as surety or in any way for the benefit of another, and not in her own business or for her own purposes, there is no presumption that she agreed thereby to bind her separate estate or property. In *Kocher v. Cornell, supra,* it is held that when a married woman signs a note as surety, and has no separate estate or property at the time of signing it will be presumed that she did not contract with reference to her property or business.

If she has rights to protect or enforce, and makes contracts reasonably appropriate to enforce or protect them, the case is entirely different. The cases cited do not de-

termine that choses in action are not property, nor that actions brought to establish rights in property should not bear their own expenses. We are not aware that this court has ever decided that a married woman may not employ an attorney to establish for her a right in property, and create a personal liability in so doing. Such questions are interesting, since the advance of civilization and changed conditions of society have produced so much legislation enlarging the rights and responsibilities of married women. This case, however, largely depends upon the provisions of the statute providing for the action in which the service was rendered. Section 12, ch. 25, Comp. St. 1909, is as follows: "In every suit brought, either for a divorce or for a separation, the court may in its discretion require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; and it may decree costs against either party, and award execution for the same; or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver." This is an exact duplicate of a section of the Michigan statutes. The statute has been construed by the court of that state in *Wolcott v. Patterson,* 100 Mich. 227, and other cases. The Michigan case cited was unlike the case at bar in one respect. The wife had a separate estate when she employed the attorney, but the reasoning of the court applies to the case we are considering. The court said: "We think the right to contract for such services is necessarily incident to and included in her right to bring suit." Shakespeare expressed a similar thought: "You take my life when you do take the means whereby I live." The statute gives her the right to bring an action for divorce in her own name, and provides that the costs may be adjudged against her. The court may under certain circumstances require the husband to pay all costs, including attorney's fees for both parties. If, however, the husband is worthless, and the wife has no property, the action is denied her, unless she is allowed the "means

whereby" she can maintain her suit. If she may bring an action to be released from a worthless husband, who has given her just cause, and she has the ability and energy to acquire means, why should she not be allowed to make such necessary contracts as she is confident she will be able to redeem? If the husband has property, and she is entitled to divorce and a share of that property, why should she not contract with reference to that property right? We agree with the Michigan court that "the right to contract for such services is necessarily incident to and included in her right to bring suit." There are many decisions which seem to hold a contrary doctrine. Among them are *Cook v. Walton*, 38 Ind. 228; *Wilson v. Burr*, 25 Wend. (N. Y.) 386; *McCabe v. Britton*, 79 Ind. 225; *Drais v. Hogan*, 50 Cal. 121; *Whipple v. Giles*, 55 N. H. 139, cited by defendant. Some of the authorities so holding are quite ancient and seem to be under the influence of the old common law rule Some are under statutes quite different from ours. In others which seem to be more nearly in point the reasoning is not as satisfactory as in the Michigan cases. They do not appear to us to be in harmony with the policy of our state as shown in its legislation.

We think the judgment of the district court is right, and it is

AFFIRMED.

FAWCETT, J., dissenting.

I do not think the clause in the section of statute quoted in the majority opinion, viz., "and it may decree costs against either party, and award execution for the same," should be construed as enlarging the power of a married woman to contract for the payment of an attorney's fee in a divorce suit, so as to make her personally liable upon such contract. If at the time of instituting the suit she owned a separate estate, I concede that she might make a contract specifically charging such estate, but I do not think she is competent to then, while still under the disabilities of coverture, and not possessed of any separate

estate, make a contract which would bind her personally and render after-acquired estate liable for the satisfaction of such contract; and that this would be true whether such acquired estate be by inheritance (*Kocher v. Cornell,* 59 Neb. 315) or from an allowance by the court of alimony in a divorce suit. At the time of employing counsel to defend such suit, she would still be under the disabilities of coverture, without separate estate of her own and the estate from which the alimony is to be paid vested in her husband. Moreover, section 12, ch. 25, Comp. St. 1909, quoted in the majority opinion, recognizes the liability of the husband for the expenses of the wife in either prosecuting or defending a divorce suit. I think this statute not only recognizes the duty on the part of the husband to pay these expenses incurred by the wife, but also recognizes the further fact that the estate which is then vested in the husband is one in which the wife has a certain though inchoate interest, and that it would be unjust to deprive her of a sufficient amount of such community property to enable her to litigate with him the question as to whether or not he has violated the marriage contract. While I concede that the authorities are conflicting upon this point, I think the reasoning of *Cook v. Walton,* 38 Ind. 228, and the other cases in harmony therewith, cited in the majority opinion, state the better rule and should be followed.

The limitations upon the powers of a married woman to contract are founded upon reason and a sound public policy; and I cannot conceive of any case where her rights should be more jealously safeguarded than in a divorce suit. In such a case she has (or thinks she has) been grievously wronged by her husband. She is without means to employ counsel to assist her in obtaining her rights. Her husband has the title to and possession of all of their community estate. She appeals to a lawyer for assistance. He is familiar with the statutes and knows that he can protect himself by obtaining an order from the court requiring the husband to pay him a reasonable

attorney's fee in such divorce suit, and I do not think he should be permitted to refrain from thus protecting himself and then seek to recover from the wife a portion of the moiety awarded to her by the court as alimony. I think this never should be permitted, unless it clearly appears in the decree of the court that the alimony awarded to the wife is intended to include the services of her attorney. The clause in the majority opinion, "If, however, the husband is worthless, and the wife has no property, the action is denied her, unless she is allowed the 'means whereby' she can maintain her suit," does not appeal to me for the reason that, to the honor of our profession be it said, there is probably not a gentleman in the profession who would not come to the relief of such a woman in her extremity.

It is a well-known fact that in the larger cities the procuring of divorces is an "industry" on the part of a certain class of lawyers. The majority opinion would leave the women who had been caught in their nets at the mercy of these divorce sharks, as they would invariably demand from their clients a portion of the pittance awarded as alimony, as an attorney's fee, in addition to what may have been previously allowed by the court "as costs." It is true that in such a case, if the victim should apply to the court in which the case had been heard, it would promptly make the attorney disgorge the excess; but very few of such unfortunate women would know that any such avenue of escape from the extortion of their attorneys was open to them.

REESE, C. J., concurs in dissent.

ELIZABETH BOSLEY, APPELLEE, V. CHARLES E. LAVERICK ET AL., APPELLANTS.

FILED MAY 23, 1911. No. 16,469.

Deeds: UNDUE INFLUENCE: EVIDENCE: SUFFICIENCY. The question presented in this case is solely one of fact, and the evidence is found to be sufficient to support the decree.

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

Heasty, Barnes & Rain, for appellants.

Perry, Lambe & Butler, contra.

SEDGWICK, J.

In August, 1907, this plaintiff, Elizabeth Bosley, conveyed to the defendant, Charles E. Laverick, by quitclaim deed, for the nominal consideration of one dollar, a quarter section of land in Furnas county. Mr. Laverick was acting as an intermediary, and as a part of the same transaction he, together with his wife, conveyed the same land to Emanuel A. Bosley, the plaintiff's husband. This conveyance was also a quitclaim deed and for the nominal consideration of one dollar. After the death of Emanuel A. Bosley, the plaintiff began this action against his heirs and the said Laverick in the district court for Furnas county to cancel said conveyances. The district court found generally in her favor and entered a judgment canceling the deeds. Some of the defendants made default; others have contested the suit, and have appealed to this court. The defendants in their brief say that two questions are presented: "First. Did the appellee on the 2d day of August, 1907, freely and voluntarily join in the execution of the deed whereby the premises in controversy were conveyed through a trustee to her husband? Second. Was the appellee through 'deceit, fraud, and misrepresentation induced to execute the deed and to believe that her

husband would be entitled to a life interest in the lands therein described, and no more, and that upon his death said lands would revert in fee to the heirs at law of the plaintiff?' "

The petition alleges that the plaintiff was married to Mr. Bosley in January, 1898; that she then had four children by a former husband, and that she had dower and homestead rights in a valuable farm of 160 acres in Furnas county and was the owner of personal property of the value of $2,100; that the farm in suit was purchased wholly with her money, the proceeds of her property; that Mr. Bosley at the time of their marriage had no property whatever; that, when the said deeds of the property in question were made, the plaintiff was old, infirm and ill, believed that she was in her last illness, and "wholly ignorant of business methods," and "by reason of said sickness * * * wholly incapacitated from properly attending to matters of business"; that she desired, in case of her death, that her husband should "have the use and control of the aforesaid described land after the death of the plaintiff during the lifetime of the said Emanuel Bosley, and no longer"; and that Mr. Bosley, knowing this, and taking advantage of her sickness and ignorance, procured her to execute the aforesaid deed, which was an absolute conveyance on its face. The petition is quite lengthy and contains other similar allegations that it is not necessary now to recite. The answer admits the marriage and the conveyance and other formal matters, and denies generally the other allegations of the petition. There is no allegation in the answer that Mr. Bosley at any time owned any property, or that he in any way contributed to the purchase of the property in question.

That the plaintiff was ill and confined to her bed at the time of the execution of the deed in question seems to be admitted, but it is contended that the evidence does not show that any special effort was made by the parties present to persuade the plaintiff to execute the deeds instead of a life lease. The evidence shows without contradiction

that the plaintiff at the time of her marriage was possessed of the property substantially as alleged, and that the land in question was purchased from the proceeds of this property. There is no attempt to allege or prove that Mr. Bosley furnished any of the money with which to buy this land. There was no motion for a new trial in the district court. We cannot therefore consider errors of law occurring at the trial. There was some incompetent evidence received. The plaintiff being the real party in interest and the adverse parties being the representatives of the deceased person, she was not qualified to testify to the transaction between herself and the deceased. If the objection to her testimony should not be considered now as waived, and her testimony upon those particular transactions is rejected, there is still ample evidence to show that the land in question was hers at the time of the execution of these deeds, and that she was not in a condition to realize that she was giving an absolute conveyance instead of a life lease of the land, and that Mr. Bosley and those who acted for him took advantage of this situation and so procured the conveyance which was wholly involuntary on her part. The allegations of the petition and the proof agree in this matter, and there is no ground for the criticism in that regard.

The decree of the district court is right, and is

AFFIRMED.

FAWCETT, J., not sitting.

LETTON and ROOT, JJ., concur in conclusion.