EPISODES IN THE LIFE OF JAMES MANAHAN

Chapter Three

The Nebraska Years

By

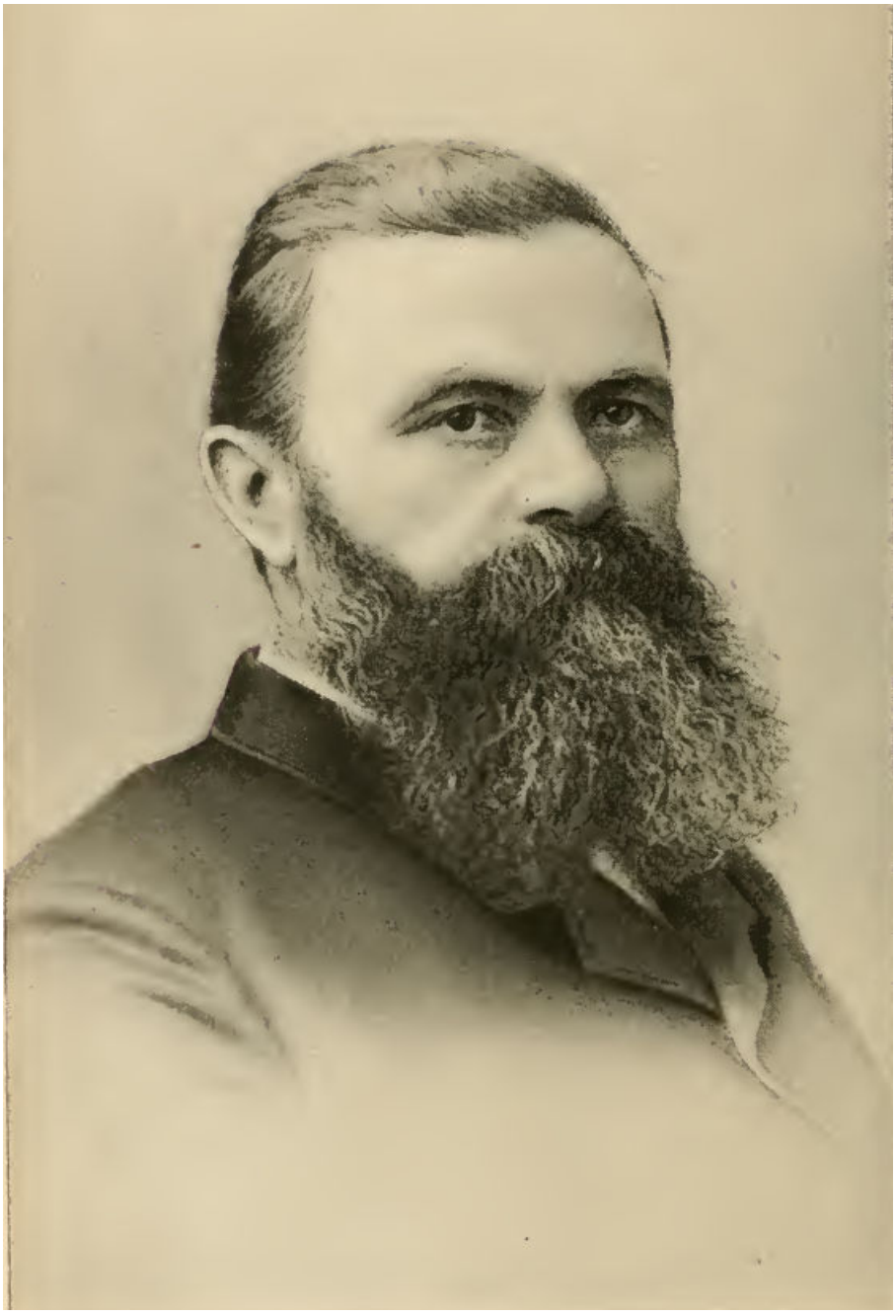
Douglas A. Hedin

Minnesota Legal History Project
minnesotalegalhistoryproject.org

• January 2021 •

Table of Contents

≈Ṁ≈



John Fitzgerald
(1889)

The Fitzgerald Estate

In 1895 after practicing law in Minnesota over five years, James Manahan moved to Lincoln, Nebraska, to attend to the legal affairs of his wife's cousin. Mary Fitzgerald, the widow of John Fitzgerald, a railroad contractor, who left an enormous fortune when he died intestate on December 30, 1894.[1] For the next decade he specialized in the law of debtor-creditor as he defended the Fitzgerald Estate from a plethora of claims and suits.

Mrs. Fitzgerald, the administratrix of the Estate, was Manahan's only client. Representing a family member is always awkward for a lawyer but Manahan's situation was especially demanding. His client was an extremely wealthy relative who suffered episodes of mental illness after her husband's death. Receiving an annual retainer of $4,000, he did not have the financial concerns of other lawyers. When he suddenly appeared in Lincoln to handle one of the most lucrative cases in the city's history he was not even a member of the bar.[2] He never

---

[1] MP Boxes 2 and 4. John Fitzgerald is one of those tycoons that appear in many local histories published in the Gilded Age. For a lengthy biographical sketch of him see Arthur B. Hayes & Samuel D. Cox, *History of the City of Lincoln, Nebraska* 301-307 (1889), posted in the Appendix, at 29-35. Purportedly Lincoln's first millionaire, he left an "estate that [is] valued at $2,000,000." *Nebraska State Journal*, December 31, 1894, at 1.

Fitzgerald was active in the Irish nationalist movement, which occasioned Manahan's story about uncovering a large number of old guns and ammunition under "Mount Emerald," the family's ornate Queen Anne styled house located near the capitol. TOL, at 23-30. A photograph of the home is posted in the Appendix, at 33.

[2] Manahan was admitted to practice before the Nebraska Supreme Court in 1896. See "Listing of Practicing Attorneys," 47 Neb. vi (1896).

Mrs. Fitzgerald turned to Manahan because Turner M. Marquett, her husband's "legal advisor for many years," died a week before him. *Nebraska State Journal*, December 31, 1894, at 1 (noting that in the summer of 1894, they won a "suit from the Missouri Pacific for a half million dollars...that lifted a load from their shoulders").

bothered to build a private practice in Lincoln.[3] It was well known that when the Estate was closed he would return to St. Paul, a thriving metropolis to the North. The peculiarity of his situation must have been the subject of idle talk and gossip by the small Lincoln bar, the sorts of stories that lawyers by their nature exchange.

The Fitzgerald Estate attracted numerous claims and at least ten lawsuits, several of which were appealed.[4] One suit, the so-called *Bartley Bond Case*, demonstrates Manahan's trial skills and an impetuosity that in later years landed him in trouble. At that time a bond was required to be posted by each new state treasurer upon taking office. Mary Fitzgerald and a dozen other sureties signed the bond of Joseph S. Bartley, the Republican Treasurer, who served from 1893 to 1897. After it was discovered that he embezzled large sums while in office,[5] the

---

[3] His law office was in the "Fitzgerald Block" in Lincoln.

[4] E.g., *Pettibone v. Mary Fitzgerald, Administratix*, 62 Neb. 869, 88 N.W. 143 (1901)(two contiguous lots were assessed a tax in an aggregate amount, which the estate argued unsuccessfully violated state revenue laws); *State ex rel. Mary Fitzgerald v. Houseworth*, 63 Neb. 658, 88 N.W. 858 (1902) (Court denies Estate's application for writ of mandamus to compel clerk of district court to accept bond). Only one case, technically not against the Estate, was brought in federal court. Manahan was co-counsel in *Fitzgerald v. First National Bank of Rapid City*, 114 F. 474 (8th Cir. 1902), a decision written by Judge Walter H. Sanborn. The controversy arose when the bank, as assignee, sued John Fitzgerald's railroad construction company for the price of beef delivered to a subcontractor; a jury verdict for the bank was reversed by the appeals court and a new trial ordered.

[5] Bartley was convicted of embezzling $201,884.05, fined and sentenced to 20 years in prison. *Bartley v. State*, 53 Neb. 310, 73 N. W. 744 (1898)(affirming conviction). He was pardoned by Governor Ezra Savage in 1902. *See* Robert W. Cherny, *Populism, Progressivism, and the Transformation of Nebraska Politics, 1885-1915* 83 (1981). His actions spawned other litigation besides that against Mrs. Fitzgerald. E.g., *In re State Treasurer's Settlement*, 51 Neb. 116, 70 N.W. 532 (1897)(in a controversy between Bartley and his successor, the court interpreted the state "depository law," which controlled how the departing state treasurer transferred and accounted to the incoming treasurer for public funds deposited in banks that posted bonds approved by state officials); *State v. Omaha National Bank*, 66 Neb. 857, 93 N.W. 319 (1903).

state, represented by the attorney general, sought to collect from Mary Fitzgerald and other sureties for defaulting on the official bond. At trial Manahan argued that his client signed the bond on January 3, 1895, the day of her husband's funeral when she was grief stricken. In a typewritten section of his memoir that was omitted from the published version, Manahan described his argument and the verdict:

> With that simple fact established in the case, I suddenly and boldly demanded that the attorney general should tell the jury on what hour on John Fitzgerald's burial day they got my client to put her name on that bond. Was it before or after the funeral, and did they use her husband's casket, by which she mourned, as a table on which to sign the bond? Whatever the hour, I said, it was not the act of a competent person, that she was insane with grief at the time she ought to have been. The jury agreed with me and returned a speedy verdict, releasing my client from liability.[6]

---

[6] MP Box 2 (there are three handwritten versions of Manahan's argument in MP Box 4). The newspaper's account is less dramatic; it also related his unusual appearance as a fact witness:

> For Mrs. Fitzgerald Mr. Manahan related the circumstances during which she was induced to sign the Bartley bond. He said that the death of her husband, the unaccountable absence of her son and her business troubles had unsettled her mind, and at the time she signed the bond she was totally unable to act intelligently. Her signature was attached on the day of her husband's funeral, when she was too feeble to dress herself or walk to the carriage and was unable to recognize members of her own family.
>
> . . .
>
> In the afternoon E. J. Wells, a bookkeeper in the state treasurer's office, was called to identify some additional records and James Manahan, counsel for Mrs. Fitzgerald, was put on the stand and asked to identify her signature on the Bartley bond. He said that he thought it was Mrs. Fitzgerald's signature, but explained that it

The jury found that Mrs. Fitzgerald was "insane" when she signed the bond. She was the only defendant absolved of liability; a verdict of $646,382.43 was returned against the other bondsmen.[7]

> was written in a manner different from that in which she now signs her name.

Omaha Daily Bee, July 6, 1899, at 12.

[7] The trial court directed a verdict against the bondsmen and held that the only fact issue for the jury was Mrs. Fitzgerald's mental capacity. *Omaha Daily Bee*, July 18, 1899, at. 10. The jury's verdict was reported in *Omaha Evening World Herald*, July 18, 1899, at 1 (copy in MP Box 5), and in the *Bee*, July 19, 1899, at 12:

> **RELEASES MRS. FITZGERALD**
> **Jury In Bartley Case Decides She Was Insane and Holds the Other Sureties.**
>
> The verdict of the jury in the Bartley bond case was reached about 10 p. m. Monday and placed in a sealed envelope, to be opened in the presence of the court yesterday morning. When court convened there were few auditors, as the instructions of the court left nothing to be decided upon except the question of Mrs. Fitzgerald's sanity, and interest in the case had lapsed. Even some of the bondsmen were absent, and none of the attorneys manifested any interest in the result except Mr. Manahan, who was Mrs. Fitzgerald's special counsel. The verdict was read by the clerk without delay. It found a judgment against the bondsmen for $646,382.43, but released Mrs. Fitzgerald on the ground that she was not in a condition in which she knew what she was doing when she signed the bond. Judge Fawcett discharged the jury, and Mr. Manahan received congratulations, while the other attorneys for the defense lugubriously began preparing to file their motion for a new trial. This will be presented as soon as the papers can be prepared.

The case against the bondsmen was reversed by the Supreme Court and in the retrial they were found not liable. *Omaha Daily Bee*, November 28, 1903, at 1 ("Frees Bartley Bondsmen").

A month after arguing that his client was mentally impaired in the *Bartley Bond* case, Manahan argued that she had recovered her wits in a case where the creditors of the Estate alleged she was incompetent. At this hearing occasion, he was assaulted by opposing counsel.

> An exciting personal encounter took place in the county court this morning between Attorneys Burr and Manahan. Some time since Attorneys Burr and Field made application before Judge Cochran to have Mrs. Fitzgerald discharged from her position as admin-

Because his legal work for the Fitzgerald Estate did not consume all his time, Manahan bicycled, read, took a course at the university and worked in Democratic politics.[8] Kathryn recalled, "Father spent a good deal of his time in a world of caucuses, political conventions, newspaper reporters, public addresses, clubs and campaigns."[9] He became a popular speaker at banquets of fraternal organizations and political dinners that permitted him to display his dry, self-deprecating wit and polish his speaking style.[10]

> istratrix of the John Fitzgerald estate. They were representing the creditors of the estate and claimed that Mrs. Fitzgerald was not a competent person to look after such business affairs. Mr. Manahan will be remembered as the democratic nominee for congress in this district last year. He was defending Mrs. Fitzgerald and her interests. The case has been in progress for several days and a number of tilts had passed between the opposing counsel before. Mr. Manahan was on the witness stand yesterday afternoon and Mr. Burr took it today. On cross-examination Mr. Manahan stated that he was going to produce some documents which would prove that Mr. Burr's motives in this case were those of persecution of the defendant. He intended to show that Mr. Burr was intentionally misrepresenting facts. Mr. Burr became enraged at once, sprang from his seat and advanced on Mr. Manahan and slapped him in the face. Judge Cochran immediately adjourned court and said it would not be convened again until the combative attorneys would agree to make no further demonstrations. The case was resumed this afternoon with both lawyers appearing tractable and docile.

Omaha Daily Bee, August 31, 1899, at 3.

[8] TOL, at 13. The irony that this future *bête noire* of the railroad industry represented the estate of a wealthy railroad builder for a decade goes unmentioned in his memoir.

[9] KM Ch. 2 (2).

[10] Among his papers at the Minnesota Historical Society are brittle, stained, century-old banquet programs—like Miss Havisham's wedding cake—listing him as toastmaster or after-dinner speaker. On July 6, 1899, he spoke at the Al-Kadr Temple No. 87, in Lincoln, Nebraska, on "Overcoming Tiger's Claws." He was the toastmaster of banquets honoring William Jennings Bryan in Lincoln on January 10, 1904 and of the Knights of Columbus in Lincoln on February 7, 1904; a dinner speaker on "Catholic Patriotism" at the same organization in Mason City, Iowa, on May 23, 1909; a speaker at a banquet of the Ancient Order of Hibernian on June 4, 1907, at the Hotel Ryan in St. Paul; among others. MP Box 3.

Roscoe Pound
(1916)

Roscoe Pound

Two cases against the Estate brought him before Nathan Roscoe Pound, a Commissioner on the Nebraska Supreme Court.

When Manahan was writing his memoir, Roscoe Pound had been Dean of Harvard Law School for over fifteen years and was one of the most famous figures in American law. But Manahan does not mention him even once.[11] That he is not a name-dropper is one explanation for this omission. Another may be that he just did not like the man.[12] Without question they knew one another. Pound practiced and taught law in Lincoln from 1890 to 1907, a period that overlapped Manahan's decade in the city. He was one of the founders of the Nebraska Bar Association in 1900.[13]

Pound became an influential theorist in the academy, writing penetrating critiques of the legal system that are read for profit today by scholars.[14] Manahan was a trial lawyer, combating in the trenches, who may have never read Pound's articles or books. Though they had great differences, each would become in his own way a Progressive Era reformer.

---

[11] In 1901 Pound was appointed a commissioner on the state supreme court; in 1903 he returned to private practice and served as dean of the University of Nebraska Law School until 1907, when he was appointed a law professor at Northwestern University. Paul Sayre, *The Life of Roscoe Pound* 1-2, 208 (1948). He served as Harvard's dean from 1916 to 1936.

[12] If so he was not alone. Willa Cather, the editor of the literary magazine at the University of Nebraska, published a satirical sketch of Pound in the 1894 issue, describing him as pompous, arrogant and a bully. Richard E. Shugrue, "Roscoe Pound, Commissioner," *in* Alan G. Gless, ed., *The History of Nebraska Law* 290-291 (2008).

[13] David Wigdor, *Roscoe Pound: Philosopher of Law* 77-78 (1974).

[14] Bernard Schwartz, *Main Currents in American Legal Thought* 471 (1993) ("I can personally attest to the value of Pound's theory of social interests...").

Not surprisingly they were on opposite sides of the political fence. About the 1896 presidential election that inspired Manahan, Pound had only contempt, as a biographer noted:

> **The campaign of 1896 was a memorable experience for Pound, and he frequently peppered his later speeches to bar associations with blistering criticism of the Populists. He remembered them as narrow, stupid men, fit only to serve as the butt of his jokes to audiences of nodding legal worthies....He found the raw protest of lower-class reform distasteful: it lacked dignity, it was not respectable, and its arguments were unsound."[15]**

Pound was active in local Republican politics and served as chairman of the party's city committee for Lincoln in 1898 when Manahan ran for congress as a Fusionist.[16] Pound's candidate won.

Pound was appointed a commissioner of the Nebraska Supreme Court in April 1901 for a two year term.[17] It was in this capacity that he was assigned to a panel that heard an appeal by the Fitzgerald Estate of a judgment in favor of the First National Bank of Chariton, Iowa. Manahan argued that the bank's claim was filed too late and the Supreme Court, with Commissioners Pound and Sedgewick dissenting, agreed.[18] This was Pound's only dissent during his two years on the

---

[15] **Id. at 74. Pound supported the McKinley-Hobart ticket in 1896.**
[16] **Sayre, note 11, at 102; Wigdor, note 13, at 77.**
[17] **Sayre, note 11, at 122-126. The Supreme Court appears to have selected the commissioners as much on the basis of politics as merit. Of the nine commissioners appointed in 1901, four were Republican, five Fusionists. Newspapers labeled Pound a Republican appointee. Id. at 125-26.**
[18] ***Fitzgerald v. First National Bank of Chariton*, Iowa, 64 Neb. 260, 89 N.W. 813 (Neb. 1902). It is posted in the Appendix, at 36-52.**

bench.[19] A biographer points to it as exhibiting a "flash" of the sociological jurisprudence he later espoused:

> **Pound felt it particularly unfortunate to make the entire trial futile because of what he regarded as purely a formal difference or what we may call a distinction without a difference. Incidentally, the question was up as to whether the verdict was contrary to the evidence. And Pound does battle with the trial court on this score also, with a flash of that moral indignation which we later find so important a part of the ethical content in all his sociological jurisprudence. This final little matter of whether the verdict was sustained by the evidence he disposes of in short order: 'It is also contended that the verdict is contrary to the evidence; but there appears to be ample evidence to sustain it and good ground for believing that it is right.'[20]**

Two months later, Pound, now speaking for the full court, rejected Manahan's appeal of the decision of the district court accepting a claim against the Fitzgerald Estate by the Union

---

[19] Harold Gill Reuschelein, "Roscoe Pound —The Judge," 90 *U. Pa. L. Rev.* 292, 329 (1942).

[20] Sayre, note 11, at 131, quoting *Fitzgerald v. First National Bank of Chariton, Iowa*, 64 Neb. at 274, 89 N.W. at 818. *Accord* Wigdor, note 13, at 83-4 ("Pound displayed a passion for common law fundamentals. At the same time, his opinions showed movement toward some advanced positions, and there were suggestions of the sociological jurisprudence to come....His opinions as a commissioner were merely glimpses of the future."). *But see* Reuschelein, note 19, at 329 ("One cannot turn to the judicial opinions of Roscoe Pound and clearly read in them the tenets of his Sociological Jurisprudence as one finds them expanded in his later juristic writings. But one may discover in the opinions the way in which he took problems as they came before him for adjudication and in their solution experimented with techniques which later he was to formulate for the guidance of others...").

Pound's "The Need of a Sociological Jurisprudence," 19 *The Green Bag* 607-615 (October 1907), is posted separately on the MLHP website.

Savings Bank of Lincoln.[21] Again Manahan contended that the claim was filed late. In his ruling, Pound made a sharp comment about Manahan's conduct that must have stung. The case was filed in county court, appealed to district court, and finally to the state supreme court. In district court, Manahan made an offer of proof that the bank had been fraudulently liquidated, but the trial judge denied it. Finding no error, Pound held that he should have raised this defense before trial, not during it, and concluded sarcastically, "We may say, also, that, while counsel are very free with charges of fraud and wrong in the winding up of the bank, their offers of proof show pretty conclusively that the estate has no ground of complaint."[22]

They may have had a final "encounter" in 1906. In the last week of August the American Bar Association held its annual convention at the Ryan Hotel in St. Paul, which coincided with headline producing hearings on reducing railroad rates before the Minnesota Railroad and Warehouse Commission. "Manahan Demands Drastic Measures" was the headline of an article in the *Minneapolis Journal* on August 27th describing Manahan's demand that the books of the Great Northern Railroad be "open" to inspection by the Commission and his client, The Minnesota Shippers' Association, and if it refused all its testi-

---

[21] *Fitzgerald Estate v. Union Savings Bank of Lincoln*, 65 Neb. 97, 90 N.W. 994 (Neb. 1902). It is posted in the Appendix, at 53-60. Thomas. J. Doyle was Manahan's co-counsel in this appeal.

About this case, Professor Reuschelein writes that Pound wanted to simplify procedure so as to minimize procedural formalities. "In construing a Nebraska statute which governed probate cases, he declared formal pleadings to be discretionary rather than mandatory." Note 19, at 326.

[22] *Fitzgerald Estate v. Union Savings Bank*, 65 Neb. at 104, 90 N.W. at 997.

The next year Manahan won a third suit against the Fitzgerald Estate using the timeliness defense. In *Mallory v. Fitzgerald's Estate*, 69 Neb. 312, 95 N. W. 601 (1903), the Nebraska Supreme Court affirmed a directed verdict in favor of the Estate in a suit brought after the expiration of the statute of limitation to recover on five promissory notes signed by John Fitzgerald.

mony should be stricken from the record. [23] **In an article on the ABA convention on August 30, 1906, the *St. Paul Pioneer Press* printed a lengthy excerpt from Pound's address delivered the previous evening on "The Causes of Popular Dissatisfaction with the Administration of Justice."**[24] **As Pound read those newspapers he encountered headlines about the histrionics of a lawyer he recalled with little affection, while Manahan, as he read excerpts from Pound's address, recalled a man whose condescending attitude still rankled.**

---

[23] *Minneapolis Journal*, August 27, 1906, at 6. On August 28th, the Commission granted another motion by Manahan for an order requiring the St. Paul road to produce a coal-carrying contract. *St. Paul Dispatch*, August 29, 1906, at 8.

[24] *St. Paul Pioneer Press*, August 30, 1906, at 7 ("Disrespect for Law. Roscoe Pound Reads Thoughtful Paper to Association").

Whether Pound's address should be reprinted and made available to the public caused a "furor" between the ABA's conservative old guard and younger progressives. Natalie E. H. Hull, *Roscoe Pound & Karl Llewellyn: Searching for an American Jurisprudence* 65 I1997). Over time it became famous and influential. It was published in the *Proceedings of the ABA*, 29 Am. Bar Assn. Rep. Pt. 1, 395-417 (1906).

William Jennings Bryan
(October 3, 1896)

"Bill" Bryan

Manahan divides his life into two parts: "I was born in '66 and woke up in '96 of the 19th Century."[25] He "woke up" when he read a speech by a neighbor, "young Bill Bryan"—a man known to the rest of the world as William Jennings Bryan.[26] Energized by Bryan's "Cross of Gold" oration at the Democratic Convention in Chicago on July 9, 1896, Manahan became active in his presidential campaign—in all three actually. Bryan's campaign and the silver issue set aflame an interest in politics and public affairs that never dimmed.

He was elected chairman of the Democratic Lancaster County Central Committee in August, and took to the stump.[27] He had given a few speeches for the Democrats when he was in private practice in St. Paul and had shown signs of being a natural public speaker. When he spoke on behalf of the cash-strapped ticket in Nebraska in 1896, it was obvious that he was a political orator of the first rank, crafting memorable phrases and images. During a lengthy introduction of a speaker who was late, he was greeted with applause when he referred to the burning of a large crayon portrait of Bryan from the top of a store in Lincoln:

> **What spirit actuated those who maliciously burned the photograph of their great opponent? They may destroy the canvas upon which the portrait is painted but they cannot deface from the heart of the American people the image of the original.[28]**

---

[25] TOL, at 9. In his memoir he passed over his youth, covering his first thirty years in the first four pages.
[26] TOL, at 9, 13-14.
[27] *Omaha Daily Bee*, August 11, 1896, at 1.
[28] *Nebraska Independent* (Lincoln), September 3, 1896, at 3.

Although Bryan lost, [29] Manahan soldiered onward, becoming a member of the executive committee of the Lancaster County Bimetallic Union, which was formed to continue the campaign for free silver. [30] Then he eyed a seat in Congress.

Candidate for Congress

In 1898 Manahan campaigned for the nominations of three "fusion" parties for congress in Bryan's old district.[31] After contentious nominating conventions, he was endorsed by the Democratic, Populist and Silver Republican parties on August 12, 1898, but the process created fissures in the coalition—derisively called the "Popocrats" by the Republican press—that carried over into the campaign. The *Nebraska Independent* reported the events of the conventions:

MANAHAN NAMED

Young Free Silver Democrat of Lincoln Selected.

---

[29] The results of the presidential election on November 3, 1896, were:

> McKinley (Republican).....7,112,132 (271 electoral votes)
> Bryan (Democrat, Populist, Silver).....6,510,807 (176 electoral votes).

[30] *The Nebraska Independent* (Lincoln), November 26, 1896, at 1; *Omaha Daily Bee*, November 25, 1896, at 5 ("It Is given out that the union proposes to take an active part in the spring election, and hopes to secure a fusion of the democrats, pop and free silver republicans on a ticket against the republican ticket.").

Manahan's interest in the silver issue did not wane. According to historian Robert W. Cherny, Manahan was "caught up in the silver fever of 1896":

> Manahan, a young Irish Catholic lawyer, came to Lincoln in 1894, was caught up in the silver crusade of 1896, and sought election from Bryan's old district in 1898.

Cherney, note 5, at 79.

[31] TOL at 31-35. Bryan served two terms in Congress representing the First District, 1891-1895.

The three conventions, populist, free silver republican and democratic which were to select a candidate for congress in the First District, met in Plattsmouth last Thursday. There was a large attendance, every county in the district being fully represented.

The three conventions organized in separate halls. It was agreed upon conference that it should require a majority in each of the three conventions to make a nomination. The first few ballots developed this state of affairs: The populists were very nearly solid for George W. Berge, of Lincoln. A large majority of the silver republicans were also for him. The democratic convention was about equally divided between the friends of James Manahan of Lincoln, and Mathew Gering of Plattsmouth. There was another feature to the situation. The democrats had their heart set upon having the congressional nomination. They urged that with a state ticket composed of nearly all of populists and a populist United States senator candidate for re-election the democrats were equitably entitled to the congressional nomination in this district with its large democratic vote and that it would be hard to get out the democratic vote if it were not given to them.

After several ballots George Abbott, of Richardson county, took the floor with a motion to concede the nomination to democrats and let them select the man. This was vigorously opposed and finally withdrawn. Part of Richardson and Cass county populists began voting for democrat candidates. On the eighteenth ballot Mr. Berge withdrew his name in one of the strongest and most affecting speeches of

> his life. The vote of the populist and silver republican conventions then shifted around until the 24th ballot when Manahan received a majority in all three. There was a close and hard struggle between the friends of Manahan and Gering in the democratic convention and some feeling over the result. [32]

As a polished stump speaker, he saw the benefit of deadpan humor. As reported by the *Nebraska State Journal*, he began a speech on serious economic issues:

> Mr. Manahan stepped forward and said he proposed speaking for a short time on a subject that might not be as interesting as a debate on repaving O street, nor as entertaining as a discourse on racing or football, but the subject was of vital importance. He referred to the subject of finance.[33]

He went on to say that he favored an income tax and opposed a high tariff.

The *Omaha Daily Bee* and the *Nebraska State Journal* were highly partisan organs of the Republicans and skewered

---

[32] *Nebraska Independent* (Lincoln), August 18, 1898, at 1. The *Bee* headlined its account of the fractured conventions "Fusion That Does Not Fuse" and began:

> PLATTSMOUTH, Neb., Aug. 12. — (Special)—James Manahan of Lancaster was at 1 o'clock this morning declared the nominee of the fusion conventions for congress in the first district amid the greatest confusion. Charges of treachery answered the cheers of the nominee's friends and delegates left the hall shouting for Burkett, the republican candidate. The nomination was dictated by the populist and silver republicans after the democrats had repeatedly expressed their preference for Matt Gering of Cass.

Omaha Daily Bee, August 12, 1898, at 1.

[33] *Nebraska State Journal*, October 4, 1898, at 3 ("Candidate Manahan Speaks").

Manahan at every opportunity. Describing a speech by his Republican opponent Elmer Burkett in Sterling, Nebraska, the *Journal* stated, "He answered all the questions put to him through a circular of Mr. Manahan in such a way that it seemed it would have been better for Mr. Manahan had he never issued such a circular." [34] A few days later, it called Manahan "a rantankerous (sp) old greenbacker. Nothing would give him more pleasure than to issue a few millions in greenbacks for the use of the dear people and himself." [35] In contrast, it flattered Burkett in the same article: "He stands for all that is good and beneficial to the people."

The *Bee* relished printing stories about the small crowds that gathered to hear Manahan and other fusion candidates. From its October 19th edition:

> **Enthusiasm was Low.**
> **Fusion Fizzle.**
>
> **Tecumseh. Neb. Oct. 19.—(Special Telegram)—The big political demonstration advertised for this city for today by the fusionists was a grand failure. The annual outing of the common people terminated in speaking by W A. Poynter, J. A. Manahan and T. H. Gillian, at the court house, to an audience of sixty people, actual count, and without regard to political affiliation this afternoon.[36]**

---

[34] ***Nebraska State Journal***, October 12, 1898, at 5.

[35] ***Nebraska State Journal***, October 17, 1898, at 4 (The *Journal* likely meant "cantankerous."

[36] ***Omaha Daily Bee***, October 19, 1898, at 3. A week later it returned to this theme:

> Dunbar. Neb. Oct. 25.—(Special)—The popocrats tried to hold a rally here last night. After having lots of hand bills struck and advertising in the local and county papers only a small audience was present and the most of it was republican. Mr. Manahan and

In his memoir, Manahan quotes one rhetorical question Burkett asked: "What would Manahan do in Congress if he got there?" [37] As a Popocrat in a Congress dominated by Republicans the answer was, not much. Jumping ahead to his term in Congress in 1913-1915, the answer would have been, nothing.

Then as now a lawyer running for public office may find his private practice intruding at inconvenient times on his campaign. Less than two weeks before the election, several creditors of the Fitzgerald Estate got an injunction against Manahan that the *Nebraska State Journal* headlined:

CREDITORS DEMAND MONEY.
Mr. MANAHAN ENJOINED.[38]

> the county nominees spoke, but they gained no converts and their work was in vain.

Omaha Daily Bee, October 26, 1898, at 3 ("Fusion Fizzle").

[37] TOL, at 35.

[38] *Nebraska State Journal*, October 27, 1898, at 8 ("Creditors Demand Money. Mr. Manahan Enjoined. . . . Judge Munger granted an injunction restraining any of the Fitzgerald heirs or Mr. Manahan taking any steps to collect the $23,000 claim. The suit is an equity proceeding to compel an accounting."). The creditors included the First National Bank of Chariton, Iowa.

This was not the only court case that haunted him on the campaign trail. The Bartley Bondsmen case was yet to be tried and that curtailed him from making Bartley's embezzlement an issue, according to the *Bee*:

> Lincoln. Aug. 12—(Special)—The local popocrats are far from satisfied over the result at the Plattsmouth convention and their congressional campaign starts out in hopeless confusion. While Manahan had the selection of the delegates from Lancaster county, there were many democrats who favored the nomination of Matt Gering and who now refuse to be satisfied with the nomination of Manahan. The populists were mostly for Berge in the first place and they also are ill-pleased with the nomination. The complaint is that Manahan is not a good campaign speaker and because of his connection with the Bartley bondsmen the embezzlement cry will have to be omitted whenever he is on the stump. In fact the popocrats feel that where a candidate is so tied up that he cannot devote most of his speeches to the Bartley

Five days before the election, Manahan, sensing defeat, challenged Burkett to seven debates on the "Gage currency bill."[39] Burkett's response proves that if political issues have changed since 1898, campaign tactics have not: "In reply permit me to say that I have not a single open date before the election."[40]

Two days before the election, the *Journal* described a tactic of Manahan under the headline, "A COWARDLY CIRCULAR." It charged that Manahan "had printed for three successive issues of the *Omaha Liquor Dealer*, a paper published exclusively for the perusal of the saloon keepers, an article stating that Mr. Burkett is a prohibitionist, and that Mr. Manahan is the 'champion of the (saloon-keepers') interests.' " [41]

According to political historians James F. Pedersen and Kenneth D. Wald, "The Popocrats offered one of their strongest tickets ever" and the result was a surprise:

> **The subsequent Popocrat victory in 1898 is one of those upsets that so frequently confounds political analysts by going against all that is obvious and logical. The entire state ticket, including [guberna-torial candidate William A.] Poynter, made it into office, as did four of the congressional candidates**

> **issue he will not work well under the direction of the committees and will be unable to take a safe issue before the people for discussion.**

***Omaha Daily Bee*, August 13, 1898, at 3 ("Manahan Satisfies No One. Popocrats All Split Up Over the First District Nomination. Candidate's Strength is Negative").**

[39] The *Nebraska Independent*, a Manahan supporter, published his lengthy, open letter to Burkett. October 27, 1898, at 8. Lyman J. Gage was Secretary of the Treasury in the McKinley administration.

[40] *Nebraska State Journal*, November 3, 1898, at 3 ("Has Other Arrangements. Why Mr. Burkett Cannot Accept Mr. Manahan's Challenge.").

[41] *Nebraska State Journal*, November 6, 1898, at 12.

> **incumbents—Stark, Sutherland, and Greene along with Robinson in the third. Only in the legislature were the Popocrats disappointed; a Senate with a Popocrat/Republican ratio of twelve to twenty-one and a House with the corresponding comparison of forty-eight to fifty-two suggested rough riding in the next session. Still, the victory of the fusionists was a major upset. There are two attractive explanations. On the one hand, the Popocrats waged a tough campaign against the Republicans and their efforts paid off handsomely. On the other, it may have been that the fusionists had become a well-established "multiparty" which could attract support irrespective of the specific issues of the day.[42]**

But in the First District, Manahan lost. The official results of the election on November 8, 1898, were:

> **Elmer J. Burkett (Republican)...16,960 votes (53.88%)**
> **James Manahan (Fusion).....14,466 (45.96%)**
> **Fred Herman.....50 (0.16%).[43]**

After his defeat, Manahan remained active in state politics. In 1900 he supported incumbent fusion gubernatorial candidate William A. Poynter, who lost.[44] That year Bryan again was the Democratic nominee for president and Manahan once more was a foot soldier in his campaign. [45] Bryan was defeated.[46]

---

[42] James F. Pedersen & Kenneth D. Wald, *Shall the People Rule? A History of the Democratic Party in Nebraska Politics, 1854-1972* 137-138 (1972).
[43] Michael J. Dubin, *United States Congressional Elections, 1788–1997* 325 (1998).
[44] Louis W. Koenig, *Bryan: A Political Biography of Williams Jennings Bryan* 281 (1971).
[45] The *Harrison Press-Journal* called him "Lincoln's brilliant and witty young Irishman" in an article about his address to a crowd in Lancaster, Nebraska that was waiting to hear from Bryan. September 27, 1900, at 5.

On January 18, 1904, he was toastmaster of a banquet honoring Bryan attended by 700 Democrats from all over the state. His selection is an indication of how much Bryan valued their friendship. As toastmaster, according to Bryan's *The Commoner*, he was clever, funny and eloquent:

> **James Manahan of Lincoln officiated as toastmaster. His "badge of authority" was a blackthorn stick which Mr. Bryan brought from Ireland. Mr. Manahan's introductions were witty and eloquent and added greatly to the enjoyment of the evening. He conducted the banquet in a novel manner, treating the guest of honor as a distinguished foreign envoy who had newly landed among the people of Nebraska and as each speaker finished, the toastmaster in a neat speech interpreted the address to the visitor who was for the moment regarded as a man of another country. In this way humorous and pointed remarks were made that captured the banquetters.** [47]

"Probably no man in Nebraska stands closer to Mr. Bryan than does James Manahan."[48] **Such was the *Bee's* opinion of Manahan's relationship with "Bill" Bryan in 1904, the year he decided to leave Nebraska.**

---

[46] **The results of the presidential election on November 6, 1900, were:**

> **McKinley (Republican).....7,228,864 (292 electoral votes).**
> **Bryan (Democrat, Populist, Silver).....6,370,932 (155 electoral votes).**

[47] ***The Commoner*, January 29, 1904, at 14 ("Banquet of Nebraska Democracy"). Bryan was the founder and editor of *The Commoner*.**

[48] ***The Omaha Daily Bee*, April 7, 1904, at 3 ("Manager for Hearst Boom").**

Professor Edward A. Ross

Edward A. Ross

Manahan's free time and budding intellectual curiosity lead him to the University of Nebraska where he took a "post-graduate" course taught by Professor Edward Alsworth Ross, who arrived in 1901 after being dismissed from Stanford. He was one of a group of rebellious sociologists who were making a "sustained theoretical attack" on William Graham Sumner, the "academic high priest of social Darwinism."[49] Legal historian Natalie E. H. Hull calls Ross "the sociologist of the progressive movement."[50] His writings attracted and influenced a wide range of public figures, including Theodore Roosevelt, Oliver Wendell Holmes and Roscoe Pound.[51]

Although Manahan was a graduate of a law school, he had never attended a college, never taken courses in the liberal arts, economics, etcetera. The first university course he ever took was from Ross. And so Ross played a part in Manahan's intellectual growth though, with one important exception, it is difficult to pinpoint exactly what imprint that was because Manahan does not mention titles of books or individuals who

---

[49] George E. Mowry, *The Era of Theodore Roosevelt, 1900-1912* 20-1 (1958).

[50] Natalie E. H. Hull, note 11, at 55.

[51] Natalie E. H. Hull, note 23, at 8 ("Ross's work had an enormous impact on Pound's own ideas about law as a form of social control."). Ross dedicated his *Principles of Sociology* (1920) to Pound.

In *Edward Alsworth Ross and the Sociology of Progressivism* 135-37, 141-42 (1972), Julius Weinberg quotes both Roscoe Pound's and Justice Holmes' letters of appreciation to Ross for his insights into law and society. Curiously, of the countless articles on Holmes, not one is on his relations with Ross.

President Theodore Roosevelt thought so highly of Ross that he wrote a letter to him that formed the introduction to his *Sin and Society*: *An Analysis of Latter-Day Iniquity* (1907)("It was to Justice Holmes that I owed the pleasure and profit of reading your book on Social Control. The Justice spoke of it to me as one of the strongest and most striking presentations of the subject he had ever seen. I got it at once and was deeply interested in it. Since then I have read whatever you have written. I have been particularly pleased with the essays which, as you tell me, you are now to publish in permanent form. …").

influenced his thinking. One axiom of Ross was valuable guidance to this student-lawyer who would examine, bring suits and write briefs about railroad rates in a few years: "Facts were of prime importance in the acquisition of knowledge." [52]

In his autobiography Ross quotes with obvious pleasure a long passage from Manahan's memoir recounting a humorous exchange during a class on what Ross then called "race suicide." [53] When Ross learned that Manahan's mother had born twelve children, he commented that it surely would have been easier on her if she had stopped after her fourth or fifth child. "Yes—perhaps so," Manahan retorted, "but—five children—that would have left me out—I was number six."[54]

Ross later abandoned his views on race suicide as he recounted in his autobiography. "Far behind me in a ditch lies the Nordic Myth, which had some fascination for me forty years ago." [55] For his part, Manahan never believed in the superiority of Anglo-Saxons. He was dismayed by racist speeches of Southern politicians who supported Bryan's presidential campaign in 1908[56] and, as a Congressman, opposed an "emigration" bill that had abhorrent restrictions.[57] After leaving Lincoln, professor and student kept in touch and they had a lively argument about judicial recall several years later.

---

[52] TOL, at 37-38.
[53] Edward Alsworth Ross, *Seventy Years of It: An Autobiography* 93-4 (1936), quoting TOL, at 37-39.
[54] Id. at 94.
[55] Id. at 276. The myth of white European supremacy slipped from the academy into popular belief. For a near perfect example, see former Supreme Court Justice Daniel Buck, *Indian Outbreaks* 10 (1904)("The master race of the world is the Caucasian."). This book is posted on the MLHP.
[56] TOL, at 110-111. Manahan was in charge of the "speakers' bureau" during Bryan's third campaign.
[57] TOL, at 195.

James Manahan never seemed to slow down after he "woke up" in '96. Besides trying cases and arguing appeals for his sole client, he was active in politics, as a participant not as an observer. He was a sought-after public speaker and political orator. The breadth of his interests widened. The silver issue over, it almost seems that he was waiting to find another cause to advocate, to throw his considerable energy and talents behind. By late 1904 the Fitzgerald Estate was wound up, his work completed, a final decision made:

James Manahan and family were coming home.

≈Ṁ≈

Appendix

Table of Contents

≈Ṁ≈

A.

Biographical profile of John Fitzgerald from Arthur B. Hayes & Samuel D. Cox, *History of Lincoln, Nebraska* 302-307 (1889):

Hon. John Fitzgerald was born over fifty years ago, in Limerick, county, Ireland. His father was a tenant farmer holding at the same time a small piece of free-hold property, the remnant of a more ample estate that had once been in the possession of his ancestors, but which had been reduced to a few acres by the operation of laws that had proved only too successful in bringing the old landed proprietors to beggary and ruin. Edward Fitzgerald, the father of the subject of our sketch, was evicted from his farm, and seeing the poverty and decay that surrounded him on all sides, leased his little free-hold, and with his sons sailed for the United States, back in the "forties."

At that time there was considerable prejudice against Irish immigration to America, and if the immigrant from the Green Isle found a fair field, he could also say that he found no favor. Americans of that day are not to be lightly blamed. American literature was in its infancy. The mental food of the people was mainly derived from English sources, and the character of the Irish people was delineated by men imbued with racial hatreds. Reared in this atmosphere of distorted teachings, and fed upon unrefuted calumnies, it is no wonder that the mass of Americans felt prejudiced toward the Irish race, whose most numerous representatives were the unlettered and poverty-stricken victims of a tyranny described by Edmund Burke as the most perfect system ever devised by the perverted ingenuity of man to drive a nation mad. The immigrants, too, had their serious faults, which, though doubtless the engendered results of a century of oppression,

helped to increase the aversion prejudice had already excited against them. Intemperance was painfully prevalent, and faction-fighting was a vice that long baffled the efforts of the priest and patriot to destroy it. Americans are a just people, and are quick to fling away their prejudices when convinced that they are in error, and few are more ready to recognize and reward true merit.

The Fitzgerald family, after arriving in New York, pushed westward, to find employment in the great public works which eventually made New York and Pennsylvania the leading States of the Union, They quickly developed qualities of mind and heart which won the confidence and respect of the leading contractors of that day. John Fitzgerald was then a youth of seventeen summers, with a strong, muscular frame, and a vigorous constitution. He was then, and always has been, a strict disciple of Father Mathew, from whom he had received the pledge while yet almost an infant. A salient feature of his character is his incontrollable desire to be doing something.

In those early days, after the close of the open season, it was usual for the great armies of canal builders to withdraw for the winter to the neighboring towns, waiting for the spring to resume work. Only too many frittered away in these idle days, all the money they had accumulated by hard labor in the burning heat of summer. The Fitzgerald's were men of a different stamp, and did not believe in making their summers pay for their winters. They sought such work as could be found, even if the remuneration hardly paid their living expenses. It was on one of these occasions that John Fitzgerald accepted work from a farmer for his board and seven dollars per month.

At another time he was working for a farmer, digging ditches, when his quick perception showed him how he could do the work by contract, make money for himself, secure better wages for his companions, and give greater satisfaction to the farmer. He made his proposition to the latter, and it was accepted.

In twenty-four hours John Fitzgerald was a contractor, his fellow-workmen became his employes, and he stood on equal ground with his former employer. The job was finished much quicker than the farmer had calculated, and the work was done to his complete satisfaction. The laborers received higher wages than their agreement with the farmer had called for, and John Fitzgerald had a good round sum of money to the credit of his profit and loss account. That was Mr. Fitzgerald's first contract, and to-day he speaks of it with greater pride than of all the enterprises of magnitude he has since completed.

The reputation achieved by Edward Fitzgerald and his sons did much in the districts wherein they labored, to raise the character of the Irish in American opinion, and contractors were glad not only to employ them, but to sublet to them large portions of their work.

After the death of their father, in New York State, the brothers, Edward and John, turned their attention to the construction of railroads. After satisfactorily completing important contracts in New England during the war, they gradually worked westward until they reached Wisconsin, where they built several hundred miles of railroad. Following the star of empire, the brothers penetrated through Iowa with their iron highways. After the death of his brother Edward, John assumed control of what had

become a vast business, and after building the greater part of the C. B. & Q. in Iowa, crossed the Missouri and took up work for the B. & M. and Union Pacific roads, until his name became inseparably bound up with the history of railroading from the Atlantic to the Rocky mountains.

Mr. Fitzgerald made his first home in Nebraska at Plattsmouth, where he owns a very large amount of property. Since becoming a resident of this State, Mr. Fitzgerald, besides his work in Nebraska, was associated with S. Mallory esq., C. E., of Chariton, Iowa, and Martin Flynn esq., of Des Moines, Iowa, in the construction of the Cincinnati Southern road through Tennessee; also in building the Denver, Memphis & Atlantic railway, in association with the Fitzgerald & Mallory Construction Company. The latest enterprise of our active towns-man is the construction of the St. Louis & Canada railroad in Michigan and Indiana.

Mr. Fitzgerald has very extensive landed property in Nebraska. The man who as a boy looked with tear-filled eyes upon the few fields from which he and his father were evicted, is to-day the owner of two of the largest and best managed farms in America, embracing 8,000 acres of unsurpassed fertility at Greenwood, and 6,000 equally as good in Gage county, in this State. In addition, he has several farms in Wisconsin and other states.

His investments in commercial lines are many and extensive. He owns the large West Lincoln Brick and Tile Works, and also has a controlling interest in the Rapid Transit company, of which he is President. He is also President of the First National Banks of Plattsmouth and Greenwood, and of the Nebraska Stock Yards Company, and a Director of the First

National and Union Savings Banks of Lincoln. Mr. Fitzgerald is also largely interested in mercantile investments, and has stores in different parts of the State.

His first experience with Lincoln was Colonel Tom Hyde's invitation to the hospitality of a shanty, and his first bed in the same shanty was a buffalo robe on the ground, damp with recent rains. To-day his magnificent residence and beautifully laid out grounds crown Mount Emerald, the finest elevation in the city, and here he loves to extend the genuine hospitality typical of the Geraldine.

RESIDENCE OF HON. JOHN FITZGERALD.

His splendid wholesale business block at the corner of Seventh and P is rapidly approaching completion, and it is but the precursor of other stately edifices with which Mr. Fitzgerald's enterprise will embellish

the city he has chosen for his home, and which owes so much to his untiring energy.

Although the most liberal and tolerant of men, Mr. Fitzgerald is a strict Roman Catholic, and a munificent contributor to his church. The Convent of the Holy Child Jesus is the gift of Mr. Fitzgerald to the nuns of that order, and his subscriptions in aid of the Catholic Church of Lincoln have been generous and constant. Some three years ago he gave a large sum to help in the construction of St. Patrick's Church in Rome, and Pope Leo XIII, in recognition of his generosity, sent him a valuable gold medal.

The Geraldine race, kin with the Gherardini of Florence, and boasting its descent from Eneas, the Trojan hero, has been conspicuous for its heroic fidelity to the fate and fortunes of the Irish nation. Its blood has poured out on every battlefield for Irish liberty, its sons have perished with stoicism in the dungeon, and looked scorn from the scaffold. The castles of the Geraldines stud the river banks and mountain glens of Munster, and few are the tales of fairy lore and weird romance in which some Fitzgerald does not play a conspicuous role. With the blood of this fiery clan in his veins, it is but natural that Mr. Fitzgerald should be ardently attached to the cause of Ireland. From boyhood to the present moment he has supported every movement consecrated to Irish liberty, and there has hardly been an Irish convention which he has not attended. Unambitious for office with no personal views, but influenced by an earnest desire to see his country enjoy the liberty so many of his race had died for, his time and his purse, and his quiet word of sound advice, were ever at the service of Ireland. The qualities of the man could hardly escape recognition, and in 1886 he was chosen President of the Irish

National League of America. His period of office has been a troubled one, great events having transpired during his administration; but he has filled the position with honor to himself and to the Irish cause. His cool, conservative policy, his strong determination to keep the league free from political entanglements and from alliances that could in any way compromise the action of Parnell and his colleagues, has merited and received the warm approbation not only of the Irish leaders, but of the best friends of Ireland in America. To everything that can add to the welfare of the Irish cause, and to the benefit of his race, John Fitzgerald has been conspicuously generous.

Mr. Fitzgerald is, in American politics, a strong Democrat, and a warm supporter of his party, but has invariably refused to accept any political honors. From men of all shades of religious and political belief Mr. Fitzgerald receives the respect due to his strict integrity and his boundless energy.

Fortunate in his business, he is equally blessed in his domestic life. Mrs. Fitzgerald is a most estimable lady, and as remarkable for her kind, unostentatious benevolence, as her husband is for his more active qualities. Their family consists of four children, and since their marriage no cloud has darkened the summer of their lives.

B.

Estate of Fitzgerald

v.

First National Bank of Charlton

64 Neb. 260, 89 N.W. 813 (1902).

. . . .

ESTATE OF JOHN FITZGERALD, DECEASED, V. FIRST NATIONAL BANK OF CHARITON, IOWA.

FILED MARCH 19, 1902. No. 10,783.

Commissioner's opinion, Department No. 2.

1. **County Court:** CLAIM: JURISDICTION: LIMITATION. The county court has no jurisdiction over a claim against the estate of a decedent which is not filed for allowance until after it has been finally barred by the statute of non-claims.

2. ——: ——: ——: ——: EXTENSION OF TIME FOR FILING CLAIM. When the county court fixes a time for the presentation of claims against an estate and enters an order barring

all claims not then presented, as provided by section 217, chapter 23, Compiled Statutes, such time may be extended on application of a belated claimant, provided such application is for good cause, and is made within six months of the time first fixed and within two years of the appointment of the commissioners.

3. ——: ——: ——: ——: ——: ERROR: DISTRICT COURT: APPEAL. Where a claim against a decedent's estate is not presented before the time first fixed for the presentation of claims, its allowance afterwards, unless upon special proceedings to revive the commission and to extend the time for the presentation of claims, is error, whether in the county court or on appeal to the district court.

4. Administrator: WAIVER. An administrator can not waive the defense of non-claim to the prejudice of his estate, either by agreement with the claimant or by neglecting to plead such defense.

ERROR from the district court for Lancaster county. Tried below before HALL, J. *Reversed.* SEDGWICK, J., dissenting.

James Manahan, for plaintiff in error.

Charles L. Burr and *Lionel C. Burr, contra.*

OLDHAM, C.

This action originated on a claim in the nature of a promissory note, due on demand, for $5,000 and interest, filed in the probate court of Lancaster county, Nebraska, by the plaintiff below against the estate of John Fitzgerald, deceased. The facts appearing from the record necessary for a determination of this cause are: That John Fitzgerald, intestate, died December 30, 1894. On March 14, 1895, Mary Fitzgerald was duly appointed and qualified as administratrix of his estate. On the same day the county court made and entered an order limiting the time in which creditors might present claims against the said estate to six months, and naming June 29, 1895, and September 30, 1895, for examining such claims as might be presented. On September 30, 1895, the county court made

and entered an order forever barring all claims not then presented against said estate, and this order was not appealed from and has never been vacated, changed or modified. On May 22, 1896, the plaintiff in the court below presented to the county court and filed the claim in dispute against the estate of John Fitzgerald, deceased. On the same day the administratrix indorsed in writing on said claim her motion to have the same stricken from the files on the ground that it was not presented within the time limited by order of the court for presenting claims against said estate. This motion was overruled and on June 19, 1896, the county court ordered the administratrix to file an answer to said claim. On August 24, 1896, the administratrix, in obedience to the order of the court, filed the following answer:

"CLAIM OF THE FIRST NATIONAL BANK OF CHARITON, IOWA,
v.
THE ESTATE OF JOHN FITZGERALD, DECEASED, MARY FITZGERALD, ADMINISTRATRIX OF SAID ESTATE.

"Comes now Mary Fitzgerald, as administratrix of the estate of John Fitzgerald, deceased, and for answer to the claim filed herein by the First National Bank of Chariton, Iowa, says: that save and except as hereinafter expressly admitted, she denies each and every allegation made by the said claimant in its complaint and each and every part thereof; she admits that John Fitzgerald, died on the 30th day of December, 1894, and that she is now the duly qualified and acting administratrix of his estate; and she admits further that in May, 1896, Charles Burr, Esq., one of the claimants attorneys presented to her a paper saying it was a note of John Fitzgerald held by the First National Bank of Chariton, Iowa, and that she then and there refused to recognize it as such. Further answering said claim said administratrix states that the

estate of John Fitzgerald is not in any manner indebted to the said claimant and asks that the said claim be disallowed.

MARY FITZGERALD,
"Administratrix of the Estate of John Fitzgerald.
"By JAMES MANAHAN, *her Attorney.*"

On a hearing subsequently had on said claim, on March 11, 1897, the claim was allowed and the cause was appealed by the administratrix to the district court of Lancaster county, Nebraska. No order was made by the district court directing an issue to be made between the parties in that court, and the hearing was had on the transcript and pleadings which had been certified from the probate court to the district court. Counsel for plaintiff in error objected to the introduction of the claim in suit for the reason that it had not been presented against the defendant in the county court within the time limited by that court for the presentation of claims against that estate; and for the reason that it had not been presented until long after a judgment of the county court had been rendered forever barring all claims not then presented against said estate; and for the further reason that this claim was not filed in the county court for more than six months after the county court had entered its order forever barring all claims not then filed. These objections were overruled by the district court. The claim was admitted in evidence. Plaintiff had judgment in the court below and defendant brings error to this court.

There are numerous errors alleged against the proceedings in the trial of this cause in the district court in the brief of the plaintiff in error, but in view of the conclusion which we shall reach with reference to the action of the trial court in overruling the objections to the introduction of the claim, it will not be necessary to consider any of the other alleged errors. The trial court overruled the objections of the administratrix to the introduction of the claim on the ground that it was an issue which was not tendered by her answer in the county court. It is the general rule of practice that, when a cause is appealed

from the judgment of the county court or a justice of the peace, the cause must be tried on the issues tendered in the court below, unless the issue tendered above is one which challenges the jurisdiction of the subject-matter of the controversy. The questions then arise: Is a plea of the statute of non-claims one that can be waived by the administrator of an estate? and is it an issue that goes to the jurisdiction of the county court over the subject-matter of the claim? These questions have never been specifically determined by a judgment of this court. The case of *Stichter v. Cox,* 52 Nebr., 532, determined some questions bearing strongly on the point at issue. In that case a claim was presented to the county court after its bar by the statute of non-claims. No pleadings were filed in the county court, but the administrator objected to the claim because of the bar of the statute. The cause was appealed to the district court, and that court directed an issue to be made between the parties. The administrator answered, and tendered the issue of the statute of non-claims. No motion was made to strike this defense from the answer. On error proceedings in this court the claimant sought to raise the question that the statute of non-claims had not been pleaded in the county court. In discussing this question NORVAL, C. J., said: "More than one answer can be properly made to this contention. There is no provision of statue requiring the administrator to plead in the county court to a claim presented therein against his intestate, except section 221, chapter 23, Compiled Statutes, makes it his duty to exhibit any claim of the decedent in offset to that of the creditor. In this case, however, the administrator did file in the county court formal objections to the allowance of this claim, and in the district court, in his answer, he specially pleaded the statute of limitations. The claimant did not move to strike this defense from the answer, nor did he in any other manner present the question to the trial court that the issues raised by the answer were different from those in the county court, obtain a ruling thereon, and preserve an exception thereto

in the record. This was indispensable to make available here the objection that there was a variance in the issues. *Robertson v. Buffalo County Nat. Bank,* 40 Nebr., 239." While the decision in this case turned on the question of the failure of the claimant to object to the answer filed by the administrator in the district court, yet it says that "more than one answer can be properly made to this contention," and it also says that the administrator was not required to file any answer in the probate court, and by inference it says that his objection to the claim in the county court was sufficient to raise the issue of the statute of non-claims.

Turning now to the sections of the statute providing for the payment of debts and legacies of deceased persons, and particularly to those sections that provide for the presentation and allowance of matured and absolute claims, to which class the claim in suit belongs, we find that sections 217-219, chapter 23, Compiled Statutes of 1901, provide as follows:

"Sec. 217. The probate court shall allow such time as the circumstances of the case shall require for the creditors to present their claims to the commissioners for examination and allowance, which time shall not, in the first instance, exceed eighteen months, nor be less than six months, and the time allowed shall be stated in the commission.

"Sec. 218. The probate court may extend the time allowed to creditors to present their claims, as the circumstances of the case may require; but not so that the whole time shall exceed two years from the time of appointing such commissioners.

"Sec. 219. On the application of a creditor who has failed to present his claim, if made within six months from the time previously limited, the court may, for good cause shown, renew the commission, and allow further time, not exceeding three months, for the commissioners to examine such claims, in which case the commissioners shall personally notify the parties of the time and place of hearing,

and, as soon as may be, make return of their doings to the probate court."

These sections are followed by sections 221 and 226, which provide as follows:

"Sec. 221. When a creditor against whom the deceased has had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claim of the deceased in off-set to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be, but no claim barred by the statute of limitation shall be allowed by the commissioners in favor of or against the estate as a set-off or otherwise."

This section prohibits the commissioners or the county judge from allowing any claim that is barred by the statute of limitation.

"Sec. 226. Every person having a claim against a deceased person whether due or to grow due, whether absolute or contingent, who shall not, after giving of notice as required in section 214 of this chapter, exhibit his said claim or demand to the judge or commissioners, within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand or from setting off the same in any action whatever," etc.

An examination of the sections of the statute above quoted reveals the fact that, after claims against an estate have been barred by the order of the county court at the time first fixed, it is still left within the power of the county court, by section 218, *supra,* to extend the time to present claims against the estate to a time not to exceed two years from the appointment of the commissioners. This section of the statute plainly contemplates a general order made by the county judge, in his sound discretion, to apply alike to all claimants who have failed to present their claims at the time first fixed. This section is followed by section 219, *supra,* which provides the manner in which a single claimant may secure a special order for the extension of the time of the presentation of his particular

claim, and the provision is that this order may be made "on the application of a creditor who has failed to present his claim, if made within six months from the time previously limited," etc.

Now, in the case at bar, it clearly appears from the record that no application has ever been made to the county court to extend the time first allowed by that court for presenting claims; and even if we should construe the mere filing of the claim into an application for an extension of time for presenting claims, which we can not do, it yet clearly appears that the claim was not presented until nearly eight months after the time first fixed for the final presentation of claims. In the case of *Sleeper v. Estate of Gould,* 53 Vt., 111, it was held that, to give any effectiveness whatever to the plain reading of a statute similar to our own, the application for an extension of time must be made within six months of the time first fixed. In the case of *McGee v. Atkinson,* 33 N. W. Rep. [Mich.], 737, it is held that the probate court would have no jurisdiction of a claim presented after the time fixed for presenting claims, where no proceedings had been taken to have the time of presentation extended. In discussing the question of the defense of non-claim, Rice, in his work on American Probate Law (sec. 8, p. 358), says: "The principle referred to is, in practical effect, a statute of limitation, having at the same time no affinities with the general statutes of limitation. According to these enactments, claimants who neglect to exhibit their demands against the estate within a set period mentioned, are forever barred, and courts should, of their own motion, insist upon this defense where it is apparent the administrator has neglected it."

In the settlement of an estate an administrator is merely the agent and trustee of the decedent and possesses only such powers as are given him by statute, and he must discharge his trust subject to all limitations prescribed by statute. It is uniformly held that an administrator has no authority to waive the statute of non-claim, either by failing to plead it or by consenting to the filing of a claim

after its bar; and the same rule applies with reference to the general statute of limitations in all states which, like our own, prohibit the allowance of claims barred by such statutes. *O'Keefe v. Foster,* 5 Wyo., 343, 40 Pac. Rep., 527; *Voorman v. Li Po Tai,* 45 Pac. Rep. [Cal.], 470; *Rockport v. Walden,* 54 N. H., 167, 20 Am. Rep., 131; *Ames v. Jackson,* 115 Mass., 508; *Collamore v. Wilder,* 19 Kan., 67; *Miner v. Aylesworth,* 18 Fed. Rep., 199; *Bush v. Adams,* 22 Fla., 177. We are aware of the fact that the conclusions which we are about to reach appear to be somewhat at variance with the doctrine announced by the supreme court of Wisconsin in the case of *Tredway v. Allen,* 20 Wis., 500, in the construction of a statute substantially the same as our own. The issues in that case arose on a claim that was presented for allowance more than six months after the time first fixed, and less than two years from the time of the appointment of the commissioners, but it differs from the facts in issue in the case at bar in that an application was made to the probate court for an extension of time, and that this application was granted over the objection of the administrator, before the claim was filed. No appeal appears to have been taken from the order of the probate court allowing the claim, but an appeal was taken from the order of distribution made by the probate judge directing the payment of the claim. On the appeal from this order of distribution the supreme court found against the administrator, and in rendering the opinion said: "We are inclined to hold that this was merely an irregular or erroneous exercise of power on the part of the county court, and did not go to the question of jurisdiction. For, as already observed, when the respondent made his application to have his claim allowed, the county court, under section 6, has an undoubted right to extend the time for all creditors of the estate to come in and present their claims. The two years did not expire until the 29th of September, 1862. But, although the court assumed to proceed under section 7, and only extended the time as to the respondent, yet, at

most, we think this was but error. Such being the case, that part of the order of distribution appealed from must be affirmed." While our statute, as above stated, is substantially the same as the statute construed in the cause just cited, it is also a substantial copy of the statute of the state of Vermont, and the construction that we are inclined to give this statute seems to be fairly sustained by the supreme court of the state of Vermont in the case of *Sleeper v. Estate of Gould, supra,* and also to be sustained strongly by the supreme court of Michigan in the case of *McGee v. Atkinson, supra.* Again, we notice that the supreme court of Wisconsin, in the later case of *Carpenter v. Murphy,* 15 N. W. Rep., 800, refers with approval to the construction of these statutes by the supreme court of Vermont. It is an elementary rule of statutory construction that, if possible, a statute should be so construed as to give full force and effect to each and all of its provisions. The construction we favor gives full force and effect to all the provisions of both sections 218 and 219, *supra,* and is in full harmony with this rule, while the construction of the statute which is intimated in *Tredway v. Allen, supra,* practically nullifies the provisions of section 219. Even if *Tredway v. Allen, supra,* contained a proper construction of the statute, and the action of the county court in allowing the claim to be filed was erroneous, and not void, as that case holds, we still think the defense of nonclaim should have been permitted by the district court, because if this defense existed the administratrix had no right to waive it.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

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

REVERSED AND REMANDED.

POUND, C., dissenting.

I am unable to agree in the conclusions reached in the opinion of my Brother OLDHAM. To my mind the con-

struction given to the sections of the statute quoted is required neither by the terms of the statute itself nor by the authorities cited. Section 214, chapter 23, Compiled Statutes, provides that ordinarily claims against an estate shall be presented to and ruled upon by the county judge, but that if the parties interested, or one of them, so demand, commissioners are to be appointed to examine and pass on such claims. Thus there are two methods of examining claims,—one by the court itself and one by commissioners appointed for that purpose; and this fact must be borne in mind in arriving at the meaning of the subsequent sections. Section 217 fixes the time to be appointed in the first instance for the presentation of claims. Section 218 confers upon the county court a general power to extend the time allowed for presentation of claims, as the circumstances of the case may require, subject to the limitation that the whole time shall not exceed two years. Section 219 provides for applications to renew the commission and allow further time for the commissioners to consider claims, and limits applications for such renewal to six months from the time originally limited. Section 220 permits the county judge to pass on claims in such cases in person, instead of renewing the commission. The question comes to this: Is section 219 a limitation upon section 218, so that no action may be had by the court under the former unless application is made therefor within the time limited by the latter, or are they independent, and do they refer to distinct proceedings intended to be governed by different rules? I am constrained to the latter conclusion both by the language of the sections themselves and by the context. The one refers in terms to a general extension of the time within which claims may be filed, and limits the period of such extension to two years from the time when claims were originally allowed to be presented. The other refers in terms to the renewal of the commission provided for in the latter part of section 214, and contains different limitations, namely, that application for such renewal must be made within six months from the time orig-

inally limited, and that the time allowed shall not exceed three months. Under such circumstances, the proper construction, in my view, is that section 218, and not section 219, applies where there is no commission, and that the court has power to extend the time for filing claims at any time, "as the circumstances of the case may require," subject to the limitation of time of section 218, at least where no commission has been demanded or appointed. I am unable to see that the cases of *Sleeper v. Estate of Gould,* 53 Vt., 111, and *McGee v. McDonald's Estate,** 66 Mich., 628, 33 N. W. Rep., 737, militate against this view. In *Sleeper v. Estate of Gould,* commissioners had been named and had reported. Application was made to renew the commission more than six months after the time originally limited. The court had before it only the section corresponding to our section 219, and said, very properly, that the "unmistakable language of the statute" required an application for renewal of the commission to be within the six months. The language quoted by my Brother OLDHAM is used with reference to a contention of counsel bearing upon that section alone, and does not refer to any questions upon the construction of such a section as our section 218. *McGee v. McDonald's Estate* was also a case where commissioners had been appointed, and a claimant who had not presented his claim to them sought to have his claim allowed by the court after they had reported, without proceeding to obtain a renewal of the commission. It is obvious that, if such a course were permitted, the provisions giving any one interested the right to have commissioners appointed could be evaded by mere inaction till after report. Such an evasion could not be tolerated. The right course, where a commission has been demanded and appointed, is to apply for a renewal thereof. Thereupon the court may in its discretion renew the commission or itself pass upon the claim. But in the case at bar there is nothing to show that there was any commission. Hence

*This case appears in 66 Mich. by the title cited in the text, and in 33 N. W. Rep. by the title cited on page 267.—REPORTER.

the provisions of section 219 as to the time within which application to renew a commission shall be made were inapplicable. The case is one falling under section 218, and only the limitation therein provided is to be considered. This position has the support of *Tredway v. Allen*, 20 Wis., *476. The statute there passed upon is substantially the same as our own, and sections 6 and 7 thereof correspond to our sections 218 and 219. The court held that where application was made more than the six months after the period originally fixed, which was the limitation in section 7, the probate judge might extend the time under section 6, not exceeding the limitation therein provided. If this construction is correct, the error of the county court in the case at bar in allowing the claim to be filed, and overruling a motion to strike it from the files, on the ground that it was not filed in time, instead of first entering a general order of extension, and then permitting this specific claim to be filed thereunder, was formal only. The county judge had the power to do what he did. He merely exercised an undoubted power in an informal and irregular manner. How far error might have been taken from such proceedings we need not inquire. When the estate proceeded to try the merits of the claim without raising this informality, it certainly waived it. Administrators can not waive the statute of limitations nor the statute of nonclaim. But they may waive technical errors and informalities. Administrators, receivers and like officers of the courts do not, by reason of their official or fiduciary relations, occupy any vantage ground as litigants. *Arnold v. Weimer*, 40 Nebr., 216. This very situation was before the court in *Tredway v. Allen, supra*, and what has just been said is in full accord with the decision in that case. Our attention has been called to no other authority which proceeds upon such a provision as our section 218. It is sound in principle, gives entire effect to every provision of the statute, and in my opinion ought to be adhered to.

Under the view I take of the jurisdiction of the county court, it becomes necessary to consider certain errors al-

leged to have taken place at the trial had on appeal to the district court, to which the opinion of my Brother OLDHAM properly makes no reference. The estate denied the genuineness of the note sued on. The claimant, upon this issue, introduced evidence tending to show that it was given in the course of a transaction between the claimant and the decedent in which Mr. T. M. Marquett, an attorney at law, represented both parties. The claimant bank was located at Chariton, in Iowa, and the decedent lived in Lincoln, Nebraska. Mr. Marquett lived at Lincoln, also. The testimony tended to show that the decedent had executed a note to claimant which had matured, and that in order to keep its assets in proper condition it sent the note in a letter to Mr. Marquett and asked him to get a renewal. Mr. Marquett died before this case was begun, but his letters to the bank, in which he acknowledged receipt of the request to procure a renewal and promised to do so, and afterwards enclosed a renewal note with a statement that he had procured it as requested, were offered by the claimant. There is testimony to show, and the claimant contended, that the renewal note referred to is the note in suit. In my opinion, these letters were admissible. The circumstances surrounding the execution of the note were highly important upon the issue as to its genuineness, and as the negotiations were carried on by conversations and letters, had the conversations and letters passed directly between the parties thereto, there could be no question. In this case the parties did not communicate directly, but through an attorney who acted for each. Hence their letters or statements to him are clearly admissible. *Boyden v. Burke,* 14 How. [U. S.], 575. There, in an action against a public officer for refusing to give copies of documents in his office, letters from the plaintiff to a person through whom his application was made were held admissible as part of the *res gestæ.* The court said that, in substance, it was "a conversation between the parties reduced to writing." See, also, *Roberts v. Woven Wire Mattress Co.,* 46 Md., 374; *May v. Brownell,* 3 Vt., 463. On this ground the

letter to Mr. Marquett was admissible. The letters written by Mr. Marquett to the bank were equally a part of the transaction, and were also admissible on another ground. He was an attorney at law, and wrote the letters in the course of his employment as such, as a statement to his client of what he had done in the latter's business. It was his duty to apprise his client that he had carried out his instructions, and he wrote the letter for that purpose. He was dead when this litigation arose. A letter may be a memorandum as much as any other form of writing, and a lawyer's letter to his client is often the only entry which he makes of the acts performed in the course of his business. As a general proposition, memoranda made by a person who is dead, whose duty it was, in the course of business he had undertaken, to do the acts and to make the memoranda of them, are competent evidence to show that such acts were done. *Welsh v. Barrett,* 15 Mass., 380; *Bank of United States v. Davis,* 4 Cranch C. C. [U. S.], 533; *Doe v. Turford,* 3 Barn. & Adol. [Eng.], 898. In *Elsworth v. Muldoon,* 15 Abb. Pr., n. s. [N. Y.], 440, memoranda of a deceased attorney, upon a receipt of a sheriff who had sold land, that he had redeemed the land and taken the receipt for the debtor, were held admissible to prove the redemption. It was as much the duty of Mr. Marquett to write the letter in question as of the several parties who made the memoranda involved in the cases cited to write down what they did. In my opinion, the rulings of the trial court were right.

It is also contended that the verdict is contrary to the evidence; but there appears to be ample evidence to sustain it, and good ground for believing that it is right.

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

SEDGWICK, J., dissenting.

I think that the right construction of the statute is expressed in the opinion of Mr. Commissioner POUND. The county court is a court of record, and has general jurisdic-

tion in the matter of the settlement of estates. Its jurisdiction to adjust claims against an estate is limited by section 218 to two years. Within that time, by express provision of the statute, it has jurisdiction of the subject-matter of the adjustment of such claims. The statute provides that the two years shall run "from the time of appointing such commissioners," and there is no express limitation of the time for allowing claims by the court when no commissioners are appointed; but I do not think that this defect renders necessary the result suggested in the opinion adopted by the court. The statute provides that it shall be the duty of the judge "to receive, examine, adjust and allow all claims and demands of all persons against the estate," if no commissioners are appointed. By a fair construction of the statute, section 218 should be held to prescribe the time in which he shall have jurisdiction to do so when no commissioners are appointed, as well as in cases where they are appointed. He must give the same notice of the limitation of time for filing claims as the commissioners are to give, and the two years prescribed within which he shall have jurisdiction to act upon claims must begin to run not later than the giving of this notice. In cases where no commissioners are appointed we are not compelled to say, either that the judge shall have no time at all in which to act upon claims, or that the time is unlimited. The statute then gives him two years and leaves it to his discretion whether he will hear claims after the time first limited. This discretion is a necessary one. It is not the policy of the law to unnecessarily prolong the settlement of estates, nor by technical restrictions to defeat just claims, fairly presented, without fault or neglect on the part of the claimant. When this claim was filed the court still had jurisdiction of the subject-matter. The question whether it should be allowed to be filed was presented to the court by a motion to strike it from the files because presented after the time first limited, and this was passed upon by the court. By its ruling the court decided to allow the presentation of the claim. The court being a

court of general jurisdiction, there can be no doubt of its authority to require issues to be made up, and, when a claim of over $5,000 is resisted, it seems proper that the court should require the administrator to plead the grounds upon which the claim is to be contested. This was done in this case. The answer filed by the administrator clearly waives any supposed irregularities in the proceedings by which the claim was brought into court. Having tried the cause upon the issues so presented, and suffered defeat, it seems clear that the administrator ought not to be allowed to appeal to another court, and there present other and different technical defenses.

C.

Estate of Fitzgerald

v.

Union Savings Bank

65 Neb. 97, 90 N.W. 994 (1902)

. . . .

ESTATE OF JOHN FITZGERALD ET AL. V. UNION SAVINGS BANK.

FILED JUNE 4, 1902. No. 11,658.

Commissioner's opinion, Department No. 2.

1. **Stock Subscription: CLAIM: CALL.** A claim upon a stock subscription payable on call of the directors does not accrue within the meaning of section 262, chapter 23, Compiled Statutes, until a call is made, and then only for the amount of the call.

2. **Estate of Decedent:** CREDITORS' CLAIMS: PRESENTMENT: COURT: COMMISSIONERS: FORM OF CLAIM. Creditors of an estate are not required to present their claims to the county court or to the commissioners appointed to examine claims by formal pleadings; a statement of the nature and amount of the claim in the ordinary form of an account or claim bill is sufficient.

3. —— —: ——: ——: APPEAL: PLEADING. On appeal to the district court from an order of the county court allowing or rejecting a claim against an estate, pleadings need not be filed unless directed by the court.

4. ——: ——: ——: ——: ISSUES: TRIAL. Such appeal, as in all other cases, should be tried upon the same issues as those presented below.

5. **New Issue in District Court:** EVIDENCE. Where there are no pleadings in the district court, so that it can not be known in advance of trial that either party expects to raise issues not presented below, it is proper to object to evidence offered in support of such new issues at the trial; and the evidence is properly excluded in case it clearly appears from the transcript that such issues are raised on appeal for the first time.

6. **Claim Against Estate:** ASSIGNMENT AFTER FILING: IN WHOSE NAME PROSECUTED. Where a claim against an estate has been assigned after filing, it may be prosecuted in the name of the person by whom it was filed.

7. **Stockholders:** SUBSCRIPTION: GOOD-FAITH: CALL: NECESSITY. If made in good-faith for the purposes of the corporation, stockholders, when sued upon their subscription, can not question the necessity of or occasion for a call. The necessity or advisability of making it rests entirely with the directors or officers of the corporation to whom the power has been entrusted.

8. **Supplemental Answer:** LEAVE TO FILE: NOTICE. There is no abuse of discretion in refusing leave to file a supplemental answer during the progress of a trial, where no reason appears for not making the application before trial and such application is made without notice and without tendering any proposed answer.

ERROR from the district court for Lancaster county. Tried below before CORNISH, J. *Affirmed.*

James Manahan and *Thomas J. Doyle,* for plaintiffs in error.

Genio M. Lambertson and *Frank M. Hall, contra.*

POUND, C.

In 1886, John Fitzgerald subscribed for $10,000 of the capital stock of the Union Savings Bank, then newly organized, paying ten per cent. down and agreeing to pay the remainder "upon call of the proper officers." He died in December, 1894, before any call was made, and on September 30, 1895, the county court entered an order in the matter of his estate barring all claims not theretofore exhibited. Afterwards, on January 13, 1896, the directors made a call for 25 per cent. of all subscriptions. A claim against the estate, based upon this call, was filed in the county court on March 2, 1896. A second call, also for 25 per cent., was made on April 15, 1897; and a claim against the estate was filed accordingly on January 26, 1898. The administratrix filed written objections to these claims, alleging that they were barred by the order of September 30, 1895, that they had not been filed seasonably, and that the court had no jurisdiction to entertain them. The county court allowed each claim. Each was taken to the district court on appeal, and judgments were rendered against the estate, from which error is prosecuted; this proceeding involving the claim upon the first call, and No. 11,659, argued and submitted at the same time and upon the same briefs, involving the claim on the second call.

We are well satisfied that the claims were filed in due time under the provisions of section 262, chapter 23, Compiled Statutes, and that the general order barring claims did not affect them in any way. The portion of that section material to this case reads as follows: "If the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims, the person having such claim may present it to the probate court, and prove the same at any time within one year after it shall accrue or become absolute." The claims upon these calls did not accrue till the several calls were made. There was no claim upon the subscription which

could be maintained in any sort of judicial proceeding until the directors or other proper authority called for a further payment. Even then, no claim accrued for anything beyond the amount of the call. It is well settled and self evident that no action may be maintained upon a subscription payable in instalments on call of the directors unless or until there has been a proper call. *Chandler v. Siddle,* 3 Dill. [U. S. C.C.], 477; *Grosse Isle Hotel Co. v. I'Anson,* 43 N. J. Law, 442; *Braddock v. Philadelphia M. & M. R. Co.,* 45 N. J. Law, 363; *Banet v. Alton & S. R. Co.,* 13 Ill., 504; *Lamar Ins. Co. v. Moore,* 84 Ill., 575; *Bouton v. Dry Dock Co.,* 4 E. D. Smith [N. Y.], 420. If the stockholder dies, the estate takes the stock burdened with the contract to pay the amount subscribed therefor, as called; and calls, when made, are proper to be allowed as claims. *Davis v. Weed,* 44 Conn., 569. But no claim accrues against the estate until a call is made, and until that time the statutes of limitation and non-claim do not begin to run. *Priest v. Glenn,* 4 U. S. App., 478, 51 Fed. Rep., 400, 405; *Great Western Telegraph Co. v. Gray,* 122 Ill., 630, 14 N. E. Rep., 214; *Kilbreath v. Gaylord,* 34 Ohio St., 305; *Marr v. Bank of West Tennessee,* 4 Lea [Tenn.], 578; *Western R. Co. v. Avery,* 64 N. Car., 491; *Baltimore & Havre-de-Grace Turnpike Co. v. Barnes,* 6 Harr. & J. [Md.], 58; *Glenn v. Williams,* 60 Md., 93. Moreover, each call is a separate cause of action, and the statutes run against it from its date only, not from the date of prior calls. *Dorsheimer v. Glenn,* 4 U. S. App., 500, 2 C. C. A., 309, 51 Fed. Rep., 404.

Errors are assigned, also, because the claims filed in the county court are not in the form of pleadings, setting forth the facts constituting the claimant's causes of action with particularity and in detail, and because no pleadings were filed in the district court on appeal. These objections are without merit. The statute, sections 214-226, chapter 23, Compiled Statutes, provides only that the claimant "present" or "exhibit" his "claim or demand" to the court or commissioners. Creditors of an estate are not required

to present their claims in the first instance by formal pleadings. A statement of the nature and amount of the claim in the ordinary form of an account or claim bill is sufficient. Nor were pleadings necessary in the district court unless that court saw fit to require them. Section 238, chapter 23, Compiled Statutes, provides that in case of appeal from the judgment of the county court upon a claim, "the district court shall proceed to a trial and determination of the case in like manner as upon appeals brought from the judgments of justices of the peace; and such court may direct an issue to be made up between the parties when it shall be deemed necessary." Construing these two provisions together, we see no room for doubt that while the trial procedure is to be the same as upon appeal from a justice of the peace, whether there shall be pleadings is left to the discretion of the court. It is well known that the expense incident to administration of estates is always large. The evident purpose of the statute is to dispense with formalities wherever reasonably possible, in order to keep down the costs.

At the trial in the district court counsel for the estate offered to prove the character and amount of the assets of the bank when the calls were made, for the purpose of questioning the necessity and advisability of making them. They also offered to prove that the bank had subsequently gone into voluntary liquidation, in the course of which these claims had been assigned, and that they were no longer prosecuted in the name of the real parties in interest. These offers were rejected. Several grounds upon which the action of the district court may be sustained are readily apparent. In the first place, no issues as to the necessity for the call, or the interest of the bank in the claims prosecuted in its name, were raised in the county court. It is fundamental in our practice that a cause must be tried upon appeal on the same issues on which it was tried in the first instance. *Lee v. Walker*, 35 Nebr., 689, 691 and cases cited. This principle is inherent in the very nature of an appeal, which is a retrial of the cause tried

in a lower court, not of some new or different controversy. It is well settled with respect to appeals from justices' courts (*Lee v. Walker,* 35 Nebr., 689, 691; *Western Cornice & Mfg. Works v. Meyer,* 55 Nebr., 440); also as to appeals in civil actions from the county court to the district court (*Darner v. Daggett,* 35 Nebr., 695; *Bishop v. Stevens,* 31 Nebr., 786); as to appeals in election contests (*Spurgin v. Thompson,* 37 Nebr., 39); and as to appeals from the district court to this court (*Norton v. Nebraska Loan & Trust Co.,* 40 Nebr., 394; *Smith v. Spaulding,* 40 Nebr., 339). There can be no reason why it should not apply equally to appeals in probate proceedings. While we ought to be very liberal in construing objections to claims made in the county court, and ought not to apply technical rules of pleading to informal statements, it would be most unfortunate to make the proceedings in the county court formal and farcical. The intent of the statute is to require that all questions arising in the administration of estates be settled in that court as far as possible. Parties should be required to present their whole case fully and fairly in the court of original jurisdiction. No opportunity should be afforded for mock contests in which neither side develops its case in good faith, followed by a substantial trial for the first time on appeal. We perceive nothing in the case of *Stichter v. Cox,* 52 Nebr., 532, which conflicts with this position. Usually, the attempt to raise new issues on appeal is disclosed by the pleadings before trial. In such case, objection must be made by motion directed at the pleadings, or the point is waived. *Stichter v. Cox, supra; First Nat. Bank v. Carson,* 48 Nebr., 763. But in this case no pleadings were filed, and none were required. Where there are no pleadings in the district court, so that it can not be known in advance of trial that either party expects to raise issues not presented below, it is proper to object to evidence offered in support of such new issues at the trial; and the evidence is properly excluded in case it appears from the transcript that such issues are raised on appeal for the first time. Otherwise

the rule that the cause must be tried on the issues presented in the first instance would be deprived of all force by the mere circumstance that there were no pleadings. The claimant was entitled to presume that the estate would rely on the defenses raised in the county court. It had no reason to suppose anything else until the evidence in question was offered. As soon as the attempt was made to introduce new issues, it made prompt and explicit objection. Moreover, the evidence offered did not tend to establish any valid defenses. The claims belonged to the bank when filed. The objection is that afterwards, and while in course of prosecution, they were assigned to other persons as a result of the bank's going into voluntary liquidation. But where a claim against an estate has been assigned after filing, it may be prosecuted in the name of the person by whom it was filed. *Harman v. Harman*, 62 Nebr., 452. The evidence offered to prove that the calls were unnecessary or ill-advised was likewise inadmissible. If made in good faith for the purposes of the corporation, stockholders, when sued upon their subscription, can not question the necessity of or occasion for a call. The necessity or advisability of making it rests entirely with the directors or officers of the corporation to whom the power has been entrusted. *Chouteau Ins. Co. v. Floyd*, 74 Mo., 286; *Budd v. Multnomah Street R. Co.*, 15 Ore., 413, 15 Pac. Rep., 659; 1 Cook, Corporations, sec. 113.

Finally, error is assigned upon the refusal of the district court to grant leave for the filing of a supplemental answer setting up fraud in the voluntary liquidation of the bank, and a conspiracy to divide its assets, including the claims in question, among the other stockholders, while excluding the estate from all participation. This leave was asked during the progress of the trial, without notice and without tendering any answer. No reason whatever was shown for not making the application before trial. It would seem clear that a showing by affidavit should have been made, setting forth the existence of the facts sought to be pleaded and the reasons for so belated an application.

The Code of Civil Procedure (sec. 149) provides: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer or reply, alleging facts material to the case, occurring after the former petition, answer or reply." Notice must be given, and a copy of the proposed pleading should be tendered. *Havemeyer v. Paul,* 45 Nebr , 373, 378; *Killinger v. Hartman,* 21 Nebr., 297, 313. The matter rests in the discretion of the trial court. *Flagg v. Flagg,* 39 Nebr., 229, 232. Under the circumstances disclosed by the record there was no abuse of discretion in denying the application. We may say, also, that while counsel are very free with charges of fraud and wrong in the winding up of the bank, their own offers of proof show pretty conclusively that the estate has no ground of complaint. Instead of putting the creditors to the delay and expense of a receivership to collect assets, litigate the claims growing out of calls on the stock, and wind up the bank, the other stockholders paid them off, and are evidently collecting the assets for their reimbursement. Such a proceeding injures no one. The creditors of the bank are paid. The debtors of the bank are in no way prejudiced by having to pay those who discharged its liabilities rather than the bank itself.

It is recommended that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

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

AFFIRMED.

≈Ṁ≈