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J. B. WATKINS & COMPANY, APPELLANT, V. FRANK KOBIELA ET AL., APPELLEES.

FILED MAY 7, 1909. No. 15,673.

1. **Mechanics' Liens:** MATERIALMEN. A materialman who, in good faith, furnishes material to a contractor, which is delivered to one of the owners upon the premises where the building is in course of construction, and upon representations by the contractor that the material so furnished is to be used in the construction of such building, is protected in the filing of his itemized and verified account of material so furnished for 60 days from the delivery of the last item furnished, and the filing and recording thereof in the proper office establishes his lien.
2. ———: GOOD FAITH: EVIDENCE. The evidence examined and discussed in the opinion *held* to establish the *bona fides* of the materialman in the sale to the contractor and delivery of building material to the owner of the premises involved in the suit.
3. **Fraud** is never presumed. Its existence must be clearly established by competent proof.
4. **Contracts:** CONSTRUCTION. Statutes, with reference to which contracts are made, enter into and become part of the contract. *Sessions v. Irwin*, 8 Neb. 5.

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

William R. Patrick, for appellant.

A. H. Murdock, contra.

DEAN, J.

This is an appeal from Douglas county, wherein the plaintiff, in pursuance of chapter 54, Comp. St. 1907, sought to foreclose a mechanic's lien upon property owned by the defendants Joseph Vachal and Anna Vachal, his wife. The defendant Frank Kobiela is a contractor who purchased the building material from the plaintiff and erected the building upon the property in question for his codefendants.

The petition states, in substance, that the plaintiff in

September, 1904, entered into a verbal contract with Kobiela, a contractor acting for his codefendants, to furnish lumber and building material for the erection of a store building for Joseph Vachal and Anna Vachal on property owned by them in Douglas county; that between September 22, 1904, and January 24, 1905, the plaintiff, in pursuance of the contract with Kobiela, furnished to the Vachals building material which was used in the erection of a store building upon the premises then owned by them; that on March 21, 1905, the plaintiff made and recorded an itemized account, duly verified, in the register of deeds' office of Douglas county, claiming a mechanic's lien on the premises for a balance due upon the material furnished in the sum of $356.91.

Joseph Vachal and his wife, Anna, filed a joint answer consisting of a general denial, but admitting the ownership of the property, and alleging they entered into a contract with their codefendant Kobiela for the erection of a building on the property in dispute, and that on January 11, 1905, they paid him the balance due on the contract. Kobiela filed no answer, but was defaulted, and a personal judgment was rendered against him for $390.23. The action was dimissed as to the Vachals, and from the judgment of dismissal plaintiff appeals.

The undisputed proof shows the last delivery of material upon the Vachals' premises by plaintiff prior to January 24 was on November 30, 1904, and that the verified and itemized statement of material furnished by plaintiff was filed for record March 21, 1905, so that the validity of the lien depends upon the delivery of material for the building on January 24, 1905. On the part of plaintiff, J. B. Watkins, one of the partners, testified that on January 24 Kobiela came in person to the plaintiff's place of business and ordered for use upon the Vachals' building 12 feet of sash sticking of less value than $1 and that plaintiff delivered it upon the premises of the Vachals the same day. Watkins' testimony is corroborated by W. H. Beckett, salesman and bookkeeper for

plaintiff, who testified on cross-examination that, when Kobiela came to plaintiff's office and ordered the sash sticking on January 24, he told witness "that he could not settle with Mr. Vachal until he had made that sash and put it in." Beckett also testified that on the same occasion he saw the delivery ticket, which is attached to the record as an exhibit, taken by the plaintiff's teamster, Herman Williams, preparatory to the latter's departure for the Vachal premises to deliver the item in question, and that he saw the ticket the same day when it was returned to the office by the teamster as a receipt for the material, with the name of Joseph Vachal written thereon. Herman Williams, the teamster, testified that on January 24 he delivered the strip of sash sticking for plaintiff at the Vachal building, and that the delivery ticket was receipted in the name of Joseph Vachal by a woman, elsewhere shown to be Anna Vachal, who was in the store and in charge of the premises at the time. The testimony of Mrs. Vachal corroborates that of Williams in regard to the delivery of the sash sticking and the signing of the delivery ticket. Watkins' testimony is also corroborated by Kobiela, in regard to the item that was sold and delivered on January 24, by reference to exhibit 43, which is a bill made out by the plaintiff under date of March 1, 1905, and which contains a summary of a bill previously rendered and sundry items of material sold to Kobiela and delivered to the Vachals for use in the erection of their store building. Among the items enumerated in the bill is the following "1905. Jan. 24. T. 201 12 ft. sash sticking $.30." At the bottom of this bill appears the following language: "Above account is correct. O. K. Frank Kobiela." Kobiela's attention was called to this exhibit, and he testified the signature was his own, and when asked, "Who made the 'O. K.' on there," he answered, "It looks like my writing." It is thus seen Watkins' testimony upon a vital point is substantiated by four witnesses, two of whom are defendants and both hostile to plaintiff.

The Vachals defend on the ground of bad faith existing between plaintiff and Kobiela in regard to the furnishing of sash sticking, and a considerable part of the record is appropriated by them to establish this defense. They undertake to show the lien is invalid because it was not recorded within 60 days after November 30, 1904. For this purpose they produce as their own witness their codefendant Kobiela, the contractor, who testified that himself and the plaintiff, by J. B. Watkins, entered into an agreement for the purpose of extending the time in which the itemized account for material furnished could be recorded by plaintiff so as to create a lien upon the Vachal property, and they attempt to prove that the sash sticking that was ordered by Kobiela on January 24, and delivered the same day on their premises by plaintiff, was so ordered and delivered for this purpose; but the record cannot be so construed, nor can this theory of the defense be maintained. *Marrener v. Paxton,* 17 Neb. 634; *Foster v. Dohle,* 17 Neb. 631; *Irish v. Pheby,* 28 Neb. 231. No reason existed on January 24 for an extension of the time for filing the itemized account. It is undisputed that the last item furnished prior to January 24 was delivered on November 30, 1904, and the 60 days given by the statute in which to record the itemized account did not expire until 60 days after that date. The record thus shows an entire absence of motive on the part of Watkins to enter into such agreement with Kobiela on January 24. On that date almost a week remained before the expiration of the time provided by law in which to record the statement in the proper office. To hold that Watkins chose the dishonorable course outlined in Kobiela's testimony, instead of the natural and less difficult one of directing an employee to prepare and to have recorded an itemized account of material furnished for the Vachal building, in the simple but effective manner provided by the statute, is to disregard the common knowledge and experience of men. Kobiela testified that he had a final settlement with the Vachals, and that he received final payment from

them in the first or second week of January. Mrs. Vachal testified that the date of the final payment and settlement with Kobiela was on January 11, on which date she paid him the balance due under the contract. But in the face of his own and of Mrs. Vachal's statement on the point of final settlement, Kobiela testified that on January 24, almost two weeks after he had been paid in full, on the occasion of his presence at the office of plaintiff when he ordered the sash sticking, he entered into an agreement with Watkins at the latter's instigation to unlawfully evade the provisions of the mechanics' lien law, and he testified that in pursuance of such agreement the following conversation took place between Watkins and himself: "Q. What did you tell him? A. Well, Mr. Watkins told me in the first place that we had got to do something with the Vachal bill because the time was expired. 'Well,' I says, 'the only thing you can do is to get something over there,' and Mr. Watkins says, 'What will it be.' I says, 'I don't know of a thing unless we can order something there, a piece of sash sticking or some kind of molding'; and that is all. Q. That is all that occurred? A. Yes, sir; that is all that occurred there. Mr. Watkins suggested we would have to do something, and sent a piece of sash sticking that day." The following appears in the record of Kobiela's cross-examination by plaintiff's counsel: "Q. Then you want to be understood as saying that you went to Mr. Watkins, and you and he agreed that, for the purpose of securing Mr. Watkins a lien upon the Vachal premises for the balance due him, you put up a job on the Vachals to deliver this lumber there. Is that the way you want to be understood? A. Practically."

The testimony of Kobiela shows that he is endowed with an eager willingness, and upon slight provocation, to create or to enter into any scheme that occasion may offer for the purpose of getting the better of his fellow-man; but it appears to us that the unlawful scheme concerning which he testified as having been agreed upon between himself and Watkins was not even presented to

the latter by Kobiela. The entire plan appears to have been a mere figment. As it will serve no good purpose in the disposition of this case, we decline to extend this opinion further in the fruitless task of discussing Kobiela's testimony on this point. It is a familiar rule that the perpetration of fraud is never presumed, but must be clearly established by competent proof. In their attempt to prove the commission of fraud by plaintiff, the defendants have miserably failed. The district court in its decree in express terms made "no finding * * * as to the existence or otherwise of any fraudulent agreement between the plaintiff * * * and Kobiela respecting the delivery of the * * * '12 feet of sash sticking' * * * on January 24, 1905." From this we conclude the trial court was not favorably impressed by the testimony of any of the defendants upon this point. Kobiela is contradicted by Watkins and Beckett in regard to the conspiracy, and he is discredited by the entire record and shown to be a witness whose uncorroborated testimony is of doubtful value, if indeed it ought at all to be considered.

Defendants' counsel argues that appellant received money from Kobiela that was paid to him by the Vachals, and that it was applied by plaintiff to Kobiela's credit for lumber on other buildings which he was then constructing, and in support of this point the testimony of Kobiela is cited. Notwithstanding the unsatisfactory character of Kobiela's testimony, we have examined carefully that part of it referred to upon this point, and to the mind of the court it does not bear the construction thus placed upon it. Kobiela's attention was called, on redirect examination, to certain checks received by him from the Vachals, and was asked if he knew what part, if any, of these checks was paid to Mr. Watkins, and he answered that he didn't know, but he expressly says, when asked if a part of the Vachal money was paid to Watkins on other jobs, "I would not say that. It might. I believe I paid some money out of this, out of Vachals'

money, on another job * * * to Mr. Watkins." And, when he is asked how much, he answers that he does not remember, but that he believes he has some papers or checks with him by which he can discover how much of the Vachal money was paid to Watkins. It then appears from the record that he examined a receipt for $97, and says concerning it: "I don't remember whether this was out of Vachals money or not, but it was about that time I got money from the Vachals."

From all the evidence we conclude the plaintiff furnished the material for the erection of the store building on the Vachal premises in entire good faith and is entitled to the establishment of its lien in accordance with the prayer of its petition. It is a familiar rule that, where a contract is entered into between parties with reference to an existing statute, such statute thereby becomes a part of the contract. *Sessions v. Irwin*, 8 Neb. 5.

The Vachals attempt to show that the plaintiff misled them and permitted them to make final settlement with their codefendant Kobiela without a proper effort on its part to protect them in payments made to the latter; but there is lacking a motive on the part of plaintiff thus to mislead them, except upon the theory of the existence of an unlawful agreement between Kobiela and plaintiff, and this we have seen is without foundation. Defendant's counsel cites *Searle & Chapin Lumber Co. v. Jones*, 80 Neb. 567, but the opinion does not support his argument.

From a careful examination of the entire record, we are at a loss to discover the theory upon which the learned trial court dismissd the action as to the defendants Joseph and Anna Vachal. The judgment, therefore, dismissing the action as to them is reversed and the cause remanded, with directions that the lien of plaintiff upon the premises of the Vachals, which are described in the decree, be established in accordance with the prayer of the petition, and for the amount, bearing interest, for which judgment was rendered by the trial court against

Kobiela, in harmony with the views expressed in this opinion and in accordance with law.

JUDGMENT ACCORDINGLY.

ADVANCE THRESHER COMPANY, APPELLANT, V. J. J. VINCKEL, APPELLEE.

FILED MAY 7, 1909. No. 15,674.

1. **Contracts:** CONSTRUCTION. A contract prepared by a vendor for his own protection will be construed most strongly against such vendor.
2. **Sales:** WARRANTY: NOTICE OF BREACH: WAIVER. The fact that notice of failure of a machine to fulfil the requirements of a printed warranty is not given in the manner provided by the contract is no defense against an alleged breach of warranty where the vendor under such notice as is given him by the vendee undertakes to remedy the defects complained of by the latter.
3. ———: CONTRACT: WAIVER. Where a contract for the sale of a machine provides that a retention thereof by the vendee beyond a given period will operate as a waiver of defects, *held* to be inapplicable where the vendor induced the vendee to retain the machine under a promise that the defects would be remedied.
4. **Appeal:** EVIDENCE. The verdict of a jury rendered upon conflicting evidence will not be disturbed where there is sufficient evidence to support it.

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

Halleck F. Rose and *Wilmer B. Comstock,* for appellant.

C. B. Willey and *George W. Wiltse, contra.*

DEAN, J.

The plaintiff brought an action of replevin to recover possession of a threshing rig and four horses under the terms of a chattel mortgage given to secure the payment

of certain notes executed by defendant for the purchase price of the machine. The defendant admitted plaintiff's right to the possession of the threshing machinery at the commencement of the action, but denied its right as to the horses, claiming a rescission of the contract on account of a breach of warranty, in that the machinery did not fulfil the requirements of the contract of sale, and that the chattel mortgage was for that reason void, and the defendant therefore entitled to a return of the horses or judgment for their value. The contract, as shown by the pleadings and briefs, contains these, among other, provisions: "That the separators if properly run and rightfully managed are not excelled by any separator manufactured of the same size in their adaptation for separating and saving from the straw the various kinds and conditions of grain and seed. * * * That upon starting the machinery and the purchasers using the usual care and skill of threshermen are unable to make the * * * thresher * * * to operate well, they shall within five days from the day of the first use give written notice to the company at Battle Creek, Michigan, by registered letter, stating * * * wherein it fails to fill the warranty, and, also, within said time, shall notify the agent through whom purchased, and a reasonable time shall be allowed them to get to the machine and remedy the defects, * * * and longer use or without notice is to be a fulfilment of all warranty." When the testimony was submitted, counsel for plaintiff moved for a directed verdict because of the alleged insufficiency of evidence to justify the submission of the cause to the jury. The motion was overruled, and upon this assignment of error, among others, the plaintiff relies for reversal. Defendant had judgment for $218.48, the value of the horses, and costs $152.50, and the plaintiff appeals.

Plaintiff's counsel contends that the defendant failed to give notice to the company of the defects in the machinery, which were required to be given by the terms of the contract to hold the plaintiff liable under its warranty.

The testimony shows that the purchaser notified the local agent, from whom the machine was purchased, on the third day after he began to operate the machine. The local agent at once notified the plaintiff's Lincoln office by letter, and shortly thereafter, and in pursuance of such notice, one of the recognized agents of the plaintiff went to the place where the machine was being operated, and with the assistance of the defendant tried to remedy the defects. In this it seems they were not successful, and the plaintiff, by its agents, on several subsequent occasions sent men to the machine to discover, and, if possible, remedy the defects so that it would perform the work for which it was intended. On this point considerable testimony was introduced by the defendant tending to show the machine was materially defective in construction, and that it failed to do good work or to come up to the requirements of the warranty contained in the contract. On plaintiff's part there was some testimony showing a state of facts with reference to the condition of the machine and its capacity for doing effective work before and soon after it was returned to the company that was opposed to the testimony adduced by defendant, but this conflict was a question of fact to be submitted to the jury, and, in obedience to a long familiar rule, we are not disposed to invade its province and set aside a verdict rendered upon conflicting testimony where there is sufficient evidence to support it.

Complaint is also made that the separator was not "properly run and rightfully managed" as required by the contract of sale, and that it does not affirmatively appear that the defendant exercised care and skill in the operation of the machine. Upon this point the testimony shows that the defendant, and one or more of his helpers, had each of them had considerable experience in the operation of this class of machinery, the defendant having been a practical thresherman of four or five years' active experience. In this and in regard to service of notice of defects the company contended for a strict compliance

by defendant with the letter of the contract, but the authorities, particularly upon the latter point, do not sustain its position. It has been held by this and other jurisdictions that, where the vendor, by its agents, sends machinemen or experts to the scene of trouble for the purpose of trying to remedy the defects complained of, the service of notice in the strict manner pointed out in the contract is thereby waived, no matter by what means the vendee caused notice to be conveyed to the company or to its duly authorized agents. It has come to be a familiar rule of construction, where applied to contracts prepared by a vendor for his own protection, that such contracts will be construed most strongly against him. *Massillon Engine & Thresher Co. v. Prouty,* 65 Neb. 496; *Westbrook v. Reeves & Co.,* 133 Ia. 655; *Cobbey v. Knapp,* 23 Neb. 579; *First Nat. Bank v. Erickson,* 20 Neb. 580; *Aultman & Co. v. Trout,* 27 Neb. 199; *Buchanan v. Minneapolis Threshing Machine Co.,* 116 N. W. (N. Dak.) 335; *Parsons Band Cutter & Self-Feeder Co. v. Gadeke,* 1 Neb. (Unof.) 605; *Sandwich Mfg. Co. v. Feary,* 40 Neb. 226.

The plaintiff makes complaint that the defendant kept the machine beyond the time permitted by the terms of the contract after the discovery of the alleged defects. This and other jurisdictions have held that, where the vendor or his agent induces the vendee to keep a defective machine upon the promise of putting it in condition to do effective work, the vendor thereby waives the condition which provides that to keep the machine beyond a certain time is a waiver of the warranty by the purchaser. This is a reasonable rule, and we are not disposed to find fault with it. The record shows that on several occasions the plaintiff not only sent practical threshermen to the machine for the purpose of trying to repair it and to put it in working condition, but that on at least one occasion, as the defendant testified, one of the authorized agents of the plaintiff induced the former to retain the machinery upon the promise of repairing it.

This was denied by the plaintiff's agent, but the testimony upon this point, as upon others, was fairly submitted to the jury. But, in any event, it is fairly established by a preponderance of the evidence that the plaintiff, by its agents and skilled workmen, made an honest endeavor to put the machine in good working order, but failed to do so. This circumstance serves in a measure to corroborate the contention of the defendant that the retention of the defective machine by him was at least with the implied, if not express, agreement that the defects would be remedied by the plaintiff, and we are not disposed to hold, from the testimony as disclosed by this record, that the defendant waived any right conferred upon him by the contract in retaining possession of the machine under the circumstances shown by the evidence.

It is argued by counsel for the company, in effect, that its agents acted beyond the scope of their authority in attempting to put the machine in working order upon the complaints of defendant made directly to the agents, and that the company is released because the letter of the contract was not strictly fulfilled with reference to notice. The rule contended for, in view of the surrounding facts, is harsh, and appears to us unreasonable, and we cannot give it our sanction. The principal place of business of the company is at Battle Creek, Michigan, but for its own convenience and profit it established a branch office and agency in Lincoln, Nebraska, the better to enable it to dispose of the output of its shops. In *Peterson v. Wood Mowing & Reaping Machine Co.,* 97 Ia. 148, the court held that the personal knowledge of the agent that the machine sold by him fails to do good work renders unnecessary any written notice to him of such fact, although it is required by the strict terms of the contract of sale. This rule is more in accord with the principles of justice than the one contended for by the company. *First Nat. Bank v. Dutcher,* 128 Ia. 413, is a case similar to the one at bar. In that case the court say: "The ap-

pellant is a corporation which can act only through agents and employees. It cannot divest itself of the power to waive a condition made for its benefit, and that power can be exercised only through some agent. These men were its servants, working in its interest, and must be presumed to have had the authority usually exercised by other agents under similar circumstances. To say that its agents were vested with the mere naked power to sell and deliver, without any authority to waive or modify any term of the printed contract, would be, as is well said in the *Pitsinowsky* case (*Pittsinowsky v. Beardsley, Hill & Co.*, 37 Ia. 9) 'to establish a snare by which to entrap the unwary, and enable principals to reap the benefits flowing from the conduct of an agent in the transaction of business intrusted to his hands, without incurring any of the responsibilities connected therewith.'" *Brown v. Eno*, 48 Neb. 538; *Creighton v. Finlayson*, 46 Neb. 457; *Oberne v. Burke*, 30 Neb. 581.

We have examined the entire record, and conclude there was no error committed by the trial court in the points relied upon by the plaintiff. Numerous witnesses were examined on both sides, and all of the controverted facts were fairly submitted to the jury and resolved in favor of the defendant, and we find in the record ample evidence to sustain its verdict.

The judgment of the district court is right, and is in all things

AFFIRMED.

NELS NELSON ET AL., APPELLANTS, V. CITY OF SOUTH OMAHA ET AL., APPELLEES.

FILED MAY 7, 1909. No. 15,520.

1. **Cities: CITY COUNCIL: SPECIAL MEETINGS.** A meeting of a city council held on a day other than that fixed for its regular meetings, although no call for a special meeting has been made, is a valid special meeting if all the members of the council are present and consent to such meeting.

2. ———: ———: ORDINANCES: SUSPENSION OF RULES. Sections 8107 and 8108, Ann. St. 1903 (Comp. St. ch. 13, art. II, secs. 108, 109, the South Omaha charter for 1903), construed, and *held* to authorize the city council of said city to suspend the rules requiring ordinances to be read on three different days.

3. ———: ———. ———: ———. When an ordinance of a city has been read at three meetings of the city council held on three different days, and the second reading was by title only, and when all the members of the council were present and voted for the second reading of the ordinance by its title only, such action is equivalent to a suspension of the rules, and is a sufficient compliance with the statute requiring ordinances to be read in full on three different days unless such reading is dispensed with by a two-thirds vote of all members of the council.

4. ———: PUBLIC IMPROVEMENTS: ORDINANCE. Section 8129, Ann. St. 1903 (Comp. St. 1903, ch. 13, art. II, sec. 128, subd. III), examined, and *held* not to require the passage of an ordinance for the ordering of paving and curbing.

5. ———: ———: NOTICE. Section 8129, Ann. St. 1903, examined, and *held* not to require the service of notice upon property owners to designate material to be used for paving and curbing.

6. ———: ———: APPROVAL OF ESTIMATES. Section 8129, Ann. St. 1903, does not require the city council to approve the estimate of the cost of paving and curbing made by the city engineer.

7. ———: ———: APPROVAL OF PLANS. The action of the city council in approving two or more sets of plans and specifications in one motion, while irregular, is not void.

8. ———: ———: SPECIAL TAXES. Section 8129, Ann. St. 1903, authorizes the city council of South Omaha to issue bonds to pay for paving and curbing, and to levy a special tax on the property specially benefited by the improvement to reimburse itself.

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

A. H. Murdock and *Frank Crawford,* for appellants.

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

GOOD, C.

This action was brought by plaintiffs to enjoin the collection of certain special taxes levied against their prop-

erty by the city of South Omaha for the paving and curbing of a part of thirtieth street in said city, upon the ground that the taxes were void for reasons hereinafter stated. From a judgment for defendants, plaintiffs have appealed.

Plaintiffs assert that the taxes are void for the following reasons: First, that the ordinance creating the improvement district is void because not properly passed; second, because the paving and curbing was not ordered by ordinance; third, because the council ordered the paving and curbing before the expiration of 20 days after the publication of the petition of property owners praying for the improvement; fourth, that 30 days' notice was not given the property owners in which to select the material for paving and curbing; fifth, the city engineer's estimate of the cost of making the improvements was not approved nor adopted by the council; sixth, the council did not approve the engineer's plans and specifications separately and apart from plans and specifications for other public improvements; seventh, the city paid for the paving and curbing by the proceeds of a bond issue, and could not levy a special tax to reimburse itself. These objections will be considered in their order.

Ordinance No. 1257, creating the improvement district, declaring the necessity for its improvement by paving and curbing, and providing for the designation of material to be used in its improvement, is asserted to be void because it was not properly passed. The precise objection made is that the ordinance was not read on three different days, and its second reading was by title only. The record shows that the ordinance was read on three separate days. The second reading occurred at what was termed in the council proceedings "an adjourned meeting." It did not appear that any previous regular or special meeting had been adjourned to that date. It did appear, however, that all members of the council were present and voted to place the ordinance upon its second reading. It is wholly immaterial whether the meeting of the council was a

special meeting or an adjourned meeting, and it is immaterial that no call for a special meeting was had. Special meetings may be held at any time by the consent and presence of all of the members of the council. *Magneau v. City of Fremont,* 30 Neb. 843; *Lord v. Anoka,* 36 Minn. 176.

It is further contended that the ordinance is void because it was read by its title only at the second reading. There are two sections of the South Omaha charter, as it then existed, relating to the manner of passage of ordinances. They are sections 8107 and 8108, Ann. St. 1903. By the first of these sections ordinances of a general or permanent nature are required to be "fully and distinctly read on three different days unless the council shall dispense with this rule by a two-thirds vote of the members elected." Section 8108 provides, among other things, "that no ordinance shall be passed the same day or at the same meeting it is introduced, and no ordinance shall be passed without being fully read on three separate days." These two sections are in seeming conflict. They were both passed at the same time and as a part of the same general act. Construing the two sections together, we think it was the intention to permit the council by a two-thirds vote to suspend the rules and dispense with the reading in full on three different days. Any other construction would make nugatory the provisions contained in the first of these sections for the suspension of rules by a two-thirds vote of the council. Statutes should be so construed, if possible, as to give effect to each and every part thereof.

The record does not disclose that there was any formal motion to suspend the rules, but it does show that all members of the council were present and all of them voted to place the ordinance upon its second reading by title. Defendants contend that this is equivalent to a suspension of the rules. The object of the rule was to prevent hasty and ill-advised legislation and to prevent an ordinance being passed or adopted until read in full on three

different days, unless at least two-thirds of the members of the council concurred in its passage or adoption. The record shows not only that two-thirds but all members voted for the second reading of the ordinance, and for its final passage at a subsequent meeting of the council. It appears to us that the passage of a formal motion to suspend the rules by two-thirds of the members of the council would have been an idle formality. Two-thirds of the council could have carried such a motion, and then a majority vote could have ordered the second reading by title. The only case that we have been able to find bearing directly upon the question is *Kendall v. Board of Education,* 106 Mich. 681. It was there held that the suspension of the rule would not have to be made in the formal way; that, if two-thirds of the body voted in the affirmative on the matter, it was in effect a suspension of the rules. We think the action of all members of the council in voting for the second reading of the ordinance by title only was equivalent to a suspension of the rules. We therefore conclude that ordinance No. 1257 was properly passed and is valid.

Plaintiffs contend that the paving and curbing should have been ordered by ordinance, and that it could not be lawfully ordered in any other way. The law governing the construction of such public improvements in the city of South Omaha is contained in section 128 of its charter and particularly in subdivision III thereof. The first part of said section 128 is as follows: "In addition to the powers herein granted, cities governed under the provisions of this act shall have power by ordinance: I. To levy taxes for general revenue purposes. * * * II. To levy any other tax or special assessment. * * * III. The mayor and city council shall have the authority to create street improvement districts for the purpose of improving the streets," etc. There are a large number of subdivisions of section 128, many of which subdivisions begin with the infinitive, as do the first and second subdivisions. The third subdivision, however, provides a

general scheme for the improvement of streets, boulevards and public grounds of the city by paving, curbing, guttering and the like. An examination of subdivision III shows that the first step required is the filing with the city clerk of a petition signed by the owners of a majority of the feet frontage of the district to be improved. Upon the filing of such petition it is mandatory upon the mayor and council to act. There are several places in said subdivision III where certain acts are required to be done by ordinance. For the purpose of paying the cost of improving the streets, the mayor and council is given power to and may by ordinance cause to be issued bonds of the city. Whenever repaving is to be done, said subdivision III requires the mayor and council by ordinance to declare it proper and necessary. While the provision for the letting of the contract for paving and curbing is simply required to be ordered and to be let to the lowest responsible bidder, there is nowhere any specific provision in said subdivision which requires the ordering of the paving and curbing or the letting of the contract to be by ordinance. There are provisions in other sections of the charter which indicate that improvements of this character may be provided for by resolution, motion or order, and there are provisions for the mayor vetoing resolutions or orders to enter into a contract for public improvement. There is another provision of the charter which requires the ayes and nays to be recorded to pass or adopt any by-law, ordinance, resolution or order to enter into a contract for improvements. The language of said subdivision would indicate that it was necessary to pass an ordinance declaring the necessity for such an improvement, yet this court has held that a similar provision in the charter of Omaha did not require an ordinance declaring such improvement necessary. *Eddy v. City of Omaha,* 72 Neb. 550; *Portsmouth Savings Bank v. City of Omaha,* 67 Neb. 50; *Orr v. City of Omaha,* 2 Neb. (Unof.) 771. The supreme court of Oklahoma in *Paulsen v. City of El Reno,* 98 Pac. (Okla.) 958, in pass-

ing upon a similar charter provision, held that it was not necessary that such improvements should be directed and made under an ordinance. In the *Atchison Board of Education v. De Kay,* 148 U. S. 591, the supreme court of the United States, speaking through Justice Brewer, upon a similar question, say: "Now, it is insisted that consent could only be given by an ordinance, and not by resolution, and in support thereof the case of *Newman v. Emporia,* 32 Kan. 456, is cited. * * * The general rule is that, where the charter commits the decision of a matter to the council, and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by ordinance." The language of the supreme court of Iowa in *Martin v. City of Oskaloosa,* 126 Ia. 680, is pertinent. In passing upon a similar charter provision, it is said: "We are of the opinion, however, that no general ordinance was essential to enable the city to order the improvement, and take the steps necessary to a valid assessment. It certainly cannot be true that where the entire procedure is regulated by statute, and nothing is left to be determined by general ordinance, the city can derive any greater authority from an ordinance which simply re-enacts the provisions of the statute. All that can be essential in such a case is that the city take the steps provided by the statute, and, if these steps are taken as required, the assessment will certainly be valid." From a consideration of the provisions of the South Omaha charter referred to and of the authorities cited, we are of the opinion that it was not necessary for the council to order curbing and paving of streets by ordinance.

In said third subdivision of section 128 it is provided that a copy of the petition of the property owners praying the improvement shall be published in the official paper of the city for five consecutive days, and no paving shall be finally ordered or contract let for the same until the 20 days allowed for protesting signatures shall have expired. Plaintiffs insist that 20 days did not elapse

from the time of the publication of the petition before council finally ordered the paving and curbing. In this we think plaintiffs are in error. The record discloses that the petition was published from the 12th to the 17th day of June, inclusive, 1905. The act by which the council ordered the improvement was the final letting of a contract. This was not done until the 1st day of August, 1905. There never was any definite or final ordering of the improvement until the contract was let, and this did not occur until more than 20 days had elapsed after the publication of a copy of the petition.

Plaintiffs contend that the property owners did not have notice to select the material for paving and curbing Thirtieth street. In the latter part of said subdivision III of section 128 it is provided that whenever any paving and curbing shall be declared necessary by the mayor and council, and an improvement district shall have been created, it shall be the duty of the mayor and council to give the property owners within such district 30 days from the date of the approval and publication of the ordinance declaring such improvement necessary to designate by petition the material to be used in the paving and curbing. There is a further provision that, if the property owners fail to designate the material, the mayor and council may designate it. The statute does not require the service of any notice upon the property owners. Ordinance No. 1257, above referred to, was published on the 15th day of June, 1904. It provided as follows: "That thirty days be and the same are hereby given to the property owners within said improvement district from and after the approval and publication of this ordinance in which to designate the material, according to law, with which the curbing and paving of said streets shall be done." The statute simply gives to the property owners 30 days within which to designate the material, but does not require that any notice be served upon them. A similar provision in the charter of the city of Omaha has been construed by this court and it was held that no

notice was required to be served. *Portsmouth Savings Bank v. City of Omaha,* 67 Neb. 50; *Eddy v. City of Omaha,* 72 Neb. 550. More than thirty days elapsed from the time of the publication of the ordinance above referred to prior to the letting of the contract for making the improvements. The statute appears to have been fully complied with.

Plaintiffs complain that the estimate of the city engineer was never approved nor adopted by the council. Section 61 of the charter provides that, before the council shall make any contract for work on the streets or any other work or improvement to cost more than $200, an estimate of the total cost thereof, together with detailed plans and specifications thereof, shall be made by the city engineer and submitted to the council, and, if approved by the council, such plans and specifications shall be returned to the city engineer and kept by him subject to public inspection, and no contract shall be entered into for any work or improvement for a price exceeding such estimates. It appears from the record that the plans and specifications of the city engineer were approved by the mayor and council, but there was no approval of the estimate. A careful reading of that portion of the statute shows that the approval by the council has reference to the plans and specifications only, and not to the estimate. The only reference to the approval by the council is in the following language: "And if approved by the council such plans and specifications shall be returned to the city engineer and kept by him subject to public inspection." This clause is set off by commas, and has no reference to the estimate of the cost made by the engineer.

Plaintiffs further complain because the action of the council in approving the plans and specifications was by a vote taken upon the acceptance of these particular plans, together with plans and specfications for an entirely different district, and both being approved by the same vote. The statute nowhere requires that a separate vote should be had in approving the plans and specifica-

tions. While the practice of approving plans and specifications for two or more districts or for two or more improvements by the same motion or resolution is not to be commended, yet it is not in contravention of any provision of the charter, and no complaint is made that any one was injured thereby. This was an irregularity, but does not go to the jurisdiction or power of the council to levy the taxes for the special assessment.

It is finally contended that, after the city had paid for the improvements by the proceeds of the issue of bonds, it was without power to reimburse itself by the levy of special taxes. A sufficient answer to this is that the charter specially provides that the city shall issue general bonds to pay for the improvement, and then provide by special taxes and assessments a sinking fund for the payment of said bonds. The special taxes complained of appear to have been levied in conformity with the statute.

We find no error in the record, and therefore recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and CALKINS, CC., concur.

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

AFFIRMED.

ALEXANDER D. MARRIOTT, APPELLEE, V. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED MAY 7, 1909. No. 15,596.

1. **Telegraphs:** FAILURE TO DELIVER: ACTION: EVIDENCE. Where the plaintiff had decided to consign a shipment of cattle to Chicago upon the receipt of a telegram regarding that market, which telegram the defendant negligently failed to deliver, he may, in an action against the defendant for such negligence, be permitted to testify that the effect upon his mind of the failure to receive the telegram was to cause him to divert a part of such shipment to another market.

2. ———: ———: NOTICE. Knowledge of the probable result of a failure to deliver a telegraph message may be imparted to the telegraph company as well by circumstances as by formal or explicit notice or by the language of the message itself.

3. ———: ———: DAMAGES. Where the failure of the defendant to deliver a message caused the plaintiff to divert a shipment of stock to an unfavorable market, the measure of damages in an action against the defendant for such failure is the difference between the net sum the plaintiff received in such unfavorable market and what he would have realized in the market to which he would have shipped the stock except for defendant's said failure.

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

George H. Fearons and *Francis A. Brogan,* for appellant.

T. W. Blackburn, contra.

CALKINS, C.

The plaintiff was a stockman having a ranch about 100 miles distant from Evarts, a station on the Chicago, Milwaukee & St. Paul Railroad in South Dakota. He had about 450 head of cattle, enough to load 21 cars, which he desired to ship to Chicago or Sioux City, the two markets which were most readily accessible from Evarts. After starting the cattle from his ranch on the drive to Evarts, he on Saturday, September 3, 1904, delivered to the defendant at Evarts a message to the Globe Commission Company of Chicago, of which one Horn was the representative, as follows: "Evarts, So. Dak. 9-3-1904. To Globe Com. Co. Yards: Will load Monday. Wire before noon Monday prospects for Wednesday. (Signed) A. D. Marriott." This was duly delivered, and on Monday, in response to the request therein contained, Mr. Horn delivered to the defendant at Chicago the following message: "Chicago, Ill., Sept. 5, 1904. A. D. Marriott, Evarts, So. Dak. 2500 westerns 10 to 20 higher; show

Humphrey. (Signed) J. S. Horn." This message the defendant negligently failed to deliver. Prior to 6 o'clock P. M. of that day the plaintiff had billed or directed the billing of all his cattle to Chicago; but not receiving the telegram sent by Mr. Horn, though called for by him at the defendant's office, he, for the reason, as he claims, that he supposed the market at Chicago had not improved, changed the billing of his cattle so as to consign six cars, containing 125 head, to Sioux City. The result was that he realized $473.23 less for the cattle than he would have obtained had the same been shipped to Chicago. There was a trial to a jury, who found for the plaintiff in the above amount, and from a judgment upon this verdict the defendant appeals.

1. The defendant argues that, before the damages claimed can be regarded as arising naturally from defendant's breach of the contract, we must ascertain what effect the receipt of this telegram would have had upon the plaintiff's mind, and that this fact is not susceptible of proof and cannot be the subject of investigation in a legal proceeding. It does not follow that, because a fact cannot be established by direct proof, the same cannot be the subject of a legal investigation; but that point it is unnecessary to discuss, as the question presented here is one of the application of the law of evidence. It is said that, while Mr. Marriott may now testify what he would have done, he cannot possibly know what the effect would have been. We think the question must be determined by the test whether the witness is testifying to a state of mind which actually existed, or what would have been the state of his mind under certain conditions. If the former, it is admissible; if the latter, it is the expression of an opinion, and irrelevant under a familiar rule of the law of evidence. Upon consideration we are convinced that the evidence relates to a state of mind which actually existed. The plaintiff had determined to ship the cattle to Chicago if he received advices showing favorable conditions existing in that market. The fail-

ure to receive any telegram caused him to divert six cars to Sioux City, which was the nearest market for such cattle. In testifying to this he was not giving an opinion as to what effect the receipt of the telegram would have produced, but what effect the failure to receive the telegram did actually produce, and we therefore conclude that the real question necessary to be determined is the effect actually produced by defendant's breach, which is capable of proof and may be the subject of legal investigation.

2. It is claimed that the diversion of part of plaintiff's shipment to Sioux City was not a result which might reasonably be supposed to have been contemplated by the parties as one of the consequences of defendant's breach of its contract to deliver the message; in other words, that, supposing the defendant actually took thought of the consequences of its neglect, it could not reasonably be expected to consider a diversion of the shipment as one of the natural results. This assumes an ignorance on the part of the defendant of the ordinary method of conducting the plaintiff's business, and the purpose for which business men make use of telegraph facilities, which is inconceivable. The defendant had forwarded the message on Saturday addressed to a commission company at the Chicago stock-yards, asking them to wire before Monday noon the prospects for Wednesday. The defendant received and transmitted this message and took from the party to whom it was addressed a reply thereto, the contents of which plainly indicated that it was intended to convey to the plaintiff information of the condition of the cattle market. We think these facts unexplained were sufficient to submit to the jury, which was the judge of the questions of fact, whether the defendant should or should not have anticipated this result as a consequence of its negligence. *Smith v. Western Union Telegraph Co.*, 80 Neb. 395.

3. The rule for the measure of damages announced in *Hadley v. Baxendale*, 9 Exch. Rep. (Eng.) *341, generally

adopted in this country, is expressed in the following language: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." We have therefore to inquire whether the defendant may reasonably be supposed to have contemplated that the diversion of such shipment might result, as it did, in a financial loss to the plaintiff on account of the less favorable conditions existing in the Sioux City market. As is pointed out in the brief of the defendant, the different markets have a tendency to approximate each other; but they vary from the normal and from each other at particular times and on account of local conditions that affect one market and do not obtain in another. The problem presented to the shipper when he is determining to which of several markets he will consign his stock is to select a market where the most favorable conditions will probably exist for the seller at the time of the arrival of his stock. This can never be done absolutely, but it is one of the conditions which the shipper undertakes to forecast from a knowledge of present conditions, and to ascertain those present conditions he uses the facilities offered by the telegraph. If the defendant company fails to transmit, according to its contract, information concerning the existing conditions, and the shipper, for want of such information, makes the mistake of shipping his stock to the market where the less favorable conditions prevail, the loss which he thus sustains arises naturally from his selection of the unfavorable market, and is one which would have been in the contemplation of any person who had considered what the consequences of selecting the unfavorable market would be. The loss that

he so suffered was the identical one which he was seeking to avoid in selecting his point of shipment, and, if the defendant considered what damage the plaintiff would suffer if he was led to select the wrong market by its failure to fulfil its contract, the difference between the prices in the favorable and the unfavorable market would have been the first and only consequence of importance which would have naturally suggested itself to the defendant. We therefore conclude that the case falls within the rule laid down in *Hadley v. Baxendale, supra,* and that the court did not err in submitting the case to the jury.

We recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

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

FILED MAY 21, 1909. No. 15,690.

1. **Landlord and Tenant:** INJURIES: NOTICE. A. and B. caused a three story and attic building to be constructed. Above the first floor the principal use to which the building was devoted was for college and lodge room purposes. The structure was planned with that intention. They leased the third floor for use of an organization, composed of men and women, which held its lodge sessions once each week. The attic floor was leased for the purposes of a gymnasium. They afterwards sold and transferred the property to the C. B. Company, a corporation, of which they, together with one S., owned the capital stock, and the three were made the directors and managers. At a subsequent time, and while the lodge was in session, a portion of the plastering fell, striking one of the lady members and inflicting an injury from which she died. In a suit by the administrator of her estate for the

* Rehearing allowed. See opinion, 86 Neb. ——.

damages caused by the injury and her death, *held* that in the construction of the building A. and B. were not the agents of the C. B. Company; that, if the building was improperly constructed and constituted a menace to the life and limb of those rightfully occupying it, the C. B. Company, having approved the lease and continued the use of the building, was chargeable with knowledge of its dangerous condition and would be liable for the damage resulting from the injury, there being no contributory negligence shown on the part of the deceased.

2. ———: ———: EVIDENCE. At the trial the principal issue was as to the averments of the unsafe and faulty construction of the building and its continuance in that condition until the injury was inflicted. On this subject the evidence was conflicting, the plaintiff contending that, by the use of the fourth or attic floor as a gymnasium, the building was caused to vibrate and shake, the floor and ceiling to spring up and down, and that thereby, the plastering having been improperly applied to the ceiling and wall, the plaster was caused to fall; while the defense was that the building was properly planned, composed of good material and constructed in accordance with approved methods. *Held*, That these questions of fact were for the consideration of the jury.

3. Instructions submitting the case to the jury on the principles of law above outlined *held* properly given.

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

Benjamin S. Baker, for appellant.

Herbert A. Whipple and *Nelson C. Pratt, contra.*

REESE, C. J.

Marion G. Rohrbough and George A. Rohrbough constructed a building in Omaha consisting of three stories and an attic. The purpose for which the building was constructed was principally for the use of colleges and lodges, especially above the first floor. The attic portion was leased for use as a gymnasium. One large room on the third floor was leased to an organization known as the "Tribe of Ben Hur," which consisted of both men and women, and which held its meetings on Tuesday of each

week. While this organization was in session on the evening of May 8, 1906, a portion of the plastering fell and struck Mrs. Dora May Young, a member of the "tribe," inflicting injuries from which she subsequently died. This action was brought by her husband, Joseph J. Young, as the administrator of her estate, who alleged that she left a family of children, naming them, depending upon her for nurture and support. The Rohrboughs leased the third floor of the building to one Baright for a term of years. They afterwards transferred the property to the defendant, the Commercial Building Company, a corporation, which assumed, took over and continued the lease to Baright. It was alleged in the petition that the injury was caused by the faulty and imperfect construction of the building by the Rohrboughs, and they and their grantee, the Commercial Building Company, with Baright, were made defendants to the suit. Upon the trial the court directed a verdict in favor of Baright, and submitted the case to the jury as against the two Rohrboughs and the Commercial Building Company. A verdict was returned in favor of the Rohrboughs and against the Building Company, upon which judgment was rendered. The Commercial Building Company appeals. From the pleadings and evidence it appears that the stock of the Commercial Building Company is owned by the two Rohrboughs and one Shimer, and that the three constitute the board of directors of the corporation and have sole charge of its affairs. Shimer was not made a party defendant to the suit.

1. It is claimed by appellant that the verdict is, first, contrary to law; second, inconsistent; and, third, contradictory and in irreconcilable conflict with itself, and for those reasons the judgment rendered upon it should not be permitted to stand. This contention grows out of the fact that the Rohrboughs and Shimer are the sole stockholders and directors of the building company; that they constructed the building, and, if it was defective in its construction, the fault was theirs; and that, as is claimed,

they were the agents of the corporation, and, if they were not liable, the corporation was not. An exhaustive brief has been filed in support of the contention that "the agents of a corporation are liable for their own wrongful acts while acting for the corporation, and the corporation is liable, not for having done or omitted to do such wrongful act, but by operation of law. The law makes the corporation liable only where its agents have been guilty of a wrong," etc. The verdict appears to have been in the usual and proper form. It was a finding in favor of plaintiff and against the defendant, the Commercial Building Company, with the assessment of the amount of plaintiff's recovery, and "in favor of the defendants, Irving G. Baright, trading as Baright Hall Association, Marion G. Rohrbough, George A. Rohrbough, against the said plaintiff." The judgment, in so far as it refers to those defendants, is somewhat unusual in form, but we think it sufficient and not open to attack by appellant. It is adjudged "that the said defendants Marion G. Rohrbough and George A. Rohrbough, as individuals, and that the said defendants Marion G. Rohrbough and George A. Rohrbough and each of them as directors and agents of said Commercial Building Company go hence without day, and that the said plaintiff, Joseph J. Young, as administrator of the estate of Dora May Young, deceased, pay the costs herein, taxed at $——, for which execution is hereby awarded." It is possible that this kind of judgment was suggested by the averments of the petition, but that it is unnecessarily awkward and verbose must go without saying. An ordinary judgment in favor of those defendants was all that was necessary for their protection. But of this appellant cannot be heard to complain.

Appellant is a corporation, a person in law, a legal entity, capable of suing and being sued, of holding property, and through its agents of making contracts which it can enforce and by which it can be bound. The theory upon which the verdict and judgment are supposed to be based is, doubtless, that the building company was the

owner of the building when the injury occurred; that said building was not safely and suitably constructed for the uses to which it was put; that appellant had leased or approved the leases which had been granted prior to the time when it became the owner; and that, for these reasons, it was liable for the loss occasioned by its failure to see that the premises were safe or were not used for a purpose which would render it unsafe or dangerous. This being true, we can see no inconsistency or illegality in the form of the verdict or judgment. They were in no sense the agents of the building company in the construction of the building, for at that time the building company had no interest in it. When they transferred it to the company, all their individual interest in the property itself was extinguished, and they became the owners of such shares of the capital stock as they received. The company could own, not only the property in question, but any other property it might become possessed of. For the reasons here suggested, we cannot see that the cases cited by appellant, holding that when a defendant and its servants or agents are sued jointly for damages resulting from the wrongful acts of the agent alone, and the jury finds in favor of the agent and against his employer, the verdict cannot stand, can have any bearing on this case. The decisions thus cited in support of appellant's contention are *Chicago, St. P., M. & O. R. Co. v. McManigal*, 73 Neb. 580, and *Doremus v. Root*, 23 Wash. 710. Nor are we able to see that *Gerner v. Yates*, 61 Neb. 100, can throw any light upon this case. That case was against joint tort-feasors, three officers of a national bank, for making false statements. The jury returned a verdict in favor of the plaintiff and against two defendants, but against the plaintiff as to the other. The court held, in effect, that, if any were liable, all were, and, if any were not, none were. That is not this case.

2. The next contention is that the verdict was not sustained by sufficient evidence. To our minds this presents a much more serious question. There is no contention

that the death of Mrs. Young was not caused by the injury she received while within the building under the circumstances above stated. It is contended, however, that the injury received was an accident for which appellant is in no way responsible, that it was not guilty of negligence in permitting the building to be used in the way in which it was used, and that the falling of the plastering was an event which could not have been reasonably expected nor guarded against. On the part of the defense, the architect who prepared the plans and specifications and who superintended the construction of the building, the various inspectors, contractors, workmen and others of experience were called, and all testified that the structure was erected in accordance with the plans and specifications, of good material, in a workmanlike manner, and in accordance with usual and approved methods. It was stated by practically all that the visible defects which were observed were due to the settling of the walls, girders and trusses, owing in part, at least, to unseasoned lumber, which occurred in practically all such buildings, and for which no one could rightly be censured or blamed. In a general way the plans and specifications were approved, but in some respects not specifically. The testimony and plans show that the floor above (the attic floor) was supported by truss work of considerable length, which it is claimed was not well sustained, and that the use of the attic as a gymnasium, where there was jumping, tumbling and violent exercise on the part of those occupying it and engaging in the exercises, caused the building to vibrate and shake to an unusual and dangerous extent. Such exercises were carried on at the same time that the Ben Hur organization was holding its meetings and entertainments, and at times the confusion became so great as to cause the organization to suspend its business. This condition seems to have been largely due and owing to the noise caused by the tumbling, but the vibration was very noticeable, some say tremendous, and this probably caused the plaster to break loose and

fall. A number of witnesses testified to the excessive shaking and vibrations. The fact of the springing of the ceiling and vibrations of the building was easily observed and observable, if the evidence on the part of the plaintiff, in this particular, is to be believed, and of that the jury were the sole judges, and it would easily be inferred that this severe vibration and springing of the ceiling was the cause of the breaking loose and falling of the plaster, and that this could and should have been discovered by ordinary observation and avoided by the supplying of proper supports. The bill of exceptions is of great length and an epitome of the evidence cannot be given. It must be sufficient to say that our conclusion is that the jury found that in the respect suggested the appellant failed to discharge its duty to those occupying the building. Upon this view we cannot say there is not sufficient evidence to sustain the verdict.

3. It is next contended that the trial court erred in giving to the jury, instructions Nos. 6, 7, 8, and 13. These instructions are too long to be here set out, and a very brief synopsis must be sufficient. Instruction No. 6 deals alone with the question of the liability or nonliability of the Rohrboughs. As the verdict of the jury was in their favor, there can be no ground of complaint either by them or the building company, and this would be true even though the instruction might otherwise be open to criticism. Instruction No. 7 treats upon the relation of the Commercial Building Company to the case. It is, in substance, that if the company had knowledge of the defective construction of the building, or by the exercise of ordinary care could have known of the fact, and knowingly maintained it, if the jury found it was a menace to life and limb of those rightfully frequenting the premises, providing the plaintiff had established the fact of that condition, they should find against the building company, unless they found that the death of the deceased was the result of her negligence, or that the injury was the result of a pure accident for which no one would be liable; that

upon the question of the knowledge of the company it would be bound by such as was possessed by its directors and managers or either of them. The rule of law as to the liability or non-liability of the defendants was fully and clearly stated in other instructions, which considered with this one renders it unobjectionable. Instruction No. 8 treats of the liability or nonliability of the Rohrboughs growing out of their relation to the building company as directors. What we have said regarding instruction No. 6 must apply to the one now under consideration. Instruction No. 13 is simply a direction to the jury as to the form of their verdict in case they found in favor of plaintiff and against any of the defendants. We can discover no objection to it. The principal criticism is that it permits a divisible verdict. This we have found was not error.

4. Complaint is made of the action of the court in refusing to give certain instructions asked for by defendants. The first of which complaint is made was a direction to the jury to return a verdict in favor of defendants. According to our view of the case no further attention need be given to it. Instruction No. 2 was a brief but imperfect statement of the issues, which was fully covered by the instructions given. No. 3 was to the effect that, before defendants could be held liable upon the ground that the building was not properly constructed, they must have known of its defective condition. The court had instructed that they must have known of the fact or had sufficient information to charge them with such knowledge. The instruction asked was defective for this reason. The fourth requested was an effort to withdraw from the jury all consideration of the construction and maintenance of the building except as to the charge that the plastering which fell was improperly placed upon the wall. The whole question of the construction and condition of the building, as well as of the method of the lathing and plastering, had been gone over by the evidence and submitted to the jury. There was no error in

refusing the instruction. The fifth, sixth, seventh and eighth were practically to the same effect and were rightfully refused. The whole subject was properly covered by the instruction given.

While, had the question of defendant's liability been submitted to us in the first instance, we might have been inclined to find in their favor under the evidence submitted, yet we are reminded that the jury has passed upon the weight of the evidence, and with their finding we must be content.

Discovering no prejudicial error in the trial, we must affirm the judgment of the district court, which is done.

AFFIRMED.

STATE, EX REL. HENRY J. HOFFMAN, APPELLANT, V. I. W. ALTER, POLICE JUDGE, APPELLEE.

FILED MAY 21, 1909. No. 15,702.

Mandamus: CRIMINAL LAW: STIPULATION. In an application for a mandamus to the police judge of the city of W. to compel him to strike out certain recitals in his docket in a case wherein the relator was prosecuted on a charge of having committed a misdemeanor, such recitals being to the effect that a trial was had and certain witnesses sworn on behalf of the state, and also to insert in the docket a recital that no plea was entered to the complaint and no trial had, it was shown that three persons were jointly charged with similar offenses, that they entered their pleas of not guilty and demanded separate trials, that one was tried, but before judgment it was agreed that the evidence would be the same, from the same witnesses, and as to the same material facts, and that the evidence so introduced might be considered and treated as the evidence against relator, and on which a finding and judgment should be entered, the docket entry to contain a recital that the same witnesses were sworn, etc. The court found the defendant guilty and sentenced him to pay a fine, from which he appealed to the district court. *Held*, That there was no error in the judgment of the district court refusing the writ and dismissing the action.

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

A. S. Ritchie, Charles L. Fritscher and *F. A. Berry,* for appellant.

George R. Wilbur and *Elmer E. Thomas, contra.*

REESE, C. J.

This was an application to the district court for writ of mandamus directed to I. W. Alter, the police judge of the city of Wayne. The prayer of the petition is that he be compelled to strike out certain portions of his docket entry in a case in which the relator was under arrest charged with selling intoxicating liquors to minors. It is alleged in the petition that relator was informed against jointly with two others; that separate trials were demanded; that upon the day set for trial relator was not placed upon his trial; that no witnesses were sworn or examined; that the respondent assessed a fine against him without arraignment or plea to the complaint; that respondent made false entries in his docket showing the examination of a number of witnesses when none had been sworn; that facts which should have been stated and recited in the docket were omitted; and that a correct docket entry had been demanded, but had been refused. Relator had instituted appellate proceedings, and at the time of the hearing the principal case was pending in the district court on appeal. Respondent filed an answer, denying the principal averments of the petition as to the condition of the docket, but which need not be set out here. Under the issues thus formed, a trial was had in the district court and the writ denied. Relator has appealed to this court.

The oral evidence introduced was conflicting, the witnesses contradicting each other in the most positive terms upon all matters supposed to be material to the inquiry. There was ample evidence, however, to sustain a finding

of the district court that, when the three parties were brought before respondent as police judge, they pleaded not guilty and demanded separate trials, and that one of the accused, Ramsey by name, was put upon his trial and the witnesses duly examined. It appears that Ramsey was a licensee and the proprietor of the saloon, and relator and another were his bartenders. After the examination of the witnesses in the trial of Ramsey, it was stated by the county attorney that the same witnesses would be called in the trial of relator, and their testimony would be the same except that it would appear that relator was not a licensee. We quote the following from the testimony of the county attorney: "A. The evidence in the trial of the Ramsey case had been received, and the state had rested. The defense rested without introducing evidence. I asked counsel for the defendant if they also wished to waive argument, and Mr. Berry replied that it all depended on what I (Wilbur) had to say in my opening argument. I made a brief opening argument, and the defendants' counsel waived argument. Q. You are now referring to the Ramsey case? A. Yes, sir. The question then arose, I don't remember who brought it up, as to whether we should at once proceed with the trial of the other two cases. I made the statement that the testimony in the other two cases would be the same as that already introduced in the Ramsey case. One of the counsel for defendant remarked that that statement had best be amended by saying that we could not prove that Thompsen and Hoffman were licensees. That was agreed to. The matter was talked over by and between all four attorneys, and it was agreed by the four attorneys that instead of continuing in the course of the next two trials, and reoffering and receiving all this evidence, it might be considered by the court as having already been offered and received, and that he could make his finding and judgment in the three cases at one and the same time, and upon the same evidence, and that the records of the three cases should be made up separately, showing a separate trial in case of

each of the three defendants, and that said records should all be alike. That is as I remember what occurred. Q. You state the fact, whether or not this was before or after the judgment was rendered and the fine imposed in the Ramsey case, Mr. Wilbur. A. This agreement took place before the justice had made any finding in the Ramsey case. He made the findings and entered judgment in all three cases at one and the same time." Others testified to substantially the same facts. Upon this evidence the police judge found all the defendants before him guilty and imposed the fine assessed. From that judgment relator appealed to the district court, and his appeal was pending at the time of the trial of this case. Upon the state of facts found by the district court, supported as it was by sufficient evidence, it is plain that there is no merit in the relation, and that the judgment of that court refusing the writ and dismissing the case was right.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

ROBERT J. TATE, APPELLANT, V. A. G. RAKOW ET AL., APPELLEES.

FILED MAY 21, 1909. No. 15,647.

1. **Pleading:** SUFFICIENCY: OBJECTIONS TO JURISDICTION. Ordinarily the question as to whether a petition contains averments sufficient to state a cause of action will not be considered on a challenge to the jurisdiction of the court.

2. ———: ———: ———. But where an action is brought against a defendant in a county other than that in which he resides, and the summons which is served upon him is directed to and is served by the sheriff of the county of his residence, a challenge to the jurisdiction requires the court to examine the petition in order to ascertain whether the action is one which can only be maintained in the county from which the summons was issued.

3. ———: ———: JURISDICTION. If upon such examination it appears that the petition is insufficient to state such a cause of action, the court is without jurisdiction, and the objection should be sustained.

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

Courtright & Sidner, for appellant.

Jackson & Kelsey, contra.

BARNES, J.

Plaintiff filed a petition in the district court for Cheyenne county, of which the following is a copy: "Comes now the plaintiff and for cause of action states: (1) The plaintiff is now, and during all the time herein mentioned has been, the owner of the east half of section twenty-six and the east half of section thirty-five, all in township fifteen, range forty-seven, in Cheyenne county, Nebraska. (2) Defendant Detta Rakow is the wife of defendant A. G. Rakow. (3) On September 14, 1907, the plaintiff, by and under the name of R. J. Tate, and the defendant, A. G. Rakow, by and under the name of A. G. Rakow, entered into a contract in writing, a copy of which is hereto attached, marked exhibit A, and made a part hereof. (4) Said contract provided, in substance, that plaintiff should sell to defendant A. G. Rakow, and that said defendant A. G. Rakow should purchase for the consideration of sixteen thousand dollars, the land mentioned in paragraph one hereof, and to pay therefor by delivering his note for $1,600 in part payment, and to pay the balance by conveyance of certain land, and that plaintiff should first inspect the land of defendant, and if then approving the sale he should on October 14, 1907 execute his deed and deposit the same in escrow in First National Bank of Fremont, Nebraska and that if defendant defaulted in the contract he should forfeit all interest in said land and all payment made thereon, and that time was the essence

of said contract. (5) The defendant A. G. Rakow, in accordance with said contract, executed and delivered to the plaintiff his note for the sum of $1,600, the same being given and received in part performance of said contract and in part payment for said land, and plaintiff has sold said note. (6) The plaintiff promptly after executing said contract examined the land of said defendant mentioned in said contract, and promptly thereafter notified the defendant A. G. Rakow of his election to carry out the terms of said contract. (7) Shortly thereafter, and on or before October 14, 1907, the plaintiff, jointly with his wife, executed and acknowledged a good and sufficient warranty deed of said land mentioned in paragraph one hereof, conveying the same to A. G. Rakow, and deposited the same in escrow with First National Bank of Fremont, Nebraska, and also deposited in said bank therewith an abstract of title showing good and sufficient title thereto in the plaintiff, and thereby performed on his part all the terms of said contract to be performed by the plaintiff. (8) The defendants have failed, neglected and refused to carry out any of the terms of said contract to be performed on their part, and have failed, neglected and refused to convey to plaintiff any land or to pay to plaintiff the money in lieu thereof, and the terms of said contract have hereby been broken by the defendants and each of them. (9) Plaintiff now elects to take the benefit of that portion of said contract which says: 'In case said party of the second part shall refuse or neglect to pay said purchase money and interest as agreed herein, said party shall thereby forfeit any right he may have to said land, and also shall forfeit any money paid in part performance to this contract'—and now declares a forfeiture of said sixteen hundred dollar note to the plaintiff and a forfeiture to the plaintiff of the land described in paragraph one hereof. Wherefore plaintiff prays a decree that the title to the land embraced in paragraph one hereof be quieted in the plaintiff, and that the partial payment of $1,600 made on said land be forfeited to the plaintiff, and

for such other relief as in equity may seem proper, and for costs."

A summons was issued directed to the sheriff of Antelope county for service, and was served in said county personally upon the defendants. They separately entered special appearances, and challenged the jurisdiction of the court, assigning as reasons therefor: First, the only service of summons had on the defendants was had in Antelope county, Nebraska; second, no cause of action is stated in the petition upon which the plaintiff could bring an action in Cheyenne county, Nebraska, against the defendant and procure service of summons in Antelope county on them. The objection to the jurisdiction was sustained, and, plaintiff electing to stand on the service, the action was dismissed at his cost, and he brings the case here by appeal.

It will be observed that the petition contains no allegation that the defendants have recorded the contract mentioned therein, and therefore no cloud has been cast upon the plaintiff's title, nor is there any allegation in the petition that the defendants are claiming or have asserted any interest in the property, nor that the plaintiff is now in the possession thereof, or that the land is unoccupied. Now, it may be conceded that as a general rule the sufficiency of a petition cannot be raised by a challenge to the jurisdiction of the court; but this rule, like all others, is subject to certain exceptions, as we shall presently see. Our code, after stating in what counties certain actions shall be brought, provides: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned." Code, sec. 60. Now, this action was brought in Cheyenne county against the defendants who, the record shows, reside and were summoned in Antelope county. Service in this manner can only be obtained where the cause of action is one of those which the law requires to be brought in Cheyenne county. It seems clear, therefore, that a challenge to the jurisdiction at the very outset raises the question

whether or not this is such an action. We are therefore compelled to examine the petition in order to determine that question. It must be conceded that, if the petition is insufficient to state a cause of action, then the summons issued to Antelope county is void, and by its service no jurisdiction was obtained of the persons of the defendants. In such a case an objection to the jurisdiction should be treated as a general demurrer to the petition. *Cobbey v. State Journal Co.*, 77 Neb. 626. In that case the petition was held insufficient to state a cause of action, and the judgment sustaining the objections to the jurisdiction and dismissing the action was affirmed. We think this case should be ruled by that decision.

It seems clear that the petition in this case is insufficient to state a cause of action to quiet the title to real estate. At the common law a defendant could only be sued in his own county, and that right, with certain clearly defined exceptions, has been reserved to him by our statute; and, before requiring the defendants to answer to an action brought against them in a county many hundred miles from their place of residence, we should be able to say that the action is one of those within the exceptions, and that the petition should clearly show the existence of such a cause of action as a necessary foundation for the issuance and service of the summons.

For the foregoing reasons, we are of opinion that the judgment of the district court sustaining the objections to the jurisdiction, and in dismissing the action, was right, and it is hereby

AFFIRMED.

REESE, C. J., dissenting.

I find myself unable to agree to the majority opinion. It is provided in section 57, ch. 73, Comp. St. 1907, that an action to quiet title may be maintained by a plaintiff claiming title to real estate, whether the plaintiff be in actual possession or not, against any one claiming an adverse estate or interest therein, for the purpose of de-

termining such estate or interest and quieting the title. While the petition may be defective, as one to quiet title, and even may not contain facts sufficient to state a cause of action, yet I am unable to see that in its present form it can be held to be anything else than one for that purpose. It cannot be for a forfeiture of the note, as plaintiff has no interest in that instrument, nor can it be for either a strict or general foreclosure, for in that event the holder of the note might properly be a party to the action. But, as the prayer is for general relief, it is quite probable that such relief under proper averments might be granted. It must not be forgotten that the question as to whether the petition states a cause of action, seeking any one of the kinds of relief referred to, cannot be considered on the mere challenge of jurisdiction. It is apparent that the pleader sought to in some manner affect the title to the real estate described in the petition. This being true, the action was properly instituted in the county where the land is situated. Code, sec. 51. It may be that under the facts and circumstances of this case a petition cannot be written at this time in which a cause of action can be stated, but that question should be met in another way, if occasion requires: It cannot be on a challenge of jurisdiction.

FRANK O. NUTTING, APPELLANT, V. WATSON, WOODS BROTHERS & KELLY COMPANY, APPELLEE.

FILED MAY 21, 1909. No. 15,695.

1. **Sales:** CONTRACT: REMEDIES. Where the written contract for the sale of a horse, entered into without fraud, misrepresentation or deceit of any kind, contains all of the agreement between the parties thereto, including the remedy of the vendee in case the horse should fail to reach a certain standard as a foal getter, the court should not by implication extend to him another remedy, or make for the parties another and different contract.

2. ———: ———: ———. Where the only remedy provided by the contract in case of failure is the right to return the horse and receive another in his place of equal value, the death of the horse, without fault on the part of the vendor, before there is any offer to return him, or demand that he be replaced by another of equal value, does not entitle the vendee to maintain an action on the contract for damages for an implied breach of warranty.

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

J. B. Strode and *A. V. Proudfoot,* for appellant.

Hall, Woods & Pound, contra.

BARNES, J.

Action for damages based upon an alleged breach of warranty in the sale of a stallion. Judgment for the defendant, and the plaintiff appealed.

The contract of sale reads as follows: "Know all men by these presents: that we have this day sold to F. O. Nutting the imported Percheron stallion Demon, No. 46,420, color, grey black. Foaled 16th day of May, 1900. We guarantee mares bred with impregnator, properly used, same as with stallion. In consideration of the sum of $2,000, the receipt of which is hereby acknowledged. Guarantee. If the above named stallion does not get sixty per cent. of the producing mares in foal with proper care and handling, we agree to replace him with another stallion of the same value, upon delivery to us of said stallion in as sound and as good condition as he is at present. This is the only contract or guarantee given by us, and is not to be changed or varied by any promises or representations of agents. Dated at Lincoln, Nebraska, Feb. 3d, 1904. Watson, Woods Bros. & Kelly Co., By Geo. J. Woods, Treas."

The plaintiff, who was a breeder of horses, took the stallion in question and placed him in the stud at his

home in Indianola, Iowa. What occurred thereafter is best told by the correspondence between the parties. It appears that on July 4, 1904, the plaintiff wrote to defendant making complaint as to the breeding qualities of the horse, and in answer the defendant wrote to plaintiff as follows: "Lincoln, Neb., July 8th, 1904. Mr. F. O. Nutting, Indianola, Iowa. Dear Sir: We have your favor of July 4th and are very sorry to hear that Demon is not fulfilling his guaranty; however, we think it is pretty early to tell, and wish you would take the matter up again with us, some time in the winter. Yours very truly, Watson, Woods Bros. & Kelly Co., By Mark W. Woods, Treas." Again on December 14 the plaintiff wrote the defendant as follows: "Indianola, Ia., Dec. 14th, 1904. Watson, Woods, Bros. & Kelly Co., Lincoln, Neb. Dear Sirs: In reply to your letter of the 10th, I cannot send the letter you want. I wish I could. I bred fifty-four mares to Demon in the spring and fall season, twenty-four I know are not in foal, and there is not one I know to be in foal, but feel sure there are some. * * * Now I have three propositions to make: Ship the horse back to you, at your expense, and refund the $2,000. Or make an exchange, you to pay the expense. Or let me keep him another year, then if he does not get fifty per cent. of his mares in foal, then make an exchange or refund the money. * * * Now I will tell you what I think about the horse. I think he would be reasonably sure with lots of exercise and not kept too fat. Imported horses are very often not sure the first year. I will tell you why I do not wish to change horses. You would want to put in an inferior horse which I would not do. I paid for a good one, and would expect a good one in exchange. Hoping to hear from you soon, I am respectfully, F. O. Nutting." To this letter the defendant replied as follows: "Lincoln, Neb., Dec. 16th, 1904. F. O. Nutting, Indianola, Ia. Dear Sir: We have your favor of Dec. 14th and note contents. We are very sorry that your horse did not do well for you this year. But it is some-

times the case with a newly imported horse. We have a full brother of your horse in our barn that is one year younger that is a match for your horse, equally as good in every way, but not quite as large. If you wish to make an exchange for him I think he will be entirely satisfactory to you. If you wish to try this horse another year we will extend our guaranty one year longer. Yours very truly, Watson, Woods Bros. & Kelly Co., Mark W. Woods, Treas." Upon the receipt of the foregoing letter the plaintiff wrote the defendant as follows: "Indianola, Ia., Dec. 20th, 1904. Watson, Woods Bros. & Kelly Co., Lincoln, Neb. Dear Sirs: . In reply to your letter of 16th I think it would be best for me to try Demon another season. I see no reason why he should not get colts with proper handling, which I shall try to give him. Respectfully, F. O. Nutting." It appears from the evidence that the plaintiff again placed the horse in stud in the spring of 1905, and on June 1 of that year he died of inguinal scrotal hernia, strangulated bowels. The record also contains competent evidence tending to show that the horse up to the time of his death had not proved to be a 60 per cent. foal getter.

At the close of all of the evidence the district court directed the jury to return a verdict for the defendant, and this is one of the principal errors assigned by the plaintiff. In support of this assignment it is contended that it was the province of the jury to determine whether or not the defendant warranted the horse to be a 60 per cent. foal getter, and it was error for the court to decide that question. It was argued that the contract is ambiguous, and should be construed most strongly against the defendant, and that by giving it such construction it implies a warranty, for the breach of which plaintiff is entitled to maintain an action for damages. In support of this contention several authorities are cited, but it seems to us they have no application to the facts of the case. The agreement in question is plain and unambiguous in its terms, and contains no warranty either express or im-

plied. By it the defendant agreed, in case the horse should not get 60 per cent. of the producing mares in foal with proper care and handling, to replace him with another stallion of the same value, upon delivery of said stallion in as sound and as good condition as he was at the time of the sale. It was also expressly provided that this was the only contract or guaranty given by the defendant, and that it was not to be changed or varied by any promises or representations of its agents. It is not claimed that there was any fraud or misrepresentation in the transaction. It was therefore competent for the parties to make such a contract. They had the right to determine what remedy the plaintiff should have in case the horse did not come up to the terms of the agreement as a foal getter. This contract having been reduced to writing cannot now be varied or changed by evidence of any other parol agreement. The court cannot substitute another or different contract for the one in question, or make another or different contract for the parties where they have without fraud contracted for themselves. It follows that, in case the plaintiff desired to pursue his remedy thereunder, he must have offered to return the horse and have demanded another one of the same value. By his letters plaintiff recognized this to be his only remedy, but he declined to pursue it until after the death of the horse, when he was unable to comply with its terms. It appears that he liked the animal; that he did not want to exchange him for another, and that he expressed the belief that with proper care he would prove to be a reasonably sure foal getter. It further appears that the defendant was willing to extend the time limit of the agreement to replace the animal with another horse equally as good for another year from and after the middle of December, 1904. So at the time of the death of the horse the parties were in the same situation they would have been had the horse died at any time during the year immediately succeeding the date of the sale.

In *Dunham v. Salmon,* 130 Wis. 164, it was held that,

where a horse was sold under a warranty that if he did not comply therewith the seller would furnish another horse in exchange on the return of the horse sold at a time and place, accompanied by proof of breach of warranty, and the buyer did not return or offer to return the horse at the time and place, he could not rely on a breach of warranty when sued on a note given for the price. In *De Witt v. Berry,* 134 U. S. 306, it was said: "When parties have reduced their contract to writing, without any uncertainty as to the object or extent of the engagement, evidence of antecedent conversations between them in regard to it is inadmissible." In *Seitz v. Brewers Refrigerating Machine Co.,* 141 U. S. 510, the court said: "When the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing." In *Zimmerman Mfg. Co. v. Dolph,* 104 Mich. 281, it is said: "The parties had deliberately put their contract in writing. No fraud is claimed in the execution of the contract. The only warranty for which the plaintiff is liable is that contained in the written contract." In *Conant v. National State Bank,* 121 Ind. 323, we find the following: "Where parties commit their contract to writing, by that writing they must stand, where there is neither fraud nor mistake. This must be true, or else the distinction between oral and written contracts will be utterly broken down. Where there is a written instrument embodying the terms of the contract between buyer and seller, an express warranty cannot be imported into the contract by parol evidence. Where the writing contains an express warranty, implied ones are excluded. This doctrine rests upon the general rule already stated, and is one among the best settled in the law." In *Ehrsam v. Brown,* 64 Kan. 466, it was held that whether parties have committed their entire contract to writing is a question for the deter-

mination of the court. In this determination the writing itself is the guide. If on its face it imports to be complete, that is, if it contains such language as imports a complete obligation between the parties, it is complete, and parol evidence will not be admitted to extend this obligation to cover matters upon which the writing is silent.

Now, when the horse in question herein was sold, the buyer and the seller, as we read the evidence, stood upon equal ground. The one knew no more than the other about his breeding qualities. Defendant was engaged in importing and selling horses, and had just received the horse in question from France. This was known to the plaintiff, and plaintiff also had knowledge of the fact that defendant possessed no more information upon the question of its foal-getting qualities than such as was contained in the recommendation of the breeder. Plaintiff was himself a breeder and raiser of horses, and was willing to take the risk that the stallion would reach the standard of 60 per cent. as a foal getter, on the sole condition that, if he failed to reach that standard, plaintiff should have the right to another horse in exchange. This contract provided the remedy in case of such failure, and the plaintiff accepted it. The law will not by implication afford him another remedy. Treating of this question in the case of the *Reeside*, 2 Sumn. (U. S. C. C.) 567, Mr. Justice Story said: "I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom, for the latter may always be waived at the will of the parties. But a written or express contract cannot be controlled, or varied, or contradicted by a usage or custom, for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications,

properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." The principle is that, while parol evidence is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms thereto. We think this case should be ruled by the foregoing decisions, and therefore plaintiff's contention cannot be sustained.

Again, the sale in this case was complete. The price was paid and the property was delivered. It is not asserted, and it cannot be successfully contended, that, if the horse had died shortly after the sale took place, the plaintiff could have claimed a return of his money on that account. The fact that the defendant extended the guaranty for another year did not change the contract, and of itself affords no right of recovery on account of the death of the animal. Its death was the plaintiff's misfortune, because he was thereby deprived of the power to tender the horse for exchange, as was undoubtedly his right had the animal remained alive.

Finally, it seems clear that the plaintiff was not entitled to any relief in this form of action, for it must be observed that he counts squarely upon the written contract, and is in no condition to comply with its terms. This renders the case unlike the ones which plaintiff has cited in support of his contention. In some of them there was an express warranty, while in the others the written contract was abandoned, and recovery was sought on another and different warranty than that contained in the written contract.

For the foregoing reasons, we are constrained to hold that the district court properly directed the jury to return a verdict for the defendant. This holding renders it unnecessary for us to consider any of the other assignments of error contained in the record.

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

AFFIRMED.

ROSE, J., not sitting.

ELMA BLOOMFIELD, APPELLEE, V. HENRY PINN, APPELLANT.

FILED MAY 21, 1909. No. 15,725.

1. **Trial:** INSTRUCTIONS: REFERENCE TO PLEADINGS. After instructing the jury as to the issues presented for their determination, it is not error for the court to refer them to the pleadings for a more specific statement, and allow them to take the pleadings when they retire to consider their verdict.

2. ———: ———. The court in paragraph two of his instructions told the jury what the plaintiff was required to prove in order to recover, and in another paragraph informed them what would be a complete defense to the matters mentioned in the former paragraph. *Held*, That this did not render the paragraphs inconsistent with each other, and that when considered together they properly stated the law applicable to the facts of the case.

3. **Appeal:** INSTRUCTIONS. An instruction not technically correct, but which is more favorable to the complaining party than to his opponent, affords him no ground of reversal.

4. **Libel and Slander:** MALICE: EVIDENCE. In an action for slander, it is proper for the plaintiff to introduce evidence of the speaking of slanderous words other than those set out in the petition, but of similar import, both before and after the commencement of the suit, when malice is a fact in issue, and to show the extent of the publication, but not in aggravation of damages.

5. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. An instruction by which the jury were told that they might consider such statements for the purpose of showing malice, or in aggravation of damages, is not technically correct; but where it is apparent from the whole record, including the amount of the recovery, that the jury were not influenced by the use of the words, "or in aggravation of damages," in arriving at their verdict, the giving of such an instruction is error without prejudice.

6. **Libel and Slander:** INSTRUCTIONS: DAMAGES. It is proper in such a case for the court to instruct the jury that in fixing the amount of damages they may take into consideration the present and future injury to the plaintiff.

7. **Trial:** SPECIAL FINDINGS: ESTOPPEL. Where a party has requested the submission of special questions to the jury to be answered by them, and the answers returned are sustained by the evidence, he cannot be heard to complain of such answers.

8. **Libel and Slander:** DAMAGES. *Held*, upon the facts disclosed by the record, that the verdict in this case is not excessive.

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

Lewis C. Paulson and *M. D. King,* for appellant.

Adams & Adams, contra.

BARNES, J.

Action for slander. Plaintiff had judgment in the district court, and defendant has appealed. For convenience the parties will be designated as plaintiff and defendant. The plaintiff's petition contained nine counts, or causes of action, based on slanderous words spoken by the defendant of and concerning the plaintiff to many different persons, and on that number of occasions. The slanderous words set out in the petition will not be reproduced in this opinion because they are unfit for publication. It is sufficient to say that they charged plaintiff with unchastity, and asserted that defendant on July 7, 1907, and from that time to July 27 of the same year, had sexual intercourse with her whenever he desired to do so, and that during all of that period he had used her the same as though she was his wife. By his answer the defendant denied some of the charges, and alleged the truth of the others as a defense. The reply was a denial, coupled with matters explanatory of some of the statements contained in the answer. The action was tried on its merit, the jury returned a verdict for the plaintiff for $3,500, and judgment was rendered thereon.

Defendant's first contention is that the district court failed to correctly instruct the jury as to the issues submitted for their consideration, and by referring them to the pleadings "for a more specific statement of said issues." We have examined the instruction complained of, and find that defendant's criticism was without merit. The court directed the attention of the jury to each cause of action set out in the petition and the answer of the defendant thereto, specifically stating the issue in each

case, and it is difficult to see, owing to the great length of the pleadings, how the issues could have been made plainer than they were. It is insisted, however, that it was error for the court to allow the jury to take the pleadings along with his instructions to their jury room. We understand that in most of the judicial districts of this state the jury are permitted to take the pleadings in the case when they retire to consider their verdict. We see nothing reprehensible in this practice, and the course pursued by the trial court in this case furnishes no ground for a reversal of the judgment.

Defendant next contends that the court erred in giving instruction No. 2 on his own motion. This instruction reads as follows: "You are instructed, gentlemen of the jury, that for the plaintiff to recover she must prove, by a preponderance of the testimony, the truth of the material allegations in her petition. The material allegations which she must prove are: That the defendant spoke, uttered and published the slanderous statements, or some of them, as alleged and set out in her petition; that they were spoken of and concerning her, and that such statements were published by him, that is, they were spoken in the presence and hearing of one or more persons." The slanderous words which it is chargd were spoken by the defendant are actionable *per se,* and the instruction above quoted correctly states the law in such cases.

It is alleged, however, that this instruction is inconsistent with paragraph No. 10½ of the court's charge, which is also severely criticised. Instruction No. 3 informed the jury what the plaintiff must prove in order to recover, while instruction No. 10½ states what would be a complete defense to the slanderous words, if uttered, and both of the instructions state the law correctly. They should be considered together, and the fact that both propositions were not contained in the same paragraph of the charge is quite immaterial, and was without prejudice to the defendant.

Complaint is also made of instruction No. 10¾ given by the court on his own motion. Without quoting this instruction, it is sufficient to say that we have examined it carefully, and find that it states the law in form and substance most favorable to the defendant, and therefore, even if it is not technically correct, it affords him no cause for complaint.

Instruction No. 10 is most vigorously assailed by the defendant because the jury were thereby told that they might consider statements made of and concerning the plaintiff other than those set out in her petition, of similar import, for the purpose of showing malice or in aggravation of damages, but not for the purpose of proving other or different causes of action than those set out in her petition. In support of this criticism the defendant cites *Frazier v. McCloskey,* 60 N. Y. 337. We find that this rule was condemned, but that decision is opposed to the great weight of authority. We are satisfied, however, that they are only admissible in this jurisdiction when malice is a fact in issue, and to show the extent of the publication of the libel or of the slanderous words spoken. But if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect to it. Such caution was given in this case, for the instruction contains the following clause: "If she is entitled to recover it is only upon the causes of action set out in her petition." A similar instruction was approved by this court in *McCleneghan v. Reid,* 34 Neb. 472. The defendant in that case pleaded want of malice and justification. To show malice the plaintiff introduced proof tending to show the falsity of the charge, and that the defendant below had at other times than those charged in the petition uttered the words claimed to be slanderous. The court said; "Such proof is admissible to show the *quo animo.* An instruction may be given, if requested, limiting the proof to that purpose. There was no error therefore in admitting it." The syllabus in that case reads as

follows: "In an action for slander, proof that the defendant repeated the words alleged to be slanderous at other times before the bringing of the action than those set forth in the petition may be introduced for the purpose of showing malice." In *Gribble v. Pioneer Press Co.*, 34 Minn. 342, we find the following: "In an action for publishing a libel upon the plaintiff, evidence of other publications by defendant, containing substantially the same imputation as that sued upon, whether made before or after the latter, or even after suit brought upon it, may be admitted in evidence for the purpose of proving actual malice in the publication prosecuted for, and thereby aggravating the damages recoverable therefor." In *Larrabee v. Minnesota Tribune Co.*, 36 Minn. 141, it was said: "To show actual malice other libelous publications by the defendant, containing substantially the same imputation against the plaintiff as the article sued on, are admissible." While the cases are somewhat divided upon this question, the great weight of authority sustains the rule that in an action for slander the plaintiff may show a repetition by the defendant of the slanderous words both before and after the commencement of the suit to prove the existence of malice; and in *Gribble v. Pioneer Press Co., supra,* and in several other cases, it is held that they may be received in aggravation of damages. We are not prepared, however, to approve of the instruction complained of, for the reason that exemplary damages are not recoverable in this state. Therefore, while we condemn their use, still we are satisfied that in this case the giving of the instruction was error without prejudice, for reasons which we shall presently give.

Defendant further contends that the court erred by instructing the jury that, in fixing the amount of damages to be awarded the plaintiff, they should take into consideration her present and future injury. The question was first considered by this court in *Boldt v. Budwig,* 19 Neb. 739, where the following instruction was approved: "If, from the evidence and the instructions of the court,

the jury find for the plaintiffs, then the jury are to determine from all the evidence and the circumstances as proved on the trial what damages ought to be given to the plaintiffs, and find your verdict accordingly, but not exceeding the amount claimed. In finding the measure of damages, the jury may take into consideration the mental suffering produced, if any, by the uttering of the slanderous words, if they believe from the evidence that such suffering has been endured by the plaintiff, Caroline Budwig, and the present or probable future injury, if any, to the plaintiff Caroline Budwig's character, which the uttering of the words was calculated to inflict. If you find for the plaintiff, she will be entitled at least to nominal damages without proof of actual damages." In *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713, the rule above stated was approved, and it was said: "In such case the jury should take into account the probable future as well as the actual past, and assess the damages once for all." We adhere to the rule announced in the foregoing decisions, and therefore the defendant's contention on this point cannot be sustained.

At the defendant's request two special questions were submitted to the jury, which were answered by them, and those answers he now vigorously assails. These questions were: First, "Do you find from the evidence that it is true that the defendant had sexual intercourse with the plaintiff at any time from and including July 7 to July 30, 1907?" Second, "Do you find from the evidence that it is true that defendant had sexual intercourse with plaintiff, as alleged in defendant's answer?" To each of the questions the jury answered "No." Those findings are amply sustained by the evidence. In fact we are unable to see how the answers could have been otherwise. It is claimed, however, that it was prejudicial error upon the submission of the questions to define sexual intercourse. While we are satisfied that such an instruction was unnecessary, yet we fail to see how it could have

resulted in any prejudice to the substantial rights of the defendant.

Complaint is made of certain rulings in the admission and rejection of evidence during the trial. We have carefully examined each of these assignments, and are satisfied that the record on this matter is without error.

Finally, it is contended that the verdict is excessive. This contention is without merit. It appears from the record that the plaintiff was an unmarried woman, 19 years old, of an excellent family, of good reputation, and was engaged in teaching school in Kearney county; that the defendant is a widower, engaged in farming, and a man of middle age. After the death of his wife, which occurred on the 20th day of January, 1907, he commenced to pay his attentions to the plaintiff, who was teaching in the school district where he resided. They kept company for some little time when they became engaged to be married. This was some time during the month of May of that year. The defendant insisted upon immediate marriage, while the plaintiff was of opinion that they should wait for at least a year out of respect to the memory of the defendant's dead wife. They continued to keep company with each other until the night of the 7th of July, 1907, at which time, while they were riding in a buggy, the defendant violently and brutally assaulted the plaintiff. That she successfully resisted him there can be no doubt. In the struggle that ensued she became somewhat confused, and at its conclusion was told by the defendant that he had accomplished his purpose. From that time on his course of conduct was such as to destroy the affection she had previously entertained for him, and on the 27th day of July she dismissed him, and refused to marry him or have any further communication with him. Thereupon defendant became enraged and desperate and at every opportunity and on many occasions spoke of and concerning her the slanderous words complained of. It was shown by the evidence that it was his purpose, as stated by himself, to bring her so

low and make her so vile in the eyes of the community that no other man would ever marry her, and that she would finally be compelled to marry him. Upon the trial her character was completely vindicated, and it can hardly be said, considering the enormity of the offense, that the damages awarded her are excessive. Indeed, they do not seem to us to be at all adequate or commensurate to the injury that the defendant has inflicted upon her. So the instruction by which the jury were told that they could consider the slanderous words spoken by the defendant of and concerning the plaintiff, both before and after the commencement of the action, to show malice or in aggravation of damages was, as above stated, error without prejudice.

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

AFFIRMED.

GEORGE W. MCKEE, APPELLANT, V. ERWIN GOODRICH, APPELLEE.

FILED MAY 21, 1909. No. 15,727.

Appeal: ESTOPPEL. A party, who by execution collects and receives so much of a judgment for costs as is in his favor, waives his right to prosecute error from the part thereof which is against him.

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

A. S. Moon, for appellant.

A. M. Robbins and *H. A. Robbins, contra.*

BARNES, J.

Action in replevin in justice court to recover the possession of three hogs. The property was taken by the officer and delivered to the plaintiff. There was a verdict

and judgment for the plaintiff for the possession of two of the hogs, and verdict and judgment for the defendant for the return of the other hog. On motion to retax the costs, plaintiff recovered a judgment against the defendant for his costs, and defendant recovered judgment against the plaintiff for the amount of his costs. The plaintiff had an execution issued, and collected his costs from the defendant, and thereafter prosecuted error to the district court from so much of the order and judgment of the justice as taxed the defendant's costs against him. It appearing from the amended transcript that the plaintiff had availed himself of so much of the judgment as awarded him costs against the defendant by suing out execution and collecting the same, the district court dismissed the error proceeding, and from that judgment the plaintiff has appealed.

Several questions are presented by the record, but it will only be necessary to consider one of them in order to correctly dispose of the case. The rule is well established in this jurisdiction that a party who voluntarily accepts the benefits or receives the advantage of a judgment or decree of the trial court is thereby precluded from afterwards prosecuting error or appeal. *Harte v. Castetter,* 38 Neb. 571. It is contended, however, that the rule above stated does not apply to the facts of this case, because the plaintiff only enforced so much of the judgment as was in his favor, and that this does not preclude him from appealing from so much of the judgment as was against him. In the case above cited the same contention was made, but the court said: "The doctrine that a party who accepts the benefit of a decree in his favor waives the right to prosecute an appeal is not limited in its application to those alone who have accepted the full amount awarded, but applies as well where there has been part acceptance. A party, by voluntary accepting under a decree a portion of the amount found due him, thereby as fully and completely recognizes the validity of the decree as if he had drawn the full amount allowed

him. If appellant desired to prosecute his appeal he should not have accepted any portion of the fund paid into court which was adjudged to be his. He was not compelled to accept the money, but could have allowed it to remain with the clerk of the district court until his appeal was decided. The acceptance of the money, under the circumstances disclosed by this record, precludes appellant from challenging the correctness or validity of the decree."

It may be said with equal force in the case at bar that the plaintiff cannot accept and enforce so much of the judgment as is favorable to himself and appeal from that part of it which is against him. He may enforce the judgment so far as it benefits him; but, if he recognizes its validity to that extent, he cannot question any part of it. If it was his desire to prosecute error from the judgment of the justice of the peace, he should not have taken out an execution and enforced the judgment as against the defendant. This case is clearly distinguishable from *Weston v. Falk,* 66 Neb. 198, and *Meade P., H. & L. Co., v. Irwin,* 77 Neb. 385, and hence they are distinguished herein.

The district court properly held that plaintiff had waived his right to prosecute error, and the judgment below is

AFFIRMED.

FAWCETT and DEAN, JJ., not sitting.

JAMES THOMPSON, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MAY 21, 1909. No. 15,624.

Railroads: DESTRUCTION OF CROPS: DAMAGES. Ordinarily the measure of damages for the destruction of growing crops is their value at the time and place of destruction, but in case of the destruction of a permanent or perennial crop, such as alfalfa, the measure of damages is the difference between the value of the land before and after the destruction of the crop.

APPEAL from the district court for Franklin county: ED L. ADAMS, JUDGE. *Reversed with directions.*

James E. Kelby, Byron Clark and *Frank E. Bishop,* for appellant.

George W. Prather, contra.

LETTON, J.

This is an action for negligence. Three causes of action are set forth in the petition. The first is for damages caused by fire negligently started by an engine on defendant's right of way, which burned about ten acres of alfalfa belonging to the plaintiff, the second is for similarly burning some hay and fence, and the third cause of action is for damages to certain fields of corn in the years 1903, 1904 and 1905, respectively, which it is alleged were occasioned by successive floods caused by the negligent manner of construction of the railroad embankment by which flood waters were held back and caused to overflow the land.

1. There seems to be no contention as to the second cause of action, so it will be unnecessary to give it consideration. As to the first cause of action complaint is made that there was no proof that the engine caused the fire complained of. This objection does not appear to be very seriously argued in the brief. Two witnesses testi-

fied that they saw the fire just after it started and before it was off the right of way; that a freight train had just passed, and that it spread from the right of way to the alfalfa field. Other evidence clearly identifies the fire which burned the alfalfa as that which started on the right of way.

2. It is next urged that the court erred in permitting the plaintiff to prove the damages on account of the destruction of the alfalfa crop by showing the value of the land before the crop was burned and its value after the crop was destroyed, and in instructing the jury that the measure of damages for the loss of the alfalfa would be "the difference in the value of the land with the stand of alfalfa as proved immediately prior to its destruction and the value of the land at and immediately after the destruction of the alfalfa." The court was within the rule approved in *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745. There is a difference in conditions between an ordinary annual crop and a permanent crop, such as alfalfa, which justifies and requires a different rule in the measurement of damages, and we are of the opinion that a fair criterion of the damage suffered by the destruction of a good stand of alfalfa would be the difference between the value of the land with such crop standing and growing upon it and the same land without such crop. We see no error in this instruction. This case is very similar to *Anderson v. Chicago, B. & Q. R. Co., ante,* p. 311, and several points argued by defendant as to the qualifications of witnesses and the competency of proof are covered by the opinion in that case.

3. As to the third cause of action, we are inclined to think that the complaint of defendant with reference to the manner of proving the damage to the corn crop is well founded. The plaintiff was permitted to show how much a matured crop of corn was worth an acre upon similar land in that locality in each year. In 1903 the corn was destroyed just as it was coming up, in 1904 it was destroyed before it had been cultivated, and the third year

it had been cultivated once before the flood. The proper measure of damages in such case is the value of the growing crop in the condition in which it exists at the time of its destruction. *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698; *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 70. No proof was offered to show the value of the crop at such time, the only evidence being as to the value of a matured crop of corn. The inquiry should have been directed to the value of the crop as it then stood. Under the rule stated in *Berard v. Atchison & N. R. Co.*, 79 Neb. 830, there was not sufficient competent evidence before the jury as to the value of the crop at the time of its destruction upon which to base a verdict. The value of a matured crop under like conditions on similar soil in the immediate locality might perhaps, in case the market value of the immature crop was difficult to prove, properly have been shown to the jury with other facts as a means of aiding them to reach a conclusion as to the value at the time of destruction, but this was the only evidence of value before the jury and was, therefore, misleading in its tendency.

A number of objections were made and overruled to questions relating to the manner in which the flood was caused, several of which were leading in their nature and seem objectionable. The answers to most of them were rambling and discursive in their nature, and neither questions nor answers are models of clearness and perspicuity in the use of language. They should not have been asked nor answered in such form; and, while we would not reverse the case if these were the only errors, at another trial the rules of evidence should be more strictly followed.

The jury made special findings as to the amount of damages upon each cause of action. The evidence being sufficient to sustain the verdict as to the first and second causes of action, the judgment of the district court is reversed and the cause remanded, with direction to render judgment on the special findings, as of the date of such

findings, in the first and second causes of action, with interest, and for further proceedings as to the third cause of action.

REVERSED.

GEORGE GOODLETT, APPELLEE, V. TRANS-MISSOURI MINING & DEVELPMENT COMPANY, APPELLANT.

FILED MAY 21, 1909. No. 15,699.

Appeal: EVIDENCE: DISCRETION OF COURT. The admission or exclusion of collateral evidence is ordinarily within the sound discretion of the trial court, and, unless there has been an abuse of this discretion to the prejudice of a party, its action in this regard will be upheld.

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

E. M. Bartlett and *W. N. Chambers,* for appellant.

John T. Cathers, contra.

LETTON, J.

This was an action to recover for services rendered by the plaintiff to the defendant as a mining prospector. The answer was a general denial. The evidence showed that the plaintiff, with others, was employed to prospect for the precious metals in Wyoming under a contract by which any lodes which he discovered were to become the property of the defendant company, and that he rendered the services as he claims. The only question is as to the liability of the company to pay him. The real defense is that at the time he was employed he refused to look to the company for payment for his services, but agreed to accept one Leopold Hahn instead of the company as the person responsible. It appears that Hahn was an old acquaintance of his. Hahn was a stockholder in the company, and had been requested by the secretary of the com-

pany to procure some experienced prospectors for the expedition. Mr. Bartlett, secretary of the company, testifies that the plaintiff, with Hahn and the other men employed, met at his office in the city of Omaha on the day they left for Wyoming; that he made out a check for the plaintiff for $40 advance wages; that Goodlett said he would not take the check, that he did not want to do anything with a foreign company in the way of contract; that his contract was with Mr. Hahn, and that he would look to Mr. Hahn for his money; that witness then said "that it would be so considered, that the money was given him on Mr. Hahn's account." This evidence is corroborated by Van Horn and Gallagher, the other men employed, but is squarely contradicted by Hahn and Goodlett. There is some other corroborative evidence of such an arrangement being then made. On the other hand, Goodlett and Hahn both testify that Goodlett was working for the company; that he never agreed to accept Hahn instead of the company as his paymaster, and that Hahn never agreed to be responsible for his wages. There is also in evidence a letter from Mr. Bartlett to Hahn, written just before the return of the expedition, concluding with the sentence, "If there are any unsettled matters between you and the treasurer and Mr. Goodlett, they will be settled on your return." Hahn was in charge of the property of the company, purchased the necessary supplies, and seemed to be the head of the expedition. Hahn testified that the company had sent him about $400 which he had used for the purchase of supplies and in part payment of money due him for services, and that the company still owed him about $500. The defendant offered in evidence a number of checks and drafts tending to show the receipt of over $1,000 by Hahn while in Wyoming, and offered to prove that fact. These offers were excluded by the court, and the argument in plaintiff's brief is directed mainly to the proposition that this was prejudicially erroneous.

The only issue in the case was whether or not the plain-

tiff had agreed to look to Hahn for his wages and to release the corporation from liability. While in Wyoming, Hahn conducted the correspondence with the secretary and treasurer of the company, and it is manifest from the evidence that in any event the money for wages would have been sent to Hahn. Both parties agree that the money was to come from the company in the first place and that Hahn was to disburse it. Unless by a fair inference the evidence offered would support the defendant's theory or negative the plaintiff's, the facts offered would have no evidentiary value and should have been excluded. Now, we are unable to see that the fact that money was sent to Hahn in excess of the amount to which he testifies can throw any light upon the question whether the plaintiff released the corporation from liability to pay for his services. This being so, it is difficult to see wherein the defendant was prejudiced by the exclusion of this testimony. It is collateral to the main issue, and its admission or exclusion was in the sound discretion of the court. We think this discretion was not abused in excluding it. The jury found upon the main issue that the plaintiff had never accepted Hahn and released the company, and there was ample evidence to warrant this conclusion.

We find no prejudicial error in the record. The judgment of the district court is

AFFIRMED.

J. H. CATRON ET AL., APPELLANTS, V. GEORGE A. DAILEY ET AL., APPELLEES.

FILED MAY 21,1909. No. 15,786.

1. **Drainage Districts:** ORGANIZATION. A majority in interest of the owners resident in this state of any contiguous body of swamp or overflowed lands in one or more counties in this state may sign articles of association for the formation of a drainage district under section 5561, Ann. St. 1907.

2. ———: ———: RESIDENT OWNERS. The words "resident owners," as used in said section, *held* to mean "owners resident in this state."

3. ———: ———. The district court may refuse to order the formation of such a district if none of the petitioners for the district reside within the county or counties in which the proposed district lies.

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

F. L. Carrico and *Hague & Anderbery*, for appellants.

W. S. Morlan, contra.

LETTON, J.

This is an appeal from an order of the district court for Harlan county denying the incorporation of a drainage district. J. H. Catron, E. K. Bradley, Bedie F. Bradley, his wife, and A. M. Munn filed their proposed articles of incorporation in the district court under the provisions of sections 5561-5597, Ann. St., 1907, praying for an order of incorporation. The petition set forth the limits of the proposed district, which included about 200 acres of land in Phelps county and about 520 acres in Harlan county, alleged it to be a contiguous body of wet, swamp, overflowed and submerged lands, and that the drainage thereof will be conducive of public health, convenience and welfare. It further states the names and residences of the owners of property within the district who refused to join in the organization. It is shown that those favorable to the organization own 480 acres and those opposed own 246 acres; that there are four persons, three of whom it is undisputed do not reside in Harlan or Phelps counties, favorable to the organization and seventeen people, six of whom live in Harlan and Phelps counties, who are opposed to the organization. All the owners of the land except two are residents of the state of Nebraska. Afterwards the owners who resisted

the incorporation of the district filed objections upon the grounds of lack of authority in the court, the unconstitutionality of the law, lack of public utility, lack of benefit to the objectors, that the petition was not signed by a majority in interest of resident owners, that a majority of the resident owners are opposed to the incorporation, and that the statements of fact are untrue, excepting as to the names and residence. After a hearing, the court found for the objectors, and dismissed the petition and articles of incorporation "for the reason and on the grounds solely that it does not appear that a majority in interest of the resident owners have made and signed the articles of association, for the reason that they do not reside on the lands or a portion of it sought to be included in the district, and further that they do not reside in the counties in which such lands are situated."

The evidence shows that the body of land which it is proposed to drain consists of a basin or depression which in seasons of long continued and excessive rain becomes filled with water and for which there is no escape or outlet except by seepage or evaporation; that sometimes long periods of years have elapsed without water accumulating to such an extent as to form a pond therein, but that on several occasions within the last 25 or 30 years it has been submerged at some points to a depth of ten feet at the deepest place. The land owned by the petitioners, Munn and Catron, was purchased by them in 1906, when it was covered with water, and for the purpose of forming a drainage district and having it drained. At the time of the hearing, Mr. Munn testified that the last time he saw it, about two months before the hearing, there was no water on the land, and that at the time of the trial he did not know whether it was under water or not. The first point necessary to determine is: Was the petition signed by the requisite number of qualified owners of land? The language of the statute is: "Section 5561. A majority in interest of the resident owners in any contiguous body of swamp or overflowed lands in

this state, situated in one or more counties in this state, may form a drainage district for the purpose of having such lands reclaimed and protected from the effects of water, by drainage or otherwise, and for that purpose may make and sign articles of association," etc. None of the owners, whether favorable or unfavorable, live within the boundaries of the district. The question is: Who are "resident owners"? Must they be residents in the swamp or overflowed lands, residents of the county, or residents of the state? A consideration of other language in the act referring to residents may aid in determining the meaning which should be attached to these words. Section 5562, relating to the service of process, provides for the issuance of summons and its service as in civil cases, "and in case any owner or owners of real estate in said proposed district are unknown, or are nonresidents, they shall be notified in the same manner as nonresident defendants are now by law notified in actions in the district courts of this state." Section 5565 provides that, if the district is organized, a meeting shall be called of the owners of real estate therein "for the purpose of electing a board of five supervisors, to be composed of the owners of real estate in said district, and a majority of whom shall be resident of the county or counties in which such district is situated." These are the only provisions in the act with reference to the residence of landowners. The objectors take the position that resident owners are persons who reside upon the land included in the drainage district, and cite a Kansas case (*Long v. City of Emporia,* 59 Kan. 46) in support of their contention. A statute required that, before condemnation proceedings might be had, "the city marshal shall serve notice upon each known resident owner of land to be taken." It was objected that it was not shown that the plaintiff was "a known resident owner." The court held that the allegation that he had for more than five years been in the actual possession and the resident owner of land was a sufficient statement that he was

"a known resident owner," and said: "The term 'resident owner' would seem to mean the owner residing on the land sought to be taken; otherwise there is nothing to indicate what the word 'resident' would signify." While, no doubt, this was the proper construction under the circumstances in that case, we are not sure that it applies in this case. If we should hold that no swamp or overflowed land can be drained until the owners residing "in any contiguous body of" such land petitioned, it might defeat the very object and purpose of the law, since the more unfit for cultivation and noxious to the public health such swamp or overflowed land may be, the less likely it is to have any owners residing "in" it. Such a construction of the statute does not seem reasonable. We are inclined to think that the word "resident" in this section should be construed in the ordinary sense in which it is used in legal proceedings as applying to a resident of the state. We are aided in coming to this conclusion by the language used in other sections of the law. The provisions in section 5562 as to service of summons makes the usual distinction between residents and nonresidents of the state, and in section 5565, treating of owners from among whom supervisors may be elected, the class of owners of real estate in the district is narrowed by the provision that a majority of the board of supervisors shall be residents of the county or counties in which the district is situated. If the petition must be signed, as appellants contend, by persons residing within the district who own a majority interest in the lands, why would it be necessary to provide that a majority of the board of supervisors must be residents of the county? This is not an enlargement, but a restriction, of the class of persons eligible to election to that position, and the object was to insure that persons in the locality affected should form a majority of the board. We think the language of the statute, if transposed as follows, would express the true intent of the legislature: A majority in interest of the owners resident in this state

of any contiguous body of swamp or overflowed lands situated in one or more counties in this state, etc. The qualifying words "in this state" evidently modify "resident owners," since the lands to be affected are required by the next clause to be lands "situated in one or more counties in this state," and the words "in this state," following the words "swamp or overflowed," unless understood to modify owners, would be tautologous.

We are fully satisfied that the strict and technical construction of the term "resident owners" contended for by the appellees would in many instances defeat the object and purpose of the law, and that it is our duty to adopt the more liberal and, as we think, the more reasonable and logical interpretation, in such manner as to uphold the promotion of enterprises for the public benefit. *Fass v. Seehawer,* 60 Wis. 525. Of the four signers favorable to the incorporation, only one claims to reside in the county where it is proposed to organize the district. The statute requires the election of "a board of five supervisors, to be composed of owners of real estate in said district, and a majority of whom shall be resident of the county or counties in which such district is situated." One of the grounds assigned by the district court for refusing to allow the incorporation is that the petitioners do not reside in the counties in which the lands are situated. The court must have had in mind this section of the statute. Unless the objectors should change their minds and consent to act, it would be impossible to organize the district for lack of supervisors. Only one of the petitioners avers he is a resident of the county in which the proposed district lies. We believe the district court was justified in refusing to declare the district organized until it was made apparent in some way that there were sufficient owners of land within the district residing in Harlan and Phelps counties from whom three members of a board of supervisors might be elected. No such number signed the proposed articles. The only petitioner who claims to be a resident of either

county is a single man whose place of business is far removed from the locality, and whom the district court of that county probably concluded was not a *bona fide* resident of that county. At least, his finding, when considered in connection with the evidence on this point, cannot be said to be unsupported.

Considering all the circumstances of the case as disclosed by the evidence, we cannot say that the findings of the district court are unsupported, and for that reason we are not justified in setting the same aside. The judgment of the district court is

AFFIRMED.

IN RE GEORGE C. LOOMIS ET AL.

FILED MAY 21, 1909. No. 16,168.

1. **Stolen Goods, Receiving or Buying.** "In this state the receiving or buying of stolen goods, with intent to defraud the owner, is not an accessory, but a substantive, offense, and a conviction may be had without regard to the person who stole the goods, or from whom they were received." *Levi v. State*, 14 Neb. 1.

2. ———: INFORMATION. The charge of buying stolen horses in this state, knowing the same to have been stolen, with intent by such buying to defraud the owner, states an offense, even though the charge further recites that the horses were stolen in South Dakota.

ORIGINAL application for writ of habeas corpus. *Writ denied.*

Sullivan & Squires, for petitioner.

William T. Thompson, Attorney General, George W. Ayres, John Tucker and *Wolcott & Morning, contra.*

LETTON, J.

This is an original application for a writ of habeas corpus. The parties in whose behalf the writ is applied

for were informed against in the district court for Cherry county on the charge of buying and receiving stolen horses, which had been stolen in the state of South Dakota, knowing them to have been stolen, and with the intent to defraud the owners. A demurrer was filed to the information, which was overruled by the district court. Pending further proceedings, this application was made upon the ground that the information and warrant upon which the prisoners are held are each void, for the reason that no offense against the laws of the state of Nebraska is charged.

It is contended that, since in this state, under the rule announced in *People v. Loughridge,* 1 Neb. 11, it is no crime to bring into the state property stolen in another state, it can be no crime to receive such property; that, since an act which may constitute the crime of larceny in this state may not be a crime in South Dakota, the courts of this state cannot try such question; that offenses against the laws of a sister state cannot be examined into or punished in this state; that, since, in order to commit the offense of horse stealing with which section 117 of the criminal code is mainly concerned, the horses must have been stolen in this state, the offenses of bringing stolen property, concealing the thief and concealing the animal, depending thereon and covered by the same section of the code, cannot be committed if the property was stolen outside of the state. By 3 and 4 W. and M. (Eng.) ch. 9, if a person received stolen property from the thief, knowing the same to have been stolen and with the intent to assist the thief in depriving the owner of his property, he is an accessory to the larceny. 1 Hale's Pleas of the Crown (Eng.), 618. Following this statute, in a number of states the offense is deemed to be accessorial in its nature. In *Engster v. State,* 11 Neb. 539, it was determined that this offense is a substantive crime in this state, and not accessorial, and that conviction may be had without regard to the person who stole the goods or from whom they were received. This case was followed in

Levi v. State, 14 Neb. 1, and *Ream v. State,* 52 Neb. 727. In the latter case it was contended that it was necessary for the state to allege and prove the conviction of the person by whom the property was originally stolen, but the court say: "That such was the rule under the former practice may be conceded, since one guilty of receiving and concealing stolen property is, at common law, treated as an accessory after the fact. But in this state the offense charged is an independent substantive crime, and the conviction of one charged therewith is in nowise dependent upon the prosecution of the original thief." There are two lines of authority upon the question of whether, in the absence of a statute, it is larceny to bring stolen property into another state than that in which the property was stolen. So far as this state is concerned, this question was settled at a very early period in the case of *People v. Loughridge,* 1 Neb. 11, in which it was held that the bringing into this state by the thief of goods stolen in another state is not larceny. This case was followed recently in *Van Buren v. State,* 65 Neb. 223. An interesting presentation of the arguments pro and con and the holdings of the several courts is to be found in 1 Bishop, New Criminal Law (8th ed.), secs. 140, 141. In this state, therefore, it is settled that it is not a crime to bring stolen property into the state, and that the offense of receiving stolen property is an independent substantive offense with no element of an accessorial nature.

The plaintiff contends, and a number of text-book writers upon this branch of the law seem to agree with him (12 Cyc. 210; 2 Bishop, New Criminal Law (8th ed.), sec. 1142*a*; Clark and Marshall, Law of Crimes (2d ed.), sec. 503), that it is not a crime to receive stolen property in a state other than that in which it was stolen, unless the laws of the state in which the property is received make it a crime to bring stolen property into the state. This is the English rule. *Regina v. Carr,* 15 Cox C. C. (Eng.) 129; *Regina v. DeBruiel,* 11 Cox C. C. (Eng.) 207. A contrary view is taken by Judge McLain,

1 Criminal Law sec. 720, wherein he says: "It has been held in England that if the goods were stolen outside of the kingdom there could not be a guilty receiving of them in the kingdom. In this country it has been held that it is immaterial that the goods were stolen outside of the state, and there is sometimes a statutory provision to that effect. The venue of the offense, if deemed a substantive one, is in the county where the goods are received; but, if it is accessorial in its character by the statute, the venue is where the goods were stolen." See, also, *Beal v. State*, 15 Ind. 378; *State v. Crawford*, 39 S. Car. 343; *Licette v. State*, 75 Ga. 253; *State v. Stimpson*, 45 Me. 608. The arguments of the applicant in this case are identical with those used in a case where it has been sought to convict one of larceny when he brings stolen property into a state where there is no statute making such an act an offense against the latter state. There seems to be no doubt that, where a statute makes bringing stolen property into the state a substantive crime against that state, such laws are constitutional and may be enforced. *People v. Williams*, 24 Mich. 156. The states of Michigan, New York, Illinois, Alabama and Mississippi have such statutes. In this state it was said by HOLCOMB, J., in *Van Buren v. State, supra:* "That the legislature may declare the bringing into this state property stolen in another an offense, and provide suitable punishment therefor, is abundantly supported by the authorities, but this phase of the subject is not before us." While this remark is *dictum*, still it indicates that the mind of the court does not run counter to the decisions of those states in which such a statute has been enacted and tested.

Under such statutes the first requisite to a conviction is that the property must be identified as belonging to the class of stolen property. It is the bringing of such property into the state that is made a crime. Now, it is no more difficult to identify stolen property in the case of a prosecution for receiving the same, knowingly and fraudulently, than in a prosecution for bringing such property

into the state. The right of the receiving state to punish, and the manner and quantum of proof that the property falls within the prohibited class, must necessarily be the same. If a statute may be enforced which punishes the bringing of stolen property within the borders of the state, it is difficult to see why a statute making the buying or receiving of such stolen property a crime may not also be enforced. The inquiry is the same in both cases. In the one case, is the property which is brought into the state "stolen property"? In the other, is the property purchased "stolen property"? We are unable to see any ground for distinction. If the statute makes it a crime to bring stolen property into the state, the bringing into the state is considered as a substantive offense committed against the receiving state. It is not an offense against the laws of the state where the property was stolen, and its prosecution is not, as is argued, an attempt to punish for an infraction of the laws of that state. There is no better nor more logical reason for holding that a conviction may be had in the one case than in the other.

The act of the legislature in either case is not obnoxious to the rule that one state will not admininister the penal laws of another, for the act denounced is one committed within the state, though the property received its taint outside of its bounds. What the legislature sought to prevent was the trade and commerce in stolen goods in this state. It had the right to make it a crime to receive goods of this character with the intent to defraud the owner, and this is the gist of the offense. It is immaterial that the owner may reside in another state. The prisoners are not charged with the infraction of the laws of South Dakota, but with the infraction of the laws of this state. It may or may not be necessary for the prosecution in its effort to establish the class to which the goods are alleged to belong to show that their original taking was in violation of the laws of South Dakota (*People v. Staples,* 91 Cal. 23; *Barclay v. United States,* 11 Okla. 503); but,

however this may be, it does not alter the fact that the offense described in the statute is one committed against the laws of this state.

Whatever may be the rule which is applicable in England under the peculiar conditions surrounding that "tight little island," the conditions existing along the northern and western boundaries of this state are such as require a common-sense interpretation of the statute. If we should construe the law as the relator contends, the effect would be to make possible a flourishing industry in receiving stolen horses and cattle in what is known as "the cattle country" in the western portion of this state, and to foster and build up the pernicious practices which the statute is intended to prevent. If the charge in this case is substantiated by the proof, a more striking illustration of the consequences liable to ensue could not well be had. The prisoners are charged with unlawfully buying and receiving 13 horses and mares with the intent to defraud the respective owners, well knowing all the property to have been stolen in South Dakota. The profit of such a commerce may be large, as this charge indicates.

It seems clear to us that stolen property is stolen property, wherever it may have acquired that distinctive character, and wherever it may be found, and that, where the receiving of it with the intent to defraud the owner is made a substantive crime, the locality of the theft or the personality of the thief is not material. The material questions are: does it belong to that class of property the buying of which is condemned by the statute? and was it bought with criminal knowledge and intent? If so, the buying with such knowledge and unlawful intent violates the statute.

For these reasons, we are of the opinion that the information charges an offense against the laws of this state, and that the prisoners are not unlawfully restrained of their liberty. The writ is

DENIED.

FAWCETT, J., not sitting.

JAMES S. CLAGUE ET AL., APPELLEES, V. TRI-STATE LAND COMPANY, APPELLANT.

FILED MAY 21, 1909. No. 15,686.

1. **Pleading:** ADMISSIONS. A statement in an answer that, if a contract was executed by a corporation, it is void because *ultra vires*, is an admission that the contract was made, notwithstanding a general denial in another paragraph of said pleading.

2. **Waters:** IRRIGATION: CONTRACT: ENFORCEMENT. A contract for the use of water, made for a valuable consideration with a corporation organized for the purpose of supplying water for irrigating land, that did not when made contravene the laws or policy of the state may, as between the parties or their successors in interest, be enforced, subject to all reasonable regulations, provided that the rights of other water users are not thereby unlawfully curtailed.

3. ———: ———: BREACH OF CONTRACT: LIABILITY. If a corporation engaged in the business of supplying individuals with water for the irrigation of arid or semiarid lands unlawfully and arbitrarily prevents the holder of one of its water contracts from using water for the irrigation of a field of growing potatoes, it is liable to the individual in damages.

4. ———: ———: ———: DAMAGES. In such a case the measure of damages is the value to plaintiff of the use of said right during the time he is deprived thereof, and it is not error to instruct the jury that the measure of plaintiffs' recovery "is the value of the crop at the time the water was shut out of said canal, with the right to irrigate it from that time on to the end of the season, less the value of the crop without the right to irrigate it from that time until the end of the season."

5. **Appeal:** INSTRUCTIONS: HARMLESS ERROR. If the court gives another instruction less favorable to plaintiffs on the same subject, it is error without prejudice to defendant, especially if it has requested practically the same instruction.

6. ———: EVIDENCE. In proving damages in such a case, considerable latitude should be given in the introduction of evidence, and a judgment will not be reversed because the court refused to strike out an answer not entirely responsive to an interrogatory, and to that extent not competent, where there is an abundance of other competent evidence in the record to support the verdict, and the only reasonable ground for contention upon the entire record is the amount of the recovery.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Wright & Wright and *Wilcox & Halligan,* for appellant.

Morrow & Morrow, contra.

ROOT, J.

Action for damages because of the alleged unlawful interference with plaintiffs' use of water for irrigating their farm. Judgment for plaintiffs, and defendant appeals.

The facts in this case are incident to the reorganization of the Farmers Canal Company, the sale of its assets under a decree of foreclosure, and the conduct of the grantee of the purchaser at said sale. Many of the facts relating to the evolution of said enterprise are detailed in *Farmers Canal Co. v. Frank,* 72 Neb. 136, and reference is hereby made to said opinion.

The original corporation was conducted as a mutual concern. The stockholders contributed small sums of money and a good deal of labor to construct the canal. In the fall of 1890 individuals, not owners of, nor subscribers to, the stock of the corporation, desired to acquire control thereof for speculative purposes. The corporate stock and other obligations were then represented principally by receipts issued to those who had paid money or contributed materials or labor for the construction of the canal. The main canal had been completed a distance of about ten miles from the headgate and about one-fourth the width originally contemplated, and the stockholders were receiving and using water from the main canal to irrigate their lands. The promotors of the reorganization and all of the stockholders of the old corporation evolved a scheme whereby the latter were to be protected in their investments and the control of the corporation given to the former without the payment of money. In

pursuance of this plan, the old company executed contracts conveying in severalty to said stockholders perpetual, preferred and nonassessable water rights, which, if valid in all particulars, gave the grantees in said instrument each an absolute right in perpetuity to the use of a number of cubic inches a second of water for irrigating any land that might be served from said canal at any point along its path within 40 miles of the headgate thereof, without the right of the corporation to prorate the use of water in said canal among said grantees on the one part and the subsequent purchasers of water from the corporation on the other, and without liability on the part of the original stockholders to pay for maintenance of the canal in the future. There is some evidence tending to prove that the promotors agreed that those contracts should be issued by the reorganized, and not the original, corporation, but all parties interested knew that the original corporation had assumed to issue the contracts and acquiesced therein. By virtue of said arrangement Joel Jackson received one of said contracts granting him the right to thus use 120 square inches of such water flowing under a five-inch pressure, but not describing any land upon which it was to be used. The contract was recorded, and thereafter Jackson used water from said canal to irrigate land owned by him. Subsequently he sold said land and water right, and his grantee, in turn, sold and assigned the water contract separate from the land, and by *mesne* conveyances plaintiffs became the owners thereof. In the spring of 1906, after said purchase, plaintiffs diverted the water from defendant's canal at a point about 14 miles from the headgate thereof, and had prepared to irrigate 40 acres of potatoes. In the latter part of July defendant commenced reconstructing its canal so as to irrigate an extensive tract of land not within the limits of the territory served by the ditch as constructed by the reorganized company. Meeting with determined opposition from the water users who had been receiving water out of the upper section of the canal, defendant built a

dam therein some distance above plaintiff's headgate, and cut the banks of the ditch below said obstruction. Plaintiffs could not secure water from any other source, and claim that their potatoes were seriously injured and that they were damaged thereby.

1. Independent of some questions of practice, defendant argues that the aforesaid contract was void and not within the chartered power of the corporation to make, because it purported to give the holder an unlawful preference in the use of water, and illegally sought to shoulder on other water users the entire cost of maintaining the canal, and, finally, that the use of water for irrigation is inseparably attached to land and cannot be conveyed separate therefrom. There is not a particle of evidence to show that defendant was under the necessity of, or that it attempted to, prorate the use of any water in its canal, nor that it had levied a maintenance tax which plaintiffs had refused to pay. Defendant arbitrarily shut off the water for its own convenience. We therefore do not determine the effect of those clauses in said conveyance.

Concerning the power of the Farmers Canal Company to convey the water right under consideration without reference to a specific tract of real estate, it may be said that the corporation had theretofore appropriated water and constructed its ditch with reference to the land now owned by plaintiffs, as well as that owned by Jackson when the contract was made with him. The corporation received from Jackson $20 and the use of a team for a year in consideration of said agreement. The corporation was organized, and had appropriated the water prior to the enactment of the law of 1889, and had executed said contract before the passage of the present irrigation law in 1895. At the time Jackson surrendered his claims against, and interest in, the corporation for said contract, the state had not announced its policy to attach the use of water appropriated for irrigation purposes to designated tracts of land, and it is not claiming in the instant

case that the use of its water is being misapplied by plaintiffs, nor are any other water users insisting that their rights are in any manner infringed by the use aforesaid. In irrigating said land, plaintiffs were applying the water to the purposes for which the corporation had appropriated it, and as between the parties hereto, upon the facts before us, we are of opinion that plaintiffs acted within their legal rights. *Strickler v. City of Colorado Springs,* 16 Colo. 61; *Oppenlander v. Left Hand Ditch Co.,* 18 Colo. 142; *Cache La Poudre Irrigating Co. v. Larimer & Weld Reservoir Co.,* 25 Colo. 144; *Middle Creek Ditch Co. v. Henry,* 15 Mont. 558; *Hall v. Blackman,* 8 Idaho, 272; *Johnston v. Little Horse Creek Irrigating Co.,* 13 Wyo. 208.

2. The court instructed the jury that the measure of plaintiffs' damage was "the value of the crop at the time the water was shut out of said canal with the right to irrigate it from that time on to the end of the season, less the value of the crop without the right to irrigate it from that time until the end of the season." Defendant requested an instruction that such measure was "the difference between the value of the crops growing on plaintiffs' land as set out in the petition immediately before and immediately after the injury complained of." The instruction requested would be proper if the injury had been inflicted by one act or at one time so that a comparison of the crop just before and immediately subsequent to the transaction would demonstrate the extent of the injury and the amount of the damage. In the instant case the injury resulted from withholding the water for several consecutive weeks. In the meantime the crops had made some progress. If the comparison were made immediately after all injury had been inflicted, defendant would have the benefit of the increased growth and value of the potatoes which had accrued notwithstanding the handicap imposed by cutting off the water. If the application were made immediately before and immediately subsequent to the damming of the canal, then a just estimate could not

be made without a consideration of the result of the continued deprivation of water during the growing season. Plaintiffs were damaged to the extent of the value to them of the use of the water during the growing season for their crop, and the instruction given fairly presented that principle to the jury.

In the sixth instruction given by the court on its own motion the jurors were informed that the plaintiffs' damages would be "the difference between the fair market value of the growing crop in its condition at or just before it was damaged by reason of defendant's failure and neglect to carry and deliver water and its fair market value immediately after the damage was done." Defendant argues that this instruction is in conflict with the second one given by the court. In so far as it conflicts, it is to defendant's advantage. The first one given more nearly approximates a proper measure of recovery, and receives our approval under the facts in this case. If the jury followed either, defendant ought not to complain.

3. Defendant insists that the court erred in instructing the jury that the execution of the contract was admitted. Evidently counsel have overlooked the allegations in the fourth paragraph of their answer that, "if said Farmers Canal Company issued the water contracts as set out in plaintiffs' amended petition, it acted *ultra vires,* * * * and said alleged contracts were issued without consideration." Thereby defendant admitted the execution of the contracts. *Dinsmore & Co. v. Stimbert,* 12 Neb. 433; *Home Fire Ins. Co. v. Johansen,* 59 Neb. 349.

4. Complaint is made concerning the admission of evidence as to the extent of plaintiffs' damage. Witnesses were permitted to testify to what in their judgment would have been the yield of potatoes if the land had been irrigated; also, to state the actual yield and the market value of potatoes in the fall; also, to say what the potatoes were worth at the time the water was shut off, but with the right to continue the use of such water during the growing season. The witness Foreman qualified as an expert,

and was asked concerning the value of the potatoes at the time the water was shut off, and stated: "All the conditions being favorable for the crop from that on, I should say that the crop would bring $100 an acre." The court refused to strike this answer out. Plaintiffs' counsel then asked the witness to give his judgment based on the hypothesis that the crop could be irrigated, but excluding the further assumption of favorable conditions, whereupon counsel for defendant objected that the witness had answered such a question, and the objection was sustained. The answer was not strictly responsive to the question, and the assumption of continued favorable conditions was not the proper one upon which to predicate an opinion as to the value of the crop on the 1st of August. *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657; *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745. In view of the position assumed by counsel that the answer given to the first question was an answer to the subsequent one, which clearly called for a different and proper answer, and because there was an abundance of other competent evidence to sustain the verdict returned, the error is without prejudice.

On the entire record we find that plaintiffs should prevail; that the only room for legitimate contention was as to the amount of the verdict. The court gave each party a wide latitude in making proof. No serious errors were committed, justice has been done, and the judgment of the district court is

AFFIRMED.

DOUGLAS COUNTY, APPELLEE, V. CHARLES T. KOUNTZE, APPELLANT.

FILED MAY 21, 1909. No. 15,700.

1. Taxation: INHERITANCE TAX: REVIEW. If this court assumes jurisdiction on an appeal from an order appointing an appraiser to ascertain the amount of an inheritance tax alleged by the authorities to be due, it will go no further than to ascertain whether there was any property subject to such appraisement.

2. ———: ———: PERSONS LIABLE. The beneficiaries in a voluntary deed of settlement made by a resident of the state, who was domiciled therein at the time of his death, which provided that a foreign trustee should hold certain stocks of a Nebraska corporation, yielding the profits therefrom to the settlor during his life, and upon his death to transfer said stocks to the first named beneficiaries, are subject to the payment of an inheritance tax upon the transfer of said stocks to them, and the trustee is also personally liable therefor.

3. ———: ———: ———. The aforesaid settlor provided in said deed that his trustee should, upon the death of the settlor, transfer to two named trustees certain stocks in trust for a beneficiary, but that, if the settlor in his last will and testament should devise other property on trusts for the benefit of said beneficiary, then the trustees named in the deed of trust should hold said stocks on the terms named in the will for the benefit of the beneficiary. *Held*, That, although the trustee in the deed of trust resided in New York and had manual possession of said stocks at the time the settlor died, yet, if the settlor did make a provision in his will as aforesaid, that the beneficiary in the deed of trust must trace her succession through said will, and that she was subject to pay an inheritance tax, for which the trustee was also liable.

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

Isaac E. Congdon, for appellant.

James P. English and *Alfred G. Ellick, contra.*

ROOT, J.

On the 20th day of November, 1906, Herman Kountze departed this life a resident of and domiciled in the city

of Omaha. His estate was administered in said county and an inheritance tax paid in conformity with the laws of Nebraska upon all property which his representatives concede was subject thereto. In September, 1907, the county of Douglas applied to the county judge for the appointment of an appraiser to the end that a tax might be levied upon the succession to certain other property claimed to be subject to said tax. Charles T. Kountze, a son of the deceased, filed objections, and alleged therein that on the 15th day of August, 1904, Herman Kountze executed a certain writing as follows: "Know all men by these presents: That Herman Kountze of the city of Omaha, county of Douglas, and state of Nebraska, for a good and valuable consideration, does hereby sell, transfer, assign, set over and deliver unto Augustus F. Kountze of the city, county and state of New York, but in trust, however, for the persons and purposes hereinafter named and as hereinafter set forth, all and signular the bonds, shares of stock and personal property hereinafter described, and all and singular the right, title, interest and ownership of Herman Kountze in and to any and all thereof. * * * Said Augustus F. Kountze shall as trustee during the continuance of the trust have, hold, manage, and control all of said bonds, shares of stock and personal property and the increment of any and all thereof and all proceeds or other property coming from any sales, exchanges or reinvestments of any or all thereof, with the rights and powers concerning and for the uses and persons as follows: He shall at all times have and is hereby given the full right, power and authority to manage, act with reference to and upon, any and all of the same so as to most advantageously serve, care for and preserve the trust property in accordance with his best judgment; but he shall at no time sell, exchange, incumber, or in anywise dispose of any part of the trust property without the written consent of said Herman Kountze. At no time shall said Augustus F. Kountze be liable to any person whomsoever for any loss occasioned through

error or judgment. Said Augustus F. Kountze as trustee shall pay to said Herman Kountze, during the lifetime of said Herman Kountze, for his own use and enjoyment, and when and as received by said Augustus F. Kountze, any and all incomes of the trust property and any and all distributions as dividends or otherwise that may be at any time made by any corporation or concern in which any shares of stock or interests are held by said Augustus F. Kountze as trustee. Upon the death of said Herman Kountze the trust shall end, and said Augustus F. Kountze as trustee, or his successor in the trust, shall thereupon close the trust and make distribution of the property of the trust estate, in kind so far as may be practicable, and if impracticable to distribute in kind then he may reduce so much of the property to money as he may deem necessary and make distribution thereof, to the following persons and in the following portions: To Clara Sarah Kountze, the wife of said Herman Kountze, one-seventh of all thereof, provided she be living at the time of the death of said Herman Kountze; to Augustus F. Kountze and Charles T. Kountze in trust for Eugenie Kountze Nicholson one-seventh of all thereof; to Augustus F. Kountze one-seventh of all thereof; to Charles T. Kountze one-seventh of all thereof; to Herman D. Kountze one-seventh of all thereof; to Luther L. Kountze one-seventh of all thereof; to Charles T. Kountze and Luther L. Kountze in trust for Gertrude Kountze Stewart one-seventh of all thereof. Should Clara Sarah Kountze die before said Herman Kountze the one-seventh which would be hers should she survive said Herman Kountze shall go and belong to such persons, and in such portions, as would in the event of her death before the death of Herman Kountze take the one-seventh of the residue of the personal property of Herman Kountze which he may bequeath to her in his last will and testament. Said Augustus F. Kountze and Charles T. Kountze shall hold the one-seventh which shall pass to them hereunder as trustees for Eugenie Kountze Nicholson for such time

and with powers and duties concerning exactly similar to the time and powers and duties concerning the portion of the residue of the property of said Herman Kountze which, in his last will and testament, he may provide shall go to trustees for her; and if in his last will and testament said Herman Kountze does not provide that trustees shall take any part of his property for Eugenie Kountze Nicholson then Augustus F. Kountze as trustee hereunder, or his successor in the trust, shall deliver one-seventh of the trust property referred to herein to Eugenie Kountze Nicholson direct, and she shall have the same freed from any trust. Said Charles T. Kountze and Luther L. Kountze shall hold the one-seventh which shall pass to them hereunder as trustees for Gertrude Kountze Stewart, for such time and with powers and duties concerning exactly similar to the time and powers and duties concerning the portion of the residue of the property of said Herman Kountze which, in his last will and testament, he may provide shall go to trustees for her; and if in his last will and testament said Herman Kountze does not provide that trustees shall take any part of his property for Gertrude Kountze Stewart then Augustus F. Kountze as trustee hereunder, or his successor in the trust, shall deliver one-seventh of the trust property referred to herein to Gertrude Kountze Stewart direct, and she shall have the same freed from any trust. In the event of the death of either Augustus F. Kountze or Charles T. Kountze before or after the death of Herman Kountze, or in the event that either of them should be unwilling or incompetent to act, then Herman D. Kountze or Luther L. Kountze, being willing and competent to act, in the order named, shall with reference to the trust for Eugenie Kountze Nicholson become the successory trustee; and in the event of the death of either Charles T. Kountze or Luther L. Kountze before or after the death of Herman Kountze, or in the event that either of them should be unwilling or incompetent to act, then Augustus F. Kountze or Herman D. Kountze, being willing and com-

petent to act, in the order named, shall with reference to the trust for Gertrude Kountze Stewart become the successory trustee; the purpose being that there shall be two trustees for each trust, but that if at any time only one of said mentioned four be living and willing and competent to act the survivor or one willing and competent to act shall be sole trustee for each trust. If all of said mentioned four should die during the continuance of the trusts the same shall end. If either Eugenie Kountze Nicholson, Augustus F. Kountze, Charles T. Kountze, Herman D. Kountze, Luther L. Kountze, or Gertrude Kountze Stewart should die before the death of Herman Kountze then the one-seventh of the trust property herein which would have gone to the one dying had he or she survived said Herman Kountze, shall go to such persons and in such portions and manner as may be provided in the last will and testament of said Herman Kountze for the passing of the one-seventh of the residue of the property of said Herman Kountze devised and bequeathed to the one so dying. In the event that Augustus F. Kountze should die before the death of Herman Kountze, or before performing all of his duties as trustee hereunder, or should resign or become incompetent to act, then Herman D. Kountze, Charles T. Kountze or Luther L. Kountze being willing and competent to act, in the order named, shall become the successory trustee; and should the trust hereunder devolve upon either Herman D. Kountze, Charles T. Kountze or Luther L. Kountze and the one upon whom the trust devolves should die or become incompetent then the eldest of said persons surviving and willing and competent to act shall become the trustee; and the trust hereby created concerning the property herein described shall never fail for want of a trustee. In testimony whereof I have hereunto set my hand in the city of Omaha, county of Douglas, and state of Nebraska, on this 15th day of August, A. D. one thousand nine hundred and four (1904). Herman Kountze. In the presence of Isaac E. Congdon."

Said instrument was executed in Omaha, where Herman Kountze then resided and was domiciled. The trustee accepted said trust in said city and there received the stocks and bonds in said deed of trust described. No money or property passed between the settlor and the trustee in consideration of said trust. The trustee was then, and at all times thereafter has continued to be, a resident of the city of New York, and, contemporaneous with his acceptance of said trust, took actual possession of said securities and transferred them to New York, where they have since remained. The securities are intact, but the dividends accruing thereon have been collected and were paid Herman Kountze during his lifetime. All of said beneficiaries are in life and of full age. Eugenie Kountze Nicholson is a resident of Indiana, where she resided in 1904. Augustus F. Kountze and Herman D. Kountze then resided and have continued to reside in the state of New York, and the remaining beneficiaries reside in Nebraska and so resided in 1904. Said trustee, acting on legal advice, submitted said property to the authorities of the state of New York and paid an inheritance tax assessed thereon by said officials, but refuses to concede such right to the authorities of Nebraska. The trustee refuses to distribute the securities at any place other than New York. Said stocks and bonds were issued by corporations organized in states other than Nebraska, except the stock of the United Real Estate and Trust Company, which is a Nebraska corporation. The county demurred to said showing, and its demurrer was sustained. The trustee elected to stand upon his answer, which was dismissed and an appraiser appointed. The trustee gave bond and appealed to the district court. No pleadings seem to have been filed therein, but the court evidently acted upon and sustained the demurrer filed in the county court and confirmed its order. The trustee appeals to this court.

Counsel for the respective litigants have filed interesting briefs and made instructive arguments concerning the

jurisdiction of the taxing authorities to levy an inheritance or succession tax upon the respective beneficiaries under the deed of trust. It is not proper to, nor will we, determine all of those questions. We are inclined to question the right of the trustee to appeal from the order made, for the reason that it did not necessarily prejudice him nor those whose rights he is defending. In any event, we shall go no further than to ascertain whether, under the facts in this case, it appears that the succession to any of the gifts made in the deed of settlement exhibited by the trustee is subject to said tax. The interests transferred to the beneficiaries under the deed were intended to take effect as to enjoyment by all of said beneficiaries, and as to possession by some of them, upon the death of the settlor, and are within the plain meaning of section 11201, Ann. St. 1907. To the argument of the trustee that at the time of the settlor's death all of said property was permanently located outside the limits and without the jurisdiction of the state of Nebraska, it may be said that the property represented by 5,224 shares of the capital stock of the United Real Estate and Trust Company, a Nebraska corporation, was for the purposes of said act within this state, and title thereto can only be transferred by virtue of the laws thereof. The complete devolution of said title must take place under the protection and according to the laws of Nebraska, and that succession is subject to the inheritance tax. *Neilson v. Russell,* 69 Atl. (N. J.) 476; *Gardiner v. Carter,* 74 N. H. 507, 69 Atl. 939. It will also be observed that the interests of the beneficiaries Eugenie Kountze Nicholson and Gertrude Kountze Stewart cannot be absolutely ascertained from a consideration of the deed of settlement, because the settlor therein reserves the right to limit in his will the terms upon which they may enjoy his bounty. The record does not disclose whether Herman Kountze made a will or not. If he did and therein exercised the right which he reserved in the deed of settlement, then said beneficiaries must trace their succession through said will and by grace

of the laws of Nebraska, and that devolution is subject to the inheritance tax.

It is argued that, as the beneficiaries have paid one inheritance tax in New York, equity and good conscience dictate that a second burden should not be laid in Nebraska. The question presented is not one of general equities, but of jurisdiction. It has been held, and logically, that the taxing authorities must be controlled solely by the laws of the state, and not by proceedings in another and distinct jurisdiction, to ascertain whether or not a certain tax should be levied or collected. Payment in the one state is not a defense when called upon to pay in the other, unless so provided by law. *Mann v. Carter,* 74 N. H. 345, 68 Atl. 130; *Blackstone v. Miller,* 188 U. S. 189.

The county court was right in appointing an appraiser. The district court ruled properly in sustaining that appointment, and its judgment is

AFFIRMED.

LETTON, J., concurring.

While I concur in the opinion, I seriously doubt whether the appeal was not prematurely taken. The statute provides for the appointment of an appraiser upon the application of any interested party who shall give notice to such persons as the county judge may by order direct of the time and place of the appraisement, and may compel attendance of witnesses and take evidence under oath concerning the property and the value thereof, and provides further for reporting the same to the county judge, who shall fix and determine the value of the property and the tax to which the same is liable. It provides further for an appeal to the county court by any person or persons dissatisfied. I think the proper practice would have been for the parties interested to wait until they were injured by some order or judgment before they sought to review the same. This is the view taken as to the manner

of procedure, in New York. *In re Astor's Estate,* 6 Dem. Sur. (N. Y.) 402, 2 N. Y. Supp. 630; *In re Estate of Ullmann,* 137 N. Y. 403, 33 N. E. 480.

EQUITABLE LAND COMPANY, APPELLEE, V. THOMAS S. ALLEN, APPELLANT.

FILED MAY 21, 1909. No. 15,707.

1. Mortgages: FORECLOSURE OF JUNIOR MORTGAGE. In an action by a junior mortgagee to foreclose his lien, a senior mortgagee whose mortgage is past due is a proper party, but, if the latter mortgage was given to secure the payment of negotiable promissory notes which were sold and transferred before the commencement of said action, the transferee will not ordinarily be precluded by the foreclosure from asserting his lien in an independent action.
2. ———: FORECLOSURE: REDEMPTION. If a junior lienor is not made a party to the foreclosure of a superior lien, he may redeem from the decree.
3. ———: ———: PRIORITIES. If a lienor holds a first and third lien on real estate, and forecloses without making the holder of an intermediate lien a party, the latter, after offering to redeem from the first lien, may prosecute an action in foreclosure, making the first named lienor, as well as the holder of the equity of redemption, a party, and the court in said action should settle the rights and priorities of all the parties, and, if all parties in interest are before the court, the first decree will be merged in the later one, and a recitation vacating the first decree will not be reviewed in this court where it is apparent that the parties thereto were not prejudiced thereby.

APPEAL from the district court for Perkins county: ED L. ADAMS, JUDGE. *Affirmed.*

Samuel J. Tuttle, for appellant.

B. F. Hastings and *Tibbets, Morey & Fuller, contra.*

ROOT, J.

In 1893 White and wife owned the land described in the pleadings, and executed to the McKinley-Lanning Loan & Trust Company, a corporation, their negotiable

promissory note due in five years with annual interest coupons, and secured the payment thereof by a mortgage upon the aforesaid real estate. The mortgage was duly recorded. In 1894 White and wife executed a mortgage subject to all subsisting liens upon said land to Kimble G. Smith. Subsequently Smith purchased a tax lien upon said premises. In 1898 the note first described, for value, became the property of the Equitable Land Company, a corporation, plaintiff herein. The mortgage was also assigned, but the assignment was not recorded. In July, 1901, Smith commenced an action in the district court to foreclose his mortgage and tax lien, making the Whites and the McKinley-Lanning company sole defendants, and in October of the same year a decree was rendered by default in his favor against all of said defendants. Thereafter the land was advertised for sale, but for various reasons was not sold. In October, 1902, the Equitable Land Company commenced an action in the district court to foreclose its said mortgage, and therein made the Whites, said Smith, John Doe and the McKinley-Lanning Company defendants. February 23, 1903, the Equitable Land Company commenced another action in said court against Smith alone to vacate his decree, and for the purpose of making the Equitable company a defendant therein and to foreclose its mortgage. Said plaintiff offered to redeem the land from Smith's tax lien. No answers were ever filed in the foreclosure suit instituted by the Equitable Land Company. The court consolidated both actions of the Equitable Company, and, after trial, vacated the decree of foreclosure rendered in favor of Smith, and found that he had a first lien on the land by virtue of his tax certificate; that the Equitable company's mortgage constituted a second lien and the Smith mortgage a third lien, and substituted Mr. Allen for Smith, the court having been satisfied in some manner that such substitution was proper. The Equitable company was given the right to redeem from said tax lien, and all liens were foreclosed. Mr. Allen appeals to this court.

As we understand counsel's argument, he claims that Smith did not commit any fraud in procuring his decree of foreclosure; that the facts alleged in the petition to vacate that judgment are not sufficient to authorize relief in equity or under the code, and therefore the decree is contrary to law and should be reversed. Counsel concedes that, as the Equitable Company was not a party to the Smith foreclosure, it was not bound thereby, and, as against the holder of the equity of redemption or a junior lienor, it had the right to foreclose its mortgage notwithstanding the former action. *Studebaker Mfg. Co. v. McCargur,* 20 Neb. 500; *Todd v. Cremer,* 36 Neb. 430. To the extent that Smith by virtue of his tax purchase may be said to be the senior lienor, plaintiff had the right to redeem. *Renard v. Brown,* 7 Neb. 449; *City of Lincoln v. Lincoln Street R. Co.,* 75 Neb. 523. Plaintiff recognized Smith's superior lien to the extent of his tax purchase, and before as well as during suit offered to redeem therefrom. The decree appealed from is the only one rendered in an action wherein all parties in interest were before the court.

So much of the decree as foreclosed the liens of the various parties and fixed their priorities was confessed by Mr. Allen's predecessor in interest by his failure to answer to plaintiff's petition in foreclosure. If the Equitable company had been a party to Smith's action, the last decree of foreclosure would measure the rights of the parties and prevail in so far as it might conflict with the former. *Sharon v. Sharon,* 84 Cal. 424; *Cooley v. Brayton,* 16 Ia. 10; *Stoltz v. Coward,* 10 Tex. Civ. App. 295.

For much stronger reasons, the last decree rendered fixes the rights of all parties thereto, and overrides the first decree, and it is immaterial under the facts in this case whether the court in the last decree vacated the former one or not.

The judgment of the district court therefore is

AFFIRMED.

ANTON ANDERSON, APPELLEE, V. JOSEPH OHNOUTKA, APPELLANT.

FILED MAY 21, 1907. No. 15,708.

1. **Vendor and Purchaser:** FAILURE OF TITLE: REMEDY. If a vendee in possession of real estate, because of his vendor's inability to convey a good title, sues to recover back partial payments made upon the contract and money expended for improvements made by him on said real estate, and for taxes paid, and does not allege nor prove that defendant is insolvent, nor claim any other equity sufficient to overcome the general rule, he is not entitled to an unconditional money judgment.

2. ——: ——: DAMAGES. In an action by a vendee for breach of a contract to sell real estate because defendant cannot convey a good title, if the former prevails, he is entitled to recover for all money paid by him, whether interest or principal, upon said contract, the money paid by him for taxes on the land, for the reasonable value of the improvements that he in good faith placed upon the premises, with interest from the date of each expenditure made by him as aforesaid, and also such a sum as will indemnify him for the loss of his bargain.

3. ——: ——: ——. In such an action plaintiff will not be permitted to recover for premiums paid to insure such property while he had possession thereof.

4. ——: ——: ——: SET-OFF. As against the aforesaid items of damage, the vendor is entitled to set off the reasonable rental value of the premises while held by plaintiff, with interest thereon from the close of each year's possession by the vendee.

APPEAL from the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

H. Gilkeson and *Charles H. Slama,* for appellant.

E. E. Placeck and *John L. Sundean, contra.*

ROOT, J.

Action for damages because of defendant's alleged inability to convey good title to real estate in conformity with the terms of a contract between the parties hereto. Plaintiff prevailed, and defendant appeals.

Plaintiff alleges that at all times he has been ready and willing to perform said contract, but that defendant cannot because of an outstanding interest in said premises. Plaintiff prays judgment for the loss of his bargain and for the money paid on said contract, with interest, and for money paid out for repairs, taxes and insurance. Dedendant admits that there is a possible outstanding dower interest in said property, but denies all other alleged infirmities in his title to said real estate, and alleges that plaintiff by virtue of said contract took, and still retains, possession of said lot, and has refused and still refuses to deliver possession thereof to defendant, although requested by him so to do, and that, if plaintiff is entitled to recover, then defendant counterclaims for the use and occupation of said premises. During the trial it was admitted that defendant's title was imperfect; that plaintiff had not paid anything on his contract since 1904, and was then in default in his payments, and that, preceding the commencement of this action, defendant had demanded that plaintiff surrender possession of said property, which he refused and still refuses to do.

1. Defendant objected to the introduction of any evidence because of the insufficiency of plaintiff's petition, and at the close of plaintiff's case moved that said petition be dismissed. The objection and motion were overruled. A jury was waived. The court found a balance due plaintiff and entered judgment therefor, but in no manner provided for the delivery of the possession of the premises to defendant. There is neither allegation nor proof that defendant is insolvent, nor that possession of the real estate is necessary to protect plaintiff in the collection of the balance justly due him from defendant on an accounting. As the case stands, plaintiff has judgment against defendant and possession of his lot. Plaintiff may issue execution and collect his judgment, and defendant must prosecute another action for the recovery of his property, which plaintiff will be enjoying rent free in the meantime. Defendant argues that *Nolde v. Gray,* 73 Neb. 373,

is decisive of this case. The cases may be distinguished. In the cited case plaintiff sued to recover partial payments and loss of profits, but retained possession of and claimed to own the land, whereas in the instant case plaintiff retains possession of, but does not claim to own, the real estate in controversy. In Nebraska there is but one form of action under the code. All distinctions between actions at law and suits in equity are abolished, and a litigant may receive whatever relief the admitted or established facts alleged in his pleadings entitle him to. We are not prepared to say that, upon proper allegations and proof of defendant's insolvency or of any other sufficient fact appealing to the conscience of the chancellor, the court ought not to permit plaintiff to remain in possession of the premises until fully paid the balance due him from his vendor, but we do not find anything in the pleadings or evidence for this possible departure from the reasoning in *Nolde v. Gray, supra.*

2. If this case should be retried and an accounting again taken, we are of opinion that defendant ought to be charged with all money received by him on said contract, whether as interest or principal, with 7 per cent. interest thereon from the date of each payment; also, with the money paid by plaintiff for taxes on the lot in controversy and for repairing the buildings or improving the premises, with a like allowance of interest. Defendant argues that he should only be charged for permanent improvements, but the proof establishes that only such repairs were made as a landlord would have been compelled to make to induce an ordinary tenant to rent the house, and in our judgment equity and good conscience demand that plaintiff should be reimbursed for those expenditures. The money paid for insurance was for plaintiff's sole benefit, and defendant ought not to pay therefor. The insurance did not preserve the property nor enhance its value to defendant. If the house had been destroyed by fire, plaintiff, and not defendant, would have received the insurance. On the other hand, plaintiff should pay rent during

his occupancy of the premises, with 7 per cent. annual interest on each year's rent from the close of that year. *Lancoure v. Dupre,* 53 Minn. 301. It is suggested that the use of the premises should be set off against that of the money. The argument might appeal to us if all of the purchase price had been paid at the time plaintiff took possession of the property, but it would not be just to permit the use of the partial payments to satisfy the rental of property worth more than their aggregate.

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

REVERSED.

CHARLES F. ROSS, APPELLANT, V. DANIEL CRAVEN ET AL., APPELLEES.

FILED MAY 21, 1909. No. 15,717.

1. **Statute of Frauds:** SALE OF LANDS. The contract of an agent in the name of his principal, for the sale of lands in Nebraska, is void under the statute of frauds unless the former's authority is in writing.
2. ———: ———. A letter written by a landowner to a real estate broker, stating the terms upon which the former is willing to sell his land, does not clothe the latter with authority to execute a contract in the former's name for the sale of such real estate.
3. **Vendor and Purchaser:** OFFER: ACCEPTANCE. An acceptance of a written offer to sell land must conform strictly to the terms of such offer to create a contract.
4. **Statute of Frauds:** PLEADING. If plaintiff's case is based upon a contract which he claims was executed by defendant's authorized agent for the sale of real estate in Nebraska, and the answer is a general denial of all allegations in the petition other than those relating to defendant's title to said land, defendant is entitled to the protection of the statute of frauds.

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

R. R. Dickson, for appellant.

M. D. Tyler and *G. W. Shields, contra.*

ROOT, J.

Action for specific performance. Decree for defendants, and plaintiff appeals.

Plaintiff claims that one Johnson, as Craven's agent, sold him the land in controversy October 2, 1906, and that Johnson's authority to make said sale is evidenced by Craven's letter, as follows: "Norfolk, Neb., Sept. 14, 1906. J. N. Johnson, Inman. Dear Sir: Your's rec'd, and I think we understand each other as to terms, only I want it all cut. It would not be fair to cut the best and let the other go. In regard to price I will say the mortgage is due Dec. 1st, but I think it can be extended however. I will take $1,800 cash, and I will pay mortgage and give clear title. This offer will last not longer than Dec. 1st, '06. Or will take $1,200 cash and mortgage for $700 at 7 per cent. int. anywhere from one to five years. After Dec. 1st I shall want more. These terms are net to me. Shall be pleased to hear from you at any time. Yours, Dan Craven." The contract is as follows: "Land Contract. This agreement, made and entered into this 2d day of October, 1906, by and between John N. Johnson, agent for the owner, party of the first part, and Charles Ross, party of the second part, witnesseth: That party of the first part has this day sold to the party of the second part the following described real estate, situated in the county of Holt and state of Nebraska, to wit: The southwest quarter of section number twenty-four in township number twenty-eight of range eleven, containing 160 acres more or less according to the government survey, for a total consideration of nineteen hundred (1900) dollars. Purchase price to be paid as follows: Seventy-five dollars paid in cash, the receipt whereof is hereby acknowledged. The further sum of two hundred twenty-five dollars is to be paid as soon as abstract has been furnished showing a good and merchantable title to said land in the party from whom the deed is to come, subject however to a certain mortgage of $1,200 due Dec.

1st, 1906, which the purchaser herein assumes and agrees to pay as part of the purchase price. The balance, the sum of $400, is to be paid on or before December 1st, 1906, when a warranty deed and possession together with abstract of title is to be given. All payments are to be made at the Inman State Bank at Inman, Nebraska. Party of the first part agrees to send all papers to Inman State Bank, Inman, Nebraska, for examination and delivery for the party of the second part. Party of the first part agrees to pay all taxes including 1906, also to pay all interest on the said mortgage up to Dec. 1st, 1906. It is additionally agreed between the parties hereto that no trees shall be cut on said land while this contract is in force. In witness whereof the parties hereto have executed these presents in duplicate the day and year first above written. John N. Johnson, Agent. Charles Ross."

October 10 Craven sold the land to defendant Abrahams. Craven's letter of September 14 was sent in answer to one of date September 10, 1906, written by Johnson with reference to securing for Craven a man to cut, cure and market the grass then growing on the land in dispute. The last sentence in said letter is: "Kindly advise me your lowest price and terms on this land, also let me know for how long I might show the land for sale at price quoted, so I am in position to handle it." The communication of the 14th is an offer to sell, stating the terms of sale, and did not authorize Johnson to bind Craven in any manner.

Section 6022, Ann. St. 1907, provides: "No estate or interest in land * * * shall hereafter be created, granted, assigned, surrendered or declared, unless by operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same." Section 6024 states that every contract for the sale of lands shall be void unless the contract or some memorandum thereof is in writing and signed by the party by whom the sale is to be made. Section 6044 declares that an agent, if authorized

in writing, may sign his principal's name to contracts required by the statute of frauds to be reduced to writing to be valid.

For the reason that the correspondence referred to in the petition did not vest Johnson with authority to bind Craven in a contract for the sale of the land in question, the written agreement with plaintiff is void, so far as Craven, or the land, is concerned. *Morgan v. Bergen,* 3 Neb. 209; *O'Shea v. Rice,* 49 Neb. 893.

Plaintiff argues that defendant's answer did not challenge Johnson's authority. Craven's answer admitted that on the 2d day of October, 1906, and prior thereto, he owned the land in controversy, and denied each and every other allegation in the petition contained. The issues thereby created entitled Craven to the protection of the statute of frauds. *Powder River Live Stock Co. v. Lamb,* 38 Neb. 339.

A copy of the aforesaid agreement was mailed to Craven October 3 and evidently received by him not later than October 4. If this could be construed as an attempt by plaintiff to accept Craven's offer, then it did not establish any rights, because it was not an unconditional acceptance. Craven desired all cash, and he was to pay the $1,200 mortgage. Plaintiff's proposition was to assume the mortgage and pay the remainder in cash, thereby, possibly, leaving Craven personally liable for the mortgage debt. Plaintiff demanded an abstract of title, which Craven had not written that he would furnish. Plaintiff demanded that the deed should be delivered and the consideration paid in Inman, whereas Craven resided in Norfolk. The so-called acceptance was not in conformity with the offer and did not complete a contract between plaintiff and Craven. *Lopeman v. Colburn,* 82 Neb. 641.

It is argued, however, that Craven ratified the acts of Johnson because he wrote in the letter of the 4th that he (Craven) had not agreed to pay the 1906 taxes, but did not make other objections to closing the deal, nor take exceptions to Johnson's assumption of authority. Plain-

tiff did not plead ratification of Johnson's unauthorized acts, but based his rights upon the letter of September 14 and the contract of October 3, executed by Johnson. Independent of this fact Craven did not write that he would ratify the contract if the taxes were paid by the purchaser, but stated that he had another deal pending for the land. Johnson and Craven talked over the telephone, and in that conversation Craven denied Johnson's authority to act for him, and thereupon Johnson wrote Craven that the contract of October 3 was valid; that $75 had been accepted thereon, and that Craven must at once furnish an abstract showing title clear of all incumbrances except the $1,200 mortgage. October 8, Johnson again wrote Craven that he must comply with the contract of October 3. October 10, 1906, Craven sold the land to defendant Abrahams, and three days later Johnson wrote Craven that plaintiff would pay the 1906 taxes and again requested an abstract. October 15 Craven wrote to Johnson, that the land had been sold to Abrahams. December 1, 1906, Johnson informed Craven that plaintiff would take immediate possession of the land, which seems to have been unimproved, and that Craven must convey to plaintiff or stand a suit. The facts do not justify a finding that Craven ever ratified the arrangements made by Johnson.

In our opinion the minds of plaintiff and Craven never met with a common intention with respect to a sale of the land involved in this action. The district court is entitled to exercise a sound judicial discretion in disposing of a case involving the specific performance of a contract. On appeal, unless we are satisfied from a consideration of the entire record that the trial court was clearly wrong, its judgment will be affirmed. *Morgan v. Hardy,* 16 Neb. 427; *Krum v. Chamberlain,* 57 Neb. 220; *Lopeman v. Colburn,* 82 Neb. 641.

Upon the pleadings and proof in this case the judgment of the district court was right and is

AFFIRMED.

RACINE-SATTLEY COMPANY, APPELLANT, V. NELS HANSEN ET AL., APPELLEES.

FILED MAY 21, 1909. No. 15,680.

1. **Conditional Sales:** VALIDITY. "A condition in a contract of sale, whereby the title is to remain in the vendor until the full amount of the contract price is paid, is void as against purchasers and judgment creditors of the vendee in actual possession, unless reduced to writing, signed by the vendee, and a copy thereof filed with the county clerk or register of deeds of the proper county." *Johns & Sandy v. Reed*, 77 Neb. 492.

2. **Evidence** examined and set out in the opinion *held* sufficient to sustain the verdict of the jury and judgment of the court.

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

Rich, O'Neill & Gilbert, Bryce Crawford, H. E. Burkett and *J. W. Woodrough,* for appellant.

R. J. Millard and *C. H. Whitney, contra.*

FAWCETT, J.

On March 24, 1906, one Nels Hansen was engaged in the business of selling farm implements at retail at Magnet, in Cedar county. On that date plaintiff sold him quite a large quantity of agricultural implements, and took from said Hansen a written contract, which, among other things, provided that upon receipt of the goods, or upon monthly balances, at the option of Hansen, the said Hansen should execute notes to the plaintiff for the amount to be paid for the goods so received according to the terms of said written contract, and that all goods ordered thereafter for that season's trade should be subject to the same conditions as to time and manner of payment as those then being ordered. The plaintiff agreed to give Hansen the exclusive sale of the goods of the classes then ordered at Magnet and vicinity for the season ending July 31,

1906, and Hansen agreed not to buy or sell any other makes or like goods for the same period, and not to countermand the order then given or any part of it except upon payment of 20 per cent. of the net amount of the goods purchased as liquidated damages. The contract further provided: "In case of death of member of firm making this contract, or if the purchaser under this contract sells out, fails or becomes insolvent, or any member of the purchasing firm fails, sells out or becomes insolvent, all accounts or notes for goods purchased under this contract, including renewal notes, regardless of who holds said notes, shall then become due and payable, whether the notes be given in payment for goods or accounts or as collateral security thereto. The purchaser agrees to settle promptly for any part of the above order, with exchange, by note or accepted draft for all time bills, and cash or its equivalent for all cash bills, and further agrees that all notes of the undersigned are to be secured by good farmers' notes, proceeds of sales of an equal amount and 20 per cent. in addition as collateral security to said notes, whenever so requested by the Racine-Sattley Company of Nebraska. The title to the goods (and all proceeds of any sale of same), for which this order is given, and all goods subsequently ordered and the proceeds of sale thereof to remain in the name of the Racine-Sattley Company of Nebraska until the same are settled for with cash; and notes or accepted drafts given are not accepted as payment, but only as evidence of indebtedness." This contract was not filed in the office of the county clerk of the county, or in any manner made a matter of publicity. Hansen gave his notes for the agreed price of the goods delivered under the contract, which notes were not yet due by their terms at the time of the occurrence of the subsequent events which gave rise to this litigation. Hansen continued to conduct the business, with what success is not disclosed, until on or about July 20 of the same year, when he traded his entire stock, including the unsold portion of the stock covered by the contract, and other

goods which had subsequently been delivered to him by the agent of plaintiff, to Dr. J. M. Talcott of Crofton for an equity in a farm. Dr. Talcott duly signed and acknowledged an assignment of his contract for the land in question, but under an agreement with Hansen placed the contract with such assignment indorsed thereon in a bank at Crofton, in which Talcott was a stockholder, and in the banking house of which he had his office. Under the written contract entered into between Dr. Talcott and Hansen on July 20, Hansen guaranteed all his implement stock as that day invoiced "to be complete in 30 days from date and all extra stock now in building not invoiced. * * * Said Talcott to place contract for land in F. S. Bank, Crofton, to be left for 30 days from day when it shall be turned to said Hansen if said J. M. Talcott finds implement stock complete as stated."

It is evident from this that Dr. Talcott was taking the stock on Hansen's invoice, and was reserving to himself thirty days' time in which to verify the correctness thereof. If found to be correct, then the assignment of the land contract to be delivered to Hansen. Hansen on his part immediately delivered possession of the stock and business to Dr. Talcott, who placed a man in charge, and for about ten days the business was conducted regularly, so far as the evidence discloses, by Dr. Talcott's agent. About ten days after Dr. Talcott took possession of the stock and began conducting the business, one E. R. Sutton entered into negotiations with Dr. Talcott for a trade of some farm land for the stock of goods. Pending these negotiations Sutton got in communication with the defendant, Gillilan, and proposed to trade the stock which he was to get from Talcott to Gillilan for one of Gillilan's farms. After some negotiations Gillilan signified his willingness to make the exchange, he to turn in his quarter section of land at $30 an acre, and to take the stock at invoice prices, and settlement to be made for the difference, whichever way it might be. Sutton thereupon stated to Gillilan that in his trade with Talcott he (Sutton) would have

to raise $1,400 in cash, but that he did not have the money on hand, or words to that effect. It was then agreed between Sutton and Gillilan that Gillilan would advance $1,400 to enable Sutton to complete his deal with Talcott, and that he (Gillilan) would take from Sutton a mortgage back on the land, which he was conveying to Sutton, for the $1,400. Thereupon Gillilan, by direction of Sutton, drew a check for $1,400 upon his account in the Hartington National Bank, payable to the order of Dr. Talcott. After the taking of the inventory was completed, Sutton called up Dr. Talcott at Crofton by telephone, and told him of the arrangement, stating that Gillilan would pay him $1,400 cash. Gillilan was then placed in communication with Talcott and confirmed Sutton's statement, stating that he was ready to turn over the check as soon as possession of the stock and business was turned over to him. Thereupon Talcott instructed his agent in charge of the business to turn over the stock to Gillilan upon Gillilan's delivering to him the check for $1,400. The check was delivered, and possession of the stock and business turned over to Gillilan by Talcott's agent. Gillilan conducted the business for two days, when an agent of the plaintiff appeared upon the scene and claimed to Gillilan that the stock belonged to Hansen, and that plaintiff had a mortgage on it and wanted to take the stock, which Gillilan refused to deliver up. Gillilan then called up Dr. Talcott and told him of the claim that was being made by plaintiff's representative, and advised Dr. Talcott that he (Gillilan) was going to stop payment on the check. Gillilan also called up his bank at Hartington and instructed them not to pay the check until further notice. The undisputed evidence of Dr. Talcott is that he had indorsed the check, and deposited it in the Crofton bank, and obtained credit for the $1,400 prior to the time that Gillilan notified him that plaintiff was claiming the stock and that he was going to stop payment on the check. Gillilan's testimony, which is not contradicted by the plaintiff's representative, John F. Day, who was present at the trial and testified as

a witness, is that Day made no claim to him that plaintiff was the owner of the stock, but on the contrary, insisted that Hansen owned the stock and that plaintiff had a mortgage on it. Gillilan subsequently had the records examined, and, finding that there was not any mortgage on record against the stock, instructed his bank to pay the $1,400 check, which was done. Finding that Gillilan would not deliver up the stock, the attorney of the plaintiff was sent for and the stock taken by plaintiff under the writ of replevin in this action. The action was tried in the district court for Cedar county to the court and a jury. The jury returned a verdict "that at the commencement of this action the defendant Frank M. Gillilan had the right of property and was entitled to the possession of the property replevied herein, and we assess the value thereof at $3,089.78." From a judgment upon that verdict this appeal is prosecuted.

Plaintiff's first contention is that the sale to Hansen was a conditional sale, and that the stock remained, and at the time it was replevied was, the property of plaintiff. Conceding this to be true, plaintiff must still fail in this action, unless the record shows that Dr. Talcott had knowledge or notice which would put a reasonable person upon inquiry that plaintiff had title to the property. Dr. Talcott testified that, at the time he made the deal with Hansen and obtained the possession of the stock, he had no knowledge or notice whatever of any claim or interest of the plaintiff therein. Gillilan also testified that, at the time he made the deal with Sutton and Talcott, he had no knowledge or notice of any interest or claim of plaintiff in the stock. A careful examination of the entire record fails to disclose any evidence which in any manner contradicts or impeaches the testimony of either. So far as this record discloses, Talcott and Sutton and Gillilan were all acting in the utmost good faith, so far as plaintiff was concerned, without any knowledge or notice of anything to put them upon inquiry as to any secret

ownership of plaintiff or any one else in the stock. Plaintiff contends that regardless of the question as to whether they had any knowledge or notice of plaintiff's claim at the time of entering into the negotiations, Gillilan had knowledge of plaintiff's claim prior to the time he paid for the stock, or at least prior to the time the check he had given had been paid by his bank; that he at least knew of the fact in time, and that he did in fact stop payment upon the check; and that, if he subsequently instructed his bank to pay the check, it was at his own risk.

Plaintiff insists further that there is no evidence that Gillilan had ever conveyed the farm to Sutton, which he testifies he was to give Sutton as a consideration for the stock. Upon the latter question the evidence is somewhat meager, but we think it was sufficient to warrant the jury in finding, as it must have found, that the farm had been conveyed to Sutton. Gillilan testified without objection that he had the stock of goods in his possession at the time they were taken under the writ of replevin in this suit. "Q. How did they come into your possession? A. I had bought them and paid for them and had them in my possession about three days." In regard to the $1,400, he testified that Sutton said "he couldn't put up the $1,400, but, if I would carry him back for this $1,400 that he would have to pay on the stock, and I agreed to it. There was a little mortgage on the land, and we took a second mortgage on the land." Again he testified: "I put my farm in at $4,800—$30 an acre." We think the argument of counsel for Gillilan is sound, that his testimony that "we took a second mortgage on the land," and that he "put in his farm at $4,800," is tantamount to testifying that he had deeded the land to Sutton; that he could not have taken a second mortgage back unless he had conveyed the title. In the absence of any contradictory evidence, we think this was sufficient to warrant the jury in finding that Gillilan had deeded the land to Sutton. As to the $1,400 check, we think it is immaterial whether the check had actually been paid by

the Hartington bank before Gillilan received notice of the fact that plaintiff was claiming a lien upon it, for two reasons: First, Dr. Talcott had in good faith and without fraud sold and delivered the stock to Gillilan. Gillilan had conveyed the land to Sutton and had thereby paid the full consideration for the stock. The check given to Dr. Talcott was nothing more nor less than a loan by Gillilan to Sutton, secured by a second mortgage upon the land which he had conveyed to Sutton, and, having received the mortgage for the $1,400 and delivered the check in consideration therefor, he had no right or authority to stop payment of the check. His subsequent instruction to his bank therefore was an immaterial matter, so far as this case is concerned. If Gillilan had persisted in his instructions to his bank to refuse payment of the check, Talcott could have brought suit upon the check and recovered judgment against Gillilan therefor. By the delivery of his check to Talcott in the manner shown by the evidence, all control over that check had passed from Gillilan. The transaction between himself and Sutton was complete and irrevocable upon the part of either. Second, even if the $1,400 had constituted a part of the consideration which Gillilan was to pay for the stock, he was warranted in recalling his stop order to his bank when he discovered that plaintiff had no such interest in the stock as it claimed to have in Day's conversation with him. Gillilan testified unqualifiedly that Day's statement to him was that Hansen owned the stock and that plaintiff had a mortgage upon it. This testimony Day does not attempt to contradict. When Gillilan had the records examined and found that the claim was untrue, he was justified in withdrawing his stop order and allowing the check to go through.

With the moral turpitude of Hansen in selling this stock of goods for which he had not paid we have nothing to do, nor can any blame attach to Talcott, Sutton or Gillilan for the same, unless they had guilty knowledge of it, which, as we have seen, the evidence in the record

before us fails to show. But, from a careful reading of the contract, we are not entirely satisfied that Hansen was guilty of any fraud in selling the stock to Dr. Talcott. The contract seems to contemplate the right of Hansen to "sell out" at any time he might see fit so to do. It provided that "in case * * * the purchaser under this contract sells out, * * * all accounts or notes for goods purchased under this contract, including renewal notes, regardless of who holds said notes, shall then become due and payable." And in the clause providing that the title to the goods should remain in plaintiff, the contract recites: "The title to the goods (and all proceeds of any sale of same), for which this order is given, * * * to remain in the name of the Racine-Sattley Company of Nebraska until the same are settled for with cash." A fair construction of this language would seem to indicate that Hansen might "sell out," but that, in case he did so, all proceeds of the sale should, in lieu of the stock sold out, remain in the name of plaintiff. Under this wording of the contract, while plaintiff might be entitled to demand the land contract assigned by Dr. Talcott to Hansen in payment for the stock, it does not necessarily follow that Hansen acted fraudulently in the matter. That his conduct will bear that construction, however, must be conceded. The verdict of the jury amounts to a finding that defendant Gillilan was an innocent purchaser of the stock in controversy for a valuable consideration, and that plaintiff wrongfully took such possession from him. These were questions peculiarly for the jury, and we cannot disturb their finding.

Complaint is made by the plaintiff that the value of the property as found by the verdict is not sustained by the evidence. This contention must also fail. Hansen was placed upon the stand as a witness. He testified that he had been engaged in the implement business for nearly 20 years; that he had been thus engaged in the retail business in and around Magnet for about 2½ years; that he was acquainted with the fair market value of goods

such as were replevied; that he was acquainted with the fair market value of the goods taken, in Magnet, at the time they were replevied, and that their fair and reasonable value was $3,872.50. The only other witness who testified as to the value was plaintiff's representative, Mr. Day, who testified that he knew the stock and value of it, and that it was worth $2,766.20 in the wholesale house at Omaha, to which there should be added the freight and drayage from Omaha to Magnet. Plaintiff complains because Day was not permitted to testify what the freight charges from Omaha to Magnet would amount to. This was not error, as no offer was made to prove the facts which would have been elicited if the answers to the questions propounded had been permitted by the court. *Alter v. Covey,* 45 Neb. 508.

Plaintiff further contends that the verdict of the jury should be set aside because "the verdict of the jury is a compromise and the jury's guess"; in other words, that they did not find the exact amount which either Hansen or Day testified to, but returned their verdict for an amount between the two, viz., $3,089.78. The jury, after hearing the witnesses and seeing them upon the stand, refused to take the exact figures of either, but arrived at what they found was the fair value of the property. The amount of their verdict is so materially less than that testified to by Mr. Hansen, and so little in excess of that testified to by Mr. Day, that it is clear the jury were not influenced by passion or prejudice against plaintiff. After hearing all of the evidence, the jury exercised their own judgment as to the value of the goods. This we think they had a right to do.

Plaintiff next insists that the verdict is contrary to instruction No. 6, given by the court upon its own motion. This instruction reads as follows: "If the jury believes from the preponderance of the evidence that the defendant Frank M. Gillilan had knowledge of the contract of purchase under which Nels Hansen purchased the goods in question, or had knowledge of the fact that

the purchase price had not been paid, if that be a fact, or if you find that the purchase price was not paid by the said Gillilan until notice sufficient to put a careful and prudent person upon inquiry which would lead to a discovery of the fact, if it be a fact, that said goods had not been paid for by the defendant Hansen, then F. M. Gillilan would not be an innocent purchaser, and you should find for the plaintiff, and so say by your verdict." The verdict was certainly not contrary to this instruction, but was in entire harmony with it.

The remaining contention of plaintiff is that the court erred in refusing to give instruction No. 1 requested by appellant, which was an instruction directing the jury to return their verdict in favor of the appellant. In refusing to give this instruction the court did not err.

We have examined the alleged "errors in reception and rejection of evidence," but are unable to agree with counsel for plaintiff that there was any prejudicial error in the rulings of the court complained of.

Finding no prejudicial error in the record, the judgment of the district court

AFFIRMED.

GEORGE B. CHAPMAN ET AL., APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED MAY 21, 1909. No. 15,714.

1. **Cities:** STREETS AND SIDEWALKS: LEASING. The charter of the city of Lincoln, giving the mayor and council supervision and control of all public highways and public ground within the city, does not authorize them to enact ordinances for the leasing of space on the streets or sidewalks in front of business houses for use by produce dealers or other merchants; such use of the streets and sidewalks being unlawful and constituting a nuisance *per se*.

2. ———: ———: OBSTRUCTIONS. Whatever space in a public street of a city is set apart for the use of the public as a sidewalk, the public have a right to use in its entirety, free from any and all

unauthorized obstructions, and it is the duty of the mayor and city council to see that it is kept in that condition.

3. ———: ———: ———: ACTION: DEFENSES. It is no defense to a party who is being proceeded against by a city for unlawfully obstructing a sidewalk that others are obstructing the walks in like manner.

4. ———: ———: ———: ESTOPPEL. Nor is the city estopped by reason of its past failure to enforce its ordinances against the obstruction of sidewalks from subsequently removing all obstructions therefrom.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

Rose & Comstock, for appellants.

John M. Stewart, D. J. Flaherty and *T. F. A. Williams, contra.*

FAWCETT, J.

Plaintiffs seek to enjoin the defendant city from enforcing certain ordinances which prohibit the use of sidewalk space in the city for the sale of fruits, books or other merchandise, and the erection or maintenance upon such sidewalk of any booth, shed, stand or other obstruction. A temporary injunction was issued, which, upon final hearing, was dissolved and plaintiffs' suit dismissed. Plaintiffs appeal.

The stipulation of facts upon which the case was tried and decided in the court below fairly reflects the issues. It stipulates that the principal defendant, the city of Lincoln, is a city of the first class, having more than 40,000 and less than 100,000 inhabitants, and is governed by chapter 13, art. I, Comp. St. 1907; that the defendants Brown, Cooper, and Strode, are the mayor, chief of police and city attorney, respectively, of the city; that plaintiffs are all residents of defendant city, and now are, and for a long time past have been, engaged in lawful business and mercantile pursuits therein; that plaintiff Chapman

has a leasehold estate in a tract of ground about 40 feet square, located at the southwest corner of Tenth and O streets in said city, which he occupies in conducting the business of a retail drug merchant; that plaintiffs Louis and John Bernero are sublessees and tenants of said Chapman, engaged in a mercantile pursuit, embracing the handling of fruits, cigars, tobacco and like subjects of lawful merchandise, which they store in a private areaway controlled by said Chapman underneath the sidewalk space immediately adjacent to said Chapman's drug store on Tenth street, and also occupy a space in the street of five feet in width with a stand and an inclosed shed or booth for the display and sale of said articles of merchandise, such space extending out from the lot line and wall of the building of said Chapman; that the said Bernero & Bernero pay monthly for the renting of said private areaway and the said privilege of occupying said space in the street for the sale and display of their goods the sum of $50 to said Chapman; that the plaintiff Swearingen conducts a business on lot B of subdivision of lots 5 and 6, in block 41, in defendant city at the corner of Eleventh and P streets, and has a leasehold interest in said property, and has for a monthly rental as a consideration paid him permitted the plaintiff Arrigo to occupy a private areaway adjacent to said property, and under the sidewalk space adjoining said property, where said plaintiff Arrigo conducts a place of business for the sale of fruits, tobacco and other lawful merchandise, and occupies a place in the street next to the lot line and abutting property of five feet for the display and sale of his wares; that plaintiff Christophalus "was heretofore granted permission by the city under its general ordinance, and as a lessee of the Harley Drug Company, a merchant occupying a tenement located at the southeast corner of Eleventh and O streets, to whom he pays a consideration, occupying with an inclosed booth or room the five feet of the sidewalk space in the street next to said tenement and lot line of abutting owner for a place

to shine shoes"; that each of the other plaintiffs occupies certain portions of the sidewalk space of defendant city, viz., the inside five feet of such walks, being the five feet adjoining the lot line of the abutting property owners, for the display and sale of merchandise of a like character to that above set out; that the same is done in each instance with the consent of the occupants of the abutting property and upon the payment of a rental therefor; that plaintiffs have a common interest in the determination of the validity and interpretation of the general and special ordinances of the city, mentioned and referred to in the stipulation, and because of their common interest have joined as plaintiffs in this suit for the purpose of saving a multiplicity of controversies, and to maintain peace and quiet and avoid dissensions and a multiplicity of civil suits and criminal prosecutions; that on September 20, 1904, the defendant city passed an ordinance which was duly published and approved, and has never been expressly repealed, as follows:

"Section 24. Hereafter no person shall construct or place, or cause to be constructed or placed, any portico, porch, door, window, sign or outside stairway, which shall project into or over any sidewalk more than four feet from the lot line. No sidewalk shall be used for the storage or exhibition of goods, wares, or merchandise of any kind or description whatever, which shall occupy greater space than four feet next to the building or boundary line of the lot." That the persons in said several lines of business are by defendant city permitted under said ordinances to exhibit and store merchandise in the sidewalk spaces not exceeding four feet in width adjoining the tenements owned and occupied by them for the same business, and permitted others owning property abutting on the public streets to occupy the same for porticos, etc., for a space of four feet of the public street or sidewalk; that such uses of the space above severally defined is general and availed of by more than 80 merchants who occupy said four feet space for exhibition and

storage of merchandise, among them a large number of grocerymen and venders of fruits and tobaccos, whose business to some extent comes immediately and directly in competition with the business of the several plaintiffs; that on November 26, 1906, defendant city passed the following ordinance, being ordinance number 436, entitled "An ordinance to amend section 1 of an ordinance entitled 'An ordinance to amend and repeal paragraph 36, section 1148 of article 46 of the Revised Ordinances of 1895 relating to misdemeanors and miscellaneous practices, and for the granting of permits for the use of sidewalk space, passed and approved Feb. 5, 1900, and to repeal sections one and two of said ordinance,'" as follows:

"Be it ordained by the mayor and council of the city of Lincoln, Nebraska. Section 1. That said section one of the above named ordinance be and it is hereby amended to read as follows: It shall be unlawful for any person, persons or corporation to erect or maintain any booth, shed, stand or other obstruction upon the streets, sidewalks or sidewalk space of the city of Lincoln for the sale of fruit, books or other merchandise, or any article or thing of value, or to erect or maintain any shed or booth or stand thereon to be used for shining boots and shoes: Provided, that this section shall not apply to wagons maintained for the sale of popcorn; and provided, that the city clerk may grant a permit to the owner of such popcorn wagons to maintain the same at a place designated for a period not exceeding one year from the date thereof, when an application for the same is presented to him with the consent in writing of the owner and occupant of the property immediately abutting upon said location. Section 2. That sections one and two of the above entitled ordinance be and the same are hereby repealed. Section 3. This ordinance shall take effect and be in force from and after its passage, approval and publication according to law. But this ordinance shall not affect the term of any license or permit heretofore granted

and now in force, during the length of time therein named."

That plaintiffs had long prior to the passage of said ordinance been granted permits for a specified period of time by the city under an ordinance theretofore regularly passed, providing for the granting of such permits to use and occupy the portions of the sidewalk space in the streets occupied by them as stated, but said time for which said permits had been granted had expired before the 28th day of November, 1906, and each of the plaintiffs had continued his business without let or hindrance from the defendants or any one of them until the passage of the aforesaid ordinance on the 26th day of November, 1906, and until the time for which permits which had been granted had expired; that defendants threaten to and will, unless enjoined by this court, close the place of business of each of the plaintiffs and prohibit the further continuance thereof, and will prosecute divers and sundry complaints against the plaintiffs and each one of them to enforce fines and penalties, and will tear down and remove the property of each one of plaintiffs under the command and by the authority of said last mentioned ordinance; that the sidewalks at all places where plaintiffs occupy any part thereof are 25 feet in width.

In addition to the stipulation, plaintiffs introduced in evidence paragraph 1290 on page 354 of the "Revised Ordinances of Lincoln, 1895," which ordinance, so far as the same is applicable to the controversy here, is the same as the ordinance of September 20, 1904, set out in the stipulation of facts, except that the latter ordinance, which is admitted to be an amendment of the former, changes the distance from the lot line for which the sidewalk space may be used for any of the purposes set out from three and five feet, respectively, to four feet. Under the above stipulation it will be seen that each of the plaintiffs is occupying five feet of the sidewalk space for the purposes mentioned, which is in direct violation of the ordinance of September 20, 1904, which only permits the

use of four feet of space for such purposes. As the city makes no point upon that fact, we pass it by.

Plaintiffs' petition contains a number of other allegations to the effect that the ordinance of November 26 is aimed specially at the plaintiffs, for the purpose of driving them out of business; and that defendant city has no intention of having said ordinance applied to the other business men of the city who are occupying sidewalk space for display of their goods; and assailing the manner in which the ordinance was passed. As the bill of exceptions contains no proof of any of these matters, we will treat them as having been abandoned, and consider the case upon the facts as set out in the stipulation above referred to.

Section 96, ch. 13, art. I, Comp. St. 1907, provides: "The mayor and council shall have supervision and control of all public ways and public grounds, within the city and shall require the same to be kept open, in repair and free from nuisances." Subdivision 6, sec. 129, provides that it is the duty of the city: "To remove all obstructions from the sidewalk, curbstones, gutters and crosswalks at the expense of the owners or occupiers of the grounds fronting thereon, or at the expense of the person placing the same there, and to regulate the building of bulkheads, cellars and basement ways, stairways, railways, window and doorways, awnings, hitching posts and rails, lamp posts, awning posts, and all other structures upon or over adjoining excavations through or under the sidewalks of the city."

Reading these two sections from the statute in reverse order, it will be seen that the city has power to remove all obstructions from the sidewalks, and that it is required so to do. The city cannot enlarge the power thus granted, nor evade the duty imposed. Hence it is not within the power of the city to grant any privileges for the use and obstruction of its streets and sidewalks in contravention of the power granted it by statute. In *Bischof v. Merchants Nat. Bank,* 75 Neb. 838, we adopted

the language of Elliott, Roads and Bridges (2d ed.), sec. 645: "Public highways belong, from side to side and end to end, to the public, and any permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance *per se.*" That the booths and business set out in the stipulation are within the class above designated is self-evident. The fact that the sidewalks of the city are 25 feet in width is immaterial. Whatever space is set apart for the use of the public as a sidewalk the public have a right to use in its entirety free from any and all obstructions, and it is the duty of the mayor and city council to see that it is kept in that condition. The fact that the city may have been derelict in its duty in that behalf in the past affords no just reason why such dereliction should continue. Nor is it any defense to any person or set of persons, when proceeded against by the city for obstructing the sidewalks, that there are others obstructing the walks in like manner, against whom the city has not proceeded. The presumption must necessarily be that the city will proceed against all violators of its ordinances and compel all persons who are obstructing its streets and sidewalks to remove such obstructions. The fact that defendant city in the past has been permitting these violations of its ordinances and the statutes of the state, but has now commenced the work of removing all obstructions, may well be construed as evidence of the fact that it intends to prosecute the good work to a final and proper conclusion. Nor is the city estopped by reason of its failure to enforce the ordinances in the past, or by reason of its permission of such violation, from now insisting upon a strict observance of its ordinances. *Rothschild & Co. v. City of Chicago*, 227 Ill. 205; *Denver v. Girard*, 21 Colo. 447; *City of Chicago v. Pooley*, 112 Ill. App. 343; *Pew v. City of Litchfield*, 115 Ill. App. 13; *Schopp v. City of St. Louis*, 117 Mo. 131. In the latter case it is said: "The St. Louis city charter, * * * giving the city power 'to regulate the use of streets,' does

not authorize it to enact ordinances for the leasing of spaces on a street in front of business houses for produce dealers, such use of the streets being unlawful and a nuisance to the abutting property owners and the public." The fact that the "abutting property owners" for a monthly cash consideration give their consent to the erection and continuance of such nuisances cannot bind the public. The public has a right to the free use of the streets and sidewalks, of which the city itself has no power to deprive it.

Moreover, the contention of plaintiffs that the city is permitting a large number of other merchants to make a like use of the sidewalks is not sustained by the stipulation of facts. From that stipulation we learn that the other merchants referred to are using a portion of the sidewalk space only for the display of their goods; that is to say, they are displaying upon the sidewalks samples of the goods they are selling in their respective stores, while plaintiffs are converting the sidewalks into a market place for crying out and selling their goods and merchandise. Because the city has, perhaps illegally, seen fit to allow its merchants to display upon the walk in front of their stores samples of the goods for sale within, it does not follow that it was ever the intention of the city that such merchants could convert the sidewalk space, set apart for the use of the public, into a source of monthly revenue by subletting it to other merchants of whatever class for the transaction of another and different kind of business from that which was being carried on in the abutting store.

We do not think the ordinance of November 26, 1906, which is so vigorously assailed by plaintiffs, will bear the construction which they place upon it. As we read the ordinance, it applies to all persons or corporations, and prohibits them from erecting or maintaining any booth, shed, stand, or other obstruction upon the streets, sidewalks, or sidewalk space, not only for the sale of fruit and books, but for the sale of "any other merchandise,

or article or thing of value." Clearly this prohibits any and all persons from in any manner using the sidewalks of the city for the sale of merchandise of any kind. In other words, it prevents all persons from using the sidewalk space for business purposes, to the obstruction of the free use of every portion thereof by the public.

In addition to what has been said, it appears from the stipulation that the passage of the ordinance of November 26 was designed by the city to put a stop to the unlawful use which had theretofore been made of its sidewalks; that prior thereto plaintiffs had been granted permits for specified periods of time by the city council under an ordinance theretofore passed by the city council providing for the granting of permits to use and occupy the portions of the sidewalk space; but that "such time for which said permits had been granted had expired before the 28th day of November, 1906." If, therefore, it could be conceded that the city had power to grant such permits prior to November 28, 1906, it is established by the record that it refused to grant any thereafter. This was clearly within its power. It being conceded that plaintiffs' right to use the sidewalk space was merely a permissory right, the moment the permission was withdrawn the right ceased; for it needs neither argument nor citation of authority to show that one who has the power to grant permission to do a certain thing, and grants it for a definite time, may, at the end of that time, refuse to extend the permission.

It would seem useless to pursue this subject further. Viewed from any standpoint, the judgment of the district court is right and it is

AFFIRMED.

FLORENCE SHIRLEY, APPELLEE, V. CITY OF MINDEN, APPELLANT.

FILED MAY 21, 1909. No. 15,726.

Personal Injury: NEGLIGENCE: QUESTION FOR JURY. "Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different conclusions as to these questions from the facts established." *City of Omaha v. Houlihan*, 72 Neb. 326.

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

M. D. King and *C. P. Anderbery,* for appellant.

Adams & Adams, contra.

FAWCETT, J.

Plaintiff claims damages for personal injuries alleged to have been sustained by falling upon a defective sidewalk in defendant city. The answer is a general denial, coupled with a plea of contributory negligence, which is denied in the reply. The jury returned a verdict in favor of the plaintiff for $500, and from a judgment entered thereon this appeal is prosecuted.

Defendant in its brief assigns but two grounds for reversal of the judgment: (*a*) That the evidence is insufficient to establish negligence on the part of the defendant. (*b*) That the evidence conclusively establishes contributory negligence on the part of plaintiff. It would serve no good purpose to set out the evidence here. It is sufficient to say that we have carefully examined the entire record, and find that the case was properly submitted to the jury on both grounds. While the evidence

is somewhat meager upon the second ground, it is such that we cannot disturb the verdict.

The judgment of the district court is therefore

AFFIRMED.

EDGAR H. HOTCHKISS, TRUSTEE, APPELLANT, V. MOSES H. KECK ET AL., APPELLEES.*

FILED MAY 21, 1909. No. 15,696.

1. **Injunction:** TITLE TO OFFICE. Under the facts stated and discussed in the opinion, injunction will not lie to test the right of rival claimants to the possession of a public elective office.
2. ———. The extraordinary writ of injunction is one of the last resorts of the litigant, and its aid should not be invoked unless it clearly appears there is no adequate remedy at law.
3. ———: PLEADING. Where the aid of an injunction writ is sought to be invoked to prevent the commission of an unlawful act, facts must be pleaded which affirmatively show the party against whom the writ is directed has threatened to, or is about to, commit an act that is unlawful.

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

Clark & Allen, for appellant.

G. W. Simpson and *H. Gilkeson, contra.*

DEAN, J.

This is an injunction suit tried on demurrer in Saunders county. Edgar H. Hotchkiss, who is plaintiff and appellant, and one J. P. Moor were elected as trustees for a term of two years at the annual election of the village of Valparaiso held in April, 1906, and duly qualified as such officer. In April, 1907, Moses H. Keck and Ellis Nance, defendants, and one William Scott were regularly elected and qualified as trustees for a like term. Some

* Reversed on rehearing. See opinion, 86 Neb. ——.

time before January 1, 1908, Scott resigned, and no person was appointed to fill the vacancy thus created. Shortly before the spring election in 1908, V. E. Brown, J. W. Pokorny and A. C. Tucker were regularly placed in nomination by a local political organization, called the "citizens party," for the position of village trustees. A rival political organization placed in nomination W. C. Elmelund, A. G. Glassburn and J. M. Jamison for the same positions. The citizens party filed its certificate of nomination with the city clerk, but failed to designate therein which of its candidates was nominated for the unexpired term. The rival organization in its certificate of nomination designated Elmelund and Jamison as candidates for the full term and Glassburn for the unexpired term. The ballot used at the ensuing election made no distinction of any sort as among the candidates, except that it was bracketed or so prepared and spaced as to indicate that Brown, Pokorny and Tucker were the candidates of the citizens party, and Elmelund, Glassburn and Jamison were the candidates of the opposing organization. There was no indication of any sort upon the ballot as a guide whereby the elector could determine which of the candidates upon either ticket were nominated for the unexpired term and which for the full term, and no distinction in this regard was made by the voters on the day of election when they indicated upon the ballot their choice of candidates. The following vote was polled by each candidate: Brown 72; Pokorny 75; Tucker 78; Elmelund 79; Glassburn 73; and Jamison 73. On April 11, 1908, the board of trustees, upon canvassing the election returns, finding it impossible to determine from the returns for whom the electors voted to succeed to the unexpired term and for whom they voted for the full term, "by formal action refused to issue certificates of election to Pokorny and Tucker, or any of the candidates, and refused to permit the defendants or any of the candidates to take their seats as officers of the board." On April 17, 1908, "the defendants Keck and Nance, with-

out giving notice to plaintiff, pretended to call a special meeting, and, together with defendants Pokorny and Tucker, pretended to organize and act as a board of trustees, selecting defendant Keck as chairman. On the first day of May, 1908, the defendants pretended to hold another special meeting, of which plaintiff had no notice," at which meeting they assumed to perform some of the functions pertaining to their positions as trustees. At the first regular meeting in May the plaintiff and J. P. Moor "were in attendance at the hall where the meetings of the board are held, for the purpose of performing their official duties as trustees, but the defendants Keck and Nance refused to sit and act with them, asserting that they intended to recognize Tucker and Pokorny in place of plaintiff and said J. P. Moor; that these defendants, together with the defendants Pokorny and Tucker, are attempting to forcibly exclude the plaintiff from the possession of his office, and will so continue unless restrained by the order of this court; that the board never issued certificates of election to Pokorny, nor has it declared the said defendants elected to the position of trustees, nor any other person or persons, and the plaintiff since his election has been and now is in possession of the office of trustee * * * in pursuance of his statutory duty to serve until his successor is elected and qualified; that he has duly qualified to serve as a hold-over officer by subscribing to and filing with the clerk of said village the oath required by law." After pleading the foregoing facts, the plaintiff prays that the defendants be enjoined from interfering with him "in the discharge of his official duty as trustee of said village, or attempting to forcibly dispossess the plaintiff or disturb him in the possession of said office until it be determined by proper legal proceedings whether Pokorny and Tucker, or either of them, are entitled to the office claimed; that pending the hearing of this cause a temporary injunction issue restraining the defendants and each of them from in any manner obstructing the plaintiff in the performance of his official

duties as trustee, and from attempting to dispossess him of his office by force or in any manner except the institution of legal proceedings to obtain the title and possession of said office." Attached to the petition as an exhibit, and forming a part thereof, there is a certificate of the village clerk showing that on April 11, 1908, the village board, consisting of the plaintiff and Ellis Nance and M. H. Keck, chairman of the board, appellees herein, and J. P. Moor, canvassed the vote and found that Pokorny, Tucker and Elmelund had received the highest number of votes cast at the election. The record shows that a motion was then made by the plaintiff that certificates of election be issued to Elmelund, Glassburn and Jamison. Upon roll call, two trustees voted for the motion and two against it. So far as the record discloses, no action other than the above was taken by the board with reference to the incumbency of the office involved.

To the petition the defendants Tucker and Pokorny demurred for the following causes: "(1) The court has no jurisdiction of the subject matter of this action. (2) The plaintiff has no legal capacity to sue. (3) The petition does not state facts sufficient to constitute a cause of action." The court sustained the demurrer, and, the plaintiff electing to stand upon his petition, the action was dismissed, and the plaintiff appeals.

The plaintiff relies upon the allegation in his petition "that he had duly qualified to serve as a hold-over officer by subscribing to and filing with the clerk of said village the oath required by law," and says the writ ought to be granted "until it be determined by proper legal proceedings whether Pokorny and Tucker, or either of them are entitled to the offices claimed." It may be suggested, in passing, that there is no allegation in the petition, nor is there anything in the record to indicate, that the plaintiff or any other person had commenced, or even contemplated the commencement of, legal proceedings to test the rights of the respective parties to the possession of the office in suit. The plaintiff pleads a legal conclusion

in the allegation "that these defendants * * * are attempting to forcibly exclude the plaintiff from the possession of his office, and will so continue unless restrained by the * * * court." Counsel for plaintiff cites authorities which hold that a restraining order in a proper case may lawfully issue to protect an incumbent in the possession of his office from unlawful encroachment by an intruder or an attempt by a usurper to forcibly eject him therefrom, but the authorities cited have no application to the present case, because there is not a fact pleaded, nor is one pointed out in the record, which bears the slightest resemblance to an attempt on the part of any person "to forcibly exclude the plaintiff from the possession of his office."

After a careful examination of the record, we conclude the learned counsel for plaintiff have mistaken the remedy to be applied to the facts pleaded. Neither the statute nor the authorities sustain their position. Section 64, ch. 26, Comp. St. 1907; *Osborn v. Village of Oakland,* 49 Neb. 340; *State v. Mayor,* 28 Neb. 103; 1 Spelling, Injunctions and other Extraordinary Remedies (2d ed.), sec. 620; *People v. Draper,* 24 Barb. (N. Y.) 265; *Willeford v. State,* 43 Ark. 62; *Burgess v. Davis,* 138 Ill. 578. MAXWELL, J., speaking for this court in *State v. Mayor,* 28 Neb. 103, says: "If an injunction may be granted to restrain a person declared to be entitled to the office * * * then it may be granted to restrain the governor of the state, duly elected, from being inducted into office or performing the duties thereof, and on various pretexts this might be continued until his term expired, and, if the power is once admitted, it may be sought against every elective officer in the state, and thus the machinery of the courts, which is designed to protect and enforce rights, will become the means by which a party not entitled to an office could retain possession of the same and keep the one elected thereto out of possession. * * * The statute has provided an adequate remedy, either by contest or *quo warranto,* for the settlement of

the rights of parties in election cases, and those remedies are exclusive." Under our form of government, and on grounds of public policy, the administration of the functions of public office should not be held in abeyance for any purpose, but should at all times be in the active control of an incumbent. To yield to the contention of the plaintiff would be to sanction the partial paralysis of an arm of muncipal government, to which we cannot give our assent.

Finding no error in the record, the judgment of the trial court is in all things

AFFIRMED.

JOSEPH P. MOOR, TRUSTEE, APPELLANT, V. MOSES H. KECK ET AL., APPELLEES.

FILED MAY 21, 1909. No. 15,998.

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

Clark & Allen, for appellant.

G. W. Simpson and *H. Gilkeson, contra.*

DEAN, J.

The facts in this case are substantially the same as the facts in the case of *Hotchkiss v. Keck, ante,* p. 545, and the judgment of the district court in this case is affirmed upon that authority.

AFFIRMED.

ARTHUR J. MODLIN, APPELLEE, V. C. L. JONES & COMPANY ET AL., APPELLANTS.

FILED JUNE 11, 1909. No. 15,719.

1. **Master and Servant:** INJURY: PLEADING: CONSTRUCTION. In an action for damages for personal injuries caused by the breaking and falling of an elevator upon which plaintiff was being carried in the performance of labor on behalf of his employer, the pleadings set out in the opinion *held* to embrace the question of negligence on the part of the employer in the matter of appliances provided, or the want thereof, for the safety of persons using the elevator in the course of the employment.

2. **Trial:** QUESTIONS FOR JURY. All questions of fact and the weight of the testimony of witnesses are, under proper instructions of the court, for the consideration of the jury hearing the case on trial.

3. ———: EVIDENCE: QUESTIONS FOR JURY. Although a witness may be contradicted by other witnesses, even of a greater number, yet the testimony of such witness is for the consideration of the jury, and the receipt thereof is not erroneous, nor can the court say that the jury should ignore it.

4. **Appeal:** IMMATERIAL EVIDENCE. Where a witness has been permitted to testify to immaterial facts and his testimony throws no light upon any controlling question involved, it will not require a reversal of the judgment, where it clearly appears that the testimony given could have no effect upon the final decision of the case and could work no prejudice to the losing party.

5. **Trial:** WITNESSES: CREDIBILITY. Plaintiff testified that, immediately upon the occurrence of the accident, a son of the owner of the property where the accident happened remarked to such owner, a defendant in the suit, "If you had fixed this when I wanted you to, this wouldn't have happened," and defendant "scowled and shook his head," but said nothing. The evidence was not objectionable and was for the consideration of the jury, although denied by both father and son on the witness stand, the jury being the judges of the credibility of the witnesses.

6. ———: ———: COMPETENCY. There is no fixed rule as to what previous training or experience is necessary to qualify one as an expert witness. The question as to his competency to testify is primarily for the court upon objection being made. If no general objection is made to the competency of the witness, his testimony goes to the jury who must be the sole judges of its weight.

7. **Appeal:** DAMAGES: MISSTATEMENTS OF COUNSEL. In the closing argument of counsel for plaintiff, he stated his claims as to the rule to be applied in the measurement of damages, and to which counsel for defendants objected as being a misstatement of the law. The objection was overruled, the court stating that the jury would be instructed as to the measure of damages. An instruction upon the subject was given. The verdict showed that the jury were not influenced by the contention of counsel. *Held*, That such contention, even if improper, did not vitiate the verdict.

8. **Trial:** SPECIAL FINDINGS. Where interrogatories requiring special findings were submitted to the jury, and their answers were not inconsistent with the general verdict, a new trial will not be ordered where upon immaterial subjects the jury answered they "did not know."

9. **Appeal:** CONFLICTING EVIDENCE. Where the evidence is conflicting, or where different minds might arrive at different conclusions from the facts proved, and the reviewing court might not have agreed with the jury in the first instance, the judgment of the trial court will not be reversed for that reason alone.

APPEAL from the district court for Adams county: ED L. ADAMS, JUDGE. *Affirmed.*

Tibbets, Morey & Fuller, for appellants.

Samuel Griffin and *J. W. James, contra.*

REESE, C. J.

This action was for damages resulting from personal injuries sustained by plaintiff while in the employ of defendants. There was a verdict and judgment in favor of plaintiff, and from which defendants appeal.

Plaintiff was an employee of defendants, and his duties at the time of the accident were to assist another employee, by the name of Dean, in conveying wagons and other farm implements from the first to the third floor of defendant's business house by means of an elevator. The day on which the accident occurred was the first and only day plaintiff labored for defendants. At the particular time of the accident plaintiff was assisting in taking sideboards of wagon-boxes, or wagon-beds, to the third floor,

using the elevator for that purpose. The boards were stood on end, leaning diagonally upon and against the bail of the elevator, and projecting above between two and one-half and three feet. Dean had charge of the elevator; plaintiff's sole duty being to assist in removing the material to and from it, except that it is claimed that plaintiff was directed to notify Dean when the bottom or platform of the elevator came within two or three feet of the third floor, so that the elevator might be stopped in its upward movement, and the boards be the more easily removed and stored away. There was some evidence that plaintiff did give such notice on trips made before the accident occurred, but not on the last one. Plaintiff testified, in substance, that, as they approached the point at which the elevator was to be stopped, he saw that Dean was trying to stop the car, and that the notice was not necessary. As the car approached the top of the elevator shaft, it broke loose and fell a distance of about 60 feet, carrying Dean and plaintiff with it, and plaintiff was injured. There is no dispute as to the occurrence of the accident, nor as to the extent of plaintiff's injuries. That he was seriously and permanently injured is clearly shown by the evidence, and not contradicted by defendants. He was about 26 years of age when hurt, and was a healthy, robust young man, depending upon his manual labor for a livelihood. His injuries have made him a cripple and an invalid for life, and render him incapable of ever engaging in his usual avocations. This is practically conceded, but it is contended that the injury was an accident against which ordinary prudence and care on the part of defendants could not guard, and that it was in no way caused or produced by any want of care or by negligence on their part; that the elevator was properly and well made and constructed; and that defendants were in no sense liable to plaintiff for the unfortunate accident, and should not be held therefor.

It is insisted by defendants that upon the trial plaintiff was allowed to introduce evidence upon facts not within

the issues made by the pleadings, and that the verdict of the jury is not sustained by sufficient evidence. Defendants contend that the petition does not contain sufficient averments to charge them with negligence, or to render them liable for the injury, and that the evidence of plaintiff that the elevator was not supplied with certain specific appliances was not within the issues made by the pleadings, and the admission thereof was prejudicially erroneous.

In order to an understanding of the questions presented, it is necessary that the substance of the pleadings upon the points of contention be stated. After the formal averments as to the employment of plaintiff by defendants, the character of the labor performed, the ownership of the business and property by defendants, that the latter's business, that of wholesale and retail dealers in hardware and implements, was carried on in a three-story building, it is alleged that at the time of the accident the defendants "owned and operated in the back part of said building an elevator (commonly called a freight elevator), used in carrying machinery, wagons, carriages, persons, etc., to and from the different floors of said building; that said elevator was run by a four horse-power motor, and that the movements of said elevator were controlled by the application of switches and brakes, the same being used to stop and control the speed of said elevator; that said elevator was also equipped with what was supposed to be an automatic clutch, and supposed to work in case said elevator should break loose, by said clutch dropping into the sides or uprights of said elevator, and thereby stopping the same"; that on the 5th day of June, 1906, plaintiff entered into the employment of defendants, and was to assist one W. H. Dean, also an employee, and who operated and handled the elevator, to load the same and transfer some machinery and wagons by means of said elevator to the upper story or floor of said building and there unload the same; that, while in the performance of said duties, it was customary and necessary for plaintiff

to get upon the platform of the elevator and be carried to the floor of the building where the machinery and wagons were being stored; that plaintiff was directed to work under the control and direction of Dean; that about the hour of 4 o'clock of said day, and while Dean was carrying and conveying some sideboards to wagon-beds to the upper story of the building, and without any fault of plaintiff and while in the exercise of due care on his part, plaintiff was carried to the top of said shaft by said elevator, where the same gave way, precipitating said elevator upon which plaintiff was standing to the basement of said building, a distance of about 60 feet, thereby injuring, bruising, mangling and permanently injuring him; that, as a direct result from said injuries, "plaintiff has been for about 50 days and still is bedridden; that during said time he has suffered intense pain and anguish; that he has had surgical operations, and has been continually since said injuries and still is under treatment"; that he has had to have a nurse at all times since said injuries, and has been totally deprived of the fruits of his labors during said time, and as he believes will always be. The petition continues as follows: "Plaintiff further says that his said injuries were wholly due to the wrongful, careless and negligent acts and omissions of the said defendants, and defendants were negligent in this, to wit, that said elevator has been in use a great many years, and poorly and improperly constructed, and is made out of poor and defective lumber, so that the same was continually getting out of order; that said elevator and machinery and appliances became old, worn, and defective and out of repair, and that by reason thereof the same was continually getting out of order, and that the said defendants allowed and caused the same to be cobbled by nonexperts, all of which was unknown to said plaintiff, but which were, or by the exercise of reasonable care might have been, known to said defendants in time to have repaired the same and prevented said injuries; and that, by reason of said defective elevator machinery and

appliances as aforesaid, said elevator became uncontrollable in its ascent, and failed to respond to the stops and brakes applied thereto, or used or attached to said elevator for safety in the case of any accident of this character, and thereby caused the injury mentioned; that the method employed in carrying and conveying said sideboards to the top of said building was the method usually and customarily employed in performing the same kind of work upon said elevator, and that plaintiff was acting under the express direction of the said W. H. Dean in occupying the position that he did occupy on said elevator, and the one necessarily and customarily assumed by said employee in the performance of said work, all of which were well known to said defendants."

Defendants answered, admitting that they were partners and engaged in business in the building as set forth, the existence and use of the elevator as alleged, "but not for the purposes of carrying persons"; that the elevator was run by a motor and controlled by the application of switches and brakes used to stop and control it, and that it was equipped with an automatic clutch; that plaintiff entered the employ of defendants at the time alleged, and was with W. H. Dean, who was in the employ of defendants, and engaged in the services as alleged, but denying that it was necessary for plaintiff to ride on the platform of said elevator; admitting that the elevator fell, but denying that it fell 60 feet, or that plaintiff "was required to act under the express directions of the said W. H. Dean, but allege that plaintiff and said Dean were fellow servants," and denying each and every allegation of the petition not admitted, qualified or denied. The affirmative allegations are as follows: "Defendants further allege that said elevator was, as far as human foresight was able to ascertain, in good, safe and proper condition to be safely operated; that the said Dean, who was at said time operating said elevator, had been thoroughly instructed in his duties in operating the same, and had for the space of two and one-half months from time to time

operated said elevator, knew the character, condition and operation of all its parts, and was considered by these defendants as a safe, trustworthy and competent person to operate the same. Defendants further allege that whatever injury plaintiff might have sustained by the fall of said elevator was not through any defect in said elevator or any of its parts, or its failure to respond to the proper operation of any of its parts, or to any negligence on the part of defendants or any of them. Defendants further allege that they and each of them frequently inspected said elevator and all its parts, saw that it was working properly and safely, and was competent and capable of doing the work for which it was used, and safe for the persons operating it or riding upon it; that defendants employed experts to overlook said elevator and to keep the same in proper condition to be safely operated, and defendants allege that at the time of the alleged accident said elevator, together with all its parts, was in a sound, safe and perfect condition, and that the accident complained of could not have happened except through the negligence of the plaintiff or his fellow servant W. H. Dean." The reply is a general denial.

While it is true that the petition might possibly have been more skillfully drawn, yet, construing the pleadings together, we are of the opinion that the issues formed embraced that of the care or want of care of defendants in furnishing reasonably safe appliances for the use of their employees while engaged in their service, and which included the usual and necessary safety appliances. The elevator in which the accident occurred had formerly been known as a hand freight elevator; that is, it was operated by what is called in the evidence as an endless cable, the movement being produced by pulling down or lifting up on the cable. Some time before the happening of the accident the power was so changed as to permit the elevator and its load to be lifted by an electrical "one-way motor." The appliance for cutting off the power was a "knife switch" operated by the use of a connecting rope

within easy reach of the person in control of the movement of the car. The efficiency of the switch was questioned on the trial, but defendants contended and now insist that, there being no specific averments as to the inadequacy of the switch, the subject was not within the issues, and that the trial court erred in admitting any evidence upon that subject. We are not able to adopt this view. As it alleged that, "by reason of said defective elevator machinery and appliances as aforesaid, said elevator became uncontrollable in its ascent and failed to respond to the stops and brakes applied thereto, or used upon or attached to said elevator for safety in case of accidents of this character, and thereby caused the injury herein mentioned," and as the answer contained the affirmative allegation that "at the time of the alleged accident said elevator, together with all its parts, was in a sound, safe and perfect condition," we think the whole field of imperfect construction of said elevator and its appliances and parts was a proper subject of inquiry.

It is next insisted that plaintiff made no serious attempt to prove the negligence alleged in the petition, except by the testimony of the witness Dean, and that his testimony was rendered valueless by the fact that in another suit he had testified that the alleged defects in the elevator were unknown to him. This refers to a petition which he had filed in a yet untried case wherein he had brought suit for damages resulting in an injury received in the same accident involved in this action; he being on the elevator as its operator at the time it fell. Without stopping to discuss the merits of this contention as bearing upon the weight of his testimony, it must be sufficient to say that that was a matter for the consideration of the jury after a comparison of the statements in connection with the explanations, if any, which might be offered. He testified on the trial of this cause that he did not know what made the elevator fall. This, however, would not necessarily detract from the weight of his testimony upon either feature of the case. If the petition which was

offered and received in evidence is true, he was found at the bottom of the elevator shaft with a broken leg, and it is hardly probable that he made any investigation soon thereafter for the purpose of ascertaining the cause of the accident. The examination of the question as to whether the verdict was supported by sufficient evidence must be reserved to a later consideration herein.

It is insisted that the testimony of two witnesses, Hoagland and Osgood, was improperly admitted. Hoagland's testimony was objected to on the ground that he was not shown to be a competent witness, and that his evidence was not within the issues. As to his competency to testify to the facts stated by him, there would seem to be no question, as he testified only as to what he observed, and showed that he had had experience with elevators for about 20 years. His testimony consisted in part in giving a history of the elevator in question with which he was quite familiar. The proof showed that certain parts of the old elevator were used in the new one at the time the power plant was installed. The defects to which he referred were subsequently shown by defendants to have been corrected, but that would not render the admission of his evidence upon that subject erroneous.

The testimony of Osgood is complained of, but no motion was made to withdraw it from the jury. It was of little, if any, importance. He was not offered as an expert. His testimony was upon immaterial matters, and could work no possible prejudice. It need not be further noticed.

Complaint is made of a part of the testimony of plaintiff. The evidence shows that the firm of C. L. Jones & Company consists in part, if not in whole, of C. L. Jones, the father, and Arthur, a son. Another son, Carl Jones, was engaged in and about the business, but was not a member of the firm. In detailing the circumstances of the accident and his condition soon thereafter, plaintiff stated that immediately after the fall he was lying on the floor of the elevator and some one was holding his

head up. He testified that "it was one of the young Joneses, but I do not know which one it was"; that C. L. Jones, the father, was also present; that the young man addressed his father and said: "If you had fixed this when I wanted you to, this wouldn't have happened." Upon being asked what the elder Jones said, his answer was: "He kind of scowled at him and shook his head. I didn't hear him say anything." The question calling for this answer was objected to as "immaterial, incompetent, not binding on the defendants, the Joneses," which objection was overruled, and to which defendants excepted. It is contended that the ruling of the court upon this objection was erroneous, and that the admission of the evidence was prejudicial to defendants, and calls for a reversal of the judgment. The whole of the statement was denied by both defendants and the younger Mr. Jones. If it be conceded that the testimony was open to the objection made, we are not prepared to say that its admission was so prejudicial as to demand the reversal of the judgment. If the conversation occurred, it was immediately after the elevator had struck the bottom of the shaft, and was so clearly connected with the accident as to be substantially a part of the event. If the testimony was true (and of that the jury were the sole judges), it was competent. The fact that defendant made no audible answer, if he heard the remark, would not exclude the evidence, since his action as described by plaintiff would clearly indicate that he heard it and did not deem it a proper subject of discussion at that time. It may be said that the preponderance of the evidence is against the fact, but that is not for the court. If the jury believed the testimony of plaintiff upon that part of the case, it was for them to decide as to the reason of defendant for his silence and conduct, as well as its probative effect.

W. H. Harris was called as an expect witness for plaintiff. He testified that his business at the time of the trial was that of chief engineer at the asylum near Hastings; that he had held the position for seven years, and had been

following the business of engineer for 28 years, and had had the opportunity to observe the mechanism of elevators with reference to appliances. He was then interrogated as to the mechanism of elevators by which provision was made for automatically checking and stopping their ascent and descent. This was objected to as "immaterial, irrelevant and incompetent, not within the issues." This did not present the question of the competency of the witness as an expert, or that sufficient foundation had not been laid to permit him to testify. A number of objections of similar import were made to questions propounded, in two of which the words "witness incompetent" occur, and in two others "no foundation laid" are found. There was no general objection to the competency of the witness as an expert, nor any request for further preliminary examination as to his knowledge or experience. Upon the cross-examination, his ability as an engineer was pretty well tested, and a number of questions of a hypothetical nature were propounded to him, but no motion was made to withdraw his testimony from the consideration of the jury. It is now contended that the witness "was absolutely incompetent" as an expert, and that his testimony was improperly admitted. While the "foundation" for his testimony was not laid with the care which the nature of the case seemed to require, yet, in view of his whole examination and the condition of the record, we must hold that the weight of his testimony was for the consideration of the jury, and that no affirmative error appears to have been committed by the court. It is also contended that an examination of the condition of the disconnecting switch and appliances, made soon after the accident, demonstrated the entire untrustworthiness of the evidence by which it was sought to be shown that they were defective. This, with many other contentions, must be disposed of by the suggestion that all questions of fact were for solution by the jury.

In defendant's brief it is said: "An important point in

this case, and one that should not be overlooked, is the fact that plaintiff, Modlin, was not in any way required to ride on the elevator except for the one purpose. That purpose would be to call out when to stop. The evidence is undisputed that he was not helping to operate the elevator," that there were stairs to all the floors, and, if Dean invited plaintiff to ride and it was not necessary for him to do so in the performance of his duties, then plaintiff rode at his own peril. It may be true that there was no requirement expressed that plaintiff should be carried up and down the elevator, but it is equally true that the work then being performed rendered it natural and proper that the persons engaged in the labor should pass from floor to floor with the material to be stored. It could not be expected that a person should load the elevator at the lower floor, and each trip climb the stairs and cause the delay in unloading which would necessarily result. The trips were frequently made, and those engaged in loading and unloading would be expected to accompany the load. There can be no doubt that the occupancy of the elevator would under the circumstances constitute a part of the labor to be performed, and the questions submitted to the jury were as to the care of the defendants in furnishing reasonably safe appliances for the protection of those engaged in the labor of the house, and the want of care, if any, on the part of plaintiff. There must have been some defect in the safety clutch, or it would have arrested the downward flight of the elevator at some point in its descent. The theory advanced upon the trial that the passage of the cable over the drum and its unwinding would be sufficient to prevent a readily working clutch from checking the fall of the elevator in the speed of its descent might not appeal to the jury as sufficient evidence that that part of the machinery was of any material value.

Objection was made to a portion of the closing argument made by counsel for plaintiff. The part objected to was a probable inaccurate computation of damages plaintiff was entitled to recover. It is true that counsel became

quite liberal in estimating the amount of plaintiff's damages. Upon a basis of $50 a month for 36 years, plaintiff's expectancy of life, the attorney appeared to have satisfied himself that plaintiff was entitled to a verdict of $21,000. Upon the objection being made, the court remarked that the jury would be instructed as to the measure of damages, and overruled the objection. As the verdict of the jury was for less than one-fourth of the amount contended for in the argument and one-fifth of the amount claimed in the petition, it cannot be said, therefore, that the forensic effort had much effect upon the minds of the jury, at least in the way of increasing the verdict. There are cases which hold that wrongful contentions by counsel as to the measure of damages require a reversal of a judgment, but we think all such are where it was apparent from the amount of the verdict that the jury were misled thereby, and that the error was to the prejudice of the losing party, but no such presumption can arise here.

Upon the subject of the measure of damages the court upon its own motion instructed the jury as follows: "If you find from the evidence and these instructions that the plaintiff is entitled to recover, it will be your duty to fix and ascertain from the evidence the amount to which he is entitled. You should carefully examine all the evidence as to the nature, character and extent of the injury and the result, whether the disability, if any, resulting from the injury was permanent or temporary, its extent, whether total or partial. If any permanent disability resulted, you should consider plaintiff's age, his reasonable expectancy of life, how much money he could earn as he was before the injury, how much he could earn, if any, with his reduced capacity, if any there was, on account of the injury, remembering that no reduction of capacity on any other account is to be considered, and allow him a reasonable compensation for any loss of time and capacity resulting from the injury. You should allow him such sum as would fairly and reasonably compensate him for moneys expended, for medical hire, nurses and medi-

cines, or for such reasonable sum as would compensate him for any obligations entered into in regard to such services. You should also allow him for his suffering, pain and anguish, if any. The law lays down no rule for the estimating of his damages on this account, but leaves it to your sound judgment, and you should allow him such amount as in your best judgment would be just and right, under the circumstances, not exceeding in all the amount claimed, to wit, $25,000." This instruction fairly covered the question, and is not objected to as a misstatement of the law, but it is contended that it does not fairly cover and correct the alleged injury inflicted by the remarks of counsel. We find no instruction in the record covering the question proffered by counsel for defendants, and therefore, following a long line of decisions in this state, must hold that error cannot be predicated upon the failure of the court to instruct more fully.

A number of instructions upon different phases of the case were asked by the defendants, but were refused, probably because sufficiently given by the court upon its own motion. We have examined them all, and can find no error in the action of the court. To set out and examine each could serve no good purpose. The instructions given appear to have covered the whole case, and must be held sufficient.

Thirty-four questions for special findings were submitted to the jury, some of which were upon material subjects, and others not. Some were answered properly by "Yes" or "No" according to the finding, and some were, with equal propriety, answered, "Don't know." We have all carefully examined the interrogatories submitted, and find that the answers given by the jury are not inconsistent with the general verdict and are of the opinion that they need not be further noticed. The findings that the proximate cause of the accident was the failure of defendants to properly equip the elevator with an automatic switch or appliance to prevent it going above the third floor, that the clutch was not in proper working order and

did not arrest the descent of the elevator, that the rope pulled by the operator of the elevator for the purpose of disconnecting the power did not respond, were sufficient, in so far as they were concerned, to justify the general verdict; but the finding that the cause of such failures, or rather the cause of the proximate cause, was unknown to the jury could not have the effect of impairing the other findings or vitiate the verdict.

To the mind of the writer the most serious question involved in this case is whether or not the evidence is sufficient on questions of fact to impose a liability upon defendants for this most unfortunate accident. Had we been called upon to decide the case upon its merits in the first instance, our conclusion might not have been in accordance with the verdict, but the case appears to have been fairly submitted, and the conclusion of the jury as the triers of fact will have to stand.

The judgment of the district court is

AFFIRMED.

WALTER S. CLEAVER, APPELLEE, V. JOHN C. JENKINS, MAYOR, ET AL., APPELLANTS.

FILED JUNE 11, 1909. No. 15,729.

Fines: COLLECTION. A police judge in cities of the second class having a population of more than 1,000 and less than 5,000 is authorized by law to issue execution against the property of one who has been fined for a violation of city ordinances for the collection of such fine and accrued costs.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Reversed and dismissed.*

O. A. Williams, for appellants.

E. D. Kilbourn, contra.

REESE, C. J.

Plaintiff commenced his suit in the district court for Antelope county, seeking an injunction against the mayor, police judge, city attorney and city marshal of the city of Neligh. The petition is of great length, and contains many averments in support of which no evidence was offered upon the trial. It is alleged that plaintiff is a druggist in said city, and, in connection with his drug business, deals in cigars, soda water and ice cream. The mayor and council of said city passed certain ordinances prohibiting the desecration of the Sabbath and the engaging in certain lines of business within the city on that day. In the pleadings and testimony of the witnesses, mention is made of an ordinance referred to as "No. 70," but, as there is no copy of said ordinance in the record, no further reference need be made to it, except to say that it will be presumed that the ordinance and all proceedings had under it were regular and legal. Ordinance number 92 is set out in the petition, and is admitted to be correctly copied, and in force. This ordinance is in the usual form of those adopted prohibiting persons from engaging in business on the Sabbath, but excepts from its provisions physicians, hotels, railroad offices, telephone offices, trains, livery stables, drug stores and restaurants for necessary purposes, vendors of ice, bread and milk. There is a provision in the ordinance that "drug stores may open only when called upon for the sale of medicines or surgical apparatus, when necessary, and it shall be unlawful for such drug store to sell any ice cream, soda water, cigars, malt, spirituous or vinous liquors, or other commodities other than medicines or surgical apparatus, or to be open and allow persons to congregate therein upon said day." It is alleged that the officers of the city, the defendants, have conspired together to cause his place of business to be watched, his customers to be persuaded to keep away from his drug store on the day named, and, in effect, that a condition of espionage has been main-

tained over his business for the purpose of injuring the same, while restaurant and hotel keepers who are in competition with him are permitted to sell ice cream, soda water and cigars. The inference to be drawn from the petition is that plaintiff is of the opinion that the ordinance imposed upon him an unjust discrimination, and because restaurant keepers may dispense ice cream, soda water and cigars, he should have the same right; in other words, that he should be permitted to sell such articles as others are permitted to supply to their customers on that day. In *Liberman v. State,* 26 Neb. 464, we said: "While a drug store may be kept open for necessary purposes, yet it is not provided that the proprietor may engage in indiscriminate trade on Sunday, but, evidently, that he may sell such medicines, and only such, as are necessary to relieve the actual necessities of the public on that day. There is no discrimination in the ordinance against plaintiff's business, and it is not void." The penalty provided by the ordinance for its violation is a fine not to exceed $50 and costs of prosecution for each offense, and that the person found guilty shall be committed until the fine and costs are paid. Plaintiff was informed against upon several occasions, charged with a violation of the ordinance, and, upon being found guilty, a fine and judgment for costs were assessed against him. He did not pay the fines or costs, nor was he imprisoned, but at a later day executions were issued and placed in the hands of the sheriff for collection. The prayer of the petition is for a preliminary injunction restraining the defendants from molesting him "from opening his store on the first day of the week, commonly called Sunday, for the purpose of compounding and sale of prescriptions of medicines, or the sale of medicines or surgical apparatus, when necessary, and from selling any or either of the same upon said day, and from remaining open for said purpose; from issuing an execution for the purpose of levying upon the property, or from levying the same after the same might be issued, for the collection of the fines, as aforesaid, and

that all parties acting under and through them, or either of them, and especially under the direction or order of the said defendant, John M. McAllister, as police judge of the city of Neligh, and that said defendants, or either of them, be restrained from remaining about the drug store of this plaintiff for the purpose of trying to turn parties away from entering said store on the first day of the week, commonly called Sunday, for the purpose of purchasing any medicine or prescription, as aforesaid, and from doing anything to injure the business of this plaintiff as set forth herein; and that on the final hearing of said cause said order of injunction be made perpetual, and for such other relief as may be just and equitable."

Answers were filed by Williams, the city attorney, and McAllister, the police judge, but no answer by the mayor or city marshal appears in the transcript. The term of office of the city marshal having expired, he seems to have dropped out of the case. The answers filed admit the official character of the answering defendants; that plaintiff was a druggist; that the other parties named in the petition as hotel and restaurant keepers were engaged in business as alleged; the passage of the ordinance named; the filing of the complaints against plaintiff, the proceedings thereunder substantially as alleged and shown by exhibits; and deny all other allegations. A trial was had which resulted in the dismissal of the case against Jenkins, the mayor, and finding "that the defendants Otis A. Williams, city attorney, and John McAllister, police judge, threaten to cause execution to issue and be levied upon the property of plaintiff to enforce the payment of said fines as alleged in the petition, and finds for the defendants upon all other matters in issue." The injunction was made perpetual as to Williams, city attorney, and McAllister, police judge, and the costs were taxed against them. From this they appeal. No brief has been filed by plaintiff, appellee.

Since the finding of the court was in favor of the defendants upon all issues except the one named, we conclude

that all questions except the right or power of the police judge to issue executions on his judgments for fines and that of the sheriff to enforce the same were decided in favor of defendants. The one question alone remains, which is that a fine imposed by a municipal court in cities of the class to which Neligh belongs cannot be collected by execution process. We are aware that this is unjust to the trial judge, but can see no other solution. It is not the duty of the trial judge to journalize his decisions and judgments, and therefore no censure is meant for him in what we here say. It is the duty of counsel to see that the clerk makes proper journal entries in decrees and judgments, and had attention been given to this, as it should have been, the record would probably not have been left in the condition in which we find it. We therefore examine the one question.

Section 72, art. I, ch. 14, Comp. St. 1907, being in the charter for cities of the second class and villages, provides: "Fines may in all cases, and in addition to any other mode provided, be recovered by suit or action before a justice of the peace, or other court of competent jurisdiction, in the name of the state. And in any such suit or action where pleading is necessary, it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the ordinance, referring to its title and the date of its adoption or passage, and showing as near as may be the facts of the alleged violation." In *Peterson v. State,* 79 Neb. 132, at page 142, after copying this section, we said: "From this it will be seen that the legislature contemplated a civil action for the recovery of a fine imposed for the violation of an ordinance, and in such case clear and satisfactory proof of the violation would certainly be sufficient to warrant a recovery." Section 30 of the same chapter of the statute provides that execution may issue against the sureties where a judgment is replevied or stayed for 90 days, as in the section provided, if the fine is not paid at the expiration of said time. There is an intimation that

this method of collecting fines is exclusive, and that no execution can issue unless the surety is given and judgment rendered as provided, but we do not so read it. The object of that provision evidently was to provide a summary and sure method of holding sureties should the fine not be paid; in other words, that the defendant might take the time in which to pay the fine if the surety were given, but that it should not be necessary to institute suits upon the undertaking in such cases. We think these sections give ample authority for issuing executions in such cases, but, were such not the fact, we think the general authority exists. 1 Bishop, New Criminal Procedure (4th ed.), sec. 1303; *Gill v. State,* 39 W. Va. 479, 45 Am. St. Rep. 928; *Kane v. People,* 8 Wend. (N. Y.) 203; 19 Cyc. 549; 1 Freeman, Executions (3d ed.), sec. 16. A prosecution for the violation of an ordinance, the act charged not being a violation of the criminal laws of the state, is a civil action, and it is quite probable that the provisions of sections 1047 and 1048 of the code giving authority to justices of the peace to enforce their judgments by execution might be applicable. But, if for any reason it should be found that the provisions of the criminal code would have to be applied, it is equally probable that sections 328 and 521 of that code gives authority to issue executions.

It follows that the judgment of the district court will have to be reversed and the action dismissed, which is done.

REVERSED AND DISMISSED.

LYDIA A. TEWKSBURY, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED JUNE 11, 1909. No. 15,733.

1. **Cities:** DEFECTIVE SIDEWALKS: LIABILITY. The making, improving, repairing, keeping in repair and in a safe condition, of streets and sidewalks by a municipal corporation relate to its corporate interests only, and it is liable for the wrongful or negligent acts of its agents in performing such duties. *Burke v. City of South Omaha*, 79 Neb. 793.

2. ———: ———: INJURY: NOTICE. Where a sidewalk is rendered temporarily dangerous by the positive negligent act of a city of the first class, and a person in passing over it, immediately or within less than 5 days thereafter, and in the absence of contributory negligence, receives a personal injury, the provisions of section 110 of the charter (Comp. St. 1907, ch. 13, art. I), requiring five days' notice of the dangerous condition of the walk to be given the city before the accident, cannot be applied, and the city will be held liable for damages sustained by the person injured.

3. ———: ———: ———: CONTRIBUTORY NEGLIGENCE. Evidence examined and it is not found as a matter of law that plaintiff was guilty of contributory negligence.

4. **Appeal:** AFFIRMANCE. There being no specific objections offered to instructions given, nor to the refusal of the trial court to give an instruction asked, and upon an examination of the whole record it appearing that the case was fairly submitted to the jury, and no prejudicial error is found to have been committed, the judgment of the district court will be affirmed.

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

John M. Stewart and *T. F. A. Williams*, for appellant.

Halleck F. Rose and *Wilmer B. Comstock*, *contra.*

REESE, C. J.

This was an action against the city of Lincoln for personal injuries resulting from a fall upon the sidewalk crossing occasioned by the accumulation of ice caused by the leaking of water from the hydrant and hose in use in

flushing a sewer. There is scarcely any dispute as to the facts, either as to the condition of the crossing caused by defendant, or the injury resulting from the fall. On Saturday, the 8th day of December, 1906, a sewer drain became clogged or dammed, and a hose was attached to a hydrant on the corner of Twelfth and O streets, and the water was carried through it to the opening in the sewer for the purpose of flushing said sewer. At the point of the union of the hose with the hydrant there was a leak, and the water was driven out upon the sidewalk and upon the bridge connecting the sidewalk with the street crossing, the bridge having a descent from the sidewalk to the street crossing of about three inches in two or three feet. During the night the water thus thrown upon the sidewalk and bridge froze, forming a thin, smooth coating of ice. On the afternoon of Sunday, the 9th, while the men were still at work, plaintiff with another lady was passing over the sidewalk and bridge on their way to church, when plaintiff stepped upon the ice, fell and broke her arm near the wrist, probably permanently injuring the arm. The negligence charged against the city was that of causing the dangerous condition which it is claimed might have been avoided by the exercise of ordinary care. It appears that during Saturday night the officers and employees of the city, observing the flow of water upon the sidewalk and bridge, caused a cloth to be wrapped upon the part where the water escaped, to prevent it from being thrown upon the walk and bridge, but no precaution was taken to prevent accidents to persons passing over the freezing water, and the testimony on the part of plaintiff is that the spraying and freezing continued on Sunday. On that day it was quite cold, and there was ice upon that part of the bridge over which plaintiff passed, which was not noticed by her, and she fell, inflicting the injury. The sidewalks and streets elsewhere were dry. Damages were laid in the petition at $5,000. A trial was had which resulted in a verdict in favor of plaintiff for $550, upon which judgment was ren-

dered. Defendant appeals. There is no contention that the judgment is for too great an amount, assuming that defendant is liable at all, but it is contended, first, that under section 110 of the city charter there is no liability, and, second, that the city cannot be held responsible, in any event, for the negligent acts of its officers and employees.

1. The section of the charter above referred to is as follows: "Cities of the first class shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks thereof within such cities, unless actual notice in writing of the defect of such public way or sidewalk shall have been filed with the city clerk at least five days before the occurrence of such injury or damage. In the absence of such notice, so filed, the city shall not be liable and in all cases such notice shall describe with particularity the place and nature of the defects of which complaint is made." Comp. St. 1907, ch. 13, art. I, sec. 110. It is contended by defendant that, in the absence of a compliance with this section, no action can be maintained, and that the court erred in refusing to direct the jury to return a verdict in favor of defendant; that, if defendant is "absolutely exempt" from liability for damages by reason of defective sidewalks unless actual notice thereof be given in writing five days before the occurrence of the accident, the court should have so directed the jury. As no notice was given, and, confessedly, none could have been given five days before the accident, it is claimed that defendant is not liable. Upon the other hand, it is contended by plaintiff, and we think with the better reason, that defendant cannot shield itself from liability for a negligent act of which it is of itself guilty and which is immediately followed by the injury; that the statute does not contemplate exemption from such negligent act; and, further, that all the knowledge that could possibly result from the giving of the notice, were it possible to give it, was already possessed by the city officers.

We have not been cited to any adjudications under an exactly similar statute, but think many of the cases cited by plaintiff are in point, on principle, and that their logic must be applied to this case. The line of demarcation between plaintiff and defendant appears to be the distinction between cases which involve the governmental function of municipal corporations and those of corporate duties and obligations of a semiprivate character imposed by law. It has been repeatedly held by this court that it is the duty of cities to keep and maintain its streets and sidewalks in repair and safe for public use. *City of Lincoln v. Walker,* 18 Neb. 244; *City of Omaha v. Jensen,* 35 Neb. 68; *Davis v. City of Omaha,* 47 Neb. 836; and others which need not be here cited.

The case of *Gillespie v. City of Lincoln,* 35 Neb. 34, was where the plaintiff in the action was struck and injured by a wagon of the fire department, and the city was held not liable on the ground that the duties of that department were not municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions which could be discharged equally well through agents appointed by the state, though usually associated with and appointed by the municipal body. But we said, on page 45: "The cases cited by plaintiff may be said to sustain the proposition that the law imposes upon a city the duty to keep its streets in a reasonably safe condition for use by the public, and for a neglect of that duty it will be answerable. They are plainly distinguishable from those to which we have referred, since the duty of the city with reference to its streets is a corporate duty. As said by Judge Folger in *Maxmilian v. Mayor,* 62 N. Y. 160: 'It is a duty with which the city is charged for its corporate benefit to be performed by its own agents as its own corporate act.' This distinction is made also in *Ehrgott v. Mayor,* 96 N. Y. 264, one of the cases cited by plaintiff. To the extent that the exemption of a city from liability for acts of officers herein enumerated af-

fects the general rule of liability for obstruction of the streets of the city it must be held to be an exception thereto—an exception based upon a public policy which subordinates mere private interests to the welfare of the general public."

Burke v. City of South Omaha, 79 Neb. 793, did not involve the exact question presented in this case, but the distinction between the two classes of cases is clearly pointed out and discussed, and a mere reference to it must be sufficient. We quoted with approval the following from a note to *McMahon v. City of Dubuque,* 70 Am. St. Rep. 143 (107 Ia. 62), "Municipal corporations, acting within the purview of their authority, and in their ministerial or corporate character, in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, are impliedly liable for damage caused by the negligence of their officers and agents, though they may be engaged in some work that will inure to the general benefit of the municipality. Grading streets, cleansing sewers, or keeping wharves in safe condition, from which a profit is derived, are duties of this character." See, also, *Shinnick v. City of Marshalltown,* 137 Ia. 72; *Hitchins Bros. v. Mayor,* 68 Md. 100; *Esberg Cigar Co. v. City of Portland,* 34 Or. 282; *Carson v. City of Genesee,* 9 Idaho, 244. Further discussion would seem to be unnecessary.

2. Is the five days' notice required in the section above quoted necessary? In other words, can the provisions of the section be applied to cases of this kind? We think not. To hold that five days' notice should be given for a wrong committed by the city itself one hour, or one day, before the occurrence of the accident, and of which the city already has absolute knowledge, would be in the highest degree ludicrous and attribute to the lawmaker a want of foresight, insight and comprehension which we cannot do. It is true that the statute provides that the city shall be "absolutely exempt from liability" unless such notice be given, but we must give a reasonable construc-

tion to the language of the act. The law never requires an impossible thing. The section presupposes that the defect in the public way must have existed at least five days, otherwise the notice would be impossible. But, even if the notice should be held necessary where the defect is caused by the elements, or the unauthorized act of third parties, it could not with any degree of reason be said that it could be required where the danger was created by the negligent act of the city itself. Suppose a deep water or sewer-way trench was excavated across the street just before dark, and no lights or other signals of danger were placed to warn those using the street of its condition, and a person in passing over the street in the dark night, two hours later, with no knowledge of what had been done, should receive an injury by driving or falling into the opening, could one say, that the legislature had in mind such a circumstance and require the five days' notice of the condition of the street? We think not. In *City of Lincoln v. Calvert,* 39 Neb. 305, it is said in the syllabus: "While a city is liable only for injuries resulting from defects brought to its notice or existing under such circumstances that ignorance of the defect amounts in itself to negligence, still, when the defect is caused by the direct act, order, or authority of the city, notice is necessarily implied." In *City of Omaha v. Jensen,* 35 Neb. 68, we said (quoting from the syllabus): "Where a city causes an excavation to be made in a public street, it cannot plead want of notice of the failure to erect barriers to prevent accidents by falling into the excavation. It is its duty to see that such barriers are erected and kept up." In the body of the opinion it is said: "It is claimed that the city is not liable, because it had no notice, either actual or constructive. In a case of this kind no notice is necessary. The city had authorized the excavation in question, and it was its duty to see that the proper guards were placed around it." See, also, *Adams v. City of Oshkosh,* 71 Wis. 49; *City of Springfield v. Le Claire,* 49 Ill. 476; *Barton v. City of*

Syracuse, 36 N. Y. 54; *City of Houston v. Isaacks,* 68 Tex. 116, 3 S. W. 693; *Still v. City of Houston,* 27 Tex. Civ. App. 447, 66 S. W. 76; 28 Cyc. 1389, note 9.

3. It is suggested that plaintiff was guilty of contributory negligence in stepping on the icy sidewalk and bridge. We find nothing in the evidence by which we can say as a matter of law that plaintiff was guilty of contributory negligence. That question was submitted to the jury under proper instructions, and their finding will have to stand.

4. Complaint is made of two instructions given and one asked by defendant and refused. They are too long to be here copied, nor is it necessary to do so, as there is no specific criticism, and the instructions given fairly covered the whole case, as well as the one refused, and we find no error in them.

The judgment of the district court is

AFFIRMED.

WABASKA ELECTRIC COMPANY, APPELLEE, V. CITY OF BLUE SPRINGS, APPELLEE; UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT.*

FILED JUNE 11, 1909. No. 15,595.

1. **Judgment:** VALIDITY: COLLATERAL ATTACK. Where a court having jurisdiction of the subject matter of an action obtains jurisdiction of the parties by due service of process, or upon appeal, and after issue joined renders judgment upon an agreement made in court, the insufficiency of such agreement, or the want of authority of the attorneys making the same, will, at most, make the judgment erroneous, but not void and subject to collateral attack.

2. **Appeal:** APPEAL BOND: LIABILITY OF SURETY. The liability of a surety upon an appeal bond is not enlarged because the appellate court adds to the amount of the judgment below interest at the legal rate from the date of its entry.

* Judgment vacated in so far as it reverses the judgment of the district court against the city of Blue Springs.

3. ———: ———: DISCHARGE OF SURETY. An agreement between the parties to an appeal pending in the district court, without the knowledge or consent of the surety on the appeal bond, to the effect that judgment be entered against the appellant for a specified sum, with costs, based upon valuable considerations moving to each of the parties outside of the matters involved in the appeal, operates as a release of the surety on the appeal bond.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

Hazlett & Jack, for appellant.

E. N. Kauffman, L. W. Colby and *E. O. Kretsinger, contra.*

BARNES, J.

This was an action upon two certain appeal undertakings executed by the city of Blue Springs, as principal, and the defendant the United States Fidelity & Guaranty Company, as surety, to perfect appeals to the district court from judgments rendered in the county court in favor of the plaintiff and against the above named city. There was a judgment for the plaintiff, and the defendant the United States Fidelity & Guaranty Company has appealed.

1. It appears that, after the appeals from the aforesaid judgments were perfected and issues therein joined in the district court, judgments were by the consent of the parties rendered against the city in each case in an amount which equalled the sum of the judgment in the county court and interest thereon computed at the rate of 7 per cent. per annum. The defendant the United States Fidelity & Guaranty Company in its arguments treats the stipulations as a confession of judgment, and argues that neither the city attorney nor the mayor and council of the defendant city had any power to confess judgment against the city, and that the judgments are therefore void. It may be conceded that, if we use the term confession of judgment in its ordinary and proper

sense of a voluntary submission to the jurisdiction of the court, giving by consent, and without service of process, what might otherwise be obtained by summons, complaint and other formal proceedings (2 Words and Phrases, p. 1420), the city attorney would have no authority to confess a judgment, and that a judgment rendered upon such confession would be void and might be collaterally attacked. Where, however, action is commenced by process duly served, or where, as in the case under consideration, the action is duly brought by appeal from a court so obtaining jurisdiction, and judgment is afterwards entered by consent, the jurisdiction does not depend upon such consent, and the judgment is not in any proper sense a judgment by confession. After a court having jurisdiction of the subject matter of the action acquires jurisdiction of the parties by service of process, no irregularity in entering judgment deprives it of jurisdiction so as to make its judgment void. As the court had power to render judgment upon a proper stipulation, or upon sufficient evidence, it follows that, if judgment is rendered upon an insufficient stipulation or upon insufficient evidence—the result is the same in each case—the judgment is erroneous, but not void. Still further, the court has power to render a judgment upon the pleadings in a proper case. If it exercises this power mistakenly or improvidently, the judgment is not void, but erroneous; and it logically follows that, if the court renders judgment without either consent or evidence, such judgment is not void, however erroneous it may be. *George v. Dill,* 83 Neb. 825; *Clark v. Superior Court,* 55 Cal. 199; *Ex parte Bennett,* 44 Cal. 84; *Garner v. State,* 28 Kan. 790; Van Fleet, Collateral Attack, secs. 696, 697.

2. The appealing defendant contends that its liability as surety was enlarged by the rendition of these judgments. The amount of each judgment, as we have seen, equalled the sum of the judgment below and interest thereon at the rate of 7 per cent. per annum. It follows that no greater liability is imposed upon the surety than

was involved in the contingency that the district court might arrive at the same decision as the county court, and this the surety was bound to contemplate.

3. In one of the stipulations it was provided that the judgment to which consent was given should be in full payment of electric light service up to the 1st day of December, 1903, which was a date later than that included in either suit. This presents the question whether the fact that the plaintiff in a judgment brought by the defendant from the county court to the district court upon appeal, by surrendering his right to recover on another claim, induces the defendant to consent to a judgment for the amount recovered below, thereby releases the surety. It appears that, while the cases were pending in the district court, the plaintiff and the defendant city entered into the stipulation above mentioned, by which the city consented that judgment be entered in that court the same as in the court below, with interest added, for a valuable consideration, viz., the relinquishment by the plaintiff of a claim for 21 months' electric light service to the city. If plaintiff was willing to yield so large a claim, it seems reasonable that it must have been on account of some inherent weakness in its cases then pending before the district court. For the purpose of getting the judgments affirmed in that court, the plaintiff waived its aforesaid claim and consented to surrender its franchise. So far as the surety was concerned, the effect of that agreement was to credit the city with the value of that claim upon the judgments which it had appealed from the county court. After that was done, the city might well have consented that plaintiff's judgments should be affirmed.

A similar case was before the supreme court of Alabama, *Johnson v. Flint,* 34 Ala. 673. In that case the stipulation was as follows: "It is agreed in this case that judgment be affirmed on the following terms: Four hundred dollars shall be deducted from the verdict, and the judgment shall be affirmed for $2,332.19, with interest

thereon from the time of its rendition, that is, the rendition of the verdict; no other damages, however, to be allowed. It is further agreed that the saw and grist mill, boilers, machinery, etc., be the property of Kirk, the defendant, and that Flint will deliver them to him, when called for, at the mills where they are, the affirmance to be at the cost of Kirk; and if the mills should be burned up, after this time, without the default of Flint, the loss shall be Kirk's." Upon these facts the court said: "The appellants were the sureties of Kirk on an appeal bond, the condition of which was that Kirk shall 'prosecute to effect his suit in the supreme court, and pay and satisfy such judgment as the supreme court shall render in the premises.' The obligation of the appellants was for the performance of certain acts by a third person. In reference to obligations of this description, it is a well-settled principle that, if the nonperformance of the stipulated acts was occasioned by the conduct of the creditor, or was the result of an agreement between him and the principal obligor, the sureties are discharged. This plain principle is conclusive of this case. The principal obligor was prevented from proceeding in the attempt to prosecute his suit to effect by the agreement entered into between him and the obligee, without the knowledge or consent of the sureties. By thus interfering, and becoming a party to an agreement binding Kirk not to prosecute his appeal, Flint must be held to have waived the obligations in his favor imposed on the sureties by the terms of their bond. The sureties guaranteed the performance by their principal of a particular contract, and engaged for nothing more. Without their consent, and by an agreement between the creditor and their principal in which mutual advantages are secured to each other, the contract into which the sureties entered has been varied. Now, nothing is more clear than that the surety will be discharged, at common law, in all cases where his responsibility is merely for the fulfilment by another of a contract which has been varied, without the consent of the surety, before

a breach has occurred. In such case, the new or substituted obligation is not that which the surety undertook should be performed; and the party who seeks to make him liable for the breach of the original agreement has, by his own act, prevented, or at least waived, its performance, by binding the principal obligor to do something else in place of that for which the surety stipulated. 2 Am. Lead. Cas. 284; *Watriss v. Pierce,* 32 N. H. 560; *Woodcock v. Oxford & W. R. Co.,* 21 Eng. L. & Eq. 285; *Sasscer v. Young,* 6 G. & J. (Md.) 243; *Mackey & McDonald v. Dodge & McKay,* 5 Ala. (n. s.) 388."

It would seem that this case should be ruled by the decision just quoted. In the present case, before any breach had taken place in the condition of the bonds, the creditor and the principal debtor, without the consent of the sureties of the latter, entered into a new agreement, founded upon a sufficient consideration, for the mutual advantage of each other, by which they stipulated that the act for which the sureties had become bound, viz., the prosecution of the appeals in the district court to effect and without delay, should not be performed. No matter how numerous the errors disclosed by the record in those cases, this new agreement effectually prevented their correction by the district court. We are therefore of opinion that by the conduct of the parties the surety was released from any liability on the appeal bonds in question.

4. It is strenuously insisted that, until it be shown that the city has failed and refused to levy each year the amount authorized by law for the payment of the judgments in question, there is no breach of the conditions of the appeal bonds sued on in this action. It is unnecessary for us to determine this question, as the judgment of the district court must be reversed for the reason above stated.

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

REVERSED.

F. H. GILCREST LUMBER COMPANY, APPELLANT, V. JOSEPH WILSON, APPELLEE.

FILED JUNE 11, 1909. No. 15,603.

1. **Sales:** WARRANTY. Where a vendee induces a dealer in agricultural implements to order for him a machine which the dealer has never previously sold or handled, and as to which he neither has nor professes to have any knowledge as to whether it will answer the purpose for which it is purchased, except certain statements made by an agent of the manufacturer, which statements he communicates to the vendee, at the same time expressly informing him that he has no personal knowledge in regard to the qualities of the machine and that it is sold without any warranty, and these facts are within the vendee's knowledge at the time of the purchase, there is no implied warranty that the machine is reasonably fitted for the purpose for which it is purchased.

2. ———: ———. Where a known, described and definite article is ordered of a dealer, although it is required for a particular purpose, still if the known, described and definite article be actually supplied, there is no implied warranty that it will answer the purpose of the buyer.

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

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

H. M. Sinclair and *Warrington & Stewart,* for appellant.

E. A. Cook, contra.

BARNES, J.

Plaintiff sued to recover the agreed purchase price of a corn picker sold and delivered to defendant at his request. Defendant admitted the purchase of the machine at the agreed price, and for a defense to the action alleged, in subtsance, that the machine was purchased by defendant to pick corn, and that plaintiff represented and warranted that the machine would gather corn successfully, and that it was suitable and adapted for the

purpose of corn picking. He further alleged that, after a fair trial, the machine did not work satisfactorily and did not pick corn successfully, and that he offered to return the machine to plaintiff, who refused to accept it. A trial resulted in a verdict and judgment for the defendant, from which plaintiff has appealed.

It is contended that the verdict in this case is not sustained by the evidence. We think there is much force in this contention. It appears that the defendant informed one Pontius, the agent of the plaintiff at Overton, Nebraska, that he wanted to purchase a corn picker. It further appears that plaintiff at the time of the sale did not handle and never had handled or sold corn pickers; that it did not have them listed for sale; that its agent had never seen such a machine; and that he did not have or profess to have any knowledge as to whether it would pick corn satisfactorily, or could be operated successfully. With full knowledge of the situation, defendant informed Pontius that he had been trying to get a corn picker for more than a year, but had so far been unable to do so. Pontius thereupon informed him that the machines were sold without any warranty, and that they did not deal in them, but he thought he could procure one for him. He also informed the defendant that he would call up Mr. Pilant, the agent of the International Harvester Company, who handled and controlled the sale of the McCormick corn picker, and ascertain if one could be purchased. Shortly afterward he informed the defendant of the result of his interview with Pilant, and also told him what Pilant said about the machines. At defendant's request Pontius ordered the machine in question, and the International Harvester Company acknowledged the receipt of the order by a letter written from Omaha, Nebraska, which reads as follows: "Gilcrest Lbr. Co., Overton, Neb. Gentlemen: We have your letter of the 23d ordering a corn picker. We took this matter up with our Mr. Pilant today, who is at Grand Island, and the picker goes forward today from Council Bluffs. These corn pickers are

shipped out without any warranty, and cash settlement must be made before the machine is delivered. These machines are priced to you at $250 f. o. b. Chicago, and you are expected to get nothing less than $350 for them. Yours truly, International Harvester Company, By B. L. Rees, Gen'l Agt." When the plaintiff received the letter above quoted, Pontius handed it to the defendant, who admits that he read at least a part of it, and when the machine arrived at Overton defendant received it, unloaded it from the car, and took charge of it without any assistance on the part of plaintiff. As above stated, he was unable to make it work successfully, and the International Harvester Company sent an expert machinist to his place to assist him in putting the machine in proper order. When he offered to return the machine, plaintiff having become absolutely liable for its purchase price, refused to accept it. The defendant refused to pay for it, and hence this suit.

The defendant, when on the witness stand, admitted that the machine was sold to him without any warranty or guaranty. In fact his testimony did not differ from that given by Mr. Pontius, but after being recalled he then testified that, when he said the machine was purchased by him without any warranty, he meant any written warranty. It also appears that he told one A. G. Bronzell, who resided in Overton, that he had ordered a corn picker which was to cost him $350 and was sold to him without any warranty. On cross-examination this witness testified as follows: "Q. And it was to cost him $350? A. I think that is it. Q. And you say you asked him what kind of a guaranty he was to get, and he said he wasn't to get any? A. I think that was it, yes, or words to that effect; just about like one man would talk to another in conversation on the street. I asked him what kind of terms they sold them on. Those are the words I used, I think, and he said spot cash. Q. Did you ask him about a warranty? A. Yes, sir; I asked him what kind of a warranty they gave him with it, and he said they gave

no warranty. I think the lumberman also told me that." One A. B. Franceour, who was a rival implement dealer, doing business in Overton, testified as follows: "Q. Do you remember the circumstance of Wilson coming into your office in November, 1906, and telling you he had bought a corn picker? A. Yes, sir. Q. I wish you would relate the conversation that was had between you and Wilson at that time. A. Well, he come in and said he had finally got a corn picker. Q. What was said further than that, if you remember? A. Well, I asked him if he had a guaranty with the corn picker, and he said no. Q. He told you who he had bought it from? A. Yes, sir." It seems to us from the foregoing evidence that the record quite conclusively establishes the fact that the defendant, when he purchased the corn picker in question, understood that he was buying it without any warranty either express or implied, and therefore the evidence contained in the record is insufficient to sustain the verdict.

Plaintiff complains of the fifth instruction to the jury. As stated above, the evidence shows that plaintiff did not expressly warrant the machine, but defendant contends that the law implied a warranty that the machine was reasonably fitted and adapted to the purpose for which he purchased it, viz., that of picking corn. The court adopted this theory, and by the instruction complained of informed the jury, in substance, that, in the absence of an express agreement that the machine was purchased at defendant's risk, the law implied that it was reasonably suitable for the purpose for which it was intended to be used, and if the jury were satisfied by a preponderance of the evidence that the machine was not reasonably suited for the purpose of picking corn, and that defendant made a reasonable effort to make it work, and gave plaintiff a reasonable opportunity to make it work, and if it did not then do reasonable work in picking corn, and defendant offered and was still ready to return it to plaintiff, they should find for the defendant. The rule is well established that, where a manufacturer or dealer

contracts to supply an article which he manufactures, or in which he deals, for a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in such a case an implied warranty that the article shall be reasonably fit for the purpose to which it is to be applied. Newmark, Law of Sales, sec. 333; Benjamin, Sales (4th ed.), sec. 657; *Omaha Coal, Coke & Lime Co. v. Fay,* 37 Neb. 68. Under the facts proved, it is clear that the case does not fall within the rule above announced. The reason for the rule is that the purchaser relies upon the superior knowledge and judgment of the dealer in the purchase of the machine. If the dealer who sells the machine is a manufacturer thereof, or is dealing generally in such machines, he is presumed to have a knowledge of the machine, and to know whether it is suitable and fitted for the purpose for which it is purchased, and the buyer has a right to rely upon such knowledge. In the instant case it is clearly disclosed that the plaintiff neither had, nor professed, any knowledge as to the fitness of the machine to perform the work for which defendant desired it. The defendant could not therefore have relied upon any supposed superior knowledge or judgment of the plaintiff in relation to it.

The machine which the defendant purchased was known as the "McCormick Corn Picker," and was the one which defendant desired plaintiff to order for him. The rule is also well established that, where a known, described and definite article is ordered of a dealer, although it is required for a particular purpose, still, if such article be actually supplied, there is no implied warranty that it shall answer the purpose of the buyer. *Oil Creek Gold Mining Co. v. Fairbanks, Morse & Co.,* 19 Colo. App. 142, 74 Pac. 543; *Cosgrove v. Bennett,* 32 Minn. 371; *Goulds v. Brophy,* 42 Minn. 109; *Ehrsam v. Brown,* 76 Kan. 206, 15 L. R. A. (n. s.) 877; *Davis Calyx Drill Co. v. Mallory,* 137 Fed. 332. Under the facts as shown by the record, it was reversible error for the court to instruct the jury

that there was an implied warranty that the machine was reasonably suited for the purpose for which defendant purchased it.

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

REVERSED.

ROOT, J., concurring.

I concur in the judgment of reversal upon the sole ground that the fifth instruction should not have been given, for the reason that it informs the jurors that there was an implied warranty that the machine was reasonably fit for the purposes for which it was sold. The evidence seems to the writer to be conflicting, but will justify a finding that defendant did not rely entirely on his own judgment in purchasing the chattel, but depended upon plaintiff to furnish him a machine that would be of some practical service. Plaintiff's agent, although denying that the machine was warranted, testified: "Well, in this case it was only warranted against defective material and workmanship, against breakage," so that there was not an entire absence of warranty. It does not seem to the writer that the evidence is conclusive that defendant ordered a McCormick corn picker. Plaintiff's agent, through whom the sale was made, makes no such claim. Defendant testified that he knew that plaintiff handled the McCormick machine, but he stated that he did not know where or from whom they would secure him one, but said: "I told him that we wouldn't quarrel about the price if he could get one, *so long as it worked.*" It seems to me that this is not a case for the application of the "known, described and defined article" rule. It will be observed that defendant did not have an opportunity of examining the machine before the order was sent. Whether a sale was consummated before the machine arrived in Overton, the record does not plainly disclose. If, before paying anything on or accepting the machine,

defendant had an opportunity to examine it, and failed to do so, this element would be eliminated. The evidence is not clear on this point.

The rules relative to the existence or nonexistence of implied warranties are succinctly set forth in *Jones v. Just,* L. R. 2 Q. B. (Eng.) *197, and it seems to me that the instant case should have been submitted to the jury to say whether the facts warranted the application of the fourth or fifth rule there stated; that is, whether in making said purchase defendant, without an opportunity to inspect the chattel, bought it, relying on the judgment of plaintiff to secure him a machine that was reasonably suited for picking corn. If he did, he had a good defense to this action, and, if he did not, a judgment in his favor cannot be sustained.

DEAN, J., dissenting.

I do not believe the verdict in this case should be disturbed. The jury was fairly instructed upon both the plaintiff's and the defendant's theory of the case. It passed upon all the questions of fact from the evidence before it and found in favor of the defendant, and to my mind was justified in so doing. The judgment of the trial court ought to be affirmed.

JAMES H. RING, APPELLANT, V. FRANCIS W. BROWN, APPELLEE.

FILED JUNE 11, 1909. No. 15,735.

1. **Corporations:** CONTRACT WITH MANAGER: LIABILITY. One who takes over the management of the business of a corporation under an agreement by which he has an option to purchase a controlling interest in its capital stock within a given time for a nominal consideration, and agrees to use his best endeavors to make its business pay and put value into its stock, in the absence of fraud

or mismanagement, is not liable for a failure to make its business profitable.

2. Evidence examined, its substance stated in the opinion, and *held* to be sufficient to sustain the judgment of the trial court.

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

J. H. Broady, Jr., and *Hugh LaMaster,* for appellant.

Strode & Strode, contra.

BARNES, J.

Prior to the 2d day of August, 1902, the plaintiff was engaged in operating a planing mill in the city of Lincoln, under the name of the National Manufacturing Company, a corporation, of which he was the president and the owner of all of its capital stock. For many years he had been a preacher of the gospel and a farmer, and therefore knew nothing whatever about the planing mill business. The mill proved a losing venture for him, and at the date above mentioned he had become involved in debt, and the concern was without credit. In order to continue the business, he entered into a contract with the defendant by which he agreed to deliver to one P. L. Hall 63 shares of the capital stock of the corporation in escrow, to be delivered by Hall to the defendant, at his option, at any time within 3½ years from the date of the contract upon the payment by the defendant of $1 to said Hall. In consideration of the delivery of the stock in escrow, the defendant undertook the management of the planing mill, and agreed to give his best service to the business in order to place it upon a paying basis, liquidate the indebtedness of the concern, and put value into its stock. It was further agreed that, if the defendant did not wish to proceed with said contract, he could cancel it at any time during its life without incurring any liability thereby. Thereupon the defendant took over the management of the plant, and he, together with the plaintiff,

employed one Harper, a person conceded to be experienced in that line of business and thoroughly competent to conduct it, as foreman and manager of the concern. It appears that the business was thereafter conducted at a loss until June 27, 1903, when a second contract was entered into, which recited that the indebtedness of the company was then about $11,000; that the plaintiff held a claim of about $3,500 against the corporation, and, in order to induce the defendant to continue the business of the company, it was agreed that the payment of plaintiff's claim should be postponed until all the balance of the indebtedness of the concern was paid. The intention and purpose, as expressed, was to subject the property of the company to the payment of its debts then due, or which should thereafter be incurred in the management of its affairs by the defendant, prior to the indebtedness due the plaintiff. After making the second contract, defendant continued in charge of the plant until January, 1904, when defendant decided not to exercise his option, and the mill was closed down. It was not thereafter reopened for business. The plaintiff thereupon instituted this action for an accounting, and prayed for a judgment against the defendant for the amount which should be found due him thereon.

Defendant's answer denied all of the allegations of mismanagement contained in the plaintiff's petition; alleged that he had conducted the business fairly and to the best of his ability; that it was a losing venture from the first; that he had expended of his own money something over $12,000 for the benefit of the plaintiff, for the payment of the corporate debts and to keep the mill running. He also prayed for an accounting, and for a judgment on his counterclaim for the amount that should be found due him thereon.

After the issues were joined, the case was referred, by agreement of the parties, to Edwin R. Mockett as a referee to take the testimony and report his findings of facts thereon. In due time the referee made his report

by which he found generally for the defendant. He also found that the plaintiff was indebted to the defendant in the sum of $2,684, and that the defendant was indebted to the plaintiff in the sum of $435, leaving a balance due to the defendant of $2,249, for which sum the defendant had judgment, and the plaintiff has appealed.

As a basis for recovery, the plaintiff alleged that the defendant under the contracts above described became a trustee for the corporation; that he was conducting a lumber yard and a planing mill in Lincoln on his own account; that he purposely and wilfully mismanaged the business of the National Manufacturing Company, and sold to it the odds, ends and culls of his own business at exorbitant prices; that he wilfully and intentionally conducted the affairs of the National Manufacturing Company in such a manner as to wreck the business; that he had violated his duties as a trustee and defrauded the company, and that the losses of the company were due to his unlawful conduct. The findings of the referee were against the plaintiff on these points, and he now contends that they are not sustained by the evidence, and that the judgment of the district court is contrary to law. This contention has made it necessary for us to read the bill of exceptions, which consists of about 500 type-written pages. This we have carefully done, and we find from the examination of the evidence that the National Manufacturing Company was organized in the fall of 1901, and commenced business in the latter part of November or early part of December of that year; that the plaintiff was not at that time directly interested in the plant; that his son, one C. B. Ring, had taken stock in the company to the amount of about $1,500; that one Stevens and one Burdine had taken 50 and 12 shares of the stock, respectively, and that there were 92 shares of stock of $100 each originally issued. Of this amount 50 shares were issued to Stevens and 12 shares to Burdine in consideration of a certain patented weather strip, and that no money was paid for those shares; that from the time the plant was

opened in December until February 12, 1902, the plaintiff had advanced about $6,000 to the plant in order to keep it going; that on February 12 he was persuaded to take stock in the company in satisfaction of the money he had advanced, and he thereupon became a stockholder of the company and its president, and from that date until July 12, 1902, managed and directed its business; that from February 12, under plaintiff's management, the capital stock suffered an impairment of $6,083.22, and from July 12 to August 2, 1902, a further impairment of $1,309.10, so that from February 12 until August 2, 1902, the company had suffered a loss of $7,392.32; that the company at that time was practically insolvent, and, having no credit, it was therefore unable to continue in business. The defendant undertook the management of the business August 2, 1902, and closed the plant about January 1, 1904; that, notwithstanding the defendant's endeavors to operate the plant on a paying basis, it suffered a loss of about $500 a month during that time. It further appears that the defendant did not have the exclusive control and management of the business, for, as above stated, he employed Harper at the instance of the plaintiff as foreman and manager of the business; that the plaintiff's son was secretary of the company; that his daughter was employed as its bookkeeper, and that the plaintiff also had employment therein as a collector. According to the testimony of the foreman Harper, who was called as a witness for the plaintiff, the defendant managed the affairs of the company as well as he could under all the circumstances; that the reasons for his failure to make the business pay was that the plant was unfavorably located; that it was not properly constructed and equipped; that it was an expensive one to run; that the company had no assets or means with which to buy its material at wholesale or to discount its bills, and it was therefore compelled to purchase its material at retail and in small quantities wherever such material could be

obtained; that the plant was managed as well as its construction, equipment and the situation permitted, but owing to strong competition, together with the facts above stated, it was impossible to conduct the business without loss.

Again, we find no competent evidence in the record which shows, or tends to show, that the defendant in managing the business discriminated against it in favor of his own lumber yard and planing mill. In fact the plaintiff failed to establish by competent evidence any of the material allegations of his petition. On the other hand, it appears that the defendant furnished material from his lumber yard to carry on the business; that he paid the running expenses of the concern from his own means; that he paid some of the debts of the corporation, advancing money for those purposes, amounting to about $12,000. It also clearly appears that at the conclusion of the business, and when defendant was compelled to close up the plant, to prevent further loss, the plaintiff was indebted to him in the amount found due by the referee, and was entitled to the credit so found for some of the machinery which defendant had taken out of the plant, with plaintiff's consent, leaving the balance due to defendant for which the trial court rendered judgment in his favor. It further appears that the defendant never received any compensation for his services; that he endeavored to make the plant pay, and put value into its stock, for which he had the option, thus hoping to compensate himself for his labor; but, failing to accomplish his purpose, he refused to exercise his option and take the stock which had been placed for him in escrow, and that he closed up the business and refused to reopen the mill for the sole purpose of preventing further loss. It also appears that he never refused to account to the plaintiff or the corporation; that the books were always open to plaintiff's inspection; that plaintiff was furnished employment in the plant; that his daughter was its bookkeeper; that his son was its secretary, and that there was never

any fraud or concealment practiced by the defendant in conducting the business.

It is further claimed that the defendant agreed to pay all the indebtedness of the corporation; that he failed and neglected to do so, and thereby violated his agreement, and that this furnished the plaintiff a basis for recovery. Upon this point the referee also found against him, and we think correctly so. We fail to find any consideration for such a promise, and it clearly and distinctly appears that, when the defendant took charge of the concern, it was with the express agreement and understanding that he was not to become personally liable for its debts.

We are therefore of opinion that the judgment of the district court was right, and it is in all things

AFFIRMED.

ANNA C. NILSON, ADMINISTRATRIX, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL., APPELLANTS.

FILED JUNE 11, 1909. No. 15,631.

1. **Railroads:** INJURY: NEGLIGENCE. Where the evidence showed that the employees of a railroad company made a flying switch of four cars on one of several parallel tracks across the main business street of a town of over 2,000 people, during a busy hour of the day, and immediately thereafter made another flying switch of two cars upon a nearby track, parallel to the first, crossing the same street, without giving other or further notice or signals than the ringing of a bell upon the engine which detached the cars at a point some distance east of the street, the question of the negligence of the defendants was properly submitted to the jury, and the evidence sustains a finding that the defendants were guilty of negligence.

2. ———: ———: ———. Under the evidence it was immaterial whether an ordinance was in existence or not regulating the speed of trains and the movement of cars within the city, since, irrespective of the existence of such ordinance, a verdict based upon the negligence of the defendants is amply supported by the evidence.

3. ———: ———: CONTRIBUTORY NEGLIGENCE. Where a person was killed by two cars making a flying switch over a public street, and the only proof of the contributory negligence of the deceased is an inference, other inferences which might be reasonably drawn from the circumstances may be considered by the jury.

4. Negligence: QUESTION FOR JURY. Unless the proof of contributory negligence is so clear that different minds could not reasonably draw different conclusions therefrom, this defense is for the jury to consider, and under the evidence in this case we are not warranted in saying that the deceased was chargeable with contributory negligence as a matter of law. *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790.

5. Instructions requested by the defendants, imposing upon a pedestrian crossing railroad tracks in a public street the absolute duty of looking and listening as a conditions precedent to recovery in case of accident, *held* properly refused, since the element of reasonable excuse for not doing so was omitted therefrom.

6. Damages: EVIDENCE. Evidence respecting the amount of property of a deceased which he owned during his lifetime or which he left to his widow and children is not competent upon the question of the measure of damages for his death by wrongful act. It is the amount of money which he has customarily devoted to the support and maintenance of his family, when considered in connection with his power and ability to continue to contribute the same to their support in the future, which should be the subject of inquiry. Proof that the deceased owned a farm and that a portion of the support which he furnished his family was derived from the rent of the same does not prejudicially affect the defendants.

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

James E. Kelby, Byron Clark and *Frank E. Bishop,* for appellants.

L. B. Stiner, Paul E. Boslaugh and *John A. Moore, contra.*

LETTON, J.

Action for damages caused by the killing of plaintiff's husband by the negligence of defendant railway company's employees. The defense is a general denial and contributory negligence.

The deceased, Jacob Nilson, was killed between 8 and 9 o'clock in the morning of July 27, 1906, at a point where Saunders avenue in the city of Sutton is crossed by the tracks of the defendant railway company. The evidence clearly shows negligence on the part of the defendant in its manner of operating its cars. Saunders avenue is the main business street of Sutton. It is crossed by five tracks. The track to two elevators, one situated east, the other west of Saunders avenue, lies farthest north. The next track is the main line of the Kansas City & Omaha Railroad Company, a subsidiary corporation of the defendant. An engine some distance east of the crossing was switching cars. Four cars had been detached on the main line for the purpose of making a "flying switch" to the station, and were passing across Saunders avenue to the west. Almost immediately thereafter two other cars were detached on the elevator track by the same method for the purpose of setting them at the west elevator, a distance of about 200 feet west of the crossing. As the four cars crossed Saunders avenue, the conductor, who was riding upon one of them, saw the two cars on the elevator track also crossing the street, and saw a man on the track directly in front of them. He called out, but the man was struck immediately, knocked down and killed. He testifies there was only the distance from the elevator track to the main line between them, and that it could not be much over 20 feet. A brakeman who was riding on the top of the car which struck the deceased testified that he was standing about the center of the west car looking west until after he passed both sidewalks; that they were going about six miles an hour and that he could see the track about 20 or 30 feet ahead of the car. The first he knew of the accident was that he heard Powell, the conductor, call out, and felt the car run over somebody; that that there was no one standing on the track as he approached the street from the east, and that if there had been a man there he could have seen him; that he saw people on both sides of the crossing, but not on this track.

The other brakeman says the cars were going about six or seven miles an hour, while other witnesses testify that these two cars were "going pretty fast," "9 and 10 miles an hour." Some witnesses testify that the bell of the engine was ringing, while other testimony is to the effect that it only rang "a few taps when it started to back" on the elevator track to make the "flying switch," and others heard no bell. No one saw the deceased step upon the track. Several witnesses whose attention was attracted by the calling out of Powell say deceased was standing upon the track when the cars struck him, facing southwest or west. Some of these witnesses were at a distance of from 185 to over 200 feet away, some a little north of west, and some south of west, of the place of accident. The two cars must have been moving with rapidity, as they did not stop for a distance of over 200 feet beyond the crossing, although the brakeman set the brakes as soon as the accident happened. The four cars seem to have been moving about four or five miles an hour, and the two cars much faster, so that both sections were moving at the same time, and the two cars, although "kicked" later, were near the four when the east end of the latter passed the street. There are buildings on the the east side of Saunders avenue which obstruct the view until a person walking south could not look eastward beyond the street line until he was on or close to the track, when he could see east for some distance.

Taking all the testimony together, we think a fair inference is that the deceased was about to cross the tracks on the west side of Saunders avenue when his attention was attracted to the four cars moving in front of him to the west on the main line; that he could not see the approaching cars from the east until he was on or close to the track; and that, as soon as the way was clear in front by the four cars passing, he stepped upon the elevator track, his attention was called and his progress arrested by Powell's cry, when he was immediately struck down by the moving cars. All the evidence shows that the

crossing of the west line of the avenue by the four cars, the cry by Powell, and the striking of deceased occupied an almost imperceptible period of time, and the man who was closest, Powell, the conductor, testifies: "Q. 889. How far were you distant from him when you called? A. Oh, I never measured the distance, but it was the distance from the elevator track to the main line, I couldn't tell you the distance because I don't remember it, it couldn't be much over 20 feet, right around there somewheres. Q. 890. When you called, how far distant were the cars on the elevator track from him? A. From the man? Q. 891. Yes. A. Well, just about to hit him, he couldn't have been very far, because the minute I hollered he was, you might say, he was knocked down, but I yelled just as hard as I could." To make "flying switches" in the manner described across the main business street of a town of 2,000 people, without other signals than those given at Sutton, and with no other precautions to ensure the safety of passers, would appear to most men to be gross negligence, and the jury were fully warranted in holding for plaintiff upon that issue.

Complaint is made that the court allowed an ordinance of the city regulating the speed of trains, etc., to be read in evidence without proof of its publication. Even if the publication were not proved properly, which we do not decide, we think the admission of this ordinance could not possibly prejudice the defendant. The fact that such an ordinance did or did not exist under the circumstances of this case could not affect the question of negligence. It was the fact of the defendant moving its cars in the manner that it did in such a thoroughfare, without greater care to protect persons passing along the street, that furnished the evidence of negligence, and it did not require an ordinance to establish it. Moreover, the answer contained what this court has in several instances held to be an admission, a qualified denial to the effect that, "if the ordinance was passed and in existence, it was unreasonable" and void. Evidence of a subsequent ordinance

repealing this one was erroneously admitted. Such evidence could have no relevancy to the questions at issue, but no prejudice is shown, and we will not reverse a case merely for the admission of immaterial evidence. To do so would reverse a large percentage of all cases tried, for, in even the most carefully conducted trials, such evidence is often received, the court being unable to anticipate that further facts may not render it material.

The main point made is that the deceased was guilty of contributory negligence in not looking and listening as he approached the track. Of course, this contention is based purely on inference. No one saw him as he approached the track or saw him step between the rails; but it is argued that, since it is proved that he could see and hear, and that his view was unobstructed to the east from the point where he was struck and from the edge of the ties close by, he must have been negligent in not hearing or seeing the approaching cars. The burden of proving that the deceased was negligent rests upon the defendant, and it was incumbent upon it to satisfy the jury of this by a preponderance of the evidence. Where the only proof is an inference, other inferences which may reasonably be drawn from the circumstances are to be considered. The defendants point of view is not the only one that may be taken. 1 Shearman and Redfield, Law of Negligence (5th ed.), sec. 114. It is true it was the duty of the plaintiff to exercise proper care in crossing the tracks of the railroad. It was also the defendant's duty to avoid making "flying switches" across a busy street without giving a warning commensurate with the dangers it created. No one saw the deceased between the tracks until the four cars were moving off the crossing, and it is probable that he stepped upon the tracks while his attention was directed to their movements. The evidence shows that he could not see east of the elevator office until he was upon or close to the track, and if the two cars were moving, as one witness states, about ten miles an hour, only a few seconds would bring them from the east side of

the street to the west sidewalk. In this case the element of time is so important that we think the jury were justified in drawing an inference more in accordance with the natural instincts of men than that which defendant seeks to deduce. "The instinct of self-preservation and the disposition of men to avoid personal harm may, in the absence of evidence, raise the presumption that a person killed or injured was in the exercise of ordinary care." *Grimm v. Omaha E. L. & P. Co.,* 79 Neb. 395. As was said by the supreme court of Missouri in *O'Connor v. Missouri P. R. Co.,* 94 Mo. 150: "Although the deceased was bound to keep a sharp watch for cars, yet he was not bound to anticipate that defendant would make a flying switch across and over the public highway—he was not bound to be prepared for an act of negligence on the part of the defendant. In view of the noise made by the passing trains, it cannot be said, as a matter of law, that he was negligent in failing to hear the warning of the men of the crew. O'Connor is dead, unable to speak, and it does not appear that he failed to make proper use of his eyes and ears. Whether he did or not was a question to be determined from all the circumstances in evidence—a question of fact for the jury. As we said in the *Stepp* case, *supra* (85 Mo. 229), where the traveler's fault, if any there was, is not disclosed by his own evidence, and the company is shown to have been in default, it devolves upon the defendant to show the want of proper care on the part of the person injured." *Grand Trunk R. Co. v. Ives,* 144 U. S. 408. There were no passing trains at Sutton, but there was another engine near the station and four moving cars in front. We think that, in the absence of affirmative proof, and under all the circumstances, the deceased was not chargeable with contributory negligence as a matter of law; that the defense was for the jury to consider, and that a verdict against the defendant for want of evidence on this point may not properly be set aside. 2 Shearman and Redfield, Law of Negligence (5th ed.), sec. 477; *Chicago, B. & Q. R. Co. v. Pollard,* 53 Neb. 730; *Union P.*

R. Co. v. Connolly, 77 Neb. 254; *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790.

It is also argued that deceased was a few feet west of the cross-walk when he was struck. The evidence is not uniform as to the exact place, and the matter was for the jury. The evidence further shows that for many years the public had been accustomed to use a space of several feet to the west of the cross-walk, as well as the main cross-walk, and the exact westward limit of the street is not shown. It seems evident, also, that the accident occurred within the street limits, as a witness, who was sitting about 175 or 180 feet north on the sidewalk in front of a store on the west side of the street, looked south and saw the accident, though there was a building near the track on that side of the street. Even if the accident occurred a few feet from the cross-walk, under these circumstances, it would not alter the legal effect of what took place.

Complaint is made of error in the giving and refusal of instructions. After instructing with reference to the issues made by the pleadings, the jury were told: "The question of the negligence of the defendant, and that such negligence was the cause of the injury to Jacob Nilson which resulted in his death and that it was without negligence on his part are the decisive questions in this case for you to pass on." They were then instructed that the burden was upon the plaintiff to prove that death resulted from the "negligent and careless operation of its railroad in running its cars at the time and place set out in the petition, and, she having established this fact by a preponderance of the evidence, it then rested upon the defendant to establish by a fair preponderance of the evidence that the negligence of the deceased, Jacob Nilson, contributed directly to the injury which caused his death." The jury were next instructed that there is no presumption of negligence on the part of either party until the contrary is shown by evidence; and, after stating a number of matters which are competent for the jury to consider with reference to the negligence of the defendant,

the court proceeds: "And upon the part of the deceased, Jacob Nilson, it is competent to consider his opportunities for discovering and avoiding the dangers to which he might be exposed, his conduct in the matter, precautions or lack of precaution as to whether he looked when passing upon the defendant's tracks or listened in order to apprise himself of the approaching danger and avoid it, and, in short, all the facts and circumstances shown in the testimony bearing upon the conduct of the plaintiff and defendant, and if, upon a consideration of the whole testimony, you find that the injury which caused the death of Jacob Nilson was the proximate result of negligence of the defendant railroad company or defendant's employees, and you do not find that the deceased, Jacob Nilson, by his failure to do that which an ordinarily prudent man should have done under the circumstances to protect himself, that is, by his negligence contributed to the injury, then you should find for the plaintiff. On the other hand, even if you find the defendants were negligent, yet if you further find that the deceased, Jacob Nilson, by his negligence contributed to the injury that caused his death, that is, that by the exercise of ordinary care and prudence he would have avoided injury, then the plaintiff cannot recover, and you should find for all the defendants." The court by the next instruction defines "negligence" and "contributory negligence" and "reasonable care." The next instruction is as to the measure of damages, and correctly instructs the jury that, if they find for the plaintiff, the amount of recovery "should be such sum as to compensate the widow and the minor children in whose behalf she sues for the pecuniary loss, if any, which they may have suffered by the death of Jacob Nilson. The law does not permit the recovery of remote or speculative damages or damages as punishment."

We are unable to see wherein these instructions do not state the law correctly, both upon the question of contributory negligence and measure of damages, the points as to which the defendant complains most seriously. This

court has never held that there is an absolute duty resting upon a person traveling along a busy street to look and listen before stepping upon a railway track, which is the idea embodied in the instructions requested by the defendant which the court refused. *Schwanenfeldt v. Chicago, B. & Q. R. Co.,* 80 Neb. 790; *Chicago, B. & Q. R. Co. v. Connolly,* 77 Neb. 254. In the case cited by defendant as authority for these instructions, this court say: "We further think that the act of a party in going upon a railroad crossing without first listening and looking for the approach of a train, *in the absence of a reasonable excuse therefor,* admits of no other inference than that of negligence, and, if such failure to look and listen contributes to the party's injury, he cannot recover." *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627. It may be observed, further, that in that case the parties were injured by driving across a highway crossing in the country, and the circumstances were nowise identical with those in this case.

At the trial some immaterial evidence was admitted respecting the property of the deceased, but this, if it had any effect at all, would be more apt to redound to defendant's advantage than otherwise. This was the very thing that the defendant sought to introduce in evidence in the case of *Chicago, R. I. & P. R. Co. v. Hambel,* 2 Neb. (Unof.) 607, and of the exclusion of which it made complaint. It is not the amount of the estate which a person owns in his lifetime or which he leaves after his decease which determines the amount of damages which his widow and children may suffer by reason of his death. *Chicago, R. I. & P. R. Co. v. Holmes,* 68 Neb. 826.

It is shown that Nilson owned 160 acres of land near Sutton and a home in that city; that he had moved to town to educate his younger children; that he worked in his own garden, worked around town and for some of the neighboring farmers in haying and harvest time. His arrangements with his son Albert evidently gave him control over the management of the farm, because the son did what his father told him to do. The parent worked part

of the time on the farm and received two-fifths of the crops. This share amounted to about $700 a year. The widow testified that her husband expended about $500 a year for the benefit of the family. The testimony concerning the income from the farm was interwoven with the other evidence proper for the jurors' consideration. The court in the eighth instruction cautioned them against confusing the rents Nilson had received with his earnings, but this caution could be in nowise prejudicial to the defendant; nor was the reception of this evidence. No complaint is made in the brief or argument that the damages were excessive, nor are they so under the evidence. This being the case, no prejudicial error was committed by the admission of such testimony.

The judgment of the district court is

AFFIRMED.

ALFRED WILSON, APPELLEE, V. GEORGE C. DALLAS, APPELLANT.

FILED JUNE 11, 1909. No. 15,740.

Appeal: REVIEW. To justify a reversal of the judgment of the district court, error must affirmatively appear.

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

J. L. White, for appellant.

Morlan, Ritchie & Wolff and E. P. Pyle, contra.

LETTON, J.

This action was begun in the county court to recover rent due upon a written lease. The defendant denied indebtedness, and pleaded a counterclaim for repairs necessary to make the premises habitable. From a judgment

for defendant, plaintiff appealed to the district court, where a trial was had which resulted in a judgment in his favor. Defendant appeals.

The first answer filed in the district court contained a general denial. Plaintiff filed a motion to strike this portion of the answer for the reason that it raised a new issue not raised in the county court. The sustaining of this motion is one of the errors relied upon for reversal. The record shows the filing of this motion, but fails to show that it was ever ruled on by the court. It next recites the filing of an amended answer setting up the same issues as in the county court and the filing of a reply thereto, and these were the pleadings upon which the case was tried.

Complaint is also made of the giving of instruction No. 5, directing the jury that under the issues and the evidence they could not allow the defendant anything upon his counterclaim. Neither can this assignment be considered.

The jury found for the defendant, whereupon the plaintiff filed a motion for judgment *non obstante veredicto,* and this motion was sustained. No motion for a new trial was filed by defendant within three days thereafter. We find in the record a motion for new trial filed by defendant three months later, but no ruling thereon was made, presumably because filed out of time.

In this condition of the record, no error affirmatively appears, and the judgment of the district court is

AFFIRMED.

WILBER I. CRAM, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.*

FILED JUNE 11, 1909. No. 15,148

1. Statutes: CONSTRUCTION: CONSTITUTIONAL LAW. Sections 10606 and 10607, Ann. St. 1907, being chapter 107, laws 1905, do not contravene sections 11 or 15, art. III of the constitution of Nebraska, nor is said legislation repugnant to the fourteenth amendment to the constitution of the United States.

2. Appeal: REVIEW. The defendant having failed to prove, or offer to prove, any affirmative defense to an action under said statute, save and except that as to its delay in forwarding one car-load of stock it did so in deference to the statute prohibiting the operation of trains on Sunday, and defendant having been given by this court the benefit of said defense, it is unnecessary to determine whether the statute precluded any other defense in said action.

3 Carriers: REGULATION. The legislature may provide by general law that a shipper of live stock may recover liquidated damages from a public carrier for failure to transport such stock committed to the carrier for transit between stations in Nebraska.

4. ———: ———. Section 4, art. XI of the constitution, does not prohibit the legislature from increasing the common law liability of common carriers, and, in case the legislature expands such liability, the courts will not declare the statute void on the complaint of the carrier, because in some hypothetical case the law, if applied, might work to the disadvantage of a shipper.

5. Commerce: REGULATION. The statute does not interfere with or regulate inter-state commerce.

6. Carriers: ACTION: DEFENSES: REVIEW. Where the evidence disclosed without dispute that as to one cause of action the delay was occasioned by unloading the stock for feed, water and rest at the feeding pens of defendant at a division point, and that to have continued the shipment to the point of destination would have probably compelled the carrier to have operated its trains on Sunday and have resulted in the delivery of said stock on the Sabbath, a judgment based on said count in the petition will be reversed.

APPEAL from the district court for Garfield county: JAMES N. PAUL, JUDGE. *Affirmed on condition.*

* See opinion on rehearing, 85 Neb. 586.

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

E. J. Clements, contra.

William T. Thompson, Attorney General, C. C. Flansburg and *B. T. White, amici curiæ.*

ROOT, J.

Action under chapter 107, laws 1905, being sections 10606 and 10607, Ann. St. 1907. Judgment was rendered in favor of plaintiff, and defendant appeals.

This case has been elaborately briefed and exhaustively argued by counsel for the respective litigants, and by friends of the court, but more attention has been given to the validity of the statute than to the facts in the instant case. The act is as follows: "Section 10606. It is hereby declared and made the duty of each corporation, individual, or association of individuals, operating any railroad as a public carrier of freight in the state of Nebraska, in transporting live stock from one point to another in said state in car-load lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in said journey from the initial point of receiving said stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles traveled including the time of stops at stations or other points, provided, in cases where the initial point is not a division station and on all branch lines not exceeding 125 miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each twelve miles of the distance including the time of stops at stations or other points, from the initial point to the first division station or over said branches. The time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required, as provided in

this schedule. Provided, further, that upon branch lines not exceeding 125 miles in length live stock of less than six cars in one consignment, each railroad company in this state may select and designate three days in each week as stock shipping days, and publish and make public the days so designated and after giving ten days' notice of the days so selected and designated, shall be required upon its branch lines to conform to the schedule in this act provided, only upon said days so designated as stock shipping days.

"Section 10607. Any individual, corporation, or association of individuals, violating any provisions of this act shall pay to the owner of such live stock, the sum of ten dollars for each hour for each car it extends or prolongs the time of transportation beyond the period herein limited as liquidated damages to be recovered in an ordinary action, as other debts are recovered."

1. It is argued that the legislature in enacting said statute violated section 11, art. III of the constitution, because the law, if given effect, amends sections 10596, 10597 and 10598, Ann. St. 1907, and the act of 1905 does not mention or repeal the statutes thus amended. The act under consideration is complete in itself, and, although it may conflict somewhat with section 10597, *supra*, it will not for that reason be held void, as the earlier act must yield to the later. *State v. Omaha Elevator Co.*, 75 Neb. 637; *Bryant v. Dakota County*, 53 Neb. 755. The act of 1905 does not in any manner modify sections 10596 or 10598, *supra*.

2. It is next suggested that the statute deprives a railway company of the equal protection of the law, in that it forecloses any defense that might reasonably exist in the carrier's favor and provides for the payment of an arbitrary sum to the shipper under certain conditions without regard to whether he is damaged or not, and thereby provides for the taking of the railway's property without due process of law. As to the first of the last

stated propositions, defendant is in the peculiar position of urging that it is without a defense, the statute being considered, and the court, not having the assistance of counsel on this branch of the law, will not exhaustively consider the question. The statute does not contain any exceptions, and defendant argues that neither the act of God nor inevitable accident would excuse it for failure to deliver a car-load of stock within the time limit. Although we do not agree with counsel, it is unnecessary to inquire concerning what facts would be a lawful excuse for a carrier in a suit like the one at bar. A statute will be read in connection with all other enactments upon that subject. *State v. Omaha Elevator Co.*, 75 Neb. 637; *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111; Sutherland (Lewis), Statutory Construction (2d ed.), sec. 448. It is also a truism that "when statutes are made, there are some things which are exempted and *fore-prized* out of the provisions thereof, by the law of reason, though not expressly mentioned: thus, things for necessity's sake, or to prevent a failure of justice, are excepted out of statutes." Dwarris (Potter's), Statutes and Constitutions, p. 123, rule 5. It was held in *United States v. Kirby*, 7 Wall. (U. S.), 482, that, although the statute providing a penalty for interfering with the transmission of the mails did not contain any exception, yet an officer might lawfully arrest a mail carrier upon a warrant charging him with the crime of murder. See, also, *Tsoi Sim v. United States*, 116 Fed. 920, 54 C. C. A. (U. S.) 154; *State v. Barge*, 82 Minn. 256; *State v. Rollins*, 80 Minn. 216. In *Sullivan Savings Institution v. Sharp*, 2 Neb. (Unof.) 300, it was held that a mortgagee was not liable in liquidated damages for refusing to cancel a mortgage if the right of the person making the demand was not clear. The statute does not deny the carrier the right to defend an action brought thereon, nor state what, if any defenses may or may not be available in such a case. Defendant will not be in position to complain in this particular until, in a concrete case, wherein it has presented and main-

tained or offered to maintain a legitimate defense, the courts have determined that the statute denies the carrier that right. *Whitehead v. Wilmington & W. R. Co.*, 87 N. Car. 255; *Allen v. Texas & P. R. Co.*, 100 Tex. 525, 101 S. W. 792.

Concerning the claim that the enforcement of the statute will amount to the taking of defendant's property without due process of law, it may be broadly stated that the carrier is not situated with reference to the public, and the statute, as natural persons engaged in the ordinary vocations in life are with reference to each other. A speed of 12 or 18 miles an hour for defendant's freight trains is not *prima facie* unreasonable, because defendant's testimony shows that it operated said trains on some parts of its railway at the rate of 30 miles an hour. It may be expensive for the railway in every instance to maintain the average speed demanded by the statute. A car of live stock transported from a branch line to a division may not reach the latter station in time to be included within a freight train going in the desired direction on the main line, and to devote a locomotive exclusively to the one car for any considerable distance would entail a considerable expense for the carrier. However, the railway company is permitted to charge remunerative rates for the transportation of freight. Its methods of bookkeeping and of collecting and tabulating statistics are such that it can with reasonable exactitude ascertain the cost to it, and a fair charge to the shipper for transporting any particular property. If the legislature has by regulating the service increased the expense of transporting live stock in Nebraska, and to comply with the statute will wipe out a reasonable margin of profit for the carrier on all of its intrastate business, it has ample recourse in an increase of rates, so that in the end, viewed as a general proposition, the enforcement of the law to the extreme suggested by defendant's learned counsel will not deprive the carrier of any just profit nor take its property without due process of law. In the instant case,

the enforcement of the law, as we view the record, will not deprive defendant of any constitutional guarantee, state or national. Defendant's property is affected by a public interest, and, having devoted that property to a use in which the public have an interest, it must, *to the limit of the interest thus acquired by the public,* submit to the control of such property for the public good. *City of Rushville v. Rushville Natural Gas Co.,* 132 Ind. 575; *Chicago, B. & Q. R. Co. v. Iowa,* 94 U. S. 155. The public is interested not only in being permitted to have its property transported for a reasonable compensation, but also in having that property, especially if subject to rapid depreciation, transported with reasonable promptness and care.

Before the enactment of this statute, the carrier was liable in damages to the shipper if it unnecessarily and unreasonably delayed the transportation of live stock committed to its possession for carriage. *Nelson v. Chicago, B. & Q. R. Co.,* 78 Neb. 57; *Denman v. Chicago, B. & Q. R. Co.,* 52 Neb. 140. The legislature, in passing from the subject of compensation to that of service, kept well within its constitutional rights, and the inquiry should be confined to ascertaining whether the operation of the law will impose such an undue burden upon the carrier as to take from it something for which the public will not give an adequate return. It is a matter of common knowledge that live stock confined in a freight car deteriorates in condition, and that, if the animals are to be placed on the market within a short time of the termination of transportation, the depreciation is not confined to a shrinkage in weight, but to many other factors difficult to prove, but actually existing and seriously affecting the market value of said property. As the damage accruing from the protracted confinement of stock is difficult to prove with reasonable exactitude, and yet always exists, the legislature has the power to provide for liquidated damages. Such legislation is not unsound in principle and has been upheld in many courts.

Section 4966 of the Revised Statutes of the United States provides that one who publicly performs a dramatic composition without the permission of the owner of the copyright thereof, if it has been copyrighted, shall be liable in damages in at least $100 for the first performance and $50 for each subsequent production. In *Brady v. Daly,* 175 U. S., 148, the statute was upheld, not as a penalty, because it was said only the owner of the copyright may bring the action, nor as a punishment to the wrongdoer, but as a reasonable liquidation of the damages which the proprietor had suffered from the wrongful acts of the defendant. So, also, where the statute provided for a flat recovery of a stipulated sum for the negligent killing of a person, the act was held not to deprive defendant of property without due process of law. It might be that substantial damages had not accrued to the plaintiff in a particular case. In some instances the damage would be insignificant, and in others death would relieve the plaintiff of a pecuniary burden. Under that statute it would not avail the defendant to plead and offer to prove that the deceased was a helpless cripple, or in the last stages of tuberculosis, nor would it be heard to say that its property was in danger of being taken without due process of law. *Coover v. Moore & Walker,* 31 Mo. 574; *Carroll v. Missouri P. R. Co.,* 88 Mo. 239.

Counsel for defendant argue that the statute purports to give more than compensatory damages, and therefore is controlled by *Atchison & N. R. Co. v. Baty,* 6 Neb. 37, but that case merely disapproved a statute that purported to give double damages, and, if the act under consideration provided for the recovery of double or treble damages, we would not hesitate to apply the earlier case to the instant one. Such is not the case. On more than one occasion we have upheld the right of the legislature to liquidate damages that may arise from the default of a person under circumstances which preclude the ascertainment of the actual damages suffered by the aggrieved person. In *Graham v. Kibble,* 9 Neb. 182, a recovery of

the statutory damages of $50 against a public officer for collecting a greater fee for his official services than the law prescribed was affirmed. In *Clearwater Bank v. Kurkonski,* 45 Neb. 1, the statute permitting a mortgagor to recover from the mortgagee $50 liquidated damages for failing to release a chattel mortgage after it had been fully paid was sustained; and in *Hier v. Hutchings,* 58 Neb. 334, we approved the statute providing for the recovery of $500 against an officer for rearresting a person who had been discharged on a writ of habeas corpus for the same offense as that described in the officer's warrant. Counsel distinguished those cases relating to public officers for the alleged reason that the legislature may subject the occupant of a public office to damages for particular unlawful acts committed in the conduct thereof. Although the legislature may not prohibit the carrier from transacting business, yet it may regulate the affairs of that public servant, and much of the reason for sustaining the power of the legislature to provide that public officers shall pay a definite sum as liquidated damages for acts of commission or omission applies to like provisions in statutes passed to regulate public carriers in the transaction of their business.

3. It is argued that the constitution of the state provides that "the liability of railroad corporations as common carriers shall never be limited" (art. XI, sec. 4); that the shipper might suffer a greater damage by reason of delay in the transportation of his stock than he could recover under the act in question; that the statute would prevent the shipper from recovering his actual damage, and therefore is void for that reason. Such a condition could not prejudice the defendant, and it cannot litigate a shipper's rights in a hypothetical case that may never be presented to this court. *Commonwealth v. Wright,* 79 Ky. 22; *State v. Becker,* 3 S. Dak. 29; *Lake Shore & M. S. R. Co. v. Ohio,* 173 U. S. 285, 308.

4. Defendant asserts that many of the shipments complained of were carried in interstate trains, and that the

statute interferes with interstate commerce, and cite *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321. Counsel have not referred to any admission in the pleadings or to a syllable of testimony that will sustain the claim advanced. All of the stock was transported between points within the state, and no part of the route traveled extended beyond the borders of Nebraska. The United States supreme court in *Houston & T. C. R. Co. v. Mayes, supra,* considered an interstate shipment, and only determined that the Texas statute was invalid in so far as it might be applied thereto, and subsequently the law was held valid as applied to intrastate shipments. *Allen v. Texas & P. R. Co.,* 100 Tex. 525, 101 S. W. 792. Nor would we concede that, by including the cars in a train made up partially of cars which contained property consigned to points without the state of Nebraska, defendant could avoid the statute so far as the intrastate shipments were concerned. *Hennington v. Georgia,* 163 U. S. 299, 317.

5. It is suggested that the statute is class legislation and inimical to section 15, art. III of the constitution. The act operates uniformly upon all persons coming within the class, and the classification has reason to justify its existence. The greater part of freight is inanimate, and much of it will not depreciate if delayed somewhat in transportation; but live stock, peculiarly of all perishable freight, must be handled expeditiously to preserve its value. Vegetables, if kept warm in winter, will not deteriorate if leisurely transported, and fresh fruit, meat and dairy products, if chilled and kept at a proper temperature, may be delayed in transit during warm weather and still arrive fresh and wholesome at the point of destination; but, regardless of the season or weather, speed is an essential element in the proper transportation of live stock by the carrier. We conclude that the law does not violate said section of the constitution. *Cleland v. Anderson,* 66 Neb. 252.

6. As to the first cause of action, plaintiff was permitted to recover for a delay of 24 hours in the shipment of one

car of stock. It is undisputed that said stock was shipped from Burwell in the forenoon of Saturday, the 1st of July; that in the regular course of transit it would pass through the city of Lincoln, where defendant maintains extensive yards and pens for feeding, watering and resting stock; that plaintiff's stock arrived at said point at 10:30 P. M. of said Saturday, which was within the time fixed by the statute, and was unloaded, fed and retained until Sunday night, when they were forwarded to South Omaha. Therefore, out of the 24 hours' delay in said shipment for which plaintiff recovered judgment, 23 hours and 15 minutes may be accounted for by said stop at the feedyards. If this time may be deducted, there was less than one hour's delay in said shipment, and plaintiff would not be entitled to recover therefor. The statute only binds the carrier to maintain the minimum rate of speed between the initial point "of receiving said stock to the point of *feeding or* destination." Defendant was within the letter of the law. Furthermore, the cattle were fed at Lincoln, and the time consumed there should not in our judgment have been charged against the carrier. We are of opinion that defendant was not required to continue running its train on Sunday, nor to deliver the stock at or about 12 o'clock Saturday night, and that it might with propriety have refused so to do without incurring a bill for damages. To that extent, at least, a defense was presented, and plaintiff should not have recovered on his first cause of action.

There is some evidence in the record to the effect that one car of stock was transported from Ashland to South Omaha via Fort Crook, a somewhat longer route than by Gretna; that the grades on the former line are lighter than on the latter, and this fact and a congestion of trains on the Gretna route impelled the choice of the Fort Crook line. The pleadings, however, do not admit the consideration of this extra mileage, which we are of opinion might have been considered had a proper issue been presented. There is also some evidence that at the stations inter-

mediate Burwell and South Omaha some time was consumed in setting out and picking up stock, for which defendant would have been entitled to credit had there been anything tangible and definite in the testimony on said point; but, in the condition of the record, neither the district court nor this court can find that on any particular shipment any definite deduction should have been made.

There is also considerable evidence tending to show, as a general proposition, that in the management of its traffic defendant is compelled to sidetrack trains and wait for passing trains; that defendant has installed a block service on its main line, and must at times delay a train until the one preceding it going in the same direction has cleared the block before the former may be permitted to enter it, but no one can apply this evidence so as to find as a matter of fact that as to any of the shipments a delay for any definite period was occasioned by the natural results of a careful operation of defendant's trains. It will therefore be unnecessary to consider whether those facts, if properly presented, would have constituted a defense to this action.

The judgment entered, to the extent of $240, is excessive. Therefore, unless the plaintiff within 30 days of the filing of this opinion remits from the judgment recovered in the district court the sum of $240 as of the date said judgment was entered, this case will be reversed and the cause remanded for further proceedings; but, if such remittitur is filed as aforesaid, the judgment of the district court will be affirmed, and in that event each party will pay its own costs in this court.

AFFIRMED.

FAWCETT, J., concurring.

I concur in the majority opinion, but only upon the ground that we are concluded by numerous former decisions of this court upon kindred questions. I have always questioned the power of the legislature arbitrarily to

determine that one party to a civil contract shall, in the event of a failure on his part to perform some condition thereof, pay to the other party damages which such other party has not sustained. To my mind the true and only just measure in all such cases is actual damage. But, in order to hold the law under consideration in this case invalid, we would be compelled to overrule a number of former decisions of this court. This a court of last resort should never do, except in extreme cases. I know of nothing more conducive to the well-being of a state than a settled state of the law.

BARNES, J., dissenting.

I am unable to concur in the majority opinion. As I view the act in question, it is unconstitutional for several reasons; but for the sake of brevity I shall discuss but one of them.

It clearly appears from the opinion of my associates that, in order to uphold the statute, they have been compelled to read into it certain exceptions to its operation, and have intimated that the court may, in a proper case, consider others. We have thus enlarged and changed the act by what seems to me to be judicial legislation to such an extent as to make a law which is quite different from the one passed by the legislature. It will be observed that, by the plain language of the statute, common carriers, in transporting live stock in car-load lots over their lines in this state, must maintain a speed of 18 miles an hour on their main and 12 miles an hour on their branch lines, and as a penalty for a failure to maintain that rate of speed they must pay to the shipper the sum of $10 a car an hour for each and every hour consumed beyond said time limit, even if no damages are caused by the delay. To the operation of this law the statute itself contains no exceptions and permits of no excuses. One of the defendant's contentions is that the law is unconstitutional because it contains no exemption from liability even where

the delay is caused by the act of God or the public enemy. I think however, this contention cannot be sustained, for it may well be said that such an exception is always understood and will be supplied by implication. So far, I am in accord with my associates, but such a rule does not apply to the failure to operate trains on Sunday and to delays caused by unavoidable accidents and the unlawful acts of third persons.

It is conceded, in effect, by the majority opinion that without the last-named exceptions the statute is unconstitutional. It will be observed that as to the plaintiff's first cause of action, which was for a delay which occurred on Sunday at the feedyards in Lincoln, the defendant is held not liable. It seems clear that to this extent the opinion amends the law, and this therefore amounts to judicial legislation. This should not be resorted to in order to uphold an act which, as it comes from the legislature, in effect deprives the carrier of his property without due process of law. In *In re Contest Proceedings,* 31 Neb. 262, it was said: "*A casus omissus* in a statute cannot be supplied by a court of law, for that would be to make laws." Where the words of a statute are plainly expressive of an intent not rendered dubious by the context, the interpretation must carry out that intent. It matters not in such a case what the consequences may be. It has therefore been distinctly stated, from early times down to the present day, that judges are not to mould the language of the statute in order to meet an alleged convenience, or an alleged equity; are not to be influenced by any notions of hardship, or of what, in their view, is right and reasonable. They are not to alter clear words, though the legislature may not have contemplated the consequences of using them; and, however unjust, arbitrary or inconvenient the intention may be, the statute must receive its full effect. What is called the policy of the government with reference to any particular legislation is too unstable a foundation for the construction of a statute. The clear language of a statute can be neither restrained nor ex-

tended by any consideration of supposed wisdom or policy; and, even when the court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. It must be construed according to its plain and obvious meaning, though the consequences should defeat the object of the act. A construction not supported by the language of the statute cannot be imposed by the court in order to effectuate what may be supposed to be the intention of the legislature. Endlich, Interpretation of Statutes, secs. 4, 5, 6. When the words of the statute admit of but one meaning, a court is not at liberty to speculate on the intention of the legislature, or to construe an act according to its own notions of what ought to have been enacted. The moment we depart from the plain words of the statute in a hunt for some intention founded on the general policy of the law, difficulties will meet us at every turn. Indeed, to depart from the language of the act is not to construe, but to alter, it, and this amounts to judicial legislation.

Again, the power of construction is restrained by certain well-settled rules, and, if this were not so, its use would often amount to usurpation of legislative power; and, as was said in *Gage v. Currier,* 4 Pick. (Mass.) 399: "A violation of the constitution we are sworn to support." In *Hyatt v. Taylor,* 42 N. Y. 258, it was held that "no rule of public policy, no necessity, no violation of right, no evidence of intent derivable from the terms of the statute or from its design, permits * * * a restriction of its plain and explicit language." I am therefore of opinion that when, in order to prevent a law from being declared unconstitutional, it is necessary to amend it by judicial construction, it is the duty of the court to promptly declare it unconstitutional, and thus avoid usurping legislative powers.

For the foregoing reasons, among others, it seems clear to me that the law in question should be declared uncon-

stitutional, and the judgment of the district court should be reversed.

JAMES M. KYLE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JUNE 11, 1909. No. 15,383.

Carriers: DELAY IN SHIPMENT. Sections 10606 and 10607, Ann. St. 1907, are valid, and in an action thereunder, where plaintiff fully proves all of the allegations of his petition, and defendant does not controvert said proof or establish any defense to the action, the judgment of the district court will be affirmed.

APPEAL from the district court for Merrick county: JAMES G. REEDER, JUDGE. *Affirmed.*

James E. Kelby, Frank E. Bishop and *Patterson & Patterson,* for appellant.

Martin & Ayres, contra.

ROOT, J.

This action was instituted to recover liquidated damages for defendant's failure to transport plaintiff's live stock as rapidly as required by sections 10606 and 10607, Ann. St. 1907. Defendant did not plead any defense other than a general denial, and the affirmative allegation that plaintiff accompanied his stock, and any damage sustained by said shipment was the result of his own negligence and carelessness. On the trial plaintiff made proof of the allegations in his petition, and defendant did not introduce any evidence whatever. In its brief defendant assails the validity of the law, and criticises plaintiff's testimony as to the time consumed by defendant on said trip in setting out and picking up live stock not owned by plaintiff. None of the instructions are criticised, and

in the state of the record, and for the reasons stated in *Cram v. Chicago, B. & Q. R. Co., ante,* p. 607, the case is

AFFIRMED.

WILLIAM L. NEWBY, APPELLANT, V. FRANK A. LAURENCE, APPELLEE.

FILED JUNE 11, 1909. No. 15,410.

Injunction: EQUITY. N. and L. entered into an agreement whereby N. was to care for L.'s apple orchard and pick the fruit therein, receiving one-half the apples for his compensation, the remaining half to be delivered to L. A dispute arose between said parties concerning the division of the fruit, and L. fastened the gate which closed the way into said orchard and forbade N. coming upon said premises. L. and N. engaged in a personal encounter, and N. applied to the district court for an injunction to prevent L. from entering upon said premises for the purpose of harvesting any of said fruit and to restrain him from picking or disposing of the same. L. was induced to act as he did because N. had not made a proper division of the fruit harvested by him. *Held,* That N. did not come into equity with clean hands and was not entitled to said injunction.

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

William L. Newby, James E. Addie and *A. J. Sawyer,* for appellant.

R. M. Proudfit and *R. D. Brown, contra.*

ROOT, J.

Action for an injunction. Defendant prevailed, and plaintiff appeals.

In 1906 defendant's wife owned, and he controlled, 62 acres of land in Saline county, upon which there was an apple orchard of 30 acres. Defendant resided about 20 miles distant. The land was fenced, but otherwise unimproved, and was heavily incumbered. May 11 the par-

ties hereto made an oral contract by virtue whereof plaintiff was to plant and till the cultivated land and mow the meadow for a share of the product. He was also to care for said orchard, pick the fruit and receive one-half thereof for his compensation. Plaintiff neither planted nor cultivated the plow land, and paid no attention to the grass land but arranged for other parties to attend thereto. Laurence acquiesced in those arrangements and received all of the rent for said lands. Plaintiff did not give much attention to the orchard, and failed entirely to harvest the summer apples, but defendant picked and marketed them. The berries grown on the land were gathered and principally retained by plaintiff. In September a dispute arose between the parties concerning a division of the apples which had then been harvested. Defendant forbade plaintiff going into the orchard, and closed and locked the gate by which access was gained thereto. Plaintiff attempted to enter the premises, and in a contest between the parties plaintiff shot and slightly wounded defendant. In a criminal prosecution therefor he was acquitted by a jury. About ten days after this difficulty plaintiff applied to the district judge and, without notice to defendant, secured a temporary injunction against him enjoining Laurence from interfering with plaintiff in the possession of said premises and from preventing plaintiff picking said fruit, and restrained defendant from selling or disposing of any of said fruit until the same had been divided. Later, upon issue joined and a trial on the merits, the court found generally for defendant, dissolved the injunction, and dismissed plaintiff's petition.

The relation of landlord and tenant did not exist between the parties. Plaintiff was a cropper or an employee entitled to a share of the fruit as compensation for his labor, and defendant had the right to go upon said premises for any proper purpose. Plaintiff's title to the apples could not, and did not, exceed an undivided one-half part thereof. *Culley v. Taylor*, 62 Neb. 651; *Sims v. Jones*, 54 Neb. 769, 69 Am. St. Rep. 749. Defendant had

not theretofore interfered in any manner with plaintiff in harvesting the apples, and at the time the difficulty between them arose the proof shows that plaintiff had not made an equal division of the fruit gathered at that time. Plaintiff did not come into equity with clean hands, nor was he any more entitled to exclusive possession of the orchard or the fruit therein than was defendant. The temporary writ was improvidently issued, and the court very properly dissolved it and dismissed the petition upon the facts as established by the evidence herein.

The judgment of the district court therefore is

AFFIRMED.

W. W. COCKINS, APPELLEE, V. BANK OF ALMA ET AL., APPELLANTS.

FILED JUNE 11, 1909. No. 15,661.

1. **Garnishment:** RIGHTS OF ASSIGNEE. Service of summons in garnishment upon a debtor of a solvent attachment defendant will not revoke an authority theretofore given by said defendant to his debtor to pay a part of said debt to a person not a party to the attachment suit.
2. ———: ———. And in such a case the debtor will be justified in acting upon said instructions, if he retains in his hands twice the amount of the attaching creditor's demand.
3. **Judgment:** PARTIES. The mere fact that a person not a party to a pending suit employs counsel to assist in the defense thereof will not make him a party or privy to such proceedings, nor estop him from questioning the issues determined therein.
4. **Pleading:** VARIANCE. "There can be no recovery if there is a material variance between the allegations and the proof. The *allegata et probata* must agree." *Elliott v. Carter White-Lead Co.*, 53 Neb. 458.

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

Gomer Thomas and *J. G. Thompson,* for appellants.

John Everson, contra.

ROOT, J.

Action for alleged conversion of plaintiff's money. Plaintiff prevailed, and defendants appeal.

In March, 1905, plaintiff resided in Lawrence, Kansas, and owned a farm near Alma, Nebraska, extending across the state line into Kansas. About 1903 he authorized defendants Porter & Griffen, who are in the real estate business in Alma, to sell said land. March 22, 1905, Porter & Griffen telegraphed and telephoned plaintiff that they had sold his land subject to his approval for $40 an acre. Plaintiff wired his acceptance of the sale, and went to Alma, arriving there in the forenoon of the 25th. Plaintiff had also listed his land for sale with Gaumer & Harbaugh, real estate agents residing in Woodruff, Kansas, ten miles distant from Alma. Before closing the deal through Porter & Griffen, plaintiff talked with Mr. Harbaugh, who claimed that his firm, and not said defendants, had made the sale, and thereafter, after again talking with the Alma men, plaintiff entered into a contract with the purchaser and received $2,800 cash. Plaintiff then went to the place of business of defendant Bank of Alma and deposited a deed to the purchaser for said land and the contract between himself and the vendee, and instructed said bank to deliver the deed to Willey, the purchaser, whenever the remaining cash payment was made and Willey's notes secured by a mortgage on said farm for $10,000 were delivered to it for plaintiff. The bank was then to pay $400 to Porter and pay for an abstract and for recording the mortgage. The instructions were reduced to writing by the president of the bank, but not signed by plaintiff. On the 27th day of March Gaumer & Harbaugh commenced an action in the county court of Harlan county against plaintiff for $450 commission for selling said farm, and garnished the bank. At that time the bank did not have any of plaintiff's property in its possession, nor was it indebted to him. Thereafter Wil-

ley paid about $4,000 to the bank for Cockins, and, according to plaintiff's instructions, it paid for the abstract and for recording the mortgage and paid to Porter $400. It retained $900 to satisfy whatever judgment might be rendered in the attachment suit, and remitted the remainder of the money, together with the notes and mortgage, to plaintiff. Gaumer & Harbaugh prevailed in the county court, and in the district court on appeal, and the judgment rendered was satisfied by the Bank of Alma. Plaintiff did not modify its instructions to the bank, nor notify it not to pay Porter the $400, but claims that the service of summons in garnishment was a sufficient revocation of the bank's authority to pay Porter.

1. In the court's second instruction the jurors were informed that plaintiff ought to recover against the defendant bank, unless Porter & Griffen were entitled to a commission from plaintiff. In the third instruction the jurors were told that Porter & Griffen were not entitled to commission, unless they were plaintiff's agents for the sale of said land and sold it in accordance with the terms of their agency. In the seventh instruction the jurors were informed that the service of summons in garnishment on the bank revoked its authority to pay Porter & Griffen the $400, and that thereafter the Bank of Alma could only pay out Cockins' money upon the order of the court or the specific directions of plaintiff or his authorized agents. The instructions are erroneous as applied to the bank. Its authority to pay the $400 was unconditional, and was never vacated or modified by plaintiff preceding the payment to Porter. So far as the bank was concerned, it was immaterial whether Porter & Griffen had earned a commission or not. The direction to the bank was plain, and it ought to be protected, so far as plaintiff may be concerned, if it followed his instructions. It is true, as a general proposition, that chattels in the possession of a garnishee, but owned by a defendant in attachment proceedings, and debts due from the garnishee to such defendant are, subsequent to

the service of summons in garnishment, in the custody of the law, but that principle is invoked to protect creditors of the defendant, and cannot be applied to destroy the rights of third persons acquired prior to the levy of the attachment or service of process in garnishment. *Fitzgerald v. Hollingsworth,* 14 Neb. 188.

We have not been cited to any authority holding that the service of summons on the garnishee in a suit against a solvent defendant will annul and set aside a *bona fide* assignment theretofore made by him, where the debt of the garnishee exceeds several times the combined amount of said assignment and the claim of the attaching creditor. Plaintiff could have protected himself if he had acted judiciously, and his failure to countermand his instructions to the bank or to interplead the rival claimants for commission will not justify a judgment in his favor against his former debtor or bailee. Plaintiff argues that the instructions given in the district court ought not to be considered because the assignments of error filed in this court in regard thereto are joint. The motion for a new trial conformed to the rule, and, under the practice established by the laws of 1907, ch. 162, the assignments of error discussed in the printed brief will be considered. *First Nat. Bank v. Adams,* 82 Neb. 801.

2. As to Porter & Griffen, plaintiff claims that they are bound by the judgment rendered in the case of *Gaumer & Harbaugh v. Cockins,* and estopped from denying that said plaintiffs were the efficient cause of the sale to Willey. The judgment in that case was received in evidence over defendants' objections. That record, of course, was proper evidence of its own existence, but ought not to have been received for any other purpose. The instructions do not indicate that the trial judge considered that the judgment concluded the defendants herein, but he did not instruct to the contrary. Counsel argue that, because at Cockins' request Porter & Griffen employed an attorney to assist in the defense of said cause, they are bound by the judgment. There is nothing in the record to indicate

that Porter & Griffen were given the control of the suit, nor that they had any right to appeal from the judgment. They did not instigate the litigation, nor did Cockins represent them therein. One may employ counsel to assist a litigant, or may testify as a witness in his favor or give other active support to his cause in court, without becoming a party to the record or bound by the judgment rendered. *Schribar v. Platt,* 19 Neb. 625; *Williamson v. White,* 101 Ga. 276; *Loftis v. Marshall,* 134 Cal. 394; *State v. Johnson,* 123 Mo. 43; *Litchfield v. Goodnow's Adm'r,* 123 U. S. 549.

Plaintiff cites *Missouri P. R. Co. v. Twiss,* 35 Neb. 267, but we there held that, if a defendant is sued for a wrong committed by a third person, and the party responsible has knowledge of the suit, and appears as a witness therein, he will be liable over to defendant; and that connecting common carriers are agents for one another for the carriage of goods accepted by one carrier to be delivered by them at a point beyond the limits of the initial carrier's railway. In the instant case the attachment suit was not prosecuted in the interest of Porter & Griffen, nor because of their misconduct, but to recover a demand which plaintiffs therein made against Cockins. In *Burns v. Gavin,* 118 Ind. 320, cited by plaintiff, the purchaser from an assignee of a bankrupt estate had induced the county treasurer to bring a suit against said assignee to compel him to pay from the assets of the estate in his hands certain taxes theretofore levied on the property sold to said vendee, and had employed counsel for the treasurer. The treasurer was defeated, and plaintiff, after paying the taxes himself, brought a suit against the assignee, and it was held that, as he had instigated and actually controlled the suit brought by the treasurer, he was bound by the judgment therein. In *Roby v. Eggers,* 130 Ind. 415, also cited by counsel, the party held to be estopped had instigated and controlled the former litigation. Those cases, and others cited by plaintiff upon this phase of the case, are not in point. It is doubtful

whether the record of the judgment was relevant from any standpoint, but, if admitted for any purpose, the jurors should have been cautioned that it did not conclude the defendants herein.

3. There is evidence in the record to the effect that a friend of Gaumer & Harbaugh brought said firm and Willey, the purchaser, together with reference to said sale, and that Porter & Griffen were not the efficient cause thereof, but that they learned of said negotiations and induced Willey to close the deal through them. Plaintiff, however, nowhere alleges that Porter & Griffen withheld from him any material facts or made any false statements whereby he was induced to close the deal through them, or promise to pay them a commission, or to order the bank to pay the $400. Neither does he charge that Gaumer & Harbaugh actually made said sale or were the efficient cause thereof. Defendants assert that, relying on the failure of plaintiff to state a cause of action in his petition, they did not introduce any evidence. The evidence must support the allegations in the petition, or a judgment in plaintiff's favor cannot be sustained. *Traver v. Shaefle,* 33 Neb. 531; *Elliott v. Carter White-Lead Co.,* 53 Neb. 458. There is not a scintilla of evidence to support the allegation in the petition that plaintiff ever countermanded its instruction to the bank, but, on the contrary, plaintiff testified that no such notice was given, unless as a matter of law the service of summons in garnishment had that effect. There is no allegation in the petition that Porter & Griffen, or either of them, deceived plaintiff or fraudulently induced him to order the bank to pay their commission. The evidence affirmatively discloses that plaintiff never had a cause of action against the bank, and does not support the case stated, if any is made, against the defendants Porter & Griffen.

The judgment of the district court therefore is reversed, with directions to dismiss the petition as to the defendant Bank of Alma, and for further proceedings as to the other defendants.

REVERSED.

JOHN POWERS, APPELLANT, V. AUGUST SPIEDEL ET AL., APPELLEES.

FILED JUNE 11, 1909. No. 15,694.

1. **Vendor and Purchaser:** DEEDS: RECORDING. If a deed conveying the real estate of a corporation is properly executed and acknowledged and delivered to the register of deeds for record, the grantee will not be prejudiced by the failure of said official to record the imprint of the corporate seal.

2. **Deeds:** ACKNOWLEDGMENT. "A certificate of acknowledgment is sufficient if it shows that the requirements of the statute have been complied with in substance." *Burbank v. Ellis*, 7 Neb. 156.

3. **Deeds of Corporation:** ACKNOWLEDGMENT: RECORD: NOTICE. The certificate of a notary public that the president of a corporation appeared before him and acknowledged as his voluntary act and deed a conveyance duly signed, sealed and witnessed by said corporation entitles said instrument to record, and the record thereof is constructive notice of the grantee's interest in the property thereby conveyed.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Wright & Wright, for appellant.

L. L. Raymond and *Wilcox & Halligan, contra.*

ROOT, J.

Suit to quiet title to real estate. Decree for defendants and plaintiff appeals.

February 7, 1895, the land in controversy was owned by the Bank of Gering, a corporation, and on said day was sold and conveyed by said bank to one Vickrey. The deed was duly recorded on the 12th day of that month. February 19, 1895, Vickrey conveyed the land to defendant, August Spiedel, who recorded his deed December 16, 1895. August 16, 1899, plaintiff purchased said land from said bank, taking a quitclaim deed therefor, which he duly recorded. The land was unimproved and unoccupied. Plaintiff took possession thereof immediately

upon receiving his deed and has occupied it from thence hitherto.

1. The court found that plaintiff at the time of his purchase had notice of August Spiedel's interest in said land. Plaintiff argues that the conveyance to Vickrey was not attested by the corporate seal of said bank, and therefore is void. The record of the deed does not disclose that a seal was used by the bank, but the original deed was produced and received in evidence on the trial and the imprint of said seal is on the deed. Plaintiff claims that the seal was attached subsequently to the recording of the instrument, but the evidence preponderates the other way. The fact that the county clerk failed to correctly record the deed will not prejudice the rights of the grantee therein, nor of those holding under him. *Perkins v. Strong,* 22 Neb. 725; *Deming v. Miles,* 35 Neb. 739.

2. It is argued that the deed to Vickrey was not acknowledged so as to entitle it to record, and hence the record thereof was not notice to plaintiff. The deed is signed "Bank of Gering, by L. H. Jewett, President," and the acknowledgment is as follows: "Be it remembered that on the 7th day of February, 1895, before the undersigned, J. G. Maulick, a notary public in and for said county, personally came L. H. Jewett, Pres. of the Bank of Gering, Neb., to me well known to be the identical person described in and who executed the foregoing deed as grantor and acknowledged said instrument to be his voluntary act and deed." The certificate of acknowledgment was otherwise regular. Section 4129, Ann. St. 1907, provides: "It shall be lawful for any corporation to convey lands by deed, sealed by the common seal of said corporation, and signed by the president or presiding officer of the board of directors of the corporation; and such deed, when acknowledged by such officer to be an act of the corporation, or proved in the usual form prescribed for other conveyances for lands, shall be recorded in the clerk's office of the county in which the lands lie, in like manner as other deeds."

Plaintiff argues that the president of the bank did not acknowledge the deed as the act of the corporation, but as his individual act and deed. We, however, are of the opinion that, although the acknowledgment is irregular, it is sufficient in substance to entitle the deed to record. The deed is regular in all other respects and signed for the corporation by the president who acknowledged the deed. The bank could only act through its officers, and the statute explicitly authorizes its president to sign its deeds. In connection with the recitations in the deed and the signature thereto, the reasonable explanation is that Jewett acknowledged the execution of said instrument for and on behalf of the corporation. Under a similar statute it was held that an acknowledgment almost identical with the one in the instant case was that of the corporation. *City of Kansas City v. Hannibal & St. J. R. Co.*, 77 Mo. 180. See, also, *Muller v. Boone*, 63 Tex. 91; *Tenney v. East Warren Lumber Co.*, 43 N. H. 343; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. Plaintiff purchased the land for $25, taking a quitclaim deed without examining the records, or having any one else examine them for him, and, as he says, without knowledge of their contents, and has paid but one year's taxes on the property since 1899. If plaintiff did not have actual he had constructive notice, at the time he received the bank's deed, that defendants were the owners of the land in dispute.

The judgment of the district court is right and is

AFFIRMED.

CHAMPLIN BROTHERS, APPELLANT, V. JOSEPH SPERLING, ADMINISTRATOR, ET AL., APPELLEES.

FILED JUNE 11, 1909. No. 15,728.

1. **Parties.** Parties who are severally liable upon a written contract may be impleaded in one action thereon, although none of the defendants are liable to plaintiff upon more than one item in said contract.

2. **Sales:** CONTRACT: ENFORCEMENT. If parties competent to contract sign a written agreement, by the terms of which one agrees to sell the other, for a specified price, a definitely described and segregated chattel, and the other party agrees to pay the stated price, the vendor, after delivery or tender of the property, may maintain an action for the purchase price, even though the vendee before such tender refuses to pay therefor.

3. **Sales:** DELIVERY. If the vendees by the terms of a contract become joint owners or tenants in common of a chattel and agree that it may be delivered by the vendor to one of them, delivery to one vendee will be delivery to all.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Reversed.*

O. A. Williams, for appellant.

C. H. Kelsey and *E. D. Kilbourn, contra.*

ROOT, J.

Plaintiff, a partnership, in November, 1904, entered into a contract with defendants Dalheim, Jaschke, Johnson, and Sperling's intestate, together with six other individuals. The agreement was signed by all parties thereto, and is as follows: "Capital stock, $3,000. Number of Shares, 10. State of Nebraska, Antelope county, Nov. 9, 1904. Champlin Bros., of Clinton, Iowa, agree to sell the imported French coach stallion to the undersigned subscribers, other than themselves, who wishing to improve their stock hereby promise to pay to Champlin Bros., or order, the sum of $3,000, the price of said

stallion, the same being 10 shares at $300 per share of the purchase price of the imported stallion named Brocardo, and No. 3698, in cash, or one-third in one year, one-third in two years, and one-third in three years after July 1, 1905, in the joint and several negotiable notes of said subscribers with interest at 6 per cent. per annum, payable at Clinton, Iowa. Said horse to be delivered to one of the undersigned at the county of Antelope. In the event all stock is not subscribed for, this agreement is void."

Plaintiff alleges that it duly delivered said horse to Stoner, one of the vendees; that it had fully performed its part of said contract; that six of the ten signers had paid their obligations to plaintiff, but that defendants had refused and still refuse to either pay cash or execute their notes as required by said agreement, whereby plaintiff had been damaged, etc. Plaintiff prays for a several judgment of $300 against each of the four defendants. Defendants demurred because of the alleged misjoinder of parties, and because the petition did not state facts sufficient to constitute a cause of action against them. The demurrer was overruled. Defendants then answered, and alleged that the six vendees who were not sued had paid the purchase price of said horse; that there is a misjoinder of defendants, and various other defenses were interposed. All affirmative defenses were denied in the replies. At the close of plaintiff's evidence the court instructed the jury to find for defendants, and from a judgment entered on that verdict plaintiff appeals.

1. Defendants have not favored us with a brief or oral arguments. The suit is brought by plaintiff as a partnership. The petition discloses that it is doing business in Clinton, Iowa, and there is no allegation that it was formed for the purpose of carrying on any trade or business or of holding any species of property in Nebraska. There is nothing in the record to indicate that objection was made by defendants to plaintiff's lack of capacity to sue, and we shall treat the record as though defend-

ants had waived the provisions of section 24 of the code. If timely objections had been made by defendants, plaintiff's right to a reversal would be doubtful, regardless of the errors occurring in the trial of the case.

Defendants allege that there is a misjoinder of defendants. Plaintiff treats the obligation of the defendants as several, and, accepting this construction of the agreement of the parties, which we think is possible, the liability, although several, arises as to all of the defendants upon the same contract. The transaction therefore is within the meaning of section 44 of the code, which provides: "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action at the option of the plaintiff." The purpose of this section of the code is to simplify litigation and prevent a multiplicity of suits for a breach of the same contract, and the case at bar is an excellent example of the wisdom of the statute. *Costigan v. Lunt,* 104 Mass. 217; *Wilde & Co. v. Haycraft,* 2 Duv. (Ky.) 309. The motion to direct a verdict was therefore not proper upon the ground of a misjoinder of parties defendant.

2. The statements of counsel, made at the close of the evidence and contained in the record, indicate that possibly the learned trial court was of opinion that defendants herein had rescinded the contract; that plaintiff had failed to prove any damages resulting therefrom, and therefore was not entitled to recover. The evidence discloses that plaintiff's agent, Miller, solicited signatures to the contract in suit; that, as soon as the tenth man had signed, notice was given all of said vendees to come to Neligh and organize a company or association. All of the signers appeared, but they did not organize. Six of the ten purchasers signed three notes for $1,000 each, but the agent Miller, at said time, delivered to them a written statement that they were not liable for four-tenths of the purchase price of said horse. The four who refused to give their notes were told by Miller that, under

the contract, if the notes were not executed they must pay cash. No payment was made, but the contract was not repudiated. Miller then delivered the horse to Stoner, one of said vendees, and, while the evidence is not clear concerning the disposition made of said animal, the record indicates that the horse was retained by Stoner and possibly by the five men who with him had paid their obligations to plaintiff. As we are advised, we are of opinion that, in the absence of fraud practiced to secure the signatures to the contract, if the vendees were competent to transact that business, the moment the tenth signature was attached to the agreement, the plaintiff, upon delivery of the horse or tender thereof to the purchasers, could maintain an action to recover the purchase price. *Baker v. McDonald,* 74 Neb. 595; 2 Mechem, Sales, secs. 1667, 1668. Although the liability of the purchasers to pay was several, their title to the horse was that of tenants in common, and delivery to one of them was a delivery to all. *Adler v. Wagner,* 47 Mo. App. 25. The vendor's right to retain possession of the chattel until the consideration was paid, or payment secured, was waived when the horse was delivered to Stoner, and defendants are liable upon their contract with plaintiff.

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

REVERSED.

CHARLES PUMPHREY V. STATE OF NEBRASKA.

FILED JUNE 11, 1909. No. 15,734.

1. **Criminal Law:** SELECTING JURY. A judgment of conviction will not be set aside because of alleged error in overruling defendant's challenges for cause to veniremen, where none of said persons sat upon the jury, and it does not affirmatively appear that they were peremptorily challenged by him.

2. ———: ———: DISCRETION OF COURT. The trial court is vested

with great discretion in excluding veniremen or talesmen from a jury, and its rulings in that particular are not subject to review unless a fair jury was not obtained.

3. **Homicide** committed in the perpetration of a robbery is murder in the first degree, and in such a case the turpitude of the act supplies the element of deliberate and premeditated malice.

4. **Criminal Law:** OPENING STATEMENT: REVIEW. In a prosecution for the alleged commission of a crime, the defendant may waive his opening statement to the jury, but if the court compels counsel, over their objections, to make that statement, the error is without prejudice, unless it affirmatively appears from the record that defendant suffered some disadvantage thereby.

5. **Witnesses:** OATH: COMPETENCY. An adult citizen of the empire of Japan is *prima facie* competent to take an oath and testify in the courts of this state. If a litigant conceives that such a witness does not understand, or will not give heed to, the oath administered, he may interrogate the witness before he is sworn, or prove his incompetency by other relevant evidence. If he fails to do so, the relevant testimony of the witness should be received.

6. **Criminal Law:** WITNESSES: EXAMINATION. The trial judge in his discretion may refuse to permit a witness to testify in narrative form, and his ruling will not be reviewed unless that discretion was clearly abused.

7. ———: EVIDENCE: REVIEW. It is the province of a jury in a criminal case to try the issue joined by a plea of not guilty, and, if the evidence of the state uncontradicted will support a conviction, this court will not ordinarily interfere with a verdict against the defendant.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Carl E. Herring and *John O. Yeiser,* for plaintiff in error.

William T. Thompson, Attorney General, and *Grant G. Martin, contra.*

ROOT, J.

Plaintiff in error was convicted of committing murder while in the perpetration of a robbery, and, from a sen-

tence of imprisonment in the state penitentiary for life, has appealed to this court.

1. The first error argued is that the court should not have overruled defendant's challenges for cause to various veniremen because thereby he was compelled to exhaust his peremptory challenges. The bill of exceptions discloses the challenges and the court's rulings, but none of those veniremen were sworn or acted as jurors in the case. Whether they were eventually excluded by the court on its own motion, by agreement of the state and defendant, upon a subsequent challenge of the state, or peremptorily by defendant, does not appear. The record therefore does not support the contention of defendant, and the error assigned will be resolved against him. *Shumway v. State,* 82 Neb. 165; *Kennison v. State,* 83 Neb. 391.

2. Defendant also claims that the court should not have excused the veniremen London, Thomas, Schmidt and Winans. The first named individual was excused because his answers indicated that he did not possess sufficient intelligence to perform the duties of a juror. The answers were contradictory, and the court did not err in dismissing this man from the jury. Defendant was being tried for murdering a Chinaman, and the answers of Thomas, Schmidt and Winans indicated that because of the nationality of the deceased they would not be inclined to convict defendant. Other veniremen were excused because they had conscientious scruples against inflicting the death penalty. There is nothing in the record to indicate that 12 impartial men were not secured to act as jurors in the case, and the court ruled wisely and justly in excusing the men first referred to. *Richards v. State,* 36 Neb. 17; *State v. Miller,* 29 Kan. 43. The veniremen whose *voir dire* examination disclosed that they were prejudiced against inflicting the death penalty were also properly excluded from the jury. *Rhea v. State,* 63 Neb. 461.

3. An assault is made upon the information and the

statute under which it was drawn, but the questions presented, as we understand them, have been set at rest in *Morgan v. State,* 51 Neb. 672, and *Rhea v. State,* 63 Neb. 461, and will not be further considered.

4. After the jurors were sworn the county attorney made his opening statement of the case. Defendant's counsel thereupon requested permission to make a statement at the close of the state's evidence. To this the county attorney objected, and the court directed defendant's counsel to state the defense, although they desired to waive that statement. It has been held in other jurisdictions, in construing statutes as mandatory as section 478 of the criminal code, that the prosecution may introduce evidence without a preliminary opening statement. *Holsey v. State,* 24 Tex. App. 35; *People v. Stoll,* 143 Cal. 689; *People v. Weber,* 149 Cal. 325. Much stronger reasons exist for permitting a defendant to waive his statement of defense, and, if he is content to rest upon his plea of not guilty, the court ought to permit him to do so. On the other hand, there is nothing in the record to indicate what statements defendant's counsel made, nor that he was prejudiced thereby. The error was without prejudice.

5. One Jack Naoi was called as a witness by the prosecution, and upon the county attorney's statement that the witness was a citizen of Japan, and could not speak the English language, an interpreter was produced. Defendant's counsel objected to the witness being sworn for the alleged reason that Japan is a heathen country; that *prima facie* the witness was not qualified to take an oath, and that the state ought to remove that presumption before the oath was administered. The objection was overruled, the witness sworn, and his testimony given through the medium of an interpreter. Counsel for defendant cite *Speer v. See Yup Co.,* 13 Cal. 73, but that case is not in point. The opinion therein was controlled by a statute absolutely disqualifying Indians as witnesses, and in *People v. Hall,* 4 Cal. 399, the same court

had construed the word "Indian" as including the Mongolian race. Section 328 of the code provides that every human being, with certain named exceptions, of sufficient capacity to understand the obligations of an oath is a competent witness in all cases, civil and criminal. Among the exceptions are "Indians and negroes who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them intelligently and truly." We are not inclined to adopt the reasoning of the California court that the legislature intended to include the Japanese in the foregoing exception, but, if such were the case, the answers of the witness to the questions propounded through the interpreter clearly take him without the exception.

Section 365 of the code provides: "Before testifying, the witness shall be sworn to testify the truth, the whole truth and nothing but the truth. The mode of administering an oath shall be such as is most binding upon the conscience of the witness." It is urged that the witness was an idolater, and would not be bound by an appeal to the "invisible God" of the Christians. In *Priest v. v. State,* 10 Neb. 393, we approved Bouvier's definition of an oath as "an outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God." In that case an Indian was held to be incompetent to testify. The Japanese, however, are a civilized people, and have at least three recognized religions—Buddhism, Shintoism and Christianity. No efforts were made by defendant's counsel to prove that the witness was not a Christian, nor did they examine him to ascertain whether he understood the obligations of the oath that was thereafter administered to him. The rule seems to be well established that, unless an adult witness comes within some exception to the general rule, the presumption is that he is competent to testify, and the burden is upon the objecting party to establish the contrary. This may properly be done by preliminary questions propounded to the proposed wit-

ness, or by any other of the known methods of establishing a fact. The issue will then be determined by the court. 2 Elliott, Evidence, sec. 778; *Arnd v. Amling,* 53 Md. 192; *Donnelly v. State,* 26 N. J. Law, 463, 506; *Territory v. Yee Shun,* 3 N. M. 100. Counsel for defendant not having established that the oath administered was not in form to bind the conscience or awaken the apprehension of the witness, this assignment of error must be overruled.

6. Defendant testified in his own behalf. His counsel, after leading him up to the assault upon Ham Pak, the deceased, requested witness to go on and relate the transaction. The county attorney objected to an answer in narrative form, and the court compelled defendant's counsel to proceed by questions and defendant by answers thereto, and error is assigned upon this ruling of the court. The subject was one within the court's discretion, and it had authority to compel the investigation to continue by questions and answers, so that the county attorney might exclude incompetent and irrelevant testimony by interposing objections to questions, rather than to break in upon a long statement of fact to object to irrelevant, immaterial or incompetent testimony voluntarily stated by the witness. The trial judge must be permitted to exercise an almost unfettered judgment in controlling this element of practice, and its action, unless plainly a gross abuse of discretion prejudicial to the complaining litigant, will not be reviewed in this court. *Clark v. Field,* 42 Mich. 342. In the instant case the witness gave his version of the crime clearly and succinctly, and he was not in any manner prejudiced by an orderly course of trial.

7. The instructions given were fair. Those requested by defendant and not given were properly refused, and the modification of instruction numbered 5, requested by defendant, was proper. Although we have not specifically mentioned every error assigned in the petition in error,

we have examined all of them and find that none of those not referred to in detail in his opinion present any serious question for consideration.

8. It is urged that the probabilities are entirely favorable to defendant's innocence. The testimony is in hopeless conflict. That Ham Pak was murdered and robbed in the county of Douglas during the night of July 10, 1907, is established by the evidence of defendant and that of the witness Mullin. Each accuses the other of committing the crime. There is considerable evidence in the record corroborating defendant, but there are also facts and circumstances shown by the evidence that corroborate Mullin's testimony. It is unfortunate that defendant's impeaching witnesses were all inmates of the state penitentiary, although he was not responsible for their duress, and probably none others were available for his purpose. If the jurors believed Mullin, as they had a right to, they could not conscientiously do otherwise than to find defendant guilty. The questions of fact having been determined by the tribunal whose solemn duty it was to ascertain them, and there being sufficient competent evidence to sustain the verdict, we cannot interfere. The rulings of the court were not favorable to defendant, but were not prejudicially erroneous.

The defendant has received a fair trial within the meaning of the law, and the judgment of the district court is

AFFIRMED.

ANNA J. ROBINSON, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JUNE 11, 1909. No. 15,637.

1. Cities: INJURY: QUESTION FOR JURY. In an action against a city for personal injuries resulting from a defective sidewalk, testimony disclosing plaintiff's opinion and the result of tests as to the cause of the accident may be considered by the jury, when admitted without objection.

2. **Appeal:** EVIDENCE. Error cannot be predicated on the admission of testimony identical with that already admitted without objection.

3. **Cities:** INJURY: LIABILITY. A city denying responsibility for the work of trespassers who tore up part of a board sidewalk in a street and replaced it with cement cannot evade liability for failure to repair a defect in a connecting walk on the ground that temporary barriers erected by such trespassers to protect the cement until it solidified were removed without the city's consent.

4. **Trial:** INSTRUCTIONS. Where the instructions in an action against a city for personal injuries resulting from a defective sidewalk clearly direct the jury that plaintiff cannot recover unless the injury was caused by a defect at the place of the accident, a separate instruction is not erroneous because it fails to repeat that direction.

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

Harry E. Burnam, I. J. Dunn and *John A. Rine,* for appellant.

John T. Cathers, contra.

ROSE, J.

When plaintiff was walking eastward along Davenport street between Twenty-Fifth and Twenty-Sixth streets in the city of Omaha about 10 o'clock on the night of August 15, 1903, she fell on a board sidewalk and was seriously injured. Three or four days earlier a part of the board sidewalk west of the place where the accident occurred had been replaced with a cement walk several inches lower, leaving a projection at the approach to the west end of the remaining portion of the board walk. The difference in the elevation was perhaps six or seven inches, but not greater than the height of an ordinary step in a sidewalk. When plaintiff fell, she and her sister, Mrs. McWhorter, were passing from the new cement walk to the old board walk. The cement walk was constructed

by the adjacent lot owner without authority from the city. In her petition plaintiff states, in substance, that there was nothing under the west end of the board walk to support it, that it had been defective and dangerous for several years and that defendant knew of its unsafe condition long prior to the accident. Enough of the petition to show plaintiff's understanding of how she was injured is here reproduced: "August 15, 1903, at about the hour of 10 o'clock p. m. this plaintiff, while going east along said Davenport street, with a companion, between said Twenty-Fifth and Twenty-Sixth streets, and while exercising due care on her part, her companion stepped upon the north side of said wooden sidewalk, which caused the same to tip up, and this plaintiff's foot caught under said wooden sidewalk, and she was tripped and violently thrown, and in falling broke the humerus of her right arm, at or near the shoulder, and broke and tore the tendons and ligaments thereof, and she was thereby permanently injured."

The answer contained a general denial and a plea of contributory negligence on part of plaintiff. There was a verdict in her favor for $1,640, and from a judgment for that sum defendant appeals.

The record shows conclusively that plaintiff fell on the board sidewalk at the time and place stated, and was seriously injured. There is proof that some of the earth under the west end had been washed out, and that this condition had existed for some time. There is also testimony which shows that prior to the accident the section of the wooden sidewalk at the west end had been in a loose, rickety and rocking condition for several years. A witness who had lived in the neighborhood about five years testified: "The wooden sidewalk adjoining this permanent walk, on the east was somewhat higher than the permanent walk, and was loose; that is, it rocked when stepped on." Referring to a time before the injury, he said in answering questions which are here omitted: "I noticed it loose and rocking there for some time previous.

To the best of my knowledge and belief it was always rocking, ever since I lived there. In passing over it I noticed that the natural earth was somewhat away from the supports on the north side of the walk. If the north end went down, the south end would go up." Referring to the west end of the board walk at the particular point where it joined that part of the old walk replaced by cement, the witness declined on cross-examination to state its condition before the change, but on redirect examination he was asked: "I want to know the condition of the joint or particular length of sidewalk immediately east of the cement. State whether or not that joint or length of sidewalk immediately east of the wooden sidewalk was not in this rickety condition and would tip up when you stepped on it." He replied: "It was." On this subject there was considerable proof, and the testimony of plaintiff's witnesses on direct examination was somewhat weakened by cross-examination, but there was sufficient evidence to support a finding that the west end of the wooden sidewalk was defective at the place where plaintiff was injured. The defect was of such a character and had existed long enough to charge defendant with notice in time to repair it prior to August 15, 1903. *City of Lincoln v. Smith,* 28 Neb. 762.

The serious controversy between the parties however, relates to the cause of plaintiff's fall. She steadfastly adheres to the theory of her petition wherein she states: "Her companion stepped upon the north side of said wooden sidewalk, which caused the same to tip up, and this plaintiff's foot caught under said wooden sidewalk, and *she was tripped and violently thrown.*"

On the other hand, counsel for defendant are just as confident that the proximate cause of the accident was not the defect in the wooden sidewalk, and attribute plaintiff's fall to another cause. The following excerpt from defendant's brief will make the city's contention clear: "We submit that the evidence shows that appellee's fall was caused solely by her foot going under the board side-

walk at the east end of the cement walk, and that it was by reason thereof that she tripped and fell; that, the dirt being from under the stringer on the north side, the alleged tipping of the walk on the south side had nothing to do with it; that the contention of the appellee and her sister that the walk tipped and tripped her was false."

The court instructed the jury that plaintiff was not entitled to recover if her fall was caused by her foot going under the wooden sidewalk by reason of the fact that the board walk was higher than the cement walk. The inquiry on this branch of the case was thus limited to the tipping of the walk as the cause of the injury, and defendant's principal argument is directed to the point that there was no evidence to justify the court in submitting the case to the jury on that issue, and that there is no evidence to sustain the verdict in favor of plaintiff. The determination of this question requires an examination of the testimony. The record has been considered with care, but no extended analysis of the evidence can be made without making the opinion too long. Plaintiff testified that at the time of the accident she was walking along the north side of the street with her sister on her left. In giving her testimony she referred to her sister, and, among other things, said: "There was a board sidewalk—an old board sidewalk—and, as she stepped upon it, it tipped up and threw it higher than it was before. When she stepped, it raised it up still further." She also said her sister stepped on the north side of the walk, made it fly up, and that it threw her. She went back to see it afterward and it was loose. She tested it, and said it was rocking, and that the earth under it was green and mouldy and looked as if it had been in that condition for some time. On cross-examination she was asked: "What is it you say that caused you to trip there, or caused you to fall?" She answered: "The old sidewalk that was up higher than the other one. It tripped me up and put my foot under it." She said further on cross-examination that the day after the accident she and her sister tested the walk by stepping

on it, and that it came up a little and made a difference in the height. Referring to the tests made, she was asked by defendant on cross-examination: "Now, Mrs. Robinson, is that the only way you know that this walk flew up on that Saturday evening and you caught your foot under it?" This was answered: "I know that night when we were walking along I was holding my skirt and had my arm behind her; and she was just a trifle ahead of me, and so she must have stepped on the walk ahead of me, because she stepped just ahead of me, when I had my arm behind her, and she stepped up first." Defendant also asked plaintiff this question: "Then how do you know that that walk flew up and caught your foot so that your foot would go under it, if you could not see it?" Her answer was: "I could not tell that night just—that she did it at that time, because I could not see; but when we came to look afterward, that was the way it happened, because she was a little ahead of me; and if it would do it the next day, it would do it the night before." Without objection plaintiff was thus permitted to give her opinion of the cause of her fall. Enough of her testimony has been quoted to show that defendant asked her to repeat that opinion and to give the result of her tests. In addition she testified without objection: "When my sister stepped on the north end, it went up higher, so it made it impossible for me to step up that high." She was asked by her own counsel: "Was the tipping up of the board the cause of your falling?" Her reply was: "Yes, sir." She was recalled and asked: "Mrs. Robinson, yesterday in your cross-examination you were asked the question whether you ran your foot into the hole. Now, I wish you would explain your testimony, just what you mean and what happened. Now state just what you wanted to say there, and how you came to fall." This was answered without objection as follows: "Well, I think if the walk was natural, I would have stepped up on it. I would have stepped up that high; that I might have stepped up on it; but, in stepping on the other end, it threw it so much

higher that I set my foot under it and fell down." Plaintiff's sister was also a witness, and, in reply to a request to state what happened, testified without objection: "As I stepped up a little first, the other end went up, and that caused her foot to catch under the edge of the walk. I was on the north side, but she was on the south side." There is evidence that the condition of the west end of the board walk at the time of the injury was the same as it had been for a long time before the cement walk was constructed. The west end of the wooden walk terminated at a lot line, and there was no evidence that any of the stringers had been cut by the trespassers who constructed the cement walk or by other persons. The step was not of itself dangerous or evidence of negligence. *Morgan v. City of Lewiston,* 91 Me. 566, 40 Atl. 545; *Witham v. City of Portland,* 72 Me. 539; *Clark v. City of Chicago,* 4 Biss. (U. S.) 486. At the time and place of the accident, the sister and companion of plaintiff stepped on the wooden walk first without falling; and that plaintiff might have done so too, except for the tipping of the walk, is altogether probable. Testimony has been quoted to justify the trial court in submitting the case to the jury on plaintiff's theory as shown by the petition, and there is sufficient evidence in the record to sustain the verdict in her favor. Without objection defendant permitted plaintiff to state her conclusion or opinion as to the cause of her injury, and by its cross-examination reproduced the results of her tests as to how she was injured. This was evidence for the consideration of the jury. The record therefore contains evidence that the city was negligent in permitting its sidewalk to remain in a defective condition, and that the tipping of the walk was the proximate cause of plaintiff's injury. The trial court did not err in refusing to direct a verdict for defendant or in declining to set aside the verdict for want of evidence to support it.

"This court erred in permitting appellee to testify that the tipping of the walk was the cause of her fall." This is argued as a ground for reversal. On direct examination

plaintiff testified without objection that the tipping of the walk caused her fall. On cross-examination she was required by defendant to restate that conclusion or opinion. Later in the trial objection was made to a question calling for a similar answer. Defendant having refrained from making an objection in the first instance in the hope the witness would state that her fall was caused by the cement walk, or for some other reason, cannot complain of a subsequent ruling admitting similar evidence. It has long been a rule of this court that error cannot be predicated on the admission of proof identical with that previously admitted without objection.

To protect the cement walk when first constructed, barriers were placed at each end. In this connection complaint is made of the refusal of the trial court to give the following instruction: "You are instructed that if you find from the evidence that sufficient barriers were placed across the east end of the cement sidewalk and the west end of the board sidewalk at said point to protect the public from any defect which existed in said board sidewalk at said time, and that said barriers were removed by the contractor who built the walk or by other persons without the knowledge or consent or authority of the city authorities, then, before plaintiff can recover, you must find that a sufficient time elapsed between the taking down of said barriers and the time of the accident for the city in the exercise of reasonable care to have learned of the taking down of the barriers and to have repaired the sidewalk at the point or to have protected it by proper barriers or signals." The barriers were not meant to protect the public from a defective sidewalk. They were intended to protect the cement walk from the public, and not the public from the board walk. They were erected by trespassers, and were obstructions which anyone could lawfully remove as soon as the cement solidified. The construction of the sidewalk and barriers was the work of the same trespassers. At the request of defendant the court, in effect, told the jury that the persons who tore up

the sidewalk and replaced it with cement were trespassers in the street and sidewalk space, and that the city was not answerable for their acts. Defendant resisted plaintiff's claim on the theory that her fall "was caused solely by her foot going under the board sidewalk at the end of the cement walk," denied responsibility for resulting damages on the ground that the cement walk was constructed by trespassers, and insisted that the tipping of the board walk had nothing to do with the accident. Defendant is therefore in the attitude of denying responsibilty for the condition of the cement walk by denouncing it as the work of trespassers, and at the same time seeking to escape liability for the condition of the board walk, because the barriers erected by these same trespassers were removed without the city's consent. This is not a case for the application of the rule that "it is sufficient to show that proper signals or secure guards were placed about an excavation on quitting work, and neither the corporation nor its contractor is liable if a wrongdoer removes the signals during the night." *Dooley v. Town of Sullivan,* 112 Ind. 451. The lower court did not err in declining to give the instruction requested by defendant.

A number of instructions are criticised because, as defendant asserts, they do not limit the city's liability to the defect at the place of the injury. This criticism is unwarranted. The court instructed the jury as follows: "The burden of proof is on the plaintiff to establish by a preponderance of the evidence that the injury to the plaintiff was received in the manner substantially as alleged in her amended petition; that the sidewalk in question at the time and at the particular place where the accident occurred was in an unsafe and dangerous condition." It was unnecessary to repeat this admonition in other instructions. A picture showing the place of the injury and surroundings was introduced in evidence. The instructions as a whole made it clear to the jury that there could be no recovery unless the injury was caused by a defect in the board walk at the place where the accident

occurred. There was nothing in the instructions to mislead the jury on this issue. Other rulings in giving and in refusing instructions are also assailed, but all have been carefully examined with the result that no prejudicial error has been found.

The judgment of the district court is

AFFIRMED.

LETTON, J., dissenting.

Until the cement walk was laid, there was no step at the place of the accident. The condition of the walk's being slightly unstable so that it yielded at one side when walked over had existed for some time. This was not a dangerous condition as the walk then stood. Until the section of the walk was wrongfully removed, such an accident was impossible. No actual notice to the city of the defect which caused the accident was shown, and, the change in the walk not having been made for such a length of time as to charge the city with constructive notice of the defect which plaintiff asserts caused the injury, it was not liable. I think the case falls within the rule of *Nothdurft v. City of Lincoln,* 66 Neb. 430, that either actual or constructive notice to the city of the defect which caused the injury is essential to warrant a recovery, and that no such notice has been shown.

BARNES and ROOT, JJ., concur in this dissent.

EIMO GOOS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JUNE 11, 1909. No. 15,677.

1. Appeal: REVIEW. Where a jury in passing on issues of fact properly submitted by instructions renders a verdict supported by sufficient evidence, it will not be disturbed on appeal, unless manifestly wrong.

2. ———: ———. On appeal a judgment should not be reversed for a ruling which is in no way prejudicial to the rights of appellant.

APPEAL from the district court for Webster county: ED L. ADAMS, JUDGE. *Affirmed.*

James E. Kelby and *W. A. Dilworth,* for appellant.

A. M. Walters, contra.

ROSE, J.

This is an action against defendant as a carrier of freight for damages caused by the freezing of beer transported on defendant's railway in one of its cars from Blue Hill to Hildreth. The entire shipment was half a car, but the beer was not all destroyed. Plaintiff recovered judgment on a verdict for $129, the full amount of his claim and interest, and defendant appeals.

In the petition plaintiff's complaint of defendant as a carrier for failing to perform its duty is alleged in the following language: "Said defendant did not safely convey and deliver said beer as it had undertaken to do, but, on the contrary, conducted itself so carelessly by its servants, agents and employees, in and about carrying and transporting the same, by delays and neglect to give proper attention thereto, that at some point at Blue Hill, or between Blue Hill or Hildreth, or at Hildreth, on the line of defendant's railway, and while the said beer was in the possession of defendant, thirteen half-barrels, eleven quarter-barrels, and ten cases of said beer were frozen and entirely spoiled and rendered worthless."

The nature of the defenses pleaded by defendant is shown by the following allegations of the answer: "(1) Said goods were part of a car-load shipment received at Blue Hill, Nebraska, by Onno Goos, who there received and unloaded the remainder of said shipment and took charge of the same, put a stove in the car containing said goods, and retained the immediate care thereof for himself

and for the plaintiff to the exclusion of this defendant; and, if said goods were injured or spoiled, such injury was caused by the said acts of the plaintiff and the plaintiff's failure to properly care for the same after he had assumed control thereof. (2) Defendant further alleges that after said goods were received for shipment, and while in transit, there occurred a very severe, unusual and extraordinary snow storm, on account of which it was impossible for the defendant to move its cars and make said shipment as promptly as it ordinarily would, and said goods were conveyed to Hildreth in the shortest possible time, and the defendant in transporting the same used reasonable and ordinary care under all the circumstances, and whatever damage the plaintiff sustained on account of injury to said goods by freezing was on account of said storm and the extreme cold weather."

Defendant complains of the court's instructions and of the sufficiency of plaintiff's evidence on the issues raised by the defenses quoted. The second defense contains language amounting to an admission that the beer was frozen after defendant received it for shipment. By instructions favorable to defendant and containing no prejudicial error, both defenses pleaded in the answer were submitted to the jury on evidence sufficient to sustain the verdict in favor of plaintiff. It follows that in the respects stated error does not affirmatively appear.

Complaint is also made that plaintiff was not the real party in interest. This question grows out of the following circumstances: Plaintiff, Eimo Goos, was the consignee and a saloon-keeper at Hildreth. His brother, Onno Goos, was the consignor and a saloon-keeper, and also a wholesale liquor dealer at Blue Hill. Plaintiff testified each had a half interest in the business of both saloons. After the closing of the testimony, defendant asked leave to amend its answer to conform to the proof by alleging that plaintiff was not the real party in interest. In the amendment it was stated that plaintiff and Onno Goos were the real parties plaintiff. In this con-

nection defendant asked, and the court refused, the following instruction: "At the conclusion of the introduction of testimony, defendant asks leave to amend its answer to conform, as claimed, to the proof, alleging that the plaintiff in this action is not the real party in interest, which said leave is granted. You are therefore instructed, gentlemen of the jury, that in order for the plaintiff to recover he must show that he is the real and only party in interest to this suit, and if he has failed to do so your verdict should be for the defendant." If the court erred in refusing to give this instruction—a question not decided—the error was without prejudice to defendant. On both defenses pleaded in the original answer the jury found for plaintiff. He was the consignee, and the carrier delivered the beer to him as such. This court has held "that the consignee may sue and recover merely on proof that he is the consignee." *Union P. R. Co. v. Metcalf & Wood,* 50 Neb. 452. In the present case such proof was adduced and not disputed. In the amendment to the answer it was alleged that plaintiff, the consignee, was one of the real parties in interest as plaintiff, and that the other was Onno Goos, the consignor. The latter on his direct examination testified positively without objection that he had no interest or ownership in the beer after it was billed to plaintiff. On the record as presented it is therefore clear that defendant was not prejudiced by the court's refusal to give the requested instruction, regardless of the question as to its correctness.

AFFIRMED.

KENDALL-SMITH COMPANY, APPELLEE, V. LANCASTER COUNTY, APPELLANT.

FILED JUNE 11, 1909. No. 15,687.

1. **Highways:** DEDICATION. "Where adjoining landowners place fences and plant trees along the line between their lands in such a way as to leave an intervening space for public travel, and with the

intention that it be used for that purpose, and the public enter upon and use the intervening space as a highway and continue in such use and enjoyment thereof for almost 20 years, it will be regarded as a highway by dedication." *Cassidy v. Sullivan*, 75 Neb. 847.

2. ———: PRESCRIPTION. Deviations of 20 feet from the line of public travel to avoid mud, pools, obstructions or encroachments will not necessarily prevent the establishment of a highway by prescription where the roadway has been used without interruption or substantial change for more than ten years.

3. ———: PRESCRIPTIVE RIGHTS. Prescriptive rights of the public in a road are not necessarily limited to the beaten track.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed with directions.*

Frank M. Tyrrell and *Charles E. Matson,* for appellant.

Charles O. Whedon, contra.

ROSE, J.

This is a suit for an injunction to prevent county officers from grading a highway on plaintiff's land. On the section line running north and south between the northeast quarter of section 31 and the northwest quarter of section 32, town 11, range 6, Lancaster county, there is a hedge of osage orange half a mile long. Four rods west of this hedge there is a parallel wire fence of the same length. In the intervening space four rods wide and half a mile long there is a public road. The hedge has been growing on the section line for more than 30 years. The wire fence was built as early as 1881, and has been maintained ever since. The road has been continuously used by the public as a highway for more than a quarter of a century. Kendall-Smith Company, plaintiff, is a corporation, and was organized three or four years before the trial of this case. It owns the northeast quarter of section 31 west of the highway, having acquired title from Kendall & Smith, a partnership, and claims the right to control the west half of the four-rod strip of land between

the hedge and the wire fence. June 7, 1906, county officers were preparing to grade and otherwise improve the road, when they were temporarily restrained on plaintiff's application by an order limiting their operations to a two-rod strip west of the hedge. This was followed by a decree allowing a perpetual injunction. Defendant appeals, and asks this court to reverse the judgment below on two grounds: (1) The four-rod strip was dedicated by the owners and accepted by the public for highway purposes. (2) The public acquired a highway four rods wide by prescription, having used the land under claim of right or adversely to plaintiff's ownership without interruption for more than 20 years.

1. The record shows that the county board made an order February 22, 1876, locating the road on the section line. A witness for plaintiff testified that a strip of land two rods wide on each side was at a later date donated to the public by adjacent owners, though the land east of the hedge was inclosed by a fence, and no part of it was ever used for a highway. The county not having removed the hedge and the land east of it being inclosed, the travel was diverted to the west side. After the county board made its order locating the road on the section line, and when the land east of it was closed against the public by fences, Kendall & Smith, owners of the quarter section of land west of the hedge, erected the wire fence described, and thereafter allowed the public to use the highway without interruption for more than 20 years. It is shown by a plat and by other evidence that the roadway for the greater part of the half mile has followed closely a line midway between the hedge and the wire fence, but varying in places from one side to the other. The proofs also show that the road has been worked by the county or by road overseers for more than 20 years. In this state ten years' user under such circumstances raises a presumption of dedication. *Rube v. Sullivan*, 23 Neb. 779. In a later case the following rule was announced by this court: "Evidence of ten years' use by the public of a road

through cultivated land without substantial variance, with the knowledge and acquiescence of the owner for a period of ten years, raises the presumption of an implied dedication and acceptance of such road as a public highway." *Brandt v. Olson,* 79 Neb. 612.

Defendant, however, does not rely alone on user with the knowledge and acquiescence of the owners to prove a dedication, but urges specific acts on their part to establish a grant to the public. It is argued on behalf of defendant that the construction of the wire fence is evidence of an intention to dedicate to the public the land left open. On this subject the supreme court of Illinois said: "We are of the opinion that it has been established in this case that the fence built in the year 1855 was not only apparently on a line thirty-three feet north of the south line of section 10, but was so in fact. And, that fact being established, no stronger proof of an intention to give the strip of land thus thrown out to the public for a street or road could be furnished, unless it were shown that a written dedication or an actual platting had been made." *Moffett v. South Park Commissioners,* 138 Ill. 620.

The proof of the intention to dedicate has support in other facts. One witness testified that, under direction of a member of the partnership owning the land, seeds of trees were sown along the fence, and another witness had assisted in setting out a tree at each fence post. In discussing acts like those described, the supreme court of Iowa said: "But we are of the opinion that the facts of the case show a dedication of the land outside of the hedge to the public use. When the hedge was planted, the highway was in use. It was planted for the purpose of a fence between the field and the highway. No man in his senses would have planted and maintained it at an average distance of three feet from the highway, and at the same time kept a fence on the line of the road. The legal presumption is that the person planting it intended the hedge to be on the line dividing the highway from his

land. The fact that the line of the hedge corresponds with the hedges adjoining it along the road, and gives the usual width to the road, supports this presumption." *Quinton v. Burton,* 61 Ia. 471. This court in the first paragraph of the syllabus in *Cassidy v. Sullivan,* 75 Neb. 847, announced the following rule: "Where adjoining landowners place fences and plant trees along the line between their lands in such a way as to leave an intervening space for public travel, and with the intention that it be used for that purpose and the public enter upon and use the intervening space as a highway and continue in such use and enjoyment thereof for almost 20 years, it will be regarded as a highway by dedication."

The defense of dedication is strengthened by circumstances in addition to those already mentioned. There is testimony to the effect that Kendall & Smith owned or controlled the land on both sides of the hedge for a period of more than ten years after the wire fence had been constructed, and during that time kept the four-rod strip west of the hedge open and the land east of it closed and that Kendall had knowledge of the use the public was making of the land in controversy and at different times sent employees to work on the road under the direction of a public overseer who gave them receipts showing the services rendered.

In support of the petition for injunction, Kendall testified, in substance, that the owners of the land opened the road for their own benefit; that the wire fence was not erected four rods west of the hedge for the purpose of dedicating more land to the public for highway purposes; and that the additional strip was intended for the private convenience of the owners, affording a passage from farm buildings to other lands and a place for farm drainage; but the presumption arising from user and the unequivocal acts of the owners in constructing the wire fence, in thus opening to the public a strip of land four rods wide, in keeping the land east of the hedge closed, in sowing seeds of trees along the fence, in planting trees beside

the posts, in allowing the public to use the land left open, in recognizing the authority of public overseers to repair the road, and in sending men to work under their authority are more convincing proofs of the *animus dedicandi* than statements by the witness as to other purposes of the owners. Such acts are inconsistent with a purpose to retain dominion over the land in dispute as against the public. The trial judge visited the *locus in quo,* and found there were no trees growing along the wire fence at the time of his visit, and this finding is urged in support of the injunction. The correctness of the finding does not disprove the dedication or weaken the inference arising from the unequivocal acts of the owners in building the fence and in sowing the seeds of trees, since one of the county commissioners testified there had been thousands of trees along the wire fence, and another witness said the trees had been cut down. The rights which the public acquired by dedication were perfect when plaintiff was incorporated, and could not be defeated by any subsequent conveyance of the land. *Wilson v. Sexon,* 27 Ia. 15. Defendant's proof is sufficient to establish a dedication.

2. Defendant also insists that the public acquired the highway by prescription. It is established beyond question that a road west of the hedge has been worked by the county or by road overseers and used for public travel for 20 years or more. There is convincing proof that the roadway for the greater part of the half mile has followed closely a line midway between the hedge and the wire fence, but varying in places from one side to the other. Defendant introduced a plat prepared by the county surveyor, which appears in the record as exhibit 2. Kendall testified that the plat did not correctly show the line of travel all the time for the ten-year period prior to the bringing of this suit; that the wagon road had varied therefrom perhaps 20 feet, and that in different places it had been nearer to the hedge fence than the plat indicated. In the oral argument, counsel for plaintiff relied on this testimony, referred to the plat to disprove the prescrip-

tive right asserted by defendant, and called attention to the fact that a portion of the wagon track near the north end of the road in dispute was wholly on land within two rods of the hedge. Plaintiff's position will be shown more fully by the following excerpt from its brief: "There is established no road by prescription, because the evidence is that the line of travel has not always been along the line shown on the plat. * * * Before the county can establish a right of way over this two rods it must show that it has exercised dominion over the entire strip in absence of a dedication. This it has not done. The plat (exhibit 2) comes far from showing that the traveled highway was on the second two rods west of the section line. The witnesses called to prove work on the road do not pretend that work was done on the two rods in controversy." In this connection plaintiff invokes the following rule announced in *Engle v. Hunt,* 50 Neb. 358, and followed in other cases: "To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land." Slight deviations of 20 feet from the line of travel in a few places on half a mile of road which has been continuously used for more than 20 years are not sufficient to prevent the public from acquiring the highway by prescription. A number of witnesses testified the line of travel remained substantially unchanged for twice the statutory period. Slight variances to avoid mud, pools, encroachments or obstructions are frequent on roads acquired by user, and are exceptions to the rule quoted from *Engle v. Hunt,* 50 Neb. 358. The deviations relied upon by plaintiff fall clearly within the following doctrine announced by this court in *Nelson v. Jenkins,* 42 Neb. 133: "It is not indispensable to the establishment of a highway over lands by prescription, or adverse user, that there be no deviation in the line of travel. If the point of travel

has remained substantially unchanged for the full period, it is sufficient, even though at times, to avoid encroachments or obstructions upon the road, there may have been slight changes in the line of travel. *City of Beatrice v. Black,* 28 Neb. 263."

Plaintiff's argument to the effect that defendant did not occupy the land west of the beaten track, where the line of travel was wholly on land within two rods of the hedge near the north end, and that therefore the public did not use the entire four-rod strip continuously for the full statutory period, is clearly untenable. The land used for a county highway is not confined to the wagon track. Teams usually pass wherever they meet, and necessarily depart from the beaten path. When they leave the roadway to pass each other, the public asserts dominion over and uses land outside of the line of travel, and prescriptive rights are not confined to the graded roadway. In *Bartlett v. Beardmore,* 77 Wis. 356, the court said: "Most country roads have a narrow beaten track, but it does not follow that the use is confined to such path. Teams must pass each other, and for that purpose must necessarily depart from the main traveled track. So when such track is muddy, public convenience requires departures from such track. We cannot hold that the public can acquire no legal right to such sides of the main traveled track by such ordinary user. On the contrary, it is held by courts of high authority that, 'where a highway is established by user merely over a tract of land of the usual width of a highway, the right of the public is not limited to the traveled path, but such user is evidence of a right in the public to use the whole tract as a highway by widening the traveled path, or otherwise, as the increased travel and the exigencies of the public may require.' *Sprague v. Waite,* 17 Pick. (Mass.) 309; *Hannum v. Inhabitants of Belchertown,* 19 Pick. (Mass.) 311; *Simmons v. Cornell,* 1 R. I. 519; *Cleveland v. Cleveland,* 12 Wend. (N. Y.) 172." One of the county commissioners testified that the grade was midway between the hedge and the wire fence;

that there were ditches on both sides where earth had been removed for grading purposes, and that the grade and ditches could be plainly seen. In using teams to scrape out the earth at the sides of the road, defendant would necessarily assert dominion over the full width of the four-rod strip.

A highway the full width of the land between the hedge and the wire fence was clearly established by user. The prescriptive rights of defendant were complete before plaintiff acquired title to the quarter section of land west of the hedge. On the testimony in the record the findings should have been in favor of defendant. The decree below is therefore reversed, with directions to the district court to dismiss the action.

REVERSED.

FAWCETT, J., dissents.

ELLEN HOOVER, APPELLEE, V. JOHN A. JONES, APPELLANT.

FILED JUNE 11, 1909. No. 15,721.

Replevin: EVIDENCE. Where a sheriff seizes personal property under an execution, and a stranger to the process deprives him of his possession by a writ of replevin, the execution, though produced by the officer at the trial of the suit in replevin, is not competent evidence of the officer's possessory rights without proof of the judgment on which such execution was issued.

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

R. D. Sutherland and *Cole & Brown*, for appellant.

H. H. Mauck and *Charles H. Sloan, contra.*

ROSE, J.

This was an action by plaintiff to recover from defendant the possession of an undivided three-fifths interest in

140 acres of corn in the field, valued at $400. In his answer defendant pleaded, in substance, that when the corn was taken from him under the writ of replevin he was lawfully holding possession of it as sheriff of Nuckolls county, having previously seized it by virtue of three executions as the property of S. E. Hoover, the husband of plaintiff herein. The executions were issued out of the district court for Nuckolls county on three separate judgments which had been removed thereto by transcripts from inferior courts. The judgments were pleaded in the answer, and their existence was denied by plaintiff's reply. In the suits in which they were rendered, S. E. Hoover was the only defendant. His wife was not a party to the suits, judgments or executions. The real controversy was between the judgment creditors and plaintiff. She insisted the corn belonged to her. The sheriff, who acted under the executions in the interests of the judgment creditors, contended that her husband was owner and that the property was subject to execution for the payment of his debts. On the issue of fact as to ownership and right of possession, the jury found in favor of plaintiff, and from a judgment on the verdict defendant appeals.

In seeking a reversal defendant argues that the evidence is insufficient to sustain the verdict, and also complains of errors in the instructions to the jury. Plaintiff suggests that all of the assignments of error presented are immaterial for the reason there is no evidence in the record to justify a return of the property to the sheriff or to show his right to possession, the judgments not having been proved except by the executions which, as she argues, are not competent for that purpose. If this point is well taken, the judgment in her favor herein must be affirmed, since seizure by defendant under executions issued on valid, unpaid judgments is the only justification for his possession of the corn.

The executions were offered in evidence without proof of the judgments, and admitted over proper objections by plaintiff. A judgment, when scrutinized as evidence, may

show on its face that it has been paid; that it is void; that it has been assigned to one not seeking to enforce it; that its enforcement has been enjoined; that it has been canceled; that it has been reversed or superseded, or that for some other reason it is not enforceable by execution. Inherent defects in a judgment do not appear on the face of an execution issued thereon. For these and other reasons, the general rule that an execution cannot be received in evidence without proof of the judgment on which it was issued is everywhere recognized. There is an exception to the rule, however, in favor of a sheriff who is required to serve the processes of the courts. In levying on property of a defendant under an execution regular on its face and issued by a court of competent jurisdiction, a sheriff is not obliged to ascertain at his peril that the judgment on which the writ was issued is valid and unpaid. When called to account as a tort-feasor for such action, he may produce the writ to protect himself from personal liability without proof of the judgment. *Muller v. Plue,* 45 Neb. 701. This exception to the general rule is necessary to the proper administration of justice. A sheriff must necessarily obey the directions of the courts without waiting to investigate the validity of their decrees. The efficacy of a judgment to satisfy a debt may depend upon the immediate seizure of the property of the defendant; and for his own protection, when sued as a trespasser, the sheriff may be permitted to produce the writ without proving the judgment. The right to do so, however, is a mere personal privilege of the officer. It does not extend to litigants or strangers, and the parties in whose behalf the sheriff acts cannot make use of the privilege to change the rules of evidence in establishing their possessory rights or title to property. *Beach v. Botsford,* 1 Doug. (Mich.) 199.

It is apparent from an inspection of the record herein that the reasons for the exception to the general rule do not apply to the present controversy. If the verdict is justified in point of fact, the sheriff levied on the property

of plaintiff, a stranger to the executions. Afterward she took it from him by replevin. He demanded its return, and pleaded facts showing his right of possession through executions issued on judgments against her husband. He could not deprive plaintiff of her property under the executions, if the judgments for any reason were unenforceable. She denied his allegations as to the judgments, and his only proofs of their existence are the executions. Defendant's liability as a trespasser in seizing the corn was not the issue in the action of replevin. The question at issue was the right of possession when the suit in replevin was instituted. The foundation of the seizure under which the sheriff held the property was the judgments, which, under the rules of evidence, could not be proved by executions issued thereon. When sued as a trespasser, the attitude of a sheriff is personal and defensive. As a defendant in replevin, his position is different. In the present case he asserted the rights of the judgment creditors and demanded affirmative relief, seeking a return of the property, and should have established by competent proof the judgments, which were the basis of his possession. The executions were not admissible for that purpose without proof of the judgments. *Muller v. Plue,* 45 Neb. 701; *Beach v. Botsford,* 1 Doug. (Mich.) 199; *Gidday v. Witherspoon,* 35 Mich. 368; *Andrews v. Smith,* 41 Mich. 683; *Ramsey v. Waters,* 1 Mo. 406; *Wilson & Gibbs v. Conine,* 2 Johns. (N. Y.) *280; *State v. Records,* 5 Har. (Del.) 146; *Campbell v. Strong,* Hemp. (U. S. C. C.) 265.

Defendant having failed to show his right of possession by proper evidence, the judgment against him must be

AFFIRMED.

MABEL P. OGDEN, APPELLANT, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLEE.

FILED JUNE 11, 1909. No. 15,970.

1. **Insurance:** REINSTATEMENT: EVIDENCE. In a suit on a certificate issued by a fraternal beneficiary association, a written statement of delinquent assessments made out by an officer of defendant and introduced by plaintiff as evidence of the date of assured's reinstatement was properly held by the trial court to be without probative force for such a purpose, when contradicted on that issue by defendant's records and explained and disproved by oral testimony.

2. **Trial:** DIRECTING VERDICT. Where the evidence is insufficient to sustain a judgment in favor of plaintiff, it is not error to direct a verdict for defendant.

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

Joel W. West, for appellant.

A. H. Burnett, contra.

ROSE, J.

Defendant is a fraternal beneficiary association, and this is a suit to recover the amount due on a certificate issued by it to Charles Ogden. Plaintiff was Ogden's wife and was designated by him as beneficiary. The certificate was issued May 9, 1899, and Ogden died January 25, 1904. Under the laws of the association delinquency in the payment of an assessment suspended membership and forfeited assured's beneficial interests. In the court below defendant denied liability on the ground that Ogden did not pay his assessment for December, 1903. The trial court was of the opinion there was no evidence for the consideration of the jury in disproof of the defense stated, and directed a verdict in favor of defendant. From a judgment of dismissal plaintiff appeals. The facts relating to this litigation are more fully detailed in three

former opinions of this court. *Sovereign Camp, W. O. W., v. Ogden,* 76 Neb. 643; *Ogden v. Sovereign Camp, W. O. W.,* 78 Neb. 804, 806.

Plaintiff frankly admits that Ogden, during the month of December, 1903, did not pay his assessment for that month. She insists, however, that he was in arrears during the previous year; that in reinstating himself in the association in December, 1902, he made a payment of $12.50, which included among other items five assessments; that under the laws of the association only four of the assessments were appropriated by it at that time, and that the fifth assessment remained a continuing credit in his favor and should be applied to the assessment for December, 1903, since all intervening assessments were paid. It is argued that forfeiture was thus averted. The merit of this contention on the part of plaintiff depends on the date of Ogden's reinstatement in 1902. Plaintiff says it occurred in December, and defendant's proof shows the disputed date was November 25, 1902. If plaintiff is correct in her position, Ogden had the amount of one assessment to his credit at the time of his alleged delinquency in December, 1903; but, if he paid his arrearages during November, he was not entitled to the credit claimed by plaintiff. The record shows that in November, 1902, Ogden was in arrears for the July, August, September and October assessments. Under a law of the association "four monthly payments of assessments" were essential to his reinstatement, and of these three were to be sent to the sovereign clerk and the fourth placed to Ogden's credit as an advance payment for the "current month." He paid his assessments from January, 1903, to November, 1903. It is therefore clear that if he was reinstated in the "current month" of November, 1902, by making five payments November 25, which aggregated $12.50, and the association was required to credit his fourth payment to the assessment for that month, the five payments must necessarily have been applied as follows: First payment to August assessment; second to September; third to

October; fourth to November; fifth to December. It follows that Ogden did not have the amount of one assessment to his credit in December, 1903, if he made his payment of $12.50 November 25, 1902, and was reinstated at that time. In directing a verdict for defendant the trial court held there was for the consideration of the jury no evidence that Ogden was reinstated in December, 1902, by payment of his arrearages during that month. Plaintiff's contention that Ogden was reinstated in December, 1902, rests alone on a document found among his papers after his death and described as a "reminder." It is dated December 1, 1902, is headed, "Reminder to pay within the month," and is directed to Ogden. It notified him to pay assessment 147 on or before January 1, 1903, and referred to some of the laws of the association. It bore the name of John N. Crawford, clerk, and contained the statement that there were due from Ogden and unpaid the following items: Assessment 147, $1.60; four assessments to reinstate, $9.20; emergency fund dues 20 cents; sovereign camp monthly dues 15 cents; camp general fund dues 35 cents; physician's examination fee $1; total $12.50.

In reviewing a former record containing the reminder described, this court referred to an inconsistency between its date and the dates in the books kept by the clerk of the camp, observed there was no attempt to explain the discrepancy, and held that the question as to the date of payment was properly submitted to the jury for determination. *Ogden v. Sovereign Camp. W. O. W.*, 78 Neb. 804, 806. In the record now presented defendant explained the discrepancy in dates by uncontradicted evidence. E. R. Stiles, an auditor in the sovereign clerk's office, testified, in substance, that he prepared the reminder November 25, 1902, at the request of Philip Miller, an officer who solicited members; that he used a blank which had been printed for distribution among local camps before the end of November and dated December 1, 1902, and that he wrote on the instrument the name of John N.

Crawford, camp clerk. "Rather than change the numbers," said the witness, "I put in the four assessments which were necessary, being the three month's arrearages, and including the advance assessment." He also stated that assessment 147 was for December, 1902, and that he had given the statement to Miller. Miller's testimony in effect shows that he went to Stiles' office, procured the reminder, and delivered it to Ogden November 25; that he had an interview with Ogden respecting the payment of arrearages; that he called on Dr. Wiese and took him to Ogden's office; that Ogden was examined for the purpose of reinstatement; that the transactions occurred November 25, 1902, and that the following document was signed in presence of the witness by both Ogden and the physician: "This is to certify that I have personally examined Sovereign Charles Ogden, a suspended member of Omaha Camp No. 16, state of Nebraska, this 25th day of November, 1902, and I am satisfied that he is now in good health and has not had any serious illness during the past six months. He has not become an habitual user of intoxicants or opium, and is not engaged in a prohibited occupation, and is worthy to be reinstated a member of the Woodmen of the World. H. L. Wiese, M. D., Office, 15th & Harney St. I certify and agree that the above is true, and I desire to be reinstated as a member of the Woodmen of the World, and said statement shall be a condition of forfeiture of my benefits if found to be untrue, and that this reinstatement shall not be in effect until accepted by the sovereign clerk. Charles Ogden. Certificate of clerk of camp. I hereby certify that Sovereign Charles Ogden certificate No. —— above referred to has this day paid four assessments amounting to $6.40, four months' emergency fund dues amounting to 80 cents, four months' sovereign camp dues amounting to sixty cents, and four months' camp dues amounting to $1.40. I enclose herewith to the sovereign clerk draft for $5.85, being three assessments, three emergency fund dues and three months' sovereign camp dues, payable to the order

of the sovereign banker. Dated this 25 day of November, 1902. John N. Crawford, Clerk, Omaha Camp, No. 16, at Omaha, state of Nebraska."

The witness Miller further testified that he received from Ogden at the time $12.50, immediately paid the physician $1, and the same day turned over to Crawford, camp clerk, the remainder of $11.50. Crawford testified Miller handed him that amount November 25, and told him it was from Ogden; that he entered the payment on his books, and made a remittance to the sovereign camp; that he received the physician's certificate from Miller November 25, and filed it with the sovereign clerk; that he filled out and signed the certificate following that of the physician, and filed the document with the sovereign clerk; that he remembered Ogden was reinstated at the time, though he could find no record of his reinstatement in the records of the meetings of the camp. A page of the clerk's cash book was introduced in evidence, and shows payment of $11.50, November 26, on account of the five assessments for August, September, October, November and December. In addition, R. L. Forgan, an assistant clerk charged with the duty of making collections from delinquent members, testified in effect that in January, 1904, he had a conversation with Ogden respecting the payment of the assessments for December, 1903, and January, 1904, and told him, in substance, that he was under suspension for nonpayment of the December assessment, and suggested payment for the months of December and January, and that Ogden expressed a purpose to drop out of the order and said he did not wish to be reinstated.

The oral and documentary evidence adduced by defendant at the last trial of this case in the district court destroyed the probative force of plaintiff's reminder as evidence that Ogden paid five assessments in December, 1902, and that he was reinstated during that month. On that issue the document introduced by plaintiff, when explained and disproved by other evidence, was insufficient to sustain a judgment in her favor, and the trial court

did not err in directing a verdict for defendant. Only one reasonable conclusion can be drawn from all the facts disclosed, and that is Ogden was not reinstated in December, 1902, by payment of arrearages during that month. Other reasons suggested to defeat a forfeiture are also unsound.

AFFIRMED.

LANDIS & SCHICK, APPELLANTS, V. GEORGE WATTS, APPELLEE.

FILED JUNE 11, 1909. No. 15,281.

1. **Evidence:** HYPOTHETICAL QUESTIONS. The rule announced in *Hamblin v. State*, 81 Neb. 148, that, "in propounding hypothetical questions to expert witnesses, it is allowable for each party to the controversy to submit such questions upon the theory of the case contended for by the side propounding them" does not mean that a party propounding hypothetical questions may do so upon a theory at variance with testimony which he himself has given, either in person or through other witnesses whom he has previously introduced.

2. ———: ———. In such a case the questions must be so framed as to fairly reflect the party's theory as shown by the facts admitted on proved by him.

3. ———: ———. And where the party's own evidence corroborates evidence which has been introduced by the other party to the action, such questions should fairly reflect all of the facts so admitted or proved by both sides.

REHEARING of case reported in 82 Neb. 359. *Judgment of district court reversed.*

FAWCETT, J.

This case is before us on rehearing. See 82 Neb. 359. Plaintiffs declared upon an account stated for a balance due as attorneys' fees in a case tried in the district court for Seward county. The answer denies that there was any account stated, and sets out other matter which it is not necessary to consider. Plaintiffs having declared

upon an account stated, all that was necessary for the defendant to do was to meet that claim. Failing to establish the account stated, plaintiffs' action would fail, regardless of whether their claim for attorneys' fees was reasonable or not.

On the trial Mr. Landis and Mr. Schick, composing the firm of Landis & Schick, attorneys at law, both testified that they were employed generally by the defendant in an action for personal injuries, which had been brought against defendant in the district court for Seward county by one Weinbar, for $12,700 damages. Defendant had already employed two other lawyers, who should be designated as chief counsel in the case. For reasons of his own, defendant saw fit to employ plaintiffs to assist the attorneys who had been already employed. Mr. Landis testified that as soon as defendant employed them he went to the clerk's office for the files, and instructed the clerk to enter plaintiffs' names on the docket as counsel; that shortly after returning to his office with the files, "Mr. Carey (one of the counsel above referred to) and Mr. Watts came in, and they suggested to me that it might be better if I should not appear of record in the case, but hang around on the side, but to go ahead and work on the case and see what could be found out, and then the other side of the case would not know that we were in the case. I informed Mr. Carey and Mr. Watts that we were not detectives, but lawyers, and that we would either be in or out of the case. If they wanted us in the case we would go in and do the best we could, would do our utmost, but we would not act as detectives, and when it was found out that we would not act as detectives, Mr. Watts said all right, and Mr. Carey said all right." This testimony by Mr. Landis is not contradicted by either Mr. Watts or Mr. Carey. Mr. Landis and Mr. Schick both testified that after they were retained, and prior to the trial, defendant came to their office on a number of occasions and spent a good deal of time going over the case, talking about

the witnesses and what they would testify to; that they went over the case very fully with the defendant and with defendant's son; that they spent a large amount of time examining the law of personal injury cases; that they examined all of the cases in this court, borrowed Labatt, on Master and Servant, a two volume work, and made a careful examination of that; that they had conferences at different times with senior counsel in the case, and discussed with them the preparation of instructions and the advisability of moving for a directed verdict when plaintiff rested. The evidence shows that plaintiffs were very active and energetic in the case from the time of their employment until the case was finally brought to a successful issue upon the trial. Defendant seeks to escape responsibility for all this by claiming that plaintiffs were not employed for any such purpose, and by the expert witnesses introduced seeks to escape liability for anything done by plaintiffs except during the two days of actual trial in court, the time when, it seems to us, their services would have been of the least value to defendant. Defendant had two older and more experienced lawyers to try the case, and it is doubtful whether plaintiffs could render them very much assistance in the court room during the trial, but such as they could render was rendered by Mr. Landis, the senior member of plaintiffs' firm. The evidence fairly indicates that the plaintiffs were employed because they were young and active, and would be apt to be energetic in getting the witnesses together, the evidence in shape, and in preparing for the trial of the important case then about to be tried. At any rate, the uncontradicted evidence shows that they performed those services, and there is not even an attempt at proof in the record that the senior counsel in the case ever did a thing along those lines, but relied entirely upon the work of plaintiffs. After plaintiffs had testified to all of these facts, partly in chief and largely in rebuttal, defendant was called to

the stand on surrebuttal. This testimony by defendant strongly corroborates everything testified to by plaintiffs. He does not deny any of their testimony, but strongly corroborates them.

The evidence of Mr. Schick, and of defendant himself, shows that some time subsequent to the trial defendant called at plaintiffs' office, and inquired what their charge was going to be for services in that case. Mr. Landis being absent, Mr. Schick told him that they had not considered the matter yet, but that when Mr. Landis returned they would take the matter up and would advise him. On Mr. Landis' return plaintiffs decided upon the amount they proposed to charge for their services, and on December 4, 1905, wrote defendant: "You were inquiring of us what our fees would be, and we write you about the same. Our fees will be $225. A prompt remittance of the same will be appreciated." Defendant received the letter, and on December 15 called at the office of plaintiffs. Defendant testified that when he called at their office he told them that their fee was excessive, and that he would not pay it; that he would pay them $100 and no more, and that that was $50 more than their services had been worth to him, and positively denies that there was any agreement to pay the $225 by paying $100 in cash and the remainder by March 1 following. Plaintiffs both testify that there was no such talk on the part of defendant; that there was no serious disagreement between them; that, while defendant said their charge was high, yet he agreed to it, and stated that he would pay them the whole amount that day if they desired, but if they would accept $100 then and wait for the remainder until March 1, at which time he expected to be getting in some money, it would be quite an accommodation to him, and that they agreed to that proposition. Mr. Landis testified that they gave him a receipt, specifying as follows: "Received $100 in part payment on the Watts-Weinbar settlement of $225." Defendant admits that they gave him a receipt for the $100, but claims that the

receipt is lost. If, as testified by him, they were attempting to hold him up for an excessive fee, and he was paying them $100 and stating to them that that was all he ever intended to pay, it seems incredible that he would have accepted, without protest, a receipt which, upon its face, declared that it was a receipt for $100 in part payment of a settlement of $225, and that Mr. Watts would have failed to carefully preserve his receipt. If it had been preserved and produced in evidence, it would have furnished strong written proof of the account stated. In this condition of the record could defendant be permitted to introduce testimony as to the reasonable value of the services performed by plaintiffs? We think not. In the first paragraph of the syllabus in our former opinion we say: "If the evidence relative to a material fact is conflicting, any collateral fact or circumstance tending in a reasonable degree to establish the probability or improbability of the disputed fact is relevant and properly admitted, although it may not tend directly to prove any issue in the case." In a certain class of cases this would be the law, but, as applied to the facts in the case at bar, we feel that that rule is not applicable. If the testimony for and against the account stated had been largely circumstantial, or enshrouded in doubt, or ambiguous, then the introduction of collateral facts or circumstances might have been permissible; but here it is not a question of doubt or uncertainty. It was a square question of veracity. The two plaintiffs had sworn positively to the account. They had shown that a paper had been given by them to defendant, stating the account in express terms. Defendant had sworn positively that no such an account stated had been agreed upon. Under such circumstances we do not think it was permissible for the defendant to offer testimony as to the value of the services which plaintiffs had performed.

But, conceding that the testimony attempted to be introduced is within the rule announced in the cases cited in our former opinion, and that defendant had a right to

introduce testimony as to the reasonable value of the services as a collateral fact or circumstance tending to establish the probability or improbability of the disputed fact, viz., the account stated, the evidence offered to prove that fact was, under the settled rule in this state, clearly inadmissible. Three lawyers were placed upon the stand by defendant, and the same hypothetical question was propounded to each. It is only necessary to refer to one, as that is similar to the other two. Mr. J. J. Thomas was introduced as a witness, and we have the following: "Q. Mr. Thomas, where a person has been sued for damages in a case where the plaintiff claims damages in the sum of $12,700 for injuries sustained caused by the falling in of a vault, claiming to have been constructed under the supervision of the defendant, and the falling in being caused by his negligence, and where said defendant employed a lawyer to assist other counsel in the trial of the case, and where the counsel employed is present during two days in court, and assists at the trial of the case during those two days, and makes a speech to the jury, and where there is no agreement made as to the value of the services of said counsel, what, in your opinion, would such services be worth per day? A. I would like to ask another element there before I would answer that hypothetical question. Who is responsible in charge of the case where the services involved are performed? As to who is responsible for the case, or is assisting. I think it would make some difference as to who is responsible for trial of the case. Q. Add to the question: Where the employment is to assist other counsel who are employed and have charge of the case. (These questions were properly objected to.) A. Well, if the services that you refer to were simply assisting the other attorney, who was the attorney in charge and had the responsibility of taking care of the case, and he was simply assisting in the trial, would simply go and help try it in court, I would consider $20 to $25 per day fair compensation." On cross-examination he testified that in the answer

given he had not taken into consideration the fact that counsel who assisted had spent considerable time in preparation of the case before trial, nor the fact whether counsel had examined or talked with the witnesses before the trial, making preparations for the same; but says: "I have simply taken into consideration the services performed in the court room." And in answer to another question, he says: "If I prepare a case and prepare the pleadings and look up the law and investigate and get ready for trial, in nearly all cases of default it takes a great deal more time to do what I do outside of the court room than what I do in. I assumed that there was somebody else had done that. I was answering a case where I was just called in to help try it in court." He further stated that in his answer he was just assuming that the counsel had nothing to do excepting the mere assistance in the courtroom, and that he had disregarded whatever might have occurred outside of the courtroom. It is apparent, therefore, that the hypothetical questions propounded to the three witnesses simply submitted to them a partial statement, and that the least valuable, of the services that were performed by the plaintiffs in that case.

At the time this testimony was offered Mr. Landis had testified to the general employment of plaintiffs in the suit above referred to; that he had consulted with senior counsel in the case over the pleadings; that he had assisted in the two days' trial of the case; that he had looked up testimony in the case, making a trip to Goehner for that purpose; that after the arrival of the witnesses and before the trial he had talked with them; that in Mr. Carey's office he had assisted in the discussion of the law and preparation of the instructions; and he and Mr. Schick had both testified as to their interview with defendant at the time of the agreement as to the account stated. Mr. Landis had also testified as to the contents of the receipt given to defendant at that time. Defendant himself had testified to the employment of plaintiffs;

that the suit in which he employed them was a damage suit for $12,700; that he was successful in that suit; that he employed them "to assist in the case; to watch the case along, and if there is anything to do, to help, to assist"; that they were "to watch all the business, in fact it was not stated, it was not singled out, to watch the thing along, to see if it went all right, and to help them (senior counsel) if they needed it"; that he "always thought that sometimes there might be a loophole left, and I didn't want it to happen that way"; that he paid Mr. Sloan $300 and Mr. Carey $200 in that case; that Mr. Landis had examined him in regard to the facts in the case, had asked him a good many questions in making preparation for the trial, when neither Mr. Carey nor Mr. Sloan was present; that defendant's son was with him, and that Mr. Landis might have examined him; that at the time he paid plaintiffs $100 they gave him a receipt; that that receipt was not a receipt in full; that they accepted the $100 on the settlement, but not in full payment; that he had lost the receipt.

The question as to what should be contained in a hypothetical question was first considered by this court in *O'Hara v. Wells,* 14 Neb. 403; again in *Morrill v. Tegarden,* 19 Neb. 534. The question was again considered and the two cases above noted cited in *Burgo v. State,* 26 Neb. 639. In that case we said: "The necessity that the questions shall fairly reflect the facts proved or admitted, where it is sought to show insanity as an excuse for crime, is apparent. The plea is in the nature of confession and avoidance. The avoidance, the insanity, is to be shown by the testimony. How can an expert give an intelligible opinion upon that point, or one that the jury would be justified in acting upon, unless the inquiry reflects the proof on that question? There must be a fair statement of the case to render the answer of any value whatever, as a partial statement, or one founded on mere fiction, would not fail to mislead the jury and probably cause a miscarriage of justice." In the syllabus in that

case we said "Where the opinion of an expert is sought upon the question of the insanity of the accused, the hypothetical question to such expert must be so framed as to fairly reflect the facts admitted or proved by other witnesses." In the syllabus in *Morrill v. Tegarden, supra,* we said: "If hypothetical questions are resorted to in the examination of expert witnesses, they must be so framed as to fairly reflect facts, either admitted or proved by other witnesses."

It is suggested that, "in propounding hypothetical questions to expert witnesses, it is allowable for each party to the controversy to submit such questions upon the theory of the case contended for by the side propounding them. A question is not improper simply because it includes only a part of the facts testified to. If facts are testified to which are not believed to be true, or which are believed to be immaterial to the issue, there is no rule of law requiring that they be included in the question." *Hamblin v. State,* 81 Neb. 148. But that does not mean that a party propounding hypothetical questions may propound them upon a theory at variance with testimony which he himself has given, either in person or through other witnesses whom he has previously introduced. In the case at bar, as above outlined, defendant himself had testified to a number of material facts as to the services performed by plaintiffs, which were completely at variance with his so-called theory that they were only employed to assist in the trial of the case in court. It will not do to say that defendant could introduce expert witnesses and propound to them hypothetical questions upon the theory that they had only been employed for a limited purpose, when he had already testified generally that he had employed them "to assist in the case; to watch the case along, and if there is anything to do, to help, to assist; they were to watch all the business, in fact it was not stated, it was not singled out, to watch the thing along, to see if it went all right, and to help them (senior counsel) if they needed it; I always thought

that sometimes there might be a loophole left, and I didn't want it to happen that way"; that Mr. Landis had examined him in regard to the facts of the case and asked him a good many questions in making preparation for the trial, when neither of senior counsel were present; that on at least one occasion defendant's son was with him, and that Mr. Landis might have examined him; that at the time he paid plaintiffs $100 they gave him a receipt; that the receipt was not a receipt in full; that they accepted the $100 on the settlement, but not in full payment. What did defendant mean when he testified that they were "to watch all the business, in fact it was not stated, it was not singled out, to watch the thing along"? This testimony could not have referred to the two days' trial, and when he said "to watch all the business, in fact it was not stated, it was not singled out," it is clear that he meant just what Mr. Landis had testified to, viz., that they were employed generally to enter upon the case and see to its preparation before the trial, as well as to assist in court. Hence, these matters should have been fairly reflected in the hypothetical question; and, it appearing that defendant's own testimony corroborated the testimony of Mr. Landis, as above set out, the hypothetical questions should have fairly reflected the facts as shown by both witnesses. The hypothetical questions propounded to the three expert witnesses introduced by the defendant, being incomplete and unfair in their statement of the facts in relation to plaintiffs' services, as shown by the testimony of defendant himself, to say nothing of the other witnesses who had previously testified in the case, the overruling of plaintiff's objections thereto was reversible error.

For the reasons above stated, our former judgment is vacated, the judgment of the district court reversed and the cause remanded for further proceedings in harmony herewith.

REVERSED.

ROOT, J., dissenting.

I cannot agree to the holding in this case. The opinion holds that evidence of collateral facts is improper, if the record, minus such evidence, presents a question of the veracity of witnesses, and thereby it seems to me discredits every other decision of this court upon that point, notably *Blomgren v. Anderson*, 48 Neb. 240; *Farmers State Bank v. Yenney*, 73 Neb. 338; *Shepherd v. Lincoln Traction Co.* 79 Neb. 834. The fact that no authority other than the opinion is cited to sustain this proposition leads one to surmise that there is neither precedent nor authority to sustain the principle announced. Moreover, the hypothetical questions fairly reflect defendant's theory of the scope of plaintiff's employment, and therefore the basis upon which he would consider himself obligated to pay, and might shed some light upon the improbability of an agreement on his part to pay them a fee in excess of that paid to experienced counsel in the case.

The opinion commits the court to holding that, where there are two conflicting theories, a hypothetical question may not be based upon facts relevant to one theory unless it includes undisputed evidence pertinent to the other, whereas the rule is otherwise. *Kiekhoefer v. Hidershide*, 113 Wis. 280; 2 Elliott, Evidence, sec. 1119; 1 Wigmore, Evidence, sec. 681. Defendant's testimony, fairly considered, amounts to this: That he employed the plaintiff Landis, not Landis and Schick, and told him: "You won't have to hunt up any testimony or anything of that kind, but watch along, and, if you are wanted to do anything, to do it." That plaintiffs were not requested to do anything, but merely appeared in court at the time the case was tried, and Mr. Landis made an argument to the jury.

The objection that the questions did not fairly reflect the testimony was also too general to predicate error upon the court's ruling. Mr. Commissioner IRVINE, speaking for this court in *Chicago, R. I. & P. R. Co. v. Archer*, 46

Neb. 907, wherein this subject was considered, said: "We do not think that the objections that no foundation had been laid for the question, and that the question was not properly framed, are sufficient to suggest the defects complained of." Counsel should have directed the court's attention to the vital undisputed evidence that they now claim was omitted from the hypothetical questions. A trial court ought not to be required to retain in mind and apply to hypothetical questions all of the relevant evidence introduced.

The jurors were instructed that, if they found that an account had been stated between the parties, the value of the services rendered, whether more or less than the amount agreed upon, would be immaterial. All of the facts were before the jury, together with plaintiffs' testimony that their services were worth $225 and it is highly improbable that the result would have been otherwise had the objections been sustained.

The record does not justify a reversal of the judgment of the district court.

LETTON, J., concurs in this dissent.

IDA L. HAAS, APPELLANT, V. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, APPELLEE.

FILED JUNE 11, 1909. No. 15,610.

1. "Forfeitures are looked upon by the courts with ill-favor, and will be enforced only when the strict letter of the contract requires it; and this rule applies with full force to policies of insurance." *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338.

2. Contracts: FORFEITURE: CONSTRUCTION. "A clause stipulating for the forfeiture of a contract should not be aided or given effect by construction in a case where the plain meaning of the language used does not require it." *Jensen v. Palatine Ins. Co.*, 81 Neb. 523.

3. Insurance Contract: FORFEITURE. It has become a settled

rule in the construction of contracts of insurance that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy.

4. **Insurance Policy:** CONSTRUCTION. A policy of life insurance is not a contract of assurance for a single year, with a privilege of renewal from year to year by paying the annual premiums. It is an entire contract of insurance for life, subject, when so stipulated, to discontinuance and forfeiture for nonpayment of any instalments of premium. Such instalments of premium are not intended as the consideration for the respective years in which they are paid, but each instalment is in fact part consideration of the entire insurance for life.

5. ———: ———. A life insurance policy, when once it takes effect by payment of the first year's premium and delivery of the policy, does not terminate at the end of the year, but it is a contract for the life of the assured. If the policy contains no provision for a forfeiture thereof by reason of a failure of the assured to pay subsequent premiums annually, a failure to pay such premiums on the day named will not constitute a forfeiture of such policy. All that the company can demand in such case is the right to set off against the amount of indemnity it has bound itself to pay the amount of the premiums remaining unpaid, with interest thereon.

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

Joel W. West and *Charles S. Elgutter,* for appellant.

James McKeen and *Montgomery & Hall, contra.*

FAWCETT, J.

Plaintiff declared on two policies of life insurance for $5,500 each, issued by defendant to her husband, Andrew Haas, the first on July 9, 1896, and the second on November 28, 1896, each of said policies being issued upon what was known as the twenty-year distribution life plan. The deceased paid four full years' premiums upon the first of said policies and three full years' premiums upon the second. The annual premium was $190.85 on each of said policies. The four annual payments upon the first policy

continued it, according to its terms, until July 9, 1900, and the three payments upon the second continued that policy, according to its terms, until November 28, 1899. The assured died May 1, 1902. Plaintiff further alleges "that after payment of said four premiums, and on the 18th day of July, 1900, the time for payment of the fifth annual premium under the terms of said policy, there was accrued and on deposit to the credit of said insured, Andrew Haas, in the possession and under the control of said defendant company, the sum of $434.50, the property of said Andrew Haas; said sum being the accumulated surplus of the annual premiums paid by said Haas during said four years under the terms of the policy. No part of said sum has been returned or tendered by said company to said insured at any time during his lifetime or to this plaintiff after his death, and said sum has remained in the possession and under the control of said insurance company available as a premium to extend said policy in the sum of $5,500, as aforesaid, as extended insurance for more than four years after the 18th day of July, 1900, according to the tables and computations in use by said company at said time for said purpose"; and under a like allegation alleges that the defendant company had the sum of $280.50 under the second policy available as a premium to extend said policy for three years and ten months after the time for which the three annual payments had paid the premium. Plaintiff further alleges as to each of said policies that "on the 7th day of May, 1902, the plaintiff notified said defendant of the death of the said Andrew Haas and demanded payment of the amount due on said policy, and defendant, waiving proof of such death, refused to pay said policy upon the sole and only ground that the said policy had become forfeited and lapsed for the nonpayment of premiums." Plaintiff further alleges that said contracts of insurance contained no provision authorizing a forfeiture thereof for nonpayment of premium; that the failure to pay the premiums when due was a delay of

performance of such payment, and that defendant by reason thereof has a lien on the amount of the insurance due plaintiff under said policies to the extent of said unpaid premiums and interest; and that on September 24, 1906, she tendered to defendant all premiums subsequent to those which had been paid by the assured up to the time of his decease, together with legal interest thereon, "which tender, although being refused by the defendant, the plaintiff has at all times and ever since kept good, and has been and is now ready, willing and able to pay, and all the conditions of said policy to be performed and fulfilled on the part of the said Andrew Haas or by this plaintiff have been duly performed and complied with." Both policies of insurance are set out *in hæc verba* in the petition. To this petition defendant filed a general demurrer, which the district court sustained, and, plaintiff electing to stand upon her petition, judgment was entered dismissing the same and for costs, from which judgment this appeal is prosecuted.

Plaintiff's claim for a reversal of the judgment and recovery upon the policies is based upon two grounds: "(1) There is no express provision in the policies which provides for a forfeiture because of the failure to pay the annual premium on the date fixed for the payment thereof, nor any provision of like import or from which even an inference might be drawn that a failure to pay the premium *ad diem* would render the policies void or work a forfeiture thereof. (2) That nonpayment of premiums, in view of the incontestability clause in the policies, is not a valid ground of defense by the company, because nonpayment of premium is not named as an exception in the general provision of 'incontestability.'"

Defendant contends: "First. That, upon failure of Andrew Haas to pay the premiums when they became due, the policies in controversy terminated and ceased to be contracts for life insurance, though they remained in force for the period of six months from default, as contracts for the issuance of other policies for life, term or

endowment insurance, at the election of the insured, if requested by him, and as provided in the policies. Upon his failure to exercise his option in this respect, the policies became absolutely void. Second. Regardless of other considerations, upon the death of Andrew Haas while in default of payment of premiums and not having exercised his options for other contracts, the policies, by their express terms, were without force in favor of the plaintiff, because the contract in each policy was to pay 'upon the following condition, and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made a part hereof.' 'The following condition,' as stated in the policies, is that 'the annual premium shall be paid in advance on delivery of this policy and thereafter to the company, at its home office in the city of New York, on the eighteenth day of July in every year during the continuance of this contract.' Third. In view of the facts and circumstances disclosed by, and properly inferable from, the petition, it appears that Andrew Haas, the insured, declined to continue the policies of insurance, and abandoned the contracts evidenced thereby, hence no recovery can be had thereon by the appellant."

The result of our consideration of plaintiff's first contention above set out renders it unnecessary to consider her second contention, viz., the incontestability clause of the policy. Defendant seeks to avoid the consequences of the absence from their policies of any forfeiture clause, on the ground that "an express provision that such a policy of life insurance shall cease, terminate, become void, or be forfeited (the preferred term of counsel for appellee) is not necessary. Considering all of the provisions of an insurance contract, both singly and in relation to each other, whether definitely expressed or properly to be inferred, and having in view the particular character of a life insurance policy as exceptional, especially touching prompt payment of premiums and the necessity of certainty on the part of an insurance com-

pany as to the status of its contract obligations, it is sufficient if it appears from the whole contract that it was intended and understood by the parties that non-payment of premium would terminate the policy, except as to the provisions therein for other insurance contracts if duly applied for." In order to sustain this contention of defendant, we would be compelled to hold that a forfeiture of an insurance contract may be created by construction, and need not be provided for by the strict terms of the contract. Such is not the law.

In *Perry v. Bankers Life Ins. Co.*, 47 App. Div. (N. Y.) 567, the court say: "It is alleged that a premium which was due on the 21st of March, 1898, was not paid; and for that reason it is said that the policy had become forfeited. The rule is well settled that no strained or forced construction of a contract will be resorted to for the purpose of establishing a forfeiture, but that, to warrant a party in insisting that his adversary has forfeited any rights which he would be entitled to by a contract between them, he must put his finger upon the specific provision of the contract which requires the party against whom the forfeiture is alleged to do the thing the failure to do which is relied upon to work a forfeiture." In *Carson v. Jersey City Ins. Co.*, 14 Vroom (N. J.), 300, 39 Am. Rep. 584, it is said: "A warranty in a policy of insurance excludes all argument in regard to its reasonableness or the probable intent of the parties. If the policy contains a condition which in law amounts to a warranty on the part of the assured, he can derive no benefit from the policy unless the condition has been literally performed. And it is immaterial to what cause noncompliance is attributable; for, if it be not in fact complied with, the assured will forfeit all his rights under the policy unless the forfeiture has been waived by the insurer (citing cases). Hence it has become a settled rule in the construction of contracts of insurance that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create

forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy." In *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220, it is said: "Each policy, after a description of the property, contained this statement: 'All contained in their frame storehouse with slate roof, situate, detached at least 100 feet on the east side of Lake Champlain.'" It appeared that there was at the time the policies were issued a small building about 75 feet distant from the storehouse occupied sometimes as an office, and so called. It was not usually used for storage purposes, but at the time of the fire it contained 83 kegs of powder which had been temporarily stored therein. The company contended that this building being less than 100 feet distant from the building containing the insured property rendered the policy void. Considering that question, the court, on page 225, say: "But the further contention that the language must be held to mean detached 100 feet from any other building of such character as to constitute an exposure and increase the risk seems to us a sensible and just construction. The brevity of the language requires that something be added to complete and elucidate the meaning. The phrase may mean detached 100 feet from any other building whatever its size or character. This would be a rigorous and severe interpretation most favorable to the insurer and operating harshly upon the insured. So construed, it would make anything which could be deemed a building, however small or insignificant, as an ice house, or privy, or open shed, within the prescribed distance, operate as a breach of the warranty. If a construction so literal or severe is intended by the insurer, he should at least say so by apt and appropriate language, and not ask the courts to supply it by intendment." In *State Ins. Co. v. Maackens,* 38 N. J. Law, 564, the seventh paragraph of the syllabus reads: "The conditions in a policy of insurance with respect to the remedy of the insured on the policy derive their efficacy entirely from the contract.

They create restrictions on his right to redress for the benefit of the insurer, which do not exist by the general law, and are to be construed strictly." In the opinion (p. 572) it is said: "To give effect to such a stipulation in cases not within its terms would be to aid in a forfeiture, which the law never permits, except in cases where the forfeiture arises under the exact words of the instrument." In *Franklin Life Ins. Co. v. Wallace,* 93 Ind. 7, the first paragraph of the syllabus reads: "Forfeitures are not favored, and, where the language of the policy is doubtful, courts will adopt that construction which will avert a forfeiture." In *Northwestern Mutual Life Ins. Co. v. Hazelett,* 105 Ind. 212, the court say: "Courts will construe a contract of insurance liberally, so as to give it effect, rather than to make it void. Conditions which create forfeitures will be construed most strongly against the insurer. Only a stern legal necessity will induce such a construction as will nullify the policy." In 2 Bacon, Benefit Societies and Life Insurance (3d ed.), sec. 352, it is said: "The parties to a contract of insurance are free to insert in it whatever conditions they please, provided there be nothing in them contrary to the common or statute law or public policy, and consequently they may agree that the policy shall be forfeited for nonpayment of premium at the appointed day. But, in the absence of any stipulation so providing, the nonpayment of a premium will not effect a forfeiture." In 2 May, Insurance (4th ed.), sec. 343, we read: "If, however, the policy contains no such proviso (that is a proviso for forfeiture), though the charter and by-laws require the payment of annual premiums, the nonpayment of the annual premium when due does not work a forfeiture. Such a policy insures for the number of years stipulated absolutely, leaving the annual payment of the premium to be enforced, not as a condition, but as a part of the consideration agreed to be paid." In *Nederland Life Ins. Co. v. Meinert,* 127 Fed. 651, the circuit court of appeals

for the Seventh circuit, in considering a policy issued by a New York company to a resident of Indiana, where the defense was nonpayment of premium, and the reply was that the contract was to be construed as a New York contract and that the company had not given notice of forfeiture required by the statutes of New York, held in favor of the plaintiff on that point. In discussing the law of forfeiture they say: "It (the policy) has not been forfeited unless it is by virtue of the express provision in the policy providing for forfeiture. Without a clause providing for a forfeiture, the policy is not forfeited for nonpayment of the premium, any more than a land contract is forfeited by nonpayment of principal or interest when due. The rule is laid down in 19 Am. & Eng. Ency. Law (2d ed.), 44, as follows: 'Since forfeitures are odious in the eyes of the law, a default in the payment of a premium on life insurance does not forfeit the policy where there is no stipulation to that effect in the policy.' This is the well-settled rule. The reason why forfeitures are odious in the eyes of the law, and are said to be abhorred, is that they are not equitable. Nevertheless, if a policy of insurance provides in express terms for a forfeiture for nonpayment of the premium when due, the law will enforce it. But, before the court will declare a forfeiture, the conditions of the policy upon which the forfeiture is founded must be strictly complied with. And this brings us to the only remaining question in the case: Whether the provisions of the policy in regard to notice of forfeiture have been complied with by the company. This provision is inserted for the benefit of the company. It is the company's language, and it cannot complain if the court, as it will, place a strict construction upon it to save a forfeiture if possible." While it is true that this case was reversed by the supreme court, the reversal was upon the ground that the company had duly forfeited the policy by a proper notice in compliance with the laws of the state of New York, but the holding of the circuit court of appeals on the ques-

tion of forfeiture without a forfeiture clause is not disturbed.

Cases exactly in point are very few in number. In *Swander v. Northern Central Life Ins. Co.*, 15 Ohio C. Dec. 3, in considering a case of this kind (p. 11), it is said: "This is the only case we have found where there was no clause of forfeiture in the policy." Again (p. 12), he says: "There are very few cases upon such policies because it is very unusual that a forfeiture clause is omitted, and the question seems to have seldom arisen." In the opinion (pp. 10, 11), it is said: "In a North Carolina case (*Woodfin v. Ashville Mutual Ins. Co.*, 6 Jones' Law [N. Car.], 558) it was held that where there was no clause of forfeiture the policy could not be forfeited for nonpayment, but that it was an absolute contract and the company could not claim a forfeiture, but could only look to the personal responsibility of the party liable for the premium. This is the only case we have found where there was no clause of forfeiture in the policy. It was decided a great many years ago, by Chief Justice Pearson, when Judge Ruffin was upon the bench of that state and was one of the court." Quoting further from the North Carolina case, the court say: "In the opinion Chief Justice Pearson says: 'Upon the point that the policy was forfeited by reason of a failure on the part of the plaintiff to pay the annual instalment, this court is of opinion with the plaintiff, irrespective of the question of notice. The policy contains no condition by which it is to be void if such payment is not made, but insures the life of the slave for five years absolutely in this respect, leaving the annual payment of $12.24 to be enforced, not as a condition, but as a part of the consideration.'" Then, discussing the case which the court itself was considering, it is said: "Nor does this policy that is before us contain any condition that, if the payment of premum is not made when due, the policy is to become void and cease and determine. There are some expressions in this policy which, it has been urged, indicate that nonpay-

ment of dues might be regarded as a forfeiture of the policy, and that the policy might, under certain circumstances, lapse; but there is no express provision of forfeiture, and in view of the authorities holding that, where there is a provision of absolute forfeiture, it is to be construed strictly in favor of the insured, and may be waived by the insurance company by its conduct, it would seem as though a court ought not to import into an insurance policy a clause of forfeiture which does not in fact there exist." In *Sanford v. California Farmers Mutual Fire Ins. Ass'n,* 63 Cal. 547, the syllabus reads: "A policy of insurance issued to one of its members by a mutual insurance company having authority to levy asessments upon the members for their proportion of the losses and expenses of the company is not forfeited or suspended by the failure of the insured to pay an assessment thus levied, unless such forfeiture or suspension is provided for as a part of the contract of insurance." A very interesting case on this subject is the case of *McMaster v. New York Life Ins. Co.,* 78 Fed. 33, which originated in the United States circuit court, northern district of Iowa, and twice ran its course through the circuit court of appeals and the supreme court of the United States. The policy in that case allowed 30 days' extension of time in which to pay the premium. The real controversy in the case was whether the 30 days' grace expired on January 12 or January 18. The application was dated December 12, 1893. The policies (five in number for $1,000 each) were dated December 18, 1893, but were not delivered until December 26 of that year. The policies contained a provision, inserted without the knowledge or consent of the insured, that subsequent premiums should be paid on December 12 of each year. The first year's premium was paid. The assured died on January 18, 1895. If the premium was due on December 12, then even with the 30 days' grace the assured was in default. But, if the premiums were not due until December 18, the 30 days' grace entitled the beneficiary to recover. An action at

law was commenced upon the policies. Pending the hearing of that action, plaintiff filed his bill to reform the policies so that by their terms the premium would be due on December 18, instead of December 12, as stated in the policies. On the hearing of that case Judge Shiras granted the prayer of the appellee, and entered a decree reforming the policies in accordance therewith. On appeal to the circuit court of appeals that decree was reversed (*New York Life Ins. Co. v. McMaster,* 30 C. C. A. 532), the court concluding its opinion in these words: "Under the evidence presented in this record, the appellee cannot recover upon these policies, either at law or in equity; and the decree below must be reversed, and the case must be remanded to the court below, with directions to dismiss the bill." Application was made in the supreme court for a writ of certiorari, but was denied. Thereupon the action at law came on for trial before Judge Shiras, a jury being waived. The judge in quite a lengthy opinion, reported in 90 Fed. 40, reviewed the case in detail, concluding (p. 57) as follows: "If free to give judgment according to my own view of the questions involved, I should find for the plaintiff; but, as already stated, the circuit court of appeals held in the equity case that there could be no recovery on the policies, at law or in equity, and I deem it my duty to follow this ruling, leaving it to the plaintiff to carry this action at law before that court for its further consideration; and therefore, while my opinion is with the plaintiff, the judgment must be for the defendant." In considering the case Judge Shiras made a number of findings; the eighteenth finding being "that the defendant company has not paid said policies, or any part thereof, and, assuming the same to be valid, there is due thereon, November 1, 1898, the sum of $5,965, after deducting from the face of the policies the amount of the second premiums, with interest thereon to March 14, 1895." In the course of his opinion Judge Shiras (p. 52) says: "If policies of life insurance were like fire insur-

ance contracts, where the risk assumed by the company terminates at a date fixed in the contract, there might be some force in the argument; but such is not the case, and the analogy suggested is misleading. In fire insurance contracts the risk is assumed for a fixed period, and the premiums demanded and paid only keep the contract in force for a named and known period. When that period elapses the contract is at an end, unless new life is given it by a renewal for another fixed period, and in such cases the payment of a year's premiums only entitles the insured to protection against loss for that period. In cases of life insurance under policies such as are sued on in this case, the contract of insurance, when once it takes effect by payment of the first year's premium and delivery of the policies, does not terminate at the end of the year, but it is a contract for the life of the assured. In other words, when the company in this case issued these policies under date of December 18, 1893, received payment of the first premiums thereon, and delivered the policies to McMaster, the company agreed on its part to pay the amounts called for in the policies to the estate of McMaster upon his death, whenever that event might occur. If the policies contained no provision for the forfeiture thereof, no further payment on the part of McMaster would have been needed to keep the policies in full force. All the company could demand in such case would be the right to set off against the amount of indemnity it had bound itself to pay the amount of the premiums remaining unpaid, with interest thereon." Plaintiff prosecuted error to the circuit court of appeals where the judgment was affirmed. 40 C. C. A. 119, Caldwell, Circuit Judge, dissenting, p. 134. On writ of certiorari to the United States circuit court of appeals for the Eighth circuit, the case was reviewed by the supreme court. 183 U. S. 25. After a full review of the case, the supreme court, in an opinion by Mr. Chief Justice Fuller, ordered: "The judgment of the circuit court of appeals is reversed; the judgment of the circuit court

is also reversed, and the cause is remanded to the latter court, with a direction to enter judgment for plaintiff in accordance with the eighteenth finding, with interest and costs." It is argued by counsel for defendant that the language of Judge Shiras above quoted is dictum. Even so, it was the opinion of an able judge, and is in harmony with the whole current of authority on that subject. Moreover it is worthy of note that the circuit court of appeals, which held views radically at variance from the views of Judge Shiras, in no manner condemned or criticised the language above quoted, nor does it meet with any condemnation or criticism in the supreme court.

In *New York Life Ins. Co. v. Statham,* 93 U. S. 24, it is said: "We agree with the court below that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid, for, after they are all paid, the policy stands good for the balance of the life insured without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong and healthy is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious

counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance. But, while this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered." After some further discussion, of like character, the opinion continues: "The case, therefore, is one in which time is material, and of the essence of the contract. Nonpayment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here." This case is cited, not only in the *McMaster* case, 78 Fed. 33, and 183 U. S. 25, *supra,* but also in numerous other cases which we have examined.

This court is thoroughly committed to the rule announced in the above cases. In *Connecticut Fire Ins. Co. v. Jeary,* 60 Neb. 338, we held: "Forfeitures are looked upon by the courts with ill-favor, and will be enforced only when the strict letter of the contract requires it; and this rule applies with full force to policies of insurance." This syllabus is quoted and reaffirmed in the late case of *Hamann v. Nebraska Underwriters Ins. Co.,* 82 Neb. 429. In *Jensen v. Palatine Ins. Co.,* 81 Neb. 523, we held: "A clause stipulating for the forfeiture of a contract

should not be aided or given effect by construction in a case where the plain meaning of the language used does not require it." To the same effect are *Springfield Fire & Marine Ins. Co. v. McLimans & Coyle,* 28 Neb. 846; *Phenix Ins. Co. v. Omaha Loan & Trust Co.,* 41 Neb. 834; *Farmers & Merchants Ins. Co. v. Newman,* 58 Neb. 504; *Connecticut Fire Ins. Co., v. Waugh & Son,* 60 Neb. 353. In *Phenix Ins. Co. v. Omaha Loan & Trust Co., supra,* the policy was issued to one Nathaniel S. Crew upon his barn and other buildings situate on his farm in Buffalo county. The trust company held a mortgage upon the farm. To the policy was attached what is known as a "mortgage slip," which read as follows: "Loss, if any, payable to the Omaha Loan & Trust Company, of Omaha, Neb., mortgagee, or its assigns, as its interest may appear. It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further agreed that the mortgagee shall notify said company of any change of ownership or increase of hazard which shall come to the knowledge of the said mortgagee, and that every increase of hazard not permitted by this policy to the mortgagor or owner shall be paid for by the mortgagee on reasonable demand, according to the established scale of rates, for the whole term of use of such increased hazard." Subsequent to the issuance of the policy, Crew sold and conveyed the property to one Platter, and immediately notified the trust company of such sale. Thereafter, for a period of about three years, the company sent its notices of maturing interest to Platter, and received payments of the same from him. Neither Crew, Platter, nor the trust company ever notified the insurance company of the sale, so that the terms of the "mortgage slip" were clearly violated. The company defended upon that ground. We held the insurance company liable, one of the main

grounds for such holding being: "The policy does not provide when the mortgagee shall give this notice, nor is there any provision in the policy or 'mortgage slip' to the effect that in case the mortgagee comes into possession of knowledge that the hazard of the risk has been increased or that the property has been conveyed, and neglects to notify the insurance company thereof, that the policy shall therefore be void." It will be seen that in that case the trust company had clearly and unequivocally violated the terms of its agreement with the insurer, and yet, because the contract contained no clause rendering the policy void by reason thereof, the policy was sustained and the trust company permitted to recover.

Counsel for plaintiff in his brief says: "With a good deal of confidence we assert the negative proposition that no case can be found where a policy of life insurance which contains no express provision providing for a forfeiture has been held to be void or nonenforceable because of the nonpayment of a premium." The writer accepted this challenge, but after three days of industrious, independent investigation he has failed to find such a case. Counsel for defendant have also been unable to meet the challenge thus given. In answer thereto they say that counsel for plaintiff "appear to have overlooked the recent important decision of the supreme court of Illinois in *Weston v. State Mutual Life Assurance Co.*, 234 Ill. 492, 498." Let us examine that case and see if it so holds. In that case the assured, Curtis, had never paid a single dollar of premium. It seems that he was an old friend of Clardy, the general agent of the company at St. Louis. It was agreed that the agent would give Curtis credit for part of his commission on the first year's premium. Two policies were issued, of $3,500 each. Premiums were to be paid quarterly. The first quarterly payment on the two policies was $58.80. Clardy gave Curtis credit for $17.64 and sent him the policies, with a request to remit $41.16. Curtis did not send the check. The policies were sent to Curtis July 5, 1889. On July 26 Clardy wrote

Curtis, advising him that he, Clardy, had advanced the premium to the company, and asking for a remittance by the 23d of August at the latest. On August 16 Clardy again wrote, asking Curtis to forward his check so as to reach St. Louis on the morning of the 24th. On August 23 Curtis wrote a letter to Clardy, stating that he was very much embarrassed at not being able to meet his obligation; that he was disappointed in getting certain moneys which he had expected, and inclosed Clardy a thirty-day note for the $41.16. On October 25 Clardy wrote Curtis, reminding him that his note had been over due for more than a month, stating that he had written several letters which had been unnoticed, and asking him to remit. On November 3 Curtis wrote Clardy, stating that he had had trouble and sickness, several members of his family having been ill, and wound up his letter as follows: "I am in close quarters all around, and just at present I do not know which way to turn. Will be obliged to give up insurance, for I cannot pay for same as I am now situated. When I applied all looked rosy. It is quite different now. What shall I do? Suggest something. What I owe you I will pay." On November 6 Clardy wrote him, expressing regret at his misfortunes, and stating that, while he was anxious to get his own "good money," he would like to keep the amount which had been written in force, and stating: "If you can send me $25 in cash and your note for $17, I will send you receipts keeping this insurance in force until December 30 and will wait a reasonable time for you to pay the notes. Now, let me know what you can do. You should by no means let this chance go by to keep insured. Your family needs the protection." On December 1 Clardy again wrote Curtis as follows: "You never said what you would do with my last proposition regarding your own insurance. Can't you look up that letter and give me an answer? I think you ought to accept it if it is possible for you to do so." Curtis did not reply to either of these last two letters. January 11 Clardy wrote Curtis: "Can-

not you do something for me on your note for $41.16?" On January 13 Curtis wrote from Glenwood, Iowa, this reply on the bottom of the Clardy letter: "The above reached me here. I will be home on the 23d. I hope at that time to have some money so that I can pay whole or part." The renewal receipts were returned by Clardy to the company the first part of January, 1900. They were received by the company January 16, 1900, and the policies marked on their books "Lapsed." Curtis died January 31. From this statement of the facts it is clear that Curtis had deliberately and unequivocally abandoned his insurance. His notation of January 13 on the bottom of Clardy's letter clearly had reference only to the payment of the note which he had give Clardy for the money which the latter had advanced for him. In the syllabus of the case there is not even a hint at a holding that the nonpayment of premium when due constitutes a forfeiture of a policy which does not contain a forfeiture clause. Counsel evidently base their suggestion that the case so holds upon what is stated in the opinion (pp. 498, 499), but we do not think the language will bear such a construction. It is as follows: "The most serious contention of appellant is that the trial court erred in instructing the jury to find a verdict for appellee; that, regardless of the letters as to the payment of premium passing between Clardy and Curtis, to render these policies invalid or unenforceable there must have been, during the lifetime of Curtis, an affirmative act of forfeiture or of disavowal on the part of the company, followed by notice to the assured. The policies in question contain no specific provision as to their being lapsed or forfeited for the nonpayment of premium. Appellee contends that these policies lapsed on September 30, 1899, by the nonpayment of the quarterly premiums. The testimony in the record tends to show that if Curtis had paid the quarterly premium after September 30 and before December 30, 1899, it would have been necessary for him to furnish, at his own expense, a health certificate before

the premium would have been received and the policies continued in force. While the evidence is not entirely clear on this last point, we think it shows conclusively that after December 30, Curtis would not only have had to furnish a certificate showing he was in good health, but that action would also have been required on the part of the company before the policies would have been considered in force, according to the rules of the company. This court has never decided the question of forfeiture raised on this record. In several cases policies have been construed which provided for forfeiture on failure to pay the premium. Appellant contends that the payment of the quarterly premium was a condition subsequent, while appellee insists it was a condition precedent. There is also a dispute between appellant and appellee as to whether this policy, under the ruling of the court, lapsed or should be held to have been forfeited. We do not think it is necessary to discuss either of these questions or distinguish as to the meaning of these words and phrases in order to reach a decision in this case. Manifestly, from the correspondence between Curtis and Clardy, especially in the light of Curtis' letter of November 3, it must be held that Curtis understood that he was giving up the insurance. He was distinctly told in Clardy's letter that the insurance could be kept in force in a certain way, and from that date until the renewal receipts were returned by Clardy to the company and these policies in question were marked on the books of the company as lapsed, Curtis never communicated with the company or its agent, or did anything to indicate that he wanted to keep the policies in force or thought they were in force." The decision of the court in that case was clearly right, but the court does not decide that nonpayment of premium at the time specified will, in the absence of an express agreement to that effect, work a forfeiture of the policy. On the contrary, it declined to decide that point and denied plaintiff a recovery on the ground that by his letter of November 3 Curtis had given up the insurance. The

rule running through all the cases is clearly expressed in *Holly v. Metropolitan Life Ins. Co.,* 105 N. Y. 437, as follows: "Punctuality in the payment of premiums in the case of a life insurance policy is of the very essence of the contract, and, when payment is not made at the time, the company has the right to forfeit if such is the contract." The converse of this is equally true, viz., the company has not the right to forfeit if such is *not* the contract.

Counsel for defendant cite *McLaughlin v. Equitable Life Assurance Society,* 38 Neb. 725, as sustaining "unequivocally a provision requiring the surrender of the policy within six months after default as a condition precedent to the right to paid-up insurance." We do not think the *McLaughlin* case in any manner aids defendant in this action. The policy in that case provided: "If premiums upon this policy, for not less than three complete years, of assurance shall have been duly received by said society, and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid-up policy, without participation in profits, in favor of said Elma R. McLaughlin, * * * for as many fifteenth parts of the original amount hereby assured as there shall have been complete annual premiums received in cash by said society upon this policy at the date when such default shall first be made; provided, however, that this policy shall be surrendered duly receipted within six months of the date of default in payment of premium as mentioned above." The policy further provided: "And if any premium or instalment of a premium on this policy shall not be paid when due, this policy shall be void; and no credit for surplus accumulated on this policy shall be deemed applicable to the payment of any premium." It will be seen from the above that the policy itself expressly provided that a failure to pay any premium when due would render the policy void; but, in a spirit of fairness to the assured, it gave him the privilege, at any time within six months after such avoidance, of obtaining a

new and different policy "for as many fifteenth parts of the original amount hereby assured as there shall have been complete annual premiums received in cash by said society upon this policy at the date when such default shall first be made." In other words, the policy expressly provided that it should become void if the assured failed to pay any premium when due, with the single exception that at any time within six months thereafter, if the assured would surrender up his old policy, they would issue to him a new contract for a different amount and upon different terms. The clause providing for this in the policy is quite similar to the clause in the policies in the case at bar; but the difference, and the controlling difference between the policy in that case and the policies in this, is that in that policy there was an express provision for forfeiture for nonpayment of premiums when due, while in the policies now before us there is no such provision. The six months' time allowed for surrendering the old policy and obtaining the new one followed, was contingent upon and controlled by the forfeiture clause. In other words, the express terms of the contract rendered the policy void if the premiums were not paid when due, but gave the assured the right to partially escape the consequences of the forfeiture by doing a certain and definite act within a certain and fixed time.

In conclusion, counsel for defendant cite, in support of their contention that the policies in this case had been abandoned: *Mutual Life Ins. Co. v. Phinney,* 178 U. S. 327; *Mutual Life Ins. Co. v. Sears,* 178 U. S. 345; *Mutual Life Ins. Co. v. Hill,* 178 U. S. 347; *Mutual Life Ins. Co. v. Allen,* 178 U. S. 351. We do not think the doctrine of abandonment can be applied to this case. The failure to pay the premiums by the assured was of short duration, about two years. Immediately upon his death, the beneficiary asserted her claim under the policies by serving notice of such claim upon the defendant, and within the time allowed by law commenced the present action.

An examination of the first of the above cases shows

that, after payment of the first year's premium, the agent waited upon the assured, Phinney, and requested payment of the second year's premium, and was informed by Phinney that he did not intend to continue the insurance, and that Phinney gave his policy to the agent to be used by the agent as a sample policy in canvassing for other business. In the other three cases the company answered, alleging in each case a demand for the premium, a refusal to pay, and an agreement with the assured that the policies were to be considered as at an end. Demurrers were filed to each of the answers in those three cases, and sustained. Defendant electing to stand upon its answers, judgment was rendered in each case for the plaintiff. These judgments were all very properly reversed, and the actions remanded. On the second trial of the *Hill* case to the court and a jury, it was shown that, when the second annual premium became due, the agent of the company called upon Hill for payment of the same, presenting a renewal receipt duly executed by the proper officers of the company. Hill did not pay. After repeated requests for payment, the agent returned the renewal receipt to the general office of the company at San Francisco. The office returned the renewal receipt to the agent at Seattle, and it was again presented to Hill, and payment requested. Hill declined to make payment, and the renewal receipt was returned to San Francisco, and thence to the home office in New York, where the policy was noted as lapsed and terminated. In the face of these facts, the jury returned a verdict in favor of the plaintiff, which the trial court sustained by entering judgment thereon. This judgment was affirmed in the circuit court of appeals (55 C. C. A. 536), but was reversed by the supreme court (193 U. S. 551), and it was from the opinion by Mr. Justice Brewer in that case that defendant makes the lengthy quotation with which it closes its brief. We do not see how that case can be claimed as an authority in this. The facts above recited (fully set out in the opinion of the circuit court of appeals in 55 C. C. A. *supra,*

but not set out in the statement of facts by Mr. Justice Brewer) clearly show that the lengthy discussion of the learned justice relied upon by defendant is largely mere dictum, and at variance with the overwhelming weight of authority. Nor do we think that *Lone v. Mutual Life Ins. Co.,* 33 Wash. 577, 74 Pac. 689, cited by Mr. Justice Brewer, gives any just rule for measuring the case at bar. In that case Lone had only made one semi-annual payment. He never paid anything more for 12 years, a length of time which might justly be held as presenting an exception to the rule announced in the many cases above cited.

In none of the cases cited by defendant did the beneficiary offer to place the company *in statu quo* by tendering all unpaid premiums, with interest from the maturity of each, as was done in the present case. Here plaintiff tendered, and still tenders, all of the unpaid premiums from their maturity, respectively, with interest at 7 per cent. per annum; thus offering to do more than place the defendant *in statu quo,* for it is a matter of common knowledge that during the short time of the assured's default defendant could not have used the premiums so advantageously. We adhere to the rule this court has heretofore announced that "forfeitures will be enforced only when the strict letter of the contract requires it," and that "a clause stipulating for a forfeiture of a contract should not be aided or given effect by construction." It can be permitted only when expressed in the policy in clear and unmistakable terms.

The argument made by defendant as to abandonment is not applicable, since the facts pleaded do not warrant a holding that as a matter of law the contract was abandoned. In our opinion the petition states a cause of action, and the district court erred in sustaining defendant's demurrer.

The judgment of the district court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

SIWOOGANOCK GUARANTY SAVINGS BANK, APPELLEE, v. FIRMIN Q. FELTZ, APPELLANT.

FILED JUNE 11, 1909. No. 15,738.

1. Mortgages: FORECLOSURE: OBJECTIONS TO APPRAISEMENT. "Objections to the appraisement of real property under a decree of foreclosure must be made prior to the sale by a motion to vacate the appraisement." *Mills v. Hamer*, 55 Neb. 445.

2. ———: ———: SALE: CONFIRMATION. "A foreclosure sale should be confirmed, notwithstanding the order of sale, issued by the clerk of the district court to the sheriff or other officer directing him to execute the decree, be returned more than 60 days from its date." *Amoskeag Savings Bank v. Robbins*, 53 Neb. 776.

3. ———: ———: ———: APPRAISEMENT. Where appraisers make no deductions from the total appraised value of real property in a foreclosure proceeding, a failure to separately find the value of the interest of the owner is without prejudice and will not invalidate the appraisement, as the value of such interest would necessarily be the same as the appraised value.

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

A. G. Wolfenbarger and *Wilcox & Halligan*, for appellant.

Loyal M. Graham, L. H. Chency and *F. M. Hall, contra.*

FAWCETT, J.

The only question involved in this case is the correctness of the judgment of the district court in confirming the sale in a suit involving the foreclosure of certain mortgages. The only party complaining here is the owner of the lands covered by the foreclosure. The validity of the decree of foreclosure is not questioned and could not be by the owner as he availed himself of the statutory stay after decree. Upon the expiration of the stay, an order of sale was issued and the property appraised at $6,000. It was offered twice, and not sold for want of

bidders, due return of which was made by the sheriff. A second order of sale was issued, and the same sheriff, together with one of the first appraisers and one new appraiser, appraised the property at the sum of $3,280. The second order of sale was issued September 20, 1907, and the sale made November 12, 1907. No objection was made to the appraisement by any one until December 19, 1907, when the defendant owner filed the following objections to the confirmation: "Comes now defendant Firmin Q. Feltz and objects to the confirmation of sale heretofore made for the following reasons: (1) The appraisal on which said sale was made was too low. (2) Because no return was made to order of sale dated September 20, 1907. (3) Because it does not appear that said property was offered twice for sale under the appraisement dated April 30, 1907, at which appraisal said property was appraised at $6,000. (4) Because the appraisement on which said land was sold does not fix or appraise interest of Firmin Q. Feltz in property." These being the only objections made in the court below, they are the only ones that can be considered here.

Objection No. 1 must fail for the reason that the objection was not made prior to the sale. *Mills v. Hamer,* 55 Neb. 445.

Objection No. 2 must fail, as the record shows that a return of the order of sale, dated September 20, 1907, was made on December 19, 1907. The fact that the return of sale was not filed until more than 60 days after its issuance by the clerk did not invalidate it. *Amoskeag Savings Bank v. Robbins,* 53 Neb. 776.

Objection No. 3 must yield to the record, which shows that the property was offered twice for sale before any attempt was made to reappraise and sell the same.

Objection No. 4 must fail because the failure of the sheriff to appraise the interest of the owner of the property was without prejudice, for the reason that no deductions whatever were made from the total appraised value as fixed by the appraisers on the second appraisal.

When no deductions are made from the appraised value, there is no necessity for separately finding the value of the interest of the owner, as the value of such interest would necessarily be the same as the appraised value.

The objections taken by defendant being all without merit, the judgment of the district court is

AFFIRMED.

HERMAN ANTON EVERS V. STATE OF NEBRASKA.

FILED JUNE 11, 1909. No. 16,123.

1. **Criminal Law:** INDICTMENT: SEPARATE COUNTS: VERDICT. In a criminal prosecution upon a complaint charging both an assault upon and rape of a female child under the age of 15 years, the jury may find the defendant not guilty of rape, but guilty of an attempt to commit rape.

2. ———: ———: ———: ———. And in such a case the omission of the word "commit" from such latter verdict, and the omission of the name of the person upon whom such assault was made, are immaterial, when, following the words "that the defendant is guilty of assault with intent to rape," the verdict contains the further words, "as charged in the information."

3. **Rape:** EVIDENCE. In the prosecution of a party for rape upon a female child under the age of consent, testimony as to improper conduct on the part of the defendant, at other times than that charged, with the same child and of the same character named and set out in the information is properly received.

4. **Witnesses:** COMPETENCY. In this state no age is fixed by the statute below which a child is presumed to be incompetent to testify, and there is no rule of law outside of the statute that a child six years of age is incompetent. In such a case, if the opposing party challenges such witness on the sole ground of age, without requesting an examination of such child by either court or counsel touching its competency, the objection is properly overruled.

5. **Criminal Law:** MISCONDUCT OF COUNSEL. Where, in the trial of a case, counsel of the respective parties engage in an altercation in the presence of the jury and are properly reprimanded by the court, and no request for a special instruction on the subject is requested, no error can be predicated thereon.

6. ———: REMARKS OF JUDGE. And where in such a case the court expresses an opinion as to improper testimony sought to be elicited from a witness upon the stand, such action on the part of the court will not be held to be reversible error, unless the appellate court can say that it probably influenced the verdict of the jury.

7. ———: TRIAL: INFANT WITNESS. In a prosecution for statutory rape, where the prosecuting witness, a little girl eight years of age, is attended by a lady friend, who is permitted by the court to sit upon the witness stand in close proximity to such prosecuting witness while her testimony is being given, and the court admonishes such lady that she is not permitted to make suggestions to the witness, and the record does not show any disregard of such admonition by the court, *held*, not erroneous.

8. ———: VERDICT: RETURN. In a criminal prosecution, when the jury have agreed upon their verdict and are conducted into court by the officer having them in charge, the procedure in receiving the verdict is governed by section 486 of the criminal code.

9. ———: INSTRUCTIONS. It is not error on the part of the court to refuse an instruction tendered by the defendant in a criminal prosecution, when the substance of everything in the proposed instruction which the defendant is entitled to have submitted to the jury is given by the court in an instruction upon its own motion.

ERROR to the district court for Dixon county: GUY T. GRAVES, JUDGE. *Affirmed, and remanded for judgment.*

R. J. Millard and *Wilbur F. Bryant,* for plaintiff in error.

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

FAWCETT, J.

Defendant was convicted in the district court for Dixon county, to which county the case had been removed on change of venue from Cedar county, upon an information, the charging part of which is as follows: "That Herman Anton Evers, being a male person of the age of 18 years and upwards, late of the county aforesaid, on or about the 10th day of October A. D. 1908, in the county

of Cedar and the state of Nebraska aforesaid, then and there being, and did then and there knowingly, wilfully, unlawfully and feloniously make an assault upon one Pauline Uding, a female child under the age of 15 years, and did then and there knowingly, wilfully, unlawfully and feloniously carnally know and abuse the said Pauline Uding, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska." The verdict of the jury was in the following language: "We, the jury in this case, being duly impaneled and sworn and affirmed, do find and say that the defendant is guilty of assault with intent to rape as charged in the information." After verdict, counsel for defendant moved the court to discharge the prisoner "because the verdict is tantamount to an acquittal." On the same day they filed a motion in arrest of judgment "because the information herein does not charge an offense under the law of this state," and a motion for a new trial. All three motions were overruled and exceptions duly taken. "Whereupon," the record states, "the defendant is asked if he has aught to say why sentence should not be pronounced upon him. Having been heard by counsel, upon his request, as to objection to the sentence, it is considered," etc., and a sentence of ten years' imprisonment in the penitentiary was imposed. From this judgment defendant prosecutes error, and assigns in his brief nine reasons why it is insisted the judgment of the district court should be reversed. These alleged errors will be considered in the order of their assignment.

The first assignment is that defendant has been convicted of a crime with which he was not charged; the contention being that he was informed against for the crime of rape upon the person of a girl under the age of consent, and was convicted of "assault with intent to rape." Section 12 of the criminal code, defines what shall constitute rape, and fixes the penalty therefor at imprisonment in the penitentiary not more than 20 nor less than 3 years. Section 14 provides: "If any person shall assault

another with intent to commit a murder, rape, or robbery upon the person so assaulted, every person so offending shall be imprisoned in the penitentiary not more than fifteen nor less than two years." Section 487 provides: "Upon an indictment for an offense * * * the jury may find the defendant not guilty of the offense but guilty of an attempt to commit the same, where such an attempt is an offense." These three sections of the statute leave defendant with nothing to hang his contention upon except the omission of the word "commit"; in other words, that the finding of the jury that the defendant is guilty "of assault with intent to rape" does not mean the same as "assault with intent to commit rape." Where the evidence clearly establishes guilt, it would be a travesty upon justice to set aside a conviction upon so strained a technicality. The fact that the verdict does not state upon whom the defendant made an assault with intent to rape we think is fully covered by the words immediately following, "as charged in the information." That the information not only charges the commission of rape, but also the making of an assault upon the little girl named, cannot be questioned. Defendant's first assignment is therefore without merit.

The second assignment is: "(1) The court erred in allowing the defendant to be cross-examined in regard to alleged offenses other than the one for which he was tried. (2) The court allowed proof of offenses other than the one for which the defendant was tried." On the first point it is sufficient to say that the questions were asked and answered without objection or exception. The testimony objected to under the second point is all testimony in relation to improper conduct on the part of the defendant with the same little girl, and of the same character, named and set out in the information. Its admission was not error. *Woodruff v. State,* 72 Neb. 815.

The third assignment is: "The court erred in allowing the state's witness, Katie Wheeler, to testify against the defendant's objection to her competency." This witness

was six years old. When she was placed upon the stand, she was asked a number of questions before any objection was made, when we have this record: "Q. And go into Tony Evers' place of business? The defendant objects first to the competency of the witness, and objects to the testimony generally on the grounds that it is incompetent, irrelevant, immaterial and no foundation laid. Sustained on the competency of the witness. Ruling withdrawn, and objection is overruled. Defendant excepts." The examination and cross-examination of this witness then proceeded to its conclusion without any further objection of incompetency by the defendant, and without any request on the part of defendant either to examine the witness himself as to her competency or for the court to make such examination. Counsel for the state contend that "in this state no age is fixed by the statute below which a child is presumed to be incompetent to testify, and there is no rule of law outside of the statute that a child six years of age is incompetent to testify. On the contrary, children of less age, it has been repeatedly held, are competent witnesses" and cite *State v. Juneau,* 88 Wis. 180, and 1 Wharton, Law of Evidence (3d ed.), sec. 399, in support of their contention. In this view of the law we concur. If counsel for defendant had any doubt as to the competency of this little girl, they should have either called upon the court to examine her as to her competency or have requested permission to make such examination themselves. Having rested their case upon the objection of age alone, the court did not err in its ruling.

The fourth assignment is: "The court erred in making a remark in the presence of the jury, tantamount to an instruction." And the fifth is: "Misconduct of the counsel for the state in using offensive and prejudicial language in the presence of the jury." These two assignments will be considered together. When the witness Eliza E. Peterson, a little girl eight years of age, was upon the stand, counsel for defendant asked her: "Your

mother was never married, was she? A. No, sir." Upon redirect examination an altercation arose between counsel. From the record we infer that counsel for defendant attempted to corroborate this answer of the witness by stating that it was true that the witness' mother had never been married. Counsel for the state retorted that, if he made that statement, it was a lie. Whereupon the court stated from the bench: "I think that Mr. Burkett (counsel for state) should apologize for using that sort of language toward a brother attorney, and Mr. Millard (counsel for defendant) should withdraw his statement that it was a fact, because his statement is not evidence, and, if it was a fact, would be immaterial to the issues in this case. Children of eight years of age do not know whether their parents are married or not." It would appear from this record that counsel for defendant was responsible for the unfortunate scene enacted in the presence of the jury; but, regardless of that, we think the court, in a very dignified and proper manner, did everything that it was called upon to do in the matter. While it perhaps would have been better for the court not to have said that "children of eight years of age do not know whether their parents are married or not," we do not think that fact could have prejudiced the jury, as it was merely a statement of a fact which we think is a matter of common knowledge. The testimony sought to be elicited was clearly improper, and, if counsel for defendant got into trouble thereby, we cannot relieve him from the consequences thereof unless we can say that the jury were probably influenced by what the court said in disposing of the matter. We do not think such is the fact, and therefore hold that defendant's fourth and fifth assignments are without merit.

In the sixth assignment defendant complains because the court permitted one Mrs. Wheeler to sit on the witness stand in close proximity to the prosecuting witness while she was testifying. The prosecuting witness is a little girl eight years old. Her mother is dead, and her father

was residing in another state. Mrs. Wheeler, it appeared, took a friendly interest in the little girl, and was permitted by the court to occupy a seat on the witness stand while she was testifying. This was objected to by defendant, and overruled. The record shows that, during the examination of the little girl, counsel for defendant stated: "Defendant wishes record to show that a lady by the name of Mrs. Wheeler is sitting on the witness stand within six inches of the witness on the stand and prompting the witness, and objects to the Mrs. Wheeler sitting on the same stand with the witness. The court: The objection as to her sitting on the stand is overruled, but she is not permitted to suggest." The examination of the little girl then proceeded, and there is nothing in the record to indicate that Mrs. Wheeler ever again, if she had previously, disregarded the admonition of the court. This assignment must fail.

Assignment No. 7 is: "The law requires that the names of the jurors shall be called." In support of this counsel cite section 290 of the code. We do not think that section is applicable in a criminal prosecution. In such a case we think the rule is to be found in section 486 of the criminal code, viz.: "When the jury have agreed upon their verdict they must be conducted into court by the officer having them in charge. Before the verdict is accepted the jury may be polled at the request of either the prosecuting attorney or the defendant." The record does not show that the jury was polled, nor does it show that either the state or the defense requested such a poll. In this there was no error.

The eighth assignment is: "We complain of the refusal to give the following instruction: 'Pay good heed to the testimony as to the defendant's good reputation before the matter for which he is now on trial, for the law presumes that no man is suddenly changed from a very good man to a very bad man, and that no man can become a criminal in a day.'" Upon this instruction is the following indorsement: "Refused because given in

substance by the court. Guy T. Graves, Judge." In this the court was right. Everything in the instruction tendered which defendant was entitled to have submitted to the jury was submitted in instruction 15 given by the court on its own motion.

Assignment No. 9 is: "The verdict did not respond to the issues in the case." We have disposed of this assignment in our consideration of assignment No. 1.

The only remaining error discussed by counsel for defendant in their brief is that the court, when it passed sentence upon the defendant, did not first inform him of the verdict of the jury, basing their contention on section 495 of the criminal code, *Dodge v. People,* 4 Neb. 220, *Tracey v. State,* 46 Neb. 361, and *McCormick v. State,* 66 Neb. 337. The section of the code referred to reads: "Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be pronounced against him." So far as the record speaks on the subject at all, it shows that the court, when about to pronounce sentence, asked the defendant if he had "aught to say why sentence should not be pronounced upon him"; but it does not show that the court informed the defendant of the verdict of the jury. While the writer does not think that *Dodge v. People* and *Tracey v. State, supra,* are in point, it must be conceded that *McCormick v. State, supra,* is decisive of the question that under the section of the statute quoted the court could not pronounce a valid sentence upon defendant without having first informed him of the verdict of the jury in addition to giving him an opportunity to say why judgment should not be pronounced against him. This, under the authorities named, does not call for a reversal of the case, but simply requires that it be remanded to the court below, with directions to pronounce judgment on the verdict in the manner prescribed by the literal wording of the statute. In the opinion of the writer, the construction placed upon the statute in *McCormick v.*

State, supra, is so at variance with the modern idea of directness, instead of circumlocution, that it should be overruled, and the more reasonable rule announced in *Bond v. State,* 23 Ohio St. 349, adopted as the rule in this state. It would seem to be unnecessary to remand this case to the district court for re-sentence simply because that court did not, at the time of passing sentence upon defendant, inform him of a fact of which he already had full and critical knowledge, viz., the verdict that had been returned by the jury; the result of which will be to give the defendant another right of appeal, thereby delaying the execution of a just sentence, and serving no good purpose to either the state or the defendant. In these views, however, a majority of my associates do not concur.

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

CONVICTION AFFIRMED, AND CASE REMANDED FOR JUDGMENT.

LETTON, J., concurring.

I agree with Judge FAWCETT'S views as to the lack of necessity for remand; but the court having adhered to this rule for many years, and the statute being as it is, I think the legislature should change the law, and not the court.

EDNA F. SKALLBERG, APELLEE, V. JOHN A. SKALLBERG, APPELLANT.

FILED JUNE 11, 1909. No. 15,705.

1. Appeal: DISMISSAL. An appeal will be dismissed where the record does not disclose the rendition of a final order or judgment.
2. ———: FINAL ORDER. A judgment awarding partition and apportionment of shares to the respective parties is not a final order on judgment from which an appeal may be prosecuted.
3. ———: DISMISSAL. Where an appeal in partition is prosecuted to this court before the trial court has acted upon the report of the referees, such appeal will be dismissed.

APPEAL from the district court for Phelps county: ED L. ADAMS, JUDGE. *Appeal dismissed.*

W. P. Hall, W. D. Oldham and *H. M. Sinclair,* for appellant.

A. J. Shafer and *G. Norberg, contra.*

DEAN, J.

This is an action in partition wherein the court rendered a judgment decreeing partition of certain premises in accordance with the prayer of the plaintiff's petition. Among others, the decree contains the following recitals: "It is further ordered by the court that P. C. Funk be, and he is hereby, appointed referee to make partition of said premises according to the above rights so found and adjudged, and that he make a report of his doing thereon at the next term of this court. It is further ordered by the court that G. H. Johnson be, and he is hereby, appointed a referee herein to make an accounting between the parties for the rents and profits arising from said premises since the death of said Elizabeth Skallberg, and to hear evidence between the parties; that, upon the conclusion of said hearing by said referee, he is hereby ordered to report his findings of fact and conclusions of law

to this court at the next term thereof for further orders of this court." The defendant John A. Skallberg excepted to the decree, assigning numerous errors, and brings the case here for review.

It appears to us from the authority of an unbroken line of decisions in this jurisdiction that the appeal is prematurely brought. "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the supreme court, for errors appearing on the record." Code, sec. 582. This statute was construed in *Mills v. Miller,* 2 Neb. 299. The court, speaking by CROUNSE, J., say: "The record does not disclose whether any sale has been made. If it had been made, it might not have been confirmed; exception to some of the proceedings had in the sale might be taken, which would form the proper subject of review here. So, whatever may be our determination upon the record before us, we may be called on to pass upon those questions liable to arise subsequent to the proceedings as disclosed in the record here." *Clester v. Gibson,* 15 Ind. 10; *Cook v. Knickerbocker,* 11 Ind. 230; *Hunter v. Miller,* 11 Ind. 356; *Stephens v. Hume,* 25 Mo. 349; *Ivory v. Delore,* 26 Mo. 505; *Gates v. Salmon,* 28 Cal. 320; *Peck v. Vandenberg,* 30 Cal. 11; *Mabry v. Dickens,* 31 Ala. 243. The following cases announce a like principle: *State v. Higby,* 60 Neb. 765; *Swift & Co. v. Koutsky,* 73 Neb. 730; *Fauber v. Keim, ante,* p. 167.

The record in the present case is somewhat voluminous and presents many interesting questions. Counsel on each side have submitted learned and exhaustive briefs upon the merits. The plaintiff in his argument urges a dismissal of the appeal for the reason that the defendant has no appealable interest. The defendant undertakes to support the contrary position; but, from the fact that the record discloses that no final order or judgment has been rendered, we are precluded from a consideration and a discussion of that and other points argued in the submission of the case.

For the reasons stated in the opinion, the appeal must be, and it hereby is,

DISMISSED.

FAWCETT, J., not sitting.

STATE OF NEBRASKA V. SEVERAL PARCELS OF LAND. HERMAN ROSENTHAL, APPELLANT, V. SUSIE H. GILLILAN ET AL., APPELLEES.

FILED JUNE 11, 1909. No. 16,076.

1. **Tax Sale:** REDEMPTION. Where land is sold at public sale, in pursuance of a tax decree obtained under the provisions of that part of the revenue law commonly called the "Scavenger act," for a less amount than the decree, interest and costs, such sale is a "premium sale" within the meaning of the act, whether there be but one bid or more than one.

2. ———: ———. Under the provisions of the revenue law (Comp. St. 1907, ch. 77, art. IX), an owner who seeks to redeem land from a public tax sale, which has been sold in pursuance of a decree obtained thereunder for delinquent taxes, must pay the full amount of the decree, with interest as provided by law, and all costs.

3. ———: ———. Where the owner of land that has been sold at public sale under a tax decree in pursuance of the revenue law fails to redeem from such sale by the payment of the full amount of the decree, interest, and costs, the purchaser is entitled to a confirmation of the sale, whether there has been one bid or a plurality of bids.

4. ———: ———. A tender by the owner of land of the amount paid by the purchaser thereof at a public tax sale, which has been held in pursuance of a decree obtained under the provisions of the revenue act, together with interest, penalties, and costs, is not a compliance with the law, and does not entitle the owner to redemption of the tract so sold.

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

Herman Rosenthal, pro se.

Morning & Ledwith, contra.

DEAN, J.

This case was commenced in the district court by the county treasurer of Lancaster county under the provisions of that part of chapter 77 of the revenue law commonly known as the "Scavenger act." In pursuance of the prayer of plaintiff's petition, judgment was rendered for $284.41 against three city lots which form the basis of this action, and which were sold at public sale by the treasurer, pursuant to the decree, to Herman Rosenthal for $44.02, he being the sole bidder. Upon application by the purchaser to have the treasurer's sale of the lots confirmed, the defendants, who were the owners of the property, filed objections to the confirmation, assigning numerous errors in the proceedings leading up to the sale, and among them, and upon which they mainly rely, the following: "Because the owners of said lots have offered to redeem from each and all of said pretended sales by tendering to the county treasurer * * * the full amount of said several sales, together with all taxes subsequently paid by the purchaser and lawful interest due said purchaser upon said sale and subsequent taxes, and also all costs, and said treasurer has refused to accept the same, and said owners have also tendered same to said purchaser, who has refused the same, and the said owners now offer to pay into court for said purchasers the full amount bid by the purchaser on each of said lots, with lawful interest, also all subsequent taxes paid and interest, and all costs of this proceeding lawfully collectible." Upon the hearing the objections were sustained, and, confirmation being denied, the plaintiff brings the cause here for review.

Numerous errors are assigned; but, as we view the record, it presents but one question for determination,

and that is whether the owner of land that is sold for the nonpayment of taxes under the provisions of the act referred to may redeem from the sale by paying to the purchaser the amount of the purchaser's bid and subsequent taxes paid by him, with interest provided by law, and costs, or whether, in order to redeem, he must pay the full amount of the decree, interest and costs. When we consider the mischief the law was intended to remedy, we conclude it was the legislative intent that the latter course should be pursued. This view is in harmony with former expressions of this court upon the same subject, and with the expressions of the courts of sister jurisdictions in the construction of statutes having substantially the same object in view. *Woodrough v. Douglas County,* 71 Neb. 358; *State v. Fink,* 74 Neb. 641; *Thomas v. Farmers Loan & Trust Co.,* 76 Neb. 568; *Wagner v. Underhill,* 71 Kan. 637; *Powers v. First Nat. Bank,* 15 N. Dak. 466; *Maxcy v. Simonson,* 130 Wis. 650; *Buchanan v. Griswold,* 37 Colo. 18; *Soper v. Espeset,* 63 Ia. 326; *Ambler v. Patterson,* 80 Neb. 570. With all its ingenuity and its resourcefulness, the legislature, it seems, has not robbed the taxing power of its proverbially unpopular features by the enactment of the law under consideration; but by that act it has to some extent equalized the public burden in providing a means whereby land that was before nonproductive of public revenue may now under its provisions be placed on a revenue producing basis.

The defendants contend that, as there was but one bid, and it was in a sum less than the decree, it cannot for that reason be denominated a "premium bid," nor can the sale be denominated a "premium sale" within the meaning of the law. From this premise they argue that the language of section 27, art. IX, ch. 77, Comp. St. 1907, which in part reads: "No redemption from premium sales shall be allowed for less than the amount of the decree, interest and costs and subsequent taxes paid," has no application to the case at bar, and insist that upon pay-

ment of the amount bid by the purchaser, with the interest that is provided by the revenue law upon the money so paid by him, and all costs and penalties provided by the statute, they are entitled to a redemption from the sale. This question has been before the court on at least two occasions, and the contention of the defendants is not in accord with our holding. In *Honnold v. Valley County,* 82 Neb. 221, in considering this point the following language is used: "Any purchase for less than the decree against a particular parcel of land should be designated a 'premium sale.'" In *State v. Fink,* 74 Neb. 641, the court say: "The term 'premium sale' as used in this act applies to such sales as are made for less than the amount of the decree." The objection of the defendants upon this point is technical, and we do not believe the language of the statute will bear the construction sought by them to be placed upon it. To hold otherwise than has heretofore been held by this court in the cases cited, and to give the meaning to the term "premium sale" contended for by the defendants, would be in part to nullify the application of the act to one of the prime purposes of its enactment, and would not only permit, but would tend to encourage, an indirect evasion of the payment of taxes lawfully imposed upon lands. To sustain the position of the defendants would be to invade the legislative province and in part destroy one of its purposes in the enactment of the law, and this we are in nowise disposed to do.

After a careful examination of the record, we conclude the learned trial court erred in refusing to confirm the sale. The judgment of the district court is therefore reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

ROBERT B. CARTER, APPELLEE, v. A. I. ROOT, INCORPORATED, APPELLANT.

FILED JUNE 11, 1909. No. 15,272.

1. Contract: WAIVER. A builder's contract provided for the construction of a building under the direction of an architect as the agent of the owner, and further provided that no alterations should be made in the work as described by the plans and specifications except upon the written order of the architect, and that extra work would be paid for only when the price had been agreed upon and affixed to the order given by the architect in writing and countersigned by the owner previous to the performance of the same. *Held,* That the architect alone could not by verbal agreement waive this provision of the contract.

2. ———: ———. A clause in a builder's contract providing for a written demand by the builder for additional time to complete the building is legal, but may be waived by the owner entering into supplemental contracts for extras which require additional time for the completion of the building.

3. ———: TIME OF PERFORMANCE. Unless otherwise provided in the contract, a builder is not entitled to additional time because he has been delayed in the construction of a building by ordinary rains, for such might reasonably have been contemplated at the time the contract was made; nor is he entitled to additional time for delays caused by accidents or unexpected conditions against which he could have provided in his contract.

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

Lysle I. Abbott, for appellant.

Thomas F. Lee, Nelson C. Pratt and *I. J. Dunn, contra.*

EPPERSON, C.

July 14, 1904, the plaintiff, a contractor and builder, and the defendant, A. I. Root, Incorporated, entered into a written contract whereby the plaintiff for a stipulated compensation agreed to construct a certain building for the defendant. Said agreement contained the following

provision: "No alterations shall be made in the work shown or described by the drawings and specifications except upon a written order of the architect, and when so made the value of the work added or omitted shall be computed by the architect and the amount so ascertained shall be added to or deducted from the contract price." The contract provided that the building was to be completed on or before October 15, 1904, and that the contractor should pay to the owner $10 for each day thereafter that the work remained in an incomplete condition as liquidated damages sustained by the owner; the same to be deducted from the contract price. But it was further provided: "Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the owner, or the architect, or of any other contractor employed by the owner upon the work, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the architect within 24 hours of the occurrence of such delay. The duration of such extension shall be certified to by the architect, but appeal from his decision may be made to arbitration, as provided in article 3 of this contract." The construction of the building by the plaintiff was to be under the direction and to the satisfaction of the architect, who by the express provisions of the contract was made the agent of said owner. The specifications, which were referred to in the contract and which are necessarily a part thereof, contained the following provision: "At any time the architect directed by the owner may require alterations, additions or omissions from the contract and the same shall not affect the validity of the contract, but the price of such work shall be added to or deducted from the contract price as the case may be. * * * But extra work will be paid for only when the price has been agreed upon and affixed to

the order given by the architect in writing and countersigned by the owner previous to the performance of the same. Such order for work must be produced and surrendered at the final settlement or no payment for such work will be made." Provisions were made for the arbitration of whatever disputes might arise as to compensation for extras. After the completion of said building, and within the time authorized by law, the plaintiff filed his lien against the defendant's property, claiming that there was due upon the original contract the sum of $4,712, and that there was due to him for extras $4,026.22, and that he had been damaged by the defendant in the sum of $1,500 for delays in the construction of said building caused by the defendant. The claim for damages was subsequently abandoned, and no further reference will be made thereto in this opinion.

This action was instituted to foreclose the plaintiff's lien. Defendant admitted the written contract, and also admitted liability for some of the extras pleaded by plaintiff, and denied others. He pleaded a counterclaim, which included an item of $1,500 damages for plaintiff's delay in the construction of the building. The lower court rejected defendant's claim for damages, and found that the plaintiff was entitled to credit for the original contract price, $18,321, and for extras, $1,772.02, and that he was chargeable with the following: Cash paid during the construction of building, $14,385.15; for small items of defendant's counterclaim, $174.10; for amount paid by defendant to subcontractors upon liens by them filed, $6,823.01. The difference being in favor of the defendant, the trial court gave him judgment therefor, which, with allowances for interest, amounted to $681.61. The defendant, contending that he is entitled to a larger judgment, has appealed to this court.

Two questions are presented for determination: First, is the plaintiff entitled to recover for the disputed extras claimed? Second, is the defendant entitled to recover damages for the delay in completing the building? Of

the extras allowed to the plaintiff by the trial court, the defendant admits $771.39. Liability for other extras are admitted, but the amounts disputed. Such items aggregate $392.33 as allowed by the trial court. The evidence as to the value of these extras is conflicting. A discussion of it is unnecessary. We adopt the findings of the trial court and give credit therefor to the plaintiff. This leaves in controversy $608.30 allowed by the lower court.

It is contended that these items were not extras, but were embraced in the written contract. This evidence also is conflicting, and it is impossible for one who is not an architect or a builder to take the contract, the plans and the specifications, and from them alone to determine whether or not certain material furnished and certain work performed are contemplated and provided for by the contract, or are supplemental to or additions to the plan of the building previously arranged. It is apparent that on account of so many details it is very difficult after the work is completed to adjust the matters here in dispute. That the plaintiff did work in addition to what would have been required had the contract been strictly complied with is apparent; but it is the defendant's contention with reference to many of the items in controversy that the additional work was made necessary because the plaintiff had first proceeded contrary to the contract, which necessitated the doing of the work over again in order to conform thereto. The defendant argues that he is not required to pay the same because no written order was given therefor as provided in the contract. The architect was the defendant's agent and as such superintended the construction of the building, and it is claimed that he, acting for the defendant, ordered and directed certain alterations and changes to be made; that his directions were given orally and complied with by the plaintiff, and that the defendant, thus acting through his authorized agent, waived the provision of the contract requiring such alterations to be made in writing. There can be no doubt but that such a provision in a builder's

contract is valid and that it will be enforced unless it is waived by the parties, nor is there any doubt but that the owner can waive such provisions by verbally entering into an agreement with the contractor for extras which would estop him from alleging the strict terms of the written contract for the purpose of defeating recovery for extra work performed or material furnished by the builder. *Erskine v. Johnson,* 23 Neb. 261. But did the verbal order of the architect in the case at bar amount to a waiver by the defendant of this provision of the written contract? A party to any contract may waive the provisions made for his benefit, but it is a rule requiring the citation of no authority for its support that an agent is bound by the terms of his agency. While the architect was the agent of the defendant, he was made so by the contract in controversy, and that contract expressly provided the manner in which the architect was authorized to make any changes in the construction of the building. Its terms must be construed as absolutely prohibiting the architect from binding his principal, the defendant, to pay for extras ordered unless the same was in writing, signed not only by the architect, but by the defendant himself. This provision of the contract was made for the benefit of both of the parties. The plaintiff could have refused to make any additions to the building as originally contemplated unless an order for the change was given as the contract provided; and, on the other hand, the defendant was entitled to know what alterations and what changes were being made. The necessity of such a contract is apparent from the mere fact of this contention. Had the clause in question been complied with, this question could not have arisen.

In *Gray v. La Société Française De Bienfaisance Mutuelle,* 63 Pac. 848 (131 Cal. 566), it was held: "Specifications for a building contract provided that no extra work should be allowed except on a written order from the architect, approved by the building committee, and that, on any alterations or changes, the character and valua-

tion of the extra work should be agreed on in a writing signed by the owner or architect and the contractor. The contractor, on verbal instructions from the architect, and without the knowledge of defendants or their building committee, continued the foundation wall 18 inches higher than specified. *Held,* That defendants were not liable therefor as extra work."

In *Langley v. Rouss,* 77 N. E. 1168 (185 N. Y. 201), it was held: "A contract for the erection, alteration, and extension of certain buildings made the architect the agent of the owner, and stipulated that no alteration should be made in the work described by the specifications, except on the written order of the architect, and that no extra work would be allowed unless an itemized estimate was submitted by the contractor, and the architect's order in writing was given for the same. *Held,* That the architect could not enlarge his powers by waiving the requirement that the contractor should furnish estimates of extra work and obtain a written order from the architect therefor." The contract construed in the last case cited is almost identical with the contract here in controversy with reference to the agency of the architect, and also with reference to the alterations which might be made. In the opinion it is said: "The architect was expressly made the agent of the owner for the purposes of the contract, but such agency, so far as it related to making alterations, or directing that extra work should be done, was limited, as in the contract stated, to such orders as he should give in writing. The restrictions on the authority of the architect were for the protection of the owner. Where contracts, including plans and specifications, involve a great amount of detail, and the merits of claims for alterations and extra work are difficult to determine and adjust after the work is completed, a provision requiring the contractor to submit itemized estimates of the expense of proposed alterations or extra work, and that the order of the architect therefor should be in writing, is reasonable and tends to a more definite

understanding and avoids controversies. The contractor is not required to make changes or perform extra work unless he first receives written authority therefor, and the contract is therefore neither unreasonable nor severe, and it should be enforced. An agent cannot enlarge his own powers by waiving the limitations thereon." 185 N. Y. 201.

In *Sheyer v. Pinkerton Construction Co.,* 59 Atl. (N. J.) 462, it was held: "Under a building contract providing that no alteration shall be made except on the written order of the engineer, a recovery cannot be had for the expense of alterations unless an order is produced, or it is shown that the stipulation was waived, or the contractor fraudulently lured into making the alteration without an order."

In *Woodruff v. Rochester & P. R. Co.,* 108 N. Y. 39, in reference to a claim for extras under a contract for the construction of a railroad, the contract providing that no extras were to be paid for unless made upon a written order, the court said: "This was one of the terms of the contract and we are unable to perceive that the engineers had any power or authority to alter or change it. It was inserted in the contract to protect the defendant from claims for extra work which might be based upon oral evidence, after the work was completed, and when it might be difficult to prove the facts in relation thereto. If the engineers in charge had an unlimited authority to change the contract at their will, and to make special agreements for work fairly embraced therein, then the defendant had very little protection from the reduction of their contract to writing. If these engineers were the agents of the defendant, they were its agents with special powers, simply to do the engineering work and to superintend and direct as to the execution of the contract; but they had no power to alter or vary the terms of the contract or to create obligations binding upon the defendant not embraced in the contract." The above was quoted with approval in *Baltimore & O. R. Co. v.*

Jolly Bros., 71 Ohio St. 92, citing: *Campbell v. Cincinnati S. R.*, 9 Ky. Law Rep. 799, 6 S. W. 337; *Sanitary District of Chicago v. McMahon & Montgomery Co.*, 110 Ill. App. 510.

In *McLeod v. Genius*, 31 Neb. 1, it was held that the owner was liable for work and material furnished by the contractor not called for by the original written contract, where the owner or his authorized agent by subsequent oral agreement promised to pay therefor, or knew that the contractor would charge for the same as extras and assented thereto or permitted the same without objection. In the opinion it is said: "But he (the contractor) cannot recover as for extras for changes and additions without making known to the owner or agent that he would expect pay." We think that that case is distinguishable from the case at bar. In that case the owner's son was the superintendent of construction and had general authority, as we take it, to bind his principal by verbal contract for extras. While in the case at bar the architect's authority as agent was limited, he having no authority whatever to bind his principal by a verbal agreement. The architect was the representative of the defendant only to the extent of seeing that the building was constructed according to the contract and the plans and specifications with whatever changes were made by the owner, either by his own additional agreement or in the manner and form permitted by the contract itself.

In *Erskine v. Johnson*, 23 Neb. 261, it is said: "The architect will be so far the agent of the owner as to bind him for alterations made necessary by the mistake of such architect, in order to complete the building according to contract, as where the plans and specifications called for windows which are too large, or too small, whereby the loss is occasioned to the contractor; therefore as between the contractor and the owner in such case the owner would be liable." That rule is inapplicable to this case for the reason that the alterations alleged by the plaintiff were not occasioned by any mistake in the

plans and specifications, the question of fact being whether or not the alleged alterations were required by the plans and specifications or required by subsequent verbal agreement which is binding upon the defendant.

The evidence shows that the defendant did not know that plaintiff expected compensation for the disputed extras, nor that plaintiff claimed that the same were extras until after the completion of the building, nor did the defendant consider that they were extras. On the other hand, it was his understanding that they were included in and made a part of the building as originally planned. We think, however, that there is one exception, an item of $80 for constructing a railing in the office-room. It is apparent that this was a change from the plans and specifications. It is apparent also that the defendant knew of this change and permitted the same to be made. This item must be allowed to the plaintiff. But all the other disputed items fall within the general rule, and as to them the defendant entered into no contract to pay extra therefor, nor did he have any reason whatever to believe that the plaintiff considered that they were extras, and as to these items, aggregating $535.12, the written contract must control.

We come now to the second question presented: Is the defendant herein entitled to recover damages for the delay in the completion of said building? There was a delay of 150 days. The contract itself provided for some contingencies which might operate to delay the completion of the building, such as the act, neglect, or default of the owner, or the architect, or of any other contractor, or delays occasioned by fire, lightning, earthquake, or cyclone or abandonment of work by employees. It was stipulated that the time given for the completion of the building might be extended for a period equal to the time lost by reason of any or all of the causes above mentioned, but that no such allowance of time should be made unless a claim therefor in writing was presented by the plaintiff to the architect. Such contracts

are legal and enforceable. Courts have generally held that provisions requiring written notices for additional time must be complied with. *Chapman Decorative Co. v. Security Mutual Life Ins. Co.*, 149 Fed. 189; *Curry v. Olmstead*, 26 R. I. 462; *Dermott v. Jones*, 23 How. (U. S.) 220; *Feeney v. Bardsley*, 66 N. J. Law, 239; *Davis v. La Crosse Hospital Ass'n*, 121 Wis. 579; *Consaul v. Sheldon*, 35 Neb. 247. Plaintiff herein failed to give notice that additional time was required. The reason that a notice in writing is required is because the contract provides therefor, and, if a delay was caused by any reason not mentioned in the contract, the plaintiff has lost none of his rights by failing to make a written demand for additional time. Undoubtedly, under the provision of the contract, if delay had been caused by the act, neglect or default of the owner, or on account of any of the other reasons named in the clause, the plaintiff would be entitled to necessary additional time for the completion of the building upon his written demand therefor. In the absence of a written demand for additional time or waiver thereof, the plaintiff cannot be relieved from damages if such delay was caused by any of the agencies, the existence of which entitled him to additional time upon his written notice. In so far as the completion of the building was delayed beyond the stipulated time by agencies not named in the contract, the rights of the parties are to be determined as they would exist had no provision whatever been made for the giving of the written demand.

The plaintiff testified that there was a delay of 60 days by reason of the extras; 14 days in cleaning the lot before he could begin the work; 30 days because the iron first prepared was condemned; 10 days by rain, and 14 days because of water rising in the excavation. His evidence in this respect was undisputed. The delay occasioned by the contracts for extras should not be charged to the plaintiff. We doubt that the contracts for the extras made verbally between the parties were "acts" of the

owner within the meaning of that clause in the contract providing for written notice for additional time. However, it is unnecessary to decide this point. As shown above, the defendant admitted that he is liable to compensate plaintiff for installing certain extras. He did not order the extras in writing, as the contract provided he should. The time fixed for the completion of the building was three months. It would seem that the parties did not contemplate that this time would be sufficient for the installing of any extras that might thereafter be desired. These contracts were additional to the written contract, and when made we take it that the defendant knew that additional time would be required to make alterations. Under these circumstances the defendant should be held to have waived a written demand for the necessary additional time required to install the extras. In the construction of similar contracts many courts have held that the contractor should not be held responsive in damages for delays caused by similar arrangements for extras. In *Sweney v. Davidson,* 68 Ia. 386, we find the following: "The defendants set up a counterclaim for damages for failure to complete the house within the time agreed. It is admitted that the house was completed 14 days later than the time fixed in the contract; but the defendants ordered extra work, and we are not prepared to say that the few additional days taken to complete the house was more than the time required to do the extra work." A similar case, also, is *Focht v. Rosenbaum*, 176 Pa. St. 14, wherein the following appears: "A building contract provided that 'no order for any change, * * * which affects the time of completion, shall be valid, unless given in writing'; and that the contractor should forfeit the sum of $10 for each day the work should remain unfinished after the time agreed upon for its completion 'unless such delay could not with reasonable diligence and prudence have been avoided or forseen' by the contractor. The owner gave a parol order to change a girder in the building,

which was complied with. The contractor claimed that the change caused a delay in the completion of the building. *Held*, (1) That the right of the owner to compensation for the delay was not dependent upon the form of the order for the change which caused it, but upon the answer to the question whether the delay was in any way attributable to a want of diligence or foresight of the contractor, and this question was for the jury; (2) that the owner could not take advantage of his own fault or neglect in not reducing to writing the order to change the girder." See 6 Cyc. 72, 73.

Some claim is made by the plaintiff for credit for delay for time expended in cleaning the lot, also for delay caused by water rising in the excavation and by rainfall. None of these items are within the issues made by the pleadings and therefore cannot be considered.

The plaintiff is not entitled to delay because a certain lot of iron first prepared was condemned. This iron was rejected because it did not come up to the standard required in the specifications. It appears that the fault was either with the plaintiff or with the parties from whom he purchased the iron. At most, under the testimony of the plaintiff himself, he is entitled to 60 days' delay, and is liable in damages for a delay of ninety days. The evidence here shows that the rental value of the building was equal to the amount stipulated in the contract as liquidated damages. This amount will therefore no more than compensate the defendant for the damages sustained. *Lee v. Carroll Normal School Co.*, 1 Neb. (Unof.) 681.

We find that when the building was completed the plaintiff was entitled to credit for the contract price, $18,321, and for extras, $1,243.72, and he was chargeable with cash paid upon the contract, $14,385.15, with items allowed by the trial court upon defendant's counterclaim, $174.10, and with damages occasioned by delay, $900, leaving a balance due to him at that time, $4,105.40. This, with interest to October 1, amounts to $4,556.50.

However, the defendant had been required to pay subcontractors money due to them from the plaintiff, which, with interest, the court found amounted on the first day of October, 1906, to $6,823.01. According to this computation the balance was in favor of the defendant and amounted to $2,266.51 on the first day of October, 1906, and for this amount the defendant should have had judgment.

We therefore recommend that the judgment of the district court be reversed and that this cause be remanded, with instructions to the lower court to enter a judgment in favor of the defendant and against the plaintiff for the sum of $2,266.51, as of date October 1, 1906.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the lower court is reversed and this cause is remanded, with instructions to the lower court to enter a judgment in favor of the defendant and against the plaintiff for the sum of $2,266.51, as of date October 1, 1906.

REVERSED.

BERNHARDT J. JOBST, APPELLEE, V. HAYDEN BROTHERS, APPELLANT.

FILED JUNE 11, 1909. No. 15,612.

1. **Parties:** NONJOINDER: WAIVER. Where the fact that a defendant is jointly interested with the plaintiff in the subject of the action appears upon the face of the petition, the objection that such defendant is not made a party plaintiff is waived by a failure to demur upon that ground.

2. **Appeal:** PARTIES. A judgment rendered in a suit in equity will not be reversed for the reason that a party who should have been made plaintiff is made defendant instead, when the party against whom judgment is rendered is not prejudiced thereby.

3. **Contract:** EXTRAS. Where a contractor, with the knowledge and consent of the owner, and under direction of the architect, but

without a written order, performs extra work entailing additional expense, he will not be precluded from recovering reasonable compensation therefor by a clause in the contract which provides that no alteration shall be made in the work done or described by the drawings and specifications except upon a written order from the architect.

4. ———: CONSTRUCTION. Where the parties have acted upon and construed a contract, in the absence of any mistake or misunderstanding between them the court will enforce such contract as so interpreted.

5. ———: PERFORMANCE: WAIVER. Where a contract requires a building to be erected by a specified time, the naked promise of the owner to waive the time clause, made without consideration, is invalid, and such owner is not thereby estopped to claim damages for such delay when it does not appear that the contractor acted upon such promise.

6. ———: ESTOPPEL. Such promise will, however, estop the owner from insisting upon a stipulation of the contract which provides that no allowance shall be made for delays caused by the owner unless a claim therefor is presented in writing to the architect.

7. Appeal: FINDINGS: EVIDENCE. Where there is no finding of the district court upon a material fact, and the evidence in the record is not directed to the ascertainment thereof, the case will be remanded for further proceedings.

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

Smyth & Smith, for appellant.

Gurley & Woodrough and *Isaac E. Congdon, contra.*

CALKINS, C.

This was an action by the plaintiff to foreclose a mechanic's lien upon a building which he had erected under a written contract with the defendant Hayden Brothers, a corporation, hereinafter called the owner. A portion of his claim was for the remainder of the contract price, to which were added for extras sundry items. The owner contested a portion of these claims for extras, and demanded a large sum for defects in construction and damages for delay in the completion of the building. The dis-

trict court allowed part of plaintiff's claim for extras, and deducted from the plaintiff's contract price for defects in construction, $100 for the freezing of the west wall, and $500 on account of defective floor topping. It found that the owner agreed to and did release the plaintiff from any and all claims for damages on account of delay in completing the building, and rendered judgment against it for the sum of $9,520.38.

1. It appears that the plaintiff first entered into a contract with the owner for the construction of a building, which was designed with re-enforced concrete columns, on the 28th day of March, 1905; that the city inspector, not being at that time acquainted with this method of construction, refused to approve the plans, and the design was changed so as to call for steel columns in place of the other; and that on April 12 an additional contract was made providing for the latter construction and for the payment of the increased expense that the same entailed. Between the date of the execution of these two contracts, a contract was entered into between the plaintiff, on the one part, and the defendants Lehmer and Collins, on the other, which recited that the latter had the exclusive agency for a certain system of re-enforced concrete construction, and provided that certain specified parts of whatever work of that class should be contracted for by the plaintiff should be executed by the said Lehmer and Collins.

After the making of the contract between the plaintiff and the owner, the plaintiff entered into a supplemental contract with Lehmer and Collins in reference to the construction of the Hayden building, under which the plaintiff agreed to execute certain specified parts of such construction, and the said Lehmer and Collins agreed to execute certain other parts, each for a fixed price. The plaintiff filed a mechanic's lien for the entire amount claimed to be due upon the contract, and Lehmer and Collins filed a lien for the amount claimed to be due them,

on the theory that they were to be regarded as subcontractors. The court found that the plaintiff and Lehmer and Collins were a partnership, but permitted the plaintiff to prosecute this action for the use of such partnership, and in entering its decree made the same for the benefit of the plaintiff and the said Lehmer and Collins. There is no contest between Jobst and Lehmer and Collins, but the owner questions the right of Jobst to bring the suit in his own name. Whether the agreement referred to constituted Lehmer and Collins partners with Jobst, or simply made them subcontractors, we do not deem it necesssary to determine. If such agreement did constitute a partnership, then the action should have been in the name of all the members of the firm. Under this assumption there was a defect of parties plaintiff, which constitutes the fourth ground of demurrer under section 94 of the code. Section 96 of the code provides that, if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same. The facts concerning the interest of these parties were fully disclosed upon the face of the petition, and the owner therefore waived the same by a failure to demur.

2. Further, section 145 of the code requires that no judgment shall be reversed on account of any error which does not affect the substantial rights of the adverse party. In this case all the parties were before the court, and the owner is as fully protected against any claims that might be made by Lehmer and Collins as it would have been had they been made parties plaintiff instead of defendants. It is not pointed out how the owner is prejudiced by this alleged error of the court, and, in the absence of such prejudice, the judgment should not be reversed, even assuming the position of the owner as to the proper parties to be correct.

3. The owner complains that the allowance of $100 for the defect in the west wall and $500 for defects in the topping of the floor was insufficient, and we are asked to re-examine the question of fact passed upon by the lower

court. After a careful reading of a most voluminous record, we are unable to say that the court below should have arrived at a different conclusion than was reached. There was evidence which would have justified a conclusion that the work was very poor in quality, and, opposed to this, testimony that the work fulfilled the conditions of the specifications of the contract. Under these circumstances the finding of the district court will not be set aside.

4. The contract contained the provision: "No alteration shall be made in the work done or described by the drawings and specifications except upon a written order from the architect; and when so made the value of the work added or omitted shall be computed by the architect, and the amount so ascertained shall be added to or deducted from the contract price." The court included in its decree six items for which it is contended the architect had not made a written order, and it is insisted as a matter of law that, under the above quoted provision, they cannot be allowed. Only two of these items are argued in the brief. It is admitted that, on account of the caving in of the earthen embankment during the winter, it was found expedient to extend the basement and subbasement some eight feet farther into the street than was originally intended. This involved going that distance beyond the curb, which was the boundary according to the original plans. It necessitated additional brick work and the use of heavier steel to support the weight of the roadway above. It is not contended that the work was not performed with the knowledge and under the direction of the architect, and that it did not impose an extra burden and additional expense upon the contractor. The other item was for a change in the form of foundation in the northern part of the west wall made necessary, or at least expedient, by conditions which we will notice more fully hereafter. It is enough to say that it was found impracticable to proceed with the work in this part of the construction according to the original specifications. There

was a sketch or plan for the new work, which the testimony shows was approved by the architect; but this document had apparently been lost at the time of the trial. There is no question made as to the merit of these claims, but it is insisted that the above quoted clause in the contract prohibits their allowance. We do not think this clause susceptible of the construction contended for. It does not provide that the contractor shall forfeit his right to compensation for extras performed by him at the request of the owner or the architect without the written direction stipulated for. The evidence abundantly establishes that the extras so complained of were performed at the direction and upon the request of the owner and architect, and the clause in the contract quoted does not prevent their allowance.

5. The building in question was designed to occupy the entire area of the lot, which was 62 by 132 feet. It fronted on Douglas street, and was bounded on the east by the Boston store and on the north by the Patterson building, both owned by the Brandeis Company. There were two stories below the level of Douglas street, and these were planned to reach under the sidewalk, and later were extended under a portion of the roadway. The preparation of the site involved the excavation of the entire lot to a depth of from 20 to 30 feet, and this part of the work had been largely executed when the first negotiations took place between the plaintiff and the owner. The contract for the grading had been let by the owner to one Jackson nearly a year before, and it was well understood by the parties that the plaintiff was not to do any portion of the excavating. Nothing is said in the contract proper about the excavating, but in the specifications there is a clause requiring the contractor to excavate to the proper depth. It is said by counsel for the owner in their brief that Jobst was to do the excavating, but this position is not very seriously insisted upon. It is undisputed that all the parties acted upon the understanding that the plaintiff was under no obligation to do

the excavating, and that they so construed the contract. It is a settled principle of construction that, where the parties have acted upon and construed a contract, in the absence of any mistake or misunderstanding between them, the court will enforce the contract as so interpreted.

6. The contract provided that the plaintiff was to finish and deliver to the owner the subbasement and basement on or before the 1st day of June, 1905, and to complete and turn over the whole building on or before the 1st day of September in the same year, and it contained the stipulation that, if the contractor should fail to deliver said building complete in every respect on the 1st day of September, 1905, he should pay the owner as liquidated damages the sum of $25 a day for each day after the 1st day of September, 1905, until the building should be delivered by him, unless he was prevented from so doing by some of the causes which the contract provided should be a sufficient excuse for delay. The building was not in fact completed until the following June. The evidence shows that the rental value of the building complete exceeded the sum of $25 a day, and the owner claims that it should be allowed that amount under the provisions of this contract. The plaintiff claims that the delay in the completion of the work was caused by the failure to finish the excavation, and, further, that in July, 1905, the owner agreed to waive the time clause in the contract. The court below made no finding as to the cause of the delay, but found that the owner waived the time clause, and agreed to and did release the plaintiff from any and all claims on account of delays in completing the building within the time limited in the contract. The owner argues that the evidence does not sustain this finding, but a careful reading of the testimony convinces us that this contention cannot be maintained, and that the finding of fact by the district court is fully sustained. Further, the owner insists that, if such a promise was made by it, it was without consideration and therefore invalid as a contract, and that it was not acted upon by the plain-

tiff so as to estop the owner from insisting upon its invalidity. We are of the opinion that the contention of the owner upon this point must be sustained, and that its promise to waive the time clause, being without consideration, is void as a contract, and that, the plaintiff not being shown to have acted upon the same, the owner is not estopped now to make a claim for such damages.

7. It does not, however, follow that the promise of the owner, though not amounting to a contract nor estopping it to claim damages for delay, had no effect whatever. The provision of the contract respecting delays which should extend the plaintiff's time for the completion of the building was as follows: "Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the owner or architect or any other contractor employed by such owner upon the work, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid. But no such allowance shall be made unless a claim therefor is presented in writing to the architect within 24 hours of the occurrence of such delay. The duration of such extension shall be certified to by the architect." It does not appear that the plaintiff made a claim in writing to the architect for an extension of time in accordance with these provisions, and it is very strenuously insisted that, in the default of having taken such action, he is precluded now from showing that he was delayed by the fault of the owner or other contractors. If it be true, as the district court found, and its finding as we have seen must be here sustained, that the owner made this agreement, and the plaintiff, relying upon its promise, neglected to make his claim in writing, we think the owner should be and is estopped to insist upon the provisions of this clause. It would have been an idle act for the plaintiff to ask an extension when the owner had already promised not to insist upon the completion of the building at the time stipulated. Such

a promise naturally lulled the contractor into a sense of security, and was well calculated to prevent him from taking steps under the provisions of the contract quoted. We therefore conclude that the plaintiff was entitled to an extension of the time equal to the period of delay caused by the failure of the owner to have his property in condition for the erection of the building.

8. The excavation necessary to prepare the site for the building was nearly completed at the time of the making of the contract in question. There was some earth which had washed in during the winter, and holes for the piers to be dug, and a quantity of earth remaining under a bridge or runway to be removed. It was necessary to excavate a few inches deeper over most of the surface, and there was a bank of earth extending some feet from the line yet to be excavated on the north part of the west boundary of the building site. The east wall of the Patterson building was flush with the west line of the proposed building for about 60 feet from the line of Douglas street, at which point there was a jog of 7 feet to the west; and from there to the rear of the lot the east wall of the Patterson building was about 7 feet west of the west line of the lot. It does not appear in the evidence how far below the surface the foundation of this part of the Patterson building was carried, but it sufficiently appears that it was very much above the grade of the new building, and that the excavation upon this part of the site could not be safely made until this portion of the Patterson building was in some way supported. But for this the work necessary to complete the excavation of the lot could have been performed in ten days or two weeks. In fact, it was not practicable for the plaintiff to install the foundations in this part of the work until long after the time in which the whole was to have been completed. It is true that other portions of the work were carried up, but that the work was done at a disadvantage and that considerable delay was caused by the failure to have this part of the site in a proper condition to permit the

installation of the foundations is evident. On the other hand, we are not satisfied that all the delay was chargeable to this cause. The district court made no finding as to how much delay was caused by the owner's failure to have the site in proper condition, and how much was owing to other causes for which the owner was not responsible. The evidence does not seem to have been directed to this question.

We think the case should be remanded to the district court, with instructions that a finding be made, upon this question only, upon the evidence already taken, and such other evidence as may be produced, and that the owner be allowed the stipulated damages for the delay, after deducting such delays as were properly chargeable to its action or failure to act, and that the judgment be modified if such findings render it necessary. It appears that work of this character cannot properly be executed in freezing weather, and, if the giving to plaintiff of such extension as he may be entitled to should postpone the date of completion into the period of freezing weather, then and in such case the period during which such work could not be safely prosecuted on account of frost should be deducted from the period of his delay.

We therefore recommend that the judgment of the district court be reversed and the case remanded for further proceedings in accordance with this opinion.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

F. W. FITCH, APPELLEE, V. EUCLID MARTIN, ADMINISTRATOR, APPELLANT.

FILED JUNE 25, 1909. No. 15,865.

1. **Evidence:** COLLATERAL FACTS. The relevancy of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford with reference to the litigated fact. If it tends in a reasonable degree to elucidate the inquiry, it is relevant, but the exercise of the trial court's discretion in excluding such evidence as too remote will rarely be overruled.

2. **Trial:** EVIDENCE. Where counsel offer "each and every memorandum shown" in several books concerning transactions covering several years, unless all of the entries are competent and relevant, they should be excluded if opposing counsel interpose a proper objection.

3. **Evidence:** EXPERTS. If an expert witness testifies that, unless certain facts are known to him, his opinion upon the subject concerning which he is about to testify will not be accurate, it is not error to reject that opinion, where it affirmatively appears that some of those facts are unknown to the witness.

REHEARING of case reported in 83 Neb. 124. *Rehearing denied.*

PER CURIAM.

Each party to this record requested a reversal of the judgment of the district court, and it was not thought necessary to determine every question presented in their respective briefs. Each party asks for a rehearing to the end that alleged errors in our opinion may be corrected and certain assignments and cross-assignments of error considered.

1. Plaintiff suggests that we determine the admissibility of the testimony of Walker, Clarkson, Bastedo, Haller, Walcott and Judge Estelle concerning certain transactions with Major wherein Fitch was not known. Walker was a real estate broker. Clarkson represented Major as his attorney when the latter was arrested on

a charge of embezzlement. Judge Estelle was counsel for the deceased in a lawsuit, and Haller represented the defendant in said action. Bastedo is a builder and contractor, and constructed two houses in Omaha for Major, and also knew about the transfer of stock in the Delphine Mining Company to the deceased. Walcott was associated with said mining company as its attorney, while Major was interested therein, and also appeared for him in a lawsuit. All of said transactions occurred during the time plaintiff claims that he was employed by the year as Major's attorney.

Plaintiff relies in some degree upon proof of continued professional services for the deceased to establish an annual renewal of the contract he claims to have made years before with Major to serve him professionally for a stipulated sum per annum. The evidence upon the main issue is not conclusive, and competent evidence of collateral facts or circumstances reasonably tending to establish the probability or improbability of the fact in issue, if not too remote, is relevant. *Farmers State Bank v. Yenney,* 73 Neb. 338; *Blomgren v. Anderson,* 48 Neb. 240. It is largely within the discretion of the trial court to say what proof of collateral facts is or is not too remote in a particular case. In *Stevenson v. Stewart,* 11 Pa. St. 307, defendant asserted that his signature had been forged to the bill in suit. The plaintiff was the administrator of the deceased payee. It was held competent for plaintiff, in rebuttal, to prove that about the date of the note defendant had borrowed money from other persons. Mr. Justice Bell reasons that the competency of a collateral fact to be used as the basis of a legitimate argument is not to be determined by the conclusiveness of the inference it may furnish with reference to a litigated fact, but that, if it tends in a slight degree to elucidate the inquiry, or to reasonably assist in a determination probably founded on truth, it should be received. See, also, Gillet, Indirect and Collateral Evidence, sec. 51. It does not require argument to demonstrate that, if Fitch were employed by

the year as Major's attorney, Major Clarkson, Judge Estelle and Mr. Walcott would not ordinarily, during that period, be attending to Major's litigation. Of course the inference would not be conclusive; the circumstances would be subject to explanation, and different minds might honestly draw diverse conclusions from the facts stated.

We are not inclined to substitute our judgment for that of the trial court in passing upon the relevancy of this collateral evidence. If the case were on trial before us, we would not receive the testimony of Mr. Haller, because it merely corroborates Judge Estelle upon an admitted fact. The transactions proved by Bastedo did not necessarily involve the services of a lawyer, and the testimony of that witness with propriety might be excluded. So much of Walker's testimony as did not refer to the examination of abstracts of title for Major, or contradict in some manner plaintiff's testimony with reference to the services he claims to have rendered the deceased with reference to specific tracts of land, might, with profit, be excluded. Upon the next trial of this case the evidence may assume such a form as to make relevant some of the evidence that now seems irrelevant, but sufficient has been said to guide the trial court in the disposition of this feature of the case.

2. It is urged that the question referred to in the second subdivision of the opinion was not answered by the witness. The opinion does not so state. The trial court did not sustain defendant's objections to the interrogatory. The question was not withdrawn, and the ruling referred to permitted the witness to answer subsequent questions on the assumption that the services testified to were performed for Major. Questions like the following were thereafter propounded: "You may now answer the original question with reference to lots in Credit Foncier addition," etc. The interrogatories referred back to the quoted question, and we remain of the opinion that error was committed in the examination of plaintiff.

It is argued that plaintiff had been cross-examined upon all of the entries in the memorandum books, which were received in evidence over defendant's objections. We have been unable to find any cross-examination with reference to the following entry in the 1894 memorandum: "Monday 17. Agreement with Major to reduce contract services to $400 per year to begin Jan. 1, '95." To the suggestion that defendant's counsel should have severed their objections so as to refer only to the entries concerning which plaintiff had not been cross-examined, it is sufficient to say that plaintiff's offer, although purporting to be several as to each item, was omnibus in character. Opposing counsel would have been compelled to check each item in several books purporting to record as many years' transactions, if they were to direct their objections specifically to the incompetent or irrelevant evidence included in the offer. The law does not place that burden upon the cross-examiner. It was the duty of plaintiff's counsel to include within his offer only competent evidence. If he did not, the objection should have been sustained. *Hidy v. Murray,* 101 Ia. 65; *Hamberg v. St. Paul Fire & Marine Ins. Co.,* 68 Minn. 335.

3. Defendant argues that the evidence does not justify instruction numbered 9, which, in substance, informs the jurors, that, if they find from the evidence that about August 17, 1896, Major indorsed his name on a certain note and delivered it to plaintiff to be applied on the claim in suit, the transaction would toll the statute of limitations. It is shown by the testimony of Karbach that some time preceding July, 1906, he heard a conversation in plaintiff's office between Fitch and Major concerning said note; that he noticed Major's name on the back of said instrument, which was thereafter transferred by plaintiff to Karbach's father for office rent, and later returned to Fitch as worthless. Plaintiff was familiar with Major's signature, and testified that it was written upon the back of the note. He did not say that he saw Major sign his name thereto, and his testimony was admissible. *Minnis*

v. Abrams, 105 Tenn. 662, 80 Am. St. Rep. 913. The note is credited under date of August 17, 1896, in Fitch's account against Major, and is charged back to the latter December 12, 1900. Mrs. Dunham also testified that she heard Fitch and Major talk about the note, and subsequent to August, 1896, saw the latter looking over Fitch's book account against him, and that he expressed satisfaction therewith. Counsel refer to facts and circumstances touching the credibility of plaintiff and Mrs. Dunham, but that argument is for the jury, and not this court, to consider. The instruction responded to the evidence, and is not erroneous.

Instruction numbered 11, with respect to the $50 credit, is correct, unless it is conceded that plaintiff and Mrs. Dunham are not to be believed. The jury, and not this court, should pass upon the credibility of the witnesses.

4. It is urged that the district court should have admitted a transcript of plaintiff's claim as it appeared in the county court, because by comparison with the petition herein it will be found that items are included in the petition that were not brought to the county court's attention. Reliance is placed on *Paxton v. State,* 60 Neb. 763, to support this assignment. In the cited case a suit had been instituted in Douglas county upon a bond of a former state treasurer and in Lancaster county a like suit was commenced upon another bond given by that official. The statements in the petition filed in Lancaster county amounted to an admission that part of the claim made in the Douglas county suit was unfounded, and hence it was held that the defendants in the last named case should have been permitted during the trial to introduce in evidence a certified copy of the petition filed in Lancaster county. Although there is an allegation in the petition in the instant case that the services plaintiff alleges he performed for Major were worth more than the sums charged therefor, the action did not proceed as one upon a *quantum meruit,* nor to recover separately for each item of said services, but to recover a judgment for services

alleged to have been performed during several years upon an employment to pay Fitch therefor by the year. Proof of services rendered was admitted to prove that something was actually done by plaintiff for Major, and for the purpose of raising the presumption that such employment continued according to alleged preceding arrangements between the parties for payment by the year for professional services. In view of the issues actually presented, there was but little probative value in the facts referred to, and the exclusion thereof was not, and their admission would not have been, prejudicial error to either party.

5. Defendant argues with much earnestness that we should determine whether the court erred in excluding the deposition of Ross, the chemist. It was shown by the witness's preliminary examination that he had taken a course in chemistry in the university of Pennsylvania, and had associated with, and worked under, a consulting chemist residing in Chicago, who gave his attention to legal and manufacturing interests. Ross had also studied, and had practical experience, with reference to determining from tests the age of handwriting, and whether or not dissimilar inks had been used in tracing different writings. It was shown that the witness had subjected entries on each page of the Major account in plaintiff's book to chemical tests, and had applied the same reagent to entries in corresponding years in the accounts in the same book against other people. The court refused to permit the witness to testify that in his opinion the entries for the various years in the Major account were all made with the same ink and at or about the same time, and that in some instances for corresponding years the entries in the other accounts in the same book were made with different ink. Defendant argues that the Major account was all prepared at the same time for the purpose of furnishing false evidence to bolster up plaintiff's claim, and that the testimony of Ross tends strongly to establish that fact.

It is stated by some writers that chemical tests fur-

nish infallible evidence of the identity or dissimilarity of inks employed in tracing different writings. Ames, Forgery, p. 270. Proof of this collateral fact, as compared with the further one that the entries in other accounts were made with different colored ink, in the discretion of the court, was proper to go to the jury; but, if in the court's opinion the evidence was too remote, or the proper foundation as to the skill of the witness, or the conditions surrounding the test, had not been shown, it was not error to exclude it. We are of opinion that sufficient foundation was not proved to admit the witness's opinion as to the age of the entries considered. The witness's cross-examination was before the court when it ruled on the offers made, and it was advised therefrom that a heavy stroke would fade sooner than a lighter one; that an entry made with a corroded pen would differ from one inscribed with a bright instrument; writings exposed to the light would fade much more rapidly than those contained in a closed book; and that the witness could not arrive at a satisfactory and an accurate conclusion unless he had knowledge of all of the facts tending to preserve or deteriorate the writings. None of the aforesaid facts were shown. Mr. Ames, in his work on Forgery, pp. 265, 267, states that it is impossible to determine with accuracy the age of writings by chemical tests. That one may determine approximately, "but to tell by the ink which of two writings is the older, when one is but two months and the other two years, is, as a rule, impossible."

Counsel for defendant request us to determine assignments numbered 132, 133 and 134 in their petition in error. They relate to the testimony of plaintiff identifying his collection register and the entries therein. It became material during the trial to establish the dates upon which plaintiff received money on a judgment recovered by Larimore against Mickel Brothers. Plaintiff was attorney for Larimore, and the evidence developed a claim that Major was surety for costs and owned the judgment in that case. The collection register exhibits

a history of said litigation and the dates that payments were made on the judgment. All of the entries in said register, save and except those referring to Major, could be lawfully identified by plaintiff, and, if relevant, be received in evidence. *Labaree v. Klosterman,* 33 Neb. 150. The record gives some countenance to the thought that counsel construe the opinion filed in this case in 74 Neb. 538, to hold that an interested witness in his suit against the representative of a deceased person may testify to facts we held he was incompetent to testify to in *Martin v. Scott,* 12 Neb. 42. No such construction should be placed on Judge Letton's opinion. We still adhere to the principles of law stated in *Martin v. Scott, supra.*

Having disposed of those assignments counsel insist should be determined, the motions for a rehearing are

OVERRULED.

FARMERS COOPERATIVE SHIPPING ASSOCIATION, APPELLEE, V. GEORGE A. ADAMS GRAIN COMPANY, APPELLANT.

FILED JUNE 25, 1909. No. 15,763.

1. **Corporations:** CONTRACTS: AUTHORITY OF AGENT. The agent or manager of a corporation organized under the laws of this state for the purpose of buying grain and live stock direct from producers, and selling and shipping the same to the general markets, and the operation of grain elevators to be used incidentally for that purpose, has no apparent authority to engage in speculations in grain and mess pork upon the Chicago board of trade; and where the evidence shows that no actual authority was given the agent to engage in such transactions, and they were carried on without the knowledge or consent of any of the officers of the corporation, it will not be bound thereby.

2. ———: ———: ULTRA VIRES. A corporation so organized, with an authorized capital stock of $10,000, and a limitation to the amount of its indebtedness to $2,000, has no power to engage in speculative transactions in mess pork and grain upon the Chicago board of trade amounting in a single day to more than $40,000, and such transactions are *ultra vires* and void.

3. Contracts: VALIDITY. The transactions in question examined, and *held* to be gambling transactions within the rule announced in *Rogers & Bro. v. Marriott*, 59 Neb. 759.

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

W. J. Connell and *Walter P. Thomas*, for appellant.

T. J. Mahoney and *J. A. C. Kennedy*, *contra.*

BARNES, J.

Action to recover a balance alleged to be due plaintiff from defendant on account of grain sold and delivered. There was a jury trial, and at the close of all of the evidence the court directed the jury to return a verdict for the plaintiff, and the defendant has appealed.

As to the following facts there is no conflict in the evidence, and they are established beyond dispute: The plaintiff was incorporated according to the laws of this state, and its articles of incorporation provided that its place of business should be at Gretna, in Sarpy county. Its business should be the buying, selling and shipping of grain and live stock and the doing of such things as were necessarily incident thereto. Its total authorized capital stock was $10,000, and the amount of indebtedness which it was authorized to contract at any time was limited to $2,000.

On the first day of December, 1903, plaintiff employed one O. C. Higbee to operate and manage its grain elevator situated at Gretna and to perform all work incident thereto, the contract of employment specifying the incidents and details of the management of the elevator. That no express authority was ever given to Higbee beyond what is found in his written contract of employment; that, although the articles of incorporation authorized the plaintiff to deal in live stock, it never availed itself of that power and never dealt in anything but grain; that,

aside from the speculative transactions in question herein, plaintiff never dealt in futures, margins or board of trade transactions of any kind whatsoever, and never transacted any business except the buying, shipping and handling of grain through its elevator at Gretna; that from the 12th day of December, 1903, to the 10th day of August, 1904, the plaintiff shipped and sold to the defendant large amounts of grain out of its elevator at Gretna, aggregating in value more than $18,000; that against those shipments the plaintiff made drafts on the defendant from time to time as the grain left its elevator, and that these drafts were paid; but whatever amounts the grain realized in excess of the drafts were not remitted by the defendant to the plaintiff except the sum of $19.48, which was remitted about the last of August, 1904, and that, if the account between the parties is limited to the grain shipped by the plaintiff to the defendant and the money received by draft or otherwise for such grain, an accounting between them would leave the defendant indebted to the plaintiff in the amount for which a verdict was directed and judgment was entered in this case.

It appears, however, that the defendant attempted to set off the amount which it owed an account of actual shipments of grain by another account growing out of speculative transactions on the board of trade, some of which were conducted with Higbee in his own name, and others with him in the name of the plaintiff. It further appears that the board of trade transactions commenced more than a month after the first actual shipment of grain by the plaintiff to the defendant, and that they were originally commenced by Higbee in his own name, and not in the name of the plaintiff. The account shows losses to Higbee, aggregating $268.75, and this account appears to have been balanced by transferring Higbee's losses to the account of the plaintiff. In this manner Higbee's accounts were squared and his losses were all charged on the defendant's books against the plaintiff. That this was done without Higbee's consent, but later on such consent

was obtained from him ostensibly in the plaintiff's name and for the plaintiff's account. Thereafter Higbee, without the knowledge of the plaintiff, conducted a large number of speculative board of trade deals with the defendant in the name of the plaintiff. In these transactions there appears to have been various profits and losses which the defendant carried into its general account with the plaintiff, intermingling such items with actual shipments of grain from plaintiff's elevator at Gretna. A great many of the board of trade transactions were in mess pork, while the others were in grain. The net result of the transactions was a loss of $2,544.48, which the defendant charged on its books against the plaintiff. This net item of loss, added to the $268.75 lost by Higbee in his own name, amounts to a total of $2,813.23 which defendant attempted to set off against the amount which it owed the plaintiff for actual shipments of grain, which, if set off, would balance the account, and this is the exact amount for which the court directed the jury to return its verdict, plus interest from the date of the commencement of the action.

The questions which are presented by the record are: First, did Higbee have any actual or apparent authority to embark in the board of trade transactions for and on behalf of the plaintiff, such as would estop it from repudiating them? Second, were the board of trade transactions within the scope of the plaintiff's powers, or were they *ultra vires* and void? Third, were the board of trade transactions *bona fide* lawful contracts or were they mere gambling transactions, speculations on the rise and fall of the price of grain upon the future market?

As bearing upon the first inquiry, it appears beyond dispute that, throughout all of the transactions above described, the agent, Higbee, concealed from his employer, the plaintiff, the fact that such transactions were taking place. It further appears that the plaintiff had an auditing committee which met regularly every month and went over Higbee's books, but found thereon no trace or record

of any of the board of trade transactions in question; that Higbee kept a register account in which appeared only the transactions growing out of the actual shipments of grain from the Gretna elevator, and that no entry of any kind was made therein relating to said speculative deals. It also appears that Higbee absconded in the latter part of August, and on the 25th day of that month, in the year 1904, just a day or two before he left the state, he entered upon the plaintiff's books a lump credit to the defendant of $2,890.55, which was the first entry of any of the transactions in question which appeared upon the plaintiff's books. After Higbee absconded, he sent by mail the key to the box in which plaintiff's books of account were kept to the president of the corporation, and none of its officers or directors had any knowledge of any of the transactions in dispute until they opened the box and obtained possession of their books of account. Now, the authority given by the plaintiff to Higbee is found in his written contract of employment. The language of this contract is: "The party of the second part (Higbee) has this day covenanted and agreed with the party of the first part (plaintiff) to operate and manage the elevator of said party of the first part situated in Gretna, Nebraska, and to perform all work incident to said operation and management." It thus appears that the plaintiff never gave Higbee any actual authority to engage in the transactions in dispute. Under this contract his authority was limited to managing the grain elevator situated at Gretna, and as incident to that management he would have the power to buy grain for future delivery at said elevator and advance a part of the purchase price thereon to responsible parties. But this would not include the buying of grain on margins, with advancements through a broker to parties whose identity, as well as their solvency, would be uttely unknown to him. The contract is clear, specific and unambiguous, and contains all of Higbee's actual authority. It limited that authority to the management and operation of the plaintiff's ele-

vator at Gretna. It gave him no permission to engage in speculations on the board of trade, even if such trades had been *bona fide* transactions. The authority of an agent does not extend to any matter or transaction which is not properly incident to the management of the ordinary business of his principal. Clark and Marshall, Private Corporations, p. 2119. We are therefore of opinion that Higbee had no actual authority to engage in the transactions in question for and on behalf of the plaintiff.

This brings us to the question of Higbee's apparent authority. It is well established that the authority of an agent cannot be established by his own acts and declarations. Thus, if A declares himself the agent of B, and then proceeds to enter into contracts in B's name, this is not a holding out by B of A as his agent. The holding out is done by the agent himself. Consequently, when we speak of the apparent authority of an agent as binding his principal, we mean such authority as the acts or declarations of the principal give the agent the appearance of possessing. Closely related to this doctrine of apparent authority, and really a part of it, is the doctrine of estoppel under which a party who has knowingly permitted others to treat one as his agent will be estopped to deny the agency. Now, what did plaintiff do to give Higbee any appearance of authority to embark in the board of trade deals? The evidence shows that it hired him to operate and manage its elevator at Gretna and put him in charge thereof, and that is all that it did in the way of affirmatively giving him an appearance of authority. Authority to operate the elevator, as we have already stated, was no authority to engage in the transactions in question. It is elementary that an estoppel to question the acts of an agent can arise only from a knowledge of his acts. Now, the evidence in this case shows that Higbee kept an account with the defendant on the books of plaintiff. That account dealt with the grain actually shipped from the Gretna elevator and the money received by drafts against that grain, and does not con-

tain a single item referring to the board of trade transactions until the 25th day of August, 1904, when he was preparing to abscond. He then, for the first time, credited the appellant with $2,890.55 on those matters. The books also show that he carefully concealed all of those ventures from the plaintiff. It further appears that the plaintiff had never engaged in buying grain for delivery anywhere except at its elevator at Gretna, or in selling any grain except such as was to be delivered out of that elevator. Again, the plaintiff's articles of incorporation, which were open to public inspection, disclosed the full extent of its powers, and showed upon their face that the plaintiff was not organized for the purpose of speculating on the board of trade; that its principal business was the buying and selling of grain and the building and conducting of country elevators and the business incident thereto. The plaintiff's stationery used by Higbee in conducting his correspondence with the defendant disclosed the fact that its capital stock was only $10,000, and that the amount of indebtedness which it could contract at any time was limited to $2,000, and yet we find from the evidence that the deals between the plaintiff and the defendant entered into on the 4th day of July, 1904, if consummated, would amount to $44,487.50, and this in the name of a concern that the defendant knew had a gross capital of $10,000 and whose articles of incorporation limited its indebtedness to $2,000. It therefore seems clear that Higbee had no apparent authority to engage in the transactions in question, and that the defendant was chargeable with knowledge of the want of such authority on his part. For this reason alone, if for no other, the district court properly directed the verdict for the plaintiff.

Our determination of the foregoing question renders it unnecessary for us to decide any of the other questions presented by the record. We may say in passing, however, that it seems quite apparent that the plaintiff under its articles of incorporation had no power to engage in the board of trade transactions in question; that they were

ultra vires and therefore void. We may further say that we have examined the question of the validity of those transactions, and are satisfied that they fall clearly within the rule announced in *Rogers & Bro. v. Marriott,* 59 Neb. 759, and cases there cited, and therefore are void as against good morals and public policy.

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

AFFIRMED.

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

OLIVER STEVENS V. STATE OF NEBRASKA.

FILED JUNE 25, 1909. No. 15,990.

1. **Information:** SEPARATE COUNTS: ELECTION. Where an information contains two counts charging but one offense, the prosecutor will not be required to elect on which count he will rely for a conviction. *Candy v. State,* 8 Neb. 482.

2. **Assault and Battery:** SELF-DEFENSE: EVIDENCE. Where one charged with assault and stabbing with intent to wound pleads and attempts to prove self-defense as a justification, the state may prove the relative size and physical strength of the parties, together with the weakened physical condition of the complaining witness, as tending to show that the defendant had no reason to believe himself in imminent danger of death or great bodily harm at the time he committed the assault.

3. ———: EVIDENCE: COLLATERAL TRANSACTIONS. It is proper in such a prosecution to exclude evidence of collateral transactions which do not warrant or justify the defendant in making the assault.

4. ———: ———: EXTENT OF INJURY. It is not error to permit the physician who attended the complaining witness, and ministered to him after he was stabbed by the defendant, to testify as to the nature and extent of the wound inflicted, together with his treatment of the same.

5. ———: ———: REPUTATION. In such a case the defendant is entitled by way of justification to prove the general reputation of the prosecuting witness in the community where he resided as a violent, quarrelsome and dangerous man; but he is not entitled

to prove specific acts occurring more than ten years previous to the alleged assault, with which the defendant had no concern.

6. **Criminal Law:** INSTRUCTIONS. It is not error to refuse an instruction which is not a correct statement of the law applicable to the theory of the defense.

7. **Assault and Battery:** EVIDENCE: REPUTATION. In such a prosecution, where the defendant attacks the reputation of the prosecuting witness, and introduces evidence tending to show that his reputation in the community where he resides as a peaceable and law-abiding citizen is bad, the prosecution is entitled to contradict such testimony by the evidence of competent witnesses.

8. **Instructions** examined, and found to contain no prejudicial error.

ERROR to the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed. Sentence reduced.*

John Everson, for plaintiff in error.

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

BARNES, J.

Oliver Stevens, who will hereafter be called the defendant, was convicted in the district court for Harlan county of a violation of section 16 of the criminal code. He was sentenced to a term of two years in the state penitentiary, and brings the case here for review. The information contained two counts. The first charged that on the 27th day of April, 1908, the defendant did feloniously assault one Benjamin Coe with a certain knife, with intent him, the said Coe, then and there unlawfully, maliciously and feloniously to kill. The second count charged that the assault upon the said Benjamin Coe was made with intent to wound. The defendant filed a motion to require the state to elect upon which count of the information it would prosecute him. The court overruled his motion, and he assigns error.

The rule is well settled in this state that, where an information contains two counts charging one offense, the prosecutor is not obliged to elect upon which count he

will rely for a conviction. *Hurlburt v. State,* 52 Neb. 428; *Korth v. State,* 46 Neb. 631; *Candy v. State,* 8 Neb. 482. In the case last above cited the identical question here presented was involved. The indictment in that case contained two counts; but as a matter of fact charged but one offense, to wit, malicious assault and shooting with intent to kill, and malicious assault and shooting with intent to wound. It was said: "The only difference between the two counts of the indictment in this case consists in the difference of the intent with which it is alleged the shooting was done. Such intent could only be gathered from the facts and circumstances surrounding the parties at the time, and the prosecutor might well be in doubt as to what might be the effect of the testimony before the trial jury, and we think the law permitted him to frame two counts, so that whether the jury believed the defendant guilty of having maliciously shot the person named in the indictment with intent to kill, or only with intent to wound, in either case they might find him guilty." And it was held that the state would not be required to elect upon which count of the indictment it would rely for a conviction. So in the case at bar the district court did not err in overruling the defendant's motion.

Before discussing the other assignments of error, it is proper for us to state the facts which are clearly established by the undisputed testimony contained in the bill of exceptions. The defendant and the complaining witness, Benjamin Coe, resided on adjoining farms in Harlan county, Nebraska. At one time they had been on quite friendly terms, but for about eight years prior to the commission of the offense charged in the information the relations between them had been so strained that they rarely, if ever, spoke to one another when they met. On April 27, 1908, the defendant was working in his field about 20 rods from the public highway. He saw the complaining witness passing, and quit his work and went to the side of the fence next to the road along which Coe was

traveling. He climbed over the fence into the road, and thereupon some words were exchanged between them, and he struck Coe with a knife, inflicting a wound upon the abdomen, which was at least seven inches in length and of considerable depth. The defendant himself was uninjured. As above stated, there is no dispute in regard to any of the foregoing facts. The defendant admits that he stabbed Coe, but claims that he stabbed him in self-defense. Coe, on the other hand, denied that he attempted or was about to assault the defendant, and testified that at the time of the assault he was in a weakened condition physically, not having fully recovered from a serious illness from which he had suffered the previous winter. It will thus be seen that the only question in dispute between the parties was whether or not the defendant was justified in making the assault which he committed upon the prosecuting witness. With this statement of facts, we come now to consider the defendant's remaining assignments of error.

He contends that the court erred in allowing the complaining witness to testify as to his alleged physical condition. The defendant having admitted that he stabbed Coe, and claimed that the act was done in self-defense, the physical health and strength of the prosecuting witness at the time he was stabbed was a proper matter for the consideration of the jury in determining whether the defendant was in such real or apparent danger at the time he inflicted the wound complained of as to justify his action. In 25 Am. & Eng. Ency. Law, p. 282, it is said: "Evidence of the relative physical strength of the deceased and the accused is admissible when self-defense is the justification." In *Hinch v. State,* 25 Ga. 699, where the prisoner was on trial for murder, and where self-defense was pleaded, it was held, that it was competent to prove on the part of the prosecution that the prisoner was a large, and the deceased a small, man. It appears that the defendant himself recognized this rule, for he testified as to his own weight and age, and brought out on the cross-

examination the age and weight of the complaining witness. Again, his counsel in his brief refers to the relative size of the two men, evidently considering that he strengthened his theory of self-defense when he showed that Coe was the younger and heavier man. Without doubt he had a right to show those things, and, on the other hand, the state had a right to show that the prosecuting witness at the time he was stabbed was in a weakened physical condition, and had not recovered from a severe attack of typhoid fever. This rule is too well settled to require further discussion, and we are therefore of opinion that this evidence was properly received.

Defendant also contends that the trial court erred in sustaining certain objections to the cross-examination of the complaining witness. This assignment strikes at the ruling on the following question: "You knew that Mr. Stevens had signed that road petition?" The state objected to the evidence as immaterial, irrelevant, and improper cross-examination. The record shows that the prosecuting witness had stated to some one that the persons who signed a certain petition for the establishment of a road which he opposed were liars, or words to that effect. Even if this were true, which is strenuously denied, it would constitute no justification for the defendant's attack upon the complaining witness, and therefore the matter was properly excluded from the consideration of the jury.

It is further contended that the court erred in overruling the defendant's objection as to the testimony of one Dr. Conklin. It appears that Dr. Conklin was one of the physicians called to attend the complaining witness after he had been stabbed by the defendant. It was proper and competent to prove by him the nature and extent of the injury as a circumstance tending to show the intent with which the assault was committed. It is claimed, however, that he should not have been permitted to testify as to what he did in the way of treating

the wound which he found upon the person of the prosecuting witness. We think this testimony was competent, and, in any event, we are unable to discover how the defendant could in any manner have been prejudiced thereby.

It appears that one Chester Keith was called as a witness, and interrogated as to the general reputation of the prosecuting witness as to being a violent and quarrelsome man. In answer to the question as to what his reputation was, he said: "A very quarrelsome man. He would quarrel with anybody that would say one word, or give him any chance at all." The last clause of the answer was stricken out on motion of the state, but the words, "very quarrelsome man," were allowed to stand. Defendant assigns error in striking out the clause above mentioned. To our minds the ruling of the district court was correct. The answer should have been confined to the general reputation of the complaining witness, and the evidence thus volunteered was certainly incompetent.

Defendant further complains of the order striking out the testimony of the witness Goodban as to the reputation of the defendant himself as a peaceable and law-abiding citizen. It appears that the witness testified as follows: "Q. Are you acquainted with Mr. Stevens there, and his reputation as to being a peacable and law-abiding citizen? A. I think so. Q. What is it, good or bad? A. Why, nothing was ever spoken against him until this affair come up that I know of." The state moved to strike out this answer of the witness as not responsive to the question, and the motion was sustained; but the defendant was not prejudiced thereby, for the witness was permitted to answer the question, and stated that defendant's reputation was good.

The defendant assigns error in excluding his own evidence that the complaining witness, some ten or twelve years before the assault in question was committed, threatened to assault one Arthur Garrison. We think that this evidence was properly excluded. Without

doubt the defendant was entitled to prove the general reputation of the complaining witness as a violent, quarrelsome and dangerous man, and it is equally clear that the testimony should be confined to such general reputation. It should not be extended to specific acts, especially those occurring more than ten years previous to the alleged assault, and with which defendant had no concern. In *Thomas v. People,* 67 N. Y. 218, the prisoner offered to prove that the deceased had been engaged in several fights with other parties, in each of which he used a knife and cut his opponent, also declarations of the deceased as to his cutting people with razors, and that all these matters had been communicated to the prisoner. The offers were overruled, and it was held that by the ruling the trial court committed no error.

Defendant further assigns as error the refusal of the court to give the jury instruction No. 4 asked for by him. Without quoting the instruction tendered, it is sufficient to say that it assumed that the complaining witness was a man of violent temper, and had on previous occasions attempted to use a knife upon an opponent in a quarrel. Whether Coe was a man of violent temper or not was a question of fact. There is some testimony in the record tending to show that he was, and, on the other hand, there is considerable evidence that he was not. Therefore the court was not warranted in giving an instruction which virtually informed the jury that the fact of the complaining witness' violent temper might be considered as established. The instruction was further objectionable because it assumed that the defendant had seen Coe on previous occasions attempt to use a knife upon an opponent in a quarrel, for there is no evidence in the record to that effect. Some testimony was given by the defendant himself tending to show that he had seen the complaining witness draw a knife when engaged in a quarrel, not a fight, with another; but there is none to the effect that he ever saw him attempt to use his knife upon another. Again, the concluding sentence of the instruc-

tion informed the jury that, if they believed from all of the facts and surrounding circumstances that the defendant struck Coe in the honest belief that he was in imminent danger of being attacked, then he would not be guilty. Nothing was said therein with regard to the nature of the attack or the danger to be apprehended therefrom. To justify the wounding of the complaining witness by the defendant upon the ground of self-defense, it was necessary that it should appear that the defendant in inflicting the wound was acting upon the reasonable belief that it was necessary to use the force he did in order to save his life or prevent the complaining witness from doing him serious bodily injury. The instruction was therefore properly refused.

Defendant complains of the ruling of the trial court admitting the evidence of certain of the state's witnesses tending to show that the general reputation of the complaining witness as a peaceable and law-abiding citizen in the community where he resided was good. It appears that on the trial the defendant attacked the reputation of the prosecuting witness, and this evidence was proper to contradict the testimony which had been produced by the defendant on that question.

Defendant complains of several of the instructions given by the trial court on his own motion. To consider each of them separately would render this opinion much too long. It is sufficient to say that a careful examination of the instructions taken together as a whole clearly shows that the jury were properly and carefully instructed upon the law of this case. In fact the instructions were more than favorable to the defendant. His theory of the case was so fairly presented to the jury that he has no reason to complain.

A careful examination of the record satisfies us that the defendant was accorded a fair and impartial trial, and that the verdict is amply sustained by the evidence. We are of opinion, however, that the facts and circumstances surrounding the transaction require us to reduce

the punishment in this case to imprisonment in the penitentiary for the term of one year. The judgment of the district court to that extent is modified, and as so modified is affirmed.

JUDGMENT ACCORDINGLY.

EUNICE H. WILBER, APPELLANT, V. CHARLES L. REED ET AL., APPELLEES.

FILED JUNE 25, 1909. No. 16,062.

1. Constitutional Law: EMINENT DOMAIN. That part of section 8605, Ann. St. 1907, authorizing the city council of cities of the first class to appoint a second set of assessors, which requires them to proceed on the day following their appointment to meet at the place designated for the meeting of the first board of assessors, and proceed without further notice to appraise the damages to the owners of property condemned for park purposes, is unconstitutional, because it amounts to the taking of private property for public use without due process of law.

2. Injunction: EMINENT DOMAIN. Proceedings for the condemnation of property under the provisions above set forth may be enjoined.

APPEAL from the district court for Gage county: JOHN B. RAPER, JUDGE. *Reversed and judgment entered.*

Hazlett & Jack, for appellant.

R. W. Sabin and *A. H. Kidd, contra.*

BARNES, J.

This action was brought in the district court for Gage county against Charles L. Reed, mayor of the city of Beatrice, and the other defendants as members of the city council, to enjoin them from appropriating the plaintiff's property, to wit, lot 4, block 36, of said city, for park purposes. When the action was commenced, a tem-

porary restraining order was issued which was kept in force until the final hearing, at which time the district court upon the issues joined found generally in favor of the defendants, dissolved the restraining order and dismissed the plaintiff's petition. From that judgment plaintiff has appealed.

The grounds urged for a reversal are: First, lack of jurisdiction to make the appraisement, for the reason that the appraisers were not disinterested freeholders; second, want of notice to the plaintiff of the appointment of the second set of appraisers, and of the time and place at which they were to meet and appraise the plaintiff's property; third, the unconstitutionality of the provision of the city charter authorizing the mayor and council to reject the appraisement of property taken for park purposes, and appoint a second set of appraisers to act without further notice to the landowner; fourth, the invalidity of the ordinance under which the defendants acted; fifth, because the city had no available funds to pay for the land in question.

An examination of the record satisfies us that the proceedings of the city council were regular and conformed substantially to the provisions of the city charter, and that a fund was provided for the payment of plaintiff's damages. Therefore plaintiff's right to the relief prayed for by her petition depends entirely upon the question of the validity of the statute above mentioned. The record discloses that the city council, after considering several locations for a public park, decided to locate the same on the north half of block 36, and by resolution appropriated and set apart lots 1, 2, 3 and 4 of that block for that purpose. A committee was appointed by the council to purchase the above described lots, if possible, and it appears that they succeeded in purchasing all of the property except lot 4, which is owned by the plaintiff. They were unable to come to an agreement with her, and therefore recommended that an ordinance be passed appropriating her property for park purposes. The ordi-

nance was regularly passed, and appraisers or assessors, as they are designated by the statute, were appointed to assess the value of the plaintiff's property. One of the assessors refused to serve, and another was appointed in his place. The appraisers met at the time and place named in the ordinance, and were about to proceed with their appraisement, when they were restrained from so doing by an order of the district court. It further appears that the restraining order was thereafter dissolved, and the city council thereupon, acting under the provisions of section 8605, Ann. St. 1907, appointed three other assessors to appraise plaintiff's damages; that such appraisement was made; and that the plaintiff thereafter commenced this suit to restrain the defendants from taking her property under the proceedings above set forth.

Section 8605, *supra,* which is a part of the charter of the defendant city, provides in substance that, when it shall become necessary for the city to appropriate private property for the use of parks, etc., such appropriation shall be made by ordinance, and there shall be appointed by the council in the ordinance making the appropriation three disinterested freeholders of the city to assess the damages, who after taking an oath to discharge their duty faithfully and impartially shall on the day provided in said ordinance view the property appropriated, and on the same day, or as soon thereafter as practicable, shall make, sign and return to the council in writing a just and fair assessment of the damages for each piece or lot of property which in whole or in part is so appropriated. It also provides that the ordinance appropriating property shall be published in a newspaper published in the city, and of general circulation therein, as much as 30 days before the meeting of the assessors; that such publication shall be sufficient notice to nonresident owners and parties interested, but, where the owners in fee reside in the city, the clerk shall deliver to each of them,

or, when the owners cannot be found, to some persons at their respective residences, the newspaper containing the ordinance, and shall at the same time call the attention of the person to whom the same is delivered to the ordinance published in the paper; and that these facts shall be certified to by the city clerk upon the book in his office in which the ordinance is recorded. The charter further provides, as follows: "At the next regular meeting of the council after such assessment, the council may vacate such assessment, if unjust, and, if so vacated, or in case of a failure to obtain the assessment, for any cause, the council by resolution may appoint other three assessors; and, in that case, such new assessors shall, on the day following their appointment, without further notice, meet at the place fixed by the ordinance for meeting of the assessors, and * * * shall proceed as provided for the first board of appraisers." Ann. St., sec. 8605.

It is plaintiff's contention that the provision of the charter above quoted is unconstitutional and void because no notice of the appointment of the second set of appraisers or the time and place of their meeting is required thereby, and that a compliance with this provision without notice would deprive her of her property without due process of law. A like question was before the supreme court of New York in the case of the *People v. Tallman,* 36 Barb. (N. Y.) 222. There a commissioner of highways instituted proceedings for a reassessment of the damages sustained by a person whose land had been taken for a public road. It was there held that the landowner was entitled to notice of the impaneling of the jury, and of the subsequent proceedings before them, and it was said: "The spirit and intention of the act, in directing the jury to hear the parties and their witnesses, requires that the parties should have notice of the proceeding; and independent of anything in the statute, no proceeding affecting judicially the rights of another, occurring in his absence without notice, can be valid." In *Rathbun v. Miller,* 6 Johns. (N. Y.) *281, an admeasure-

ment of dower was set aside because the tenant had no notice of the application to the surrogate for commissioners, although the statute did not provide for or require any such notice. It is contended by defendant's counsel that the proceeding is a continuous one, and that, as the plaintiff had the notice required by statute of the first steps, he is to be presumed to have notice of all subsequent steps. It is manifest that, if this reasoning be sound, the application of the wholesome principle of general jurisprudence above stated would be of no avail in such a case. It would be of little or no advantage to a party to be notified when the first set of appraisers would meet, if he was not to be informed when the second set of appraisers would meet so that he might present his proof and be heard before them. In point of fact, however, this is not one continuous judicial proceeding. The passage of the ordinance, of which the plaintiff was notified, was merely the first step toward constituting the tribunal which was to pass upon her rights. Now, the statute makes no provision for notice of the proceeding to constitute the second tribunal, which was to determine a question affecting her property, and requires no notice of the proceedings of the second tribunal toward a judicial examination and determination of that question. In this, therefore, the statute seems to be fatally defective.

In *City of Brooklyn v. Franz,* 33 N. Y. Supp. 869, it was said: "Brooklyn City Charter, tit. 14, sec. 51, providing that any building in violation of the provision as to fire limits may be removed, but not requiring notice to be given to the owner of such building, is void, as authorizing the taking of private property without due process of law, and the objection is not obviated by giving notice to the owner." The deprivation of property without due process of law is inhibited by both the federal constitution and the constitution of this state. While the term due process of law may not be susceptible of a precise definition which will include all cases, yet it has ever been held to require an opportunity to be heard.

Notice of some kind is essential, and because there is no provision in the statute in question for a notice or an opportunity to be heard it is violative of the constitutional provisions for the protection of property rights.

A like question was before the supreme court of Wisconsin in *Seifert v. Brooks,* 34 Wis. 443. The village charter of the village of Waupun contained provisions attempting to regulate the proceeding to determine whether land sought to be condemned for a street in the village was necessary for that purpose. It made no provision, however, for notifying the owner of the time and place of the assembling of the jury. It was held that the omission rendered the act as to that subject unconstitutional, and that the proceedings taken under it were wholly void. In deciding the question Chief Justice Dixon said: "As determined in *Lumsden v. Milwaukee,* 8 Wis. 485, the proceeding is strictly adversary; the corporation, representing the public, being the party on the one side, and the person whose property it is proposed to take the party on the other. Where such is the character of the proceeding, the law is most justly unrelenting in its abhorrence and unalterable in its condemnation of every act or step, in its nature final, which shall be done or taken *ex parte,* or without notice to the other party, where such notice can be given. It will not tolerate such act or step, but unhesitatingly declares it void upon the broadest and most obvious grounds of natural reason and justice. * * * That every man is entitled to his day in court, and must have it, and cannot be affected in his person or his property, unheard or without the privilege secured to him of appearing or being represented in his own defense, if he so desires, is a maxim the force and importance of which every good lawyer appreciates, and one which no court ever surrenders."

State v. City of Fond du Lac, 42 Wis. 287, was a case where the property of the relator had been assessed by the respondent for benefits resulting from a certain street improvement. The assessment was contested on the

ground that th statute which failed to provide for the giving of personal notice to the property owner was unconstitutional, and the proceedings were therefore void. In the opinion in that case we find the following: "It follows from these views that, on account of the failure of the charter to provide for the giving of personal notice to the owner of the property of the time and place of the appointment and meeting of the jury to inquire into and determine the necessity, the proceedings were void, and were properly vacated by the circuit court." Due process of law in the most comprehensive sense implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. This is a right of which the property owner cannot be deprived by courts, city council, or even by the legislature itself, for any act which authorizes an appropriation or the damaging of property for public use in any manner, or by any person or persons, must further provide for compensating the owner of the property, and a notice of the time and place where he may be heard upon the question of the amount of his damages. *McGavock v. City of Omaha,* 40 Neb. 64.

It is insisted that the provision for an appeal contained in the statute in question obviates the constitutional objection, and amounts to due process of law. To our minds, however, this provision renders it all the more necessary that the property owner should have notice of the time and place of the appraisement, for, without such notice, he might by lapse of time and without his knowledge be deprived of the right of appeal, and in such case he would have no redress. We are therefore of opinion that so much of section 8605, *supra,* as provides that the second set of assessors appointed to appraise the damages to property condemned for park purposes shall on the day following their appointment, without further notice,

meet at the place fixed by the ordinance for the meeting of the assessors and proceed to appraise the damages to such property is unconstitutional and void. We are satisfied that the provision above mentioned does not affect the remainder of the section, which we hold to be a valid exercise of legislative power. It follows that, in order to lawfully condemn the plaintiff's property, the mayor and city council must institute new proceedings for that purpose.

For the foregoing reasons, the judgment of the district court is reversed, and the defendants are enjoined from appropriating plaintiff's property under the proceedings complained of.

JUDGMENT ACCORDINGLY.

JOHN T. BRESSLER, APPELLEE, V. WAYNE COUNTY, APPELLANT.

FILED JUNE 25, 1909. No. 15,332.

1. **Taxation:** INVESTMENT COMPANY. A domestic corporation formed for the purpose of buying real estate, and whose whole capital is invested in land, is not "an investment company" under section 56 of the revenue law (Ann. St. 1907, sec. 10955).

2. ———: SHARES OF STOCK: ASSESSMENT. It is the duty of the holder of shares of stock of joint-stock or other companies to list the same for assessment, "when the capital stock of such company is not assessed in this state." Section 28 of the revenue law (Ann. St. 1907, sec. 10927).

REHEARING of case reported in 82 Neb. 758. *Former opinion vacated in part, and judgment of district court reversed.*

LETTON, J.

The facts in this case are stated in the former opinion, 82 Neb. 758. The principal question decided in that case was that the Nebraska Land Company is an investment

company, and that its property should be assessed under the provisions of section 56 of the revenue law (Ann. St. 1907, sec. 10955). Upon reargument and further consideration, while we adhere to the principle laid down in the second paragraph of the syllabus that the owner of shares of stock of a domestic investment company is not required to list them for taxation, we are convinced that the Nebraska Land Company, the corporation the taxation of whose shares to the individual shareholder was in question, is not embraced within the class of "investment companies," to be assessed under section 56. In the consideration of the case, we are confined to an examination of the pleadings, since there is no bill of exceptions properly before us. While the petition alleges that the corporation is an investment company, this is a mere conclusion, and the further facts alleged that it was formed for the purpose of purchasing a large tract of land, that all of its capital is invested in the land, and that the real estate constitutes all its assets, in nowise tend to bring the corporation within the class, but rather remove it from that category. The fact that its capital stock is invested in land does not make this an investment company. We are not aware of anything in the revenue law that distinguishes a corporation which purchases land from one which invests its capital in cattle, or horses, or in dry goods, or groceries, or in any other commercial channel. There is no particular virtue in real estate which makes a trading venture in it an investment and a similar venture in other property not an investment.

In one sense all corporations formed for the purpose of profit are investment companies. Their main object and purpose is that the stockholder may obtain a profit from the investment of his money in the business of the company, but this is not the sense in which the words are used in the statute. The meaning of the words is made clear by a consideration of the context. The language of the statute, so far as pertinent, is as follows: "The president, cashier, or other accounting officer of every bank

or banking association, loan and trust, or investment company, shall on the first day of April of each year make out a statement," etc. Ann. St. 1907, sec. 10955. The "investment company" mentioned in the section evidently belongs to a class of financial institutions dealing in bonds, stocks, notes, mortgages, and other instruments, or evidences of value representing invested capital. It properly belongs and is classed with banks, banking associations, and loan and trust companies having a "cashier" or "accounting officer." Its purpose is not to deal with actual and tangible property itself so much as with the representatives of property or mediums of exchange such as money, notes, obligations and securities. It may be difficult to draw the line between a concern which is an investment company and one which is a mere broker, but this we are not concerned with in this case. There is a clear distinction between a company formed to buy or to deal in real estate and an "investment company" under the statute. So far then as the result at the former hearing is based upon the proposition that the company in question is an investment company, the opinion must be vacated.

Section 28 of the revenue law (Ann. St. 1907, sec. 10907), requires every resident of the state to list all "his moneys, credits, bonds, or stocks, shares of stock of joint-stock or other companies, when the capital stock of such company is not assessed in this state." Under the law it is the duty of every owner of capital stock of corporations not assessed in this state to list the same for taxation. If he omits to do so, and the shares of stock owned by him are sought to be placed upon the assessment roll by the assessor or by the board of equalization, he may raise the issue of their exemption from taxation by presenting facts to show that the capital stock of such company is assessed in this state, or any other matter which entitles him to be exempt from assessment on such shares. A hearing can then be had and a record made before that board, from which, and on the particular question there

decided, an appeal may be had to the district court. From the judgment of that court on an appeal to this court the proceedings of the district court will be examined in the same manner and to the same extent as other appeals, and the same presumptions will be applied with respect to the validity of the findings and judgments of that court as in other cases. *Woods v. Lincoln Gas & Electric Light Co.*, 74 Neb. 526. In the present case both parties seem to have presumed that the question in the case was whether or not the Nebraska Land Company was an investment company, and whether its lands lay in this state or in North Dakota. This, it seems to us, was not the real issue in the case. Our view is that the real matter to determine was whether the capital stock had been "assessed in this state." If not, it was taxable to the owner of the shares. So far as the question of the right to deduct the value of the real estate from the assessment of the capital stock of the corporation is concerned, this was not properly before the court, since it was a matter which directly concerned the corporation, to which it was the proper party, and not the stockholder. The petition alleges that the capital stock of the Nebraska Land Company was assessed, not to the company itself, but to the individual stockholder, and this is admitted by the answer. If not assessed to the corporation, it should have been assessed to the individual. On the facts pleaded the shares were properly assessed to the plaintiff, and the judgment was erroneous.

The former opinion is vacated in so far as it holds that the Nebraska Land Company is an investment company, and the judgment of the district court is reversed.

JUDGMENT ACCORDINGLY.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. COLFAX COUNTY, APPELLEE.

FILED JUNE 25, 1909. No. 15,693.

1. **Appeal:** BILL OF EXCEPTIONS. Where the district court quashed a portion of a bill of exceptions, and there is nothing in the record indicating which portion was quashed and which was considered, this court, upon objection being made, will not consider the evidence.

2. **Exceptions, Bill of:** AUTHENTICATION. A bill of exceptions of proceedings before a county board, not identified either by the certificate of the county clerk or of the clerk of the district court as being part of the record, is not sufficiently authenticated.

3. **Drains:** ASSESSMENT: RECORD. When it is sought to review an apportionment and assessment in a drainage proceeding, that portion of the report and apportionment made by the engineer and county board which purports to charge the property of the appellant must appear in the record.

4. ———: ———: APPEAL: DISMISSAL. When no final order or judgment affecting appellant's property appears in the record, the appeal will be dismissed.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Appeal dismissed.*

Edson Rich and *C. J. Phelps,* for appellant.

J. A. Grimison, contra.

LETTON, J.

This is an appeal by the Union Pacific Railroad Company from a judgment of the district court affirming the proceedings of the board of county commissioners of Colfax county in establishing a drainage ditch in that county. At the threshold of the case it is necessary to consider objections made by the appellee to its consideration upon the record as presented to this court. The record shows that a motion to quash the bill of exceptions was made in the district court, and that this motion was

sustained "so far as relates to the evidence taken in the month of January, 1907," but "the court overrules the rest of the said motion to quash the bill of exceptions." Following the certificate by the clerk of the district court to the transcript is a mass of typewritten matter paged from 1 to 131, together with a map or tracing. This is headed: "This cause is the hearing of the Union Pacific Railroad Company upon its exceptions to the apportionment on file and made by the surveyor." No certificate of any kind is to be found at the end of this and nothing beyond the above quotation to show where, when, or in what proceeding it was taken. It does not even show that it was ever filed in the office of the clerk of the district court, although it is bound up with the transcript. Following this again are 111 pages of like matter, numbered consecutively from 1 to 111, entitled: "Before the board of county commissioners of Colfax county, Nebraska. In the matter of the exceptions of the Union Pacific Railroad Company to the assessment and apportionment in the Payzant-Hughes drainage ditch. Bill of exceptions." At the end of these 111 pages are two certificates by a stenographer, but in neither certificate is there anything to show when this testimony was taken. The certificate is sworn to on the 13th of March, 1906. A certificate follows signed by the board of county commissioners allowing the bill. This also fails to show when the testimony was taken. But there is nothing to show how far this certificate reaches, or whether it belongs to both bundles of testimony or not. There is no certificate or filing mark showing that the original bill of exceptions was ever filed with the clerk of the district court, although there is a certificate immediately following the transcript and preceding these papers that "the above and foregoing is a true and correct copy of all the record, including the final judgment and the bill of exceptions allowed by the board of county commissioners of Colfax county, Nebraska, in an action wherein the Union Pacific Railroad Company was plaintiff and the

county of Colfax was defendant, as the same appears from the files and record in the office of the clerk of the district court." This is not sufficient identification.

As we have seen, the district court quashed the bill of exceptions in part and sustained it in part, but there is absolutely nothing on the face of this record indicating which part of the bill of exceptions was quashed by the district court and which was allowed to stand. The whole matter is typewritten, including signatures. In the absence of a certificate identifying the original bill as being a part of the record in the office of the county clerk, these papers could form no part of the record of the county board and of the transcript to the district court, and, in the absence of any certificate from the clerk of the district court definitely showing what portion of this testimony was before that court and considered by it, it is impossible for this court to review its findings. *Shaffer v. Vincent,* 53 Neb. 449; *Romberg v. Fokken,* 47 Neb. 198; *Romberg v. Hediger,* 47 Neb. 201. The papers are defective both as to proper authentication and as to proper identification. We must therefore disregard the purported bill of exceptions.

We are unable to find in the record the final order or judgment of apportionment of which complaint is made. Omitting much redundant and irrelevant matter which has been improperly included in the transcript, and omitting the proceedings from the filing of the petition to the 15th of January, 1906, it is shown that on that day the appellant filed objections "to the apportionment and assessment made and filed by the surveyor in the above entitled matter." The record shows that on that day the board met and found that proper notice had been given that a hearing would be had upon that day upon the report of the engineer in the matter of the Dolph drainage ditch, and the further hearing of the petition was continued until the 24th of January. The record then shows that the hearing of evidence and arguments began on January 24, and was continued on the 25th, 26th, 27th

and 29th of that month, and that the proceedings continued on February 3, 6, 7, 14, 15, 23, 24, 26 and 27; that on March 9 a resolution was adopted reciting the prior proceedings, and that "an amended schedule of all lots, lands, public and corporate roads and railroads that will be benefited by said improvement, and an apportionment of a number of lineal feet and cubic yards to each lot and tract of land, public and corporate roads and railroads according to benefits which will result to each from said improvement, which said amended schedule and apportionment was filed in the office of the county clerk on the 9th day of March, 1906, and attested by the signature of the chairman and members of this board. Therefore be it resolved that said report and said amended apportionment and said profile and plat and said estimate of the number of cubic yards for each working section and said amended schedule of lots and lands, roads and railroads and said amended apportionment of lineal feet and cubic yards to each, and said estimate for location and construction to each, and said specifications are hereby by this board adjudged to be in all respects fair and just according to the benefits and in form as required by law, and that they and each and all of them are hereby approved, confirmed, and adopted as the final act and judgment of this board in the premises." The record shows that the appellant excepted. These exceptions, filed after the apportionment was adopted, alleged as grounds thereof "that the apportionment and assessment is unfair and unjust, in that said drainage ditch confers no benefit whatever upon said railroad's roadbed or any real or personal property owned by said railroad company." A hearing was begun on that day on the exceptions, and continued upon March 12 and 13, on which day the board found "that the apportionment made against the Union Pacific Railroad Company for the location and construction of said ditch in the sum of $2,550 is just, and therefore the exceptions are overruled," and taxed the costs to the appellant.

From this abstract it appears that there is no copy of that portion of the report or of the apportionment affecting the appellant's property in the record. The only matter in the form of a final order which appears is the ruling of the county board upon the exceptions to the report and apportionment filed after their adoption. The resolution of the board adopting and confirming the amended report of the engineer and the amended schedule and apportionment as the final act and judgment of the board is of no force or effect with regard to appellant in the absence of any recital or showing of that portion of the report and apportionment, if such there be, which affects its property or which purports to lay a tax thereon. All that this record shows may be true, and yet appellant's property rights not be infringed upon or in any way affected. It is true that afterwards, on March 13, the board found that the apportionment was just and overruled the exceptions, but these exceptions were in the nature of a motion for a new trial, and the order then made was not the final judgment which it is sought to review. The final order of which the plaintiff complains not being in the record, there is nothing before us for review, and the appeal is therefore dismissed.

We deem it our duty to say that the record in this case is a thorough going example of everything which a record ought not to be. The papers are attached together in a jumbled, confused and almost undistinguishable manner, and it has required unnecessary labor upon the part of the court to bring order from chaos and sift from the confused mass enough to show the manner and order in which the proceedings were had.

APPEAL DISMISSED.

JOSEPH H. MCCLATCHEY, APPELLANT, V. JOHN S. ANDERSON, APPELLEE.

FILED JUNE 25, 1909. No. 15,754.

1. **Sales:** BREACH OF WARRANTY: DAMAGES. Where a breach of warranty occurs and the sale had not been rescinded, the usual measure of damages is the difference between the actual market value of the warranted chattel and its market value if it had been as warranted and represented to be. The fact that the purchaser had in turn sold the chattel with a warranty, and had not been compelled to respond in damages for a breach thereof, does not furnish any ground for refusing to submit the question of damages for the breach of the original warranty to the jury.

2. **Evidence:** BREACH OF WARRANTY: SELF-SERVING DECLARATIONS. In an action for breach of warranty of a stallion, the plaintiff testified in effect that he rescinded the sale and returned the horse to the defendant, but that at the defendant's request he kept the horse in his stable, and that while in his possession the horse was sold by the defendant to one Gallagher. Defendant introduced the testimony of Gallagher and himself to the effect that the horse was purchased by Gallagher from the plaintiff, and not from defendant. Plaintiff then offered to prove that at the time that Gallagher purchased and took the horse he told Gallagher that the horse did not belong to him, but belonged to the defendant. This evidence was excluded by the court upon objection. *Held*, That the offered evidence was a self-serving declaration of the plaintiff made after the fact, and was properly excluded.

3. **Appeal:** INSTRUCTIONS. If a party believes that the instructions of the court are not sufficiently definite or specific to properly present the issues to the jury, it is his duty to request or tender more definite and specific instructions, and, failing in this, he cannot assign the indefiniteness of the court's instructions as ground for reversal.

4. **Appeal:** VERDICT: EVIDENCE. When questions of fact are decided by a jury upon conflicting evidence, the verdict will not be set aside on the ground of insufficient evidence, unless it is manifestly wrong.

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

France & France and *Landis & Schick,* for appellant.

J. J. Thomas, M. D. Carey and *Edwin Vail, contra.*

LETTON, J.

This action was brought by the plaintiff to recover damages for breach of warranty upon a stallion named Jupiter, which he procured from the defendant in exchange for a stallion named Stobal and $300 in money. The defendant admits the exchange of stallions and the receipt of the money, but denies the warranty. He also alleged that the plaintiff warranted the stallion Stobal, that there was a breach of this warranty, and prayed for damages for the breach. In reply the plaintiff admits the warranty of the stallion Stobal, and denies a breach. There was a verdict for the defendant on the plaintiff's cause of action, and for the plaintiff on its counterclaim.

1. Appellant's first contention is that the court erred in submitting the counterclaim of the defendant to the jury, for the reason that shortly after he acquired the stallion Stobal he sold him to one Wertman, with a warranty that he was a sure breeder and foal getter; that Anderson had not been compelled to pay anything to Wertman on account of a breach of this warranty, and therefore cannot recover against McClatchey until he has been compelled to respond to Wertman in damages. We believe this to be an erroneous idea as to the law. The breach of warranty, if any, occurred at the time of the sale, and the purchaser upon discovery of the breach was entitled to recover the difference between the actual market value of the animal and its market value had it been as warranted and represented to him. *Young v. Filley,* 19 Neb. 543; *Clark v. Deering & Co.,* 29 Neb. 293; *Burr v. Redhead,* 52 Neb. 617; 3 Sutherland, Damages (3d ed.), sec. 670. The fact that Anderson had sold the horse in nowise affected his right to recover upon the warranty, and it was proper to submit the question to the

jury. In any event no prejudice to the plaintiff is shown, because the jury found in his favor on this issue. It is insisted that because of the counterclaim the jury set off the damages for this breach against the damages properly accruing to the plaintiff, but this is a mere speculation which we are not at liberty to consider or treat as of any weight in the way of argument.

2. The alleged error most strenuously complained of was the rejection by the court of the plaintiff's offer to prove that he told one Gallagher that the stallion Jupiter did not belong to him, but belonged to Anderson, at the time that Gallagher became the owner of the horse. The plaintiff testified that he returned this stallion to the defendant, but that defendant requested him to keep the horse at plaintiff's barn in York until he could dispose of him, and that defendant afterwards sold him to Gallagher. This was denied by the defendant, who introduced evidence to show that Gallagher dealt with the plaintiff for the stallion Jupiter and purchased the horse from him, and not from defendant. We think the court was clearly right in excluding this testimony. The declarations were self-serving statements made after the transaction in the absence of the opposite party. Under no rule of evidence of which we are aware could they have properly been received. *Commercial Nat. Bank v. Brill,* 37 Neb. 626; *Zobel v. Bauersachs,* 55 Neb. 20. It is argued that the rejected evidence should have been received in order to meet the evidence of Gallagher, but it is clearly incompetent.

3. The plaintiff testified that he bred the horse Jupiter to between 45 and 50 mares; that with one or two exceptions each was served three times, but that the horse was useless. During the trial plaintiff was permitted to amend his petition so as to claim $250 damages for expenses in keeping the horse Jupiter during the season of 1905. Following this amendment, the plaintiff returned to the witness stand and testified that he kept a record of

the mares served. This record was offered in evidence, but was objected to as incompetent and immaterial and not being a book account such as the statute permits to be introduced as original evidence. The court sustained the objection, but permitted the plaintiff to refresh his recollection by using the book, and permitted counsel to use it upon cross-examination. This ruling is complained of. The district court did not err in refusing to admit this book in evidence. It does not fall within the statutory requirements as to books of original account, neither was it admissible as an independent memorandum, the proper foundation not being laid by proof that the entries were true and correct. The plaintiff was allowed to refresh his memory by its use, and we think this was all he was entitled to.

4. A large number of errors are assigned with respect to the reception or rejection of evidence. To take up each complaint in detail would extend this opinion to an unnecessary length, but we find no prejudicial error in the rulings of the court thereon. There is a direct conflict in the testimony with reference to the conversation between the parties at the time of the purchase of the horse Jupiter. The plaintiff testifies to a positive warranty, while the defendant testifies that the horse was unsound, that he so informed plaintiff at the time of purchase, that if the horse had been sound he would have been worth from $1,500 to $2,000, but being in the condition that he was his price was only $800, that the plaintiff inspected a number of other stallions which the defendant had for sale, but because Jupiter was an especially fine horse in size, style and breeding the low price at which he was offered induced the plaintiff to purchase, although not warranted. There is also a direct conflict of evidence with regard to the transaction with Gallagher; plaintiff asserting that the defendant disposed of the horse Jupiter to Gallagher, while the defendant testified that he merely informed plaintiff that Gallagher had brought some horses from the west, that

he would like to trade for the horse Jupiter, and that he had nothing to do with the transaction between Gallagher and McClatchey further than to bring the parties together.

5. Complaint is made that the court erred in permitting the affidavit of the defendant for continuance to be read in evidence to the jury. The record shows that a motion for a continuance was made by the defendant for the purpose of procuring the testimony of Gallagher, that the same was overruled, and that an agreement was made by the plaintiff in open court that the witness Gallagher, if present, would testify as stated in the affidavit, and that it might be read in evidence at the trial. When the affidavit was offered, the plaintiff objected on the ground that the plaintiff consented to the reading of this affidavit in evidence upon the condition that the case should be tried upon the 26th of December. The court, however, recited the agreement made of record as above set forth, and overruled the objection. After making an unconditional agreement of record that this affidavit should be read in evidence, the plaintiff was in no position at the trial to object to its introduction, and has no standing in this court to complain of the action of the district court in permitting it to be read in evidence.

6. Complaint is made of the giving of instructions 3 and 4 by the court. In these instructions the jury were told, in substance, that the material facts in the petition were the warranty, reliance thereon, a breach of the warranty, that the plaintiff was damaged thereby, and also that the defendant took back the horse Jupiter and traded him for western horses and $200 in cash, and that if they found such facts to be true the defendant would be liable to the plaintiff in damages, but that if, on the contrary, they believed that the defendant did not warrant the stallion, but told the plaintiff before the exchange that the horse was unsound, and expressed his opinion that it was an average foal getter, then the

expression of opinion would not constitute a warranty, and the plaintiff cannot recover. The court further instructed the jury that if they found for the plaintiff they should allow him the difference between the value of the horse Jupiter if he had been warranted and his real value as shown by the evidence at the time of the exchange, together with expenses of keeping and standing the horse for the season of 1905, and that from this sum they should deduct the value of the western horses as found from the evidence and the $200 in cash paid by Gallagher, and the difference between these two latter sums and the first will be the amount of plaintiff's damages.

These instructions were based upon the issues as made by the pleadings. If the plaintiff had established the allegations of his petition to the satisfaction of the jury, he would have been entitled to recover the difference between the value of the horse Jupiter as he actually was and what he would have been worth had he been as warranted; but if, as he alleged, the defendant had taken back the horse and given the plaintiff $200 in money and horses of the value of $300 in exchange, the plaintiff's recovery would be the difference in value less the amount which he had thus received. No instruction was requested or tendered by plaintiff asking a more definite statement. The plaintiff framed his petition so as to present these two questions to the jury, and while the instructions might have distinguished the issues more clearly, the plaintiff having failed to request more definite or specific instructions and having presented the issues in such manner, cannot now complain that they were imperfectly stated. *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578; *Brownell & Co. v. Fuller,* 60 Neb. 558; *Barney v. Pinkham*, 37 Neb. 664.

7. Lastly, it is insisted that the evidence does not support the verdict. While there is a direct conflict in the testimony, there is sufficient to have supported a verdict for either party. It is impossible that the story of all

the witnesses can be true. This being the case, the jury are the judges of the facts, and we have repeatedly held that, where questions of fact are decided by a jury upon conflicting evidence, the verdict will not be set aside on the ground of insufficient evidence, unless it is manifestly wrong. While there is room for considerable difference of opinion as to the merits in this case, the verdict is not manifestly wrong, and this court would not be justified in setting it aside. The jury evidently considered that this was a case of "diamond cut diamond." We are not able to say that they did not reach a correct result.

The judgment of the district court therefore is

AFFIRMED.

HENRY M. STONE ET AL., APPELLANTS, V. CITY OF NEBRASKA CITY ET AL., APPELLEES.

FILED JUNE 25, 1909. No. 16,022.

Highways: VACATING: DISCRETION OF COUNTY BOARD. "The decision of the necessity or expediency of establishing, maintaining or vacating a public road is committed exclusively to county boards and other like legislative and governmental agencies, and is not subject to judicial review." *Otto v. Conroy*, 76 Neb. 517.

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

John C. Watson, for appellants.

D. W. Livingston, A. A. Bischof and *O. G. Leidigh, contra.*

LETTON, J.

This action was brought to restrain defendants from closing and vacating a public road. The petition alleged, in substance, that a public county road had run in front of the tract of land belonging to the plaintiffs for more

than 30 years; that the buildings and structures upon the property of plaintiffs had been erected with reference to the road; that the defendants threaten to vacate and close said road; and that if this is done the means of access to plaintiffs' premises will be much impaired, and the value of their property greatly diminished in a manner and to an extent not susceptible of admeasurement in damages. The answer, in substance, admits the intention to vacate the road, pleads that the subject matter of the action is entirely within the jurisdiction of the board of county commissioners, and not within the jurisdiction of the district court, and further sets forth a justification of the proposed action of the board by reason of local circumstances. The court found generally for the defendants and dismissed the petition.

The proceedings of the board looking to the vacation of the road are fully set forth in the petition, and it appears that all the preliminary requirements have been complied with sufficient to give the board jurisdiction to act. The simple question is presented whether a court of equity has power to control by injunction the discretion of the proper officers of a county in the establishment or vacation of public highways. This is not a new question to this court. We are of the opinion that the court has no such power, the jurisdiction or matter of the establishment or vacation of county roads has been committed by the legislature exclusively to the discretion of the proper officers of the county, and with this discretion the courts cannot interfere. "The decision of the necessity or expediency of establishing, maintaining or vacating a public road is committed exclusively to county boards and other like legislative and governmental agencies, and is not subject to judicial review." *Otto v. Conroy,* 76 Neb. 517, and cases cited. *Throener v. Board of Supervisors,* 82 Neb. 453.

It may be true, as plaintiffs alleged, that the closing of the highway will be a great disadvantage to them and inflict an injury upon them greater than that suffered by

any other person, and more than to counterbalance the public advantage which may follow from the opening of a new road, but these matters are for the consideration of the county officers alone. It is their power and duty to consider the relative advantages and disadvantages to the public and to individuals of the proposed vacation. The law has conferred this power and duty solely upon them, and not upon the courts. It is only in cases where the county board has not acquired jurisdiction of the subject matter that a court of equity will interfere to prevent the opening or closing of a public highway. No case has been cited to us holding otherwise, nor do we believe that such a one can be found. In the case of *Letherman v. Hauser*, 77 Neb. 731, relied upon by the plaintiffs, the opinion shows that an essential jurisdictional fact which must affirmatively appear upon the record of the proceedings vacating the road did not appear, and that the record of the vacation proceedings was therefore fatally defective in failing to show any jurisdiction in the board to act. Of course, in such a case injunction would lie.

Under the facts shown in the present case, the district court properly held that the county board had jurisdiction to act, and that there was no equity in the bill. Its judgment therefore is

AFFIRMED.

SUNDERLAND ROOFING & SUPPLY COMPANY, APPELLANT, v. UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLEE.

FILED JUNE 25, 1909. No. 15,573.

Insurance: CONTRACT OF INDEMNITY: BREACH OF WARRANTY. A written statement made by an employer to a bonding company to the effect that the accounts of applicant's cashier have been examined upon a certain date and were found to be correct, with cash and securities on hand to balance, which statement is in-

tended to and does enter into a contract between said parties indemnifying the employer against said cashier's dishonesty, and induces the execution thereof, is in the nature of a warranty, and, if false in a material part, will defeat recovery on the bond for the delinquency of such employee.

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

Baldrige & De Bord, for appellant.

McGilton, Gaines & Smith, contra.

ROOT, J.

This is an action to recover on a fidelity bond and a renewal thereof. The district court directed the jury to find for defendant, and plaintiff appeals from the judgment rendered upon their verdict.

1. One Snyder in April, 1904, had been in plaintiff's employ for a year and two months as bookkeeper and cashier. Defendant had guaranteed Snyder's financial fidelity to plaintiff for the year ending April 1, 1904. April 25, 1904, Snyder applied to defendant for another bond for the benefit of his employer for the year ending May 1, 1905, and sent with his application plaintiff's certificate, stating, among other things, that his accounts were audited April 23, and were correct in every particular. Defendant desired further information, and sent plaintiff a list of printed questions, which were answered on the same instrument. Thereupon the bond first described in the petition was executed. In answer to said questions, plaintiff by its secretary stated that Snyder was its cashier; that he handled incoming money for it and collected in the city (Omaha); that he would not be authorized to pay out cash in his custody in any amounts on plaintiff's account, and that he accounted to the secretary of plaintiff daily for funds and securities. The following questions and answers also appear in the statement last referred to: "9. Q. Is he required

to make deposits in bank, if so, how often? A. No. 13. Q. When were his accounts last examined? A. 23d. 14. Q. Were they at that time in every respect correct, and proper securities and funds on hand to balance? A. Yes. 15. Q. Is there now or has there been any shortage due you by applicant? A. No. 16. Q. Is he now in debt to you? A. No." Plaintiff was informed by defendant that its answers to said questions would be taken as the basis of the bond, if issued, and as conditions precedent for said undertaking and any renewal thereof. The bond recites that it is issued in consideration of the premium paid, and upon the faith of said statements, which plaintiff warrants to be true, and as a condition precedent to the employer's right to recover upon the bond; that if said written statement is in any respect untrue, the bond shall be void.

Defendant alleges that the statements made in the certificate sent with Snyder's application were each and all untrue, and that the foregoing answers were each false and untrue, for that at the time said statement was made and answers were given Snyder was short $100 in his accounts, which fact an examination of plaintiff's books would have disclosed. The evidence indicates that Snyder's books and accounts were correct and his conduct honest up to the month of April, 1904. On the 15th day of that month he falsely increased the footing of accounts payable in the cash book $100, and failed to account for that sum. That subsequent to May 1, 1904, Snyder embezzled continuously from plaintiff during that and the following year, and by false entries in the books under his control, by padded pay rolls and other devices, kept the general ledger in balance so that the monthly trial balances submitted to his employers, indicated a correct course of business, and that he had accounted for the funds in his possession or under his control. It seems to have been the course of business in plaintiff's establishment for Snyder to submit to the secretary and president trial balances about the middle

of one month, to exhibit the condition of the corporation at the close of the preceding month's business. Accompanying this trial balance were sheets containing an analysis of plaintiff's accounts with individual customers, which indicated the name of every purchaser who was indebted to plaintiff, and, in a general way, the age and amount of each account. The secretary and general manager would examine those statements and the general trial balance. Under the circumstances it was impossible for them during the middle of the month, to count the cash that was on hand the last of the preceding month, and the trial balance could only be verified in the improbable event that all cash received on the last day of the month had been deposited in the bank that same day. The transcripts submitted showing the condition of plaintiff's affairs at the close of business March 31, 1904, were thus examined April 23, 1904; but the accounts kept by Snyder between those days were not examined until subsequent to the execution of the bond in suit.

It is argued by plaintiff that the thirteenth interrogatory did not call for an examination of Snyder's books, but of his accounts; that plaintiff's officer was not asked the last date in the accounts examined; and that Edgerly, the secretary, did not know nor believe that Snyder was dishonest or that his accounts were incorrect; that the statements were representations merely, were believed to be true, were not relied upon by defendant, and that the jury, and not the court, should determine the good faith of the secretary, the materiality of the statements made and whether or not defendant relied thereon. If the thirteenth interrogatory stood alone and was considered without reference to the purpose for which the information was sought, it might be construed as plaintiff argues, but, when contemplated in connection with the fourteenth interrogatory and with relation to said purpose, it cannot in reason be thus interpreted. The fourteenth interrogatory not only asks if the ac-

counts were correct, but whether at "that time" there were securities and funds on hand to balance. "That time" is the date the examination was made. The funds and securities on hand one day would rarely, if ever, balance the accounts and books of any preceding day. Nor could an auditor ascertain by inspection and computation on the 23d day of a month the funds and securities that were on hand the last day of the preceding month. Furthermore, if the accounts were not to be inspected down to the date of the examination, there is nothing in the language employed to indicate that any particular antecedent day should be selected as the time for striking a balance and inspecting the cash and securities on hand. However much counsel may disagree upon the thought embodied in the questions submitted, we do not think it possible for any unprejudiced business man to read them and come to any conclusion other than that they could not be answered truthfully, or so as to give the information requested, unless the accounts were examined down to the date of inspection and the cash was counted upon that day. This was not done by the secretary, nor by any one else for the company. The thirteenth and fourteenth questions do not call for opinions only, at least such is not the case so far as the date of the examination of the accounts and cash are concerned. It may be said that the $100 defalcation would not have been discovered on the 23d if the cash had been counted and the books examined that day. This we do not know, nor can any individual other than the absconding cashier inform us. He may have been short on the 23d, more than the $100 embezzled on the 15th. It is true that Rose, the expert, testified that there were no irregularities in the accounts between the 15th and 23d of April, but he could only follow the entries in the books, and, without knowledge of the actual cash on hand, it would be necessary to accept those entries as reflecting actual conditions. It is not improbable that the false entries made covered anterior pecula-

tions that had aggregated an amount which Snyder thought unsafe to carry on his books as cash in the drawer. In any event, defendant was entitled to have an effort made, whether it was successful or not, to have the accounts examined down to the date certified, and the cash counted on that day. It is doubtless true that the rules applicable to the interpretation of life or fire insurance policies are pertinent in actions upon fidelity bonds, and that, if such an undertaking is reasonably susceptible of two constructions, the one most favorable to the assured will be adopted, provided that it is consistent with the objects for which the bond was given. *American Surety Co. v. Pauly,* 170 U. S. 133; *American Bonding & Trust Co. v. Burke,* 36 Colo. 49. In the instant case the parties interested have specifically agreed that the statements referred to shall become a part of their contract, the basis of the bond, and a condition precedent to a recovery thereon. With but few exceptions in actions upon fidelity bonds, such statements are held to be warranties upon the truth whereof depends the right to recover. *Rice v. Fidelity & Deposit Co.,* 43 C. C. A. 270; *Carstairs v. American Bonding & Trust Co.,* 54 C. C. A. 85; *Warren Deposit Bank v. Fidelity & Deposit Co.,* 116 Ky. 38; *American Bonding & Trust Co. v. Burke,* 36 Colo. 49; *Model Mill Co. v. Fidelity & Deposit Co.,* 1 Tenn. Ch. App. 365; *Livingston & Taft v. Fidelity & Deposit Co.,* 76 Ohio St. 253. Counsel, however, assert that this court is committed to a contrary rule. *Ætna Ins. Co. v. Simmons,* 49 Neb. 811, *Kettenbach v. Omaha Life Ins. Co.,* 49 Neb. 842, and *Ætna Life Ins. Co. v. Rehlaender,* 68 Neb. 284. We are satisfied with the principles announced in those cases as applied to the facts therein considered.

In *Ætna Ins. Co. v. Simmons, supra,* it was claimed that the assured in his application for fire insurance had overvalued the property thereafter insured. In *Kettenbach v. Omaha Life Ins. Co.* and *Ætna Life Ins. Co. v. Rehlaender, supra,* the court dealt with statements made

by the assured in his application for insurance with reference to his health. From the very nature of things the insurance company in all of those cases must have known that the applicant was giving them the result of his judgment, whereas in the instant one such is not the case concerning the date upon which and down to which the cashier's accounts were claimed to have been examined and found to be correct. Nor is it reasonable to hold that defendant did not rely upon the information given, or that it was not an inducement for the execution of the bond. Symington, defendant's secretary, superintendent of its fidelity department, and the individual who conducted the correspondence with plaintiff concerning the bond in suit, testified that they relied particularly upon the statement that Snyder's accounts were examined and found to be correct on the 23d of April, 1904. There is nothing in the record that directly or by inference contradicts this testimony, and, if the jury had been requested to find whether defendant relied upon said answers and it had found for plaintiff, the evidence would not have supported the verdict. Counsel argue that Symington did not have authority to pass upon the sufficiency of the showing made by plaintiff, and refer to section 4, art. 9 of defendant's by-laws. The by-law is a grant of power to certain executive officers, and does not prohibit the superintendent of its fidelity department doing just what Symington did in the instant case. So far as the record advises us, the bond in suit was issued according to the usual course of defendant's business.

2. Concerning the renewal of the bond for one year from May 1, 1905, it is sufficient to say that it was agreed between the parties that the statement made in April, 1904, should control not only the bond that was issued May 1, 1904, but any renewal thereof. In addition, plaintiff in April, 1905, certified that the books and accounts of Snyder had been examined by it on that day and found to be correct in every respect. The same method was employed in 1905 as in 1904 in inspecting

the cashier's accounts. The books were not examined, not even the footings of the respective accounts; but the analysis of unpaid accounts was inspected to ascertain the condition of the credits due the company, and the trial balance from the general ledger was examined to ascertain whether the books were in balance. The actual cash on hand was never ascertained and checked against the transcript submitted by the cashier. The items in the pay roll were never footed and compared with the check drawn by Snyder to pay the employees for that month, nor were the vouchers or sale tickets ever compared with the record made by him. Snyder deposited plaintiff's cash and disbursed the money paid out for employees' wages, so that his opportunities were ample for the fraud and deception practiced by him. Plaintiff had represented to defendant that its cashier was not and would not be authorized to perform either of said functions. Under the circumstances, plaintiff must have known that it had not taken any precaution whatever to protect itself against the embezzlement of its funds by Snyder; that the cashier's books and accounts were examined by him, and not it; and that it was not giving defendant any substantial information concerning the state of Snyder's accounts.

We do not approve technical defenses in cases like the one at bar, but common honesty dictates that the assured should be neither untruthful nor negligent in answering questions propounded to it for the purpose of securing material information concerning the risk that a bonding company is asked to assume. If the assured is either untruthful or negligent and misleads the bonding company, the employer, and not the surety company, should stand the loss made possible thereby. We have not examined the defense argued in defendant's brief that Snyder's duties were increased, and that he was permitted to pay out plaintiff's money and deposit its cash contrary to the statement made by plaintiff, because that defense was not specifically pleaded.

We do not find any error prejudicial to plaintiff in the record, and the judgment of the district court is

AFFIRMED.

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

ETTA TAYLOR, APPELLEE, V. ILLINOIS COMMERCIAL MEN'S ASSOCIATION, APPELLANT.

FILED JUNE 25, 1909. No. 15,575.

1. Insurance: PROCESS: PLEADING: BURDEN OF PROOF. If an incorporated foreign insurance company, as a defense in an action upon one of its policies, pleads that the return of the sheriff that he served process upon its agent is false, for the reason that the person named was not and is not its agent, and plaintiff in her reply denies those allegations, the burden is on defendant to negative the agency of the individual upon whom the process was served.

2. ———: ———: EVIDENCE. Defendant's evidence negatived the fact that it had agents in Nebraska for specific purposes, but did not deny that the individual designated in the sheriff's return as its agent had not performed such acts as under section 6407, Ann. St. 1907, would constitute him its agent. The court, therefore, did not err in not submitting said defense to the jury.

3. ———: CHANGE OF OCCUPATION. The policy provided that if the assured changed his business or vocation, he must immediately send the secretary of the company written notice of said fact, and that, unless the board of directors consented to such change, the policy upon the tenth day thereafter should cease and determine. *Held*, That the change referred to meant the substitution of one business or vocation for the other as the usual business or vocation of the assured, and did not refer to a casual or incidental resort to other activities for 30 days, where the vocation described in the policy was not abandoned, and it was undisputed that the assured expected within a few days to continue his usual vocation.

APPEAL from the district court for Colfax county: JAMES G. REEDER, JUDGE. *Affirmed.*

John J. Sullivan and *James Maher,* for appellant.

C. J. Phelps and *H. P. Peterson, contra.*

ROOT, J.

Action upon an accident insurance policy. Plaintiff prevailed, and defendant appeals. In May, 1906, defendant issued an accident insurance policy on the life of Breffelt F. Taylor, and plaintiff is the beneficiary in said policy. On the 6th of August, 1906, the assured died as a result of injuries inflicted by a stroke of lightning.

1. Defendant is an incorporated foreign insurance company, and alleges that process was not served upon its agent. Plaintiff resided in Colfax county, and, upon defendant's refusal to pay the insurance claimed by her, a cause of action, if any existed, arose in that county. In accord with section 59 of the code the proper venue in Nebraska for this action was Colfax county. *Nebraska Mutual Hail Ins. Co. v. Meyers,* 66 Neb. 657. Defendant alleged "that the sheriff's return to the effect that the summons in this action was served upon defendant by delivering a copy thereof to its agent, Leonard P. Bauderman, in Colfax county, Nebraska, is a false return and confers upon this court no jurisdiction," etc. It is further alleged that Bauderman is not and never was defendant's agent for any purpose. Plaintiff's reply traverses those allegations. The pleadings thereby presented for the jury's consideration the issue of Bauderman's agency. The burden was upon defendant to negative the return of the sheriff, and its counsel evidently so understood, because he demanded, and over plaintiff's objection was given, the opening and closing in the trial of the case. Neither the summons nor the return thereto appears in the bill of exceptions. All defendant's evidence to rebut the sheriff's return may be found in defendant's by-laws, one question propounded to its secretary, and his answer thereto. The by-laws provide

that defendant's business shall be transacted in Chicago, but do not forbid its officers appointing agents. In fact, without such representatives, defendant's business would languish and the object for which it was created would be defeated. The secretary was asked: "Q. Has the Illinois Commercial Men's Association any agents, general, special, or of any kind, empowered to solicit insurance for it, to accept members for it, or to receive assessments and dues for it?" He answered: "It has not. All its business must be transacted at its offices in Chicago, Illinois." This testimony is insufficient to exculpate defendant. It attempts to negative Bauderman's agency for specific purposes; that is, that he did not have authority to solicit insurance, accept members, or receive assessments for it. The secretary did not state that Bauderman had not performed any of those acts in Colfax county for defendant, nor that, if he had attempted to do so, it had rejected the fruits of his labors. The secretary testified to his conclusions. Just what facts would constitute Bauderman defendant's agent according to the logic of the witness we do not know. Section 6407, Ann. St. 1907, provides: "Any person or firm in this state who shall receive or receipt for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall receive or receipt for money from other persons to be transmitted to any such company or individual aforesaid, for a policy or policies of insurance or any renewal thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in anywise, directly or indirectly, make or cause to be made any contract or contracts of insurance, for or on account of such company aforesaid, shall be deemed, to all intents and purposes, an agent or agents of such company, and shall be subject and liable to all the provisions of this chapter." The record is barren of

evidence to demonstrate that within the meaning of the law Bauderman was not the agent of defendant in Colfax county at the time the sheriff served process in this action upon him. The defense is technical, and should not be held sufficient unless it responds to every fact essential to establish the immunity sought. Defendant is in the attitude of collecting premiums from the residents of Nebraska, and denying to the courts of this state the right to protect its citizens and enforce defendant's contracts, and its defense to the jurisdiction of the district court will not be supported by intendment. In the state of the record, we hold that the trial court was right in not submitting the first defense to the jury.

2. The defense upon the merits is that Taylor, in order to induce defendant to issue the policy in suit, made the following warranty and promise in his application for insurance: "I understand that if I shall hereafter change my business or vocation from that herein stated, that I must immediately notify the secretary of the association of such change, as provided in article II, section 7 of by-laws." The by-law is as follows: "Whenever any member of this association shall change his business or vocation he shall immediately thereafter send to the secretary a written notice of such change, and the association shall, at its discretion, continue or cancel the membership of such new member, and his membership shall cease and determine on the tenth day after such change without action of the board of directors, unless he shall in the meantime have sent such written notice." Defendant alleges that, when said policy was issued, Taylor's business or vocation was that of a commercial traveler, and he was not engaged in any other business or vocation; that for more than 30 days preceding his death he had entirely and permanently abandoned his said business or vocation, and, when injured, was engaged exclusively in the business or vocation of a carpenter; that notice was never given defendant by any one of such change, and that neither defendant nor

any of its officers had knowledge thereof or consented thereto. The policy was in force at the time Taylor died unless forfeited by reason of his unauthorized change of business or vocation. It is unnecessary to cite authorities to sustain the proposition that the defense interposed must fail unless the facts bring the case within the strict letter of the contract upon this point, but that, if by any reasonable construction of the contract and application of the facts thereto the policy can be held valid, such construction should be adopted and application made. On the other hand, if defendant has established its defense, it should, and will, be given the benefit thereof.

There is but little, if any, conflict in the evidence. At the time the policy was issued and until he died Taylor's home was in Schuyler, Nebraska, and he was in the employ of the Money Weight Scale Company as a traveling salesman selling computing scales on commission. In his application for the policy in suit Taylor gave his vocation as a traveling salesman, and stated that he devoted twelve months in the year to said business. About July 3, while following that vocation, he met Mr. Morey, an old acquaintance, in Crawford, Nebraska. Morey was foreman in charge of the construction of several buildings in said city, and desired to employ carpenters to assist him in said work. Taylor was a carpenter by trade, and told Morey that "the scale business did not pay, and he wanted a job to make a raise for a few days; then he was going back to the road to try it again." Thereupon Morey induced Taylor to work as a carpenter on said buildings. Taylor stored his sample cases in the hotel in Crawford, and borrowed some tools and worked with them until he sent for and received his own tools. It is claimed by defendant that Taylor worked continuously as a carpenter from July 3 until his death, August 6, but this is not accurate. Marshall, the employer, states that between July 7 and July 14 Taylor worked but three days and eight hours, leaving at least three days during which Taylor's movements are not

accounted for. August 4 Taylor was about to quit said carpenter work, whereupon Marshall raised his wages and induced him to promise that he would remain for another week. Taylor stated that at the end of that time he would return to the road. August 6, just before a storm, Taylor sought shelter in an inclosed house, and was there killed by a stroke of lightning. Taylor had never resigned his employment with the scales company, and its manager testified that Taylor was in the company's employ at the time of his death. The question presented is whether within the meaning of the policy Taylor had changed his business or vocation ten days or more preceding his death.

Counsel for the respective parties cite with assurance *Union Mutual Accident Ass'n v. Frohard,* 134 Ill. 228. Plaintiff's counsel argue that we should accept the definition given by Judge Baker of "occupation" as "that which occupies or engages the time or attention, the principal business of one's life," and apply it to the instant case, whereas counsel for defendant reason that the opinion defines the word as "the vocation, profession, trade or calling in which the assured was engaged for *hire or profit,*" and that the determining fact in the instant case is that Taylor worked for wages. Most of the cited cases are based upon conditions providing that the assured shall not engage in any occupation more hazardous or different from the one described in his policy. In the instant case the condition is against a change of vocation. Now, a man may have more than one vocation and engage in an additional occupation without abandoning the one described in his policy, and, if he does so, he does not necessarily change his vocation, unless the one is substituted for the other. Defendant's by-laws contemplate that its policy holders may have more than one occupation. Membership is confined to traveling salesman, "provided he (the policy holder) is not also engaged in any other business more hazardous than the one named." In *Stone's Adm'rs v. United States Casualty Co.,* 34 N. J.

Law, 371, a school teacher out of employment was killed as a result of a fall from the second story of a barn which he was having built, and the court held that the words "changing his occupation" meant engaging in another employment as a usual business. In *Simmons v. Western Travelers Accident Ass'n,* 79 Neb. 20, the deceased had been out of employment as a traveling salesman for two years, and during that time had resided on his father's ranches in Texas. He had performed some service for said parent, but had not received wages, and it was held for that reason, and because he had written for the purpose of securing employment as a traveling salesman, that he had not changed his occupation within the meaning of his policy. If Taylor had performed the services of a carpenter as a matter of exercise or for the accommodation of a friend, the *Simmons* case would be squarely in point. It does not seem to us that the mere payment of compensation for the identical act that otherwise would not invalidate the policy can work so great a transformation in the rights of the parties as to forfeit the beneficiary's right to recover for her husband's death. That Taylor was working for wages was an important fact to be considered in connection with all other relevant evidence in establishing the vital and ultimate one—whether he had changed his vocation. Defendant concedes that such change must have been permanent by pleading that "he (Taylor) had entirely and permanently abandoned the business or vocation of commercial traveler, and had engaged in the business or vocation of a carpenter." The proof is clearly to the contrary, and the court correctly permitted the jury to find whether Taylor had resorted to carpenter work as his usual employment, or merely casually, and properly instructed them that, to change his vocation within the meaning of defendant's by-laws, Taylor must have abandoned the vocation of traveling salesman for that of a carpenter. The instruction did not, as counsel argue, permit a recovery based upon Taylor's secret intentions, because

the evidence is undisputed from his acts and declarations that he had not abandoned his employment as a traveling salesman, but expected to actively engage therein within a few days of the date of the accident, and that the carpenter work was a mere casual incident to his actual vocation. Had the jury found for defendant, we would not have disturbed their verdict, nor, on the other hand, will we vacate their finding upon the evidence before us.

3. The complaints made concerning the instructions other than the one referring to Taylor's change of vocation do not present serious questions. They have all been considered and must be resolved against defendant.

The judgment of the district court therefore is

AFFIRMED.

AUGUST BRUNKE, APPELLEE, V. ALBERT GRUBEN; E. F. RUZICKA, INTERVENER, APPELLANT.

FILED JUNE 25, 1909. No. 15,755.

1. **Garnishment:** INTERVENER: BURDEN OF PROOF. If a garnishee answers that it is indebted to the execution defendant who does not resist the proceedings, and a third person intervenes and claims the account, the burden is upon the intervener to establish his title to the fund in litigation.

2. **Evidence:** PROCESS: PRESUMPTIONS. Officers are presumed to act according to law, and where an execution was issued and returned "*nulla bona*" on the 25th, and a summons in garnishment sued out the same day, but the evidence fails to establish whether the first named writ was returned before the latter one was issued, it will be presumed that the summons in garnishment was sued out subsequent to said return.

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

W. A. Bergstresser, for appellant.

Cole & Brown, contra.

ROOT, J.

Plaintiff caused the First National Bank of Lawrence to be garnished upon a judgment against defendant Gruben. E. F. Ruzicka intervened, claiming title to the money deposited by defendant in said bank. From a judgment in plaintiff's favor, the intervener appealed. The garnishee answered that it was indebted to defendant. Gruben did not resist the garnishment, but testified in Ruzicka's favor, and did not appeal from the judgment. The burden was on Ruzicka to establish title to the disputed property. *Racek v. First Nat. Bank,* 62 Neb. 669. One may draw an inference in favor of either plaintiff or Ruzicka, according to the credit given the testimony of Gruben and Ruzicka. The former had been in the saloon business at Lawrence for two years. To his application for a license for 1907, a remonstrance was filed, and the intervener thereupon applied for and secured a license to conduct that business in the building occupied by defendant. Gruben executed bills of sales to Ruzicka for his stock of goods and fixtures, but continued to manage the saloon, deposited in the garnishee bank to his personal credit the receipts of said business, and paid therefrom for merchandise used by him and expenses incurred in operating the saloon. All goods were charged and shipped to Ruzicka. Gruben did not check on said account for the benefit of the intervener, but claims to have paid him cash from time to time. Gruben's name remained upon the saloon window, and he disclaimed any interest in said goods and fixtures when the sheriff threatened to levy thereon, but claimed the bank deposit under consideration.

We will not extend this opinion by further reference to the evidence, but different minds may honestly draw diverse conclusions therefrom. The trial court probably knew the witnesses personally or by reputation, and must have observed their demeanor on the witness stand, and his findings are supported by the evidence.

It is urged that the court did not acquire jurisdiction to try the issue because the execution was not returned "not satisfied" before the summons in garnishment was sued out. No such issue was presented to the trial court except in the motion for a new trial. The evidence in support of said motion was not preserved in a bill of exceptions. From an amended transcript filed in response to an order for a diminution of the record, we learn that the execution was issued and returned on the 25th of October, and the summons in garnishment sued out that day. Which writ was first issued the record does not disclose, but we will not presume that the clerk of the district court did not perform his duty according to law.

The judgment of the district court therefore is

AFFIRMED.

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

ARTHUR H. BENTON, APPELLANT, V. FRANK F. SIKYTA, APPELLEE.

FILED JUNE 25, 1909. No. 15,762.

1. **Notes:** BONA FIDE PURCHASERS. The indorsee of a promissory note, which was given in consideration for a right to make, use or vend a patented invention or one claimed by the payee to be patented, takes the paper subject to all defenses between the original parties, if at the time of his purchase he had knowledge of the consideration aforesaid, and none of the parties through whom he claims were in ignorance of that fact, even though the note was not indorsed, "Given for a patent right," and he paid value for and purchased it before maturity.

2. **Evidence:** DECLARATIONS. In a suit upon such an instrument, after it has been shown that plaintiff and his predecessors in title, before or at the time they acquired title thereto, had knowledge of the consideration for which it was given, the defendant may prove by a third party declarations of the payee made while in possession of the note and tending to impeach its validity.

3. Notes: VALIDITY: INTOXICATION. A promissory note, signed while the maker is intoxicated so that he is incapable of knowing or understanding the nature or quality of his act, if not thereafter ratified by him, but, on the contrary, promptly repudiated after he had recovered his senses and appreciated what had been done, is voidable, at his election, in the hands of an indorsee who is not an innocent holder thereof.

4. ———: BONA FIDE PURCHASERS. Section 9255, Ann. St. 1907, has not changed the law as announced in *Dobbins v. Oberman*, 17 Neb. 163.

5. "Parol evidence is inadmissible to establish an oral agreement contemporaneous with the making of a negotiable instrument whereby said instrument was not to be negotiated." *Waddle v. Owen*, 43 Neb. 489.

6. Notes: COLLATERAL: RIGHTS OF INDORSEE. If a note is valid between the original parties, an indorsee who holds it as collateral may recover the face thereof with accrued interest, retaining any surplus as trustee for the party beneficially entitled thereto after his own claim is satisfied; but, if the note is invalid between the immediate parties, one who holds it as collateral security may only recover the amount of his claim to which said note is collateral.

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

A. W. Lane and *Baxter & Van Dusen*, for appellant.

J. C. Moore and *Hugh La Master*, *contra.*

ROOT, J.

Suit upon a negotiable intrument by an indorsee thereof. There was judgment for defendant, and plaintiff appeals.

Defendant alleges that the payee's agent induced him to become so intoxicated that he was incapable of understanding the legal effect of said instrument, and while in that condition he signed the note without knowing or comprehending its force or nature; that the note was given for a pretended right to vend a patented invention, but does not contain the statement that it was "given

for a patent right," as required by law, and was and is void and without consideration, and that plaintiff at the time he took said note and received an assignment thereof had knowledge of the aforesaid facts. The reply is a general denial.

1. Upon the trial of the case defendant, over plaintiff's objections, was permitted to testify that Fordyce, the payee's agent, represented to defendant that the note would not be negotiated, but held simply as security, and that testimony was submitted in an instruction by the court as a defense to the suit, provided the jury found that plaintiff was not an innocent holder. No such defense was pleaded in the answer, nor should it have been considered if incorporated therein. The note is payable to bearer, is negotiable by delivery, and that quality cannot be impaired by a contemporaneous parol agreement. The exact principle was announced by this court in *Waddle v. Owen,* 43 Neb. 489. See, also, *Van Etten v. Howell,* 40 Neb. 850. There was error in the admission of the testimony and in the instruction referred to.

2. Plaintiff received the note as collateral to secure the payment of Fordyce's note for a smaller sum. At plaintiff's request the court instructed the jury that, if he was an innocent holder, he ought to recover the face of the note in suit, with interest. The court on its own motion instructed the jury that, if Benton was an innocent holder of the collateral, but it was secured from defendant while he was so intoxicated that he did not know or understand what he was doing, the verdict ought not to exceed the Fordyce note, with interest. It is suggested that the instructions conflict. The criticism is merited, but the instructions only relate to the amount of the verdict. The jury did not find that plaintiff was entitled to recover anything, and hence the error is without prejudice. *Gullion v. Traver,* 64 Neb. 51. For the future guidance of the parties, it may be said that, as plaintiff in his petition asserts title by virtue of an assignment of the note made on February 7, 1907, and

not by purchase, his rights are those of a holder of collateral only. Under the issue presented by plaintiff, he ought not to recover in any event more than the face of the note to which the one in suit is collateral, with interest. *Haas v. Bank of Commerce,* 41 Neb. 754; *Barmby v. Wolfe,* 44 Neb. 77. Section 9256, Ann. St. 1907, cited by counsel, was not intended to abrogate the settled law of this state with respect to the rights of the holder of collateral securities.

3. The court charged the jury, as requested by defendant: "If the jury believe from the evidence that the plaintiff, before he purchased the note sued upon in this action, knew, or as an ordinary prudent man had reason to believe from circumstances brought to his knowledge before he purchased it, that the defendant had or claimed to have a defense to the note, then the plaintiff is not an innocent holder of said note." The instruction is erroneous in permitting the jury to consider what an ordinarily prudent man might believe from the facts brought to plaintiff's knowledge, and does not confine their deliberations to the good or bad faith of the plaintiff, whose rights are not to be determined by reference to that fictitious individual, the "ordinarily prudent man." Prior to the enactment of the present negotiable instrument statute, the law was settled that, to constitute bad faith on the part of the purchaser of a negotiable promissory note transferred to him for value before maturity, he must have acquired it with knowledge of the infirmities inhering in the original transaction or with a belief based on the circumstances known to him that there was a defense to the instrument, or the evidence must show that he acted in bad faith or dishonestly. *Dobbins v. Oberman,* 17 Neb. 163; *Myers v. Bealer,* 30 Neb. 280; *First State Bank v. Borchers,* 83 Neb. 530. Section 9255, Ann. St. 1907, provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the in-

firmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." The statute, in our judgment, in no manner relaxes the rule of law decided in the cited cases. Of course, if the consideration for the note is the right to vend a patented invention, and plaintiff knew that fact when he became the holder thereof, the element of notice of any other fact material to the defense is immaterial. On the other hand, if it is conceded that Benton did not have that knowledge, we are of opinion that the evidence does not justify a finding or inference that plaintiff knew that defendant was intoxicated when he signed the note in suit.

5. It is argued that the evidence does not sustain the verdict, and that the admission of Benton's testimony to prove Fordyce's statements was error. For the benefit of the litigants we will consider those assignments.

The note in suit is payable to the Leader Fence Machine Manufacturing Company, or bearer, and Fordyce seems to have been the general manager of that company. The evidence tends to prove that, about a week before the note was signed, Fordyce induced defendant to sign two contracts wherein he agreed to purchase several fence machines from said company and to act as its exclusive agent for at least a year for the sale of said machines in three townships in Johnson county. Each writing recites that the defendant has given his obligation to pay for the machines purchased. Defendant refused to give his notes, but later, in Sterling, was plied by Fordyce with whiskey until intoxicated, and, while incapable of understanding what he was doing, was induced by Fordyce to sign the instrument in suit. Section 9395, Ann. St. 1907, provides that there shall be written or printed above the signature and across the face of all notes given in consideration of the right to make, use or vend a patented invention, or an invention claimed to be patented, the words "Given for a patent right," and that such an instrument shall at all times be subject to all defenses

available against the payee thereof, and if any such notes are not thus indorsed, but a subsequent holder thereof has knowledge of the consideration therefor, he shall hold it subject to said defenses. The legislature in the exercise of the police power may enact statutes like the one quoted, and individuals dealing in negotiable instruments must take notice of the law. *Tod v. Wick Bros. & Co.,* 36 Ohio St. 370; *Allen v. Riley,* 203 U. S. 347; *Woods & Sons v. Carl,* 203 U. S. 358. The proof is not as satisfactory as a court might desire to establish that the machine referred to in the contract was patented, that Fordyce claimed it to be patented, or that plaintiff knew either fact at or before the date he took the note in suit as collateral, but the evidence is not entirely without probative value to support those issues. If, therefore, the note was given for the right to use or vend a patented invention, or one that Fordyce claimed to be patented, and plaintiff knew that fact at or before the time he purchased the instrument, defendant had the right to have the jury consider his defense that, at the time he signed said instrument, he was so intoxicated by Forydce's procurement, that he did not know or understand the character or consequences of his act, and that he had repudiated the note within a reasonable time after recovering his senses. Between the original parties, or one not a *bona fide* holder, that defense is legitimate. *Gore v. Gibson,* 13 Mees. & Wels. (Eng.) 623; *Case Threshing Machine Co. v. Meyers,* 78 Neb. 685. It should be borne in mind, however, that plaintiff is not to be defeated because the facts may satisfy the trier of fact that Benton had constructive notice that the note was given in consideration of a right to use or vend a patented invention. The language of the statute is, that the indorsee is not an innocent holder if he purchased the note *"knowing it to have been given for the consideration aforesaid."*

Over defendant's objections it was shown that Fordyce, about 15 to 30 days after he secured the note from defendant, told the witness that he, Fordyce, "got Sikyta

drunk when he signed the note, * * * so drunk that he could scarcely move or handle himself at all." At the time the note was executed Fordyce was the payee's agent, and, unless he owned the note when he made that statement, it ought not to have been received except for impeachment purposes, if Fordyce had testified and the proper foundation had been laid. *Gale Sulky Harrow Co. v. Laughlin,* 31 Neb. 103. The evidence does not fix with any degree of certainty just when Fordyce became the owner of the paper. He transferred it before maturity, and the jury might infer, from all of the circumstances developed from the evidence, that his title antedated the declaration made; but we think that the jury should have been advised that, unless they found that fact to exist, they should disregard Benton's testimony on this point. The courts are not in harmony upon the admissibility of such evidence in any event, but the dictum of Judge SULLIVAN in *Zobel v. Bauersachs,* 55 Neb. 20, indicates the inclination of this court to hold such evidence competent where the litigant claims title through the declarant and is not an innocent holder, and such we hold to be the law. *Fisher v. Leland,* 4 Cush. (Mass.) 456; *Reed v. Vancleve,* 3 Dutch. (N. J.) 352; *Thorp v. Goewey, Adm'r,* 85 Ill. 611; *Remy v. Duffee,* 4 Ala. 365. The authorities cited on this point by plaintiff all support the proposition that the statements made by one who theretofore owned a negotiable instrument will not be received to impeach the bill, and they are sound, but do not apply to the case before us.

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

REVERSED.

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

STATE, EX REL. EMMA C. JOHNSTON, RELATOR, V. SILAS R. BARTON, AUDITOR, RESPONDENT.

FILED JUNE 25, 1909. No. 16,205.

States: APPROPRIATIONS. The state public school for dependent children referred to in chapter 69, laws 1909, is identical with the "Home for the Friendless," and the appropriations made by the legislature for said school are specific appropriations for the support of said institution, whether described as the Home for the Friendless or the State Public School.

ORIGINAL application for writ of mandamus to compel respondent to issue a warrant in payment of wages due employees of the Home for the Friendless. *Writ allowed unless respondent issue a warrant within ten days.*

Clark & Allen, for relator.

William T. Thompson, Attorney General, for respondent.

ROOT, J.

The early history of the Home for the Friendless may be found in *Society of the Home for the Friendless v. State,* 58 Neb. 447. The legislature during its thirty-first session repealed sections 4, 5 and 6 of chapter 35 of the Compiled Statutes of Nebraska, and provided for a state public school for dependent children to be located at the Home for the Friendless. Laws 1909, ch. 69. There is no emergency clause to this act, and it will not become effective until July 1, 1909. The appropriations made by the legislature in 1907 for maintenance of the Home for the Friendless and the payment of its officers terminated April 1, 1909. The legislature in 1909 did not make an appropriation referring in so many words to the Home for the Friendless, but did provide in the appropriation made for the current expenses of the state government for the years ending March 31, 1910, and March 31, 1911,

for the maintenance of said state public school. Provision is thereby made for employees' wages, for general repairs, for school supplies and traveling expenses, and for the "care of indigent women now residents of the institution," board, clothing and care of children placed in private homes, etc. In the bill appropriating money for the payment of the salaries of state officials for the biennium commencing April 1, 1909, may be found items for the payment of salaries for the officers contemplated for said school. Each of said appropriations carried an emergency clause.

The auditor has allowed a claim for wages due employees of the Home for the Friendless for the month of April, 1909, but refuses to draw a warrant therefor on the ground that the legislature did not make any appropriation for the support of said institution, and justifies his conduct by reference to section 22, art. III of the constitution, which states: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, * * * and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever, either by joint or separate resolution." The appropriations considered are specific, each item therein referring to a definite subject. The legislature evidently intended to change the name but continue the institution of the Home for the Friendless. The statute creating the state public school does not refer to adult dependents, but the general appropriation bill does appropriate money for the support of indigent women now resident at that institution. It is incredible that the legislature intended to leave the dependent children and aged women in the Home for the Friendless without means of support for three months, and expected the employees and officers necessary for the transaction of the business of that institution to labor for the state three months without compensation, or, in default of such gratuitous services, that the institution should become a derelict during the second quarter of 1909. The

appropriations for said school, with the exception of the item for the placing-out agent, whose office is created by ch. 69, laws 1909, are identical as to officials and amounts with the appropriations made by the 1907 legislature for the Home for the Friendless. It certainly was not the intention of the legislature that the superintendent, matron, physician, head teacher, nurse and engineer in the state public school should receive 24 months' salary for 21 months' work, and yet such will be the case if respondent's theory be adopted. The appropriations are for the biennium, and yet, because the change in the name of the institution will not become effective till July 1, respondent reasons that the money appropriated cannot be used in 3 out of 24 months of the biennium. It is clear that the legislature appropriated money to maintain the institution known as the Home for the Friendless, which subsequent to July 1, 1909, will be described as the State Public School for Dependent Children.

The auditor under the circumstances was justified in not acting unless advised by the court that it was his duty to do so. If within ten days of the filing of this opinion respondent signs the warrant referred to in the application, the writ will not issue and the costs will be taxed to relator; but, if he fails to do so, a peremptory writ will at the end of said ten days issue as prayed for and relator will recover her costs.

JUDGMENT ACCORDINGLY.

ROSE, J., dissenting.

I concur in the spirit of kindness in which the writ is allowed, but dissent from the propositions of law on which the judgment is based. Relator is superintendent of the Home for the Friendless, and as such applied for a peremptory writ of mandamus to compel the auditor of public accounts to issue a warrant on the state treasurer for $428 to pay the wages of the employees of that insti-

tution for the month of April, 1909. The auditor approved relator's voucher, because the employees rendered the services for which compensation is demanded, but declined to issue a warrant for want of an appropriation. Under the name of the "Home for the Friendless" the legislature at its last session made no appropriation for the employees of that institution. In the act making appropriations for current expenses of the state government for the present biennium, there is, however, an appropriation in the following language: "For State Public School at Lincoln: Employees' wages, $6,500." Though this item was appropriated for the "State Public School at Lincoln," an institution not now in existence, the auditor of public accounts is directed to draw a warrant against it to pay wages of employees at the Home for the Friendless for the month of April. The justification for this order, as announced in the opinion of the court, is that legislative appropriations for the State Public School at Lincoln are specific appropriations for the Home for the Friendless. This conclusion, as I understand the statutes, is wholly unwarranted. The statutes themselves do not say that the institutions are identical, that the superintendent of the Home for the Friendless is the superintendent of the State Public School, or that the employees of one institution are employees of the other. Except by mere inference from the pleadings, there is nothing in the record to show such facts. The purpose of the new legislation was to change the existing order of things at the Home for the Friendless. The new act to which the court adverts in the opinion shows that the name, purpose and management of the old institution are to be changed. Formerly the mission of the Home for the Friendless was to aid and support destitute and dependent women and children. In describing its purpose Judge SULLIVAN in *Society of the Home for the Friendless v. State,* 58 Neb. 447, said: "The home contemplated by the legislature was a physical home—a place where the unfortunates of society, the jetsam and flotsam of life's

restless sea, might find a temporary refuge, clothing and food, and shelter and rest."

One of the declared purposes of the new act is to change the institution from a home to a school. This is shown by the title, which is as follows: "An act providing for the creation and location of a state public school for dependent children and providing for the government of the same, and providing for the care and custody of all the dependent children within the state, and repealing sections four (4), five (5) and six (6) of chapter 35 of the Compiled Statutes of Nebraska." Laws 1909, ch. 69. This title limits to dependent children the benefits of the state public school to the exclusion of the aged women now in the Home for the Friendless. For them no provision is made in the new act. The first section is as follows: "There is hereby created and established a state public school for dependent children to be located at the Home for the Friendless in the city of Lincoln, which said school shall have charge of all the dependent children within the state as herein defined and provided."

The State Public School is thus located at the Home for the Friendless, but neither the section quoted nor any other provisions of the act abolishes its present statutory name or repeals that part of the original act establishing the original home. The board of public lands and buildings, in so far as it now has control of dependent children, will be superseded by the governor. In an least three material respects, therefore, the State Public School will differ from the Home for the Friendless: (1) The names of the institutions will be different. (2) Aged and dependent women will be excluded from the State Public School under the provisions of the act creating it, though they found at the old home "a temporary refuge, clothing and food, and shelter and rest." (3) In so far as the institution protected and controlled dependent children, the board of public lands and buildings will be superseded by the governor. The recent legislation will change the name, purpose and management of the Home for the

Friendless. It will put into the hands of the governor power to change the officers and employees. The general appropriation bill, which contains items for the current expenses of the State Public School, and the salary bill, which contains items for the salaries of officers of the same institution, show that both bills were drawn with reference to the changed conditions of the institution, and that the legislature intended that those funds should be drawn under the new management only. It was within the power of the legislature to abandon the Home for the Friendless, to change the character of the institution, or to suspend its functions by failure to make appropriations. The intention to preserve its identity, to continue its functions, or to make appropriations for its support can only be found in the language of legislative enactments. I do not find such intentions in existing legislation. The making of appropriations for state institutions is within the exclusive province of the legislature. The intentions of the lawmakers in exercising that power must be determined from their language. The courts can neither supply intentions of the legislature nor add language to legislation. The appropriation for the State Public School for the entire biennium may indicate a legislative intention to pass with an emergency clause the act creating that institution, and thus make the law effective upon its approval by the governor, but it does not show a purpose to appropriate money for employees at the Home for the Friendless for the month of April. In my judgment the auditor properly refused to issue the warrant on the ground that there was no appropriation to pay it within the meaning of the constitutional provision that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." No specific appropriation was made under the head of the "State Public School at Lincoln" to pay the wages of the present employees at the Home for the Friendless for the month of April, 1909. Strict adherence to the constitutional provision quoted is necessary to the proper fiscal

management of the state government. I fear the precedent established will be cited in the future to justify the misapplication of public funds and the wrongdoing of public officers.

FRUIT DISPATCH COMPANY, APPELLEE, V. BERNARD GILINSKY, APPELLANT.*

FILED JUNE 25, 1909. No. 15,743.

1. **Contracts:** CORRESPONDENCE. By means of letters exchanged in due course of mail, parties may make a contract in writing without inserting all of its terms in a single instrument, and a receipt describing a definite, printed agreement and accepting its provisions may perform the office of a letter in that respect.

2. **Sales:** CONTRACT: EVIDENCE. A special finding of a jury that a contract printed in the back of a book containing a cipher code and embodying uniform conditions of sale was executed by an importer of tropical fruits and a wholesale dealer therein, *held* to be sustained by the evidence in the record.

3. **Principal and Agent:** SCOPE OF AUTHORITY. An agent acting within the scope of his apparent authority, though outside of his actual authority, may bind his principal by acts affecting innocent third parties.

4. **Statute of Frauds:** STATUTE OF ANOTHER STATE. Where the Iowa statute of frauds is pleaded in Nebraska to defeat an Iowa contract, the law of that state controls as to such defense.

5. **Sales:** DELIVERY. Subject to exceptions, a general rule applicable to sales is that a delivery to a carrier is a delivery to the purchaser and consignee.

6. ——: TRANSFER OF TITLE: DELIVERY. On a record showing that a wholesale dealer in tropical fruits at Council Bluffs ordered a car of bananas from an importer, knowing it was being shipped northward from the seaport at New Orleans under a bill of lading not disclosing a destination or consignee, the trial court properly held that the title was transferred in the hands of the carrier and the bananas delivered to the purchaser as soon as his name as consignee and the proper destination were inserted in the bill of lading by order of the consignor after he accepted the order, . . . being no contrary agreement, and the proof showing that the bananas at the time complied with the order as to quality and condition.

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* See opinion on rehearing, 85 Neb. ——.

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

Baldrige & De Bord, for appellant.

Francis A. Brogan, contra.

ROSE, J.

This is a suit by the Fruit Dispatch Company to recover from Bernard Gilinsky the purchase price of a carload of bananas shipped from New Orleans to Council Bluffs. The fruit weighed 21,500 pounds, and the price was $1.70 a hundred weight. The jury rendered a verdict in favor of plaintiff for $396.95, the full amount of its claim and interest. From a judgment for that sum defendant appeals.

The parties disputed over the terms of their agreement. Plaintiff's understanding is that the sale was controlled by the terms of a written contract applicable to all sales to defendant and containing uniform provisions, one of which required him to accept the fruit when delivered to the carrier at the seaboard. Defendant denied the existence of such a contract, and insisted his only obligation was to accept the bananas at Council Bluffs, and pay the purchase price, if they arrived in a green and merchantable condition. They did not so arrive, according to his estimate of their condition, but, on the contrary, as he alleges, were ripe and unmerchantable. He therefore refused to accept the consignment. Plaintiff disclaimed ownership of the fruit at Council Bluffs, and it was sold by the carrier to pay the freight charges. The position of each party is disclosed by facts fully and formally pleaded. Defendant was a wholesale fruit dealer at Council Bluffs. Plaintiff was an importer of tropical fruits, and its method of doing business is partially described in its brief as follows: "The fruit was brought by steamships from tropical countries to the port

of New Orleans, where it was immediately loaded by the Fruit Dispatch Company in cars of the Illinois Central Railroad and other railroads for shipment north and west. The fruit being of a character which would perish and become unsalable, if not handled promptly, the method of marketing and shipment was to obtain sales throughout the territory in which the company operated, through its agents, in advance of the arrival of a shipment. If the entire cargo had been sold in advance in car-load lots, the cars were immediately billed to the different purchasers, at the time of leaving New Orleans. As it could not always be known exactly when a ship-load would arrive, and as the loaded cars were ready to start from the port of New Orleans shortly after the arrival of the ship, it would frequently happen that not all of the car-loads would have been sold when the shipment was ready to leave New Orleans. In that case, the cars were started north without a fixed destination, and for each car a bill of lading in duplicate was issued, with the consignee and destination left blank; but the custody of these bills of lading was retained by the agent of the railroad in New Orleans until instructions could be given. Cars shipped in this manner were said to be 'rolling,' and are so referred to in the testimony. It was the purpose of the fruit company to find buyers for these cars before they reached the first diverting point of the railroad, and, when this was done, the office of the fruit company in New Orleans was notified by wire, and thereupon the agent of the railroad was directed to insert the name of the purchaser as consignee and the place of destination. Instructions would then go from the railroad's office in New Orleans to the proper railroad division to divert the car and deliver it according to such instructions."

About 5 o'clock on the morning of November 7, 1906, the shipment in question left New Orleans for the north on the Illinois Central Railroad, but at that time the bill of lading did not disclose the destination of the car or the name of the consignee. Knowing the car was "rolling,"

as that term has been described, defendant by an oral order directed R. B. Thompson, plaintiff's agent at Omaha, to wire plaintiff an offer of $1.70 a hundred weight, November 8, 1906, "if fruit green and in good condition." The order was immediately accepted by plaintiff at New Orleans, and notice thereof was at once communicated to defendant. By direction of plaintiff the name of defendant as consignee was promptly inserted in the bill of lading, which had been previously issued, and it was then mailed to him at Council Bluffs, where he received it November 12, 1906, the date of the arrival of the car. There is proof that the bananas should have reached their destination November 10, and that the delay in transportation may have been sufficient to ripen the fruit. Plaintiff insists that the sale was controlled by the following contract, which appears in the back of a book entitled "Cipher Code and Uniform Conditions Governing Sales for Use in Writing Orders to and Receiving Notifications from Fruit Dispatch Company":

"In conformity with similar announcements heretofore made, the Fruit Dispatch Company has established the following uniform conditions to govern all purchases of bananas and other fruit from it.

"1. All bananas and fruit are sold by the Dispatch Company delivered f. o. b. freight cars at the seaboard, with the exception of special sales provided for in clause No. 11 hereof. After delivery to the carrier at the seaboard all bananas and fruit are at the sole risk of the purchaser. Every order for or sale of bananas or fruit given or made after the same shall have been shipped at the seaboard, shall relate back to the time of such shipment and shall have the same force and effect in every respect as if given or made prior to such shipment.

"2. The certificate of the official weigher, respecting the weight of the bananas or fruit in any given car upon shipment at the seaboard, shall be final and conclusive upon both parties.

"3. Unless the contrary is clearly specified in writing,

every order for bananas or fruit given to the Dispatch Company shall be understood to contain the request that a messenger be furnished to accompany the bananas or fruit purchased for the benefit of the purchaser. The Dispatch Company at all times shall have the option of providing such messenger or not. Whenever a messenger shall accompany a car or cars, he will be instructed to look after the interests of the purchasers, and accordingly will be subject to all instructions of the purchasers respecting their bananas or fruit respectively. In the absence of such instructions, the messenger will conform to the general rules and regulations established by the Dispatch Company, and to such special orders as the Dispatch Company may give on behalf of the purchaser in any case. The receipt, certificate, or statement of a messenger respecting the amount, quality, and condition of the fruit which he is to accompany, given in writing and signed by him at the time of shipment at the seaboard, shall be conclusive and final as to all matters therein contained, upon both the Dispatch Company and the purchaser.

"4. Any purchaser may furnish his own messenger to accompany his bananas or fruit, and every such messenger shall have authority to accept bananas and fruit for the purchaser, and all receipts and statements respecting such bananas and fruit, signed by such messenger, shall be binding upon the purchaser.

"5. The Dispatch Company will employ and pay all messengers furnished by it as aforesaid for account of the respective purchasers, and hereby guarantees that the charges to the purchasers for the services of such messengers shall not exceed one dollar per car to the respective diverting points established by the Dispatch Company, and beyond such diverting points shall not exceed five dollars a day and extra railroad fares, any fraction of a day in excess of twelve hours being counted a full day. Messengers may be paid by the Dispatch Company, and such payments shall be reimbursed by the

purchasers upon receipt of bills rendered therefor, but the failure of the Dispatch Company to render any such bills or to collect such payments shall not impair or affect any of the terms or conditions hereof. It is further expressly understood and agreed that, without increasing the cost of messengers to the purchasers above the amounts hereinbefore stated, the Dispatch Company may, for the purpose of having suitable messengers ready for service at all times, pay the messengers greater amounts, or may employ them upon salary.

"6. The purchasers shall bear all loss on account of damage or deterioration of bananas and fruit after shipment at the seaboard, arising from any cause whatsoever, and without altering or affecting this provision, the messengers or the Dispatch Company may place any cars of fruit in any store-house or shelter, for the purpose of regulating the temperature or ventilation thereof, or for any other purpose, and in so doing, the Dispatch Company may assume the custody of any bananas or fruit, either directly or through instructions to any messenger, from the carriers temporarily without any liability to the Dispatch Company for anything that may happen or be done to the bananas or fruit in consequence thereof.

"7. The Dispatch Company agrees properly to investigate every claim made as hereinafter provided and will make prompt and fair adjustment thereof, if found meritorious. The purchaser, however, shall in every instance pay to the Dispatch Company the full amount of invoice without any deduction whatever, and shall abide by the decision of the Dispatch Company with respect to any claim, and accept in full satisfaction thereof any allowance made by the Dispatch Company. No such allowance, for whatever cause made, shall have the effect of impairing or affecting any of the provisions hereof, nor shall it constitute any precedent for any future claim.

"8. Notice of every claim against the Dispatch Company must be given to its resident manager at the place where the order was given, immediately after the arrival at its

destination of the car containing the bananas or fruit complained of, and a full statement in writing of the basis of every such claim must be filed with such resident manager within twenty-four hours thereafter. In default of such notice or written statement, the Dispatch Company shall have the option of disregarding any such claim.

"9. All notices of claims filed with such resident managers will be forwarded to the Dispatch Company in New York city for investigation and decision. No representation or agreement made by any resident manager as to the rejection or allowance of any claim will be binding upon the Dispatch Company.

"10. Purchasers shall be bound to pay all freight and other charges from shipment at the seaboard unless a special arrangement shall be made respecting the payment of such freight in any given case, but the assumption or payment of freight by the Dispatch Company shall not affect the delivery at the seaboard as herein provided.

"11. Special sales may be made, after arrival of bananas or fruit at the final destination, to purchasers personally inspecting and accepting the same on the spot.

"12. Every order given to or for the Dispatch Company whether by telephone, telegraph, in writing, or otherwise, shall be regarded as being made under and subject to the terms and conditions herein contained. Every purchase from the Dispatch Company of bananas or fruit, and every sale thereof by it, shall be upon and subject to all the terms, conditions, and provisions herein contained in every respect, unless waived in a writing signed by the president or general manager of the Dispatch Company, it being expressly stated and understood that no officer, employee, or representative of the Dispatch Company, except only the president or the general manager, has any authority to make any contract or sale of bananas or fruit except upon and subject to the said terms, conditions and provisions.

"FRUIT DISPATCH COMPANY,
"By JOHN EVANS, *General Manager.*
"Approved: A. W. PRESTON, *President.*"

"RECEIPT.

"6-28, 1905.

"Received from the Fruit Dispatch Company Code Book No. 605, containing the terms, conditions, and provisions governing purchases from and sales by the Fruit Dispatch Company. The undersigned hereby assents to the same and notifies and directs the Fruit Dispatch Company that every order hereafter given to it or to any of its officers or employees, for the purchase of bananas or fruit, by the undersigned, shall be deemed and construed to refer to and contain the 'Uniform Conditions Governing Sales,' as set forth in the said code book, on pages 55 to 59 thereof, as part of the terms of such order, without any further reference, and hereby further and expressly agrees with the Fruit Dispatch Company that, in consideration of the acceptance from the undersigned of any order or orders for bananas or fruit, all sales of bananas and fruit from the Fruit Dispatch Company to the undersigned, shall be under and subject to the said terms, conditions, and provisions in every respect. The undersigned agrees to return the said code book at any time on demand. Witness the hand and seal of the undersigned the day and year above written. Signed, sealed and delivered in our presence. (Two witnesses.) B. GILINSKY."

Plaintiff received the foregoing receipt by mail, when it was detached from the matter preceding it, but a copy in blank follows the formal conditions of sale in the back of the code book introduced in evidence. By definite provisions in paragraph 12, the terms of the contract were made applicable to all sales to defendant, and could not be changed or waived except by a writing signed by the president or general manager. There is no proof of such a writing. Defendant insists, however, that he is not bound by any of the terms of the document quoted, and

that the parties never entered into a contract under which he was compelled to accept the bananas. The first point argued in support of the propositions stated, if correctly understood, is that the signing and mailing of the receipt did not make the conditions of sale contractual obligations of defendant. Plaintiff procured the receipt in response to letters mailed to defendant, and the latter insists he is not bound by the contract, because it was concealed in the back of the code book, was not mentioned in plaintiff's letters, and was not embodied in the receipt. The terms of the contract and the manner of procuring it are severely criticised by defendant. Plaintiff's letters, when viewed in the light of the record, do not disclose any element of fraud in procuring the receipt. The letters refer directly to the code book, and its contents is indicated by the following words which appear in bold type on the cover: "Uniform Conditions Governing Sales." Plaintiff's last letter to defendant on the subject contains the following request: "If you are not going to sign the receipt and return it, we will ask that you return both the receipt and the book." During the month of June, 1905, plaintiff wrote defendant three letters in regard to the code book, and forwarded the book itself by registered mail. The hazardous nature of the business of supplying northern markets with perishable fruits from the tropics suggests an honest motive for the repeated demands for the receipt and for the exacting terms of the contract. A contrary motive is not shown by any fact proved. Defendant was a customer of plaintiff. He was a wholesale dealer in tropical fruits, and can scarcely have been ignorant of the methods adopted by plaintiff for its own protection. The receipt itself identifies the contract, and is an acknowledgment that defendant received the code book, that it contained the terms, conditions and provisions governing all purchases by him, and that he assented to the same.

The position that defendant is not bound by the contract because its terms were not made a part of his receipt is also untenable. Parties may make a contract in

writing without inserting all of its terms in a single instrument. A contract may be made by letter. In such a case the material parts of the correspondence constitute the agreement of the parties, and all writings on the same subject should be construed as one instrument. *Collyer v. Davis,* 72 Neb. 887. It is not necessary that both parties act at the same time. *Esmay v. Gorton,* 18 Ill. 483. For the purpose of identifying a written instrument and of accepting the terms thereof, a receipt may perform the office of a letter.

Defendant further insists that he never saw the letters; that he did not know of the existence of the contract when he was sued; that he never signed the receipt; that he did not authorize any one to sign it for him, and that his name was used without authority. Defendant's name was signed to the receipt by his son Sam, but it is urged that the latter acted without knowing the contents of the code book and without the knowledge or consent of his father. That defendant was bound by the act of his son was shown by a general verdict, as well as by a special finding. The trial court submitted to the jury this interrogatory: "Do you find from the evidence that the contract contained in the code book and the receipt for the same were executed by the defendant through his son, Sam Gilinsky, as his agent?" "Yes" was the answer of the jury, and it settles that question, if the finding is supported by sufficient evidence. Defendant could not read or write the English language. Much of his correspondence was entrusted to his son, who was a high school graduate. Defendant placed him in his store, where he was permitted to open and answer mail, and where he participated in his father's business. In his own brief defendant says: "Sam was a clerk in his father's place of business, buying a car of fruit now and then, and once did write to the Dispatch Company that he was authorized to do some buying." In the position in which defendant placed his son, the latter received and answered a letter containing a demand for the receipt for the code book. In that position he signed

his father's name to the receipt. This is at least some evidence, in connection with surrounding circumstances, that the son had apparent authority to act for his father in the manner in which he did act. In reply to letters directed to defendant at his regular place of business, plaintiff procured the receipt by due course of mail, and had a right to presume the letters were answered and the receipt signed by the person addressed, there being nothing to indicate the contrary. *Violet v. Rose,* 39 Neb. 660; *People's Nat. Bank v. Geisthardt,* 55 Neb. 232; *Helwig v. Aulabaugh,* 83 Neb. 542. There is evidence that one of plaintiff's agents was informed by defendant that the son was "running the banana end of the business." In relating what took place between one of plaintiff's agents and defendant as to purchasing a car of fruit, defendant testified: "I said my son is outside. Go and talk with him. If he wants to buy, it is all well and good." It was also shown by documentary and oral proofs that, pursuant to the terms of the contract quoted, a claim for damaged fruit was made out by the son in the name of defendant and paid in full by plaintiff. An examination of the entire record leads to the conclusion that there is sufficient evidence to sustain a finding that the son had apparent authority to act for defendant, and that his conduct affected plaintiff as an innocent third party, within the meaning of the rule that "a principal is bound by the acts of his agent, not only when performed within the scope of his actual or implied authority, but when within the scope of apparent authority conferred upon him by the principal." *Johnston v. Milwaukee & Wyoming Investment Co.,* 46 Neb. 480.

The original contract in writing and the oral order for the car of fruit were Iowa contracts, and to defeat a recovery defendant pleaded, and now urges, the Iowa statute of frauds as a defense. He also insists there was no delivery to him. These points will be considered together. Under the statute of Iowa contracts which must be in writing and signed by the party charged include "those in

relation to the sale of personal property, when no part of the property is delivered and no part of the price is paid." Defendant did not sign a written memorandum in ordering the fruit, and asserts there was no delivery to him within the meaning of the foregoing provision. He therefore concludes the case is within the Iowa statute of frauds. Whether this point is well taken depends upon the question of delivery. If delivery to the carrier was delivery to defendant, or if the fruit, after delivery to the carrier, was transferred to defendant by the bill of lading when plaintiff accepted the order, the case is not within the Iowa statute. In *Leggett & Meyer Tobacco Co. v. Collier,* 89 Ia. 144, the supreme court of Iowa said: "In the case at bar there was no undertaking by the vendor to deliver the goods at the place of business of the defendant firm, nor did the vendee designate a special carrier by whom the delivery should be made. In the absence of such designation and undertaking, the rule is that a delivery to the common carrier, in the usual and ordinary course of business, transfers title and possession of the property to the vendee, subject, as we have said, to the exercise by the vendor of the right of stoppage in transit. * * * It is said that there was no acceptance of the goods, and hence the case is within the statute of frauds. Under our statute, the delivery of goods under a contract of sale, to a common carrier in the usual course of transportation, is sufficient to take the case out of the statute. Code, secs. 3663, 3664. In this respect our statute seems to be different from that of New York, where both delivery and acceptance are required."

The statute and opinion cited were introduced in evidence, and control the decision on this branch of the defense. The name of defendant as consignee was inserted in the bill of lading November 8, 1906, and it was promptly mailed to him upon receipt of his order. A messenger who was in charge of the car testified the bananas on that date were green and in good condition, and that the temperature of the car was properly regulated. His report was

introduced in evidence, and shows the same facts. The first paragraph of the contract, containing the uniform conditions governing sales, provides: "After delivery to the carrier at the seaboard all bananas and fruit are at the sole risk of the purchaser. Every order for or sale of bananas or fruit given or made after the same shall have been shipped at the seaboard, shall relate back to the time of such shipment and shall have the same force and effect in every respect as if given or made prior to such shipment." The law applicable to the proofs and contract is well settled. *Mobile Fruit & Trading Co. v. McGuire,* 81 Minn. 232, was a suit to recover the balance of the purchase price of a car of bananas shipped from Mobile, Alabama, to St. Paul, Minnesota. Green and fancy bananas were ordered by wire. When delivered to the carrier at Mobile, the fruit was green and fancy, but did not arrive at St. Paul in that condition. The consignee refused to pay the purchase price in full, on the ground that his order required delivery of the fruit in a green and fancy condition at St. Paul. The consignor insisted that delivery to the carrier at Mobile was delivery to the consignee. In sustaining a recovery for the balance of the purchase price, the supreme court of Minnesota announced the following rule: "If no place of delivery is specified in the contract of sale, and there are no circumstances showing a different intent, the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale, and that their delivery to the proper carrier is a delivery to the buyer, and that the title passes to him subject to his right of inspection and rejection of the goods on arrival, if found not to be in accordance with the contract. The buyer, however, unless otherwise agreed, assumes the risk of deterioration in the goods necessarily incident to the course of transporation."

The general rule that, in absence of an agreement to the contrary, a delivery to the carrier is a delivery to the consignee has been announced by this court. *Butts v.*

Hensey, 73 Neb. 421; *McKee v. Wild*, 52 Neb. 9; *Havens & Co. v. Grand Island Light & Fuel Co.*, 41 Neb. 153. It follows that plaintiff's recovery was not defeated by the Iowa statute of frauds, and that the facts proved in connection with the agreements of the parties warrant the conclusion that there was a delivery to defendant as early as November 8, 1906, when the fruit was green and in a good condition, as ordered.

Some of the instructions are criticised as conflicting, and others as containing repetitions prejudicial to defendant. Other rulings of the court in giving and in refusing instructions are also assigned as error. A discussion of these questions separately would make the opinion too long, but all such rulings have been carefully considered in connection with the entire charge. The result of the investigation is that no error requiring a reversal of the judgment of the trial court has been found.

AFFIRMED.

MYRA E. BRIGGS, APPELLEE, V. ROYAL HIGHLANDERS, APPELLANT.*

FILED JUNE 25, 1909. NO. 15,758.

1. **Insurance:** BENEFIT ASSOCIATION: NEW BY-LAW. A by-law providing for a forfeiture, adopted by a fraternal beneficiary association subsequent to the issuance by it of a benefit certificate, will be strictly construed against the association, and, if passed in contravention of the provisions of the statute governing such association, it will be held void and of no effect. *Lange v. Royal Highlanders*, 75 Neb. 188.

2. ———: ———: GOVERNMENT: CHANGES IN CERTIFICATE. "Where a fraternal benefit association has not complied with the provisions of section 1, chapter 47 of the act of 1897, and adopted a representative form of government, its governing body is without power to adopt an edict or by-law changing the terms and obligations of a mutual benefit certificate theretofore issued to one of its members." *Lange v. Royal Highlanders*, 75 Neb. 196.

* See opinion on rehearing, 85 Neb. —.

3. ———: ———: ———. Where, under the provisions of the constitution and by-laws of a fraternal beneficiary association, the delegates to the governing body thereof, regularly elected by the members of said association, cannot of themselves, and without the participation of members of committees appointed from members outside of such delegates, legally and of right adopt, alter, or amend the edicts and laws of such association and absolutely control the government of the same, such governing body is not a representative body, and an association so constituted and governed cannot be said to have a representative form of government.

4. ———: ———: SUICIDE. Suicide will not defeat recovery upon a benefit certificate in a fraternal beneficiary association unless such certificate, together with the lawfully enacted laws and edicts of such association, so provide in express terms.

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

Hainer & Smith, for appellant.

A. R. Oleson, contra.

FAWCETT, J.

On June 5, 1897, Robert N. Briggs, whom we will hereinafter designate as the assured, became a member of a local castle of defendant society, and under that date received from defendant a benefit certificate upon his life in the sum of $3,000, payable at his death to his wife (plaintiff) and son. In April, 1905, the assured, for the sole purpose of changing his beneficiary, surrendered his certificate of June 5, 1897, and received from defendant, as a substitute therefor, the benefit certificate in suit. Defendant wrote on the face of such later certificate the words: "The date of certificate No. 1,741 (the former certificate) shall be the date on which the settlement of this certificate shall be based." In its answer defendant admits that the later certificate "was issued in lieu of said first-named certificate."

The defense pleaded is suicide. It is conceded that, at the time the assured became a member of defendant society and obtained his original certificate, there was noth-

ing in the edicts and laws of the society making suicide a defense, but defendant alleges that in June, 1901, its edicts and by-laws were amended by inserting the following provision: "The benefit certificate issued to a member shall become void and all benefits thereunder shall be forfeited in case the member shall die from suicide, felonious or otherwise, sane or insane"; and that in September, 1905, they were again amended so as to provide: "In case of the suicide of a member, either sane or insane, the amount of all contributions of a member to the fidelity fund of the fraternity only shall be paid to the beneficiary named in the certificate," and that the amount contributed by assured during his lifetime to the fidelity fund is the sum of $106.27, which amount it tendered plaintiff and which plaintiff refused, and that it has kept the tender good by depositing the same in court for the use and benefit of the plaintiff. The reply admits that the assured committed suicide, and alleges that the acts of defendant in attempting to amend its edicts and by-laws in June, 1901, and in September, 1905, are void, for the reason that defendant did not, at either of said times, have a representative form of government; that the body designated "Executive Castle," which is the governing body of defendant, is not a representative body; that it is not elected by the members of said defendant nor by delegates chosen thereby, and that the same is an arbitrary self-perpetuating body, not representative in form and not authorized or empowered by defendant to enact by-laws, rules or edicts for the government of the members of defendant, or to revise or amend the same. There was a trial to the court without the intervention of a jury, and judgment for the plaintiff for the full amount of her certificate, with interest; from which judgment this appeal is prosecuted.

The motion for a new trial in the court below is as follows: "(1) That the findings of the court are not sustained by the evidence in the case, but are contrary to the manifest weight thereof. (2) The findings and judgment of the court are contrary to the law of the case.

(3) That the finding and judgment of the court should have been for the said defendant instead of for the said plaintiff." This motion raises but the one question: Is the judgment of the district court sustained by the evidence? If we give any consideration whatever to the second paragraph of the motion, then the question would simply be: Can a judgment, based upon the evidence actually received, be sustained?

Some point is made by defendant that the amendment of its edicts and laws in 1901 was prior to the issuance of the certificate in suit, and that the issuance and acceptance of such certificate was subject to the edicts as so amended. This contention is without merit. The mere substitution of the certificate in suit for the one first issued, for the sole purpose of changing the beneficiary, did not constitute such certificate a new and independent contract. We think it is clear that the certificate in suit must be considered, so far as its date and the rights and liabilities of the respective parties are concerned, as if it had been issued upon the date of the issue of said first certificate, viz., the date of assured's admission into the society.

That the alleged change in the edicts and laws of defendant by its convention of June, 1901, was ineffectual and void has already been determined by this court, in *Lange v. Royal Highlanders* (this same defendant), 75 Neb. 188. The opinion in that case so fully and fairly sets out the history of defendant from its organization down to and including its convention of June, 1901, and its attempted amendment of its edicts and by-laws at that convention, that it need not be restated here. The defense in that case, as in this, was suicide. We there held that defendant down to and including its convention of June, 1901, had not adopted a representative form of government and that its attempted change of the by-laws at that convention was therefore null and void. Down to that time, therefore, the rights of the parties in this case must be considered as having been determined by our decision in that case.

This leaves for our consideration the sole question as to whether or not the action of defendant in September, 1905, was of such a character as to relieve it of liability in this action. The convention of September, 1905, was composed of 25 delegates elected from 25 districts, the number and boundaries of which districts were determined by an executive committee, which had been selected by the unrepresentative body of 1901, together with 13 officers, also elected by that body, and 10 committeemen appointed by the president elected at that convention. Did this constitute a representative government? It is claimed by defendant that, when the by-laws were voted upon at the convention of September, 1905, the 10 committeemen, by request of the president, refrained from voting, and that the change in the edicts at that convention was voted for by all of the delegates. The fact remains, however, as admitted by the secretary of defendant upon the witness-stand, that these 10 committeemen had a legal right to vote: "Q. Now, this statement of the president, requesting the members of the committee, who were not delegates, not to vote upon the adoption of these edicts, was a mere voluntary request, was it not? A. Well, I should say it was. At least they did not ask him to make any such provision. Q. But under the edicts under which that executive castle had convened, these members of the committees were entitled to vote thereon? A. They were, but he would not have appointed them committeemen had they insisted upon voting." The president does not confirm the assertion made in the latter clause of this answer. Moreover, the voluminous journal of the proceedings of that convention, introduced in evidence, does not show that the president ever made such a request or imposed any such restriction upon the committeemen. The journal does show, however, that none of the members of that convention voted on any change of the by-laws. The chairman of the committee on edicts made a lengthy report to the convention, recommending a number of changes of certain specific sections in the edicts and by-laws

theretofore existing, among which was one recommending a change in section 141, designating the conditions which should thereafter be a part of every certificate issued by defendant, which proposed amendment provided: "That in case of the suicide of a member, either sane or insane, the amount of all contributions of the member to the fidelity fund of the fraternity only shall be paid to the beneficiary named in this certificate." The journal then shows that, after a short discussion of that proposed change, the president, who is designated by the order as "Most Illustrious Protector," asked: "Are there any other suggestions? If not, the section will be passed." This is the only record of any action taken upon the proposed amendment. We hardly think this sustains defendant's contention that all of the delegates at that convention voted for the proposed change.

The laws of the order provide: "The edicts of the Royal Highlanders shall not be altered or amended except when two-thirds of all the members of the executive castle favor such changes." Section 203, Edicts of 1901. This language is plain and unambiguous, and prohibits any change of the edicts of the society except when two-thirds of all its members favor such change. Under the wording of this section of the edicts, any member of the executive castle who refrained from voting on any proposed change of the edicts would thereby in effect vote against it. It is conceded that there were 48 members of that executive castle, viz., 25 delegates, 13 officers, and 10 committeemen. The executive castle being composed of that many members, its edicts could not be changed unless 36 of those members voted for such change. The fact therefore that the president might request the 10 committeemen to refrain from voting, or that the 10 committeemen and the 13 officers should all refrain from voting, would not add to the powers of the regularly elected delegates to amend any of the edicts of the society. If we exclude the committeemen, the result is the same. It is not claimed that the 13 officers elected by the conven-

tion of June, 1901, promised, or were even requested, to refrain from voting. Their right to vote is not questioned. Excluding then the 10 committeemen, it would still be impossible for the 25 delegates, alone, to make any change in the edicts and laws which previously had been adopted by the unrepresentative body of 1901. There being 25 delegates and 13 officers, a total of 38, in the convention of 1905, it would require 26 votes to change any of the edicts and by-laws of the society, so that the officiary of this society elected at a convention in June, 1901, composed of 9 delegates and 16 officers, could at the convention of 1905 effectually balk any attempt at amendment on the part of the delegates. As we view the matter, the question of whether the committeemen or the officers, or both, refrained from voting on the single question of amending the edicts is immaterial. The test of whether or not defendant had a representative form of government is not whether certain members of its governing body refrained from voting on some particular question, but, rather, whether they had a voice and the right to vote on all questions of government. That the officers and committeemen elected and appointed as herein shown did have such right is beyond dispute.

It is insisted by defendant that the convention of September, 1905, amended section 9 of its laws and edicts by adding the words, "Provided, however, only elected officers and the accredited delegates from representative castles shall be entitled to vote," and that by such amendment appointive officers and committeemen would not thereafter be entitled to that right. If this change in section 9 would have the effect of subsequently giving defendant a representative form of government, which we do not decide, it cannot avail defendant in this case, for two reasons: (*a*) The statute under which defendant is operating provides: "Every such society shall file with the auditor of public accounts a copy of its constitution and by-laws duly certified to by the secretary or corresponding officer, and before any amendment, change or alteration

thereof shall take effect or be in force a copy of such amendment, change or alteration, duly certified to by its secretary or corresponding officer, shall be filed with the auditor of public accounts." Ann. St. sec. 6656. The record shows that a copy of the amendment of the edicts and by-laws of the convention of September, 1905, was not certified by the chief secretary and filed with the auditor of public accounts until December 1, 1905, so that they did not become effective until long after the adjournment of the convention which it is claimed made the change in regard to suicide. (*b*) It further appears from the testimony of the chief secretary that when the change was made by the convention of September, 1905, the rules and regulations provided for by the convention of June, 1901, were followed. It also appears in the record that the officers elected at the convention of September, 1905, were not installed in office until the closing act of that convention on the last day of its session. It therefore appears that that convention, during its entire session, was subject to the control of officers and committeemen which rendered its proceedings, as to any amendment of its laws and edicts at least, unrepresentative in character and void.

It seems useless to pursue this matter further. Viewed from any standpoint, the executive castle, as it existed in September, 1905, was not a representative body, and as so constituted the defendant did not have a representative form of government. It follows, therefore, that the attempted change of the by-laws in September, 1905, was as ineffectual as the attempted change thereof in June, 1901. There being nothing in the certificate of membership issued to the assured, or in the edicts and by-laws of the defendant as they existed at the time he was admitted into membership and received his certificate, which exempted the defendant from liability in the event of suicide, we must hold that the judgment of the district court was right, and it is

AFFIRMED.

WILLIAM L. ARMSTRONG, APPELLEE, V. CITY OF AUBURN, APPELLANT.

FILED JUNE 25, 1909. No. 15,759.

1. **Cities:** IMPROVEMENTS: LIABILITY. "If a municipal corporation rightfully causes an improvement to be constructed or other work to be done, whether by an independent contractor or otherwise, it is bound to take notice of the character of the work and its condition, whether safe or dangerous, and is bound to take notice of the condition, whether safe or dangerous, of its streets and grounds as affected by the prosecution or performance of such improvement or work." *City of Beatrice v. Reid*, 41 Neb. 214.

2. **Trial:** INSTRUCTIONS. "An instruction which, if standing alone, might be erroneous, may not be so when considered with the other instructions upon the same subject given in connection therewith." *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726.

3. **Evidence** examined and referred to in the opinion *held* sufficient to sustain the verdict of the jury and judgment of the court.

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

Edgar Ferneau and *H. A. Lambert*, for appellant.

E. B. Quackenbush, contra.

FAWCETT, J.

This action was brought in the district court for Nemaha county to recover for personal injuries sustained by reason of the negligence of defendant in removing a bridge or covering of a large culvert, in Main street in said city, and leaving the same, during the night following the removal of said bridge, without barriers to prevent persons traveling over said street from walking or driving into said culvert, and without any lights or signals to warn them of its dangerous condition. The answer is a general denial. There was a verdict for plaintiff for $1,500. From a judgment on such verdict, defendant prosecutes this appeal. As the answer does not tender any

defense of contributory negligence, that question is eliminated from the case, leaving the only questions to be considered certain alleged errors in the admission of testimony, the instructions given and refused, and the sufficiency of the evidence to sustain the verdict. We will consider these points in the order named.

The only error in the admission of testimony seriously complained of is in permitting plaintiff's father, who was the chief owner of the company by which plaintiff was employed, to testify that, subsequent to the time of plaintiff's injury and after his marriage, the witness, in behalf of his company, denied plaintiff a raise of salary, for the reason that he was not able to perform the work that would justify an increase in his salary from the firm, and that the reason he was not able to perform the work in such manner was on account of his being unable to lift and do heavy work that he should do. We are not prepared to say that this was error; but, even so, the amount of the verdict is such as to satisfy us that the testimony could not have influenced the jury. The reason for this holding will appear in our discussion of the weight of the evidence.

The instructions given by the court were all submitted by the parties to the action, some of them by plaintiff, and the others by defendant. We do not think any good purpose could be served, either to the parties or to the profession, by setting out the instructions. We deem it sufficient to say that two of the instructions requested by plaintiff would ordinarily, in a suit for personal injuries by reason of defects in a public street, be somewhat defective; but, in the present case, they cannot be complained of, because defendant tendered, and the court gave, instructions which covered the imperfections of those requested by plaintiff. In such a condition of the record, error will not lie. *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726. Taken as a whole, we think the instructions fairly submitted the case to the jury under the pleadings and the evidence.

The evidence shows that the work of removing the plank covering of the culvert was done by the street commissioner of defendant city; that, when the men quit work at 6 o'clock on the evening of the accident, they did not put up any barricades or leave any lights or danger signals of any kind to warn people of the dangerous pitfall which had been created in the middle of the public street. Counsel for defendant sought to prove that the street commissioner instructed the men during the day to do these things, and that the city had no notice or knowledge until after the accident that the orders of the commissioner had not been obeyed. This evidence was properly excluded. The defendant, having created this dangerous pitfall in the middle of the public street, was bound to see that the public was safeguarded against the same, and could not escape responsibility by charging the workmen engaged upon the work with that duty. The same would be true even if the street commissioner was doing the work under contract. *City of Beatrice v. Reid*, 41 Neb. 214. The evidence shows that it was a dark night; that between 7:30 and 8 o'clock plaintiff, in company with a young lady, was driving along the main street in a single-horse buggy, and plunged into this culvert; that the culvert was between six and seven feet deep, with loose rock at the bottom; that plaintiff was precipitated upon these rocks, and received severe injuries; that he was confined to his bed for about eight days, and had, at divers times subsequent thereto, been confined to his bed for short periods of time, and during all the time from the date of the injury to the time of the trial, a period of over two years, had constantly suffered pain, particularly in rainy weather. The testimony of the attending physicians who had examined him on different times, one of such examinations being just prior to the commencement of the trial, was that his limb had become shortened about three-quarters of an inch; that the hip had become atrophied, and that the injury would probably be permanent. He was not able to resume his duties in the store

where he was employed for a period of two months after the injury, and at different times had been compelled to lay off for short periods of time. The evidence of the serious character of his injuries is very full, and, in our judgment, quite conclusive, so much so that we think a verdict for even a larger sum would have been justified thereby.

One of the elements of plaintiff's demand was the sum of $79, for which he had become obligated for medical services, medicines, and appliances. While the evidence shows that plaintiff had obligated himself for such an amount, defendant contends there is no evidence in the record to show that $79 is the reasonable value of such services, medicines, and appliances. In this contention we think defendant is right, and, as that sum may have been allowed by the jury in making up the amount of its verdict, it should be deducted therefrom.

Finding no other error in the record, the judgment of the district court is affirmed, on condition that plaintiff within 30 days from this date file a remittitur for the sum of $79. Failing so to do, the judgment will stand reversed.

JUDGMENT ACCORDINGLY.

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

HERMAN BOCHE V. STATE OF NEBRASKA.

FILED JUNE 25, 1909. No. 15,616.

1. **Witnesses:** IMPEACHMENT. Proof of specific acts is not ordinarily permissible upon the question of general reputation.
2. **Criminal Law:** INSTRUCTIONS. The instructions discussed in the opinion *held* to be without prejudice to the rights of the accused.
3. **Witnesses:** CROSS-EXAMINATION. A cross-examiner is not bound by the answer of a witness to a question upon a subject that is germane to the main issue.

4. ———: IMPEACHMENT. A witness testified to a fact material to and in support of one of the defenses interposed by the defendant, and on cross-examination stated that he had communicated the fact in question to A and B. The state, over objections, was allowed to show by A and B that the witness had never made such statements to them. *Held*, That the court in the exercise of a sound judicial discretion properly admitted the evidence.

ERROR to the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

William V. Allen, M. D. Tyler and *Burt Mapes,* for plaintiff in error.

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

DEAN, J.

Herman Boche, who is hereinafter called the defendant, was charged with murder in the first degree, tried and convicted of manslaughter, and sentenced to serve ten years in the penitentiary. To reverse the judgment he prosecutes error to this court. The record is voluminous and, among others, discloses these facts: The defendant is a farmer who, at the time of the trial and for many years prior thereto, resided within about three miles of Norfolk. He was an intimate friend of Frank Jarmer, the deceased, who was a saloon-keeper in that city, and is shown to have been a man in moderate circumstances, while the defendant is a man of considerable means. In the afternoon of April 30, 1907, the defendant was in Norfolk and visited the saloon of Jarmer where he drank some liquor. He then returned to his home, and after supper returned to Norfolk on foot, and, he testifies, with about $800 in currency on his person, out of which it was his intention to loan to Jarmer $750, in pursuance of a former arrangement or understanding between them, to procure a liquor license for the fiscal year then about to begin, provided the latter would give him sufficient security for the loan.

The defendant's son, Walter, corroborates the defendant's testimony in that he says he saw his father getting, as he expressed it, "quite a big bunch" of money at home before he left for Norfolk in the evening, but he does not know how much. And the defendant's wife testifies that she missed the money the next day from the place where it was usually kept. It is in evidence that the defendant, before leaving home to go to Norfolk in the evening of April 30, procured a revolver and took it with him. The fiscal year of 1906 was about to close, and the testimony tends to show that the deceased was fearful that he would be unable to raise the sum of $750, which would be necessary to procure a liquor license for the ensuing year, and that the deceased was under the impression that his saloon license for 1906 would expire on May 1, 1907, thus necessitating immediate payment of his license fee or the closing up of his saloon in Norfolk. The proof also shows that the defendant remained in Jarmer's saloon until about midnight, when the place was closed, and the deceased and the accused went to a restaurant to procure a lunch. The defendant testified that soon after arriving at the restaurant he left the room for a few minutes, and returning and partaking of some coffee complained to deceased that it was not good and "tasted awful bitter and bad," but no other witnesses testified to this effect. After they partook of the refreshments Jarmer procured a hack driven by one Lee Vroman, who drove the defendant and the deceased to a notorious resort kept by one Edna Ingham just outside of the city limits, where they remained until about 5 o'clock the next morning. The evidence shows that the defendant was so badly intoxicated when he arrived at the resort that he could not control his movements. It is shown that he expended something like $40 in that place, purchasing a large amount of beer at $1 a bottle for the use of the inmates and visitors, and that he continued to drink beer during the night, and at 5 o'clock in the morning was in a state of profound stupor.

The testimony of the state is to the effect that at about 5 o'clock in the morning of May 1, Edna Ingham desiring to close up her place, the visitors prepared to depart, and that Boche at that hour was sitting in a chair in the front room, and, while he was apparently in a condition of extreme intoxication, Jarmer pulled him from his chair onto the floor and dragged him across the room, through the door and across the porch, and tried to place him in Vroman's hack that was in waiting there, and that the defendant resisted, but finally was overpowered and placed therein. It is shown that he got out and started away, and that the defendant wanted to walk and the deceased wanted to ride, and that the former refused and resisted the attempts of the deceased to induce him again to get into the hack. Boche then drew his revolver and deliberately shot Jarmer down, exclaiming as he did so: "God damn you, I fix you, God damn son of a bitch." He completed the tragedy while his companion and friend was helpless on the ground begging for mercy. Jarmer was unarmed, and died within an hour. After his death but a small amount of money was found upon his person, perhaps not to exceed $10. The defendant testified that he could not remember what transpired after he drank the coffee at the restaurant until he regained consciousness outside of the lewd resort early the following morning, and that even then his mind was cloudy, and his present recollection of the transaction is uncertain; but he testified that he remembers that he was attacked by two men who choked him and put their hands in his pockets, and that he then learned that his money was gone, and that upon making this discovery he at once drew his revolver and fired in self-defense, and only remembers that he was then relieved from further attack and started for home, and does not know where he went other than that he found himself the following night in a pig pen, and from thence went home.

One theory advanced by the defendant was that Jarmer, knowing that he had a large amount of money on his per-

son, plied him with intoxicating liquors at the saloon, and drugged his coffee at the restaurant and induced him to drink large quantities of liquor at the resort where they spent the remainder of the night, and in the morning, in company with the hack driver, assaulted and robbed him. The state produced two eyewitnesses to the homicide, Vroman, the hack driver, and Edna Ingham, the keeper of the resort. Dr. Mackay testified for the defense that shortly before the shooting; possibly a day, he was in Jarmer's saloon, and that while Boche was in there drinking Jarmer called him, the witness, aside and said, referring to the defendant, he knew a fellow that had money that "I can get, if you give me some drops," but that at the time he thought Jarmer was either joking or intoxicated, and did not give him any drugs as suggested. On cross-examination the witness was asked if he had told any one about Jarmer's statement, and he named several persons to whom he said he thought he had repeated what Jarmer had said to him. Two of those individuals were called by the state on rebuttal, and, over defendant's objections, permitted to testify that Mackay never made the statements to them.

The defendant insists the court erred in permitting this testimony to go to the jury, and argues that it is collateral to the main issue. The rule is elementary that, where a cross-examiner asks a question and the answer elicited is a response that is wholly collateral, he is bound by the answer and cannot call another witness to contradict him. The enforcement of the rule is in consonance with reason, and to relax it would tend to interminably protract the trial of even the most trivial case. As to what is or is not collateral to the issue in the immediate case on trial must then, in the exercise of a sound judicial discretion, determine the application of the rule. This point, owing to its important bearing in this case, has given us some perplexity, but after a careful examination we conclude the trial court did not err in permitting the testimony com-

plained of by the defendant to go to the jury for the reasons herein shown. The inquiry did not, strictly speaking, relate to collateral matter. Its purpose was to turn a light directly upon certain testimony adduced upon a vital point to test its probative value. It was competent for the jury to have before it every circumstance obtainable that would aid in the discovery of the truth upon every material feature of the case. As we view it, the testimony of Mackay on this point was important, and, in view of the weight of authority, it was competent for the trial court in the exercise of a sound judicial discretion to permit the evidence complained of to be introduced. One of the reasons for the adoption of the rule for excluding inquiry into purely collateral matter, besides the commendable one of brevity, is that the juror's mind may not be diverted from the consideration of the main issue. The holding that the district court did not err in permitting the witnesses to testify in rebuttal on the part of the state, that Mackay did not tell them about Jarmer's request for "knock-out drops," is in no sense a departure from the rule, nor a violation of any of the reasons for its adoption. 1 Wharton, Law of Evidence (3d. ed.), sec. 561: "It has been held that a witness may be asked whether he has not a strong bias or interest in the case, and, if he denies such interest or bias, that he may be contradicted by evidence of his own statements, or of other implicatory acts. * * * It is true that we have cases disputing this conclusion, but it is hard to see how evidence which goes to the root of a witness's credibility can be regarded as collateral to the issue."

Smith v. State, 5 Neb. 181, is a murder case that was twice before this court. One Crowell, a witness for the state at the second trial, was asked if he did not testify on the former trial that at the time of the shooting he was only 10 or 15 rods, at the most, from the parties. He answered in effect: I said it was 10, 15, 20, or, may be, 30 rods. The defense called a witness who was present at the former trial and offered to prove that Crowell then

testified he was 10 or 15 rods from the parties at the time of the shooting. This court held the offer was properly denied because, "so far as appears from the record, Crowell could see what transpired, and hear the conversation of the parties, as well at thirty as at ten or fifteen rods. The question of the distance, at which the witness stood, is not a material inquiry in the case; at the most it is a mere expression of opinion."

George v. *State,* 16 Neb. 318, is a case wherein the defendant was charged with having committed the offense of robbery upon the person of one Louis Brown on November 19, 1883. Upon his cross-examination the defendant was asked, in substance, if he had not said to one Mamy in the Tivoli garden last August, in the hearing of one Frankie Driscoll: "This feller had got money, come and get into the hack, and I will drive you out, and we will have a chance to get it, or fix him, or anything of that sort?" The defendant answered: "No, sir." After the defense rested, the state called Frankie Driscoll and proved by her that the defendant had used the language attributed to him. The case was reversed on the ground that the defendant was being tried for the commission of an alleged offense which occurred November 19, 1883, and was interrogated and contradicted concerning a statement purporting to have been made by him in August of the same year, the court properly holding that testimony in regard to the August incident was collateral matter.

Myers v. State, 51 Neb. 517, is a case where the defendant was charged with the offense of statutory assault. One Phena Thams, a witness for the defense, on her cross-examination was interrogated with reference to five or six alleged occasions of immodest conduct on her part with one Thompson, a negro. This question, as the last of the series, was then put to her: "I will ask you if Frank Cross did not overtake you, or find you, and one Charles Burnham on the public highway right north of Utica, embracing each other?" The questions were all objected to, but the witness, being required to answer, denied each of the

charges. The state in rebuttal called a witness and proved by him the substance of the charge conveyed in the last question, and this court, speaking by IRVINE, C., held that the inquiry was concerning collateral matter, and therefore erroneous.

Gulf, C. & S. F. R. Co. v. Matthews, 93 S. W. 1068 (100 Tex. 63): "In an action against a railroad company for negligently causing the death of a person walking on its tracks, a witness for plaintiff testified that deceased, or a person of the same name and answering his description, had registered at the hotel where witness was clerk the night before the accident, and had left there the following morning, going in the direction of the place where deceased was killed. On cross-examination the witness testified that he had told but one person of these facts prior to being examined as a witness. *Held,* That, to affect his credibility, it was competent to ask him on cross-examination if he had not read newspaper reports and heard rumors to the effect that deceased had been killed and that it was suspected that he had been foully dealt with, and also to introduce evidence that the person whom the witness claimed to have told about his knoweldge of the whereabouts of deceased was, at the time the witness made the statements, reported to be dead."

Evansich v. Gulf, C. & S. F. R. Co., 61 Tex. 24: "While the rule that only such evidence as is relevant to the matter in issue is admissible applies to the cross-examination as well as the examination in chief of a witness, it is not applied with the same strictness to a cross-examination. Any fact which bears on the credit of a witness is a relevant fact; and this, whether it goes to his indisposition to tell the truth, his want of opportunity to know the truth, his bias, interest, want of memory, or other like fact."

State v. McKinney, 31 Kan. 570, is a case wherein the court, speaking by Brewer, J., says: "Where, on the trial of a person charged with murder, more than a year after the homicide a witness for the defendant had testified

to certain material facts, * * * *held,* that the state might on cross-examination ask the witness whom he told, if any one, of these facts; and, upon certain persons being named, might also, in the discretion of the court, prove by such persons that nothing of the kind was ever told them."

From the reasoning in the foregoing decisions as applied to the facts in the present case we are of opinion that the matter in question was not collateral to the inquiry. And it seems clear to us that the facts in the present case are distinguishable from those in *Smith v. State, George v. State,* and *Myers v. State, supra.* And they are also distinguishable from the facts in *Frederick v. Ballard,* 16 Neb. 559, *Carter v. State,* 36 Neb. 481, and *Johnston v. Spencer,* 51 Neb. 198.

The instructions given by the court are vigorously assailed, and the refusal to give instructions submitted by the defendant is assigned as error. The motion for a new trial first filed did not specifically complain of those rulings of the court, but an amendment to the motion was filed by leave of court. Defendant's counsel made a showing that they were unavoidably prevented from filing the amendment within three days, and it seems to have satisfied the district court. We will therefore treat the amendment as if it had been filed in time.

Complaint is made with reference to the court's instructions on the subject of manslaughter, which is as follows: "If you fail to find the defendant guilty of murder in the second degree, and do find, beyond a reasonable doubt from a consideration of all the evidence in this case and the instructions given you, that the defendant at the time and place charged in the information did unlawfully kill the said Frank H. Jarmer, without malice, upon a sudden quarrel, then you will find the defendant guilty of manslaughter, and so say by your verdict." The statute defines manslaughter as: "If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed

guilty of manslaughter; and, upon conviction thereof, shall be imprisoned in the penitentiary not more than ten years nor less than one year." Criminal code, sec. 5. As we understand counsel for defendant, they argue that unless the slayer is engaged in an unlawful act independent of the homicide, he cannot be found guilty of manslaughter. The statute, as we view it, does not change the common law which defines that crime as: "The unlawful killing of another, without malice * * * upon a sudden heat; or involuntarily, but in the commission of some unlawful act." 4 Blackstone's Commentaries (Hammond), *191. The Ohio code on this subject is the same as that of Nebraska. Both the state and the defense rely on *Sutcliffe v. State,* 18 Ohio, 469, as sustaining their respective positions. The question determined in that case was concerning the sufficiency of one count in an information which purported only to charge manslaughter, and does not, as we understand it, support the defendant's contention herein. In the case at bar, although the charge of manslaughter is not set out in the information in apt words, yet it is, as a matter of law, contained in the charge of murder in the first degree. In *Weller v. State,* 19 Ohio C. C. 166, in considering the Ohio statute, it was held that, to convict a defendant of manslaughter, it must be proved *either* that the killing was done in a sudden quarrel, or while the slayer was in the commission of some unlawful act, and such we consider to be the law of Nebraska. In the first class of cases referred to in the statute the homicide must have been intentional, but in sudden passion or heat of blood caused by a reasonable provocation, and without malice; in the latter clause the killing must have been unintentional, but caused while the slayer was committing some act prohibited by law and other than rape, arson, robbery or burglary. Criminal code, sec. 5; Clark and Marshall, Law of Crimes (2d ed.), sec. 255 *et seq.* It may be that in some cases the mere use of the word "unlawful," in defining the crime of manslaughter, might leave the

jury to conjecture what was or was not unlawful, but we do not think there was or could have been any misapprehension on the part of the jurors in the present case, because they were fully instructed as to self-defense, insanity and intoxication, and a consideration of all of the instructions together would advise them fully concerning the alleged unlawful killing of Jarmer. An instruction very like the one considered in the present case was commended in *Savary v. State,* 62 Neb. 166, and in *Bohanan v. State,* 15 Neb. 209.

The defendant complains of the instructions upon "reasonable doubt." The question was perhaps more elaborately discussed in the instructions than was necessary, but we fail to find anything upon this point which could work to the prejudice of the defendant, and they do not present conflicting views. If the question had already been sufficiently elaborated, the instruction asked by the defense should have been withheld. The jury were correctly instructed upon this point.

Proof of specific facts was attempted to be introduced by the defendant to show that Grace Cole, who is shown to be a courtesan and inmate of the Ingham resort, and Lee Vroman, to whom she was engaged to be married, had both testified falsely in a divorce proceeding wherein the Cole woman was a party, to the effect that she was pure and chaste. Complaint is made by the defendant that he was not permitted to introduce this testimony. He also complains because the trial court sustained an objection to the following question propounded to the witness Mackay "tending to show the vicious character and habits of Jarmer," and that the deceased was "irritable, quarrelsome and persistent": "You may state one instance, or instances, of assaults or affrays in which Jarmer was engaged which came under your observation a short time, say within a year or less, before the alleged shooting in this case." It is elementary that ordinarily, and as a rule, it is not permissible in a proceeding that has for its end the impeachment of the veracity of a wit-

ness or the impeachment of his general reputation as a peaceable and law-abiding citizen to prove specific facts or instances.

It appears to us from a careful examination of the record that the jury may have concluded from all the evidence that Boche, inflamed with intoxicants, was piqued and annoyed because his companion interfered with his personal liberty in his endeavor to persuade him to quietly leave the scene of their midnight revel, and slew his friend in resentment for his interference. The jury tempered their verdict with mercy, and in view of the record we are not disposed to disturb it. The defendant has assigned 238 errors, and we have examined all of them with care, but must decline to discuss them all specifically, as it would extend this opinion to an unwarranted length.

We find no reversible error in the record, and the judgment must be, and it hereby is,

AFFIRMED.

ROOT, J., dissenting.

I cannot assent to the holding in this case. It seems to me that the state ought not to have been permitted to contradict Mackay's testimony on cross-examination to the effect that he had repeated to certain individuals the statements he claimed Jarmer had made to him preceding the tragedy. The cross-examination was upon a subject collateral to the inquiry, and the state was bound by the answers given. The principle is stated in *Attorney General v. Hitchcock,* 1 Wels., H. & G. Exch. (Eng.) *91: "The test whether the matter is collateral or not is this: If the answer of a witness is a matter which you would be allowed on your part to prove in evidence—if it have such a connection with the issue, that you will be allowed to give it in evidence—then it is a matter on which you may contradict him." Proof that Mackay had or had not repeated out of court those statements would in no manner prove or tend to prove their existence, nor to establish the witness' temper or disposition toward, or interest in,

Boche or the prosecution. The rule has been recognized and adopted in this court in *Carter v. State,* 36 Neb. 481; *Johnston v. Spencer,* 51 Neb. 198; *Myers v. State,* 51 Neb. 517. Text-writers and courts generally hold that, if a witness is interrogated on cross-examination upon a subject collateral to the issue, counsel will not, over objection, be permitted to prove that the witness had not answered truthfully in respect to said collateral subject. *Rosenbaum v. State,* 33 Ala. 354; *Cokely v. State,* 4 Ia. 477; *Fogleman v. State,* 32 Ind. 145; *Welch v. State,* 104 Ind. 347; *Huber v. State,* 126 Ind. 185; *State v. Benner,* 64 Me. 267; *Davis v. State,* 85 Miss. 416, 37 So. 1018; *Stokes v. People,* 53 N. Y. 164; *State v. Patterson,* 2 Ired. Law (N. Car.), 346; *State v. Roberts,* 81 N. Car. 605; *State v. Davidson,* 9 S. Dak. 564; 1 Greenleaf (Redfield's), Evidence, sec. 462; Gillett, Indirect and Collateral Evidence, sec. 90; Starkie, Evidence (10th ed.), p. *200; Stephen (Beers), Digest of the Law of Evidence, art. 130, p. 450; Underhill, Criminal Evidence, sec. 241; Wharton, Criminal Evidence (8th ed.), sec. 484. This rule which has heretofore been recognized by this court is simple, easy to understand, expedites trials and serves the ends of justice. Jarmer's intention to rob defendant and his preparations to that end were material facts for the defense, and any ruling that permitted Mackay to be improperly contradicted by incompetent evidence was prejudicial error.

The thirteenth instruction given by the court on its own motion is to all intents identical with the one criticised by this court in 1905 in *Lillie v. State,* 72 Neb. 228, and with those condemned thereafter in *Mays v. State,* 72 Neb. 723; *Junod v. State,* 73 Neb. 208; *Keeler v. State,* 73 Neb. 441; *Clements v. State,* 80 Neb. 313. Although none of those cases were reversed, it was held that the instruction criticised should not have been given. In the instant case the trial court on its own motion also gave two other lengthy instructions upon the same subject, and therein, as the writer understands them, cautioned the

jurors not to give any considerable weight in their deliberations to the principle of a reasonable doubt. Those instructions are in addition to the one given at defendant's request, to which reference is made in the opinion of the court. Defendant's testimony is in many particulars in sharp conflict with that of the witnesses produced by the state, and it was material for him that the jurors should have been permitted to give the principle of a reasonable doubt such weight as it was entitled to in the exercise of their unhampered judgment. Especially is this true when we consider that the witnesses who were present when Jarmer was shot, and who testified for the state, are a notorious prostitute and an impecunious procurer who had theretofore subsisted in part upon the earnings of lewd women, but shortly after the tragedy had negotiated for the purchase of a hack line in Norfolk, and offered to make a considerable cash payment down to bind the bargain.

The trial court was in most respects eminently fair and exceedingly patient, but nevertheless, through inadvertence evidently, he did not, it seems to the writer, accord defendant a fair trial in the particulars above referred to, and therefore a new trial should be granted.

LEONARD A. DAVIS, APPELLANT, V. SCHOOL DISTRICT OF THE CITY OF SOUTH OMAHA, APPELLEE.

FILED JUNE 25, 1909. No. 15,691.

1. **Evidence:** EXPERTS. The opinion of expert witnesses in a case involving the value of the services of an architect, based upon facts in evidence before the jury, need not be substituted by such jury for its own deliberate judgment.

2. ———: ———: VALUE OF SERVICES. Where a witness skilled in architecture testifies solely as an expert regarding the value of the services of an architect, the same rule will be applied to his testimony that is ordinarily applied to the testimony of expert witnesses in other professional employments.

3. ——: ——: ——. A jury may decline to accept the opinion of expert witnesses upon the value of an architect's services, even though uncontradicted, and in the light of their own experience and general knowledge, and in the exercise of their independent judgment, may base their verdict as to the value of such services upon their own deductions from all of the evidence before them of services performed.

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

T. J. Mahoney and *J. A. C. Kennedy,* for appellant.

A. H. Murdock and *A. C. Pancoast, contra.*

DEAN, J.

Leonard A. Davis, plaintiff and appellant, is an architect who was employed in that capacity by the board of education of the school district of South Omaha to prepare plans and specifications for the construction of a high school building for the defendant school district upon what is known as the "Hoctor site." In pursuance of his employment, he performed the service, and, the defendant refusing to pay the sum demanded by him, this suit was begun. The plaintiff alleges that the rate of compensation which he was to receive was not fixed other than that he was to be paid the usual, reasonable and customary compensation for such services, which is 3½ per cent. of the cost of labor and material in the construction of the proposed building, and that the cost of constructing complete such a high school building as that contemplated by the plans and specifications prepared by him, including all labor and material necessary for its occupancy, would have been not less than $160,000, and that his compensation upon the basis of 3½ per cent. of the above sum is $5,600, which he maintains is the usual, reasonable and customary fee for like services. He admitted having received $1,900 from the school district, but alleged there was still due to him a balance of $3,700 for

his services, for which he prayed judgment. The question of services as a supervising architect during the course of construction does not enter into the consideration of this case. The answer denied generally and specifically the allegations of the petition, and prayed for a judgment of dismisal. Issues were joined, and upon the trial the plaintiff was awarded a verdict for $1,127.48, upon which judgment was rendered. The defendant took no exceptions to the judgment, but the plaintiff, being dissatisfied with the amount of the recovery, brings the cause to this court for review.

Upon the question of the probable cost of the construction of a high school building to be erected in pursuance of the plans and specifications furnished by the plaintiff, the record discloses that the allegations of the petition were fairly supported by the testimony. Upon the question of compensation, the plaintiff's testimony was supported by that of four or five skilled architects called by him as expert witnesses, and who testified, in answer to hypothetical questions and from an inspection of the exhibits, that the customary, usual and reasonable value of an architect's services such as those rendered by the plaintiff is 3½ per cent. of the cost of the entire building finished, complete and ready for occupancy, and that this rate is general throughout the country. The testimony of some of the expert witnesses is to the effect that this fee is prescribed by the "American Institute of Architects," one or more of them being active members of that organization.

The defendant introduced no direct evidence to contradict the testimony offered on the part of the plaintiff upon the question of the reasonableness of the rate of compensation, and the latter maintains that for this reason, among others, the verdict of the jury cannot be sustained under any system of computation that may be adopted, except upon the theory that the jury limited the amount of the recovery to compensation for preliminary sketches and drawings, and contends that, if this was the theory

of the jury, no legal justification therefor can be found in the record. The plaintiff also charges that the verdict may be accounted for because of prejudice and passion on the part of the jury.

Counsel for plaintiff argue that, in view of the evidence and the instructions, the jury should have merely confined their attention to the task of computing 3½ per cent. upon $160,000 and bringing in a verdict for that sum in favor of their client. They complain and charge that instead of doing this, the jury arbitrarily and in defiance of the undisputed testimony returned a verdict for less than 1 per cent. upon that sum. They concede that expert or opinion evidence is not always binding upon the jury, because there are many instances in which there are no fixed rules by which the value of services may be determined, concerning which experts are called upon to testify, such as the professional services of attorneys, but they contend that it is otherwise with reference to the professional services of an architect, the value of which they argue may be almost as certainly established and computed as the price of the most staple articles of commerce, and that for this reason, among others, the jury in the present case were bound by the expert evidence of skilled architects with reference to the value of the services of a brother architect, the same as it would be in a case involving the establishment of the usual and customary wage of brick layers, carpenters and trades workers generally, or "the going wage" of farm hands, where the testimony is all identical upon a given point and undisputed. They insist that the evidence upon this point submitted by them in behalf of their client's cause may not properly be designated opinion testimony.

We have examined the questions raised by plaintiff's counsel and the principles of law applicable thereto as presented by the record before us, and are unable to adopt their reasoning or to apply the distinctions to the evidence for which they contend. To do so would be to ignore and to set at naught the functions of the jurors

in the performance of a solemn duty imposed upon them by the law, by their consciences, and by their oaths. All of the facts in the case, including not only those which may properly be denominated the strictly professional services of the plaintiff, but also the work that was performed by three or four of his assistants and subordinates who were in his employ, were presented to the jury in detail by the plaintiff's testimony upon the direct and the cross-examination, and we are not prepared to say that the jury were not thereby fully enlightened and amply qualified to pass upon and properly determine the issues involved, nor are we disposed to say from the record presented to us that they did not give to all the material facts in evidence before them that careful and deliberate consideration to which they were entitled. The testimony does not show that the services that devolved upon the plaintiff in pursuance of his professional employment were unusually intricate or complicated, and it is disclosed that a part of the work was performed by some of his employees after the usual working hours and on holidays. We do not discover anything in the record to preclude the jury from the free exercise of its judgment as to the weight to be given to the expert testimony and the other evidence submitted. It may be that the court from a submission of the same facts would reach a different conclusion than that arrived at by the jury, but that is not the question before us. Adapting the language of *Kilpatrick v. Haley,* 6 Colo. App. 407, 41 Pac. 508, to the present case: "Expert testimony is entitled to consideration in connection with the facts upon which it is based, and is intended to assist the jury in reaching a conclusion upon the entire evidence; but they should give it only the weight to which, in the light of their own knowledge and experience, they may consider it entitled. Their judgment upon the facts is not to be supplanted by the opinions of witnesses."

It is elementary that there is a clear distinction in regard to a verdict that is based upon testimony con-

cerning facts which are within the personal knowledge of the witness and a verdict based upon expert or opinion testimony which gives to the jury the conclusion of the witness or the opinion he may have formed from a given state of facts. This distinction has long been clearly recognized by the courts, and we do not believe the facts in the present case exclude it from the application of this salutary rule. In a proper case the jury are bound by the evidence adduced in the former class, but the rule is not so unyielding in the latter. The trend of authoritative expression upon the subject of expert testimony does not lie in the direction of unduly enlarging the sphere of the expert witness in controversies involving facts that are not unusual or extraordinary, as herein presented, and for which the experience of the average citizen will form a criterion. A reason for this may be found in the fact that with the passing of the years the minds of men are being broadened by the diffusion of general knowledge in every department of human endeavor. To yield to the contention of plaintiff's counsel, and to hold that the work of the jury as argued by them "should have consisted merely of computing 3½ per cent. on $160,000, which would have given $5,600, deducting the $1,900 paid, and computing interest at 7 per cent. per annum on $3,700 from July 1, 1901, to May 6, 1907," would be equivalent to a denial of the right of the jury to exercise its judgment as to the weight to be given to the evidence before it upon questions of fact that are not unusually intricate, and to make of that important branch of our jurisprudence a mere assemblage of automatons selected and set apart for the merely formal purpose of recording the opinion of the experts who are called to testify. To such procedure we are not prepared to give our approval.

1 Wharton, Law of Evidence (3d ed.), sec. 454: "When expert testimony was first introduced, it was regarded with great respect. An expert, when called as a witness, was viewed as the representative of the science of which

he was a professor, giving impartially its conclusions. * * * Apart from the partisan temper more or less common to experts, their utterances, now that they have as a class become the retained agents of parties, have lost all judicial authority, and are entitled only to the weight which a sound and cautious criticism would award to the testimony itself. * * * In this sense we may adopt the strong language of Lord Campbell, that 'skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.'" *Head v. Hargrave,* 105 U. S. 45. Speaking for the court, Mr. Justice Field says: "To direct them (the jury) to find the value of the services from the testimony of the experts alone was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. * * * Other persons besides professional men have knowledge of the value of professional services; and, while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable. * * * The judgment of witnesses, as a matter of law, is in no case to be substituted for that of the jurors." In support of the rule the court in the above case cites: *Anthony v. Stinson,* 4 Kan. 211; *Patterson v. City of Boston,* 20 Pick. (Mass.) 159; *Murdock v. Sumner,* 22 Pick. (Mass.) 156. Justice Field cites this language from *Murdock v. Sumner* with approval: "The jury were not bound by the opinion of the witness; they might have taken the facts testified by him, as to the cost, quality and condition of the goods, and come to a different opinion as to their value." In *The Conqueror,* 166 U. S. 110, Mr. Justice Brown states the rule: "Testimony as to value may be properly received from witnesses who are duly qualified as experts, but the jury, even if

such testimony be uncontradicted, may exercise their independent judgment; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinions of scientific witnesses. * * * While there are doubtless authorities holding that a jury * * * has no right arbitrarily to ignore or discredit the testimony of unimpeached witnesses so far as they testify to facts, and that a wilful disregard of such testimony will be ground for a new trial, no such obligation attaches to witnesses who testify merely to their opinion; and the jury may deal with it as they please, giving it credence or not as their own experience or general knowledge of the subject may dictate." The following additional authorities cited by defendant's counsel fairly support the rule adhered to herein: *Guyon v. Brooklyn Heights R. Co.,* 97 N. Y. Supp. 1038; *McReynolds v. Burlington & O. R. R. Co.,* 106 Ill. 152; *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578; *Forsyth v. Doolittle,* 120 U. S. 73; *Bentley v. Brown,* 37 Kan. 14; *Stevens v. City of Minneapolis,* 42 Minn. 136; *Meyers v. Greer & Sons Realty Co.,* 96 Mo. App. 625, 70 S. W. 914.

Hull v. City of St. Louis, 138 Mo. 618: "An instruction that told the jury that they are not bound to accept the opinion of expert witnesses, but may give such opinions the weight to which the jury may deem them entitled, 'or may altogether disregard such opinions if from all the facts and circumstances in evidence they believe such opinions unreasonable,' is *held* on rehearing to be proper. Following *City of St. Louis v. Ranken,* 95 Mo. 189."

Jones & Williams v. Fitzpatrick, 47 S. Car. 40: "The testimony of experts is merely the expression of opinions, and it is not error in a circuit judge to refuse to set aside a verdict because the amount found by the jury was much less than the experts (the only witnesses examined as to the value of services) thought the services were worth."

We have searched the record, and are unable to discover any reversible error upon the points complained of by the plaintiff. The judgment of the district court is therefore

AFFIRMED.

MAGGIE MCELROY, APPELLANT, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE.

FILED JUNE 25, 1909. No. 15,609.

1. **Insurance:** PLACE OF CONTRACT. Where the parties to an insurance contract are in different jurisdictions, the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into.

2. ———: LOCAL CONTRACTS: LAWS OF FOREIGN STATES. Insurance business transacted in this state by New York insurance companies without any provision that the New York laws shall govern is not subject to the provision of the New York statute requiring a notice to be mailed to the policy holder in that state as a condition of forfeiture for nonpayment of premiums.

3. ———: PREMIUMS: AUTHORITY OF AGENT. The agent of an insurance company cannot by oral contract with the assured waive the express terms of the policy and extend the time of payment of a premium, when the policy provides that none of its terms can be varied or modified, nor any forfeiture waived nor premiums in arrears received, except by agreement in writing signed by the president, vice-president, secretary or assistant secretary.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

A. N. Sullivan, for appellant.

J. B. Strode, contra.

CALKINS, C.

This was an action upon a policy of life insurance issued by the defendant upon the life of one Julia Mc-

Elroy, in which policy the plaintiff was named as beneficiary. The defense was that the policy had been forfeited for non-payment of a semiannual premium which fell due December 28, 1906, and remained unpaid at the time of the death of the assured, which took place February 27, 1907. There was a trial to a jury, upon which the court directed a verdict for the defendant, and from a judgment entered thereon the plaintiff appeals.

1. It is conceded that, if the contract is to be considered as made in and construed by the laws of this state, the policy was by its express terms forfeited by the failure to pay the premium in question, unless the time of such payment was extended or such forfeiture waived. The defendant is a New York corporation, and there was in force in that state at the time of the issuance of the policy in question a statute regulating the business of life insurance, which, among other things, provided: "No life insurance company doing business in this state shall within one year after the default in payment of any premium, instalment or interest declare forfeited or lapsed any policy hereafter issued * * * unless a written or printed notice stating the amount of such premium * * * due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured * * * at his or her last known post office address in this state. * * * The notice shall also state that, unless such premium * * * shall be paid * * * by or before the day it falls due, the policy and all payments thereon will become forfeited and void." There was an attempt to give the notice required by this statute, but it is claimed it was so imperfect as not to amount to a compliance with the above quoted provisions. The question is therefore presented whether the rights of the parties under the policy sued on are to be determined by the laws of this state or those of New York. It is a general principle that, if the parties to an insurance contract are in different jurisdic-

tions, the place where the last act is done which is necessary to give validity to the contract is the place where the contract is entered into. *Antes v. State Ins. Co.,* 61 Neb. 55; *Bascom v. Zediker,* 48 Neb. 380; *Mutual Life Ins. Co. v. Cohen,* 179 U. S. 262. In the body of the policy sued on it is provided that no obligation is assumed by the company until the first premium has been paid, nor unless upon the delivery of the policy the assured is living and in sound health; and in the application, which is a part of the policy, there is inserted the stipulation: "I further agree that the company shall incur no liability under this application until it has been received, approved, and the policy issued and delivered, and the premium has actually been paid to and accepted by the company during my lifetime and while I am in good health." In this case the policy was sent from the company's home office in New York to its agent in Nebraska, who delivered the same to the assured upon the payment by her of the first premium, at Plattsmouth, Nebraska, on the 28th day of July, 1905. Applying the principle above quoted to these facts, the contract of insurance in question must be considered a Nebraska, and not a New York, contract.

2. The effect of this statute upon policies of insurance issued by New York companies upon the lives of persons residing in other jurisdictions has been the subject of consideration in the courts of California, Washington, Texas, and the supreme court of the United States. *Harrigan v. Home Life Ins. Co.,* 128 Cal. 531; *Griesemer v. Mutual Life Ins. Co.,* 10 Wash. 202; *Metropolitan Life Ins. Co. v. Bradley,* 98 Tex. 230, 82 S. W. 1031; *Mutual Life Ins. Co. v. Cohen,* 179 U. S. 262; *Mutual Life Ins. Co. v. Hill,* 193 U. S. 551. In the California case above referred to, which was decided in August, 1899, it was held that the provision of the New York statute prevented the forfeiture of a policy issued under such circumstances without the notice therein provided for. In each of the other jurisdictions an opposite conclusion was reached.

In *Mutual Life Ins. Co. v. Cohen, supra,* there was a very full consideration of the subject in an opinion by Brewer, J., with the reasoning of which we are satisfied. It does not appear that this question has been before the court of appeals of New York; but the supreme court has lately had it under consideration in a case where a policy was issued and delivered in the state of New York to a person who resided in Chicago, and had no post office address in New York. *Napier v. Bankers Life Ins. Co.,* 100 N. Y. Supp. 1072. The conclusion there arrived at was that the provisions of the statute only applied to policies issued to persons residing and having a post office address in the state of New York. Attention is directed to the use of the words "in this state," which it appears were recently added to the statute by amendment, and it is urged that the use of these words tends to show that the intention of the legislative act was to confine the provisions of this section to policies issued within that state. We are satisfied that the forfeiture must be governed by the law as it exists in Nebraska; and, while it would be well within the jurisdiction of the lawmaking power of this state to enact a similar statute concerning policies upon the lives of the residents thereof, we must hold that the failure to pay the semi-annual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company.

3. It is contended by the plaintiff that the evidence established a course of dealing between the agents of the company and the assured which justified the assured in waiting until the agent called at the house to collect the premium. It appears that the company issued in this locality a kind of policy called the industrial, in amounts of $50 to $200, upon which the premiums were paid by weekly instalments. By the express terms of these industrial policies the agents of the company were required to go to the home of the assured and collect the premium, and the evidence establishes that the custom was not to strictly enforce the rule requiring the premiums the day

they became due, the assistant superintendent having authority to extend the time, provided that he saw the assured personally and found him in good health. No such custom nor practice was established in reference to the class of policies sued upon, and the policy under consideration contained the provision that none of its terms could be varied or modified nor any forfeiture waived or premiums in arrears received, except by agreement in writing signed by either the president, vice-president, secretary or assistant secretary, whose authority for that purpose was not to be delegated. The evidence shows that all the premiums paid on the policy were paid to agents of the defendant by Frank McElroy, the father of the assured, at his place of business in Plattsmouth. Only two premiums were ever paid, and one of these was that paid at the time the policy was delivered. There was no promise on the part of the agent to waive the forfeiture or postpone the payment, unless the same might be inferred from the testimony of Frank McElroy, which shows that in the latter part of January or first of February he had a conversation with Mr. Davies, the agent of the defendant, in which he said, when asked what Mr. Davies' exact words were: "The way I understood it when I spoke to him about it, he said it would be all right to keep the other money and give it to him together. Afterwards he came to the shop, and said he didn't know about that, and he asked me for my daughter's address, and I told him I didn't have it. I told him then if he insisted on the money to go up and see my wife, as it was not any benefit to me anyhow. She had money." It appears that it was the practice of the company to send receipts to its local agents before a premium became due, and that the agent was authorized to deliver such receipt upon payment of the premium at any time within 30 days of the date upon which the same had become due. In case of nonpayment of the premium within that period, the agent was required to immediately return the receipt to the home office, and was without any authority to ac-

cept the premium thereafter without further instructions. The date of the above conversation is not very definite, but we will assume that it was before the expiration of the 30-day period. The evidence does not seem to us sufficient to sustain a finding that the agent did agree to give time beyond the expiration of this period for the payment of the premium. Whether he did or not, it is clear that he had no authority to make any such agreement. We think the restriction upon the power of agents to waive the forfeiture of the policy is binding. *Hartford Fire Ins. Co. v. Landfare,* 63 Neb. 559.

The witness McElroy relates another conversation with the agent, Mr. Davies, as follows: "The next time I seen him was about the 18th or 19th. That was after getting a dispatch from Chicago calling me there on account of my daughter's sickness. I met him there, and, 'Now,' I says, 'if you have got that receipt, I have got the money in my pocket,' and he said, 'No,' but he would get my receipt the next week." This conversation was after the agent had returned to the home office the receipt, at the end of the period of 30 days, and when he neither had nor pretended to have authority to accept the payment of the premium. The offer of McElroy to pay at this time could have no effect unless the time of payment of the premium had been extended by the former conversation. As we have seen, the agent had no authority to make that extension. The district court did not therefore err in refusing to submit this question to the jury and in directing a verdict for the defendant.

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

DUFFIE, EPPERSON and GOOD, CC., concur.

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

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12. Where the parties have acted upon and construed a contract the court will so enforce it. *Jobst v. Hayden Bros*... 735

13. Promise by owner to waive time clause in building contract, without consideration, *held* invalid, and the owner is not thereby estopped to claim damages for delay. *Jobst v. Hayden Bros.* 735

14. Promise by owner to waive time clause in building contract *held* to estop him from insisting on a stipulation that no allowance should be made for delay caused by the owner unless a claim therefor be presented in writing to the architect. *Jobst v. Hayden Bros*..... 735

15. Where a contractor with the owner's consent and under direction of the architect, but without a written order, performs extra work, he can recover, though the contract calls for the architect's written order therefor. *Jobst v. Hayden Bros.* 735

16. Dealings on board of trade *held* to be gambling transactions. *Farmers Cooperative Shipping Ass'n v. Adams Grain Co*.... 752

17. Parties may make a contract in writing without inserting all its terms in a single instrument. *Fruit Dispatch Co. v. Gilinsky* 821

Corporations. See LANDLORD AND TENANT, 1.

1. A corporation formed to manufacture talking machines *held* governed by sec. 37, ch. 16, Comp. St. 1905, and the incorporators not liable individually for failure to file the articles of incorporation with the county clerk. *Meyer-Cord Co. v. Hill*..... 89

2. One who takes the management of a corporation with an option to purchase its stock, and agrees to use his best endeavors to make the business pay, in the absence of fraud or mismanagement, is not liable for failure to make it profitable. *Ring v. Brown*..... 589

3. Evidence in suit for accounting by manager of corporation *held* to sustain judgment for defendant. *Ring v. Brown*... 589

4. Manager of corporation organized to buy and sell grain and live stock has no apparent authority to speculate in grain and mess pork on the board of trade, and the corporation is not bound thereby. *Farmers Cooperative Shipping Ass'n v. Adams Grain Co*..... 752

5. Speculative transactions in mess pork and grain by corporation organized to buy and sell grain and live stock *held ultra vires* and void. *Farmers Cooperative Shipping Ass'n v. Adams Grain Co*..... 752

Costs.

The power to tax costs being unknown at common law, statutes providing therefor are strictly construed. *Branson v. Branson* 288

Counties and County Officers. See GUARDIAN AND WARD, 2.

1. County attorney can sue county to recover amount due him on claims allowed by county board. *Strong v. Thurston County* 86
2. Failure of county attorney to institute proceedings to abolish a fiscal system through which county business was mismanaged and payment of his allowed claims for salary delayed does not estop him from recovering the amount due. *Strong v. Thurston County* 86

Courts.

Under sec. 16, art. VI of the constitution, a county court has no jurisdiction of an action for breach of covenants of warranty, where the breach consists of removal of buildings and fences by a tenant of the covenantor under paramount title. *Birkel v. Norton* 175

Criminal Law. See HOMICIDE. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS, 9-14. MANDAMUS. RAPE.

1. On a trial for incest, declarations of prosecutrix, made in defendant's absence, of prior acts of intercourse with him in another county *held* incompetent. *Peterson v. State* 76
2. Instruction *held* to give undue prominence to the fact that defendant's interest might induce him to testify falsely. *Peterson v. State* 76
3. One cannot complain of an instruction given at his request. *Peterson v. State* 76
4. Where one word of a statute is omitted in quoting it in an instruction, *held* without prejudice. *Boyer v. State* 407
5. It is not error to refuse an instruction covered by an instruction given. *Boyer v. State* 407
6. A conviction for receiving stolen goods may be had without regard to the person who stole the goods, or from whom they were received. *In re Loomis* 493
7. A charge of buying stolen horses in Nebraska, knowing the same to have been stolen, with intent to defaud the owner, states an offense, though it recites they were stolen in South Dakota. *In re Loomis* 493
8. Accused may waive his opening statement, but if the court compels his counsel to make one, *held* without prejudice. *Pumphrey v. State* 636
9. The court's discretion in excluding veniremen or talesmen from a jury is not subject to review unless a fair jury was not obtained. *Pumphrey v. State* 636

Criminal Law—*Concluded.*

10. A conviction will not be set aside because of alleged error in overruling challenges for cause, where none of the persons challenged sat upon the jury, and it does not appear that they were peremptorily challenged. *Pumphrey v. State*.... 636

11. The trial court in its discretion may refuse to permit a witness to testify in narrative form. *Pumphrey v. State*..... 636

12. Where the evidence will support a conviction, the supreme court will not interfere. *Pumphrey v. State*..... 636

13. On a complaint charging both an assault and rape, the jury may find the defendant guilty of an attempt to commit rape. *Evers v. State*..... 708

14. Expression of opinion by the court as to improper testimony sought to be elicited *held* not reversible error. *Evers v. State* 708

15. On a prosecution for rape, allowing a woman to sit by a witness eight years of age *held* not ground for reversal. *Evers v. State*..... 708

16. The procedure in receiving the verdict in a criminal case is governed by sec. 486 of the criminal code. *Evers v. State*, 708

17. It is not error to refuse an instruction tendered by defendant, where its substance is given in another instruction. *Evers v. State*..... 708

18. Where counsel engage in an altercation before the jury and are reprimanded, and there is no request for a special instruction thereon, there is no reversible error. *Evers v. State* 708

19. It is not error to refuse an instruction which is not a correct statement of the law applicable to the theory of the defense. *Stevens v. State*..... 759

20. Instruction as to manslaughter *held* proper. *Boche v. State*, 845

Damages. See LIBEL AND SLANDER, 4, 5, 7.

1. There is no fixed rule for the measure of damages occasioned by pain, and the amount thereof is for the jury. *Bayard v. City of Franklin*..... 150

2. Where a perennial crop, such as alfalfa, is destroyed, the measure of damages is the difference between the value of the land before and after its destruction. *Thompson v. Chicago, B. & Q. R. Co*..... 482

3. Measure of damages for death by wrongful act stated. *Nilson v. Chicago, B. & Q. R. Co*..... 595

4. Verdict for $1,500 for personal injury *held* not excessive. *Armstrong v. City of Auburn*..... 842

Deeds.

1. The evidence relating to the delivery of a deed being conflicting, consideration will be given to the grantee's conduct in surreptitiously recording it, to determine the weight of the evidence. *Engelke v. Engelke* 134
2. No presumption of undue influence arises from the fact that an aged grantor for adequate consideration conveys all his real estate to a near relative to whom he was under obligation. *West v. West* 169
3. Mental weakness alone will not avoid a deed. *West v. West*, 169
4. To set aside a deed for want of mental capacity, it must be established that grantor's mind was so unbalanced that he did not comprehend what he was doing. *West v. West* .. 169
5. A certificate of acknowledgment is sufficient if it shows that the statute has been complied with in substance. *Powers v. Spiedel* 630
6. The certificate of a notary that the president of a corporation appeared and acknowledged a deed, duly signed, sealed and witnessed, entitles it to record, and the record is constructive notice of the grantee's interest in the property conveyed. *Powers v. Spiedel* 630

Depositions. See EVIDENCE, 6.

Divorce.

1. Where a suit for divorce for cruelty is determined against the wife, in a subsequent suit by her husband charging desertion, she cannot plead such cruelty as a defense. *Wilkins v. Wilkins* 206
2. Under the facts, a decree of divorce for the wife's desertion *held* not reversible because alimony was disallowed. *Wilkins v. Wilkins* 206
3. An award of custody of infant on granting a divorce, where neither parent is disqualified, should be subject to further order of the court. *Wilkins v. Wilkins* 206
4. Allowance to wife for expenses of defending a divorce suit is in the discretion of the court, and will not be reviewed where the wife has not been hampered in making her defense. *Wilkins v. Wilkins* 206

Drains.

1. A majority in interest of the owners resident in this state of any contiguous body of swamp or overflowed lands in one or more counties may sign articles of association for a drainage district under sec. 5561, Ann. St. 1907. *Catron v. Dailey* 487
2. The words "resident owners," as used in sec. 5561, Ann. St.

Drains—*Concluded.*

1907, *held* to mean "owners resident in this state." *Catron v. Dailey* 487

3. The district court may refuse to order the formation of a drainage district where none of the petitioners reside in the county or counties in which the proposed district lies. *Catron v. Dailey* 487

4. To review an assessment in a drainage proceeding, that portion of the apportionment charging property of appellant must appear in the record. *Union P. R. Co. v. Colfax County* 778

5. Where no final order or judgment affecting appellant's property appears in the record, the appeal will be dismissed. *Union P. R. Co. v. Colfax County* 778

Ejectment.

1. In ejectment, where defendant asks affirmative equitable relief, such issues are triable to the court. *Card v. Deans* .. 4

2. The rule that plaintiff must recover on his own title *held* not applicable where defendant obtained possession as tenant of plaintiff. *Card v. Deans* 4

3. Ejectment against one claiming under a life tenant *held* premature, where begun before the death of the life tenant. *Currier v. Teske* 60

4. Ejectment against one claiming under life tenant *held* not a bar to a subsequent action. *Currier v. Teske* 60

Elections. See CONSTITUTIONAL LAW.

The canvass of an election for executive state officers by the speaker of the house is a ministerial duty, and when such votes are duly canvassed his duties are ended. *State v. Dean,* 344

Eminent Domain.

Under sec. 7478, Ann. St., where a city appropriating property has a lien thereon for special assessments and fails to have it established, it cannot after the time for appeal has expired offset its lien against damages awarded for the taking of the property. *State v. Fink* 185

Estoppel.

Where a party gives a reason for his conduct, he cannot after action commenced assign a different one. *Powers v. Bohuslav* 179

Evidence. See APPEAL AND ERROR, 1-19. CRIMINAL LAW. TRIAL. WILLS, 1-8. WITNESSES.

1. A written contract cannot be varied by parol evidence of a prior or contemporaneous oral agreement. *Krbel v. Krbel* .. 160

2. Parol evidence is inadmissible to establish an oral con-

Evidence—*Continued.*

temporaneous agreement that a note was not to be negotiated. *Benton v. Sikyta*..... 808

3. A farmer raising crops and live stock is competent to testify to their value. *Anderson v. Chicago, B. & Q. R. Co*..... 311

4. A farmer is competent to testify as to the value of his land and crops. *Anderson v. Chicago, B. & Q. R. Co*..... 311

5. A farmer having knowledge of value of lands in the vicinity of a particular tract is competent to give an opinion as to its value. *Anderson v. Chicago, B. & Q. R. Co*..... 311

6. A party taking a deposition may read the cross-examination of witnesses examined by him in chief, and use exhibits produced by them. *Crites v. Modern Woodmen of America*.... 378

7. In an action for price of heating plant, hearsay testimony of an opinion of a workman after completion of the plant, *held* inadmissible. *Nebraska Plumbing Supply Co. v. Payne*, 390

8. Hearsay evidence, if admitted without objections, may sustain a verdict. *Sheibley v. Nelson*..... 393

9. On the questions of whether a woman was assaulted and the identity of assailant, evidence of her appearance and her spontaneous declarations *held* admissible as part of the *res gestæ*. *Sheibley v. Nelson*..... 393

10. A collateral fact *held* relevant, if it tends to elucidate the inquiry. *Fitch v. Martin*..... 745

11. Certain evidence *held* a self-serving declaration made after the fact, and properly excluded. *McClatchey v. Anderson*.. 783

12. Where an execution was returned and summons in garnishment sued out the same day, it will be presumed that the summons in garnishment was sued out after the return. *Brunke v. Gruben* 806

13. In an action on a note by one not a good faith holder, declarations of the payee while in possession, tending to impeach its validity, *held* admissible. *Benton v. Sikyta*.... 808

14. A party cannot propound hypothetical questions upon a theory at variance with testimony which he has given. *Landis & Schick v. Watts*..... 671

15. Hypothetical questions must be so framed as to reflect the party's theory as shown by the facts admitted or proved by him. *Landis & Schick v. Watts*..... 671

16. Where a party's own evidence corroborates evidence introduced by the other party, hypothetical questions should reflect all facts so admitted or proved by both sides. *Landis & Schick v. Watts*..... 671

17. Where an expert testified that, unless certain facts were

Evidence—*Concluded.*

known to him, his opinion would not be accurate, and some of the facts were unknown to him, *held* not error to reject his opinion. *Fitch v. Martin* 745

18. The opinion of experts as to the value of services of an architect need not be substituted by the jury for its own judgment. *Davis v. School District* 858

19. Where a witness testifies as an expert as to the value of services of an architect, the same rule applies that applies to other expert testimony. *Davis v. School District* 858

20. A jury may decline to accept the opinion of expert witnesses on the value of an architect's services, though uncontradicted. *Davis v. School District* 858

Exceptions, Bill of.

Bill of exceptions of proceedings before county board *held* not sufficiently authenticated. *Union P. R. Co. v. Colfax County* 778

Executors and Administrators.

1. The personal estate is primarily liable for decedent's debts, whether secured by mortgage on his real estate or not. *Schade v. Connor* 51

2. Where the executor of a will, who is also the residuary legatee, has received personal property exceeding the amount of a mortgage lien, he may be compelled to discharge the lien. *Schade v. Connor* 51

3. The right to enforce payment of a mortgage debt is not barred by failure of the mortgagee to file a claim against a decedent's estate. *Schade v. Connor* 51

4. Purchaser at administrator's sale who assumes a mortgage does not incur obligation to heir who repudiates the sale on the ground that the property was decedent's homestead. *Holz v. Burling* 211

5. An administrator paying money on order of county court cannot be personally charged with reimbursement, in the absence of fraud. *Weeke v. Wortmann* 217

Exemptions.

Wages *held* personal property and exempt under sec. 521 of the code. *Jones v. Union P. R. Co* 121

Fines.

A police judge in cities of the second class is authorized to issue execution against the property of one fined for violation of city ordinances to collect the fine and costs. *Cleaver v. Jenkins* 565

Food.

Transaction *held* not a violation of ch. 63, laws 1907, commonly known as the "Pure Food Law," as it stood prior to the amendment of 1909. *State v. Swift & Co*..... 244

Fraud.

1. In an action for fraud, the petition must set forth the facts showing fraud. *Chapman v. Meyers*..... 368
2. In an action for fraud, evidence *held* insufficient to sustain judgment for plaintiff. *Chapman v. Meyers*..... 368
3. Fraud is never presumed, but must be clearly established by competent evidence. *Watkins & Co. v. Kobiela*..... 422

Garnishment.

1. Service of summons in garnishment upon a debtor of a solvent attachment defendant will not revoke prior assignment by defendant. *Cockins v. Bank of Alma*..... 624
2. In garnishment, the burden is on an intervener to establish title to the fund. *Brunke v. Gruben*..... 806

Guardian and Ward.

1. A sale of real estate by a guardian is void, if he does not subscribe the oath prescribed by sec. 55, ch. 23, Comp. St. 1907, before he fixes time and place of sale. *Card v. Deans*, 4
2. County attorney *held* not entitled to a fee for representing a woman in bastardy proceedings, and his good faith *held* not to justify the guardian of the woman in paying such fee. *Ress v. Shepherd*..... 268

Highways.

1. Where adjoining landowners place fences so as to leave space for public travel, and the public use the space as a highway for almost 20 years, it becomes a highway by dedication. *Kendall-Smith Co. v. Lancaster County*..... 654
2. Deviations of 20 feet from the line of public travel will not necessarily prevent the establishment of a highway by prescription. *Kendall-Smith Co. v. Lancaster County*..... 654
3. Prescriptive rights of the public in a highway are not necessarily limited to the beaten track. *Kendall-Smith Co. v. Lancaster County* 654
4. The decision of the expediency of establishing or vacating a public road is vested in county boards and other like agencies, and is not subject to judicial review. *Stone v. City of Nebraska City*..... 781

Homicide. See CRIMINAL LAW, 20.

1. Where accused did not state that he feared injury from deceased, the supreme court will not scrutinize closely instructions submitting law of self-defense. *Boyer v. State*.. 401

Homicide—*Concluded.*

2. The adjective "fatal" in an instruction *held* to preclude the idea that the jury were to consider merely the blow, and not its consequences. *Boyer v. State* 407
3. Instruction on self-defense *held* properly refused. *Boyer v. State* 407
4. Homicide in the perpetration of a robbery is murder in the first degree, and the turpitude of the act supplies the element of deliberate and premeditated malice. *Pumphrey v. State* 636

Husband and Wife.

Deed direct from husband to wife *held* valid both in law and equity. *Currier v. Teske* 60

Incest. See CRIMINAL LAW, 1, 2.

Indictment and Information.

Where an information contains two counts charging but one offense, the state will not be required to elect on which count it will rely. *Stevens v. State* 759

Infants.

1. A guardian *ad litem* of an infant defendant should file a cross-petition if necessary to protect the infant's rights. *Schade v. Connor* 51
2. To avoid liability on his contract, an infant must disaffirm within a reasonable time after becoming of age. *Krbel v. Krbel* 160

Injunction.

1. Injunction will not lie to test the right of rival claimants to a public office. *Hotchkiss v. Keck* 545
2. Injunction should not be invoked, unless it clearly appears there is no adequate remedy at law. *Hotchkiss v. Keck* ... 545
3. To authorize an injunction facts must be pleaded which affirmatively show defendant has threatened or is about to commit an act that is unlawful. *Hotchkiss v. Keck* 545
4. One who does not come into equity with clean hands is not entitled to an injunction. *Newby v. Laurence* 622
5. Proceedings to condemn property under an unconstitutional act may be enjoined. *Wilber v. Reed* 767

Insane Persons.

The fees of a juror in an insanity inquest under secs. 454, 551, 552 of the criminal code must be paid by the county in which the penitentiary is located. *Chappell v. Lancaster County* 301

Insurance. See BENEFICIAL ASSOCIATIONS.

1. That part of an insurance policy relating to proofs of loss should be construed with great liberality. *Farrell v. Farmers & Merchants Ins. Co* 72
2. An agent charged with the duty of adjusting insurance losses can waive notice and proof of loss. *Farrell v. Farmers & Merchants Ins. Co* 72
3. Evidence *held* to show waiver of notice and proof of loss. *Farrell v. Farmers & Merchants Ins. Co* 72
4. The rule that notice to an agent is notice to his principal *held* not to apply where the agent's duty to his principal is opposed to the interest of another for whom he acts in the transaction where knowledge is obtained. *Exchange Bank v. Nebraska Underwriters Ins. Co* 110
5. Assured *held* confined constantly in the house within the meaning of an insurance contract for sick benefit. *Breil v. Claus Groth Plattdutschen Vereen* 155
6. By-law of mutual hail insurance company as to payment of premiums *held* reasonable. *Nimic v. Security Mutual Hail Ins. Co* 403
7. Member of mutual hail insurance company, who gave a note for his premium, *held* not entitled to recover for damages to crops for nonpayment of premium in accordance with a by-law, though the note was not due. *Nimic v. Security Mutual Hail Ins. Co* 403
8. In a suit on a benefit certificate, a written statement of delinquent assessments *held* insufficient to show date of assured's reinstatement. *Ogden v. Sovereign Camp, W. O. W.*, 666
9. A life insurance policy is an entire contract for life, and an instalment of premium is not intended as consideration for the year in which paid, but as part consideration of the insurance for life. *Haas v. Mutual Life Ins. Co* 682
10. Where there is no provision in a life insurance policy for forfeiture for failure to pay premiums, a failure to pay will not constitute a forfeiture; the company having only the right to set off the premiums unpaid, with interest, against the amount of the policy. *Haas v. Mutual Life Ins. Co.* 682
11. Provision for a forfeiture will be construed most strongly against the insurer. *Haas v. Mutual Life Ins. Co* 682
12. A forfeiture will be enforced only where the strict letter of the contract requires it. *Haas v. Mutual Life Ins. Co* 682
13. Statement of employer *held* to be in the nature of a warranty, and, if false, to defeat recovery on indemnity bond

Insurance—*Concluded.*

of employee. *Sunderland Roofing & Supply Co. v. United States Fidelity & Guaranty Co* 791

14. Where a foreign insurance company denied that the return of the sheriff that he served process upon its agent is false, for the reason that the person on whom process was served was not its agent, the burden is on it to negative the agency. *Taylor v. Illinois Commercial Men's Ass'n* 799

15. Where defendant company did not deny that the individual served with process as its agent had not performed such acts as under sec. 6407, Ann. St. 1907, would constitute him its agent, *held* proper to refuse to submit such defense to the jury. *Taylor v. Illinois Commercial Men's Ass'n* 799

16. Change of business, in an accident policy requiring notice thereof, *held* to mean the substitution of one business for another as the usual business of the assured. *Taylor v. Illinois Commercial Men's Ass'n* 799

17. A by-law of a beneficial association providing for a forfeiture, adopted subsequent to the issuance of a benefit certificate, will be strictly construed, and, if passed in contravention of the statute governing such association, will be held void. *Briggs v. Royal Highlanders* 834

18. Where a beneficial association has not complied with sec. 1, ch. 47, laws 1897, and adopted a representative form of government, its governing body is without power to adopt a by-law changing the terms of a benefit certificate theretofore issued. *Briggs v. Royal Highlanders* 834

19. Governing body of beneficial association *held* not a representative body, and that the association could not be said to have a representative form of government. *Briggs v. Royal Highlanders* 834

20. Suicide *held* not to defeat recovery on a benefit certificate, unless the contract so provides in express terms. *Briggs v. Royal Highlanders* 834

21. Where parties to an insurance contract are in different jurisdictions, the place where the last act is done is the place of contract. *McElroy v. Metropolitan Life Ins. Co* 866

22. Insurance business transacted in Nebraska by a foreign company is not subject to a statute of the foreign state requiring notice to a policy holder as a condition to forfeiture for nonpayment of premiums. *McElroy v. Metropolitan Life Ins. Co* 866

23. The agent of an insurance company cannot by oral agreement extend the time for payment of a premium in violation of the policy. *McElroy v. Metropolitan Life Ins. Co* ... 866

Intoxicating Liquors.

1. A freeholder is not disqualified to sign petition for liquor license because he is not personally acquainted with applicant, or does not know he is a man of respectable character. *In re Thompsen* 67
2. On appeal from an order granting a saloon license, the district court is without authority to direct the excise board to reconvene and receive evidence offered by remonstrant and excluded. *In re Thompsen*..... 67
3. Where a barkeeper sold liquors to minors or habitual drunkards, the proprietor *held* responsible, in the absence of evidence that the sales were made in violation of his orders. *In re Berger* 128
4. In an action for liquors sold, plaintiff need not allege that he is a licensed liquor dealer. *Rohlff v. Bice*..... 141
5. Under Ann. St., ch. 32, a petition for a liquor license must be signed by *bona fide* freeholders. *Cohn v. Welliver*..... 230
6. One made a freeholder to qualify him as a petitioner for a liquor license is not a *bona fide* freeholder under the liquor law. *Cohn v. Welliver*..... 230
7. Freeholder under liquor law defined. *Cohn v. Welliver*... 230
8. Holder of executory contract to purchase land is not a freeholder under the liquor law. *Cohn v. Welliver*..... 230
9. Secs. 20-22, ch. 50, Comp. St. 1907, provide for a dual prosecution in the same case—one for keeping intoxicating liquor for unlawful sale, and the other for destruction of liquor kept for such purpose. *Riggs v. State*..... 335
10. Under sec. 21, Comp. St., if accused is held to the district court, to prevent the destruction of liquor seized, he must appeal from the order of destruction. *Riggs v. State*..... 335
11. Where a prosecution for keeping liquor for unlawful sale was against the majority stockholder of a pharmacy company, and the evidence showed that the company owned the liquor, *held* no variance. *Riggs v. State*..... 335
12. On a trial for keeping liquor for unlawful sale, the jury may specify in their verdict of "guilty" the liquor unlawfully kept, and only such liquor can be destroyed. *Riggs v. State*, 335
13. In a prosecution for keeping liquor for unlawful sale, the order as to destruction of liquor *held* without prejudice to accused. *Riggs v. State*..... 335
14. Evidence *held* to support verdict. *Riggs v. State*..... 335

Judgment. See EJECTMENT, 4.

1. Answer in proceedings by assignee of dormant judgment to revive it *held* to state no defense. *Brunke v. Gruben*..... 14

Judgment—*Concluded.*

2. One who seeks to enjoin the enforcement of a judgment because entered against a person bearing another name must negative that he was the party against whom judgment was rendered. *Jones v. Union P. R. Co* 121

3. A party challenging jurisdiction of district court on error from a justice cannot collaterally attack final judgment of district court. *Radil v. Sawyer* 143

4. On proceedings to revive a dormant judgment valid on the record, no objections to the original judgment will be heard. *American Freehold Land Mortgage Co. v. Smith* 237

5. On appeal from an order reviving a dormant judgment, where the pleadings are not in the record, it will be presumed they sustained the original judgment. *American Freehold Land Mortgage Co. v. Smith* 237

6. Where a court renders judgment upon agreement of the parties, its insufficiency, or the want of authority of the attorneys making it, will not make the judgment void or subject to collateral attack. *Wabaska Electric Co. v. City of Blue Springs* 577

7. The mere fact that a person employs counsel to assist in the defense will not make him a party to the suit, nor estop him from questioning the issues determined. *Cockins v. Bank of Alma* 624

Jury. See EJECTMENT, 1. INSANE PERSONS.

Landlord and Tenant.

1. Where a corporation and A and B were sued for personal injuries, *held* that A and B were not agents of the corporation, requiring a verdict in their favor and against the corporation to be set aside. *Young v. Rohrbough* 448

2. In action for death, owner of building *held* liable. *Young v. Rohrbough* 448

Libel and Slander.

1. Where there is reasonable doubt as to the meaning of words, their construction is for the jury. *Sucha v. Sprecher* 241

2. If a defendant admits publication of an article libelous *per se*, but alleges its truth, it is error to instruct that the burden is on plaintiff to prove malice and damages. *Sheibley v. Nelson* 393

3. Where defendant denies that he published a libel, he will not be permitted to prove its truth. *Sheibley v. Nelson* 393

4. In an action for slander, plaintiff may prove the speaking of slanderous words other than those set out in the petition, but of similar import, where malice is an issue, to

Libel and Slander—*Concluded.*

show the extent of the publication, but not in aggravation of damages. *Bloomfield v. Pinn* 472

5. An instruction that future injury can be considered in fixing damages for slander *held* proper. *Bloomfield v. Pinn* 472
6. Instruction *held* not prejudicial. *Bloomfield v. Pinn* 472
7. Verdict of $3,500 *held* not excessive. *Bloomfield v. Pinn* ... 472

Limitation of Actions.

1. Action on a contract to furnish certain items annually during lifetime of obligee *held* barred as to items which should have been furnished more than five years prior to the action. *Krbel v. Krbel* 160
2. Service of summons in ejectment arrests the running of limitations in favor of a defendant who claims title by adverse possession, though the form of action is changed by amendment to a suit to redeem. *Butler v. Smith* 78
3. Action for rents against tenant in common *held* not barred until four years from its accrual. *Schuster v. Schuster* 98

Mandamus.

Application for mandamus to compel police judge to strike out certain recitals in his docket in a misdemeanor case, and insert others, *held* properly refused, where relator had been charged jointly with two others and had stipulated as to the entries. *State v. Alter* 456

Master and Servant.

1. Injury caused by the caving in of a trench *held* not the result of sudden danger. *Cornelius v. City Water Co* 130
2. Employee with power to control other servants, and to see that appliances are in safe condition, *held* not a fellow servant. *Debus v. Armour & Co* 224
3. It is a master's duty to furnish a reasonably safe working place for his servants. *Debus v. Armour & Co* 224
4. In an action for injuries caused by the falling of an elevator, pleadings *held* to embrace the question of negligence of the employer in providing appliances for the safety of employees using the elevator. *Modlin v. Jones & Co* 551

Mechanics' Liens.

1. Materialman *held* to have furnished material in good faith, and entitled to a lien. *Watkins & Co. v. Kobiela* 422
2. Evidence *held* to show that the materialman furnished material in good faith. *Watkins & Co. v. Kobiela* 422

Mortgages.

1. For the purpose of giving constructive notice to defendant in foreclosure of mortgage not signed by himself, his legal

Mortgages—*Concluded.*

name includes his first Christian name and surname. *Butler v. Smith* 78

2. Foreclosure *held* not to divest title of nonresident defendant sued by the initial letters of his name. *Butler v. Smith,* 78

3. One obligated to discharge a mortgage may, on application of the owner of the land, be made a party to the foreclosure suit, and be compelled to pay the debt. *Schade v. Connor* .. 51

4. Foreclosure sale held to convey only the life estate of defendant. *Currier v. Teske* 60

5. The purchaser at foreclosure sale buys all the interests of the parties to the suit. *Currier v. Teske* 60

6. Where a mortgagee's agent purchased at foreclosure sale, and after confirmation caused the sheriff to execute a deed direct to a third person, who paid him the amount of the bid, *held,* that such third person acquired title. *Currier v. Teske* 60

7. Where denied, plaintiff must prove allegation that no action at law has been instituted to recover the debt. *Beebe v. Bahr* 191

8. Purchaser at foreclosure sale acquires only the title of parties to the action. *Kerr v. McCreary* 315

9. Purchaser at foreclosure sale acquires title of mortgagor only where his grantee has been made a party to the foreclosure. *Kerr v. McCreary* 315

10. Transferee of senior mortgage *held* not precluded by foreclosure of junior mortgage from foreclosing his lien. *Equitable Land Co. v. Allen* 514

11. A junior lienor not made a party to foreclosure of superior lien may redeem from the decree. *Equitable Land Co. v. Allen* 514

12. Where the holder of a first and third lien forecloses without making the intermediate lienor a party, the latter may prosecute a suit in foreclosure, in which the court should settle the priorities of all parties. *Equitable Land Co. v. Allen* .. 514

13. Objections to the appraisement must be made prior to the sale. *Siwooganock Guaranty Savings Bank v. Feltz* 706

14. A foreclosure sale should be confirmed, notwithstanding the order of sale be returned more than 60 days after its issuance. *Siwooganock Guaranty Savings Bank v. Feltz* 706

15. In a foreclosure sale, where the appraisers make no deductions from the appraised value of the property, failure to separately find the value of the owner's interest will not invalidate the appraisement. *Siwooganock Guaranty Savings Bank v. Feltz* 706

Municipal Corporations. See TAXATION, 4-7.

1. Tax for construction of sidewalk *held* a lien on the abutting property. *Smith v. Hofeldt* 47
2. The mayor and council of a city of the second class under 5,000 inhabitants can reconsider allowance of claim against the city at any time before claimant, in reliance on their action, has changed his position. *State v. City of Minden* .. 193
3. Sec. 80, art. I, ch. 14, Comp. St., 1905, providing that costs shall not be recovered in an action against a city on an unliquidated claim unless first presented to the mayor and council for audit, does not make their action judicial, nor give it the effect of a judgment. *State v. City of Minden* ... 193
4. Where a city obtained the use of an asphalt plant for repair of its streets under a void contract, *held* it was liable for the reasonable value of the use of the plant. *Nebraska Bitulithic Co. v. City of Omaha* 375
5. Accumulation of snow and ice on a sidewalk *held* a defect under sec. 107, art. II, ch. 13, Comp. St. 1905, requiring the filing of notice of accident within 20 days. *McCollum v. City of South Omaha* 413
6. Filing notice of accident with city clerk within 20 days *held* not excused by the fact that the injury deprived plaintiff of consciousness during that time. *McCollum v. City of South Omaha* 413
7. Judgment for costs *held* proper. *Butterfield v. City of Beaver City* 417
8. Verdict of $1,250 *held* not excessive. *Butterfield v. City of Beaver City* 417
9. A meeting of a city council on a day other than that fixed for regular meetings, though no call for special meeting has been made, *held* valid; all members of the council being present. *Nelson v. City of South Omaha* 434
10. Secs. 8107, 8108, Ann. St. 1903 (South Omaha charter, 1903), *held* to authorize the city council to suspend the rule requiring ordinances to be read on three different days. *Nelson v. City of South Omaha* 434
11. Where all members of the council voted for the second reading of an ordinance by title, *held* a compliance with the statute requiring ordinances to be read in full on three different days unless dispensed with by a two-thirds vote of the council. *Nelson v. City of South Omaha* 434
12. Sec. 8129, Ann. St. 1903, *held* not to require an ordinance for the ordering of paving and curbing. *Nelson v. City of South Omaha* 434
13. Sec. 8129, Ann. St. 1903, *held* not to require service of

Municipal Corporations—*Continued.*

notice on property owners to select material for paving and curbing. *Nelson v. City of South Omaha* 434

14. Sec. 8129, Ann. St. 1903, *held* not to require the council to approve estimate of cost of paving and curbing made by the city engineer. *Nelson v. City of South Omaha* 434

15. Approval of two street improvement district plans in one motion, while irregular, is not void. *Nelson v. City of South Omaha* 434

16. Sec. 8129, Ann. St. 1903, *held* to authorize the city to issue bonds for paving and curbing, and to levy a special tax on property benefited to reimburse itself. *Nelson v. City of South Omaha* 434

17. The Lincoln charter *held* not to authorize the enactment of ordinances for leasing space on streets or sidewalks to merchants. *Chapman v. City of Lincoln* 534

18. The public have a right to use sidewalk space in its entirety, free from obstructions. *Chapman v. City of Lincoln* 534

19. It is no defense to one for unlawfully obstructing a sidewalk that others are obstructing sidewalks in like manner. *Chapman v. City of Lincoln* 534

20. A city is not estopped, by past failure to enforce ordinances against obstruction of sidewalks, from subsequently removing all obstructions therefrom. *Chapman v. City of Lincoln*, 534

21. A city is liable for wrongful or negligent acts of its agents in making, improving and repairing streets. *Tewksbury v. City of Lincoln* 571

22. Where a sidewalk is rendered dangerous by the act of a city of the first class, and a person within 5 days thereafter is injured, sec. 110 of the charter (Comp. St. 1907, ch. 13, art. I), exempting the city from liability, unless five days' notice of the dangerous condition of the walk is given, *held* not applicable. *Tewksbury v. City of Lincoln* 571

23. In an action for injury on defective sidewalk, evidence *held* not to show, as a matter of law, that plaintiff was guilty of contributory negligence. *Tewksbury v. City of Lincoln* 571

24. In an action for injuries from a defective sidewalk, plaintiff's opinion and the result of tests as to the cause of the accident, admitted without objection, may be considered by the jury. *Robinson v. City of Omaha* 642

25. A city denying responsibility for trespassers who replaced a board sidewalk with cement cannot evade liability for a defect in a connecting walk on the ground that barriers protecting the cement were removed without the city's consent. *Robinson v. City of Omaha* 642

Municipal Corporations—*Concluded.*

26. City *held* liable for injury caused by negligence of its employees in failing to place barriers around a culvert. *Armstrong v. City of Auburn* 842

Names. See MORTGAGES, 1, 2.

Negligence.

1. Questions of negligence and contributory negligence, where the facts are such that different minds may reasonably draw diverse conclusions therefrom, are for the jury. *Hair v. Chicago, B. & Q. R. Co* 398
2. Negligence, contributory negligence, and proximate cause of an injury are questions for the jury where the evidence is conflicting. *Shirley v. City of Minden* 544
3. Contributory negligence is for the jury, unless the evidence thereof is so clear that different minds cannot reasonably draw different conclusions therefrom. *Nilson v. Chicago, B. & Q. R. Co* 595

New Trial.

A new trial should not be granted for newly discovered evidence, unless material, and it is shown that diligence was used to produce it at the trial. *Butterfield v. City of Beaver City* 417

Occupying Claimants. See PUBLIC LANDS, 1, 2.

Parties.

1. Where the petition shows that a defendant is jointly interested with plaintiff in the action, the objection that he is not made a plaintiff is waived by failure to demur. *Jobst v. Hayden Bros.* 735
2. Parties severally liable on a written contract may be impleaded in one action thereon, though none is liable on more that one item in the contract. *Champlin Bros. v. Sperling* .. 633

Partition.

Where partition proceedings are not amicable, the fees of defendants' counsel are not taxable as costs. *Branson v. Branson* 288

Partnership.

Sharing gross returns, with or without a common interest in the property, does not of itself create a partnership. *Tyson v. Bryan* 202

Pleading. See APPEAL AND ERROR, 35, 37. FRAUD, 1. INTOXICATING LIQUORS, 4. STATUTE OF FRAUDS, 4.

1. Petition alleging that a carrier wrongfully ejected plaintiff from its freight train, *held* to state a cause of action *ex delicto*, and not *ex contractu*. *Reed v. Chicago, B. & Q. R. Co.*, 8

Pleading—*Concluded.*

2. Whether petition states a cause of action will not be considered, usually, on a challenge to jurisdiction. *Tate v. Rakow* 459
3. Where defendant is sued in a county other than that in which he resides, and summons is served at his residence, a challenge to the jurisdiction requires the court to examine the petition to ascertain whether the action is one which can only be brought in the former county. *Tate v. Rakow*.. 459
4. Objections to jurisdiction sustained. *Tate v. Rakow*..... 459
5. Answer *held* to admit execution of contract, notwithstanding a general denial. *Clague v. Tri-State Land Co*..... 499
6. There can be no recovery if there is a material variance between the allegations and the proof. *Cockins v. Bank of Alma* 624

Principal and Agent.

1. All profits made by an agent in the execution of his agency belong *prima facie* to his principal. *Wells v. Cochran*..... 278
2. Where an agent retains profits, the burden is on him to prove that his principal consented thereto. *Wells v. Cochran*, 278
3. An agent cannot lawfully have an interest in the sale of property of his principal without his consent given after full knowledge of all facts, and the burden is on the agent to show such knowledge and consent. *Wells v. Cochran*... 278
4. An agent acting within his apparent authority, though without his actual authority, may bind his principal. *Fruit Dispatch Co. v. Gilinsky*..... 821

Principal and Surety. See APPEAL AND ERROR, 43, 44.

Process.

1. Where process is served on a person by a wrong name, and he suffers default or omits to plead the misnomer, he is concluded by the judgment. *Jones v. Union P. R. Co*..... 121
2. Service of summons on a wife at her home *held* sufficient, where delivered to her husband for her in her presence, and read to her by the officer. *Krotter & Co. v. Norton*..... 137
3. An unnecessary indorsement on summons, which has no tendency to mislead or prejudice the defendants, *held* not to render service void. *Krotter & Co. v. Norton*..... 137
4. A court acquires jurisdiction of defendant by personal service of process, even though she be defectively described therein. *Krotter & Co. v. Norton*..... 137

Public Lands.

1. That an occupying claimant cannot deed the land because he cannot convey the fee will not deprive him of the value of his lasting improvements. *Wells v. Cox*..... 26

Public Lands—*Concluded.*

2. The provision of the occupying claimant's act applies to eviction under secs. 1019-1032 of the code, pertaining to forcible entry and detainer, of one claiming under the homestead laws of the United States. *Wells v. Cox* 26
3. By the terms of the act of congress granting public lands to the state for the support of the university and agricultural college, the state became a trustee of the funds derived from such grant to apply them solely to the objects of the grant. *State v. Brian* 30
4. Lessee under a school land lease executed pursuant to ch. 74, laws 1883, *held* not to waive his right under the statute to redeem from a forfeiture. *Hile v. Troupe* 266

Quieting Title.

1. Evidence *held* to sustain decree for plaintiff. *Morrison v. Gosnell* 275
2. Where defendant in a suit to quiet title prays affirmative relief, he is subject to the maxim that he who seeks equity must do equity. *Kerr v. McCreary* 315

Railroads. See DAMAGES, 2, 3. TRIAL, 16.

1. On the issue of the sufficiency of openings in a railway embankment for the escape of flood waters, plaintiff's evidence of statements by him to defendant's officers as to the insufficiency of the openings *held* irrelevant. *Suiter v. Chicago, R. I. & P. R. Co* 256
2. A railroad company maintaining its station in a public highway in the center of its switchyards, *held* bound to exercise reasonable care to avoid injuries to persons within the yards in the vicinity of the station. *Hair v. Chicago, B. & Q. R. Co* 398
3. Where the only proof of contributory negligence is an inference, other inferences which may be reasonably drawn from the circumstances can be considered by the jury. *Nilson v. Chicago, B. & Q. R. Co* 595
4. Evidence *held* not to show decedent chargeable with contributory negligence as a matter of law. *Nilson v. Chicago, B. & Q. R. Co* 595
5. Evidence *held* to sustain finding that defendants were guilty of negligence. *Nilson v. Chicago, B. & Q. R. Co* 595
6. Whether a city ordinance regulating speed of trains within the city existed, *held* immaterial, defendants' negligence having been established by other evidence. *Nilson v. Chicago, B. & Q. R. Co* 595

Rape.

1. On a prosecution for assault with intent to commit rape, verdict *held* sufficient. *Evers v. State* 708

Rape—*Concluded.*

2. On a prosecution for assault with intent to commit rape, evidence of improper conduct of defendant at other times than that charged, and of the same character as that set out in the information, *held* properly received. *Evers v. State,* 708

Receiving Stolen Goods. See CRIMINAL LAW, 6, 7.

Reformation of Instruments.

Evidence *held to* sustain decree reforming a deed to show that property was conveyed subject to an existing lease. *Katz v. Ish* 380

Release. See CONTRACTS, 2.

Remainders.

One who sustains no fiduciary relation to nor privity of estate with a remainderman may purchase a paramount lien and foreclose it to obtain title against the remainderman. *Holz v. Burling* 211

Replevin.

1. In an action on a supersedeas bond in replevin, an offer by the surety to return the property *held* a good defense to the extent of the value of the property as fixed in the replevin action. *Ervin v. Montgomery* 107
2. Where the evidence establishes title in plaintiff and right of possession in defendant, the court should submit to the jury the value of defendant's possession. *Tyson v. Bryan* .. 202
3. Evidence *held* to sustain verdict for defendant. *Racine-Sattley Co. v. Hansen* 525
4. Where a stranger replevies personalty seized under an execution, the execution is not competent evidence of the officer's possessory rights without proof of the judgment on which issued. *Hoover v. Jones* 662

Sales.

1. In an action for damages for failure to deliver corn, *held* that seller's contract to furnish the corn was not conditioned on his ability to get cars to make shipment. *Teasdale Commission Co. v. Keckler* 116
2. In an action for price of heating plant, where the defense was that it was not according to contract, rule as to substantial performance *held* to apply. *Nebraska Plumbing Supply Co. v. Payne* 390
3. That notice of a failure of a machine to fulfil warranty is not given as provided by the contract, *held* no defense, where the seller under such notice undertakes to remedy the defects. *Advance Thresher Co. v. Vinckel* 429
4. Provision in contract for sale of machine that retention be-

Sales—*Continued.*

yond a fixed time will be a waiver of defects, *held* waived, where the purchaser was induced to retain it under promise that defects would be remedied. *Advance Thresher Co. v. Vinckel* 429

5. Where a contract of sale contains the entire agreement, including the remedy of the buyer, a court should not by implication give him another remedy. *Nutting v. Watson, Woods Bros. & Kelly Co* 464

6. Where the only remedy for breach of warranty in a contract of sale of a stallion is the right to return it and receive another, its death before an offer to return does not entitle the buyer to recover damages for breach of warranty. *Nutting v. Watson, Woods Bros. & Kelly Co* 464

7. A contract of sale, title to remain in seller until the price is paid, is void as against purchasers and judgment creditors of the buyer in possession, unless in writing, signed by the vendee, and recorded. *Racine-Sattley Co. v. Hansen* 525

8. Under the evidence, *held* there was no implied warranty that a machine was reasonably fitted for the purpose for which purchased. *Gilcrest Lumber Co. v. Wilson* 583

9. Where a known, described and definite article was sold, *held* there was no implied warranty it would answer the purpose of the buyer. *Gilcrest Lumber Co. v. Wilson* 583

10. Evidence *held* insufficient to show a warranty of a corn picking machine. *Gilcrest Lumber Co. v. Wilson* 583

11. Where parties contract for sale of a horse at a specified price, the seller may sue for the price after tender, though the buyer before tender refused to pay therefor. *Champlin Bros. v. Sperling* 633

12. Where purchasers become joint owners of a chattel and agree that it may be delivered to one of them, delivery to one is delivery to all. *Champlin Bros. v. Sperling* 633

13. That a buyer has resold a chattel with a warranty, and has not been compelled to respond in damages for a breach thereof, is not ground for refusing to submit question of damages for breach of the original warranty to the jury. *McClatchey v. Anderson* 783

14. Evidence in action for price of fruit *held* to support a finding that a contract, printed in the back of a book containing a cipher code and embodying uniform conditions of sale, was executed by defendants. *Fruit Dispatch Co. v. Gilinsky* 821

15. Delivery to a carrier is, ordinarily, delivery to the consignee. *Fruit Dispatch Co. v. Gilinsky* 821

16. Where a dealer in fruits ordered a car of bananas, knowing

Sales—*Concluded.*

it was shipped under a bill of lading not disclosing a consignee, *held* that title was transferred and the bananas delivered as soon as his name as consignee was inserted in the bill of lading. *Fruit Dispatch Co. v. Gilinsky*..... 821

States.

1. Under sec. 19, art. III of the constitution, it is the unexpended surplus of the amount appropriated that lapses, not the uncollected portion of an appropriation. *State v. Brian*, 30
2. An appropriation of "the proceeds of the one mill university tax for the years 1907 and 1908" is an appropriation of the whole amount of the tax. *State v. Brian*..... 30
3. The legislative appropriation of the income from the land grants to the use of the university and agricultural college is a complete appropriation to the beneficiary of the income from such trust funds. *State v. Brian*..... 30
4. The provisions of sec. 19, art. III of the constitution, providing for biennial appropriations, are not applicable to trust funds devoted by congress, by grant of public lands, to a specific use. *State v. Brian*..... 30
5. The state public school for dependent children provided for in ch. 69, laws 1909, is identical with the "Home for the Friendless," and appropriations by the legislature for the school, whether described as the Home for the Friendless or the State Public School, are specific appropriations, under sec. 22, art. III of the constitution. *State v. Barton*..... 815

Statute of Frauds.

1. Agreement to ship corn *held* taken out of the statute of frauds by a shipment of part of the corn. *Teasdale Commission Co. v. Keckler*..... 116
2. Contract of agent in name of principal for sale of land *held* void under the statute of frauds unless his authority is in writing. *Ross v. Craven*..... 520
3. Letter by a landowner to broker *held* not to authorize him to execute a contract in owner's name for sale of lands. *Ross v. Craven*..... 520
4. Under a general denial in a suit for specific performance of real estate contract executed by defendant's agent, defendant is entitled to the protection of the statute of frauds. *Ross v. Craven*..... 520
5. Where the statute of frauds of a sister state is pleaded in Nebraska to defeat a contract of the former state, the law of that state controls. *Fruit Dispatch Co. v. Gilinsky*..... 821

Statutes. See CONSTITUTIONAL LAW, 3-5.

1. A statute should be construed in the light of all general laws upon the same subject at the time of its enactment. *Chappell v. Lancaster County* 301
2. The enrollment, authentication and approval of an act of the legislature are *prima facie* evidence of its due enactment. *State v. Dean* 344
3. The silence of the legislative journals is not conclusive evidence of the non-existence of a fact, which ought to be recorded therein, regarding the enactment of a law. *State v. Dean* 344
4. An act of the legislature is not invalid because of silence of senate journal as to concurrency in a formal amendment of a senate bill by the house. *State v. Dean* 344
5. Secs. 10606, 10607, Ann. St. 1907, relating to shipment and care of live stock in transit, *held* complete in itself, and not to contravene secs. 11 or 15, art III of the constitution of Nebraska, nor repugnant to the fourteenth amendment to the constitution of the United States. *Cram v. Chicago, B. & Q. R. Co* 607

Street Railways.

1. In an action against a street railway company for personal injuries, plaintiff *held* chargeable with contributory negligence. *Wood v. Omaha & C. B. Street R. Co* 282
2. A person who waits for a street car at a cross-walk, sees it coming, and is struck and injured through his own negligence cannot recover damages on the sole ground that the motorman failed to sound the gong. *Wood v. Omaha & C. B. Street R. Co* 282
3. In an action for injury on a street car track, where the motorman might have stopped the car by the exercise of ordinary care, *held* not error to submit the question of negligence in failing to stop it. *Wenninger v. Lincoln Traction Co* 385

Taxation. See MUNICIPAL CORPORATIONS, 1.

1. A valid tax sale cannot be made unless all delinquent taxes, with interest and costs, are included. *Barker v. Hume* 235
2. A sale for delinquent taxes for less than the amount of taxes, interest and costs is not a sale of the land, but only of the taxes, and simply transfers the lien to the purchaser, who may enforce it by foreclosure. *Barker v. Hume* 235
3. Where the purchaser at a void tax sale forecloses his lien, the sale thereunder is a judicial sale, not final until confir-

Taxation—*Continued.*

mation, and the two years given to redeem dates from such confirmation. *Barker v. Hume* 235

4. Occupation tax *held* not void for want of uniformity. *Nebraska Telephone Co. v. City of Lincoln* 325

5. Occupation tax *held* not to result in double taxation. *Nebraska Telephone Co. v. City of Lincoln* 325

6. An occupation tax measured by the gross earnings of a street railway company, whose franchise is also taxed in connection with its tangible property according to its value as a going concern, *held* not to tax the property twice. *Lincoln Traction Co. v. City of Lincoln* 327

7. An ordinance imposing an occupation tax of 5 per cent. of the gross receipts of street railway companies *held* not objectionable because of a provision that companies required by existing ordinances to pay a percentage of their receipts shall be credited with the amount so paid on the occupation tax. *Lincoln Traction Co. v. City of Lincoln* 327

8. On appeal from an order appointing an appraiser to ascertain the amount of an inheritance tax, the supreme court will only determine whether there was any property subject to such appraisement. *Douglas County v. Kountze* 506

9. Foreign trustee and resident beneficiaries in a deed of settlement *held* liable to inheritance tax. *Douglas County v. Kountze* 506

10. Beneficiary in deed of trust who must trace her succession through a will is subject to inheritance tax. *Douglas County v. Kountze* 506

11. Where land is sold under the scavenger act (Comp. St., ch. 77, art. IX) for less than the decree, interest and costs, the sale is a premium sale, though there was but one bid. *State v. Several Parcels of Land* 719

12. Under the scavenger act, an owner seeking to redeem from the sale must pay the full amount of the decree, with interest and costs. *State v. Several Parcels of Land* 719

13. Where the owner of land sold under the scavenger act fails to redeem by payment of the full amount of the decree, interest and costs, the purchaser is entitled to confirmation of sale, though there was but one bid. *State v. Several Parcels of Land* 719

14. A tender by the owner of the amount paid by the purchaser at a sale under the scavenger act, with interest, penalties, and costs, *held* not to entitle him to redeem. *State v. Several Parcels of Land* 719

15. A domestic corporation formed to buy real estate, whose cap-

Taxation—*Concluded.*

ital is invested in land, *held* not an investment company under sec. 56 of the revenue law (Ann. St. 1907, sec. 10955). *Bressler v. Wayne County* 774

16. Under sec. 28 of the revenue law (Ann. St. 1907, sec. 10927), it is the duty of the owner of stock of joint-stock or other companies to list the same for assessment, "when the capital stock of such company is not assessed in this state." *Bressler v. Wayne County* 774

Telegraphs and Telephones.

1. Knowledge of the result of failure to deliver a telegram may be imparted to the company by circumstances. *Marriott v. Western Union Telegraph Co* 443
2. Measure of damages stated, for failure of defendant to deliver a message, causing plaintiff to divert shipment of live stock. *Marriott v. Western Union Telegraph Co* 443
3. Plaintiff may show the effect on his mind of failure to receive a telegram which defendant neglected to deliver. *Marriott v. Western Union Telegraph Co* 443

Tenancy in Common.

1. A tenant in common holding adversely *held* liable to his cotenant for an accounting. *Schuster v. Schuster* 98
2. Evidence *held* to establish tenancy in common, and plaintiff's right to sue for partition and for rents and profits. *Schuster v. Schuster* 98

Trial. See APPEAL AND ERROR. CRIMINAL LAW. NEGLIGENCE. REPLEVIN, 2.

1. It is not error to refuse an instruction which permits a jury to base any of its findings on their belief, unless such belief is founded on the evidence. *Kerr v. Mangus* 1
2. Error in an instruction as to the material allegations to be proved *held* cured by other instructions. *Cornelius v. City Water Co.* 130
3. The court in its discretion may permit maps properly identified to be taken to the jury room. *Suiter v. Chicago, R. I. & P. R. Co* 256
4. Any error in failing to instruct as to the burden of proving an affirmative defense *held* waived by plaintiff's failure to request an instruction thereon. *Suiter v. Chicago, R. I. & P. R. Co.* 256
5. An issue presented by the pleadings, but unsupported by evidence, should not be submitted. *Suiter v. Chicago, R. I. & P. R. Co.* 256
6. It is not error to refuse an instruction included in instructions given. *Suiter v. Chicago, R. I. & P. R. Co* 256

Trial—*Concluded.*

7. Where there is any competent evidence of a material fact, it is error to instruct that there is no evidence on that point. *Sheibley v. Nelson* 393
8. A party requesting the submission of special questions cannot complain of the answers if sustained by the evidence. *Bloomfield v. Pinn* 472
9. After instructing the jury as to the issues, it is not error to refer them to the pleadings for a more specific statement. *Bloomfield v. Pinn* 472
10. Where the court in one paragraph of the instructions stated what the plaintiff was required to prove, and in another what would be a complete defense, *held*, that this did not render them inconsistent. *Bloomfield v. Pinn* 472
11. A new trial will not be ordered where the jury answered to immaterial interrogatories that they did not know. *Modlin v. Jones & Co* 551
12. Evidence of statements of son of owner of building to his father just after accident to plaintiff *held* for the jury, though denied by both as witnesses. *Modlin v. Jones & Co* .. 551
13. Questions of fact and weight of evidence are for the jury. *Modlin v. Jones & Co* 551
14. Although a witness may be contradicted by witnesses of a greater number, yet his evidence is for the jury. *Modlin v. Jones & Co.* 551
15. Question of competency of expert witness is for the court, where objection is made. *Modlin v. Jones & Co* 551
16. Instruction imposing on one crossing railroad tracks in a public street the absolute duty to look and listen, *held* properly refused; the element of reasonable excuse for not doing so being omitted. *Nilson v. Chicago, B. & Q. R. Co* 595
17. Where instructions in an action against a city direct that plaintiff cannot recover unless the injury was caused by a defect in a walk at the place of the accident, a separate instruction *held* not erroneous because it fails to repeat the direction. *Robinson v. City of Omaha* 642
18. Where the evidence is insufficient to sustain verdict for plaintiff, it is not error to direct verdict for defendant. *Ogden v. Sovereign Camp, W. O. W* 666
19. An instruction which, if standing alone, might be erroneous, may not be so when considered with the other instructions. *Armstrong v. City of Auburn* 842
20. A court of equity has inherent power to consolidate suits for purposes of trial. *Butler v. Secrist* 85
21. An offer of entries in books, unless all are competent, should be excluded. *Fitch v. Martin* 745

Vendor and Purchaser.

1. Purchaser of land in possession of one claiming ownership thereof *held* to take subject to his equities. *Morrison v. Gosnell* 275
2. Where a vendee in possession alleges failure of title and seeks to recover payments made and for improvements and taxes, *held* that he is not entitled to an unconditional money judgment while retaining possession. *Anderson v. Ohnoutka,* 517
3. In an action for failure of title, the vendee cannot recover insurance premiums. *Anderson v. Ohnoutka* 517
4. In an action for failure of title, the vendor is entitled to set off the reasonable rental value of the premises while held by the vendee, with interest. *Anderson v. Ohnoutka* 517
5. Measure of damages for failure to convey good title stated. *Anderson v. Ohnoutka* 517
6. Acceptance of offer to sell land must conform strictly to terms of offer. *Ross v. Craven* 520
7. The grantee in a deed of a corporation properly executed will not be prejudiced by failure of the register of deeds to record the imprint of the corporate seal. *Powers v. Spiedel,* 630

Waters. See RAILROADS, 1.

1. A contract with an irrigation company for the use of water, that does not contravene the laws or policy of the state, may be enforced, where rights of others are not thereby unlawfully curtailed. *Clague v. Tri-State Land Co* 499
2. An irrigation company unlawfully preventing the holder of a water contract from using water for irrigation is liable in damages. *Clague v. Tri-State Land Co* 499
3. The measure of damages to the holder of a water contract with an irrigation company is the value of the use of the right during the time he is deprived thereof. *Clague v. Tri-State Land Co.* 499
4. Instruction as to measure of damages for a wrongful withholding of water by an irrigation company *held* not erroneous. *Clague v. Tri-State Land Co* 499

Wills.

1. Evidence received without objection will not be disregarded on appeal because in the form of a conclusion. *In re Estate of Ayers* 16
2. Evidence *held* to show publication of will. *In re Estate of Ayers* 16
3. Evidence *held* insufficient to show a change of residence of testator. *In re Estate of Ayers* 16
4. Evidence *held* to show testamentary capacity. *In re Estate of Ayers* 16

Wills—*Concluded.*

5. Evidence showing the condition of testator's mind prior and subsequent to execution of will *held* competent for sole purpose of showing testator's mental capacity when the will was executed. *In re Estate of Winch*..... 251
6. On the issue of testator's sanity, it is within the court's discretion to limit the time after the making of a will within which evidence of mental unsoundness should be confined. *In re Estate of Winch*..... 251
7. Senile dementia is determined by rules applicable to other forms of insanity. *In re Estate of Winch*..... 251
8. On the issue of sanity, *held* there was no abuse of discretion in limiting the period of inquiry to two years after execution of will. *In re Estate of Winch*..... 251
9. The county court has jurisdiction to construe a will for the advice of the executor. *Lesiur v. Sipherd*..... 296
10. In the construction of a will, the intent of testator, as disclosed by its language, in connection with surrounding circumstances, will govern. *Lesiur v. Sipherd*..... 296
11. Will construed, and *held* not to create a trust estate, and that the widow takes all the property without restriction, except that such as remains at her death vests in testator's children in equal shares. *Lesiur v. Sipherd*..... 296

Witnesses.

1. An adult citizen of the empire of Japan is *prima facie* competent to take an oath and testify. *Pumphrey v. State*. .. 636
2. There is no rule of law that a child six years of age is an incompetent witness. *Evers v. State*..... 708
3. Objection to witness on the ground of age, without requesting an examination as to competency, *held* properly overruled. *Evers v. State*..... 708
4. Evidence of specific acts occurring more than ten years prior to an assault *held* not admissible to show reputation. *Stevens v. State*..... 759
5. Proof of specific acts is not ordinarily admissible on the question of general reputation. *Boche v. State*..... 845
6. A cross-examiner is not bound by the answer of a witness to a question on a subject germane to the main issue. *Boche v. State* 845
7. Certain evidence *held* not to relate to a collateral issue, and properly admitted to impeach a witness. *Boche v. State*.... 845
8. Evidence of specific acts are not admissible to impeach a witness. *Boche v. State*..... 845