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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1913.

VOLUME XCIV.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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1914.

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

73312

JUSTICES.

MANOAH B. REESE, CHIEF JUSTICE.
JOHN B. BARNES, ASSOCIATE JUSTICE.
CHARLES B. LETTON, ASSOCIATE JUSTICE.
WILLIAM B. ROSE, ASSOCIATE JUSTICE.
JACOB FAWCETT, ASSOCIATE JUSTICE.
SAMUEL H. SEDGWICK, ASSOCIATE JUSTICE.
FRANCIS G. HAMER, ASSOCIATE JUSTICE.

OFFICERS.

GRANT G. MARTIN..... Attorney General
GEORGE W. AYRES..... Deputy Attorney General
FRANK E. EDGERTON.....Assistant Attorney General
HARRY C. LINDSAY.....Reporter and Clerk
HENRY P. STODDART.....Deputy Reporter
VICTOR SEYMOUR.....Deputy Clerk

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

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

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOL. XCIII.

BARTH, CHARLES F.
BEAULIEU, L. V.
BURGER, JOSEPH O.
BUSSE, HERBERT R.
BYRD, FRANK J.
CAMPBELL, HENRY H.
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COHN, MAX M.
DONOVAN, M. L.
HARRIS, SILAS A.
MCGUCKIN, JAMES T.
MAROWITZ, ARTHUR
PALMER, THOMAS P.
PORTER, JUSTIN E.
PUTNAM, G. P., JR.
QUIGLEY, JAMES C.
REARDON, NEAL DANIEL
RHOADES, HERBERT
SCANDRETT, B. W.
SHERWOOD, J. HARVEY, JR.
THUMMEL, GEORGE B.
WILSON, GEORGE AUGUSTUS
WINN, GEORGE H.

RULES OF THE SUPREME COURT.

In force February 1, 1914.

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

2. SUBMISSION OF CASES.—A case shall be regarded as regularly reached for submission at the expiration of the time hereinafter provided for the service and filing of briefs; provided, that if no briefs are filed on or before the day fixed by the clerk as rule day and no extension of time has been granted, the appeal will be dismissed on motion unless good reason is shown for the delay.

3. CONTINUANCES.—Cases upon the proposed call may be continued by order made at the next session of the court after such call is issued. The order may be made upon stipulation of the parties, or on motion and notice unless grounds for refusing the same are then presented. No oral argument will be allowed.

When placed upon the final call, cases will not be continued except on motion and for urgent necessity shown.

4. DEFAULTS.—Whenever a case is reached and the briefs of the party having the affirmative are not on file, the judgment will be affirmed or the proceedings dismissed, unless otherwise ordered on sufficient showing. When default has been made by the other party and there is due proof of service of process and the briefs of the party holding the affirmative are on file with proof of service thereof within the time provided by Rule 11, he may proceed *ex parte*. The hearing of no case shall be delayed by default of either party in serving or filing briefs. To avoid such result the case will be disposed of as if the delinquent

party's briefs had not been served and filed; provided that the court may under special circumstances and on suitable terms otherwise order.

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

6. ADVANCEMENT OF CASES.—Criminal cases will stand advanced for hearing without motion. The court will, on motion, which motion shall be submitted without argument, advance for hearing cases which have previously been regularly upon the docket of the court. The court will likewise advance cases within the original concurrent jurisdiction of this court, which have been prosecuted in the district court and brought to this court by appellate proceedings, and will also advance cases in which a case stated has been prepared and filed in accordance with Rule 14. The court may also in its discretion advance other cases if they involve questions of public interest; but this power will not be exercised except in cases of grave import and serious urgency; and may also advance cases where it is apparent that, if not advanced, the litigation may be fruitless.

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

8. MOTIONS.

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

b. *Form of.*—The notice herein provided for shall conform to the provisions of section 7726, Revised Statutes 1913, and shall be accompanied by a copy of the motion with copies of all affidavits which are to be used upon the hearing. It may be served by a bailiff of this court, or by any sheriff or constable in this state, or by any person; in the latter case, however, the return must be under oath. Fees for service of said notice shall be allowed and taxed as for the service of summons in proper cases.

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

d. *For Rehearing.*—All motions for rehearing must be printed and may be filed as of course at any time within forty days from the filing of the opinion or rendition of the judgment of the court in the case. Such motion must specify distinctly the grounds upon which it is based and include the brief in support thereof, which shall be prepared as nearly as possible in accordance with Rules 12 and 13. Fifteen copies must be filed with the clerk. In original cases where the error assigned is that the court erred as to the legal principles involved or in its application of the law to the facts, the foregoing provisions shall apply; but as to all other assignments the motion must be made as provided in section 7884, Revised Statutes 1913, and may be typewritten.

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

10. TRANSCRIPTS AND BILLS OF EXCEPTIONS.—The transcript shall contain the final judgment entered in the court below and in addition thereto only those parts of the record necessary to a determination of the case. If any objection is made to the giving or refusing to give any instruction they must all be copied in the transcript. If

no such objection is made they can all be omitted. The appellant shall cause the transcript to be neatly and securely bound, and to be paged at the foot, and the questions in the bill of exceptions to be numbered. He shall also cause marginal notes on each page to be placed on the transcript in their appropriate places, indicating the several pleadings in the case, the exhibits, if any, the rulings of the court, the verdict or special finding, if any. The appellant shall also note on the margin of the transcript all motions and rulings thereon, the instructions given and refused, and shall prepare an index referring to the initial page of each pleading, motion and other paper or ruling in the record, such index to form the first page of the transcript. The bill of exceptions shall be paged at the foot, and shall have an index forming the first page thereof, referring to the initial page of the direct, cross and re-examination of each witness, and of each deposition or other paper or exhibit. Where the evidence is set out by deposition or otherwise, the name of each witness, and whether the examination is direct, cross or redirect, shall be stated at the top or on the margin of each page. All depositions, exhibits or papers contained in the bill must, when practicable, be inserted immediately following the rulings of the court thereon.

11. BRIEFS.

a. *Time of Service.*—At the time of docketing each *civil* case the clerk of this court shall estimate the probable date on which the same will be reached for hearing, and thereupon fix and enter on the appearance docket the time, to be known as Rule Day, within which the plaintiff, appellant or relator shall serve his brief on the opposite party or his attorney of record, which Rule Day shall be not less than ninety days before the date of hearing so estimated by the clerk. Within sixty days after Rule Day or within sixty days after such service the opposite party shall serve his brief on the first party, who may reply thereto within ten days thereafter, at his own expense, except in case of cross-appeal, when costs shall be taxed as usual for the answer brief of cross-appellee.

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

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

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

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

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

12. BRIEFS—HOW PREPARED.

(1) *Appellant's Brief.*—The brief of appellant shall consist of the statement of the case and the propositions of law relied upon, with authorities supporting them.

The statement of the case shall consist of:

(*a*) The nature of the case.

(*b*) The issues.

(*c*) How the issues and case were decided.

(*d*) The errors relied upon for reversal, with a concise statement, in connection with each point presented, or

separately, as will best present the error relied upon, of the substance of so much of the record as is necessary to present each question to be determined, referring to the pages and paragraphs of the transcript and the page of the bill of exceptions and the number of the interrogatory.

If the insufficiency of the evidence to sustain the verdict or finding of fact or law is assigned, the statement shall contain a concise statement of the substance of the evidence bearing upon the point so presented, referring with particularity by question and page to the evidence in the record supporting the contention made. The statement will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall deny the correctness or accuracy of the statement, specifying with particularity the defects and inaccuracies therein, with citation of the page and paragraph of the transcript or page and question of the bill of exceptions, as the case may be, relied upon by him in support of his contentions in that regard. Following this statement the brief shall contain the propositions of law relied upon as necessarily involved in the decision of the case; each proposition must be numbered and separately stated, concisely and without argument or elaboration, and authorities relied upon as supporting them must be cited with each proposition, respectively.

Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any text-book referred to must be given in connection with the cited page or section thereof.

(2) *Appellee's Brief.*—The brief of appellee on the assignment of errors shall point out any omissions or inaccuracies in appellant's statement of the record, and shall contain a short and clear statement of the propositions by which counsel seek to meet the allegations of errors and sustain the judgment or decree, or by which such errors are obviated. Following this statement, the brief shall contain the points and authorities relied on, in like manner as required in the appellant's brief. The brief of appellee

on cross-errors shall be prepared in the manner required in the case of appellant's brief. The brief of appellant, in answer to the cross-assignment of errors, shall be prepared in the manner required of appellee in answer to the assignment of errors. Reply briefs shall be prepared in like manner to answer briefs.

(3) *Printed Argument.*—The brief of any party may be followed by an argument in support of such brief, which shall be distinct therefrom, but shall be bound with the same. The argument shall be confined to discussion and elaboration of the points contained in the brief.

13. BRIEFS—HOW PRINTED AND TAXED.

a. *How Printed.*—All briefs shall be printed on good book paper on pages eight inches wide and eleven inches long, small pica type, leaded lines; the printed matter to be four inches wide and seven inches long, with a margin of two inches on each side and end; but the type in which extracts are printed may be small pica solid or brevier leaded. The heading of each brief shall show the title of the case, the county from which the case was brought, the name of the trial judge, the names of counsel filing the brief and shall also indicate in whose behalf the brief is filed.

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

14. CASE STATED.—The parties may by agreement state the case to be presented to this court on appeal. The case stated shall in plain language briefly recite the facts upon

which the questions of law arise and also any substantial conflict in the evidence as to any fact involved, and separately state and number the rulings of the court complained of, with so much of the record as will fully show the law question involved in such ruling and the exceptions and contentions of the parties thereon. The case stated will in such case constitute the bill of exceptions, and must be allowed and certified by the judge who tried the case, and filed with the clerk pursuant to sections 7880 and 8194, Revised Statutes 1913. The case stated must be printed and bound with appellant's brief. A case so submitted will be advanced for hearing, if both parties desire.

15. SECURITY FOR COSTS.—In each case brought to this court the appellant, plaintiff in error, or relator, shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of $50 with one or more sureties, conditioned for the payment of the costs of this court, which bond must be approved by the clerk of this court. The obligation of the surety shall be complete, simply by indorsing the summons in error or notice of appeal, or by the execution of a formal bond for costs, and such surety shall be bound for the payment of all costs which may be adjudged against the appellant, or relator, whether either of them obtain judgment or not, and after final judgment this court, on motion of the appellee, or respondent, or any other person having a right to such costs, or any part thereof, after ten days' notice of such motion, may enter up judgment in the name of the appellee, or the respondent, or the legal representatives of either, against the surety for costs, his executors, or administrators for the amount of the costs adjudged against the appellant, or the relator, or so much thereof as may remain unpaid, and for accruing costs. Execution may be issued on such judgment, as in other cases, for the use and benefit of the persons entitled to such costs. But these provisions shall not apply in cases where a bond or undertaking has been filed in the court below, in accordance with the provisions of section 8189, Revised Statutes 1913, where such bond is conditioned to pay costs, but in such

cases the transcript filed must show the giving of such bond or undertaking, with the names of the sureties thereon. Besides the security for costs above required to be given when a case is docketed, the party docketing such case shall deposit with the clerk $10 to cover clerk's costs that may be made by such party in the case; and if the deposit shall at any time be exhausted by the party making the same, the clerk may from time to time require such party to deposit a further sum of $5. Upon the termination of a case any sum remaining from such deposit not applicable to the clerk's costs incurred by the party making the deposits shall be returned to him.

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

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

18. PRÆCIPE.

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

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

cross-appellant, and the names of all adverse parties as cross-appellees.

19. NOTICE OF APPEAL.—Upon the filing of said transcript and præcipe, where no notice of appeal has been filed in the district court within ninety days after the rendition of the judgment or decree, the clerk shall issue a notice of appeal, which shall designate as appellants the names of parties joining in the appeal, and as appellees the names of all other parties. It shall also designate the court from which the appeal is taken, the date of judgment appealed from, and separately state the names of the parties plaintiff and the parties defendant, respectively, in the district court. The notice shall be returnable within thirty days after it is issued, and shall be served upon the appellees named therein or their attorney or attorneys of record in the district court. The service shall be made by the sheriff of the county in which the parties or attorneys may be found, and as provided by law for the service of summons in civil actions in the district court. The issuing and service of the notice may be waived by writing, signed by the parties to be served, but neither such waiver nor the filing of notice of appeal in the district court will dispense with the filing of the præcipe.

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

RULES FOR ADMISSION OF ATTORNEYS.

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

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

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

an applicant that his preceptor is dead, or that for other satisfactory reasons his certificate cannot be obtained, there may be substituted therefor the certificate of any member in good standing of the bar of the county in which the applicant pursued his studies, and who may be personally cognizant of the facts.

4. OTHER PROOF OF CHARACTER AND QUALIFICATONS OF APPLICANT.—None of the facts required for qualifying an applicant for admission shall be conclusively established by the foregoing proof, but the applicant shall in his application give the names and addresses of at least three (3) persons, other than those whose certificates he presents, of whom inquiry can be made in regard to the applicant's character and other qualifications.

5. PAYMENT AND DISBURSEMENT OF FEES.—The applicant shall also, with his application, deposit with the clerk the sum of five ($5) dollars. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the Chief Justice, in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, $1.50; to each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding $5 a day. The secretary shall receive a salary of $50 per annum.

6. ADMISSION FROM ANOTHER STATE OR A TERRITORY.—Any practicing attorney in the courts of record of another state or a territory, having professional business in either the supreme or district courts of this state, may, on motion to such court, be admitted for the purpose of transacting such business, upon taking the required oath. Any such attorney having become a resident of this state, desiring to be admitted to practice generally in the courts of this state, must make his application as required by these rules and present proof by satisfactory certificate

that he is a licensed practitioner in a court of record of another state or a territory where the requirements for admission when he was admitted were equal to those now prescribed in this state, or, that he has practiced law five full years under license in any state or territory within ten years next preceding the date of his application.

7. REGISTRATION AT COMMENCEMENT OF STUDY: FORM: FAILURE TO REGISTER: CHANGE OF PRECEPTOR: FEE.—The clerk of this court shall keep a register, in which every person applying for admission upon examination as having studied in the office of a practicing attorney in this state must have registered at the beginning of his term of study, unless good cause, other than ignorance of this rule, satisfactory to the commission, be shown to the contrary. Such register shall disclose the name of the student, his residence, and the name and address of the attorney in whose office he is studying. The application for registration shall be in writing and may be formal or informal. In case of change of preceptor or removal from one office to another, such change must be notified to the clerk, who will note it on the register. The clerk may require a fee of fifty cents from every applicant registered.

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

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

10. REJECTION OF APPLICANT: FURTHER CERTIFICATE. If an applicant shall be rejected, he shall not again be admitted to an examination for one year from the time of such rejection, and until he shall file a certificate that he has studied law for one year since his rejection.

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

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1913.

FRANKLIN STATE BANK, APPELLANT, V. WILLIAM H. CHANEY ET AL., APPELLEES.

FILED JUNE 16, 1913. No. 17,121.

1. Note: CONSIDERATION: PAROL EVIDENCE. In an action between a bank, the original payee in a promissory note, and the makers, parol testimony may be received to establish the defense of no consideration and to show that the note was given merely for the convenience of the bank and as a memorandum of a collateral transaction.
2. Appeal: CONFLICTING EVIDENCE. The verdict of a jury based upon conflicting evidence will not be interfered with by this court if there is sufficient competent evidence to support the same.

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

W. C. Dorsey and *A. H. Byrum,* for appellant.

H. W. Short, E. U. Overman and *George W. Prather, contra.*

LETTON, J.

This action was brought to recover a balance of $532.50, with interest, upon a promissory note for $887.75, dated January 6, 1904, signed by defendants Chaney, Gettle and Hildreth. Verdict and judgment for defendants Chaney and Gettle. Plaintiff appeals.

The defendants Chaney and Gettle answered admitting

the execution of the note. They further alleged that defendant Hildreth was the president and practically the owner of the plaintiff bank and was in full charge of its business; that defendants, together with plaintiff and one Doher, had been interested as creditors in a certain brickyard owned by Fitz and Bruce and which was turned over to them; that Fitz and Bruce owed plaintiff $1,000, Gettle $500, Chaney $200, and Doher $200; that plaintiff agreed to operate the brickyard for the benefit of these creditors, paying the claims *pro rata* out of the proceeds of the yard; that to evidence the interest of the bank in the property, and for its convenience solely so that it might carry its interest in the yard as an item of loans and discounts rather than as an item of personal property, and for no other consideration, the note in question was signed by these defendants with their codefendant Hildreth, who was then acting for the plaintiff bank. It is further alleged that afterwards in 1904 it was agreed between the parties that the bank should take the ownership and control of the property without regard to the claims of these defendants, and should sell and dispose of the same to pay its own claim against Fitz and Bruce without accounting to these defendants, and that the surrender of the property and the waiver of their claims should be accepted as payment of any possible liability of defendants on the note.

The reply pleads that from about August 1, 1903, until January 6, 1904, when the note in suit was given, the brickyard was operated by the three defendants, Chaney, Gettle and Hildreth; that the bank advanced various sums of money to them at various times in this period for use in the business; that before the note was executed the bank prepared and submitted to defendants a written statement showing each and every item of the running account, and all debits and credits, and that the balance due the bank on the account was $887.75; that the defendants were afforded an opportunity to inspect and verify each item and make objections thereto, and that defendants executed and delivered the note in payment and settlement

of the stated account and are therefore estopped from setting up the defense of want of consideration. It is further alleged that no part of the indebtedness of Bruce and Fitz is included in the note sued upon. A motion was filed by plaintiff to require the defendants to elect whether they would rely on the defense that the note was a mere memorandum made for the convenience of the bank and without consideration, or upon the defense of settlement or release of liability by a subsequent agreement. This motion was overruled, and this ruling is assigned as error. It is said these defenses are plainly inconsistent, and it is argued that proof introduced to show that when the note was signed by the defendants they incurred no liability in signing it must necessarily disprove the allegation that afterwards they were released from liability by a subsequent agreement. We think these defenses are not so inconsistent that they cannot be pleaded in the same answer. Even if there were no actual liability upon the note for the reasons alleged, the fact that the plaintiff was in possession of a promissory note upon which the defendants' names appeared as makers showed that a liability apparently existed, and this apparent liability might be the moving cause for a subsequent agreement between the parties by which it was extinguished or removed. The test of inconsistency is whether the proof of one defense necessarily disproves the other. *Blodgett v. McMurtry*, 39 Neb. 210; *Nelson & Co. v. Brodhack*, 44 Mo. 596.

After both parties rested, plaintiff moved the court for an order striking from the record and instructing the jury to disregard all that part of the testimony of Chaney and Gettle to the effect that, at the time or just prior to the time the note was executed, they were assured by the plaintiff that they would never be called upon to pay the note, and that the same was and should be no liability against them, for the reason that parol testimony is inadmissible to contradict and vary the terms of a written instrument. This motion was sustained.

Plaintiff now contends that, because the court sustained

its motion to strike this testimony, there was no evidence left upon which this issue should have been submitted. It appears from the record that when the court came to submit the case to the jury, while it instructed them that they should disregard any testimony relative to statements made by the bank or its officers that the defendants were not to be liable upon the note, it further stated in the same instruction: "You may and should consider all the other evidence introduced touching the circumstances surrounding the signing and execution of the note in question, and all testimony of statements made by the parties at the time of the execution of the note which show the purpose for which the note sued on was given, and all other evidence introduced touching the consideration for the signing of said note by the defendants, if any, as defined in these instructions."

By the latter portion of this instruction the testimony as to what was said at the time the note was given with regard to the purpose for which the note was given was again submitted to the jury for its consideration. If the testimony was admissible in the first place, the defendants alone were prejudiced by it being stricken out, and that portion of this instruction which tells the jury to disregard the testimony of defendants in this respect would only be prejudicial to them, and not to plaintiff; so that the fundamental question presented is: Was this testimony proper to be considered by the jury? Plaintiff relies upon the first opinion in *First Nat. Bank v. Burney,* 90 Neb. 432; but the law laid down in this opinion was overruled upon a rehearing of that case (91 Neb. 269), and it was held that as between the parties such testimony may be received to explain the purpose for which the note was given and to show that it was a mere memorandum.

The controlling issue which was presented to the jury for its determination was whether the note was executed and delivered by the defendants to the bank in settlement of a stated account, or whether it was given in renewal of a $1,000 note, which was originally given merely as a con-

venience for the bank and without consideration. It is not practicable in the brief space of this opinion to detail the testimony upon either contention. The testimony with respect to the relations of the parties with each other and with Fitz and Bruce, and to the brickyard property up to the time of the execution of the $1,000 note, is not inharmonious, but as to what was said at that time, what the purpose was of that instrument, and what were the further transactions between the parties with reference to the operation of the brickyard, it is in almost irreconcilable conflict. The evidence of Mr. Hildreth, corroborated as it was by documentary evidence, would seem to be convincing that the note in suit was given in settlement of the money paid out by the bank for the defendants while they were operating the brickyard; but, as has been said, there is a decided conflict in the evidence on almost every material point, and we are unable to say that there is not sufficient evidence on behalf of the defense to support the verdict on the issue as to want of consideration. There is likewise a sharp conflict in the testimony with reference to a later settlement between the parties. Defendants testify that such was made upon a sufficient consideration, to wit, their release and cancelation of their respective claims against the brickyard, while the plaintiff testifies that no such release of the defendants from liability ever took place. There seems to be sufficient evidence on this issue also to justify its submission.

While we might have reached the conclusion that the defendants were liable if we had been the triers of fact, the settled rule is that we are not entitled to interfere with the verdict of a jury on conflicting evidence, unless it is manifestly wrong. The instructions, while not entirely consistent, submitted every question of fact in the case, and we do not feel authorized to set aside the verdict.

The judgment of the district court is

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

NEBRASKA TELEPHONE COMPANY, APPELLANT, V. CITY OF RED CLOUD, APPELLEE.

FILED JUNE 16, 1913. No. 17,127.

Municipal Corporations: LIABILITY FOR MATERIAL: PLEADING. Where a city receives and retains property for a purpose authorized by statute, and under a contract which it has the general power to make, but which is invalid for failure to follow some of the requirements of the statute, the fact that the petition, in an action to recover the reasonable value of the property, does not allege the existence of facts necessary to a valid contract, such as the prior making of an appropriation, the letting to the lowest bidder, etc., does not make the pleading vulnerable to a general demurrer.

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

Edgar M. Morsman, Jr., and *Bernard McNeny*, for appellant.

J. S. Gilham and *L. H. Blackledge, contra.*

LETTON, J.

The only question presented is whether the amended petition in this case states facts sufficient to constitute a cause of action. In substance, its allegations are that the city of Red Cloud in 1906 decided to erect a municipal electric light plant, and that on or before September, 1906, said city entered into a valid contract with plaintiff, whereby plaintiff agreed to furnish and install for the city certain poles of the kind and character mentioned in a certain memorandum, which was attached to and made a part of the amended petition; that the poles were necessary for the construction of the plant; that defendant agreed to pay plaintiff for the same the sum of $1,404.50; that plaintiff delivered the 500 poles, and the same were accepted by the defendant city and were used by it in the construction of the plant; that $1,404.50 was the reasonable mar-

ket value of the poles so delivered; that the city has paid to plaintiff on account of the purchase price the sum of $1,000, leaving a balance due and unpaid of $404.50; that as evidence of the balance due it delivered to plaintiff its warrant for $404.50, a copy of which is attached to the petition; that the warrant was duly presented for payment and payment refused; and that the city has refused to pay the balance due on the poles, though often requested so to do by plaintiff. A general demurer to this petition was sustained and the action dismissed.

Counsel for the city contend that the amended petition is insufficient to state a cause of action, because it fails to allege the appropriation of any sum of money for the purpose for which the contract was made; that it is also defective in that it fails to aver that the council advertised for bids, that plaintiff was the lowest bidder, and that the contract entered into was in conformity with the bid; that it fails to allege that the contract was entered into on behalf of the city by its mayor and council; and that each and all of these are necessary averments—citing *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775; *Tullock v. Webster County*, 46 Neb. 211; *City of Kearney v. Downing*, 59 Neb. 549; *De Wolf v. Village of Bennett*, 3 Neb. (Unof.) 470; *City of Plattsmouth v. Murphy*, 74 Neb. 749; *Murphy v. City of Plattsmouth*, 78 Neb. 163; and *School District No. 16 v. School District No. 9*, 12 Neb. 241.

While the writer would be inclined to take a different view upon the question of pleading from that taken in those cases cited which involve this point, and to hold that the presumption of regularity of official conduct applies, that the general allegations of the petition are sufficient *prima facie* to state a liability of the city on the contract, that the failure to perform any acts required by statute in order to make the contract a valid one, such as failure to make a prior appropriation or to advertise for bids, are matters of defense, which should not be anticipated, but which the adverse party should set forth in the answer, it

seems that this question has been foreclosed by the decisions holding that these matters must affirmatively appear in the petition. These decisions, however, apply purely to pleadings in actions founded solely on the contract. The petition before us, however, does not predicate the right to recover upon the contract alone, but asks for a recovery of the reasonable market value of property received and retained. In such a case, the later decisions of this court indicate that, even though the statutory requirements as to the making of a contract have not been carried out, if the city authorities are vested with the general authority to do the act for the performance of which the materials are supplied, and there are no elements of other than fair dealing shown, and the city elects to keep the property, there may still be a recovery for the reasonable value of the same.

By the act of 1889 (laws 1889, ch. 19, Comp. St. 1911, ch. 14, art. I, sec. 124) the city is given power to establish and maintain an electric lighting plant. The city council has power to establish the plant without submitting the question to a vote of the people. A levy of 5 mills may be made by the council every year for the purpose of establishing, extending and maintaining the plant. If this amount is insufficient, bonds may be issued for the purpose (sec. 125). The facts stated in the petition show that the city procured the poles from the plaintiff upon a promise to pay for the same; that it accepted them, used them in the construction of its plant, and still retains them, while refusing to pay either the reasonable value of the same or the contract price. While it is true that municipal corporations are governed by the provisions of their charters, and that in the absence of powers granted, either expressly or impliedly by the charter, they have no authority to contract, still, when a city is engaged in an enterprise authorized by its charter, and by virtue of its apparent authority to contract procures property which it uses in such enterprise and retains in its possession, it may become liable for the reasonable value of the same. *Rogers v. City of*

Omaha, 76 Neb. 187; *Cathers v. Moores,* 78 Neb. 13; *Rogers v. City of Omaha,* 80 Neb. 591; *Nebraska Bitulithic Co. v. City of Omaha,* 84 Neb. 375.

It is somewhat difficult to reconcile the cases in this and other courts, but the pivotal point under our former decisions seems to be whether the city had the general power to make such a contract. If it had no such power, its acts are *ultra vires* and void, and the rule of the cases cited by defendant applies with full force. If it had the power, but the manner of its exercise was irregular or defective, and the city accepts, makes no offer to return, and still retains property obtained by virtue of the irregular proceedings, it is bound, both morally and legally, to pay the reasonable value thereof, not under the void contract, but by way of compensation. 2 Dillon, Municipal Corporations (5th ed.) sec. 794. The principle has been fully discussed in former opinions, which are collected in *Miles v. Holt County,* 86 Neb. 238. See, also, note to *McCormick v. City of Niles,* 27 L. R. A. n. s. 1117 (81 Ohio St. 246).

We are of the opinion that the petition states a cause of action, and that the court erred in sustaining the demurrer and dismissing the case. The judgment of the district court is therefore.

REVERSED.

ROSE, J., dissents.

FAWCETT, J., not sitting.

FREDERICK B. ISKE, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED JUNE 16, 1913. No. 17,185.

1. **Railroads:** SURFACE WATERS: DIVERSION: NEGLIGENCE. When in the construction of a railroad it becomes necessary to cross a natural channel or waterway through which storm or surface

waters have been accustomed to flow, it is negligence upon the part of the company to construct its embankment in such a manner as to obstruct or dam the natural waterway and thereby divert the waters which may reasonably be expected to flow therein upon the lands of others.

2. ———: ———: ———: DAMAGES. "Damages are recoverable by a landowner against a railway company for negligently maintaining an insufficient culvert or drain in an embankment, whereby his lands are flooded, although damages may have been recovered by plaintiff or his grantor for the location of the road, because the damages then recoverable were to be estimated upon the theory that the road would be constructed and maintained in a reasonably proper and skilful manner." *Chicago, R. I. & P. R. Co. v. Ely*, 77 Neb. 809.

3. Waters: SURFACE WATERS: DIVERSION: CONTRIBUTORY NEGLIGENCE. A landowner is entitled to rely on the belief that an adjoining proprietor will refrain from wrongfully and negligently diverting flood waters upon his premises, and it is not his duty to anticipate such wrongful action by digging a ditch before floods come, or by deepening or cleaning out one already constructed.

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

E. M. Morsman, Jr., for appellant.

W. R. Patrick, contra.

LETTON, J.

Action to recover damages to plaintiff's crops, which the petition alleges were caused by the negligent obstruction of a natural drainage channel, whereby storm and surface waters were diverted from their natural course upon plaintiff's land. The answer was a denial of negligence, a denial that defendant diverted the waters contrary to their natural flow, and a claim that the damage to the land was included in the compensation paid for the right of way. The jury returned a verdict for the plaintiff, and from a judgment on the verdict defendant appeals.

Defendant relies for a reversal upon three main points argued in its brief. The first is that in charging the jury

the court erred by omitting all reference to the question of negligence, and by permitting the jury to find against defendant if they found certain facts to exist, irrespective of whether these facts in the opinion of the jury constituted negligence. In this connection it complains specially of instruction No. 6, given by the court. It is unnecessary to set this instruction forth at length, but, in substance, it told the jury that, if before the erection of the embankment by defendant the surface waters flowed across the defendant's right of way through a well-defined channel or course, then it was the duty of the defendant in the erection of the embankment to so construct it as to leave an opening "sufficient to afford an outlet for all waters that might reasonably be expected to flow through said channel or waterway," and, "if defendant failed to do so, it would be liable in damages for such injuries as were the direct and natural result of such failure."

Defendant's position is that the evidence shows that its track was considerably lower than the ground at the mouth of the draw or drainage channel, and that, since it could not construct a culvert at that point, it should have been left to the jury to say whether or not failure to do so was negligence. We cannot take this view. We have repeatedly held that, when in the construction of a railroad it becomes necessary to cross a natural channel or waterway through which storm or surface waters have been accustomed to flow, it is negligence upon the part of the company to construct its embankment in such a manner as to obstruct or dam the natural waterway and thereby divert the waters which may reasonably be expected to flow therein upon the lands of others. Defendant's railroad may be constructed without negligence so far as the operation of trains is concerned, and yet at the same time it may be negligently constructed so far as relates to the right of of adjoining proprietors upon whose lands such waters are diverted. The negligence in the latter case exists in failing to provide for the natural flow of the waters in their accustomed channel and their consequent diversion.

By other instructions the jury were told that the gist of the action was negligence in the closing of a natural channel and the diversion of the waters, and that before the plaintiff could recover it must appear that such overflow and the injury sustained thereby were directly and naturally the result of the negligent or wrongful act on the part of said defendant which is charged against it in the petition. The law relating to this subject has been so repeatedly declared that it seems almost unnecessary to cite authorities. *Fremont, E. & M. V. R. Co. v. Harlin,* 50 Neb. 698; *Chicago, R. I. & P. R. Co. v. Andreesen,* 62 Neb. 456; *Chicago, R. I. & P. R. Co. v. Shaw,* 63 Neb. 380; *Missouri P. R. Co. v. Hemingway,* 63 Neb. 610; *Roe v. Howard County,* 75 Neb. 448; *Chicago, R. I. & P. R. Co. v. Ely,* 77 Neb. 809; *Reed v. Chicago, B. & Q. R. Co.,* 86 Neb. 54.

Defendant also claims that, even under this theory of the law, appellant was not liable unless in constructing an embankment it caused the waters to flow in a direction contrary to the *natural* flow thereof—meaning the direction in which they flowed before the intervention of any act of man—and say in this connection that the construction of the line of the Chicago, Burlington & Quincy railroad diverted the waters prior to the building of defendant's road. It is shown, however, that this railroad has a sufficient culvert at the point where it crosses the ravine so that the waters flowed in their accustomed course. The evidence shows, also, that the defendant constructed an embankment and ditch on the west side of its track opposite the mouth of the ravine, extending for a distance of 40 or 60 rods, and that before this was built the water flowed in a southeasterly direction across the line of both railroads, but that afterwards all the waters coming from the ravine were directed in a northeasterly direction to the plaintiff's land. The evidence is clear, therefore, that these waters were diverted from their natural course.

It is also contended that defendant paid to the owner of the Iske farm at the time it acquired its right of way by condemnation the value of all future damages caused by a

non-negligent construction and maintenance of the railroad, and that this contention should have been submitted to the jury. It has been repeatedly decided by this court that for such damages as are claimed in this case the fact that condemnation money has been paid is no defense. When such proceedings are had, the damages are appraised upon the theory that the railroad company will provide the necessary outlet for waters flowing in such a ravine; and, if the company is negligent in that respect, the person damaged thereby may recover. *Missouri P. R. Co. v. Hemingway,* 63 Neb. 610; *Chicago, R. I. & P. R. Co. v. Andreesen,* 62 Neb. 456; *Chicago, B. & Q. R. Co. v. Mitchell,* 74 Neb. 563; *Chicago, R. I. & P. R. Co. v. Ely,* 77 Neb. 809; *Reed v. Chicago, B. & Q. R. Co.,* 86 Neb. 54.

It is next urged that the plaintiff was guilty of contributory negligence by reason of his failure to open or deepen a ditch upon his land which would carry off all the waters.

If the defendant by its wrongful act diverted water upon the plaintiff's premises, we know of no principle of law which made it his duty to anticipate such wrongful action by digging a ditch before floods came, or by deepening or cleaning out one already constructed. A landowner is entitled to rely on the belief that an adjoining proprietor will refrain from wrongfully and negligently diverting flood waters upon his premises.

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

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

KATE L. GLEESON, APPELLANT, V. WILLIAM J. GLEESON, APPELLEE.

FILED JUNE 16, 1913. No. 17,194.

Divorce: ADJUSTMENT OF PROPERTY RIGHTS. The decree in this case which finds the defendant entitled to a share of the property accumulated by the joint efforts of husband and wife during the existence of the marriage relation is sustained by the evidence.

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

C. S. Polk, for appellant.

Price & Abbott, contra.

LETTON, J.

This is an action for divorce on the ground of non-support and extreme cruelty. The defendant denied that he was guilty of the commission of the acts charged and of failure to support his wife, and by way of cross-petition alleged that during marriage a large amount of real and personal property had been accumulated by their joint efforts, which was held in the plaintiff's name, and that he was entitled to one-half of the same. He asked that if a divorce be granted he be declared the owner of one-half of the property. The court found that the plaintiff was entitled to a divorce, and also found that certain real estate in plaintiff's name was accumulated by the joint efforts of the parties during marriage. It adjudged that plaintiff should pay the defendant $1,000 for his equity therein and the title quieted in her when that was done. Plaintiff appeals.

It is unnecessary to detail the evidence. In 1898, at the time the parties were married, the plaintiff had been keeping a rooming house in Lincoln for some years; she continued to do so until a short time ago, when the business and furniture was sold and the proceeds, together with $2,200 which she inherited, were invested in other real estate, which is the property described in the defendant's answer. According to plaintiff's account of the joint affairs, the husband was a worthless loafer, a drunkard, and addicted to the use of opium. He would leave home without cause and be gone for periods of three to ten months, and while he was at home she performed most of the work in the rooming house without much assistance from him. She also testifies he took money from her a number of times

when he went away, usually in sums of about $100. Her testimony as to the failure of defendant to work does not seem to be corroborated to any extent. On the other hand, the defendant admits that he occasionally became intoxicated, and confesses that he left home on a few occasions, as testified to by the wife, but he introduces a material variation in the plaintiff's story by declaring that he was practically driven away by her. He testifies positively that while at home he did nearly all the work connected with the care of the rooming house, making beds, sweeping, scrubbing, varnishing woodwork and furniture, etc., and that when the new property was acquired he painted the rooms, worked in the yard, took care of those rooms that were rented, as in the other house, and did other work about the premises. His testimony as to his work in the rooming house is corroborated by several other witnesses.

It is impossible for this court to tell from the cold record which of these witnesses is telling the truth. Where a person is accused of being a drunkard and confirmed opium user, his personal appearance upon the witness-stand may often throw light upon the truth or falsity of the charge. The trial court had both parties before it, and is better qualified to determine the truth of their respective stories than this court. It evidently believed the defendant, in part at least, as to his share in the joint accumulation.

The new house was purchased for $7,400; there is a mortgage upon it for $1,600, leaving the equity of the plaintiff therein $5,800. Twenty-two hundred dollars of this was derived from her inheritance, so that $3,600 from the proceeds of the business had been invested in this property. There is also $500 from the profits of the rooming house invested in a farm in Wyoming. At the time the parties were married the wife's property was worth from $50 to $100, leaving about $4,000 net as their joint accumulations. We think the division of the property made by the district court is fair. No objections were made in the district court to the settlement of these prop-

erty rights, and hence none will be considered here. *Greene v. Greene*, 49 Neb. 546.

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

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JAMES W. MEDLIN, APPELLEE, V. WILLIAM L. HUFFMAN, APPELLANT.

FILED JUNE 16, 1913. No. 17,255.

Appeal: INSTRUCTIONS: HARMLESS ERROR. Where a statement of law contained in a portion of an instruction complained of as error relates to facts which the jury found did not exist, the alleged error is immaterial and will not be considered.

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

Charles W. Haller, for appellant.

Clement L. Waldron, contra.

LETTON, J.

Action to recover for damages and for money expended in repairs to a motor buggy left with the appellant for sale. The answer is a general denial. Plaintiff recovered, and defendant appeals.

Plaintiff bought the vehicle in June, 1908, paying $475 for it. After being used more or less, he brought it to defendant, who is a dealer in automobiles, about February, 1909, and left it with him at his place of business. There is a direct conflict in the testimony as to what arrangement was made when this was done; the plaintiff testifying that the agreement was that it was left with defendant for sale, defendant then claiming to have a customer, and that it was further agreed $200 of the purchase price should be

paid to plaintiff, and all money received above that amount should be retained by defendant for his services in selling the buggy. Plaintiff's wife corroborates this testimony, while defendant denied that any such conversation was had. His testimony is to the effect that he told plaintiff that he might leave the machine at his place of business, and that it would not cost him anything. Five witnesses testify that the buggy was in fair or good running order when it was left with the defendant, and an equal number testify to the contrary. A letter was introduced in evidence from the plaintiff to the manufacturers of the machine, introducing Mr. Huffman, complaining that the machine had never worked well, suggesting that they make the defective parts good, and concluding that Mr. Huffman "will explain the matter fully to you." Medlin testified that he wrote this letter at Huffman's request and under his direction. A number of witnesses testify to the value of the machine at the time Huffman received it, fixing the value from $250 to $300, while Mr. Huffman testified it was worth from $35 to $100. Other witnesses testify it was worth only $35 to $40 when received by Huffman. Mr. Huffman also denies knowing the contents of this letter until he received it in Chicago.

The trial court instructed the jury: "Should the proofs show the buggy was left for sale on commission, then the defendant owed an ordinary and reasonable degree of care during such custody. Should the proofs show a simple storage without charge therefor, then the defendant owed simply the duty of keeping with slight care and not wantonly injure. You are instructed that by the term 'slight care' is meant such degree of care as one ordinarily takes of his own property."

The appellant claims that the court erred in defining slight care in this instruction. Since the jury found that the buggy was left for sale on commission, this portion of the instruction, whether right or wrong, had no effect upon the verdict and could not be prejudicial error if erroneous.

The only other complaint made is that the court erred in

permitting one witness to testify as to the value of the vehicle without being properly qualified as to his knowledge of values. Since a number of other witnesses fix the value much higher than did this witness, and since the verdict was for much less than the value fixed by him, we do not think this affected defendant's substantial rights or constitutes reversible error.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CHARLES S. EASTON ET AL., APPELLEES, V. SNYDER-TRIMBLE COMPANY, APPELLANT.

FILED JUNE 16, 1913. No. 17,270.

1. **Witnesses:** CROSS-EXAMINATION. "The cross-examination of a witness should be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine the witness upon other matters, the party desiring such examination must make the witness his own, and call him as such." *Davis v. Neligh*, 7 Neb. 84.

2. **Contracts:** PAROL MODIFICATION: CONSIDERATION. "While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration." *Bowman v. Wright*, 65 Neb. 661.

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

De Bord, Fradenburg & Van Orsdel, for appellant.

C. J. Garlow and *Walter S. Stillman, contra.*

LETTON, J.

Plaintiffs seek to recover from defendant upon an alleged oral contract the price of 525 barrels of apples at $2.50 a barrel, which it is alleged were sold and delivered

to them under the contract. Defendant's answer denied the existence of an oral contract, but admitted the purchase of 1,600 barrels of apples by a written contract under which 524 barrels had been delivered and accepted. It also, by way of counterclaim, alleged that defendant had purchased 1,600 barrels of apples; that the apples delivered were of the value of $1,310; that, on account of the failure of plaintiffs to deliver the apples purchased according to contract, the defendant lost the difference between the contract price and the market value of the apples. It also alleged that the plaintiffs were indebted for the expenses and wages of the men furnished by it at the plaintiffs' request in the sum of $88.90. It prays judgment for the difference between the amount due the plaintiffs and its loss of profits, and expenses amounting to $582.65. By reply the plaintiffs admitted the execution of the written contract, but alleged that it was afterwards orally waived by the parties. Plaintiffs had judgment, and defendant appeals.

The defendant is a wholesale fruit merchant in Omaha. The plaintiffs were engaged in 1909 in buying apples from the owners of orchards, picking and sorting the same, and selling them to dealers. On September 18, 1909, plaintiffs, by Mr. Easton, entered into a written contract with the defendant to sell it 1,600 barrels of apples, "800 barrels hand-picked Jonathans, 800 barrels Ben Davis, Winesaps and Genetons, to be barreled and loaded on board cars at Bellwood to be shipped to Omaha, bill of lading attached." On October 4, 1909, plaintiffs shipped a car-load of Jonathan apples under this contract. Easton sent the bill of lading to defendant by mail, and in the letter inclosing the same intimated plaintiffs would be unable to furnish the full amount of Jonathans, saying also that he "would be able to fill the whole contract with other varieties * * * and I may be able to send you in another car of Jonathans." Some doubt was also expressed as to the car shipped coming up to the standard, and he requested to be notified if they were not accepted. The car was received in Omaha,

October 9, 1909, but the apples were rejected by the defendant as not coming up to contract grade. Easton and Trimble had a conversation over the telephone with regard to this car, and at Easton's request Trimble released it and it was billed out by Easton to Illinois. Easton testifies that in this conversation he told Trimble that he had better come to Bellwood and see further about the shipment of apples before any more were shipped; that Trimble went to Bellwood the next day, October 9, and went with him through the orchard where the apples were being picked; that that evening Easton accompanied Trimble to Columbus on the train, and that while on the way Easton objected to shipping any more apples; that Trimble agreed that plaintiffs need not ship any more, but said, "I would like to have the apples in this orchard. * * * I am buying apples 25 cents per bushel cheaper in Omaha today than I am paying you for these, but these being an extra quality of apples why I will let the price remain and take the apples from this orchard here;" that it was further agreed that Trimble was to furnish a man at $3 a day to oversee the packing of the apples, and that the apples were to be paid for as shipped. He testifies further that on Monday, October 11, he went to Illinois, and returned on the evening of October 17, when he found that Trimble and two of his employees were at Bellwood packing and shipping apples.

On the other hand, Trimble, while admitting he had a conversation with Easton on the train, says it was after the apples were shipped, and positively denies any modification, waiver or abandonment of the contract in this conversation. He says that Easton then said something about thinking he would not be able to fill the contract, but that he told him "the contract was for so many apples, and that if he didn't have them he could buy them and furnish them to the Snyder-Trimble Company."

There is a good deal of inconsistency in the testimony as to the dates of the visits of Trimble and Easton to the orchard, and as to the time of the conversations on the train, whether before or after the apples were picked, but

these matters are not essential to the consideration of the points presented for review.

The plaintiffs' right to recover in this case depends upon whether the provisions of the written contract, while still executory, were superseded and set aside by mutual agreement and an oral contract entered into for the sale of apples in a specific orchard. If the written contract was not thus set aside, then the rights and liabilities of the parties must be measured by its terms.

The defendant complains that the court erred in refusing to allow it to show on cross-examination of Easton that Mr. Garlow was authorized to conduct a correspondence on behalf of Easton & Bennett with Snyder & Trimble and their attorneys, and in excluding this correspondence and testimony explanatory thereof. After Easton had testified to having received a letter from defendant dated October 28, 1909, stating defendant was deferring payment on the apples shipped until they heard from Easton & Bennett regarding the delivery of the remainder bought under the contract, a question on cross-examination as to his knowledge that his counsel, Mr. Garlow, was carrying on a correspondence with defendant with regard to the apples was excluded on the objection that it was improper cross-examination and its purpose was to compel the divulgence of a privileged communication between attorney and client. This was not proper cross-examination, having no relation to facts brought out in chief. An offer to prove Garlow's authority was also excluded. Mr. Garlow was called as a witness by the defendant. A letter was shown to him which was written by him to the Snyder-Trimble Company on November 1, 1909. The witness testified that he was the attorney for plaintiffs in relation to the controversy with Snyder-Trimble Company, that he had seen a copy of the written contract, dated September 18, 1909, at the time he wrote the letter. The letter is as follows: "Nov. 1, 1909. Messrs. Snyder-Trimble Co., Omaha, Nebraska. Dear Sirs: Messrs. Easton & Bennett of Cambridge, Nebraska, have placed in my hands a claim against

you for adjustment of 525 barrels of apples at $2.50, making $1,312.50. I also have copy of contract and statement of the facts regarding the deal. I am advised that you are long in default in payment so please remit to me at once, and oblige. Yours truly, C. J. Garlow." Garlow was then asked whether, in writing this letter of November 1, he therein referred to the written contract of September 18. The plaintiffs objected to this, and the objection was sustained. This letter was offered in evidence, but it was also objected "that it divulges a confidential relation existing between client and counsel, * * * for the further reason that any communications had between counsel regarding any matter in dispute cannot be binding upon the clients, and is improper and incompetent." The objection was sustained. The witness was then asked whether he received an answer from Snyder-Trimble Company, or any one representing them, to the letter of November 1. The witness was then shown a series of letters from him to Baldrige, De Bord & Fradenburg, defendant's attorneys, and letters from them in reply in relation to the controversy, and he was then asked to identify the same; but, upon objections, he was not required to answer, and the letters were excluded. If the letters had been written by the plaintiffs themselves, they were probably admissible as tending to show an attitude somewhat inconsistent with the hypothesis of the apples having been sold under an oral contract for the contents of one orchard, but the question of admissibility of the letters depends upon their materiality and upon how far the statement or declarations of an agent for the collection of money with respect to the past transaction out of which the liability is claimed to have arisen are binding upon his principals.

In *Saunders v. McCarthy,* 8 Allen (Mass.) 42, the attorney for the plaintiff made certain statements as to the facts in the case against his client's interest. This evidence was held properly excluded, the court saying: "The admissions in this case were mere matters of conversation, and, though they related to the facts in controversy, they

cannot be received in evidence against the plaintiff. The attorney was not the agent of his client to make such admissions. 1 Greenleaf, Evidence (16th ed.), sec. 186. If they had been in writing they would not have been admissible." This is the general rule. *Underwood v. Hart,* 23 Vt. 120, 129; Jones, Evidence (2d ed.) sec. 255; *People v. Vernon,* 35 Cal. 49, 95 Am. Dec. 49.

The contents of the first letter are not so inconsistent with the claim of plaintiffs as to make it material to the controversy. The statement, "I also have copy of contract," is qualified by the further statement, "and statements of the facts regarding the deal." If the written contract alone was the basis of the claim, there was no necessity for any "statements of the facts regarding the deal." The language used is consistent with the idea that the written contract originated and the oral contract terminated the transaction between the parties. It might have been as well to have allowed the letter to go to the jury, but we cannot say its exclusion was prejudicially erroneous. The other letters excluded were between the attorneys for the respective parties, and were in part negotiations for a settlement. We think they were also properly excluded.

It is next argued that, there being no consideration for the abrogation of the written contract, it is still in full force and effect. In *Bowman v. Wright,* 65 Neb. 661, we held: "While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration." We adhere to this view.

While it is not improbable that the jury reached the wrong conclusion on the facts, there is enough evidence to uphold the verdict, and the judgment of the district court must be, and is, affirmed. Other points are presented, but we find no error which we consider affected the substantial rights of the defendant.

The judgment of the district court is AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STANSBERRY LUMBER COMPANY, APPELLANT, V. SCHOOL DISTRICT OF CITY OF MCCOOK ET AL., APPELLEES.

FILED JUNE 16, 1913. No. 17,281.

Assignments: PRIORITY. Where a portion of a fund in the hands of a school district due to a building contractor was assigned by the contractor to one who had furnished material for the building, and the school board was immediately notified of the assignment, the facts that the signed order was not left with the school board, but an unsigned copy thereof, until several months afterward, when, the original assignment being lost, a new assignment was executed and filed, and that in the meantime another assignment of the same fund was made to another creditor and filed with the board, did not affect the rights of the first assignee.

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

Cordeal & McCarl, for appellant.

Lambe & Butler, contra.

LETTON, J.

One Liberty, a building contractor, built a schoolhouse for the city of McCook under contract. Among those who furnished material for the building were the assignors of the plaintiff and defendant McCook Brick Company. At the time this action was begun there was $1,013.70 in the school district treasury to the credit of Liberty. The plaintiff claimed this amount by reason of an assignment dated October 23, 1907, made by Liberty, and of which notice was given to the school district next day. The defendant claimed $779 out of the fund by virtue of an assignment from Liberty alleged to have been made on July 30, 1907, and of which notice was immediately given to the school district. The right of the plaintiff to the fund is clear, unless there had been a prior assignment of the same to defendant. From a decree holding that defendant had the prior right to the fund, plaintiff appeals.

The facts are a little peculiar. Mr. McAdams, the secretary of the McCook Brick Company, testified that on July 30, 1907, he procured from his attorney an original and one copy of a form of assignment; that Liberty signed and delivered to him the original order; that there was to be a meeting of the school board that evening or next morning, which Liberty was to attend, but at which McAdams could not be present; that after the order was signed he handed it back to Liberty, and asked him to give it to the board; that a few days after the meeting he spoke to Mr. Barnes, secretary of the school board, who told him the order had been handed to him by Mr. Barnett, a member of the school board, and had been presented, but no action taken on it, and that later Barnett gave him the same information. The record of the proceedings of the school board was introduced, which shows, under date of July 30, 1907: "Order of McCook Brick Company brought up and discussed, but laid over till a future meeting of a full board." About two months afterwards Barnes told him that the order was missing, and he procured a new one on November 20, 1907, which he filed with the board. About a week before the trial Barnes told him for the first time that the first order was in blank, and was not signed by Liberty. After proving a search, the witness testified to the contents of the first order or assignment, which was in the usual form. Mr. Barnes testified that he was handed a typewritten order, such as Mr. McAdams describes, by Mr. Barnett at the meeting July 30, 1907, but that the order was in blank, never having been signed; that a long time afterward he gave this blank to Mr. Wolfe. He also says that Liberty was present at the meeting on July 30, and he is unable to say that Liberty did not mention the fact that he had given the order. He also admits that it was only a few days before he received the order of November 20 that he told Mr. McAdams that the school board had no signed order in its possession. Mr. Barnett contradicts both Barnes and McAdams, and denies ever seeing or handling a paper of this kind. The evidence of Liberty

is not in the record, the trial court refusing to allow an adjournment to procure his testimony, due diligence not having been shown.

Plaintiff's first contention is that, since McAdams by returning the order to Liberty made him the agent of the brick company to deliver the same to the school board, if Liberty destroyed the order and did not present it, there was then no order in existence, and the brick company acquired no rights superior to those of a subsequent assignee. When Liberty signed and delivered the order to Mr. McAdams, he thereby conveyed all his interest in the fund to the brick company. It could not lose the right thereby acquired, unless by some subsequent act of omission or commission on its part. Even though the order itself were destroyed by Liberty and only a carbon copy of the same delivered to the school board without signature, the fact that the board had notice and knowledge of the existence of the assignment before it changed its position by paying out any money upon the order, and before being notified of the existence of another and subsequent assignment, rendered its liability complete, and the assignee might, under section 30 of the code, have maintained an action against it in its own name to recover the fund.

Plaintiff also contends there is no evidence that the assignment executed in July was brought to the notice of the school board. Mr. Barnes testifies that the entry in the record of its proceedings referred to the blank order which had been handed to him by Barnett; but the evidence is positive that, not only Barnes, but other members of the school board, knew that McAdams claimed to have an order signed by Liberty for this fund. Whether the paper which was left with the board was the signed order or merely a copy of it is not so very material when it is considered that there is nothing to contradict the testimony that the order was actually signed, and that the board had knowledge of the claimed assignment and retained the fund in its possession.

Under the facts in the case, we find it unnecessary to discuss the legal question as to whether a subsequent assignee, by giving the first notice of assignment to the holder of the fund, can thereby gain priority over a prior assignee. The evidence is sufficient to sustain the district court in holding that the brick company had the first assignment and the plaintiff the second in point of time.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

OLIVER RICHARDSON, APPELLANT, V. FRONTIER COUNTY ET AL., APPELLEES.

FILED JUNE 16, 1913. No. 17,308.

1. **Highways: ESTABLISHMENT: NOTICE: APPEARANCE.** One who appears at the hearing on the petition for the establishment of a public road and takes part in the proceedings cannot after complain that he did not receive notice in the legal manner.
2. **———: LOCATION: VARIATIONS.** It is not essential that a public road be laid out upon the exact line prayed for in the petition, and slight variations in order to procure a more practicable route are permissible.

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

L. H. Cheney and *Lambe & Butler,* for appellant.

W. S. Morlan, H. W. Berry, W. H. Latham, J. A. Williams and *J. L. White, contra.*

LETTON, J.

This action was brought to restrain the defendants from opening a public road across the land of plaintiff, from trespassing upon it, and from tearing down his fences. The district court found for defendants, and dismissed the plaintiff's action.

The pleadings are exceedingly voluminous, but plaintiff's complaint seems to be that the notice of the proposed establishment of the road petitioned for was insufficient; that there was a departure from the route petitioned for in the report of the commissioner, and a still further departure by the surveyor; that no provision was made to ascertain and compensate the plaintiff's damages; that he was deceived into appearing at the hearing upon the petition by the defendants; that the county officers accepted another road dedicated by the plaintiff in lieu of the road petitioned for, and are now estopped from opening a second road across his premises; that at the point where the overseer is threatening to tear down the fences there is no public highway, and that there is no money in the road funds wherewith to pay his damages.

The defendants plead the legality of all the proceedings. It is further alleged that the plaintiff consented to the changes and departures from the line described in the petition; that due notice for the filing of claims for damages was given; that plaintiff with knowledge of all the facts presented a claim for damages, and was allowed $200; that he afterwards appealed from this allowance, and dismissed the appeal; that he assisted in establishing the route of said road, and is now estopped from claiming any irregularities.

It is unnecessary to consider whether the plaintiff had legal notice of the proceedings for the establishment of the road. He appeared at the time and place set for the hearing, was represented by an attorney, and took an active part in the proceedings. The claim that he was induced to do so by the artifice of the county officers is not based upon the evidence. The original petition was signed by a large number of landowners nearby who were desirous for the location of the road. A commissioner to view the route was duly appointed. On June 21, 1909, he reported in favor of the establishment of the road, varying slightly from the line prayed for in the petition, but substantially in the same general course and with the same starting point

and termination. He also filed a plat in conformity with this report. The road was established in accordance therewith, and the notice to remove fences given by the road overseer to the plaintiff describes the road as thus located. The mere fact that the line of road was not in exact accordance with the line prayed for is immaterial. It was the duty of the viewer to lay out the most practicable route within reasonable limits, and apparently this was done.

On September 6, 1909, the date fixed for the hearing upon the petition, the plaintiff filed a proposition to grant the right of way for a road across his land at another point, in consideration of $187 damages. After considering the proposition of the plaintiff, the claims for damages and the evidence, the board found in favor of the establishment of the road as prayed for in the petition and recommended by the viewer. The appraisers appointed to ascertain and fix the amount of damages reported in favor of allowing the plaintiff $187. The county commissioners, however, allowed the plaintiff $200 as damages. While it is shown the matter of crossing plaintiff's land by another course was considered, there is no proof that the county authorities accepted another road dedicated by the plaintiff in lieu of the road petitioned for.

It is also complained that since the road was established the county surveyor has staked it out upon a different line from the proper one, and that the road overseer is threatening to tear down plaintiff's fences on the line laid out by the surveyor. If the road overseer should attempt to tear down the plaintiff's fences at a point where the road is not established he would be entitled to his proper remedy, but we find no proof of such facts.

The contention that no provision has been made for money to pay plaintiff's claim for damages is unsupported by the evidence. The county treasurer testifies he has the money in his hands for that purpose, and has been ordered by the county board to retain it for the payment of the warrants issued for plaintiff's benefit. It is immaterial whether the money was on hand when the road was located,

though it is very material whether it is on hand or provided for before the road is opened.

We can see no merit in the plaintiff's appeal, and the judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

H. C. BUSBOOM, APPELLEE, V. CONRAD SCHMIDT ET AL., APPELLANTS.

FILED JUNE 16, 1913. No. 16,914.

1. **Pleading**: DEMURRER: ADMISSIONS. A demurrer to a pleading admits only such facts as are well pleaded, mere conclusions of the pleader not being admitted.
2. **Appeal**: REVIEW. The objection that an unverified pleading, which has been superseded by an amended pleading, is inadmissible in evidence against the pleader, to be available on review, should be made in the trial court.
3. ———: INSTRUCTIONS: HARMLESS ERROR. In a suit on a note, an instruction withdrawing from the jury the defense of want of consideration *held* not erroneous, where defendants by their own testimony proved a valid consideration.

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

Landis & Schick and *E. J. Clements,* for appellants.

Norval Bros., contra.

ROSE, J.

This is an action on a promissory note for $900, dated May 1, 1905, and payable May 1, 1906. The payee, H. C. Busboom, is plaintiff, and the makers, Conrad Schmidt and Fred Schmidt, are defendants. The answer of Fred Schmidt was a general denial. Conrad Schmidt pleaded (1) want of consideration; (2) accord and satisfaction; and (3) lobbying as the consideration. From a judgment

in favor of plaintiff for the full amount of the note and interest, defendants have appealed.

1. To the third defense mentioned the trial court sustained a demurrer, and the correctness of this ruling is the first question presented. Was a lobbying contract properly pleaded as the consideration for the note? That part of the answer challenged by the demurrer contains the averment that the payee agreed to "lobby" for a license for the makers of the note, and the agreement to do so is characterized as a "lobbying contract," but facts showing that the use or employment of unlawful means on the part of plaintiff was contemplated by the parties are not properly alleged. A demurrer to a pleading admits such facts only as are well pleaded. "Lobby" and "lobbying," without stating the facts constituting such acts, are mere conclusions of the pleader not admitted by the demurrer. It is clear, therefore, that lobbying as an illegal consideration was not well pleaded, when the third defense is searched by demurrer.

2. Complaint is made because the trial court received in evidence part of an original pleading or answer admitting the execution of the note, though that fact was denied in an amended answer. The objection now is that the superseded answer was not signed or verified by the answering defendant, and that there is nothing to show he had any knowledge of its contents. The record does not contain an objection in the trial court on this ground. The execution of the note was proved by other testimony. The assignment of error is therefore overruled.

3. It is argued that the court erred in instructing the jury to return a verdict for plaintiff, if the defense of accord and satisfaction had not been shown by a preponderance of the evidence; the effect being to withdraw the defense of want of consideration. Defendants have no reason to complain of this instruction. By their own testimony they proved a valid consideration.

There is no error in the record.

AFFIRMED.

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

WILLIAM S. FITCH, APPELLANT, V. PATRICK WALSH, APPELLEE.

FILED JUNE 16, 1913. No. 17,186.

1. **Pleading**: GENERAL DENIAL: EJECTMENT: ESTOPPEL. Under a general denial in ejectment, defendant is permitted, by section 627 of the code, to prove an estoppel for the purpose of defeating plaintiff's cause of action.

2. **Boundaries**: ESTOPPEL. A lessee of school land, who points out to a purchaser a boundary line along one side of the demised premises and transfers the lease to him, may be estopped to dispute the line thus designated, where the purchaser, relying upon it in good faith, built a fence thereon, maintained it for 17 years, cleared and occupied the land on his side of the fence, and afterward purchased the fe

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

B. F. Butler and *C. E. Eldred*, for appellant.

W. S. Morlan and *J. L. Rice, contra.*

ROSE, J.

The action is ejectment. The parties are owners of adjoining farms in Red Willow county. A part of the boundary line between their possessions is in dispute. Plaintiff claims a short, narrow strip of land occupied by defendant, alleges he has a legal estate therein, and that he is entitled to possession thereof. The answer is a general denial. From a judgment in favor of defendant, plaintiff has appealed.

1. In the admission of evidence and in the instructions to the jury, the trial court recognized the right of defendant, under his general denial, to prove facts showing that plaintiff was estopped to question the line which marked the controverted boundary of the disputed strip occupied by defendant. In these respects the rulings are challenged as erroneous, because estoppel was not specially pleaded.

Was it proper to prove an estoppel under a general denial? There is specific legislation on the subject of pleading in ejectment. The code declares: "In an action for the recovery of real property, it shall be sufficient, if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof." Code, sec. 626. "It shall be sufficient in such action, if the defendant in his answer deny, generally, the title alleged in the petition." Code, sec. 627.

A text-writer on Ejectment says: "Where special pleading is not allowed, the defendant, in support of his possession, may give in evidence any matter which would have operated as a bar if pleaded by him by way of estoppel to a real action brought for the recovery of the same premises." Tyler, Ejectment and Adverse Enjoyment, p. 465.

In *Franklin v. Kelley,* 2 Neb. 79, 118, this court said: "It is undoubtedly true that the theory of the system of pleading under the code generally is that the facts necessary to constitute a cause of action or defense shall be stated. But, in respect of actions for the recovery of real property, another rule has been adopted. Why this is so is not very clear. It may be because, as two trials, of course, are given in that class of actions, the parties are supposed to learn, from what is shown on the first, what will be in issue on the final trial. But, whatever the reason, it is apparent that in this class of actions, as also in cases of replevin, the facts need not be stated. That being the rule of pleading contained in the code, we have only to enforce it here." This language was approved in *Staley v. Housel,* 35 Neb. 160, wherein it is held that defendant, under a general denial, may prove any fact which will defeat the plaintiff's cause of action, and that the rule established by the code is not changed by language of a different import in *Uppfalt v. Nelson,* 18 Neb. 533, a case herein cited by plaintiff. Under the general denial pleaded by defendant, therefore, proof showing that plaintiff's assertion of title was defeated by estoppel was properly admitted in evidence and considered by the jury.

2. Was the defense of estoppel proved? The record contains evidence tending to show the following facts, most of which are undisputed: The land in controversy was formerly school land. Under a lease from the state plaintiff formerly had an interest in the tract owned and occupied by defendant. At the same time defendant had a similar interest in the land now owned and occupied by plaintiff. The interests thus acquired by lease from the state were exchanged by plaintiff and defendant in 1893, each taking possession of the tract which had been leased by the other. When they were negotiating for the exchange, they went upon the premises for the purpose of determining the boundary line between the leased tracts. Plaintiff pointed it out, and soon thereafter defendant built a fence on it. During the following spring defendant employed men, and with them cut the timber and grubbed the brush on his side clear up to the fence. Relying on the line thus established, he bought from the state the land held by him under the exchanged lease, paid for the same, and procured a deed therefor. He kept up the fence in the same place, and has used the land on his side of it without interruption ever since, a period of 17 years. In the meantime plaintiff occupied the land on the other side of the fence under a lease or deed. Until the beginning of this suit plaintiff did not dispute the boundary pointed out by him and relied upon by defendant. These facts, if established, constitute an estoppel binding on plaintiff. *Clark v. Thornburg,* 66 Neb. 717; *Merriwether v. Larmon,* 3 Sneed (Tenn.) 447; *Spears v. Walker,* 1 Head (Tenn.) 166; *Ward v. Middleton,* 124 S. W. (Ky.) 823; *Allyn v. Schultz,* 5 Ariz. 152; *Seberg v. Iowa Trust & Savings Bank,* 141 Ia. 99; *Rowell v. Weinemann,* 119 Ia. 256; *Parrish v. Williams,* 79 S. W. (Tex.) 1097; *Clark v. Hindman,* 46 Or. 67; *Thompson v. Borg,* 90 Minn. 209. Plaintiff admitted that the exchange of leases was made in the fall of 1893, that defendant built his fence the next spring and kept it in the same place thereafter, and that defendant has claimed and occupied the land on his side of the fence ever since. The issue of estoppel and

the evidence thereon were properly considered by the jury with other questions of fact, including adverse possession. There was a general verdict in favor of defendant. Upon a consideration of the whole case, it seems clear that no other conclusion could have been reached, in view of the rules of law stated and the evidence applicable to the question of estoppel.

The judgment will therefore be affirmed without a discussion of other assignments of error.

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

MARK J. RYAN, APPELLEE, V. CONTINENTAL CASUALTY COMPANY, APPELLANT.

FILED JUNE 16, 1913. No. 17,199.

1. **Appeal:** FINDINGS: REVIEW. On appeal, a special finding of fact by a jury will not be disturbed unless clearly wrong.
2. **Insurance:** CONSTRUCTION OF POLICY: RECOVERY. In a suit on a $500 accident insurance policy providing that, if the injury causing the loss results wholly or in part from the intentional act of insured or of any other person, the insurer's liability shall be one-fifth of the amount otherwise payable, plaintiff's recovery is limited to $100, where the uncontradicted evidence shows that assured was intentionally struck in the face by another person, who did not intend to kill him, and that assured fell backward, striking his head on the pavement and fatally fracturing his skull; the injury to his face by the initial blow not being serious.

APPEAL from the district court for Hall county. JAMES N. PAUL, JUDGE. *Reversed with directions.*

M. P. Cornelius, Harrison & Prince and *Manton Mavcrick*, for appellant.

Arthur G. Abbott and *O. A. Abbott, contra.*

ROSE, J.

This is an action to recover $500 on an accident insurance policy dated January 29, 1909. Thomas P. Ryan, assured, died December 25, 1909. His brother, Mark J. Ryan, plaintiff, had been named in the policy as the beneficiary. Defendant offered to confess judgment for $100, and pleaded two defenses to the remainder of plaintiff's claim: (1) Assured was intoxicated when the injury resulting in his death was inflicted, and for that reason defendant is not liable for more than $100 under the terms of the insurance contract. (2) The injury causing the death of assured resulted wholly or in part from the intentional act of another person, a risk limited by the policy to one-fifth of the insurance otherwise payable. From judgment on the verdict of a jury in favor of plaintiff for $500, defendant has appealed.

1. The evidence of assured's intoxication at the time of the injury is very meager. This conclusion is reached after an examination of the evidence without reference to the abstracts. The jury made a special finding that assured was not intoxicated when injured, and on that issue there is ample evidence to sustain their verdict.

2. The question presented by the other defense is harder to answer. Under "Part V" of the policy, relating to "Special Accident Indemnities," the following provisions are found: "In any of the losses covered by this policy (1) where the injury causing the loss results wholly or in part from voluntary exposure to unnecessary danger or obvious risk of injury, or from the intentional act of the insured or of any other person (assaults committed upon the insured for the sole purpose of burglary or robbery excepted); * * * then in all cases referred to in this paragraph B of Part V the amount payable shall be one-fifth of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding, and subject otherwise to all the conditions in this policy contained."

Defendant argues that within the meaning of the policy "the injury causing the loss" resulted "wholly or in part" from "the intentional act" of a person other than insured, that this fact is shown by uncontradicted evidence, and that consequently one-fifth of the amount otherwise payable, or $100, is the limit of recovery. During the evening of December 24, 1909, assured was engaged in performing the duties of his employment as a helper on the stage in the opera house at Wood River. After the performance, as late as 1 or 2 o'clock the next morning, he was in that city on the sidewalk in front of a public telephone office with one of the showmen and Charles Thompson. Witnesses who were in the telephone office at the time heard some of the remarks and saw what occurred. Thompson exclaimed, "I can lick you," and struck from his shoulder, hitting assured in the face. The latter fell backward, fracturing his skull on the pavement. Thompson and the showman gave him immediate attention, helped him to his feet, and took him to a railway station a short distance away, where he died. The blow struck by Thompson did not seriously injure assured's face. Death was caused by the injury on the back of his head. Thompson intended to strike assured. The evidence of these facts is uncontradicted. An intention on the part of Thompson to kill assured is not shown.

Under these facts can a recovery in excess of $100 be sustained without disregarding the terms of the policy? Defendant admits that decedent was insured against what actually occurred, but insists that its liability was limited by the contract to one-fifth of the face of the policy. Plaintiff argues that, since there is no proof of an intention on the part of Thompson to kill assured, his death was an accident entitling the beneficiary to a full recovery. In this connection it is contended by plaintiff that the words "wholly or in part," as they appear in the clause, "where the injury causing the loss results *wholly or in part* from voluntary exposure to unnecessary danger or obvious risk of injury," refer alone to the "exposure" and the "risk" mentioned in the clause in which they are used, and do not

modify "intentional act." The context, the grammatical construction, and the use of the disjunctive "or" between prepositional phrases which relate to the same subject condemn plaintiff's interpretation. It is clear that the words "wholly or in part" have the same relation to "intentional act" as they have to "voluntary exposure" and to "obvious risk." The words "wholly or in part" cannot be disregarded in their relation to "intentional act." No other construction is permissible. The inquiry is therefore reduced to this: Did the death of assured result wholly or in part from the intentional act of Thompson?

To sustain the proposition that the injury causing the death of assured "resulted from the sidewalk blow, and not from Thompson's intentional act," plaintiff cited a number of cases to which reference follows: In *Railway Officials & Employees Accident Ass'n v. Drummond*, 56 Neb. 235, the policy provided that the insurer "shall not be liable for injuries resulting from the intentional acts of the insured or any other person, or death resulting from such acts." The policy, so far as the report shows, contained no provision that, where the injury causing the loss results wholly or in part from the intentional act of the assured or of any other person, the assurer's liability shall be one-fifth of the amount otherwise payable. Assured was shot by a highwayman under circumstances indicating that the assassin's pistol was accidentally discharged. The terms of the policy and the facts, therefore, differ in material respects from those in the present case. Other cases cited by plaintiff are: *Richards v. Travelers Ins. Co.*, 89 Cal. 170; *Utter v. Travelers Ins. Co.*, 65 Mich. 545; *Manufacturers Accident Indemnity Co. v. Dorgan*, 58 Fed. 945; *Crandal v. Accident Ins. Co.*, 27 Fed. 40; *Accident Ins. Co. v. Crandal*, 120 U. S. 527. Each of these cases is distinguishable from the present one, either in the terms of the policy or in the facts.

As already stated, Thompson said, "I can lick you," and struck assured in the face, the latter falling backward and fatally fracturing his skull on the pavement. The in-

tention to strike is shown without contradiction. How can it be said that the injury causing the death of assured did not result wholly or in part from the intentional act of Thompson in striking him? Except for the blow in the face he would not have fallen and the injury causing his death would not have occurred. For the injury resulting in the loss in this case, the policy, under the uncontradicted evidence, made provision for payment of one-fifth of the amount otherwise payable. This conclusion is supported by the reasoning in analogous cases. *Mossop v. Continental Casualty Co.*, 137 Mo. App. 399, 118 S. W. 680; *Carr v. Pacific Mutual Life Ins. Co.*, 100 Mo. App. 602, 75 S. W. 180; *Shader v. Railway Passenger Assurance Co.*, 66 N. Y. 441; *Furry's Adm'r v. General Accident Ins. Co.*, 80 Vt. 526, 68 Atl. 655; *Fidelity & Casualty Co. v. Smith*, 31 Tex. Civ. App. 111, 71 S. W. 391; *Travelers Protective Ass'n v. Weil*, 40 Tex. Civ. App. 629; *Matson v. Travelers Ins. Co.*, 93 Me. 469, 45 Atl. 518. It follows that the judgment is reversed, with directions to the district court to enter a judgment in favor of plaintiff for $100; the costs in both courts to be taxed to him.

REVERSED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

STATE OF NEBRASKA, PLAINTIFF, V. WOODRUFF BALL ET AL., DEFENDANTS.

FILED JUNE 16, 1913. No. 16,050.

New Trial: COSTS. Defendant was awarded a new trial for newly discovered evidence on condition that he pay the costs of all new witnesses produced by him in any event. *Held*, That such condition was improperly imposed, and on judgment in favor of defendant all of the costs were properly taxed against plaintiff.

OPINION on motion for rehearing and to retax costs of case reported in 93 Neb. 358. *Motion overruled.*

FAWCETT, J.

Judgment was rendered and opinion filed March 14, 1913, 93 Neb. 358. Plaintiff has filed motion for a new trial and to retax costs. Upon due consideration of the motion for a new trial, the same is overruled.

There have been two trials in this case. Upon the first trial the judgment was in favor of plaintiff. 90 Neb. 307. A motion for a new trial was filed and granted March 12, 1912, on the ground of newly discovered evidence. Upon consideration of the motion it was ordered: "That said motion be, and the same hereby is, sustained on condition that said defendant pay the costs of all new witnesses produced by him in any event." The case was then referred to a referee to take additional testimony and report findings of fact and conclusions of law. The report of the referee was favorable to defendant, and upon due consideration the report was approved and judgment entered accordingly. The clerk taxed all of the costs against the plaintiff. Plaintiff now urges that under the order of March 12, 1912, the costs of all new witnesses produced by defendant should be taxed to him. The defendant urges that our order of March 12 should not have been entered, and that under the statute he is entitled to recover his costs. Upon due consideration defendant's contention is sustained. Our order of March 12, 1912, is therefore vacated and set aside, and plaintiff's motion to retax costs is

OVERRULED.

LETTON, J., not sitting.

ROSE, J., dissents.

SYLVAN M. PAYNE, APPELLEE, V. GEORGE H. RISSER ET AL., APPELLANTS.

FILED JUNE 16, 1913. No. 17,229.

Appeal: REVERSAL. A verdict which is unsupported by any competent evidence is insufficient to sustain a judgment based thereon.

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

D. J. Flaherty and *George H. Risser,* for appellants.

J. A. Brown, contra.

FAWCETT, J.

This action originated in justice court. From a judgment of the district court for Lancaster county, in favor of plaintiff, defendants appeal.

The petition in the district court alleged that defendant Risser, police judge of the city of Lincoln, defendant Rhode, health officer of the city, and defendant Paine, president of the Lancaster County Humane Society, in the month of May, 1909, "entered into an unlawful conspiracy against the plaintiff, and wickedly, wilfully, maliciously and unlawfully conspired together with the intent and for the purpose of destroying the property of the plaintiff;" that on the 20th of that month plaintiff was leading a horse on Tenth street when defendants Risser and Rhode, and other persons to plaintiff unknown, came out of the police station "with guns and revolvers, and surrounded the plaintiff and his said horse," and that defendant Paine, pretending to act under and by virtue of his position as president of the humane society, and defendant Rhode, pretending to act under and by virtue of the order and direction of defendant Paine, "and acting in pursuance of said unlawful conspiracy, so entered into as aforesaid," took the horse from the possession of plaintiff, and then and there shot and killed him. The answer consists of an objection to the jurisdiction of the district court for the reason that no judgment was entered in justice court, and a general denial.

The objection to jurisdiction was properly overruled. While the judgment entered by the justice was not in precisely the usual form and was not accurately worded, we think it was sufficient.

The fourth assignment of error is that the verdict is not sustained by the evidence. This assignment goes to the real merits of the case, and is the only one necessary to be considered. The evidence shows that the horse had been tied to a piece of 2 by 4; that she became frightened and pulled back, pulled the piece of 2 by 4 off, and started to run with it dangling to the tie strap; that it swung around and penetrated one of her thighs above the stifle, on the inside, making a hole about nine inches in depth. Plaintiff then took her to a barn, where she was treated by Doctor Reeves, a veterinarian. She remained under his treatment for about three weeks. The doctor testified that, when plaintiff came for the mare, "I told Payne it would be hard for her to travel, and that he had better take her home in a wagon, but Payne thought he had better take her out a short distance and leave her. I told Payne that if he would get her in a pasture where she could get green grass it would be better for her than dry feed. I thought the mare had improved, and that her chances of recovery were good. I did not think the wound had affected the mare for breeding purposes. I thought if the mare recovered entirely she would be worth $120 or $125 or something like that." On cross-examination he testified: "If the mare recovered she would be worth as much as she ever was; if she did not recover she would not be worth anything—she would die." Plaintiff testified that the barn where the mare was being treated was less than a block from the police station; that on the day she was killed he was leading her home; that while opposite the police station Judge Risser came out and stopped him and sent for defendant Paine; that when Paine arrived he said the mare should be killed, and defendant Rhode killed her. When interrogated as to her value, he testified: "I base my valuation on the market value and what she was worth to me, and I would put her at $125. The mare was eight years old past. She was worth $125 to me. I do not think she would sell for $125 in her condition; but then we would have to wait and see how she would come out. She was worth that to

me. I don't know what she would sell for." He also testified that there were no bones broken. Plaintiff called his brother-in-law, E. C. Graves, as a witness. He testified: "I never saw the mare after she was hurt. The nature and extent of the injury would affect the market value. She would be worth $125, assuming that she would get well." J. E. Graves, brother of the preceding witness, testified that the mare was worth $125 before she was injured; that, "if she would recover from the injury so that she could do the same work she did before, she would be worth $125." This was the only evidence offered by plaintiff as to the value of the mare at the time she was killed. Upon that question, it was no testimony at all. Plaintiff and all of his witnesses coupled with their valuation of $125 the condition that she would be worth that sum "if she recovered," or, as the doctor put it, if she "recovered entirely." As against this testimony, defendants introduced eight witnesses who testified that the mare in her then condition had no value at all. As against the doctor's testimony that he thought the mare's chances of recovery were good, seven witnesses testified that in their judgment she could never have recovered; and two or three other witnesses testified to facts in relation to her condition which strongly corroborate this testimony. There is a total failure of evidence to show that the mare was of any value at the time she was killed. She was so badly crippled that on the day she was shot, which was about three weeks after she was injured, she walked on three legs, was weak and reduced in flesh, and had other sores on her hip and body, the result doubtless of her struggles in the barn. This is not a case where a verdict should be sustained on the ground that it was rendered upon conflicting evidence. The verdict is so clearly without any competent evidence to sustain it that it should not be permitted to stand.

The allegation in the petition that defendants entered into a conspiracy to destroy plaintiff's property is not worthy of serious consideration. On the contrary, the evidence shows that they acted in the utmost good faith, in

the performance of what they believed to be their official duty, and they should not be further harassed.

Plaintiff's case is so clearly without merit that the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

LETTON, ROSE and HAMER, JJ., not sitting.

LUCIA R. DILLENBACH, APPELLEE, V. SYLVESTER S. SNYDER, APPELLANT.

FILED JUNE 16, 1913. No. 17,245.

1. Errors assigned, but not shown in the abstract, will not be considered.
2. Appeal: CONFLICTING EVIDENCE. A verdict based upon conflicting evidence, and approved by the trial court, will not be disturbed, unless manifestly wrong.

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

John C. Stevens, for appellant.

J. W. James and *H. F. Favinger, contra.*

FAWCETT, J.

This action was instituted in the district court for Adams county to recover money delivered to defendant's agent in connection with what plaintiff contends was a proposal to purchase certain real estate in the city of Hastings. From a verdict and judgment in favor of plaintiff, defendant appeals.

The substance of the petition is that plaintiff, being desirous of purchasing some residence property, visited the office of Higinbotham & Pickens, real estate agents, and

requested the senior member of the firm to show her some residence property. He showed her the property of defendant, and told her the price thereof was $4,600. She declared her willingness to take the property at that price, and left with the agent a certificate of deposit for $900, the agent giving her a receipt which recited the purchase price, the amounts and the dates of the different payments, and that the proposition was subject to the approval of the owner, the defendant in this action; that this was done June 2, 1909; that at 8 o'clock the next morning she withdrew her offer to purchase, and so notified the agent and demanded a return of her certificate of deposit; that the agent cashed the certificate and turned the money over to defendant; that before the trial the defendant sold and conveyed the property to a third party. The answer admits the agency of Higinbotham & Pickens; that appellee was desirous of purchasing property; that she examined the property of defendant; that defendant had later sold the property for $4,100, and denies all other allegations in the petition. It then alleges that on June 2 plaintiff agreed to purchase the property for $4,600, and as a part of the purchase money paid $900 to the agents; that on the same evening the agents informed defendant of the sale, and he thereupon approved and accepted the terms of the sale and the said sum of $900; that he was ready, able and willing to convey the property to plaintiff, and on the 1st of September, 1909, tendered to plaintiff a deed to the property, but she refused to comply in any manner with the conditions of the contract, and has never since offered or tendered performance of the same; "that by her conduct she forfeited her right to have paid back to her said $900." The reply was a general denial.

We think the issues in this case are well stated by counsel for defendant in his brief: "To simplify the proposition, in my opinion, the only question is: Did the appellee purchase the real estate described in the petition?" Plaintiff testified, in substance, that, when she went with the agent on June 2 to look at defendant's place, the agent told

her the price was cash, and she told him she could not pay cash, but would make him this offer: That she would give $900 cash, $1,900 July 1, and $1,800 September 1; that the agent said he would take the $900, but would have to get the owner's approval; that she thereupon gave him the $900 certificate, and he gave her the receipt. The receipt reads: "Hastings, Neb., June 2d, 1909. Received from Miss Lucia R. Dillenbach nine hundred dollars on purchase of S. S. Snyder property on 7th St. between Hastings & Denver Ave. at $4,600 Bal to be paid 1900 July 1st, 09 and balance 1800 Sept. 1, '09 at which time possession to be given. Subject to aproval of S. S. Snyder. (Signed) Higinbotham & Pickens, Agents." It is apparent that up to this point the minds of the parties had not met in a completed contract. The most that can be claimed for the receipt given by the agent, which is the only written evidence of what was done, is that plaintiff submitted to defendant through his agents a proposal to purchase his residence property for the sum stated and upon the terms named in that receipt; that this proposal was subject to the approval of defendant. The only disputed question of fact, therefore, is: Did the plaintiff, before she was advised of the acceptance of this offer, distinctly and unqualifiedly withdraw the same? Upon this, the evidence is in sharp conflict. The jury found in favor of the plaintiff, and thereby found that the withdrawal of the offer was made before notice was given of its acceptance, and that therefore no completed contract was ever entered into between the parties. This being true, the plaintiff was entitled to a return of her money with interest, as found by the jury.

Complaint is made of certain instructions given by the court. The appeal was lodged in this court and abstract and briefs filed during the time that the law and the rules of this court in relation to abstracts were in full force and effect. In No. 19 of the rules it was provided that, in the preparation of abstracts, "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." This requirement of the rules was not followed in the preparation of defendant's abstract, only a portion of the court's charge being set out. This assignment of error will therefore be disregarded. Complaint is made of the refusal of the court to give instructions 1, 2, 3 and 4, requested by defendant. As the charge of the court is not set out, we must assume that the points covered by these four instructions were fully embraced therein. In fact, that portion of the instructions given by the court, set out in the abstract, shows such to have been the case.

Summed up, the case turns entirely upon a question of fact, as to which the evidence is in conflict. The jury saw the witnesses upon the stand and heard them testify. They saw fit to give credit to the evidence offered by plaintiff and to discredit that offered by defendant. No good reason is shown why we should say that the jury were wrong in so doing.

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

COHN-GOODMAN COMPANY, APPELLANT, V. MANDELSON & GOLDSTEIN, APPELLEES.

FILED JUNE 16, 1913. No. 17,246.

1. **Sales**: CONDITION: RETURN OF GOODS. If a manufacturer sells goods to a retail dealer with a condition in the contract that the dealer may return anything that is not entirely satisfactory, he cannot complain if the dealer, upon receipt of the goods, makes a reasonable attempt to dispose of the same before availing himself of the condition of return.

2. **Review**. The record examined, and found to contain no prejudicial error.

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

Pitzer & Hayward and *Edwin Zimmerer,* for appellant.

Logan F. Jackson, contra.

FAWCETT, J.

This action was instituted in the district court for Otoe county to recover a balance of $187.50, claimed to be due upon an account for ladies' suits and coats. From a verdict and judgment in favor of defendants, plaintiff appeals.

A number of assignments are set out and argued at great length. We do not deem it necessary to refer to them, for the reason that, as we view the case, it turns upon a very simple proposition.

Defendants in their answer allege that one of the conditions of the purchase of the goods in question was that if they were not satisfactory defendants might return them to plaintiff. The witness Kennedy, manager of the ladies' department of defendants' store, testified to such agreement. In this he was corroborated by two other witnesses. Notwithstanding the fact that this testimony is uncontradicted, the court submitted the question to the jury under an instruction that to relieve the defendants from liability they must have had some substantial reason for declining to retain any of the goods. This was certainly all that plaintiff could ask. The evidence shows that defendants received 28 coats and suits in four consignments, the first being shipped October 28, the second November 4, the third November 6, and the fourth November 10, 1909. About two weeks later defendants returned 14 of the coats and suits, assigning two reasons for so doing. The package arrived at plaintiff's office on November 30. Upon receipt of the package plaintiff sent the goods to its attorneys at Nebraska City, and notified defendants that the package "has been refused for the reason that *they* consider that the reasons for the return do not exist." On December 15 defendants returned two more of the coats. Upon receipt of this package, plaintiff again wrote defendants refusing to accept the same. The evidence also

shows that defendants mailed plaintiff a check to cover the goods not returned. Plaintiff refused to accept the check, and returned the same to defendants, not because it was a personal check, but because it was not in full of account. Mr. Goldstein, one of the defendants, testified: "That check is still at the disposal of plaintiff." Thus matters stood at the time of the trial. As stated by counsel for defendants: "Properly speaking, there is in this case no question of *rescinding* the contract. It was the exercise, by the defendants, of the right to return any unsatisfactory goods." In other words, defendants are not attempting to rescind the contract, but are standing upon and asserting their rights under it.

The fact that upon receipt of the goods they did not at once return them, but remitted for the first consignment and placed the other goods upon sale, and tried for some two or three weeks to sell them, seems to us immaterial. If they, in good faith (of which the jury were the judges), tried for a reasonable length of time to sell the goods and found that they were unable to do so because of certain defects in their make-up, and for that reason the goods were unsatisfactory to them, they should not thereby be estopped from availing themselves of the condition of the contract, which was: "Anything you get from us that is not entirely satisfactory you can return it." If plaintiff saw fit to sell these goods to defendants with such a condition in the contract, it ought not to complain because defendants made a reasonable attempt to dispose of the goods, before availing themselves of the condition. A check for all goods sold is still at plaintiff's disposal. It agreed that defendants might "return any unsatisfactory goods." The goods not sold were unsatisfactory to defendants. They were all returned and are now in plaintiff's possession. This seems to be a case where the doctrine of substantial justice applies.

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

ARAPAHOE STATE BANK, APPELLANT, V. LOLA H. MCKENNA, APPELLEE.

FILED JUNE 16, 1913. No. 17,247.

Appeal: RECORD. The condition of the record, as shown in the opinion, *held* to contain no prejudicial error.

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

Morning & Ledwith and *F. W. Byrd,* for appellant.

W. S. Morlan, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Furnas county to recover balance due on a promissory note. The defense relied upon by defendant is that plaintiff and other creditors obtained from her a transfer of all her property under an agreement that such property, when delivered to one Finch, trustee, should be accepted by such creditors in full settlement of their demands. There was a trial to a jury. Verdict and judgment for defendant, and plaintiff appeals.

The grounds relied upon in plaintiff's brief for a reversal are: "(1) That the verdict is absolutely unsupported by the evidence. (2) That the court erred in giving instruction No. 4, there being no evidence tending to establish any of the questions of fact therein involved. (3) The court erred in permitting the introduction of the petition above referred to in evidence." The bill of exceptions contains 15 closely written pages of testimony, and a number of exhibits. The abstract of the same, omitting the conclusions of counsel, is less than one page. None of the exhibits is abstracted, nor is the testimony of the witnesses sufficiently set out to give the court any fair understanding of the case. We have examined the bill of exceptions far enough to show that the abstract

does injustice to defendant, when it states: "There is nothing in the record except the contents of the answer written by Morlan that even indicates an agreement to accept the property of the defendant in full discharge of the debts due the creditors." On page 14 of the bill of exceptions defendant testifies that, when plaintiffs were trying to induce her to sign the trust deed of all of her property to Finch, "they said if I would sign that trust deed they would leave my property alone, and they wouldn't bother my property, and I would have some money left." We cannot say from the record presented to us that the verdict is not sustained by the evidence.

By instruction No. 4, complained of, the court instructed the jury: "If you find from the evidence that the plaintiff secured the execution of the trust deed introduced in evidence through and by representations that it was to defendant's interest to execute the same, and that she would be relieved the same as if she was adjudged a bankrupt, or if it was agreed between plaintiff and defendant that she should execute the said trust deed and that the same should be taken as payment of defendant's indebtedness, then your verdict should be for the defendant." The testimony of defendant, quoted above, fairly sustains the allegation of her answer, and justified the giving of instruction No. 4. The third assignment, that the court erred in permitting the introduction of certain exhibits, cannot be considered, as neither the exhibits nor their substance are set out in the abstract.

Plaintiff having failed to point out any prejudicial error, the judgment of the district court is

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

HENRY R. POPEJOY, APPELLEE, V. EDWIN E. BURR, APPELLANT.

FILED JUNE 16, 1913. No. 17,248.

Appeal: AFFIRMANCE. "Where the verdict returned is clearly right and is the only one warranted by the evidence, the judgment will be affirmed, although errors may have intervened at the trial." *United States School-Furniture Co. v. School District*, 56 Neb. 645.

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

Bernard McNeny, for appellant.

L. H. Blackledge, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Webster county to recover the value of two mares and a mule colt, stolen from him across the line in Kansas, which animals he alleged were sold to defendant and by defendant resold without his knowledge or permission, of the alleged value of $400. The answer was a general denial. From a verdict in favor of plaintiff for $300 and judgment thereon, defendant appeals.

The principal contentions here are: The identity of the larger of the two mares; that the court erred in some of the instructions given upon its own motion and in refusing certain other instructions tendered by defendant; errors of the court in the admission and exclusion of evidence; and that generally the evidence is insufficient to sustain the verdict. We have carefully examined the abstract prepared by defendant, and are unable to see how, so far as the identity of the animals in controversy is concerned, any other verdict could be sustained than the one returned by the jury. On the question of the value of the animals, the evidence is in sharp conflict. There is testimony in the record which would have supported a larger verdict.

There is also testimony which would have supported a verdict for a considerably less sum. The jury saw the witnesses upon the stand, heard them testify, and, under the well-settled practice, their verdict must control. It would serve no good purpose to discuss the rulings of the court upon the introduction and exclusion of evidence, or as to the giving and refusal of instructions, as we do not see how the errors complained of could have in any manner changed the result. The defendant was evidently an innocent victim of a horse thief, but he seems to have had a fair trial, and must stand the consequences of the fraud practiced upon him.

AFFIRMED.

LETTON, ROSE and HAMER, JJ., not sitting.

HENRY GAWEKA, JR., V. STATE OF NEBRASKA.

FILED JUNE 16, 1913. No. 17,826.

1. **Indictment and Information: SUFFICIENCY.** An information or complaint must charge explicitly all that is essential to constitute the offense. It cannot be aided by intendment, nor by way of recital or inference, but must positively and explicitly state what the accused is called upon to answer.

2. ———: ———: **RESISTING OFFICER.** A complaint under section 30 of the criminal code for resisting a municipal officer while attempting to make an arrest without a warrant, which does not allege that the offense was committed within the limits of the municipality of such officer, is fatally defective.

ERROR to the district court for Thayer county: LESLIE G. HURD, JUDGE. *Reversed.*

Charles H. Sloan, Frank W. Sloan, J. J. Burke and *J. T. McCuistion,* for plaintiff in error.

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

FAWCETT, J.

From a conviction in the district court for Thayer county, of a misdemeanor in resisting an officer, and a fine of $1, the accused, whom we will designate as defendant, has prosecuted error to this court.

The amended complaint, under which defendant was tried and convicted, charges that defendant "did unlawfully and wilfully resist, abuse, strike, and threaten to do bodily harm to the said M. O. Weidenheimer, village marshal of the village of Bruning, while the said officer was in the lawful performance of his duties as village marshal, and in the proper execution of his office; said Henry Gaweka, Jr., knowing said M. O. Weidenheimer to be village marshal of the village of Bruning, contrary to the form of statutes," etc.

The first point urged for reversal is that the complaint is insufficient, in that it does not allege where the offense was committed, further than to aver that it was in Thayer county. This point is well taken. It is conceded that the marshal did not have a warrant for the arrest of defendant, but it is alleged in the complaint that the arrest was attempted to be made "for disturbing the peace and attempting to provoke an assault, same being done in the presence of the said village marshal." As a village marshal the officer would have no authority, without a warrant, to make such arrest outside of the limits of his municipality. If he attempted to do so, defendant would be justified in resisting with all reasonable and necessary force. It will be observed that the complaint nowhere alleges that the offense was committed in the village of Bruning, of which the officer was the marshal. But it is said, the statement in the complaint that the marshal was in the performance of his usual duties as marshal of said village, and was in the lawful execution of his said office as village marshal, in making the arrest, is sufficient; that the officer could not lawfully arrest any one outside of the limits of his jurisdiction, and if he was in the law-

ful execution of his office he must have been within the limits of the village. In other words, we are asked to aid the complaint by construction or inference, and hold that an offense under section 30 of the criminal code has been alleged. This is not the law in this state. In *Moline v. State,* 67 Neb. 164, we held that an indictment or information "must charge explicitly all that is essential to constitute the offense. It cannot be aided by intendment, nor by way of recital or inference, but must positively and explicitly state what the accused is called upon to answer." As far back as *Smith v. State,* 21 Neb. 552, we held: "A complaint must charge explicitly all that is essential to constitute the offense, and it cannot be aided by intendments." *Smith v. State* has since been cited with approval in numerous decisions of this court. In *Seifried v. Commonwealth*, 101 Pa. St. 200, it is held that "where the offense is statutory, and can be committed only in a certain municipal division, which is less than the county within the jurisdiction of the court, the name or description of such division, and the fact that the offense was committed therein, must be set forth in the indictment."

Under the authorities above cited, the information in this case is insufficient. The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

LETTON, ROSE and HAMER, JJ., not sitting.

JOSEPH W. GRIFFITH ET AL. V. STATE OF NEBRASKA.

FILED JUNE 16, 1913. No. 17,957.

Larceny: VERDICT: VALUE OF PROPERTY. In a prosecution for cattle stealing under section 117*a* of the criminal code, the jury are not required to ascertain and declare in their verdict the value of the cattle stolen. *Fisher v. State,* 52 Neb. 531, and *Holmes v. State,* 58 Neb. 297, overruled.

ERROR to the district court for Morrill county: RALPH W. HOBART, JUDGE. *Affirmed: Sentence modified.*

E. D. Clark and *M. F. Harrington,* for plaintiffs in error.

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

FAWCETT, J.

From a judgment of conviction in the district court for Morrill county, of the crime of cattle stealing, defendants have prosecuted error to this court.

The information charges plaintiffs in error, who will be referred to as defendants, with having stolen two red steers of the age of four years and of the value of $160, the property of Frank F. Peterson. The jury returned the following verdict: "We, the jury, duly impaneled and sworn in the above entitled cause, do find the defendants Joseph W. Griffith, Jr., and Joseph W. Griffith guilty of stealing cattle in manner and form as charged in the information. And we earnestly recommend that the court fix as light a sentence upon the defendants as the law in the case will permit." As to defendant Joseph W. Griffith, Jr., the court adjudged that sentence should be suspended and the defendant released on parole. Defendant Joseph W. Griffith was sentenced to confinement in the penitentiary for a period of not less than three nor more than ten years, and pay the costs of prosecution. No exceptions were saved by defendants during the progress of the trial, nor was any motion for a new trial filed or bill of exceptions settled, so that the case stands before us on the information, the verdict of the jury, and judgment. The sole question presented is that the court erred in entering judgment at all against either of the defendants, for the reason that the verdict does not fix any value on the property alleged to have been stolen.

Defendants were prosecuted under section 117*a* of the criminal code, which provides: "If any person shall steal

any cow, steer, bull, heifer, or calf, of any value, * * * every such person so offending shall be imprisoned in the penitentiary not more than ten years nor less than one year, and shall pay the costs of prosecution." This section of the code was adopted in 1895, and took effect July 6 in that year. Defendants rely upon *McCoy v. State,* 22 Neb. 418, *McCormick v. State,* 42 Neb. 866, *Fisher v. State,* 52 Neb. 531, *Holmes v. State,* 58 Neb. 297, and *Armstrong v. State,* 21 Ohio St. 357. *McCoy v. State* and *McCormick v. State* were both decided prior to the enactment of the section under consideration. At that time cattle stealing came under the general provisions of the criminal code as to larceny. Under the law as it then stood, a verdict like the one in the case at bar would be insufficient. *Fisher v. State* was a prosecution for cattle stealing. The offense was alleged to have been committed September 30, 1895, which it will be observed was shortly after the section under consideration took effect. The verdict in that case is similar to the one in the case at bar, in that it failed to find the value of the cattle stolen. The syllabus in that case reads: "A verdict of guilty in a prosecution for larceny is fatally defective, which omits to find the value of the property alleged to have been stolen. *McCoy v. State,* 22 Neb. 418, followed." The discussion of the case by the writer of the opinion is very brief, and clearly shows that the court did not have in mind the new section of the criminal code. This appears from the fact that the opinion cites only section 488 of the code, and *McCoy v. State* and *McCormick v. State, supra.* After citing those two cases the opinion concludes (p. 532): "The case at bar is ruled by those decisions." This was an oversight on the part of the court and of the learned judge who wrote the opinion. The prosecution in that case was not under the code as to larceny generally, but under a distinctly independent section of the criminal code, complete within itself, which made the crime charged a definite and substantive crime, to be dealt with independently of the general provisions of the code as to larceny (*Wallace v. State,* 91 Neb. 158),

and the case could not properly and should not have been held to be ruled by those decisions.

Holmes v. State, supra, was a prosecution under section 113*a* of the criminal code, enacted in 1887, which provides: "Every person who steals property of any value by taking the same from the person of another without putting said person in fear by threats or the use of force and violence, shall be deemed guilty of grand larceny, and shall, upon conviction thereof, be punished by confinement in the penitentiary for not less than one nor more than seven years." The verdict in that case found "the said defendant guilty of larceny from the person, as she stands charged in the information." Paragraph 1 of the syllabus reads: "A general verdict of guilty of the crime of larceny from the person, from which is omitted a statement of the value of the property alleged to have been stolen, is fatally defective." In that case, as in *Fisher v. State, supra,* the court proceeded upon the theory that section 488 applied. The cases cited in the opinion are *McCoy v. State, McCormick v. State, Fisher v. State,* and *Armstrong v. State, supra.*

In *Armstrong v. State,* the Ohio court seems to have fallen into the same error as this court did in *Fisher v. State* and *Holmes v. State,* viz., in holding that the case was governed by section 167 of their criminal code, which is substantialy the same as our section 488, notwithstanding the fact that by the twenty-seventh section of the Crimes Act horse stealing was a made a penitentiary offense, "whatever may be the value of the animal stolen." The position of the Ohio court in a case of larceny from the person (which was *Holmes v. State*) is made clear in *Harris v. State,* 57 Ohio St. 92, and *State v. Whitten,* 82 Ohio St. 174, where it is distinctly held that a verdict upon the trial of an indictment for pocket picking which finds the defendant guilty of pocket picking in manner and form as charged in the indictment is sufficient to sustain judgment and sentence, although such verdict does not find and return the value of the property taken. It is true *Armstrong v. State* is not overruled in either *Harris v. State,*

or *State v. Whitten*, but is distinguished as involving an offense against property, while the two later cases involve crimes against the person. This distinction is drawn from the fact that larceny is provided for in chapter 4, under the subtitle of "Crimes against Property," while pocket picking is provided for in chapter 3 of title 1 of the penal subdivision of the statutes, entitled "Crimes against the Person."

We deem it unnecessary to enter into a discussion of the provisions of the Ohio law referred to, or of the distinction drawn by that court, preferring to determine the case upon careful consideration of our own code in an effort to get right in its construction. We think this court went wrong in *Holmes v. State*, and on reading *Keller v. Davis*, 69 Neb. 494, we discover that this is not the first time we have doubted the soundness of that case. In the case just cited, in commenting upon section 488, *supra*, the opinion says (p. 496): "Our attention has not been called to any decision expressly holding that the section quoted is applicable to the larceny of horses, yet, by analogy at least, *Holmes v. State*, 58 Neb. 297, holds that it is, and, in the further consideration of this case, we will assume that it is." But in paragraph 2 of the syllabus it is held: "Whether the provisions of section 488 of the criminal code, requiring the jury to ascertain and declare in their verdict the value of the property stolen, apply to prosecutions had under section 117 of the criminal code, *quære*." Upon a careful consideration of section 117 of the criminal code, and of our former decisions, we are all of the opinion that the query contained in *Keller v. Davis, supra*, should now be definitely answered and that section given the full force and effect evidently intended by the legislature when it was enacted. Section 117 makes horse stealing a felony, without regard to the value of the animal stolen. Section 117*a* makes the same provision as to cattle stealing; section 117*b* the same as to hog stealing; and section 117*c* the same as to the stealing of chickens and other domestic fowls. Prior to the enactment of these sections, section

488 required the jury to find the value of the property stolen. This was necessary in order to determine the grade of the crime—whether grand or petit larceny. By the new sections the stealing of any of the animals or fowls enumerated is made a felony, without reference to value. The value has nothing to do with determining the grade of the crime. It is therefore unnecessary, for that purpose, for the jury to find the value of the property.

There was formerly another reason why the jury should find the value of the property. Prior to the adoption of section 502*a* of the criminal code, known as the indeterminate sentence act, the trial court was vested with a large discretion in passing sentence upon one convicted of crime, within the limitation of the maximum and minimum penalty fixed by statute. Then the verdict of the jury as to the value of cattle stolen would aid the court in determining the degree of punishment to be inflicted. The court would not be likely to sentence one convicted of stealing a calf of the value of $10 to as long a term of imprisonment as one who had been convicted of stealing a number of animals of considerable value; but that is all changed by section 502*a*, which provides that every person over the age of 18 years, convicted of a felony or other crime punishable by imprisonment in the penitentiary, excepting murder, treason, rape and kidnapping, "shall be sentenced to the penitentiary; but the court imposing such sentence shall not fix the limit or duration of the sentence, but the term of imprisonment of any person so convicted shall not exceed the maximum nor be less than the minimum term provided by law, for the crime for which the person was convicted and sentenced; the release of such person to be determined as hereinafter provided." By succeeding sections the matter of release is placed in the hands of the state prison board. There being no longer any reason for requiring the jury to find the value of the property stolen, and section 117*a* of the criminal code making the larceny of cattle a felony, regardless of value, we see no reason why the value should be stated in the verdict. We there-

fore hold that, in a prosecution for cattle stealing under section 117*a* of the criminal code, the jury are not required to ascertain and declare in their verdict the value of the cattle stolen. *Fisher v. State,* 52 Neb. 531, and *Holmes v. State,* 58 Neb. 297, are overruled.

In one respect the district court erred. The penalty provided by section 117*a,* in case of conviction, is imprisonment in the penitentiary for not more than ten years nor less than one year. Section 502*e* of the criminal code authorizes the state prison board to establish rules and regulations by which prisoners within the penitentiary may be allowed to go upon parole at any time after "the minimum term fixed by law for the offense has expired." This would entitle the defendants to be permitted to go upon parole at the expiration of one year. The court, however, in passing sentence upon defendant Joseph W. Griffith, fixed the minimum at three years, thus depriving him of two years of time within which the prison board might permit him to go upon parole. This right to parole is a substantial right, of which one convicted of crime cannot be deprived by the court. While holding that it is not within the power of the district court to fix the minimum of the sentence at a greater period than that fixed by law, we do not at this time decide that the court may not fix the maximum at less than that fixed by law. The reason for this distinction is obvious.

For the reasons above stated, the minimum penalty of three years, fixed by the sentence and judgment of the district court, is reduced to one year, and in all other respects the judgment is

AFFIRMED.

J. C. YORK & COMPANY, APPELLEE, V. W. J. BOOMER ET AL., APPELLANTS.

FILED JUNE 16, 1913. No. 17,040.

1. **Trial**: INSTRUCTIONS. If the issue is fairly presented to the jury in a proper instruction, the judgment will not be reversed because the same issue was incompletely and defectively stated in another instruction, unless it affirmatively appears that the complaining party was prejudiced thereby.

2. ———: ———. In an action to rescind or annul a contract for fraud, if the plaintiff alleges several grounds for such relief, a verdict in his favor will not be set aside because of error of the trial court in withdrawing from the jury a part of plaintiff's cause of action; sufficient remaining to justify the verdict. Such error is without prejudice to the defendant.

3. **Contracts**: SUIT TO RESCIND: EVIDENCE. The evidence is found to be sufficient to support the verdict of the jury.

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

Adams & Adams, for appellants.

F. L. Carrico and *J. L. McPheely, contra.*

SEDGWICK, J.

This action was begun in the district court for Kearney county as an action in replevin, and a part of the property involved was taken under the writ. The plaintiff filed a petition which is in form a petition in equity to rescind or annul a contract which the plaintiff claims was obtained by fraud, and under which the defendants obtained possession of the property. The cause was submitted to a jury, and there was a verdict and judgment for the plaintiff, and the defendants have appealed.

It does not appear from the briefs that there was any controversy between the parties as to the manner of the trial, and no objection is now made on that ground. The petition alleged that the plaintiff is the owner and entitled

to the immediate possession of a stock of harness and other goods constituting their stock in trade in Minden, Nebraska, of the value of $3,800, and that the defendants wrongfully and unlawfully obtained the goods and chattels from the possession of the plaintiff. The petition then alleges that on the 17th day of June, 1910, the defendants represented that W. J. Boomer was the owner of a tract of land in Lincoln county, Nebraska, consisting of 320 acres, and represented that it was of the value of $8,000, when in truth and in fact it was not of greater value than $4,000; and represented that a purchaser for said land, one C. K. Gittings, had been secured who would enter into a contract to purchase the land for the sum of $8,000, and that if the plaintiff would exchange its stock of goods for the defendants' land, the said Gittings would take the land and pay therefor the sum of $8,000 and that thereupon two contracts were executed, by one of which contracts the defendants agreed to exchange the said land for the said stock of goods and the plaintiff agreed to give in exchange therefor the said stock of goods, valued at $3,800, and to pay for the same $1,200 on the 1st day of August, 1910, and then to take the land subject to two mortgages, one for $1,400 and the other for $600, and to secure the payment of the remaining $1,000 of the purchase price of the land by a mortgage. By the other contract the plaintiff agreed to sell the said land to the said Gittings for the sum of $8,000 "in the manner following; $400 cash in hand paid, the receipt whereof is hereby acknowledged, and the balance as follows: $4,600 on the 1st day of August, 1910, at which time second party is to assume one mortgage of $1,400 and one mortgage of $600 and one mortgage of $1,000 now on or to be placed on said land, and the first party is on the 1st day of August to execute deed according to this contract subject to above described mortgages. * * * The said two contracts were * * * both at time of execution delivered into the possession of defendant W. J. Boomer, upon the express condition then and there made orally, and the delivery of same depended and the final

consummation of said contracts upon giving same unto the possession of said W. J. Boomer, was that same be not finally delivered unless full and complete performance be made by all the parties to both contracts and that there be full and complete performance by said C. K. Gittings of all covenants and agreements contained in contracts executed by him. And relying upon said representations and believing same to be true, the said contracts as signed *was* given into the possession of defendant W. J. Boomer and plaintiff delivered said stock of goods." And that when said contracts were executed they were taken by the defendant Boomer and deposited in the bank, in accordance with the understanding of the parties, to remain on deposit until the 1st day of August, when the deeds were to be executed and the exchanges made, and that, when so taken by the said Boomer, each of the said contracts contained the following clause: "And in case of failure of the said party of the second part to make either of the payments or perform any of the covenants on his part hereby made and entered into this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract." And that afterwards the said defendants altered the said contract between the plaintiff and the said Gittings by erasing from the said clause thereof the words "at the option of the party of the first part," so as to reserve to the said Gittings the right to forfeit and determine the contract; and that, "at the time set for the performance of the conditions in said contract, the said C. K. Gittings refused and now refuses to perform the conditions contained in said contract, all as prearranged by and between them, the said C. K. Gittings, W. J. Boomer, and the W. J. Boomer Implement Company. And plaintiff elected to and by reason of the fraud on the part of said C. K. Gittings, W. J. Boomer, and the W. J. Boomer Implement Company, to rescind said contract, instituted these proceedings, and replevied the property herein described."

To this petition the defendants filed a general denial. The petition, perhaps, is not very artistically drawn, but no objection was made thereto, and there was no motion for a more specific statement, and the evidence, so far as is shown by the briefs, was taken in all respects as though the petition was sufficient.

The principal contention of the defendants in the brief is "that the verdict is wholly unsupported by the evidence and is contrary thereto." Boomer & Company were in the hardware business in Edgar, Nebraska. One Stanley was a traveling man, selling hardware, and, perhaps, other goods. He visited Minden and stopped at York's store. He told them he knew of a man who wanted to trade some land for a stock of goods. After some talk he wrote the name and address of Mr. Boomer on a piece of paper and left it with York. York wrote a letter to Boomer telling him that he understood that he wanted to exchange some land for a stock of goods, and that he had a stock of goods, etc. Boomer immediately called them up over the telephone, and right away afterwards called at their store. They went out to see the Boomer land, which was 320 acres, and Boomer priced it at $25 an acre, being $8,000. The stock of goods was then valued by the parties at about $4,000. After looking over the land York told Boomer that he could not deal at all upon that basis, and that he could not take the land for the stock of goods, unless they could find a cash purchaser for the land. Soon afterwards Stanley, the traveling man, informed York that he had found a cash purchaser who would buy the land. This was Gittings, and not long afterwards Boomer and Gittings came together to see Mr. York. York testified that he told them when they were both together (that is, Gittings and Boomer) that he would not trade the stock for the land, unless the land was sold at the same time. He would not make one deal without the other. When Gittings and Boomer met in the presence of York, York introduced them. They told him then that they had never met, but soon afterwards York testifies that they told him they had

talked the matter over before and had been acquainted some time. At all events, Gittings agreed to take the land at $8,000. There is no explanation why they did not make the deeds at once and close up the business, but they agreed, as York says, that it should be closed up on the 1st of August, which was about a month later, and so, instead of making the deeds and closing up then, they made the two contracts. Under one contract Boomer agreed to sell the land to York, and in the other York agreed to sell the land to Gittings. These contracts were written upon identical blanks; they were written by some stranger at Hastings, and were dictated by Mr. Boomer. It was agreed that they should be in the bank until the deal was consummated and the deeds made, and that they should not be delivered to the parties until that time. When the contracts were completed Boomer put them both in his pocket and they all went to the bank. Boomer turned the contracts over to the bank. These blanks upon which the contracts were written contained the clause to the effect that, if the purchaser failed to carry out the contract, the seller, at his option, might forfeit the first payment and keep his land. It turned out afterwards, when Gittings refused to complete the contract and pay for the land as agreed, that the option clause in his contract had been erased and so changed that the purchaser was not compelled to take the land, but merely to forfeit his first payment; and as the first payment was only $400 and the amount that York was paying for the land was over $4,000 more than he regarded as its true value, Mr. Gittings concluded to let York have the $400 and not take the land. Mr. York testified positively that he read both of these contracts at the time they were signed, and that when these contracts were put in Boomer's pocket this clause had not been erased. If the jury believed this testimony, it would mean that Gittings and Boomer, or one of them, changed the Gittings contract afterwards so that Gittings would not be compelled to take the land. This was quite important, as Gittings says he was worth $75,000, and of course did not want to be com-

pelled to take the land unless he chose to do so. An arrangement of this kind, if it was as York claimed, and as the jury found, could not be proved by the direct evidence of witnesses who knew that they had agreed to so swindle Mr. York. Such transactions are always to be proved by circumstances that indicate fraud, and by the result of the deal. If the jury believed that the Gittings contract was so changed after Boomer took possession of it as to enable Gittings to avoid it by merely forfeiting the $400, and believed that the contracts, as soon as executed, were taken by Boomer together and by him placed in the bank, they must have believed that the change was either made by Boomer, or that he knew it was made and knew the reason of its being made. It turned out that York bought the land, if this contract is carried out, with mortgages on it for more than he would be willing to pay for the land, and that he must pay $1,200 in cash and give the stock of goods at $3,800 and assume and give additional mortgages, so that the result is to defraud York of something more than $4,000.

The defendants say in the brief: "Suppose it was true that this matter of the trade or trades had been prearranged by Boomer and Gittings, and neither of them ever said a word to the Yorks about it, or made any representations, or made any agreement that both deals should go through, and the trades had been made, just as they were, then in such case would there be actionable deceit or fraud?" Both of the Yorks testified that the agreement was that both contracts should go through or they would not make the exchange. They seem to be frank and straightforward in their testimony, and of course the jury were at liberty to believe them, though contradicted by the other parties to the alleged fraud. The jury believed York, and we cannot believe that they were so clearly wrong in so doing that we are compelled to set aside their verdict.

The court excluded some competent evidence offered by the plaintiff, and by its instructions withdrew from the jury some important issues presented by the petition and

evidence. This was prejudicial to the plaintiff, but the defendants are not in a position to complain of these rulings. One of the instructions complained of by defendants was incomplete, but the issue above outlined was fairly presented by another instruction. We cannot extend this opinion with a detailed discussion of the instructions, which, from the nature of the case, were necessarily quite comprehensive. The parties by this verdict are placed as nearly as may be in the position they occupied before the transaction was entered into. We find no error in the record prejudicial to the defendants so as to require a reversal of the judgment.

The judgment of the district court is therefore

AFFIRMED.

ROSE, J., dissenting.

The facts constituting the fraud on which the relief granted is based are not pleaded. The judgment, though affirmed as a decree in equity, was rendered on the verdict of a jury in an action at law and is not supported by any evidence. The action was replevin. Under the writ plaintiff seized the property in a harness store and saddler's shop at Minden. The value of the stock was alleged to be $3,800. Part of the goods in the store had been sold by defendants before the action was instituted. The jury rendered a verdict in favor of plaintiff and fixed the value of the property which had formerly been a part of the stock, but not taken under the writ, at $1,400, and the damage for detention at one cent. The effect of the judgment rendered on this verdict in the action at law was to cancel an executed bill of sale and two separate contracts for the purchase of a half section of land, though grantee in one of the contracts is not a party to the action of replevin.

The import of the petition in replevin is that plaintiff owned the stock, and, through the fraud of defendants, was induced to enter into a contract to exchange it for 320 acres of encumbered land in Lincoln county; that defend-

ants procured possession of the stock of harness and the storeroom June 18, 1910, and that plaintiff rescinded the contract of sale August 3, 1910. Any fraud which can be inferred from the petition may be summarized thus: (1) Defendants falsely represented the value of the 320 acres of land to be $25 an acre, whereas it was only worth $4 an acre. (2) A fictitious agreement or fraudulent representation by defendants that C. K. Gittings would purchase the land from plaintiff and pay $8,000 therefor. (3) By prearrangement among defendants and Gittings the latter promised to purchase the land from plaintiff with the intention of violating his contract, and attempted to carry out the fraudulent scheme, though it was agreed by all parties to both land deals that the sale of the stock of goods was contingent upon the performance by Gittings of his contract to buy and pay for the land. (4) The contract by Gittings to purchase the land for $8,000 was materially altered without the consent of plaintiff. The trial court properly instructed the jury that there was no evidence to sustain either the first or the second charge of fraud. Nothing but the other charges is left for consideration. Plaintiff is a partnership composed of James C. York and his father, James H. York. The Boomer Implement Company, defendant, is a partnership composed of W. J. Boomer and three brothers. Before any of the contracts were executed, the senior York had viewed the land and Boomer had inspected the saddlery. After negotiations by means of letters, telephone communications and personal interviews, the two Yorks, Boomer and Gittings met at Hastings, June 17, 1910. Three contracts were there drawn and signed on that date. One was executed by W. J. Boomer on behalf of defendants and by J. C. York on behalf of plaintiff. It obligated defendants to convey the land to plaintiff, to execute a deed at once, and to deliver it August 1, 1910. It bound plaintiff to make a cash payment of $3,800, to pay $1,200 August 1, 1910, to assume on the same date two mortgages, one for $1,400 and the other for $600, and to execute a mortgage for $1,000. Another

contract binding Gittings to purchase the land from plaintiff was signed by the vendee and by J. C. York. This contract obligated Gittings to make a cash payment of $400, to pay $4,600 August 1, 1910, and to assume three mortgages at that time, one for $1,400, another for $600, and the third for $1,000. In addition to the two contracts described, a bill of sale transferring the saddlery to defendants was executed by plaintiff. The next morning Boomer appeared at the First National Bank of Minden and in presence of Gittings and the Yorks deposited in escrow his deed conveying the land to plaintiff and the two land contracts mentioned. Gittings deposited with the bank his cash payment of $400, which has never been withdrawn. The Yorks testified that Boomer also deposited the bill of sale, but they concede that he withdrew it without protest from them before he left the bank, saying he was entitled to it. Since the trial court properly directed the jury that there was no evidence of the first and second charges of fraud, the verdict could only be sustained by proof supporting the third and fourth.

On the witness-stand the Yorks both said they stated to defendants and to Gittings, before the negotiations were concluded, that the sale of the stock of saddlery depended upon performance by Gittings of his contract to purchase the land, but they did not testify that defendants agreed to such terms, and there is no such proof in the record. The circumstances indicate the contrary. Though the parties undertook to reduce their agreements to writing, the writings do not show that the land contracts are dependent upon each other, nor do they state that the sale of the saddlery was contingent upon the sale of the land to plaintiff or upon the latter's sale to Gittings. The statements of the Yorks were merged in the contracts. It is neither alleged nor proved that there was fraud in drawing or in signing the contracts. Boomer kept the bill of sale without protest from plaintiff, and took charge of the store the next morning. Plaintiff turned the keys over to defendants within a few days, permitted a part of the stock

to be removed, and sanctioned sales in the regular course of business without making any demand for the proceeds or for an accounting. The record not only contains no evidence that defendants agreed to the oral terms upon which plaintiff relies, but those terms cannot properly be inferred from the circumstances proved. The reason Boomer left his deed at the bank instead of delivering it when executed is definitely stated in his testimony. Plaintiff owed him a balance on the purchase price of the land sold by him to it and he refused to deliver the deed before the debt was paid. Anxiety on the part of plaintiff to sell the saddlery was fully shown. For the purposes of a sale Stanley was plaintiff's agent under an agreement that he should receive $25 for expenses. The introduction of Gittings to Boomer by York, as disclosed by the evidence, was an innocent circumstance fully explained. It is like others which occur every day in legitimate business transactions. It is only by attaching to innocent acts sinister aspects not shown by any evidence that even suspicions of fraud can be created. Such suspicions may arise from negotiations resulting in any honest agreement, and the effect of entertaining them in this case is to interfere with the right of contract, to make the court the guardian of the improvident, to destroy the integrity of written instruments, and to deprive parties to contracts of rights guaranteed by the state and the federal constitutions. The third assumed allegation of fraud is not proved.

The fourth imputation of fraud is likewise unproved. There is no evidence that defendants, or any of them, changed the Gittings contract. Gittings testified positively that he made the erasure before the contract was signed. If he was mistaken, a court of equity would reform the contract to express the agreement made and thus enforce it. That he was financially able to perform is shown by undisputed proof that he was worth $75,000. Boomer was not a party to that contract. He had no motive for changing it. As to him the change was immaterial. If, contrary to the evidence, his dishonesty had been shown,

his business acumen, as conclusively established, is proof against the charge that he changed the contract and thus defeated his own negotiations by a foolish and unnecessary act. Facts constituting fraud are neither shown by direct proof nor by proper inference.

BARNES, J., concurs in this dissent.

JOHN M. RISHER, APPELLANT, V. NELS C. MADSEN, APPELLEE.

FILED JUNE 16, 1913. No. 17,106.

1. **Evidence:** SECONDARY EVIDENCE. A witness who testifies positively that she received a letter from the defendant in due course of mail, that she knows who signed the letter and it was signed by defendant, and that the letter has been lost, that she has made careful search and is not able to find it, should be allowed to testify to its contents as far as material to the issue being tried. It will not be presumed that she has not had opportunity to know defendant's signature or other facts positively testified to by her, in the absence of cross-examination as to such opportunities.

2. **Adverse Possession:** REBUTTAL EVIDENCE. In an action of ejectment, when the defense is adverse possession and the statute of limitations, it is competent to prove in rebuttal that the defendant after the alleged running of the statute of limitations, being asked by the plaintiff why he was using the land, stated that the land was unoccupied, and made no claim of right as against the plaintiff.

3. ———: TOLLING THE STATUTE. In such action an attempt on the part of the defendant to lease the land from the plaintiff during the alleged running of the statute of limitations will toll the statute.

4. **Ejectment:** GENERAL DENIAL: EVIDENCE: SUBSEQUENTLY ACQUIRED TITLE. Evidence that the defendant in ejectment has purchased an outstanding tax title based upon a sale for taxes while the action is pending cannot be received under a general denial. If such issue is tendered upon a supplemental answer the plaintiff will be allowed to join issue thereon.

5. **Adverse Possession:** QUESTION FOR JURY. Possession upon which to

base a title under the statute of limitations must be adverse to all the world, including the plaintiff who holds the legal title. If the holder of the legal title is a nonresident and pays all taxes on the land regularly and has no actual notice that the land is claimed by any one adversely to his title, and a trespasser, without any color of title, cuts wild grass and otherwise uses unenclosed lands and excludes other trespassers to enable him to do so, it presents a question for the jury to determine whether he has held such possession as is adverse to the rights of the true owner.

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

Leavitt & Hotz and *H. M. Buddha,* for appellant.

James P. English and *Will H. Thompson, contra.*

SEDGWICK, J.

The plaintiff brought this action in ejectment in the district court for Douglas county to recover the possession of five lots in block 74, in Benson, an addition to the city of Omaha. The answer was a general denial. The trial resulted in a verdict and judgment for the defendant, and the plaintiff has appealed.

It appears from the evidence that in 1893 block 74 and various other adjoining blocks in that addition were wild, uncultivated lands. Several dairymen and others were in the habit of keeping their herds in that neighborhood and pasturing them where they could on unoccupied lands. Some tracts of land appear to have been rented by various stock owners, and others were used without any authority from the owners. One Hanson had a herd of cows, and had a lease of some lands adjoining or in the vicinity of block 74, and had erected a fence along one side of block 74, and had apparently been grazing his cattle on the land that is now in dispute. In 1893 this defendant and one Jacobson in partnership bought out the interest of Hanson in his dairy and apparently in his leases, including the fences which Hanson had erected adjacent to block 74. They be-

gan at once to use all of block 74, cutting the grass, making hay in the summer, and pasturing the cows on the grass after the hay had been removed. The block was good hay ground, except about an acre which they plowed and put in millet. After about two years the defendant bought out Mr. Jacobson's interest in the business, and continued as before, including the use of block 74. From their first occupancy of this land in 1893 for a little more than 10 years they continually claimed the right to use this land. They excluded other dairymen and herders therefrom and prevented people from driving indiscriminately over it. Fannie B. Risher purchased this land in June, 1893, and received a warranty deed therefor, and in March, 1905, she, then being a member of the plaintiff's family, conveyed the land to this plaintiff. The plaintiff put in evidence conveyances apparently showing his chain of title direct from the government. His legal title so obtained is not controverted in the record. The plaintiff and his immediate grantor paid the taxes upon the land. They allowed the land to be sold for taxes in 1900, but afterwards, in 1902, redeemed it. After defendant excluded plaintiff from the land in 1905, the plaintiff paid no taxes; in 1908 the land appears to have been sold for taxes of 1906, and in January, 1910, the county treasurer executed a treasurer's tax deed conveying the land to one Francis I. Thomas, and thereupon Francis I. Thomas and Dexter Thomas executed a quitclaim deed of the lands in question to this defendant.

The defendant claims the land by adverse possession. He made no attempt to establish any other claim or right at the time of the commencement of this action. There is no doubt that he used the land during the 10 years that he claims to have used it, and there is no doubt that he excluded the public generally from the land. The real issue between the parties was whether he held this land adversely to the plaintiff. One witness testified positively that in 1893, about the time the defendant began using the land, the defendant told him that he had rented the

land and had a right to use it. The defendant positively denies this. Edwin Garvin, a real estate agent of Omaha, testified that he represented the owners of this property, and early in 1905, as agent of the plaintiff, he had a conversation with the defendant in which he asked the defendant what he was doing on the land, and what right he had there, and that the defendant answered: "Nobody was using it and he had been cutting grass; he didn't claim to own the land." Afterwards, the witness served a notice on the defendant for possession. The defendant then said that he had possession and was going to hold it. The defendant testified in regard to this conversation, and appears to intend to contradict the evidence of Mr. Garvin, although the defendant's testimony is not very explicit.

Mrs. Risher testified that in 1901 she received a letter from the defendant; that it came by mail in the usual way; that she had made diligent search for the letter and was unable to find it; that she knew by whom it was signed, and that the defendant's signature appeared on the letter; and that she was able to state the contents of the letter. This she was asked to do, but, upon objection, her evidence was excluded. This evidence was apparently excluded upon the ground that Mrs. Risher was not in position to know the signature of the defendant, but she testified positively that she did know his signature, and there was no attempt to cross-examine her as to her means of knowledge, and in the absence of such cross-examination we think the evidence should have been admitted.

If it is true that in 1901 the defendant attempted to lease the land from the plaintiff or his grantor without making any claim to hold it adversely against the plaintiff, or if it is true that when Mr. Garvin, the plaintiff's agent, first approached him in 1905 and asked him in regard to his claim the defendant made no claim to hold it adversely to the plaintiff's interest, he could not claim title by adverse possession against the plaintiff.

We think also the court erred in receiving in evidence

the treasurer's tax deed and the deed from Thomas to the defendant. This action was begun in 1906. This deed, therefore, and the sale upon which the tax deed was issued all occurred while this action was pending. In an action of ejectment the defendant under general denial can make any defense that he has, but it must be a defense to the plaintiff's right of possession as it existed at the time that the action was begun. If the defendant had obtained rights in the property, or had secured substantial equities after the action was begun, it seems probable that under our liberal code practice he might be allowed to present such subsequently acquired rights for adjudication by supplemental pleadings, but he ought not to be allowed to do so under a plea of general denial of the plaintiff's right of possession without supplemental pleadings. *Duggan v. McCullough*, 27 Colo. 43, 59 Pac. 743. If the defendant tendered such issue by supplemental pleadings, the plaintiff would of course be allowed to join issue thereon, and such issue, if equitable in its nature, would be determined by the court. The court by instructions attempted to withdraw from the jury all consideration of this tax purchase and deed as affecting the right of possession. If the tax deed had been brought into the case by proper pleading and proof, the trial court would be required to determine the legal questions arising as to its validity, and the right of possession thereunder Its reception in the condition that the issues then were and its subsequent rejection tended to confuse, and perhaps to mislead, the jury.

The plaintiff and his grantor, who held the legal title to this land during the 10 years that the defendant is now claiming that he held it adversely, were residents of another state, and the evidence shows that they paid the taxes on the land in good faith and had no actual notice of any adverse claims of ownership whatever. Did the defendant hold this land adversely to their title and possession? Did he have such possession and use of the land as would in law afford the rightful owners constructive

notice that he was holding it adversely to their right? He admits that he had no right to the land whatever when he commenced using it. He made no inquiry as to the true owners, but he says he claimed the land from the start. If this claim was merely as against other trespassers, and an attempt of himself and other cattlemen to apportion these unoccupied lands among themselves, and use in herding and appropriating the wild grass without any act or claim adverse to the owners of the title, this would not necessarily constitute such adverse possession against the true owners as would ripen into complete title. If the jury found from the evidence that within 10 years before the commencement of this action the defendant recognized the plaintiff's right by attempting to lease it from the plaintiff or his grantor, or that, when the plaintiff by his agent inquired of the defendant what right he claimed in the land, he failed to assert any right in the land itself as against the plaintiff, the verdict should have been for the plaintiff. There was no doubt under the evidence that the defendant's use of the land was adverse as to the other cattlemen who were using other tracts of land in that neighborhood in the same manner, and if this question had been presented to the jury they might have found that this was the extent of the defendant's claim of adverse possession. The real issue was not defined and plainly submitted to the jury in the instructions.

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

REVERSED.

LETTON, ROSE and HAMER, JJ., not sitting.

BUFFALO COUNTY, APPELLEE, V. JOEL HULL, APPELLANT.

FILED JUNE 16, 1913. No. 17,148.

OPINION on motion for rehearing of case reported in 93 Neb. 586. *Rehearing denied.*

SEDGWICK, J.

The brief upon the motion for rehearing points out two mistakes in the opinion. 93 Neb. 586.

1. The first one of them is that the opinion says that the bridge was built in 1874, and also says that the act of 1879 was in force when the bridge was built. The point in mind was that the statute of 1881 was treated by Judge MAXWELL in the opinion in *State v. Kearney County,* 12 Neb. 6, as controlling, although it was enacted a long time after the bridge was built; and the opinion in this case is all predicated on the statement therein: "The liability of adjoining counties for repairs of a bridge over a stream betwen them is fixed by statute, and it is within the power of the legislature to alter or amend the statute in that regard. The conditions and extent of the liability depend upon the statute in force when such repairs are made and the liability incurred." 93 Neb. 586. This was what Judge MAXWELL held in 12 Neb., the case upon which this defendant relied. The error in stating that the act of 1879 was in force in 1874 is quite immaterial to the merits of the case.

2. The second error is that it is stated that the repairs involved in this case were made in 1894. This is a typographical error for 1904. The proceedings were begun in 1904 and the repairs ordered, but it appears they were not actually made until 1905. This typographical error is immaterial to the merits of the case.

The motion for rehearing is

OVERRULED.

W. D. STARBIRD, APPELLEE, V. J. H. MCSHANE TIMBER COMPANY ET AL., APPELLANTS.

FILED JUNE 16, 1913. No. 17,152.

1. **Brokers: COMMISSIONS.** One who is employed by another to sell specified property at a stated price and for an agreed compensation for making such sale, but has no exclusive contract of agency, other persons with his knowledge being likewise authorized to make such sale with the same agreement as to compensation, cannot recover the stipulated commission upon sale being made by others so employed, although his own efforts may have contributed to the result.

2. ———: ACTION FOR COMMISSION: PLEADING. Neither the pleadings nor the evidence in this case will support a judgment for the value of the plaintiff's services in assisting to make a sale of the property.

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

Isaac E. Congdon, for appellants.

De Bord, Fradenburg & Van Orsdel, contra.

SEDGWICK, J.

During the year 1907 the J. H. McShane Timber Company, a corporation, owned property and a business in the Big Horn mountains in Wyoming, which had cost the company about $400,000. The capital stock of the company was $250,000, all of which was held by J. H. and F. J. McShane. In the beginning of the year the company was largely involved in debt and the business was unprofitable and very much embarrassed. It became apparent that the business could not be continued and that a sale of the entire property and business would soon become unavoidable. This plaintiff had been conducting a somewhat similar business in Idaho, and was contracting for one in the state of Washington. He heard incidentally that the McShanes were anxious to sell their property

and business, and wrote them that he had heard that they desired to sell and suggested that he might be of assistance to them. Afterwards it was suggested to the McShanes by a former owner of the property that this plaintiff might be able to effect a sale. The McShanes requested the plaintiff to meet them at the property, and a verbal understanding was arrived at between them under which the plaintiff became very much interested in assisting the McShanes in placing and keeping the property and business in condition to sell and in finding a purchaser. There was at that time no definite contract between them as to compensation to the plaintiff for his services, but it seems to have been understood that the plaintiff was authorized to sell the property, and he was promised if he succeeded in making such sale that he would be amply paid therefor, "more money than he had ever had." With this indefinite understanding the plaintiff, who appears to be an active man and to have had some experience and a large acquaintance with parties who might be expected to become purchasers of such property, gave considerable time and attention to the undertaking of selling the property and in assisting the McShanes in so doing. In the meantime the condition of the business did not improve. Matters continually grew worse. The McShanes became desperately anxious to sell. The plaintiff demanded a definite agreement as to his authority in the matter, and in March, 1908, the timber company gave him a memorandum in which they agreed to sell the whole property to the plaintiff for the sum of $260,000. The memorandum concluded with these words: "The intent of this instrument is an option of purchase, and is and shall remain in force until July 1, 1908." Afterwards the McShanes executed a writing whereby they gave the plaintiff "the right, privilege and option" up to January 1, 1909, of selling the entire capital stock of the company for a price therein stated, and agreed to pay him $25,000 for making such sale. At the same time they executed a writing, which is called a supplemental instrument, in which they re-

ferred to the last-named writing, and extended it to April 1, 1909, and included, not only the stock of the company, but all of its property rights also. Both of these writings bore the same date and appear to have been delivered together in September, 1908.

In November, 1908, the creditors became insistent, and the McShanes became unable to obtain further money or supplies so as to continue the operation of the plant. They were indebted to the First National Bank of Omaha in the sum of $74,000, and to Paxton & Gallagher in about the sum of $25,000 for supplies, and to the Bank of Commerce of Sheridan, Wyoming, in a large amount. When Paxton & Gallagher refused to furnish supplies, Mr. McShane appears to have stated to Mr. Pearce, their manager, the condition of the company's affairs, and informed Mr. Pearce that it was impossible for them to continue the business, and suggested that it would be better to go into bankruptcy or have a receiver appointed. Mr. Pearce suggested that it would be better to turn the property and assets over to trustees to hold and manage the same for the creditors, and upon this suggestion a contract was entered into appointing Mr. Pickens, of Paxton & Gallagher, Mr. Davis, the first vice-president of the First National Bank, and Mr. Perkins, president of the Bank of Commerce of Sheridan, as trustees, and all of the property was assigned to them in that capacity. The trustees took possession of the property in November, 1908, and continued the business. In January, 1909, the property was sold to McPherson & McLaughlin for $182,850. While this sale was being consummated, this plaintiff served notice on all the parties interested that he claimed a commission of $25,000 if the property was sold, and afterwards the plaintiff began this action in the district court for Douglas county against J. H. and F. J. McShane and the McShane Timber Company and the three trustees to recover the $25,000 commission. Upon the trial, when the evidence was completed, the trustees moved for an instructed verdict in their favor. The McShanes

and the McShane Timber Company moved for an instructed verdict in their favor. The plaintiff dismissed his action as to the trustees, and moved for an instructed verdict in his favor against the McShanes and the McShane Timber Company. The court thereupon dismissed the action as against the trustees and discharged the jury, and afterwards rendered a judgment in favor of the plaintiff against the McShanes and the McShane Timber Company for $18,798, and the defendants have appealed.

The action was based upon the contract, authorizing the plaintiff to sell the property, to recover the $25,000 agreed commission for doing so. There was no allegation of the value of the plaintiff's services. The plaintiff insists that there is sufficient evidence of the value of the services to support the judgment, and also insists that under the evidence the plaintiff was entitled to the full sum of $25,000, and that the defendants cannot complain of the judgment for a less amount. With the contracts above stated between the plaintiff and McShane, the latter employed the plaintiff to assist in the management of the business and care of the property, and to put it in condition to sell. They paid him $300 a month, and agreed that his salary should begin from the preceding January. They also paid all of his expenses incurred either in the care of the property or in endeavor to sell. The plaintiff insists that the salary was paid him because the employment would require him to employ a man to manage his business, and that plaintiff gained nothing by receiving this salary. But the plaintiff testified that in May, 1907, he was operating a lumber plant in Chance, Idaho, and "had gotten out all our timber and still had all of our property, and I was undertaking to get our money out of it, and was tied up in another contract I was figuring on." He closed this latter contract by purchasing a mill at Springdale, Washington. He says that his plant at Springdale was to "start up" April 1, 1909. He looked after his personal interests himself, and there is no evidence that he employed a man in his place or was put to

any expense in that regard. As we have already stated, his first contract of March 28, 1908, was merely an option to purchase the property for a fixed price of $260,000, and was to remain in force until July 1, 1908. The contract for commission for selling the property upon which he sues, which was dated a few days later, fixed the value of the property at which he was authorized to sell at a somewhat less figure. This price was fixed upon careful inventories of cash values estimated by plaintiff himself, and was about $250,000. He was not engaged in the business of a broker, and had no advantages for securing purchasers such as a clientage of a broker's agency might have supplied. McShane agreed to give Mr. McPherson the same commission if he would sell the property. He made the same agreement with several others. The plaintiff had no exclusive agency to sell the property. No doubt this employment with a salary was dependent upon the more important matter of selling the business. McPherson, who was also promised $25,000 if he should make a sale of the property, appears to have been very active in the matter. He knew that the property was about to be sacrificed and was ready to take an interest in it himself, but did not want to undertake the purchase alone, and afterwards did actually purchase it from the trustees with Mr. McLaughlin. Mr. McLaughlin was engaged in similar business in another location, and when the property was offered to him for $250,000 he expressed himself as unwilling to pay more than $225,000, and afterwards reduced this from time to time, and finally made the definite offer of $180,000 for the property. The contract with the trustees gave them full power to sell the property for such price and upon such terms as they found to be in the interest of the creditors. It was provided that the McShanes might make contracts for the sale of the property subject to the approval of the trustees. At a meeting in Omaha in January, 1909, with McPherson and McLaughlin, at which the trustees and others interested were present, including Mr. J. H. McShane, a contract of sale was made by the trus-

tees to McPherson & McLaughlin. McShane had understood that these purchasers would pay at least $200,000 for the property, and when they proposed to pay only $180,000 he protested. The trustees finally offered to accept $182,500, with a few dollars added as expenses, and McShane at once left them, declaring that that amount would not be sufficient to pay the indebtedness. In this he appears to have been right. The indebtedness largely exceeded the amount of the sale. This plaintiff was not present when the sale was made. It does not appear that the purchasers or the trustees, or any of them, knew that the plaintiff had any contract for a commission, nor that he was employed to make a sale. They seem to have understood that the plaintiff was employed at a salary, and supposed that that was the extent of his relation to the business. When the property was turned over to the trustees they contracted with the plaintiff to continue in their employment, so that he had notice of the assignment and of the duties and powers of the trustees. He knew that, while these defendants were still interested in the property and in bringing about as advantageous a sale as possible, no sale of the property could be made except by or through the trustees, and of course his power to act was limited accordingly. When it was found that the property could not be sold for the price for which the plaintiff had been authorized to sell it, and that it must be sold for some price, no new agreement was made authorizing him as agent to sell for a lower price, and yet these defendants continued to avail themselves of his efforts to secure a purchaser for the property.

We have attempted to state the facts sufficient to show in a general way the nature of the plaintiff's employment and the necessary construction of his contract. Neither the plaintiff nor any one of the other parties authorized by the McShanes to sell the property nor Mr. McShane himself can be said to have done so. How much the efforts of any one of them contributed to the result it is difficult to determine. The sale was consummated and closed by the

trustees. They never employed nor authorized this plaintiff to sell the property. Under these circumstances, it seems clear that it cannot be said that the plaintiff has sold this property and so became entitled to the stipulated sum that was to be paid him if he made such sale. On the other hand, it was not the understanding of the parties that the salary paid to the plaintiff should necessarily be in full payment for all services rendered by him, if such services were of greater value than the amount of the salary. So far as we have observed from the examination of the abstract, evidence was offered by the plaintiff as to the value of his services, but was excluded upon objection. At all events, there is not sufficient evidence in the record to justify the judgment upon the ground of the value of the plaintiff's services. The plaintiff should be allowed to amend his petition, if so advised, and count upon a *quantum meruit* upon payment of costs accrued to the time of making such amendment.

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

REVERSED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

SAMUEL M. JACKSON, APPELLANT, V. CHARLES F. ROHRBERG ET AL., APPELLEES.

FILED JUNE 16, 1913. No. 17,265.

Limitation of Actions: ACTION BY MORTGAGOR. The mortgagor's cause of action to quiet his title, recover possession, and redeem from the lien of the mortgage accrues when the mortgagee takes possession of the mortgaged property with color of title to the fee and claim of ownership, and the ten years' limitation of the statute will then begin to run.

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

Fred H. Free, McGraw & Wilke and *C. S. Polk,* for appellant.

Douglas Cones, Mapes & Hazen, W. W. Quivey and *M. H. Leamy, contra.*

SEDGWICK, J.

The plaintiff began this action in the district court for Pierce county to quiet his title, and recover possession of the real estate described, and to redeem the same from the lien of a mortgage. After some questions had been raised, the plaintiff filed an amended petition, and the defendants demurred thereto generally. The court sustained the demurrer, and, the plaintiff not pleading further, the action was dismissed, and the plaintiff has appealed, so that the only question presented is as to the sufficiency of the petition to entitle the plaintiff to the relief demanded.

The petition alleges that the plaintiff obtained title to the premises by deed on the 16th day of April, 1890. There is no allegation that he ever obtained possession, and the petition alleges that the defendants are in possession. The petition also alleges that in April, 1890, a mortgage company filed a petition in the district court for Pierce county to foreclose a mortgage upon the land, and that in May, 1890, a decree of foreclosure was entered in that action for the sum of $10,704.76, and that a sale was had thereunder, and pursuant thereto the sheriff executed a deed and delivered it to the plaintiffs therein, who afterwards conveyed to these defendants.

From these allegations it appears that these defendants and their grantors, as mortgagees, took possession of the land in the spring of 1891, with color of title, and claiming the title against this plaintiff and all others. The plaintiff's cause of action accrued when the mortgagees entered into possession under their claim of title. *Clark v. Hannafeldt,* 79 Neb. 566. This action was not begun until much more than 10 years thereafter. The plaintiff's

action was therefore barred by the statute of limitations, and the demurrer to his petition was rightly sustained.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

FORD & ISBELL LUMBER COMPANY, APPELLANT, V. H. F. CADY LUMBER COMPANY, APPELLEE.

FILED JUNE 16, 1913. No. 17,293.

1. **Pleading: ANSWER: JOINDER OF DEFENSES.** A defendant may plead in his answer as many defenses as he has, whether legal or equitable, or both. Such defenses must be consistent. They are consistent unless one of them cannot be proved without disproving the other.

2. ———: ———: ———. The petition alleged that "the defendant (a corporation) through J. F. Gresly & Co., brokers, ordered in writing of the plaintiff" certain property, describing it, and setting out the written contract in full, signed by G. & Co., and not purporting to be signed or authorized by defendant. The answer was in substance a general denial, with the allegation that the plaintiff did not ship the property "within a reasonable time after it alleged it received said order from" G. & Co. *Held*, That these defenses were not inconsistent, and did not amount to an admission that G. & Co. were authorized by defendant to make the contract for it.

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

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

De Bord, Fradenburg & Van Orsdel, contra.

SEDGWICK, J.

This cause was determined in the district court for Douglas county upon a demurrer to the plaintiff's peti-

tion. The district court sustained the demurrer, and, plaintiff refusing to plead further, judgment was entered for defendant, and plaintiff has appealed.

The parties have discussed numerous points of practice in an interesting way, but it is necessary, in our view of the law, to discuss but one of the points presented. The action was begun in county court, and it was a term case under the statute. In such case the rules of pleading are the same in the county court as in the district court. The original petition alleged that "the defendant through J. F. Gresly & Company, brokers, ordered in writing of the plaintiff five cars of lumber, said order being in words and figures following:" Then follows an order for the shipment of the lumber by plaintiff to the defendant, the terms being sufficiently definite, signed, "J. F. Gresly & Co." It is then alleged that the defendant refused to receive the lumber, and plaintiff was damaged in the sum of $292.12.

It seems to be conceded that this petition was insufficient because it fails to allege that Gresly & Company had authority to make such a contract for the defendant. The defendant answered by general demurrer, a general denial, and "that the alleged contract is within the statute of frauds and void." During the progress of the trial in county court the defendant amended the answer by adding the following: "Defendant shows that independent of, and without waiving, the foregoing defenses, plaintiff cannot recover, for said plaintiff did not ship said lumber within a reasonable time after it alleged it received said order from J. F. Gresly & Company, brokers, nor did this defendant have any knowledge that the said plaintiff or any one else claimed that defendant had ordered said cars of lumber on September 25th, 1908; that, had defendant known that any such claim existed, it would have canceled such alleged orders, and defendant shows that the said plaintiff did not ship said lumber within a reasonable time after September 25th, 1908, nor until after lumber had greatly deteriorated in market value, nor did the plaintiff exercise good faith in said matter." The defend-

ant afterwards, and before the cause was submitted, asked to withdraw this amendment, but the county court refused permission to do so.

Upon appeal to the district court, the plaintiff filed a petition in the exact words of the original petition in the county court. The defendant demurred to this petition, and the court sustained the demurrer. The plaintiff then amended its petition by adding the allegation that the defendant amended its answer in the county court and attaching to the petition, as an exhibit, the said amendment, which is above quoted in full. The defendant moved to strike out this amendment, on the ground that it was surplusage and redundant. The court sustained the motion and struck out the amendment. The plaintiff then filed a petition, being the same as its original petition. The defendant again demurred to the petition. The plaintiff moved the court to strike out the demurrer, which motion was overruled, and the demurrer was then sustained, and, the plaintiff electing not to plead further, the court entered judgment dismissing the plaintiff's case. Of course, the county court should have allowed the defendant to amend its answer on suitable terms.

The principal one of these fine points of practice raised by the contending counsel is as to the construction and effect of the amendment to the answer which was filed in the county court. It is contended by the plaintiff that the allegations of this amendment are inconsistent with the general denial in the answer and amount to an admission that the alleged contract was a valid contract between the parties.

In our code practice a defendant may plead as many defenses as he has, whether legal or equitable, or both. The plea of the statute of frauds does not seem to be strictly applicable. The contract was in writing; it was not the contract of this defendant, but the general denial raised this issue, so that the question is, whether the amendment made in the county court is inconsistent with a general denial. Defenses "are not inconsistent unless the

proof of one necessarily disproves the other." *Blodgett v. McMurtry,* 39 Neb. 210.

Would proof that plaintiff did not ship the lumber "within a reasonable time after it alleged it received said order from J. F. Gresly & Company" necessarily prove that Gresly & Company were duly authorized to make the contract for the defendant? An allegation "if Gresly & Company were authorized and the defendant is bound by the contract the plaintiff did not ship," etc., would be an admission of the binding force of the contract under the decision in *Nason v. Nason,* 79 Neb. 582, and other cases. It seems to us that the allegations of the amended answer in the county court in this case amount to this: "Gresly & Company had no authority to make the contract you have sued upon, and you virtually admitted it and failed to ship the lumber to us according to the terms of the contract which Gresly & Company made." Some of the early cases in this court go to a great extent in excluding defenses on the ground of inconsistency. We are not inclined to press further in that direction. "Defenses are inconsistent only when one, in fact, contradicts the other, and has nothing to do with a seeming and logical inconsistency, which arises merely from a denial and a plea in confession and avoidance. Such a plea may sometimes be properly made in connection with a denial, as it may be true, in fact, that one never assumed the obligation sued on, and was an infant, or a *feme covert,* at the time it was claimed to have been assumed." Bliss, Code Pleading (3d ed.) sec. 343. And so it is not inconsistent to allege that Gresly & Company were not authorized to make any contract for defendant, and that the plaintiff has not complied with the unauthorized contract which they assumed to make. The plaintiff should allege and prove that it had substantially complied with the contract on its part, including the shipment of the lumber within a reasonable time. And such allegation and proof could be negatived under a general denial. The amendment to plaintiff's petition in the district court, therefore, setting up the amendment

that defendant had made to its answer in the county court, added nothing to the petition, and the order of the court striking it from the petition was not prejudicial to the plaintiff. The petition failed to state a cause of action with or without this amendment, and the court did not err in sustaining a demurrer thereto.

The judgment of the district court is

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

OLE C. SORENSON, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JUNE 16, 1913. No. 17,294.

1. Carriers: EJECTION OF PASSENGER. It is the duty of the conductor and employees of the company in charge of a street car to maintain order and protect the passengers from insult and annoying disturbances such as loud talking, swearing and singing of boisterous and improper songs in the car. If a passenger refuses to refrain from such conduct, the conductor may remove him from the car, and may use such reasonable force as is necessary for that purpose.

2. ———: ———: PREJUDICIAL INSTRUCTIONS. Instructions quoted in the opinion are *held* to be misleading and prejudicial under the issues and evidence in this case.

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

C. S. Allen and *O. B. Clark,* for appellant.

Wilmer B. Comstock, contra.

SEDGWICK, J.

The plaintiff alleged in his petition that he was a passenger on one of the cars of the defendant company from

the city of Havelock to the city of Lincoln, and that the employees in charge of the car, "under guise and pretense of preserving order and without any provocation, assaulted plaintiff with a club and controller with which the car was operated." He demanded damages for the injuries so sustained. The defendant answered that the plaintiff was boisterous and offensive to the other passengers and that he was in a state of intoxication; "that, in the discharge of their duties to preserve order and protect passengers from annoyance, the servants of the defendant requested the plaintiff to desist, whereupon he became more offensive and committed an assault upon them; that in resisting the assault and in enforcing order the servants used only reasonable force and no more than was necessary." There was a verdict and judgment in favor of the plaintiff, and defendant has appealed.

It appears that the car was crowded with passengers; that the plaintiff was employed in the Havelock car shops; and that he and a considerable number of his fellow employees were standing together in the rear end of the car. The plaintiff testified in his own behalf, and also called five of his fellow employees in the car shop, all of whom testified that they did not consider the plaintiff intoxicated at the time. The plaintiff and some of his witnesses testified that he drank two glasses of beer before he took the car that evening. One of these witnesses testified that the plaintiff "was conducting himself as a gentleman and making no disturbance; that the conductor came, and, after some words, pulled a black jack out of his pocket and struck him; that he pulled the bell and the motorman came running in and also hit him with the controller. Plaintiff made no effort to strike either of them, but merely attempted to protect himself." These witnesses vary somewhat in their version of the circumstances and language used between the plaintiff and the men in charge of the car at the commencement of the disturbance. James Dalton, a machine apprentice, also testified for the plaintiff and in some respects corroborated these other wit-

nesses. One Doran, who was not on the car at the time, testified for the plaintiff that he saw him at supper time and he appeared to be sober; he saw him again at 10 o'clock that night and he was sober at that time.

The question for the jury to determine was whether the circumstances and the plaintiff's conduct at the time were such as to lead a reasonably prudent man, situated as the conductor was, to believe that it was necessary to do what he did in the interest of the passengers and to preserve the peace, and that he acted with reasonable prudence under the circumstances or whether the conductor unjustifiably assaulted the plaintiff. It was in the interest of the passengers on the car that any public disturbance should be prevented and that they should be protected from annoyance and insult, and, on the other hand, that the passengers should not be unnecessarily or unreasonably assaulted by the employees of the company. The passengers then would be presumed to be disinterested witnesses in the case.

Mrs. Allen was a passenger on the car and was accompanied by a young girl. She testified, among other things, that they "went up to the front end of the car. We concluded that was the best place after seeing the conditions in the car. We were obliged to go to the city. We keep student boarders, and there were some things we could not get at University Place. We intended to wait until the drunk cars were gone. The car went by that we supposed was the regular drunk, as it was known in 'Uni.,' so we said, 'We will have to take this car, the next one will be too late to get into the stores.' The platform was full of men. I got my way through, but my daughter attempted to get on and the bell rang and she fell. * * * After we had gone a ways there was so much noise, talking, swearing and some singing, and all the time the car kept stopping for quite a ways. I wondered why it was. Finally I watched and there were some men around the stove, and I noticed one reach up and pull the bell. I spoke to my daughter and said, 'They are pulling the bell.'

I kept seeing the motorman look back, and I thought there might be something wrong with the car. I looked over the car, and my daughter said, 'Let's get off—I did not want to go—let us get something, whatever we can, for dinner.' I said, 'No, we will be up here by the motorman, we can jump off if anything happens.' They were so noisy, we were afraid of something. I saw the conductor. I was so far in front I could not understand what he said, but I think he asked them to quit pulling the bell rope. And then I saw the conductor, I think he went to him two or three times out there, and said something to them, but it didn't make any difference. And one passenger that sat opposite me said, 'There will be a racket, a row, but we will see fair play.' Of course then I didn't know what they were doing with the conductor; they were surrounding him, but I saw the conductor go back. * * * Some of the passengers sat with their mouths open; some were so intoxicated, they could not sit up straight. There was a good deal of noise and profane language and singing. * * * I saw the plaintiff grappling with the conductor. The three of them had hold of him. I thought all three were after the conductor. That's the way it looked to me."

The young girl testified: "The seats were full, most of them with drunken men. Noticed that the car kept stopping all the while. Thought there was something wrong, glanced back. I did not see any one pulling the bell cord, but heard the bell ring a number of times. * * * They had been singing most of the time, singing songs that were not fit to be sung in a place of that kind. I glanced back and saw this man strike the conductor. Looked around again and saw that they were fighting. Mortorman kept looking back to see what the trouble was. He took the crank of the street car that he had in his hand. I remember seeing him go by me, as I was standing leaning against the seat, just as he got to this man. * * * It was very noisy and there was profane language. Came from parties standing around the stove. I saw the man at the stove

strike the conductor. Conductor struck in protection of himself. Think the passenger struck the conductor with his fist. Saw nothing in conductor's hand." Several of the passengers testified in the case and their testimony was generally corroborative of that of these two ladies.

The conductor testified: "Plaintiff's conduct attracted my attention. He was talking with two companions, very loud, and swearing, and raising quite a disturbance. I went up to him and told him that the noise would have to be stopped, and the swearing. Said he hadn't done anything but what he would do again, and defied me to stop him, and swore. Stopped the car and asked him to get off. I took hold of his arm and he struck at me. After he struck at me I struck back at him. Motorman came in. I don't know whether he hit anybody or not; I could not see. There was quite a jam."

The court instructed the jury: "(7) The undisputed evidence in this case shows that the plaintiff was a passenger upon defendant's car. It was therefore the duty of the defendant to use a high degree of care and diligence to protect plaintiff from injury, and to convey plaintiff safely and properly from Havelock to his destination in the city of Lincoln. If the defendant entrusts this duty to its servants, the law holds it responsible for the manner in which those servants discharge such duty, and the defendant is responsible for any malicious or wanton acts of its motorman or conductor, or either of them, against or upon the plaintiff during the course of the discharge of their duty to the defendant, which relates to the plaintiff, and if its servants, instead of protecting the plaintiff, assaulted and beat him without just cause, as hereinafter explained, then the defendant has failed in its duty to the plaintiff and is answerable to him for whatever injury he has sustained by such assault.

"(8) On the other hand, if you find from the evidence that the plaintiff was boisterous, unseemly and offensive to the other passengers riding in the car, then defendant's conductor not only had the right, but it was his duty to

the other passengers, to require plaintiff to desist in his boisterous and offensive conduct, even to the extent of requiring plaintiff to leave the car in the event that he still persisted therein."

It would seem that under this evidence the jury must have been misled by these instructions. The instructions do not seem to be exactly adapted to the evidence. The jury is told that it was the duty of the defendant to use a high degree of care and diligence to protect plaintiff from injury and to convey him safely and properly from Havelock to his destination in the city of Lincoln. This would be true so far as the ordinary duty of the defendant to its passengers is concerned, but it does not appear to have in view the question as to whether the conduct of the plaintiff was such as to make it the duty of the conductor to remove him from the car. In the following instruction the jury are told that, if the conduct of this plaintiff was boisterous and offensive to other passengers, the conductor had the right and duty to require him to desist, "even to the extent of requiring plaintiff to leave the car in the event that he still persisted therein." This does not appear to recognize the right of the conductor to use such force as was reasonably necessary under such circumstances to remove the plaintiff from the car. He might require the plaintiff to leave the car, but there is no light given the jury as to the right or duty of the conductor in case the plaintiff refused to leave. The instruction is followed immediately by another to the effect that words of provocation alone will not justify an assault, "except in so far as the assault consisted in attempting to put the plaintiff off the car." This language does not seem to remedy the failure to explain to the jury the duty of the conductor under such circumstances. The jury is nowhere directly told under what circumstances it would be the duty of the conductor to remove the plaintiff from the car. The tenth instruction is as follows: "While one may resist any unlawful attempt to injure his person, he must not in resisting an assault in that regard exceed the bounds

of necessary defense and protection, for it is only permitted as a means to avert an impending evil, which might otherwise overwhelm the party, and not as a punishment or retaliation for the injurious attempt. The degree of force necessary to repel an assault will naturally depend upon and be proportioned to the violence of the assault, but with this limitation any degree is justifiable. Excessive violence, even if called into play in the first instance, in self-defense, must be answered for in damages."

It seems that by the instructions the case was submitted as a quarrel resulting in an assault, and the question is put to the jury whether the assault by the conductor and motorman was justifiable as being in self-defense, whereas the real issue was whether the conductor and motorman were in the line of duty in protecting the passengers against the misconduct of the plaintiff and his companions and in attempting to remove plaintiff from the car, and, if they were, whether they used more violence than appeared to be reasonably necessary under the circumstances. The jury might have believed under this evidence that the plaintiff and his companions were noisy and boisterous and disregarded the rights of the other passengers entirely, or so much so that it became the duty of the conductor to take some action to preserve decent order, and they might have supposed, under these instructions, that the conductor was not justified in using force to eject the plaintiff from the car. From the condition of the evidence and the instructions, it seems clear that the jury must have been misled in regard to the real issue that they were required to pass upon.

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

REVERSED.

ROSE, J., dissents.

FAWCETT, J., not sitting.

IN RE ESTATE OF JEANETTE VAN ORSDOL.

MINNIE INGERSOL, APPELLANT, V. ELIZABETH VINTON, APPELLEE.

FILED JUNE 16, 1913. No. 17,299.

1. **Descent and Distribution.** The first four subdivisions of section 2, ch. 23, Comp. St. 1911, are limited and modified by the fifth and sixth subdivisions of the section.
2. **———.** O. died, leaving a child by a former wife, also leaving his widow and their child, J. Afterwards J. died under age, and not having been married. *Held*, That the estate which J. took from her father descended to her sister.

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

Hartigan & Wunder, for appellant.

Heasty, Barnes & Rain, contra.

SEDGWICK, J.

W. S. Van Orsdol died in March, 1909, and left surviving him his widow and their infant child, Jeanette Van Orsdol, and his daughter by a former marriage, this plaintiff, now Minnie Ingersol. Soon afterwards Jeanette Van Orsdol died in infancy, and a few days later the widow also died. The defendant, Elizabeth Vinton, as the surviving heir of Mrs. Van Orsdol, claims the share of Mr. Van Orsdol's estate which was inherited by the infant, Jeanette. The plaintiff, Minnie Ingersol, claims the share of the estate inherited by Jeanette, as her sister and the sole surviving child of their father, from whom Jeanette inherited the property. The district court held that the widow, Jeanette's mother, inherited her interest in the property, and the sister, Minnie Ingersol, has appealed.

Some other matters were presented by the record, but the only question discussed in the briefs is whether the

mother of Jeanette or her half-sister, the surviving child of her father, inherited her interest in the estate.

The statute governing is section 2, ch. 23, Comp. St. 1911, which is as follows: "When any person leaving no husband nor wife surviving, shall die, seized of any real estate, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, it shall descend, subject to his debts, in the manner following: *First.* In equal share to his children, and to the lawful issue of any deceased child by the right of representation; and if there be no child of the deceased living at his death, the estate shall descend to all his other lineal descendants; and if all the said descendants are in the same degree of kindred to the deceased, they shall have the estate equally; otherwise they shall take according to the right of representation. *Second.* If the deceased shall leave no issue, the estate shall descend to the father and mother of the deceased or to the survivor of them. *Third.* If the deceased shall leave no issue, nor father nor mother, the estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by the right of representation. *Fourth.* If the deceased shall leave no issue, nor father nor mother nor brother nor sister, the estate shall descend to his next of kin in equal degree, excepting that where there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote: Provided, however, *Fifth.* If any person shall die leaving several children, or leaving one child and the issue of one or more other children, and any such surviving child shall die under age and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent, shall descend, in equal shares, to the other children of the same parent, and to the issue of any such children who shall have died, by the right of representation. *Sixth.* If, at the death of such

child who shall die under age and not having been married, all the other children of said parent shall also be dead, and any of them shall have left issue, the estate that came to the said child by inheritance from his or her said parent, shall descend to all the issue of the other children of the same parent; and if all the said issue are in the same degree of kindred to said child, they shall take the estate equally; otherwise they shall take according to the right of representation. *Seventh.* If the deceased shall leave no kindred nor husband nor wife, the estate shall escheat to the state of Nebraska."

The solution of this question depends upon the meaning and effect of the fifth and sixth subdivisions of the section. They were first enacted by the territorial legislature of 1855 and 1856. 1 Complete Session Laws, p. 263. These two subdivisions have been retained without change in all of the subsequent amendments of the laws of descent of property. Section 176, ch. 14, Rev. St. 1866, after making allowances for the temporary support of the widow and minor children, provided that in the distribution of the residue of the personal property the widow should receive the same share as the child of the intestate. By the enactment of our present statute in 1907 (laws 1907, ch. 49; Comp. St. 1911, ch. 23, sec. 176) it is provided that the residue of the personal estate shall be distributed the same as real estate. So that before the act of 1907 the widow inherited personal property as one of the children, but by that act, when the husband or wife died, the survivor has an interest in the property of the deceased by virtue of the marriage relation. By the present act the share of the property of the intestate which is taken by the surviving husband or wife is definitely fixed. By the first subdivision of section 1, ch. 23, Comp. St. 1911, if the surviving husband or wife is not the parent of all the children of the decedent, he or she takes one-fourth part of the intestate's estate, but by the second and third subdivisions, if the survivor is the parent of all the children of the decedent, and there be two or more children,

or one child and the issue of one or more deceased children, the survivor takes one-third, but if there is only one child or the issue of a deceased child, one-half, and the survivor, if the parent of all of the children of the decedent, also takes one-half if there is no child surviving nor the issue of any deceased child. Under these provisions the surviving spouse is given absolutely one-fourth of the estate when not the parent of all of the children of the decedent, and that part of the estate of the decedent that may be diverted from the line of his or her descendants is limited to one-fourth, and this perhaps would furnish a reason for providing that if a child of the decedent, who has inherited a part of his or her estate, dies under age and unmarried, its share shall go to the other children of the decedent.

The seventh subdivision of section 2, above quoted, provides for escheat to the state when there is no one to inherit. The first four subdivisions provide generally for all cases where there is no surviving husband or wife. These four subdivisions are followed by "Provided, however," and are all limited, modified and explained by the proviso contained in the next two subdivisions, which complete the subject of the distribution of intestate estates when there is any one to inherit them. These two subdivisions are connected by the words "such child" in the sixth, and together compose one provision limiting all that part of the section which they follow and of which they are a part. The second subdivision, "If the deceased shall leave no issue, the estate shall descend to the father and mother of the deceased or to the survivor of them," is limited by the proviso, and is only operative when the conditions specified in the proviso do not exist.

This construction of the statute is necessary for another reason. If the fifth and sixth subdivisions of the section had been enacted independently, and not as a proviso, they would be special provisions applying to special circumstances not provided for or mentioned in the general provision for the descent and distribution of property. Gen-

eral provisions that might control in special circumstances and conditions must give way when there are special provisions for those particular circumstances and conditions. The rule of this proviso is very general, and its origin and reason are apparent. The theory is that property should stay on the side of the house from whence it came; it should go to one's descendants, if he has any. If the child reaches maturity it can protect the brothers and sisters in their inheritance. When all of the children of the decedent are also children and heirs of the surviving spouse, and one of the children dies under age and unmarried, if its surviving parent could inherit its share, it would go to all of the children of the decedent at the death of such surviving parent. In such case the proviso is apparently not necessary, and perhaps would be more logical if its application were limited to cases where the decedent left a child or children, or their issue, not the child or children of the surviving spouse. If some of the children of the decedent are not children of the surviving spouse, they would take no part in such share at the death of the surviving spouse. Therefore, upon the death of such child of the decedent, the property which it inherited from the decedent goes directly to all of the other children of the decedent.

The statute places the share that this infant inherited where it would have gone if she had died before, instead of shortly after, her father. This purpose of the statute is stated by the supreme court of Massachussetts, as follows: "The whole purpose is the descent of intestate estate; and we think the effect is that, where upon the descent of an estate to children, one of them shall happen to die in infancy, that is, at any time before arriving at the age at which, by law, he has the power of disposing of his estate, and before he has by marriage contracted obligations and established new connections which change his relative situation to others, his share of the inheritance, that is, his portion of the intestate estate, for the descent of which this statute is now providing, shall go

just in the same manner as if such child had died in the lifetime of the ancestor, or, in other words, to those who would have taken the same share if such child had not existed. It directs that it shall go to the other children of the parent from whom it came, which it would have done, had the child so dying not been in existence at the time of the decease of such parent. It is rather giving a new destination to that portion of the parent's estate, which has in some measure failed to accomplish the design of the legislature by the premature death of such child, than to provide a new and distinct rule of distribution for such child's own estate." *Nash v. Cutler,* 16 Pick. (Mass.) 491, 499. Their statute (Rev. St. Mass., ch. 61, sec. 1), like ours, contained the provision, among others, that if the decedent "have no issue nor father, the same shall descend in equal shares to the intestate's mother, if any, and to his brothers and sisters, and the children of any deceased brother or sister by right of representation," and the general provisions for the descent of intestate property were followed by a proviso, as in our statute, and the court said that the proviso was "an exception from the generality of the antecedent rule." The supreme court of Michigan follows this decision and quotes from it with approval. *Burke v. Burke,* 34 Mich. 451. Many courts have so construed statutes substantially the same as our own.

In *Estate of De Castro v. Barry,* 18 Cal. 97, the statute being entirely equivalent to ours, the court said: "The clause in question (our fifth subdivision) provides for a specific and peculiar state of facts; therefore, there is no contradiction between it and the general provisions going before, for these last provide the usual rule, while the latter clause provides the unusual rule, or the rule governing the particular case recited. This is not a contradiction, but only an exception. * * * The meaning being clear, probably it is not very important to inquire into the considerations which moved the legislature to make a different disposition of the property characterized in the seventh clause, and property otherwise coming to

the intestate child. Possibly, the reason was that the legislature considered the husband sufficiently provided for in being allowed an entire third part of the estate of the deceased wife, irrespective of the number of children over one; and that he should not have his portion increased by the circumstance of the death of one of the heirs. The act gave him a defined proportion of the whole estate left at the death of the spouse, leaving the residue for the children; and as this proportion was liberal, and was not diminished by the number of the children, it might well have been considered not unjust to him that that proportion should not be increased by the death of any one or more of them." Our statute, as we have already seen, suggests the same reasons.

In *Estate of Donahue,* 36 Cal. 329, the former holding of the court is not questioned, but it was held that if the estate came to the deceased child by devise the statute did not apply. See, also, *Sheffield v. Lovering,* 12 Mass. *489; *Goodrich v. Adams,* 138 Mass. 552; *Runey v. Edmands,* 15 Mass. *291.

The defendant relies upon *Rice v. Saxon,* 28 Neb. 380, *Gwyer v. Hall,* 34 Neb. 589, and *Shellenberger v. Ransom,* 31 Neb. 61, rehearing, 41 Neb. 631. In *Rice v. Saxon, supra,* the husband died leaving two children and a widow, who was the parent of one of the children, a son, the other being a child of a former marriage. The son died unmarried and without issue, and it was held that the estate which he inherited from his father "descended in equal proportions to the mother and sister of said son."

In *Gwyer v. Hall, supra,* when Mr. Hall died, he left a widow, and afterwards a son was born. Mr. Hall left no other children or issue of any deceased child. Therefore the statute that we are now construing had no application, and the mother inherited from her son under the fourth subdivision of section 30 of the decedent law, as it existed under the Revised Statutes of 1866.

In *Shellenberger v. Ransom, supra,* when Mrs. Shellenberger died she left two children, who were also the chil-

dren of Mr. Shellenberger. She left no other children, and when one of those children died it was held that, under the ordinary operation of the statute, Mr. Shellenberger would inherit the estate which his child had inherited from its mother; but this decision was expressly overruled in *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 912, in which it was said: "It also appears from the record that at the time of the death of the owner of the land in controversy she left surviving her two children, the appellant and one other, who soon thereafter and in infancy died. Under the provisions of the sixth subdivision of section 30, chapter 23, Compiled Statutes, entitled 'Decedents,' the surviving brother succeeded to the inheritance of all the real estate of the deceased parent, subject only to the life estate of the father as tenant by curtesy. *Burke v. Burke*, 34 Mich. 451; *Runey v. Edmands*, 15 Mass. *291; *Estate of De Castro v. Barry*, 18 Cal. 97. We are aware that the view thus expressed is not in harmony with the opinion in *Shellenberger v. Ransom*, 31 Neb. 61, and same case on rehearing, 41 Neb. 631. In that case, however, this provision of the statute was entirely overlooked; and, in the face of the plain statutory enactment, the case can no longer be considered authority." The case of *Rice v. Saxon*, *supra*, was decided under section 30, ch. 23, Comp. St. 1887, which was substantially changed by the act of 1907. It was substantially the same as the decedent law of the Revised Statutes of 1866. At the time it was first enacted the surviving spouse took only a life estate in the property of the decedent. Afterwards the rights of the wife were enlarged and she was allowed to take as a child of her deceased husband. The provision of that section of the Compiled Statutes of 1887, above cited, in that regard also "provided that if she shall have a mother also she shall take an equal share with the brothers and sisters." This language may have led to the supposition that she must be regarded as a child of the decedent and inherit accordingly. There is no discussion of the question in the opinion, and we are left in the dark

as to the reasoning of the court. The subdivision of our statute which controls in case the decedent leaves children and one of such children dies in infancy and unmarried was not construed, and apparently not considered, and that case must be distinguished from the case at bar or regarded as overruled by the opinion in *Veeder v. McKinley-Lanning Loan & Trust Co., supra,* which expressly overrules *Shellenberger v. Ransom, supra.*

The infant, Jeanette, having died "under age and not having been married," all the estate that came to her by inheritance from her father goes to this plaintiff, his surviving child.

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

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

JOHN MOLER, APPELLEE, V. HELEN M. CASTETTER ET AL., APPELLANTS.

FILED JUNE 16, 1913. No. 17,300.

Adverse Possession: Evidence. In an action to quiet title, if it appears that plaintiff has had possession of the land for much more than 10 years under a purchase for full value and claim of title, and that he and his grantors have regularly paid all taxes that have ever been assessed against the land, one witness testifying that plaintiff has had exclusive, adverse occupancy for many years, without specifying the number of years, and there is no cross-examination nor evidence that any one else has ever had or claimed any possession, a finding that plaintiff has title by adverse possession will not be reversed solely on the contention that no witness has testified that plaintiff's possession was exclusive and adverse during the whole time that he so held the land.

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

L. C. Chapman, for appellants.

J. A. Donohoe, contra.

SEDGWICK, J.

The plaintiff began this action in the district court for Holt county to quiet his title to certain lands in that county. The defendants answered claiming title to the land. The court entered a decree for the plaintiff, and the defendants have appealed.

The court found that the plaintiff had been in exclusive and adverse possession of the land for more than 10 years, and we think the finding is supported by the evidence. It appears that the land was wild land, and the plaintiff and his grantors have paid all taxes on the land that have ever been assessed thereon, and otherwise have had such possession as goes with their title papers, and for many years, if not the full term of 10 years before the action was begun, have been actually using the land to the exclusion of all persons whatsoever. The defendants offered no evidence as to the condition, possession and occupancy of the land, and the evidence in that regard is very meager as shown by the abstract and record.

It is very clear from the record that all of the equities are in favor of the plaintiff, and the judgment of the district court is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

FRANCES M. FARRINGTON, APPELLEE, V. F. E. FLEMING COMMISSION COMPANY ET AL., APPELLEES; MERCHANTS BANK OF ST. JOSEPH, APPELLANT.

FILED JUNE 16, 1913. No. 17,304.

1. **Garnishment**: ANSWER: RIGHTS OF THIRD PARTY. When a garnishee answers that he has money in his hands belonging to the judgment debtor, it is proper to allow one who claims the money, and is not a party to the proceedings, to appear and contest the right of the plaintiff to apply the money on his claim.

2. ———: APPLICATION OF FUND. The effect of service upon the garnishee is to impound the funds in his hands. It is the duty of the garnishee to pay the money in his hands to the party having the better right as determined by the court. Only the interest of the attachment debtor can be applied upon the plaintiff's claim.

3. ———: BANK DEPOSIT: OUTSTANDING CHECK. Before the enactment of section 188 of the negotiable instrument act (laws 1905, ch. 83) this court held that the holder of a check might maintain an action thereon against the bank on which it was drawn if the maker of the check had a general deposit in the bank subject to the check, when it was presented to the bank. *Fonner v. Smith*, 31 Neb. 107. This was upon the ground that as between the maker and holder the check transferred the deposit *pro tanto*. Without determining in this case the effect of that section on the rights of the bank, it is *held* that, when the holder in good faith has paid the maker in full for the check, the deposit is not subject to garnishment at the suit of another creditor of the maker.

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

Waggener & Challis and *Edwin Falloon*, for appellant.

Reavis & Reavis, contra.

SEDGWICK, J.

The plaintiff began this action in the county court of Richardson county against the defendant, the F. E. Flem-

ing Commission Company, to recover money claimed to be due from that company, and procured the Richardson County Bank, doing business at Falls City, Nebraska, to be summoned as garnishee; the commission company at that time having a deposit account in that bank. Afterwards the Merchants Bank of St. Joseph, Missouri, intervened and claimed $1,200 of the deposit. The commission company was a corporation doing business at St. Joseph, Missouri, and drew a check for $1,200 upon its account in the Richardson County Bank in favor of the Merchants Bank of St. Joseph, and received the money thereon from that bank. There were several transactions between the commission company and the St. Joseph bank, but as no question is made in this case upon those transactions we state simply the legal effect thereof. The garnishment above stated was not issued and served upon the Richardson County Bank until after the commission company had given the check to the St. Joseph bank and received the money thereon. It will be seen that the controversy here is between the plaintiff and the St. Joseph bank. It appears from the answer of the garnishee that, when it was served with process, it held in the deposit account of the commission company the sum of $1,237.56. The district court entered a judgment in favor of the plaintiff and against the commission company for the amount of the plaintiff's claim, and ordered the Richardson County Bank, as garnishee, to apply the deposit in payment of the judgment. The St. Joseph bank has appealed.

The intervener insists that the check of the commission company, which was paid by the intervener, creates an equity in the deposit in his favor as against the commission company, so that that deposit was not liable to attachment in the suit of a third party against the commission company. The plaintiff contends (1) that section 188 of the negotiable instrument act (laws 1905, ch. 83) applies, and that under that section the holder of a check has no equitable right in the deposit on which the check

is drawn; (2) that the St. Joseph bank "has no standing in court, either to have its claim heard, or to appeal from a determination of its claim adverse to its contention." The contention is that the matter in litigation was the disputed claim of the plaintiff against the commission company, and that as the St. Joseph bank was not interested in that claim it could not intervene under section 1047, Ann. St. 1911 (code, sec. 50*a*). But the matter in litigation was not only the claim of the plaintiff against the commission company, but also the deposit in the bank, and if the St. Joseph bank was interested in, and entitled to, that deposit, it would be entitled to protect that interest. We think the court did not err in allowing the St. Joseph bank to appear and resist the application of the deposit to the payment of the plaintiff's claim against the commission company.

Section 188 of the negotiable instrument act is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." Before the enactment of that section this court held that the holder of a check might maintain an action thereon against the bank upon which it was drawn, if the maker of the check had a general deposit in the bank subject to check at the time the check was presented to the bank. *Fonner v. Smith,* 31 Neb. 107. The courts of some of the states held the same doctrine, but the supreme court of the United States and the courts of other states held that, under such circumstances, the holder of the check could not maintain an action against the bank, and that his right of action was against the maker of the check alone. *Bank of the Republic v. Millard,* 10 Wall. (U. S.) 152. This holding of the supreme court of the United States was expressly put upon the ground that the relation of depositor and banker is that of debtor and creditor. The moment the deposit is made it becomes part of the property of the bank, under a contract to repay the amount to

the depositor or to his order, at such time and in such amount as he may direct. The funds are no longer the funds of the depositor, but of the bank, and the depositor is the creditor for the principal sum. He has a right to draw for them in such sums as he may see fit. The obligation of the banker to the depositor is perfect. The latter may maintain an action for the whole deposit; he may countermand any and all the checks he has given; if he has funds when the check is presented, he may maintain an action on the case for a refusal by the banker to pay his check. The effect would be that a right of action for the same money in the hands of a third party existed in two persons upon one promise at the same time. The conflict in the two lines of cases was as to the position of the bank with reference to the fund, and not as to the equitable rights in the deposit of the maker and holder of the check, respectively. It appears to us that the holding of the supreme court of the United States and of those courts that followed that decision was more applicable to the common law practice and proceedings, and the reasoning of Mr. Justice MAXWELL in *Fonner v. Smith, supra,* was more applicable to the practice and proceedings under the code. Under the code practice it seems more natural to allow the action to be brought by the holder of the check as the real party in interest than to limit the liability of the bank to the old common law "action on the case" by one who would appear in equity to have transferred his interest in the deposit to another. If the effect of the negotiable instrument act is to adopt the rule that no action against the deposit bank can be maintained upon the check by the holder "unless and until it accepts or certifies the check," which it is not necessary now to decide, still that section is not applicable to the facts in this case. This plaintiff is not claiming under the negotiable instrument act. The effect of service upon the garnishee is to impound the funds in the hands of the garnishee. The bank holding the deposit is not directly interested in this litigation. Its duty as garnishee is to pay the money to

the party having the better right to it, as determined by the court. The commission company had money on general deposit in the garnishee bank, and procured that money from the St. Joseph bank by drawing its check against that deposit in favor of the St. Joseph bank. The St. Joseph bank clearly has a better right to the deposit than the commission company has, and this plaintiff by garnishment could obtain no better right than her debtor had.

The order of the district court applying the deposit on the plaintiff's judgment is reversed, and the cause remanded, with instructions to enter a judgment for intervener bank against the commission company for $1,200, with protest fees and interest from the date of the check, and order the garnishee to pay the money in its hands into court to be applied on said judgment; all costs to be taxed against the plaintiff.

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

DAWSON COUNTY, APPELLANT, V. PHELPS COUNTY, APPELLEE.

FILED JUNE 16, 1916. No. 16,861.

1. **Counties: REPAIR OF BRIDGES.** Section 87, ch. 78, Comp. St. 1909, requires a county to contribute toward the repair of a bridge across the Platte river which extends into such county, although it is located mainly within the adjoining county.

2. ———: ———: "STREAM." The word "stream," as used in said section, is used in a general sense, and applies to rivers and smaller courses of running water. *Dodge County v. Saunders County*, on rehearing, 70 Neb. 451.

APPEAL from the district court for Phelps county: HARRY S. DUNGAN, JUDGE. *Reversed.*

T. M. Hewitt and *E. A. Cook*, for appellant.

Frank A. Anderson, contra.

HAMER, J.

This action was brought by Dawson county against the county of Phelps to recover for repairs made to a bridge across the Platte river at a point south of the village of Overton, where the river divides the two counties. In the trial of the case, after the evidence had been submitted by the parties, the plaintiff county and the defendant county each submitted a motion for an instructed verdict. The court thereupon instructed the jury to return a verdict for the defendant county.

One of the contentions of the defendant county was that the village of Overton, in the plaintiff county, was near the bridge, while in the defendant county there was no town nearer than ten or twelve miles. From this it would seem that the supervisors of the defendant county took the view that, because the bridge was a convenience to the residents of the defendant county to enable them to trade in the plaintiff county, and because the plaintiff county by reason thereof secured a portion of defendant county's trade, defendant county should be relieved of its share in the maintenance of the bridge. While bridges across a river may be built with a view to the convenience of the people, and their construction may enable the people of one county to receive more trade than another, it is doubtful if such fact can be successfully urged as a reason why the law imposing upon two counties the joint obligation of keeping up a bridge should be abrogated. The plaintiff has appealed from a judgment in favor of defendant. The bridge as originally constructed was a toll bridge, and in 1890 was surrendered by the bridge company which constructed it to Dawson county, and was accepted by the same, and that county declared the bridge to be a free bridge.

In the summer of 1908 the plaintiff county gave notice to the defendant county of needed repairs, and requested the defendant county to enter into a contract for the repair of the bridge. No action was taken by defendant, and plaintiff entered into a contract, as provided by the statute, and paid the contractor for the repairs which he had made, and filed its claim with the defendant county for one-half the cost thereof. The repairs made were of a substantial character and were quite extensive. It is shown by the evidence that the bridge was unsafe at the time the contract for the repairs was made; that holes had broken through the floor because the boards were worn; and that it was necessary to put the bridge in a good state of repair for public travel. It was also shown that the bridge was part of the public road, and that there was a highway in each county extending to the bridge. The bridge is in a populous part of the state, and because it is a part of the public road is much used. The expense incurred seems to have amounted to $5,322.90, and it is claimed by the plaintiff that Phelps county should pay one-half of the same. There seems to be no issue raised as to the sufficiency of the notice served upon the defendant county to contribute to the repair of the bridge. There have been many bridge contests in this state not wholly dissimilar to the one under consideration.

The claim was rejected by the county on July 13, and notice of the action of the board was mailed to the county clerk of Dawson county July 14, and was received by him July 15. Notice of appeal was given the county clerk of Phelps county, and an appeal bond given and approved July 24. It is contended by appellee that an appeal was not taken in time, and that the court was therefore without jurisdiction, and that whether the appellant is right or wrong on the merits of the case is immaterial, because the appeal was not taken in time. An examination of the statute covering appeals for disallowed claims against counties does not disclose that any time is now provided by the statute when the notice of appeal must be served

and bond executed. This change of the law occurred in an act of the legislature of 1907. Prior to that time it was necessary, after serving notice upon the county clerk, to file an appeal bond within 20 days after the decision of the county board. As the statute stood at the time of the appeal in this case, no time was fixed within which notice of the appeal must be given and an appeal bond filed. It must then be taken that a party appealing would have at least a reasonable time within which to serve his notice and perfect his appeal, and the time consumed in this case does not seem to be an unreasonable time.

Was the court right in directing a verdict for the defendant? The statute fixes the north boundary of Phelps county and that part of the south boundary of Dawson county (which lies north of Phelps county) "as the middle of the south channel of the Platte river." It is urged by appellee that the "south channel" of the Platte river at the point where it is crossed by the bridge in question is a very narrow channel, being bounded by the south bank of the Platte river on the south, and an island in the Platte river on the north, which said island lies wholly within said Dawson county; and it is contended that, inasmuch as it was not shown that any part of the repairs made on the bridge were made upon the part thereof between the south bank and this island, the verdict is right.

The statute governing the construction of bridges over streams between counties (Comp. St. 1909, ch. 78, secs. 87-89) provides:

"Section 87. Bridges over streams which divide counties, and bridges over streams on roads on county lines, shall be built and repaired at the equal expense of such counties; provided, that for the building and maintaining of bridges over streams near county lines, in which both are equally interested, the expense of building and maintaining any such bridges shall be borne equally by both counties.

"Section 88. For the purpose of building or keeping in repair such bridge or bridges, it shall be lawful for the

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

The words "streams which divide counties" have received consideration from this and other courts, and it seems to have been uniformly held that, in arriving at the meaning of the words, not only their literal meaning is to be considered, but the purpose of the statute. Literally the Platte river does not divide Dawson and Phelps counties, because the dividing line is made the middle of the south channel, and part of the river therefore lies in Dawson county and part in Phelps county, and the actual boundary is an imaginary line in the river; but in the statute under consideration, which deals with the construction of bridges across "streams which divide counties," the legislature employed the words in their ordinary sense and *for rivers,* not to an imaginary line in the stream, but to the whole stream, consisting of its bed, the water flowing therein, and the banks or shores thereof confining the water, on one side of which stream lies one county, and on the other side of which stream lies another county. *Cass County v. Sarpy County,* 63 Neb. 813; *Keiser v. Commissioners of Union County,* 156 Pa. St. 315; *State of Alabama v. State of Georgia,* 23 How. (U. S.) 505; *Dodge County v. Saunders County,* 70 Neb. 442.

Nor does it make any material difference that all the

bridge except the south portion is within Dawson county. *Dodge County v. Saunders County,* 70 Neb. 442, on rehearing, 70 Neb. 451. It is said in the syllabus of the first opinion: "The banks of a river are essential parts thereof, and, when a county boundary is fixed at 'the south bank,' the river may be said to divide the county from the one on the opposite side, within the meaning of section 87. The purpose of said section, and the ones immediately following, is to provide for bridges which are rendered necessary in order to travel from one county into an adjacent one, and to divide the cost between the two, and the statute should be construed, if possible, so as to give effect to the apparent intent of the legislature." In the opinion on the rehearing Judge SEDGWICK, delivering the opinion of this court, said: "The bridge in question being confessedly located mainly in Dodge county, it is contended that the legislature would not have authority to require Saunders county to expend the funds of that county in repairing a bridge outside of its jurisdiction; but this proposition seems not to be supported by authority." This court then quotes from the second paragraph of the syllabus of the opinion in *Washer v. Bullitt County,* 110 U. S. 558: "At the common law and also by statute, a county may be required and authorized to build and maintain, at its own expense, a bridge or highway across its boundary line, and extending into the territory of an adjoining county." The court also quotes from the opinion in *County of Mobile v. Kimball,* 102 U. S. 691, announcing the same doctrine; and, quoting from a Maryland case, it is said: "A county is one of the territorial divisions of a state created for public political purposes connected with the administration of the state government, and, being in its nature and objects a municipal organization, the legislature may exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organization."

In the body of the opinion on the rehearing it is said:

"The fact that the body of the water of the river is in Dodge county, and that the bridge will therefore be mainly outside of the territorial limits of Saunders county, is not an important factor in determining the issue. The question is, what is the meaning of the expression, 'Streams which divide counties.' * * * The bank is that part of the river or stream which retains the water, and it seems, therefore, reasonable that the word stream as used by the legislature when applied to a river, as in this case, must be construed to mean the whole of the river, including the bank as well as the water and the bed, and, within that meaning, the boundary line here lies within a part of the river, to wit, the bank, so that the river divides the two counties in the sense intended by the legislature."

The Overton bridge is none the less a bridge over a stream which divides counties, within the meaning of section 87, ch. 78, Comp. St. 1909. It was undoubtedly the intention of the legislature to make such bridges, which may be equally used by the inhabitants of both counties, a charge upon both counties. These bridges form an important part of the highways of the state, and these highways are very properly made the subject of legislative action. The counties are municipal subdivisions of the state, the creatures of the legislative will, with which the legislature, within constitutional limitations, may deal as in its discretion seems best. When the bridge was acquired from the Overton Bridge Company, Dawson county, by a resolution, undertook the maintenance of the bridge. We do not think this makes any difference, because Phelps county was not a party to the contract between the bridge company and Dawson county, nor was the contract made between the bridge company and Dawson county for the benefit of Phelps county. The inhabitants of Phelps county equally with those of Dawson county enjoyed the use of the bridge, and the bridge is only a part of the public roads of the state, and the legislature has charged the counties on either side of the Platte river with a share of the maintenance of the bridges built over that river. The

resolution of the commissioners of Dawson county accepting the bridge and agreeing with the Overton Bridge Company to maintain and repair it does not excuse Phelps county from the obligation imposed upon it by law. In a very recent case (*Buffalo County v. Hull*, 93 Neb. 586), it was held: "The liability of adjoining counties for repairs of a bridge over a stream between them is fixed by statute, and it is within the power of the legislature to alter or amend the statute in that regard. The conditions and extent of the liability depend upon the statute in force when such repairs are made and the liability incurred."

It therefore follows that the judgment of the district court for Phelps county is wrong, and that it should be reversed.

REVERSED AND REMANDED.

NATHAN H. BLAKELY, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED JUNE 16, 1913. No. 16,916.

1. **New Trial:** AMOUNT OF RECOVERY. A new trial will not be granted in an action for damages because of personal injuries on account of the smallness of the verdict alone, where section 315 of the code was in force at the time the district court refused to grant the same.

2. **Jury:** EXAMINATION OF JUROR. In the examination of a veniremen upon his *voir dire*, he will not be deemed to have deceived counsel as to his relations with opposing counsel, when he admits the relations existing between them and answers all questions truthfully.

3. **Appeal:** DAMAGES: REVIEW. In an action for damages for personal injuries, if the verdict is for the plaintiff, only those errors will be considered on plaintiff's appeal which might affect the measure of damages.

4. **Street Railways:** PEDESTRIANS: NEGLIGENCE. The pedestrian should look before he attempts to cross parallel street railway tracks, and if there is an obstruction which interferes with his view he should use additional care.

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

H. S. Daniel, Weaver & Giller and *John A. Moore,* for appellant.

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

HAMER, J.

Nathan H. Blakely, the plaintiff and appellant, appeals from a judgment rendered in the district court for Douglas county in his favor and against the defendant and appellee, the Omaha & Council Bluffs Street Railway Company. It is claimed by the plaintiff that the defendant company was negligent in the operation of one of its street cars, whereby the same struck and injured the plaintiff. The judgment is for $305. The appeal is upon the theory that the judgment fails to correspond to the injury sustained. In *O'Reilly v. Hoover,* 70 Neb. 357, this court held as stated in the syllabus: "In an action for personal injuries, a new trial will not be granted on account of smallness of damages." Code, sec. 315. The section of the code referred to read: "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor any other action where the damages shall equal the actual pecuniary injury sustained." The section of the code referred to has since been repealed, but, being in force at the time of the trial, must control the action of this court.

The first assignment of error is based upon the examination on his *voir dire* of the juror Gorman. In the same first assignment of error it is said "that said juror Gorman failed to make a full disclosure of his business connection with the defendant's attorney, W. J. Connell, in response to questions, proper answers to which would have disclosed such business relationship." In the brief of counsel for the plaintiff it is said: "It is established that the juror was asked by the plaintiff on *voir dire* if he had any busi-

ness relations with defendant's attorney, and the only disclosure thereof by the juror was that he had furnished the attorney's family with livery at times, but not as much as the juror would like, while a full and fair disclosure would have shown that the attorney was a regular customer; that the relationship of debtor and creditor existed between them; that in the month of January, a few days before the trial, and after Gorman had been summoned as a juror for the term of court in which the case was tried, his firm furnished livery to the attorney, which was used by the attorney personally; that the latter had a charge account with juror's firm, which under the usage and custom of the firm had not been closed at the time of trial; that the juror at least thought that the attorney hired all his livery from the juror's firm." The affidavit of Carpenter tends to show that one of the counsel for the defendant, Mr. Connell, had an account with the livery firm of which the juror was a member; that this account was for the use of a carriage or carriages, and Mr. Connell's affidavit shows that the carriage or carriages were ordered by his wife or by some other member of his family. It will be seen that the contention of the plaintiff is that the proposed juror should have made fuller answers to the questions put to him by counsel for the plaintiff. The proposed juror seems to have made no denial of the fact that "he had furnished the attorney's family with livery at times, but not as much as (he) the juror would like." There was no denial of the business relation existing. It was the duty of the counsel for the plaintiff, if he deemed the juror likely to be influenced by a transaction of that kind, to have then and there excused him. He did not do that. After the verdict is rendered comes his first objection. In view of the facts stated, it is perhaps unnecessary to further discuss the contention of counsel for the plaintiff on this point. It is claimed that the plaintiff is entitled to know all the facts so as to enable him to exercise his right of peremptory challenge advisedly. *Basye v. State,* 45 Neb. 261. Plaintiff's counsel, with full knowl-

edge of the facts, allowed the venireman to be accepted and to be sworn as a juror, and to sit and render a verdict.

It is contended by counsel for the plaintiff that there was error in part of instruction No. 1, reading: "If you believe any witness has knowingly and wilfully testified falsely, you are at liberty to disregard the whole of such witness' testimony, except such portion as may have been corroborated by other credible witnesses or evidence." It is said that there was no warrant for giving this instruction as there was no evidence that any witness had sworn falsely, and the false testimony must be in regard to some material matter. If the result of the trial had been a verdict for the defendant, this instruction might have been held to constitute prejudicial error, but there was a verdict for the plaintiff, and from this verdict it is evident the jury believed the plaintiff's witnesses. Therefore, if there is error in this instruction, which is certainly not to be commended, then it is not prejudicial error. We do not think that it can be safely assumed that because this instruction was given there was prejudicial error, as there was a verdict for the plaintiff which does not seem to be in disregard of the evidence.

It is also contended by counsel for the plaintiff that there was misconduct of the jury because some of the jurors experimented as to whether they could see a car coming upon the farther track while passing behind another car. The affidavit of Elbert F. Feenan alleges that he, with other jurors whose names he does not mention, stood behind a moving street car on Farnam street, and, looking beyond said moving street car to where a car could be seen approaching upon a parallel track, they endeavored to determine something as to the effect of certain evidence in the case. He does not say what that something was, nor how it was applied to the particular case. Of course the purpose of the affidavit was to show misconduct upon the part of the jury, and in that way to obtain a new trial. Unless it can be shown that the misconduct was prejudicial to the claim of the plaintiff, it furnishes no reason

for a new trial, and as the verdict was in plaintiff's favor no prejudice is shown.

In *Crowell v. State,* 79 Neb. 784, the officer in charge of a jury in taking them to their boarding place conducted them along the street where the alleged burglary was said to have been committed, and two of the jurors made affidavit that they walked slowly past the place and made such observations as they could, and that the moon was shining and a bright electric light was burning in the center of the street, and presumably the conditions as they described them were about the same as when the burglary was alleged to have been committed. There had been evidence by one of the witnesses for the prosecution that he recognized the defendant, and saw him go to the window of the feed store in question and break it and reach in and take a sack of flour. There were affidavits also to show that when they returned to the jury room there was a discussion, and the argument was presented that the light was not sufficient to enable the witness to recognize the accused. Notwithstanding this argument the jury found the defendant guilty, and this court held that the conduct of the jury was not shown to be prejudicial to the defendant. The court said that, while it would have been better if the officer had conducted them by another route, the court was not prepared to say that what had been done was misconduct; that if it had any effect at all upon the jury it was in some measure to shake the confidence of the jury in the truth of the statement of the witness for the prosecution who claimed to have recognized the accused. The opinion of this court is sustained by cases from other states which it cited.

It is claimed the court erred in giving to the jury on its own motion instruction No. 6, relating to contributory negligence. This instruction was not prejudicial to plaintiff, and the jury found in his favor.

We have examined the other alleged errors, and are unable to find any error which seems so far prejudicial to the plaintiff's rights as to require the reversal of the judg-

ment and a new trial. The plaintiff has recovered. Only those errors that go to affect the measure of the plaintiff's damages are properly to be considered. We have been unable to find any such.

The judgment of the court below is

AFFIRMED.

LORANDO D. BLAIR, APPELLEE, V. SHERIDAN COUNTY, APPELLANT.

FILED JUNE 16, 1913. No. 16,986.

Elections: EXPENSES: MILEAGE FEES. Where the plaintiff, who was the clerk of the election board, carried the election returns from the polling place to the county seat, where he delivered them to the county clerk, and in going to and returning from the county seat he "traveled over the only available route between said places, a distance of 131 miles," and the route was the shortest railroad route between such points, "and said route was and is the route generally traveled by people between said places," and the shortest distance traveling by team "is a distance of 60 miles through the sand-hill country," and "ordinary traveling by team in ordinary weather takes * * * a day and a half to make the trip, or three days to make the round trip," and by the railroad route actually traveled "it took plaintiff eight hours to make the trip," and before returning it would be necessary to remain over in the county seat 33 hours, and the foregoing facts were stipulated, and on a trial in the district court without a jury the court rendered judgment for plaintiff upon his claim for mileage by the railroad route at 5 cents a mile, this court will not declare that the distance was not "necessarily traveled," or that the district court erred in so holding.

FAWCETT, J. I cannot approve this syllabus.

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

R. L. Wilhite, for appellant.

Boyd & Barker, contra.

HAMER, J.

The defendant county has appealed from the judgment of the district court for Sheridan county. The plaintiff alleges in his petition that Sheridan county is duly organized; that he is himself a resident taxpayer and voter of Reno precinct in that county; and that at the general state election held on the 2d day of November, 1909, within Reno precinct in said county, he, the plaintiff, was the duly appointed and acting clerk of the election board for said precinct, and that he performed all the duties on his part to be performed as such clerk of election; that the duties of the plaintiff as such clerk required four days' work on November 2, 3, 4 and 5, 1909; and that it was also part of his duty to transport the returns of said election in his precinct to Rushville, Nebraska, the county seat of the county, and deliver said returns to the county clerk; and that he carried and transported said returns from said Reno precinct to Rushville, Nebraska, where he delivered the same to the county clerk; that said precinct is the extreme southern precinct in said county; and that "the usual traveled road from said precinct and the shortest railroad route between said points is *via* Crawford, Nebraska, *via* the railway lines of the Chicago, Burlington & Quincy Railroad Company and the Chicago & Northwestern Railroad Company, and that the plaintiff in transporting said election returns did travel from Reno, Nebraska, to Rushville, Nebraska, *via* Crawford, Nebraska, over said route above mentioned; that the mileage *via* said route is 131 miles; and that the plaintiff returned to his home from Rushville to Reno, Nebraska, by way of Crawford, Nebraska; that the plaintiff necessarily traveled said route, and that said route is the shortest railroad route between Reno, Nebraska, and Rushville, Nebraska." It is further alleged in the petition that, after performing the said services, the plaintiff filed his claim therefor with the county clerk in the sum of $22.10, the reasonable value of such services and the fee allowed by the stat-

utes; and that on the 17th day of November the board of county commissioners of said county disallowed said claim, and has ever since refused to pay the plaintiff the sum of $22.10, or any part thereof.

The answer admits the filing of plaintiff's claim against the defendant county in the office of the county clerk claiming four days' service as clerk of election and $13.10 as mileage of 262 miles from the polling place in Reno precinct, in Sheridan county, to Rushville, the county seat, and return, and alleges that the county board allowed said claim in the sum of $16, allowing four days as clerk of election, and for "140 miles traveled in making his returns;" that 70 miles and return, making 140 miles, is the full number of miles "that it is necessary to travel in making said returns;" and that it was wholly unnecessary "for plaintiff to travel 262 miles, as alleged in his petition," and that the amount allowed the plaintiff "was more than sufficient to compensate plaintiff for four days' service and five cents per mile for the number of miles necessarily traveled in making said returns."

There was a trial to the court without a jury upon a stipulation of facts. It is shown by the stipulation that the plaintiff was a resident taxpayer and elector of the county, and that he was the duly appointed and acting clerk of the election board in the precinct of Reno, in said county, and that as clerk of said election board he devoted November 2, 3, 4 and 5, 1909, four days, as clerk of said election board and in transporting the ballots from the polling place to the county seat of said county; that the polling place in Reno precinct and plaintiff's residence in said precinct are in the extreme southern portion of said county, and that the plaintiff in carrying said election returns to Rushville, the county seat, traveled over the only available route between said places, a distance of 131 miles; that the route traveled by plaintiff was the shortest railway route between the polling place in Reno precinct and Rushville, the county seat, and said route was, and is, the route generally traveled by people between said

places; that the shortest distance, traveling by team from said polling place to Rushville, is 60 miles through the sand-hill country; that ordinary traveling by team in ordinary weather takes plaintiff a day and a half to make the trip, or three days to make the round trip; that by the said railroad route actually traveled by plaintiff it took plaintiff eight hours to make the said trip to Rushville, and before returning by said railroad route it is necessary to lie over in Rushville 33 hours.

The court found the allegations of the plaintiff's petition to be true, and "that in making said returns said plaintiff traveled by the usual route of travel between the polling place in Reno precinct, in Sheridan county, Nebraska, to Rushville, Nebraska, the county seat; and that he is entitled to mileage for 131 miles, as claimed in his petition." The judgment was rendered for the plaintiff for $22.10 and costs.

The matter in dispute involves a construction of the statute as applied to the facts.

Section 9472, Ann. St. 1911, provides that the judges and clerks of election and board of canvassers for the county, at all general elections, shall receive for each day's service $2, and that "the person making the return of the election to the county clerk shall receive the additional sum of five cents for each mile necessarily traveled." The question in this case is whether the 131 miles and return were "necessarily traveled." Was the plaintiff bound to drive across a rough sand-hill country from Reno precinct to Rushville, or was he at liberty to take the train and to increase his comfort and shorten the number of hours of travel? The stipulation makes the railroad route by way of Crawford "the route generally traveled." The stipulation makes the route traveled the usual route. The stipulation also makes the route which was traveled the route "plaintiff necessarily traveled." If the route was one which the plaintiff necessarily traveled, that seems to dispose of the whole question. The case was tried before the district judge of the district court. His home is at

Rushville, and he has for many years resided in Sheridan county. He is familiar with the roads in his county and with all the surrounding circumstances. He is well qualified to judge of the correctness of the stipulation. His finding and judgment are for the plaintiff. He would not have allowed plaintiff mileage for 262 miles unless he felt that the stipulation and the facts warranted the finding which he made and the judgment which he rendered. We do not clearly see our way to disturb the judgment of the district court.

We have examined some decisions more or less in point. In *Logan County v. Doan*, 34 Neb. 104, the syllabus reads: "The only compensation for serving election notices, to which a sheriff is entitled, is five cents a mile for each mile actually and necessarily traveled."

In *Commissioners of Lyon County v. Chase*, 24 Kan. 774, an important witness in a criminal case, who resided within 17 miles of the place where the trial was subsequently to be had, entered into a recognizance for his appearance at the next term of the court to serve as a witness on the part of the state, and afterward, and before the next term of the court, he changed his residence, removing from Emporia to Boston, a distance of 1,600 miles. It was held that he was entitled "to receive mileage fees for the distance necessarily and actually traveled in going from the state line to the place of trial and returning, and no more." The court seems to have taken the view that the starting place of the witness could not be beyond the boundary of the state. It was said that no power of the state could compel the witness to come from Boston to Emporia, and therefore it was said: "The legislature merely intended that the witnesses should receive mileage fees only for the distance necessarily and actually traveled within the jurisdiction of the court."

In *Cody v. Clelam & Drury*, 1 Pa. Co. Ct. Rep. 9, it is said: "Mileage is to be calculated by the nearest traveled route (1 Pearson, 126), nonresidents to be allowed from the state line. This means by the usually traveled route, whether by railroad or turnpike."

In *Maynard v. Cedar County,* 51 Ia. 430, it was held: "Section 3788 of the code, providing that the mileage of an officer for conveying a convict to the penitentiary shall be computed by the 'most direct route of travel,' is to be construed as intending the route by which the journey can be the most speedily performed." In that case in the body of the opinion it is said: "Travelers now estimate distance rather by time of travel than by miles. The route by which they will most speedily perform the journey is considered the most direct. In the case before us the record shows that the distance by rail betwen Tipton and Anamosa is sixty-four miles; and by the highway, it is thirty-five. No public conveyance runs by the highway. Those who travel between these towns by public conveyance must take the railway. It is to be regarded, therefore, as 'the most direct route of travel.'"

In *Rebert v. Eline,* 21 Pa. Co. Ct. Rep. 431, it is said in the syllabus: "Where there are two usually traveled routes between residence of witness and county seat, one by rail and the other by turnpike, and of different length, mileage should be taxed according to the route traveled." The body of the opinion fully sustains the syllabus. In that case the distance was 10 miles by the wagon road and 24 miles by the railroad. Mileage was taxed by the railroad route because the witness came that way.

In *Commonwealth v. Heiges,* 4 Pa. Dist. Rep. 184, it is said in the syllabus: "Mileage will be allowed by the route usually traveled by persons attending court. And an allowance is proper where a longer but quicker route by rail is selected in preference to a stage route shorter by actual distance, but longer in time." In that case mileage was computed by the longer route, although it exceeded the other by 54 miles, but it was shorter in point of time.

The stipulation fails to show any public conveyance or means of travel by the shorter route. Without attempting to lay down a general rule which shall determine every case, we feel called upon to affirm the judgment of the

court below. In this case it seems to be right and to be supported by the facts.

AFFIRMED.

F. C. COCHRAN, APPELLANT, V. LANCASTER COUNTY, APPELLEE.

FILED JUNE 16, 1913. No. 17,341.

Jury: FEES. A juror drawn for three weeks' service in the district court for Lancaster county, under sections 668*a* to, and inclusive of, 668*n* of the code, and who appears and serves as a juror in said court during said period, is entitled to receive pay during the full term of such panel, Sundays excepted, unless finally excused from further attendance by the court before the expiration of such three weeks' term, and Saturdays within the period will not be excluded in making the computation of the amount due the juror, even though the juror may have been informed by the court that his attendance would not be required on such Saturdays. See *Spalding v. Douglas County*, 85 Neb. 265.

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

G. W. Berge, for appellant.

Jesse B. Strode and *George E. Hager, contra.*

HAMER, J.

This case involves the fees of a juror subpœnaed to attend the district court for Lancaster county for the April, 1911, term of that court. He was subpœnaed to appear for the panel of jurors of said court to commence on the 24th day of April, 1911, and to serve on said panel until he should be discharged. He appeared on the 24th day of April, 1911, and served continuously from and including said day until May 18, 1911, except Sundays and on three Saturdays. He was not finally discharged as a juror until May 18, 1911. At the rate of $3 a day he is entitled to

$66 for his services as a juror during the existence of said panel, including the said three Saturdays. After said panel of jurors was discharged, the clerk of the district court filed with the county commissioners the time of the jurors serving on said panel, including the time of plaintiff. On May 20, 1911, the plaintiff filed with the county clerk of Lancaster county his claim for $66 for services as such juror. The county commissioners of Lancaster county allowed the plaintiff the sum of $57, but disallowed his claim for $3 for services on Saturday, April 29, $3 for services on Saturday, May 6, and $3 for services on Saturday, May 13, making the total amount disallowed $9. The claim of the plaintiff is that the defendant county is indebted to him in the sum of $9 for his services as a juror and that the defendant county refuses to pay the same. It is alleged in the petition that the plaintiff is a traveling man, and that it was impossible for him to leave Lincoln and to render any services for the firm that he represented; that he could not and did not do any other work on the said Saturdays, except to hold himself in readiness for service as a juror under the direction of the court, and that during all of the time the plaintiff was at the courthouse and ready for service as a juror and under the direction of the court.

The answer of the defendant county admits the selection of the plaintiff as a juror, and that he was served with a subpœna to appear and serve and not to depart the court without leave, and that he did appear, and that he served from April 24 to April 28, inclusive, and that on the 28th day of April he was excused by the court from further service until Monday, May 1, at 9:30 o'clock in the morning, at which time the plaintiff again appeared and served continuously from May 1 to May 5, inclusive, when, by order of the court, he was again excused until Monday, May 8, 1911, at 9:30 A. M.; the plaintiff again appeared on Monday, May 8, at 9:30 A. M. and served continuously as a juror until Friday, May 12, 1911, inclusive, when he was again, by order of the court, excused from further

service until Monday, May 15, at which time the plaintiff appeared and duly served as a juror continuously until Thursday, May 18, 1911, inclusive, when he was finally discharged; that the total number of days actually served was 19, and that the county commissioners allowed him pay for 19 days at $3 a day, being a total of $57. The answer also alleged that the plaintiff did not serve as a juror on Saturday, April 29, Saturday, May 6, and Saturday, May 13, and that he was excused by order of the court on each of said days; that this was done in accordance with the rules of practice adopted by the judges of said district court. The rule provides: "Saturday of each week during the term shall be the time for hearing motions; unless otherwise specially ordered no causes will be tried on Saturday." There was an appeal from the action of the board of county commissioners of Lancaster county to the district court. The district court held against the plaintiff, and the case comes here on an appeal from the judgment of the district court.

It is contended with some earnestness that the juror should not draw pay on Saturday because, under the rule of the district court, it is not contemplated that any cases will be tried on that day. An examination of the statute seems to contemplate that during the term for which the juror is drawn, consisting of three weeks, he is expected to be in attendance on the court. Section 668*a* of the code provides that, in counties having a population of 30,000, or more, and less than 60,000, the county board of commissioners or supervisors shall at or before its meeting in January of each year, or at any time thereafter when necessary for the purposes of the act, make a list of a sufficient number, not less than one-tenth, of the legal voters of each township or precinct in the county, giving the place of residence of each person whose name appears on the list, said list to be known as the jury list. It is provided in section 668*d* of the code: "All jurors on the regular panels shall serve during the weeks or term for which they were drawn and until discharged from the case

in which they may be serving, if any, at the expiration of such time, unless sooner excused by the court." It is provided in section 668*f* that a list of jurors selected as provided in the act "shall be kept in the office of the county clerk, who shall write the name and residence of each person selected upon a separate ticket and put the whole into a box or wheel, to be kept for that purpose." And it is provided in section 668*g*: "At least twenty (20) days before the first day of any trial term of the district court, the district clerk of such court shall appear at the office of the county clerk, and in the presence of such county clerk, and at least one of the judges of the district court, after the box or wheel containing said names has been well shaken by the county clerk, and without partiality, draw thirty (30) names of persons then residents of said county, for each judge sitting with a jury in said court, as petit jurors for the *first three weeks of that term.*" It is further provided in that section that, at the same time and in the same manner, the clerk shall also draw the same number of names as petit jurors for the *second three weeks of that term of jury service.*

It will be seen that these jurors for a panel are called for three weeks. The act provides that they shall serve *during the weeks or terms for which they were drawn* and until discharged from the case in which they may be serving. Section 15, ch. 28, Comp. St. 1911, provides: "Grand and petit jurors shall each receive for his services three dollars for each day employed in the discharge of his duties, and mileage at the rate of five cents for each mile necessarily traveled." Under the act specially applicable to this sort of a jury, the time would seem to be three weeks during *which they are required to attend, unless discharged.* This would seem to contemplate a final discharge at the end of the three weeks. Under the stipulation of counsel made in this case, it appears that the plaintiff is a traveling salesman; that he attended the court as set forth; and that during the three Saturdays mentioned he was unable to engage in the business of selling monu-

ments for the house that he represented because there was no time sufficient to go to the territory where sales could be made in his business and return to be on hand Monday morning at Lincoln for jury service.

The question here presented is whether the plaintiff can be taken from his usual occupation to serve the public as a juror and be compelled to thereby neglect his own private business during the Saturdays mentioned without pay. But the view we take of the statute disposes of the merits of the case. It is not contemplated that the juror will be excused until the expiration of the three weeks for which he has been subpœnaed, but that he may be if his discharge is final. The question turns upon what sort of a discharge is contemplated by section 668*d*. There is no provision contained in the statute permitting the discharge of the particular panel until it is finally discharged, either at the expiration of the term of the panel, or afterwards, or before such term expires. There is no flexibility in the statute. "All jurors on the regular panels (which means this sort of a special jury for counties having the population specified) shall serve during the weeks or term for which *they were drawn* and until discharged from the case in which they may be serving, if any, at the *expiration of such time, unless sooner excused by the court.*" The order excusing the jury is to be at "the expiration of such time," except that it may be sooner if it is a discharge from the "term for which they were drawn." In other words, it is not contemplated that the jury will be discharged until it is discharged for the three weeks' term for which it has been drawn. The jury is expected to be in attendance upon the court until it is finally discharged.

In *Spalding v. Douglas County*, 85 Neb. 265, the second point in the syllabus reads: "A juror drawn for three weeks' service in the district court for Douglas county who appears and serves as a juror in said court during that period is entitled to recover for all of the days of said term, Sundays excepted, unless excused from such attendance by the court." We are at liberty to look at the body

of the opinion, where it is said: "Sections 668*a*-668*n* of the code have a limited application in the state, and contemplate service by jurors in attendance on the district court during a term of three weeks, unless sooner excused by the court."

It would seem that the author of the foregoing had in mind that the service must be "during a term of three weeks," unless there was a final discharge before the expiration of that time. In that case the plaintiff sued Douglas county to recover for service as a juror for two Saturdays. He alleged "being in attendance upon said court for 21 days," and that compensation for the two days was deducted by the commissioners "for the reason that said two days were Saturdays and that the court was not on said two days engaged in the trial of jury cases." The county filed a general demurrer to the petition, and that was overruled and judgment was rendered in favor of the plaintiff, and the defendant appealed. There was an argument at the bar, as stated in the opinion, that he was excused for two Saturdays during that period, and therefore was not discharging his duties as a juror. But it was alleged in the opinion that it was not stated in the petition that he was excused for the two Saturdays. From this it would seem that the juror alleged that he was in attendance all the time for 21 days, but that the commissioners allege, as a reason for not paying him, that two of the days were Saturdays, and that the court was not engaged in the trial of jury cases during those two Saturdays. It does not follow from that that the juror was not in attendance. Under the facts stated in his petition, he would be deemed to be in attendance and not to be excused. The case cited seems to contemplate that the juror was not excused, and that he could not be excused under the statute, unless excused from further attendance during the term of three weeks for which he had been subpœnaed.

In the instant case there was no final discharge until the end of the three weeks, and being excused from at-

tendance on the particular Saturdays mentioned is not contemplated by the statute as a discharge or within the power of the court, so far as it may affect the fees to be paid to the juror. He should be paid for the full term for which he was subpœnaed to attend, unless finally discharged before the expiration of that time.

It follows that the judgment of the district court is wrong, and it is

REVERSED.

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

LIZZIE FARRELL, APPELLANT, V. CHARLES H. DIETRICH ET AL., APPELLEES.

FILED JUNE 26, 1913. No. 16,958.

1. **Trusts: CONVEYANCE OF LAND: RATIFICATION.** In 1893 plaintiff and her husband deeded the land in controversy to D. by general warranty deed, and the deed was soon thereafter recorded. From that time to the commencement of this action, in 1909, no taxes were paid by plaintiff, nor any acts of ownership over the land asserted by the grantors in the deed to D. An action was brought by the county to foreclose the lien for taxes, a decree of foreclosure entered, the land sold at sheriff's sale to R. for $103.14 more than the taxes, interest and costs, and the surplus was paid into the hands of the clerk of the court. Subsequently D. applied to the court for an order directing the clerk to pay the surplus to him. The order was entered, the money paid as directed, and received by D. At the time of the execution of the deed to D. a bank, of which he was the president, held the promissory note of plaintiff and her husband for quite a large sum. The $103.14 was credited upon this indebtedness. Subsequently plaintiff had a settlement and adjustment with the bank and D., in which the $103.14 was accounted to her as a credit. *Held*, a ratification of the conveyance to D., and that plaintiff was not entitled to recover the land more than 16 years after the conveyance.

2. **Taxation: FORECLOSURE OF LIEN: RIGHT OF REDEMPTION.** *Held*, also, that D. prior to the commencement of this action having conveyed his interest in the land to R., who was from the date of

the purchase in possession thereof, plaintiff was not entitled to redeem from the foreclosure sale for taxes.

3. Trusts: EVIDENCE. The evidence detailed in the opinion *held* to sustain the decree of the district court in favor of defendants D. and R.

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

J. W. James, for appellant.

Wilcox & Halligan, contra.

REESE, C. J.

This appeal is from the district court for Lincoln county. The suit involves the title to the south half of the northwest quarter and lots 3 and 4, all in section 2, township 12 north, range 34 west. The land was patented by the United States to Thomas E. Farrell, the husband of plaintiff, on the 14th day of July, 1893, and he held the title thereto until the 22d day of November of the same year, when he and plaintiff conveyed the premises to Charles H. Dietrich by a general warranty deed. The taxes were paid for some three years thereafter, when the payments ceased. On the 17th day of February, 1902, the county of Lincoln commenced its action against Dietrich, the holder of the record title, to foreclose its lien for taxes, and such proceedings were had as resulted in a decree of foreclosure, when the land was purchased by defendant Robb for the sum of $200. The total amount of principal, interest and costs at the time of the sheriff's sale amounted to $65.96, leaving a surplus of $134.04 in the hands of the sheriff. On the 6th day of June, 1903, Dietrich applied to the court for an order requiring the clerk to pay over to him, as the former holder of the title, the sum of $103.14. the amount remaining in the clerk's hands. The order was made and the money paid as directed. The date of the sheriff's deed to Robb was December 9, 1902. On the 30th day of June, 1909, Dietrich executed a quitclaim

deed to defendant Robb, which was recorded on the 17th day of July of that year. This action was commenced on the 9th day of the same month against Dietrich and Robb. It appears that, at the same term of the district court at which the order of confirmation of the sheriff's sale was made, the court entered upon his docket an order setting aside the order of confirmation and all proceedings theretofore had in the case, but at the same term, probably, ran a line through his entry, as if to obliterate it, and on the margin placed the word, "Error," but the order was entered by the clerk at length upon the journal, and it so stood until the 19th day of January, 1910, when, on motion of defendant Robb, as the successor in interest to Dietrich, the court entered what is claimed to be a *nunc pro tunc* order, reciting that the order setting aside the sale "was inadvertently made and made by mistake," and setting aside the order of cancelation, "for the reason that said order and judgment was inadvertently made by the court, and the court did not intend to make that order in this case." There is a sharp contention as to the legal effect of this entry, plaintiff insisting that it was void, for various reasons, while defendants insist that it had the effect of canceling whatever might be the results of the former order. According to the view entertained by us, the question here presented is not deemed of importance, and no further attention will be paid to it.

All the issues herein disposed of were fully and fairly presented by the pleadings, and we do not deem it necessary to extend this opinion to the extent of setting them out in detail herein. On the trial to the court a decree was entered in favor of defendants, dismissing plaintiff's petition, and from which plaintiff has appealed.

It is alleged in the petition that the deed executed to Dietrich by plaintiff and her husband, of November 22, 1893, was made in pursuance of a purpose on the part of Thomas E. Farrell and plaintiff to transfer the title to plaintiff, and that Dietrich, being a friend and confidential adviser to plaintiff and her husband, was selected as a

conduit for conveying the title from the husband to the wife, all believing that the interposition of a third party was necessary to such transfer, but that Dietrich had failed to comply with his agreement to make the deed to plaintiff; that a resulting trust was thereby created, which should be enforced by a court of equity. Defendant insists that, if such was the agreement, it would be an attempt to create an express trust by parol, which is forbidden by statute. It is also insisted that plaintiff and her husband were indebted to the German National Bank of Hastings, of which Dietrich was the president, that the deed was executed for the purpose of securing such indebtedness, and that therefore the deed was, in legal effect, a mortgage. We do not deem it necessary to decide the questions here presented, for, had there been no estoppel and the action been timely brought, plaintiff would have been entitled to recover in a proper action in either event.

Thomas E. Farrell died December 3, 1902, nine years after the execution of the deed to Dietrich, and the amended petition was filed on the 1st day of February, 1910. We are unable to discover from the record before us when the original petition was filed, but it sufficiently appears that the time between the execution of the deed to Dietrich and the commencement of this action was 16 to 17 years. The evidence adduced on the part of the defense tends strongly to prove that probably Mrs. Farrell is mistaken as to the full purpose of the conveyance by her husband and herself to Dietrich in 1893. It is quite reasonable to believe her statement that the land was to be finally reconveyed to her. It is also reasonable to believe that one of the purposes of the deed was to secure the indebtedness of her husband and herself to the bank, for, at that time, the bank held the promissory note signed by both for quite a large sum of money. As we have seen, Mr. Dietrich received $103.14 surplus remaining after the satisfaction of the county's decree of foreclosure. This sum was indorsed upon the note as a credit. On the 23d

of April, 1906, plaintiff by her son, who was her duly accredited agent, had a settlement with the bank officers, a memorandum of which was reduced to writing, as follows: "Hastings, Nebraska, April 23, 1906. I have this day compromised and settled with the German National Bank of Hastings, Nebraska, the balance due on an indebtedness arising by reason of and represented by a certain promissory note dated August 24, 1893, for the sum of $10,000. Secured by real estate mortgage signed by myself and payable to the order of H. S. Dungan and by him indorsed to the order of the German National Bank of Hastings, Nebr. And as part consideration of said settlement and compromise I have released and do hereby release and acknowledge full satisfaction of any claim I have had or may have against Chas. H. Dietrich by reason of his having conveyed by deed to J. F. Heiler, lots 14 and 15, block 29, Johnson's addition to Hastings, under deed dated December 21, 1903. This settlement being a full and complete adjustment and settlement of all matters of difference now existing between the said German National Bank of Hastings, Nebraska, Chas. H. Dietrich and myself. Lizzie Farrell, by Frank E. Farrell as agent." The note was then surrendered to plaintiff, who testified that she thinks it was burned. The memorandum of settlement clearly shows an adjustment of all matters of difference between plaintiff and the bank, as well as between herself and Dietrich. It also appears that the taxes on the land, so far as they were paid, were paid by Dietrich or the bank, not by plaintiff, although she testified that when paid by Dietrich or the bank they were charged up in the bank account against plaintiff's husband. As to that matter the evidence is quite unsatisfactory. There was no showing by the bank upon the subject. It must be conceded, however, that the absence of all care over the property for so long a time, allowing the taxes to accumulate, and the receipt of the proceeds of the sheriff's sale would all seem to indicate an abandonment of the property. Added to this is the absence of knowledge on the part of

defendant Robb of any claim of interest in the property by either plaintiff or her husband in his lifetime; the presence of the record of the warranty deed from them to Dietrich from December 28, 1893, the date on which it was recorded, and his purchase from Dietrich, must deprive plaintiff of the right to redeem.

The decree of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

JOSHUA RUSHTON, APPELLEE, V. AMBROSE S. CAMPBELL ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17,104.

1. **Appeal**: REMAND: RESUBMISSION. The final *per curiam* order in this cause (*McNeny v. Campbell*, 81 Neb. 754, 761), remanding the cause for further proceedings, required a resubmission of the issues upon a later trial in the district court.

2. ———: CONFLICTING EVIDENCE. The question of the liability of a defendant upon an alleged obligation with others having been submitted to a trial jury upon conflicting evidence, the verdict of the jury will be sustained, unless clearly and manifestly wrong.

3. **Venue.** Where a suit was instituted against A, B, and C in W. county, the service of summons being made upon A in that county, the county of his residence, and upon B and C in C. county, the county of their residence, the jurisdiction of the court over B and C depending upon the joint liability of A with them, the verdict of the trial jury finding that all were jointly liable to the plaintiff on the cause of action pleaded in his petition fixed the jurisdiction over B and C.

4. **Vendor and Purchaser**: RESCISSION: JOINT LIABILITY. It was alleged that A represented to the plaintiff that the title to a certain tract of land was held by B and C, but that A had an interest therein, being one of the owners thereof, and that, upon his false and fraudulent representations as to the title and quality of the land, plaintiff was induced to enter into a contract for the purchase thereof and make a substantial payment thereon. It is

held that in an action for a recovery of the money paid, after a rescission of the contract, if the allegations of the petition were sustained by sufficient evidence, and plaintiff was entitled to recover the money so paid, all defendants would be jointly liable therefor and a joint judgment against all would be sustained.

5. ———: ———. Where a contract for the sale and purchase of land required the payment therefor to be made at a certain time, but contained no provision as to when the transfer of title should be made, the law implies that the payment and conveyance shall be concurrent acts, and that if upon tender of payment at the time agreed upon the vendor is not able to make the transfer of title, and fails so to do, the purchaser may rescind the contract and recover the money paid thereon.

6. Instructions examined and found not to be harmonious, but the defendants (appellants) were not prejudiced thereby, and the error did not require a reversal of the judgment.

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

C. W. Meeker, P. W. Scott and *L. H. Blackledge,* for appellants.

Bernard McNeny and *J. S. Gilham, contra.*

REESE, C. J.

The suit upon the cause of action involved in this case was first instituted by Bernard McNeny, as assignee of Joshua Rushton, against the defendants, and upon trial in the district court the then plaintiff recovered judgment. The defendants appealed to this court and secured a reversal of the judgment and a remand to the district court. The opinion was written by the late ELISHA C. CALKINS, Commissioner, and is reported in 81 Neb. 754, 761, where the principal facts are stated. Upon the cause being remanded to the district court, a second trial was had, the jury failing to agree. A third trial was had to a jury, which returned a verdict against all the defendants, on which a judgment was rendered, and from which they appeal.

In view of the statement of facts contained in the

former opinion, we do not deem it necessary to encumber the record by a repetition thereof. Prior to the last trial McNeny reassigned the claim to Rushton, by whom the case has since been prosecuted, and who is here as appellee. The issues presented are practically the same as upon the former appeal, and all questions of fact have been retried. Had the final judgment of this court upon the former appeal been entered in accordance with the recommendations of the commissioner, it is quite probable that the conclusion reached might have had an important bearing upon the final determination of the action; but, instead of dismissing the action as to Carpenter, as recommended, the court overruled that part of the judgment and remanded the case for further proceedings, which, in effect, required a new trial of the issues.

As shown by the former opinion, the question of jurisdiction was presented. Carpenter resided in Webster county. Burke and Campbell were residents of Chase county. The suit was commenced in Webster county, where service of summons was had on Carpenter, and service made upon the other two defendants in Chase county. If there was no liability as against Carpenter, the others could not legally be sued in Webster county with service of summons in Chase county. The question of the liability of Carpenter became an important one, as affecting, not only his rights, but those of Burke and Campbell. If Carpenter was interested in the agreement by which Burke and Campbell sold the land to plaintiff, as a party thereto, or had joined with them in the perpetration of any fraud upon Rushton, and Rushton had rescinded the contract, either for fraud or the failure of Burke and Campbell to comply with its terms, and plaintiff was entitled for either reason to recover back the money which he had paid on the attempted purchase of the land, Carpenter would be liable, and the suit could be maintained in Webster county, where he resided and was served with summons.

This question was submitted to the jury upon quite a large volume of conflicting evidence, the claim of plaintiff

and his witnesses being in support of the alleged statements made by Carpenter to plaintiff, that he was the owner of an interest in the land, that the title was clear and held by Burke and Campbell, as well as statements made to others to the same general effect. This was denied by Carpenter, and it was claimed by him, as well as by Burke and Campbell, that he had no interest whatever in the land nor its sale, and that he did no more than call plaintiff's attention to the property. The written contract of the sale was made by Burke and Campbell, Carpenter signing as a witness only. But the contention of plaintiff is that this was done because it was represented by all the defendants that the title to the land was in Burke and Campbell. It could serve no good purpose to state the evidence upon this part of the case more in detail. It must be sufficient to say that there was a conflict, which it was the province of the jury to settle, as well as the inference to be drawn from the conceded acts and declarations of Carpenter. While the evidence leaves the matter in doubt in the mind of the writer, we are admonished that the jurors were the triers of the fact, and with their findings thereon we must be content. The liability of Carpenter being found against him by the jury disposes of the question of jurisdiction over Burke and Campbell, and leaves the case for decision upon the merits as against the three defendants.

The written contract which furnishes the basis of plaintiff's action is as follows: "This agreement, made and entered into this 11th day of October, A. D. 1906, by and between Joshua Rushton, of the town of Esbon, R. F. D. No. 2, county of Jewell, and state of Kansas, of the first part, and Burke & Campbell, of Imperial, county of Chase, and state of Nebraska, of the second part, witnesseth: That the said party of the second part covenants and agrees to and with the said party of the first part to transfer by warranty deed, together with abstract posted to date showing clear title (to) the southeast quarter of section twenty-nine, in township seven north, of range thirty-

eight west of the 6th P. M. Possession to be given March 1st, 1907. And the said party of the first part covenants and agrees to pay unto the said party of the second part, for the same, the sum of four thousand (4,000) dollars, as follows, viz: One thousand four hundred fifty dollars cash in hand, receipt of which is hereby acknowledged. Two thousand five hundred fifty dollars on or before January 20th, 1907. In witness whereof, the parties to these presents have hereunto set their hands, the day and year last above written. (Signed) Joshua Rushton. (Signed) Burke & Campbell. Signed, sealed and delivered in presence of (Signed) A. H. Carpenter."

It will be observed that, while this writing fixes a definite time for the final payment, there is no stipulation as to when the deed should be delivered. But, as under such conditions the payment of the price and the delivery of the deed are concurrent acts, the deed was due at the time of, and upon the payment or tender of, the purchase price. *Primm v. Wise & Stern,* 126 Ia. 528; *Webb v. Hancher,* 127 Ia. 269; 39 Cyc. 1334. It may be further noted that the parties so construed the contract. The date fixed for the final payment was January 20, 1907. On that day a tender is alleged to have been made of the amount due on the contract, and demand made for the deed. Defendants did not procure the deed, nor could they, as they did not have the title to the property. They had an option to purchase, but they had not paid the amount due upon their option, and the title was still in the original owner. Not having title at the time when they should have conveyed, they were not in a position to demand an extension of the time in which to make the conveyance, and the tender of the money and demand for the deed, with their inability to convey, gave plaintiff the right to rescind, which he did, and entitled him to a return of the $1,450 which he had paid. *Webb v. Hancher, supra.* At that time there was an unpaid and unsatisfied mortgage for $1,100 on the land, which should have been satisfied of record before or at the time for the conveyance. Plaintiff was under no

obligation to pay over the purchase price and trust to defendants to satisfy the mortgage. His contract provided for a "clear title." He was entitled to this upon tender of the amount due at the time provided by the contract for payment.

There was a sharp conflict in the evidence upon the trial as to whether there was a misrepresentation of the value of the land by defendants to plaintiff before the contract of purchase was finally made. A strong showing was made by the defense that the property was actually worth the value placed upon it by the defendants. But, upon the other hand, evidence was produced to the contrary, and this placed the solution of the question in the hands of the trial jury. While the writer hereof, had he been the trier of fact, might have decided this question of fact in favor of the defense, we cannot say that the verdict in that regard is not sufficiently supported by the evidence. However, did plaintiff's right to recover depend upon that question alone, the plaintiff having seen the land and had the opportunity to know its value, we should seriously question his right to recover; but, as we view the case, this is not a controlling question. This subject was properly presented to the jury by the seventeenth instruction, given at defendants' request.

It is claimed by appellants that there is a conflict between the eighth and fifteenth instructions given to the jury. By the second instruction the jury were told that the burden of proof was on the plaintiff, and, before they would be warranted in returning a verdict in his favor, he must establish by a preponderance of the evidence the truth of the material allegations of his petition, not admitted, which were that the sale of the land was made by Burke and Campbell for and on behalf of themselves and Carpenter; that plaintiff was induced to enter into the contract because of statements made by Carpenter that the three were the owners of the land, the legal title being held by Burke and Campbell; that such representations or some of them were false when made; that plaintiff re-

lied upon them; and that plaintiff or his assignor rescinded the contract on account of such fraudulent representations, and demanded the return of the money paid. The eighth instruction was to the effect that, if the jury found that Carpenter made the representations that Burke and Campbell had a present perfect title to the land and were able to convey at any time, that plaintiff relying thereon paid to Burke and Campbell the $1,450 as part of the purchase price of the land, that Burke and Campbell did not have the title to the land and were unable to convey, and that plaintiff rescinded the contract therefor, Carpenter would be equally liable with Burke and Campbell. By the fifteenth instruction the jury were informed that, under the undisputed evidence, the title to the land was in Pritchard, the defendants Burke and Campbell holding a lease with option to purchase, and that at the time of making the contract with Rushton they could lawfully make in their own name the agreement made, and the fact that they did not have the full legal title to the premises does not constitute ground for Rushton or his assignee to rescind the contract and demand a return of the purchase money paid. There seems to be no doubt that this instruction is somewhat at variance with other instructions. It was given at the request of defendants, and the three instructions were evidently not so carefully considered as they should have been before being given. But it is not clear that the defense suffered any prejudice thereby. Had the proposition contained in the fifteenth instruction been the only contention in the case, it would have been practically an instruction for the jury to find in favor of defendants; but, as there were other vital issues in the case, it could only have the effect of withdrawing that issue from the consideration of the jury, and we cannot see that the want of harmony between the instructions must of necessity require a reversal of the judgment.

The case is not without its perplexing questions, but, upon a review of the whole record, we are not satisfied

that the judgment should be molested. It is therefore

AFFIRMED.

FAWCETT, J., not sitting.

SEDGWICK, J., dissenting.

It seems to me that the majority opinion is inconsistent with itself. It states two reasons for allowing the plaintiff to repudiate his contract: That the contract was procured by fraud; and that the defendants did not comply with its terms on their part.

The supposed fraud, as stated in the majority opinion, is in the two statements by Carpenter—that he (Carpenter) was the owner of an interest in the land; and that the title was clear and held by Burke and Campbell. The opinion shows that all the parties knew exactly the condition of the title; that Burke and Campbell had an option to purchase the land, and the plaintiff contracted with Burke and Campbell only, knowing at the time that the legal title was in the third party, and that Burke and Campbell intended to give the plaintiff the title by obtaining the deed from the third party who held the legal title. If Carpenter made the statement to the plaintiff that he was "the owner of an interest in the land," the plaintiff could not possibly have relied upon that statement or have been deceived thereby. If Carpenter told the plaintiff that the title was clear and held by Burke and Campbell, the plaintiff could not possibly be damaged thereby, because it would make no difference who held the legal title if Burke and Campbell were able to procure the legal title to be conveyed to the plaintiff according to the terms of their contract. It is said in the opinion: "Defendants did not procure the deed, nor could they, as they did not have the title to the property. They had an option to purchase, but they had not paid the amount due upon their option, and the title was still in the original owner."

The plaintiff caused a written statement to be given to defendants of "our requirements on this title," in which

he demanded: "(3) A general warranty deed coming from Lyman B. Pritchard and wife. (4) A bonded abstracter's certificate to the effect that the transfers from Lyman B. Pritchard and wife to Joshua Rushton is properly made. With these requirements we will accept the title." These requirements were fully complied with.

The opinion says that the fact that defendants did not procure the deed on the 20th of January justifies plaintiff in refusing to accept it. The facts, as shown by the abstract, are that the money was to be paid on the 20th of January, and of course the deeds were to be delivered at that time. On the 12th of January the plaintiff by his attorney wrote to the defendant: "Mr. Rushton was in the office today and wanted me to ask you if you would be ready to close the deal upon his land there on the 23d of this month. This would let him have the advantage of the rates. If this is satisfactory to you try and have our requirements ready so we can close the deal all up on that date and get back. I will probably come up for Mr. Rushton, as he wants me to look after the matter for him. Please let me know by return mail if this is satisfactory and you can have the requirements met so I can get back the same day." The defendants at once ordered the papers forwarded to the place where the contract was to be consummated, and they arrived there on the 24th—the deed from Pritchard, the release of the prior mortgage, and complete abstract, and all the papers that had been required by the plaintiff's attorney in his letter of January 18, which is copied in the abstract. The contract did not provide that time is of the essence of the contract, and at the plaintiff's request it was delayed three days, but the plaintiff refused to delay the other day, when he knew that the papers were in transit and had been delayed in the mail.

When this case was here before (*McNeny v. Campbell*, 81 Neb. 754), the court stated at large the facts in the case. The present majority opinion adopts that statement of facts without change, explanation or addition, and yet

upon the statement of facts the former opinion found that the case must be reversed. This seems to raise a direct conflict between the first opinion and the present opinion. In the last trial the court instructed the jury in the fifteenth instruction that "under the undisputed evidence in this case as to the title of the land * * * being in Lyman B. Pritchard, and the defendants Burke and Campbell" had only an option of purchase, "does not constitute ground for said Rushton or his assignee to rescind such contract and demand a return of the purchase money paid." This is the law of the case as held by all of the authorities.

As to the other representation as to the value of the land, the court in the seventeenth instruction told the jury that, when a purchaser has opportunity to examine the property before he purchases, he cannot maintain an action against the parties on the ground that the vendor made false statements in regard to the value of the property. "Such purchaser is bound to rely on his own judgment in regard to such matters, and not on the statements of the vendor." It is conceded, as stated in the majority opinion, that Rushton went to look at the land himself, and the majority opinion says that the case would not be reversed upon that ground alone, and further says that, "if Carpenter was interested in the agreement * * * as a party thereto, or had joined with them," etc.; but the record shows, and the opinion states, that Carpenter was not a party to the agreement. The agreement was in writing, and it was between Burke and Campbell on the one side and plaintiff on the other.

According to the second paragraph of the syllabus, it is not enough that the verdict of the jury is clearly wrong. It must also be "manifestly" wrong in order to justify a reversal. This is adding something to any and all of the cases that we have heretofore decided.

HENRY STEHR V. STATE OF NEBRASKA.

FILED JUNE 26, 1913. No. 17,539.

Criminal Law: SENTENCE: LAW GOVERNING. Where a crime is found to have been committed before the taking effect of the indeterminate sentence law, the sentence, upon the verdict of the jury finding the accused guilty, should conform to the law in force at the time of the commission of the offense.

OPINION on motion for rehearing of case reported in 92 Neb. 755. *Affirmed and remanded.*

REESE, C. J.

The opinion affirming the judgment in this case is reported in 92 Neb. 755. A motion for rehearing has been filed, and the whole record has been carefully re-examined. We are unable to discover that any prejudicial error occurred during the trial which requires interference by this court. So far as the trial itself is concerned, the defendant seems to have been fairly dealt with. It appears from the record that the defendant is charged with the commission of the offense on the 22d day of January, 1911. The evidence shows that to be the date of the death of the child. The trial was held, and finally terminated on the 27th of November, 1911, when the defendant was sentenced under the indeterminate sentence law for a term of from one to ten years. That law took effect on the 7th day of July, 1911, and, of course, could not be applied to this case as to the sentence to be imposed or method of punishment. In *Forbes v. State,* 93 Neb. 574, after quoting from the indeterminate sentence law, we said: "It seems clear that the legislature never intended this language, in its proper connection with the whole act, to apply to crimes committed before the enactment went into effect. The lawmakers legislated for the future, not for the past. An eminent text-writer has wisely said: 'It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative

intention that it should operate retrospectively.' Cooley, Constitutional Limitations (7th ed.) 529." It is practically, if not strictly, the uniform holding of the courts of this country that the indeterminate sentence law cannot operate upon crimes committed prior to the taking effect of the law. *Dial v. Commonwealth,* 142 Ky. 32. See *Stewart v. Commonwealth,* 141 Ky. 522; *Humn v. Commonwealth,* 143 Ky. 143; *People v. Deyo,* 103 App. Div. (N. Y.) 126; *In re Marion,* 140 Mich. 219; *People v. Casady,* 250 Ill. 426; 12 Cyc. 956, clause *b*.

It seems quite clear that the district court erred in imposing the sentence under a law not in existence at the time of the commission of the alleged offense, and the cause will have to be remanded for a correct sentence. It is no doubt true that, as the trial was held long after the law took effect, the court and counsel overlooked the fact that the prior law must govern, and that counsel when presenting the cause to this court also did the same, and the subject was not called to our attention either in briefs or arguments, nor in the motion for rehearing, and was therefore overlooked in the opinion heretofore filed; but the question presents, not only a vital constitutional right of defendant, but one involving the jurisdiction of the court to render the sentence imposed, and cannot be ignored. We also think it not improper to suggest that, under all the circumstances of this case, the new sentence imposed should be of the shortest possible time, considering the length of time defendant has already served, and that he should be discharged from custody.

The judgment of the court, therefore, is that, no error appearing in the record before us up to the time of pronouncing sentence, the judgment of the district court as to all such matters is affirmed, and the case is remanded to that court for the rendition of a valid judgment upon the verdict.

Conviction affirmed, and case remanded for judgment.

AFFIRMED AND REMANDED.

L. ROSE BLAKESLEE, APPELLEE, V. EDWARD R. VAN DER SLICE, APPELLANT.

FILED JUNE 26, 1913. No. 16,976.

1. **Appeal:** PLEADING: AMENDMENT: DISCRETION OF COURT. It is usually a matter within the discretion of the district court to allow or refuse to allow a pleading to be amended to conform to the evidence; and, in order to predicate error in allowing the amendment, it must be shown that the trial court has abused its discretion.

2. ———: CONFLICTING EVIDENCE. Plaintiff broke her arm, and sued the defendants for a failure to properly reduce and treat the fracture. It was claimed by the defendants that plaintiff violated their instructions not to use the broken arm or hand. The evidence on that question was conflicting. *Held*, That the verdict of the jury should not be disturbed.

3. ———: VERDICT: REVIEW. When the issues in such an action are all submitted to a jury under proper instructions, the verdict will not be set aside, unless it is shown to be clearly wrong.

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

Meier & Meier and *George A. Adams,* for appellant.

Wilmer B. Comstock, H. A. Reese and *A. G. Wolfenbarger, contra.*

BARNES, J.

Action to recover damages alleged to have been sustained by the plaintiff for the failure of the defendants to properly reduce a fracture of her arm. A trial in the district court for Lancaster county resulted in a verdict and judgment for the plaintiff for the sum of $400, and the defendant Van der Slice has appealed.

It appears that on the morning of the 10th day of February, 1909, the plaintiff suffered a fracture of the radius of her left arm, commonly called the Colles' fracture, as the result of a fall. Within about 30 minutes after

the accident happened, Doctor Richard E. Howard and Doctor Edward R. Van der Slice appeared at the plaintiff's home, and, working together, attempted to reduce the fracture and repair the plaintiff's injury. During the next five days immediately following the injury, Mrs. Blakeslee did not leave her bed, and during the time from February 9 until February 21 one of the defendants called upon her almost daily, and on each occasion he was informed that the arm felt full and twisted and out of place. On the 21st day of February, 1909, while both Doctors Howard and Van der Slice were present, they first removed the dressing from the arm, and their attention was again called to the extremely swollen and painful condition of the injury. At that time they rebandaged the arm, replacing the same splint upon the forearm and hand, and left it in the same condition in which they found it. From February 21 until March 5, 1909, the defendant Howard continued to call on Mrs. Blakeslee, and during that time on several occasions removed the bandage and examined her arm. On Saturday, the 6th day of March, the plaintiff called on Doctor Williams of University Place, and submitted the injured arm to his examination. Doctor Williams found that it was very much swollen, and, according to his diagnosis, the bone was broken and was then out of place. On Sunday morning, March 7, 1909, Doctors Wiliams and McKinnon called at the home of Mrs. Blakeslee, made an examination of her injured arm, administered an anæsthetic, and pulled and manipulated the arm in order to get the broken bones in apposition. They claimed to have set the arm, or reduced the fracture. They testified that on that date the broken bone had not yet united. Doctor Howard testified that on the 21st day of February, 1909, the broken bone of the injured arm was in the same position as left by himself and Doctor Van der Slice at the time they attempted to reduce the fracture. It should be observed that Doctor Howard testified that they did properly reduce the fracture at the time the injury occurred. After Doctors Williams and McKinnon

had treated the fracture, the swelling and pain subsided, and the twisted feeling left the plaintiff's arm.

Complaint is made of the admission of evidence of pain. It is difficult to see how the injury or the injured condition of the arm could be described without using the words "pain" and "swelling," and, as we view this assignment of error, it is quite immaterial.

Complaint is made because plaintiff was allowed to amend her petition at the close of the evidence. On pages 454 and 455 of the record it is shown that the plaintiff asked leave to amend the petition by changing the word "ulna" to the word "radius" in furtherance of justice and to conform to the facts proved. The record shows that leave to amend was granted over the defendants' objections. To our minds it seems clear that the amendment asked for could not and did not in any way mislead the defendants. The case had been tried upon its merits, and whatever discrepancy appeared in the petition was properly cured by the amendment, and the defendants were not thereby misled to their prejudice.

In *Chicago, R. I. & P. R. Co. v. Shaw,* 63 Neb. 380, it was said: "It is usually a matter within the discretion of the trial court to allow or refuse to allow a pleading to be amended to conform to the evidence given on the trial." See, also, *Brown v. Rogers & Bro.,* 20 Neb. 547. There is nothing contained in the record which shows, or tends to show, that the district court abused its discretion in allowing the amendment in question.

Error is also assigned for permitting counsel to propound numerous questions to witnesses pertaining to a book or treatise entitled "The Treatment of Fractures," by Scudder. There is nothing contained in the record showing, or tending to show, that this work, or any part of it, was introduced in evidence, and whatever reference there was made to it, so far as we are able to see, was confined to the fact that there was such a work, and was without prejudice.

It is also contended that the failure of the district court

to direct the jury to return a verdict for the defendants was prejudicial error. It appears that the evidence in this case as to the manner and effect of the treatment given by the defendants to the plaintiff's injury was conflicting, and therefore it would have been prejudicial error for the court to direct a verdict for the defendants.

Defendants assign error in giving the fifth instruction. By that instruction the jury were told that if the plaintiff was guilty of negligence in the care of her injured arm, or in the use of the same, such negligence causing, or contributing to cause, the injury she claims, then in that case she could not recover. But, on the other hand, if the jury should find that she was not negligent in that respect, then the plaintiff would have the right of recovery. While this instruction, considered alone, might be erroneous, yet, when considered with the other instructions given, error could not be predicated thereon.

Considerable stress was given to the evidence tending to show that plaintiff had been using her arm and hand prior to the time it was treated by Doctors Williams and McKinnon. We think the evidence on that question is entitled to very little, if any, weight. The principal testimony tending to show that plaintiff had used her arm at all were statements alleged to have been made by the plaintiff's daughter. This was clearly hearsay evidence.

Again, the defendants both testified that, when they examined the plaintiff's arm on the 21st day of February, they found it in the same condition in which they had left it; that it had not been displaced or disturbed in any manner. We are therefore inclined to the view that the instruction complained of correctly stated the law. As we view the record, the case was submitted to the jury upon conflicting evidence and under proper instructions, and we feel unable to disturb the verdict.

The judgment of the district court is therefore.

AFFIRMED.

REESE, C. J., ROSE and HAMER, JJ., not sitting.

JAMES BELL ET AL., APPELLANTS, V. CITY OF DAVID CITY ET AL., APPELLEES.

FILED JUNE 26, 1913. No. 17,329.

1. **Municipal Corporations: POWERS: ELECTRIC LIGHT PLANT.** A city or village has the power, under the provisions of section 8704 *et seq.*, Ann. St. 1911, to construct and operate a municipal electric light system for the purpose of furnishing lights to the city and the inhabitants thereof.

2. ———: ———: ———. Under our statutes the city may use the engines and power of an electric light plant to pump water for the use of the city and its inhabitants.

3. ———: ———: ———: LIABILITY. In constructing such a system, due regard must be given to the rights of the owners of the present system. The municipal system should be so constructed as not to unnecessarily interfere with the property rights of the owners of the present plant, and in case of necessary interference the city will be liable for the injury sustained.

4. ———: ———: ———: INJUNCTION. The city having denied that it will construct its light plant in such a manner as to interfere with the property rights of the owners of the present system, and introduced proof to sustain that allegation, *held* that plaintiffs are not entitled to enjoin the construction of the municipal plant before there is actual or threatened interference.

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

A. M. Post and *Roper & Fuller,* for appellants.

John J. Sullivan, Arthur J. Evans, E. A. Coufal, J. J. Thomas and *C. M. Skiles, contra.*

BARNES, J.

This action was commenced in the district court for Butler county by James and Samuel Bell against David City and the officers of that city to enjoin them from constructing and maintaining an electric light system in said city. A temporary injunction was allowed, but upon a

trial of the merits the injunction was dissolved, the action was dismissed, and plaintiffs have appealed.

It appears that plaintiffs had been granted a franchise to build their electric light plant on the streets, alleys and public grounds of the city, and that they have constructed it accordingly. It further appears that the plaintiffs have a right of occupancy where they have placed their lines and poles and other necessary property in building their plant. No company would have a right to interfere with the property of the plaintiffs, or with its necessary occupancy of the location where their lines are situated. The rights of the city in that regard are the same as those of any other company which might obtain a franchise and proceed to erect a second plant. It is also true that the plaintiffs do not have any exclusive right to operate an electric light plant in David City, and the city therefore has a right to proceed to build another part, but must of course follow the law in so doing.

The question is very much discussed in the brief as to the right of the city to build a power plant, or to build a combined light, water and heating plant. There is no statute authorizing the city to build a power plant, and therefore it may be said that it would not be allowed to build a power plant as such. Neither is there any statute authorizing the city to build a combined plant. The question whether the city is violating the law and attempting an unlawful expenditure of the taxpayers' money in building a power plant, and in building a combined light and water plant, is the question most discussed by the plaintiffs. This subject should be considered from two different points of view. The city is authorized, for instance, to build a light plant to furnish light for the public streets of the city and to its inhabitants. When such a plant is built the city would probably not violate any law if it sold to the citizens power which is necessarily produced in the act of furnishing electricity for lights, and so the fact that furnishing power might be incidental to an operation of their light plant, or the fact that they intend to furnish

heat from the light plant, would not necessarily be a violation of the law.

Again, if the city builds a light plant, and then from the engines of its light plant furnishes the power to pump the water for the use of the city and its inhabitants as an incidental use of the light plant, we do not see why that should be considered a violation of the law.

Considering the question from the other point of view —that is, from the point of view of raising the money at the expense of the taxpayers for these projects—as there is a special statute authorizing the construction of light plants, and another authorizing the construction of water plants, the taxpayers in subjecting their property to the expense of constructing these plants have a right to know what is to be done with the money. When they vote to bond the city for the purpose of constructing the water plant, they have a right to know that the money so raised upon the bonds for that purpose will be used only for the construction of a water plant. And so, when they vote money for a light plant, they have a right to know what the specifications for the light plant are, so they may determine whether the amount of money asked for is necessary for the purpose of erecting a light plant. They also have a right to know that the money so raised will be used to erect a light plant, and for no other purpose. The fact that the light plant, if it is built according to the specifications upon which they voted bonds, is to furnish power, or incidentally to furnish heat, and the power is to be used for private consumers, and for operating the water plant of the city, if those uses are incidental, and the bonds are voted strictly for the construction of the light plant, it does not seem that it would be a violation of the intention of the legislature in framing these statutes. We do not think that they could vote bonds to raise a certain sum of money to build a light plant, and also vote bonds to raise a certain other sum of money to construct or enlarge a water plant, and then transfer the money so raised from one fund to the other. The defendants by their answer and

by their testimony show that such is not the intention, and therefore we are satisfied that the injunction, so far as this branch of the case is concerned, was properly denied.

It is strenuously contended by the plantiffs that the method by which the defendants intend to build their light plant is bad, that a construction according to their plans will interfere with plaintiff's plant, and damage them greatly. The defendants alleged in their answer, and testified on the trial, that it is not necessary to build their plant so as to interfere with the plaintiffs' property rights, and that they do not intend to do so. We suppose there is no doubt that the defendants will not be allowed to build their plant so as to unnecessarily interfere with the plaintiffs' plant; nor would they be allowed to build so as to necessarily interfere with the plaintiffs' plant, without liability to compensate the plaintiffs for whatever damages they may sustain. But the defendants deny that they intend to build a plant so as to interfere with the plaintiffs' plant, and therefore the time for plaintiffs to apply for an injunction is not yet ripe. If, however, it shall appear when plaintiffs construct their plant that it is being constructed in such a manner as to unlawfully interfere with the property rights of the defendants, and by such construction it is attempted or threatened to damage the plaintiffs' plant, then proceedings to enjoin defendants from so doing may be in order, and the plaintiffs may, at any future time, obtain such injunction.

As we view the record in this case, the injunction was properly dissolved and the action dismissed. The judgment of the district court is therefore

AFFIRMED.

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

MINDEN-EDISON LIGHT & POWER COMPANY, APPELLANT, V. CITY OF MINDEN ET AL., APPELLEES.

FILED JUNE 26, 1913. No. 17,629.

1. **Municipal Corporations:** ELECTRIC LIGHT BONDS: TIME OF PAYMENT. The proposition on which the electric light bonds in question were voted examined, and *held* that it provides that the bonds are to be made payable in twenty years, and redeemable at any time after five years from the date when they are issued.

2. ———: POWERS: TAXATION. Where a municipal corporation is authorized to create an extraordinary debt by the issuance of negotiable bonds, it has the inherent power to levy taxes sufficient to meet the payment of the principal and interest of such bonds at maturity, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention.

3. ———: ———: ELECTRIC LIGHT PLANT. Plaintiff's franchise examined, and *held* that it contains no provisions which prevent the city from constructing and operating another electric light system.

4. ———: ———. A city of the second class or village may house the machinery necessary to operate its electric light system in the same building with the machinery used in operating its water plant.

5. ———: BOND ELECTION: VALIDITY. The fact that, in the discussion of the proposition to vote bonds to construct an electric light system, certain persons express an opinion that the surplus revenues arising from the operation of the lighting system could be used to help pay the principal and interest on the bonds, does not render the election void.

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

J. L. McPheely, Adams & Adams, and *P. A. Hines,* for appellant.

C. P. Anderbery, contra.

BARNES, J.

This action was brought by the Minden-Edison Light & Power Company against the city of Minden to enjoin the issuance and sale of $15,000 in bonds voted by the electors of that city to establish an electric light system. A temporary injunction was issued by the county judge of Kearney county, and upon a hearing of the case in the district court for that county the injunction was dissolved, the action was dismissed, and the plaintiff has brought the case to this court on appeal.

It is the contention of the plaintiff that the bonds in question are void on account of the language contained in the notice of election providing for the time of their payment. The language of the notice was: "Shall the city of Minden, Kearney county, Nebraska, borrow money and issue the bonds of said city in the sum of $15,000, in denominations of $100, or any multiple thereof, bearing interest at such rate as the mayor and city council may determine at the time of issuance of said bonds, not to exceed 5½ per cent., payable semiannually, principal and interest payable at the fiscal agency of the state of Nebraska, city of New York, state of New York; said bonds to mature 20 years from the date thereof, but, at the option of the city of Minden, payable at any interest pay day in the order in which bonds are numbered from one up to and including the last, and in any event payable at any time five years after the date of their issuance."

It is urged that this is a violation of the provisions of the statute in force at the time the election was held, and that by the language of the proposition submitted the bonds may be made payable in less than five years from the date of their issuance. We think the proposition is not vulnerable to the plaintiff's contention. The proposition on which the bonds were voted clearly means that they are to be made redeemable at any time after five years from the date on which they are issued, in the order in which they are numbered, and not payable at any earlier date.

The language used might have been made plainer, but it seems clear to us that the words, "payable at any interest pay day in the order in which bonds are numbered from one up to and including the last," are limited by the expression, "in any event payable at any time five years after the date of their issuance." Such is the construction which the defendants have placed upon the proposition by their answer and the evidence, as shown by the record.

It is next contended that the bonds are void because there is no provision in the law under which they are voted for levying a tax to pay the principal and interest. It is true that prior to April 23, 1913, there was no provision for levying a tax in the sections of the statute authorizing the voting of these bonds. Since April 21, 1913, there has been made ample provision for such levy.

In *Ralls County Court v. United States*, 105 U. S. 733, it was held that, where authority is granted to a municipality or subdivision of the state to contract an extraordinary debt by the issuance of negotiable securities, it has the power to levy taxes sufficient to meet such debt at maturity, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. This case points out the distinction between the power of the city to issue the bonds in question and those where there was a limitation in the act authorizing the issuing of bonds. There is no such limitation in the act under which the election was held.

In *Loan Ass'n v. Topeka*, 87 U. S. 655, it was held that a law which authorizes a town to contract debts or other obligations payable in money implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided.

In *United States v. New Orleans*, 98 U. S. 381, it was held that, when authority to borrow money or incur an obligation to execute a public work is conferred upon a municipal corporation, the power to levy a tax accompanies it without any special mention that such power is granted.

It is next contended that the election is void because the petitions ask that the mayor and city council have power to provide for the establishment and maintenance of an electric light system for the city, in accordance with sections 8704-8708, Ann. St. 1909, at a cost of not to exceed $15,000. It is argued that the proposition was misleading for the reason that the petitions use the words "light system," instead of the words "lighting system." We think this variance in the language is wholly immaterial.

It is further contended that the plaintiff light company has an exclusive franchise, or such a contract for lighting that it will bar the city for 50 years to construct its own system. It is not argued that the franchise by its terms gives to the light company an exclusive contract; but it is contended that the contract with the city of Minden for street lighting cannot be violated by the city by constructing a municipal plant. To this contention it may be answered: First, that there is no contract with the company by which the city of Minden is bound to take street lights; and, second, even if such a contract exists, the city can continue to perform the obligations existing under the contract, and at the same time construct and operate a municipal lighting system for itself. If the franchise to the present company were by its terms exclusive, such a franchise or contract is prohibited in direct terms by the constitution of this state. Section 5 of the present franchise provides that the company agrees to furnish free lights of a certain type to the city at four street intersections to be selected by the council; and for every arc light required to be taken by the city payment shall be made on a certain basis. It is not disputed, however, that the light company furnished the required lights free, and, if the city of Minden should decide it did not need the lights now running, it could order them stopped, and the present company would have no option in the matter. Even if it were held that the light company does have a contract for four arc lights upon the streets, a municipal plant might be conducted by the city by the payment for said lights, and there

would be no conflict between the rights of the present company and the one proposed to be established.

In *City of Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, it was held that there was no implied contract which would prevent the city from selling light to private and public consumers from its municipal plant.

In the case at bar there has been no language pointed out in the franchise whereby the city, in express terms, or even impliedly, has agreed to take any number of lights. But concede, for the sake of argument, that the present lighting company has a contract with the city of Minden for a certain number of lights at a fixed price, until those lights have been shut off, or payment for the same has been refused, the present light company would have no cause of action against the city, and there is nothing in the franchise of the present lighting system which can be made a basis for an injunction.

It is also contended that the city has no power to join its water-plant with an electric lighting system. We think this contention is without merit. It appears that the city of Minden voted water-works bonds and constructed its present system of water-works some 23 years ago, and has now submitted the proposition to construct an electric light plant, and it is the purpose of the city to build additional walls on the west side of the present building housing the water-works, within which to house the electrical machinery to be used in its system of electric lighting. It is said another boiler will be added at the expense of the light fund, and the two boilers used as occasion demands for the generation of electric current and the pumping of water. This is an economical arrangement both as to the expense of maintenance and construction. It is clearly provided by the statute under which the bonds in question are voted that, in cities and villages having and maintaining a system of water-works and a water commissioner, such water commissioner shall be *ex officio* heat or light commissioner, and thus the two systems may be merged into one, and the city supplied, not only with

water, but with electric lights. Section 8997, Ann. St. 1911, provides that the same commissioner shall have charge of both plants, and it is clearly contemplated that they may be constructed together, so that the commissioner can attend to his duties at both plants at the same time. We can see no reasonable objection to this manner of conducting the business, and this contention cannot be sustained.

Finally, it is contended that a fraud was committed upon the voters of the city of Minden by the mayor and city council and the electrical engineer in the campaign prior to the bond election. This contention is based on the suggestion that some of the officers of the city and some of the citizens understood that the surplus money accumulated from the revenues which would be derived from the consumption of an electric current might be applied to the payment of the interest and principal of the bonded debt. The evidence on the part of the witnesses for the city is fairly represented by the testimony of Charles A. Chappell, the city clerk, county attorney, L. W. Hague, and T. F. Sturdevant, the electrical engineer employed by the city. As we read the record, none of these persons positively stated that the surplus would be so applied, but simply that it might be applied to the payment of the principal and interest of the bonds which went into the construction of the new lighting plant. At most, this was an expression of an opinion, and, so far as the record discloses, the election was conducted, maps were drawn, plans and specifications were filed with the city clerk, and two meetings were held, at which time the questions were fully discussed. The notice of the election was published in both of the newspapers published and in general circulation in the city of Minden, and in fact every phase of the question was placed before the voters of the city. If any misrepresentations or misstatements of fact were made at either of the meetings, there was plenty of opportunity to correct the same. The election seems to have been fairly conducted, and resulted in an overwhelming majority for the issuance of the bonds in question.

As we view the record, the district court correctly held that the temporary injunction be dissolved and the action dismissed, and the judgment of the district court is therefore

AFFIRMED.

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

MARY A. RECTOR, ADMINISTRATRIX, APPELLANT, V. RED WILLOW COUNTY, APPELLEE.

FILED JUNE 26, 1913. No. 17,138.

1. **Appeal**: DAMAGES. Where the evidence is conflicting as to the damages to a farm by reason of the establishment of a highway, and the amount of recovery is consistent with the testimony on the part of the county, the verdict will not be disturbed merely on account of the smallness of damages.

2. ———: MISCONDUCT OF ATTORNEY. While it is improper for counsel to state to the jury the amount of damages allowed by the county board, *held* that the circumstances set forth in the opinion did not injuriously affect the substantial rights of the plaintiff.

3. **Highways**: ESTABLISHMENT: DAMAGES: EVIDENCE. A proposed road divided a pasture into two tracts, one of which was thus cut off from a supply of water for the cattle. No agreement was shown between the county authorities and the landowner for a connecting runway, and it was shown that a new water supply would cost several hundred dollars. The amount of the verdict indicates that no allowance was made for a new water supply. At the trial the county was permitted to show that a bridge could be constructed by it so as to allow a sufficient runway. *Held* prejudicial error.

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

C. E. Eldred, for appellant.

Ritchie & Wolff and *W. M. Somerville*, *contra.*

LETTON, J.

This case originated in an appeal by the plaintiff from the damages awarded him by the county board for the appropriation of part of his farm for a public highway, and for incidental damages to the remainder of the tract. He claimed damages in the sum of $1,250. In the district court the jury fixed the damages suffered at $385, and judgment was rendered accordingly. From this judgment he appeals.

The road established runs through a portion of plaintiff's farm and takes 13 acres of his land. It divides his cultivated land and cuts his pasture into two tracts, necessitating new fences; and the water supply in the pasture, when the road is opened, will all be on one side of the road, so that other provisions must be made for watering stock in the portion cut off. The plaintiff complains that the judgment and verdict are contrary to law, to the evidence, and the instructions of the court, and that the damages are too small. He complains, further, of irregularity on the part of defendant's counsel in stating in the hearing of the jury the amount of damages allowed by the county board, and that there was error in permitting the introduction of testimony showing that a bridge could be erected and used as a runway for plaintiff's cattle from one portion of his pasture to the other. The plaintiff's witnesses value the land taken at from $35 to $40 an acre, while those for the defendant place the value at from $17 to $25 an acre. There is evidence, therefore, to sustain a finding as to this item as low as $221, and as high as $520. Plaintiff's witnesses estimate the entire depreciation in value of the farm at from $2,000 to $2,500, while the testimony on behalf of the defendant, while meager, indicates that the value of the whole farm, except for the value of the land taken, would be affected but little. Plaintiff testified fully as to the necessity for and the cost of new fences, and of a new water supply.

As to the general assignments of error, we think they

cannot be sustained. There was a conflict of evidence, which was submitted to a jury of the vicinage, and there seems to be no reason to disturb the verdict for lack of evidence to support it.

The complaint is made that the court erred in allowing counsel to state the amount of damages allowed by the county authorities. This does not seem to us to be of much consequence. Counsel said: "Defendant now offers in evidence the remainder of page 130 of record No. 4, commencing with the words, 'claim for damages,' and ending with the words, 'allowed by the board, $315,' which has been identified by the reporter as defendant's exhibit A. Plaintiff objects, as incompetent, improper, and prejudicial to plaintiff, and asks the court to admonish the jury to disregard the remarks of the attorney. The court: They are only making an offer. Plaintiff excepts. The court: The objection is sustained at this time. Defendant excepts." The record of the commissioners' proceedings showing the amount of damages claimed and allowed was then offered in evidence, but was excluded. Two of the county commissioners were witnesses, and testified to a low estimate of the value of plaintiff's land and of his damages. We think the substantial rights of the plaintiff were not injuriously affected by the ruling of the court, and cannot reverse the case for this reason.

The point to which most of the argument in the case was directed, and as to which the court is most in doubt, remains to be considered. After the plaintiff had testified that it would cost $300 to provide a water supply for that portion of the pasture cut off by the road, the following cross-examination took place: "Q. If a bridge was put in, it could be used as a runway, could it not? Plaintiff objects to this question as calling for a conclusion. Objection overruled. Plaintiff excepts. A. If it was allowed by law. Q. You have asked for one, have you not? Plaintiff objects to this question as immaterial and improper cross-examination. Objection overruled. Plaintiff excepts. A. Yes; I asked for one. Q. And if it were put in and you

used it, it would do away with the necessity of a pumping plant, would it not? Plaintiff objects to this question as immaterial, incompetent, and improper cross-examination. Objection overruled. Plaintiff excepts. A. Yes; it would." F. S. Lofton, one of the county commissioners, testified as to the road dividing the pasture, as follows: "As you go down the road there, that is quite a steep bank, probably 14 feet down on the west side; the other side is not so high, probably 6 or 8 feet; it will require a bridge probably 8 or 10 feet high, and it will have to be graded." "Q. This bridge that you mention, would that be sufficiently high enough to afford a runway for his stock? Plaintiff objects to this question as immaterial, incompetent under the issues joined in this case, and no foundation laid for its admission. Objection overruled. Plaintiff excepts. A. Yes, sir. Q. Have you agreed upon a plan in regard to this bridge? A. Yes; we have talked it over. Q. But you haven't agreed upon any plan, as yet? A. No, sir. Q. There is nothing to prevent the commissioners from changing their minds about it? A. No, sir." It seems evident that the damages were assessed at the amount named in the verdict on account of the jury taking the view that no new water supply would be required in consequence of the bridge furnishing a runway for the cattle. The court instructed the jury (after telling them that plaintiff was entitled to the value of the land taken) to ascertain the difference in the value of the land not taken, before and after the establishment of the road, and that in this connection "you should take into consideration the expense of constructing and maintaining fences required by the establishment of the road, if any; the fact that the plaintiff's pasture has been cut in two and a portion thereof cut off from the buildings and the water supply; the expense of procuring and maintaining a water supply for that portion of the pasture so cut off; the fact the cultivated land had been divided into separate tracts; the inconvenience of the dividing of said lands, if any—in other words, you should consider every element of damages, if any, arising out of

the establishment of the road you find established, by the evidence, if any."

It is insisted by plaintiff that the introduction of this evidence was prejudicially erroneous. There is no doubt that he is correct, unless the county is bound to erect and maintain a sufficient runway for his cattle from one pasture to the other. It is probable that under the facts developed here the county could be compelled to furnish and maintain such runway if the judgment of the district court is affirmed. Since, however, it is in the interest of all parties that there be an end to this litigation, we have concluded to reverse the judgment, unless by October 1, 1913, the county authorities erect a bridge of sufficient height and width to furnish a reasonable and proper passageway for plaintiff's live stock at the point where the road crosses the ravine in the pasture.

If such bridge is erected by October 1, 1913, and proof of the fact is made to the judge of the district court within ten days thereafter, the judgment of the district court will stand affirmed, otherwise the judgment will stand reversed.

AFFIRMED ON CONDITION.

ROSE, FAWCETT and HAMER, JJ., not sitting.

JOHN MILLIGAN ET AL., APPELLEES, V. WILSON MCLAUGHLIN; CLARENCE BROTHER MCLAUGHLIN, INTERVENER, APPELLANT.

FILED JUNE 26, 1913. No. 17,272.

Parent and Child: ADOPTION: PROCEEDINGS: VALIDITY: ESTOPPEL. While, under the provisions of section 800 of the code, a person desiring to adopt a child should file the petition for adoption in the county of his residence, and the county court of another county should refuse to receive and file the same, yet, the statute being enacted for the benefit of the child, in a case where the facts are that all the interested parties appeared before the

county court of another county, and agreed, on the one side, to relinquish the child, and consented to its adoption on condition that it should have the full rights of heirship as if born in wedlock, and, on the other, to adopt and make it an heir, and the child is surrendered to the custody of, and remains in the family of, the adopting parent until the death of that parent, which occurred while the child was of tender years, the collateral heirs of the deceased adopting parent are estopped to deny the validity of the adoption proceedings and that the child is entitled to inherit.

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

Wilcox & Halligan and *J. G. Mothersead,* for appellant.

Warren Pratt, contra.

LETTON, J.

This was an action in partition. A question of title arose in the case, the solution of which depends upon whether or not certain proceedings seeking to adopt Clarence Brother McLaughlin in the county court of Custer county were valid and effectual, or, if ineffectual, whether there was a contract of adoption which will be specifically enforced. The record shows that on October 3, 1906, Mary McLaughlin filed a petition in the county court of Custer county setting forth that "she resides in Logan county, Nebraska," and that Clarence Brother McLaughlin "is a minor male child under the age of 14 years, to wit, of the age of two years on the 23d day of April next; that they do hereby declare that they (and each of us) do freely and voluntarily adopt said child as their own, upon the terms and conditions following, to wit: They intend hereby to make it an heir of themselves with the right to inherit from them the same as it might do if it was their own child, and that they do hereby bestow upon said minor child equal rights, privileges, and immunities of children born to us (or either of us) in lawful wedlock." The prayer was in the usual form. The petition was signed and sworn to by

Mary McLaughlin alone. On the same day Martin McLaughlin and Eva McLaughlin, the parents of the child, filed their signed relinquishment and consent to the adoption, setting forth therein that they and the child reside in Custer county, Nebraska; that they are the parents of the child; "that Mary McLaughlin, residing at Arnold, in the county of Logan, state of Nebraska, desires to adopt said child, * * * granting to said minor child * * * full heirship with all the rights of a child born in lawful wedlock;" and relinquished their right to the custody of the child and right to its services, "to the end that said child shall be fully adopted by the said Mary McLaughlin, upon the terms and conditions above set out; and we hereby fully consent to such adoption. And each party waives the issuance and service of notice and asks that the cause be immediately heard and determined." The record of the county court recites that on the same day the matter came on for hearing, "the said petitioners and the said minor child being present in court in person, and also Martin McLaughlin and Eva McLaughlin, parents of said minor child, whose consent is filed." The court then finds that the statements of the petition are true, that Mary McLaughlin is a proper and suitable person to adopt the child, and that it is for the best interest of the child that it should be so adopted. A decree was then entered in conformity with these findings.

Mary McLaughlin was the wife of Wilson McLaughlin. She died intestate in Logan county on the 11th day of March, 1908, leaving no children born of her body. The family home of Wilson and Mary McLaughlin was, at all times material to this controversy, in Logan county, and they never lived in Custer county. Martin, the father of the child, at this time was living in Logan county, and working for his brother, Wilson McLaughlin. Eva McLaughlin, his wife, the mother of the child, was a resident of Custer county, and the child was with his mother. All the parties interested were present in court at the hearing. It is also shown that Wilson McLaughlin consented to

the adoption, paid for making out the papers, intended to sign and offered to sign the petition for adoption while before the court, but that his counsel said it was unnecessary for him to do so. After these proceedings the child was taken to the home in Logan county, and lived in the family until the death of Mary McLaughlin, and to the time of the trial of this case in district court.

In this action brothers and sisters of Mary McLaughlin are claiming the land as her heirs. The guardian *ad litem* of Clarence Brother McLaughlin intervened and filed a petition claiming an interest in the land for him as the adopted son of Mary McLaughlin. He also set up a contract for his adoption and to make him her heir, and asked that, if the court found the adoption proceedings were invalid, such contract should be specifically enforced, and the boy decreed to have the same interest in the property as if he had been the natural heir of Mary McLaughlin. The district court held that the adoption proceedings were void, and that the county court of Custer county was without jurisdiction. It also refused to specifically enforce the alleged contract, and quieted the title of plaintiffs.

The provisions of the code affecting the determination of the questions presented are section 798: "A married man, not lawfully separated from his wife, cannot adopt a minor child without the consent of his wife; nor can a married woman, not thus separated from her husband, without his consent: Provided, the husband or wife, not consenting, is capable of giving such consent." Section 800: "Any person or persons desiring to adopt a minor child shall file in the county court of the county where the person desiring to adopt said child resides a petition stating that he freely and voluntarily adopts said minor child, which petition shall be signed and sworn to by the person so desiring to adopt. Said petition may state the terms and conditions on which said adoption is desired to be made."

The plaintiffs contend that the adoption proceedings are void for the reasons: (1) That no formal consent of

Wilson McLaughlin was given to the adoption of the child by his wife; (2) that Mrs. McLaughlin was not a resident of Custer county.

Appellant urges that the consent of Wilson McLaughlin is sufficiently shown by the record and by facts in evidence; and that the appearance of the adopting parents with all the other interested parties was sufficient to confer jurisdiction upon the county court of Custer county. Appellant also contends that the provision of the statute conferring jurisdiction upon the county court where the person desiring to adopt the child resides is directory only. He argues that, though an ordinary civil action must be brought in the county in which the defendant resides or may be summoned, if he enters a voluntary appearance in an action brought in another county, the court of that county would acquire jurisdiction; and, further, that in any event Mary McLaughlin was at least a temporary resident of Custer county, and this is all that is required. He further has pleaded a full performance on the part of the surrendering parents and the child, of the contract of adoption and to make the child the heir of Mary McLaughlin, and maintains that the collateral heirs may not deny the validity of the adoption proceedings or the right of the child to take as an heir.

An examination of cases in other states shows that there are two classes of decisions upon such questions: One based upon the view that, since statutes of adoption were unknown at common law, the powers conferred upon probate or county courts are of such a limited and special nature that all proceedings must be strictly construed, no presumptions will be indulged in, that nothing can be shown outside of the record to supply omissions therein, and that the statutory requirements must be strictly followed in all respects in order to confer jurisdiction. The other class, while adhering to the view that statutory requirements as to jurisdiction must be complied with, take a more liberal view, and hold that in the exercise of the jurisdiction conferred upon them in adoption proceedings

they are courts of general jurisdiction in that regard, and the same presumption with respect to the regularity of their proceedings apply as in other courts. Under the doctrine announced by this court in *Ferguson v. Herr*, 64 Neb. 659, the latter principle of construction has been adopted in this state, and the decree of a probate court in adoption proceedings "has all the force and effect of a judgment, being subject to collateral attack only for want of jurisdiction."

No written consent to the adoption of the child by his wife was signed by Wilson McLaughlin, but he was present in court at the hearing on the petition, and made no attempt to oppose or contest the granting of the same. The statute does not require the consent of the husband to be in writing. Considering the whole record, the petition, the recital of the proceedings, the findings and the decree, and construing them together in connection with the presumptions of regularity, we think it is sufficiently established that the consent of the husband was granted at the time of the adoption proceedings. *Estate of McKeag*, 141 Cal. 403, 74 Pac. 1039; *Bland v. Gollaher*, 48 S. W. (Tenn.) 320.

Were the proceedings absolutely void and subject to attack by any one for the reason that Custer county was not the county in which the petitioner resided? One of the leading cases on this question is *Appeal of Wolf*, 13 Atl. (Pa.) 760. The Pennsylvania statute of adoption is similar to that of Nebraska in the respect that the petition must be presented to a court "in the county where he or she may be resident." A petition was filed by a person who alleged he was a resident of California, and "is now a temporary resident of the county in which the proceedings were had." Upon the objection that the court acquired no jurisdiction, it was held that the word "resident" included both a permanent and a temporary resident, and that the petition was sufficient to confer jurisdiction. As we shall see later, the proceedings were also upheld on other grounds. See, also, *Van Matre v. Sankey*, 148 Ill. 536, involving the validity of the same adoption proceedings.

In other states, however, adhering to the strict construction rule, residence in the county is held to be a jurisdictional fact. The question is discussed at length in a monographic note to *Van Matre v. Sankey,* 39 Am. St. Rep. 210 (148 Ill. 536). The absurdity of applying the rule of strict construction to a code which expressly provides that the common law rule of strict construction shall not apply to its provisions is pointed out, and it is said: "The statutes frequently require the child to be adopted and the persons adopting it, or both, to be residents of the county where the proceeding takes place. It is doubtful whether the want of such residence, as a matter of fact, is such an irregularity as to avoid the proceedings. So far as the order or other writing is concerned, any statement therein from which it can be reasonably inferred that the parties are residents of the county is sufficient, and, if the adopting parent should falsely state himself to be a resident, both he and his personal representative will be estopped from controverting the statement for the purpose of annulling the adoption. *Estate of Williams,* 102 Cal. 70; *People v. Bloedel,* 16 N. Y. Supp. 837; *Abney v. De Loach,* 84 Ala. 393." In the same note (p. 219) we find the following on the question of estoppel: "If a person resorts to a court for the purpose of obtaining, and does there obtain, a decree or judgment, though it is void as against his adversary, yet if the latter accepts and acts upon it, he at whose instance it is obtained is estopped from asserting its invalidity for the purpose of seeking some advantage to himself, or of subjecting the innocent party to some loss or punishment. * * * If the adopting parent conducts such proceedings, and procures an order or agreement of adoption, and takes the child into his family, where it assumes the place and duties of his child, we think the courts will not permit him to subsequently urge that his proceedings were void. Nor, indeed, up to the present time has any adopting parent ever undertaken to do so, but in several cases, after his death, persons connected with him by ties of consanguinity have tried to

claim his estate and incidentally to assert that the order of adoption procured and respected by him was void."

It seems apparent that the object of the statute permitting a person desiring to adopt a child to present his petition to the county court of his residence is primarily for the benefit of the child, so that if in after years his right to inherit should be questioned he would be furnished a record within the county of his adoptive parent's residence to which he might readily refer to ascertain his status and what his rights of heirship by adoption were. The evil to be guarded against was apparently the contingency of an adoption being made in one county, the residence of the adopting parents of the child being in another state or county perhaps hundreds or thousands of miles removed. In such case, if the adopted child were ignorant of the facts, he might be deprived of his lawful inheritance for want of the record evidence necessary to substantiate his claim. Taking this view of the statute, we think it was not designed to be used as a sword to cut down the rights of the child, but its intention was beneficent, and its purpose was to protect him against other claimants by furnishing him accessible proof of his adoption. In this case all the parties appeared before the county court of Custer county; the parents relinquished the child, and Mrs. McLaughlin adopted it as her heir in as solemn a manner as she could do so. She took the care and custody of the child, took it to her home in Logan county, and treated and considered it as her own until the time of her death. During her lifetime she made no attempt to repudiate the obligation which she had entered into, but ratified and confirmed the contract of adoption. The surrendering parents performed to the full extent on their part, and are interposing no objections to the adoption proceedings and no claim to the child. We think no court would, under the facts before us, have permitted Mrs. McLaughlin during her lifetime to deny that the child in her possession had been adopted and had the rights of a lawful heir, and her collateral heirs are equally estopped. As was said in

Appeal of Wolf, supra: "They are not here in the interest nor on behalf of the innocent subject of adoption, but decidedly against the same. They are either strangers to the adoption proceedings, and therefore have no standing in court, or they are privies in blood or in law, and stand in the shoes of Samuel Sankey, through and under whom they claim." It is also said in the opinion that many cases were cited where decrees had been set aside for or in the interest of the adopted child, but none were cited where such decrees were revoked where the revocation would be against the innocent child. See, also, *Estate of Williams,* and *Estate of McKeag, supra.* Even if the county court of Custer county had not acquired jurisdiction, we think the facts proved as to what occurred at the time all parties met in the county court are sufficient to justify a holding that the child is entitled to the specific performance of the agreement to make him the heir of Mary McLaughlin, under the rules laid down in *Kofka v. Rosicky,* 41 Neb. 328; *Pemberton v. Heirs of Pemberton,* 76 Neb. 669; *Peterson v. Bauer,* 83 Neb. 405; *Hospin v. Wendeln,* 85 Neb. 172; *Johnson v. Riseberg,* 90 Neb. 217. The same view is taken in Iowa and in some other states. Note to *Chehak v. Battles,* 8 L. R. A. n. s. 1130 (133 Ia. 107), and cases cited in note.

Controversies over the validity of adoption proceedings are not infrequent. It is to be regretted that where the statutes are so plain, the requirements so simple, and the consequences may be so momentous, more care is not exercised by the county courts, and more attention paid to detail by counsel. Though we are of the opinion that the county court of another county than that in which the adopting parents reside should refuse to receive and file a petition for adoption, under the facts in this case we are of opinion that the collateral heirs of Mrs. McLaughlin are estopped to deny the validity of the adoption proceedings; that the proceedings taken on the day of the hearing, the relinquishment upon conditions, and the delivery of the child, together with the other facts in evidence, con-

stituted a completed contract for adoption and heirship, and that the intervener is entitled to inherit as the heir of Mary McLaughlin.

The judgment of the district court is therefore

REVERSED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

BOYER-VAN KURAN LUMBER & COAL COMPANY, APPELLANT, V. COLONIAL APARTMENT HOUSE COMPANY ET AL., APPELLEES.

FILED JUNE 26, 1913. No. 17,285.

Mechanics' Liens: PAYMENTS. A, the owner of an apartment house being built by B, a building contractor, under contract, entrusted B with a check for $750, with the proceeds of which B agreed to pay C, a materialman, $400, and other specified materialmen and laborers $350, and to return the receipts therefor to A. B deposited the check in a bank to his own credit in order to draw checks in favor of the respective creditors. Some time before, B had given to C, to whom he was indebted for lumber used in other buildings, an undated check for $670 to be filled out and cashed by C when notified by B that money had been deposited, from payments upon the other buildings, with which to pay this check. C, without being notified, dated the $670 check, presented it to the bank, and drew that amount out of the proceeds of the $750 check given by A. He refused to allow A any credit on his account, but applied the $670 on the prior indebtedness of B. *Held*, in this, an action against A by C to foreclose a mechanic's lien on A's building, that A was entitled to be credited with the $670 and interest.

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

A. H. Murdock, for appellant.

Crane & Boucher and *J. W. Woodrough*, *contra.*

LETTON, J.

This is an action to foreclose a mechanics' lien upon an apartment building in Omaha. A multitude of items are embraced in the account, but there seem to be only two matters actually in dispute. The pleadings are long and involved and will not be set out at length. Certain building contractors, named Woodward, agreed to construct an apartment house for Messrs. Crane and Rood. After the contract was made, the Colonial Apartment House Company became the owners of the property. The contractors entered into a subcontract with the plaintiff for lumber and material necessary in the construction of the building. The total amount furnished, for which plaintiff claims a lien, was $2,228.24. The defendants insist that they are entitled to two credits upon this account, which are the matters in dispute.

A credit of $750 was claimed by reason of the following circumstances. On January 15, 1910, there was due on the apartment building, according to the architect's estimates, $750. On that day Mr. Woodward applied to Mr. Crane, who was acting for the Colonial company, for this money. They figured up the various amounts due subcontractors and laborers, and found that $400 was due plaintiff for material furnished, and $350 to several specified laborers and materialmen. Mr. Crane then said he would write checks to the various creditors for the amounts due them, respectively, but Woodward suggested that the check be given to him, and he would pay the money to each of these parties himself. Woodward deposited Mr. Crane's check in his bank to the account of his firm, and wrote out checks in order to dispose of the $750 which had been entrusted to him for that purpose. Woodward and the plaintiff had had numerous dealings prior to the building of the Colonial apartment house, and Woodward was indebted to plaintiff for material supplied before this time for other buildings. It was Woodward's custom to procure estimates from time to time as work progressed on

these buildings, and to pay to plaintiff its proper proportion of the money received upon these estimates. Some months prior to January 15, Woodward had given two undated checks to plaintiff for material furnished in other buildings, one check being for $670. These checks were given with reference to material furnished upon other jobs, and were accepted by plaintiff with the agreement and understanding that Woodward would notify plaintiff when he received the architect's estimate and the money due upon the respective jobs, and would let the plaintiff know when it might cash these checks. After the talk with Crane, at which he had received the $400 to apply on the claim of plaintiff against defendant, Woodward called Mr. Van Kuran on the telephone, and told him he had some money for him. Van Kuran then, without further inquiry and without notification or permission from Woodward, filled in the date of "November 30, 1909," upon the undated check for $670, immediately presented it to the bank for payment, and thereby withdrew $670 of the $750 which had been given to Woodward by Crane to pay the specific amounts and parties named, including $400 to plaintiff. Before the check was cashed, Woodward's account was overdrawn $107.46, and by the payment of the $670 check the account was again overdrawn $27.46. The $670 thus obtained was applied by the plaintiff upon prior debts of Woodward for material used on other buildings, and no credit was given the Colonial company for any amount. The check was given to Woodward on Saturday, January 15, after banking hours. On Monday, January 17, before banking hours, Mr. Crane called up Mr. Van Kuran, and asked him if he had received the $400 that was sent to him on Saturday. Van Kuran told him he had, but when Crane asked for a receipt Van Kuran said he did not think a receipt was necessary, and told Crane "to fix it up with Woodward." Crane also testified that Woodward agreed to bring the receipt on Monday morning for the several amounts which were included in the $750 check. Crane testifies that afterward he had a conversation with Mr.

Boyer, in which he insisted upon receiving credit for the $670, but that Boyer said that Woodward had several accounts, and they had applied it.

The district court found upon this branch of the case in favor of defendants, and held they were entitled to credit for the amount withdrawn from the bank with interest. Plaintiff insists this was erroneous. It is said that Woodward was not a trustee, and that, therefore, plaintiff had the right to apply the money on whichever account of Woodward's it pleased. We are of the opinion that the money did not belong to Woodward, but that it was entrusted to him for a specific purpose, and that it was deposited by him for that purpose. Woodward was merely a messenger or bailee entrusted with the check for the purpose of paying the money represented thereby to the plaintiff and to the other parties named, in the specific amounts agreed upon, and for bringing back to Mr. Crane a receipt from each of the creditors for such specific amounts. The plaintiff was not authorized by Woodward to withdraw these funds from the bank, and had no right, under the previous agreement with Woodward whereby the undated checks were to be paid from the estimates upon the jobs for which the material was furnished, to fill in the date and present the check for payment at the bank at the time it did so. The plaintiff by this unauthorized act of withdrawal, and by refusing to credit the Colonial company with this money, wrongfully converted to its own use the $670 drawn from the bank. Under well-settled principles of law, it would have been liable to an action for money had and received, and it is equally bound to allow the owner of the fund credit upon its indebtedness to that extent.

It is urged that there was no consideration passing between Woodward and Crane, and therefore no trust relation was created. Even if Woodward were only a gratuitous bailee entrusted with the check for a specific purpose, this would not alter the conditions. Plaintiff was never authorized to use the undated checks to draw this

fund, and can predicate no rights as against the owner of the fund on the fact that possession of the undated check gave it the power to do so.

The next matter of which plaintiff complains is that the court erred in deducting $187.21 from plaintiff's account for lumber not finally used in the construction of the building. The deduction was made, it is said, upon the theory that certain lumber furnished was used for the constructing of scaffolding, runways, and a storage shed, while the building was being erected. The testimony shows that after the work on this building was completed there was a quantity of material which had been used for scaffolding, etc., a part of which had nail holes in it, and some of it was covered more or less with lime stains. This unused material was examined and checked up by Mr. Boyer and Mr. Woodward, and an itemized statement made. Woodward testified he had an arrangement with plaintiff by which it would take back material that was delivered upon the job and unused, with a discount for deterioration; that the lumber which was unused and checked up amounted to $240.96; and that part of this lumber was used on another building. There seems to be sufficient evidence to justify the district court in making the deduction, and the appellant has not affirmatively shown any error in that regard. Its contention that this court has held that, when the material was delivered upon the ground for use in the construction, its duty was discharged and it became entitled to a lien, as held in the cases cited, loses sight of the testimony as to the agreement that it was to be taken back or used in another job, and the fact that after the building was constructed it was sorted and checked over by Boyer and Woodward and used elsewhere.

We have found nothing in the record which convinces us that the judgment of the district court was wrong, and it is therefore

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

MONARCH PORTLAND CEMENT COMPANY, APPELLANT, V. P. J. CREEDON & SONS, APPELLEE.

FILED JUNE 26, 1913. No. 17,317.

1. **Corporations: CONTRACTS: AUTHORITY OF MANAGER.** "The manager of sales of a manufacturing corporation has power to direct and contract in regard to the usual running business of selling its wares, and persons contracting with such corporation are not bound to know of a by-law thereof limiting the power of such manager to make the customary contracts." *Barber v. Stromberg-Carlson Telephone Mfg. Co.*, 81 Neb. 517.

2. **Sales: ACCEPTANCE.** Where a contract prepared by a local sales agent is drawn up in the presence of the general sales manager of a corporation, and, after being signed by the buyer and by the local sales agent on behalf of the seller, is presented to the general sales manager for approval, a telegraphic direction by him to the home office to ship a part of the goods, and the shipment and receipt by the buyer of the goods shipped, constitutes such an acceptance of the contract as to make the seller liable for a failure to deliver the remainder of the goods according to contract.

3. ———: ———. The fact that at the time goods were shipped by other officers of the corporation in response to a telegram from the sales manager such officers were not aware that a written contract had been entered into between the parties is not material in an action for damages for breach of contract.

4. ———: CONTRACT: RATIFICATION. Evidence examined, and *held* to establish the ratification and approval of the written contract between the parties by the general sales manager of plaintiff.

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

Switzler, Goss & Switzler, for appellant.

Smyth, Smith & Schall, contra.

LETTON, J.

Since the defendant concedes that the statement of the case made by the plaintiff in its brief fairly presents the

questions involved, we adopt it as a statement of the facts. The plaintiff, the Monarch Portland Cement Company, manufacturers of cement at Humboldt, Kansas, sued the defendant, P. J. Creedon & Sons, for five cars of cement shipped March 31 to April 8, 1910. The conceded net amount due on these five cars, after proper credits for freight and sacks returned, was the sum of $480, and was so allowed at the trial. The defendant counterclaimed for damages for breach of a written contract which provided for the purchase of a minimum of 12,500 barrels and a maximum of 25,000 barrels to be delivered between the date of the contract, March 31, 1910, and December 31, 1910. A copy of the contract is attached to the answer, also exhibit 1. The court in its instructions fixed the amount of plaintiff's claim at $480, and limited defendant's counterclaim to the minimum quantity of 12,500 barrels and damages of $2,390, and told the jury, if they found for the defendant, the verdict should be for $1,925, which amount they so found and for which judgment was entered.

The main controversy is over the validity of the contract. It was made for the plaintiff by one Hickey of Omaha, who held a written contract, which is in evidence, and which gave him certain limited powers, and was executed for defendant by W. J. Creedon, an officer of defendant company. Defendant's contenti was that this contract was approved and ratified at Omaha by S. D. Crozier, the sales manager of plaintiff. The plaintiff denies the alleged approval, and the dispute on this point forms the main controverted point in the case. The defendant's contention was that Crozier, the sales manager of plaintiff, was shown the contract, and that, while he declined to sign the blank provided for its approval, he stated to Creedon that it was not necessary, and that the telegraphic order he then and there sent for five cars "would start the contract to going." Plaintiff's claim is that Crozier had no authority to approve it, declined so to do, that he agreed only to submit it, and a week later when he did submit it

to the executive officers at Humboldt they refused it, and that the ordering of the five cars was to supply an immediate want unconnected with the contract.

The first contention of plaintiff is that the verdict is not sustained by the evidence. In February, 1910, Mr. Hickey, the Nebraska sales agent, Mr. Peters, who was also in the employment of the plaintiff, apparently as a special agent or salesman, and Mr. Crozier, the sales manager of the plaintiff, were together in Omaha, and had some conversation with Mr. Creedon with reference to a purchase of cement by him from the Monarch company. Apparently nothing definite was accomplished at this time, but on or about the 31st of March, 1910, Crozier and Peters went to Omaha and met Mr. Hickey at the office of the Power-Heafy Coal Company. Crozier testifies he went to Omaha on receipt of a telegram, that he consulted Mr. Connet, the president of the company, and decided he ought to go. Crozier and Hickey discussed the matter of a contract with defendant, and Hickey prepared a contract in triplicate and passed it to Mr. Crozier for his examination, who said he did not believe Creedon would sign it, but suggested no changes. Mr. Peters says that at this time Crozier discussed the terms of the contract with Hickey, and that it was partly reduced to writing when he left the room. Later in the day Mr. Hickey telephoned to Creedon, and Creedon went to Hickey's office, where he found Hickey with the contract all drawn up, except the signatures. Hickey then signed it for the Monarch company and Creedon for the defendant. After signing, Hickey took the contract, and they both went from there to the Henshaw hotel at Hickey's suggestion that they go and talk the matter over with Mr. Crozier. They found Crozier and Peters at the hotel. Creedon testified that Hickey produced the contract, and Creedon stated, "Here is the contract with our signatures," and asked him to approve it. Crozier said it was unnecessary for him to sign, and asked for an order for five cars of cement, saying: "We have entered into this contract now and we desire to

start it at once to conform with the terms of the contract. I will wire in an order." Hickey, Creedon and Peters practically agree that Crozier took the contract and asked Creedon how much cement he could take to start the contract; that Creedon authorized the shipment of five cars of 100 barrels each, and that Crozier then wrote a telegram instructing the shipment of five cars. He told Creedon that perhaps the shipment would be invoiced to him at a higher price, but he would be back in Humboldt in a few days, and if it was he would have it fixed. Crozier took two copies and Creedon retained one. The essential part of the written contract is as follows:

"That the party of the first part hereby sells and agrees to ship and the party of the second part purchases and agrees to receive a minimum of 12,500 and a maximum of 25,000 barrels of Monarch Brand Portland Cement, to be shipped the party of the second part at a maximum price of 80 cents per barrel f. o. b. cars at Humboldt, Kan., with the further understanding that, if at any time during the life of this contract Kansas Gas Belt current list price should be lower than the above figure, then during such time as such reduction exists the price on shipments made to the party of the second part during said period shall be reduced to current figure in effect. * * * It is further understood that party of the second part shall begin ordering said cement at once, and that shipments shall be distributed as equally as possible between the months covered in this contract, approximating a minimum of 1,500 and a maximum of 3,000 barrels monthly, with the further understanding that the party of the first part shall not be obliged to ship over 5,000 barrels in any one month. * * * This contract to remain in full force and effect subject to above contingencies from April 1st, A. D., 1910, to December 31st, A. D., 1910. In token of our acceptance hereof, witness our hands this 31st day of March, A. D. 1910, same being affixed by our duly authorized representatives. Monarch Portland Cement Company, by E. G. Hickey, Nebr. Sales Agt. Approved P. J. Creedon & Sons.

by W. J. Creedon, Secy. & Treas. Monarch Portland Cement Company by ———."

The telegram is as follows: "Omaha 3-31-1910. To Monarch Portland Cement Co., Humboldt, Kansas. Ship P. J. Creedon & Sons, Omaha, one car today sure; allow four more hundred barrel cars to follow *via* Mo. Pac. S. D. Crozier."

The first communication received by Creedon from the Monarch company was as follows: "The Monarch Portland Cement Co. Humboldt, Kans., March 31, 1910. Creedon & Sons, Omaha, Nebr. Gentlemen: We have received today a telegram from our Mr. Crozier, to ship you one car Monarch cement today sure, and allow four more 100 barrel cars to follow *via* Missouri Pacific, and we are sending you today one 150 barrel car and will give the rest of the order our prompt attention. Trusting this is satisfactory, we are, Yours very truly, The Monarch Portland Cement Co. S. D. Crozier, Sales Manager."

Defendant received 550 barrels of cement within a few weeks afterward, billed to it at 80 cents a barrel, which was the contract price. On April 26 the Monarch company was directed by letter to ship one car of cement a day on the contract until further notice. On April 28 the Monarch company acknowledged receipt of the order of one car a day, but stated that the price was now $1 f. o. b. Humboldt, or $1.10 f. o. b. Iola, Kansas, and refused to ship cement under the contract. Creedon also testified that in May he was told by Mr. Keith, the secretary of the Monarch company, that the contract had not been approved by the company, and cement had advanced, and therefore he would not ship under the contract. Crozier testified that, when the contract was shown to him at the hotel, he told Creedon that plaintiff could not accept it because it did not conform to the original contract with Mr. Hickey, but that he was willing to submit it to Mr. Connet, the president of the company, but was sure it would not be accepted; Creedon said he was out of cement and wanted five cars at once; Hickey and Creedon were trying to write

a telegram, that they showed it to him, and that he rewrote it, saying at the time that these five cars were to be shipped without having any relation to any contract; that in about a week he took the contract to Humboldt and showed it to Connet, and returned it to Hickey revised in accordance with their contract with Hickey. The president and secretary of the company both testified that, when the five cars were shipped, they did not know of the Creedon contract. Creedon and Hickey both deny specifically that Crozier said the contract would not be accepted because it did not conform to the Hickey contract; that he would submit it to Connet, but that he did not think it would be approved; and that Crozier said the five cars would be shipped without any relation to the contract.

We are convinced from the evidence that Mr. Crozier as sales manager of the Monarch company had power to enter into or to approve and ratify this contract. Why constitute such an officer and at the same time bind him by secret limitations on his authority? In fact, the question of his authority does not seem to be very material, because it appears to be conceded that if Crozier had approved the contract at the meeting his action would have bound the principal, and this was really the main issue in the case. In *Barber v. Stromberg-Carlson Telephone Mfg. Co.*, 81 Neb. 517, we said: "The manager of sales of a manufacturing corporation has power to direct and contract in regard to the usual running business of selling its wares, and persons contracting with such corporation are not bound to know a by-law thereof limiting the power of such manager to make the customary contracts."

We are convinced that Crozier not only had ostensible authority to make or approve this contract, but had actual authority so to do. The real inquiry is whether the evidence is sufficient to sustain the verdict. The jury were amply justified in believing Hickey, Creedon and Peters with respect to the conversation at the hotel as against Crozier, and, when we take into consideration the further fact that Crozier was cognizant of and took part in the

preparation of the written document before Creedon ever saw it, the story of these witnesses seems to be fully corroborated. The fact that the other officers of plaintiff had no knowledge of the specific terms of this contract when the telegram ordering the five cars was received is not essential to its validity. Crozier had authority to ratify the contract, his acceptance of it and direction to ship the goods was a sufficient approval and ratification on the part of the corporation.

The contention is made that the court erred in excluding evidence that new contracts were sent to Hickey about April 8, and that he so informed Creedon. It is said that this was important to go to the jury, especially in view of the fact that it was nearly a month after the meeting at the hotel before Creedon ordered any more cement. The only possible effect this evidence could have would be to show that, when the terms of the contract were brought to the attention of the other officers of the plaintiff company, they did not approve them and desired to change them. This had already been testified to directly, could throw no light upon what actually occurred at the hotel, and was immaterial.

The case is not one, as suggested by the plaintiff, where one party to a proffered contract, required by the statute of frauds to be in writing, can make that contract binding by his own verbal testimony to its acceptance; but, as we view the testimony, it is one where a written contract was prepared and signed by a local sales agent under the authority and by the direction of the general sales manager of a corporation, and by the purchaser, and when presented to the sales manager for approval was ratified by him, by accepting the contract, ordering from his principal and delivering goods under its terms.

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

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

ANNA J. WILSON, APPELLANT, V. L. AUGUSTUS WILSON, APPELLEE.

FILED JUNE 26, 1913. No. 17,851.

1. Appeal: ASSIGNMENTS OF ERROR. The judgments of the district courts of this state are presumed to be correct, and counsel assailing the correctness of the same must assume the burden of pointing out specifically the rulings of which they complain and the mistake made by the trial court.

2. ———: IMMATERIAL EVIDENCE. A case tried to the court without the intervention of a jury will not be reversed on account of the introduction of immaterial testimony, if there is sufficient competent and material evidence in the record to sustain the judgment.

APPEAL from the district court for Gosper county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Lafe Burnett and *R. D. Stearns*, for appellant.

Ritchie & Wolff and *O. E. Bozarth, contra.*

LETTON, J.

This is a second appeal by a ward from a settlement of her estate made by her guardian. The former opinion may be found in 90 Neb. 353, 361. A large number of complaints seem to be made in the brief with reference to different items in the accounting, but the objections are not pointed out specifically enough, except in a few instances. We find, however, a number of assignments of error which will be considered separately.

1. It is complained that the court erred in overruling the ward's motion for reasonable attorney's fees and expenses, and it is said that, where litigation is caused by the guardian's neglect, he is liable for the costs of litigation, as well as attorney's fees. The abstract shows that the ward's motion to be allowed expenses incurred in the case to the amount of $215.19 was sustained to the amount

of $90.67, and that $100 attorney's fees was allowed "for this trial." There has been no affirmative showing made that these allowances were insufficient, nor has any evidence been pointed out to convince us that such is the fact.

2. It is next assigned that "the court erred in permitting defendant to encumber the record with immaterial matter over the objection of plaintiff." We have repeatedly held that the introduction of immaterial testimony in a case tried to the court is not prejudicial error, if there is sufficient competent and material evidence in the record to sustain the judgment. Of course, if a party introduces a mass of testimony on the statement that it is material, and the trial court finds it has no bearing upon the issues, there is no doubt that the costs so made would, on seasonable application being made, be taxed to the party thus needlessly encumbering the record. This does not appear to have been done.

3. That the court erred in its rulings on objections interposed by defendant by excluding questions asked the witness Lewis, who was the judge of the county court, as to his reasons for including the dower of $500 in the judgment. The reasons of the court were entirely immaterial and could throw no possible light upon the issues in the case. The evidence was properly excluded.

4. That the court erred "in allowing the defendant to deny his own sworn report, pages 258 to 260, inclusive." We find no testimony in the record at the pages named to which this assignment is applicable. To attempt to search through hundreds of pages of a lengthy and confused bill of exceptions to ascertain what testimony is applicable to this assignment is too much of an imposition upon the court, and in the crowded condition of our docket is too unfair to other litigants to justify the effort. Where a multitude of items are involved, as in this case, it is the duty of counsel to point out specifically the particular pages of the abstract, in a case where abstracts are used, or of the bill of exceptions in cases without abstracts,

where the evidence or ruling justifying the contention is to be found.

5. These are the only specific assignments of error made. A large number of items are complained of in the brief of appellant, but the particular errors of which complaint is made are not clearly pointed out. Explanations as to many of these items are made in the brief of appellee, and others seem, so far as we can see, to have been decided properly by the district court. The presumption is that the trial court on the second hearing followed the principles laid down by this court in the former opinion. It has not been affirmatively shown that it has not done so. It would take an expert accountant to bring order out of the chaos presented by this record and abstract, and the court must decline a task for which it is in no way fitted. If a litigant desires such a case as this reviewed as to each item, the matters complained of must be clearly and specifically pointed out, and the fact that the trial court made a mistake made apparent. This has not been done.

We find no reason to disturb the findings of the district court, and its judgment is therefore

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

WILLIAM E. WALLACE, APPELLEE, v. A. W. COX ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17,068.

1. Replevin: RETURN OF PROPERTY: REFUSAL TO ACCEPT. Mere delay during three winter months in complying with a judgment requiring the return of a replevied threshing outfit *held* not to justify the owner's refusal to accept it when returned.

2. ———: ———: ———. Where a defendant in replevin, after a judgment has been rendered in his favor for a return of the replevied property, refuses to accept it on the sole ground that

it was damaged while unlawfully detained, his refusal cannot afterward be justified because the return was delayed for three months.

3. ———: ———: ———: DETERIORATION. Deterioration in the value of replevied property, while it is unlawfully detained, does not alone justify the owner in refusing to accept it, when returned in due time pursuant to a judgment in replevin, damages to the property after the rendition of such a judgment being recoverable in an action on the replevin bond. *Wallace v. Cox*, 92 Neb. 354, overruled on rehearing.

REHEARING of case reported in 92 Neb. 354. *Former judgment vacated, and judgment of district court reversed.*

ROSE, J.

This is an action on a replevin bond. Property, consisting of a threshing-machine, a traction-engine, and the appliances belonging to a threshing outfit, had been taken from the obligee under a writ of replevin. There was entered in his favor in the replevin suit a judgment for a return of the property, or for its value in the sum of $2,000 in case a return could not be had, for damages in the sum of $404.50 by reason of the wrongful taking and use of the property, and for costs in the sum of $121.60. The replevin bond bound obligors as follows: "Plaintiff shall duly prosecute his action aforesaid and pay all costs and damages which may be awarded against him, and return the property to the defendant in case judgment for a return of such property be awarded against him." Obligee, who is plaintiff herein, pleads the judgment in replevin, nonpayment of the damages, and failure to return the property to him "in the same, or substantially the same, condition in which it was taken," and prays judgment for $2,526.10, the sum of the three items named. Obligors are defendants herein, and admit the judgment in replevin, but plead a subsequent return of the replevied property. From a judgment in favor of plaintiff on the replevin bond for the full amount of his claim with interest, defendants have appealed.

Upon a consideration of the appeal at a former term, plaintiff was required to remit, as a condition of affirmance, $404.50, the amount allowed by the jury in the replevin suit as damages for the wrongful taking and use of the replevied property. *Wallace v. Cox,* 92 Neb. 354. Later a rehearing was granted on motion of defendants and the case has been reargued. In the former opinion two reasons for the conclusion reached on appeal are given: (1) The threshing outfit was not returned within a reasonable time after the judgment in replevin directed its return. (2) The property was diminished in value while it was wrongfully detained, and for that reason the owner properly declined to accept it.

1. Further reflection makes it necessary to recede from the position that the property was not returned within a reasonable time. The judgment ordering a return of the property was rendered December 1, 1909, and the property was returned February 25, 1910. It requires more than mere lapse of time for a short period to show that the delay was unreasonable. The right to appeal from the judgment in replevin did not expire for six months. To comply with the judgment by an immediate return of the property would terminate that right. After a return had been adjudged, the threshing outfit was not retained during a threshing season. An earlier return was prevented by the bad condition of the roads. Plaintiff, in making his own case, testified positively that he refused to accept the property because, "when offered back," it was not "in the same, or substantially the same, condition" as when taken. The delay in making the return had nothing to do with plaintiff's refusal to accept the returned property. For these reasons, the first position assumed in the former opinion will be abandoned.

2. Was deterioration during the time the property was wrongfully detained a sufficient justification for the refusal to accept it in a damaged condition? While there was some controversy, not material to this inquiry, over the identity and condition of an appliance, the identical

thresher and engine taken under the writ were in fact returned. Plaintiff's own testimony shows that they were then worth at least $1,000, though the jury in the replevin suit had found the value when taken to be $2,000. Witnesses for defendants said the property, when returned, was in as good condition as when received. In the former opinion cases were cited to show that the returned property, under the facts of this case, was properly rejected. Each of those cases has been re-examined, with the following result:

In *Pittsburgh Nat. Bank of Commerce v. Hall*, 107 Pa. St. 583, the following language was approved: "It would be anything but an act of justice to permit a person who has wrongfully deprived another of his goods, and retained them in his possession until they were nearly destroyed by time and use, afterwards, when judgment was rendered against him for his wrongful act, to save a forfeiture of the bond by an offer to return the article in its depreciated condition. Nor can the sureties be placed in any better condition than the principal." This is a holding that the return of property which has been practically destroyed does not satisfy the bond, but it is not a holding that identical property taken, when of great value, may be rejected, if promptly returned.

In *Fair v. Citizens State Bank*, 69 Kan. 353, it was held that one who replevied a promissory note and permitted it to outlaw while in his hands could not satisfy a judgment for its return by subsequently tendering it back, the rule announced being: "Where, as a compliance with the alternative judgment in an action of replevin providing for a return of the specific property or the value thereof, the property returned has depreciated in value, an action may be maintained to recover such depreciation. The statute contemplates that the property be returned in substantially the same condition, and of the same value, as when taken." The return of an outlawed note was not in law a return of the collectible note received.

In *Parker v. Simonds*, 8 Met. (Mass.) 205, the replevied

property was never returned, and in a suit on the replevin bond plaintiff was allowed to recover its value.

In *Berry v. Hoeffner*, 56 Me. 170, the replevied property was accepted when returned. The point discussed was: "The question presented is whether a return of the goods replevied, *not* 'in like good order and condition as when taken,' is a sufficient compliance with and performance of the condition of the replevin bond?" While the bondsmen were liable according to their obligation to return the property in as good condition as when taken, the question of the right to reject the property because it was not returned in that condition was not decided.

In *Capital Lumbering Co. v. Learned*, 36 Or. 544, the suit was brought to recover the value of replevied property never returned.

Childs v. Wilkinson, 15 Tex. Civ. App. 687, was determined under a statute providing: "If the property tendered back by the defendant has been injured or damaged while in his possession under such bond, the sheriff or constable to whom the same is tendered shall not receive the same, unless the defendant at the same time tenders a reasonable amount for such injury or damage, to be judged of by such sheriff or constable."

In *Douglass v. Douglass*, 21 Wall. (U. S.) 98, the report shows: As authorized by a statute of Maryland, defendant, who lost possession of chattels under a writ of replevin, retook them by giving a bond. After a judgment had been rendered against him the goods were delivered to the sheriff under a writ *de retorno habendo*. This was held to satisfy the bond for a return of the chattels, though they were not in as good condition as when the bond was given. It was further held that redress for injury to the property in the meantime should be sought in a separate action.

In harmony with those cases it was said in *Eickhoff v. Eikenbary*, 52 Neb. 332: "In order to satisfy a judgment for the return of property the identical property must be tendered in substantially the condition in which it was received."

While the cases cited are precedents for holding that the return of damaged property does not satisfy the replevin bond or the judgment in replevin, they do not contain an announcement of the doctrine that the identical property replevied, when of great value, may be rejected on the sole ground of deterioration. The contrary doctrine is supported by both reason and authority. The principal questions litigated in replevin are the ownership and the right of possession of specific chattels. The adjudication of those questions is not a matter which either party may lightly disregard. It is not optional with a successful defendant in replevin to accept in money the value fixed by the jury in lieu of the property. The judgment is in the alternative. The purpose of fixing the value is to afford a measure of relief, where the property is not, or cannot be, returned. Injury to replevied property while wrongfully detained and failure of the defendant to comply with a judgment in replevin are protected by the replevin bond. Under the code of this state the law is:

"The successful party to an action of replevin should recover therein all damage which he has actually sustained by reason of the unlawful detention of the property in controversy.

"A defendant who has in an action of replevin recovered judgment for the return of the property and his damage for the wrongful detention thereof cannot thereafter maintain an action against the plaintiff for damage on account of depreciation in the value of such property while in possession of the latter." *Teel v. Miles,* 51 Neb. 542.

Damages to property after the rendition of a judgment for its return are recoverable in an action on the replevin bond. A text-writer on Replevin says: "If the property has in fact been injured while in the plaintiff's possession, that fact will not absolve the defendant from the duty of receiving it in its damaged condition. The judgment for a return does not leave it at the option of the defendant to accept or refuse and demand the value. The depreciation is, however, to be made good, and the party may receive

full indemnity by suit on the bond." Wells, Replevin (2d ed.) sec. 422.

Another author states the law as follows: "Whichever party recovers a judgment for a delivery or return of the property, in replevin, when the same is in the possession of the adversary, is bound to accept the return of it, or the return of a substantial part of it. In case of the tender of a part of it, such tender of return should be accompanied by a tender of the money value of the remainder in satisfaction of the judgment for a return or for a payment of the value in case a return cannot be had. The party has a right to deliver or return what he can, and pay for that which he cannot deliver. This is true, if the part offered to be returned is separable from the others and in no way dependent upon it for use or value, and the part tendered is in the same condition as when taken." Shinn, Replevin, sec. 679, citing *Reavis v. Horner*, 11 Neb. 479. The views thus expressed seem to be justified by both reason and authority. *Leeper, Graves & Co. v. First Nat. Bank*, 26 Okla. 707, 29 L. R. A. n. s. 747; *Paulson v. Nichols & Shepard Co.*, 8 N. Dak. 606; *Pabst's Brewing Co. v. Rapid Safety Filter Co.*, 54 Misc. Rep. (N. Y.) 305; *Allen v. Fox*, 51 N. Y. 562; *Pickett v. Bridges*, 10 Humph. (Tenn.) 171; *Washington Ice Co. v. Webster*, 125 U. S. 426.

In the present case, the conclusion is that plaintiff's refusal to accept the property when returned was not justified by the evidence nor sanctioned by the law. The opinion to the contrary is therefore overruled. It necessarily follows that the former conditional affirmance is vacated, the judgment of the district court reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., LETTON and HAMER, JJ., dissent upon the ground and reasoning contained in the former opinion.

JOHN C. SPRECHER, APPELLEE, V. ENGELBERT F. FOLDA ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17,170.

1. **Mortgages**: DEED AS MORTGAGE: ELECTION: EVIDENCE. Where a grantee in possession of realty under a mortgage in the form of a warranty deed seeks to defeat the grantor's equity of redemption by a parol settlement or by an oral election to treat the conveyance as an absolute deed instead of a mortgage, such facts must be clearly established by a preponderance of the evidence.

2. **Appeal**: EQUITY: CONFLICTING EVIDENCE. In an accounting in equity where, upon an issue of fact, the proof consisted largely of oral testimony which is in irreconcilable conflict, the findings of the district court thereon are entitled to be considered by the appellate court in determining the question of the sufficiency of the evidence to sustain the judgment.

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

George W. Wertz and *Edgar M. Morsman, Jr.*, for appellants.

John J. Sullivan and *John C. Sprecher, contra.*

ROSE, J.

This is a suit in equity to adjudge a deed to the south 88 feet of lots 13, 14 and 15, block 80, in Schuyler, to be a mortgage, to determine by an accounting the amount due defendants from plaintiff, to permit him to redeem the lots from the lien thus created, and to restore the legal title to him upon the payment of his indebtedness. The Banking House of F. Folda, defendant, is a corporation engaged in the banking business at Schuyler, and defendant Folda is its cashier, manager and principal stockholder. In the petition the following summarized facts are pleaded in detail: Plaintiff owed defendant $11,500 on a promissory note dated July 10, 1901, due in five years,

and bearing interest at the rate of 7 per cent. per annum. Being engaged in improving his lots, when the note was executed, he arranged with defendants to furnish him money as needed, not exceeding $8,500, in addition to the note described, with the understanding that they should collect from tenants rents amounting to $190 a month and apply them on his indebtedness. Pursuant to that arrangement defendants furnished him at various times between $1,500 and $2,000. Since July 12, 1901, they have collected the rents, but have failed to render a statement showing the amounts received by them or the balance of his indebtedness. Plaintiff does not know the amount of such balance, but alleges it does not exceed $12,500.

Some of the facts pleaded in the answer may be briefly stated as follows: In addition to the note for $11,500, dated July 10, 1901, plaintiff was then indebted to defendants in the sum of $3,000 on a note dated December 15, 1899, and bearing interest from July 10, 1901, at the rate of 8 per cent. per annum. On the latter date plaintiff and wife, by warranty deed recorded the same day, conveyed the premises to Folda, who entered into a written agreement to sell the property to plaintiff for $14,500. Pursuant to the contract of sale, plaintiff, by payment of various sums, had reduced the note for $11,500 to $9,900 December 4, 1902. In addition to the two notes described, defendants advanced to plaintiff from March 1, 1902, various sums, aggregating with interest $2,356.65. Plaintiff owed defendants December 4, 1902, $15,600, composed of the following items: Balance due on the note for $11,500, $9,900; note dated December 15, 1899, $3,000, and interest thereon, $343.35; other loans $2,356.65. December 4, 1902, plaintiff took up the note for $11,500, and executed another note in favor of Folda for $12,600, bearing interest at the rate of 7 per cent. per annum and payable December 31, 1902, on which interest was paid monthly in the sum of $73.50 until July, 1904, when payments ceased. Plaintiff and wife verbally agreed with defendants, on or about July 1, 1904, that the contract of sale should be

canceled and that plaintiff should abandon all claims to the realty; defendants agreeing to release him from all of his obligations and indebtedness to them, to pay the taxes for 1903, and to release his home from the lien of a mortgage which had been given to secure his note for $3,000. The obligations thus assumed were performed by defendants, and they took possession of the premises as owners August 15, 1904; plaintiff acquiescing and making no objection until sometime prior to May 8, 1910. Defendants sold the south 88 feet of lots 13 and 14 to a lodge of the Odd Fellows, and transferred the title and possession to the purchaser October 4, 1904. The purchaser has been in possession as owner ever since, and has improved the building on the premises at an expense of $8,000. Plaintiff had full knowledge of the facts pleaded in the answer, remained silent for more than five years, asserted no right to the premises, nor made any claim against defendants in the meantime, but frequently asserted to Folda and others that he had sold the lots and had no interest therein. By reason of his conduct and silence he is estopped to assert any claim to the premises or to demand from defendants an accounting.

In a reply plaintiff alleged that the note for $3,000 had been merged in the note for $11,500, and denied any indebtedness beyond that pleaded in his petition. Such facts as were not stated in the petition or admitted in the reply were denied.

Upon a trial of the issues, the district court upheld the sale of the south 88 feet of lots 13 and 14 to the Odd Fellows, credited the purchase price of $12,000 on the indebtedness of plaintiff to defendants, found the balance due them to be $3,661.52, and permitted him to redeem the south 88 feet of lot 15 upon the payment of that sum. Defendants have appealed.

It is asserted that the decree is erroneous for the reason that plaintiff by an oral election abandoned and lost his right to redeem the premises. In this connection defendants invoke the rule that, where grantee is in possession of

realty under a mortgage in the form of a warranty deed, the grantor's equity of redemption may be defeated by a parol settlement or by an oral election to treat the conveyance as an absolute deed instead of a mortgage. *Stall v. Jones,* 47 Neb. 706. The loss of the right to redeem under such circumstances, however, depends upon the proof of the settlement or of an election to treat the deed as an absolute conveyance. In the present case it is conceded that the right of redemption existed under a deed absolute in form. Plaintiff admitted that he offered to allow Folda to retain the fee upon cancelation of all of his indebtedness to defendants, not exceeding $12,500, and upon the payment of about $7,000 to other creditors, and testified that the property was worth $20,000. He also testified that Folda agreed to these terms, but failed to keep his agreement and did not pay the other creditors. In his relations with plaintiff Folda was more than a mere mortgagee. He had lived in plaintiff's family. He became a brother-in law of plaintiff. He was a trusted adviser, looked after many of his financial and business transactions, collected his rents and applied them on his debts, and kept accounts of transactions between them. Where a verbal election to abandon the right to redeem is invoked by the lienor under such circumstances, the evidence should be more convincing than that upon which defendant relies. When all of the conditions are considered, there should not be a finding that plaintiff abandoned his right to redeem or that the parties executed an oral agreement to that effect.

In regard to the accounting, the controverted issue between the parties may be stated in this form: Was the indebtedness of $3,000 included in the later note for $11,500? The question is not easy to answer. The evidence is conflicting. Though there are two abstracts, the entire bill of exceptions has been read and considered. Accounts were kept under the direction of Folda, and they corroborate his testimony that the note for $3,000 was not included in the larger one. Plaintiff trusted Folda and did not

keep an account of their transactions. Their business relations extended over a number of years. Plaintiff, however, kept an account at Folda's bank, and in a few instances checks were drawn against it at the direction of Folda without plaintiff's knowledge. Plaintiff was financially embarrassed and could not direct his affairs independently of Folda. Both plaintiff and his wife testified that the indebtedness of $3,000 had been reduced by payments, but they could not give the amounts nor dates. They testified positively that Folda had said, before the larger note was executed, that it included plaintiff's entire indebtedness to defendants, and that he agreed to release the mortgage on their home. Plaintiff testified that afterward Folda did not claim that the item in dispute was unpaid nor make any demand for the interest thereon. Some minor circumstances tend to corroborate plaintiff. While there is some doubt about the correctness of the finding of the trial court, it is not more certain that the evidence as a whole requires a different conclusion.

AFFIRMED.

BARNES, SEDGWICK and HAMER, JJ., not sitting.

PAXTON IRRIGATION DISTRICT, APPELLEE, V. JOHN H. CONWAY ET AL., APPELLEES; HOWARD MILES ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17,196.

1. **Equity: JURISDICTION: MULTIPLICITY OF SUITS.** To prevent a multiplicity of suits against an irrigation district, a court of equity may acquire jurisdiction to cancel void district bonds in the hands of many different holders.

2. **Waters: IRRIGATION DISTRICT BONDS: CANCELATION.** Void bonds illegally issued by officers of an irrigation district to pay for excavating a canal may be canceled without requiring the district to pay the holders of the bonds the reasonable value of services

performed, where the contract for such work was made in violation of statute, and resulted in no benefit to the district.

3. ———: ———: VALIDITY. Bonds of an irrigation district are void, if issued in violation of mandatory legislation that they shall be signed by the secretary of the district, that the seal of the district shall be attached, that they shall be paid in instalments maturing at different times, that they shall be numbered consecutively as issued, and that they shall bear date from the time of their issuance.

4. ———: ———: ———: RATIFICATION. An irrigation district, by paying interest on void bonds with taxes levied for that purpose, does not thereby ratify the bonds or estop itself from assailing them as illegal.

5. ———: ———: ———. In a statutory proceeding, an order confirming the preliminary steps leading up to the execution of bonds of an irrigation district does not affect a subsequent, unlawful negotiation or transfer of the bonds.

6. ———: ———: BONA FIDE PURCHASERS. A person who negotiates for the purchase of bonds executed by an irrigation district and enters into a contract to excavate a canal in exchange for such bonds is required to take notice of the statutes governing the district and of the limitations of its officers.

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

Wilcox & Halligan, A. Muldoon and *L. E. Roach,* for appellants.

Hoagland & Hoagland and *J. G. Beeler, contra.*

ROSE, J.

Plaintiff was organized in 1895 as an irrigation district to make a canal from the South Platte river through the lands of the organizers in Lincoln and Keith counties for the purpose of irrigation. To that end some work was done, but the project was a failure. The canal was never completed nor used to carry water for irrigation. When water was needed, the river was generally dry at the point of diversion. Bonds in the sum of $100 each were executed by the district July 1, 1896, to the extent of $27,000.

At an election held July 11, 1905, the electors of the district determined to dissolve the organization. Afterward the district property was appraised at $111. Creditors were notified by publication to assert their claims. As a result, demands were made as follows: Warrants and other claims, composed of 27 items, including $13 earned by F. G. Hoxie as appraiser, $1,138.23; judgment in favor of Diana Hawley, $102.83; irrigation bonds in the hands of 11 holders, $6,300. The claimants are defendants. The suit is one in equity to cancel the bonds, the warrants and other evidences of indebtedness as being illegal and void, and to enjoin the enforcement of all claims against the district. Upon a trial of the cause the court below allowed the claim of the appraiser and of the judgment creditor, held that the bonds, the warrants and other claims were illegal and void, canceled them, and enjoined defendants from attempting to collect them from plaintiff. Three defendants only appeal, claiming to be innocent holders of the bonds. They are the First National Bank of North Platte, Daniel Schurtz, and Howard Miles.

A reversal is demanded on the ground that plaintiff had an adequate remedy at law, which defeated jurisdiction in equity to cancel the negotiable bonds held by appellants. The decision is not controlled by the rule invoked. Plaintiff is a public corporation and is seeking by lawful means to end an unprofitable existence. Many of the bonds have never passed out of the hands of the officers of the district. If they are negotiable, they ought to be destroyed when the district is dissolved. Taxes levied against the lands in the district will be affected by the cancelation of the bonds. Bonds said to be void are in the possession of different holders. Warrants and claims for excavating were in some instances exchanged for bonds. It is alleged that contracts for work on the canal were void, and that bonds were accepted in payment for such work. These are conditions under which equity will take jurisdiction to prevent a multiplicity of suits.

The next point argued is that plaintiff, in any event,

should have been required to do equity by paying the reasonable value of the work done by the persons to whom bonds had been delivered. The adverse view of the trial court is justified on several grounds. The reasonable value of such work was not pleaded. An offer by Miles to do excavating for bonds was accepted. This method of incurring an indebtedness was not then authorized by the irrigation law. Miles was an officer of the district, and his contract violated the statute, providing that no officer shall be interested in a contract awarded by the board; that the amount of money necessary for construction work shall be estimated in advance; that the cost of construction shall be paid wholly out of the construction fund; that the board shall have no power to incur an indebtedness in excess of express statutory provisions. Laws 1895, ch. 70. The bonds themselves made direct reference to the statute containing these provisions. Contractors and purchasers were charged with notice of the terms of the law and with the records which the board was required to keep. It is undisputed that the irrigation district received no benefit from the contracts they made. It was unable to sell the bonds in the manner provided by law, and could not raise the money to complete the unused canal. The district's property was appraised at $111, and the appraisement included the value of a grader. On such a record, it cannot be said that the trial court erred in canceling the bonds, if they were void, without allowing the holders to recover the reasonable value of excavating.

Were the bonds void? Plaintiff insists they were issued in violation of the statutory provisions that they shall be "signed by the president and secretary," and that "the seal of the district shall be attached thereto." Laws 1895, ch. 70, sec. 13. The bonds purport on their face to have been executed July 1, 1896. The trial court properly found from the evidence that Elmer P. Mason was secretary at that time, and that he continued to be such until February 20, 1907. The bonds do not bear his name as secretary, but purport to have been signed by "B. M.

Gilbert" as secretary. In this respect they did not therefore comply with the statute.

There was also a finding below that no seal had been provided for the district, and that the one used was unauthorized. This finding is not disproved by the record. An original bond was submitted to the trial court, while the bill of exceptions contains a copy only, which does not bear the impression of a seal.

The notice and call for the special election at which the bonds were voted proposed the issuance of bonds to mature in 20 years, though the statute required their payment in instalments maturing at different times, beginning in 11 years. Laws 1895, ch. 70, sec. 13.

Ratification of the bonds by levying and collecting taxes and by paying interest is urged as an objection to the injunction. Taxes were levied in compliance with a peremptory mandamus previously issued by the trial judge who presided in the present case. The validity of the bonds, however, was not decided on the application for the writ, and it is a well-settled rule that a public corporation, by paying interest on void bonds, does not ratify them or estop itself from assailing them.

Appellants also resisted the injunction on the ground that plaintiff is concluded by a former order in which the district court confirmed the proceedings leading up to the execution of the bonds. The order invoked confirmed the proceedings as regular. It was made by the judge who presided in the present case. A proceeding to confirm the preliminary steps before the bonds are negotiated is authorized by the irrigation law. The order, however, did not affect the sale and delivery of the bonds. At the time they were delivered the statute did not authorize the district to dispose of them in the manner in which they were procured by appellants, but provided: "The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred in excess of such

express provisions shall be and remain absolutely void." In acquiring the bonds appellants were bound by this statute, and were required to respect the limitations of the officers of the irrigation district.

The record does not show that appellants were innocent holders. Miles had been an officer, and knew the circumstances under which the bonds were voted, negotiated and transferred. Schurtz acquired bonds in the sum of $500 for services which he admits did not exceed $150 in value. He received them under circumstances which should have put him upon inquiry. The First National Bank transacted its business in Lincoln county, and was not only required to know the provisions of the statute, but was charged with notice of the public records which the officers of the irrigation district kept.

The findings of the court below are justified by the evidence. No error has been found, and the judgment is

AFFIRMED.

JOHN H. HARTE, APPELLEE, V. GUSTAVE E. SHUKERT, APPELLANT.

FILED JUNE 26, 1913. No. 17,282.

1. **Landlord and Tenant: LEASE: FORFEITURE: ESTOPPEL.** A landlord who, for several months, failed to exercise an option to declare the forfeiture of a long-term lease for nonpayment of past-due monthly rentals, while the tenant, with the knowledge and consent of the landlord, was making permanent improvements under his lease at a vast expense, may be estopped to exercise such option after the improvements have been completed.

2. **Mechanics' Liens: MERGER OF LEASEHOLD IN FEE.** Though a mechanic's lien, when filed, attached only to a leasehold estate, it may be enforced against the fee also after the leasehold has been merged therein by the acts of the landlord.

3. ———: **INDEBTEDNESS: INSURANCE PREMIUMS.** The statute creating the right to a mechanic's lien does not authorize a lien for premiums paid by a contractor for liability insurance.

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

W. H. Herdman and *Martin Langdon,* for appellant.

M. L. Learned and *Carl E. Herring, contra.*

ROSE, J.

This is an action to foreclose a mechanic's lien for $15,113.08 on a lot in Omaha. Under a contract for improvements, Harte, the plaintiff, earned $42,628.19 between November 6, 1907, and June 26, 1909. He received $27,515.11. The lien is for the remainder.

When Harte commenced work there was on the lot a two-story brick building occupied by the owner, Gustave E. Shukert, and his tenants. The contract for the improvements was made by Harte and Tolf Hanson, the latter having leased the premises from Shukert, May 20, 1907, for a term of ten years, beginning April 1, 1908, the agreed rental being $102,000, payable monthly in advance at the rate of $850 a month from April 1, 1908. Under the terms of the demise, failure to pay any part of the rent when due gave Shukert the right, at his option, to declare the lease at an end, and thereby cancel and annul it, to retake immediate possession of the premises, and to remove any person occupying the same. The lease also provided: "All the improvements to said premises made by said lessee shall revert to the owner at the expiration of this lease." With the consent of the owner and the other occupants, Harte began to make permanent improvements for Hanson as early as November 6, 1907, and continued until sums in excess of $70,000 had been expended by June 26, 1909, when Hanson became insolvent. He had not paid the rents for May, June and July of that year, but Harte and other creditors paid the May rent July 21, 1909. In the federal court Hanson was adjudged a bankrupt August 3, 1909, and died September 1, 1909. The receiver of the

bankrupt estate and the trustee in bankruptcy held possession of the demised premises from July 31, 1909, until September 30, 1909, and paid the monthly rentals. Pursuant to a void order of the bankruptcy court, the trustee surrendered the leasehold estate to Shukert, September 30, 1909, and he has been in possession of the premises ever since. Shukert and his wife, his tenants, the trustee in bankruptcy and the administratrix of the estate of the deceased Hanson are defendants herein. The defense of Shukert is that the Harte lien attached only to the leasehold interest of Hanson; that Shukert exercised his option to terminate the lease for nonpayment of rentals due; that the lien expired with the lease; and that the improvements made by Hanson became the property of Shukert. The trial court found that there had been no effective forfeiture of the lease, and that the leasehold estate had been merged in the fee, and rendered a decree of foreclosure in favor of Harte for the full amount of his claim. Shukert has appealed.

The finding that the lease had not been forfeited or terminated for nonpayment of rentals is challenged as erroneous. On the first day of each of the months of May, June and July, 1909, Shukert made a demand for the amount due and unpaid. He asserts that he notified Hanson in writing July 31, 1909, to vacate the premises within three days, and that service was made by leaving the notice at Hanson's usual place of residence. It is argued that the demands and notice mentioned, in connection with the defaults of Hanson, amounted to an exercise of Shukert's option to declare the lease at an end and to retake possession of the premises. By undisputed facts Shukert, on principles of justice and equity, is estopped to assert against Harte the forfeiture of the lease. Harte made the improvements under the direction of Hanson. They were made on a scale so expensive as to indicate that they never would have been undertaken except in contemplation of their use by the lessee during the term fixed by the lease. This was understood by the parties. Shukert knew what

was being done on the premises by Hanson and Harte, and observed the progress made by them in improving his property. Months before Hanson began to remodel the building, Shukert knew of his tenant's intention to improve it in a manner requiring the outlay of large sums of money. He stood by for more than a year and saw improvements made at the rate of thousands of dollars a month until the aggregate exceeded $70,000. He knew Harte's connection with the work, and during a portion of the time visited the premises daily. For the entire period covered by these expenditures, no rent was ever paid when due. While the property was being improved, Shukert did not exact payment of the monthly rentals according to the terms of the lease or attempt to exercise his option to cancel it. Had he done so, the situation of Hanson and Harte would have been changed. In that event their improvements and expenses would have been stopped at the end of the first month of the term. Instead of exercising his option, he accepted the rent for each month after the time when it should have been paid and permitted the work of improvement to proceed. He knew of Harte's right to a mechanic's lien. He was charged with notice of the lien when filed. He knew it bound the leasehold estate of Hanson. He waived his right to exercise his option during the time his property was being improved; but, when the work of improvement ceased, he attempted to declare a forfeiture of the lease and to take possession of the improvements as his own property without discharging the lien of Harte. This is not the ordinary case of the forfeiture of a lease for a default in payment of rent, where the tenant makes no improvements, but uses the landlord's property alone. In the present case the right to use permanent and valuable improvements made by the tenant with the consent of the landlord is involved. The distinction is stated in *O'Connor v. Timmermann*, 85 Neb. 422, 24 L. R. A. n. s. 1063. The opinion in that case contains this language: "There is a class of cases holding that one having the right to declare a forfeiture, who does not declare it when he is

entitled to do so, waives the right, but this rests upon the ground of estoppel. In such cases the lessee has usually incurred large expenditures or made valuable improvements believing that, by the landlord failing to assert the right of forfeiture after breach of condition, it would not be asserted."

In the present case facts creating an estoppel which prevents Shukert from asserting, as against Harte, that the option to declare the lease at an end had been exercised are clearly established by undisputed evidence.

It is further argued that the decree is erroneous because it permits the fee to be sold to satisfy Harte's lien, which attached only to the leasehold of Hanson. There were two estates, the fee and the leasehold. That Shukert owns the fee is unquestioned. After he assumed to forfeit the lease, he took possession of the demised premises and of all the improvements made by Hanson and Harte, and ever since has used both estates as his own property. He remodeled the improved building at a cost of $15,000, and leased different parts of it to different persons. He has not kept the estates separate, and for the purposes of the lien has merged the leasehold in the fee.

Another argument is directed to the point that an item of $395.20 for premiums on liability insurance was erroneously included in the decree. A mechanic's lien is a statutory one. The statute does not authorize a lien for liability insurance. Harte, therefore, is not entitled to a lien for this item. The case being here for trial *de novo*, the error will be corrected, but the correction will not be allowed to affect the costs, since it does not appear from the abstract that the objection now made was specifically directed to the attention of the trial court. The item for liability insurance is therefore stricken from the decree, and as thus modified it is affirmed.

AFFIRMED AS MODIFIED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STORZ BREWING COMPANY, APPELLEE, V. JOHN SKIRVING, APPELLANT.

FILED JUNE 26, 1913. No. 17,320.

Bills and Notes: DEFENSES: GAMING. Record examined, and the case *held* to be ruled by *Smith v. Columbus State Bank*, 9 Neb. 31.

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

L. C. Chapman, for appellant.

Richard S. Horton and *J. A. Donohoe, contra.*

FAWCETT, J.

From a judgment of the district court for Holt county, in favor of plaintiff, for the sum of two promissory notes, with interest and costs, defendant appeals.

The petition alleges that the notes in suit were executed and delivered by defendant to one Stanton; that before maturity and for a valuable consideration they were sold and delivered by Stanton to plaintiff. The answer admits the execution of the notes, denies all other allegations in the petition, and alleges affirmatively that defendant received no consideration for the execution and delivery of the notes; that Stanton was engaged in the saloon business and in connection therewith conducted a gambling house; that about March 1, 1904, defendant, in Stanton's place, engaged in gambling and lost large sums of money; that the promissory notes sued upon were given to Stanton in settlement of such loss; that there was no other or further consideration for said notes; that by reason thereof the title to the notes did not pass from defendant to Stanton, and that the notes are the individual property at the present time of defendant; that plaintiff has no title whatever in the notes and no standing to maintain an action thereon.

It will be observed that the gambling debt, if such it may

be termed, was incurred by defendant on or about March 1, 1904, while the notes were not given until the 14th of the next month. There is no provision in our statute making a note, given under such circumstances, void. The wording of the statute is that any person who shall lose any property or money in a gambling house, the wife or guardian of such person, his heirs, legal representatives or creditors, shall have the right to recover the money or the amount thereof, or the property or the value thereof, in a civil action, and may sue all persons participating in the game, and may join the keeper of the gambling house in the same action, "who shall be jointly and severally liable for any money or property lost in any game or through any gambling device of any kind, and no title shall pass to said property or money." Criminal code, sec. 214. This language comes far short of declaring a promissory note, subsequently given to settle a gambling loss, void. That such note would be voidable in the hands of the original payee may be conceded, but the note being negotiable in character, and having been assigned for value before maturity to an innocent purchaser, the rule cannot be extended to such a case. That the plaintiff in this case is a *bona fide* holder for value of the notes is established by the stipulation of the parties upon the trial. The third paragraph of the stipulation reads: "That the plaintiff, before the maturity of said notes, and for a valid consideration, purchased said notes of the payee, A. A. Stanton, without any knowledge or information of the consideration for which they were given, and that plaintiff is an innocent purchaser for value of both of said notes before maturity."

Extended consideration of this case is not necessary. It is ruled by *Smith v. Columbus State Bank*, 9 Neb. 31. Upon the authority of that case, the judgment of the district court is

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

GEORGE D. FOLLMER, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED JUNE 26, 1913. No. 16,931.

1. **Courts:** PLEADING: DEMURRER: LAW OF THE CASE. The ruling of one judge of the district court upon a general demurrer to the petition is not conclusive upon another judge of the same court who afterwards tried the case. If the demurrer is erroneously sustained, the error may be corrected at a subsequent term if the case has not been finally disposed of at the prior term.

2. **Constitutional Law:** STATE OFFICERS: EMPLOYMENT OF ATTORNEY. That part of section 4778, Ann. St. 1911, which authorizes the chief officer of a department or institution to retain and employ a competent attorney in cases of importance or difficulty does not conflict with section 1, art. II of the constitution, and requires such officer to use a reasonable discretion in determining the necessity of such employment.

3. **Statutes:** CONSTRUCTION: "CHIEF OFFICER." The singular number often includes the plural in the construction of statutes, and generally when the manifest intention of the legislature requires it. "Chief officer," as used in section 4778, Ann. St. 1911, is so construed.

4. **Attorney General:** ADVISER OF STATE OFFICERS. The attorney general is the attorney for the state, and the officers who by the constitution and laws are given charge of the affairs of the state may call upon him for advice upon questions of law which arise in the discharge of their duties.

5. **State Board of Educational Lands and Funds:** EMPLOYMENT OF ATTORNEY. There is no chief officer of the board of educational lands and funds within the meaning of section 4778, Ann. St. 1911. The board acts by a majority of its members. The commissioner of public lands and buildings is by the constitution made a member of the board, but the legislature is given power to prescribe by statute the manner of the general management of the business of the board. Many special duties are by statute devolved upon the commissioner of public lands and buildings, but the employment of a competent attorney in special cases relating to the duties of the board is lodged with the board itself.

6. ———: ———: RATIFICATION. If the commissioner of public lands and buildings, as a member of the board of educational lands and funds, employs a competent attorney in a case of importance

and difficulty relating to the department of educational lands and funds, and such attorney, with the knowledge and acquiescence of a majority of the board, renders valuable services which are received and acted upon by the board without objection to the employment of such attorney, and the legislature, after being informed as to the transaction, authorizes suit to be instituted against the state upon a claim for the value of such services, in such suit the fact that the attorney was not formally employed by the board is immaterial.

7. **Action:** MOTION TO DISMISS: REAL PARTY IN INTEREST. The legislature, with full knowledge of the circumstances, by joint resolution authorized the plaintiff to prosecute this action against the state to recover the value of legal services rendered by a competent attorney at law who had been employed by the plaintiff, while commissioner of public lands and buildings, in cases of importance and difficulty relating to the department of the board of educational lands and funds. Thereupon the attorney assigned his claim for such services to plaintiff. *Held*, That plaintiff's action should not be dismissed on the ground that he is not the real party in interest, and the admission of the attorney that he did not intend to enforce his claim against the plaintiff unless plaintiff was remunerated by the state will not defeat this action.

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

Grant G. Martin, Attorney General, for appellant.

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

SEDGWICK, J.

The plaintiff was commissioner of public lands and buildings during the years 1901 to 1904, inclusive. He alleges that during that time as commissioner he employed one Edwin J. Murfin, a practicing attorney at law in the state of Nebraska, to represent the interests of the state and the board of educational lands and funds in matters pertaining to the public school lands of the state, and that the legislature of the state duly authorized the plaintiff to prosecute this action against the state. The trial in the district court for Lancaster county resulted in a

judgment in favor of the plaintiff, and the defendant has appealed.

1. It appears that the defendant filed a general demurrer to the petition, which was sustained by the district court. Afterwards the plaintiff filed a motion to set aside the ruling upon the demurrer, and also filed an amended petition. The motion was sustained and the amended petition held sufficient. The defendant now contends that the first ruling upon the demurrer became the law of the case, and that it was error to set the same aside and admit evidence under the amended petition. It seems to be conceded that the district court has control of its own judgments and orders during the term of the court at which they were made, but the contention is that after the term of court at which the order is made it becomes final. *Marvin v. Weider,* 31 Neb. 774, is cited as authority for this position, and perhaps some of the language there used might suggest such a conclusion, but that case has been twice overruled by this court, in *Perry v. Baker,* 61 Neb. 841, and in *Tiernan v. Miller & Leith,* 69 Neb. 764.

2. The next contention is that section 4778, Ann. St. 1911, is unconstitutional and void so far as it authorizes the governor or chief officer of a department or institution to employ an attorney to appear on behalf of the state. Section 1, art. II of the constitution, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." It is said that under this provision of the constitution the attorney general is the "head or chief officer of the law department. * * * He is the law officer of the state, whose action cannot be controlled by the state board," and that the said section 4778 is a direct violation of that constitutional provision, "in that it attempts to authorize a person belonging to one

department to exercise the power properly belonging to one of the other departments." A casual reading of the section quoted will show that it cannot be so applied. It divides the powers of the government into three departments, the legislative, executive and judicial, and provides that the officers of one of these departments shall not perform the duties of the other departments, but, of course, has no application to a distribution of duties among different officers of the executive or administrative department of the state government.

It is further contended that the attorney general has entire control of the litigation in which the state is interested by virtue of the provision contained in the first part of the said section 4778. The attorney general is, generally speaking, the attorney for the state. It is his duty to devote his time and energies to that employment, as it is the duty of attorneys generally to appear and defend the rights of their clients in the litigation in which they are employed. He is given executive powers in regard to various matters committed to his care. The officers who by the constitution and laws are given charge of the affairs of the state will continue generally to control them, although there may be litigation in regard to them. Those officers are authorized by this section of the statute to employ "a competent attorney" in cases of importance or difficulty, not necessarily as assistants of the attorney general, but an attorney with the general powers of attorneys at law for the matters in which they are employed. It is, of course, for these officers of the different departments and institutions to determine within their discretion whether the case is of importance or difficulty so as to justify the employment of counsel. They are entitled to the opinion and advice of the attorney general upon questions of law relating to their several departments, but they are not necessarily controlled by that advice in matters especially committed to their care. If the law were otherwise, any executive office of the state could be controlled by the opinion of the attorney general specifying what the law requires to be done in that office.

3. It is next contended that the commissioner of public lands and buildings is not the "chief officer of the department or institution to which" this litigation related, and so was not authorized to employ an attorney. The commissioner of public lands and buildings is a constitutional officer. His duties, however, are not specifically defined in the constitution; and the constitution also establishes a separate board for the sale, leasing and general management of all lands and funds set apart for educational purposes, "in such manner as may be prescribed by law." Const., art. VIII, sec. 1. The legislature, as it is authorized by this section to do, has provided for the organization of the board. Ann. St. 1909, sec. 10357. By this statute the governor is made chairman, and the commissioner of public lands and buildings secretary of the board, but it appears that each member of the board, which consists of the governor, secretary of state, treasurer, attorney general, and commissioner of public lands and buildings, has equal authority in the management of the school lands and funds. It seems to follow that there is no "chief officer" of this board within the meaning of the statute. In the construction of the criminal code "the singular number includes the plural" (section 246), and also in the revenue law (Ann. St. 1911, sec. 10910). The wording of section 4778 suggests that construction here. Undoubtedly the section should be construed as though it read, "the governor or chief officer or officers of the de-department or institution," so that where there is a board established by law, and no one with greater power in the performance of the work of the board than another has, it should require a majority of the board to act in the employment of an attorney, as in other matters.

4. While the plaintiff held the office of commissioner of public lands and buildings, a controversy arose in regard to several thousand acres of land in Boyd county. These lands had been selected as a part of the school lands of the state, but settlers were occupying them and claiming them. We do not consider it necessary to state in detail

the conditions that caused this controversy. It is sufficient, for the purpose of indicating the questions of law that we think are involved, to say that the lands were valuable, and that the questions involved were complicated and difficult, and were affected by rulings of the land department of the government, and the matter was in litigation in the district court for Boyd county; it was transferred to the federal court of this district, and afterwards remanded, and was twice before this court.

This plaintiff and the then attorney general were both by virtue of their respective offices members of the board of educational lands and funds. They disagreed seriously as to the rights of the state in the matters involved and as to the proper course to be pursued to protect those rights. The attorney general at first advised that the lands in question be relinquished by the state to the general government in favor of the settlers, pursuant to an act of the legislature so providing. The plaintiff insisted that the act of the legislature in question was unconstitutional; that the title to the lands had become vested in the state, and under the provisions of the constitution could not be alienated. It developed afterwards that the plaintiff was right in this contention. The attorney general changed his opinion upon that point, and insisted that his first opinion was based upon an incorrect representation of the facts made by the plaintiff himself. It is unnecessary to examine the cause of the disagreement between these two public officers. If we suppose that they were both acting in good faith with a single purpose of protecting the rights of the state, it still appears, as is usual in such cases, that they allowed their personal controversy to give more or less color to their official acts. The attorney general was by virtue of his office a member of the board, and, as such, had equal authority with the other members in those matters which the law committed to their care. He was also the law officer of the state, and, as such, the members of the board were entitled to his advice upon questions of law affecting their power and duties. Under

such circumstances, and in matters of so much importance, if the board could have unanimously agreed to employ competent counsel, and the attorney general and such counsel could have represented the board in harmony and to the satisfaction of all the members, it would have been in the interest of the state. The plaintiff, not satisfied with the advice of the attorney general, submitted the principal question involved to the present chief justice of this court, who was then in the practice of law, and obtained his written opinion, which he submitted to the board. This opinion appears to have justified the views of the plaintiff as to the legal rights of the state. The board appears to have accepted this opinion with approval, and in general to have acted upon it. The plaintiff also early in the controversy employed Edwin J. Murfin, a member of the bar of this state, who appears to have made an exhaustive investigation of the whole controversy and submitted to the board the result of that investigation. The board received this communication and availed themselves of the information there contained. Mr. Murfin, during the whole course of controversy with the settlers, counseled and assisted the plaintiff in the discharge of his duties with respect to the matters involved, and it appears to be conceded by all parties that the amount of this claim would not be an unreasonable charge for the work performed by him. The contention is that the plaintiff had no authority in law to employ him on behalf of the state; that he was never employed by the board, who alone had such authority; that, the attorney general being the law officer of the state, whose duty it was to perform this labor without compensation other than his salary, the employment of Mr. Murfin was wholly unnecessary, and that for these reasons he is not entitled to compensation from the state. At a meeting of the board in September, 1903, while the litigation was pending in the district court for Boyd county, and in the absence of the attorney general, the board adopted a resolution introduced by Governor Mickey instructing this plaintiff "to take such

action as he may deem proper to defend the interests of the state" in that action in the district court. This appears to have been construed as an action on the part of the board determining the controversy that had existed between the plaintiff and the attorney general in favor of the plaintiff, with the effect of taking the control of the matter from the attorney general and placing it in the hands of this plaintiff. On the following day, at the request of the attorney general, Governor Mickey called a meeting of the board, and by the vote of three to two "the action of the board of educational lands and funds relative to the injunction brought against the commissioner of public lands and buildings in the Boyd county land case" was reconsidered and the action rescinded. This appears to have left the controversy between these two officers undetermined, the remaining three members of the board still being in doubt in regard to their duty in the matter, and the situation continued as before; the attorney general assuming to control the litigation as the law officer of the state, and the counsel employed by the commission of public lands and buildings attempting to represent that official, as the chief officer of the department, in the litigation. The court appears to have recognized the authority of the attorney general, but so far as pointed out in the brief, or as we have observed, the question as to the necessity of the employment of Mr. Murfin was not directly presented to, nor determined by, the courts in the progress of this litigation, nor have we discovered in this record that at any time the board of educational lands and funds repudiated the services of Mr. Murfin or expressed its disapproval of his employment. In the exhaustive and able brief of the state our attention is not called to any portion of the record showing such action by the board or by the courts. The board knew of his employment; they accepted the services he was rendering. Mr. Murfin's complete analysis of the situation, including the rulings of the land department of the government and the facts upon which the settlers on the lands based their claims, and a com-

prehensive brief of the questions of law involved and citations of the authorities upon those questions, were presumably of assistance to the attorney general himself, as well as to the other members of the board. If this controversy were between private individuals, the party accepting such service would be, not only morally, but legally, bound to compensate them. The joint resolution of the two houses of the legislature authorizing the plaintiff to bring this action against the state was presumably for the purpose of ascertaining whether the state has received benefit from the services procured by the plaintiff which would, as between private persons, create a legal liability, and we think such liability exists in this case.

5. It is said that as Mr. Murfin rendered the services in this case, and if any one is entitled to the compensation therefor, he is the real party in interest, and this action cannot therefore be maintained in the name of this plaintiff. It appears from the record that, before this action of the legislature, this plaintiff made a detailed report to the legislature of the whole transaction, showing that he, as commissioner of public lands and buildings, had employed Mr. Murfin, and that the services were rendered by Mr. Murfin, and upon that report the legislature authorized this plaintiff to bring an action against the state to determine the matter. Thereupon, Mr. Murfin made a formal assignment of his claim against the state to this plaintiff. The petition alleges the resolution of the legislature, and the assignment of the claim to the plaintiff. Mr. Murfin testified that he was employed by the plaintiff; that he expected his compensation to come from the state; and that, while he insisted that the plaintiff was liable to him for the amount of his claim, he did not intend to assert his claim against the plaintiff unless the state would remunerate the plaintiff, and that he had so informed the plaintiff. It is insisted that this testimony shows that the interest of the plaintiff in the case is colorable only, and that he is not the real party in interest. If it appeared that Mr. Murfin had released the plaintiff from all liability

upon consideration that the plaintiff should pay to him whatever he might recover from the state, there would be force in this objection, under the decision in *Hoagland v. Van Etten,* 22 Neb. 681. But, so far as this evidence shows, the liability of the plaintiff to Mr. Murfin still exists. Mr. Murfin's statement, after the services were rendered, that he would not enforce his claim against the plaintiff unless the plaintiff was remunerated by the state was wholly without consideration. Since the legislature has authorized this claim to be prosecuted in the name of this plaintiff, and Mr. Murfin has assigned his claim to the plaintiff, so that the result of this litigation will be a complete bar, we think the objection that the plaintiff is not the real party in interest should not be allowed to defeat this claim.

The jury found the amount of plaintiff's claim to be $1,100, and upon this they compute interest from February 28, 1905, $404.04, making the amount of the verdict, $1,504.04. The record recites that the plaintiff's claim was filed with the legislature on the 28th of February, 1905. This was probably an error; but, however that may be, the resolution of the legislature was concurred in on the 1st day of April, 1909, and under the circumstances in this case the plaintiff should not recover interest prior to that date. In his claim before the legislature he does not ask for interest, and in the resolution authorizing the prosecution of this suit it is recited that the claim is for expenses incurred for services performed by Mr. Murfin, and there is no authority there given to prosecute any suit for interest, therefore there should be no recovery for interest prior to the authorization to bring this suit. The judgment was entered in the district court on the 27th day of May, 1910. The interest on $1,100 from April 1, 1909, to that date at 7 per cent. would amount to $89.26. The judgment therefore in excess of $1,189.26 is erroneous. If the plaintiff will file with this court a remittitur of $314.78 from the judgment within 60 days from the filing

of this opinion the judgment will stand affirmed; otherwise the judgment will be reversed.

AFFIRMED ON CONDITION.

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

PHEBE A. GOODMAN, APPELLANT, V. LUVINA SMITH ET AL., APPELLEES.

FILED JUNE 26, 1913. No. 17,338.

1. **Parol Evidence:** DEEDS: CONSIDERATION. The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration.
2. **Trusts:** RESULTING TRUSTS: LIMITATIONS. When the property of an infant is sold and the proceeds invested in other property, the title to which is taken in the name of a friend of the infant who transacted the business, a resulting trust arises in favor of the infant. The statute of limitations will not begin to run against an action by the *cestui que trust* after becoming of legal age until she has notice that the trustee denies her right in the property.
3. **Appeal:** EQUITY: TRIAL DE NOVO. In an action in equity this court is required upon appeal to try the cause *de novo* upon the pleadings and evidence, and determine the matter independently of the judgment of the trial court. Upon the evidence in the record, the decree is reversed, with directions to enter a decree in favor of the plaintiff.

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

Jay C. Moore and *Burkett, Wilson & Brown,* for appellant.

S. P. Davidson, contra.

SEDGWICK, J.

Phebe A. Goodman began this action in the district court for Johnson county to establish her interest in cer-

tain real estate in that county which she claimed as an heir of her father, Thomas Phippin. The district court entered a judgment in favor of the defendants, from which the said Phebe A. Goodman appealed. Afterwards she died, and the action was revived in the name of her husband, Thomas Goodman, as administrator of her estate.

Thomas Phippin died in Waukesha county, Wisconsin, in 1847. He left surviving him his widow, Ann Phippin, and two children, the said Phebe, afterwards Phebe Goodman, and another daughter, who a few days later died in infancy. The widow, Ann Phippin, afterwards married Worthy Luce, and two children were born to them, the defendant, George Luce, and the defendant, Luvina Smith, formerly Luce. Phebe's mother, Ann Luce, formerly Ann Phippin, died in 1901 in Johnson county, Nebraska, and afterwards, in June, 1909, Worthy Luce died intestate in that county.

The petition alleges that when Thomas Phippin died he was the owner of 40 acres of land in Waukesha county, Wisconsin, and some personal property, and that under the law of Wisconsin at the time his two daughters inherited the land, and, upon the death of the younger daughter, the daughter Phebe inherited her interest in the land, so that Phebe became the owner of the 40 acres of land; that this 40 acres of land was afterwards sold for about $1,600, and with the proceeds, together with about $2,000 realized from 20 acres of land in Waukesha county owned by Mr. and Mrs. Luce, the real estate in question in Johnson county was purchased by Mr. and Mrs. Luce, so that this plaintiff is entitled to an undivided four-ninths interest in said real estate. After the death of Mr. and Mrs. Luce, these defendants, George Luce and Luvina Smith, claimed to be the owners of the land in Johnson county as the heirs of Worthy Luce, and that their half sister had no interest therein.

Did Thomas Phippin purchase and pay for the 40-acre tract? If he did, have the proceeds realized from that 40 acres been traced by this evidence to the purchase of the

land held in the name of Worthy Luce at the time of his decease? The deposition of one Ira Redford was in evidence upon the trial. He was a brother of the former owner from whom it is claimed Mr. Phippin purchased the land. He was working for Mr. Phippin at the time. He testified that Mr. Phippin gave his brother a yoke of oxen in the purchase, but he did not know whether he paid some money also. He saw his brother take the oxen away when the trade was made, and heard Mr. Phippin say that he (Phippin) would have no more trouble about complaints that his milldam caused the land to overflow, as he now owned the land himself. This, he says, was a year or two before Mr. Phippin's death. The witness shows that he was entirely familiar with the land, and with the business relations of his brother and Mr. Phippin, and with all of the persons then interested or in any way connected with the ownership of the land. He testified positively that his brother sold the land absolutely to Mr. Phippin and received full pay therefor from him. The witness was 78 years old when he testified. He made mistakes as to dates, or rather failed to be positive in regard to them, as well as other matters of less importance. His evidence shows that he had an active mind and clear ideas when he testified. He might not be expected to remember unimportant matters which happened more than a half century before, but his evidence seems clear and quite satisfactory as to the fact that the land was sold by his brother to Mr. Phippin, and the agreed payment received therefor, and that from the time of the purchase until his death Mr. Phippin exercised the rights of ownership of the land. This witness and several others testified that from the time of Mr. Phippin's death this tract was generally known as "Phebe's forty," and was so designated by Mr. and Mrs. Luce.

Mr. Phippin never received a deed of the land, and after his death a deed was executed by the former owner to Ann Phippin. It recites a consideration of $25, and there is no other evidence cited in the briefs that she paid any-

thing for the land. The consideration named in the deed can always be inquired into, and the preponderance of the evidence is that the consideration for this deed was Mr. Phippin's previous purchase and payment for the land. The evidence shows that there was always the best of feeling and entire confidence among these parties. None of them seems to have supposed that it made any difference who was named as grantee in a deed of real estate purchased by them. This 40 acres and the 20 acres afterwards purchased were deeded to Ann Phippin, afterwards Luce, and, when these two tracts were sold and the Nebraska land purchased with the proceeds, the deed was taken in the name of Worthy Luce, although the 20 acres were bought, or at least improved, with money received from land given Mrs. Luce by her father, and no one claimed that Mr. Luce himself furnished the money with which to buy the Nebraska lands. The three children were apparently treated alike by Mr. and Mrs. Luce, and they evidently supposed that Phebe had at least as large an interest as any of the three children in the property. A short time before his death Mr. Luce attempted to make an equal division of the three eighties among the three children. He agreed to give each of them an 80, and each of them was to pay to him $1,000, which was supposed to be about one-fourth of the value of the land received. Upon their agreements to pay this amount he deeded an 80 to each of the three, and they took possession of the land, and Phebe paid the $1,000 according to agreement, but the other two children failed to make any payment. Not long before his death Mr. Luce stated that the three children would get the property, and although some of this property clearly belonged to Mrs. Luce, and all of her children inherited from her equally, and the proceeds of Phebe's 40 were more than a third of the purchase price of the Nebraska land, still Mr. Luce assisted by his labor, and perhaps financially, in improving the land, and they all seem to have supposed that the fair proportion to Phebe, under all the circumstances, would be a one-third

interest. It is difficult to determine from this evidence whether Mr. Luce contributed money to improve these lands, and, if so, what amount, and it seems probable that the idea of Mr. and Mrs. Luce in that regard was substantially correct. At least Mrs. Goodman appears to have acquiesced in it. We think that the weight of the evidence is that Mrs. Goodman's property contributed one-third of the purchase price of the Nebraska land, and that she is entitled to share accordingly.

It is contended that the action is barred by the statute of limitations. As we have already said, there was no quarreling in this family. Each appears to have been willing to assist the others in any way possible. They all understood in a general way what the interest of each was in the property, and none of them had any reason to suppose that his or her right or interest would be denied by the others, until after the death of Mr. and Mrs. Luce, when his two children claimed the whole property. The interest of Mrs. Goodman, then, was held by Mrs. Luce in trust until the land was exchanged for Nebraska land, and afterwards was so held in trust by Mr. Luce, and the statute of limitations would not begin to run against the claim of Mrs. Goodman until the parties who held her property in trust denied her rights therein. The $1,000 that Mrs. Goodman paid when she took title to the 80 acres of land above mentioned was invested in other lands, and she should have the benefit thereof. A decree should be entered allowing the plaintiff an interest in the land to the amount and value of $1,000, and an equal one-third interest in the remainder.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree as above indicated.

REVERSED.

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

STATE, EX REL. EDWARD B. MCDERMOTT, APPELLEE, V. CHARLES REILLY, APPELLANT.*

FILED JUNE 26, 1913. No. 17,921.

1. **Judges:** POLICE MAGISTRATE: TERM OF OFFICE. The office of police magistrate in cities of the second class having more than 5,000 and less than 25,000 inhabitants is created and the length of the term fixed by the constitution. The legislature cannot change the length of the term, nor remove the incumbent by legislation before the expiration of his term.

2. **Elections:** POLICE MAGISTRATE: TIME OF ELECTION. The provision of the constitution (art. XVI, sec. 13), fixing the time of holding general elections, and what officers shall be then elected, excepts "school district officers, and municipal officers in cities, villages and towns;" police magistrates in cities of the second class being municipal officers, the legislature may by statute provide the time of their election.

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

John A. Miller and *Frank E. Beeman*, for appellant.

E. B. McDermott, W. L. Hand and *H. M. Sinclair, contra.*

SEDGWICK, J.

Kearney is a city of the second class having more than 5,000 and less than 25,000 inhabitants. At the election held on the 4th day of April, 1911, the respondent, Charles Reilly, was elected police judge of the city, pursuant to section 8510, Ann. St. 1909. He duly qualified and entered upon the duties of the office, and has since been performing them. At the general election in the fall of 1911 one Willis L. Hand received a plurality of the votes cast for the office of police judge of the city. It is stipulated that he filed his official bond as such police magistrate, and that the bond was approved. He demanded possession

* Rehearing denied. See opinion, p. 238, *post.*

of the office from the respondent, which was refused. This action was begun in the district court for Buffalo county upon the relation of the county attorney of that county to test the respondent's right to hold the office. The district court entered a judgment ousting the respondent from the office, and the respondent has appealed.

Several important questions are presented and discussed in the interesting briefs of counsel, but the two principal questions are as to the validity of the said section 8510, which depends upon the power of the legislature to fix the time of the election of police magistrates; and the validity and effect of the act of 1911 (laws 1911, ch. 23), in so far as it might result in removing the respondent from office before the expiration of his term fixed by the constitution. Section 13, art. XVI of the constitution, specifies what officers shall be elected at the general election, "except school district officers, and municipal officers in cities, villages and towns." The relator argues that police magistrates of cities of this class are not municipal officers, and are therefore not within the exception. He contends that they are district officers and are within the general provisions of that section of the constitution. The only basis of this contention, so far as we can see, is derived from that part of section 18, art. VI of the constitution, which provides: "Justices of the peace and police magistrates shall be elected in and for such districts, and have and exercise such jurisdiction as may be provided by law." It is said that the legislature may create districts of any extent for police magistrates, and so extend their jurisdiction beyond the city limits; and, as the legislature by the act of 1911 (laws 1911, ch. 23; Comp. St. 1911, ch. 14*a*, art. II, sec. 1) has extended such jurisdiction for three miles beyond the city limits, by so doing it has created a district and made the police magistrate a district officer, which requires that he must be elected at the general election. If this is the correct construction of the constitution and statutes, the police magistrate of Omaha has jurisdiction in South Omaha, if not also in Council Bluffs, and the

police magistrate of South Omaha has like jurisdiction in Omaha. The magistrate of Kearney has jurisdiction of a part of the adjoining county, and, if the legislature should see fit, that jurisdiction might be extended so as to include Lincoln and Omaha. It does not seem to be necessary to determine this curious question, because even if such a district could be created by the legislature, and the jurisdiction of the police magistrate extended accordingly, he would still be a municipal officer within the meaning of the constitutional provision which we are considering. He would still, under present constitutional and legislative provisions, be chosen by the voters of the municipality. The only thing that the constitution fixes is to create the office of police judge and fix the length of the term. It does not prescribe when the term shall begin, nor when he shall be elected, nor in fact whether he shall be elected or appointed, nor how he shall be paid, nor what bond he shall give, nor who shall approve the bond; all of these things are fixed by the legislature, and are by the legislature made municipal matters. If the legislature could create a judicial district without reference to the present judicial districts, providing a judge for the district, with jurisdiction not superior to the present district courts, and attempted to do so without giving all the voters of the district a voice in his election, such legislation would probably be invalid. We do not think the legislature has attempted any such thing.

The police magistrate of a city, being a municipal officer, is especially exempt from the general provision of the constitution as to the time of his election, and that matter is left to the legislature. The office of police magistrate is undoubtedly a constitutional office in that the constitution provides that there shall be such an office and fixes the length of the term; all other matters with reference to the office are left to the legislature, and as to them it is a legislative office.

In *State v. Mayor,* 91 Neb. 304, this court took a different view, but upon motion for rehearing and further

consideration another argument was ordered. Afterwards the litigation was settled between the parties thereto, and the court had no opportunity to correct its former opinion. That opinion is not to be considered as authority, therefore, upon any of the points therein determined.

County of Douglas v. Timme, 32 Neb. 272, is not authority in this case for three reasons: The principal and sufficient reason is that this question was not involved. The only question in that case was whether the legislature could increase the compensation of an officer during his term, and, there being no provision in the constitution to the contrary, the court held that the legislature could do so. This does not affect this case.

In *State v. Stuht,* 52 Neb. 209, the act criticised provided that the police magistrate elected in Omaha in 1897 should enter upon his term of office before the term of the then incumbent expired, thus abridging the term of the incumbent, and this it was held the legislature could not do, since the constitution fixed the term of the incumbent at two years. It was because the legislature could not shorten the term of the incumbent that the time fixed for the new term to begin was in violation of the constitution, and not because the constitution fixed definitely when each term shall begin. This case is not governed by *State v. Stuht, supra,* nor *State v. Moores,* 61 Neb. 9. Neither of those cases depends upon the question here involved. Neither of them depends upon the question whether the constitution fixes the time of the year in which the term of the police magistrate must begin.

The contention that section 8510, Ann. St. 1909, not being repealed by the act of 1911, is still in force, and other contentions in the brief are not necessary to this decision. The constitution provides that the term of police magistrate shall be two years. The respondent was duly elected to that office in the spring of 1911, and his term of office did not expire until the end of that time.

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

REVERSED.

FAWCETT, J., dissenting.

The majority opinion ignores a number of important and, to my mind, controlling questions presented in the record and fully argued in the briefs and at the bar.

The case was tried upon a stipulation of facts, from which it appears that respondent has been performing the duties of police judge for many years, having been elected and re-elected from time to time at city elections held in the spring; his last election being on April 4, 1911. Under that election he qualified two days later and entered upon the discharge of his duties. On April 8, 1911, the legislature passed, with an emergency clause, an act relating to police magistrates. Laws 1911, ch. 23. At the general election in November, 1911, one Willis L. Hand received a majority of the votes cast for police magistrate, was declared elected, filed his bond and oath, and demanded the office, which respondent refused to deliver.

It is stated in the brief of respondent: "The legal questions involved in this case are the same as those involved in the case of the *State, ex rel. Benson, v. Mayor and Council of City of Hastings,* 91 Neb. 304." The decision in that case is then vigorously assailed by respondent. We there, without division, held: "The office of police magistrate being a constitutional office, and the constitution having fixed the time when such officer shall be elected, the time when, after election, he shall enter upon his term of office, and the duration of such term, the requirements of the constitution in those particulars must be complied with; and any attempt on the part of the legislature to provide for the election of such officers in any other manner or at any other times than fixed by the constitution is void." For our reasons in so holding, reference is made to the opinion in that case. Further consideration of the questions there decided leaves the writer still of the opinion that the decision was right, and that it should be adhered to.

The majority opinion errs when it states that "the court

had no opportunity to correct its former opinion." The final disposition of that case will be found in a *per curiam* order reported in 91 Neb. 852, as follows: "This cause was argued and submitted, and in due time a decision was rendered. The opinion is reported, *ante,* p. 304. A motion and briefs for rehearing were filed, and, upon further reflection and examination, some of the members of the court became doubtful of the correctness of the decision, and argument was ordered upon the motion for rehearing. When the cause was called for hearing, it was shown that the respondents had complied with the commands of the alternative writ of mandamus in all things and no rights could be protected or enforced by any further hearing. The motion for rehearing is overruled." The fact that the parties to that action had settled their differences and complied with the judgment of the district court could not prevent us from correcting our decision, if wrong. In justice to the district judges throughout the state, it was our duty to have done so. Not having made any correction, our judgment in that case stood in full force and effect, and was binding upon the trial courts of the state. The learned judge of the district court for Buffalo county undoubtedly took that view of the matter. We have, then, this situation: In *State v. Mayor* we affirmed the judgment of the district court for Adams county. The district court for Buffalo county followed our judgment. We now reverse its judgment. Our own former holding and the holdings of two district courts, one of them based upon our holding, are swept aside by a divided court. And yet some say that the law is an exact science. I have always insisted and still hold that decisions of this court should not be set aside by a "majority vote" of the court as subsequently constituted. I am all the more insistent upon that point because the attention of the court was called to the alleged error in the former decision, while the case in which it was rendered was still before it and might have been corrected, if wrong, before the decision became final, and binding upon the trial courts of the state.

BARNES, J., concurs in above dissent.

The following opinion on motion for rehearing was filed September 26, 1913. *Rehearing denied, and case dismissed:*

SEDGWICK, J.

Counsel for relator have filed an ingenious brief upon their motion for rehearing, in which they assert: "If the opinion already rendered in this case stands, the legislature will never be able to provide for a police magistrate's court for prescribed districts and also for municipal courts for cities and towns, but will be limited to just the one court, that of the police magistrate. So far this court recognizes but one of these courts. By its opinion herein this court has entirely nullified that part of section 1, art. VI of the constitution, that authorizes the legislature to create municipal courts for cities and towns. And this was done without naming that section at all." They then ask the question: "Does the court want to leave these questions in this chaotic condition?"

The two questions determined in our former opinion (*ante*, p. 232) herein seem so clear and simple as not to require further comment, but the matter is of so much importance, and counsel are so vigorous and persistent in suggesting difficulties in the way of city authorities, that we have concluded to attempt an answer to some of their many contentions more or less related to the matters involved in this litigation. In the former opinion it is determined that the length of the term of office of police magistrates is fixed by the constitution, and the legislature cannot shorten the term, and cannot legislate the incumbent out of office during the term for which he was elected; that this is the only limitation upon the legislature in regard to this office, and therefore the legislature may, by appropriate legislation, provide for the election of such officers at the municipal election or at the general

election as it sees fit. Under the statute as it then existed the respondent was elected in the spring of 1911, and, as the constitution fixes his term at two years, the subsequent act of the legislature changing the time of the election to the general election in the fall of that year could not have the effect to shorten his term. In answer to this reasoning it was contended that the constitution also fixed the time of the election at the general election, and therefore the statute under which respondent was elected was invalid, so that there could be no valid election in the spring of 1911, and respondent was therefore not entitled to the office. This answer was based upon the further contention that the office of police judge in the city of Kearney is not a municipal office, and therefore not within the exception of section 13, art. XVI of the constitution. This last point was the gist of the controversy; it is the point relied upon in the dissenting opinion, although that dissent is wholly based upon the opinion in *State v. Mayor*, 91 Neb. 304, 852. The majority thought that, a reargument having been allowed in that case and the case having been disposed of by settlement of the parties thereto before the formal hearing was had, the opinion first filed should not be regarded as a precedent, and, even if it was so regarded, it was so manifestly wrong in holding that a police officer of a city is not a municipal officer that it ought to be overruled.

It was not held in our former opinion that the act of 1911 (laws 1911, ch. 23) is in any respect invalid. It was only held that that act could not have the effect to oust from office before the expiration of his term one who was duly elected and qualified before that act took effect. This, as before stated, was solely because the constitution fixed the length of the term. On the other hand, it was expressly held that "the legislature may by statute provide the time of their election." When the legislature has provided the time, an election may be held at the time so provided to fill a vacancy that may exist by the expiration of the term of the incumbent. The election of Mr. Hand

in the fall of 1911 was void because there was then no vacancy to be filled. The constitutional term of the respondent had not expired.

We cannot see any dilemma for the legislature, as suggested in the above quotation from relator's brief. By section 1, art. VI of the constitution, the legislature may establish courts inferior to the district court for cities and incorporated towns. Such courts "for cities and incorporated towns" will of course be municipal courts, and the legislature may provide the time of election, and, except for police magistrates, may also fix the term of office. The constitutional limitation of the power of the legislature to alter the length of the term of police magistrates may not be necessary, but section 20, art. VI, seems to so provide and has been many times so construed. Section 18, art. VI, provides that police magistrates shall be elected, "in and for such districts * * * as may be provided by law." If under this provision the legislature should divide our larger cities into districts and provide for the election of a police magistrate in and for each district, such police magistrates would still be municipal officers. They would in a sense be district officers; that is, they would be elected in and for a municipal district. When the constitution was adopted there were established courts in existence in this state with well-known jurisdictions, called "district courts." These courts were continued by section 1, art. VI of the constitution.

The legislature may establish "other courts" which must be inferior to the "district courts," but the district courts are continued in existence by the constitution itself. To say that, because the legislature may establish courts "inferior to the district courts" which are the creatures of the constitution, it therefore follows that, if the legislature divides a city or town into districts and authorizes a police court in each district, such court becomes a "district court," within the meaning of the constitution, and because it is a district court it cannot be a municipal court,

seems puerile in the extreme. If such a court can be called a district court of the municipality or a district court in any other sense, it is not the "district court" which the constitution requires and permanently establishes. And if it is a district court in any sense, even if a constitutional court, it would still be also a municipal court. But it is not established by the constitution, and any court that the legislature may establish for the city is a municipal court, and is wholly within the power of the legislature, with the one exception that the term of police judge must be two years. If the court established by the legislature for the city is not a police court, then this exception does not exist. In *State v. Moores,* 70 Neb. 48, it is said in the opinion of Mr. Commissioner GLANVILLE that the police judge of Omaha is a district officer, and not a municipal officer. This statement is a clear *non sequitur,* as already shown. The statement had nothing to do with the case then being considered. The point decided and the law of the case are stated in the syllabus. The conclusion reached is right, and the mistake of the court was in not placing the opinion in the unofficial reports.

There are several other decisions of this court involving the controversy of Judge Gordon as to his office and salary. In some of these decisions there are expressions used *arguendo* which perhaps are somewhat misleading. But the questions raised and decided are simple and rightly determined.

Prior to 1897 the charter of Omaha provided that the police judge or police magistrate should be elected at the general election in the fall, and the salary should be $2,500 a year. In 1897 the legislature amended the charter, and provided that the police judge should be elected in the spring, and the salary should be $1,200. Gordon was elected to the office in the fall of 1895 for a term of two years, beginning in January, 1896, and ending in January, 1898. An election was held in the spring of 1897 under the new act, and Gordon received a plurality of the votes cast. From that time the authorities refused to pay him

more than $1,200 a year, and he brought an action in mandamus to compel them to pay him at the rate of $2,500. The court held (*State v. Moores,* 61 Neb. 9) that the act of 1897 was void, and that the relator was holding under his election of 1895, and that until his successor was duly elected and qualified he held as of his original term, and was entitled to his salary of $2,500 a year during all of the time that he so held. This holding was followed in several subsequent cases. Then in the fall of 1901, at a general election, Gordon was a candidate, and Berka was also a candidate. Berka was elected for the term commencing in January, 1902, and duly qualified and performed the duties of the office. Gordon brought another action in mandamus to compel the authorities to pay him a salary for the years 1902 and 1903, and it was held (*State v. Moores,* 70 Neb. 48, third paragraph of the syllabus): "That a successor to relator for the office of police judge has been elected and qualified; that relator was not the incumbent of such office during the time for which he is seeking herein to enforce payment of salary, and that the writ prayed for was properly denied."

This was of course clearly right. The attempted legislation of 1897 had been held to be void. The term, therefore, was, as it always had been, for the two years commencing in January, and the police judge was, as he always had been, elected at the general election in the fall. Gordon had been allowed to hold over until his successor was duly elected at the fall election and had qualified and served, then he was refused any salary from that time on. That was what was decided in *State v. Moores,* 70 Neb. 48, and nothing else was decided, as will appear from the reading of the syllabus in that case. In the two opinions that were filed in that case, there is no clear and consecutive statement of the facts upon which the decision was founded. It was not necessary to discuss whether the police magistrate was a district officer or a municipal officer, and it does not appear that any such question was presented or discussed by the counsel. The statement that

it was a district office had nothing to do with the case. There was a rehearing granted, and Commissioner GLANVILLE'S opinion was done away with. In Commissioner OLDHAM'S opinion there is also some language *arguendo* which is now construed to mean that the office of police magistrate is not a municipal office, but no such point was decided in the case nor necessary to the decision.

To say that an officer elected by the voters of a municipality to an office established by the legislature in and as a part of the city charter, an officer who must hold office within that municipality, whose chief function is to construe and enforce the ordinances of the municipality, whose bond is presented to and approved by the municipality, is not a municipal officer, within the meaning of the constitution, appears to be ridiculous upon its face. The voters of the city elect him as they elect other officers of the city, and the intention of the constitution was to allow them to elect all municipal officers at the same election. The act of 1897 was not held invalid because the legislature could not provide for electing the police judge at the city election, but because they attempted to change the length of the term, which the constitution does not allow. The first case (61 Neb. 9, opinion by Justice NORVAL) clearly states this.

The motion for rehearing is overruled, and the case

DISMISSED.

JULIA A. ADAMS ET AL., APPELLEES, V. AFFA C. SEELEY ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17,034.

Trial: MOTION TO DISMISS: SUBSEQUENT PROCEEDINGS. The fact that the defendant in the trial of a case to the court, when the plaintiff rests, interposes an objection that plaintiff has failed to establish a case, and moves that plaintiff's action be dismissed, does not preclude the defendant, in the event of a ruling adverse to his contention, from proceeding with the trial and offering such

evidence as he may have in support of his answer stating a defense, and it is prejudicial error for the court under such circumstances to refuse to hear further evidence and to render a judgment for the plaintiff.

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

H. W. Keyes and *J. L. McPheely*, for appellants.

W. S. Morlan and *J. L. White, contra.*

HAMER, J.

This is an appeal from the district court for Frontier county. The plaintiffs brought an action against the defendants seeking to quiet title to the N. W. ¼ of the S. E. ¼ and the S. W. ¼ of the N. E. ¼ of section 34, township 8, range 28 west of the sixth P. M., in Frontier county. The record shows that the plaintiffs introduced their testimony and rested. Then the defendants moved the court to find for the defendants and to dismiss plaintiffs' case. Thereupon the plaintiffs asked the court that the case be submitted upon the pleadings and evidence. After that the defendants asked leave to withdraw their motion to dismiss and to introduce further testimony in support of the allegations of their answer, and this was denied.

The journal entry touching the motion of the defendants to dismiss the plaintiffs' case and to introduce further evidence in support of the allegations of their answer shows: "The plaintiffs introduced their testimony and rested. Thereupon the defendants moved the court, on the pleadings and the evidence introduced, to find for the defendants and dismiss plaintiffs' case. Upon said motion of the defendants, the plaintiffs joined, and asked that the case be submitted upon the pleadings and the evidence already introduced on behalf of the plaintiffs. Thereupon the defendants asked leave to withdraw their motion to dismiss, and to introduce testimony in support of the allegations of their answer. Said motion of the defendants

was denied by the court, to which ruling of the court the defendants duly excepted."

The journal entry further shows that there was a judgment in favor of the plaintiffs quieting the title to the land above described. An examination of the bill of exceptions fully sustains the journal entry touching the motion of the defendants to dismiss the action and what was said and done by the plaintiffs; that the defendants attempted to withdraw their objection and to offer the court testimony in support of their answer to the petition; and that the offer to withdraw the objection and the offer to produce testimony were both denied. Counsel for the defendants offered to call one John Melvin to the stand, whereupon counsel for the plaintiffs, Mr. Morlan, said: "I think this thing has gone far enough. We object to John Melvin taking the stand, and, further, the counsel is in contempt of court. * * * Mr. McPheely: The defendants, Paul S. Seeley and Affa C. Seeley, now offer to prove— Mr. Morlan: We object to making any offer to prove anything; the court has ruled on this, and no offer should be made in the present condition of the case. Objection sustained. Defendants except."

We think an examination of the authorities will conclusively show that the action of the trial court was an abuse of discretion. In *Gillette v. Morrison*, 9 Neb. 395, counsel for the plaintiff asked leave of the court to withdraw his rest, and for leave to introduce the journal entry showing the setting aside of the other journal entry constituting a judgment against the defendant. The court refused the request and sustained the motion for nonsuit. Held, that the district court should have granted the request of counsel for the plaintiff, and that his refusal to do so was an abuse of discretion, for which the judgment must be reversed and a new trial granted.

Section 1 of the code provides: "Its provisions, *and all proceedings under it*, shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice." Would that be a "liberal construction," and

would it tend to "assist the parties in obtaining justice" to forbid the defendant to prove his defense, as alleged in his answer, simply because he objects to the sufficiency of plaintiff's evidence?

The error of the trial court is doubtless due to the fact that it mistook the rule applicable to cases being tried before a jury where each party moves for a directed verdict to be applicable to this case. There is no similarity, and in this case counsel for the defendants *was careful not to agree to submit the case upon the evidence.* He was all the time seeking to *reserve* the right to *introduce his evidence.* He made his motion objecting to the sufficiency of the evidence for the plaintiffs, but he never waived his right to introduce evidence on behalf of his clients to establish their defense. The judgment of the district court is reversed.

REVERSED AND REMANDED.

CHARLES A. GRIMMEL, ADMINISTRATOR, APPELLEE, V. ANNA H. BOYD ET AL., APPELLANTS.

FILED JUNE 26, 1913. No. 17,339.

1. **Carriers: PASSENGER ELEVATORS: LIABILITY.** "One who installs passenger elevators in his building for the use of his tenants and the public generally is subject to the same degree of care in transporting and protecting his passengers as is imposed upon common carriers." *Quimby v. Bee Building Co.*, 87 Neb. 193.

2. ———: ———: ———. Where the defendants were the owners of the building described in the petition and referred to in the evidence, and maintained and operated therein a passenger elevator for the accommodation of their tenants and persons having business with their tenants, or desiring to call upon them, these facts constituted the defendants common carriers of passengers, and as such common carriers it was their duty, and the duty of their servant, to use the highest degree of care possible, consistent with the practical operation of said elevator, to avoid injury to passengers while being carried from one portion of said building to another.

3. ———: ———: ———. It was the duty of defendants in such case to have some one in charge of the elevator as a conductor, and the said conductor was charged with the duty of exercising on behalf of his employers the highest degree of care possible, consistent with the practical operation of the elevator, with a view to avoiding injury to passengers. In such case it was the duty of the conductor to see that the door to the shaft was not left open.

4. ———: ———: NEGLIGENCE OF PASSENGER: REVIEW. It is the duty of one who approaches the entrance to an elevator to enter the same to exercise that degree of care which a person of ordinary prudence would exercise under like circumstances; and, when the question as to the exercise of such care is properly submitted to the jury, the verdict will not be disturbed.

5. ———: ———: ———: ———. One who attempts to enter an elevator for the purpose of being carried to another part of the building should act with such care as a person of ordinary prudence would exercise under similar circumstances, and, if he fails to do so and his negligence contributes to cause an injury which he receives, the owner of the building is not liable for the damages sustained; and, where the question of the exercise of such care has been properly submitted to the jury and a verdict has been rendered for the plaintiff under evidence which supports it, the verdict should remain undisturbed.

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

Greene, Breckenridge, Gurley & Woodrough, for appellants.

Duncan M. Vinsonhaler and *W. H. Farnsworth, contra.*

HAMER, J.

Counsel for the appellants are to be congratulated upon the clearness of their contentions. The plaintiff in the court below recovered a judgment against the defendants for damages in a personal injury case, where it is claimed that the plaintiff's decedent was killed by being caused to step into an elevator shaft through the negligence of the defendants. The widow, son and daughter of the late Governor Boyd are made defendants. They are alleged to be

the owners of the Boyd Theatre building in Omaha, which at the time of the unfortunate tragedy contained 13 or 14 rooms occupied as offices or studios. Of these, the corner room at the west end of the hall on the fourth floor was occupied by Mrs. Walter Dale as a studio for instruction in vocal music. Miss Bessie Chambers, the decedent, had been Mrs. Dale's pupil for a period of about six months, and had been going to her studio at 5 o'clock in the afternoon once a week for that time. There is a passenger elevator in the building, the entrance to which on the fourth floor is about 55 feet from the west end of the hall on that floor, and about 40 feet from the door of Mrs. Dale's studio. The hallway is about 5 feet wide, and perhaps 89 feet in length, or a little more. There is a window in the west end of the hall facing the Y. M. C. A. building across the street, and another window about 20 feet east of the elevator on the south side of the hall, which faces an alley. The entrance to the elevator is similar to the doors to the offices. The door to the elevator sets into the north wall of the hall 8 or 10 inches from the outside of the door casing. The elevator was in charge of a colored man named Sam Madison. There was an electric light or lamp in the elevator cage, which it is claimed by the defense was always lighted. On March 16, 1910, Miss Bessie Chambers was at Mrs. Dale's studio with Miss Mary Ellsworth. After she had finished her lesson the three ladies, Mrs. Dale, Miss Ellsworth and Miss Chambers, left the studio together and walked along the hall east towards the elevator. It is said that Miss Chambers was on the north of the hall on the side nearest the elevator, and that Miss Ellsworth was on the south side of the hall, and that Mrs. Dale was in the middle, as the three walked abreast toward the elevator. It was about half past five in the afternoon, and was growing dark in the hallway. It is claimed by the defendants that Madison, who was in charge of the elevator, said nothing to any of the ladies, and that no one of them said anything to him, also that the ladies saw this colored man standing at the window which faced to the

south. It is further claimed by the defense that this man did not approach the elevator, and that he made no movement of any kind, and that he remained in the position where he was when the ladies first saw him near the window until after the accident happened which resulted in the death of Miss Chambers. It is claimed by the defense that Mrs. Dale did not lock her door when Miss Ellsworth and Miss Chambers left the studio, and that she was not leaving for the afternoon, and therefore was not herself intending to use the elevator, and that as the three young women walked down the hall from Mrs. Dale's door toward the elevator they were laughing and talking, and that the subject of their conversation was facial massage; that when they got to the elevator entrance, or near it, they stopped; that they could not have seen the opening if they had looked. There is no evidence that Miss Chambers did not see the elevator entrance, or that she had her attention called in any way to the fact that the elevator itself was *not there ready to be entered.* It is further claimed by the defense that Miss Ellsworth did not look to see whether the door to the elevator was opened or closed, and it is claimed that Mrs. Dale saw that the elevator was not there. It is not, however, claimed that Mrs. Dale or Miss Ellsworth called the attention of Miss Chambers to the fact that the elevator was not there. Miss Chambers seems to have been looking toward Mrs. Dale. Just before she stepped into the shaft, where she fell to her death, she said to Mrs. Dale: "You haven't." As she said that, she turned from Mrs. Dale and stepped into the elevator shaft, fell to the bottom of the shaft, and was instantly killed. The door of the elevator shaft was open, and the elevator itself was above the floor.

That the matter may be the better understood, we quote a small part of the evidence from Miss Ellsworth's testimony as to just what transpired at the elevator: "Q. I don't care to go any further with it. When Miss Chambers made this remark of these two words, 'You haven't,' she was looking towards Mrs. Dale? A. Yes. Q. That was

away from the opening into the elevator? A. Yes. Q. And instantly, without looking into the opening of the elevator, she turned and stepped in? A. Yes." Mrs. Dale's statement is as follows: "And as we stood there talking and laughing for a few seconds, I think it must have been inside a half a minute, and I made a little remark, and she laughingly answered me, and turned and stepped quickly into the shaft." Miss Ellsworth testified: "Q. You should say she stepped first before she looked into the shaft? A. Yes; she turned as she stepped, but— Q. The turning and the stepping were about the same time? A. Yes. Q. *She didn't look before she stepped, however, did she?* A. *I don't think so.*" Mrs. Dale testified: "Q. Miss Chambers didn't look toward the opening into the elevator before she stepped into it, did she, Mrs. Dale? A. I didn't see her look. * * * Q. So, if she had looked, turned around and looked at the shaft or the opening into the elevator, she could have seen it; she was where she could have seen? A. You mean I could have seen if she looked? Q. No; *she was where she could have seen if she had looked?* A. Yes. * * * Q. Did I ask you, Mrs. Dale, whether Miss Chambers stepped into the shaft sideways, or did she turn clear around and step in it facing, squarely facing, the shaft? A. My remembrance is she wheeled on her left foot and stepped in with her right. Q. Stepped forward with the right foot? A. Yes."

By a stipulation it appears that Madison was up on the fourth floor. Why he was up there no one seems to know. There is no showing that Miss Chambers saw that the elevator was not there, or that Miss Ellsworth or Mrs. Dale called her attention to the fact that it was not there, or that the light, claimed to be in it, was not shining. The elevator had gone up the elevator shaft. It does not appear that there is any evidence to show why it went up the shaft.

Appellants complain of the eighth instruction, which is as follows: "By negligence of the defendants in this case is meant a failure on the part of the defendants' servant to

exercise that high degree of care required of a common carrier of passengers, as elsewhere defined in instruction No. 4. By contributory negligence is meant any negligence of plaintiff directly contributing to the accident. By ordinary care is meant that amount or degree of care which common prudence and a proper regard for one's own safety required under the circumstances shown in the evidence."

As the fourth instruction was referred to in the eighth, we copy that part of it which we deem material. It is contended by the appellants that they were not negligent in fact, and that they should not have been held to be negligent as a matter of law. It is then contended that the act of Bessie Chambers in stepping into the open elevator shaft was contributory negligence, and that it proximately caused her death.

The door of the elevator shaft was open, and every witness agrees to that. The elevator was not at the bottom of the shaft, and every witness agrees to that. If Madison, the servant employed to run the elevator, had kept it down on a level with the door of the shaft, the accident could not have happened. The fourth and eighth instructions are particularly applicable to this.

In the fourth instruction it is said: "It was the duty of the defendant in this case to have some one in charge of said elevator as conductor, and the evidence establishes that they employed one Sam Madison in that capacity, and he was charged with the duty of exercising on behalf of his employers the degree of care required of a carrier of passengers, as above in this instruction defined; therefore, if you find from the evidence that Madison knew, or in the exercise of the high degree of care required of him ought to have known, that Bessie Chambers or other persons in the building were intending to use the elevator at the time in question, it was his duty to so manage and control said elevator as to avoid injuring any one attempting to enter the same while using ordinary care; and, if you further find from a preponderance of the evidence that said Madison left the door of the elevator shaft open and the elevator

unattended, you should find defendants guilty of negligence; and, if you further find from a preponderance of the evidence that the death of Bessie Chambers was the direct and proximate result of such negligence, and that her next of kin have suffered pecuniary loss in consequence thereof, your verdict should be for plaintiff, provided you do not find that said Bessie was guilty of negligence, as elsewhere instructed, directly contributing in any degree to cause her death."

By instruction No. 8, and also by instructions Nos. 5 and 6, the jury were informed that it was the duty of Bessie Chambers, upon approaching the elevator entrance and entering the same, to exercise that degree of care which a person of ordinary prudence would have exercised for her own safety under the circumstances. This idea is clearly expressed in at least the three instructions mentioned. As we view the matter, the jury were properly charged concerning the rule of contributory negligence. The fourth and eighth instructions, given by the court on its own motion, are models of clearness. It is contended by counsel for appellants, with much force, that when the jury were told that the defendants were negligent because Sam Madison was not within the elevator or at the entrance to it, so as to prevent any person from going into the shaft when the elevator was not there, the issue of Bessie's negligence might as well have been withdrawn from the jury. The man in charge of an elevator is, from the nature of his occupation, required to be continuously on hand. It is his business to see that the door to the shaft is not left open, and that those seeking passage do not fall to their death through his conduct. In this particular case the conduct of Madison, who was in charge of the elevator, would seem to be particularly subject to censure. He had the elevator up on the fourth floor. He left the door to the elevator shaft open and unguarded. He permitted the elevator to climb up the shaft, so that there was nothing to prevent the unfortunate girl, when she stepped into what she supposed was a safe place, from be-

ing precipitated to the bottom. The fact that he stood there near the elevator shaft was a sort of guaranty that one might safely step within and find himself standing in the elevator. In view of the facts, the language of the instruction seems temperate and guarded. In view of the circumstances of this case, it was probably very difficult for the jury to find otherwise than that Madison left the door of the shaft open and unattended, except that he stood not far away from it, and that he did not call Bessie's attention to the fact that the elevator had gone up the shaft, and that it was a pitfall of death that awaited her if she stepped in. The main questions were left with the jury. Bessie was required to exercise ordinary care. If she did not, then she was guilty of negligence. If she was guilty of negligence that directly contributed to her death, then the defendants were not guilty. This matter was properly left with the jury, and they found for the plaintiff.

The elevator shaft is a perpetual menace to those who would use the elevator. No means of public carriage is used so frequently as an elevator. It is used many times a day, and it is and ought to be the duty of the man who is left in charge of it to protect those who use it, and to see that the elevator itself may be safely entered when it is used, and that it is at the entrance to the elevator shaft so the passenger may step into it.

The fourth instruction is further criticised by counsel for the defendants in this way: In the fourth instruction it is assumed that Madison had notice of the intention of Bessie Chambers to immediately enter the elevator. It is then said that there is no evidence that "he had any such notice, and no pretense that she or either of the two ladies with her indicated such purpose." For what purpose do persons in the fourth story of a building go to an elevator? It would seem that they go there to use it. The cases of *Knapp v. Jones*, 50 Neb. 490, *Omaha H. R. Co. v. Doolittle*, 7 Neb. 481, *Village of Culbertson v. Holliday*, 50 Neb. 229, and *City of Beatrice v. Forbes*, 74 Neb. 125, are cited, touching the want of ordinary care and contributory negli-

gence. We are unable to accept the views of counsel for the appellants. To us the cases which they cite do not seem to be in point. We find no errors prejudicial to the defendants.

It is contended with great earnestness that the verdict is excessive. Bessie was helping her father and mother in a substantial way. To the mother she gave $25 a month out of her earnings, and to the father she contributed $10 a month toward his support. She assisted in the housekeeping and in the household work. No one may say that she might not in the future provide more for her parents than she was then providing. She was 29 years old, and she was cultivating herself. Each year, perhaps, she would be able to earn a little more than she had earned in the past. We are unable to say that the amount of the verdict is excessive.

The judgment of the district court is

AFFIRMED.

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

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1913.

STATE, EX REL. EDWARD GUNNARSON, APPELLEE, V. NEBRASKA CHILDREN'S HOME SOCIETY ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1913. No. 17,235.

1. **Habeas Corpus**: VENUE: CUSTODY OF CHILD. An application for a writ of habeas corpus by a parent to recover the possession of his minor child may be brought in the district court in the county where the unlawful detention takes place. Whether it may also be brought in the county where the relator resides is not decided.

2. **Parent and Child**: SURRENDER OF CUSTODY OF CHILD: REPUDIATION OF AGREEMENT. A father can, by his agreement in writing, surrender the custody of his infant child to another, so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and retain the custody of his child, unless he can show a clear breach of the agreement, or an abuse of the child, or that the best interest of the child requires it.

3. ———: CUSTODY OF CHILD: EVIDENCE. Evidence examined, its substance stated in the opinion, and *held* that it is for the best interest of the child to remain in the custody of the respondents.

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

Allen & Dowling and *Baldrige, De Bord & Fradenburg,* for appellants.

H. Halderson and *M. B. Foster, contra.*

BARNES, J.

This was a proceeding in habeas corpus brought in the district court for Madison county by the relator, Edward Gunnarson, to recover the possession of his two minor children, Olga Gunnarson and Ellen M. Gunnarson. A trial resulted in an order giving the custody of Ellen M. Gunnarson to the relator, and remanding the custody of Olga to the respondents. From that judgment the respondents have brought the case to this court by an appeal.

It appears that the relator, on or about the 18th day of March, 1910, by an instrument in writing, duly signed and acknowledged before a notary public of Madison county, relinquished the care and custody of his two daughters to the respondents, who took them, without objection on his part, to Omaha, in Douglas county.

It is respondents' first contention that the action should have been commenced in Douglas county, and the district court for Madison county had no jurisdiction in this case to make the order of which the respondents complain. It is argued that the action should have been commenced in the county where the unlawful restraint took place, and some of the authorities seem to sustain that contention. Whether it may also be commenced in the county where the relator resides has not perhaps been determined by this court, but we deem it unnecessary to decide this question, for the reason that the judgment in this case can well be put upon another ground.

It appears that about five years before the commencement of this proceeding the wife of the relator died, leaving him with the two children in question, one of whom was about a year old, and the other some four years of age; that immediately after the death of his wife the relator placed the youngest child in the charge of a Mrs. Newman, residing in Newman Grove. The eldest girl, Olga, was placed in charge of one Eugene King, where she remained some four or five months, when she was also placed in the charge of Mrs. Newman. That for the period of about four

years the relator also lived in the Newman home. The treatment of the children was such as to cause comment among the neighbors, and in March, 1910, Gunnarson's brother and wife came on a visit to Newman Grove. They found such a condition existing that they notified the officers of the respondent that something ought to be done for the care of the children, and Mrs. Quivey, acting for the respondents, came to Newman Grove, and secured the relinquishment above mentioned, and, without objection on the relator's part, took the children to Omaha. They were afterwards placed in the home of Philip Nichols and Emma E. Nichols, his wife, and in the home of Robert A. Collier and Retta Collier, his wife, at or near the town of Campbell, in Franklin county, Nebraska. At the time the children were taken to Omaha the relator was living in the home of Mrs. Newman, whom, it is apparent from the record, in a few days thereafter he married, and thereupon he filed the application for a writ of habeas corpus to recover possession of the children.

The district court found that there was no fraud, false representations or undue influence used on the part of the respondents to obtain possession of the children. The finding of the court reads as follows: "The court further finds that said instruments (relinquishment papers) in writing were not obtained by fraud, false representations or undue influence on the part of the respondents, or any other person, and that the relator was persuaded to sign the same by persons acting in good faith, who believed that they were acting for the best interest of said children, without false representations on their part." The court, however, found that the instruments were voidable and subject to rescission by the relator, and that on the 19th day of March, 1910, the relator notified the persons in charge of the office of the respondents, the Nebraska Children's Home Society, that he desired to rescind the authority of said instruments purporting to convey to said Nebraska Children's Home Society the custody of the said children, and that he thereby rescinded and canceled his said agreements.

It is a significant fact that the court further found that "the relator has not furnished, and is not able to furnish, proper parental care, custody and control of the said Olga Gunnarson, and is not entitled to the custody of said child." The court further found, however, that "the relator has been, and is able to furnish a home and proper parental control for the said child, Ellen M. Gunnarson, and is a proper person to have the custody of said child, and is entitled to her custody." There was a further finding by the court that "the Nebraska Children's Home Society is a suitable institution to have the control and custody of said children, and that said Robert A. Collier and Retta Collier are suitable persons to have the actual custody of said Ellen M. Gunnarson, and that said Philip Nichols and Emma E. Nichols are suitable persons to have the actual custody of said Olga Gunnarson." It is clear that the findings of the court are somewhat inconsistent.

The testimony shows that it was a matter of common knowledge that the relator lived with Mrs. Newman. He testified: "I lived there at Mrs. Newman's house three years before I signed exhibits A and B. When I was not at home, Mrs. Newman had charge of these little children."

A Mrs. Condrim testified, in substance, that she had lived at Newman Grove for about 18 years, and had known Mrs. Gunnarson, the mother of the two girls; that she lived across the corner of the block from Mrs. Newman. She said Mrs. Newman told her that she was a widow, and she testified in regard to a conversation she had with Mr. Gunnarson. In relation to this matter her testimony is as follows: "Well, I don't remember just how we started the talk. He said to me that the girls were not treated right. * * * And I said: 'Are you married to her (meaning Mrs. Newman)?' He said: No; he was not married. I said: 'Well, if you was a decent man you would not live there with your children if you were not married.' I says: 'Why don't you take them away?' He says: 'That is what I should do.' That is about all that was said."

Mr. Nelson, cashier of the bank at Newman Grove, who

knew the Gunnarsons well, testified, in substance, as follows: I had a talk with him after he sent the children to the respondents. I told him it was a pretty hard thing for a father to have to do. He mentioned something—he thought the children would be better off to have a home—something to that effect. People made remarks that relator and Mrs. Newman were not married. I was surprised to learn that they were not married, because I did not think it was quite the proper way for a man to live with his children. Don't know how long they lived there. Relator and Mrs. Newman did not get married until the girls had been sent away. This witness further testified that Gunnarson drank excessively, and that the children were whipped by Mrs. Newman when they lived with her; that the eldest child ran away from home on account of the treatment she had received.

A Mr. Juelson testified that, after the papers were signed, Gunnarson proposed that he get an officer to go along to the house to get the children. One was at home with Mrs. Newman, the other had run away, or had gone into the country some distance, the night before. Gunnarson seemed afraid to go. He said he knew there would be trouble if he went down. Mrs. Quivey went down. Mr. Gunnarson drove out to get the other child.

Mrs. Quivey testified that Gunnarson told her that he went home about 11 o'clock one night, and the children were both out of doors, and were not willing to go into the house, and that made him send for some one to take care of them. He said the younger girl had been treated well, but Mrs. Newman did not like the other one, and treated her cruelly. He said she had whipped her and had hurt her. He said the eldest girl had run away the night before.

Louis Pospicl testified, in substance, that he lived at Newman Grove; was 35 years old, and was a married man; was in the implement business; and lived about 300 or 400 feet from Mrs. Newman; that he knew the children; that he did not know whether Gunnarson was married

to Mrs. Newman or not. He further testified: "I have noticed lots of times that they (referring to the children) were not treated right. Mrs. Newman slapped Olga. I heard lots of hollering between Mrs. Newman and Olga. Mrs. Newman was hollering. I did not know what she said. I know she whipped her with her hand."

Mrs. Pospicl testified: "The little girls did not have any home except Mrs. Newman's; if they had any other I would have known it. Yes; I saw Mrs. Newman whip these children. Yes; snow on the ground; she whipped both of them. She did not whip the little one as much as she whipped the oldest one. She whipped the oldest until she laid down in the snow and hollered. She said: 'Mamma, don't lick me any more.' I called to her. The children were screaming so much I guess she didn't hear me. Yes; it was Olga. She was lying in the snow. I don't know how many times she slapped her. I could not hear just what was said. The sun was going down. She hit her a good many times. She hit her when she was lying in the snow. I said to Mrs. Newman: 'What are you doing?' I went in, and did not see her any more. I have heard the children scream over from the house. I have heard it so many times I do not know." On cross-examination the witness testified: "I do not know what Mrs. Newman whipped the girls for that day. No; I didn't see Olga shortly after the whipping, nor for some time later. I don't know whether there were any marks on the girl from this whipping."

Mr. Gutru, who is in the hardware business at Newman Grove, testified in regard to the treatment of the children. He said: "I knew the little girls quite a long time before they were sent away. They came to my house and got in with my children. As I understand it, they had been driven out of the house. My wife tried to send the children home when supper time came, but she couldn't get rid of them. She called me up at the store, and wanted me to look after the children and get them away, because she didn't want to get into any trouble, so I set out to find

Mr. Gunnarson, and took him down and asked him to go and get the girl. * * * He said he would, and started off. Some other gentlemen informed me that Gunnarson went down and inquired, and said he would punish the girl, so I started right home. I didn't want any trouble at my place. * * * We talked a little while, and he said, 'We had better get the girl and take her home,' and we found the girl had lit out—had gone out the back door, and was gone. I don't know where she went to. * * * Well, I can't say that he was particularly under the influence of liquor. I know that he is in the habit of getting drunk very often. One day the two girls came with my girl from the schoolhouse, and would not go home. They wanted my girls to go home with them, and said, 'They will not whip me if you go with us.' * * * The same day my children went up town to find Gunnarson; and they had walked around on the streets, and Mr. Gunnarson and the two children came into the store. They stopped there, and we got to talking of the girl. * * * Mrs. Newman had accused her of telling lies, and that she had punished Olga and whipped her, and washed her mouth to wash the lies out of her mouth. Gunnarson said he couldn't be there. He said they were whipped or mistreated, and he said that is too bad that they were treated that way. He says, as near as I remember, that they tell lies, or something like that, and he knew that was one of the punishments they received for telling lies." Testifying of Gunnarson's general reputation in the community, he stated: "He is in the habit of getting drunk. I would not say that he is the worst drinker in Newman Grove * * * is right with the drinkers. Olga didn't tell that she was punished by putting soap in her mouth at my house. She told it out in the street before Mr. Gunnarson and myself. I had very good reason to believe it. The girl cried, and didn't dare to go home. * * * We had quite a little talk with Gunnarson about this matter. He seemed to be in trouble himself to know where to take the children. He was apparently afraid to take them

home himself. No; I didn't talk with him about a plan, for I didn't know of any plan, * * * to take care of them."

John Juelson, a reputable business man of Newman Grove, testified that he knew the people very well; that Gunnarson's general reputation in the neighborhood was that he drank pretty hard.

Lillian McClelland testified for the respondents that she was at the Children's Home Society when Gunnarson came to see about reclaiming his children. Her testimony, in substance, is as follows: "When he came there I was alone. I should say he was intoxicated. Yes; I have seen enough of intoxicated men to know when they are intoxicated. I had a talk with him with reference to the children. He said he came to see Mrs. Quivey. I told him Mrs. Quivey was out of the city, and would not be able to see him before the first of the following week. He said he had a letter from Mr. Quivey that he had written. I said: 'Why did you give your children up, if you wanted to have them back again?' He said he didn't really want to give them up, but he had been living with Mrs. Newman for five years. He said he did not believe it was the right place for the children, but he wanted them back." On cross-examination she testified: "It was about 2 o'clock in the afternoon that Gunnarson appeared at the office. Yes, sir; he must have come directly from the depot to the office. Yes; he was drunk. Well, he lay over the register and vomited; acted as much like a drunk man as I ever saw. I never saw him but twice; that is all I know about his drinking."

Miss Carrie Stewart testified, in substance, as follows: "I don't think I ever was at Newman Grove before that case came up. It was in my judgment a case that required attention. Yes; I have seen Mr. Gunnarson. First about January 6, 1910, at Newman Grove on a coach attached to the freight train. He came in and sat down just back of me. From his remarks I judged he was intoxicated. Shortly after I took my seat in the car, Mr. Gunnarson

came on with two little girls; was sitting just back of me, and they sat there for a short time. He seemed to be so much intoxicated that he could scarcely resist Mrs. Newman, and she took the two little girls and got off the train and went across the railroad track. She was scolding the eldest girl."

There is considerable other testimony in the record showing, or tending to show, that Gunnarson was a man addicted to the use of intoxicating liquors. It seems clear from the testimony that Gunnarson himself knew that his children had been cruelly treated by the woman he was living with. It also seems clear that she had no affection for the children of Gunnarson's first wife; that her conduct towards them drove them away from home; that they were subjected to frequent punishment in the way of whippings. If she would do this while the children were living there, before they were taken in charge by the respondents, it is fair to assume that she would continue this cruel treatment in case they were returned to the custody of the father.

A father can, by agreement, surrender the custody of his infant children to another, so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and retain the custody of the children, unless he can show a clear breach of the agreement, or an abuse of the child, or that the best interest of the child requires it. *Cunningham v. Barnes,* 37 W. Va. 746; *Anderson v. Young,* 54 S. Car. 388.

In *Clark v. Bayer,* 32 Ohio St. 299, it was said: "It sometimes happens that parents have abandoned their minor children, or by act and word transferred their custody to another. In such cases, where the custodian is, in every way, a proper person to have the care, training, and education of the infant, and the court is satisfied its social, moral, and educational interests will be best promoted by remaining in the custody of the person to whom it was transferred, or received, when abandoned, the new custody will be treated as lawful and exclusive."

In *Bonnett v. Bonnett*, 61 Ia. 199, it was said: "The weight of authority, we think, sustains the position that a parent can by agreement surrender the custody of his child, so as to make the custody of him to whom he surrenders it legal."

In view of the finding of the trial court that Robert A. Collier and Retta Collier are suitable persons to have the actual custody of Ellen M. Gunnarson, we see no reason why that custody should be transferred again to the father, who voluntarily relinquished it. It has always been held by this court that the interests of the child should be taken into consideration in determining its custody. *In re Burdick*, 91 Neb. 639; *State v. Porter*, 78 Neb. 811; *In re White*, 33 Neb. 812. As we view the record, it is apparent that it is for the best interest of Ellen M. Gunnarson that she remain in the custody of Robert Collier and Retta Collier until such time as it is shown that a change of custody will materially promote the child's welfare, morally and physically.

The judgment of the district court, so far as the care, custody and control of the child Ellen is concerned, is therefore reversed, and the proceeding is dismissed.

REVERSED AND DISMISSED.

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

LARDNER HOWELL, APPELLEE, V. CORNELIUS JORDAN, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,336.

1. **Tax Sale: VALIDITY: NOTICE OF REDEMPTION.** Notice of the expiration of the time for redemption of real estate from tax sale must be served on the person in whose name the land was assessed; and there must be personal service of the notice, or a showing that such service cannot be had, in which case service

may be made by publication. A failure to serve such notice, or show the necessity for service by publication, renders the subsequent proceedings void.

2. ———: REDEMPTION: TENDER. Tender by the owner to the county treasurer of the payment of an amount sufficient to redeem the land from tax sale, such tender being refused, is a sufficient compliance with the statute providing for payment of all taxes due to enable the owner to maintain an action for redemption of his land from tax sale.

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

Michael J. O'Connell, Allen G. Fisher and *William P. Rooney,* for appellant.

Albert W. Crites, contra.

BARNES, J.

Action to redeem a quarter section of land situated in Sioux county, Nebraska, from a sale for taxes, and to quiet the title of the plaintiff thereto. A trial in the district court resulted in a judgment for the plaintiff, and the defendant has appealed.

The record discloses that on the 2d day of November, 1902, the entire quarter section of land in question was sold to one Grant Guthrie for the delinquent taxes of 1901, amounting to the sum of $3.93; that notice of the time of expiration for redemption was published in the Harrison Sun, a newspaper published and in general circulation in Sioux county, commencing on the 15th day of July, and ending on the 29th day of that month, in the year 1904; that on the 14th day of November of that year a treasurer's tax deed was issued to the said Grant Guthrie, who thereupon conveyed the land by quitclaim deed to the defendant, Cornelius Jordan, who claimed to be the owner thereof under the quitclaim deed above mentioned.

It appears that the published notice was the only notice given of the expiration of the time for redemption; that the land was taxed in the name of William A. Pat-

zowsky, and the title was in one W. H. Carnahan, receiver of the McKinley-Lanning Loan & Trust Company, and his deed was recorded on the 3d day of June, 1903, in the deed records of Sioux county. The statute providing for notice of the expiration of the time for redemption was construed in *Thomsen v. Dickey*, 42 Neb. 314, and it was there held that the notice must be served upon the person in whose name the land was assessed. There is no showing that personal service of the expiration of the time for redemption could not be served upon Patzowsky, or some person in possession of the land. The record discloses that no notice other than by publication was served upon Patzowsky, and it is not shown that personal service could not have been made upon him. For this, and other reasons, it appears that the notice was defective, and conferred no authority on the treasurer to execute the tax deed in question.

Again, it appears that the entire 160 acres of land was sold for the paltry sum of $3.93, and it does not seem at all probable that no one would have purchased a less amount of the land for that sum. When it is sought to divest the owner of his land by a tax deed, it has always been held by this court that the provisions of the statute must be strictly complied with, for such provisions are mandatory. *State v. Gayhart*, 34 Neb. 192; *Jones v. Duras*, 14 Neb. 40; *Peck v. Garfield County*, 88 Neb. 635. It therefore follows that the tax deed was void.

It is contended that there was no showing on the part of the plaintiff that he had paid all of the taxes due upon the land, and therefore he was not entitled to a decree in his favor. It appears, however, that the plaintiff had tendered payment of all of the taxes due several times to the county treasurer, who had refused to accept such payment. The plaintiff could not do more, and therefore this contention cannot be sustained.

Finally, it appears that there was an accounting of the amount necessary to redeem, and the court found that sum to be $36.50. This sum of money the plaintiff was re-

quired to pay in order to redeem the land from the tax sale, and that amount was paid into court for the benefit of the defendant.

It follows that the judgment of the district court was right, and is

AFFIRMED.

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

ONN LUMBER & SHINGLE COMPANY, APPELLANT, V. POWELL LUMBER COMPANY ET AL., APPELLEES.

FILED SEPTEMBER 26, 1913. No. 17,340.

Estoppel in Pais. To create an estoppel *in pais*, it must appear that the party against whom it is invoked made the declaration or did the act, on which the estoppel is sought to be based, either with the express intention to deceive, or acted with such careless and culpable negligence as to amount to a constructive fraud.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

F. N. Prout and *T. A. Witten*, for appellant.

C. C. Flansburg and *C. H. Denney, contra.*

BARNES, J.

Action to recover the purchase price of a car-load of shingles. A trial in the district court for Jefferson county resulted in a judgment for the defendants, Delmar D. Norton and Isaac J. Elwood, and the plaintiff has brought the case to this court on appeal.

The record discloses that for some years prior to the 17th day of February, 1910, the defendant Delmar D. Norton was the owner of a lumber yard in the village of Powell, Jefferson county, which was in charge of an agent

by the name of Frisch, who carried on the business under the name of the "Powell Lumber Company;" that on that date he sold the yard in question to the defendant Elwood, giving him a deed to the real estate, and executing to him a bill of sale of the stock of lumber; that Elwood on the same day sold the yard to W. L. Parker and Edgar A. Foster, who at that time took possession of the yard and business; that thereafter, and on or about the 10th day of March, 1910, Parker and Foster ordered the car-load of shingles in question from the plaintiff, who shortly before that time succeeded to the business of the Derickson Lumber Company of Seattle, Washington. The order was by mail, and made by defendants Parker and Foster, under the name of the Powell Lumber Company, the order having been signed by a rubber stamp; the letter-head used in mailing the order did not contain the name of either Norton or Elwood. The car-load of shingles was shipped upon this order. The shipment never came to Powell, but was diverted in transit to the Panhandle Lumber Company of Canadian, Texas, and it was sought to hold defendants Norton and Elwood on the ground of an estoppel.

It was not claimed that plaintiff had ever, at any time before the shipment in question was made, sold either to Norton or Elwood any lumber, or had any dealings with the Powell Lumber Company. It is claimed, however, that before it made the shipment it had examined a "Red Book" (the date of which is not given), used by the trade, and had ascertained that the defendant Norton was worthy of credit, and therefore made the shipment in question. It is not claimed that the plaintiff made any other or further investigation, or that it ever had any dealings or correspondence with either Norton or Elwood, or the Powell Lumber Company, except to fill the order in question. The district court held that there was no estoppel, and that, as to the defendants Elwood and Norton, plaintiff was not entitled to recover.

In order to create an estoppel *in pais*, it must appear that the party against whom it is invoked made the dec-

laration or did the act, upon which estoppel is sought to be based, either with the express intention to deceive, or with such careless and culpable negligence as to amount to a constructive fraud. *Griffeth v. Brown,* 76 Cal. 260.

It appears that, when the order in question was made, neither Norton nor Elwood was interested in any manner in the Powell Lumber Company. Norton had sold and conveyed the entire business to Elwood on the 17th day of February, 1910, and thereafter had no interest in the Powell Lumber Company. Elwood had sold and conveyed the property to Parker and Foster on the same day, and therefore had no interest in the company. There had been no course of dealings between the plaintiff and the Powell Lumber Company, and there was nothing on which to base an estoppel as against Norton or Elwood. It does not appear that either Norton or Elwood had any knowledge or intimation that it was the purpose of the defendants Parker and Foster to continue the business under the trade-name of the Powell Lumber Company, and, as we view the record, there is nothing in the evidence to create an estoppel as against either of them.

There was a special appearance by the appellees, which was kept good, and it is claimed by them that the district court for Jefferson county never acquired jurisdiction over them, or either of them. It is not necessary to determine that question, for the reason that the plaintiff has failed to establish any liability on the part of the appellees.

The judgment of the district court is therefore

AFFIRMED.

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

CORA CAROLINE COLMAN, APPELLEE, V. ALBERT LOEPER, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,351.

1. **Intoxicating Liquors:** ACTION FOR DAMAGES: LIMITATIONS. Where it is shown that an unlicensed seller of intoxicating liquors has sold such liquors to one who has become an habitual drunkard, within four years next before the commencement of an action brought by his wife to recover damages for the loss of support, a plea of the statute of limitations is not available as a defense.

2. ———: ———: RECOVERY. In such a case, where the disability is permanent, the injury is a continuing one, and recovery may be had for the whole period of the disability.

3. ———: ———: DEFENSES. The fact that the wife consented to or acquiesced in the sale or gift of intoxicating liquors to the husband is no defense or bar to an action for damages by the wife, and in behalf of the minor children, for loss of means of support through the disability or disqualification of the husband for labor caused by drinking the intoxicating liquors. *Gran v. Houston*, 45 Neb. 813.

4. ———: SALES: CIRCUMSTANTIAL EVIDENCE. The sale of intoxicating liquors, like any other fact, may be proved by circumstantial evidence; and it is not error to receive the testimony of a station agent, who had delivered some 32,000 pounds of bottled goods labeled "mineral water" to the defendant, that in his opinion the goods were intoxicating liquors.

5. ———: ACTION FOR DAMAGES: WITNESSES: CROSS-EXAMINATION. Where, on the trial of an action for damages caused by the sale of intoxicating liquors to an habitual drunkard, the defendant has introduced evidence to show that he is the owner of a small amount of property, it is not error to permit the plaintiff to pursue that inquiry upon cross-examination, and show that the defendant was possessed of a farm worth about $8,000.

6. ———: ———: VERDICT. Evidence examined, and *held* that a verdict for $5,516.70 was not excessive.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

L. W. Colby, for appellant.

Hugh J. Dobbs, contra.

BARNES, J.

Action against an unlicensed seller of intoxicating liquors, brought by Cora Caroline Colman, for herself and her two minor children, to recover for the loss of support occasioned by the debauched and drunken condition of the husband and father, Harry D. Colman. A trial in the district court for Gage county resulted in a verdict and judgment for the plaintiff. The defendant has appealed, and his first contention is that a part of the damages claimed were barred by the statute of limitations.

It appears that plaintiff and her husband were married in 1894, and at that time he was a sober and industrious man; that for some six years thereafter he was able to and did earn about $1,000 a year, which he contributed to the support of his wife and children; that in the year 1900 he commenced to obtain intoxicating liquor from the defendant, and gradually became addicted to its excessive use, until the year 1906, when plaintiff induced him to take what is called the "Keeley Cure"; that when Colman returned from that institution he was sober and industrious, and resumed his occupation as a carpenter and farmer, and remained in that condition until the 4th of July, 1907, when he again obtained intoxicating liquor from the defendant, which he drank to excess; that he obtained such liquors from the defendant frequently, and again became an habitual drunkard, and was totally unable to support the plaintiff and his children; that he continued in the excessive use of intoxicating liquors until eventually he threatened to kill his wife and children, and they were compelled to flee from him and take up their abode elsewhere. In March, 1909, the plaintiff brought this action, and it appears that, owing to the debauched condition of her husband, she obtained a divorce from him on or about the 1st of June, 1909; that the husband continued to use intoxicating liquors until he died.

The defendant filed a motion to compel the plaintiff to separately state and number her several causes of action.

The motion was overruled, and the defendant filed an answer, in which he interposed a plea of the statute of limitations as to all sales of liquor which occurred prior to March 10, 1905, and on the trial the defendant requested an instruction to that effect, which was refused, and the court instructed the jury, upon his own motion, as follows:

"Instruction No. 4. If you find from the evidence at the time plaintiff married the said Harry D. Colman, and for some years thereafter, he was a sober and industrious man, was able to, and who did, earn money which he applied to the support of plaintiff and her children, and that afterwards the said Harry D. Colman became a drunkard, and by reason thereof failed to support plaintiff and her said children as well as he would have done had he not become a drunkard, and that defendant, Albert Loeper, at any time within four years prior to March 10, 1909, sold or gave to said Harry D. Colman any intoxicating liquor or liquors, which either caused, or contributed to, his said drunkenness, then plaintiff is entitled to a verdict against the defendant for the amount of damages which you find from the evidence she has sustained by reason of the drunkenness of said Harry D. Colman."

The question on this phase of the case is: Did the trial court err in refusing to treat the appellee's cause of action as separable? This action is not for a partial loss of support during any severable period of time embraced in the petition. It is an action for the total destruction of the means of support which would have been afforded the plaintiff and her children but for the wrongful and illegal sales of intoxicating liquors by the appellant to her husband through a long series of years. It is the ultimate and final result of such sales, namely, the total and permanent disqualification of her husband to support his family, that constitutes the plaintiff's cause of action. Such a cause of action is single and individual.

After reciting her marriage to Harry D. Colman in 1894, the petition alleges that, during all the times covered by her grievance, her said husband with herself and

children constituted one family; that she and her minor children were wholly dependent upon him for their maintenance and support. It is alleged that, during all the time mentioned in her said petition, defendant Loeper was engaged in the sale of intoxicating liquor at his residence in Gage county, Nebraska, without having ever been licensed to deal in alcoholic drinks; that during the years 1900, 1901, 1902, 1903, 1904, and 1905, and a part of 1906, her husband was transformed by the appellant from an absolutely sober, healthy and industrious man to a common drunkard, so that by July of the last named year he was in a condition of almost continuous inebriety; that during the month of July of that year he was placed in a Keeley Cure, and treated for six weeks for alcoholism; that on his return from said institution, and after taking such treatment, the defendant Loeper, well knowing that he had been under treatment at said institution, continued to ply him with intoxicating liquors, and to sell the same to him, beginning about July 1, 1907, and on the 4th day of July, 1907, to the date of the commencement of this suit, the plaintiff's husband lapsed again into the habitual and excessive use of alcoholic liquors as a beverage, such liquors having been furnished and supplied to him by the defendant, whereby he was rendered incapable of providing suitable support and maintenance for plaintiff and her children, and did utterly fail to provide such support and maintenance, and after a prolonged debauch for many years prior to the 20th day of February, 1909, plaintiff, believing that her own life and the lives of her children were endangered by the drunken and incapable condition of her said husband, fled from home with her children, and has not since lived with her said husband.

There is no hint in the language of this petition that the appellant considered her cause of action as anything else than the total disqualification of her husband to support herself and children. The contention of the appellant founded upon the theory of partial failure of

support is negatived by the averments of the plaintiff's petition and the evidence offered in support of it.

In *Pilkins v. Hans,* 87 Neb. 7, we held: "In an action against licensed saloon-keepers for damages arising from the sale of liquors to plaintiff's husband causing his death, it is proper to allege and prove that for some time immediately prior to the day of the death of the deceased the defendants had sold liquors to the deceased and had thereby caused him to become an habitual drunkard."

In *Stahnka v. Kreitle,* 66 Neb. 829, the sales by some of the defendants to the husband, an habitual drunkard, had extended through a greater portion of five years, and the judgment was affirmed. The court held that those defendants, who during the entire period of time had contributed to the formation of the habit, were liable for the resulting continued course of dissipation on the part of the husband.

In *Jessen v. Willhite,* 74 Neb. 608, it was held that one selling liquors is liable, not only for the actual results of the sale, but for all damages growing out of the disqualification resulting from or contributed to by such sale, without reference to the time through which such disqualification may continue.

The obvious meaning of the law is that, when a cause of action has once accrued under the civil damage provisions of the Slocumb act in favor of the wife against the liquor dealer for damages to her means of support arising from the sale of intoxicating liquors to her husband, whereby he has become an habitual drunkard and incapable of supporting his family, the injury is a continuing one, and the wife may recover for all future loss from the moment the cause of action arose, no matter what the quantum of the disqualification may be, and without regard to the length of time through which it may continue to run. It seems clear that the cause of action is not barred by the statute of limitations if a suit is brought within four years after the defendant has ceased to supply the husband with intoxicating liquor.

We are therefore of opinion that the instruction given by the court upon its own motion was as favorable to defendant as he was entitled to, and the instructions as to the statute of limitations tendered by the defendant were properly refused.

The defendant contends that the court erred in refusing to give instructions numbered 2 and 3, at his request. By instruction No. 2 the jury were told, in substance, that if they found from the evidence that the plaintiff voluntarily consented to, or contributed to, the intoxication of her husband by furnishing to him money to purchase intoxicating liquors from the defendant from which the plaintiff's husband became intoxicated, or if she assented to the sale of intoxicating liquors to her husband by the defendant by which liquor her husband became intoxicated, then in that case the plaintiff could not recover. By instruction No. 3 the jury were told that if they found from the evidence that the plaintiff voluntarily contributed money to her husband for the purchase of intoxicating liquors, or if plaintiff gave permission to the defendant to supply her husband with all the intoxicating liquors that he wanted, that plaintiff's husband became intoxicated by the use of said liquors so sold by the defendant, and became sick and neglected his business by reason thereof, those facts were proper to be considered by the jury on the question of damages. The question presented by these instructions is no longer an open one in this state. *Wardell v. McConnell,* 23 Neb. 152; *Gran v. Houston,* 45 Neb. 813; *Jessen v. Willhite*, 74 Neb. 608; *Kliment v. Corcoran,* 51 Neb. 142. In the case last cited it was said: "But whatever view we might feel constrained to adopt of the subject as an original proposition, the question is certainly not now an open one in this jurisdiction. In *Buckmaster v. McElroy,* 20 Neb. 557, the voluntary purchaser of intoxicating liquor was held to be within the protection of the statute providing that 'the person so licensed shall pay all damages that the community or individuals may sustain in consequence

of such traffic,' etc. The doctrine of that case was reasserted in *Curtin v. Atkinson*, 36 Neb. 110, and in *Gran v. Houston*, 45 Neb. 813, was applied to a state of facts in all essential respects identical with those here presented." It follows that the instructions were rightly refused.

Exception is taken to the giving of instruction No. 8, by the court upon his own motion. By that instruction the jury were informed: "In determining the amount of damages to which the plaintiff is entitled, if you find her entitled to damages, you will take into consideration the amount of support received by plaintiff from the said Harry D. Colman under the decree of divorce which she obtained from him, as shown by the evidence in this case, and make the amount you allow her personally that much less than it would be if she had not received anything from said Harry D. Colman by reason of said decree of divorce; but you will not deduct anything from the amount you allow for the support of the children, except the $30 which the evidence shows has been paid by said Harry D. Colman for their support, pursuant to the decree in said divorce cause."

It appears that after this action was commenced Colman's condition was so bad that the plaintiff was compelled to prosecute a suit for divorce against him; that in that action she was awarded a small amount of alimony, and provision was made for the support of the children. That decree was introduced in evidence, and the amount of alimony actually paid on the decree, together with the amount paid for the support of the children, was shown, and the court instructed the jury to deduct from the damages, if they found in favor of the plaintiff, the amount paid upon the decree. Of this defendant had no right to complain, and if the giving of this instruction was error it was error without prejudice, so far as his rights were concerned.

Complaint is made of the reception of the evidence of Alex T. Watson. This witness was the station agent of

the Burlington railroad at Diller, and his deposition shows that during the year 1906, the year 1907, and part of the year 1908, the defendant caused to be shipped to himself at Diller station, alone, from wholesale liquor houses in St. Joseph, Missouri, some 32,000 pounds of bottled goods, for which he receipted to the company as "mineral water," and which he hauled away. This evidence was introduced for the purpose of showing that the defendant, who was not a licensed saloon-keeper, was engaged in the sale of intoxicating liquors. Up to the time this testimony was introduced it had been strenuously denied by the defendant that he had sold any intoxicating liquors to Harry D. Colman, and this testimony was introduced for the purpose of showing that he had in his possession intoxicating liquors for sale, and incidentally to show that he had sold them to Harry D. Colman. The witness testified to the facts upon which he based his opinion, and it was those facts which tended to prove that defendant was an unlicensed seller of intoxicating liquors.

The sale of intoxicating liquors may be proved, like any other fact, by circumstantial evidence, and the testimony complained of was plainly introduced for that purpose. *Curran v. Percival*, 21 Neb. 434; *Dolan v. McLaughlin*, 48 Neb. 842; *McManigal v. Seaton*, 23 Neb. 549; *Pilkins v. Hans*, 87 Neb. 7. It is true that the witness testified that in his opinion the goods so received by the defendant as "mineral water" were in fact intoxicating liquors. The opinion of the witness was, of course, in itself no evidence upon which the jury could act, and must under some circumstances be so prejudicial as to require a reversal. In this case, however, the witness stated fully the facts from which the conclusion was drawn that the "bottled goods" were in fact intoxicating liquors, and the whole evidence is so conclusive upon this point that we cannot find that the defendant was prejudiced by the admission of the opinion of the witness.

It is also contended that the court erred in receiving

evidence of the fact that defendant was the owner of a farm worth about $8,000. It is a sufficient answer to this contention to say that it appears from the record that defendant opened up that question by his own testimony, and, having introduced evidence to show that he was worth a very small amount, the plaintiff was entitled to pursue that inquiry.

Finally, it is claimed that the verdict was excessive, and was not supported by the evidence, and was due to the passion and prejudice of the jury. The jury, responding to the issues and the proofs in the case, by its verdict, found that the husband, through his habitual drunkenness at the time this action was commenced, was permanently disqualified from supporting his family, and assessed the damages accordingly. By section 11 of the act relating to the sale of intoxicating liquors, it is provided that all persons who shall sell or give away upon any pretext, malt, spirituous or vinous liquors, or other intoxicating drinks, without first having complied with the provisions of this act, and obtained a license as herein set forth, shall, for each offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $100 nor more than $500, or be imprisoned not more than one month in the county jail, and shall be liable in all respects to the public and to individuals, the same as he would have been had he given bond and obtained license as herein provided. The effect of this provision is to place all dealers in intoxicating liquors on exactly the same footing with respect to damages occasioned by the traffic in intoxicants. A suit may be brought against individuals for the recovery of damages growing out of such traffic, whether licensed saloonkeepers or not.

In *Young v. Beveridge,* 81 Neb. 180, it was held that under the foregoing provisions of law the measure of damages recoverable by the widow against a saloonkeeper is the present value of the sum that the husband would have contributed to her during their joint expect-

ancy, and the amount recoverable by a minor child is the value of the support the father would have contributed to her support during her minority.

In the case of *Warrick v. Rounds*, 17 Neb. 411, it was said: "Questions of fact, and upon conflicting testimony, are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong."

Persons engaged in selling intoxicating liquors under license obtained pursuant to the laws of this state are liable in damages for all legitimate and approximate consequences of their traffic, and, if they have induced habitual drunkenness in a previously sober and industrious man, they are liable for a consequent thriftless, dissipated career followed by him after they have ceased to furnish him with liquor.

In *Jessen v. Willhite, supra,* it was said: "(1) One selling intoxicating liquor is liable, not only for the actual results of the sale, but for all damages growing out of the disqualification resulting from or contributed to by such sale, without reference to the time through which such disqualification may continue. (2) Where a husband becomes an habitual drunkard, and abandons his family and ceases to provide for its support, whether such loss of support is permanent or otherwise is a question of fact for the jury."

Acken v. Tinglehoff, 83 Neb. 296, was a case where a man 28 years of age, strong and able-bodied, capable of earning $700 a year, was killed by a train while intoxicated from liquors sold to him by the defendant saloonkeepers. It was held that a verdict of $4,500 in favor of his wife and children was not excessive.

In *Jessen v. Willhite, supra,* a verdict for $4,000 was sustained. In that case the husband furnished only $50 or $60 a month for the support of his family, and prior to the trial he had abandoned them.

In *Gran v. Houston, supra,* a verdict of $5,000 was

sustained. In *Scott v. Chope,* 33 Neb. 41, a verdict of $7,000 was affirmed as not being excessive, in the case of a man 24 years of age, whose earnings amounted to about $600 per annum.

In the case at bar, the husband at the time of the trial was 42 years of age, with an expectancy of something over 25 years, and the plaintiff's expectancy of life was much greater. The minor children were aged 13 and 15 years, respectively. Before the husband became an habitual drunkard, he was capable of earning, and did earn and contribute to the support of his family, the sum of about $1,000 a year, and the jury might well have considered that he would have contributed much more than $5,516.70, the amount of the verdict in this case, in the 25 years of his expectancy, to the support of his wife, and the support of his children during their minority.

There is no error in the record of which the defendant can justly complain. It is apparent that he had no defense to this action, and the only question for the consideration of the jury was the amount of the plaintiff's damages. In the light of all of the evidence contained in the record, it cannot be said that the verdict of the jury was excessive.

The judgment of the district court is therefore

AFFIRMED.

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

IN RE ESTATE OF JANE E. DOUGLASS.

WILLIAM ROYER ET AL., APPELLEES, V. JEFFERSON T. POTTER ET AL., APPELLEES, THOMAS DORSEY BEALL, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 18,008.

1. **Wills:** BEQUEST: "PUBLIC CHARITY." A gift by will of the income of certain shares of bank stock of the First National Bank to the

First Congregational Church Society of Seward, Nebraska, is a donation to a public charity.

2. ———: ———: TRUSTEES. The officers of the bank, where they are designated for that purpose, may hold the title to said bank stock as trustees, and pay the dividends accruing to said stock to the church for religious purposes.

3. ———: DEVISE: CHARACTER OF ESTATE. A gift by will of the parsonage, together with the lots upon which it is situated, to such church society so long as it is used for a parsonage, etc., is a donation to a public charity, and vests the church with a base fee to said lots, terminable upon an event that may or may not happen, and, until the happening of the contingency or event, the trustees or governing body of the church may hold and use the property for the purpose for which it was donated.

APPEAL from the district court for Seward county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Green, Breckenridge, Gurley & Woodrough, for appellant.

T. L. Norval, J. J. Thomas and *R. S. Norval, contra.*

BARNES, J.

Action by the executors to obtain a construction of the will of the late Jane E. Douglass. The findings and judgment of the district court for Seward county were in favor of the contentions of the executors, and Thomas Dorsey Beall, one of the collateral heirs, has appealed.

It appears that Jane E. Douglass, late a resident of Seward, Nebraska, by her will, which has been duly admitted to probate, in items 9 and 10 of that document, provided as follows:

Item 9. "I give, grant, devise and bequeath to the First Congregational Church Society of Seward, Nebraska, * * * the income derived from sixty shares of bank stock in the First National Bank of Seward, Nebraska; * * * and I direct the officers of said bank to hold said principal amount of said bank stock in trust for the benefit of said church; * * * and I direct said

officers of said bank to pay to the treasurer of said church society one-twelfth of said annual income of said bank stock on the first day of each month."

Item 10. "I hereby give, grant, devise and bequeath to the First Congregational Church of Seward, Nebraska, the west seventy-five feet of lots numbered 7, 10 and 11, respectively, in block numbered 2 of the original town, now city, of Seward, Nebraska, to be used by said church society as a parsonage so long as said church shall remain the First Congregational Church or Church Society of Seward, and shall not unite with any other church or churches, save and except the United Brethren or Protestant Methodist Church or Churches, and so long as said society shall keep same well and reasonably repaired, and shall seasonably and regularly pay all necessary insurance and all taxes and assessments lawfully levied thereon, and shall not ever directly or indirectly employ, hire or engage Reverend F. W. Leavitt as pastor or minister in said church, or in any other capacity, after my death. If, however, any of the above conditions are not complied with, or should this bequest for any other reason fail to be carried out as herein provided, I hereby direct that said parsonage and premises revert to my separate estate, be sold at public sale, and the proceeds thereof be divided among the heirs and legatees mentioned and described in item 16 of this my last will and testament." There was a similar provision attached to item 9.

The first question to be determined is: Are the gifts above mentioned donated to a public charity? For upon this question will depend the correctness of the findings and judgment of the trial court.

In *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, this court held that, under the common law, the English courts of chancery exercised inherent judicial power over charities anterior to, and independent of, the statute of 43 Elizabeth, and that the doctrine of charitable uses as administered as part of the common law jurisdiction of the courts of chancery exercising judicial power has been

transplanted in this state, and become a part of the jurisprudence of courts possessing common law equity powers. In the opinion in that case, Judge HOLCOMB, speaking for the court, said: "After discussing a number of cases decided by the chancery courts of England, and expressing the opinion that the jurisdiction under which that court acted belonged to it in the exercise of its judicial powers independent of the statute of 43 Elizabeth, the author further says: 'In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as I can gather from the imperfect statement in the printed records, they were also cases where there were no trustees appointed, or the trustees were not competent to take.'" In that case the terms of the will under consideration gave to the trustee power to apply the property and the proceeds of the same and the sale thereof to some particular and definite charity according to the judgment of the trustee, once and for all, after which the trustee and his duties and powers in the premises should cease and terminate, the trust having been fully discharged. In disposing of the question there presented, it was said: "This contract, like all others, must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the laws of the state, or in contravention of public policy, no reason exists for declaring it invalid. The object of the trust is clearly charitable, and is specified as such in so many words. A trustee is named, and is empowered by the testator to select for him, and as an expression of his will, a charity upon which the property in controversy is to be bestowed. The trustee has accepted the trust. He is willing to carry out its provisions, and has attempted to do so. He stands ready to make certain the very matter of uncertainty upon which contestant relies for a judgment. The will is for an object which has always been looked upon with favor by the courts. It is one of the most worthy of all bequests, save perhaps near kindred, having, by reason of their kinship,

peculiar claims to the consideration of a testator in the distribution of his property. The bequest is sanctioned by law and contravenes no public policy. Its invalidity can be declared only by the adoption of a doctrine at variance with the great weight of authority, to wit, that the beneficiaries shall be so certain that they may come into court claiming the benefits of the trust, and demand its execution. We do not think this doctrine should be adopted in this state, and hence hold to the view that where a bequest for a charitable purpose, though entirely general and uncertain in its character, is made to a trustee who is empowered to select the object of the charity, and who is willing to or has accepted the trust, the will will not be declared invalid because of the general nature of the object or objects of the charity." It may be stated, in passing, that the trustees mentioned in item 9 of the will under consideration have certified in writing their acceptance of the trust.

In *St. James Orphan Asylum v. Shelby, supra*, the gift was in the most general terms that the proceeds be applied to some charity; but the testator preferred the same to be applied to an establishment or maintenance of an orphanage. The will in the case at bar is much more specific, for it directs the dividends of the stock to be paid to the First Congregational Church, an institution of which the testatrix had been a member since its organization. Webster defines the word "church" as a body of Christian believers holding the same creed, observing the same rights and acknowledging the same ecclesiastical authority. The terms "church" and "society" are used to express the same thing, namely, a religious body organized to sustain public worship. The term "church" imports an organization for religious purposes. And a gift to a church without restriction as to the use to be made of the property is a charitable purpose.

In *McAlister v. Burgess*, 161 Mass. 269, 24 L. R. A. 158, it was said: "'The very term church imports an organization for religious purposes; and property given to it *eo*

nomine, in the absence of all declaration of trust or use, must by necessary implication be intended to be given to promote the purposes for which a church is instituted, the most prominent of which is the public worship of God.' * * * It is a matter of common knowledge that the individuals who attend the services of any particular church are not limited to the members of that church, but are an indefinite and varying number of persons."

A gift to a church of land for a site for a church is a good charitable gift. *Schmidt v. Hess,* 60 Mo. 591; *Reformed Protestant Dutch Church v. Mott,* 7 Paige Ch. (N. Y.) 77; *Jones v. Habersham,* 107 U. S. 174; *Pennoyer v. Wadhams,* 20 Or. 274, 11 L. R. A. 210; *Van Wagenen v. Baldwin,* 7 N. J. Eq. 211.

Where a gift to an unincorporated company is definite and certain, a court of equity will enforce the execution of the trust. 2 Perry, Trusts (6th ed.) sec. 730. A gift of real and personal property generally, without stating the purpose, to a corporation existing for a peculiar purpose alone, must be regarded as a devise for such particular purpose. *Santa Clara Female Academy v. Sullivan,* 116 Ill. 375, 56 Am. Rep. 776; *McAlister v. Burgess, supra; First Universalist Society v. Fitch,* 8 Gray (Mass.) 421; *Gibson v. McCall,* 1 Rich. Law (S. Car.) 174.

We think it needless to multiply authorities. The gift to the church in question seems clearly to be a gift for charitable purposes. The will in the case at bar provides: "I give, grant, devise and bequeath to the First Congregational Church Society of Seward, Nebraska (the income from certain shares of bank stock), and I direct the officers of said bank to hold said principal amount of said bank stock in trust for the benefit of said church." It is contended, however, that the bank officers are not competent to take or administer the trust, and it is argued that the position of a bank officer and a trustee are incompatible. In other words, that there is such a conflict of interest that the officer cannot serve in his trust capacity without injury to the bank. On the other side, it

is argued that, if a bank officer may own stock as an individual, he may also hold it in trust for a beneficiary, and that his duty as such could not possibly conflict with his duty as a director, and the more zealously he performs his duties as a director the more faithfuly he serves the interest of his beneficiary. Upon this point no authorities are cited; but, if it be conceded that the positions are incompatible, it does not follow that the trust must fail, for where the two offices are inconsistent the acceptance of the last vacates the first. In the instant case the officers have voluntarily accepted the trust, so, if it be incompatible, they have *ipso facto* vacated their positions as bank officers. We see nothing, however, which would indicate that the officers could not hold the stock in trust for the benefit of the church, and their duties as trustees are not in conflict with their duties as bank officers.

It is argued that the district court erred in holding that a trust was created in favor of the church with respect to the bank stock, and appellant's counsel ask: In whom does the title to the property now vest? Under the doctrine announced by the supreme court of Illinois in *Kemmerer v. Kemmerer*, 233 Ill. 327, 122 Am. St. Rep. 169, it vests in the executor or trustee.

In this case it is not necessary to resort to implication in order to vest this title in the trustees. By the terms of the will itself it is provided: "I direct the officers of said bank to hold said principal amount of said bank stock in trust for the benefit of said church." This language furnishes unmistakable proof that the testatrix intended to vest title to the bank stock in the officers of the bank and their successors in office, and was sufficient to vest the trustees with the legal title to said stock. *Young v. Young*, 80 N. Y. 422; *Organized Charities v. Mansfield*, 82 Conn. 504.

Great stress is placed by the appellant on that portion of the will providing that, if the gift to the church should fail, the property "reverts to her separate estate," and shall be divided among the heirs and legatees mentioned

in item 16. An analysis of this proposition shows it to be without merit. It was the primary wish of the testatrix to have the property go to the church. True, she annexed conditions, upon the occurrence of which the gift might fail, but they are conditions subsequent, and do not destroy the gift. None of those conditions have occurred. It follows that, if we give this property to the residuary legatee without the occurrence of those conditions, we violate the express language of the will of the testatrix.

We come now to consider the effect of item 10, which provides as follows: "I hereby give, grant, devise and bequeath to the First Congregational Church of Seward, Nebraska, the west seventy-five feet of lots numbered 7, 10 and 11, respectively, in block numbered 2 of the original town, now city, of Seward, Nebraska, to be used by said church society as a parsonage so long as said church shall remain the First Congregational Church or Church Society of Seward." The conditions attached to this gift are of the same nature as those relating to item No. 9, and are not vital to this discussion.

It is argued by the appellant that the interest of the church in the dwelling is at best a tenancy, or license, to cease upon certain conditions. It is apparent, however, from the language of the will that the testatrix intended to give the church some sort of an estate in the property. It is also apparent that that estate is what in law is considered a base or qualified fee. "A base or qualified fee is such an one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end." 1 Blackstone, Commentaries (Cooley, 4th ed.) 109. The estate is a fee because by possibility it may endure forever in a man and his heirs, yet as that duration depends upon concurrence of collateral circumstances which qualify and debase the purity of the donation, it is therefore a qualified or base fee. If the happening of the event upon which the estate is to be determined becomes impossible, it is converted into an estate in fee simple. 16 Cyc. 602.

In *Mendenhall v. First New Church Society,* 177 Ind. 336, it was said: "It has been held that a conveyance of real estate to a religious society to hold so long as such real estate shall be devoted to the use and interest of the church, on the condition that said real estate should revert to the estate of the grantor on the cessation of such use, created in said religious society a determinable fee in the property." *North v. Graham,* 235 Ill. 178, 18 L. R. A. n. s. 624; *Lyford v. Laconia,* 75 N. H. 220.

In *Smith v. Smith,* 64 Neb. 563, and *Schnitter v. McManaman,* 85 Neb. 337, this court expressly recognized the validity of base or determinable estates. In the case last cited the will provided: "I give and bequeath to my beloved son, John N. Barrett, all property of which I shall die seized or possessed, whether real, personal or mixed." This of itself would have passed an estate in fee simple, but a later portion of the will provided: "In the event of the death of John N. Barrett without lawful issue born, the property herein bequeathed to him shall immediately become the property of my daughter Mary Katherine McManaman." Considering the will as a whole, it was decided that it was the intention of the testator to devise to his son a base or determinable fee.

The suggestion as to the title being in abeyance is without point, for here the fee is not in abeyance, but vested in the church, the proprietor of a determinable fee, so long as the estate in fee remains, until the contingency upon which the estate is limited occurs. Whatever estate was created by the will of Mrs. Douglass vested immediately upon her death. The limitations over, whatever be their legal effect as to creating future estates for the benefit of residuary legatees, cannot detract from the estate devised to the church.

We therefore hold that item 10 conveys to the church a determinable fee, defeasible by its terms upon the happening of certain events which may or may never occur. The estate conveyed to the church is an indefinite fee, and therefore the limitation over is not a remainder, but

rather an executory devise, and vests no estate in the residuary beneficiary. *North v. Graham, supra; Lyford v. Laconia, supra; Mendenhall v. First New Church Society, supra.*

In concluding this opinion, it may be observed that the case has been ably presented by exhaustive and well written briefs; that many points are discussed therein which have not been adverted to by the court, but all questions raised by the briefs have had due consideration.

It may be said that it appears that Mr. and Mrs. Douglass came to Seward county, Nebraska, in 1870. They accumulated their fortune there, valued at about $100,000. Of this amount Mrs. Douglass set apart for the reglious use of the community in which they lived the parsonage and $6,000 in bank stock. The residue was given to relatives residing in New York, New Jersey, Virginia, and California, who contributed nothing to the estate, nor the comfort of the testatrix in her lifetime. They have no moral claim to the generous bequest the will bestows upon them. The community in which Mr. and Mrs. Douglass spent their lives made this fortune possible, and it was a fitting manifestation of her gratitude towards the community that she made provision for the perpetuity of an institution devoted to its moral and religious worship. As we view the terms of her will, it needs no construction. It is as plain as words can make it.

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

AFFIRMED.

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

HERMAN WACHTER ET AL., APPELLANTS, V. LOUIS LANGE ET AL., APPELLEES.

FILED SEPTEMBER 26, 1913. No. 17,283.

1. **Drains:** INJUNCTION: HIGHWAYS: ESTOPPEL. Where a landowner knew of the placing of tile drains in a highway so as to drain a pond situated upon the lands of another, and actively assisted in the work of making drains or ditches upon his own land so as to conduct the water from the highway ditch over the same, an injunction will not be granted, years afterward, to enjoin the maintenance of the tile drains and ditches in the highway for the reason that in some years more water was discharged upon his land than he expected, or because the landowner above had promised to stop the flow of the water at intervals so as to allow him to farm the land below.

2. ———: HIGHWAYS: REMEDIES. Public authorities may construct drains along the side of highways if necessary to render the road passable. If in so doing they divert the waters of a pond out of the natural course of drainage and upon the lands of one not consenting to the work, they may not, ordinarily, if the work is done in good faith, be enjoined; but they may be liable for damages to persons whose lands or crops are injured. *Churchill v. Beethe*, 48 Neb. 87.

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

H. C. Palmer and *John C. Stevens,* for appellants.

J. B. Scott and *Ambrose C. Epperson, contra.*

LETTON, J.

The plaintiffs, who are separate owners of distinct tracts of land lying in sections 23 and 26, town 7, range 5, complain that the defendants Lange and Cundall, who own, respectively, the northeast ¼ of section 23 and the northwest ¼ of section 24, in the same town and range, and the other defendants, who are members of the town board of Sutton township, have by means of certain tile drains and open ditches drained a lagoon of 60 to 80 acres in extent lying in the lands of Lange and Cundall, con-

trary to the usual and natural course of drainage, and in such a manner as to divert and throw upon the plaintiffs' land large quantities of surface water that otherwise would not reach the same, thereby causing the loss and destruction of crops and diminishing the value of their premises. They ask an injunction to prevent the maintenance of the drains and ditches. The district court denied the writ.

The making of the drains and ditches is admitted. The right of defendants so to discharge the waters is claimed to exist by way of consent and estoppel, and by virtue of the right of the township authorities to improve the public highway, leaving any one injured thereby to their remedy at law for damages.

It appears that the public road between sections 23 and 24 often became impassable on account of the height of waters in the large depression or lagoon through which the section line ran, and that in 1891, by agreement between one McDermott, who then owned the northeast quarter of section 23, and the road authorities and plaintiff Ebert, a six-inch tile drain was put in to drain the pond along the side of the highway to a slight depression in Ebert's land, whence it might flow to the southwest, eventually reaching a deeper depression on the lands of the other plaintiffs. Ebert testifies that while McDermott owned the land he suffered no damages, for that when he requested McDermott he would stop up the tile and prevent the water coming on his land until he had removed the crop standing thereon, but that Lange, who purchased from McDermott, refused to do this, giving as a reason that the tile was in the public road and he could not interfere; that prior to 1908 he suffered no damages, but that in that year his lands were flooded and his crop destroyed in the portion on which the water flowed. He admits that he and McDermott ran a grader to a depth of about 18 inches across his land and onto the land of plaintiff Wachter in order to facilitate the flow onto Wachter's land. Some of the other plaintiffs testify as to

the condition of the road prior to the time the tile was put in in 1901, and corroborate Ebert as to there being no trouble of any moment until 1908, on account of McDermott closing the tile until their farming work was done.

It is in evidence from their own testimony that plaintiffs Ebert, Buttell and Scheuerman were fully cognizant of the digging of the ditch and placing of the original tiling in 1901, and also of the substitution of the larger tiling in 1904, and made no objections thereto at the time. It is true they all testify that the reason they made no objection was on account of promises made by McDermott, and also for the reason that they were not aware that the placing of the larger tile would make the flow of water so much more rapid that it would injure the crops in the depression through their lands. Testimony on behalf of plaintiff also shows that in 1908 the town board closed the tile drain at the request of one of those farming the land below until he removed his crop, and that when he had finished his work the drain was again opened by the authorities. If a material matter in the case, it might be a matter of some doubt as to whether the depression on the land of Ebert where the water leaves the highway comes within the definition of a natural drainage channel, but, as we view the case, this is not a determining factor.

The conclusion we draw from the whole of the testimony is that the action is not barred by the statute of limitations, as defendants insist, but that the improvement of the highway made the lowering of the level of the water in the pond necessary, and hence the authorities were justified in digging the ditch and laying the tile. *Churchill v. Beethe*, 48 Neb. 87.

Moreover, the conduct of Ebert and others of the plaintiffs in making no complaint at the time, and in actively assisting in the work, places them in a position that a court of equity will not act in their behalf. *Gilmore v. Armstrong*, 48 Neb. 92.

Plaintiff Wachter, however, seems to have been ignorant of the proceedings taken to collect and discharge the water upon his land. No authority has been shown in his tenant, who apparently gave consent, to do so. He may be in a position where he has a right of action for damages for the flooding of his land in 1908 and subsequently, if such has been the case. While a proprietor may have the right declared in *Todd v. York County*, 72 Neb. 207, and in *Aldritt v. Fleischauer*, 74 Neb. 66, to drain stagnant water into a natural drainage channel on his own lands, it has never been declared that he can, against the wishes of another landowner, enter upon his premises to open drains or ditches; or that he can collect and discharge surface water out of the natural course of drainage upon the lands of another.

We think, on the whole case, the district court properly denied the injunction, and its judgment is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

OTTO MUTZ, APPELLANT, V. CHARLES O. SANDERSON, SHERIFF, APPELLEE.

FILED SEPTEMBER 26, 1913. No. 17,305.

1. **Execution: LEVY: SALES IN BULK.** Under the provisions of the "Bulk Sales Law," a sale of a stock of goods in bulk without complying with the provisions of that measure is void as to creditors, and executions issued upon judgments obtained by creditors of the original vendor may be levied thereon the same as if no sale had ever taken place.

2. ———: ———: **CUMULATIVE REMEDIES.** The right to levy an execution upon a stock of goods purchased in bulk and out of the usual course of business, and without regard to the terms of ch. 62, laws 1907, commonly known as the "Bulk Sales Law," is cumulative to the remedies theretofore existing to creditors of

the vendor, and it is not a condition of such right that an execution be first issued and be returned unsatisfied as to other property of the judgment debtor.

3. **Replevin**: ORDER OF PROOF. It is the duty of a plaintiff in replevin to produce the evidence of his title to the property in controversy in his case in chief, and it is within the discretion of the district court to refuse to permit such evidence to be introduced upon rebuttal.

4. **Witnesses**: CROSS-EXAMINATION. It is not erroneous to confine cross-examination to matters drawn out in the direct examination of a witness.

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

Sterling F. Mutz, George W. Berge and *R. J. Greene*, for appellant.

Charles H. Epperson, M. L. Corey, Paul E. Boslaugh and *H. H. Wilson, contra.*

LETTON, J.

In October, 1909, plaintiff purchased a stock of goods from D. M. Roush, doing business in the name of the Spring Ranch Mercantile Company, without complying with the provisions of the "Bulk Sales Law." Laws 1907, ch. 62. Defendant, Sanderson, as sheriff of Clay county, levied four executions upon the stock while in Mutz's possession. These were issued upon judgments rendered against Roush in favor of certain wholesale houses who had supplied him with goods. This action was brought by Mutz to regain possession of the goods seized. The jury found for the defendant, judgment was rendered accordingly, and plaintiff appeals.

The first argument made by the appellant is that the word "void" in the bulk sales law means "voidable," and that, consequently, a creditor must first obtain a judgment against the judgment debtor, issue an execution against his property other than the stock of goods sold, and have it returned unsatisfied before he is entitled to levy upon

the property transferred. We think the latter proposition a *non sequitur*. The legislature evidently intended that a sale of a stock of goods in bulk made without compliance with the requirements of the statute, although it may be entirely valid as to all other persons, shall be void and of no effect as against creditors; that is, that the corpus of the goods shall remain as fully subject to execution and levy for the debts of the seller as if the sale had never taken place. It would seem that the title to goods sold from the stock by the vendee in the ordinary course of business will pass to the retail purchaser in identically the same manner as it would have done if the stock had remained in the possession of the vendor, but the stock itself in bulk occupies the same relation to the creditors as if no sale had ever taken place; but this it is unnecessary to decide. *Appel Mercantile Co. v. Barker*, 92 Neb. 669. We think it unnecessary to cite or discuss the cases referred to in the briefs, since the language of the statute is clear that the sale is void as to creditors, unless its terms are complied with.

These considerations practically dispose of the argument that garnishment is the only proper remedy. The statute does not in any manner abrogate the rights and remedies which creditors had prior to its passage, and the remedy given by it is cumulative to those already existing.

It is also assigned that the verdict is contrary to the evidence, and contrary to the law, because the jury should have found that Mrs. Roush was a partner in the business, and that, hence, creditors of D. M. Roush had no right to levy upon partnership property for his individual debt. The evidence conflicts as to whether Mrs. Roush had an interest in the stock and business. No instruction was requested by plaintiff asking that this question be submitted to the jury. The jury evidently believed that Roush was the owner, and we think this finding is in accordance with the great preponderance of the evidence.

In this connection complaint is made of instructions Nos. 4 and 5 as being inconsistent. A clause in No. 4

states: "There is no contention but that the plaintiff, Mutz, bought these goods of Roush." This instruction as a whole tells the jury that the executions are issued upon judgments obtained by creditors of Roush and against him, and that the sheriff has levied the same upon a stock of goods in the possession of Mutz, claiming the right to do so by virtue of the "Bulk Sales Law." The court then recites to the jury the provisions of that statute requiring a buyer of a stock of goods sold in bulk to procure the names of creditors, and to notify them, in order that the sale be valid as to such creditors. The clause complained of follows. In the fifth instruction it is said: "It is contended by the plaintiff that he bought the goods from the Spring Ranch Mercantile Company, and not from Roush, the person against whom these executions run. As to this, it is immaterial under what name Roush conducted the business if, in fact, he was the owner of it and of the stock of goods sold to plaintiff, Mutz." We think the instructions are not inconsistent when each is considered as a whole. Moreover, the point sought to be made in this court as to the existence and effect of a partnership interest in the stock being held by Mrs. Roush was not definitely raised in the lower court. The charge as a whole seems adequately to set forth the issues and the theory upon which the case was tried, and we find no prejudicial error therein.

It is next contended that evidence to show that a part of the goods levied upon had been purchased by Mutz since the sale was erroneously excluded. Mr. Mutz testified in chief that he was the owner of the stock of goods and had bought it from the Spring Ranch Mercantile Company. He was asked upon rebuttal to examine the return upon the execution and state whether he could tell "the different articles of merchandise contained in the inventory which were acquired by you after you purchased the merchandise of the Spring Ranch Mercantile Company." This was objected to as incompetent, irrelevant and immaterial, and not proper rebuttal evidence,

and the objection was sustained. The plaintiff then offered to show by this witness that goods to the value of $1,009.13 of those levied upon under the four executions were put in stock betwen October 30, 1909, and May 25, 1910. A like objection was sustained to this offer. It is said by appellant that if this evidence had been admitted plaintiff would have shown that these goods were new lines which had not been carried by the Spring Ranch Mercantile Company, and had not been confused and commingled with the general stock. It is, no doubt, true that goods purchased after the sale, which have been kept separate and not commingled with the general stock, may not be levied upon as the property of the vendor, but no such conditions were made apparent at the trial. Moreover, the evidence offered was not proper in rebuttal. Plaintiff was asserting title to the property taken. He should have produced his evidence of title to these specific chattels upon his case in chief. We find no error in this ruling.

It is next complained that the court erred in sustaining the objection to a question put to Mr. Roush on cross-examination as to whether he had made arrangements after the sale with any creditors in regard to the settlement of accounts. It was objected that this was not proper cross-examination and the objection was sustained. It is said in this connection that in the motion for a new trial it is shown that one of the creditors was paid in full, and that the judgment was collusively obtained, and also that it is proper cross-examination because in direct examination Roush claimed that he had not paid any of the claims in controversy. We think the objection was properly sustained. We find that Mr. Roush upon his direct examination was inquired of whether he had paid certain particular creditors, naming them, and that he stated he had not paid such claims, but we find no general denial such as is stated. Furthermore, the evidence set forth in the motion for a new trial would not justify the granting of the same for the reasons urged; being too vague, indefinite, and remote to warrant the relief asked for.

Complaint is also made with respect to certain language used in instruction No. 5. While, perhaps, the language of the instruction might have been less involved, and its meaning clearer and more apparent, we do not find that the issues were in anywise confused thereby.

The contention made that the bulk sales law is unconstitutional and void has already been considered and disposed of in *Appel Mercantile Co. v. Barker, supra.* It is probably true that the plaintiff has suffered hardship by his failure to comply with the provisions of the statute. Under the law as it stood before the passage of the act, creditors were often made the victims of misplaced confidence and defrauded of their just dues by sales of merchandise in bulk and the removal or concealment of the proceeds. The legislature sought to remedy this evil by a short and simple statute, which, if followed, would protect both buyer and creditor. If the law is unwise or oppressive, the lawmakers must be appealed to for relief.

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

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

SMITH BROTHERS, APPELLEE, V. CAROLYN D. WOODWARD, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,312.

1. **Appeal:** ADMISSION OF EVIDENCE: HARMLESS ERROR. The admission of incompetent evidence in an equity case is error without prejudice if the competent evidence sustains the findings and judgment.

2. **Evidence:** RECORDS: CERTIFICATE. A certificate of the filing of an instrument for record under provisions of sections 9603, 9608,

Ann. St. 1911, signed in proper form by one purporting to be the register of deeds, or his deputy, is sufficient proof, *prima facie*, that the document was so filed.

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

Matt Miller, for appellant.

Mills & Beebe, contra.

LETTON, J.

This is an action to foreclose a lien on certain property of the defendant and appellant for the price of certain building material furnished by the plaintiffs and used in making additions, alterations and repairs to the dwelling thereon in which defendant lived. There is no dispute in the evidence as to the quantity or price of the materials furnished. The defense is that the material was not purchased by the defendant or furnished to her. It appears that Doctor Woodward, defendant's husband, first arranged with the plaintiffs to supply the lumber; but the testimony on behalf of plaintiff is to the effect that Mrs. Woodward afterwards called their office by telephone and ordered part of the material. It was all delivered at the dwelling where she lived. Defendant denied that such a conversation ever took place; but the trial court, with the witnesses before it, evidently found for the plaintiffs on this point. We are unable to say that the testimony, especially when considered with the circumstances that the defendant was present at the time the work was being done, and to some extent at least suggested the manner of performance of a portion of it, does not support the finding. Dr. Woodward also testified to the fact of defendant's ratification and assent to the agreement made by him for the material. Though this testimony is somewhat weakened by the fact that a subsequent estrangement occurred between him and Mrs. Woodward, it tends to support the general finding for the plaintiffs.

Complaint is made that errors were made in receiving certain incompetent evidence. The case being tried without a jury, this could not be prejudicial if sufficient competent testimony appears in the record to support the finding.

It is also urged that there is a failure of proof that the claim of lien was ever filed as the statute requires. The certificate seems to be in exact accordance with the provisions of sections 9603, 9608, Ann. St. 1911, and is sufficient *prima facie*. It was unnecessary to prove aliunde that the person purporting to have signed it as county clerk was at that time the incumbent of the office, and so likewise as to the holder of the office of deputy county clerk. The signed certificate was *prima facie* sufficient.

We think the conclusion reached by the district court is supported by the evidence, and it is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

HARTINGTON NATIONAL BANK, APPELLEE, V. L. L. GILES, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,327.

1. Appeal: EXCLUSION OF EVIDENCE: HARMLESS ERROR. The exclusion of competent evidence at one stage of a trial is not prejudicially erroneous if the facts sought to be proved are subsequently established.

2. Bills and Notes: ACTION: DEFENSE OF NO CONSIDERATION. Under the facts stated in the opinion, *held* that the defense of no consideration was not established.

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

H. E. Burkett, for appellant.

P. F. O'Gara, contra.

LETTON, J.

Action on promissory note brought by the indorsee. The defense is that the note was given without consideration, and that the plaintiff is not a *bona fide* holder for value, but knew at the time it was purchased that there was no consideration given for its execution. It is also alleged that plaintiff bank is not the real party in interest. The note, which is for $32.10, is dated August 9, 1909. The cashier of the plaintiff bank testified that he purchased the note of one Turley on August 12, 1909, at a price that would net the bank 10 per cent. interest. It appears that the note was executed payable to one Turley, who was an agent for the Security Mutual Life Insurance Company, in payment for life insurance; that at the time it was made and delivered Mr. Kimball, the cashier of the plaintiff bank, was present and introduced Turley to Giles; that what is termed by insurance men a "binding receipt" for the note was given Giles, which stated that he was required to take and pass a medical examination before the policy would issue; and that Giles refused and neglected to present himself for such examination. Kimball had an agreement with Turley that he was to receive 20 per cent. of the proceeds for his introduction and assistance in procuring the insurance contract. The note was bought three days after its execution.

Defendant complains that the court excluded testimony offered by him to prove certain of the facts before related. Since the facts all came out eventually, no prejudicial error occurred by this exclusion.

We are of opinion that the defense of no consideration was not established. The note was given in consideration of a contract of insurance, conditioned, it is true, but none the less a contract, and no breach or failure had occurred at the time of the purchase. If there was a breach of the contract, it was made by Giles when he

refused to take the medical examination. The facts do not bring the case within the doctrine of the North Dakota case relied upon by defendant. *Bank v. Garceau*, 22 N. Dak. 576. In that case the defendant performed his duty under the contract, duly offered himself for examination, and was rejected by the medical examiner, while in this case the default was wilfully made by the defendant.

The district court properly held no defense had been established, and its judgment is

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

WILLIAM R. CUNNINGHAM ET AL., APPELLANTS, V. MALVINA MARIE MARSHALL, APPELLEE.

FILED SEPTEMBER 26, 1913. No. 16,969.

Homestead: SUIT TO ESTABLISH: EVIDENCE. In a contested suit to establish homestead rights, failure to prove the acquisition or occupancy of a homestead defeats plaintiff's case.

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

Morning & Ledwith, for appellants.

S. L. Geisthardt, contra.

ROSE, J.

This is a suit in equity to establish homestead rights in 240 acres of land in Lancaster county. The trial court dismissed the case after a full hearing, and plaintiffs have appealed.

Felix Cunningham, a married man, held the legal title

to the land, and, describing himself as a single man, deeded it to Frank McKelvie, May 5, 1897. For full value the latter deeded the land to Joseph H. Marshall, who willed it to defendant, his wife. He died June 15, 1907. Felix Cunningham is dead. Four of his five children are plaintiffs. His wife was divorced, and is not a party to this action. During the time covered by the asserted acquisition and occupancy of the homestead pleaded, the wife and all of the children, except the oldest son, lived in New York, and never saw the premises in controversy. A fair interpretation of all of the evidence leads inevitably to the conclusion that neither the father nor his oldest son ever acquired, occupied or claimed, when in possession, a homestead in the land, within the meaning of the homestead law. An analysis of the evidence upon which this conclusion rests would neither benefit the parties nor make an addition to the law, and will not be attempted. For failure to establish this material fact, the case of plaintiffs entirely fails. The decree conforms not only to the law, but to the demands of equity.

AFFIRMED.

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

MCCAULL-DINSMORE COMPANY, APPELLEE, V. HANS P. NIELSON, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,228.

Appeal: FINDINGS: CONFLICTING EVIDENCE. A finding of the trial court, if sustained by sufficient evidence, in an action at law tried without a jury, will not be set aside on appeal, where the controverted issue was determined on substantially conflicting evidence.

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

John M. Ragan, for appellant.

Tibbets, Morey & Fuller, contra.

ROSE, J.

Plaintiff's claim consists of three items: Damages resulting from defendant's failure to deliver at Minneapolis 2,500 bushels of wheat at 76¼ cents a bushel under a sale contract dated March 9, 1907, "thirty days' shipment," the time having been subsequently extended so that the bill of lading would reach plaintiff at Minneapolis before November 1, 1907, $331.20; overpayment for a former shipment, $20.44; protest fees for nonpayment of draft $2.50—total $354.14. The first item only is controverted.

According to the petition defendant sold plaintiff 2,500 bushels of wheat at 76¼ cents a bushel, and was short in delivery to the extent of 1,522 bushels and 50 pounds, which plaintiff was compelled to purchase from another at the increased market price of 98 cents a bushel, thereby sustaining a loss of 21¾ cents a bushel; the difference between the contract price and the market price amounting to $331.20. Defendant, in addition to a general denial, answered that the extension agreement permitted him to ship the remainder of the wheat from Lexington, Nebraska, by November 1, 1907, and that he had the wheat on hand there and was engaged in loading it October 31, 1907, when he received from plaintiff a telegram stating that it had canceled the contract and bought wheat to cover the remainder. The parties waived a jury and tried the case to the court. The findings and the judgment were in favor of plaintiff, and defendant has appealed.

The terms of the extension agreement were the controlling issues in the case. Was the bill of lading to reach plaintiff at Minneapolis before it purchased wheat to cover defendant's shortage in delivery? The findings are in favor of plaintiff, but defendant argues they are not sustained by sufficient evidence. Though two abstracts have been filed, the bill of exceptions has been examined

to determine the merits of the controversy. There is evidence sufficient to sustain the agreement as pleaded by plaintiff. As thus proved, defendant did not comply with its terms. The damages are established. The evidence is conflicting, and the case falls within the rule which makes the findings of the trial court conclusive.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

CHARLES W. WHITNEY, APPELLEE, V. CARL BROEDER ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1913. No. 17,273.

1. **Appeal:** REJECTION OF EVIDENCE: BRIEFS. An assignment of error directed to the rejection of offered testimony may be disregarded on appeal, if the places in the record where the offer of proof and the challenged ruling may be found are not pointed out in appellant's brief.

2. **Trial:** INSTRUCTIONS: RECORD. An instruction requiring the party on whom the burden of proof rests to "satisfy" the jury on an issue of fact by a preponderance of the evidence is not a ground for reversing a judgment, where prejudice to appellant is not shown by the record.

3. ———: ———: ———. The giving of instructions submitting to the jury as an issue of fact the authority of an agent to make warranties in selling horses for his principal, *held* not ground for reversing a judgment in favor of the latter, on a record showing that the parties raised such issue by the pleadings and supported it by proof, and that the trial court was not asked to determine that issue as one of law, or to take that question from the jury by an instruction.

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

Wilcox & Halligan, for appellants.

Hoagland & Hoagland, contra.

ROSE, J.

Plaintiff sued defendants for the balance due on a promissory note for $900, dated July 9, 1907, payable January 9, 1908, and bearing interest at the rate of 10 per cent. per annum. A credit of $639.50, August 19, 1907, is pleaded in the petition, leaving unpaid a balance of $260.50. Defendants admitted the execution and delivery of the note and the payment of $639.50. In addition, the following facts are pleaded in the answer: The note was given for 26 horses and 9 colts purchased by defendants from plaintiff. Six of the horses had recently been castrated, and plaintiff, through C. A. Moore, who was the former's agent, agreed that, if any of the animals should die as the result of castration, their value should be credited on the note. A few days after the sale two animals of the value of $75 so died, and plaintiff is entitled to credit for that sum. As an inducement to the purchase, plaintiff, through the agent Moore, falsely represented to defendants and warranted that none of the animals was over eight years old. In these respects defendants relied on plaintiff. Fifteen of the animals were from 12 to 15 years old, and were worth $25 a head less than they would have been had they been as represented. By reason of plaintiff's false representations and breach of warranty, defendants were damaged in the sum of $375. All of the facts pleaded by defendants, except the admissions in the answer, are denied in a reply. The case was tried to a jury. From a judgment in favor of plaintiff for $291.19, defendants have appealed.

The first assignment of error is directed to the rejection of offered testimony, but the places in the abstract or bill of exceptions where the offer of proof and the challenged ruling of the trial court may be found are not pointed out in the brief. The assignment will therefore be disregarded for failure to comply with that part of rule 9 which de-

clares: "Each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief."

The following instruction is criticised as erroneous: "If the defendants have failed to satisfy you by a preponderance of the evidence that C. A. Moore acted as plaintiff's agent in the sale of the horses in question, or that he acted within his authority or apparent authority, or that he agreed to credit the value of all horses that died as the result of their castration upon the note sued upon, and guaranteed and warranted all of said horses to be eight years old and under, then you will return a verdict for plaintiff; or, if defendants have failed to satisfy you by a preponderance of the evidence that defendants believed and relied upon said Moore's alleged agreement to give credit on the note sued upon for the value of all horses that died as the result of their castration, and the alleged guarantee and warranty that said horses were of the age of eight years and under, or that such representations were what induced defendants to buy, you will find for plaintiff."

It is argued that the word "satisfy" in the connection in which it is thus used, requires too high a degree of proof. It is contended that to "satisfy" a jury on an issue of fact is to require more than a preponderance of the evidence. Instructions containing expressions like those quoted have frequently been criticised, but they are not necessarily prejudicial. In the present case the word "satisfy" is modified "by preponderance of the evidence." It is only by a preponderance of the evidence that the jury are to be satisfied. Earlier in the charge they were directed that defendants admitted the execution and delivery of the note, and that the burden rested upon them to show by a preponderance of the testimony each and every material allegation of their answer. "If the preponderance is with the plaintiff," said the trial court, "or if the testimony is evenly balanced, you should find for the plaintiff." In that part of the instructions defendants were not re-

quired to "satisfy" the jury by a preponderance of the evidence. When the charge is considered as a whole, in connection with the entire record, there is nothing to indicate that the jury were misled, or that defendants were prejudiced by the use of the word "satisfy" in the instructions. Qualifications of the term "preponderance of the evidence" were criticised in *Altschuler v. Coburn,* 38 Neb. 881, but an instruction open to such criticism did not result in a reversal. For the same reasons, this assignment of error will be overruled.

The final assignments of error are directed to a number of instructions submitting to the jury the issue as to Moore's authority to make representations and warranties. It is argued that the trial court should have decided, as a matter of law, that Moore had authority to act for plaintiff in making the sale. In the answer it was alleged that Moore was the agent of plaintiff, and acted for him in making the representations and warranties. This was denied by the reply. Defendants were conceded the right to open and close, and adduced proof tending to establish the representations and warranties upon which they relied, and Moore's authority to make them. Plaintiff testified that Moore had no such authority. The parties therefore tried the issue as one of fact, and the trial court adopted their theory. The abstract does not show that defendants, at any stage of the proceedings, asked the trial court to determine Moore's authority as a question of law, or that an instruction to that effect was requested. With the record in the condition indicated, defendants are not entitled to a reversal on the ground that the issue as to the authority of plaintiff's agent was erroneously submitted to the jury. No reversible error has been pointed out, and the judgment is

AFFIRMED.

BARNES, FAWCETT, and HAMER, JJ., not sitting.

MEYER BROTHERS DRUG COMPANY, APPELLEE, V. HIRSCHING-MORSE COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,290.

1. Pleading: STRIKING PART OF ANSWER. In a suit on a note, it is not prejudicial error to strike from the files all of the answer, except an admission of the execution, delivery and nonpayment of the note, where no defense or proper counterclaim or set-off is pleaded.
2. ———: JUDGMENT ON PLEADINGS. In a suit on a note, a motion in favor of plaintiff for judgment on the pleadings may be sustained, where the execution, delivery and nonpayment of the note are admitted in an answer pleading no defense or proper counterclaim or set-off.

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

John S. Bishop, R. S. Mockett and *A. S. Tibbets,* for appellant.

S. L. Geisthardt, contra.

ROSE, J.

The action was commenced before a justice of the peace to recover the amount due on a promissory note for $43.86, dated March 31, 1908, payable May 15, 1908, and bearing interest at the rate of 7 per cent. per annum. From a judgment in favor of plaintiff, defendant appealed to the district court. There plaintiff recovered a judgment on the pleadings for $31.30; being the amount of plaintiff's claim, less a former judgment in favor of plaintiff and against defendant for $22.50. Defendant has appealed.

There are three assignments: The trial court erred (1) in striking from the files the amended answer and cross-petition; (2) in sustaining the motion of plaintiff for judgment on the pleadings; (3) in rendering judgment against defendant without a trial, and while defendant had an answer and cross-petition on file.

1. The amended answer condemned by the trial court admitted all of the allegations of the petition, and under a ruling below this admission was permitted to remain in the pleadings. In allowing a credit for the amount of a former judgment, the trial court ruled in favor of defendant, who, in that respect, has no ground of complaint. A counterclaim for a tort, which was made the basis of a demand for $5,000, was properly stricken out as not being within the jurisdiction of the justice of the peace or litigable upon appeal. The record does not affirmatively show error in the holding that the answer as a whole contained no matter amounting to a defense or to a proper counterclaim or set-off.

2. The execution, delivery and nonpayment of the note being admitted in an answer containing no proper defense, there was no error in sustaining the motion for judgment on the pleadings.

AFFIRMED.

BARNES, FAWCETT and HAMER, JJ., not sitting.

STATE OF NEBRASKA V. JOHN F. THORP.

FILED SEPTEMBER 26, 1913. No. 18,014.

Information: INTENT: PURE FOOD LAW. An information charging defendant in the language of the statute with wilfully and unlawfully violating the pure food law by overreading a test of cream purchased by him for commercial purposes is not demurrable for failing to charge that the act was committed with the intent to defraud the seller; such intent not having been made by statute an element of the offense. Comp. St. 1911, ch. 33, sec. 20.

ERROR to the district court for Cuming county: GUY T. GRAVES, JUDGE. *Exception sustained.*

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, for plaintiff in error.

A. R. Oleson, contra.

ROSE, J.

In the district court for Cuming county defendant was accused of violating the pure food law by overreading a test of cream purchased by him from William Pfleuger. The trial court sustained a demurrer to the information and dismissed the prosecution. For the purpose of settling the law, an exception to the ruling on the demurrer is presented here under section 515 of the criminal code.

That part of the pure food law which defendant is accused of violating makes it unlawful for any person to "overread or underread, or in any other manner make, announce or record any false or untrue test of either butter or cream." Comp. St. 1911, ch. 33, sec. 20. The charge is that John F. Thorp in Cuming county, November 26, 1912, "did then and there wilfully and unlawfully overread a certain test of cream, and did then and there wilfully and unlawfully make and announce a false and untrue test of cream, he the said John F. Thorp being then and there engaged in the business of testing and purchasing cream for commercial purposes, and having then and there purchased the said cream for commercial purposes from one William Pfleuger." The information was attacked by demurrer (1) "because the facts stated therein do not constitute an offense punishable by the laws of this state; (2) because the intent is not alleged, proof of such intent being necessary to make out the offense charged; (3) because there is no allegation of any intent to defraud any one in the doing of the acts complained of."

Counsel appointed by the trial court to present the reasons for the sustaining of the demurrer argues that the statute can only be sustained by construing it to mean that an intent to defraud the seller by an underreading and that an intent to defraud the purchaser by an overreading are essential elements of the offense. It is further insisted that the result of overreading the test was to pay too much for the cream, and that defendant did not cheat or intend to defraud any one. The legislature, however, did not use language making intent an ingredient of

the offense condemned, nor is the statute void for that reason. The act was passed in the exercise of legislative power to protect the public health and to regulate weights and measures. The protection of health and the testing, weighing and measuring of food products are so closely connected with the public welfare that no limitation not imposed by the constitution upon legislative power in relation thereto should be fixed by the courts. These are among the common and necessary subjects of both state and municipal legislation. Within constitutional limitations the legislature is the judge as to how the demands of society in these respects are best subserved. Reasonable laws which make the authority of food commissioners and boards of health effective for the protection of the public are proper enactments and must be respected by those who buy and sell and measure and weigh perishable foods. The intent with which reasonable statutory regulations are disobeyed by persons engaged in buying or in selling cream, and who are thus dealing with the public in a necessary article of food, is not always essential to a criminal charge or to proof of guilt. An evil intent or malice may be presumed from the wilful violation of a positive statute. Where the statute does not make intent a part of the violation of a proper police regulation, it is not always necessary to charge or prove it. *State v. Hurds*, 19 Neb. 316; *Seele v. State*, 85 Neb. 109; *Staley v. State*, 89 Neb. 701; *Harding v. People*, 10 Colo. 387; *Commonwealth v. Graustein*, 209 Mass. 38; *Commonwealth v. Mixer*, 207 Mass. 141; *State v. McBrayer*, 98 N. Car. 619; *State v. Smith*, 17 R. I. 371; *Mills v. State*, 58 Fla. 74; *State v. Henzell*, 17 Idaho, 725, 27 L. R. A. n. s. 159. Both the statute and the information are within the recognized exception to the general principle that intent is an element of a criminal offense and a necessary part of an information. The exception of the county attorney to the sustaining of the demurrer is therefore well taken.

EXCEPTION SUSTAINED.

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

NELS O. ALBERTS, APPELLEE, V. COURTLAND WAGON COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 16,907.

1. Judgment: REVIVOR: PLEA OF PAYMENT. "In a proceeding to revive a dormant judgment, where the judgment debtor pleads payment, a presumption of payment arises, and the burden is upon the judgment creditor to rebut that inference." *Platte County Bank v. Clark*, 81 Neb. 255.

2. Quieting Title: EQUITY: DORMANT JUDGMENT: PRESUMPTION OF PAYMENT. And the rule is the same where the judgment creditor is demanding the payment of a dormant judgment as a condition precedent to the right of the judgment debtor to quiet his title to real estate as against such dormant judgment.

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

Ambrose C. Epperson and *Robert G. Brown*, for appellant.

John C. Stevens, contra.

FAWCETT, J.

Plaintiff instituted this suit in the district court for Clay county to quiet his title to certain lots and lands in that county. The petition alleges that on November 9, 1885, plaintiff was engaged in business with one Oberlander; that on said date the defendant obtained a judgment against plaintiff and Oberlander, as partners, in the sum of $87.13, and another judgment for the sum of $170.56; that on November 11, 1885, defendant caused such judgments to be transcripted to the district court, and thereby caused them to create an apparent lien upon plaintiff's property; that said judgments have long since been paid, but through negligence, carelessness, or oversight the evidence of their payment had not been filed with the clerk of the district court; that they are nonenforceable by lapse of time; that they so affect plaintiff's real

estate that those who deal with it are fearful that such judgments might be valid. Wherefore, he prays that the judgments be canceled of record and the title to his real estate quieted. The answer denies that the judgments were obtained against plaintiff and Oberlander as partners; denies that they have been paid; alleges that plaintiff has failed to tender the amount which in equity is due upon the judgments, and is not entitled to the relief he seeks, "except that he first pays the amount which is, in equity, due upon the said judgment liens;" alleges the amount due upon the judgments as an equitable lien upon the real estate, and prays that defendant have a sale of the property described in plaintiff's petition for the payment and satisfaction of the judgments. The trial resulted in a finding that plaintiff's petition is without equity; that he is not entitled to the relief prayed without first paying the judgments described in the pleadings; that said judgments have never been paid in whole or in part; that the judgments have been dormant for more than ten years prior to the institution of this suit; and that defendant is not entitled to affirmative relief. Plaintiff's petition and defendant's cross-petition were both dismissed at plaintiff's cost. From this judgment defendant appeals, and plaintiff joins with a cross-appeal.

The briefs are devoted quite largely to the proposition that plaintiff could not prosecute his suit to quiet title without doing equity by paying the judgments. We deem it unnecessary to consider this phase of the case, for the reason that we do not think there is any competent evidence in the record to overcome the presumption in support of the allegation in plaintiff's petition that the judgments have been paid. This suit was instituted February 16, 1910. The judgments were rendered November 9, 1885, over 24 years prior to the beginning of the suit. During all of those years no attempt was made to collect the judgments, not even to the extent of having execution issued thereon. The only proof attempted to be offered in support of defendant's plea that the judgments had not

been paid was the testimony of one of defendant's attorneys. The substance of his testimony is as follows: "Q. What is your profession? A. I have been an attorney at law. Q. And where did you reside in 1885? A. At Sutton. Q. What was your business or profession then? A. An attorney at law." These questions and answers would indicate that he is not now in active practice. The substance of the rest of his testimony is that he procured the judgments in controversy; that the judgments have never been paid to him; that after the suit was commenced and shortly before the trial he had a conversation with plaintiff, in which the plaintiff admitted that he (plaintiff) had never paid the judgments, but that plaintiff claimed, in that conversation, that Oberlander had paid the judgments, or fixed the matter up. When interrogated upon cross-examination as to the whereabouts of the defendant company, he shows a lack of knowledge of the present business status of defendant. When asked if the defendant company is still in existence, his answer was, "Oh, yes; I think so." He further stated that he was not sure but what they changed to the Courtland Buggy & Wagon Company. When asked if the old corporation had "all gone to pieces," he answered, "I ain't prepared to say that it has, but they still do business at New York as the Courtland Buggy Company or the Courtland Buggy & Wagon Company." When asked, "When did they authorize you to appear here for them?" his co-counsel objected, and the objection was sustained. When asked, "When did you last hear from the Courtland Wagon Company?" objection was again interposed and sustained. When further asked, "Q. The only reason you have for saying that this judgment is not paid is because you didn't get the money, is it?" he answered, "Well, I was doing the business for the company and I am confident it was not paid to me." And when finally asked, "As a matter of fact you wouldn't swear that it hasn't been paid, will you?" he answered, "Well, I don't know that I could. I have testified all I can testify and tell the truth."

As we view it, this evidence falls far short of rebutting the presumption of payment. So far as this record discloses, these are the only judgments which Mr. Brown ever obtained for the defendant company. They were obtained nearly a quarter of a century ago. He does not show that he has ever had any connection with or communication from the company since that time, and the fact that the judgments have never been paid to him falls far short of showing that they have not been paid to the defendant. If they have not been paid to the defendant, it would have been an easy matter to have shown that fact by the deposition of some member of the company, but no attempt was made to produce such testimony. It may be said in answer to this that it would have been an easy matter for plaintiff to have testified that the judgments had been paid, but the record shows that plaintiff was not present at the trial; and, when Mr. Brown testified that plaintiff had admitted to him that he (plaintiff) had never paid the judgments, counsel for plaintiff then stated: "The plaintiff is taken by surprise by the testimony of the witness on the stand and asks that the case be adjourned until we have time to get the testimony of the plaintiff. Objection overruled. Plaintiff excepts." The admission by plaintiff to Mr. Brown, in the conversation to which the latter testifies, that he (plaintiff) had not paid the judgments, was coupled with the statement to Mr. Brown that Mr. Oberlander had paid them, or "fixed it up." Where judgments have stood for so long a time without any attempt to collect them, it requires more positive testimony than anything appearing in this record to overcome the presumption of payment. The third subdivision of the opinion by Judge ROOT in *Platte County Bank v. Clark,* 81 Neb. 255, fully sustains the conclusion above reached. We think the testimony of payment in that case was stronger than in this.

Considering the indifference and gross laches of defendant in asserting the validity of these judgments, and the fact that defendant could easily have established its claim

upon the hearing of this case, if it has any valid claim, and considering the many years that plaintiff has been handicapped by this apparent lien upon his property, we think plaintiff is now entitled to full relief. The judgment of the district court is therefore reversed and the cause remanded, with directions to enter a decree in favor of plaintiff in accordance with the prayer of his petition.

REVERSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

LIZZIE L. WRIGHT ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,189.

1. **Master and Servant:** INJURY TO SERVANT: RULES: SUFFICIENCY: QUESTION FOR JURY. A railroad company has a right, and it is its duty, to make reasonable rules for the protection of the safety of its employees, and such rules its employees are bound to regard and obey; but whether or not any particular rule, under the circumstances shown, is sufficient and adequate for the safety of the company's employees, is a question of fact for the jury.

2. ———: ———: NEGLIGENCE. Under the rules of the defendant company, the switch engine in its Lincoln yards had the right to occupy the main track, protecting itself against overdue trains. The extra, which was being run by plaintiff's decedent, was required to proceed through the yard under full control, and protect itself within yard limits. The switch engine having the right of way over the extra, it was the duty of the decedent to be on the lookout for the switch engine and to take such precautions as the situation demanded to prevent a collision; but this did not relieve the crew of the switch engine from the exercise of ordinary care in avoiding a collision with the extra, which they knew had entered the yard.

3. ———: ———: ———: QUESTION FOR JURY. The uncontradicted evidence shows that the defendant company, at and prior to the collision which caused the death of plaintiff's decedent, had not promulgated any written or printed rules regulating the rate of speed at which the switch engine might be run in its yards.

Held, That it was for the jury to say whether or not, under the circumstances shown, the failure of the company to adopt and promulgate such a rule was negligence on its part.

4. **Negligence**: EVIDENCE. There being no evidence in the record tending to show negligence on the part of plaintiff's decedent, the question of contributory negligence does not arise.

5. **Damages**. The evidence shows that the decedent was a man of good health, 32 years of age; that he was earning from $125 to $150 a month; that his expectancy, according to the Carlisle table, would be 32 years. *Held*, That we cannot say that $15,000 is an excessive judgment under these circumstances.

6. **Commerce**: INTERSTATE. Plaintiff's decedent was running a lone engine, as an extra, from one point to another in this state, not in connection with any cars. *Held*, That he was not engaged in interstate commerce.

7. **Instructions** complained of and set out in the opinion, examined, and *held* free from prejudicial error.

8. **The evidence** examined and set out in the opinion, *held* sufficient to sustain the verdict and judgment.

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

M. A. Low, P. E. Walker, E. P. Holmes and *G. L. De Lacy*, for appellant.

George W. Berge, contra.

FAWCETT, J.

From a judgment for $15,000 in favor of the plaintiffs on account of the alleged negligence of the defendant in causing the death of Otto O. Wright, husband of plaintiff Lizzie L. Wright, defendant appeals.

The abstract contains 86 printed pages, the supplemental abstract 201 pages, the brief and reply brief of appellant 139 pages, and the brief of appellee 90 pages. To follow counsel through this voluminous record and through their equally voluminous briefs would necessitate an opinion of such length that it would be useless to the profession, for the reason that no lawyer would ever read it. We shall, therefore, deal directly with the material issues in the case.

Otto O. Wright was an engineer in the service of defendant. At the time set out in the pleadings he was ordered to run an engine, No. 1486, as "an extra" from Fairbury to Albright, both points in Nebraska. In making this run he was required to pass through the city of Lincoln. After leaving the station at Lincoln, and while running north through the company's yards at a point a short distance from the Holdrege street viaduct, this extra collided with the company's switch engine No. 1220, which was used by the defendant in its Lincoln yards for switching purposes, causing the death of Mr. Wright. These two engines will hereinafter be referred to by their respective numbers. The point where the collision occurred was in a cut and on a curve. The controlling, and in fact the only real question involved in this case, is, who was to blame for this collision?

It is shown that the defendant had rules for the guidance of its employees, including engineers. On its printed time-tables, such as were then used by engineers, rule 16 provided: "All except first class trains will approach (enter, and pass through the following named yards under full control), expecting to find main track occupied or obstructed. Albright, Fairbury, Lincoln, Belleville, Jansen, Phillipsburg." Subdivision *b* of rule 9 provided: "The speed of trains in the city of Lincoln between M street (two blocks west of passenger station) and Vine street (east of coal dock) must not exceed six miles per hour." Rule 97*a* in the book of rules promulgated by defendant provided: "Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks, protecting themselves against overdue trains. Extra trains must protect themselves within yard limits." The term, "under full control," in rule 16, all of the witnesses testified means "to be able to stop within the vision of the engineer." It is conceded that 1486 was required, while passing through the company's yards in the city of Lincoln, to proceed under such control. It is uncontradicted that the defendant had no written or printed rule

relating to the rate of speed at which its switch engines might run within its yards. There is some testimony to the effect that there was some sort of an unwritten rule or understanding that switch engines should also be run under full control; but the evidence is entirely satisfactory, and not contradicted by any testimony offered by defendant, that defendant's switching crew did not consider that it was bound by any such rule, except as to that portion of the Lincoln yard between M and Vine streets, which portion was not only covered by subdivision *b* of rule 9, but also by a city ordinance. Defendant in its brief urges 13 assignments of error, which we will consider in their order:

The first assignment is that the verdict is not sustained by sufficient evidence. In considering this assignment, the place where the collision actually occurred is important. There is a viaduct on Holdrege street at the place where that street is intersected by defendant's track. Holdrege street runs east and west. The collision occurred north of the viaduct; 1486 was running north, and 1220 south. In going north, after leaving the viaduct, the track curves to the east in a cut. The collision occurred in that cut. The point where the collision occurred is testified to by the engineer, fireman, switch foreman, and two of the switchmen who were riding on 1220, McLane, the fireman on 1486, and by four witnesses who resided in the immediate vicinity, and who visited the scene immediately after the collision. All of these witnesses locate the point of the collision as right opposite or a few feet south of a barn standing on the first lot east of the track, which lot faces south on Holdrege street. This lot is 135 feet in depth. The four residents of the vicinity locate the collision a little south of the barn. McKinstry, a switchman on 1220, says that 1486, after the collision, was about 35 or 40 feet south of the building shown in the photographs, which is the barn referred to. Some of the switching crew testify that the collision occurred about 150 feet north of the viaduct. This testimony, however, was simply

the opinion of the witnesses so testifying. This testimony cannot be considered in the face of the large number of witnesses whose uncontradicted testimony locates the exact place where the collision occurred in front or a few feet south of a fixed object or point by the side of the track. Considering, therefore, the length of the lot upon which the barn stood and the point in relation thereto, where these residents show the collision occurred, there is no escape from the conclusion that the collision actually occurred at a point about 100 feet north of the viaduct.

It is admitted that all of the members of the switching crew knew that the extra 1486 was in the yard. McKinstry, the switchman above referred to, was the first to discover that the two engines were running towards each other on the main track. He testifies that he immediately gave the alarm. The men on 1220 testify that when McKinstry gave the alarm the engineer threw on the emergency brake. When 1220 had run about 75 or 100 feet, McKinstry and some of the others jumped from the engine. All of the crew, including the engineer, jumped, but whether the others jumped at the same time McKinstry and Carr did, is not shown. Possibly the engineer remained on a little longer. According to McKinstry and Carr, 1220 proceeded about 25 feet after they jumped, before the collision occurred, so that, according to their testimony, 1220 proceeded about 100 feet, after McKinstry gave the alarm, before the collision occurred. Some of the witnesses on 1220 testify that at the time McKinstry gave the alarm 1220 was running from three to five miles an hour; others say from three to four miles an hour; yet McKinstry and Carr both say that when the collision occurred 1220 was going "not to exceed three miles an hour." The witness Palmer, engineer on the company's switch engine at the time of the trial, testified that he was familiar with engine 1220, and had run it; that an engine running at a rate of five miles an hour ought to be stopped in 20 feet, at 10 miles an hour in 30 feet, at 15 miles an hour in 45 feet, and at 20 miles an hour in 60 feet. This

testimony stands uncontradicted. It is thus clearly established that 1220 must have been running at a high rate of speed, or that the emergency brake was not applied and the engine reversed before the crew jumped from the engine. It is testified to by some of the crew of 1220, and conceded in the brief of defendant, that at the time McKinstry discovered 1486 approaching, it was at least 50 feet north of the viaduct. That fact being established, and also the fact that the collision occurred not over 100 feet north of the viaduct, it stands established as a fact that 1486 did not run to exceed 50 feet after its engineer, Wright, discovered the approach of 1220. A photograph introduced in evidence was taken at a point 420 feet north of the viaduct. It shows the barn above referred to, the cut and curve, and the rails of the track from that point to the viaduct, and clearly shows that at any point within that 420 feet two engines approaching from opposite directions would have a clear view of each other. 1486 being 50 feet north of the viaduct, it is beyond question that the point of view in the photograph could have been extended that number of feet farther north, so that there was a clear, open view of the track for the entire distance of 420 feet when the engines came within the vision of the two engineers. Of that 420 feet, 1486 only traveled about 50 feet when the collision occurred, while 1220 traveled 370 feet. As we view the record, there is no escape from these facts. This being true, then the conclusion is irresistible that the engineer of 1486 was proceeding north with his engine under full control; that the engineer of 1220 was proceeding south with his engine not under full control, but traveling at such a rate of speed that he was unable to stop it within a distance of 370 feet, and that, even after traveling that distance, his engine was still going at the rate of two or three miles an hour.

Mr. Burleigh, trainmaster for the Nebraska division of the defendant road, was called as a witness by defendant. Defendant's abstract of Mr. Burleigh's testimony sets out

only that part showing that engineers were examined by him as to their fitness, and as to the published book of rules; that he had examined Wright; that Wright had a clear understanding of the rules; that he informed Wright that switch engines had a right over all except first-class trains in yard, and that other trains would have to look out for them; that he read the rules to Wright, who gave him his understanding of the same as they were read; that Wright gave as his understanding of the term, "under full control," as meaning "to run at a speed which would make it impossible for two trains coming in opposite directions to collide with one another." That is not the meaning given by any other witness. If that be the meaning of the term, you could not run an engine at all without having a flagman in advance to warn you of approaching trains. An important part of Mr. Burleigh's testimony, not set out in defendant's abstract, appears in plaintiff's supplemental abstract: "Q. When you say you examine men for switch engines, do you use these rules? A. Yes; and the time tables. Q. You tell switch engine men that they have a right to run 25 miles an hour in the yards? A. Yes, sir. Q. You tell them that? A. If they want to —I don't tell them anything about running. Q. How is that? A. I don't tell them anything about how fast they shall run, or how slow. Q. You understand, of course, that they can at any time run their engines negligently? A. I understand that, yes."

Mr. Carr, the switch foreman, testified that when they went around that curve they always slowed up to save steam. "Q. But you went on the theory and assumed the right that everything had to get out of the way for you except this passenger? (By the term, 'this passenger,' the questioner meant a passenger train which was due to pass through a few minutes prior to the time of the collision, but which train was some 12 or 15 minutes late.) A. Yes, sir. Q. Although you knew the extra was in the yards? A. Yes, sir. * * * Q. Have you any rule applying to switch engines about running under control?

A. No, sir." It will be seen, therefore, that in the defendant's yard the switch engine was a free lance as against all except first-class trains.

The second assignment is that the court erred in submitting the sufficiency and reasonableness of the company's rules to the jury. In the instructions complained of the court told the jury that the question as to whether the defendant was negligent in one or more respects alleged in the petition, as set out in subdivisions *a*, *b*, *c* and *d* of the first paragraph of the instructions, which stated the allegations of the petition, "is one of the material elements of plaintiff's cause of action to which the jury should direct their attention in determining upon their verdict. Negligence may be defined as the omission to do something which a reasonable man guided by those conditions which ordinarily regulate the conduct of human affairs would under the circumstances do, or doing something which a reasonable man would not do under the circumstances. In other words, negligence is the absence of care according to the circumstances." By instruction No. 8 the court instructed the jury: "Touching subdivision *a* of the first paragraph of these instructions, you are further instructed that it was the duty of the defendant company to exercise reasonable care to adopt and promulgate reasonable rules for the control and conduct of its business in all cases, in case its business had become sufficiently extensive to demand their adoption in the exercise of reasonable care for the protection of its employees. In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries." Instruction No. 10: "You are instructed that under the rules of the company the light engine, which was being run by plaintiff's intestate as an extra, was required to run and pass through the Lincoln yards 'under

full control.' It is for you to say from the testimony what the term 'under full control' means, and then to apply your interpretation to the rules of the defendant company in which the term is used, and also to the acts of Otto O. Wright, in compliance with or failure to comply with such rules, in determining whether his acts were in compliance with or in violation of defendant's rules." Instruction No. 11: "If you find from the evidence that the defendant was negligent in one or more of the particulars alleged, and as set out in the first paragraph of these instructions, and if you further find from the evidence that such negligence proximately contributed to the injury of plaintiff's intestate, then you should direct your attention, among other things, to the defendant's claim that plaintiff's intestate was negligent, and also that he assumed the risks of his employment." The gist of defendant's complaint as to the foregoing instructions is that they submitted to the jury the reasonableness and sufficiency of the rules governing the operation of the switch engine in its yards. A number of authorities are cited by defendant in support of its contention. While we concede that in the main they sustain defendant's point that the reasonableness and, in some cases, the sufficiency of the rules are questions of law for the court, and not for the jury, this is not by any means the universal rule.

In *Southern R. Co. v. Craig*, 113 Fed. 76, the syllabus holds: "(1) Plaintiff's intestate, a railroad conductor on an extra train, had orders to precede a delayed regular train into defendant's yards. No instructions were given to look out for any other train on entering the yards. Intestate was killed in a collision with a switching engine in the yards. No notice of the approach of the extra train had been given to those on the switch engine. (In this case the switching crew had full notice of the presence of 1486 in the yard.) The company's rules, known to intestate, gave the right of way to switch engines in the yards, and required that extra trains must approach and run through yard limits under full control. The evidence

as to whether intestate's train was under full control was conflicting. The night of the accident was shown to have been dark and foggy. *Held,* That, notwithstanding the rules of the company, it was the duty of the crew of the switching engine to exercise ordinary care in avoiding collisions with incoming trains. (2) An instruction that the crew of the switching engine should take proper precautions against collisions with incoming trains, the character of such precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals, was correct. (3) The question as to whether intestate observed the rule of having his train under full control on entering the yards was for the jury." In that case the company requested the following instruction: "Under the rules the switch engine had the right to the use of the main line, protecting itself against only regular trains. The extra was required to proceed through the yard under full control. This requirement applied, not only to the speed of the train, but to such precautions in addition as the dark and foggy night demanded. The switch engine having the right of way over the extra, it was the duty of the other to be on the lookout for the switch engine, and to take such precautions as the situation demanded to prevent a collision." The trial court modified the instruction by adding: "Yes; but it did not relieve the switching engine from the exercise of ordinary care in avoiding collisions with trains entering the yard." The defendant requested this instruction: "The rules of the company do not require notice of the movements of extra trains to be given to the crew of a switch engine working within the yard limits, and it is not negligence on the part of the defendant not to have given such notice," which the trial court modified by adding, "But the crew of the switching engine should take all proper precautions against collisions with trains entering the yard, the character of these precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals." In the

opinion the court say (p. 79): "We find no error in the modifications made by the court in giving the instructions requested. After giving the first instruction requested, the court simply said, in substance, that it was the duty of the switching engine to exercise ordinary care in avoiding collisions with trains entering the yard. We cannot conceive of any circumstances under which the operators of a railroad train are relieved from the use of ordinary care to prevent collisions with other trains. This is a duty that devolves upon those running and operating trains at all times. What constitutes ordinary care depends upon the relationship of the parties and the circumstances under which they act, and what would be ordinary care or common prudence under certain conditions would not be under others." The judgment of the trial court was affirmed.

We think this reasoning is eminently sound, and its application to the switching crew in charge of 1220 is apparent. They knew the extra was in the yard. They had been expressly notified of that fact. They knew that when the extra moved farther through the yards it would be running on the main track, and for them to run their engine upon the main track, around the curve and through the cut at the rate of speed at which they were unquestionably running was a reckless disregard of the lives of those upon the engine of the extra. That they knew that they were liable to meet the extra is shown by what Switchman McKinstry said when he saw 1486 coming. His language was: "Get off; here comes that extra. * * * Q. Let me refresh your memory; did you say, 'There she is'? Did you use that language? A. I don't know whether I did or not. Q. How? A. I don't know whether I did or not; I just told them to get off, 'There comes the extra.'" A rule that a switch engine may run through the yards, on the main line, not under control, but at a high rate of speed, when its crew all know that there is an "extra" on the main line passing through the yards, would be a barbarous rule; and, if the rules of a railway company

permit such a practice, it should be held liable for injuries to employees on the extra who are injured while such extra is being operated in compliance with the rules of the company, viz., under full control. If the reasonableness of a rule is for the court, and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable. Submitting the question to the jury in such a case could not, therefore, prejudice defendant.

Directly upon the question of submitting to the jury the sufficiency of the company's rules, *Texas & P. R. Co. v. Cumpston*, 40 S. W. 546 (15 Tex. Civ. App. 493), is an instructive case. The fourth paragraph of the syllabus holds: "In an action for negligence of an employer in failing to provide rules, whereby an employee was killed, plaintiff need not allege or prove exactly what rules should have been made."

Mr. Labatt in his work on Master and Servant, vol. 1 (ed. 1904), sec. 228, in discussing the question of reasonableness, says: "Whether the reasonableness of a rule is a question for the court or the jury is one as to which there is much apparent conflict between the authorities. One theory is that this question is always for the court; the reason assigned for this view being that it would otherwise be impossible to secure a uniformity of view, or to insure that a rule pronounced reasonable in one case by a jury might not be pronounced unreasonable by another jury in a subsequent case. Another view is that the question is primarily one for the jury. Some courts have enunciated an intermediate doctrine which seems to be more in harmony with general principles, viz., that the reasonableness of a rule is a mixed question of law and fact, except in plain cases." The author cites numerous authorities in support of all three of the theories.

In *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. 87, it is held in the syllabus: "It is negligence on the part of railroad companies to fail to adopt such rules and regulations as are proper and necessary for the protection of

the safety of its employees." The trial court charged the jury: "I say generally that the railway company has a right, and it is its duty, to make rules for the protection of the safety of its employees, and such rules its employees are bound to regard and obey. But under the form of making rules, of course, a railroad company cannot exempt itself from negligence. Its rules must be such as tend to the protection of the lives of its employees. With this general statement in regard to the rules, you may take and consider them." The jury found for the plaintiff, and in an opinion by Brewer, J., the verdict was sustained, and the motion for a new trial was overruled.

In *Merrill v. Oregon Short Line R. Co.*, 29 Utah, 264, the syllabus holds: "(1) A master is under a primary and nondelegable duty to use ordinary care not only to promulgate, but also to enforce, reasonable rules and regulations for the safety of his servants, when the nature of the work requires it, and this duty is not performed merely by promulgating the rules, and using ordinary care in selecting men to enforce them. (2) The fact that the negligence of a fellow servant concurs with the negligence of the master in causing injury to a servant does not exempt the master from liability for his negligence." In the opinion (p. 279) it is said: "We think the evidence on behalf of respondents was quite sufficient to submit to the jury the question as to whether appellant used ordinary care, not so much, probably, in establishing and promulgating rules and regulations, but particularly in using ordinary care to enforce them. * * * The truth and the weight of this testimony were for the jury, which, if believed by them, was sufficient to find that ordinary care had not been used by the appellant in either establishing or in enforcing rules and regulations for the safety of its servants."

In *Murphy v. Hughes*, 40 Atl. 187 (1 Pennewill (Del.) 250), it is held: "The question as to whether an employer has made proper rules for the government of his employees is for the jury." In the opinion it is said (p.

188): "It is, however, always a question for the jury to determine whether such rules are sufficient for the purpose."

In *Devoe v. New York C. & H. R. R. Co.*, 66 N. E. 568 (174 N. Y. 1), the first paragraph of the syllabus reads: "Car inspectors, employed at a station at which there were many tracks and switches upon which a large number of trains passed every day, were required to inspect each car of each train while it was at the station, at which time there was much switching and moving of cars. Several inspectors had been injured in the performance of such duties, and many complaints had been made as to the dangerous character of the work. There was but one printed rule on the subject, which had never been enforced. *Held*, in an action for the death of a car inspector killed by the backing up of a train against the train under which he was working, that it was for the jury whether a parol rule, claimed to have been made by the foreman of the car department, without instructions from any one, was in use, and was sufficient, and properly promulgated under the facts."

In *Lake Shore & M. S. R. Co. v. Murphy*, 50 Ohio St. 135, it is held: "It is the duty of a railway company to afford reasonable protection to its employees against dangers incident to their work. *Railway v. Lavalley*, 36 Ohio St. 221, approved and followed. And if, under the circumstances of this case, a rule providing for warning was necessary, and by the exercise of reasonable care on the part of the company that necessity could have been foreseen, it was the duty of the company to prescribe such rule. Whether it ought to have so provided or not was a question for the jury."

In *Abel v. Delaware & Hudson Canal Co.*, 9 N. E. 325 (103 N. Y. 581), it is held: "In an action against a railroad company for damages for the death of an employee, a repairman, which occurred while he was engaged in repairing defendant's cars standing upon a side-track, which were run into by one of defendant's engines, it is

for the jury to say whether or not defendant's rules providing for the safety of repairmen so employed are adequate for that purpose, and the court errs in ruling, as matter of law, that they are sufficient." In closing the opinion the court say (p. 326): "We do not perceive how it was possible to say, as matter of law, that the rules of the defendant were proper and sufficient for the protection of its repairmen, and that it should not have taken greater precautions, by rules or otherwise, for their safety. We think the facts should have been submitted to the jury, and that the nonsuit was improper." A judgment of reversal, therefore, followed.

In *Chicago, B. & Q. R. Co. v. McLallen, Adm'r,* 84 Ill. 109, the fourth paragraph of the syllabus holds: "A railway corporation has the lawful right to make reasonable rules for the conduct of its employees, and also for the conduct of passengers. Whether any given rule be reasonable, and therefore within the power of the corporation, or whether it be unreasonable, and therefore *ultra vires,* is a question of law for the court; but whether such rules are adequate for the safety of others, and the management of the trains, is a question of fact for the jury." In that case the decedent was a conductor in charge of an extra train, commonly called a "wild train." Plaintiff recovered a verdict and judgment for $4,500, which was affirmed. In the light of the authorities above cited, to which others might be added, defendant's second assignment must be decided adversely to it.

The third assignment is that the court erred in submitting to the jury subdivison *b* of instruction 1, viz.: "In the failure to give said Wright timely warning by bell or whistle of the approach of said switch engine." The language above referred to was used by the court simply in stating the issues to the jury. Defendant has not called our attention to any other instruction where that language is used.

The fourth assignment is that the court erred in submitting to the jury the question whether defendant's em-

ployees upon the switch engine, as soon as they discovered the engine of plaintiff's intestate, jumped from their engine without reversing the same and without trying to stop. Counsel say this question should not have been submitted to the jury, for the reason that the undisputed testimony in this record of the witnesses introduced by both plaintiff and defendant is that, at the very first moment the presence of 1486 was known, the engineer applied all the apparatus on the engine to stop it, and actually did stop it in a very short distance. The trouble with this contention is that the undisputed evidence does not show, absolutely, that the engineer applied all the apparatus on the engine to stop it; but, instead of showing that he actually did stop it, the evidence shows that it had not stopped when the collision occurred. This question was properly submitted to the jury.

The fifth assignment is that the court erred in submitting to the jury the question as to whether defendant was guilty of negligence in running the switch engine around a curve at a negligent and dangerous rate of speed without having the same under control. What we have said under the first assignment disposes of this adversely to defendant.

The sixth assignment is that the court erred in giving instruction No. 10. This instruction has already been set out and disposed of under the second assignment.

The seventh assignment is that the court erred in giving instruction No. 13: "As to the defense of contributory negligence, and also as to the defense of assumption of risks, the burden of proof is upon the defendant to establish both of said defenses by a preponderance of the evidence, as those terms have been hereinbefore defined." There was no error in this instruction. *Grimm v. Omaha E. L. & P. Co.*, 79 Neb. 395; *Dowd v. New York, O. & W. R. Co.*, 170 N. Y. 459; *Arenschield v. Chicago, R. I. & P. R. Co.*, 128 Ia. 677; *Mace v. Boedker & Co.*, 127 Ia. 721.

The eighth assignment is that plaintiff's intestate was guilty of gross negligence. We spend no time in discuss-

ing this assignment as there is an entire absence of evidence to show any negligence on the part of plaintiff's intestate.

The ninth assignment is the legal sufficiency of the evidence for the court. In discussing this assignment, counsel say that in the trial court counsel for plaintiff relied on the Nebraska Employers' Liability Act (Comp. St. 1911, ch. 21, secs. 3-5), which modifies the defense of contributory negligence. What we have said in answer to the eighth assignment is a sufficient answer to this. There was no contributory negligence on the part of plaintiff's intestate. This also disposes of the tenth assignment.

The eleventh assignment is that the verdict was the result of passion and prejudice, and is excessive. The evidence shows that the decedent was a man of good health, 32 years of age; that he was earning from $125 to $150 a month; that his expectancy, according to the Carlisle table, would be 32 years. We cannot say that $15,000 is an excessive judgment for the death of a man under these circumstances.

The twelfth assignment is that the decedent assumed risk of collision with switch engines. We think counsel for the plaintiff answer this contention in plaintiff's brief, where it is said: "Engineer Wright assumed the risks ordinarily incident to the business he was engaged in, but he did not assume any negligence of the defendant, and certainly did not assume the reckless conduct of the switch engine on this particular day."

The thirteenth assignment is that the court erred in submitting the case under the Employers' Liability Act. The contention under this assignment is that engine 1486 was on its way from Fairbury to Council Bluffs, Iowa, and hence Wright "was engaged in interstate commerce." It is probably true that, if Mr. Wright was engaged in interstate commerce at the time he was killed, the remedy would be under the federal act exclusively, but the trouble with this contention is, neither Mr. Wright nor engine 1486 was at the time engaged in interstate com-

merce. His order was to take this engine from Fairbury, in Nebraska, to Albright, in Nebraska. He was running the engine without cars or train of any sort. The engine, so far as we can gather from the record, was defective, and was on its way to the car shops for repairs. In *Chicago & N. W. R. Co. v. United States,* 168 Fed. 236, the circuit court of appeals for this circuit held: "The necessary movement of a defective empty car alone, for purpose of repair only, and not in connection with any cars commercially used, does not subject the carrier to the penalties of the acts." A similar holding was made by the same court in *United States v. Rio Grande W. R. Co.,* 174 Fed. 399. The same rule will, of course, apply to an engine.

We have given this case very careful consideration. We have examined the record with great care, and are unable to find in it any prejudicial error. The judgment of the district court is therefore

AFFIRMED.

HAMER, J., dissenting.

1. Whether the defendant railway company formulated and promulgated any written or printed rule regulating the rate of speed that its switch engines might be run in the yards at Lincoln does not present any question of negligence for the jury to consider, unless in this particular case this part of the track run over was so run over by the switch engine at an unreasonable rate of speed, considering all the circumstances, and especially that this part of the yards was in a cut in a curve of the road, and so might have imperiled the safety of plaintiff's decedent. As the jury were not so told, and were not properly instructed touching the question, I am under the impression that there is prejudicial error in the proceeding and in the instructions given, as also in the third paragraph of the syllabus of the majority opinion. Whether the railroad company did or did not lay down a rule for the guidance of its employees concerning the rate of speed at

which the switch engine should be run in the yards is immaterial, unless it is shown by the evidence that the switch engine was run too fast and had such an unreasonable rate of speed as to endanger the safety of the decedent. The third paragraph of the syllabus is objectionable.

2. It must be all a matter of speculation, in the absence of any rule, that if a reasonable rule had been made by the railroad company touching the running of the switch engine in its yards it would have controlled, or even influenced, the conduct of the crew in running such switch engine. For this reason, the theory of the opinion seems to be wrong.

3. By instruction No. 8 the court instructed the jury: "Touching subdivision *a* of the first paragraph of these instructions, you are further instructed that it was the duty of the defendant company to exercise reasonable care to adopt and promulgate reasonable rules for the control and conduct of its business in all cases, in case its business had become sufficiently extensive to demand their adoption in the exercise of reasonable care for the protection of its employees. In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries." The effect of this instruction would seem to be to turn the jury loose in the field of speculation as to whether the railroad company might not have improved its rules touching the protection of its employees, and if for any reason it had not done so, that it is liable in this case. The trouble with this sort of thing is that the attention of the jury is not called to any specific thing which may have contributed to the death of plaintiff's decedent.

It is well said in the majority opinion: "A rule that a switch engine may run through the yards, on the main

line, not under control, but at a high rate of speed, when its crew all know that there is an 'extra' on the main line passing through the yards, would be a barbarous rule; and, if the rules of a railway company permit such a practice, it should be held liable for injuries to employees on the extra who are injured while such extra is being operated in compliance with the rules of the company, viz., under full control. If the unreasonableness of a rule is for the court, and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable." I apprehend that the railway company may make no rule which would relieve the crew of the switching engine from exercising ordinary care and common prudence to avoid a collision, but the language used in the instruction quoted is of a most general character. That turns over to the jury the question of determining whether a better set of rules might not have been constructed, and, if so, then the inference is that it is the duty of the jury to find that the defendant is liable. I do not think that this can be the law. If the jury is turned loose and told that it may occupy as wide a province as it likes, it will be almost sure to find that other and better rules might have been made. When it is remembered that jurors are not specially instructed along the line of operating railways and formulating rules for their management, it must be seen that the instruction is an invitation to pursue any theory which may present itself to the imaginative mind of the juror.

The first case cited in the majority opinion is that of an inferior court. The Texas case cited does not seem to be clearly in point. The other cases cited do not seem as broad as the instruction in the instant case.

4. Instruction No. 9, requested by the defendant, reads: "You are further instructed that the defendant was not required to insure its locomotive engineers from collisions with switch engines or other like accidents resulting from the management of trains; that defendant's duty to the employees was only to use reasonable care and diligence

in the management and operation of its switch engines, and unless you find that the defendant, or its agents and employees, failed to use reasonable care and diligence in the management of its switch engine, and as a consequence thereof plaintiff's intestate was injured, you cannot find for plaintiffs." I think the above instruction requested by the defendant should have been given.

5. It was according to the theory of the defendant's case that the plaintiff's intestate was running his engine at a rate of speed so great as not to be under full control, and that this was the proximate cause of the injury. Touching this matter, the defendant requested the giving of an instruction as follows: "Instruction No. 13. You are instructed that the company has promulgated and published rules governing the operation of locomotive engines and trains in the Lincoln yards; and that, under said rules, Otto O. Wright was bound to run his engine through the Lincoln yards under full control. You are instructed that an employee, if within his power so to do, is bound to obey all of the reasonable rules and instructions of his employer with reference to the conduct of his business, and if you find from the evidence that at or immediately before the accident, when the engines first came in sight of each other, the said Otto O. Wright was running his engine at a rate of speed so as not to be under full control, and that this was the proximate cause of the injury, then you are instructed that plaintiffs cannot recover." I think it should have been given.

For the foregoing reasons, I dissent from the majority opinion.

AUGUST HENKEL, APPELLEE, V. WILLIAM BOUDREAU ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1913. No. 17,242.

1. **Judgment: FORMER ADJUDICATION: DISMISSAL.** Where, in a petition on the commencement of an action, several persons are named as plaintiffs, and before issue is joined by answer leave is given to file an amended petition, and the name of one of the plaintiffs is, without any order of the court, dropped from said amended petition when filed, and the items set forth in the original petition, for which the plaintiff, so dropped, alone could recover, are also dropped from the amended petition, and thereafter defendants answer the amended petition, and plaintiff replies to such answers, and the case proceeds to trial upon the issues so joined, and no claim or demand of the plaintiff, so dropped from the amended petition, is adjudicated upon such trial, such action cannot be urged as a bar to plaintiff's right to maintain a separate action in his own name, based upon his individual cause of action.

2. **Appeal: REVIEW.** Where the record upon which a case is submitted to this court contains no motion for a new trial, the only question which will be considered will be the sufficiency of the pleadings to sustain the judgment.

3. **Intoxicating Liquors: ACTION FOR DAMAGES: SUFFICIENCY OF PETITION.** Upon the authority of *Buckmaster v. McElroy*, 20 Neb. 557, the petition in this case is *held* to state a cause of action and to be sufficient to sustain the judgment.

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

L. H. Blackledge and *A. H. Byrum*, for appellants.

M. A. Hartigan and *W. H. Miller*, *contra*.

FAWCETT, J.

The substance of the petition is that on January 14, 1908, plaintiff, then a man 48 years of age, by occupation a farmer, was in good health and successful in his occupation and business, from which he received annually the sum of $1,000 and upwards; that the defendants William Boudreau and Leonel Boudreau were then engaged in the

licensed sale of intoxicating liquors; that the defendant United States Fidelity & Guaranty Company is a bond and surety company; that for the purpose of securing licenses for engaging in said liquor business the company executed its bonds for said defendants; that on the date named, and for more than a year prior thereto, the defendants were engaged in the sale of liquors, were well and intimately acquainted with plaintiff, and during said time they gave and supplied plaintiff with intoxicating liquors in quantities and amounts, and continuously from time to time and so frequently and often that plaintiff became an habitual and confirmed drunkard; that on the date named plaintiff purchased and received from the defendants and drank the liquors so purchased until he became helplessly intoxicated; that when so intoxicated he attempted to drive his team home; that by reason of said intoxication caused by defendants he lost control of his horses and they ran away, throwing plaintiff from his wagon and so injuring him that it was necessary to amputate his right arm near the shoulder; that by reason of the injury, in addition to his confirmed habits and disease so fixed upon him by the use of the liquors sold and given to him by the defendants, plaintiff is unfit to carry on his usual occupation of a farmer; that he is permanently and effectually crippled for life; that it became necessary for plaintiff to employ surgical and medical services and to pay therefor the sum of $350; that plaintiff also incurred and paid out large sums for medicine, nursing and care in the further sum of $350; that by reason of the injuries aforesaid he is permanently crippled and injured for life, to his loss and damage in the sum of $15,000, for which amount he prays judgment.

One Frank Robbins was also joined as a defendant, but by direction of the court he was released from liability.

The defendants answered separately, but in like terms, in which answers they deny all allegations not admitted to be true; allege that the petition does not state facts sufficient to constitute a cause of action; that any injury

plaintiff received was the result of his own negligence; that if plaintiff was intoxicated at the time of the injury he voluntarily, by his own desire and by his own acts, became in such condition, and not by the desire, request, influence or contribution of the defendants. The answers further allege that plaintiff, his wife, Sophie Henkel, and five children recovered judgment in March, 1909, for $4,000 against the answering defendants for the aforesaid injuries, "which action is now pending on appeal in the supreme court of Nebraska." The reply is a general denial. There was a trial to the court and a jury. Judgment was entered against the defendants in favor of plaintiff for $1,500. Defendants appeal.

The defendants insist that plaintiff was a party plaintiff in the suit by Sophie Henkel, his wife, against these defendants, as set out in their answers, and that whatever claim he may have had against the defendants was finally adjudicated in that case. This contention is based upon the ground that plaintiff never was dismissed out of that case, as it was originally commenced, either by order of the court or by any action of record of plaintiff himself. That case went to judgment, and was appealed to this court, where the judgment was affirmed. *Henkel v. Boudreau*, 88 Neb. 784. It is undisputed that when that case was originally commenced the plaintiffs named in the title to the case were Mrs. Henkel, the five children, by Mrs. Henkel as their next friend, and August Henkel, plaintiff in this case. Defendants assailed the petition upon various grounds, and leave was given plaintiff to file an amended petition. In the amended petition August Henkel's name was dropped. The opening paragraph of the amended petition recites: "The plaintiff complains of the defendants and for cause of action shows unto the court in her own right and as well as the next friend for her minor children as follows," etc. In the amended petition specific items, which the original petition counted on in favor of August Henkel, are omitted. When defendants answered in that case, they answered the amended peti-

tion, and not the original, and therefore knew at the time they answered that August Henkel had dropped out of the case, and that no demand was being made for any recovery for him. That was the case tried, and that was the case presented in this court. The opinion by our then and present chief justice shows that no claim of August Henkel was litigated or decided. But, counsel say August Henkel was in the original case, and ask: "If so, how and when did he make his exit?" It is then argued that he could only get out of that case by a formal dismissal either by order of the court or by his own motion, and cases from Kansas are cited to sustain this contention. One of those cases is sufficient to refer to. In *Allen v. Dodson*, 39 Kan. 220, the first paragraph of the syllabus holds: "An action cannot be dismissed by the plaintiff by entry to that effect on the appearance docket. It is in the nature of a judgment, and requires the order of the court."

In *Grimes v. Chamberlain*, 27 Neb. 605, this court held: "An action may be dismissed without prejudice to a future action by a plaintiff before the final submission of the case to the jury or court where the trial is to the court (sec. 430 of the civil code); and such dismissal may be made at the option of the plaintiff without leave of the court. It is a right specially given by statute which the court has no power to refuse."

Under the authority of the above case, August Henkel had a perfect right, before the original case was submitted, and certainly before issue had been joined, to dismiss that case so far as he was concerned. The formal way would have been to have obtained an entry on the docket of the court showing such dismissal, but, the case having subsequently been tried on issues joined between the defendants and the remaining plaintiffs, the irregularity, if it be such, cannot now be urged. An examination of the instructions in the abstract before us shows that the trial court carefuly safeguarded the defendants against any possibility of allowing plaintiff to recover for anything for

which his wife and children recovered in the other case. The irregularity was therefore without prejudice, and under section 145 of the code constitutes no ground for reversal.

This case was filed in this court while the abstract law was in force, and was submitted upon an abstract prepared by defendants. So far as the abstract shows, no verdict was ever returned by the jury. The abstract does not inform us why no verdict was returned, nor does it set out any motion for a new trial. All that it states is: "December 24, 1910, separate motions for new trial were made by Leonel Boudreau and the United States Fidelity & Guaranty Company. Motions were severally overruled and exception taken, and judgment was rendered by the court." In this condition of the record, all that we can consider is the sufficiency of the pleadings to sustain the judgment.

That the petition states a cause of action is the settled law of this state. *Buckmaster v. McElroy,* 20 Neb. 557. This opinion is vigorously assailed by counsel, but it has been frequently referred to and followed in subsequent decisions by this court. Counsel say that the case has been much criticised by other courts and text-writers, and also by this court. It is true the decision in that case was criticised in a dissenting opinion by one member of the court at the time it was decided. The subsequent criticism by this court, to which counsel refers, is evidently the statement by Judge POST in *Curtin v. Atkinson,* 36 Neb. 110, where the judge says: "And in *Buckmaster v. McElroy,* 20 Neb. 557, it was held that one who had suffered injury in consequence of his own voluntary intoxication may recover on the bond of the saloon-keeper from whom the liquor was procured. We are not disposed to recede from the position taken in previous decisions, notwithstanding the last-named case has been the subject of no little criticism, particularly by Mr. Black in his recent work on Intoxicating Liquors, sec. 291. But to further extend the liability of the saloon-keeper would be a palpable misconstruction of the liquor law and an unmistak-

able encroachment upon the powers of the legislature." It will be seen from this quotation that this court has deliberately considered the criticisms passed upon *Buckmaster v. McElroy*, yet, notwithstanding such criticism, it has adhered to that case. Further comment upon that point is unnecessary.

As above stated, the petition states a cause of action. We have examined the instructions given by the court and find that they respond to the issues tendered by the pleadings. There is nothing before us to show that the motion for a new trial, which counsel say was filed, challenged the correctness of any of the instructions, or any of the rulings of the court during the trial, or the sufficiency of the evidence to sustain the verdict. This being true, there is nothing left for us to do but affirm the judgment.

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

JESSIE E. BOLTON, APPELLEE, V. HENRY BOLTON, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,313.

Divorce: EXTREME CRUELTY: EVIDENCE. Evidence examined, and referred to in the opinion, *held* sufficient to entitle plaintiff to a divorce on the ground of extreme cruelty.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Affirmed as to defendant's cross-petition, and reversed as to plaintiff's petition, and remanded, with directions.*

C. J. Phelps and *George W. Wertz*, for appellant.

W. M. Cain and *M. F. Harrington, contra.*

FAWCETT, J.

This suit was instituted by plaintiff in the district court for Colfax county, for a divorce on the ground of extreme cruelty. Defendant answered, denying all of the acts of cruelty, and alleging adultery on the part of plaintiff, and prayed for a divorce on that ground. Plaintiff then filed an amended petition, alleging the same matters set out in her original petition, and adding other and more serious acts of cruelty. After an extended trial, in which a large amount of testimony was taken, the district court found that neither the acts of cruelty charged in the petition nor the charge of adultery set out in defendant's answer and cross-petition had been sustained by sufficient evidence, and dismissed both the petition and cross-petition. Defendant appeals, and plaintiff prosecutes a cross-appeal.

It would serve no good purpose to set out the testimony offered on both sides of this unfortunate case. We have examined the evidence with great care, and have reached the conclusion that the findings and judgment of the court in favor of plaintiff as to defendant's cross-petition should be affirmed, but that the charge of cruelty contained in the fifth paragraph of plaintiff's amended petition is sufficiently sustained to entitle her to a divorce. We are the more ready to so hold because we think that in this case the legitimate ends and object of matrimony have been utterly destroyed, and that these two people can never again live together as husband and wife.

The amended petition alleges that defendant is the owner of a quarter section of land in Colfax county of the value of $16,000, a stock of merchandise in the city of Schuyler of the value of $15,000, a stock of merchandise in the village of Dodge of the value of $5,000, a quarter section of land in Perkins county of the value of $7,000, and bank stock of the value of $2,000—total $45,000. The defendant in his answer admits the ownership and value of the stock of merchandise in the city of Schuyler, but

alleges that he is indebted therefor in the sum of $5,000; admits the ownership and value of the Colfax county land, but alleges that it is encumbered in the sum of $8,000; admits the ownership of the Perkins county land, but denies that it is worth $7,000, and alleges that its value is but the sum of $3,200; admits the ownership of the bank stock, but denies that it is of the value of $2,000, and alleges that it is of the value of only $1,000, and is encumbered in the sum of $500; and further alleges a general indebtedness, in addition to the items above enumerated, of $5,000. No proof was offered by either party as to the value of the property or as to any indebtedness thereon.

Counsel for plaintiff insist that in this state of the record no deductions can be made for indebtedness; that defendant having alleged an indebtedness, but having given no evidence in support of his allegation, "this court must find conclusively that he is not in debt." We are inclined to agree with counsel for plaintiff in this contention, but it is unnecessary to determine the point, for the reason that the allowance of alimony is a question resting largely in the sound discretion of the court awarding the same, and the court is not absolutely bound by the exact figures showing the amount of the husband's property. The parties to this suit had only been married about eight years. So far as the evidence shows, defendant had accumulated substantially all of his property before he married plaintiff. She is not, therefore, entitled to the same allowance out of his estate as she would be if they had started life together and had jointly accumulated the property. Considering all of the allegations pro and con as to the value of the property, and all of the facts and circumstances shown in evidence, and considering the ages of the parties, we think an allowance of $6,000 as permanent alimony would do substantial justice between the parties.

The judgment of the district court is therefore affirmed as to defendant's cross-petition, and reversed as to plain-

tiff's petition, and the cause is remanded to the district court, with directions to enter a decree granting plaintiff a divorce on the ground of extreme cruelty, and awarding her the sum of $6,000 as permanent alimony; defendant to pay all costs.

JUDGMENT ACCORDINGLY.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

LINCOLN REALTY COMPANY, APPELLEE, V. GARDEN CITY LAND & IMMIGRATION COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1913. No. 17,322.

1. **Statute of Frauds: CONTRACT: MODIFICATION.** Where a contract is one required by the statute to be in writing, there must be a consideration for a modification by waiving some of its requirements, or else such new agreement must be in writing.
2. **Brokers: COMMISSION: WHEN DUE.** In a written contract of agency for the sale of real estate, which provides that the agent's commission shall be "due and payable when deal is closed," such commission is due and payable when the agent has brought his principal and a purchaser together, and the principal and purchaser have fully negotiated and agreed upon a sale and purchase, and have entered into an executory contract for the performance of such agreement.
3. **The instructions examined, and set out in the opinion, *held* free from prejudicial error.**

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

C. Petrus Peterson, Albert Hoskinson and *R. W. Hoskinson,* for appellant.

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

FAWCETT, J.

From a judgment of the district court for Lancaster

county, in favor of plaintiff for commissions earned in an alleged sale of lands for defendant, defendant appeals.

The petition sets out the following contract: "Lincoln, Neb., Nov. 13, 1909. We the undesigned agree to pay the Lincoln Realty Co., of Lincoln, Neb., a commission of $3 per acre on all lands sold by them, said commission to be based on our regular selling terms, one-half cash of said purchase price, said lands owned and controlled by us in Finney and Scott counties, Kansas, said commission due and payable when deal is closed. Such parties to have the following territory: Lancaster, Otoe, Saunders, Seward, Saline, Gage and Jefferson counties, and Cass county. The Garden City Land & Immigration Co., by H. J. Wells. H. J. Wells, 407 Commerce Bldg., Kansas City, Mo."—and alleges that plaintiff sold 320 acres to J. D. Heugel, 160 acres to J. O. Greenawalt, 160 acres to H. W. Strock, and 400 acres to Clarence Shumway, "all of said lands being located in Scott county, Kansas, and sold under the terms and conditions of the contract;" that there is due plaintiff a balance on account of such commission of $2,040, for which judgment is prayed, with interest from March 8, 1910. For answer to the petition as to the sale to Heugel, defendant alleges that the sale was in part a trade or exchange, in which, "in part payment of the purchase price, there was conveyed by the purchaser to the defendant two houses and lots in Lincoln, Nebraska, and the balance of the purchase price, $3,600, was paid by the purchaser in cash;" that it was agreed between plaintiff and defendant "at the time of said sale" that one of said two houses and lots should become the property of the defendant, and the other the property of the plaintiff and one Wells, and that when the last-mentioned lot should be sold the proceeds of said sale should be divided equally between plaintiff and Wells, and the other house and lot remain the property of defendant; that the two houses represented all the profit there was to the defendant in the sale of the land to Heugel, and in consideration of that fact it was agreed

that plaintiff should accept one of the said houses and lots in full of its commission for the sale of said land and for the services rendered by said Wells in making said sale; that, after the sale of the land had been negotiated and the terms of sale agreed upon, plaintiff sent to defendant a written contract to be signed by defendant, but did not then disclose that plaintiff had received $200 on account of the purchase price, and that at the time defendant signed the contract it did not know of such payment to plaintiff; that defendant signed the contract, and its president took the same to Lincoln to close up the deal, and there, in the presence of the purchaser, the president of defendant stated that the amount of cash to be paid was $3,600, whereupon Heugel stated that he had already paid $200, and there only remained to be paid in cash $3,400, which statement plaintiff verified; that Mr. Harris, of plaintiff company, admitted he had received said $200 in cash, and that he took a check for $3,400, the balance of the purchase price which had been given to Heugel; that thereupon the president of defendant demanded of plaintiff the said $3,600, the full amount of the cash purchase price, which plaintiff refused to pay, "but the plaintiff did pay to the defendant the sum of $3,120, and kept and retained the balance of said purchase price, $480, which sum the plaintiff owes the defendant, with interest thereon from the date of its receipt by the plaintiff;" that immediately or shortly after the defendant received from plaintiff said sum of $3,120, the contract between plaintiff and defendant was by mutual consent canceled, and since that date, "which was about one week after the deal covering said half section of land was closed, the plaintiff has never been the agent of the defendant;" and denies each and every allegation in the petition not specifically admitted. It will be seen that the answer as to the three deals last above named is a general denial only. The reply is a general denial.

We will consider first the Heugel deal. As to this deal,

the assignments of error are that the court erred (1) in excluding evidence of a subsequent oral agreement with reference to compensation to plaintiff for negotiating this deal, and (2) in giving instruction 7 and 8, which direct a verdict for plaintiff as to their claim by virtue of the Heugel deal. A fair construction of the answer would be, and the evidence conclusively shows, that this deal was fully consummated and the transfer made. The evidence as to any modification of the contract with reference to commissions is in direct conflict. The testimony of plaintiff that no such modification was ever made is quite strongly corroborated by the fact that, when the deal was consummated, the deed to the two houses and lots, one-half of one of which the defendant claims plaintiff was to receive as full compensation for its services, was taken in the name of the president of defendant, and by him subsequently conveyed to one Clark, who, the president testifies, "was trustee for what we called the 'syndicate' in handling these lands." No deed has ever been executed or tendered to plaintiff for either of said lots or any portion thereof. On the trial of the case the court, on plaintiff's motion, struck out the testimony which had been given by the witness Wells, in behalf of defendant, pertaining to the question of a modification of the written contract by the alleged oral agreement to take the house and lot in lieu of the commission provided for by the written contract, on the ground that the statute of this state requires a contract of brokerage to be in writing, stating the amount of commissions, and that the alleged oral arrangement is void under the statute, "and incompetent to vary them." Instructions 7 and 8, complained of, were to the same effect. In No. 7 the jury were told that the evidence, touching the agreement to accept the house and lot in lieu of commission, should not be regarded by them, as such contract was void, not being in writing; and in No. 8 they were told that defendant was not entitled to recover upon their counterclaim for $480, being one-half of the commission upon the Heugel deal,

as stated in the written contract. In the ruling excluding testimony referred to, and in the instructions given, the district court did not err. The rule is correctly stated in the second and third paragraphs of the syllabus in *Bowman v. Wright,* 65 Neb. 661, as follows: "(2) While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration. (3) Where, however, the contract is one required to be in writing by the statute of frauds, there must be consideration for a modification by waiving some of its requirements, or else such new agreement must be executed." No consideration for the alleged oral modification of the contract is either alleged or proved. The allegation that the two houses represented all the profit that there was to the defendant in the sale of the land to Heugel cannot be urged as a consideration passing to plaintiff for the surrender of $960 of commission, and taking in lieu thereof one-fourth interest in the Heugel lots, which the witness Wells, in behalf of defendant, testified Harris told him were worth about $2,700.

As stated in the brief of counsel for defendant, "the three remaining transactions call for an interpretation of the agency contract with reference to the time when commissions are due." The contention made by defendant is that the words in the contract, "said commission due and payable when deal is closed," mean when the deal is finally consummated by the actual transfer of the property by the defendant to the purchaser secured by plaintiff; while plaintiff's contention is that those words mean that the commission is due and payable when plaintiff has done everything there is to be done by it; that is to say, when it has brought the purchaser and seller together, and a sale by them has been fully negotiated and agreed upon, and an executory contract for the performance of that agreement entered into between the seller and purchaser. We think the plaintiff's contention is sound and should be sustained.

This holding, we think, disposes of the case as to the Greenawalt, Strock and Shumway deals. The evidence shows that the Shumway deal was actually consummated. No consideration, therefore, need be given to that. As to the Strock deal, it is shown that a sale was made to Strock and an executory contract executed by him. He was ready and willing to consummate the deal, but the president of the defendant refused to go with him to the bank, where Strock testifies he had his money, and the cashier of which bank Strock desired to look over the papers. His testimony is positive to the point that he requested the president of defendant, who was in the small town where the bank was doing business, having come there for the purpose of consummating the deal, to go with him to the bank, and that the president refused. This testimony is contradicted by the president. There is no evidence that defendant tendered Strock a deed, but the president left town, according to Strock's testimony, without making any further attempt on his part to consummate the deal, and no deed was ever given Strock for the land purchased by him. Upon this branch of the case the court instructed the jury that the evidence disclosed that plaintiff procured and introduced Strock to the defendant; that Strock and defendant entered into a valid contract of sale for the land involved in that deal; that no deed was ever made and delivered to Strock for the property; that defendant did not receive from Strock the purchase price of said property; and that "the jury are instructed, if they find from the evidence that the said Strock, the purchaser, was financially able to carry out the terms of the said contract, then the failure to carry out that contract does not deprive the plaintiff of the right to the commission contracted for, and in this case, if the jury find that the said Strock was able to carry out the terms of said contract, its findings should be for the plaintiff for the sum of $480." The court was partially in error in stating that the defendant did not receive from Strock the purchase price of the property. It had not received the whole

purchase price, but it had received from Strock a note for $2,500, which at the time of the trial it still held and had never offered to return. If Strock was able to carry out the contract, he could, under his executory contract, have been compelled to do so, but, instead of insisting upon performance by him, defendant never offered performance on its part. We think further discussion of this deal is unnecessary.

As to the Greenawalt deal: This appears to have been to some extent an exchange of property. Defendant was to accept from Greenawalt three lots in the town of Daykin and a stock of merchandise. When the deal was agreed upon, an executory contract was entered into between defendant and Greenawalt. Mutual abstracts of defendant's land and Greenawalt's lots were made, examined and approved. The inventory of the Greenawalt stock of merchandise was made by Mr. Harris, of plaintiff company, at the request of Mr. Hope, president of defendant. Mr. Harris testifies that no objection was made to the same. There is no contention made in this case that there was to be any rebate or modification of commission. Upon this branch of the case the court instructed the jury that, if they found from the evidence that the defendant refused to carry out the terms of the contract with Greenawalt, upon such refusal taking place, plaintiff would be immediately entitled to the commissions contracted for in his contract, unless the refusal by defendant to carry out the contract was for the reason that Greenawalt was unable to perform on his part. There is no conflict in the evidence that Greenawalt was ready and willing and entirely able, and had prepared his deed, ready to complete the contract.

We have been unable to discover any prejudicial error in the record. The judgment of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

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

FILED SEPTEMBER 26, 1913. No. 17,654.

1. **Appeal:** LAW OF THE CASE. The determination of questions presented to the supreme court becomes the law of the case, and, ordinarily, will not be re-examined when the case is again brought up for review.

2. **Taxation:** PUBLICATION OF DELINQUENT TAX LIST: NEWSPAPERS: ORDER OF COUNTY BOARD. A motion adopted by a county board that "the printing of the scavenger delinquent tax list was awarded to the O'Neill Frontier," *held*, not a designation of such newspaper as the one in which subsequent notices in the same suit should be published.

3. **Appeal:** RULINGS: HARMLESS ERROR. "To warrant the reversal of a judgment it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining." *Dobry v. Western Mfg. Co.*, 58 Neb. 667.

4. ———: VERDICT: INADEQUACY. The verdict of a jury will not be set aside on the sole ground of inadequacy of amount, where it appears that substantial justice has been done.

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

Brome & Brome and *W. K. Hodgkin*, for appellant.

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

FAWCETT, J.

This is the fourth time we have been called upon to decide some phase of this controversy. *State v. Cronin*, 75 Neb. 738; *Miles v. Holt County*, 86 Neb. 238; *Cronin v. Cronin*, 88 Neb. 141. Reference is made to those opinions for a history of the controversy, and to the last of said opinions for a statement of the issues tendered by the petition in this action. An examination of that opin-

ion will show that when this action was commenced a general demurrer was interposed to the petition and sustained by the district court. Upon appeal to this court, the petition was carefully examined, and, as shown in the opinion by SEDGWICK, J., was held good, and the judgment of the district court reversed. Upon the trial of the case to a jury upon the merits, the district court, on motion of defendants, over the objection of plaintiff, dismissed plaintiff's second cause of action. The trial resulted in a verdict for plaintiff on his first cause of action for $1,011.66. From this judgment plaintiff appeals.

Defendants ask us to review our decision on the former hearing as to the sufficiency of the petition. The petition was then carefully examined, and, without division of the court, was held to be sufficient. We therefore apply the rule that that decision became the law of the case.

Plaintiff's first assignment of error is that the court erred in dismissing his second cause of action. From a reading of the history of the case in our former opinions above cited, it will be seen that this controversy grows out of the publication of certain notices in what is termed the scavenger tax suit for Holt county. Plaintiff's first cause of action is based upon the allegation that defendant Cronin, who was county treasurer, notwithstanding the fact that the county board had designated the O'Neill Frontier, plaintiff's newspaper, as the newspaper in which "the delinquent tax list" should be published, delivered such list to the Holt County Independent, a rival newspaper. His second cause of action is based upon the allegation that defendant Cronin also delivered to the Holt County Independent the notice respecting the sale at public auction of the parcels of real estate, consisting of lands and lots, ordered sold by the decree entered by the district court after the publication of the delinquent tax list, upon which the first cause of action is grounded. It is admitted in the record that the only designation ever made by the county board was on April 21, 1905, prior to the publication of the delinquent tax list, in the following

language: "On motion, the printing of the scavenger delinquent tax list was awarded to the O'Neill Frontier." After the delinquent tax list had been published, improperly as we have held, in the Holt County Independent, the county board was fully advised, by the commencement of the action reported in 75 Neb. 738, of the fact that the defendant treasurer was proceeding upon the theory that the board had not designated the newspaper in which the notices in the scavenger suit should be published. With this knowledge, the board made no attempt at any further designation of a newspaper. The contention of plaintiff is that the designation made by the board on April 21 applied to and included all notices to be published at any stage of the proceedings in the scavenger suit. We think the district court did not err in holding adversely to plaintiff on this contention. The opinion by Mr. Commissioner ALBERT, in 75 Neb., pp. 741, 742, shows very clearly that there is a decided distinction between the two notices. In order to hold that the designation of April 21 of the Frontier as the paper in which should be published "the scavenger delinquent tax list" covered the notice of sale under a decree to be subsequently entered, we would have to read into the order made by the board language which it does not contain. In an action of this character, such a course would be unwarranted. Plaintiff's first assignment, therefore, must fail.

The second assignment is that the court erred in receiving in evidence, over plaintiff's objection, testimony of defendant Cronin to the effect that, before designating the Holt County Independent as the paper in which to publish the delinquent tax list, he consulted the county attorney, and was advised by him that he had a right to make such designation. As plaintiff recovered a substantial verdict and judgment upon his first cause of action, we are unable to see wherein this ruling of the court in any manner prejudiced him. It is therefore unnecessary to consider whether or not the ruling was erroneous. The same may be said of the third assignment, which is

that the court erred in admitting evidence that defendant Cronin had accounted to the county for all the docket fees and funds that he collected as county treasurer in the tax suit.

The fourth assignment is that the court erred in receiving in evidence testimony of the witness Elrod, on behalf of defendants, that he had examined the notice of the tax suit published in the Holt County Independent, and that it was "fatted" about one-half; and, fifth, that the court erred in giving instruction No. 6. These two assignments must stand or fall together. It appears from the evidence that the notice which the treasurer caused to be published in the Holt County Independent was prepared about the time or immediately after the order of the board of April 21, and that the notice was published in the Holt County Independent as prepared by the clerk. The contention of plaintiff is that, under his first cause of action, he was entitled to recover what his profits would have been in publishing that particular notice, while the contention of defendants is that plaintiff could not base an estimate of his profits on the notice published in the Independent, but that he was only entitled to profits on a notice properly prepared, and that in an action of this kind, where he is seeking to recover damages for the loss of profits which he would have made if he had been permitted to do something which he has not in fact done, defendants are entitled to have the damages minimized by excluding from the computation everything in the tax notice which was in the nature of surplusage, or, in other words, which might have been omitted without destroying the efficiency of the notice. The testimony objected to was along that line, and the language of the court in instruction No. 6 upon that point is: "But it would be the duty of the plaintiff, in order to make the damage as light as possible, to publish said notice in the least possible number of squares and at the same time have it perfectly legible. But the plaintiff would not be required to publish said notice in so small type or to make said notice

so short or so abbreviated as to make it misleading." We incline to the view taken by the trial court, but do not decide the point for the reason which we will give in considering the sixth and seventh assignments of error.

These assignments are that the verdict of the jury is contrary to the evidence, in that the verdict is much less than the amount plaintiff was entitled to recover under the undisputed evidence respecting the first cause of action, and the verdict is contrary to the instructions of the court, in that it is much less than the amount which should have been returned upon the evidence and under the instructions given. The action of defendant Cronin in depriving plaintiff of the right granted him by the county board was in every sense unwarranted. As said by Mr. Commissioner ALBERT, in his opinion in 75 Neb. 738, we are unable to view the conduct of defendant "in any other light than as a wanton disregard of duty and a reckless attempt to thwart the purpose of the governing body of the county." He perpetrated a wrong upon plaintiff for which he should answer, and for which the judgment in this case compels him to answer; but the fact that he did wrong does not justify permitting the plaintiff to mulct him in an unreasonable sum; that is to say, he should be compelled to respond in a sum which will give the plaintiff substantial justice. In such a case, where the recovery awarded is sufficient to probably do justice to the injured party, an appellate court should not interfere. We think it is clear that the notice published in the Holt County Independent was quite materially fatted. The fact, if it be a fact, which we do not say, that defendant had purposely fatted it so that his friend, the publisher of the Independent, could make a handsome profit out of the publication, would afford no justification for estimating plaintiff's damage upon that basis. To sum up our conclusion in a single sentence, we think that substantial justice has been done, and that this controversy should be brought to an end.

The judgment of the district court is therefore

AFFIRMED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

LUCY A. WIGHT, APPELLEE, V. JENNIE A. MCGUIGAN ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1913. No. 17,117.

1. **Tax Sale.** When real estate is sold for taxes, all delinquent taxes thereon must be included in the sale.
2. ———: PRIVATE SALE. Real estate cannot be sold for taxes at private sale unless all taxes thereon then delinquent have been included in the notice of public sale, and the land has been duly offered at such public sale and not sold for want of bidders.
3. ———: INVALID SALE: INTEREST ACQUIRED. A purchaser of land in good faith at private sale for taxes takes the interest of the public in the tax lien when the sale is invalid without fault of such purchaser.
4. **Waters:** IRRIGATION DISTRICT: NONIRRIGABLE LAND: TAXATION. The statute (laws 1895, ch. 70, sec. 49) provides that no land that for any natural cause is incapable of irrigation shall be held by any irrigation district or taxed for irrigation purposes. A tract of land, being a government subdivision or other well-defined tract, ought not to be included in an irrigation district if it is for natural causes incapable of irrigation, but the fact that there are comparatively small knolls or sloughs thereon will not necessarily exclude the tract, and under such circumstances the tract, if included, should be assessed as a whole.
5. ———: ———: TAXATION: VALIDITY. If the district board neglects to levy a tax for costs of organization and payment of outstanding bonds, the county board may levy such tax on the general assessment. The district board alone can equalize the assessment and levy a tax for the general purposes of the district. A tax levied by the county board for such general purposes of the district would be void. If a part of the levy is void a sale thereon would be voidable.

6. **Taxation:** INVALID SALE: INTEREST ACQUIRED. A sale for taxes, although irregular and voidable, will operate to assign the lien of the public.

7. **Waters:** IRRIGATION DISTRICT: TAXATION: PRESUMPTIONS. Section 16, ch. 70, laws 1895, prescribes the form of assessment by the district assessor; when it appears that these provisions have been substantially complied with and the district board has reviewed the assessment and that a levy was made thereon, it will be presumed that the district board made such levy and that the proceedings were regular, in an action by the landowner to cancel the tax, unless the official records or other satisfactory evidence shows that the district board did not levy the tax.

8. ———: ———: ———: VALIDITY. From the evidence in this case it is found that the assessment and levy for certain specified years were sufficiently regular to create a lien for the tax so levied, and for other specified years there was no valid levy.

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

Sullivan & Squires, for appellants.

Silas A. Holcomb, Willis Cadwell, E. F. Myers and *C. L. Gutterson, contra.*

SEDGWICK, J.

Plaintiff brought this action in the district court for Custer county to foreclose the lien of a tax sale certificate. The sale was for general taxes and for taxes alleged to be levied by the Lillian Irrigation District. Defendants, the owners of the land, tendered the general taxes, and refused to pay the taxes for the irrigation district. The trial court found that plaintiff was entitled to a lien for the general taxes assessed against the land and for the principal part of the taxes assessed for the irrigation district, rejecting a few items of the latter. The defendants have appealed.

The answer filed by defendants is very voluminous; many of its allegations appear to be conclusions only; and it contains some generalities and repetitions. The abstract is incomplete and the record is very improperly

indexed. The public record introduced in evidence has been inaccurately made and carelessly preserved. We will necessarily be limited to a consideration of some of the leading principles of law that appear to be involved.

1. Objection was made to the introduction of evidence as to the assessment of property and levy of taxes in the alleged irrigation district because the existence of the district was denied and had not been proved. It has previously been declared by this court that an irrigation district properly organized under the statute is a public corporation. It is a political subdivision of the state, and is formed, not by an act of the legislature as counties and judicial districts are formed, but is more analogous in that regard to villages and school districts. The courts take judicial notice of the existence of municipal subdivisions of the state which are formed by legislative enactment, as by a special act of the legislature under the first constitution. *Hornberger v. State,* 47 Neb. 40. In *Agnew v. Pawnee City,* 79 Neb. 603, it is stated in the third paragraph of the syllabus: "The courts will take judicial notice of the fact that a city is an incorporated city, of the time when it was incorporated, and of the salient facts of its geography and history." That proposition is not discussed in the opinion, and so broad a statement was not necessary to a decision in that case. It was only necessary to hold that, when it is conceded that a city is incorporated, and a recorded plat of the city is in evidence upon which streets of the city are shown, the court will take judicial notice that the streets of cities so organized are public streets, and of the nature of the title and right of the city therein. Whether the courts in this state will take judicial notice of the existence of a village or an irrigation district, not created by public law, but by the county board of the county in which it is located, when the existence of such corporation is directly put in issue in an appropriate proceeding for that purpose, was not determined by the court in that case. In the case at bar, however, a copy of the history of the bonds issued by the

district was received in evidence with the consent of all parties; the defendants waiving all objection thereto, except that the facts therein recited were incompetent and immaterial. This document recited the facts in regard to the organization of the district, and there was no evidence offered modifying or explaining the facts therein recited. The trial court did not make any finding as to the existence of the district, nor was it asked to do so; all parties apparently assuming that the said recital of the facts of organization was correct. We think the defendants should be held to have waived this objection.

2. It is contended that the sale upon which the tax certificate in suit was issued was invalid because no private sale for taxes upon real estate can be made at the time that this sale was attempted. The statute then in force was the public revenue law of 1903 (laws 1903, ch. 73). By section 150 of the act real estate taxes became delinquent on the 1st day of May of the year after which the taxes have been assessed, and bear interest from that date at the rate of 10 per cent. per annum. By section 206 private sales may be made after the lands have been offered at public sale and the treasurer has made his return thereof to the county clerk. The public sale, by section 194, must be for "the amount of all delinquent taxes against each tract, with interest thereon to the date of sale," and the purchaser at a private sale must, of course, pay for each tract purchased all the delinquent taxes against the same. The sale was made on the 5th day of October, 1905, and was for the taxes assessed in 1903 and prior taxes. It did not include the taxes assessed in 1904, which became delinquent in May, 1905. It could not, of course, include the taxes assessed in 1904 because no public sale therefor could be made prior to the first Monday of November, 1905. No sale for taxes can be made without including all the delinquent taxes in the sale, and no taxes can be included in the private sale unless the land has been offered for those taxes at public sale. It follows necessarily that real estate cannot be sold

at private sale while there are delinquent taxes against the same for which the land has not been offered at public sale. The certificate is therefore invalid, but the purchaser is entitled to recover, as assignee of the public, the amount of the valid taxes, if any, included in the sale, and all prior and subsequent valid tax liens paid by her as such purchaser, with interest at 10 per cent. from the time of such purchase or payment.

3. The statute (laws 1895, ch. 70, sec. 49) provides that land not capable of irrigation shall not be retained in the district nor taxed. Defendants assume that any considerable piece of land, as a high, sandy ridge running through a tract, must be exempted from taxation, and the assessor seems to have so regarded it. The assessment roll for some years names seven forties (280 acres) as a tract of land to be assessed, and the tract is assessed as containing a much less number of acres. The men who made the assessment testify that these figures represent the estimated number of acres on which the water could be put. This is not the meaning of the decision in *Andrews v. Lillian Irrigation District,* 66 Neb. 461. If the tract is such as can be watered, the fact that there may be a knoll or slough thereon will not exempt the tract. It is for the board to determine in the first instance whether the tract is so capable as that irrigation would be beneficial to the tract considered in its entirety, and the decision of the board will not be reviewed unless it clearly appears that the tract is such as would not be benefited.

The owner of a specific tract of land ought not to be compelled to join an irrigation district and pay taxes for the support thereof if his land as a whole is so situated that for natural causes it cannot be irrigated. But such a farm cannot be said to be incapable of irrigation because there happens to be a knoll or ridge thereon, comparatively a small part of the farm, that cannot be watered. Such knolls and ridges should be taken into consideration in determining the benefits to the land as a whole by the irrigation works, and also in determining the value of

the land for assessment, and so will reduce the assessment. Such elevated knolls and ridges may be of such comparative importance as that the farm or tract as a whole should be found to be incapable of irrigation. If a government subdivision of land, or a tract otherwise capable of identification and definite description, is incapable of irrigation, and so situated with reference to the proposed district and other lands therein as to make such a course practicable, such tract might be omitted from the district, although it formed a part of a larger tract of the same owner. The idea of including a given farm or tract in the district and then omitting from assessment such knolls or sloughs thereon as the assessor may consider incapable of irrigation is impracticable and not contemplated by the statute.

4. The law requires the district assessor to assess the lands and return the assessment to the district board, and that board must correct the assessment and levy the tax. Unless these provisions were substantially complied with, there could be no valid tax, except for costs of organization and for payment of valid outstanding bonds. So far as this record shows, it should be found that in some years they were and in some they were not complied with. A sale for taxes, although irregular and voidable, would operate to transfer to the purchaser the lien of the public for the valid tax. To this lien must be added subsequent valid taxes paid by the purchaser, and this with interest at 10 per cent. would be the amount of plaintiff's claim.

5. The law provides that, if the district authorities fail to assess and levy, the county board shall levy on the county assessment for irrigation bonds and costs of organization. Plaintiff says these taxes can be sustained under that statute; but that seems impossible because the taxes are for said items and also to raise money to complete the work of the district, and the county could not levy for the latter purpose. If a part of the tax is void the sale would be voidable.

6. If defendants had tendered all taxes due they could

not be charged with interest from the time of the tender; but it seems they did not tender all, because some of the irrigation taxes were a lien and plaintiff is entitled to interest as the county would have been if no sale had been made.

7. The plaintiff can recover in this action the amount of taxes legally assessed and included in her purchase of October 5, 1905, or in the amounts subsequently paid by her for taxes pursuant to that purchase, with interest thereon at 10 per cent. per annum from the time of paying such amounts, respectively. The general taxes are not controverted and were correctly stated by the trial court. To ascertain from this record the validity of the irrigation tax liens so paid is a difficult matter. Section 16 of the district irrigation law (laws 1895, ch. 70) prescribes the form of assessment by the district assessor. In the assessment of farm lands, not under lease and assessed to the owner, there must be included: (1) The name of the person to whom the property is assessed, if known. (2) A description of the land by township, range, section or fractional section, and, when such land is not a congressional division or subdivision, by metes or bounds or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon. (4) Cash value of the real estate. (5) The cash value of the improvements on the real estate. (9) The full value of all property assessed. (10) The total value of all property after the equalization by the board of directors.

The assessments generally, and except as hereinafter stated, were duly certified by the district assessor, and were by the county clerk certified to the county treasurer for collection. In some cases the assessments also show the values found by the district assessor and the values as corrected by the district board of equalization. In such cases we think that, in the absence of satisfactory evidence to the contrary, it ought to be presumed that the board acted thereon at a regular meeting for that purpose, and upon notice, and corrected the assessment and duly levied

the tax, and that the assessment and levy were properly returned to the county clerk. It appears from the assessment rolls that the assessment for 1902 described these lands by government subdivisions of 40-acre tracts, stated the name of the owner to whom the lands were assessed, the valuation placed thereon by the district assessor and the corrected valuation by the district board of equalization, the amount of the tax for the irrigation bonds and the amount of the general irrigation tax, respectively. The defects in this assessment insisted upon are that it described the whole of each of the seven forties as assessed, whereas a part of two of the forties was not included in the irrigation district, and the assessment does not state the value of the land and the improvements thereon separately. The assessment roll shows that the number of acres actually assessed was 154.45, and this was approximately the number of acres in these seven forties that were included in the irrigation district. Of course, no deed issued upon so indefinite a description could be valid. The trial court held that the defendants ought not to be allowed to relieve their land from the lien of a just tax without offering to do equity in the matter, and so determined that this tax was a lien upon the land in favor of the plaintiff. There was much evidence upon this and similar questions, and some records of the various offices tending to identify the lands assessed, and upon the whole record, so far as we are able to understand it, we conclude that the trial court was right in so doing.

The assessments for 1903 and for 1901 are substantially the same, and it was correctly held that the defendants should be required to redeem the same.

In the assessment for 1904 the name of the party to whom the land was assessed was not stated. There is a column in which the total value is stated, but no value is stated in the column for values corrected by the board of equalization. In columns headed "Wheat and Corn" there are values stated which it is contended indicate the tax assessed against the land, but there is no other evi-

dence relating to the tax assessed, except the fact that the figures in some degree correspond with some other assessments. An assessment by the district assessor should be filed with the secretary of the district board and examined and adjusted by that board, and the levy made by them and then certified by the secretary to the county clerk. As we have already said, where the assessment shows a valuation made by the district board, together with the amount of the levy, and there is no evidence to the contrary, we may presume that the law has been complied with in this respect in an action to redeem from the lien of a tax conceded to be just and equitable. Here there is no indication in the record that the supposed assessment was ever in the hands of the secretary of the board or that the board ever considered or saw the assessment. On the contrary, there is evidence tending to show that the district assessor transmitted his proposed assessment directly to the county clerk. We think that the pretended assessment and levy for 1904 are so totally irregular as to be invalid and constitute no lien upon the land.

The assessment for 1898 shows a description of the land by forties; it states that the number of acres assessed is 255.55; states the name of the owner to whom the land was assessed, the amount of the irrigation tax on each forty, and the total amount, and states the value of each forty. The column entitled "Value as corrected by the board of equalization" is not filled, and there is nothing to indicate that the board of equalization ever acted upon this assessment. The same objection obtains to the assessment for 1899.

The assessment for 1905 is the same as for 1902, except that the amount of the bond levy is stated, but not the general levy for irrigation.

1907 describes the land, the name of the party to whom it was assessed, states the total number of acres to be 154.40 acres, states the amount of the bond levy, and the total value of the land. It does not show by whom it was valued, presumably by the district assessor. For 1900 the

name of the owner and description of the land are stated; the total number of acres is stated to be 254.45. The amount of the irrigation tax is stated, and the total value, but the column for correction by the board of equalization is blank. There is nothing in the record, so far as we have observed, to raise the presumption that the tax for either the year 1900 or 1907 was levied by the district board, or that the board ever corrected or saw the work of the district assessor. As no one but the district board has power to levy such a tax, these levies must be held invalid. The trial court correctly found that the assessment for the irrigation district for the years 1897 and 1906 were invalid.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree for the amount of the general taxes and for the irrigation taxes assessed in the years 1901, 1902, 1903 and 1905, with interest on the several amounts at the rate of 10 per cent. per annum from the time of the respective payments thereof by the plaintiff, with costs of the district court. The costs of this court are taxed against the plaintiff.

REVERSED.

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

MARY M. BOHRER, APPELLANT, V. MANSELL DAVIS ET AL., APPELLEES.*

FILED SEPTEMBER 26, 1913. No. 17,222.

1. **Limitation of Actions: REMAINDERMAN.** The statute of limitations does not begin to run against a right of action until that right exists. The party who has the right of action has the full period of the statute in which to enforce it. The remainderman has no right of possession until the particular estate is terminated. He has no right of action which depends upon the right of possession until he is entitled to the possession.

* Rehearing allowed December 24, 1913.

2. **Life Estates:** CONVEYANCE OF ESTATE: FORFEITURE. The conveyance of the life estate by the life tenant conveys all of the rights of the grantor, and the grantee holds the same estate held by the life tenant. The remainderman cannot declare and enforce a forfeiture of the life estate by reason of such conveyance, and his rights are not ordinarily affected thereby.

3. ———: ———: REMAINDERMAN: ESTOPPEL. If a remainderman consents to a sale of a part of the estate, and advises the life tenant to make such sale for the purpose of payment of an incumbrance upon the whole estate, and the sale of a part of the estate is made for full value accordingly, and the proceeds applied in payment of the incumbrance, and the purchaser takes immediate possession of the land with deed of general covenants of seizin and warranty, and holds it for more than 17 years, making valuable improvements, the remainderman will not be allowed afterwards in an action in equity to repudiate such sale and recover his interest in the land as against such purchaser.

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

O. A. Abbott and *George W. Scott,* for appellant.

R. L. Staple, J. R. Berry and *J. R. Swain, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court for Greeley county to quiet her title in 80 acres of land in that county. Both parties derived title from Ansel A. Davis, who died in Greeley county on the 3d day of March, 1892, intestate and leaving no children, father or mother. At the time of his death he had 160 acres of land. His widow made application to the county court under the statute known as the "Baker's Decedent Law," and the county court, pursuant to that application, caused the land to be appraised, and, it appearing to be worth but $2,000, the court entered a decree assigning the same to the widow as her homestead in fee. There was a mortgage of $1,000 upon the homestead, and some time after the decree of the county court the widow sold one 80 of this land to the plaintiff for $1,000, and in December, 1902, executed to

the plaintiff a deed of general warranty for which the plaintiff paid the sum of $1,000, and the mortgage was satisfied with the proceeds of this sale. The defendant Mary R. Davis is the wife of the defendant Mansell Davis, who is a brother of the decedent, Ansel A. Davis, and the other defendants are the children of a deceased brother of Ansel A. Davis. Anna Davis, the widow of Ansel A. Davis, died in February, 1906, and in 1910 this action was begun by this plaintiff. The trial resulted in findings and decree in favor of the defendants, and the plaintiff has appealed.

The so-called Baker's decedent act has been many times held by this court to be unconstitutional and void, and it is conceded that the order of the county court attempting to vest the fee in the widow was void. She had only a life estate by virtue of her homestead right, but the plaintiff insists that, having paid the full value of the land, and having taken a warranty deed purporting to convey the entire estate and possession thereunder, and having held the same as her own to the exclusion of all parties and with the knowledge of all these defendants for more than 17 years when this action was begun, her title has become complete. The defendants insist that the statute of limitations did not begin to run as against them until the death of the widow holding the life estate, and, as their action was begun within the ten years thereafter, it was not barred by the statute.

Counsel for plaintiff, in the oral argument and in the brief, has presented his views with clearness and force, so much so that, if the question were a new one, the writer would have been convinced that the better reason supports the plaintiff's views. When the plaintiff bought this land, the so-called Baker's decedent act was generally supposed to be valid legislation, and all parties interested in the transaction supposed that the plaintiff's grantor had perfect title and that the plaintiff took a clear and unquestionable title by her purchase. She paid full value for the land, received a deed with full covenants of seizin and warranty, took immediate, complete and notorious pos-

session under her deed, and has held such possession continuously until the present time. She acted in entire good faith and ought to be protected, unless the defendants have a better right in law and at least an equal equity to be protected in that right. But the law is so well settled, not only by the decisions of this court, but by substantially all other courts where the English language is used, that we have no alternative but to enforce the law as it is, and, if there can and should be a better rule, leave the legislature to supply it.

The universal rule of law is that the statute of limitations does not begin to run against a right of action until that right exists. The party who has the right of action has the full period of the statute in which to enforce it. The remainderman has no right of possession until the particular estate is terminated. He has no right of action which depends upon the right of possession until he is entitled to the possession. The plaintiff says that the statute begins to run when there is an ouster or disseizin, and that a deed by a tenant to a stranger, purporting to convey the whole estate for full value actually paid and possession thereunder, operates as ouster of the remainderman. There are many authorities so holding, but never unless the remainderman by such sale and conveyance becomes entitled to possession. In the cases so holding, it is also held that the tenant by such sale and conveyance forfeits his estate; and the remainderman may at once elect whether he will consider the particular estate forfeited. If he so elects he may recover possession, and of course under such circumstances the statute of limitations would at once begin to run against his claim. But the courts so holding also generally hold that the remainderman is not required to consider the particular estate forfeited; he may disregard the act of the tenant in making such sale and conveyance and may claim his estate when the particular estate is terminated according to its terms. The statute then will not commence to run until his right of possession accrues at the termination of the life estate.

The sale and conveyance by the tenant is not an ouster or disseizin, unless the remainderman elects to so consider it. The general rule is that a conveyance of the life estate conveys all the rights of the grantor. The grantee holds the estate during the life of the grantor; the remainderman cannot forfeit the life estate, and is not entitled to possession until that estate terminates, and is not ordinarily affected by the conveyance. This is undoubtedly the rule in this state. *Helming v. Forrester,* 87 Neb. 438; *McFarland v. Flack,* 87 Neb. 452.

The general question is pretty fully discussed in a note to *Allen v. De Groodt,* 14 Am. St. Rep. 626 (98 Mo. 159). The editor says in the note: "When, upon the termination of a life or other estate which entitled its owner to the possession of the property, the reversioner or remainderman becomes vested with an estate giving him a right to such possession, he will naturally meet with reluctance upon the part of the persons in possession to yield it to him. If possible, they will interpose a claim that his estate has been extinguished by prescription, or by his laches, or by any other mode which their ingenuity or that of their counsel can suggest. It is a general rule, well supported both by reason and authority, that no one can be in default in not bringing an action which it was impossible for him to have maintained if brought, and that no statute of limitations can commence running until the period arrives when the person claiming title or right of possession can successfully vindicate his claim and right by some appropriate action. When, therefore, one who has been a reversioner or remainderman becomes entitled to the possession of the property by the termination of a preceding estate in possession, and he brings his action to enforce his right, and is met with a plea of prescription or laches, the proper inquiry is, whether the action which he thus brings could have been commenced and maintained by him at any period anterior to its actual commencement; and, if so, the statute must be regarded as operating from and after such period. If, after that period, the full time

required by the statute of limitations has interposed, he should be regarded as barred. Otherwise, his right must be regarded as still intact and irresistible, however long continued the delay has been. To this rule there appears to be an exception, arising in the cases in which the tenant in possession has been guilty of some act or default for which the reversioner or remainderman might have elected to terminate the estate in possession. In such cases, while the reversioner may so elect, and, upon such election, maintain an appropriate action to recover possession, he may also waive the forfeiture; and, if he does waive it, he is regarded as obtaining a new right of possession upon the death of the life tenant, or other termination of the particular estate; and the statute of limitations will not be allowed to commence its operation until the happening of the latter event (citing cases). * * * The possession of the tenant for life is never deemed adverse to the reversioner or remainderman (citing cases). The protection of the latter is not limited to a mere presumption that the possession is not adverse to him; it cannot by any possibility become adverse, for the reason that such possession is not an interference with his rights. The tenant cannot make his possession adverse, though he denies that any one has any estate in reversion or remainder, and proclaims that he is the owner of the fee. 'There is no one to sue, no matter how often or how openly and loudly such tenant may claim to be an absolute proprietor, for the person in reversion or remainder concedes the right of possession for life, and cannot therefore dispute it.' *Salmons' Adm'rs v. Davis*, 29 Mo. 176. Hence it follows that the statute of limitations does not run against any possessory action in favor of a reversioner or remainderman until the extinguishment of the estate of the tenant for life. * * * The fact that the reversioner did not pursue his remedy to remove a cloud from his title appears to us to be immaterial. It has always been the law that any one might resort to a court of equity to remove an apparent cloud upon his title, and statutes are now in

force in many of the states under the provisions of which one may call upon any one asserting an adverse claim to his property to litigate such claim, and to submit it to judicial determination. If persons holding estates in remainder or reversion, and therefore not entitled to the immediate possession of the property, must exercise the right thus conceded to them in equity or by these statutes, or be met with a presumption that every conflicting claim accompanied by the possession is valid, these rights of action operate as so many snares. These equitable remedies, by which one claiming an estate or interest in land may appeal to the courts to determine it, were designed for his protection, rather than his destruction, and the fact that he does not resort to them ought not to be regarded as an irrevocable abandonment of those remedies to which he is otherwise entitled." We quote thus liberally from this note because the author here states the law as it now exists in this state and the reason for its existence. If the reasons given are insufficient and the law should be changed, the courts cannot change it without the help of the legislature.

Tenants in common have an equal right of possession, and if one of them conveys the whole estate for full value to a third party, who excludes the other tenant in common, the statute of limitations will run from the time of such exclusion. *Beall v. McMenemy,* 63 Neb. 70. The reason is because the right exists at the time of the exclusion. No new or additional right accrues to the tenant so excluded. His right of action is as complete as it ever can be. The plaintiff cites, as supporting her theory, *Lewis v. Barnhardt,* 43 Fed. 854; *Crawford v. Meis,* 123 Ia. 610. There is language in the opinion in each of these cases which appears to support the plaintiff's contention. In *Lewis v. Barnhardt* the estate was sold for taxes and the defendant claimed under that title. It was held that the purchaser at the tax sale was a purchaser in good faith, "without notice that his vendor owned an estate for life," and that in such case the statute of limitations began to run from the time of the purchase. The decision is put

upon that ground. The case is a peculiar one, and whether it may be considered as authority in general it is not applicable to the question here presented. *Crawford v. Meis* also involves the question of a tax title and the power of one cotenant to disseize the other. The court, after saying that "as a general rule the limitation statute does not begin to run as against a remainderman until the termination of the preceding estate," said that that rule involves the continuation of the relation of tenant and remainderman. The court then states the law as this plaintiff contends it is, but the decision of the case does not appear to be necessarily based upon this statement of the law. The court appears to consider that this view of the law is necessarily derived from its former holding in *Murray v. Quigley*, 119 Ia. 6, but that case involved a question of ouster between cotenants, and was principally determined upon the fact that the plaintiff's title was derived directly from the state, and the essential defense was that the conveyance was obtained by fraud. The language used in the latter case was apparently not justified by the former decision. Both of the cases, however, were decided after the note from which we have quoted so liberally was written, in which it was said: "The rule that the possession of a tenant for life is not adverse to the remainderman or reversioner has never been repudiated in express terms." The title of these defendants was not barred by the statute of limitations, and the district court was right in so holding.

The defendant Mansell Davis, as one of the two surviving brothers of the decedent, Ansel A. Davis, inherited a one-half interest in the estate in remainder, and has since purchasd a one-twelfth interest from one of the heirs of his deceased brother, Orsel. The outstanding mortgage of $1,000 covered not only the 80 acres of land involved in this litigation, but included also land which has now descended to Mansell Davis. It was in his interest to have this mortgage paid. He was consulted in regard to selling a part of the land in order to relieve the remainder from

incumbrance, and consented to so doing. The proceeds of the 80 sold were used to relieve the remaining 80 from incumbrance. He participated in the transaction, which was for his benefit in the same sense in which it was for the benefit of the owner of the life estate, and has thus himself received the full value of all interest that he had in the land sold, and it seems clear that he cannot now in a court of equity repudiate the transaction and recover an interest in the land disposed of, while retaining the full value received therefor. The evidence does not show that the other defendants took any part in these transactions.

The decree of the district court, therefore, is right as to the children and heirs of Orsel Davis, deceased. The decree is modified so as to quiet the plaintiff's title in seven-twelfths interest in the land, and in other respects is affirmed, and the cause is remanded, with instructions to partition the land between the plaintiff and the children of Orsel Davis, deceased. The costs in this court will be equally divided between the plaintiff and the defendant Mansell Davis.

AFFIRMED AS MODIFIED.

LETTON, J., not sitting.

FAWCETT, J., dissenting.

The majority opinion is an excellent one down to the last paragraph, and as to the first and second paragraphs of the syllabus. The closing paragraph of the opinion and the third paragraph of the syllabus are, in my judgment, all wrong. Referring to defendant Mansell Davis, the opinion states: "The outstanding mortgage of $1,000 covered not only the 80 acres of land involved in this litigation, but included also land which has now descended to Mansell Davis. It was in his interest to have this mortgage paid. He was consulted in regard to selling a part of the land in order to relieve the remainder from incumbrance, and consented to so doing. The proceeds of the 80 sold were used to relieve the remaining 80 from incum-

brance. He participated in the transaction, which was for his benefit in the same sense in which it was for the benefit of the owner of the life estate, and has thus himself received the full value of all interest that he had in the land sold, and it seems clear that he cannot now in a court of equity repudiate the transaction and recover an interest in the land disposed of, while retaining the full value received therefor." This is an incorrect and very misleading statement of the record. He did not "participate in the transaction," nor was he "consulted" in regard to selling a part of the land "in order to relieve the remainder from incumbrance," nor did he "consent to so doing." His language will have to be greatly enlarged upon in order to give it any such meaning. I will now give the entire testimony upon that point. Before doing so, however, let me call attention to one legal principle and to one question of undisputed fact. The legal principle is: Estoppel is an intentional relinquishment of a known right. The undisputed fact is: That at the time Mansell Davis was "consulted," in reference to the sale of the 80, and "consented" thereto, everybody supposed that the whole quarter section was the absolute property of the widow Davis. It had been set off to her under the Baker's decedent act, which at that time had not been held invalid. The widow, who was making the sale, Mrs. Bohrer, who was making the purchase, her husband, Mr. Bohrer, Mansell Davis, the county judge and the lawyer in the case, all thought that the property belonged absolutely to her and that she had the full right to sell it, so that everything that Mansell said in relation to the matter was with that understanding as to the situation and ownership of the property. Now, let us see what the testimony is upon that point. I give it entire as shown by the abstract prepared by appellant.

Mrs. Bohrer, the plaintiff, gave no testimony on the subject. It is evident, therefore, that she had no conversation whatever with Mansell Davis. Her husband testified as follows: Direct examination: "Had a talk with Man-

sell Davis about buying a part of it. Well, I met him in the road, and I told him I had been talking to Tom (that was her son) and old Annie herself (we always called her old Annie) about buying that piece of land, 'Well,' he says, 'if you buy it, it would help her out on that mortgage on that 80.'" Cross-examination: "Yes, sir; that talk with Mansell Davis was in November before the deed was made, along between his place and the land, in the road, stopped and talked about it. No one present just me and him. He was horseback. If I recollect I was afoot. Oh, we got to talking there like neighbors will, and then I told him I had been talking with Tom and Annie about that piece of land, and that's the way it commenced. Well, he was willing (this, of course, is a conclusion), said it would help her out, leave her a home if she got the mortgage off, and so on." The papers show how much the mortgage was. Redirect examination: "There was something said in my talk with Mansell Davis about how the rest of this mortgage would be taken care of. Why the mortgage would be released on the east 80 and put on the west 80, and that would leave her a home. That was the general understanding with us, all the way through." It will be observed that this redirect is a mere conclusion of the witness as to what was said. Recross-examination: "Q. When did Mansell make that statement to you? A. Why, as a friend, we was a-talking there. Then there was another time we were talking about that, that has come to my mind, Mansell Davis came down to my place one Sunday morning, and we talked the matter over again there west of the house. That was just before the deed was made. No one present, just him and me by ourselves. No; nothing said about the mortgage at that time that I recollect of; oh, yes; the mortgage was talked about at the first conversation. There were several talks around amongst us, I can't just remember. Talks with Mrs. Davis and Tom and Mr. Davis told me about the $1,500 mortgage. Mrs. Davis, Tom and Mansell. Yes, sir; Mansell just said this, if I would take it she could turn the money

over to the Lombard Loan Company, the one that held the mortgage against it, and could put the mortgage on the other 80, west 80, and that would release the east 80. No; it was Mansell, not Mrs. Davis, that said that. He knew the Lombard Company had the mortgage all right." This is the sum total of the testimony offered by plaintiff upon that point. Without any contradiction or qualification on the part of defendant Mansell Davis, I insist that it is entirely insufficient to sustain a judgment of estoppel as against Mansell. He did not know that he had any right in the property. The talk between him and Bohrer was, as twice stated by Bohrer, a mere friendly talk. There was absolutely nothing said about Mansell's having any interest. It was simply a friendly talk as to whether or not it would be a good thing for the Bohrers to buy the 80, and Mansell, as a friend, simply stated that if they did buy the 80 "it would help her out" on the mortgage.

Mansell Davis testified, upon direct examination: "I heard part of Mr. Bohrer's testimony, not sure I heard it all. I don't think I had as much conversation as he said. I remember his asking me something about the advisability of his buying that place. I can't just recall now nearly so much as he said here. I remember his asking me if I thought he ought to buy, or if it would be safe for him to buy it. Well, I may have suggested that it would be safe enough for him to buy it so far as I knew. I didn't advise him to buy it, as he said. I am very sure we never had any such conversation on Sunday at his place." Plaintiff's counsel did not see fit to cross-examine Mansell. The above is the entire testimony upon this point.

The decree of the district court found that the defendants were entitled to the possession of the premises at the death of Mrs. Davis and to the rents and profits since that time; that plaintiff's possession since the death of the life tenant had been wrongful; found the value of the improvements made by plaintiff to be $125 (plaintiff testified that no buildings had ever been erected on the property); found the sums paid for taxes for the year 1892 and taxes

since the death of the life tenant; found that plaintiff had paid the $1,000 mortgage, and that such payment was beneficial to the defendants; found the annual rental of the property since the death of the life tenant to be $100; stated the account between the parties as to rents, payment of taxes, and payment of mortgage, and found a balance due the plaintiff for $1,047.47; that plaintiff was entitled to a lien for the same; ordered defendants to pay the same within 60 days, and that in case of a default the premises be sold to satisfy the amount so found due, with interest, costs and increased costs. This judgment is not only right in every respect, but is the only judgment which, under the former decisions of this court and the other authorities cited in the majority opinion, could, properly, be rendered upon the record before us. The district court evidently had those cases before it, together with *Hobson v. Huxtable*, 79 Neb. 340. The rules announced in those cases were followed, and the judgment should not be disturbed.

Briefly stated, plaintiff purchased the life estate of the widow Davis and has enjoyed that life estate for 17 years. In order to have that enjoyment, she paid off a mortgage of $1,000. The decree of the district court now gives that back to her, credits her for taxes paid since the death of the life tenant, credits her with her improvements, and only charges her with rent since the life tenant's decease. If she is not obtaining full equity under the decree of the district court, then I confess that I have no conception of equity. The holding of the majority opinion amounts to absolutely taking away from a remainderman his estate, under the guise of estoppel, when no estoppel has been shown.

As an abstract proposition of law the third paragraph of the syllabus may be sound; but the trouble is, it has no application to the facts in this case. Mansell Davis is not invoking the aid of a court of equity to repudiate a sale by the life tenant which he had advised. He is here standing upon his legal rights, in a suit in equity com-

menced by the grantee of the life tenant, which seeks to enlarge his purchase of his grantor's life estate into a purchase of the fee of the entire estate. In such a case the rule announced in paragraphs 1 and 2 of the syllabus applies. Mansell is not refusing to do equity. On the contrary, the decree of the district court requires him to do that which is equitable. Very few persons who buy a mere life estate have the good fortune to enjoy that estate for 17 years. The district court allowed plaintiff everything that she is entitled to, and its judgment should be affirmed generally.

HAMER, J., joins in above dissenting opinion.

HANNAH BRYANT, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

MODERN WOODMEN OF AMERICA, APPELLANT, V. HANNAH STREIT (NEE BRYANT), APPELLEE.

FILED SEPTEMBER 26, 1913. Nos. 17,231, 17,988.

1. **Pleading:** INCONSISTENT ALLEGATIONS. If a pleader makes inconsistent allegations in a pleading, he is bound by those that are most favorable to the case of his opponent.

2. **Appeal:** BRIEFS. In a civil case, when no brief is filed which separately states and numbers the points relied upon, with the citations of authorities relied upon under each point, respectively, and designating "the several pages of the record containing matter bearing upon the questions discussed in such brief," and in other respects complying with rule 9 of this court, the court will not ordinarily, for the purpose of reversing a decision of the trial court, look for matters in the record not briefed as the rule requires.

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

B. D. Smith, W. E. Reed and *T. S. Allen,* for appellant.

William V. Allen and *William Dowling, contra.*

SEDGWICK, J.

This defendant, formerly Hannah Bryant, brought her action in that name in the district court for Madison county against this plaintiff upon a certificate of membership and fraternal insurance, upon the life of her former husband, Ellard E. Bryant. She recovered a judgment in that action, which upon appeal to this court was reversed and the causes remanded for another trial. *Bryant v. Modern Woodmen of America,* 86 Neb. 372. Upon another trial in the district court she again recovered a judgment from which the defendant in that action appealed to this court. Afterwards, the company brought this action in the district court for Madison county to obtain a new trial of the former action under section 602 of the code. The district court found against the company and entered a decree dismissing the action for a new trial. From this decree the company appealed to this court, and upon motion the two cases were consolidated and were submitted together.

In the brief of the appellant it is said: "We have assumed that the only issue here is whether or not the appellant is entitled to a new trial. * * * For that reason we have not discussed the evidence in the original case." The brief then states in a general way some reasons for supposing that the judgment in the original case is erroneous. These reasons are derived entirely from the supposed evidence in the case, and no reference is made in the brief to any part of the record supposed to disclose errors requiring a reversal. In this condition of these records, and the submission of the cases, there is no question presented to this court, except the sufficiency of the evidence to support the decree of the district court in refusing the new trial.

The ground relied upon for a new trial is that through the neglect of the official reporter of the district court, and without any fault on the part of the defendant company in the original case, the company was unable to obtain a transcript of the evidence in the original case and procure a settlement of a bill of exceptions. It appears that when the transcript of the evidence was delivered by the official reporter to the attorneys for the company, some 10 or 20 days before the expiration of the time for serving the bill of exceptions, the application for membership and the certificate of membership which had been offered in evidence at the trial were not incorporated in the transcript, nor attached thereto, and it is insisted that counsel were unable to obtain these documents in time to settle the bill of exceptions, and for that reason no bill of exceptions was ever properly settled and allowed.

Upon examination of the pleadings in the original case, we find that the petition sets forth in full the application for membership and the certificate of membership. The amended answer admits that these are the application and certificate in the following words: "The defendant admits that on or about the 16th day of January, 1907, one Ellard E. Bryant, mentioned in plaintiff's petition, then a resident of Madison, Nebraska, made and executed an application for membership in the defendant society, and to Box Elder Camp No. 485, a subordinate lodge of this defendant, located at said Madison, Nebraska (a copy of which said application is referred to in plaintiff's petition as 'Exhibit A' and incorporated therein and made a part thereof), and that in pursuance of said application this defendant did on the 28th day of January, 1907, issue to the said Ellard E. Bryant benefit certificate No. 1,346,629, a copy of which said certificate is set forth in plaintiff's petition."

The company now insists that the application and certificate are not correctly and fully set out in the petition in the original case; and that therefore it was necessary to introduce them in evidence, which was done, and that

if they were properly preserved and presented in a bill of exceptions they would show important representations of the insured which were false and vitiated the insurance.

If a pleader makes inconsistent allegations in a pleading, he is bound by those that are most favorable to the case of his opponent. When a contract is incorporated in the petition in a case and is admitted by the answer to be the contract between the parties, neither party will be allowed to prove or contend that the contract was other or different than as so solemnly agreed upon in the issues. No attempt was made to withdraw the admission or to change the answer in that regard. The application and certificate, then, were wholly unnecessary as proof of the contract between the parties, which was fully established by the pleadings themselves. It is not contended that these documents were material for any other purpose. These papers, then, would be of no assistance to the court if incorporated in the bill of exceptions. Moreover, these papers, being fully established by the pleadings, could have been supplied from the pleadings themselves if thought to be necessary in settling the bill of exceptions. The company, therefore, has suffered no "unavoidable casualty or misfortune preventing the party from prosecuting or defending."

The trial court was right in refusing a new trial; and, no error being shown in the original case, the judgment and decree in these cases are

AFFIRMED.

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

CHARLES P. BRESEE, APPELLANT, V. HARRY A. SNYDER, APPELLEE.

FILED SEPTEMBER 26, 1913. No. 17,335.

1. **Bills and Notes: ACTION: PARTIES.** Under section 23 of the code, an action upon a promissory note may properly be brought against the maker thereof in the name by which he signed the note.

2. **Judgment: TRANSCRIPT: EXECUTION: SALE: COLLATERAL ATTACK.** A transcript of a judgment of the county court may be filed in the office of the clerk of the district court in any county of the state. It is not necessary to first file it in the county in which the judgment was rendered. When it appears that a true transcript of the judgment is filed in another county, execution and sale thereon will not be held void in a collateral attack eight or ten years afterwards; the land having been several times transferred to innocent purchasers in the meantime.

3. **Execution: SALE: IRREGULARITIES.** A mere irregularity in the notice of sale of real estate upon execution is cured by confirmation, as against a collateral attack.

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

Andrew M. Morrissey, Allen G. Fisher and *William P. Rooney*, for appellant.

Charles E. Lear, Forrest Lear and *William H. Pitzer, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court for Keya Paha county to set aside certain conveyances and quiet his alleged title in real estate situated in that county. Both parties derive their title by mesne conveyance from one Aaron Markley. Markley and his wife conveyed the land by warranty deed in 1893 to Folkert Fass. In April, 1896, Folkert Fass, in the name of F. Fass, and one H. H. Fass executed and delivered to one Gedney Venter their negotiable promissory note for $300. In 1898 Ged-

ney Venter obtained a judgment in the county court of Otoe county against F. Fass and H. H. Fass for $311.92 and costs. Afterwards a transcript of this judgment, duly certified, was filed in the office of the clerk of the district court for Otoe county. Afterwards the clerk of the district court for Otoe county made a transcript of this judgment, and certified thereon that "the foregoing is a true and compared copy of the transcript in said cause as the same appears on file and of record in my office." This transcript was duly filed and docketed in the office of the clerk of the district court for Keya Paha county, and an execution issued thereon and delivered to the sheriff of Keya Paha county. That officer certified that he made diligent search in said county for goods and chattels of the defendants named therein, and for want thereof levied the execution on the land in question. The sheriff sold the land upon the execution to the plaintiff therein, Gedney Venter, on the 15th day of November, 1898. On the 11th day of May, 1908, Folkert Fass and Mary A. Fass, his wife, executed a quitclaim deed of the land in question to the plaintiff. The plaintiff claims under this deed, and alleges that the judgment and sale in the suit of Mr. Venter were so irregular as to convey no title. In 1899 Gedney Venter and his wife conveyed the land by warranty deed to M. L. Hayward, and in the same year Hayward and wife conveyed by warranty deed to W. C. Thomas, and in December, 1906, Thomas and wife conveyed by warranty deed to this defendant, Harry A. Snyder. Mr. Thomas took possession of the land under his purchase, and in the following year inclosed the land with a fence and used it as a pasture. There was no one living on the land when he bought it, and he continued to use it as a pasture until he conveyed it to this defendant, who appears to have bought it in good faith.

The appellant's brief does not comply with rule 9. It does not separately state and number the points of law, upon which he relied for a reversal, with the citations of authorities supporting each point cited under the point

which they are supposed to support. The brief does not by number designate the several pages of the record (the abstract) containing matter bearing upon each question discussed, respectively. The references to adjudicated cases do not comply with the rule so as to enable the court to turn to them without loss of time. In other respects the rules are not complied with. Counsel must not be disappointed if the court refuses to do their work and brief their cases for them, especially for the purpose of reversing a judgment of the trial court. The judgment of the trial court is presumed to be right, and, if upon a general view of the record no substantial error prejudicial to the rights of appellant is observed, the court will not ordinarily look further for errors not properly briefed in compliance with the rules. The rules are not advisory merely; they are not binding upon the court alone; counsel must also observe them.

1. The objection that the judgment against Mr. Fass was invalid because he was not sued by his full name is without merit. An action upon a promissory note may properly be brought against the maker thereof in the name by which he signed the note, under section 23 of the code.

2. It is also objected that the district court for Keya Paha county had no jurisdiction to sell the land because the transcript of the judgment of the county court of Otoe county was not filed directly in Keya Paha county. It was first filed in the office of the clerk of the district court for Otoe county, and a transcript from that court filed in Keya Paha county.

Section 18, ch. 20, Comp. St. 1911, provides that a transcript of judgment in county court may "be filed in the office of the clerk of the district court in any county of this state." It is not necessary to file the transcript in the office of the clerk of the district court in the county in which the judgment is rendered, as in case of judgments of justices of the peace. The words of the statute are that "any person having a judgment * * * may cause a transcript thereof to be filed." There is no evi-

dence that the transcript was not correct and complete. Technical objections to the manner of its preparation and certification might be raised and determined upon motion to confirm the sale. We think that this objection ought to be disregarded when raised in this collateral manner in an equitable proceeding after the lapse of so many years; the land in the meantime being conveyed to innocent purchasers.

3. An irregularity in the notice of sale upon execution is mentioned in the brief. This might have been urged against the confirmation of sale, but ought not now to be considered in this collateral proceeding.

We have not found any error in the record requiring a reversal, and the decree of the district court is

AFFIRMED.

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

FIRST NATIONAL BANK OF DAVID CITY, APPELLANT, V. LEWIS SPELTS ET AL., APPELLEES.

FILED SEPTEMBER 26, 1913. No. 17,350.

1. **Mortgages**: DEED AS SECURITY: TITLE CONVEYED. A deed of real estate given and received as security for debt will, as between the parties thereto, be treated as a mortgage. Such deed conveys the legal title, and the grantor's remaining interest in the land is equitable only. Such interest is not subject to the lien of a judgment, and can be reached by his creditors only by equitable proceedings.

2. **Vendor and Purchaser**: BONA FIDE PURCHASER. One who purchases the land in good faith for full value from the apparent owner and takes his deed from the holder of the legal title, without actual notice of any adverse claims, is not bound to take notice of a judgment against a former holder of the legal title, when such judgment was entered and docketed after such former holder of the legal title had conveyed the same to the grantor of such purchaser.

APPEAL from the district court for Garfield county: JAMES N. PAUL, JUDGE. *Affirmed.*

C. M. Skiles, B. F. Good and *L. B. Fuller,* for appellant.

J. S. Pedler, contra.

SEDGWICK, J.

Lewis Spelts inherited an interest in real estate in Garfield county from his father, and conveyed the same by quitclaim deed to the Phillips County State Bank of Holyoke, Colorado, to secure his indebtedness to that bank. Afterwards the plaintiff obtained a judgment in district court for Butler county against the defendant Lewis Spelts, and caused a transcript thereof to be filed and docketed in the district court for Garfield county. The defendant Alvin Spelts negotiated with his brother Lewis and other brothers and sisters for their respective interests in the real estate. He knew that the interests of Lewis had been conveyed to secure an indebtedness, and their agreement was that Alvin should pay the agreed value of Lewis' interest to the bank and the bank should convey directly to Alvin. Pursuant to this agreement the bank executed a quitclaim deed to Alvin, and he paid the value of Lewis' interest in the land to the bank, which was applied upon the indebtedness to secure which Lewis had deeded his interest to the bank. Afterwards the plaintiff began this action in the district court for Garfield county to set aside the conveyance to Alvin and to subject the interest of Lewis to the lien of its judgment. The district court found generally for the defendants and dismissed plaintiff's action, and plaintiff has appealed.

The plaintiff in the brief seems to concede that Alvin paid full value of the interest of Lewis in the land, and bought it, as he did the respective interests of the other heirs, in good faith and without notice of the plaintiff's claim. The brief says: "In any view of the case, whether we consider Alvin Spelts a fraudulent vendee, or a pur-

chaser for value, the result is the same. * * * In either case he took the title to the undivided one-ninth interest of his brother Lewis, subject to the lien of the plaintiff which attached on the filing of a transcript of the judgment." In this the plaintiff is wrong.

An absolute deed, whether a warranty or a quitclaim deed, conveys the legal title. The grantor may still have some equities in the land. If the deed is given to secure an indebtedness, it is treated as a mortgage as between the parties to the deed, but it conveys the legal title. The grantor has no right in the land, except an equitable right to pay the debt and receive reconveyance. A judgment is not a lien upon an equitable interest in land. A levy and sale of an equitable interest will not pass the title to the purchaser. *Dvorak v. More*, 25 Neb. 739.

The plaintiff obtained no lien upon the interest of Lewis by filing the transcript of the judgment. Lewis had no title, no leviable interest, merely an equitable right to conveyance upon satisfying his indebtedness to the bank. Such an interest is not subject to lien; it can only be reached by proceedings in equity. Alvin paid full value for the land in good faith and received his deed before the commencement of this action. His title, therefore, was complete before this action was begun.

The judgment of the district court is

AFFIRMED.

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

LOUIS C. ANDERSON ET AL., APPELLANTS, V. JOSEPH A. SCHERTZ ET AL., APPELLEES.

FILED SEPTEMBER 26, 1913. No. 17,302.

1. **Homestead.** As our statute uses the term "homestead." it means the house and parcel of land where the family reside and which is to them a home. *Galligher v. Smiley*, 28 Neb. 189; *Meisner v. Hill*, 92 Neb. 435.

2. ———: CONVEYANCE. Under section 4, ch. 36, Comp. St. 1905, any conveyance or incumbrance made of the homestead is absolutely void unless executed and acknowledged by both husband and wife. *Horbach v. Tyrrell*, 48 Neb. 514.

3. ———: ———: VALIDITY. A contract in writing to convey a homestead, which has been signed by both husband and wife, but which they have not acknowledged, is void, and will not be in any way enforced.

4. ———: ———: ———. The homestead means something more than and different from the $2,000 exemption which the statute allows the homestead claimant as against the claims of creditors; it means the actual home of the family, including the land and buildings which constitute the same, and the possession and ownership of all which may be successfully defended by either husband or wife during the marriage state against the independent acts of either, and against the void acts of either, or both; and it is this homestead to which the survivor succeeds after the death of the husband or wife, and in which such survivor will hold the life estate. *Meisner v. Hill*, 92 Neb. 435.

5. **Specific Performance.** The court will not attempt to make a new contract for the parties litigant which they did not make themselves, nor will it enforce new conditions which could not have been within the minds of the contracting parties, nor will it enforce a contract which does not contain the substance of the agreement made.

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

J. H. Grosvenor, Wilcox & Halligan and *J. G. Motherstead*, for appellants.

Hainer, Craft & Aylsworth and *Patterson & Patterson, contra.*

HAMER, J.

This action was brought to enforce the specific performance of a written contract for an exchange of lands. This contract covers certain lands in Deuel county, in this state, and 280 acres of land situate in Hamilton county, the property of the defendants, who are husband and wife. The district court refused to enforce specific performance of the contract, and rendered judgment dismissing the plaintiffs' action. From this judgment the plaintiffs have appealed.

We do not deem it necessary to consider all the reasons urged by the appellants for a reversal of the judgment, as, in our opinion, there exists a reason why the plaintiffs are not in any event entitled to the specific performance of the contract.

One hundred and sixty acres of land belonging to the defendants was occupied by them and is claimed by them as a homestead. The contract sought to be enforced was signed by both defendants, but it was *not acknowledged by either of them*. Section 4, ch. 36, Comp. St. 1905, reads: "The homestead of a married person can not be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." In *Horbach v. Tyrrell*, 48 Neb. 514, the statute is quoted, and it is said: "The obvious purpose of this statute is to render all conveyances or incumbrances made of a homestead absolutely void unless such conveyances are not only signed and witnessed but acknowledged by both the husband and the wife." In the second point in the syllabus in that case it is said: "A conveyance of real estate, such real estate being the homestead of the grantors, is, unless acknowledged, absolutely void."

In *Blumer v. Albright*, 64 Neb. 249, the wife signed the instrument, but she stated to the justice of the peace who took the acknowledgment that the deed was not her voluntary act, and that she had been forced to sign it by

being threatened with the sheriff; but she finally told him that he could go ahead and take the acknowledgment, still persisting, however, that it was not her voluntary act. This court held that the wife's acknowledgment under the circumstances was not such an acknowledgment as was contemplated by the statute, and that "under the statutes of this state the conveyance of a homestead without the acknowledgment of the wife is absolutely void." In the syllabus it was said: "Under the laws of this state, the acknowledgment of the wife to a deed conveying the homestead is essential to its validity."

In *Buettgenbach v. Gerbig*, 2 Neb. (Unof.) 889, the statute in question was quoted, and it was said: "From the holdings of this court it would seem that we have firmly established the doctrine in this state that the statutory provisions for the conveyance or incumbrance of the homestead are exclusive. In other words, there is no power by which homesteads can be conveyed or incumbered other than by a substantial compliance with the statute, and this would mean only by an instrument in writing, executed and acknowledged by both husband and wife for that purpose. * * * A construction of a statute which results in nothing but annullments of its provisions cannot be upheld."

In *Whitlock v. Gosson*, 35 Neb. 829, the wife was confined in an insane asylum in another state, while the husband with his children resided on the homestead in Nebraska. Judge POST, speaking for this court, says: "The statutory provision for the conveyance or incumbrance of the homestead is exclusive." He then quotes the statute, and says: "Here is a plain prohibition against the incumbrance of the homestead without the joint act of both husband and wife. It contains no exception with respect to an absent or insane husband or wife. Had Mrs. Gosson, defendant's wife, been in fact a resident of this state and her domicile the premises in controversy, it is plain that she would have been incapable of relinquishing her homestead right, and a mortgage executed by her hus-

band would have been ineffectual for the purpose of creating a lien thereon. And it requires no argument to prove that on account of her absence from the state she could (not) accomplish by indirection that which she was incapable of doing by her voluntary act." In the same case the contention was made that the husband had represented himself in the mortgage to be a single man, and therefore that he was estopped from claiming his homestead right. Judge POST said: "Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law. The statute in effect declares a conveyance or incumbrance of the family homestead by the husband alone void, not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead right as against the grantee or mortgagee. Such is the view sanctioned by the clear weight of authority and supported by the soundest reasoning." It has frequently been held that an instrument purporting to convey the homestead is absolutely void unless it is acknowledged.

It is contended by appellants that a conveyance is good as to all the interest of the defendants in their land, except as to the homestead of $2,000 in value, and that they are entitled to a specific performance of the contract, except as to the homestead and compensation by abatement of $2,000 in the amount of the purchase price. Foundation for this position can, perhaps, be found in some of the expressions of this court, which were recently reviewed and overruled in the case of *Meisner v. Hill,* 92 Neb. 435. In that case it was held that the limitation of the homestead to $2,000 is solely for the purpose of fixing the rights of the homestead claimant as to creditors, and that this limitation did not apply as between the surviving widow and the heirs of the deceased.

In *Galligher v. Smiley,* 28 Neb. 189, Chief Justice REESE, delivering the opinion of this court, said: "In its inception a homestead is a parcel of land on which the family resides, and which is to them a home."

In *Palmer v. Sawyer,* 74 Neb. 108, the definition of Judge REESE was quoted with approval. In the syllabus in that case it is said: "A debtor who has acquired a homestead does not lose his right to the exemption, where he continues to occupy the property as a home, though, by reason of death and the removal of his family, he has no one living with him." In the body of the opinion it is said: "There is no provision in our statute for the determination of the homestead right when once acquired, except by death or voluntary action of the party acquiring it. The statute which provides for a homestead for the head of a family, who is unmarried when the homestead is selected, does not limit the right of its enjoyment to the time during which the premises are occupied by the dependent members of the family jointly with the owner." We think it follows from the authorities cited that the contract in question is void as to the entire homestead tract of 160 acres. The contract was not acknowledged, and the quarter section occupied as a homestead by the defendants cannot be taken from them under this contract, because it was not acknowledged, and because of the further reason that the land is exempt as a homestead.

Having determined that the contract cannot be enforced as to the homestead, should it be enforced as to the remainder? While contending that the homestead was limited to a tract of land of $2,000 in value, appellants ask for enforcement of the contract as to the remainder, and compensation for the homestead. The evidence shows the land of defendants to be worth from $125 to $150 an acre, or the homestead is worth from $20,000 to $24,000, an amount greatly in excess of that part of the purchase price which the plaintiffs were to pay in money. The homestead embraces more than half of the land of the defendants involved in the controversy. Under these circumstances, to enforce the contract with the homestead out of it, is not to enforce the contract which the parties made, but it is to make a new contract for them, a con-

tract which they never made or contemplated making. The contract enforced should be, in substance, the contract made. It would be a dangerous precedent to make and enforce a new contract between the parties to which they never gave their assent.

A careful reading of the evidence fails to satisfy us of the merit of plaintiffs' claim.

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

AFFIRMED.

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

JOSEPH A. KIME, APPELLANT, V. NORBERT A. KRENEK ET AL., APPELLEES.

FILED OCTOBER 17, 1913. No. 17,201.

1. Ejectment: EXCHANGE OF LANDS: ESTOPPEL. Where plaintiff, the former owner of the land in question, exchanged it for other land of equal value, receiving and retaining title thereto, he cannot be heard to claim the title to the land so exchanged, where his claim is that he is the sole owner thereof in his own right.

2. ———: ———: ———. Where, prior to the exchange, plaintiff had deeded the land to a third party, who redeeded it to plaintiff's wife, but which deed was not recorded nor possession of the property taken by the wife, and the plaintiff exchanged it for another tract of equal value, receiving and retaining title and possession, he cannot, as the grantee or devisee of his now deceased wife, reclaim the possession and title to the property which he had caused the grantee of his deed to convey to the purchaser, who purchased in good faith and for full value, even though said grantee had reconveyed the property to the now deceased wife.

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

William Mitchell, for appellant.

Eugene Burton and *B. F. Gilman, contra.*

REESE, C. J.

This is an action in ejectment whereby plaintiff seeks the possession of the northwest quarter of section 4, township 24, range 47, in Box Butte county. It appears from the pleadings and evidence that on the 29th day of February, 1896, the present plaintiff, Joseph A. Kime, then a married man, was the owner of the land in question, and that on that date he and his wife conveyed it to Loren Mallery, a relative, but whether for a consideration does not definitely appear. There is some evidence of a subsequent statement by plaintiff to the effect that the transfer was only colorable for the purpose of protecting it from the creditors of Kime. The deed was recorded March 3, 1896. On the 18th of the same month Mallery and wife conveyed the property to Susan Kime, the wife of the present plaintiff. This deed was not recorded until the 30th day of August, 1899. During this time the land was open and uncultivated prairie, and no one seems to have been in possession thereof. About the month of August, 1898, the present plaintiff applied to W. W. Norton for an exchange of lands. Norton owned an equal quantity of land which was inclosed in this plaintiff's pasture, and the land in question was adjacent to other lands held by Norton. The two tracts were of equal value. An agreement for an exchange was made, and Norton conveyed his land to this plaintiff, who has retained the ownership, and, so far as herein appears, is still the owner. At the time of the agreement for the exchange this plaintiff represented to Norton that the title was held by Mallery, but only for prudential reasons, and the deed to Norton would be made by him. A quitclaim deed of conveyance was executed by Mallery and wife to Norton, of date of September 30, 1898, and by him recorded on the 14th day of February, 1900. Susan Kime's deed not being of record, nor any appearance of possession of the land by her, Norton had no notice of any rights she might claim in the land, nor had he any knowledge of the existence of her

deed or any claim of title or interest in the land by her. The evidence shows that he acted in entire good faith in the transaction. Soon after he obtained the deed from the Mallerys he leased the land to Matthew G. Wambaugh, who continued in its occupation until February 12, 1900, when he purchased, receiving a deed of that date. This deed was recorded on the day of its execution. The land, by mesne conveyances, passed through a number of hands until the 12th of October, 1904, when the defendant became the owner by purchase, his deed of that date being recorded on the 28th of March, 1908. From the time of Wambaugh's lease the land has been in the exclusive possession of himself and grantees, the owners making valuable improvements and residing thereon, all conveyances from the Mallerys down to defendant having been made upon consideration and in good faith. On the 22d day of September, 1908, Susan Kime commenced this action. Thereafter she departed this life, and, upon a showing that she made a will and this plaintiff is the sole heir and devisee thereunder, the suit was revived in his name as the sole party plaintiff in interest. This proof was made by oral testimony of this plaintiff, but there is nothing in the record to show the contents of the will, nor if it was ever admitted to probate. The revivor having been entered, Joseph A. Kime became the sole plaintiff in his own behalf. A jury trial was had, which resulted in a verdict and judgment in favor of defendants. Plaintiff appeals.

From the four corners of the case we think there is a serious doubt if plaintiff was divested of the beneficial interest in the property by his deed to Mallery. His wife joined him in that deed. The Mallerys reconveyed the property to her, but she withheld her deed from record until long after the Mallerys conveyed to Norton for full value received and retained by plaintiff, and he (Norton) had, by his tenant, taken possession of the property. The land was being improved by the line of grantees from Mallery and Norton, the owners making their home thereon, but she appears to have given no notice of any

claim of ownership by her, presumably considering that the occupants were the rightful owners.

The former owners of the land under Mallery's deed to Norton, as well as to the defendant, were called as witnesses to testify to their purchase, the occupation and improvement of the property by them. Objections were made to their testimony on the ground that plaintiff was the representative of his deceased wife, he, as claimed, having obtained title from her. No witness was asked to detail any conversation or testify to any transaction with the decedent. We are unable to see how or where the provisions of our statute (code, sec. 329) were in any way violated, and can find no error in the rulings of the court upon the objections to the evidence.

It is true that the deed from the Mallerys to the now deceased wife of plaintiff was recorded before their deed to Norton was on record. But he had taken possession, by his tenant, before her deed was recorded, and that possession has been held ever since. It is provided by section 10816, Ann. St. 1911, that, as to subsequent purchasers in good faith without notice, a deed "shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before." Applying the rule of this statute to this case the condition would not be different had the deed to her been executed on the 30th day of August, 1899, the date of its record. At that time Wambaugh was in possession of the land as Norton's tenant, the possession being notice of his rights.

If it is true, as claimed by plaintiff, that his title was received from his wife by her will, he is in the attitude of insisting upon a recovery of the land, which he had exchanged to Norton for land of equal value, and at the same time retaining the full and ample consideration received for it. It is unnecessary for us to inquire what the rights of his deceased wife would have been had she survived to the end of this litigation. It is enough to know that plaintiff is now claiming the land in his own right

and that he has received and retained its full value in exchange.

Some objections are made to the instructions given by the court to the jury, but they are without merit and need not be specifically noticed.

The verdict and judgment are just, and the judgment is

AFFIRMED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

HIRAM P. WALKER, APPELLANT, V. JOHN HOKOM ET AL., APPELLEES.

FILED OCTOBER 17, 1913. No. 17,306.

1. **Principal and Agent: AUTHORITY OF AGENT: MORTGAGES.** The evidence examined, and it is found that J. O. W. was the duly authorized agent of plaintiff to loan money, receive payment thereof, and to reloan the same, under the direction of plaintiff, but that he had no authority, either express or implied, to bind plaintiff by the purchase and sale of the mortgaged property in his own name, without the knowledge, consent or ratification of plaintiff, and obligate plaintiff to release the security thereon.

2. **Mortgages: FORECLOSURE: AUTHORITY OF AGENT.** J. O. W. was the agent of plaintiff for the purpose of loaning money, with general authority to receive and reloan the proceeds upon security to be approved by plaintiff. Under such agency and authority he loaned C. $800, taking a promissory note therefor, payable to plaintiff, secured by a mortgage on real estate. He subsequently purchased the real estate, paying the difference between the purchase price and the money secured by the mortgage, taking title in his own name, and undertaking to procure, cancel and return the mortgage and surrender the note secured thereby. He afterwards sold the property to defendant. Plaintiff, the owner of the note and mortgage, had no knowledge of what J. O. W. had done and never consented to nor ratified the transaction. The mortgage was of record in the mortgage records of the county and so continued, uncanceled and unsatisfied. *Held*, That in an action by plaintiff, the mortgagee, to foreclose the mortgage, he was entitled to a decree.

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

Ambrose C. Epperson, for appellant.

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

REESE, C. J.

This is an action to foreclose a mortgage on the north half of lots 12 and 13, and the west 50 feet of the north 100 feet of lot 14, and the east 50 feet of the south 150 feet of lot 13, all in block 2, of Walker's First addition to the town of Ong, in Clay county, given by John Carlson, a former owner, and his wife to plaintiff on the 1st day of July, 1901, to secure their note for $800. The petition is in the usual form, except that it is alleged that, subsequent to the execution of the mortgage, the mortgagors conveyed certain portions of the mortgaged property to others, who are made defendants, but no question is presented which requires further notice of them. The answer of defendant Hokom consists, first, of a general denial of all unadmitted averments of the petition; second, it is alleged that the loan to secure which the note and mortgage were given was negotiated through J. O. Walker, who was, on and prior to July 1, 1901, and for more than 7 years thereafter, the legally authorized agent of plaintiff to loan money, buy and sell commercial paper, indorse and assign notes and securities, both real and personal, for plaintiff, and to collect and receipt for all such, and that the note was taken by J. O. Walker for plaintiff under such contract of agency; that the said J. O. Walker thereafter received payment from the mortgagors and others of the full amount due on said note and mortgage; that at the time of receiving the same the said J. O. Walker had full right and authority to collect and receive the same and so bind plaintiff, his principal, and the payment was received on behalf of plaintiff; that by such pay-

ment the debt was paid and extinguished, the note and mortgage thereby canceled, the lien destroyed, and defendant entitled to a cancelation thereof of record, and the cause dismissed. The reply is a general denial. A trial was had, which resulted in a finding and decree by the court in favor of defendants, canceling the mortgage, and dismissing plaintiff's petition. Plaintiff appeals.

There is but one serious contention in the case. The evidence shows that J. O. Walker purchased the mortgaged property of the mortgagors for the sum of $1,300; that he paid therefor by agreeing to cancel and return the note and mortgage and by paying in cash the sum of $500, taking a deed to himself, and that he subsequently sold the major portion of the property to defendant Hokom for the expressed consideration of $1,500. The note and mortgage were neither canceled nor returned to the mortgagors, nor had the plaintiff any notice or knowledge of the transaction between the mortgagors and Walker, nor of the sale and conveyance by him to defendant Hokom. It is conceded by plaintiff that J. O. Walker had full authority to collect and receipt for the payment of the principal and interest of the many loans which he had made in that vicinity for plaintiff, but it is insisted that J. O. Walker had no authority, either express or implied, to purchase the mortgaged property, taking title in his own name, paying the excess of the consideration, and agreeing to cancel and return the mortgage and note, but which he never did, and of which transaction plaintiff had neither knowledge nor notice until after the death of J. O. Walker, when he discovered the facts, but which he never ratified nor consented to by any action on his part. There is no averment of accord and satisfaction in the answer; the issue of payment being alone presented.

It is contended by plaintiff that the law is that an averment of payment in a case of this kind can be sustained only upon proof that the alleged payment was made in money or what usually passes and is treated in commerce as money, and that a transaction of the kind be-

tween J. O. Walker and the mortgagors can in no event be treated as payment. As there is no issue of estoppel by ratification or otherwise presented in the answer, we are impressed with the belief that plaintiff's contention is correct, but we do not decide the case upon that point.

The testimony of plaintiff was taken, and a large number of letters from him to J. O. Walker were introduced in evidence. It is made clear that J. O. Walker was the agent of plaintiff to loan money for the latter, and to receive the prinicipal and interest, either remitting the money to plaintiff or reloaning it to other borrowers in the name of plaintiff (uncle of J. O. Walker) and upon securities to be approved by plaintiff, who is a nonresident of the state. We have examined the bill of exceptions closely, and are wholly unable to discover any evidence of other authority given to J. O. Walker, or of other transactions of a similar kind by him. The letters from plaintiff to J. O. Walker all tend strongly to show that proposed new loans were submitted to plaintiff, and he gave specific directions as to the making thereof. It is true that this was not always done, as J. O. Walker seemed to conduct a part of the business in his own way, at times taking the mortgages in his own name, and when payments were made entering the satisfaction of the mortgage, under the direction of plaintiff, but we are unable to find any evidence whatever that J. O. Walker's authority extended beyond this. The relations between the parties appear to be of the most confidential character, but the agency of J. O. Walker was at all times limited to his one line of employment. In the case now before us he clearly exceeded his authority, not only in the purchase of the land, but in making the purchase for himself, taking title in his own name, and selling it to defendant and retaining the proceeds of the sale, never at any time nor in any manner notifying plaintiff of what he had done. While it is true that he gave his promise to Carlson, the mortgagor, that he would procure and cancel the mortgage and return same with note to Carlson, yet he never

did either, the note at least, and probably the mortgage, remaining in plaintiff's possession. Carlson conveyed the mortgaged property to J. O. Walker, received the difference between the amount of the mortgage and purchase price, and accepted Walker's word to cancel and return the mortgage and surrender the note. The mortgage remained uncanceled and unsatisfied of record. We readily and fully appreciate that the foreclosure of the mortgage will result in a hardship upon the mortgagor and the defendant Hokom, the grantee of J. O. Walker, but in this we are met by the fact that the mortgage has been at all times, since its execution and recording, upon the mortgage records of the county, and that defendant Hokom had it within his power to protect himself by an examination of the records, of the contents of which he was charged with notice, before making the purchase of the mortgaged property. The familiar rule that the loss must fall upon the party whose want of care contributed thereto must be applied.

The decree of the district court is reversed and the cause remanded thereto, with directions to said court to enter a decree foreclosing the mortgage in accordance with the prayer of plaintiff's petition.

REVERSED.

LETTON, ROSE and SEDGWICK, JJ., not sitting.

WILLIAM J. JOHNSTON, APPELLEE, V. INDIANA & OHIO LIVE STOCK INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 17, 1913. No. 17,319.

1. **Insurance: APPLICATION: APPROVAL: LIABILITY.** Where a written application for insurance of live stock is made upon a blank form which provides that no liability shall attach until the application has been approved by the home office, and the application, together with the premium, is delivered to the agent of the company, and,

before the application has been approved by the home office, the property insured dies, *held* that ordinarily the insurance company is not liable for loss occurring before such approval. Following *St. Paul Fire & Marine Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720.

2. ———: CONTRACT: LAW GOVERNING. An insurance contract is governed by the law in force at the time of the making of the alleged insurance.

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

E. J. Clements and *L. H. Cheney*, for appellant.

Lambe & Butler and *J. L. White, contra.*

REESE, C. J.

This action was commenced in the county court of Frontier county upon an alleged contract of insurance from death by accident or disease of a horse of the value of $500, the insurance being for the sum of $300. It was alleged in the petition that the contract of insurance was entered into on the 26th day of June, 1909, to continue for one year from said date, at which time plaintiff paid the premium of $30, and that defendant by its agent agreed that the insurance should be effective from that time; that on the 30th day of the same month the horse died from disease, without the fault of plaintiff; that the loss was duly reported to defendant on the 30th day of the same month, and for which judgment was demanded. Defendant answered, admitting the ownership of the property in plaintiff; that it was of the value of $500; and that on the date named plaintiff applied to defendant's soliciting agent for insurance to the extent of $300; alleging that the agent had no authority to enter into any contract of insurance, being only a soliciting agent, whose authority was limited to taking written applications, signed by the proposed assured, and which application was to be forwarded to the home office of defendant company at Crawfordsville, Indiana, when, if approved, a policy would be issued; that the application was signed by plaintiff and

forwarded to the office; that said application was forwarded by Weckbach, the soliciting agent, and received by the company on the 30th day of June, 1909, at the hour of 4 o'clock P. M. of said day; that between the hours of 8 and 9 o'clock of the morning of said day the horse died; that defendant issued said policy at between 4 and 5 o'clock of said day, and without any knowledge that the horse had died, said policy being for a term of one year from June 30, 1909; that, when defendant learned that the insured property had no existence at the time the policy was issued, it tendered back the $30 to plaintiff, and has kept the tender good. Reply: (1) A general denial; (2) alleging that it was specifically understood between defendant's agent (Weckbach) and plaintiff that the insurance was to run for twelve months commencing at noon on the 26th day of June, 1909; that the policy was issued and forwarded to defendant's agent at Lincoln, Nebraska; that at the time the policy was issued the managing officers of defendant knew that the contract was that the insurance was to date from the 26th day of June, 1909; that by the acts of the officers and agents of the company they had estopped it from denying liability on the policy.

Defendant moved the court to strike out the averments of the reply for the reason, first, that no part of the same was contained in the reply filed in the county court, where the suit was instituted and first tried; second, that the same raised new and different issues; third, that no estoppel was pleaded in the county court; fourth, that the same, if material, should have been pleaded in the petition, and not in the reply. The motion was overruled and a trial had to a jury, who returned a verdict in favor of plaintiff for the full amount of the policy, and on which a judgment was rendered. The motion for a new trial was overruled, and defendant appeals.

It is shown by the evidence that the application for insurance was made on the 26th day of June; that the horse was taken sick on the 29th, and died in the forenoon of the 30th; and that the policy was written up during the after-

noon of the same day, dated June 30, to continue one year from that date, and returned to defendant's agent at Lincoln, soon thereafter, to be countersigned and delivered to plaintiff, but without any knowledge of the death of the horse. When the policy reached the agent in Lincoln, he, having learned of the death of the horse, did not countersign nor deliver the policy.

As we view the case, it is not necessary for us to pass upon the alleged error of the court in refusing to strike out the averment of estoppel in the reply, for the reason that, if defendant is liable at all, that liability rests upon other grounds, and, if not liable at all, the question of estoppel becomes an immaterial one.

It is stipulated in the application for insurance that the insurance "shall not be in force until accepted by the home office, and the policy issued thereon." But it is claimed by plaintiff that this clause furnishes no protection nor defense for the company in the face of the statute of this state. Upon this subject reliance is placed upon the provisions of section 49*j*, ch. 43, Comp. St. 1911. This section cannot be considered, for the reason that it was not in force at the time the alleged contract was made, whether that date should be held to be June 26, or June 30, 1909. It seems clear that the clause in the application, signed by plaintiff, which provides that the insurance shall not be in force until the application is accepted by the home office, and the policy issued thereon, is valid, unless procured by fraud, misrepresentation, mistake, or in violation of some statute or contract entered into between the parties, or their authorized agents. *St. Paul Fire & Marine Ins. Co. v. Kelley,* 2 Neb. (Unof.) 720, and cases there cited, approved and followed in *Lowe v. St. Paul Fire & Marine Ins. Co.,* 80 Neb. 499, which must be decisive of the question.

It is fundamental that, where a contract is made with reference to or covering property whereby one assumes a liability with reference to it, the property must be in existence, either actually or potentially, in order to form a

basis or consideration for the support of the agreement. In this case the question of whether a contract of insurance was made during the life of the horse becomes an important one. In other words, was such a contract made on the 26th day of June, at the time of making the application for the insurance and the payment of the premium, or did they only constitute a proposal or offer to enter into such a contract when approved by defendant at Crawfordsville? The application states that the insurance was not to be in force until approved and the policy issued. It also contained a recital that the insurance was not based upon "any statements or promises made by any solicitor or any person professing to represent the company, and that no agent or other person professing to represent the company has power or authority to make oral contracts of insurance, or to bind the company by any oral statements or representations, or to waive, alter or vary any of the agreements or conditions contained in this application, or the policy which may be issued thereon." There is no testimony in the record as to how or by whom the application was written or filled out, whether it was submitted or read to plaintiff, or if he was aware of its contents, except his answers when he signed it. There is no word as to knowledge, or the absence thereof, on the part of plaintiff of the conditions contained in the application, and his testimony is not clear as to the construction placed upon the application by the agent. His final testimony is that the agent stated that the insurance would date from that day if the application was accepted by the company. The deposition of the agent was taken, and although his attention was challenged to the subject of what he said to plaintiff "in regard to when, if ever, the insurance would take effect and be in force," his answer fails to respond to that part of the question, and this part of the case is not made clear. If the conditions contained in the application were brought to the knowledge of plaintiff when he signed such application and paid the premium, it is apparent that he is not entitled to recover.

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

REVERSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

CONSERVATIVE LIFE INSURANCE COMPANY, APPELLEE, V. JAMES A. BOYCE ET AL., APPELLANTS.

FILED OCTOBER 17, 1913. No. 17,331.

Fraudulent Conveyances: HUSBAND AND WIFE: EVIDENCE. The evidence, the substance of which is stated in the opinion, is examined, and *held* not to support the charge of fraud or conspiracy between husband and wife for the purpose of defrauding creditors of the husband.

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

Hollister & Cunningham and *C. W. Britt*, for appellants.

Richard S. Horton and *Gerald M. Drew, contra.*

REESE, C. J.

This action is in the nature of a creditors' bill instituted in the district court for Douglas county by plaintiff against the above named defendants. It is alleged in the petition that the defendants Boyce are husband and wife, and that the banks named are banking corporations, duly organized, etc., in the city of Omaha; that on the 8th day of August, 1905, the plaintiff recovered a judgment in the county court of Douglas county against James A. Boyce and William F. Porter for the sum of $789.15 principal, and the costs taxed therein at $18; that the judgment was duly transcripted to the district court of that county, and execution issued thereon, the same being returned unsatisfied; that

the defendant James A. Boyce, with intent to defraud his creditors, and especially the plaintiff, and preventing it from collecting its judgment, has deposited in the First National Bank of Omaha the sum of $1,500 in the name of his wife, Ethel K. Boyce, and has deposited in the Corn Exchange National Bank of Omaha in her name a sum of money, the amount of which is unknown to plaintiff; that the said Ethel K. Boyce has no interest in said funds or either of them; that the said James A. Boyce, for the purpose of defrauding plaintiff, and his creditors, has purchased certain real estate, and has placed the legal title to said property in the name of his wife, Ethel K. Boyce; that the said James A. Boyce and Ethel K. Boyce have conspired together for the purpose of defrauding their creditors, and, in pursuance of such intent, have placed in the name of defendant Ethel K. Boyce title to the following described real estate (from the confused condition of record, it will be impossible to state descriptions with precision): Lot 13, block 5; west 10 feet of the north ½ of lot 15, block 2; north ½ of lot 16, block 2; east 55 feet of the north 140 feet of lot 10, block 5; west 35 (75?) feet of the north 150 feet of lot 10, block 5; west 52 feet of the north 140 feet of lot 9, block 5; east 55 feet of the north 140 feet of lot 10, block 5 (this seems to be a repetition); east 80 feet of the north 150 feet of lot 11, block 5; all in Park Place addition to the city of Omaha, Douglas county, Nebraska; and the west 50 feet of the north ½ of lot 7, block 2, Orchard Hill addition to the city of Omaha; that the said James A. Boyce paid for all of said property and is the owner thereof, and the title thereto has been placed in the name of Ethel K. Boyce for the purpose of defrauding plaintiff and other creditors; that the title was so placed in Ethel K. Boyce's name after the recovery of plaintiff's judgment, with the fraudulent intent above named. The prayer of the petition is that the money on deposit in the two banks be declared to be the money of James A. Boyce, and that the banks be enjoined from paying the same out upon the checks of Ethel K. Boyce. A decree is also asked

that all the real estate, above described, be declared to be the property of James A. Boyce; that Ethel K. Boyce has no interest, right or title therein; and that it may be ordered sold for the payment of plaintiff's judgment.

To this petition the defendant James A. Boyce made answer consisting (1) of a general denial; and (2) that plaintiff is not the real party in interest, it having sold and transferred the judgment to another, whose name is given; but, as we find no evidence upon this averment, it need not be further noticed. The separate answer of Ethel K. Boyce is to the same effect, but with the further averment that plaintiff has become extinct, its charter surrendered and canceled, and its business being since closed. No other pleadings are shown by the transcript.

The cause was tried to the court, which resulted in findings and decree to the effect that a judgment was recovered in favor of plaintiff and against James A. Boyce; that plaintiff filed its transcript and caused execution to be issued, the same being returned unsatisfied as alleged, and that the amount due was as alleged; that in September, 1903, and after the indebtedness upon which the judgment was obtained had accrued, James A. Boyce "gave to his wife, Ethel K. Boyce," the sum of $1,000, and that the same was so given for the purpose of defrauding plaintiff and to prevent it from collecting its judgment, and the same was so received by the said Ethel K. Boyce; "that when the said defendant James A. Boyce gave said sum of money to his wife, Ethel K. Boyce, the said defendant James A. Boyce was unable to pay his debts and was indebted to this plaintiff and to others, and that this plaintiff was defrauded thereby and prevented from collecting its judgment, that the said gift is void and made in fraud of the rights of this plaintiff;" that defendants James A. Boyce and Ethel K. Boyce were copartners in the profits derived from certain transactions on the board of trade made by James A. Boyce with the funds of defendant Ethel K. Boyce; that said profits were invested by James A. Boyce and Ethel K. Boyce in the west 50 feet of the

north ½ of lot 7, in block 2, Orchard Hill addition to the city of Omaha, the east 55 feet of the north 140 feet of lot 10, block 5, and the east 80 feet of the north 150 feet of lot 11, block 5, in Park Place addition to the city of Omaha, the title to which was taken in the name of Ethel K. Boyce, and the said James A. Boyce has an undivided interest therein, and which is subject to the payment of plaintiff's judgment, and the judgment is a lien upon said half interest. It is further found that the gift of $1,000 given by James A. Boyce to his wife in September, 1903, was invested by her in the east 55 feet of the north 140 feet of lot 10, block 5, the west 75 feet of the north 150 feet of lot 10, block 5, the west 52 feet of the north 140 feet of lot 9, block 5, the east 80 feet of the north 150 feet of lot 11, block 5, and the north ½ of lot 13, block 5, all in Park Place addition to the city of Omaha, and the title taken in her name, and that a trust in the sum of $1,000 should be impressed upon said real estate in favor of plaintiff, and a lien thereon to the extent of the said sum of $1,000; that all the other real and personal property of Ethel K. Boyce or in her name of record affected by this suit is not liable for the payment of said judgment, or any part thereof, and is not liable for the payment of any debt or obligation of the said James A. Boyce. The findings were in favor of the two banks. A decree was entered in accordance with the foregoing findings, and the sheriff was ordered to proceed to sell the one-half interest in what is declared to be the partnership property, and should that fail to sell for sufficient to pay plaintiff's judgment, with interest and costs, and the costs of this action, he may sell such portion of the real estate held liable as may be necessary to pay the remainder thereof, not to exceed the sum of $1,000. The usual order for the sale of the property was entered. Defendants James A. Boyce and Ethel K. Boyce appeal.

We have read with care, not only the abstract and briefs in this case, but all the pleadings and evidence preserved in the transcript and bill of exceptions. The evidence gives

a full history of the course of business pursued by the defendants since their marriage in 1890, and in which it appears that at the time of their marriage Mrs. Boyce was possessed of about $800 in money, which, by payments by her mother soon thereafter, amounted to about $1,000, which she kept separate and apart from her husband's business, handling and investing it as she saw fit; that at the time of their marriage Mr. Boyce was the proprietor of a normal school at Princeton, Indiana, and she, in her own right, took charge of a dormitory or large rooming and boarding house, which she conducted for about four years, and during which time she ran a book, music and stationery store, and at the end of which time she had accumulated, in addition to her former means, the sum of about $4,000, which she retained as her own, and out of which she loaned some $2,000. At the end of this time Mr. Boyce disposed of his school, and they later went to Arkansas where, he was employed in charge of another school, where they remained some time; Mr. Boyce receiving a salary of $2,500 a year for his services. During this time Mrs. Boyce's health was not good, and Mr. Boyce suffered an illness of typhoid fever, and they soon thereafter came to Nebraska, settling temporarily at Nebraska City, Mr. Boyce's health not being good, and he was earning little or nothing for a long time. They afterwards went to Kearney, where they resided for a time, and then came to Omaha, where they still reside. The long continued indisposition of Mr. Boyce and his inability to earn the means of a livelihood for the family made inroads on the capital of Mrs. Boyce, although this is not shown with particularity. He later earned money by promoting local enterprises in Auburn, Hastings and St. Paul, for which he received about $3,000, and out of which he paid his wife $1,500. After settling in Omaha he promoted what is called a "brick deal," his commission amounting to about $3,800, and out of which he paid his wife $1,000, making a total of $2,500 paid to her. This subject was not as clearly explained as it should have been, but it clearly

appears that he had made use of a part of her money in advancing his business, and, in connection with her expenditures in the maintenance of the family expenses, it is apparent that he did not overpay what he justly owed her. Counsel treated these payments as "gifts," which they clearly were not. Mrs. Boyce had the absolute right to receive and he to return the money she had expended in his assistance and the maintenance of the family.

After they settled in Omaha Mrs. Boyce, desiring to engage in business on her own account, obtained a commission business, which, with her means, she maintained for some time, but which proved not to be profitable. In order to secure the use of a wire between her office and her correspondent in St. Louis, she deposited of her own funds the sum of $5,000, which remained on deposit as long as she retained the use of the wire, upon relinquishing of which she drew down the deposit and commenced the purchase of real estate in the city. Out of her funds she repaid principally all persons who had made deposits with her. It would extend the opinion to an unnecessary length to give in detail all the items of business and expenses as contained in the bill of exceptions. It must be sufficient to say that the evidence clearly establishes the facts that she maintained the business, meeting expenses with her own checks, and allowing her husband 25 per cent. of the profits for his services in managing the business under her control, he being responsible for none of the losses. If no profits were made he received no compensation. She kept her funds deposited in the banks in her own name, and out of which she met expenses. There was no partnership relation existing between them. While in this service he occasionally made ventures on the board of trade, at one time buying a quantity of pork, and out of which he made a handsome profit. In doing so he took from his wife's funds, but without her knowledge or consent, the sum of $100, which he almost immediately returned. He seems to have bet heavily on a pending election and made a gain of $3,000. He purchased a $5,000 automobile, which he

used for some time in the city and then sold. In none of these deals did his wife participate or have any interest. It is very clear that there is no evidence of the existence of a partnership between the two in any of the transactions described, and, hence, the findings of the court that such partnership existed, and that thereby the plaintiff was entitled to a half interest in the property, described in the findings to be sold by the sheriff, cannot be sustained.

Mrs. Boyce appears to be a practical and successful manager of her own affairs, although not always successful in her enterprises. Knowing the failings of her husband in financial matters, she has aimed to keep her individual property out of his hands as much as circumstances would permit. The husband is under both a legal and moral obligation to pay his debts to his wife as to any other creditor. It is apparent that he has refunded to her no more than he has used of her means. It was his duty so to do and it was her right to receive. We are unable to detect convincing proof of fraud in her dealings either with her husband or with others. The statute requires this court to decide the case as if the court of first instance, uninfluenced by the decision of the district court. We are unable to view the case as seen by the learned trial judge.

The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, SEDGWICK and HAMER, JJ., not sitting.

MELVIN V. HALLGREN, APPELLANT, V. JACOB L. BECKER, APPELLEE.

FILED OCTOBER 17, 1913. No. 17,347.

1. **Equity: REFORMATION OF CONTRACT: INJUNCTION.** In an action in equity to enjoin a suit at law and to reform the written contract upon the provisions of which such suit depends, the basis of the equitable action is the right of the plaintiff to the reformation of the contract.

2. **Contract: REFORMATION: EVIDENCE.** "In order to authorize the reformation of a written contract, it must be made to appear what the actual contract between the parties was; that the written contract exhibited does not express the contract made; and these facts must be established by clear, convincing, and satisfactory evidence." *Slobodisky v. Phœnix Ins. Co.*, 52 Neb. 395.

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

Thomas F. Hamer, for appellant.

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

REESE, C. J.

This is another one of those unfortunate lawsuits between relatives, the existence of which is always to be deplored. The relation between plaintiff and defendant is that of nephew and uncle. The pleadings are too long and verbose to be here copied or even summarized, and we shall be content by giving a brief statement of the facts out of which the litigation has grown. Defendant is the owner of a farm of 320 acres situated in Dawson county. In the fall of 1908 he, by an oral agreement, leased the land to plaintiff, who then resided a distance of about 40 miles therefrom, the term of lease to begin on the 1st day of March, 1909. There is a sharp conflict between the parties as to what the length of the term should be, plaintiff claiming that the final agreement was that he should have the use of the land for one year with the privilege of

extending the term to five years if he so elected. Defendant insists that it was a definite agreement for one year, ending March 1, 1910. No written contract of lease was entered into until the 23d day of April, 1909, when the parties obtained the services of a scrivener, and a contract in writing was prepared and signed by them. This writing was defective in many particulars and limited the term to one year. Plaintiff had long before that time taken full possession of the farm, residing thereon with his family, and progressing with the farm work. The relation between the parties appears to have been cordial and confidential for some time, when disagreements arose. We deem it unnecessary to state the cause of the friction between them. Plaintiff continued to reside upon and cultivate the land, and on the 23d day of August, 1910, during the second year of plaintiff's possession, defendant served upon him a written notice as follows: "Sumner, Nebr., 8-23-1910. Notice to Quit. I hereby give you notice to quit and deliver up on the first day of March, 1911, the possession of the farm which you now hold of me as a tenant. Dated August 23, 1910. To Melvin V. Hallgren, Tenant. J. L. Becker, Landlord." At that time plaintiff had plowed some 40 acres of the land and sowed the same in wheat, and had also disked 10 acres in rye, which was then up and growing. On the 1st day of March, 1911, defendant served upon plaintiff a notice to quit the "E. ½ of the N. E. ¼ of section four (4), town (11), range nineteen (19), N. ½ of the N. W. ¼ of section three (3), in town eleven (11), range thirty-three (33), town twelve (12), range nineteen (19), also the field of alfalfa north of the Union Pacific Railroad track in section four (4), town eleven (11), range nineteen (19), in Dawson county, Nebraska." It may be observed that the farm and contract of lease includes the southeast quarter of section 33, township 12, range 19, but which is not included in the notice to quit. Proceedings in forcible detention were commenced before a justice of the peace, but the record of that suit is not before us, and we

have no way of knowing the description of the land involved therein. After an adjournment of eight days had been obtained, plaintiff brought this action for an injunction to restrain defendant from prosecuting the forcible detention suit and to reform the contract of lease. In the petition the land is described as in the written contract, the southeast quarter of section 33 being included. The answer and cross-petition also includes the land in section 33, and therefore we may assume that the suit in detention included the same, although not mentioned in the notice to quit. No point seems to have been made upon the trial by which the effect of the notices were drawn in question, and no further attention will be given to it. A temporary injunction was granted at the commencement of the suit. The cause was tried to the district court, the result thereof being a finding in favor of defendant, the dissolution of the temporary injunction, and the dismissal of the suit. Plaintiff appeals.

As we see the case, it will not be necessary to review the evidence in detail, nor seek to harmonize the conflicts thereof. It must be conceded that, if a court of equity could rightfully take jurisdiction of the case, that jurisdiction must be founded and based upon the right of plaintiff to a reformation of the contract of lease by which it can be made to conform to the contract and intention of the parties. It is a well-settled rule of equity jurisprudence that, in order to secure a reformation of a written contract, the evidence must be clear, convincing, and satisfactory that the contract as written does not reflect the real contract and agreement of the parties. *Slobodisky v. Phœnix Ins. Co.*, 52 Neb. 395. The burden of proof is, of course, upon the party seeking the relief. As we have said, there was a sharp and irreconcilable conflict in the evidence, plaintiff testifying that the agreement was that he was to have a lease for one year with the privilege of extending it to five years, and in which he is supported by the testimony of witnesses that defendant had admitted that such was the agreement, while defendant as posi-

tively asserted upon the witness stand that no such agreement was ever made. The testimony of the scrivener who drew the lease is equally positive that the terms of the lease in its details were dictated to her by the parties; that nothing was said about an extension of the lease; that she read the lease in full to the parties, to which both agreed before signing, the contract being left with her for safe keeping, she furnishing plaintiff a copy thereof some weeks or months thereafter. There is also testimony of statements made by plaintiff to the effect that he had rented the farm for one year. The alleged admissions were denied by both parties, and in each instance their denials were supported by witnesses who were present and heard the conversation in which the admissions were said to have been made. Applying the well-known rule of equity to the evidence, we are constrained to hold that it was not sufficient to justify a reformation of the contract, and that the district court was right in so holding. The issue upon the effort to reform the contract being the only one of equitable cognizance, the suit was rightly dismissed. As every other question can be fully tried in the suit at law, which is still pending in the court of the justice of the peace, we cannot see our way to reverse the judgment of the district court.

The judgment of the district court is therefore

AFFIRMED.

LETTON, SEDGWICK and HAMER, JJ., not sitting.

AUSTIN M. BROWNFIELD, APPELLANT, V. CITY OF KEARNEY ET AL., APPELLEES.

FILED OCTOBER 17, 1913. No. 17,974.

1. **Municipal Corporations**: LIGHTING PLANT: BOND ISSUE. In order to the legal issue of bonds for the construction of a municipal lighting plant in cities of the class having a population of from 5,000 to 25,000 inhabitants, it is necessary that the provisions of section 54 of the city charter (Comp. St. 1911, ch. 13, art. III) be followed and complied with.

2. ———: ———: STATUTES: REPEAL BY IMPLICATION. The provisions of that section having been enacted and re-enacted subsequent to the passage of sections 1 and 2, art. V, ch. 14*a*, Comp. St. 1911, supersede the latter act wherein there is a conflict in their provisions.

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

Thomas F. Hamer and *Warren Pratt*, for appellant.

H. M. Sinclair and *N. P. McDonald, contra.*

REESE, C. J.

On the 14th day of February, 1912, the mayor and council of the city of Kearney submitted to the electors of the city a proposition to issue the bonds of the city in the sum of $40,000 for the purpose of raising money to pay for the construction of a municipal lighting plant and system for the use of the city and its inhabitants. There were 1,086 votes cast at the election, of which 618 votes were cast in favor of the proposition and 468 votes against it. The proposition was declared carried, the bonds prepared, submitted to and registered by the state auditor of public accounts, and delivered to the state treasurer on an executory contract between the city and state treasurer for their sale to the school funds of the state; but the money was not paid for them, they remaining in the possession of

the state treasurer, when a temporary injunction was issued, the whole matter stayed, and still rests *in statu quo*. The cause was tried in the district court, the trial resulting in a finding in favor of defendants, the temporary injunction dissolved, and the plaintiff's petition dismissed. Plaintiff appeals.

The petition is of considerable length, and attacks the proceedings in the matter of the issuance of the bonds with careful particularity, beginning with the alleged want of power to issue bonds for so great an amount, the alleged irregularities in the proceedings antedating the election, the lack of a sufficient majority of votes in favor of the issue, resulting in the defeat of the proposition. The answer admits the averments of the petition as to the corporate character of the city, the official positions of the defendants, mayor, councilmen, etc., that the election was held and the number of votes polled, the number of votes in favor and the number against the proposition, and the making and registration of the bonds, as alleged. All other averments of the petition are denied. In view of the contentions of the parties as to the ruling question presented, it is not deemed essential that the pleadings be further noticed in detail. Nor do we deem it necessary to dwell upon the evidence adduced upon the trial.

Practically the whole contention is centered upon whether the provisions of section 54, art. III, ch. 13, Comp. St. 1911 (embodied in the city charter), or whether sections 1 and 2, art. V, ch. 14*a*, Comp. St. 1911, are to be applied and held to be the law, by which the city council and the people should have been governed. It is insisted by plaintiff (appellant) that the provisions of section 54, *supra*, should have been complied with by the council, and, if so, the bonds are void. This section requires a three-fifths majority vote in order to authorize the issue of bonds. It is conceded that there was not that majority in favor of the proposition. It is contended that the powers of the city council did not depend upon that section, but that their action was taken under the provisions of sec-

tions 1 and 2, art. V, ch. 14*a*, Comp. St. 1911, and that upon those sections, and those alone, do defendants rely as giving authority for the action taken by the city council.

An examination of the legislation as contained in the two somewhat antagonistic provisions shows that section 54, art. III, ch. 13, Comp. St. 1911, was passed in 1901, and has been practically continued, but with later amendments, until 1909, when it was re-enacted, with slight modification, by House Roll No. 129 (laws 1909, ch. 19) as it appears in sec. 54, art. III, ch. 13, Comp. St. 1911. Sections 1 and 2, art. V, ch. 14*a*, Comp. St. 1911, appear to have been enacted in 1901, and to have remained as then passed until 1903, when chapter 25, laws 1903, was passed, since which time no change or amendment has been made, and they now stand as sections 1 and 2, art. V, ch. 14*a*, Comp. St. 1911. We find it impossible to hold that the later enactments of section 54, *supra*, of the city charter, must not govern and control the powers of the mayor and council as the last expression of the legislative will, and that wherein it conflicts with the section relied on by the city the latter must give way. We are not unmindful of our decision in *State v. Searle*, 76 Neb. 272, decided in 1906, where a quite similar question was presented, but upon the earlier statutes. The later enactments of the legislature seem to render it certain that the powers of the city council are to be limited thereby. We can see no escape from this conclusion, and that the amended charter as it existed at the time of the submission and election must govern and be complied with. This not having been done, it follows that the bonds are invalid.

The decree of the district court is therefore reversed and the cause is remanded, with directions to that court to reinstate the cause and enter a decree rendering the injunction perpetual.

REVERSED.

LETTON and FAWCETT, JJ., not sitting.